General Enquiries into Reparation for War Victims under International Law*

Investigación General sobre la Reparación a las Víctimas de Guerra en virtud del Derecho Internacional

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Abstract

This work aims to assess some theoretical discussions about legal standing of reparation for war victims in international law and its legal foundation in contexts of war. The first enquiry leads to two approaches, one expansive idea of reparation and the other more restrictive. Under the first one, reparation is seen as a general right of customary character, directly conferred to individuals as a result of its peremptory nature. Following the restrictive tack, reparation is the result of breaches of some but not any right or international obligation, as there is no binding instrument embodying such a general right, nor is possible to identify peremptory rules (jus cogens) that can be universally applicable. Furthermore, States remain the leading actors in building international legal foundation for reparations and entitlement for individuals, and remedies should stand more as States' obligations rather than individuals' rights in settings of mass atrocities. The second enquiry sheds light on international

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law as source of reparation for war victims. Both human rights and humanitarian law applies to determine when the obligation to make reparation arises, but context conditions must be accounted in order to know which law prevails.

Keywords: Reparation for War Victims, International Law as Source of Reparation.

Resumen

Este trabajo pretende evaluar algunas discusiones teóricas sobre el estatus jurídico de la reparación a las víctimas de guerra en el derecho internacional y su fundamento jurídico en contextos de guerra. La primera indagación conduce a dos enfoques, una idea expansiva de la reparación y otra más restrictiva. Según el primero, la reparación se considera un derecho general de carácter consuetudinario, conferido directamente a los individuos como consecuencia de su carácter perentorio. Siguiendo el criterio restrictivo, la reparación es el resultado de la violación de algunos derechos u obligaciones internacionales, pero no de todas estas, ya que no existe un instrumento vinculante que plasme tal derecho en general, ni es posible identificar normas imperativas (ius cogens) universalmente aplicables. Además, los Estados siguen siendo los principales actores en la construcción de los fundamentos jurídicos internacionales de las reparaciones y los derechos de los individuos, y las reparaciones deberían considerarse más como obligaciones de los Estados que como derechos de los individuos en contextos de violaciones masivas. La segunda exploración arroja luz sobre el derecho internacional como fuente de reparación para las víctimas de la guerra. Tanto el derecho de los Derechos Humanos como el Derecho International Humanitario se aplican para determinar cuándo surge la obligación de reparar, pero hay que tener en cuenta las condiciones del contexto para saber qué derecho prevalece.

Palabras Clave: Reparación de Víctimas de Guerra, Derecho Internacional como Fuente Legal de la Reparación.

Introduction

When studying reparations for victims of armed conflict through the lens of international law, it is not possible to circumvent the following sad paradox: "the principle of full reparation cannot be enforced" in such a massive violations context, so victims "cannot really expect full compensation," even when international law avows the right to receive proportional remedies.[1] In other words, the real limitations for the implementation of reparations stand regardless the ideals envisaged in law. This gap between what is possible and what is desirable arises the question about what should be mandatory. That is, should the protection to the right to reparations be subjected to the limits of this paradox? Or on the contrary, should the conditions of implementation be adapted in order to fulfill international legal requirements? This discussion is out of the reach of the present paper, but shows the importance of studying the legal standing of reparations in international law. The reason is that by enquiring into the juridical nature of remedies it will

[1] Christian Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law' in Randelzhofer Albrecht; Tomuschat Christian (ed), *State Responsibility and the Individual Reparation in Instances of Grave Violations of Human Rights* (Martinus Nijhoff Publishers 1999) 60-61. See also Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Third Edit, Oxford University Press 2014) 416

be possible to identify and understand the limitations for the implementation, giving a more realistic image of what can be expected from law.

The problem this paper aims to address is related to the applicability of international law as legal basis for reparations in the setting of armed conflict. International Human Rights Law (IHRL) and International Humanitarian Law (IHL) are bodies of international rules that regulate very different circumstances. Whereas the former is intended to protect human being in times of peace, the latter is meant to provide rules for conducting military operations and protecting combatants and civilians in the setting of armed conflict. Each of these body of rules has different institutional framework, guiding principles and focus. However, the frontier between these branches is not well-defined because the application of one set of rules does not necessarily mean the derogation of the other. Considering reparations for victims of internal armed conflict, certain points need to be clarified, namely what law is applicable and to what extent do these bodies interplay.

This work aims to assess some theoretical discussions behind the definition of the legal standing of reparations within the frame of human rights. It starts by presenting some ideas considering three discussions about the legal standing of reparations in international human rights law, namely, juridical nature as an autonomous and general right, individual entitlement, and recognition as an obligation rather than as a right regarding practical applicability. Following from this, the question about applicability of IHRL and IHL is addressed in the second part.

