Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law

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ABSTRACT

International humanitarian law (IHL) is increasingly being invoked as a potential legal vehicle for individual claims to reparations, including compensation, postconflict. In this article, I explore the limitations of such an approach. In particular, I examine the distinctly pragmatic nature of IHL, which takes as its starting premise the existence of armed conflict and from this point seeks to attenuate the effects of conflict and address the suffering and needs of those caught up in it. Drawing largely on the work of Jean Pictet, I consider how a rights-based approach – which is founded primarily on legal constructs rather than the broader needs of victims of conflict – fits with the conceptual framework of IHL. This exploration feeds into discussions on the role of rights in the context of transitional justice.

KEYWORDS: international humanitarian law, rights-based approach, reparations, needs versus rights, military necessity

INTRODUCTION

Man can never claim to do some good which is not mixed with something bad, to defend a truth which does not hide some error or dispense justice which does not bring some element of injustice in its wake.2

As the primary branch of international law regulating the conduct of armed conflict, international humanitarian law (IHL) has attracted significant attention in recent years as a potential legal vehicle for repairing the losses suffered by victims of war. Historically, IHL has had relatively little to say about the needs of individual victims postconflict, instead being chiefly concerned to regulate the relationship between warring parties. To the extent that reparations have been made following

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armed conflict, they have traditionally been awarded via agreements between the belligerent states. Now, however, there are increasing attempts by or on behalf of individuals – in both national and international courts – to found legal rights to reparations, particularly compensation, in the rules of IHL. Indeed, despite the relative novelty of using IHL as a mechanism for individual rights to reparation, scholars are increasingly arguing that an individual right to reparations for violations of IHL is emerging. Resolutions such as the UN’s 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, and international agreements such as the Rome Statute of the International Criminal Court (ICC) bolster such efforts, and have been relied on by scholars, judges and institutions. Advocates optimistically argue that individual reparations are a potential means for victims to obtain justice, ease the consequences of injuries, hold perpetrators accountable and support compliance with international standards.

Proponents frequently rely on reasoning by analogy with human rights law, emerging evidence of state practice or both. The International Law Association (ILA), for example, could ‘find no reason why the individual, who already enjoys strong protection under international human rights law, should have a weaker position under the rules of [IHL].’ Such modes of thinking appear attractive to many...


7 ‘Rome Statute of the International Criminal Court,’ UN Doc. 2187 UNTS 90 [hereinafter ‘Rome Statute’].


12 ILA, supra n 4 at 18–19.
due to similarities in the content of IHL and human rights law, with some going so far as to argue that IHL has merged with, or is a subset of, human rights law. Some interplay between the branches of law is, indeed, both appropriate and increasingly evident. However, given the important differences between IHL and human rights law, there are persuasive arguments against simplistic reasoning by analogy. For instance, as René Provost observes, human rights law assumes a ‘normal’ context in which it seems suitable to empower individuals with the tools for defending their fundamental rights and freedoms. IHL, by contrast, applies in the context of armed conflict – the consummate emergency – in which normal relationships between individuals and the state have been disrupted. In this setting, individuals are typically powerless and vulnerable and in need more of protection than empowerment. Thus, IHL generally involves the imposition of obligations on those who wield power, rather than the conferral of rights on individuals. Moreover, a body of national and international case law has stopped short of finding that individuals have an enforceable right to claim reparations for violations of IHL under international law. In light of the theoretical impediments and limited state practice of awarding individual reparations for violations of IHL, it cannot be said that an enforceable individual right to compensation under IHL exists as part of the law as it currently stands. This notwithstanding, there remains considerable momentum behind a rights-based approach to violations of IHL.

15 See, *Al-Skeini and Others v. United Kingdom, Judgment (Merits and Just Satisfaction)*, European Court of Human Rights Grand Chamber (7 July 2011). See also, Provost, supra n 9.  
17 Provost, supra n 9.  
20 Marco Sassoli, Antoine A. Bouvier and Anne Quintin, eds., *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2011); Pfanner, supra n 19; Modirzadeh, supra n 16.
approach (RBA) to violations of IHL as part of emerging or prospective law. This juncture provides an invaluable opportunity to delve deeper into the particular limitations and challenges of an RBA under IHL for victims of war.

Measures to address the suffering of victims of armed conflict are indeed desirable and much needed. However, this article strikes a cautionary note on the potential of an RBA under IHL as a means of doing so, identifying some of the key limitations and challenges of using such an approach. In this article, an RBA refers to a model whereby individuals may claim monetary or material reparations under international law if they have suffered loss due to the violation of a rule which gives rise to an individual right to reparations. It does not include symbolic forms of reparations, which raise distinct issues and challenges. I draw a distinction between the concept of an RBA to redress victims of armed conflict, and an approach based on needs. Needs are loosely defined as losses arising out of armed conflict, whether as a result of a violation of IHL or otherwise. This definition is not intended as technical or exhaustive; rather, it is used to illustrate the limitations of an RBA under IHL.

I start by providing a theoretical overview, situating the inquiry within a broader framework of transitional justice (TJ) and IHL scholarship. I then proceed to examine the nature of IHL and the unique driving forces behind it. In particular, I consider how notions of humanity exist in equipoise with principles of military necessity, resulting in a body of law which seeks to attenuate human suffering and meet human needs, over and above enforcing individual rights. Given the singular nature of IHL, I emphasize the work of Jean Pictet, the main architect of the 1949 Geneva Conventions and a key contributor to the 1977 Additional Protocols. Building on this analysis, I then consider how these forces render an RBA under IHL a potentially blunt and unresponsive tool for addressing the needs of victims postconflict. I address, moreover, how an RBA sits with the broader goals of both IHL and reparations. As will be discussed, the paradigm of armed conflict gives rise to different needs, and tolerates very different levels of harm, from nonconflict situations. Accordingly, the needs of victims of armed conflict will frequently be at odds with any legal rights they might – or more pointedly, might not – possess. This complex situation demands a sensitive and nuanced response beyond a simplistic RBA.

