



**The Creation of an Individual Right to Reparations under
International Humanitarian Law**

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Abstract

There is no general individual right to reparation for international humanitarian law violations because, under the law of war, the State is the only actor entitled to compensation, not the individual.

While there have been calls to establish such an individual right in recent years, others have tried to find that this right exists in other international mechanisms, which individuals could use to invoke their rights. Nevertheless, what advantages could come from establishing individuals' right to claim their rights under international humanitarian law? It would not only serve justice for the victims by avoiding having their rights taken by "lump sum" peace accords but would also serve in the enhancement and promulgation of compliance, especially as individuals will be able to demand reparations from other individuals.



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Introduction

Historically, the concept of '*rights*' in Jus in Bello referred solemnly to State or belligerent rights - the right to engage in actions prohibited by the law of peace. Individual rights were absent from traditional accounts, and whether individuals are granted rights of reparation under current international humanitarian law (IHL) remains an open question.¹ This essay will explain why an individual right to reparation under IHL must be created while presenting arguments on the grounds of law, justice, accountability, and enforcement of IHL; and explain how individuals can be responsible for providing reparation to other individuals under IHL.

Reparations for Individuals Serve Justice for the Victims

Even once the armed conflict has ended, individuals of violations remain highly vulnerable. For example, they may need long-term medical care, may no longer be able to earn an income, and are likely to have lost homes and belongings.² Therefore, reparation for individuals has a crucial aim of eliminating, as far as possible, the dire consequences of the illegal act and restoring the situation that would have existed if the act had not been committed.³ Reparation can take several forms: restitution, compensation, or satisfaction. In response to a specific violation, these remedies can be used singly or in combination.⁴

The goal of restitution is to restore the situation that existed prior to the wrongful act. For example, the release of wrongfully detained individuals, the return of the wrongfully seized

¹ Lawrence Hill-Cawthorne, 'Rights under International Humanitarian Law' [2018] *The European Journal of International Law* Vol. 28 no. 4.

² Emmanuella-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' [2003] *International Review of the Red Cross* Vol. 85 Issue 851, pp. 529-553.

³ Ibid.

⁴ International Commission of Jurists, 'The Right to a Remedy and Reparation for Gross Human Rights Violations' [Revised Edition, 2018], Partitioners Guide No.2, Chap. 7, pp. 153 – 214.



property, and the revocation of an unlawful judicial measure;⁵ whereas compensation is a monetary payment for monetary damage caused by the violation. It covers both physical and psychological harm underwent by the victim;⁶ and finally, a non-material injury that amounts to an affront to the injured State or person is covered by satisfaction.⁷ Examples include an acknowledgment of the violation, an expression of regret or an official apology, or assurances that the violation will not be repeated. Satisfaction can also involve taking disciplinary or penal action against those whose actions resulted in the wrongful act.

Therefore, criminal prosecution of those accused of war crimes is critical to a victim's right to justice.⁸ In armed conflicts, where severe violations of IHL have occurred on a large scale, there is frequently a need to balance the victims' right to restorative justice between states. The balance must also be made between the interests of the states and the victims to deal with committed atrocities in a way that does not provoke further violence and advances the reconciliation process.⁹

Exclusion from Lump Sum Accords

At the end of the armed conflict, when peace is restored, states often engage in negotiations to fulfill their obligations to make reparations to one another for violations of IHL committed by the states and its agents.¹⁰ Often also, the '*payment*' received can cover both the losses suffered by the State itself and those of its nationals. This is the approach traditionally

⁵ Christine Evans, 'The Right to Reparation in International Law for Victims of Armed Conflict' [2012], Cambridge University Press, Chap. 2, pp. 33-35.

⁶ Ibid.

⁷ Special Rapporteur, Mr. M. Cherif Bassiouni, 'The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms' [2000], Submitted in Accordance with Commission Resolution 1999/33. Doc. E/CN.4/2000/62.

⁸ Yasmin Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition' [2003], International Review of the Red Cross, No. 851, Abstract.

⁹ Ibid.

