English Summary

Borrowing from domestic private law is a ubiquitous phenomenon in public international law. The rules on treaties, state responsibility, or the acquisition of territory remind us that international law has heavily drawn on the rich experience of (often Roman) private law. Given that international law was largely understood as a system of coordination between sovereign and equal States, taking inspiration from a field of law coordinating the relationship between equals does not come as a surprise. Yet, regardless of how much international law once might have resembled private law, it has undergone profound changes since the 19th century. It expanded its scope considerably, expansively limiting what had been thought to fall into the States' domaine réservé. Similarly, international law has recognized more actors as holders of rights and duties. While States used to be the main subjects of international law for a long time, also the individual has become a subject of international law. As a consequence, international law also regulates legal relations between States and individuals. It governs States' exercise of public powers, e.g. when imposing human rights obligations. Insofar, international law today resembles domestic public law. This insight forms the starting point of the thesis: If the borrowing from private law depended on international law largely regulating the relationships between States, the shift towards public law begs the question whether this change had any effect on international legal concepts and rules that were once incorporated into the body of international law from private law. The monograph tries to shed some light on this question by analysing one example for international law's borrowing from private law. For this purpose, the monograph chose non-material damages[2289] because they can be traced to private law concepts and surface across various sub-fields of international law.

Individual chapters examine how courts and tribunals have dealt with non-material damages under general international law, human rights law, and international investment law. Taken together, they identify remarkable differences in how non-material damages are awarded in cases between

2289 The summary uses non-material, non-pecuniary, and immaterial interchangeably without implying a difference in substance.

States and those between a State and an individual. The most striking difference is a threshold requirement for awarding non-material damages. While individual claims for moral damages are successful only if the injury or its consequences are sufficiently serious, no such requirement exists for inter-State claims. The monograph proposes to explain this difference by using the conceptual distinction between public law and private law. This distinction is well known to many jurisdictions, yet, the monograph argues that it also provides a useful lens to describe international law. In a nutshell, inter-State international law shares some similarities with private law as it governs the relationship between free and equal persons. Conversely, international law resembles public law where it allows the individual to bring claims against a State. Applying this distinction to both areas of international law also reveals different rationales underlying the respective parts. As the monograph argues, these rationales also explain why non-material damages are dealt with differently in the respective areas of international law. Basically, limiting claims for moral damages in the way observed resonates well with the idea of public law.

The monograph unfolds this argument in four steps. Firstly, Part 1 sets out the conceptual framework by defining private and public law and explaining their usefulness to understand public international law. On this basis, Parts 2 and 3 present doctrinal studies on how different sub-fields of international law deal with non-material damages. In Part 2, the focus is on inter-State international law, which Part 1 identified as fundamentally similar to private law. In contrast, Part 3 is devoted to sub-fields allowing for individual claims such as human rights law and international investment law which resemble domestic public law. Part 4 connects the doctrinal analysis of Parts 2 and 3 with the conceptual framework of Part 1: It argues that the different treatment of non-pecuniary damages in inter-State and individual claims reflects the distinction between private and public law. As the major part of the monograph is based on an example, non-material damages, Part 4 also reflects on what insights may be drawn from the analysis of non-material damages for private law analogies in general.

1. Part 1 defines the concepts of private law, public law, and private law analogies for the purposes of this study.

a) § 2 argues that the distinction between private law and public law can be transferred to international law to describe (parts of) its structure. It does so in two steps. Firstly, the chapter identifies ideal types underlying the domestic distinction between public and private law. Thereby, the thesis' understanding of the distinction escapes most of the debates about

