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## BOOK REVIEWS

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*Basic Documents and Case Law, 1995–2000 CD-ROM*, United Nations International Criminal Tribunal for Rwanda, United Nations Publications, New York, USA, ISBN 92-95013-04-02, ISSN 1020-8941, UN Publication Sales No. E/F.01.III.W.1, US\$ 125.00\*

[To order, send a cheque (made out to the ICTR) to United Nations Publications, 2 United Nations Plaza, Room DC2-853, New York, NY 10017, USA (e-mail: [publications@un.org](mailto:publications@un.org)), or Palais des Nations, CH-1211 Geneva 10, Switzerland (e-mail: [unpubli@unog.ch](mailto:unpubli@unog.ch)) or UNICTR, Library, AICC, P.O. Box 6016, Arusha, Tanzania.]

One of the difficulties with practicing, teaching or studying international criminal law is in locating one source that draws together the burgeoning quantity of materials from the International Tribunals in an accessible format. A CD-ROM compiled by the library section of the United Nations International Criminal Tribunal for Rwanda ('ICTR'), and released in February 2001, is a welcome step toward simplifying that quest.

### 1. CONTENT

The ICTR CD-ROM features over 1800 documents falling into 5 categories: Basic Documents, Cases, Testimony of Expert Witnesses, United Nations Documents and Other ICTR Publications.

The "*Basic Documents*" category includes key legal texts and regulations governing the operation of the ICTR: the Statute of the Tribunal, Rules of Procedure and Evidence, Directive for Court Management, Directive on Assignment of Defence Counsel, Code of Professional Conduct for Defence Counsel, Guidelines on the Remuneration of Expert Witnesses, Prosecutor's Regulations, Rules Covering the Detention of Persons Awaiting Trial or Appeal by the Tribunal or Otherwise Detained on the Authority of the Tribunal, the Regulation for the Establishment of Disciplinary Procedure for Detainees, and the Head Quarters Agreement between the United Nations and the United Republic of Tanzania. Some of these documents are also available on the ICTR website (<http://www.ictor.org>).

Click on the word "*Cases*" and you will see the names of all accused indicted between 1995 and 2000. Click on a name and an index listing the life cycle of each accused's case from arrest to appeal (between 1995 and 2000) is revealed. You can expect to find Warrants of Arrest, Indict-

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\* The CD-ROM is dedicated to the late Judge Laity Kama, first President of the ICTR from 1995 to 1999, who delivered the first judgment of the Tribunal in the *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T.

ments, Trial Chambers' Decisions, Judgments and Sentences, Appeals Chamber Decisions and related documents. Click on the relevant word in the index and you access the full text of the document in PDF format. This ensures that the documents retain their official seals and signatures. Along with this feature, the CD-ROM also contains more documents than are published on the web. For obvious reasons restricted documents are excluded. Written submissions of the parties and transcripts of proceedings would be a useful addition on future releases of the CD-ROM.

The CD-ROM includes a selection of Trial Chamber transcripts of the "*Testimony of Expert Witnesses*" given during Tribunal proceedings held in 1997 and 1998. The experts featured are General Romeo Dallaire, Alison Des Forges and Mathias Ruzindana in the *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Rene Degni-Segui and Andre Guichaoua in the *Prosecutor v. Kayishema*, Case No. ICTR-95-1, and Filip Reyntens in the *Prosecutor v. Rutaganda*, Case No. ICTR-96-3. The reports of these experts are not included. Nor is the list of experts comprehensive. Even so, this feature of the CD-ROM is welcomed as a useful and efficient trial preparation tool. More of the same is encouraged.

The category of "*United Nations Documents*" include Security Council Resolutions, Reports on Financing, ICTR and Annual Reports. This section is instructive for scholars and others interested in the background to the establishment of the Tribunal, in tracing the pragmatics of its progress, and for those looking for insight into the practical problems faced by a new international criminal justice system and how these might be resolved. The section sports an interesting compilation of letters and reports. These include, for example, reports on:

- The Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994) [Click on "Other UN Documents" – "Letters" – "S/1994/1405-9/12/94"]. This Commission gathered evidence on humanitarian law violations in Rwanda during the 1994 genocide and recommended the establishment of an international tribunal to investigate allegations of humanitarian law violations; and
- Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (Click on "Other UN Documents" – A/54/840-Review operation ICTR&ICTY 27/4/00).

The "*Other ICTR Publications*" section includes the ICTR Quarterly Bibliography and a handbook for journalists.

## 2. IS THE CD-ROM USER FRIENDLY?

Navigation is self-explanatory. Hypertext links make the CD-ROM easy to browse. The CD-ROM is presented in both French and English and most

of the documents are available in both languages. Documents featured are in either Word or PDF format.

There is a trick to viewing the CD. When you first open it to your screen you will see three file icons and one icon depicting the white dove of peace (reader.EXE). For the CD-ROM to take flight, click on the dove. The other three file icons are only for systems purposes.

The opening page is complete with music and graphics. Click on "enter" and the simple menu of contents appears juxtaposed against photographs of the ICTR premises and judiciary. To access each category of documents, click on the relevant word. Unless, that is, you want to search. In that case, do not click on the word "search," click on the icon of the magnifying glass at the top of the screen.

### **3. SEARCH ENGINE CAPABILITIES**

The search engine has a three-tier document search system linked to a set number of indexed words. You can search by title word using a text search, by case search (using the name of the accused, by category or key word), or for a UN document by a document symbol (UN document reference number) or a key word.

The inherent deficiency in the CD-ROM is the capacity of the search engine, which does not have an Optical Character Recognition system. So, it is not possible to do a comprehensive full text document search. Searching is limited to indexed words. This means that a search will only pull up a hit if the specific word or phrase is listed in the search dictionary. If it is not, you will not get a hit. Nor is any variation on a theme possible. For example, a search for "admissibility of evidence" cannot be adapted to the phrase "inadmissible evidence." For some of the text boxes the indexed words are accessed by clicking on the adjacent down arrow. Even then, if an indexed word is selected, you may not get a hit. Documents containing hits are listed in a text box. Click on "view" and the portion of the page of the document containing the hit will display although the word or phrase searched for is not highlighted. While the advanced search options allows refinement of searching criteria without some knowledge of the cases, a comprehensive search for jurisprudence on a decided issue, for example, would entail a manual search using the browse function.

### **4. FOUR SYSTEMS REQUIREMENTS**

The CD has four systems requirements. They are:

- Windows 95, 98, NT Work Station
- Pentium II +, 32 Mb RAM
- Internet Explorer 4+
- Flash 3+ plug-in

Most importantly, to view the CD your computer must be loaded with a version of Internet Explorer with an embedded flash 3+ plug-in. That does not mean that you need access to the Internet. The CD can be used on a laptop or other remote site as long as Internet Explorer is loaded, but without the flash plug-in you will be faced with a labyrinth of material in folders with no searchable capacity.

### **5. CD-ROM v. INTERNET FORMAT**

In an age when most publishers are moving to on-line electronic data based products, why was a CD format chosen as the vehicle for publication? The answer is accessibility. If you live in, practise or study law in a country where Internet access is slow and where downloading PDF documents can be a laborious and frustrating process, the CD allows local access and rapid download facility.

### **6. WHO IS THE TARGET AUDIENCE?**

Any international criminal law adherent.

### **7. IS IT VALUE FOR ITS MONEY?**

As a compact and consolidated reference tool for ICTR legal texts, ICTR regulations and case related documents filed between 1995 and 2000, the CD-ROM works. There is no other text or product available with as much ICTR material in one location. It is easy to use anywhere, anytime because it is not reliant on access to the web, is handy for traveling and in Court Rooms wired for laptops. Browsing and searching are fast.