¹⁰ Paola Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?' [2011], Oxford University Press, Chap. 8, pp. 305-340.



adopted by peace treaties, which often include lump-sum payments for individuals who have suffered losses that the recipient State is responsible for distributing.¹¹

However, with the development of international law, and the parallel recognition of the fact that individuals are entitled to protection against abusive state conduct, individuals are no longer considered '*objects*' of rights accruing only to states but are also considered to enjoy rights vis-à-vis states, especially in times of aggression.¹² Therefore, individuals must be given the right to demand their reparations. The most prominent example of this case, is the "*making the good again*" program implemented after the 1952 treaty, which aimed to distribute money to Jewish holocaust survivors.¹³

Additionally, as the ICRC Commentary on AP I aptly observes, the purpose of both articles 91 of the AP I and 3 of Hague IV '*is specifically to prevent the vanquished from being compelled in an armistice agreement or peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor.*'¹⁴

Albeit the fact that peace treaties are political and they are primordial tools for the end of the armed conflict, the above statement clearly implies that '*on the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility of starting the war...On the other hand, they are not free [...] to deny compensation to which the victims of violations of the rules of the Convention and Protocol are entitled.*'¹⁵

¹¹ Ibid.

¹² Ibid.

¹³ Ariel Colonomos, Andrea Armstrong, 'The Handbook of Reparations' [2006], Oxford Academic, Chap.10 (German Reparations to the Jews after World War II: A Turning Point in the History of Reparation), p.390-419.

¹⁴ ICRC Commentary to AP I, art. 9, Par. 3640.

¹⁵ Ibid.



Therefore, the position of victims of violations of humanitarian law must ultimately be evaluated in light of their right to seek redress, which includes procedural capacity or the ability to pursue a national or international authority directly and request redress. The Diplomatic Conference in 1949 underlined the following: *'It is not enough to grant rights to protected persons and to lay responsibilities on the States; protected persons must also be furnished with the support they require to obtain their rights; they would otherwise be helpless from a legal point of view concerning the Power in whose hands they are.'*¹⁶

This is not only an argument in favor of giving individuals the right to demand reparation for the prejudice they have been subjected to but highlights the right of individuals not to have their rights used as negotiation tools or bargaining chips on the conclusion of the peace treaty.

Reparations Enhance Compliance

Reparations can strengthen compliance with the international legal system and substantially prevent future violations. While reparation can only address the consequences of a violation in each case, on a broader level, the international rule of law is strengthened if an entitlement remedies to reparation. Therefore, reparation is a crucial component of enforcement and can be effective in deterring future violations.¹⁷ This is especially considering that some courts already give that right to individuals. Examples include the case of *Prefecture of Voiotia*, 2000, where the Supreme Court of Greece confirmed in its decision that victims of

¹⁶ Lizabeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' [2003] *International Review of the Red Cross Vol. 85 Issue 851*, pp. 497-524.

¹⁷ Emmanuella-Chiara Gillard, 'Reparation for victims of Armed Conflict: Impulses from the Max Planck Trialogues' [2018] *International Review of the Red Cross Vol. 85 Issue 851*, pp. 529-553.



the Distomo killings have the right to directly uphold a claim of compensation against Germany under Article 3.¹⁸

Examples from IHRL have shown that giving the right to individuals to claim their rights themselves has increased compliance and promoted the law's advancement.¹⁹ Therefore, if there is an increasing acceptance today that individuals have a right to reparations for violations of IHL when they are victims, this well-establishment must also be seen in consideration of human rights law.²⁰ This is mainly because human rights mechanisms on national, regional, and international levels, giving rights to individuals to proclaim their rights, have been seen as a valuable tool for the enforcement of international law in general and particularly of rights of individuals to reparations.

Finally, according to Kalshoven, "compensation" rather than "reparation" should be interpreted as referring specifically to individuals who have benefited from the rule. Furthermore, the UN Principles on the Right to Remedy are based on the assumption that violations of IHL give victims the right to reparation.²¹

Individual-Individual Reparations

The final argument to be presented is that while contested, the fact that while the right of individuals to obtain reparations in IHL remains contested, an important aspect to consider is the fact that individuals' responsibility to provide reparations to other individuals for violations of IHL can also be brought up. Therefore, individuals can have the right of reparation, under IHL, enforceable against other individuals. It can be deducted from Articles

¹⁸ Greece, Court of First Instance of Leivadia and Supreme Court, *Prefecture of Voiotia case*, Judgment 4 May 2000, para 194; Greece, Statement before the European Court of Human Rights in the *Kalogeropoulou and Others case*, (December 2002), para 194.