the usefulness and feasibility of distinguishing private from public law domestically and internationally. The move to identify ideal types rests on a widely shared intuition in the debate about public and private law: While many scholars doubt the feasibility of neatly distinguishing both areas, most would agree that tax law differs fundamentally from sales law. As the chapter argues, this intuition is based on certain fundamental differences between public and private law: Ideal-typically, both regulate different situations. While private law coordinates the relationship between equal and free persons, public law regulates the exercise of public power vis-à-vis individuals. Public law is, thus, concerned with a relationship of subordination. What is more, the basic ideas of both fields are different. Private law is based on the freedom of the individual and thus allows everyone to pursue her or his own interest (within certain boundaries, of course). Public law, on the other hand, serves the common interest. In addition, both areas also serve different ideas of justice. While private law is deeply rooted in the idea of compensatory justice, public law is an exercise in distributive justice. The way this chapter espouses the distinction between public and private law does not offer a useful delimitation of the sub-areas of law for all conceivable cases. The second step is to use these ideal types to describe and explain the developments under international law. That way, the distinction offers an analytical framework to understand parts of international law. When granting rights to individuals vis-à-vis States (especially under human rights law and international investment law), it exhibits the characteristics of public law, understood as an ideal type. In contrast, inter-State international law remains similar to private law, at least in parts. On this basis, the chapter also distinguishes private-law-like and public-law-like areas in the law of state responsibility. When responsibility is invoked in an inter-State framework, the situation is (partially) analogous to private law. Conversely, individual claims for state responsibility have some similarity to public law. This analytical framework allows us to explain possible differences in the handling of responsibility in these two areas.

b) Building on the framework introduced in § 2, § 3 disentangles the relationship between international law's borrowing of private law concepts and the distinction between public law and private law introduced in § 2. Their relationship is crucial for the monograph's overarching idea: The structural shift of international law towards a more public-law-like framework affected its private law heritage. This intuition, however, assumes that public international law incorporated private law concepts precisely

because international law resembled private law in important ways. Yet, a myriad of reasons explains why international law borrowed from private law. Still, the chapter concludes that the concepts' respective origin in private law plays a role for their current application in international law. The chapter unfolds this argument in three steps. Firstly, it defines the term 'private law analogy' broadly as all those rules and concepts originating in some domestic private law. Subsequently, the chapter traces how the use of private law for international issues has been justified across time. As this analysis reveals, the reception of Roman-law-based private law in international law was not a uniform project, but a process fuelled by different motivations over time. To some extent, most of them rest upon the idea that relations between sovereigns and between private individuals are similar insofar as formally equals deal with each other. Yet, the chapter also shows that it is essentially anachronistic to describe international law's borrowings from Roman law as a private law analogy. Distinguishing international law from domestic law as well as distinguishing public and private law are modern concepts which were not fully developed until the 19th century. Thus, it would have been alien to medieval or early modern lawyers to understand the use of Roman law for international issues as a transfer of domestic private law to international law. Rather, they relied on divine revelation, natural law ideas, reason, or the "nature" of the issue. Of course, this heterogeneity of justifications for the reception of private law begs the question whether private law analogies are properly so called or whether they should be rather understood as e.g. borrowings from general concepts of law. Yet, the chapter refutes such a position. While it acknowledges the anachronism involved in using the term private law analogy, it shifts the perspective to the reasons for the continued relevance of private law thinking in public international law. As the chapter emphasises, the idea that private law and international law deal with structurally similar situations continues to be an important reason for applying rules and concepts with private law origins in international law. Thus, the transfer of private law concepts to international law is properly framed as an analogy to private law.

2. Applying these conceptual distinctions, Part 2 analyses inter-state international law (i.e. the private-law-like part of international law) for its treatment of non-material damages. In a three-step process, Part 2 explains why compensating non-material damages in inter-state international law essentially rests upon a private law analogy.

a) To set the scene, § 4 introduces the customary international law rules on reparation for internationally wrongful acts. The chapter highlights three features of this framework. Monetary compensation is one of the major legal consequences for a violation of international law. However, the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and customary international law distinguish between non-material harm to the individual and to the State. Only the former is subject to monetary compensation while satisfaction is reserved for the latter. Although the law of state responsibility is primarily inter-State in nature, it covers non-material harm of individuals as well. The individual's home State can seize the individual's claim by way of diplomatic protection and elevate it to the inter-State level.

