

Unité et diversité du droit international Unity and Diversity of International Law

Ecrits en l'honneur du professeur Pierre-Marie Dupuy

Essays in Honour of Professor Pierre-Marie Dupuy

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CHAPTER TWENTY-TWO

IS THERE AN INDIVIDUAL RIGHT TO REPARATION? SOME THOUGHTS ON THE ICJ JUDGMENT IN *THE JURISDICTIONAL IMMUNITIES CASE*

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1.

The possible existence of an individual right to reparation for victims of egregious breaches of human rights is among the most controversial questions in the law of State responsibility. Classically answered on the basis of theoretical preconceptions regarding the legal status of individuals under international law, the issue needs to be reappraised in its practical aspects in light of ongoing efforts to determine the legal regime of *erga omnes* obligations. Not surprisingly, the issue echoes constantly, even if mostly silently, in recent judgments of the ICJ and in the works of the ILC.

In discussing the existence of an individual's right to reparation, one must confront the difficulty of interconnecting legal systems which apparently developed independently from each other, such as the law of State responsibility and the rules which establish mechanisms of enforcement of human rights protections. Not only does their relative logical autonomy constitute an obstacle to any attempt to identify their mutual relations; their respective legal regimes unfold along different legal paradigms. Whilst the law of State responsibility is hinged on classical interstate relations, international human rights law revolves around the opposite conceptual scheme. At the beginning of the analysis one should therefore be aware that it touches upon the more general issue of the unity of international law—an issue which vividly recalls a major contribution of the scholar to whom these pages are dedicated.¹

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¹ P.-M. Dupuy, "L'unité de l'ordre juridique international, Cours général de droit international public", *Recueil des cours de l'Académie de droit international*, 297, 2002.

2.

A necessary and logical pre-condition of the existence of an individual right to reparation should be the existence of individuals' rights and duties flowing from the primary rules whose breach entails international responsibility. One might presume that a breach of international obligations can entitle an entity to invoke the responsibility of the wrongdoer only if the obligation breached is owed to that entity.

The ICJ came very close to this implication in *Avena* when it recognised that, following a breach of Art. 36 of the Vienna Convention on consular relations, "it is incumbent upon the Court to specify what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States through the non-compliance with those international obligations".²

The existence of an individual right to reparation is neither expressly admitted nor expressly excluded by Art. 48(2)(b), of the Articles on State responsibility. This provision establishes that breaches of *erga omnes* obligations entitle every State belonging to a group of States to which the breached obligation is owed to claim reparation in the interests of the specially affected State or of the beneficiaries of the obligations breached.

One can hardly infer from the use of the word "beneficiaries" the conclusion that the affected non-State entities, unlike the affected States, do not hold a right to reparation. Indeed, the provision does not intend to determine the legal status of individuals in the system of State responsibility. Its purpose is rather to make it clear that the *omnes* not materially injured by the breach are entitled to claim the reparation only in the interest of the entities materially injured. Likewise, Art. 48(2)(b), abstains from taking a position with regard to the individual right to reparation.

The role of materially affected entities in the law of State responsibility is determined by other provisions. Art. 42(b)(i), expressly establishes that specially affected States possess the full panoply of powers and prerogatives connected with international responsibility; therefore, they are also entitled to claim reparation on their own behalf. With regard to non-State entities which, in certain circumstances, are the only entities materially injured, Art. 32(2), states that "[t]his

² International Court of Justice (ICJ), *Avena and other Mexican nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Reports 2004, 12, para. 128. It is common knowledge that this holding was anticipated by its previous judgment in *LaGrand*, where the Court found that Art. 36(1), of the Vienna Convention on consular relations "creates individual rights, which, by virtue of Art. I of the Optional Protocol, may be invoked in this Court by the national State of the detained person", ICJ, *LaGrand case (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports 2001, 466, para. 77; see also para. 89.

part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State".