¹⁹ *Ibid.*

²⁰ Christian Marxen, Anne Peters, 'Remedies for Victims of Violations of International Humanitarian Law' [2003] *MPIL Research Paper Series No. pp. 37-45*,

²¹ Lizabeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' [2003] *International Review of the Red Cross Vol. 85 Issue 851, pp. 497-524*.



91²² of AP I and 3²³ of the 1907 Hague Convention that the liability of conflict parties to pay compensation for violations of IHL committed by members of their armed forces could imply an obligation to compensate that involves not only States but also individual victims. Thus, the obligations of States and other warring parties under IHL could be interpreted as mirroring victims' rights, which IHL envisages as a cause of action if violated. However, several experts believe the article aimed to confer rights directly on individuals.

Also, Individuals may seek restitution from non-state armed groups under IHL. Many scholars regard ex-combatants as a potential resource in peace-making work rather than a security challenge to be managed.²⁴ While the United Nations Basic Principles on the Right to Remedy and Reparations are primarily aimed at states, there is growing recognition that certain human rights obligations can bind certain non-state armed groups in addition to their obligations under IHL for non-international armed conflicts.²⁵ As a result, non-state armed groups can actively participate in reparations, for example, by reparation schemes, issuing apologies and statements of acknowledgment, telling the truth, and recovering the remains of those who disappeared during the conflict.²⁶

Furthermore, non-state armed groups can provide reparations to three key constituencies: civilians, their members, and other armed groups, and they can be encouraged to think of reparations as a form of responsibility in which ownership of past actions is taken, harm is acknowledged, and a commitment to non-repetition is made.²⁷ Such "good faith" efforts may help members of non-state armed groups reintegrate and rehumanize.

²² Additional Protocol I to the Geneva Convention of August 12, 1949, art. 91.

²³ Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, October 18, 1907.

²⁴ Luke Moffet, Cheryl Lawther, Senneva Gilmore, Ebba Lekvall, 'The Limits of the Law: Putting Reparations in Practice' (2019) EJLT < <https://www.ejiltalk.org/the-limits-of-the-law-putting-reparations-into-practice/> > accessed December 4, 2022.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.



Individuals must be given the right to report crimes that are not punishable under criminal law or any other branch of law but only under IHL, such as war crimes against persons requiring special protection, against those providing humanitarian assistance, against property, but also hostage taking, intentionally directing attacks against the civilian population, intentionally directing attacks against buildings dedicated to education, religion, art, and so on.²⁸

Conclusion

Reparations cannot fully remedy all the harm or repercussions caused by flagrant violations in warfare. Such measures, however, play an essential role in acknowledging a return to shared values and the rule of law. When individuals are not given their right to reparation under IHL, it dispossesses them of their entitlement to be protected against illegal conduct by belligerent, which means that if there are no remedies for individuals, this also means that there are no consequences for the violations of IHL. Parties to the conflict will suppress individuals to a position no different from that of ‘endangered species’ in situations where, on the contrary, belligerents must not forget that they are dealing with human beings.

IHL must no longer be only the 'Jus in Bello.' It must become a body of law that gradually acquires a true humanitarian purpose, as the international regulation of international and non-international armed conflicts demonstrates. The bulk of these rules must prioritize protecting fundamental human rights and, above all, the rights of individuals. These rules must allow individuals to claim these rights when violations occur.

IHL has undergone a significant transformation. It can no longer be considered a branch of international law merely regulating inter-state conduct and only conferring rights and

²⁸ United Nations Office on Genocide Prevention and The Responsibility to Protect ‘Definitions, War Crimes.



obligations upon states; it was valid in the past but can no longer be considered accurate.

Finally, as pointed out by Lord Denning: *‘a right without a remedy is no right at all.’*²⁹

²⁹ J.L. Montrose, ‘The Treatment of Statutes by Lord Denning’ [1959], *University of Malaya Law Review*, Vol. 1, No.1 pp.87-110.



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³⁰ This paper does not use *Berytus* style.



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