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SYMPOSIUM ON WHAT MIGHT INTERNATIONAL LAW REPAIR?

INTRODUCTION

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To accompany the print edition of this issue of the *American Journal of International Law*, *AJIL Unbound* is publishing eleven essays across two Symposia on Reparations in International Law. These essays were selected from the call for essays published in June 2024, which generated more than 150 proposals. The large response from colleagues across the world—from Canada to South Africa, Kenya to Australia, United Kingdom to Zambia—and from early career researchers, established scholars, and practitioners in the field, demonstrates the enormous interest in the topic. It also underlines the changes in the field that have brought calls for reparative justice to the fore. The proposals we received covered the fields of climate change and environmental harm, war reparations and sexual violence, slavery and reparations for historical wrongs, and many others. The selected proposals showcase examples of successful and unsuccessful domestic and international reparations efforts and the lessons we can learn from them. The authors also propose solutions and provide inspiration that other fora—courts or commissions—can experiment with in the future. The eleven essays are divided into two separate symposia: the first speaks to the underlying questions of who can seek reparations, what reparations should look like, and finally, how the process of reparations is operationalized, with a plurality of the essays focusing on the case of climate change. The second symposium showcases a number of additional case studies—from reparations for cholera in Haiti, repatriation of Native American cultural objects under U.S. law, to attempts to redress the atrocities committed against the Mau Mau veterans, to the Ogoni Community case in Niger Delta, and the settlement of Indian Residential Schools policy in Canada—while also foregrounding broad historical perspectives on the colonial past.

As the essays in the print issue underscore, reparations represent a serious challenge for international law. The difficulty finding fair and consistent means of repairing injustices highlights the potential limits of international law itself, challenging our expectations of what international law can achieve and challenging us to imagine how international law might do more. Answering questions about reparations is an effort at soul-searching for the field. The selected essays in this Symposium complement the print issue by focusing on three particularly difficult threshold questions.

First, the essays ask *who* can claim reparations. In principle, reparations are intended to redress the harm caused to the injured party and to restore—as far as possible—the original condition, to secure *restitutio in integrum*. But who can claim to be the "injured" party under international law? In the context of climate change, our authors contrast claims made by vulnerable individuals and fossil fuel companies, victims of harm and actors that perpetuated the harm, and the emergence of justiciability for claims made on behalf of the earth itself.

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Julia Dehm, of La Trobe University, looks at these questions by focusing on how conflicting legal claims are being articulated and adjudicated in climate litigation. On one side, she finds vulnerable individuals and states, primarily from the Global South, who have advanced arguments in various forums that they are owed reparations or compensation for the harms caused by excessive emissions of high-emitting states or corporations. Yet concurrently, fossil fuel companies are utilizing international investment law and arbitration to seek compensation for government policies that promote a transition away from fossil fuels. Dehm compares two climate cases to interrogate who might be entitled to reparations: *Luciano Lliuya v. RWE AG*, in which a Peruvian farmer is suing Germany's largest energy producer; and *Rockhopper v. Italy*, in which a British company sued Italy for banning oil production concessions of its coastline. While there are many differences between these cases—including forum, causes of action, actors, and applicable law, these cases demonstrate the asymmetry in available legal mechanisms—where fossil fuel companies are entitled to protection under legally binding treaties, but climate-affected communities must rely on politically contingent and legally fragile avenues for redress. The international legal order thus reflects a structural bias that prioritizes corporate compensation over climate justice, protecting fossil fuel companies' expected profits while creating legal and procedural barriers for climate victims seeking reparations.

Krzysztof Pelc, of Oxford University, wonders whether a backward-looking commitment to repairing harm should also entail a forward-looking commitment to avoid it and asks the difficult moral question whether the latter might militate in favor of paying harm-causers to stop. Looking at the example of climate change, Pelc observes two competing compensation discourses: one involves the creation of a global fund to compensate poor countries for centuries of carbon emissions by rich countries, while another imagines a fund that would compensate fossil fuel workers who currently block crucial decarbonization efforts. The first option compensates victims of past injustice; the second compensates current beneficiaries of inefficient and unjust systems who act as hold-out interests. Both are attempts to rectify harm, yet they rest on different institutional and ethical arguments. The case for reparations is most often formulated as a deontological claim about recognizing the moral rights of victims of past harms. Buyouts rest on a consequentialist argument that improves long-term welfare by unlocking beneficial reforms—but may also give rise to its own deontological concerns, if it is seen as "rewarding" the very actors responsible for perpetuating the harm. Pelc, however, suggests that there is a means of recasting both policies under a common framework of harm reduction. Buyouts become a form of forward-looking compensation that fulfills an ethical duty which extends to future victims of persistent ongoing harms. Yet buyouts must be carefully balanced against existing liability claims and the attendant risk that perpetrators' accountability—such as industrialized countries' responsibility for historical emissions—may be obscured. Pelc argues that there is an argument for international law to take forward-looking obligations into greater account, in pursuit of the very aims that underlie calls for reparations.