21 See, infra n 106.
25 Such situations are governed primarily by human rights law, and provide the context for most reparations claims under international human rights law.
THEORETICAL OVERVIEW

IHL has historically been, and remains, concerned primarily with regulating situations of armed conflict, having relatively little to say about the aftermath of violence or the transition to peace.26 With limited exceptions,27 postconflict measures (such as repatriation of prisoners of war and sanctioning rule-breakers) tend to be directed towards implementing the law and repressing violations of IHL. Similarly, Article 91 of Protocol 1 imposes on parties to the conflict liability to pay compensation for violations of IHL committed by their armed forces, a provision intended primarily to enhance compliance with the law.28 The rule represents customary international law and reflects accepted principles of state responsibility.29 While Article 91 does not specify the recipients of compensation, under positivist interpretations of international law – such as that preferred by the International Court of Justice in the Jurisdictional Immunities case – states, rather than individuals, are the intended beneficiaries of the obligation, with the standing to enforce any claims.30 Individuals therefore lack direct, reliable avenues for obtaining reparations for violations of IHL from offending governments. Rather, they generally remain dependent on national laws establishing programmes conferring redress to victims,31 or on the assistance and goodwill of their government to advocate on their behalf under the rules of diplomatic protection. This can represent a significant limitation in many cases, particularly those involving noninternational armed conflicts. It is thus not surprising that scholars and practitioners alike have sought to apply human rights law modes of thinking to IHL as a means of seeking redress for individual survivors of armed conflict.32

The role of individual rights in societies emerging from war is unresolved. As TJ develops as a field, scholars and practitioners are grappling with how best to manage the multifaceted demands of justice, needs and rights to achieve a just and lasting peace following mass violence.33 The challenges posed by repairing mass violence

27 See, infra n 103.
29 Ibid.; Henckaerts and Doswald-Beck, supra n 11.
30 See, Jurisdictional Immunities, supra n 8; Sassoli, Bouvier and Quintin, supra n 20; Modirzadeh, supra n 16 (noting that IHL lawyers tend to favour a positivist approach).
32 See, Modirzadeh, supra n 16, on the teleology of such an approach.
are different from those of isolated aberrations, and often involve a complex array of judicial and nonjudicial elements designed to assist in the transition to peace. Within this context, reparations are sometimes used as a transitional measure to contribute, if modestly, to the reconstitution of a peaceful society. As Pablo de Greiff notes, reparations represent a form of reparative justice, and for some victims are the ‘most tangible manifestation of the efforts of the state to remedy the harms they have suffered.’ Beyond this, the precise role of reparations as a transitional effort is nebulous and remains unsettled. Exactly how reparations should be awarded, and how individual rights should be balanced with the needs of a society in transition, are complex and contested questions. An exploration of the limitations of an RBA to violations of IHL therefore feeds into a broader TJ debate about the extent to which rights should be pursued in societies emerging from conflict.

For TJ scholars, the word ‘reparations’ tends to be used in two contexts: first, reparations under international law (measures to redress harm as a consequence of certain violations of the law), and secondly, reparations programmes under domestic legislation (coordinated sets of reparative measures with extensive coverage). The present inquiry is relevant to both contexts. As will become apparent, an RBA under IHL has potential to generate unexpected and unintended consequences. These in turn give rise to complex questions of justice and may hinder a transition to peace following armed conflict. Due to the nature of IHL and the distinctive forces driving its development, an RBA yields considerations which tend not to arise in the context of other areas of law and justice. For this reason, an RBA under IHL warrants its own critical inquiry, as the consequences for a society emerging from armed conflict are potentially significant.

**THE DRIVING FORCES BEHIND IHL**

It is widely recognized that IHL involves an interplay between two chief considerations which exist in tension and equipoise: military necessity and humanity.

**Military Necessity**

Military necessity describes the notion that belligerents are, subject to the laws of war, permitted to use such force as is militarily necessary to defeat the enemy, with the least possible expenditure of time, life and money. The concept is a logical

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34 De Greiff, supra n 31.
35 Ibid.
36 Ibid., 2.
37 See the conflicting submissions in Prosecutor v. Thomas Lubanga Dyilo, ‘Decision Establishing the Principles and Procedures to be applied to reparations,’ Trial Chamber I of the International Criminal Court (7 August 2012), Case No. ICC-01/04-01/06 AA2A3.
38 De Greiff, supra n 31.
40 See, United States of America v. Wilhelm List et al., Case 7 (8 July 1947 to 19 February 1948) (Hostages Trial); Dinstein, supra n 39.
corollary of the foundational assumption that has underpinned the law of war since Enlightenment scholar Emmerich de Vattel:41 that in order to regulate the conduct of war, the justice or legality of the cause must be put aside. In other words, as Henry Wheaton put it in 1836:

A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted by the laws of war to one of the belligerent parties is equally permitted to the other.42

Such reasoning was central to the rejection of the ‘just war’ theory, which had prevailed for centuries and dictated that only belligerents with a ‘just’ cause could wage war lawfully.43 Despite its shortcomings,44 a variation on this Enlightenment reasoning became a conceptual cornerstone of modern IHL,45 with legality depending on compliance with the laws of war, independent of the justice of the cause.