As a jurisprudential search tool, the CD-ROM is only as good as the search engine dictionary, or as the user's manual browsing skills or prior knowledge of the subject matter. An annual release of an ICTR CD-ROM containing new material is promised. If the search function on future releases is improved, the product will become an even more valuable tool in an international lawyer's or scholars' tool kit.

*Andra K. Mobberley\*\**

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\*\* Barrister and Solicitor, High Court of New Zealand; Prosecution Counsel, United Nations International Tribunal for Rwanda. The views expressed in this document are those of the author alone.

*Women, Armed Conflict and International Law*, by Judith G. Gardam and Michelle J. Jarvis, Kluwer Law International, The Hague, 2001, ISBN 90-411-1640-0, 290 pp., EUR 90/US\$ 83/UK£ 57

*Women, Armed Conflict and International Law* is a timely and over-due book. Judith G. Gardam and Michelle J. Jarvis have written a lucid, condensed critique of gender bias in international humanitarian and international law that nevertheless envisions the international legal system's potential to truly serve women.

Chapter One neatly introduces the book's premise – that armed conflict exacerbates global inequalities against women and creates new forms of gender discrimination – and its basic inquiry: Does international humanitarian law ('IHL') reflect the real experience of women in armed conflict? However, it is in Chapter Four, when the authors hit a sure-footed stride that they compellingly declare the challenge:

What is needed is a comprehensive gender-based critique, that reveals the role of IHL in reinforcing and exacerbating the endemic discrimination that exists in all societies. IHL is particularly useful for gender analysis as it deals with the activity where one finds the ultimate in constructed male and female – armed conflict. Its rules perpetuate in a condensed and strikingly visible way, all the assumptions of Western femininity and masculinity that permeate law in general. (p. 94)

While *Women, Armed Conflict and International Law* retreats from offering a comprehensive treatment, it convincingly concludes that IHL and international criminal law, refugee and human rights law, at best, partially addresses the impact of armed conflict on women and, at worst, reinforces gender discrimination within the international legal system.

The authors commence Chapter Two by painstakingly detailing the myriad ways that war confronts women, in order to assess the (in)adequacy of IHL and international law's coverage. How armed conflict affects women is illustrated by examples packed into sub-sections entitled "Deliberate Killing of Civilian Women", "Collateral Damage and Women", "Violence Against Women", "Displaced and Refugee Women", "Women in Detention", "Loss of Family Members," "Loss of Social Position", "Economic Effects of Armed Conflict", "Access to Essential Supplies and Services", "Women's Health", and "Access to Emergency Relief".

This chapter tends to read like an extensively footnoted human rights report. It cites official governmental and international organization documents as well as non-governmental reports, journalistic accounts and books as primary sources. Some weaknesses dent but do not destroy this crucial background texture. First, the sources are uneven. Journalist accounts that could be one-off impressions in the heat of war reporting are treated on equal footing with long-term human rights reporting or international organization study papers. The situations that women face are presented with unwavering certainty and not couched in any probability or relative terminology. Second, factual conclusions about women's victimization, such

as in genocide, are confusing and lack refinement. For example Srebrenica, in the former Yugoslavia, men were targeted for genocide and women bore the hardship of survival, while in Rwanda, male and female intellectuals were “equally” the first to be killed. Third, some of the terminology is misleading. One illustration of collateral damage is applied to the long-term danger of land mines long after military operations have ceased. Although the point is very well taken, technically, this is not the ordinary use of collateral damage under IHL. Over all, this chapter of *Women, Armed Conflict and International Law* boldly underscores that women, as victims or survivors, undergo many war-related horrors.

Chapter Three is a concise primer in IHL and international law provisions that address women. This exercise grooms even the informed reader to more fully partake in the analytical critiques found in the succeeding chapters. Especially appreciated are the enlightened discussions about IHL’s regime of equal protection and non-adverse discrimination for all persons and its regime that accords special protection for women’s reproductive capacity and maternal functions. Not since the insightful article by Françoise Krill in the 1970s has a discussion of the equal protection and special protection regimes been so adeptly resurrected. A significant observation impressed upon the reader is that these regimes are historically bound patriarchal beliefs that incongruously uphold both the formal equality of the sexes *and* the inferiority of women under IHL. This is illustrated by the cite to the Commentary to Article 12 of the First and Second 1949 Geneva Conventions:

[T]he special consideration with which women must be treated is of course in addition to the safeguards embodied in the preceding paragraphs, to the benefits of which women are entitled equally with men. What special consideration? No doubt that accorded in every civilized country to beings who are weaker than oneself and whose honour and modesty call for respect. (p. 63)

Chapter Three’s concise review also concedes that the civilian population that IHL serves, is, in its majority, female. Women therefore, are the main, intended beneficiaries of non-combatant immunity status. In addition, Chapter Three presages the meritorious critiques of how IHL ranks its prohibitions. Crimes against humanity and genocide, as well as the rules of procedure and evidence of the *Ad Hoc* Tribunals for the former Yugoslavia (International Criminal Tribunal for the former Yugoslavia) and Rwanda (International Criminal Tribunal for Rwanda) are glimpsed as part of the widening international criminal law protections available to victims of armed conflict.

The last point raised in this background chapter is how IHL and related international criminal law potentially give rise to an individual right to compensation. The book identifies three possible sources of compensation: the state; the perpetrator; and, trust funds created by the international community.

Now that the authors have transported the reader to Chapter Four, the

real subject-matter jurisdiction of the book explodes. In a brilliantly perceptive argument, that journeys from chivalric knights and “damsels in distress” to the Persian Gulf War, the gendered, Western Christian culture of IHL is exposed and denounced. The authors’ instinct to disrobe the IHL male of his shining armor as a means to profile the IHL woman succeeds:

[T]he secular chivalric tradition similarly provided protection for other groups, including women. Although the institution of chivalry led to restraints on the conduct of warfare and recognized the concept of non-combatancy, it is also based on self-interest – the preservation of the superior knightly class.

The knight, as we have seen, was the ‘natural protector’ of women. Part of the protector/protected relationship depended on the exclusion of women from combat on the basis of their lack of physical strength to handle weaponry of the time. Thus the distinction between non-combatants and combatants was drawn in Chivalric tradition between the ‘enemy’ and the ‘innocents’: the enemy were those who carried arms and the innocents were those who did not. This differentiation created a class of inferior individuals requiring protection and thus ratifying the superior position of knightly men. (p. 111)

The IHL women personified under Geneva and Hague law originates from a protection-needing species. The IHL provisions presuppose her weakened physical and societal condition. According to the authors’ tally, under the Geneva Conventions, she requires nineteen specific provisions to cover her status as an expectant or nursing mother. Twenty-four provisions in their majority deal with preserving her honor and dignity from incidents of rape and other sexual violence. Notably honor and dignity for the IHL knight stems from his bravery as a warrior who merits not to be subjected to degrading treatment when wounded on the battle field or when captured and imprisoned. Honor and dignity for the IHL woman centers on her chastity and reproductive role, not the fact that she too is surviving an on-going conflict.

The authors insightfully note that the special provisions direct the parties to protect females, but not to *prohibit* the infliction of inhumane acts. Consequently the protect/prohibit dichotomy perpetuates a two-tiered system that extends inferior assistance to women. Under Geneva law, the ultimate prohibitions of the grave breaches require state enforcement. The omission of rape from each of the four grave breaches provisions is therefore not just an unfortunate oversight, but another victim befallen to masculine hierarchy of harms. Rape’s absence as a grave breach in the Fourth Geneva “Civilians” Convention is, on its face, symbolic of the real unresponsiveness of IHL to a prevalent danger that civilian females confront. It reposes upon an assumption of “who” is the civilian population.

