

Remedies to Victim under the International Humanitarian Law

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Abstract

International humanitarian law ensures the protection and provision of assistance to the victims of armed conflicts. However, once individuals become the victim of violations of international humanitarian law, the protection offered by this body of law effectively ceases. In particular, the law on its face offers victims of serious violations of this law little or no means of obtaining redress.

International humanitarian law sharply contrasts on this point with tendencies in international law. The related but separate body of human rights law clearly articulates a legal right to a remedy for violations of fundamental rights. Most recently, the Rome Statute of the International Criminal Court authorizes the Court to determine any damage, loss or injury to victims and provide reparations to them. Humanitarian law, however, does not expressly guarantee victims of violations of the law any right to a legal remedy.

This research paper examines the legal ways and means currently available under domestic and international law to victims of violations of international humanitarian law to have their primary rights respected. It explores the question of whether victims have the right to a remedy and the extent to which this right can be enforced, if at all.

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Introduction

As UN Secretary-General Ban Ki-moon noted, “reparations are arguably the most victim-centred justice mechanism available and the most significant means of making a difference in the lives of victims. UN experience demonstrates that reparations may facilitate reconciliation and confidence in the state, and thus lead to more stable and durable peace in post-conflict societies.

International humanitarian law (“IHL”) has never been confined to the level of relations between States.² On the contrary, the initiators of the nineteenth century conventions already believed that human persons had inviolable rights even during armed conflicts.³ However, recognition of rights is one thing; the right to claim those rights is another. So far, States have been reluctant to entitle, explicitly and in general, victims of violations of international humanitarian law to claim reparation.

While the punishment of individuals for war crimes has received much greater attention over the past decade, shifting some inter-State aspects of IHL to individual criminal responsibility, the position of the victims of these crimes has not been equally addressed. Their rights and interests have largely been overlooked. Yet redress and reparation for victims of violations of IHL is an imperative demand of justice. The relevance of rights under IHL is questionable if victims have no legal capacity to enforce their rights, before either a national or an international tribunal, once they claim to have become a victim. As pointed out by Lord Denning: “a right without a remedy is no right at all”.⁴ The United Nations Commission on Human Rights has recognized the interests of victims of IHL violations. The “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law” (hereinafter “UN Principles on the Right to a Remedy”), adopted by the United Nations Commission on Human Rights at its 56th session in 2000, aim to provide victims of violations of human rights and IHL with a right to a remedy. The content of this right includes access to justice, reparation for harm suffered and access to factual information concerning the violations and has been encoded under Principle 11 of the UN Principles on the Right to a Remedy. It

²T. Meron, *The humanization of humanitarian law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 239-278 (2000).

³ J. PICTET, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, ICRC, GENEVA, 1958 77 (1st ed. 1994).

⁴ Lord Denning in *Gouriet v. Union of Post Office Workers*, AC, 1978, p. 435.

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distinguishes between five forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

Objective

To understand the provisions and their scope contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Recognizing that millions of people, including many women and children, throughout the world still suffer harm as a result of crime, abuse of power and terrorism, and that the rights of these victims still have not been adequately recognized, and that they may, in addition, suffer hardship when assisting in the prosecution of perpetrators.

Rights of Victims

Since its inception, the United Nations has adopted two General Assembly resolutions dealing with the rights of victims: the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the 2006 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. The focus of the former was on victims of domestic crimes, while that of the latter is on victims of international crimes; more particularly, gross violations of international human rights law and serious violations of international humanitarian law. The 2006 Principles are, for all practical purposes, an international bill of rights of victims. Their adoption has been hard-fought, but their implementation both at the national and international levels is sure to still face many obstacles. Parallel to this historic development have been decisions by the European Court of Human Rights and the Inter-American Court of Human Rights, as well as provisions in the statute of the International Criminal Court (ICC), giving standing to victims in ICC proceedings, but also certain rights of compensation. These parallel developments, as well as others within domestic legal systems, evidence a wide movement towards the recognition of the rights of victims of crime, whether domestic or international, or gross violations of human rights.

Victim's Right to Remedy

The victim's right to a remedy and reparation depends in the first place on his/her rights under International Humanitarian Law being violated. The right to a remedy is a secondary right, deriving from a primary substantive right that has been breached. So if there is no primary right, there can be no secondary right.

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The humanitarian law norms were generally understood as applicable to States vis-à-vis each other and are commonly worded in terms of prohibitions applicable to the parties to a conflict. However, in 1929, the principle of rights was more clearly defined, the word “right” appearing in several provisions of the 1929 Prisoners of War Convention specifically under Article 42 and 62. And in the 1949 Geneva Conventions the existence of rights conferred on protected persons was explicitly affirmed under Article 7 and 8. An empirical investigation into these Conventions shows that a number of rules refer explicitly to concepts such as “rights”, “entitlements” or “benefits”.

In the context of international conflicts, Article 78 of the Third Geneva Convention serves as an example. It gives prisoners of war the right to make known their requests regarding the conditions of captivity to which they are subjected and to complain about such conditions. Similarly, Article 30 of the Fourth Geneva Convention provides all protected persons with the right to file a complaint with the Protecting Powers, the ICRC and the National Red Cross about an infringement of the Convention. These and other provisions create rights of individuals or presuppose the existence of rights.