The law’s ambivalence as to cause means that, in effect, all belligerents, not just the one with the ‘just’ cause, are permitted to use (within the law’s confines) such force as is militarily necessary to secure victory.46 In describing ‘necessity,’ Pictet observed that ‘maintenance of the public order legitimates the use of force; the state of war justifies resort to violence.’47 Military necessity represents a manifestation of the underlying premise that war – a condition fundamental to a Westphalian system of states48 – licenses violence. Its purpose as a principle of law is, as Nils Melzer writes, to

provide a realistic standard of conduct by permitting those measures of warfare that are reasonably required for the effective conduct of hostilities, while at the same time prohibiting the infliction of unnecessary suffering, injury and destruction.49

44 Ibid.; Thomas M. Franck, The Power of Legitimacy among Nations (New York: Oxford University Press, 1990) (describing Vattel’s rule that all war was legal as long as it was fought ‘by the rules,’ as ‘an idiot rule’), 81.
45 See, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863. See also, Protocol 1, preamble; arts. 1 and 2 of the Geneva Conventions of 1949, which confirm the universal and unqualified application of IHL in international armed conflicts.
46 This was made explicit in the Lieber Code. For discussion of the early development of this idea, see, Neff, supra n 3.
47 Pictet, supra n 2 at 63.
Thus, modern IHL does not adjudge the legality or justice of a side’s cause, but rather tolerates a considerable degree of violence to secure military victory.\(^{50}\)

**Humanity**

Military necessity has, however, long been tempered by considerations of humanity. Indeed, modern IHL, and particularly the First Geneva Convention of 1864, arose out of the concerns of Henry Dunant, the Swiss founder of the International Committee of the Red Cross (ICRC), over the treatment – or lack thereof – of sick and wounded armed forces on the battlefield.\(^{51}\) Dunant tended to the sick and wounded members of the armed forces injured in the Battle of Solferino in 1859, adopting the rallying cry *tutti fratelli* and encouraging the provision of care on the basis of need rather than status, nationality or other considerations.\(^{52}\) The ICRC’s adoption of Pictet’s neologism ‘international humanitarian law’ in the 1950s, in lieu of the descriptors ‘law of war’ or ‘law of armed conflict,’\(^{53}\) reflects IHL’s humanitarian motivation and its goal to protect the individual in armed conflict.\(^{54}\) The notion of ‘humane treatment’ – a manifestation of considerations of humanity – today forms the cornerstone of the key IHL treaties, the 1949 Geneva Conventions and 1977 Additional Protocols.\(^{55}\) These treaties also codify ‘the principles of humanity’ as a protecting force in cases not covered by those documents,\(^{56}\) a modern iteration of the so-called Martens Clause, which first appeared in the 1899 Hague Convention (II).\(^{57}\)

Despite the centrality of considerations of ‘humanity’ to IHL, there is no authoritative definition of the term.\(^{58}\) Its dominant meaning, and the sense in which it is, broadly speaking, used in the context of IHL, is ‘the quality of being humane,’\(^{59}\) that

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\(^{50}\) Schmitt, supra n 39.


\(^{52}\) Ibid.


\(^{55}\) See, First Geneva Convention, art. 12; Second Geneva Convention, art. 12; Third Geneva Convention, art. 13; Fourth Geneva Convention, art. 27; Protocol I, art. 10(2) (all applicable in international armed conflict); art. 3 common to the four Geneva Conventions, and art. 4(1), Protocol 2 (applicable in noninternational armed conflict). See also, Jean Pictet, ed., *Commentary on the Geneva Conventions of 12 August 1949*, vol. 1 (Geneva: International Committee of the Red Cross, 1952).

\(^{56}\) See, First and Second Geneva Conventions, art. 63(4); Third Geneva Convention, art. 142(4); Fourth Geneva Convention, art. 158(4); Protocol 1, art. 1(2); Protocol 2, preamble, para. 4.


\(^{58}\) Dinstein, supra n 39; Robin Coupland, ‘Humanity: What Is It and How Does It Influence International Law?’ *International Review of the Red Cross* 83(844) (2001): 969–989; Pictet, supra n 55 at 53 (stating that expressions such as ‘humane treatment’ have ‘entered sufficiently into current parlance to be considered’).

is, ‘characterised by sympathy with and consideration for others; feeling or showing compassion towards humans or animals; benevolent, kind.’60 Pictet describes humanity as ‘a sentiment of active goodwill towards mankind.’61 ‘Humanitarian,’ in turn, refers to any action beneficent to people,62 while ‘humanitarianism’ is the ‘universal social doctrine which aims at the good of all mankind.’63 Pictet is particularly interested in the concept of humanitarianism, as it is the driving force behind the development of IHL.64 Deriving from the fundamental precept ‘do to others what you would have done to yourself,’ humanitarianism is ‘an attempt at organising relationships between human beings on the basis of a compromise between their respective interests.’65 Pictet perceives humanitarianism as drawing inspiration from charity and justice, but distinct from both.66