IHL presumes that other than instances of pregnancy and maternity, that the needs of male and female civilians are identical. The IHL woman is usually merged back into a civilian population that fails to “recognize the unequal situation of men and women” (p. 97) in their domestic society. Here, the book unmasks IHL’s classic concentration on protecting civilians as an *a fortiori* demonstration of its unfailing commitment to women.

Undifferentiated care of the general civilian population has been a frequent riposte used by the IHL mainstream to counter feminist critics. As if that were not damning enough, the authors criticize the military culture's propensity to justify heightened combat by the doctrines of military necessity and to excuse, as collateral damage, civilian female deaths. This ascribes, particularly in modern bombing campaigns, yet another, more subtle, IHL hierarchy that favors the life of the combatant/knight.

Chapter Four continues by questioning IHL's rigid operating boundaries. IHL does not address the sexual violence, starvation, displacement, and economic sanctions or other hardships that take place in the immediate aftermath of the cessation of hostilities. Neither international criminal law, nor refugee law or human rights law seamlessly protects women from the panoply of harms engendered by war. The authors warn that only an endemic non-response from international law awaits most women who survive armed conflict.

This centerpiece chapter concludes by correctly begrudging the fact that women, to a far larger degree than men, inevitability rely upon interpretations of IHL to know whether it protects them from serious attacks on their person. Until recently, the interpretations offered by the International Committee of the Red Cross ('ICRC') Commentaries or the ICRC's Aide Memoires, the "official" interpreters of the IHL, have not been unproblematic. As noted, the ICRC, while improving its response to women facing war, is still caught in an impasse.

The limited approach of the ICRC to the issue of women and armed conflict is also exemplified by the way in which the fundamental principle of the Movement, impartiality, is interpreted by the Organization. Although recognising that women should benefit equally from existing measures to meet the needs of the civilian population, the ICRC considers that '[f]aithfully applying that principle [of impartiality] rules out an exclusively gender-specific approach.' Impartiality, however, assumes the absence of endemic discrimination against women. (p. 133)

After setting forth the main tenets, the successive chapters review the United Nations actual response to women in armed conflict. The startling hesitant approach of the General Assembly in the early 1970s to support the initiatives of the Committee for the Standing of Women ('CSW') and place the topic on the official agenda appears appalling in hindsight. Such foot-dragging, the authors contend, was dwarfed by the next fifteen years of almost total, and not so benign, inaction by UN bodies. Official UN references to women caught in armed conflict were generally limited to "expectant mothers" and "maternity cases." One could add to those dreary years the blatant disregard of gender by the International Law Commission who did not insert any sex-based crimes into the Draft Code for Mankind until the 1990s – forty-five years into their mandate. Only in the last decade, with the focus on sexual violence at the *Ad Hoc* Tribunals, the condemnation of crimes against the "Comfort Women" by UN Special Rapporteurs and the creation of the United Nations Compensation



Commission ('UNCC'), did UN officials other than those posted to CSW address the prosecution or compensation of women in armed conflict as a matter of concern for the international community.

*Women, Armed Conflict and International Law* commendably recounts the chillingly divergent manner that the UN initially reacted to the massive rapes in the Yugoslav armed conflict, as compared to its response to sexual violence committed during the Rwandan genocide. The Yugoslav IHL woman was at least accorded the international community's "grave concern" through the Commission of Experts Report, Security Council and General Assembly Resolutions. The Rwandan IHL woman did not merit immediate consideration of Security Resolutions nor mention in the Preliminary Report of the Commission of Experts. Only in the Final Report of the Commission and briefly and belatedly in the report of the Special Rapporteur for Rwanda was the rampant sexual violence that the Rwandan Tribunal later held to be part of the genocide drafted into official UN documents. Whether early inaction can be excused by a focus on the Rwandan genocidal killings, or engrained racism about African v. European warfare or a differing perception of rape in the two countries, the UN response to wartime sexual violence was not uniform.

Nevertheless, the book found that persistent petitioning of the UN agencies and initiatives such as the Beijing Conference had, by the later 1990s acknowledged an "evolving woman" that contrasts in complexity to the genteel IHL woman of the Geneva Conventions. Steady gains are not guaranteed. The International Criminal Court ('ICC') should take heed and be ever cogent that individuals can and do take recalcitrant positions on how competently gender is dealt with in the international system.

In Chapter Six, the authors' second thesis – international redress via prosecution or economic compensation – resounds with fruitful detail of UN practice. Assessment of the infusion of gender into international criminal law as practiced at the Yugoslav and Rwanda Tribunals is perceptive and refreshingly non-cliché yet critical where warranted. The book's congratulatory stance toward the prosecution of sexual violence at the *Ad Hoc* Tribunals does not hinder its valid unease with IHL's concentration on women's sexual integrity. It is pertinent to remember however, that even though protection from wartime rape descends from old-fashion patriarchy values, it has nonetheless provided a strategic legal beachhead. The beginning emphasis on prosecution of sexual violence is analogous to the US civil rights movement's early attacks on racial discrimination via state-run education institutions.

What is most important about this penultimate chapter is the informative examination of the UNCC for losses experienced during the Persian Gulf War. Most individuals, women being no exception, receive no compensation or reparations for war-related loss. Treaties resolving claims for war damages are usually concluded at the inter-state level and deal in lump sum awards to the victorious state. The UNCC scheme financially compensated individuals for IHL or human rights violations, redressing

economic, social and psychological losses that at times are only apparent in the aftermath of war.

Established to restore international peace and security, the fact-finding and financial assessment function of the UNCC recognized a broader definition of civilian war-related injuries, such as serious personal injury, death, loss of income, housing and personal property. Unlike the rigid boundaries of IHL, refugee law and the vague boundaries of human rights law the UNCC processed claims from refugees and displaced persons, many of whom were women. Claims were accepted for death and serious personal injuries and losses sustained in the war or incurred while fleeing the conflict or while in refugee camps. Wives, even multiple wives, of a deceased spouse could claim compensation. Victims forced into hiding and detention forwarded successful claims. The category of serious personal injury was defined to include, *inter alia*, “instances of physical or mental injury arising from sexual assault,” miscarriage, stillbirths, or unwanted abortions. Claims could be awarded for multiple sexual assaults up to a maximum of US\$ 30,000. Women were compensated for the detrimental effect that the war had on their health. One-fourth of UNCC claims for loss of employment went to women.

Although the authors point out that the UNCC did not evaluate the access that women had when filing claims nor examine the impact of gender in determination of the amount of the claim, its broader definition and time-line of war-related harms proved more reflective and inclusive of the “evolving” UN woman’s reality. In comparison, the possibility of a victim to be individually compensated at the *Ad Hoc* Tribunals is more burdensome. Responsibility for payment must be established in a separate proceeding before a national court after a conviction has been entered. The ICC modifies that approach and can handle compensation claims under its Statute. Undoubtedly the authors admired the potential to create funds like the UNCC in order to circumvent the rigid treaty and customary law boundaries of IHL and the time-consuming nature and uncertainty of criminal trials. Within the international system the UNCC is a rare legal tool for women.

At this juncture, the authors conclude their exposition and offer two solutions. The first is a creative solution that envisions international law ripping apart the seams of its outmoded garment and stitching a cloak that amply *shelters* women. The second, a traditional or even a male-like approach to international law, augurs for further amending of old instrument and the creation of a research center to rectify the existing *lacunae*. Whether IHL is entrenched and must undergo a piece meal evolution via interpretation or submit to a complete over-haul is unanswerable. It’s broke. How you fix it is not the authors’ major focus, yet it informs their traditional and utopian solutions. *Women, Armed Conflict and International Law* succeeds even without a follow through on the remedies. The thin volume’s strength is not found in its suggested solutions, but in its judicious examination of the law.