Nina Bries Silva, of European University Institute, reflects on the *who* by introducing a decision of the Colombian Special Jurisdiction for Peace, a Court that recognized the reparation claim articulated by the Awá people on behalf of *Katsa Su* (Mother Earth in the Awapit language). Silva's contribution recounts the story of the Awá, one of Colombia's Indigenous groups primarily living in the region of Nariño, where the prolonged internal armed conflict in Colombia affected not only human beings but also their Mother Earth. The Awá consider their territory a living being that can experience pain and is currently sick and in need of reparation. In 2019, the Colombian Special Jurisdiction for Peace—as the court in charge of dealing with cases related to the armed conflict—recognized the *Katsa Su* as a victim of the armed conflict, with its own right to reparation.

The three essays reveal tensions in *who* should claim reparation, but they also challenge the traditional assumptions about *what* reparations should look like—the second issue tackled in the Symposium. Silva's discussion of the Special Jurisdiction for Peace, instituted in 2024, which issued its first reparative measures to the *Katsa Su,* for example, speaks of "Harmonizing the territory and weaving paths towards the collective restoration

of the Awá people." She maps out the relational character of the reparations between the territory and the Awá communities who inhabit it, and describes how specific remedies, such as the building of the House of Wisdom or the proposed reforestation project go beyond a simple act of replanting trees but rather address the disrupted relationship with the territory and aim to restore harmony.

Pelc's essay goes further and suggests that international law should consider buyouts as a means of achieving the aims that underline calls for reparations. Pelc argues that if there exists a moral imperative to offer reparations for past injustices, a corresponding duty may exist to proactively address ongoing political impasses that perpetuate harm. One means of doing so is through buyouts, which also involve compensation. Unlike reparations, however, buyouts compensate the actors perpetuating the harmful status, as a means of removing barriers to beneficial reforms.

The third issue that the Symposium tackles is *how* reparations might be operationalized—*where* they can be sought and what the process looks like. The first of these essays looks at the process of awarding compensation and notes an increasing convergence and commonality amongst international bodies. The second seeks solutions for situations where no adjudicative body exists to which injured parties can turn to for reparations.

Ashley Barnes, of Thompson Rivers University, looks at the ballooning of expectations in international law that those impacted by violations of public international law will receive a remedy, specifically compensation. She notes that this expectation has been shaped by the practice of different international institutions, including large compensation awards rendered by courts, like the International Court of Justice in *DRC v. Uganda* and the International Criminal Court victims' reparations order, and the establishment of a loss and damage fund for climate damage. Looking at these developments, she finds common reparations practices with wider significance. She argues that these contemporary practices do not flow solely from a single right but represent a combination of new ideas, forms, and procedures that promote access to justice for large-scale violations of international law—what she terms an "emerging law of international compensation." Methodologically, this emerging law of compensation reveals a bundle of common attributes or approaches, including direct remedy for mass harms, the adoption of familiar procedural frames, the opening of new access points, and the stretching of established legal principles. These attributes or approaches appear from the bottom-up in the latest remedial developments, drawn eclectically from international or domestic precedents and finding commonalities across international criminal and climate change law.

Chiara Giorgetti, of Richmond Law School University, observes that existing international courts and tribunals often lack the jurisdiction to provide full reparations. As a consequence, obtaining reparations in the current international legal system often proves difficult. International claims commissions can be effective instruments to provide reparations in such circumstances, including in post-conflict and other complex situations. Indeed, international claims commissions can fill the vacuum that exists between breaches and reparations due for serious violations. Their flexibility is a unique feature that can provide the missing procedural bridge between international law violations and reparation. As innovative legal instruments, international claims commissions can help address some of the most complex current legal problems. At present, negotiations are underway to create an international claims commission as part of a larger compensation mechanism for those who suffered injury, damage, or loss because of Russia's aggression against Ukraine. A similar instrument was proposed in a UN General Assembly resolution in the context of the Israel/Palestine conflict. A claims commission could also be created to provide reparations for claims arising from climate change for both individuals and states. In her contribution, Giorgetti explains what international claims commissions are, how they work, and how they can be used to ensure reparations in some of the most complex and pressing contemporary situations.

Together, these six essays tackle the most recent developments across the world in the field of reparations. They challenge several aspects of the traditionally established idea that reparations are intended to redress the immediate victim's harm: first, by wrestling with *who* should benefit from reparations—from victims of harm to

actors perpetuating harm, to mother Earth and communities inextricably connected with it; second, by expanding *what* reparations should look like—from buyouts to community led-reparations and reparations reestablishing harmony between the injured party and the territory it belongs to; and finally, by asking *how* and *where* reparations can be effectively secured—whether through increasingly similar approaches to determining compensation or in especially created claims commissions. In the end, these contributions help tease apart the hard questions that will need to be answered as international law confronts its obligations to help repair past harm and support global justice. A more just international law will require hard choices and hard work. These essays help light the path forward.