The relationship between justice, charity and humanitarianism bears particular examination in the context of an RBA to reparations for violations of IHL. For Pictet, justice consists in delivering to each person their due, and involves two distinct aspects: legal justice and equitable justice.67 Legal justice – on which an RBA is founded – gives to each person according to their rights, and seldom on the basis of needs.68 Pictet’s equitable justice, the higher form of justice, is more concerned with ‘bringing to each what he (or she) is lacking,’ and involves ‘repairing the aberrations of fate.’69 Charity, by contrast, dispenses according to suffering or needs, refusing to evaluate a person’s merits or faults.70 In Pictet’s conception, humanitarianism represents a unification of charity with a higher form of justice, based not on legal justice but on broad concepts of universal and equitable justice.71

In IHL, humanitarianism manifests itself in requiring action ‘always for man’s good,’72 and demands different standards depending on the situation.73 In the conduct of armed conflict, for example, Pictet argues that considerations of humanity

[insist] that capture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated

60 Ibid., s.v. ‘humane.’
62 Pictet, supra n 2. See also, Oxford English Dictionary, supra n 59 at s.v. ‘humanitarian’: ‘Concerned with humanity as a whole; spec. seeking to promote human welfare as a primary or pre-eminent good; acting, or disposed to act, on this basis rather than for pragmatic or strategic reasons.’
63 Pictet, supra n 2 at 15. See also, Oxford English Dictionary, supra n 59 at s.v. ‘humanitarianism’: ‘Concern for human welfare as a primary or pre-eminent moral good; action, or the disposition to act, on the basis of this concern rather than for pragmatic or strategic reasons.’
64 Pictet, supra n 2.
65 Ibid., 16–17.
66 Ibid.
67 Ibid.
68 Ibid.
69 Ibid., 23.
70 Ibid.
71 Ibid.
72 Ibid., 32–33.
73 See, Dinstein, supra n 39.
and cured; that the wounds cause the least possible pain; that captivity be

In the context of persons who are \textit{hors de combat} and not directly participating in hostilities, considerations of humanity impose three related duties towards victims of war: to respect them, to give them protection and to treat them humanely.\footnote{Pictet, supra n 2.} Humanitarianism is, however, not only concerned with helping particular individuals and ameliorating suffering at any given moment. It also has more positive aims, ‘designed to attain the greatest possible measure of happiness for the greatest number of people.’\footnote{Pictet, supra n 61 at 144.} It is not concerned with simplistic concepts of justice and injustice based on Manichean theories of good and evil, which tend to result in a worsening of human conflicts.\footnote{Pictet, supra n 2.}

Pictet’s conception of humanitarianism reflects the development, nature and purpose of IHL, which, as Provost observes, is constructed to apply in a highly chaotic context in which individuals are typically powerless and vulnerable, and need protection more than empowerment.\footnote{Provost, supra n 9.} In this setting, tempering conduct based on notions of humanity, as opposed to conferring individual rights, is the dominant guiding principle. Indeed, the concept of humanity can be discerned to some degree in almost all the rules of IHL.\footnote{Schmitt, supra n 39.} It is particularly apparent, for example, in the provisions on medical care and triage in armed conflict, embodied in Article 12 of the First and Second Geneva Conventions. This provision contains the ‘fundamental principle’\footnote{Commentary to art. 12 of First Geneva Convention, in Pictet, supra n 55.} that the wounded and sick must be treated humanely without adverse distinction based on such grounds as sex, race, nationality or political opinions. In treating the sick and wounded, only urgent medical need authorizes priority in the order of treatment. Humanitarian considerations are readily apparent in this provision, which seeks to reduce human suffering regardless of the patient’s characteristics or affiliations. Other IHL rules are balanced more heavily – or at least more obviously – in favour of military necessity over humanity (discussed later).

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\textbf{A Deeply Pragmatic Body of Law}
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The need to balance the demands of state sovereignty – made manifest in considerations of military necessity – with considerations of humanity has, over many centuries, given rise to a unique body of law largely designed and implemented by states’ military forces.\footnote{See, Helen Durham, ‘International Humanitarian Law and the Gods of War: The Story of Athena Versus Ares,’ \textit{Melbourne Journal of International Law} 8(2) (2007): 248–258.} IHL is, thus, characterized by a deep sense of pragmatism. To some observers, it may appear immoral in the degree to which it tolerates killing and

\ \footnotesize{\textit{\textsuperscript{74}} Pictet, supra n 53 at 62; Pictet, supra n 2 (in similar terms). Cf. W. Hays Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect,’ \textit{New York University Journal of International Law and Politics} 42(3) (2010): 769–830.\textit{\textsuperscript{75}} Pictet, supra n 2.\textit{\textsuperscript{76}} Pictet, supra n 61 at 144.\textit{\textsuperscript{77}} Pictet, supra n 2.\textit{\textsuperscript{78}} Provost, supra n 9.\textit{\textsuperscript{79}} Schmitt, supra n 39.\textit{\textsuperscript{80}} Commentary to art. 12 of First Geneva Convention, in Pictet, supra n 55.\textit{\textsuperscript{81}} See, Helen Durham, ‘International Humanitarian Law and the Gods of War: The Story of Athena Versus Ares,’ \textit{Melbourne Journal of International Law} 8(2) (2007): 248–258.}
destruction, particularly given the law’s idealistic moniker. Even a cursory examination of the foundations of human rights law, for instance, serves as a foil for the deeply realistic philosophical underpinnings of IHL. Human rights law – a branch of international law developed after World War II primarily as a means of preventing recourse to war – establishes for every human being a right to life, violation of which requires a high level of justification. IHL, by contrast, balances license to kill and destroy in pursuit of an overall military goal with the requirement of avoiding excessive noncombatant casualties. As Naz Modirzadeh suggests, for many scholars such a balancing act is anathema to the very idea of human rights.