Art. 32(2), thus makes clear that, in spite of the term "beneficiaries", Art. 48(2)(b) can in no way be read as implying that individuals do not have a right to reparation. The term "beneficiaries" employed by Art. 48(2)(b) accordingly appears to have a polysemic significance. Rather than settling the theoretical dispute on the existence of an individual right to reparation, it leaves the field open to many and even contradictory options.³

3.

If a right to reparation existed, it would not necessarily have peremptory nature. In its judgment of 3 February 2012 on the *jurisdictional immunities of a State*,⁴ the ICJ pointed out that "against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted".⁵

This holding appears fully reasonable. However, it can hardly be read as ruling out the existence of an individual right to reparation. It merely indicates, in generic terms, that the obligation to reparation, if existent, can be derogated by an interstate agreement. This also seems to be in accordance with the function of

³ See G. Gaja, "The Position of Individuals in International Law: An ILC Perspective", in *European Journal of International Law*, 21, 2010, 11. The Articles on State responsibility only offer a methodological direction, which emerges from the provisions that determine the conditions under which States can invoke reparation for unlawful act. Both Articles 42 and 48 expressly point out that the right to reparation is inherent in the circumstance that the obligation breached is owed to that State, individually or as a member of a group whose collective interest the obligation was designed to protect. The methodology adopted by the ILC is thus based on the simple syllogism that the holder of a right also has the secondary right to reparation, in its own interest or in the interest of the entity in whose interest the primary obligation was established. This methodology does not give us a final word on the existence of an individual right to reparation. However, it indicates that, in the legal paradigm normally applied in international law, the right to reparation is inherent in the existence of primary right. Should one admit that international law confers rights directly to individuals, the dissociation of the individual right to reparation would make it necessary to demonstrate that this paradigm does not apply to individuals.

⁴ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 Feb. 2012 (not yet reported), available on the ICJ website.

⁵ *Ibid.*, para. 94.

diplomatic protection, conceived of as the right of a State to invoke responsibility of another State for injuries to its nationals. Diplomatic protection traditionally includes the right to conclude lump sum agreements and to prevent nationals of the acting State from individually pursuing their own claim.

In principle, this solution should also apply to the right to reparation flowing from a breach of human rights. The mere fact that a right to reparation flows from a serious violation of *jus cogens* is not, by itself, an element capable of bestowing peremptory nature upon the secondary rule on reparation. It should follow that States can conclude lump sum agreements and can agree to bar individual claims.

4.

However, this conclusion would apply only if the duty to reparation were owed solely to the State injured by a breach. Such is the case where a State exercises diplomatic protection for damages suffered by its nationals in consequence of a breach of the minimum international standard on the treatment of foreigners.

The legal regime of responsibility to reparation for injuries suffered by individuals in consequence of a breach of *erga omnes* obligations is based on a different scheme. Art. 48(2) makes clear that the obligation to reparation is owed *erga omnes*. Consequently, every State of the international community is entitled to claim performance of this obligation without the need to have a special interest. As the ICJ said in its judgment of 20 July 2012 on *questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, with regard to the obligation to cease the unlawful act, "[i]f a special interest were required for that purpose, in many cases no State would be in the position to make such a claim".⁶ That same rationale should also apply to the obligation to reparation.⁷

Art. 48(2)(b) was probably intended to apply to situations in which no State can claim to be materially affected by the breach and therefore no State can claim

⁶ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012 (not yet reported), para. 69.

⁷ Interestingly, the Court found that the essence of the *erga omnes* character of an obligation resides precisely in the fact that it establishes a common interest which each of its addressees is enabled to pursue. This logic distinguishes the legal reasoning followed in this case from the legal reasoning famously followed by the ICJ in *Barcelona Traction* (ICJ, *Barcelona Traction, Light and Power Company, Limited, Belgium c. Spain*, new application, Judgment, 5 Feb. 1979, ICJ Reports 1970, 3). In that case, the *erga omnes* character of an obligation was rather based on the importance of the interest protected and not so much on its structure. Having said that "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection", the Court went on to say that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*" (para. 33).

a privileged status with regard to reparation. In this situation, the existence of a legal interest of every State of the international community to claim reparation in the interest of the victims typically expresses the existence of a collective dimension of a breach of *erga omnes* obligations.