Discussions about Legal Standing of Reparations in International Human Rights Law

That reparations must follow from those breaches of rules that result in damage seems to be evident in law. However, in the field of international law and in the context of massive violations committed during armed conflict, that assumption may be challenged because not all the violations seem to involve the corresponding obligation to redress the harm. Further, it is not clear if individuals rather than states can directly claim remedies at international forum. This section seeks to appraise the arguments underpinning the statement of reparations as a general right conferred to individuals by international customary law. Three challenging premises will be studied. The first one is that there is not such an autonomous nor a general right to reparations but specific arrangements in specific treaties. The second highlights that international law has not directly entitled individuals with the right to reparations. Finally, the third assertion refers to how the practical impossibility to provide reparations for all injured people may lead to consider the provision of remedies as an obligation of state instead of recognising corresponding right for victims.

There is No General Right to Reparation but Specific Arrangements in Specific Treaties

It has been argued that there cannot be such an autonomous right to reparations, nor a general binding instrument conferring that right, since its existence depends on the breach of a primary right, and the available mandatory international mechanisms are specifically related to the violation of a determined set of human rights. In the first sense, Reparations are deemed to be secondary as this entails the violation of other rights. In other words, there are no reparations without any prior right being violated[2]. Regarding the second reason, although the idea of a general right to reparations has gained international

[2] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Third Edit, Oxford University Press 2014) 403.

prominence[3], thanks to some instruments and body treaties' jurisprudence such as the Basic Principles, the Human Rights Committee or the Economic and Social Council, their contents and decisions are not binding, so it is not possible to derive from them general rights for individuals.[4].

The fact that reparations are set forth by specific treaties, but not by a general instrument, limits their scope concerning its applicability to certain territories –those of the states that have ratified the treaty-and certain beneficiaries– those who have suffered specific right violations[5]. However, from a less restrictive interpretation, it has been put forward the idea of universal applicability of the right to reparations irrespective of treaty adherence on the ground that remedies are the inseparable and logical consequence of breaches, and that the protection of certain human rights has been considered as generally mandatory as they are *jus cogens* norms[6] .

In the first sense, the fact that only certain human rights violations could have legal consequences but not the others would not make sense, and that the individual protection from abuses pends on domestic decisions either. The reason is that the source of such right is not the state legal system, but the international human rights law, which in turn is held by virtue of the integrity and dignity of the human being.[7] The problem then would not be to identify which rights violations lead to reparations, but what sort of remedy can better contribute to wiping out the offense. This assertion seems to be plausible enough to state a general right to reparation, but it is not taken on board that the logic link between a primary right violation and the secondary right to reparation does not necessarily result in a juridical connection. Tomuschat finds that in some regional human rights systems, particularly within the European, decisions recognizing breaches do not always involve the provision of compensation[8].

The second reason is less clear and defendable, as it is not easy to define what specific human rights are considered *jus cogens* and why. From the Vienna Convention on the Law of Treaties, the term *jus cogens* is used to refer to peremptory norms of general international law that are "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"[9]. In the same vein, these peremptory norms can virtually invalidate any conflicting provision derived from any treaty, even if this latter has predated them[10]. These norms have been considered indelible because of their customary nature.

Although the highest hierarchy of this norms is not a matter of discussion, the definition of their contents and the methods to determine certain international rules as peremptory has been controversial. On the one side, while some rules have been clearly defined as *jus cogens* (for example, the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy),

3 'United Nations Approach to Transitional Justice. Guidance Note of the Secretary General' (2010) [A2] [B3]; Commission on Human Rights, 'Promotion and Protection of Human Rights Impunity Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher E/CN.4/2005/102/Add.1' (2005) [Principle 31]

4 Tomuschat (n 1) 7-11

5 Tomuschat (n 2) 406

6 Evans Christine, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press ed, Cambridge University Press 2012) 41

7 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford Clarendon Press 1995) 96.

8 Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' (2002) 10 Tulane Journal of International and & Comparative Law 157.

9 Vienna Convention on the Law of Treaties 1969 53

10 Vienna Convention on the Law of Treaties 1969 64

still there are open debates about the definition of some matters as peremptory norms[11]. From the Crawford´s perspective, for example, the fact that certain human rights are recognised as *jus cogens*, does not lead to affirm that the obligation to prosecute violations falls into the same juridical category[12]. On the other side, as Bassiouni has affirmed, there is no consensus as to the method to define how and when determined norm rises to *jus cogens* level, because these questions are answered from very different philosophical and methodological sides, which entail particular views about evidentiary elements, goals, and sources of law[13].

Certain criteria have been established to identify human rights as norms of *jus cogens*, despite the problems in the definition of an exhaustive list of contents. Scholar consensus and international judicial practice point out that human rights qualify as peremptory norms since they protect not only individual but mankind, which is an interest transcending those of states. It has been argued that international order will be endangered by leaving human rights at the mercy of negotiations among states, which can be mediated by political and economic interests. Thus, international tribunals and treaty bodies have recognized some human rights as *jus cogens*, such as the right to life, the prohibition of torture and summary execution, disappearance and arbitrary detention, equal protection before the law and non-discrimination, among others.[14] However, it has also been admitted that not all human rights rise automatically to the level of peremptory norms, because particular examination must be done as to whether a right embodies an international community's interest transcending those from individual states, and whether or not can be derogated under certain circumstances by international treaties[15]. In light of these criteria and conceiving reparations as a secondary right, it is still unclear if the right to remedy can be considered as *jus cogens* norm.