Key philosophical presumptions underlying IHL and human rights law respectively thus appear to operate in divergent directions. In the context of IHL (compared to human rights law), considerations of humanity manifest themselves in a largely negative sense. There are many instances in which innocent civilians may lawfully be made to suffer in war. Regrettably, this is the rule rather than the exception in armed conflict, in contrast with the situation in peace. War, even lawfully fought, is a hellish business. As a consequence, many IHL scholars, including several affiliated with the ICRC, are deeply pragmatic about the potential and limitations of law during war. They accept the fact that, as history attests, war unleashes the beast. The law seeks simply to impose a modicum of restraint on human behaviour to preserve minimum standards of humanity. In the words of a British delegate to the 1907 Hague Peace Conference, ‘to humanise war is like trying to humanise hell.’

The highly pragmatic foundations of IHL, and the delicacy of establishing peace between warring parties, have long been reflected in the law and practice of war reparations between states. In the 18th and 19th centuries, reparations

83 See, preamble to ‘Universal Declaration of Human Rights,’ UN Doc. A/810 (10 December 1948).
86 Ibid.
87 Modirzadeh, supra n 16.
89 Dinstein, supra n 39.
91 Examples of the horrors of war are numerous and well documented. See, Jonathan Glover, Humanity: A Moral History of the Twentieth Century (New Haven, CT: Yale University Press, 2001).
92 Durham, supra n 81.
93 Meurant, supra n 90 at 237.
were generally dealt with by way of peace treaties between sovereigns, the purpose of which was to bury both the cause and conduct of the war in oblivion.\textsuperscript{94} This meant that there was little or no scope for seeking to secure ‘strict justice’ based on the conduct of the war. As Vattel noted in 1758, if states demanded strict justice, peace would never be reached.\textsuperscript{95} Thus, reparations for specific breaches or damages arising out of the conduct of the war were, with limited exceptions,\textsuperscript{96} subsumed into general war indemnities, which involved lump sums to be distributed as the sovereign saw fit.\textsuperscript{97} The Treaty of Frankfurt, for instance, which ended the Franco–Prussian War of 1870–1871, provided for France to pay war indemnities of five billion francs over three years, without specifying the grounds for the payment.\textsuperscript{98}

In 1907, the Fourth Hague Convention introduced a novel provision (Article 3, a precursor to Article 91 of Protocol 1) obliging the payment of compensation between belligerent states for violations of the laws of war.\textsuperscript{99} Contemporaneous scholars saw Article 3 as, primarily, a means of enforcing the laws of war.\textsuperscript{100} Notwithstanding this obligation, however, the practice of states making lump sum postwar payments continued for much of the 20th century.\textsuperscript{101} Itemized and individual claims were largely omitted – indeed, sometimes specifically excluded – from this state-centric practice, frequently in the interests of reestablishing peace.\textsuperscript{102} While IHL is not primarily concerned with establishing peace following conflict, such a goal is clearly consistent with its broad objectives and terms.\textsuperscript{103} It is also, broadly speaking, consistent with the broader goal of humanitarianism (as enunciated by Pictet) to attain the greatest possible measure of happiness for the greatest number of people,\textsuperscript{104} and resonates with the aim of TJ to achieve a just and lasting peace in societies emerging from war and mass violence.\textsuperscript{105}

\begin{thebibliography}{100}
\bibitem{Vattel} Vattel, supra n 41; Wheaton, supra n 42; John Shuckburgh Risley, \textit{The Law of War: By John Shuckburgh Risley} (London: A.D. Innes, 1897).
\bibitem{Vattel2} Vattel, supra n 41.
\bibitem{Wheaton} Wheaton, supra n 42; Thomas Erskine Holland, \textit{The Laws of War on Land (Written and Unwritten)} (Oxford: Clarendon Press, 1908).
\bibitem{Art.3} Art. 3, ‘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 (18 October 1907).
\bibitem{Fleck} Fleck, supra n 19; \textit{Jurisdictional Immunities}, supra n 8.
\bibitem{Protocol} See, Protocol 1, preamble, para. 1; Protocol 2, art. 6(5) and commentary (see, Sandoz, Swinarski and Zimmermann, supra n 28).
\bibitem{Pictet} Pictet, supra n 2.
\bibitem{May} May, supra n 33.
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RBA: NEEDS VERSUS RIGHTS

An RBA to Reparations under IHL

Under orthodox approaches to international law, in order for a nonstate actor (including an individual) to invoke a right to reparations, it must be the beneficiary of the primary obligation to repair injury under international law, and there must be a specific procedure available to invoke the responsibility for breach of that obligation on its own account. It is, therefore, axiomatic that individual reparations be founded on a violation of a rule of international law which gives rise to an individual right to reparations. This threshold requirement is reflected in documents like the Basic Principles.

The Basic Principles began life in 1989 as a ‘study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.’ At their inception and in several subsequent drafts, the Principles addressed only human rights abuses, with reference to IHL being added in 1996. Some states were reluctant to address the question of direct reparations for IHL alongside that of human rights law, and were appeased only by reassurances that the Principles do not represent an attempt to create new law. Rather, they are meant to be ‘victim oriented and predicated on social and human solidarity . . . not intended to reflect the legal differences between international human rights law violations and international humanitarian law violations.’

The Basic Principles and documents like these are nonetheless inextricably linked to an RBA. Article 3(d) of the Principles, for instance, sets out the duty to ‘provide effective remedies to victims, including reparation.’ Article 8 defines victims as

persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.


