Toward a Universal Doctrine of Reparation for Violations of International Human Rights and Humanitarian Law

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Introduction

In this brief essay I try to make a preliminary case for the development of a universal doctrine of reparation for violations of human rights and humanitarian law that draws on different legal traditions, without being confined to the specific framework of any of them. The critical need for this approach is indicated by the essential nature and purpose of international law. Because human rights and humanitarian law principles are supposed to be universal in validity and application, the doctrine of reparation should not be limited to principles of some legal traditions, to the exclusion of others. In any case, no single legal tradition can fully satisfy the reparation requirements of human rights and humanitarian law, due to the basic incompatibility of the two types of legal systems in such matters as jurisdiction and general principles of liability for compensation. Whereas traditional legal systems envisage their subject and cause of action, for example, in terms of domestic legal systems and, where relevant, conflict of laws principles among different legal systems, human rights and humanitarian law should be based on universal entitlement and jurisdiction.

All major legal traditions recognize the idea of harm and the consequent entitlement of the victim or his/her estate to compensation, in addition to punishment for the perpetrator when the elements of a criminal offence are also satisfied. As is to be expected, however, the scope and requirements of these particular doctrines of responsibility and remedies are determined by a variety of political, philosophical, religious, legal, and other considerations specific to the context of the particular legal system. The nature and practical application of these doctrines are also affected by such factors as the level of institutional capacity and development of the jurisdictions in question, and the cultural or social attitudes toward accountability and remedies.

Emerging out of the state practice, institutions, and general principles of law of West European states during the 17th to 19th centuries, traditional international law continued to draw on the same sources because those were the most familiar

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and accessible to the practitioners and scholars (publicists) engaged in that process. As international law evolved and matured over time, the incorporation of domestic law principles and rules into the adjudication of such international claims continued to supplement or clarify some of the principles and rules already accepted as part of international law.¹ Given the realities of colonial power relations until the mid-20th century, it was not surprising that Islamic, Indian, Chinese and other non-European legal traditions had a scant role in that process. However, with major changes in international law and relations after the Second World War, it is now clear that non-Western legal traditions must be included as sources of “general principles of law of civilized nations” that can contribute to the continued development of international law.²

The point for our present purposes is not only that a universal doctrine of reparation should draw upon the widest possible range of legal traditions of the world, but also that this should be done in ways that ensure the integration of such constituent elements into a coherent universal doctrine of reparation, beyond the constraints of any of those legal traditions,³ whether they be European, non-European, or traditional international law. The traditional international law doctrine is that an international claim arises when an act or omission attributable to one state wrongfully violates a duty owed under international law to another state or its nationals, when that act or omission is the cause of the claimant's injuries, and no justification is available to excuse it.⁴ Whether one adopts this formulation or another, it is clear that traditional international law not only requires a finding of


² According to Article 38 (1) (c) of the Statute of the International Court of Justice, “general principles of law recognized by civilized nations” constitute one of the sources of international law. Despite the problematic term “civilized nations”, this Article is generally acknowledged to be the most authoritative statement of the sources of international law.