International Law has not Directly Entitled Individuals with the Right to Reparations

Regarding the second premise of indirect entitlement to individuals, it has found that the legal standing as right-bearers is directly conferred by domestic law but not by international law, whose provisions enjoin states to design and implement those necessary legal instruments to protect the rights outlined in international treaties. Thus, international regulation on reparations has not a different role from that one of urging and guiding states to set out domestic rules to provide remedies to victims

11 Ian Brownlie, *Principles of Public International Law* (7th Edition, Oxford University Press 2008) 510-512

12 James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press 2012) 597

13 Mc Bassiouni, 'International Crimes:" Jus Cogens" and" Obligatio Erga Omnes'" (1996) 59 Law and Contemporary Problems 63. In the same line, Orakhelashvili shows how the idea of peremptory norms above inter-state treaties where easily accepted within natural law approaches, but careful re-examination is required from the positivist one. Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 36-38

14 Orakhelashvili (n 13) 54-55. Gaja highlights the strong relationship between *jus cogen* norms and obligations *erga omnes,* being the first those rules that impose the latter. In this sense, he draws attention to the idea that rules imposing *erga omnes* obligations need not to be necessarily universal, because even regional or multilateral treaties may embody obligations state must abide by towards international community. Giorgio Gaja, 'Obligations Erga Omnes, International Crimes and Jus Cogens, A Tentative Analysis of Three Related Concepts' in Joseph Weiler, Antonio And Cassese and Marina Spinedi (eds), *International Crimes of States, A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Walter de Gruyter 1989).

15 Orakhelashvili (n 13) 58

of violations[16]. In this vein, one might assert that only when reparations are enshrined in the domestic legal system, can they be considered as a right with effective implications on individuals, such as the possibility to address reparative claims before international tribunals[17].

From a different view, it has been put forward that individual has been entitled to claim reparations, being international customary law its normative basis. This is the argument: human rights, having customary legal standing, are universally applicable regardless the adherence or ratification of the treaties embodying them. Reparations, being legally inseparable from human rights violations, has acquired customary status as a state´s obligation in favor of individuals. This means that individual is an international human rights law beneficiary, having a right provided by international rules that should be fulfilled irrespective of being ratified by states.[18] Some of those who consider the right to reparation as customary law also think that its legal support can be found in state practice reflected in its *opinio iuris*, that is, the conclusion of treaties and voting records in international context, which reveal the intention to acknowledge remedies for victims in case of violations irrespective of whether or not it is explicitly mentioned.[19] In the same sense, it has been asserted that there is consolidated contemporary state practice acknowledging the duty to provide remedy to victims in cases of human rights violations[20].

The above-mentioned argument deserves some comments and explanations, being the first point to consider that one of universal applicability of human rights. It is said that they are directly enforceable without treaty adherence because of their customary nature. However, not all human rights fall into the category of international customary law, and particular analyses must be done to define when specific human right applies to states regardless previous treaty ratifications. From the International Court of Justice Statute, international custom is considered as an international law source when there is evidence of "general practice accepted as law":

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. *international custom, as evidence of a general practice accepted as law*; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. **2.** This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.[21]

Following from this definition, two elements must be taken on board to establish a rule as customary, namely, the objective, which comprises the common and uniform conduct, settled by states, and the subjective consisting in a common and shared sense of legality that leads to consider the custom as binding rule.[22] What can be seen in the development of international human rights law is that the emergence of such norms was due to

16 Tomuschat shows for example how the article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment enjoins states to implement those internal mechanisms necessary to ensure redress, fair compensation, and rehabilitation for ill-treatment victims. Tomuschat (n 1) 10

17 Ibid. 14

18 Evans (n 6) 42-43

19 Ibid. 40

20 M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203.

21 Statute of the International Court of Justice [38] (emphasis added)

22 Philip Simma, Bruno; Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' 12 AustralianYear Book ofInternationalLaw 82.

spontaneous concern for human being protection rather than to consolidated states practice.[23]

It is necessary a second caveat concerning the idea of taking the international customary law as a source of individual´s right to reparations. Although reparations have been part of statist practice, this does not mean that international custom is the normative basis of such an individual right. The reason is that reparations were initially envisaged as the consequence of an internationally wrongful act, by which an aggressor state had the obligation to redress those injured people from another, being this latter the right holder but not their damaged citizens.[24] So, if some right to reparation can be traced from international custom is that one states hold as protagonists of a classical international law paradigm, featured by the secondary position of the individual in international relations mediated by states' interests.[25] Within this traditional pattern, reparations are even considered as a general obligation of the responsible state for its breach, rather than as an injured state´s right. Additionally, a person can be the ultimate beneficiary of reparations when the wrongful act entails her rights violations, but only her state can invocate responsibility of the wrongdoer sate.[26]