108 Ibid.


110 Ibid.

111 Van Boven, supra n 107 at 2; Basic Principles, preamble.

112 Emphasis added. The definition in art. 8 may also include immediate family, dependents and persons who sought to assist victims in distress.
Despite intending to be victim-oriented and based on human solidarity, by adopting a definition of victims which is tied to violations of the law rather than need, the Basic Principles are intrinsically limited in their capacity to address human suffering. The same can be said of various ILA documents, and Article 7S of the Rome Statute (read with Rule 85 of the Rules of Procedure and Evidence), which, through their definitions of ‘victim,’ involve Pictet’s concept of legal justice. The Basic Principles and analogous documents seek to respond to victims’ needs in the amount of compensation ultimately awarded. However, the fact that victims must have been injured as a result of a violation of law to trigger an award of reparations imposes a threshold which is inherently rights-based.

**Limitations of an RBA**

Perhaps the most striking – if self-evident – limitation of an RBA to reparations for violations of IHL is that it is conditional upon the existence of a right rather than need (thus coinciding with Pictet’s concept of legal rather than equitable justice). This would result in a system where only a portion of those who have suffered in war may be entitled to reparations. In situations of war, the distinction between need and legal right of civilian casualties is often particularly stark. As noted, IHL permits – within limits – militarily necessary conduct, and there are numerous situations in which considerable suffering may be caused by the lawful conduct of a belligerent party. Thus, the disparity between human need and individual rights will in general be more pronounced than in situations of peace. This is poignantly apparent in the provisions addressing targeting under IHL. These provisions reflect the reality – and tacit acceptance – that civilian losses are a consequence of war, albeit a tragic one. For instance, the colloquial concept of ‘collateral damage’ is embodied in the rule of IHL that prohibits only losses which would be disproportionate to the military advantage gained. Similarly, IHL does not explicitly prohibit means or methods of attack that cause extensive destruction, but rather bans indiscriminate attacks or weapons which are of a nature to strike military objectives and civilians or civilian objects without discrimination.

In the context of reparations, incidental civilian losses arising out of a lawful attack would not give the victim legal rights, notwithstanding the fact that the magnitude of the loss may be comparable to that suffered by a victim of an unlawful attack. Thus, a farmer killed while working alongside a military barracks that is under attack

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115 See, Basic Principles, arts. 11 and 15 (requiring *adequate* and *effective* reparation for harm suffered); cf. art. 20 (compensation should be ‘appropriate and proportional to the gravity of the violation’).

116 Protocol I, art. 51(5)(b).


118 ILA, supra n 4.
is unlikely to be the victim of a violation of IHL and his or her family will not be enti-
tled to reparations. However, if the farmer was killed alongside 20 other civilians in
the same attack, this might be sufficient evidence of a violation of IHL to justify a
claim for reparations, although even then the proportionality assessment is
fraught. The application of these rules reflects the compromise between military
necessity and humanity at the heart of IHL, as well as the relative indifference of an
RBA towards human suffering and need.

In other scenarios, the divergence between need and right might be less signifi-
cant. A number of the detention and fair trial provisions under IHL, for instance,
protect individuals more comprehensively than those regulating targeting. These pro-
visions coincide in large part with analogous human rights law scenarios, lending
themselves more readily to litigation in a human rights setting. The European Court
of Human Rights, for example, has in general been more inclined to make a favour-
able finding when applicants were in respondents’ physical power and control at the
time of the alleged violation. Building on similar reasoning, Provost notes that the
fundamental judicial guarantees set out in Article 75 of Protocol I may be amenable
to an RBA, as the individual is more likely to be capable of holding and exercising
rights. In these and comparable scenarios, which more closely mirror peacetime
situations with which human rights law is concerned, an RBA is more likely to align
with human need.

The division of IHL into subcategories of rules is not new. IHL was historically
divided into two main branches of law: the Law of The Hague, which primarily regu-
lated the conduct of hostilities, and the Law of Geneva, which protected those per-
sons placed hors de combat and those not participating directly in hostilities. However,
recognizing the historical and conceptual divide within IHL fell out of fa-
vour after the collation of both branches in the Additional Protocols, with many pre-
ferring to consider IHL as a unified body of law. The Basic Principles, for example,
speak of reparations for ‘serious violations of the laws of war.’ This phrase, though
not defined therein, might best be understood as referring to violations that endan-
ger protected persons (e.g., civilians, prisoners of war, wounded or sick combatants)
or objects (e.g., civilian objects or infrastructure), or that breach important values.
The concept of ‘serious violations’ is thus based more on the degree or scale of harm
carried by the violation, rather than on a qualitative difference in the provisions
violated. In the context of individual reparations for violations of IHL, however, the
distinction between the types of rules might provide some guidance, particularly in

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119 See, Dinstein, supra n 39.
120 See, Protocol 1, art. 75; Protocol 2, art. 4; art. 3 common to the Geneva Conventions.
121 Al-Skeini, supra n 15.
122 Provost, supra n 9.
123 Pictet, supra n 2.
124 International Committee of the Red Cross, ‘What Are “Serious Violations of International
Humanitarian Law”? Explanatory Note,’ https://www.icrc.org/eng/assets/files/2012/att-what-are-ser-
ious-violations-of-ihl-icrc.pdf (accessed 11 November 2015); cf. ICTY Prosecutor v. Dusko Tadic,
Appeals Chamber Decision on Jurisdiction, IT-94-1-A, 2 October 1995, para. 94. See also, Andrew
Clapham, Paola Gaeta and Marco Sassoli, eds., The 1949 Geneva Conventions: A Commentary (Oxford:
Oxford University Press, 2015).
relation to resolving complex legal and moral questions that arise in considering the needs of victims as opposed to their rights. It is, potentially, particularly apt given that an RBA involves applying human rights law modes of thought to IHL.

