accessible through the ICC may not provide a sufficient or appropriate measure of justice for those affected. Similarly, revolutionary access for individuals in the context of international investment arbitration fed into existing criticisms of the unprecedented recent growth of investment arbitration, giving far too much leverage to Western investors over the interests of the host states and their citizens, and calls for reform.[8]

Finally, ELIC also consists of a willingness to stretch established international legal principles. The expectation of direct remedy together with the instinct to open up new access points can lead to a loosening of more restrictive understandings of long-held international legal principles. This aim is not explicit but arises out of necessary implication. In the case of the ICC, a relevant principle was that of state responsibility. The ICC reparations regime was not linked to the actions of one state against another or in representing the interests of their citizens—normally a crucial element of state responsibility. Instead, the reparations regime uses a trust fund model of voluntary contributions. In this way, it moves just beyond strict state responsibility to a more disparate understanding of responsibility of individual perpetrators as regards victims and the international community. Similarly, in investment arbitration, access to justice for small-scale investors depended on a loosening of the principle of consent—a cornerstone of international law. Though contentious, the tribunal reasoned that consent did not suddenly end with the inclusion of a large number of smaller parties and could accommodate mass investor claims as a procedural adaptation,[9] even if that meant stretching the initial host state consent.

Since it is possible to see ELIC's four attributes across different areas of international law, there is something in the air as part of a wider drive for access to justice. The common legal sensibility of ELIC is likely to arise in further fields of international law that involve mass harms. What this looks like will be worked out by the actors in that field, just as the actors did in the examples of international criminal and investment law. For example, the expectation of direct remedy will be similar, but the legal frames of reference that are familiar and available may differ. No area of international law is necessarily off limits when it comes to ELIC. To the contrary, compensation became possible in international criminal law, even among states with no domestic legal tradition of incorporating victim compensation into criminal law. It became possible in international investment law, another field of international law in which there was no precedent. International legal mechanisms are in the mix now in innovative and, at times, unexpected ways, in the drive for a remedy. ELIC has the potential to shape the future direction of international law in ensuring access to justice for large-scale injury.

Remarks by Brian L. Cox

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Establishing the circumstances pursuant to which parties to an armed conflict are required to provide reparations or other compensation for harm inflicted in the course of hostilities is an enduring and seemingly intractable challenge in the field of public international law. With the recent full-scale invasion of Ukraine by Russia and the ensuing harm to civilian persons and property being inflicted daily on an almost unimaginable scale as a result of the ongoing fighting, the issue of recompense for damage inflicted in the course of armed conflict has become infused with a renewed

[8] *See, e.g.*, Stefan Hindelang & Markus Krajewski, Shifting Paradigms of International Investment Law (2016).

[9] Andrea Marco Steingruber, Abaclat and Others v. Argentine Republic*: Consent in Large-Scale Arbitration Proceedings*, 27 ICSID Rev. 237 (2012).

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sense of urgency. My contribution to the *Remedies and Reparations for Individuals Under International Law* panel explores the topic that I refer to as "belligerent liability"—that is, reparations or other compensation required to be distributed by states for harm to civilian persons or property caused during armed conflict—from both a conceptual and applied approach.

The conceptual component of the presentation and of my ongoing research on which the presentation is based seeks to identify and describe the modes of discourse that shape and inform various perspectives on the topic. This conceptual aspect of the inquiry explores the divergence between analysts and practitioners who tend to align with what I describe as the "humanitarian protection" perspective and the "combatant" perspective. With the contours of the divergent perspectives outlined, the project then examines how the categories manifest in scholarship and practice related to the topic of belligerent liability and assesses the applied implications of the divergence.