A frailness that interrupts *Women, Armed Conflict and International Law* is its inability to acquire a firm grasp on the different experiences that male and female civilians have during war. Age, sex, health, sexual orientation, race influence the experience of women during war, and men. There is an untidy overlap. Even the heretofore hidden incidences of wartime male sexual assault are gradually emerging. Chemical weapons and landmines scar the long-term reproductive health of both sexes. Deformation of the production of sperm and resulting detriment to male and female children's health is an egregious consequence impacting the entire family, extended or otherwise. If women were active economically in the aftermath of war, their taxes would be drained in funding health-care. If they are homemakers, they will be required to supply the brunt of the care-taking. That does not mean that the IHL's non-differentiated treatment should prevail. To the contrary, IHL perpetuates a male-centered veneer and does not provide coverage for women based upon any clear articulation of their real position in the civilian population, but rather outdated damsels in distress. What is obvious is that women's lives, particularly when in the midst of war, are not compartmentalized – neither are men's lives. More, coherent research needs to be done on how civilians, who in their majority are women, experience armed conflict so that the comparative data serve to modify international law.

IHL earns the brunt of the book's attention because of its preeminence. But one must concede that because it is "hard law" compared to human rights law, the masculinity of the IHL knight is easier to target than the underlying gender bias assumptions in human rights law and refugee law. Why is there no outright prohibition of rape in any of the human rights conventions? Examination of the male-centered veneer should extend into international law's other grouping of religion, race, nationality or ethnicity under genocide or persecution. Under such an analysis, the 1973 Apartheid Convention, a subset of crimes against humanity in the ICC Statute, would again reveal the necessity of interpretation to conclude that members of the group encompass women. Article II(ii) of the Apartheid Convention, crime of the provision regarding infliction of "serious bodily injury or mental harm to the group by infringement of [...] their dignity" perhaps covers sexual violence.

Since resistant, residual oppression against women endures, in varying degrees, in each country and in the larger international community, *Women, Armed Conflict and International Law* should challenge professionals, practitioners, activists and scholars in IHL, international criminal and human rights law. International law's inability to seamlessly protect women from and compensate them for the harm inflicted by war and its aftermath is an observation that doubles as a dire warning. In the very least, the ICRC should heed recommendations to commission new commentaries to the Geneva Conventions and the Protocols that incorporate a gender perspective.

The authors' initial premise is that armed conflict exacerbates global

inequalities and creates new forms of discrimination against women. This larger message should therefore resound with municipal politicians and law-makers. The authors caution that gender discrimination that grips all societies will further strangle and cripple those that embark upon and then stagger out of armed conflict. Assuring gender competent policies in property acquisition, inheritance rights, access to education, political office and meaningful employment, insuring equality irrespective of civil status – single, married/partnered, divorced or widowed – has never been contemplated as a means to strengthen the national defense nor bolster the international peace. What a thought!

*Patricia Viseur Sellers\**

*State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights*, edited by Albrecht Randelzhofer and Christian Tomuschat, Martinus Nijhoff Publishers, The Hague, 1999, ISBN 90-411-1147-6, 320 pp., EUR 79.50/US\$ 105.00/UK£ 61.00

## I

The position of the individual within the law of state responsibility can be viewed from two perspectives. On the one hand, the individual may find him- or herself on the side of the wrongdoer, and conceivable cases in this regard are manifold. Since international law conditions the behaviour of states as its primary subjects and since the state – besides its being a social construct – is a legal fiction which can only act through human beings as its organs, any internationally wrongful act will involve individuals, say government officials, who perform and implement the rights and duties assigned to the state. In particular, the rules of attribution of the conduct of state organs raise difficult questions,<sup>1</sup> such as the still disputed place of fault within state responsibility.<sup>2</sup> Likewise, due to the increased transferral of duties and competencies from the state to private individuals, the imputation to the state of the conduct of private individuals has gained importance during the last decades.<sup>3</sup> Also individual

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\* Legal Advisor for Gender, ICTY.

1. With regard to human rights see H. Diplá, *La responsabilité de l'Etat pour violation des droits de l'homme. Problèmes d'imputation* (1994).

2. See the excellent comment by A. Gattini, *Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility*, 10 EJIL 397 (1999).

3. This area of state responsibility has been treated extensively in the German-speaking doctrine, see, e.g., A. Epiney, *Die völkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater* (1992); J. Wolf, *Die Haftung der Staaten für Privatpersonen nach Völkerrecht* (1997).

(criminal) responsibility directly under international law is an issue of increasing importance nowadays.

The second perspective from which the relationship between state responsibility and the individual can be viewed is that of the individual as the victim of an internationally wrongful act. In this respect, it was primarily the law governing the responsibility for injuries suffered by aliens and the process of diplomatic protection which played an important role in the development not only of the law of state responsibility but also of the position which the individual holds within state responsibility. Due to the influence of diplomatic protection on the law of state responsibility, the latter was even equated with the former. With the growing importance of human rights, the focus has shifted from diplomatic protection to the protection of human rights. Although human rights law – mainly due to the lack of an internationally accepted enforcement machinery – still is inadequate to effectively protect individuals on the international, let alone universal, level, and while therefore human rights did not supersede the law on the treatment of aliens and diplomatic protection,<sup>4</sup> the various regional and quasi-universal treaties in the field of human rights protection have led to the desirable situation that the individual no longer is exclusively dependent upon the national state to protect his fundamental rights and freedoms. The remarkable corpus of human rights law as applied by the various treaty bodies as well as the influence of the writings of human rights scholars have fostered the further development of the law of state responsibility.

At the same time, however, the emergence of human rights as a separate body of, or a subsystem under, international law had conceptual repercussions on the “older” law of aliens as well as on the law of state responsibility and, to be sure, international law in general. The increasing practice of human rights organs has furthermore brought about conceptual problems which do not lend themselves to easy solutions. For instance, it is debatable in how far the application of the local remedies rule in human rights protection differs from its application in diplomatic protection.<sup>5</sup> More generally, what is the relationship between the various human rights treaties

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4. See F. Przetacznik, *The Protection of Individual Persons in Traditional International Law*, 21 ÖZÖRV 69, at 113 (1971); R. Lillich, *The Diplomatic Protection of Nationals Abroad: an Elementary Principle of International Law under Attack*, 69 AJIL 359 (1975).

5. This question is provoked by the fact that with regard to the requirement of the exhaustion of local remedies human rights treaties refer to “generally recognized principles” (Art. 41(c) International Covenant on Civil and Political Rights) or to “generally recognised rules” (Art. 26, 1950 European Convention on Human Rights (‘ECHR’)) of international law. This particular problem also arises in other areas of international law, for instance in the law of the sea (Art. 295, 1982 UN Convention on the Law of the Sea); see, generally, C.F. Amerasinghe, *Local Remedies in International Law* (1990).

on the one hand, and general international law on the other?<sup>6</sup> Does a human rights violation entail distinctive consequences differing from those which ensue from an “ordinary” wrongful act?<sup>7</sup> Do the various treaty regimes on the protection of human rights establish subsystems – and if so are they self-contained?<sup>8</sup> What are the consequences for the legal position of the individual under international law, if he has the capacity to claim reparation in his own right? The multitude of intricate problems which the relationship between human rights and state responsibility entails – and those mentioned above are by far not exhaustive – shows that one is moving here among a host of uncertainties. Therefore, it is highly welcome that doctrine endeavours to scrutinise this relationship and to find answers at least to some of the problems provoked.