b) § 5 proceeds by analysing whether, to what extent, and under which conditions inter-State international law compensates non-material harm. As a basis for further investigation, the chapter reaches four main conclusions. Firstly, compensating an individual's non-material harm is a rule of customary international law in inter-State claims. In this respect, the conception of the ARSIWA reflects international law as it stands. Secondly, the chapter's analysis of arbitral practice has revealed that the historical support for compensating non-material damages is more fragile than the conventional account would suggest. In some cases, arbitral awards at the end of the 19th and beginning of the 20th century explicitly rejected compensation for non-material damage, relying on private law analogies. This insight shows how the International Law Commission (ILC) has relied on selective references to old arbitration practice to construct historical authority in support of the rules it suggested in the ARSIWA. Thirdly, the concept of non-pecuniary damages, as applied by judicial and arbitral practice, is vague and blurry. The chapter argues that the best ways to clarify its meaning are forming sub-categories and distinguishing it from other concepts, such as punitive and legal damages. Combining categories proposed by *Sabahi* and *Wittich* and based on judicial and arbitral practice, non-material damages include damage to person and personality (consisting of suffering and pain as a result of personal injury, anguish, and mental suffering) as well as damage to reputation. In contrast, non-material damages must be distinguished from legal damages, i.e. the damage of enduring the violation of a right, because this concept is redundant under the current regime of state responsibility. Equally, non-pecuniary damages must be distinguished from punitive damages, at least in inter-State claims. Different from punitive damages, non-pecuniary damages are meant to compensate

a harm while punitive damages can be awarded regardless or in excess of the real harm. Fourthly and most importantly, inter-State international law does not impose any other requirement for compensating non-material harm than establishing such harm occurred.

Besides, the chapter highlights that national preconceptions or (veiled) references to specific domestic (private) law regimes are common in international practice and scholarship dealing with non-material damages. These national biases in applying non-material damages become obvious when arguments based on private law analogies are used to justify opposing results, i.e. the admissibility of as well as the wholesale rejection of non-material damages in international law.

c) Building on the insights of §§ 4 and 5, § 6 argues that non-material damages in inter-State international law are properly called a private law analogy. The chapter bases its argument on the origin, terminology, and rationale of non-material damages. The chapter traces the concept's private law origins in arbitral awards. Most prominently, the US-German Mixed Claims Commission referenced domestic private law rules and decisions when recognizing the availability of non-material damages in its *Lusitania* decision. In addition to these references to domestic private law, international law's terminology testifies to the concept's private law heritage. For example, tribunals and the literature often use the term 'moral damages' when referring to non-material damages. Yet 'moral damages' is not a concept of English law, but a translation of the French private law concept 'dommage moral'. Granting non-material damages for every moral harm, as international law does for inter-State claims, corresponds to the idea of private law: by compensating every moral harm with money, the concept is in line with the idea of compensatory justice.

3. After the analysis of inter-State practice in Part 2, Part 3 is dedicated to the practice in areas which grant rights to individuals. To set the scene, § 7 explores which rules apply to individual claims for reparation under international law. On that basis, individual chapters analyse the practice of the European Court of Human Rights (ECtHR; § 8), the Inter-American Court of Human Rights (IACtHR; § 9), the African Court on Human and Peoples' Rights (AfCtHPR; § 10), and international investment tribunals (§ 11). § 12 concludes this Part by bringing together the insights from the various sub-fields studied in the previous chapters.

a) § 7 starts off with the observation that the ARSIWA do not claim to reflect the customary rules on reparation for individual claims (Art. 33 para. 2 ARSIWA). Rather, the ARSIWA only cover inter-State

claims for reparation. Yet, the chapter argues that individual claims are, in principle but not necessarily, governed by the same rules as inter-State claims. This conclusion is supported by (State) practice and doctrine. It also follows from first principles. Classic inter-State international law dealt with individual claims via diplomatic protection. As long as there is no relevant difference, it seems difficult to accept that individuals are treated differently when they are allowed to bring claims for themselves. In turn, however, the particularities of individual claims for reparation against States may justify deviating from inter-State rules of reparation. These differences concern e.g. the number of possible claims (which will be higher for individual claims) and the nature of the claimant, i.e. the State opposed to an individual person. A prominent example in this respect is satisfaction pursuant to Art. 37 ARSIWA, which is generally thought to apply to inter-State claims only.