To provide structure to the theoretical aspect of the inquiry, I draw upon the description by Jens Ohlin and Larry May of necessity as a cluster concept. According to this framework, necessity can be described as a license, exception, or constraint depending on the context in which an action is contemplated or carried out. For the first, "necessity can mean that one has a license to act in certain ways once one can show that the action is part of a role, and to satisfy this role it is necessary for one to act in this way." For the second, "necessity can be an exception to an otherwise binding obligation in the sense that if it is necessary for one to act, say so as to avoid one's own death, one is entitled to use means . . . that would normally not be permissible." Finally, "necessity can be a constraint that blocks a form of activity due to the lack of necessity that activity can be engaged in."[1]

The divergence between the combatant and humanitarian protection perspectives can be described as a function of dissimilar conceptions of the function of necessity in the context of the conduct of hostilities. From a combatant perspective, a participant in the armed conflict utilizes force in a manner consistent with necessity as a license to achieve the objective of the belligerent state in the armed conflict, which in general is to compel the submission of the enemy as quickly and efficiently as possible. In this context, necessity functions as a license to permit force to be used in any manner that is not prohibited pursuant to the law of armed conflict. From a humanitarian protection perspective, in contrast, the law of armed conflict tends to be interpreted through the "necessity as a constraint" lens because the foundational purpose of the international humanitarian law from this perspective is to limit the effects of armed conflict for humanitarian purposes.

Identifying and accounting for this divergence in perspectives informs the endeavor to engage with actual or contemplated events that occur in the context of armed conflict. If the starting position is that the purpose of relevant legal rules is "*to limit the effects of armed conflict*" for "humanitarian reasons,"[2] the mode of discourse and analysis will be fundamentally different from the outset as compared to a perspective that considers the purpose of the law of armed conflict to prohibit only conduct that states have determined to be "militarily unnecessary per se"[3] while combatants fight to compel the submission of the enemy as quickly and efficiently as possible. Each of the two broad categories of perspective represents a conceptual mode of discourse that then shapes debates and practice involving armed conflict in the applied context, including in relation to the topic of belligerent liability.

As a prototypical example of the combatant perspective, for instance, the U.S. Department of Defense *Law of War Manual* observes on the topic of belligerent liability that "although indemnification is *not required* for injuries or damage incidental to the lawful use of armed force,

[1] Jens David Ohlin & Larry May, Necessity in International Law 3 (2016).

[2] Advisory Serv. Int'l Humanitarian L., Int'l Comm. Red Cross, *What Is International Humanitarian Law?* 1 (2004), *at* https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf (emphasis in original).

[3] Off. Gen. Couns., Department of Defense Law of War Manual, para. 2.2.2.1 (3d ed. 2016).

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compensation may be provided as a humanitarian gesture."[4] This focus on whether the conduct that led to the incidental damage complies with existing rules of the law of armed conflict is to be expected from a combatant perspective. From this perspective, as the *Manual* describes, "the importance of prevailing during armed conflict [as an expression of military necessity] often justifies taking actions based upon limited information that would be considered unreasonable outside armed conflict."[5]

From a humanitarian protection perspective, this outcome is predictably unsatisfactory because the civilian population suffers often catastrophic losses inflicted by combatants during the conduct of hostilities whether or not the conduct that led to the damage complied with the law of armed conflict.[6] If the foundational purpose of international humanitarian law is understood to be to limit the effects of armed conflict, this provides motivation to identify or devise requirements that would expand upon a doctrinal application of existing rules. Doing so would arguably "encourage states to change their military strategies" to avoid the prospect of strict liability for incidental damage inflicted during armed conflict[7] and would, in any event, shift the application of relevant rules of international law in favor of the affected civilian population rather than the participants to the hostilities.

In the absence of a widely ratified treaty provision requiring reparations for even lawful incidental damage or, alternatively, absent extensive and virtually uniform state practice and an accompanying *opinio juris* demonstrating the same, there is no question that international law as it currently exists does not *mandate* such recompense. From a combatant perspective, the status quo is suitable because the law of armed conflict exists to regulate the behavior of those engaging in the conflict and the proscriptions reflected therein are limited to conduct states have determined by consensus to be militarily unnecessary per se. This doctrinal approach is inherently permissive and likewise complicates the endeavor to establish that an attack did not comply with relevant law of armed conflict rules because doing so requires an assessment of the knowledge and intent of personnel who are responsible for the attack.