Pictet perceived certain classes of principles of the Geneva Law to coincide with human rights law, including, for instance, the right to ‘legal guarantees recognised by civilised peoples’ and the prohibition on torture or degrading or inhuman punishment. Principles governing the conduct of hostilities and certain provisions of the Geneva Law, by contrast, were seen as conceptually and historically distinct, arising from the historical laws of war. At the risk of overgeneralizing, individual reparations for violations of those principles that are common to both IHL and human rights law are more likely to reflect a convergence between the needs and rights of victims of armed conflict. However, in situations involving the conduct of hostilities, the disparity between the needs and rights of victims of conflict is likely to be greater.

ALTERNATIVES TO AN RBA

How might the disparity between needs and rights be resolved? The answer is not a simple one and will potentially involve a variety of measures. To this end, existing responses to mass violence are instructive.

The ICC and associated Trust Fund for Victims (TFV) regime offers an interesting combination of rights- and needs-based responses. The two branches of the ICC/TFV regime operate under different legal and philosophical mandates, reflecting the different contexts in which they arise. The ICC reparations regime dispenses primarily legal justice. As the Appeals Chamber in the Lubanga reparations decision observed, the ICC is a legal system establishing individual criminal liability for crimes under the Rome Statute. The reparations regime reflects this goal of ensuring individual accountability. Thus, an order for reparations is to be made directly against the convicted person. Under the constituting documents, the ICC may order either individual or collective reparations, or both. Collective reparations might be made in favour of a particular community; however, only community members who have suffered harm as a result of the crimes of the convicted person are eligible. This finding prioritizes the principle of accountability at the centre of the ICC regime, and reflects Pictet’s conception of ‘legal justice.’

125 Pictet, supra n 2 at 63.
126 Ibid.
127 This potentially includes situations of occupation. See, International Court of Justice, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion),’ IC Rep 136 (9 July 2004); Al-Skeini, supra n 15.
128 On the importance of the context of reparations, see, Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals against the ‘Decision Establishing the Principles and Procedures to be Applied to Reparations’ of 7 August 2012 with AMENDED Order for Reparations (Annex A) and Public Annexes 1 and 2, Case No. ICC-01/04-01/06-3129 (3 March 2015).
129 Ibid.
130 See, Rome Statute; ICC Rules of Procedure and Evidence; Lubanga Reparations, supra n 128.
133 Stahn, supra n 132.
In certain circumstances, including where ‘the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate,’ the Court may order that an award for reparations against a convicted person be made through the TFV. The TFV, a body established by the Assembly of States Parties for the benefit of victims of crimes and their families, has a dual mandate: to implement awards of reparations ordered by the ICC (reparations mandate); and, acting independently of the Court, to use funds provided from independent sources to assist victims with physical and psychological rehabilitation and/or material support (assistance mandate). Whereas the operation of the TFV under its reparations mandate is linked to criminal accountability, the assistance mandate enables the TFV to assist victims of crimes without the need for a guilty verdict to act as a trigger. This allows the TFV to act in a timelier manner and to reach a wider range of survivors of conflict, regardless of whether the harm they suffered arises from particular offences charged in a specific case. In carrying out its operations, the TFV is guided by ‘principles of non-discrimination, doing no/less harm and aiming at reconciliation,’ and thus prefers broader collective as opposed to individual reparations. The approach and dual mandate of the TFV enable a higher degree of responsiveness to the needs of survivors (including those injured as a result of lawful conduct under IHL) and TJ considerations than a strict RBA.

The extent to which the ICC/TFV regime will succeed in redressing harm resulting from crimes under the Court’s jurisdiction, without hindering reconciliation efforts, remains to be seen. The focus of the ICC reparations regime on individual accountability and legal certainty necessarily tethers the Court to an RBA, though there is some discretion within this approach. (For instance, the case law to date suggests that collective awards will frequently be preferred to individual reparations.) The TFV, by contrast, focuses on repairing harm and facilitating reconciliation, avoiding damage that may be caused through individual reparations. This approach is more concerned with needs than the ICC’s RBA, and forms an important means for overcoming the potentially divisive effect of the Court’s reparations regime. As the Appeals Chamber in Lubanga noted,

134 Ibid., rule 98; Lubanga Reparations, supra n 128.
135 Rome Statute.
136 See, Lubanga Reparations, supra n 128.
141 Stahn, supra n 132.
the meaningfulness of reparations programmes with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes for which [the convicted person] was found guilty.142

The TFV, acting under its assistance mandate, thus forms a critical safety net in the implementation of the ICC’s RBA. The success of the ICC/TFV regime will depend largely on a clear enunciation of the objectives of reparations and other assistance, and its ability to respond sensitively to situations at hand in any given case.