After the Second World War, the traditional attitude of international law towards individual changed even challenging state sovereignty. However, this shift in the goals of legal protection does not imply that individual is directly entitled to claim reparations at international level. In the aftermath of the Second War, contemporary international law is not only regulating interstate relations, but also individual matters such as human rights.[27] This paradigm shift implies that human being is placed in the centre of international community's concerns to the extent that she is considered not only as subjected to state's sovereignty but also as bearer of rights regardless her nationality. Further, it cannot be admitted that human rights protection pends on the domestic mechanisms implemented by states, because it would lead to admitting that person is at the mercy of the state. Therefore, individual now can claim their rights protection even against her state.[28] Nevertheless, the role of international law is limited, because the basic law-making process and reinforcement mechanisms remain statist, that is, the applicability of the right to reparations is mediated by the action of state, either through the ratification of international law, or through the implementation of international courts' decisions.[29] Additionally, although there is contemporary generalized state practice recognizing the duty to remedy human rights violations, it has been triggered by international community concerns after the Second World War and points out towards the implementation of reparations as a state's duty[30].

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23 Ibid 107

24 Riccardo Pisillo-Mazzeschi, 'International Obligations to Provide for Reparation Claims?' in Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual Reparation in Instances of Grave Violations of Human Rights* (Martinus Nijhoff Publishers 1999).

25 Tomuschat (n 8) 173-174. Even within this traditional statist scheme, reparations has not been the most frequent consequence of internationally wrongful acts. In fact, states have preferred to apply other different more punitive measures. Roberto Ago, 'Obligations Erga Omnes and the International Community' in Joseph Weiler, Antonio Cassese and Marina Spinedi (eds), *International Crimes of States, A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Walter de Gruyter 1989).

26 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. Yearbook of the International Law Commission' (2001) [art 34 para 4] [art 33 para 3-4]

27 Pisillo-Mazzeschi (n 24).

28 Richard Falk, 'Reparations, International Law, and Globlal Justice: A New Frontier' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006). See also Bassiouni (n 20) 209

29 Riccardo Pisillo-Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview' (2003) 1 Journal of International Criminal Justice 339.

30 Bassiouni provides important data about the generalized practice of embodying remedies within domestic law and claims for the customary nature of the right to remedy.

Political Considerations that Lead to Primarily Conceive Reparations as State's Obligation rather than as Victims' Right

It has also been drawn attention to practical reasons that support why reparations must not account for an individual right in international law. Their supporters admit that although it is desirable that reparations are fully delivered for all the victims, the practice of states shows that is not possible to provide remedies for the whole universe of victims in proportion to the harm suffered. There is a sad paradox in international law on reparations that has to be considered as a serious hurdle to recognize legal standing as an individual right to compensation under international law. The paradox, affirms Tomuschat, is that "the principle of full reparation cannot be enforced" in such a massive violations context, so victims "cannot really expect full compensation," even when international law avows the right to receive proportional remedies[31].

Keeping in mind that paradox, Tomuschat suggests that considerations of justice and rights protection must be done accounting the limited capabilities of states to provide remedies, especially in those contexts where violations have been massive, and the rule-breaking has left impoverished and deeply wounded societies. Therefore, a rigid system of reparations derived from the conception of a general right to be repaired is not workable. He considers that conferring such a personal standing to reparations when violations have been massive leads to individualize its implementation, thus making almost impossible to deliver remedies for all the victims in proportion to the suffered harm.[32] Even in those contexts where damages have been inflicted by other states, as it may happen in international armed conflict, because this sort of case-by-case treatment can exhaust the wrongdoer state´s resources to the extent that it may compromise future generation's needs, thus leading to resentment and new conflicts[33]. In this vein, reparations regime should not be uniform, nor based on the assumption of an individual right, as it has been affirmed in the Basic Principles, because this cannot be successfully attained but create unrealistic expectations, which may undermine the credibility of international law if they are not satisfied[34].

Strongly linked to the practical impossibility to provide reparations for all the victims, the third premise asserts that, for political considerations, reparations must be primarily conceived as a state obligation rather than as a victims' right, so that they can be implemented autonomously. Robouts and Vandeginste proposed that given the contextual economic and socio-political limitations that might threaten successful reparations, it would be necessary to promote state discretion in the implementation of such measures by conceiving reparations primarily as its obligation rather than as a victims' right, thus

However, the information he presents also shows how this is mainly a post-war phenomenon. Bassiouni (n 20) 218-223

31 Tomuschat (n 1) 60-61. See also Tomuschat (n 2) 416

32 Tomuschat (n 1) 23-24

33 Similar considerations can be done in the setting of non-international conflicts, where reparations may impose disproportionate burdens on state, making impossible to fulfil its obligations to protect the rights of other citizens from victims' ones.