Focusing instead on the outcome of an attack would allow for a wider net of responsibility for recompence to be cast. Likewise, evidence of the knowledge and intent of personnel engaged in or otherwise responsible for an attack is typically difficult, and often impossible, to develop from outside of the military organizations involved in the armed conflict. For the humanitarian protection perspective, these factors combine to encourage inventive solutions to "fix" a perceived deficiency in existing doctrinal law. The damage to civilian persons and property being inflicted on a seemingly industrial scale in the ongoing armed conflict in Ukraine presents a particularly urgent practical context for which requirements related to belligerent liability will become increasingly significant.

From a humanitarian protection perspective, adopting an expansive approach to the circumstances pursuant to which the Russian Federation can be required to compensate either the government of Ukraine or perhaps even individual claimants for damage inflicted in the armed conflict is advisable. However, practitioners adopting a combatant perspective recently warned that

[4] *Id.*, para. 18.16.3 (emphasis added).

[5] *Id.*, para. 5.3.1 (footnote omitted).

[6] *See, e.g.*, Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529, 549 (2003) (asserting that requiring reparations only when an attack is found to violate international law means "that a civilian whose house was targeted would be compensated, but that his neighbour, whose dwelling was destroyed as the result of permissible collateral damage, would not," which, according to the author, "is hardly a satisfactory outcome from the point of view of the victims, who are equally in need").

[7] Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181, 223–24 (2009).

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"rigorous attention to the evidentiary demands of the law of war, and a cautious, even circumspect approach to *attack effects*, will best serve justice . . . and preserve the law of war as a relevant and effective restraint on combat."[8] Insisting upon a doctrinal approach to assessing whether a particular attack constitutes a serious violation of the law of armed conflict, and would therefore lead to potential compensatory liability for the damage, then, may frustrate or limit efforts to assign belligerent liability for the attack from a humanitarian protection perspective. However, maintaining the integrity of existing international law involving the conduct of hostilities constitutes a competing and compelling interest counseling against an expansive approach to belligerent liability from a combatant perspective.

One potential solution that may maintain the integrity of existing international law while still supporting efforts to eventually secure reparations from Russia in relation to belligerent liability in the context of the armed conflict in Ukraine may be to clarify and expand upon the *jus ad bellum* analysis presented in a recent decision of the International Court of Justice. In the reparations judgment published in February 2022 for the *Armed Activities on the Territory of the Congo* case, the Court determined that violation of the "prohibition of the use of force as expressed in Article 2, paragraph 4, of the United Nations Charter" by Uganda constitutes an internationally wrongful act that "gives rise to the obligation of Uganda to make full reparation" for losses inflicted as a result of the violation.[9] For this formulation to be widely operationalized, the exact contours of the "degree and magnitude" standard described in the underlying opinion on the merits and incorporated in the later reparations decision should be elaborated.

Doing so will inform the necessary endeavor of distinguishing "a grave violation of the prohibition on the use of force"[10] from ostensive Charter violations of a potentially lesser scale. Whatever the exact boundaries of the "degree and magnitude" standard, there is little question that the full-scale invasion of Ukraine by Russia will qualify since this constitutes a prototypical use of force the Charter was developed to forbid. As the preliminary internationally wrongful act from which the liability of Russian forces or proxies is derived, the Russian Federation as a belligerent could be held responsible even for damage that is inflicted pursuant to otherwise lawful attacks in the *jus in bello* context. The ongoing armed conflict in Ukraine demonstrates the stakes involved in establishing with precision the substantive conditions pursuant to which a belligerent can be required to provide reparations for damage inflicted during the conduct of hostilities—assuming, of course, the considerable jurisdictional obstacles are overcome.