b) The following chapters examine how the three major regional human rights systems as well as international investment law approach non-material damages. In each chapter, the focus is on differences to inter-State claims. As the chapters highlight, one such difference concerns additional requirements for awarding non-pecuniary damages. Different from inter-State law, regional human rights courts and investment tribunals award monetary compensation for non-pecuniary harm only if the violation or its consequences are sufficiently severe. To begin with, § 8 presents the ECtHR's practice on non-material damages. As the chapter explains, the ECtHR employs a very broad concept of non-material damage, which *inter alia* includes the victim's frustration about the violation of Convention rights. Ultimately, this practice means that damage and violation almost converge. In turn, this might already explain to some extent why the Court has often found a finding of a violation to be a sufficient form of satisfaction for moral harm. The chapter characterizes this practice as compensatory declaration ('entschädigende Feststellung'). With regard to this practice of compensatory declarations, the Court faces a lot of criticism in the literature mainly because the Court does not explain in any detail when a compensatory declaration suffices. Thus, many commentators argue that the Court's practice is unprincipled and arbitrary. In contrast, this chapter demonstrates that there is indeed a logic behind the ECtHR's remedial practice. Generally speaking, the ECtHR will not award monetary compensation and instead award a compensatory declaration for minor violations. Based on a detailed analysis of the ECtHR's case law in one year combined with a review of additional judgments and relevant literature,

the chapter identifies three instances when a compensatory declaration will usually suffice: 1. availability of domestic reparation, 2. a lack of proven harm or a lack of causation between violation and harm, and 3. the insignificance of the violation. Although this remedial practice deviates from the general international law rules of reparation, it is backed by Art. 41 ECHR because this treaty rule leaves it to the Court's discretion whether to award reparation. Essentially, the Court has modified the inter-State remedy of satisfaction under Art. 37 ARSIWA to accommodate individual claims for damages.

c) § 9 analyses the inter-American practice of remedying non-material damages. The chapter notices some differences in the treatment of non-material damages in comparison to the ECtHR. Firstly, the IACtHR's concept of non-material damages appears to be more comprehensive. Secondly, the IACtHR is more generous in compensating the relatives of direct victims than the ECtHR. Thirdly, the Court introduced a novel concept to the law of state responsibility by acknowledging the 'life project' of a victim as a distinct category of damage. Yet, despite all the praise for this innovation in the literature, the concept is fraught with ambiguity. Fourthly, the IACtHR has only rarely found that the judgment per se is a sufficient form of compensation for non-material harm. Thus, abstaining from awarding monetary damages occupies a much smaller role in the inter-American system than before the ECtHR. Overall, it is certainly correct to describe the IACtHR's approach to reparation of non-material damages as more comprehensive than the ECtHR's. Yet, the chapter argues that these differences are a consequence of the courts' different institutional structures: While the ECtHR is almost drowned by individual complaints, relatively few cases come before the IACtHR because every complaint first has to be handled by the Inter-American Commission on Human Rights in turn creating a bottleneck effect. It is not only the case numbers which differ, but also the types of cases. While many cases are brought to the Commission by NGOs, the Commission also has to prioritize which of its many cases should be handled first. As a result of both factors, cases before the IACtHR more often than not concern systemic human rights violations. In turn, the Court has attempted to approach the issue of reparation in a way that takes account of the large number of people affected by the underlying issue without losing sight of the victims participating in the proceedings. Given the mechanisms influencing the cases before the court, grave human rights violations have been at the heart of the IACtHR's practice. This also explains why the Court has only rarely found the judgment itself to con-

stitute sufficient satisfaction. Of course, the situation is quite different for the ECtHR where there is no comparable filter for cases and where, thus, thousands of cases arrive every year. Interestingly, the chapter observes that the IACtHR has still resorted to a form of compensatory declaration, albeit less often than the ECtHR. In any case, such a practice finds a sound legal basis in Art. 63 para. 1 IACHR. In particular, the provision allows the IACtHR to make equitable consideration ('if appropriate') when awarding reparation.