An alternative to a rights-based, or combined rights- and needs-based, response might be to compensate all victims of war for their losses, regardless of whether they were sustained through violations of IHL or otherwise. Such an approach was adopted in respect of the UN Compensation Commission arising out of losses in Kuwait, which compensated individuals on the basis that they were victims of Iraq’s unlawful invasion and occupation of Kuwait.143 Today, some international organizations appear to operate more on a needs- rather than rights-based model. The Centre for Civilians in Conflict, for instance, uses ‘policy channels’144 to encourage all warring parties to ‘make amends to civilians for harm it causes them within the lawful parameters of its combat operations, despite having no legal obligation to do so.’145 Such amends, whether comprising an apology, financial compensation or other ‘dignifying gestures,’ are neither dependent on, nor seen as representing evidence of, legal liability for a violation of the applicable law.146 They are reflected in the recent practice of ex gratia or solatia payments offered to civilians by some state armed forces for losses resulting from lawful military operations.147 This approach has the potential to be more responsive to the needs of a greater number of victims of armed conflict than one based on violations of IHL, and might address some of the inherent limitations of an RBA. That said, it lacks the imprimatur of international law and might be exercised haphazardly or for political gain.

Ultimately, any response to redress victims’ suffering postconflict, whether rights- or needs-based or a combination of both, must be sensitive to the conceptual and practical contexts in which it operates. These contexts should drive the philosophy and modalities underpinning the response. The conceptual context of IHL suggests that reparations should have two key purposes: serving broad humanitarian goals, both immediate and long term; and enhancing compliance with the law. A response must also be situated within the practical context of the widespread devastation and

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142 Lubanga Reparations, supra n 128 at para. 215; Trust Fund for Victims, supra n 139.
143 Such an approach does, however, depend on a finding of a violation of the jus ad bellum, so remains constrained by RBA to some degree.
destruction that follows major armed conflict, the international practice of dealing with war damages ‘on a general footing and often on a reciprocal basis’ and the need of warring states to reconstruct their societies and economies.\textsuperscript{148} In such scenarios, there appears to be limited scope for individual reparations, and a substantial risk that an RBA would only enlarge the credibility gap that already exists between law and practice in armed conflict.\textsuperscript{149} This underscores the need for a sensitive and nuanced response, as the Appeals Chamber recognized in the \textit{Lubanga} reparations decision.

**CONCLUSION**

An RBA gives rise to a philosophical tension within IHL, which is designed to operate primarily during armed conflict, the most chaotic and violent of situations. IHL applies to protect the vulnerable and powerless, while at the same time allowing armed forces to pursue legitimate military objectives. In this context, rights tend to be subordinated to broader humanitarian demands, resulting in a body of law that seeks to protect rather than empower individuals. Humanitarianism, a driving force behind IHL, seeks to attain the greatest possible measure of happiness for the greatest number of people, and aims to repair the aberrations of fate by bringing to individuals what they are lacking. It is not tethered to notions of strict or legal justice, which, as Pictet observed, may bring an element of injustice in its wake. An RBA, by contrast, is largely disinterested in human need and suffering, differentiating instead primarily on the basis of whether individuals have been the victims of a violation of IHL. This gives rise to a tension within IHL between individual rights and the broader concept of humanitarianism.

Individual reparations under IHL are not a panacea for all survivors of armed conflict. Indeed, an RBA may generate unintended and undesirable consequences, given the relatively blunt nature of the law in responding to human needs postconflict. For example, people who suffer in war other than as a result of a violation of IHL – a regrettably frequent occurrence – would not be entitled to reparations under an RBA. As a result, legal right will frequently be at odds with human need. These consequences may hinder reconciliation and TJ efforts.

If reparations are indeed included as part of TJ measures, several considerations and auxiliary measures are required as a matter of policy. First, any response must be sensitive to the context – both conceptual and pragmatic – in which it arises. The conceptual context might include the degree and types of violations that have occurred and the source of the rules violated. For example, widespread violations of the rules governing targeting will raise different issues from isolated offences against a small number of prisoners of war, or abuses occurring in situations that fall short of armed conflict. The pragmatic context will include such issues as prior payment of compensation between states, the extent of the need for overarching economic and social reconstruction and the source and availability of funds. Failure to account for these pragmatic and conceptual considerations gives rise to a risk of overpromising and underdelivering, a duality that is likely to jeopardize the credibility of the law.

\textsuperscript{148} \textit{Jurisdictional Immunities}, supra n 8 at para. 18 (Judge Keith). See also, ibid. (majority).
\textsuperscript{149} Sassoli, supra n 90.
and hinder efforts towards peace. Secondly, as the Lubanga reparations decision indicated, auxiliary needs-based measures, such as those provided by the TFV, will generally be necessary to round out any ill effects of an RBA. Determining the nature and extent of such measures would require a high degree of sensitivity to the cultural, social and political circumstances in question.

Identifying the limitations of an RBA under IHL invites reflection on the obverse question: what is the potential role of such an approach? Further research is warranted to address this question. For instance, does an RBA strengthen compliance with the law, thus reducing harm suffered and potentially easing the transition from war to peace? Further, in what specific situations is an RBA likely to coincide with the needs of survivors? The answers to these questions will be instructive in ascertaining the extent to which an RBA furthers the goals of both IHL and TJ, and whether such an approach offers potential benefits that cannot be achieved through strengthening the existing legal system.

A sensitive RBA, supported by measures to address survivors’ needs, could in some situations advance the goals suggested by advocates of reparations: enabling victims to obtain justice, easing the consequences of injuries, holding perpetrators accountable and supporting compliance with international standards. However, an RBA should only apply in appropriate settings and only represent part of the picture. Those invoking IHL should aim to respond to all who have suffered as a result of conflict, not only those who have suffered due to violations of the law. A sensitive and nuanced approach motivated by humanitarian ideals would be true to the spirit of IHL and, ultimately, more likely to facilitate a transition to peace.