34 Tomuschat also points out that moral reparations in the sense of truth disclosure and public acknowledgment of responsibility and apologies place less heavy burdens over economically constrained states and that the implementation of these mechanisms does not necessarily imply the affirmation of an individual right, since they are intended to preserve collective interests. However, truth disclosure has been recognized as a collective but also as individual victims´ right. Tomuschat (n 1) 20; Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006). On the autonomous nature and societal dimension of the right to the truth: Commission on Human Rights (n 3).

incorporating socio-political considerations to the legal interpretation[35].

In the setting of war, it has been submitted that the legal standing of a right to compensation must not depend on the economic conditions to protect it, although the amount, timing and modalities of compensation can be seen limited to available resources. Schwager and Bank have concluded that reparative claims have to be recognized as a consequence of victims' legal entitlement to the general and secondary right to compensation, but this cannot mean its unlimited application in circumstances of lacking financial support. In this case, they suggest, states can 'rely on the plea of necessity', according to article 25 of the Draft Articles on State Responsibility[36], which means that the form of reparations may be altered but not the legal standing[37].

The idea of primarily taking reparations as an obligation, rather than as a victims' right because of the impossible practical applicability in massive violations deserves some comments. From the perspective of justice, as Droege has warned, this would be tantamount to say that 'the more widespread and massive the violation, the less right to reparation for the victims'[38], which in turn may give offenders (state or others) good incentives to inflict damages, as they would find the lower cost of pursuing their objectives. In the same vein, we consider that although state discretion is necessary when implementing reparative ventures, this autonomy should be limited by a set of human rights standards; otherwise, the state may end up denying reparations simply by arguing lacking resources as a way to cover its negligence. The consideration of reparations as a right does not exclude in itself the necessary state´s autonomy to protect it. Quite on the contrary, to think of reparations as an obligation but not as a right may result in strengthening the image of the provision of remedies as an act of solidarity rather than one of responsibility for the violations. This can be the result of having an obligation in which one party is constrained to do something in favor of other, but this other has no entitlement to claim fulfilment.

The rationale derived from that paradox of reparations can undermine the credibility of international human rights law, by restricting its already secondary role insofar as that people cannot rely on international community to answer the question about what to do when there is no national forum to bring reparative claims. This is the case when national authorities either cannot or are not willing to provide remedies. As international practice has shown, there is no general international forum for victims to assert such an individual right to redress, being, therefore, their home state and its judges the first scenario to define what the consequences of violations must flow. As wrongdoers may be part of the state as

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35 Heidy Robouts and Stef Vandeginste, 'Reparations for Victims of Gross and SystematicHuman Rights Violations: The Notion of Victim' (2003) 16 Third World Legal Studies 89.

36 **Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. "*Article 25. Necessity.*** 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (*a*) the international obligation in question excludes the possibility of invoking necessity, or (*b*) the State has contributed to the situation of necessity."

37 Roland Bank and Elke Schwager, 'Is There a Substantive Right to Compensation for Individual Victims of Armed Conflicts against a State under International Law?' (2006) 49 German Year Book of International Law 367 406.

38 Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310 354

judges are, one may think of the state as a judge in its cause. Therefore, this requires the independent judiciary to provide serious decisions instead of biased rulings that seek to cover state responsibility or protect its financial resources[39]. Then, the questions arise: what can victims do when this minimal rule of law requirement is absent due to structural conditions of massive abuses and law-breaking? In such instances, the acknowledgment of reparations legal standing as a right may contribute to affirm a serious commitment on wiping out past offenses. So, the problem should not be whether or not reparations must be regarded as a right, but what must be the more appropriate form of reparation[40].

IHRL as Source of Reparations for Victims of Internal Armed Conflict

Internal armed conflict is traditionally an IHL category, so inquire about human rights law on reparations as a legal source to support the right of victims or the state's duty against this backdrop leads us to raise questions about the applicability of IHRL in war time and its interplays with IHL. The protection of rights can be assessed in a spectrum of different circumstances from breaches in peacetime conditions to violations in wartime. Regarding this latter, there are a restrictive and expansive application of human rights to consider.

On the one side from the restrictive idea, IHRL and IHL are considered different branches of international law seeking to regulate very different circumstances. Whereas the former is intended to protect human being in times of peace, the latter is meant to provide rules for conducting military operations and protecting combatants and civilians in the setting of armed conflict. Each of these body rules has different institutional framework, guiding principles and focus. While IHL focuses on restraining combatants to humanitarian conduct, and protecting victims of international and internal violence, with ICRC and Red Cross movement leading process of law-making and enforcement; human dignity is the guiding principle of IHRL, which is intended to protect human being in her relations with others and the states, being United Nations system and other specialized international and regional bodies responsible for their promotion and codification[41]. Hence, IHL would be applicable in the specific circumstances of war, as this is '*lex specialis* of the battlefield', and human rights provisions are differently applicable in this situation. For example, while according to ICCPR states cannot derogate the general right to life even in "times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed",[42] the protection of this right is limited in the setting of armed conflict to those who are not taking active part in hostilities:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> "(1) *Persons taking no active part in the hostilities*, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall

[39] Tomuschat (n 2) 418-419

[40] Tomuschat (n 1) 56

[41] Theodor Meron, *Human Rights in International Strife: Their International Protection* (Cambridge Grotius Publications Limited 1987) 14-23

[42] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 1966 (ICCPR) art 4.2

remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

"(a) *violence to life and person*, in particular murder of all kinds, mutilation, cruel treatment and torture (…)"[43].

