

# In the Midst of Reparation: On the Correlation between *Individual* Rights and *State* Obligations

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A recurring argument in the legal discourse on reparation tackles the legal right of victims to receive reparation as *correlative* of the legal obligation of States to provide such reparation. In such an argument, it is assumed that a State legal obligation may correspond to an individual legal right. This contribution is concerned with the question whether such a correlation is tenable under international law, more specifically in the context of reparation for victims of violations in armed conflicts. Due to space constraints, the reflections below will account for State obligations and victims' individual rights to compensation, which is a form of reparation.

The architecture of compensation for victims of armed conflict stands on two pivotal questions: i) whether States bear an obligation to pay compensation for violations in armed conflict, and, if so, to whom; ii) whether individuals have a right to compensation as a result of a violation in armed conflict.<sup>1</sup> Inferring the existence of an *individual* right from the existence of a *State* obligation may be a morally tempting exercise, not least because affirming or neglecting such an individual right impinges on the situations of victims of armed conflicts who have lost their home, suffer physical injuries or psychological traumas, or whose families are shattered.

International humanitarian law (IHL) governs conducts in times of armed conflict. Pursuant to Art. 91 of the 1977 First Additional Protocol (AP I) to the 1949 Geneva Conventions (GCs), which reiterates Art. 3 of the 1907 Hague Convention (IV), “[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation (...)”.<sup>2</sup> In light of the general

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<sup>1</sup> Importantly, these two questions articulate themselves in the realm of secondary rules triggered by the violation of primary rules of international law. The distinction between primary and secondary rules is traditionally attributed to the ILC work on State responsibility. See ILC Second Report on State Responsibility, by *Roberto Ago*, Special Rapporteur – The Origin International Responsibility, ILCYB, Vol. II, 1970, 179.

<sup>2</sup> See Art. 68 GCIII and Art. 55 GCIV, Rule 150 of the ICRC Study on Customary International Humanitarian Law, 2005.

obligation to make full reparation arising from a violation of international law,<sup>3</sup> this prescribed liability has been understood as an obligation to pay compensation incumbent upon the violating state.<sup>4</sup> According to the *necessary correlativity* doctrine, the existence of a legally posited obligation necessarily entails a corresponding legal right.<sup>5</sup> Within this logical-definitional relationship, it would be redundant legally to posit both the obligation to pay compensation and the right to receive it, since they are conceptual correlatives.<sup>6</sup> Hence, according to this doctrine, a legal right to receive compensation can be logically inferred from the obligation laid down in Art. 91 AP I. Yet, this provision leaves the recipient of the compensation, hence the relevant *jural relationship*, legally indeterminate. It has been argued that, although a set of (primary) rules governs the legal relationships between States, a violation of those rules generates a distinct legal relationship between potentially different holders of the secondary rules.<sup>7</sup> It follows that, even if AP I is understood as governing legal relationships between States, the holder of a legal right to compensation, correlative of the State legal obligation, is not necessarily a state but can also be an individual. Since this position still appears unsettled in international legal scholarship, the following section addresses the question: *How, then, can an individual right to compensation be construed?* Three tentative, non-exhaustive, scenarios are submitted.

First, one may claim that an individual right to compensation for violations of IHL has emerged *within* IHL through State practice (including judicial practice of domestic courts),<sup>8</sup> which has progressively expanded the

<sup>3</sup> PCIJ, *Factory at Chorzów* case (*Germany v. Poland*), Series A No. 17 (1928), § 73; Art. 31, Articles on the Responsibility of States for Internationally Wrongful Acts.

<sup>4</sup> See ICRC Study (note 2), 537. For the distinction between liability and duty, see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale L.J. 23 (1913), 16; P. Schlag, *How to Do Things with Hohfeld*, Law & Contemp. Probs. 78 (2015), 185. For a thorough analysis on the obligation in times of non-international armed conflict, see A. Peters, *Beyond Human Rights – The Legal Status of the Individual in International Law*, 2016, 222 et seq.

<sup>5</sup> N. Bobbio, *Teoria della norma giuridica*, 1958, 199; W. N. Hohfeld (note 4), 30 et seq. In the legal debate, the correlativity doctrine is countered by examples of duties and rights as self-standing constructs, (e.g. obligations under criminal law; the construction of states positive obligations under international human rights law).

<sup>6</sup> D. Lyons, *The Correlativity of Rights and Duties*, *Noûs* 4 (1970), 45, 46 et seq.

<sup>7</sup> E. Roucoumas cited in: A. Peters (note 4), 168; “separation approach”, 172. For an examination of the possible convergence between primary and secondary rights holders, see E. Roucoumas (note 7), 191 et seq., and 167 et seq., 212.