d) § 10 examines the practice of the AfCtHPR on non-material damages. Roughly speaking, the AfCtHPR is part of a hybrid system combining the features of the two other regional human rights treaty systems: against some States, affected persons can seize the Court directly as is the case under the ECHR. Yet against other States, individuals have to approach the African Commission on Human and Peoples' Rights first which resembles the procedural architecture of the IACHR. Regarding substantive protections, the African Charter on Human and Peoples' Rights is the main instrument. Notably, it differs from the other human rights treaties in terms of content, in particular with regard to collective rights. Nevertheless, this feature only had a limited influence on the AfCtHPR's remedial practice so far. Rather, the chapter finds that the court has closely followed the decisions of the other two regional human rights courts. In line with this broader development, the AfCtHPR also recognises non-material harm as a distinct category of damages. It also introduced a presumption in favour of non-material damages. This presumption is more generous than the one employed by the IACtHR because the AfCtHPR held that non-material damages are the automatic consequence of a human rights violation. Despite this stance, the Court does not award substantial amounts of money as compensation for non-material damages in every case. Rather, the Court at times found the judgment to form a sufficient form of compensation or awarded only a symbolic amount of compensation. Such decisions play only a minor role before the AfCtHPR, as the Court employs these remedies only for insignificant moral harm, in line with European and Inter-American case law. Besides, the chapter observes that the Court has developed a practice to award the same amount of compensation for certain violations (notably the right to free legal assistance), regardless of the particularities of the individual case.

e) § 11 analyses the remedial practice under international investment law. Perhaps surprisingly at first sight, the chapter finds that non-material damages are available under international investment law despite some

concerns. In particular, tribunals have also granted non-material damages to corporations for the suffering of their employees, without any sound doctrinal basis. While these and other issues of non-material damages remain largely unsolved, the main focus of the chapter is on another development: Based on the 2009 award in *Desert Line v. Yemen*, arbitral tribunals have subjected an award of non-material damages to an exceptional-circumstances-standard. Circumstances are held to be exceptional if the violation underlying the case is serious and causes suffering, pain, or loss of reputation of a certain severity. This development is in and of itself remarkable given its short time frame and the uniformity of practice. What makes it even more remarkable is that the majority of commentators oppose the standard and instead argue that non-material damages should be awarded in every instance, as is the case in inter-State international law. The chapter argues that the small circle of actors involved in the most influential decisions accounts for the quick crystallization of an almost uniform practice despite the constant criticism in the literature. Thereby, the chapter contributes to a better understanding of the role of individual actors in the development of investment law.

The chapter complements the sociological perspective on the practice with a doctrinal analysis. It argues that arbitral practice reflects a newly emerged rule of customary international law for compensating non-material damages in the relationship between state and individual. In line with the finding of § 7, the rules of reparation for individual claims do not have to be identical with the rules of inter-State claims. § 11 argues that there are reasons to distinguish both regimes as far as non-material damages are concerned. Different from inter-State claims, individual claims for non-monetary damages are much more common, as the high case numbers of the ECtHR attest to. Combined with limited public funds, the high numbers of cases create a need to limit respective claims. This need is particular to individual claims and thus explains why non-material damages are handed differently. Awarding non-material damages only under exceptional circumstances is also in line with the object and purpose of a regime which mainly focuses on the economy. In addition, State practice and *opinio iuris* support such a rule. Thus, non-material damages are awarded under exceptional circumstances only.

f) § 12 brings together the results of the previous chapters (§§ 7 to 11) and highlights where the different subfields converge. Before, the chapter rounds off the studies of the previous chapters by briefly surveying the treatment of non-material damages in the law of armed conflict, interna-

tional criminal law, and the law of international civil servants. While the findings in these areas support the overall findings in human rights law and international investment law, the chapter also stresses the fundamental differences between international criminal law and the law of international civil service on the one hand and human rights law or international investment law on the other hand. Therefore, the remainder of the chapter focuses mainly on the latter.

All in all, § 12 concludes that the three major regional human rights systems as well as international investment law apply by and large a similar concept of non-material damages. In addition, all sub-fields award non-material damages only if the harm crosses a threshold of severity. While the threshold varies from field to field, the observation of a minimum level of severity for compensating immaterial damages is remarkable because it is at odds with inter-State practice. Here, courts and tribunals have also awarded money damages to remedy minor moral harms.