## II

The present book is the record of a three-day international colloquium held on 26–28 September 1998 in Berlin, jointly organised by the law faculties of the Free University and the Humboldt University. The general objective of the colloquium, which brought together 24 renowned international law scholars mainly from continental Europe, was to examine whether human rights violations give rise to a right, directly under international law, of the injured individual to claim reparation (p. viii). Accordingly, the title of the conference was “Individual Reparation Claims Entailed by Human Rights Violations – The Legal Position of the Individual under International Law”, indicating that the entitlement of individuals to submit reparation claims might advance their legal capacity under international law. The organisers thus linked the concept of the individual as a subject of international law to the capacity to bring a claim, and in doing so, they focused on human rights, since this is the area *par excellence* of international law where an effective enforcement of the relevant international obligations requires that the individual human being has standing in his own right. The subtitle of the book insinuates that a right of the individual to claim reparation is confined to “instances of grave violations of human rights.” Such an understanding, however, would be misleading; none of the international or regional systems of human rights protection which provide that the individual may himself claim reparation for viola-

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6. See E.W. Vierdag, *Some Remarks About Special Features of Human Rights Treaties*, in B. Barnhoorn & K. Wellens (Eds.), *Diversity in Secondary Rules and the Unity of International Law* 119 (1995), and the remarks thereto by A. Marschik, *Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the international Legal System*, 9 EJIL 212, at 224 (1998).

7. See, generally, M. Traßl, *Die Wiedergutmachung von Menschenrechtsverletzungen im Völkerrecht* (1994); D. Shelton, *Remedies in International Human Rights Law* (1999).

8. Unfortunately this question is widely neglected in doctrine. For a notable exception see B. Simma, *Self-Contained Regimes*, 16 NYIL 111, at 129–135 (1985).

tions of his human rights, requires a certain gravity or seriousness of breach as a condition for submitting a claim or for requesting reparation. Indeed, and not the least because of the unclear terms used to describe the “intensity” of the violation,<sup>9</sup> it is unclear as to whether so-called “grave breaches” of human rights entail any distinct or specific consequences in terms of procedural or substantive remedies.

As regards structure, the volume is divided into four parts each consisting of two presentations which are grouped according to thematic criteria. Every part is followed by the record of the discussions among the participants of the symposium, which allows for a summary of, and serves as a useful bridge between, the presentations. The last article on the German experience with rehabilitation and compensation of victims of human rights violations suffered in East Germany was written after the conference at the request of the organisers.

In his introductory contribution, Christian Tomuschat gives a brief survey of several aspects of the enforcement of individual claims (“Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law”, pp. 1–25). He starts with a critique of the International Law Commission’s (‘ILC’) Draft Articles on State Responsibility, which make “no mention of the individual as an actor in the legal relationship brought into being by a breach of a rule of international law” (p. 3). Tomuschat maintains that “from the very first day, the codification process was geared to States exclusively” (p. 4). Quite apart from the fact that García Amador, the ILC’s “very first” Special Rapporteur on state responsibility, linked the law of international claims with human rights and even envisaged the entitlement of individuals to pursue claims in their own right,<sup>10</sup> it is questionable whether the individual’s legal position within the law of state responsibility should indeed explicitly be referred to in the articles as suggested by Tomuschat. To be sure, the ignorance of the ILC towards the individual as a holder of rights under international law and the state-centric approach of the articles do not conform to the current move towards an anthropocentric international law which no longer treats human beings as mere objects of state policy and which no longer marginalises humans even in human rights law. But, after having found that on the universal level there are no appropriate legal remedies for the enforcement of individual claims, Tomuschat rightly concludes (p. 25) that it would be unwise to suggest a replacement of the traditional system of state responsibility by a system which acknowledges the individual as injured party in the relevant provisions of

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9. Terms generally used are grave, gross, serious, egregious, widespread, systematic, flagrant and manifest.

10. International Responsibility: Report by G.V. García Amador, Special Rapporteur, 1956 YILC, Vol. II, at 173. Allott calls García Amador’s initial approach to state responsibility as being “full of dramatic views as to the very nature of international law and many of its leading principles,” P. Allot, *State Responsibility and the Unmaking of International Law*, 29 Harv. J. Int’l L. 1, at 5 (1988).

the ILC text, in particular former Article 40 defining the injured state. Apart from the difficulty of shaping such an alternative system, the main reason for this scepticism probably is the quandary that such a broadening of one of the key articles in the draft would disincline states to accept the articles in their entirety.

The ILC was well aware of both, the shortcomings of former Article 40 and the lack of a general consensus for a broader concept of standing that would take account of the interest of the individual, in particular with regard to the invocation of state responsibility. The result of the ILC's work is the well balanced Article 48 which provides i.a. that in case of breaches of obligations established for the protection of a collective interest, such as human rights obligations, other, *i.e.*, not injured, states may invoke such a breach "in the interest of the beneficiaries of the obligation breached."<sup>11</sup> While thus the individual is still not entitled himself to invoke a breach and to exercise his own right, other states may vindicate such a right in the individual's as well as the general interest. In other words, this provision (Article 48(2)) stipulates a kind of *actio popularis*, and, from a positivist point of view, this aspect of Article 48(2) involves a highly desired measure of progressive development.<sup>12</sup> This result is of course a compromise solution and may be criticised with good reasons as being inadequate. It is however submitted that this provision may indeed be considered as a first step towards filling the gap rightly bewailed by Tomuschat.

### III

The subsequent contributions deal with reparation in its broadest sense of human rights violations under the various treaty regimes. Eckart Klein focuses on the legal basis for reparation claims under the International Covenant on Civil and Political Rights ('ICCPR') (pp. 27–41). After some observations of the Human Rights Committee on the issue of reparation

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11. Report of the ILC on the Work of its Fifty-third Session 2001, UN Doc. A/56/10 (23 April–1 June and 2 July–10 August 2001), URL: <http://www.un.org/law/ilc/reports/2001/2001report.htm>.

12. This is also recognised by the ILC in its commentary to Article 48(12). For the text of the commentary see J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* 74, 279 (2002). In its well-known and highly criticised judgment in the second phase of the South West Africa cases, the ICJ held that such a right resident in any member of a community to take legal action in vindication of a public interest was not known to international law as it stood at the time, South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase), Judgment of 18 July 1966, 1966 ICJ Rep. 1, at 47. Thus the Court left open the possibility of such an *actio popularis* to develop, and fortunately the ILC took the opportunity to indeed develop the law further.



he turns to Article 2(3)(a) ICCPR<sup>13</sup> as “substantive legal basis” of individual reparation claims. According to Klein the nature of this provision as a suitable basis for reparation claims is disputed primarily because the French text uses the word *recours*, which covers only the procedural right, but does not include substantive consequences as does the much broader English term *remedy*. Klein argues that according to the “rationale” of the provision the term “should be interpreted as incorporating into the Covenant the substantive consequences of a violation of an international human rights obligation by providing victims with the necessary effective remedy” (p. 33). Since “[t]his interpretation transfers the rule of general public international law into a conventional norm which stands on its own,” it is in his view not necessary to resort to general rules of state responsibility in order to find a legal basis for reparation claims under the Covenant. Not only because of the questionable methodology of “transferring” a rule of customary law into one of treaty law by way of interpretation, would it have been useful to resort to the principles of state responsibility under general international law or to the ILC text. A comparison with general international law could probably shed light on the question raised by Klein as to whether Article 2(3)(a) ICCPR requires a wrongdoing state to perform specific obligations as a consequence of the breach. For instance, Klein refers to several cases where the Human Rights Committee took the view that the wrongdoing state was obliged to open a proper investigation, or to take measures that would prevent a recurrence of the conduct which had constituted a violation of the Covenant (p. 34 *et seq.*). Particularly the last-mentioned remedy largely resembles guarantees or assurances of non-repetition as embodied in Article 30 of the International Law Commission’s articles on state responsibility,<sup>14</sup> and “to bring to justice those responsible for the victim’s disappearance,” also referred to by Klein, comes close to one of the forms of satisfaction listed in former draft Article 45, namely the punishment or prosecution of the individual responsible for the human rights violation (*see also* the comment by A. Cassese, p. 138).<sup>15</sup> It would have been worthwhile indeed to investigate as to whether the specific forms of reparation established and applied

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13. Art. 2(3)(a) ICCPR reads as follows:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity [...].