There are political reasons supporting the restrictive application of IHRL in conflict, related to the critical position of the United States regarding the progressive application of human rights beyond the boundaries of each national state. From this view, international instrument enacting civil and political rights is meant to regulate the relationship between certain state and its citizens within the margins of its territory but not extraterritorially, otherwise, the extensive application of human rights treaties in territories under military occupation can affect the right to self-defence, whose protection may prevent other violations of humanitarian and human rights law. This tack has been strongly criticised and become less dogmatic since 2011[44].

On the other side, it has been asserted that there should be a 'continuum of protection' of human rights alongside the different possible circumstances of breaches because the application of IHL does not exclude the enforcement of human rights.[45] The reason is *that* both share the concern for humanity and are oriented by the broad principles of inviolability of human being, non-discrimination, and security of each person. *Inviolability* entails that degrading treatments are forbidden because they affect personal integrity and life. *Non-discrimination* principle means that persons shall be equally treated without any distinctions based on race, sex, nationality, political or religious opinions and other criteria; and security, implies that human being shall only be held responsible for her own acts, and protected with legal guarantees[46].

It has been stated that there is 'growing convergence' between IHRL and IHL, and it is possible to trace overlaps in the protection of human being in the setting of armed conflict. This is better reflected in the convergent protection against torture and cruel, inhuman or degrading treatment, discrimination and unfair trials. The prohibition of torture and cruel, inhuman or degrading treatment is enacted in the article 7 of the ICCPR and regulated in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but also Geneva Conventions and their Protocols set out the obligation to treat humanely prisoners (Article 13 of Geneva Convention III) and protected persons (Article 32 of Geneva Convention IV), and forbid torture, physical mutilations, medical experiments, tissues or organs removal for transplantation (Article 3-1a common to the Geneva Conventions and Article 11, Protocol I). Non-discriminatory treatment is enshrined by IHRL in ICCPR (article 26) but is also enacted in humanitarian instruments to protect wounded or sick combatants (article 12 of Geneva Convention I), shipwrecked (article 12 of Geneva Convention II), prisoners (article 16 of Geneva Convention III), protected person (article 27 of Geneva Convention IV) and those people who are not taking part in hostilities (article 3 common to the Geneva Conventions). Due process is set out in the ICCPR (articles 9 and 14), and in IHL. For example, there are provisions protecting persons not taking active part in hostilities from sentences and executions carried out without previous judgment 'affording the judicial guarantees' (article 3-1d common to the Geneva Conventions), and

[43] Article 3 common to the Geneva Conventions of 1949 (emphasis added).

[44] Gary Solis, *The Law of Armed Conflict. International Humanitarian Law in War* (Cambridge University Press 2016) 18-29

[45] Theodor Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' (1983) 77 American Journal of International Law 589.

[46] Meron (n 41) 22-23

entitling prisoners of war with the right to assistance and defence during trials (article 105, Geneva Convention III)[47].

Convergence is not the only possible relationship between IHRL and IHL, but also complementarity and integration. The first idea suggests that although human rights and humanitarian law have important differences in the use of language[48], IHRL may offer answers when IHL is silent. Thus, humanitarian law does not have the last word and give rise to apply human rights law because the 'law of humanity' remains as protective umbrella when there is no specific regulation[49]. This follows the widest interpretation of Martens Clause, which entails that: 'the laws of humanity and the requirements of the public conscience' remain as shields to protect population and combatants beyond the treaty letter[50]. Integration implies that the interplays between IHRL and IHL in time of armed conflict take place through a comparison between these two branches regarding specific provisions enacting specific rights[51]. Thus, peacetime human rights can be also wartime human rights enacted in IHL instruments, such as the prohibition of torture (article 7 of the ICCPR and article 3 [a] common to the Geneva Conventions), or be more or less protected in the setting of conflict, as is the case of the freedom of medical experimentation or the freedom of assembly respectively[52].