To this end, describing and accounting for existing divergence in the prevailing modes of discourse on the topic of belligerent liability can contribute to the endeavor of developing innovative yet pragmatic solutions to one of the most intractable challenges in contemporary public international law. What I describe as the humanitarian protection perspective tends to emphasize the perceived primary purpose of relevant provisions of international law to limit the effects of armed conflict and to consequently expand the set of conditions that will support a finding of belligerent liability. In contrast, the combatant perspective tends to adopt a doctrinal approach that emphasizes the enduring effectiveness of the law of armed conflict to prohibit only the range of conduct that states have deemed by consensus to be militarily unnecessary per se. Reconciling these divergent perspectives is a challenging yet necessary undertaking to support the endeavor to establish and

[8] Geoff Corn & Sean Watts, *Ukraine Symposium – Effects-Based Enforcement of Targeting Law*, Articles of War (June 2, 2022), *at* https://lieber.westpoint.edu/effects-based-enforcement-targeting-law (emphasis added).

[9] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Reparations Judgment, para. 145 (Feb. 9, 2022), *at* https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf.

[10] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 ICJ Rep. 16, para. 165 (Dec. 19).

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operationalize the specific conditions pursuant to which a belligerent can be required to provide reparations for damage inflicted while engaged in the conduct of armed hostilities.

Remarks by Sotirios-Ioannis Lekkas

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On February 9, 2022, the International Court of Justice (ICJ) rendered its judgment on the reparations phase of the *Armed Activities (DRC v. Uganda)* case which related to the Democratic Republic of Congo's (DRC) claims against Uganda arising from the Second Congo War.[1] The judgment concluded a case which had all the hallmarks of a landmark: an exceptionally large-scale, protracted, and complex armed conflict, a key actor as the respondent, and virtually unfettered material jurisdiction of the Court. As a reminder, in 1999, the Court was seised with DRC's claims against Uganda arising from the (then ongoing) Second Congo War. Similar claims against Rwanda and Burundi failed before reaching the merits stage. In 2005, the Court rendered its judgment on the merits declaring Uganda responsible for violating the principle of non-use of force and non-intervention by the acts of its own forces and by supporting armed groups in the DRC.[2] The Court also found Uganda responsible for breaches of international humanitarian law and international human rights law, and for plundering DRC's natural resources.[3] The Court concluded that Uganda had to make reparation to the DRC for the injury caused by its internationally wrongful acts and enjoined the parties to enter into negotiations for that purpose.[4] After almost ten years of sporadic and fruitless discussions, in 2015, the DRC brought the case back to the Court for conclusive resolution.

The paper took a closer look at the 2022 judgment, focusing on the ways in which it dealt with the complex issue of the "personalization" of reparations for atrocities committed in war. By "personalization" of reparations, the paper denoted an approach which aims to reflect both the responsibility of the wrongdoer and the harm and circumstances of the victim. It argued that, from this perspective, the Court's approach is not amenable to wholesale reproduction in future cases.

It is trite that the obligation to make reparation is limited to injury *caused* by the internationally wrongful act.[5] In this respect, the *Armed Activities* case posed significant challenges as, in the merits judgment, Uganda was found responsible not only for acts committed by its armed forces, but also for its incitement of acts committed by private armed groups and its failure to ensure public order in Ituri in which it was the occupying force. The Court held that the status of Ituri as occupied territory had "a direct bearing on questions of proof and the requisite causal nexus."[6] The Court held that Uganda was responsible for all damage resulting from the conflict in Ituri even from actions of third parties, unless it could establish with respect to a particular injury that it was not caused by its failure to meet its obligations of vigilance as an occupying force.[7] For damage

[1] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Reparations Judgment (Feb. 9, 2022), *at* https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf (hereinafter, *Armed Activities*, Reparations).

[2] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 ICJ Rep. 16, para. 345(1) (Dec. 19).

[3] *Id.*, para. 345(3)–(4).

[4] *Id.*, paras. 261, 345(5)–(6).

[5] ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, II(2) Y.B. Int'l L. Comm'n 31, Art. 31 (2001).

[6] *Armed Activities*, Reparations, *supra* note 1, para. 78.

[7] *Id.*, paras. 78, 95.

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