14. Source in note 11, *supra*. *See* the commentary to Article 30, in Crawford, *supra* note 12, at 196–200. *See also* J. Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507 (15 March 2000), paras. 53–59; G. Arangio-Ruiz, Second Report on State Responsibility, 1989 YILC, Vol. II (Part One), 1, at 42.

15. Former draft Art. 45(2)(d) mentioned as a form of satisfaction “disciplinary action against, or punishment of, those responsible in cases where the wrongful act arose from serious misconduct or criminal conduct of officials or private parties.” *See* commentary to Article 45 [Article 10], 1993 YILC, Vol. II (Part Two), 76, at 80, para. 14 *et seq.*

by the Human Rights Committee fit into the system of legal consequences under the general law of state responsibility or under the ILC draft. Furthermore, it is open to debate whether Article 2(3)(a) ICCPR in a general way stipulates secondary norms as a consequence of a violation of the Covenant or whether this provision rather reflects a specific primary norm with a strong preventive function.<sup>16</sup>

Michael Reisman's contribution ("Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas", pp. 63–108) provides a most valuable and comprehensive case-by-case analysis of the evolving practice of the Inter-American Court of Human Rights ('IACHR'). In particular Reisman scrutinises the *Aloeboetoe* case in a very detailed and illustrative manner (pp. 85–91). In this judgment, which could serve as a precedent for similar cases, the Court took a very progressive approach when it tried to take account of indigenous social structures in fashioning a compensation decision. In addition to the practice of the Court, Reisman examines the decision of the Bryan Commission in the *Letelier and Moffitt* cases<sup>17</sup> (pp. 98–100) as well as two instances of national practice (the compensation by the US of Japanese-Americans for relocation and detention during World War II, pp. 100–106, and Chilean compensation for human rights victims under military dictatorship, pp. 106–107). Reisman convincingly shows that in the practice of the Americas the legal regime of reparation (or "fair compensation" under Article 63 of the IACHR) goes far beyond the mere compensation of the loss suffered by the victim or his beneficiaries, and that the reparation regime in the Americas also includes what could be called "reconstructive social remedies." These include public condemnation and exhaustive investigation of the breach and also adjustments in the domestic social structures that gave rise to the breach. With regard to monetary compensation, Reisman points to the struggle of the Court in measuring compensation, in particular for moral damage (p. 67). Since the measure of damages neither is a new problem in international law nor is restricted to human rights violations, it would have been interesting to test the case law of the Inter-American Court in this regard with the practice of other courts and tribunals.

Despite his thorough analysis, Reisman's reading of the *Aloeboetoe* case with regard to punitive damages is misleading. The case concerned a group of Maroons who were murdered by a jungle commando of the Surinamese Army. The Inter-American Human Rights Commission argued that the

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16. See, e.g., TraBl, *supra* note 7, at 46–53, who ascribes a double function to measures of "satisfaction" in the field of conventional human rights protection. Thus, the duty to prosecute the official responsible for the human rights violation might form part of the primary norms inherent in the relevant treaty. See also C. Dominicé, *La satisfaction en droit des gens*, in B. Dutoit & E. Grisel (Eds.), *Mélanges Georges Perrins* 91, at 105–108 (1984). See, generally, K. Zemanek, *La responsabilité des Etats pour faits internationalement illicites, ainsi que pour faits internationalement licites*, in P. Weil (Ed.), *Responsabilité internationale* 3, at 64–65 (1987).

17. *Re Letelier and Moffitt* (Chile v. United States of America), 88 ILR 727 (1992).

killings had been racially motivated, a fact which should be taken into account in the measure of damages. Since the Court was not convinced of the alleged racial motivation of the killings, it rejected this request.<sup>18</sup> By way of an *e contrario* argument, Reisman interprets the Court's dictum so as to imply that the Court would have admitted punitive damages, if it had been convinced that the killings were indeed racially motivated. This leads him to conclude that "[m]oral damages could also be awarded for punitive purposes, if the *intention* of the violation was also unlawful under the Convention" (p. 90, emphasis in the original). This argument, however, is flawed since the Court did not prejudge at all the question of punitive or exemplary damages and it is a widespread technique of courts and tribunals to avoid a legal appraisal of a highly controversial issue – such as punitive damages – when the case can be easily decided on the factual level. To infer from the Court's silence on this issue that it would have awarded moral damages for punitive purposes is pure conjecture. Furthermore, Reisman's interpretation would run counter to the Court's previous judgment in the *Velásquez-Rodríguez* case where the Court explicitly held that "[t]he expression 'fair compensation', used in Article 63(1) of the Convention to refer to a part of the reparation and to the 'injured party', is compensatory and not punitive."<sup>19</sup>

Matti Pellonpää then treats "Individual Reparation Claims under the European Convention on Human Rights" (pp. 109–129). He starts by pointing out two "basic differences" between the reparation regime of the European Convention and that of general international law (p. 110). The first is that reparation under the European Convention has to be provided primarily to the individual and not to the state, a feature, however, which – though being different from general international law – is inherent in human rights protection in general and not particular to the European Convention. The second difference is the meaning of reparation available under Article 50 ECHR which, according to Pellonpää, is more restrictive than under general international law and, as a consequence, prevents the Court from ordering a violating state to amend its laws or to quash a judgment. Again it is questionable whether this "restrictive feature" is specific to the European Court of Human Rights. While courts and tribunals have the power to declare that a certain domestic law or judicial decision is not in conformity with what is required by international law, they – just like the European Court of Human Rights – probably do not

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18. *Aloeboetoe et al.* case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of 10 September 1993, 1994 Inter-Am.Ct.H.R. (Ser. C) No. 15, para. 82.

19. *Velásquez-Rodríguez* case, Compensatory Damages, Judgment of 21 July 1989, 1990 Inter-Am.Ct.H.R. (Ser. C) No. 7, para. 38, reprinted in 95 ILR 233 (1994) and 11 Human Rights Law Journal 127 (1990). On the issue of punitive damages see in more detail N.H.B. Jørgensen, A Reappraisal of Punitive Damages in International Law, 68 BYIL 247 (1997); S. Wittich, Awe of the Gods and Fear of the Priests: *Punitive Damages and the Law of State Responsibility*, 3 Austrian Review of International and European Law 101 (1998).

have the power to “order” a state to amend domestic laws or judgments.<sup>20</sup> Pellonpää continues to analyse the conditions for the granting of pecuniary compensation (pp. 112–120) as well as problems relating to the assessment of compensation (pp. 120–124) and concludes that particularly in case of non-pecuniary damage the Court’s practice appears erratic, if not arbitrary. This sounds rather familiar to the problems Reisman has faced in scrutinising the American system. Perhaps one of the reasons for this “chaotic” practice – as Tomuschat put it (p. 201) – is the inconsistent use of the concept of non-pecuniary damage which – depending on the context – may cover various types of damage not assessable in economic terms. Even with regard to one and the same human right, the term “non-pecuniary damage” may have different meanings (*see also* the comment by P. Malanczuk, p. 140). In view of this conceptual confusion, one would have reasonably expected an attempt to shed light on the concept of damage in the system of the European Convention, or how it differs from the American system and general international law. Pellonpää finally expresses the hope that the new European Court of Human Rights as established by Protocol no. 11 will take the chance to reconsider the practice of its “predecessor.” This would indeed be an opportunity to make the compensation regime of the European system more consistent.