There is no reason to suppose that this collective dimension disappears in the presence of a specially affected State.⁸ This risk materialises when a State claims reparation for injuries arising out of a breach of human rights suffered by its nationals.

In *Diallo*,⁹ the ICJ held that diplomatic protection also covers a claim to reparation for a breach of human rights. This solution intuitively satisfies the need to concentrate in one and the same entity, the national State, all the claims of the State for injuries suffered by its citizens. This conflation, however, presents the drawback that the *erga omnes* dimension of human rights is sacrificed to the interest of the national State of the individuals injured. In an ambiguous passage of its judgment in the *jurisdictional immunities* case, the ICJ found that,

[w]here the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality.¹⁰

This passage seems to be based on the premise that reparation for injuries to individuals is owed to the national State regardless of the nature of the obligation breached, be it an obligation owed to that State or be it an obligation *erga omnes*.

This conclusion is not uncontroversial. The national State of the individuals materially affected has a dual interest in claiming reparation: one in its capacity as national State, and one in its capacity as a member of the international com-

⁸ One can even doubt that the notion of specially affected State applies to breach of *erga omnes* obligations established in the interest of individuals, by nature, are not designed to protect interests of one or more States specifically identified. Therefore, a breach of human rights can hardly be deemed to offend the individual interest of the national State of the individuals injured. That State can individually invoke the responsibility of the wrongdoer on a different account, namely by virtue of the concomitant violation of the minimum standards of treatment of foreigners. However, this is a distinct violation of international law arising out of the same conduct. It is not uncommon for the same conduct simultaneously to offend a plurality of rules protect-

ing individual or collective interests.
⁹ ICJ, *Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of Congo)*, Judgment, 19 June 2012, not yet reported.

¹⁰ ICJ, *Jurisdictional Immunities of the State*, para. 102.

munity and possessing an unqualified legal interest. To assign exclusive relevance to the first interest is inevitably to the detriment of the other.

The conclusion would also run against the logic of the system of protection of human rights. It would give to the national State the exclusive power to interfere with the right to claim reparation conferred to all the States of the international community in the interests of the individuals affected. If there is a plurality of entities that have a right to claim reparation on behalf of individuals affected by wrongful acts, the determination of the national State can hardly be binding on these entities. No instrument for the protection of human rights confers to the national State such an intrusive power to interfere with the consequence of a violation of fundamental rights.

Art. 16 of the 2006 ILC draft Articles on diplomatic protection seems to point in a different direction. According to Art. 16, "[t]he rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles". This provision is designed to guarantee that remedies open to entities other than the national State of the individuals injured, including individual claims, are not barred by the fact that the State of nationality is exercising diplomatic protection. If the right to bring a claim by other entities is not barred by the mere exercise of diplomatic protection, there would be little reason for concluding that such a right would be barred by a lump sum agreement.

5.

Art. 16 of the 2006 draft Articles on diplomatic protection further reinforces the idea that reparation for breach of rights conferred in the interest of individuals cannot be disposed of by their national State. It tends to recognise the existence of a potential conflict between the exercise of concurring claims by the individuals injured by their national State, and by other States and non-State entities having a legal interest. It further tends to recognise that such a conflict cannot be conveniently settled through a rule of conflict giving priority to diplomatic protection and, ultimately, to the claim of the national State over other concurring claims.¹¹

¹¹ In its Advisory Opinion of 11 April 1949 on the *Reparation for injuries suffered in the service of the United Nations*, ICJ Reports, 1949, 174, the ICJ seems to have recognised the existence of concurring claims to reparation by a plurality of entities, none of which has the power to interfere or to bar the claim of the others. The Court found that, "[i]n such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim".