<sup>8</sup> For a broad overview on domestic practice, see ICRC Study (note 2), 538 et seq.

legal relation from an intra-State one to a State-individual one.<sup>9</sup> As such, certain States' obligations are recognised as ultimately owed to individuals insofar as international law does not only regulate inter-State relations but addresses rights and entitlements of individuals *vis-à-vis* States, according to a trajectory moving from inter-national law to *droit des gens*.<sup>10</sup> According to this avenue the individual right to compensation would be understood as the *correlative* of the codified State obligations interpreted as to be owed ultimately to individuals. An increasing number of international judicial decisions have identified the existence of such an individual right in the application of IHL rules.<sup>11</sup>

Secondly, one may argue that relevant provisions of IHL, generally worded in terms of obligations, have been informed by the development of international human rights law (IHRL) and that, as such, IHRL-based rights<sup>12</sup> have complemented IHL-based obligations. Such a reading is not only consequential to the joint application of IHL and IHRL in times of armed conflict,<sup>13</sup> but it is also in conformity with the rules of interpretation laid down in the Vienna Convention on the Law of Treaties, *rectius* Art. 31(3)(c), which demands to take into account "any relevant rules of international law applicable in the relations between the parties".<sup>14</sup> In addition, international human rights treaties, more ostensibly than IHL instruments, are premised on an inherent *legal relationship* between States and individuals, which is evidenced by the mechanisms of individual complaints, petitions, applications or communications instituted by several human rights treaties.<sup>15</sup> This scenario would be capable of addressing the

<sup>9</sup> See, among others, *M. Sassoli*, State Responsibility of International Humanitarian Law, *Int'l Rev. of the Red Cross* 84 (2002), 401, 419.

<sup>10</sup> See *A. Cassese*, *International Law in a Divided World*, 1986, 30 et seq.

<sup>11</sup> See Eritrea-Ethiopia Claims Commission (2000), UN Compensation Commission (Kuwait/Iraq, 1991) reviewing claims for compensation of violations of *jus ad bellum* and *jus in bello* suffered, among others, by individuals; ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Establishing the Principles and Procedures to Be Applied to Reparations, 7.8.2012, ICC-01/04-01/06, para 185: "[...] the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties [...]."

<sup>12</sup> Art. 9 ICCPR, Art. 5(5) ECHR, Art. 3 Protocol 7 to the ECHR; Arts. 10 and 21 ACHR, Art. 21 ACHPR.

<sup>13</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8.7.1996, § 25.

<sup>14</sup> Notably, Art. 31(3)(c) in principle requires that the parties to "any relevant rules of international law" be the *very same* of the rule to be interpreted.

<sup>15</sup> ILC Commentary to Art. 33 of the Draft Articles on State Responsibility, ILCYB Vol. II, 2001, Part 2, 95, § 3: "in the context of human rights treaties, individuals should be regarded as the ultimate beneficiaries of prescribed rights, although the treaty is stipulated between States".

issue of IHL provisions not embedding a correlative right originating from the same set of legal rules, by admitting the use of IHRL instruments to identify such a right, pursuant to an evolutive reading of IHL State obligations in light of IHRL.<sup>16</sup> Importantly, such an avenue presupposes that different international law regimes may influence each other and do not work in isolation.<sup>17</sup> Reading IHL and IHRL as complementary, thus giving rise to complementary constructs, overcomes a compartmentalised approach of regimes to understand legal questions more systemically. Such an approach is confirmed by the adoption of the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles),<sup>18</sup> which purport to codify existing customary international law on victims' individual right to reparation stemming from qualified IHL and IHRL violations.

Thirdly, the existence of an individual right to compensation may be refuted for violations that do not stem from IHRL applicable treaties, leaving the State obligation to pay compensation for violations of IHL an inter-State matter or – in more idealistic terms – an unfinished project of *droit des gens*.<sup>19</sup> Such an avenue would consider IHL and IHRL as two separate regimes that come to interact only when certain violations relate to legal matters disciplined by IHL and IHRL alike (e.g. right to be free from torture and inhuman or degrading treatment, deprivation of liberty, seizure of property, among others).<sup>20</sup> According to this avenue, a *general* individual right to compensation (and to reparation more broadly) for violations in armed conflict can be primarily claimed based on instruments such as the UN Basic Principles which, despite being normatively relevant, are not legally binding on States.

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<sup>16</sup> See Report of the International Commission of Inquiry on Darfur to the UN Secretary General, 25.1.2005, §§ 593-598.

<sup>17</sup> Besides the rich jurisprudence of the IACtHR, see ECtHR, *Al-Jedda v. The United Kingdom*, Judgement of 7.7.2011, Application No. 27021/08; ECtHR, *Al-Skeini and others v. The United Kingdom*, Judgement of 7.7.2011, Application No. 55721/07. Important developments as to victims' reparation for violations in armed conflict took place in the context of international criminal law. See Art. 75 ICC Statute and ICC reparation orders based thereon.

<sup>18</sup> Adopted by General Assembly on 16.12.2005, (A/RES/60/147).

<sup>19</sup> This corresponds, *grosso modo*, to the reasoning applied by the German Federal Supreme Court in *The Distomo Massacre case (Greek Citizens v. Federal Republic of Germany)*, Judgement of 26.6.2003, ILM 42 (2003), 1030.

<sup>20</sup> E.g. Art. 91 AP I arguably derogates general rules such as Art. 14 Convention Against Torture.

Notably, whether or not an individual right to compensation may be grounded on a legal basis revolves around different, at times antithetical, conceptions of international law. The three scenarios briefly sketched above read international law either as a set of rules which admits substantive developments through judicial practice, as a body of norms acknowledging normative effects of legally binding and non-legally binding instruments alike, or – in a more orthodox fashion – as a body of consent-based rules pertaining to States solely.