#### IV

The question whether states are under an international obligation to provide for reparation claims is dealt with by Riccardo Pisillo-Mazzeschi (pp. 149–172). Since to date, the international personality of the individual has been viewed primarily from the point of view of substantive human rights norms, Pisillo-Mazzeschi focuses on the highly interesting question as to whether the individual also possesses rights, directly under international law, with regard to reparation for breach of human rights. For this purpose he examines the position of the individual in both diplomatic as well as human rights protection and distinguishes between reparation due to the state (pp. 152–157), reparation due to the individual established by domestic law as implementation of an international obligation (pp. 157–165), and reparation to the individual directly established under international law (pp. 165–171). Concerning the obligation of inter-state reparation, Pisillo-Mazzeschi rightly argues that some aspects of reparation (*i.e.*, the general duty to reparation, the forms of reparation and the “procedural” obligation of reparation towards the other states to give the injured individual an effective domestic remedy against the violation) are identical in diplomatic and human rights protection alike, whereas others differ, such

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20. *See* the ILC’s commentary to draft Article 43, 1993 YILC, Vol. II (Part Two), at 61, para. 10. With regard to the doubtful competence of the ICJ to order specific performance, *see* C. Gray, *Judicial Remedies in International Law* 64–66 (1987).

as the *erga omnes* character of human rights norms and the concept that damage is not a constitutive element of the internationally wrongful act. The last aspect, however, is not necessarily linked to violations of human rights, as the concept of damage as a constitutive element has long been abandoned by the ILC.<sup>21</sup>

In a next step, Pisillo-Mazzeschi argues that the international obligation of a state to grant to the individual a right to reparation within the domestic legal order for the breach of an international obligation depends on the self-executing character of the norm (p. 157 *et seq.*). This argument, it is submitted, blurs the distinction between the *international obligation* of the wrongdoing state to provide reparation and the *right of the individual* to claim reparation on the *domestic level*. There is no reason why the former should depend on the latter, the more so as the domestic right of the individual only is the implementation of the international obligation of the state. Pisillo-Mazzeschi's further argument that only a norm that establishes an obligation of conduct is self-executing ignores the fact that the whole concept of direct applicability of self-executing norms heavily depends on the domestic legal, particularly constitutional, system and, therefore, resists generalisation (*see also* the comments by W. Czaplinski, p. 189, G. Danilenko, p. 193 and C. Tomuschat, p. 201). He further asserts that the rules on the treatment of aliens – with the sole exception of certain categories of bilateral treaties – lay down “typical” obligations of result and therefore are non self-executing, whereas human rights norms generally embody obligations of conduct which lend themselves to direct applicability. This may, or may not, be correct; one would, however, have hoped for a discussion of the basis on which such a generalisation is made. In the opinion of this reviewer, Pisillo-Mazzeschi's general assumption is untenable, not so much because it is contradictory to the (previous) approach by the ILC<sup>22</sup> – which Pisillo-Mazzeschi of course is aware of (*see* p. 161, n. 37) –, but more importantly because the distinction between obligations of conduct and obligations of result in fact is a classification of primary norms. Thus, whether the obligation is one of conduct or one of result depends on the interpretation of the relevant primary norm.<sup>23</sup> The various modes of performance and implementation of human rights obligations – even with regard to the same human right – make it impossible to generally assert that these obligations require a particular course of conduct or rather oblige the state to prevent or achieve a certain result. Pisillo-Mazzeschi argues that since human rights govern relations between the state and the individual, “[i]t is [...] much more logical that they be interpreted in such a way as to favour their applica-

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21. Report of the ILC on the Work of its Twenty-fifth Session, UN Doc. A/9010/Rev.1 (13 July 1973), 1973 YILC, Vol. II, 161, at 183, para. 12.

22. Commentary on Articles 20 and 21, 1977 YILC, Vol. II (Part Two), 11, at 28 *et seq.*

23. J. Crawford, Second Report on State Responsibility, UN Doc. A/CN.4/498 (17 March 1999), at 39, para. 78; *see already* P.-M. Dupuy, *Le fait générateur de la responsabilité des Etats*, 188 Rdc 9, at 44–51 (1984 V).

tion within the State.” This statement gives the impression as if his conclusion that human rights obligations *per se* are obligations of conduct does not result from the arguments presented, but instead existed already in his mind simply because he wants these obligations to be self-executing. Even his doubts as to whether human rights are *always* self-executing contribute very little to alleviate this impression, for he concludes that “their self-executing character should generally speaking be maintained since their goal is to create a right to a domestic remedy in favour of individuals” (p. 165). Pisillo-Mazzeschi finally turns to the question of a right of the individual to reparation established by general international law and it comes as no surprise that he answers this question in the negative, because Article 50 of the European Convention and Article 63 of the Inter-American Convention “remain isolated in the conventional international law of human rights” (p. 171).

Norbert Wühler then describes the organisation, the law and the procedure of the UN Compensation Commission (‘UNCC’) (pp. 213–229). Unfortunately his paper does not go beyond a general introduction to the system of the Commission. A distinctive feature of the UNCC is that in deciding claims it has in the first instance to resort to Security Council resolutions, and shall apply other relevant rules of international law only where necessary.<sup>24</sup> In view of this primary character of Security Council resolutions it would have been interesting to investigate whether, and if so to what extent, the UNCC has deviated from the rules of general international law in its compensation decisions (*see also* the comment by P. Malanczuk, p. 244). It is only in the concluding section of his presentation that Wühler touches upon these questions (pp. 227–229). After a trifling reference to the works of various scholars, to a report of the Special Rapporteur of the Commission on Human Rights<sup>25</sup> and to the “van Boven Report”,<sup>26</sup> Wühler concludes that “the [United Nations Compensation] Commission and its process have a firm foundation in international law” (p. 229). This may well be the case, but as long as there is no disclosure of the arguments which lead to this conclusion, an interested reader will remain dissatisfied.

Two other articles deal with examples of national practice of compensation for grave violations of human rights. Lovell Fernandez treats the ambitious attempt of the first democratic government in South Africa to restore the civil and human dignity of the victims of the *apartheid* regime (“Reparation for Human Rights Violations Committed by the *Apartheid* Regime in South Africa”, pp. 173–187). Bardo Fassbender portrays the

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24. Art. 31 of the Commission’s Provisional Rules for Claims Procedure, UN Doc. S/AC.26/1992/10 (26 June 1992).

25. UN Doc. E/CN.4/1992/26 (16 January 1992), Special Rapporteur W. Kälin.

26. *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4/Sub.2/1993/8 (2 July 1993).

German experience of rehabilitating and compensating victims of the communist regime in the former German Democratic Republic (“Rehabilitation and Compensation of Victims of Human Rights Violations Suffered in East Germany (1945–1990)”, pp. 251–279).

## V

Albrecht Randelzhofer finally assumes the difficult task to answer the question whether the results of the colloquium give rise to a new evaluation of the legal position of the individual under current international law (“The Legal Position of the Individual under Present International Law”, pp. 231–242). Randelzhofer adopts the common view that, in analogy to municipal legal systems, legal personality requires that the individual possesses (international) rights and duties, whereas it is not necessary that he also has the capacity to exercise those rights himself (p. 233 *et seq.*).<sup>27</sup> The problem with this simplistic concept of legal subject is that it ignores the multiple aspects of differentiated legal capacity on the international plane. While international law certainly guarantees that individuals enjoy rights in a particular realm (*i.e.*, human rights) and today even imposes sanctions on individuals when they violate international obligations incumbent on them (obligations under humanitarian law and the laws of armed conflict), the individual still does not have the capacity to dispose of rights and obligations. What is meant here is that the question whether the individual is a subject of international law is not amenable to a clear-cut answer. Rather, it must be approached in a contextual manner, since form and extent of the relevant legal capacity depend on the particular status the individual enjoys in the area he is acting (*see also* the comment by P. Kooijmans, p. 247 *et seq.*). Such a dynamic approach to the differentiated international legal personality of the individual would call for criteria additional to the simple dichotomy of rights and obligations, in order to determine the given status of the individual; such criteria are for instance the treaty-making capacity, and the possibility of being held (delictually and criminally) responsible.<sup>28</sup>

In applying the “rights-and-duties-test” Randelzhofer turns to the question whether the individual is also a bearer of obligations. With regard to the obligations arising under the laws of armed conflict, Randelzhofer rightly argues that the four 1949 Geneva Conventions do not contain obligations of the individual since the relevant provisions “enjoin the State parties to make the commitments of the conventions binding for their

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27. *See*, however, A. Verdross & B. Simma, *Universelles Völkerrecht*, 3rd Ed., Section 424 (1984).

