Rights to Reparation as a Consequence of Direct Rights under International Humanitarian Law

Anne Peters[*]

This contribution argues that the lens of the law of international responsibility can clarify the controversy over individual rights to reparation for violations of international humanitarian law (IHL). Potential rights to reparation can be explained and justified as the legal consequence (on the level of secondary law) of a violation of direct rights accruing to individuals under IHL (on the level of primary norms). This conceptualisation helps to identify and demarcate reparation claims.

I. Individual Rights to Reparation as a Consequence of International Responsibility

Reliance on the established structures of international responsibility is better than opening up disjunct new "*sui generis*" categories for individual rights to reparation in the field of armed conflict,[1] whose application would create more complexity and lack foreseeability.

I will in the following concentrate on State responsibility although the international responsibility of members of armed non-State groups is highly relevant in practice, too. State responsibility may arise in relation not only to other States but also to other persons (subjects) of international law. According to Art. 33(2) of the International Law Commission Articles on State Responsibility (ILC Articles), the provisions are "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State".[2] So the ILC Articles (and the commentary) hold that it is possible in principle – as a matter

[*] Director at the Max Planck Institute for Comparative Public Law and International Law, Professor Dr iur., LL.M. (Harvard).

[1] But see *L. Hill-Cawthorne*, Rights under International Humanitarian Law, EJIL 28 (2017), 1187 et seq., at 1208.

[2] Art. 33(2) of the ILC Articles on State Responsibility (UN Doc. A/CN.4/L.602, Rev.1 (2001)). See also ILC Commentary on Art. 33 of the ILC Articles, ILCYB (2002) Vol. II, Part 2, 94 et seq. (95, para. 3).

of customary law – for individuals to participate in the secondary legal relationship arising from the breach of a primary international norm that protects individuals.

Next, there is a conceptual difference between legal rules embodying so-called "objective" standards of protection (imposing obligations/duties on the obligors) and rules which additionally confer "subjective" rights (entitlements)[3] on those persons whom the rules seek to protect. The difference between rules embodying only obligations and rules generating additional rights is more obvious for non-human objects of protection: It is prohibitted to scribble on the Mona Lisa (i.e. everyone is obliged to desist from scribbling on the painting), but Mona Lisa does not have a right not to be scribbled upon.

Any potential right to reparation is – in the logic of international State responsibility – the legal consequence flowing from a "breach of an international obligation of the state" (see Art. 2 b) ILC Articles 2001). The provisions of Art. 3 Hague Regulations and Art. 91 Additional Protocol I (AP I) are manifestations of this principle. They are *leges speciales* to the rule on reparation as expressed in Arts. 31 and 34 ILC Articles.

If the primary obligation of a State does not give rise to a corresponding right in the person of the victim, it seems difficult to acknowledge a right of the victim on the secondary level. A parallelism of rights seems in doctrinal terms more consistent than a disjunction of legal categories. While it is not impossible to conceptualise a "secondary" individual right to reparation flowing from a breach of a merely "objective" protective standard, such a legal construct seems patchy. In that sense, direct individual rights flowing from the primary norms of IHL are – even if no necessary pre-condition – a facilitator for recognising rights to reparation in the event of the violation of the concrete primary norm.

II. Legal (Hair-) Splitting

In German case law on war reparation claims by individuals, the two levels of law ("primary" level and "secondary" level) have been separated in the converse fashion: While individuals have been acknowledged as owners of some primary rights under IHL, the ownership of the secondary right to reparation (level of State responsibility) has so far always been assigned to

[3] I use the terms "right", "claim", and "entitlement" synonymously. The qualifier "subjective" rights stems from German doctrine where rights are often called "subjective" rights as opposed to "objective" law.

the State alone.[4] For example, in the *Kunduz* judgement of 2016, the Federal Court of Justice stated:

> "For treaties in public international law, the [secondary] obligation of responsibility is limited to the international legal relationship between states. It exists only between the contracting parties and is distinct from the primary entitlement of the affected person to have the norms of IHL complied with."[5]

This split is overly complicated. It seems more straightforward to either acknowledge both primary and secondary rights, or to deny individual rights on both levels.

III. Direct Rights under IHL?

The question then is which rules of IHL also encapsulate individual rights. To give two examples: Female inhabitants of occupied territories are protected against enforced prostitution. Do they also have a *right* not to be forced to prostitute themselves (see Art. 27 Geneva Convention [GC] IV)? Ethnic minorities are protected against racial discrimination by the occupying power. Do they also enjoy – under IHL – the *right* not to be discriminated against (Art. 27 Geneva Convention IV)?

Traditional IHL-analysis did not problematise the difference between objective standards and subjective rights. Rather intuitively, individuals were seen as beneficiaries but not holders of rights; they were objects of protection but not subjects. The relevant treaty provisions were interpreted as giving rise to obligations between States, the fulfilment of which was owed only to the other contracting States.

Only after the "humanisation" of IHL, scholarship explicitly addressed the question whether IHL generates rights of individuals or (only) protects persons by rebound. *David Luban* has argued that, historically, IHL was not designed to protect human dignity but to reduce human suffering. This is – according to *Luban* – a more utilitarian (Benthamite) rationale than a

[4] BVerfGE 112, 1, Ruling of the 1st Chamber of the Second Senate of 28.6.2004, 2 BvR 1379/01, NJW 57 (2004), 3257 et seq. – *Bodenreform III,* paras. 32-33; BVerfGE 112, 1 et seq. – *italienische Militärinternierte*, para. 38 (translation mine).