Integration has been the predominant interplay between these bodies of rules when they are deemed to be applied in concrete violations cases. The lack of effective international mechanisms for IHL enforcement has given rise to the integration of IHRL and IHL through the interpretation of human rights in context of armed conflict made by treaty bodies and international criminal courts[53]. Moreover, the connection between these two legal frameworks was further illustrated by the Basic Principles, whose main concern is to assume the problem of violations from the victims' perspective, and to avoid those legal discussions and catalogues that can create uncertainty and let victims without remedies:

> Human rights law stems from the same commonly shared human values as international humanitarian law. There is an overlap between the two legal regimes. The 2006 Basic Principles and Guidelines attempted to create a bridge between international human rights and humanitarian law, because for victims it would be artificial and counterproductive to make separations on the basis of legal definitions. The evolution of international

47 Ibid.

48 Linguistic differences go beyond different usage of terms. On the contrary, these reveal deeper differences in terms of concepts and goals between IHRL and IHL. To pick just one example, the protection of the right to life and from arbitrary killings is differently conceived in each branch. Whereas this entails a general acknowledgment in IHRL, it has a restrictive connotation in the IHL arena meaning that civilians shall not be targeted but admits the possibility to attack opposing combatants. Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 International Review of the Red Cross 737.

49 Hans-Joachim Heintze, 'Theories on the Relationship between International Humanitarian Law and Human Rights Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elga 2013); Lubell (n 48)

50 Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (*International Review of the Red Cross*, 1997) <https://www.icrc.org/eng/resources/documents/article/other/57jnhy.htm> accessed 31 January 2018.

51 Heintze (n 49) 61-62.

52 Yoram Dinstein, 'Human Rights in Armed Conflict: International Humanitarian Law' in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Oxford University Press 1984).

53 Zegveld L, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 497; Gowlland-Debbas V and Gaggioli G, 'The Relationship between International Human Rights and Humanitarian Law: An Overview' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 104-125; Evans (n3) 64.

> humanitarian law has not always been linear. There have been overlaps and gaps, and it is sometimes difficult to retrace an obligation or right to an initial legal source. (…) it is imperative that we consider the violation from the point of view of the victim[54].

Following from these possible applications of IHRL in wartime, the question arises then about the applicability of the right to remedies, specifically reparations, in the context of non-international armed conflicts. Although there is a wide agreement about the use of IHRL as a source of reparations for victims in such context, still it is a matter of discussion how and when to apply this body of rules. From the expansive perspective, for instance, IHL violations fall better into the protective spectrum of IHRL as they also entail human rights violations and there may be concurrent application of both normative bodies in the context of conflicts. It is said that this convergence takes place within the limits of *lex specialis principle.* That is, the body of rules applicable to a given case of violation would be that whose contents comprise specific regulation aimed at addressing such breach. Thus, while IHL would be preponderant when dealing with methods of war and the way to conduct hostilities, IHRL would play the central role in the definitions of remedies to protect the rights of persons in the power of the other party in the conflict. On this view, synergies or tensions between IHL and IHRL will depend on the concrete events where international law is deemed to be applicable rule[55].

It is necessary to keep in mind that reparations are secondary right stemming from the violation of other (primary) rights in order to analyse applicability of IHRL. Thus, there are two possibilities in seeking to establish when IHRL is the source of war victims' reparations in armed conflict. The first case comprises IHRL breaches, while the second directly entails IHL rules violations, being human rights law the source of reparations in the first circumstance, and article 91 of Protocol I additional to Geneva Conventions in the latter.

The starting point is the definition of violations leading to remedies. Following the analytical model proposed by Murray and others[56] it should be considered as IHRL breaches those committed in carrying out 'security operations', while those perpetrated during 'active hostilities' would fall into the category of IHL violations. In the setting of non-international armed conflict, on the one hand, the term 'security operation' refers to those activities conducted by State for the sake of law enforcement in times of armed conflict, when the intensity of fighting is low. These are actions such as 'administration of government and maintenance of the rule of law'[57] in areas where it is possible to do so despite the confrontation. International human rights instruments explicitly set out obligations and rights that apply to this situation. On the other hand, the category 'active hostilities' connotes those situations in which military operations are actively 'sustained and concerted'[58] or where state cannot exert effective territorial control because either an armed group has the exclusive control, or any state forces incursion can be military contested[59] IHL directly applies to such context.

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54 Bassiouni (n 20) 255

55 Droege (n 38) 355; Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501.

56 Murray and others inferred from European case law that two normative frameworks, namely 'active hostilities' and 'security operations', may be applied in contexts of armed conflict, regarding the existence of explicit rules to regulate certain conducts, and the configuration of a set of circumstances that make a determined context amenable to the application of such rules. Daragh Murray, *Practitioners' Guide to Human Law in Armed Conflict* (Akande Dapo and others eds, Oxford University Press in association with Chatham House The Royal Institute for International Affairs 2016) [4.25-4.35]

57 Ibid [4.39]

58 Ibid [4.47]

59 Ibid [4.49]

In light of this analytical distinction, victims harmed during security operations should be benefited from IHRL remedies, while humanitarian law provisions on compensation would apply to redress those casualties stemmed from 'active hostilities'.[60] However, in the definition of remedies within the latter framework, IHRL instruments can serve as complementary interpretative tools to expand the interpretation of humanitarian law, since these are convergent and provide more specific content.[61] The delimitation between IHRL and IHL ends up being relevant for the definition of the violations rather than that of remedies. For example, within the context of internal armed conflict the use of lethal force resulting in deprivation of civilians' lives can lead to different consequences depending on the situation in which it takes place. If it is the result of the use of force to deal with civilian demonstrations in an area where state exerts effective control and there is no intensive hostilities, human rights law must be the legal framework to determine whether or not there was right violations. On the contrary, if deprivation of lives occurs in the setting of active military operations with contested territorial control, IHL obligations would be determinant to define to what extent the use of force was unlawful. Finally, in both cases IHRL can be regarded as a source to establish the remedies for victims.