28. With regard to the influence of status on the legal capacity or personality of legal subjects under international law *see, in general*, D. Rauschnig, *Das Schicksal völkerrechtlicher Verträge bei der Änderung des Status ihrer Partner* 12–41 (1963).

nationals through municipal law” (p. 241). Those obligations are only addressed to the states and therefore have no “direct applicability” to the individual. Yet Randelzhofer further argues that the establishment of the *Ad Hoc* Tribunals for the former Yugoslavia and Rwanda did not advance the concept of individual criminal responsibility because the Tribunals’ Statutes are vague on the punishable crimes and silent on the penalties (p. 241). Valid as this argument may be with regard to the rule of law, it fails when it comes to determine the criminal responsibility of individuals standing trial before the Tribunals. Contrary to the 1907 Hague Convention No. IV and the Geneva Conventions, the Security Council resolutions establishing the Tribunals first of all contain obligations addressed to individuals rather than to states. In view of the fact that the Yugoslavia and the Rwanda Tribunals enjoy primacy over national courts,<sup>29</sup> prosecution and punishment are effectuated against the individual directly by centralised organs (almost) without the intervention of the state. One could even argue that the type of individual criminal responsibility as established by those Tribunals is of a self-executing character, as it were – apart from the obligation to cooperate which entails the duty to surrender the indicted and which of course calls for implementation by states in (and probably amendment of) municipal law. In theory, the concept of individual criminal responsibility directly under international law could hardly be any clearer. The Yugoslavia Tribunal already had the occasion to address this issue. In *Prosecutor v. Tihomir Blaškić*, the Appeals Chamber of the Tribunal held that in certain cases, the Tribunal could circumvent the national authorities and take direct measures towards individuals.<sup>30</sup> Therefore, given the increased importance and effectiveness also in practice of the concept of criminal responsibility of individuals under international law as illustrated above, Randelzhofer’s conclusion that “[t]he role of the individual in public international law has not changed in substance” (p. 242) is untenable.

Yet even more troubling than his conception of individual criminal responsibility under the Tribunals is the inconsistency of Randelzhofer’s main argument: Although in his opinion one of the constitutive elements of the legal personality of the individual, namely that the latter is a bearer of obligations under international law, is “doubtful” and “still disputed” (p. 241 *et seq.*), he states that “[t]oday it is generally accepted that the individual is indeed a subject of public international law” (p. 232, *see also* pp. 238 and 242). Finally, with his conclusion that “[u]nder customary international law there is no rule granting rights directly to the individual,” Randelzhofer either denies the customary character even of fundamental

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29. Art. 9(2) of the Statute of the International Criminal Tribunal for the former Yugoslavia and Art. 8(2) of the Statute of the International Criminal Tribunal for Rwanda.

30. Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108bis, T.Ch. II, 29 October 1997, paras. 53–55.



human rights, or adopts a very restrictive notion of “right” which also requires the capacity to exercise or enforce it. The latter assumption, however, would contradict his previous argument that “it would be too high a hurdle to acknowledge rights of the individual only in cases in which he has the capacity to exercise the right himself” (p. 234). In sum, Randelzhofer’s approach to the issue of the individual as a legal subject under international law appears somewhat puzzling.

## VI

The book is a solid and valuable contribution to a topic of international law which is to a large extent beset with uncertainty and confusion. Written in the tradition of mainstream international law scholarship, the individual parts treat some of the questions which are raised by the legal position of the individual under international law in general, and, in particular, the capacity of the individual to invoke human rights violations in the various systems of human rights protection. It is clear that the book could not provide an answer – let alone a satisfying answer – to all these questions. Yet it must be noted that in various ways, the book unfortunately suffers from the narrowness of the approach taken. A general remark in this regard concerns the choice of topics selected for analysis. For example, the contribution on the UNCC appears somewhat displaced among all the other presentations which specifically deal with reparation for human rights violations, whereas the UNCC provides compensation for any loss, damage or injury as a result of Iraq’s unlawful invasion and occupation of Kuwait. This embraces a wide range of heads of damages, including direct damage to states, harm to the environment and, in particular, economic loss of companies. In other words, the UNCC was not established to cope with claims of natural persons in particular, let alone claims arising from human rights violations. This of course raises the question to what extent mechanisms to enforce claims by individuals outside the field of human rights, such as the UNCC, which provide that the individuals themselves may submit claims, may contribute to the enhancement of the individual’s position in international law.<sup>31</sup>

On the other hand, even within the field of human rights protection in its narrower meaning, the contributions in the book do not appear to be representative. The focus of the book lies on regional (Europe and the Americas) or even domestic systems of human rights protection. Yet, in view of the fact that the overall problematique of the symposium and the book was the legal position of the individual in *international* law, any

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31. In this respect, it would have been extremely helpful to also take into account other enforcement mechanisms outside the field of human rights, such as that established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (‘Washington or ICSID Convention’) of 18 March 1965, 575 UNTS 159.

assessment of this position which is based on mainly Western/Eurocentric systems of human rights protection and which ignores the situation in Asia or Africa – with the sole exception of one presentation dealing with reparation for human rights violations committed by the *apartheid* regime in South Africa – will only reveal a fragmentary picture and thus will remain incomplete. Even a tentative conclusion as to the position of the individual in international law would have required to address the question why effective regional systems of human rights protection are still lacking in Africa and Asia and, more importantly, what the lack of such effective enforcement mechanisms means with regard to the position of the individual on the global level.

Finally, the narrowness of the approach taken is also perceptible in the contributions themselves, in that only few authors mention, much less analyse, the overlap between the individual treaty regimes or the relationship between these and general international law. Thus, apart from two short references in the foreword by the editors and in the introduction by Tomuschat, the ILC Articles on State Responsibility are nowhere mentioned in the book. Hence the individual contributions on a particular “human rights regime” stand on their own, without being put into a more general perspective. The book would have greatly benefited from a more comprehensive approach which, for instance, attempts to link the specific consequences which the various human rights treaties envisage in case of their breach with the general law of state responsibility. For this reason, it would have been very useful to provide a theoretical setting which, in particular, sets out the criteria for assessing the legal position of the individual in international law. Since it is obvious that none of the authors had the opportunity to address this issue in detail, a general presentation of such a theoretical framework would have been helpful for the authors to serve as a common point of reference or as a basis of comparison.

It must however be emphasised that a great deal of the shortcomings criticised above are the inevitable result of the multi-author colloquium format of the book. On balance, the book provides a useful comparative survey of the practice of reparation in the various (quasi-)judicial dispute settlement procedures in which the individual enjoys standing in his own right, in particular under human rights treaties; and in this sense the book may serve as a reference for further analysis. Unfortunately, the book does not achieve its main purpose, *i.e.*, to shed new light on the current status of the individual in international law.

*Stephan Wittich\**

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\* Department of Public International Law and International Relations, University of Vienna, Austria.