[5] BGH, judgement of 6.10.2016 – *Kunduz*, para. 16 (translation mine), ECLI:DE:BGH:2016:061016UIIIZR140.15.0. See also BGHZ 169, 348 et seq. – *Varvarin,* para. 11; BVerfG, 2 BvR 2660/06, inadmissibility decision of 13.8.2013 – *Varvarin*, esp. paras. 43-47; BVerfG, 2 BvR 1476/03, Non-Acceptance Order of the 1st Chamber of 15.2.2006, NJW 59 (2006), 2542 et seq. – *Distomo*, paras. 20-21.

Kantian one[6] – which means that IHL does not create rights. Along this line, various authors opine that IHL merely protects persons by rebound.[7]

IV. Textual Analysis

The legal investigation about potential IHL-based rights should start with the text of the relevant conventions. On the one hand, most of the provisions expressly stipulate State obligations and do not clothe them in the language of rights. Important examples of provisions formulated as objective protection standards are Common Art. 3 of the Geneva Conventions and the list of fundamental guarantees set out in Art. 75 of AP I of 1977.

On the other hand, numerous precepts and prohibitions in the Hague Regulations, all four Geneva Conventions, and both Additional Protocols require not only the protection of individuals but expressly refer to the "rights", "claims", "entitlements", "liberty", or "guarantees" in regard to the individual.[8] In sum, the wording of the provisions of IHL is mixed, so that the textual analysis is inconclusive.

V. History, Object, and Purpose

We therefore need to draw on arguments beyond the mere wording. The negotiating history of the Geneva Conventions suggests that certain provisions should be interpreted so as to generate individual rights.[9]

An important indicator of the contracting parties' intention to lay down individual rights in these texts is provided by two types of clauses. First, each of the four Geneva Conventions contains a non-renunciation (non-disposal) clause.[10] The wording of these non-renunciation clauses indicates

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[6] *D. Luban*, Human Rights Thinking and the Laws of War, in: J. D. Ohlin (ed.), Theoretical Boundaries of Armed-Conflict and Human Rights, 2016, 45 et seq. (49 et seq.).

[7] *R. Provost*, International Human Rights and Humanitarian Law, 2002, 27 et seq. (33 and 116); *K. Parlett*, The Individual in the International Legal System, 2011, 176 et seq.; *Z. Bohrer*, Divisions over Distinctions in Wartime International Law, in: Max Planck Trialogues on the Law of Peace and War, Vol. 2 (Anne Peters/Christian Marxsen eds., 2019 forthcoming).

[8] See for a full list of these provisions *A. Peters*, Beyond Human Rights, 2016, 195 et seq.

[9] Final Record of the Diplomatic Conference of Geneva of 1949, 2004, Vol. II, Sec. B, 76 (Special Committee, Joint Committee, 23rd Meeting); *J. Pictet* (ed.), Commentary on the Geneva Conventions, Vol. I, ICRC 1952, 82 et seq.; *J. Pictet* (ed.), Vol. III, ICRC 1960, 91.

[10] Art. 7 of GC III; Art. 8 of GC IV; Art. 7 of GC I; Art. 7 of GC II. See also Art. 11 of AP I on scientific experiments.

that rights are granted to or conferred on the individual directly by the conventions themselves, not only once domestic law has been enacted by the contracting parties. The purpose of granting protected persons their own rights was to remove those persons from the interference and sovereignty of their home States. Typically, the affected persons – such as wounded persons or prisoners of war – are put under pressure by the custodial States to renounce their rights, and deals with the home State might be struck. The non-disposal rule was intended precisely to prevent this type of extortion and to take any incentive away from the States to exercise coercion. Because free decision-making would be unlikely, the recognition of the protected persons' power of disposal over their rights would create only a "pseudo-liberté".[11]

The second indicator of individual rights is found in the prohibitions of all special agreements (saving clauses) that are contained in each of the conventions.[12] The wording of this saving clause again indicates that rights are conferred on individuals, and again directly by the international agreement itself.

Overall, history and telos rather speak in favour of the possibility of individual rights under IHL. In conclusion, some provisions of the law of armed conflict can reasonably be interpreted such that the obligations set out therein are owed not (only) to other States, but (also) directly to individuals. They correspondingly contain individual rights to have the provisions respected.

VI. Conclusion

Where a direct individual right can be identified, individuals are entitled to compliance with the primary norm of IHL. We then see a "primary" legal relationship between the obligor and the entitled individual. Whenever such a legal relationship is found, an individual "secondary" right to reparation for the breach of that particular primary rule seems warranted as a matter of legal principle. Where no such primary entitlements exist, rights to reparation are less compelling.

[11] *R.-J. Wilhelm*, Le caractère des droits accordés à l'individu dans les Conventions de Genève, Int'l Rev. of the Red Cross 32 (1950), 561 et seq. (587).

[12] Art. 6 of GC I; Art. 6 GC II; Art. 6 of GC III; Art. 7 of GC IV.