There are other options as well. One is shaped by Art. 19(b) and (c) of the Draft articles on diplomatic protection.¹² These provisions recommend that States take into account the view of individuals in the decision to enter into an action of diplomatic protection and in the determination of the reparation. It further recommends that the funds obtained by the national State be transferred to these individuals. One could wonder whether this recommendation does not turn into an obligation when the reparation is claimed for breach of individual rights. Such an obligation would create a rule of conflict which, while recognising that the action of the national State has a leading role in diplomatic protection, nonetheless makes the determination of the reparation conditional on the assent of the individuals injured by the breach. In the relations between the individuals and their national State, this rule would conveniently accommodate the contradictory needs emerging from the existence of individual rights with the classical rule on diplomatic protection. In *LaGrand*, the ICJ based the existence of an individual right on the recognition that individuals were empowered to oppose the exercise of the national State's action.¹³ In the reverse order, such a logical correlation could apply to the system of reparation for breach of human rights.

6.

It thus seems that international law has developed a sophisticated set of instruments and procedures designed to deal with reparation owed in consequence of a breach of human rights. These instruments correspond to the right of the national State to exercise diplomatic protection, the right of States and non-State entities to claim reparation on behalf of the individuals affected, and the right of these individuals to assent to the determination of the reparation and to be its final beneficiaries. In other words, international law has developed a complex apparatus of instrumental procedures and remedies aimed at making effective the benefit of reparation to individuals affected by a breach of human rights. Yet the question remains whether individuals have a right to reparation or whether they remain the mere beneficiaries, even if in some manner they are

¹² "A State entitled to exercise diplomatic protection according to the present draft, should take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions".
¹³ Para. 77. The Court noted that under Art. 36(1)(b) of the Vienna Convention on consular relations "[t]he said authorities shall inform the person concerned without delay of his rights under this subparagraph". In the view of the Court, this provision is interpreted with Art. 36(1)(c), according to which the right of the sending State to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action".

involved in the process of its determination. There are a number of arguments for answering the question in the affirmative.

The existence of an individual right to reparation seems to emerge as the obvious implication, at the secondary level, of the existence of individual rights at the level of primary rules. This inference seems to meet elementary requirements of legal logic, which support the idea that a breach of individual rights which entails a duty to reparation cannot but create a right to reparation for the same individuals whose primary rights have been affected. This assumption can be enhanced by the observation of the existence of collective procedures of enforcement of the duty to reparation, which seem to obviate the structural weakness of individuals as actors in international relations. It would be incoherent to consider the existence of a collective procedure of enforcement as an element which nullifies an individual right to reparation rather than one which enhances its effectiveness.

In other words, the existence of instruments and procedures which could give full effect an individual right to reparation is a powerful argument in favour of the existence of such a right. This view would lend systematic coherence to the legal regime of reparation and would make sense of the recent developments in international law. Yet the use of a deductive method, in the presence of scant and inconsistent practice, can raise doubts as to its sufficiency to establish conclusively such a right. Different views in this regard have been held in the international scholarship.¹⁴

The enduring uncertainty regarding the existence of an individual right to reparation symbolically depicts the disorderly and somewhat tumultuous development of contemporary international law. The eruption of new categories of *erga omnes* obligations, established for the protection of fundamental interests of individuals, has had the inevitable effect of altering the classical scheme, without however replacing it with one endowed with an equal degree of coherence and comprehensiveness. The debate on the existence of an individual right to reparation seems destined to live long and prosper.

¹⁴ Diverging conclusions have been argued, for example, by C. Tomuschat, "Reparation for Victims of Grave Human Rights Violation", *Tulane Journal of International and Comparative Law*, 10, 2002, 157, and by R. Pisillo Mazzeschi, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview", in *Journal of International Criminal Justice*, 1, 2003, 339. See also the *Declaration of international Law Principles on Reparation for Victims of Armed Conflicts (Substantive Issues)*, adopted by the 74th Conference of the *International Law Association*, held at The Hague, The Netherlands, on 15–20 August, 2010. See, in particular, Art. 6, which states that "[v]ictims of armed conflict have a right to reparation from the responsible parties", and the commentary to it, with a detailed analysis of practice, prepared by R. Hofmann, Corapporteur, available from the website of the Association at: <http://www.ila-hq.org>.