International Remedies to Victims

At the international level, too, victims of violations of International Humanitarian Law are hardly able to exercise their rights under that law. There is no general international mechanism allowing them to assert those rights. The UN Principles on the Right to a Remedy state that the right to an adequate remedy against a violation of International Humanitarian Law includes “all available international processes in which an individual may have legal standing”. In practice, all existing procedures under International Humanitarian Law are subject to the agreement of the parties to the conflict concerned and none provide individual victims with a general right to a remedy for violations of the law.

Various Examples are-

International Committee of the Red Cross

The ICRC claims to be the primary international body for the protection of war victims. It is broadly mandated to protect and assist war victims and to act as promoter and guardian of International Humanitarian Law.

Human Rights Bodies

The Inter-American Commission and Court on Human Rights have adopted the most liberal attitude, applying International Humanitarian Law directly in the context of the individual complaints procedure. The Commission stated its view that it should apply International

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Humanitarian Law because it would enhance its ability to respond to situations of armed conflict. It found that the American Convention on Human Rights, although formally applicable in times of armed conflict, is not designed to regulate situations of war.

In the so-called *Tablada* case (1997), the Commission developed an extensive set of arguments in support of its decision to include humanitarian law in its mandate. In brief, it argued that, although an explicit legal basis was absent, several articles of the American Convention should be read as indirectly mandating it to apply International Humanitarian Law. The finding of the Inter-American Commission that it is competent to apply humanitarian law is not unproblematic.

It is therefore not surprising that its practice was challenged in the *Las Palmeras* case that concerned a complaint against Colombia lodged with the Commission on 27 January 1994. The complaint led to the adoption by the Commission of a report on the case on 20 February 1998, in which it confirmed its approach in earlier cases of directly applying IHL. Colombia was held to have violated the right to life in Article 4 of the American Convention and Article 3 common to the Geneva Conventions. After the Commission had submitted the case to the Court, the Colombian government entered five preliminary objections in September 1998. With the second and third preliminary objections, Colombia challenged the competence of the Commission and the Court to hold a State responsible for a violation of the right to life under Article 3 common to the Geneva Conventions. In its judgment of 4 February 2000,⁵ the Court admitted these two objections and found that it was not competent to apply the Geneva Conventions, while being competent to interpret the Geneva Conventions whenever necessary to interpret a rule of the American Convention.

In the *Bamaca Velasquez* case against Guatemala (judgment of 25 November 2000), dealing with ill-treatment in detention, the Court found that there had been a violation of Article 1(1) of the American Convention on Human Rights that stipulates the duty to ensure respect for the rights in the American Convention, in relation to Article 3 common to the Geneva Conventions.

Claims Commissions

In recent years, there has been a proliferation of tribunals and commissions that have been set up as a result of international or internal armed conflicts to provide remedies for claims from victims of violations of International Humanitarian Law. Two known examples are the United Nations Compensation Commission (UNCC) and the Eritrea-Ethiopia Claims

⁵Caso *Las Palmeras*, Excepciones Preliminares, Sentencia de 04 de Febrero de 2000, Serie C, No. 66.

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Commission (EECC), whose jurisdictional bases include specific references to violations of IHL.

International Criminal Tribunals

The primary emphasis of such tribunals is on punishment of criminals, and the focus on victims and their remedies is limited. While the prosecutor is expected to represent the interests of the international community, including those of the victims, the prosecutor's concerns do not necessarily match those of the victims. Thus there is a mechanism in place which provides a remedy for minor crimes. However, for more serious forms of damage — harm to life or person — there is no remedy under the said Statutes.

Conclusion

On the basis of these fragmentary considerations, the conclusion is justified that few examples exist where victims are endowed with a right of their own to a remedy for violations of International Humanitarian Law.

While developments at the national level are promising, many cases in which individuals have brought claims under Article 3 of the 1907 Hague Convention before national courts have failed because the courts did not recognize that individuals have standing against the State. They regarded the right in that article as one that only States can exercise on behalf of individuals. At the international level, there has been some progress in the means open to victims for the defence of their rights before international bodies, but the practice of international bodies providing remedies to victims of violations of International Humanitarian Law is ad hoc and is not organized. There is no general mechanism that would allow victims to assert their rights under International Humanitarian Law.

At the same time, to say that victims have no individual legal standing in International Humanitarian Law would not be a correct description of the actual state of affairs. Although States are still the traditional subjects of International Humanitarian Law, victims have also, in an increasing number of cases, achieved recognition as subjects of International Humanitarian Law. In the years to come, the UN Principles on the Right to a Remedy will undoubtedly lead to greater attention to application of International Humanitarian Law in domestic and international courts, and thus to an injection of International Humanitarian Law norms in the approach to individual remedies. The UN document is a welcome move towards bringing about remedies for victims of violations of International Humanitarian Law. It still has nonbinding status. However, this does not necessarily negate its potential influence.

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