However, it has been stated that human rights law 'must apply alongside IHL' and maintain a core meaning independently of humanitarian rules interpretation.[62] In this sense, it should not be understood that the applicability of humanitarian law displaces IHRL rules. The reason of this claim is that IHL is intended to establish a minimum set of guarantees to protect humanity in the setting of war, but not to authorize combatants to commit acts that would be openly forbidden in peace times. Moreover, as significant mitigation of barbarity of conflicts did not ensue from The Hague Law, international community has progressively come to accentuate the humanitarian dimension of this law through broader interpretation of its contents and distinctions, becoming similar to IHRL. Thus, while it is appropriate that human rights law shapes the interpretation of gaps and ambiguities of IHL, it should not be understood that this latter determines the meaning of IHRL.[63] Therefore, what can be considered as lawful conduct under IHL is not necessarily so under IHRL when defining if there are violations leading to reparations. The Murray´s distinction then may be important in the definition of reparation in favour of those who are victims but at the same time victimizers taking active part in hostilities as it is the case of, for instance, children soldiers. The upshot is that human rights law remains as source of reparations even in the context of internal armed conflict.

Conclusion

This chapter has presented some ideas considering three discussions about the legal standing of reparations in international human rights law, namely, juridical nature as an autonomous and general right, individual entitlement, and recognition as an obligation rather than as a right regarding practical applicability. Two main approaches can be traced from this evaluation. One expansive idea of reparation that conceives them as general customary right, directly conferred to individuals by international legal instruments as a result of its peremptory nature. The other more restrictive tack understands reparations as secondary right, that is, derived from violations of other rights. Further, it is asserted that there is no general binding instru-

60 Ibid [17.45]

61 Ibid [4.64] [17.51]

62 Derek Jinks, 'International Human Rights Law in Time of Armed Conflict' in Andrew Clapham and others (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014).

63 Ibid 674.

ment embodying such a general right, neither is possible to identify peremptory rules (*jus cogens*) that can be universally applicable. Regarding entitlement, reparations qualify as international custom but as the consequence of state responsibility. Moreover, although the international law has shown serious concern for individual´s rights, the mechanisms of law-making and enforcement remain state-oriented. Finally, the paradoxical practical inapplicability of remedies in the context of massive atrocities suggests that reparations should be more regarded as a state obligation rather than as a victims' right. However, this account can strengthen the image of the provision of remedies as an act of solidarity rather than as one of responsibility for the violations, thus undermining IHRL credibility.

Regarding the applicability of IHRL in the settings of armed conflict, it has stated that this body of law deems to be source of reparations. Restrictive application of human rights in war time does not stand the growing agreement about the integration of IHRL and IHL, in which human rights remains as shields against breaches committed during hostilities. In other words, the circumstance of war does not suffice to abolish neither human condition, nor the protection bestowed by international community. Regarding the application of law on reparations, delimitation between IHRL and IHL ends up being relevant for the definition of the violations rather than that of remedies because IHRL instruments can serve as complementary tools to expand the interpretation of what the obligation to redress comprises from humanitarian law. In this vein, the study of Murray and others offers two possibilities for the application of international law. The first one refers to violations committed in the context of armed conflict but within 'security operations', which entails 'administration of government and maintenance of the rule of law',[64] such as for example the use of force to deal with civilian demonstrations in an area where state exerts effective control and there is no intensive hostilities. In those cases, human rights law would be the legal framework applicable to determine whether or not violations were committed. The second interpretative possibility involves breaches during 'active hostilities' in which IHL directly applies. That is to say, humanitarian law would define whether or not reparations follow from acts committed in those situations where military operations are actively 'sustained and concerted',[65] or where state cannot exert effective territorial control because either an armed group has the exclusive control, or any state forces incursion can be military contested.[66]

From these discussions the conclusion arises as follows. Reparations are limited in two senses. In the first one, not all the human rights violations entail the provision of remedies. In the second, the applicability of international regulation is still mediated by state action, but this cannot lead to the understanding of reparations as solidarity. Concerning the applicability, it has been stated that IHRL plays as legal source of reparations, even when violations are committed while conducting hostilities.

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[64] Murray (n 56) [4.39]

[65] Ibid [4.47]

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