4. The fourth and final chapter aims at making sense of the finding of § 12 by combining the prior strands of the argument. As this part suggests, the differences between inter-State and individual claims may be conceptualised on the basis of the distinction between private and public law. From that perspective, the developments in human rights law and international investment law are symptoms of a shift towards a more public-law-like regime. To conclude, the part tries to draw some more general conclusions on the development of private law analogies in public international law.

a) In a nutshell, § 13 argues that the different handling of non-material damages in individual claims in comparison to inter-State claims can be read as a shift towards public-law. For this argument, the chapter relies on the framework set out in §§ 2 and 3, i.e. it applies the ideal-typical distinction between a law of coordination serving individual interests and compensatory justice (private law) and a law of subordination serving the general interest and distributive justice (public law). In particular, the chapter argues that introducing a minimum threshold of severity for compensating non-material harm is a turn to public law. By compensating moral harm only if the severity of the harm so requires, damages change their function. They are less about compensating harm and more about sanctioning unlawful behaviour. Thereby, moral damages rather serve the general interest in upholding a legal regime than the individual interest of full compensation. This observation also translates into a shift towards an exercise of distributive power. All in all, by subjecting non-pecuniary damages to a threshold requirement of sufficient severity, the law of indi-

vidual claims exhibits characteristics of public law. To support this finding, the chapter analyses how domestic state liability regimes deal with non-material damages. In general, there is a tendency to subject claims for State liability to more restrictions than claims for tort. Yet, only few domestic systems on State liability subject non-material damages to the same requirement as international human rights law and investment law. Although the restrictions vary considerably, the rationales are always similar: liability is limited in order to ensure the proper functioning of government by limiting its financial exposure to damages claims. This reasoning also applies to the minimum threshold of severity required by human rights tribunals and arbitral tribunals.

The chapter defends its characterisation of the developments in human rights law and international law investment law as a shift towards public law against a possible critique from a private law perspective. It distinguishes these developments from de-minimis-rules also known to tort law on the basis of their function. As the chapter argues, their purpose is different because they are largely intended to relieve courts from an undue burden of minor cases while the threshold requirement found in international law changes the notion of non-pecuniary damages to an instrument to protect the respective legal order.

As the chapter stresses, characterising the developments observed for non-pecuniary damages has a value beyond mere description. Understanding the difference in handling non-pecuniary damages as a private law analogy's shift towards public law allows us to see similar developments in different subfields of international law and it also offers a framework to assess future developments.

b) § 14 broadens the picture by asking what general lessons we can learn from the study of non-pecuniary damages for private law analogies. To this end, the chapter first analyses two further examples of private law analogies, the rules on the use of immovable state property in occupied territory and the rules on the change of territorial sovereignty. In each case, the study finds that the private law concepts underlying the respective rules of international law have been complemented by an additional layer of public law. While these findings support the overall conclusion of the monograph, the chapter cautions against a general assumption of a shift towards public law for each and every private law analogy. Rather, it argues for a case-by-case assessment.

In addition, the chapter identifies two further insights from the previous studies which equally apply to all private law analogies in international law.

Firstly, the monograph has repeatedly shown that the content of private law analogies is often clouded in uncertainty. This is because lawyers, consciously or unconsciously, use their own national understanding when applying concepts derived from municipal private law. As many municipal legal systems use similar concepts, it is easy to see why lawyers would sub-consciously apply the concepts they are familiar with. Secondly and closely related to the first point, not all legal traditions had a fair share in influencing international law. Rather, there is a strong bias towards European legal traditions. In some decisions, arbitrators openly or covertly just incorporated their own private law. All of these insights are first steps only to identify national pre-understandings and the 'epistemic nationalism' (Anne Peters) deeply entrenched in private law analogies. They also provide a fertile ground to eventually overcome these biases. In that sense, the evolution of private law analogies in public international law traced in this monograph might mark the beginning of a common understanding beyond national pre-understandings and biases.