

Frameworks for Accountability: How Domestic Tort Law Can Inform the Development of International Law of State Responsibility in Armed Conflicts

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The development of international law of state responsibility in warfare thus far has either implicitly relied on tort law and theory as a means of comprehending elements of liability, or explicitly suggested that reparations in international law could follow domestic tort law in form and substance. In this Article, I argue that both approaches raise concerns about coherence and clarity and suggest that a Contextual Reliance Approach is required. Accordingly, the principles and concepts underlying domestic tort law can be adapted and applied to international law of state responsibility, but the unique features of warfare must be accounted for. In doing so, the Contextual Reliance Approach crystalizes the boundaries and unique functions of tort law and international law of state responsibility.

By deploying the Contextual Reliance Approach, I clarify four main contested doctrinal and theoretical issues in the field of international law of state responsibility during warfare. First, the right to reparations under international law should only be extended to states. Second, duty to make reparations should only arise when a loss is inflicted by infringing the law of war. Third, fully correcting wrongs requires distinguishing between just and unjust wars, imposing compensatory damages for the former but allowing additional aggravated damages for the latter, while maintaining a prohibition on punitive damages. Fourth, global damages can be awarded, but only for losses that cannot be quantified based on market value.

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I. INTRODUCTION

Reparations under international law for civilian injuries during warfare are suffering from an identity crisis as two different schools of thought push it in different—often opposing—directions. One school of thought implicitly relies on domestic private law, drawing on it as a source of inspiration through which some international law norms can be comprehended.¹ I refer to this approach as the “Weak Reliance Approach.” While the Weak Reliance Approach draws on domestic tort law and theory, it does not require strict adherence to their form and substance. The second approach explicitly suggests that domestic private law concepts and doctrines could be deployed in and adopted by international law. Advocates of this approach advance a view that the duty to pay reparations under international law should follow the form and substance of domestic private law to a considerable degree. This approach is common to eminent scholars

1. While users of the Strong Reliance Approach assert that they are indeed arguing that private law should be adopted into international law, users of the Weak Reliance Approach do not necessarily openly acknowledge that they are drawing on private law to develop international law. For instance, Gabriella Blum and John Goldberg rely on the incomplete privilege of private necessity to interpret and develop international law norms surrounding the Unable or Unwilling Doctrine. Gabriella Blum & John C. P. Goldberg, *The Unable or Unwilling Doctrine: A View from Private Law*, 63 HARV. INT’L L.J. 63 (2022). In doing so, they clearly acknowledge that they are relying on private law to think about international law. Yet, others might simply use concepts and terms from private law without referencing them at all.

who are viewed by many as the founders of international law, such as Grotius,² Pufendorf,³ and Vattel,⁴ but was also adopted by contemporary writers.⁵ I shall refer to this approach as the “Strong Reliance Approach.”

As a result, both the basic structure for reparations under international law during armed conflicts, as well as the character and application of particular doctrines, are questioned and in flux. In this Article, I argue that the Weak Reliance Approach advances an international law liability regime that is under-inclusive and fails to capture and offer a remedy for all the wrongs inflicted on civilians during armed conflicts. In contrast, the Strong Reliance Approach is over-inclusive and, if followed, would offer remedies when none would be required.

Instead, I suggest that a “Contextual Reliance Approach” should be adopted, according to which domestic tort law could be relied upon while accounting for the unique moral and legal features of warfare. In doing so, the Contextual Reliance Approach is drawing on tort law and theory explicitly but requires stricter adherence to the form and substance of tort law and theory than the Weak Reliance Approach. Still, the Contextual Reliance Approach is attentive to the realm in which it operates, and as a result is less dogmatic than the Strong Reliance Approach. Consequently, the Contextual Reliance Approach could enable the development of a reparations regime under international law with greater clarity. By understanding how and why the theoretical basis for liability should operate differently in peacetime and in warfare, the Contextual Reliance Approach would develop international law more coherently using domestic tort law

2. Grotius views warfare as a means of settling legal disputes in instances that litigation fails, and if a state exceeds what it is allowed to do during war an obligation of reparation arises just like it would under ordinary private law. See: HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE*, bk. II, ch. I, 81–82 (1625) (Stephen C. Neff ed., 2012). In Bk. II, Ch. XVII, Grotius provides his account of what amounts to a wrong that brings about an obligation of reparation ordinarily—and it is this natural law account that informs his assertions throughout the three books about why reparation might be warranted for a breach of international law. What makes a private law wrong makes it an international law wrong as well. *Id.* bk. II, ch. XVII.

3. SAMUEL FREIHERR VON PUFENDORF, *OF THE LAW OF NATURE AND NATIONS*, bk. V, ch. IX, 767 (C. H. Oldfather & William Abbott Oldfather trans., 1688) (arguing that states at war do not owe each other damages for what they have justly caused as they are viewed as engaging in a contract of chance to settle their dispute and implicitly agreed not to pay damages).

4. EMER DE VATTEL, *THE LAW OF NATIONS*, bk. III, ch. IX, § 185, bk. III, ch. XIII, §§ 193, 195 (1758) (Béla Kapossy & Richard Whatmore eds., 2008) (arguing that an individual who inflicts an injury, generally, has an obligation to make reparations and the same is true for a prince who wages unjust war; that war is a contractual means of collecting a debt; and that no state can complain on taking of property through war as through the law of nations all states implicitly consented to the terms of warfare).

5. See ARTHUR RIPSTEIN, *KANT AND THE LAW OF WAR 7–9* (2021). See generally Asaf Lubin, *The Reasonable Intelligence Agency*, 47 *YALE J. INT'L L.* 119 (2022); see also Rebecca Crotofof, *War Torts*, 97 *N.Y.U. L. REV.* 1063 (2022).

and theory.⁶

Two recent examples demonstrate the challenges raised by the Weak Reliance and Strong Reliance Approaches to reparations for civilians who were harmed during warfare. The first is the International Court of Justice's (ICJ) recent decision in the *Armed Activities* case, which has yet to be analyzed in depth.⁷ I argue that the *Armed Activities* majority opinion develops doctrines relating to the burden and standard of proof, as well as the quantification of damages. The Weak Reliance Approach could illuminate some of the developments of international law of state responsibility in the *Armed Activities* case, but it would not be able to address some of the clearest critiques that were advanced against it.

The second example is Rebecca Crootof's argument that international law has an accountability gap, as states only owe a duty of reparation for violations of international law and civilians have no right to bring a claim directly for the losses they sustain during warfare.⁸ The solution, according to Crootof, is to create a new liability regime under international law, which she calls "War Torts," wherein states would owe a duty of compensation for injuring civilians or damaging their property.⁹ Crootof's suggestion calls for international law to create a new regime in the image of domestic tort law.¹⁰

My argument is that the *Armed Activities* case's reliance on tort law and theory is too loose, whereas Crootof's suggestions take too strong of an approach that might not leave much room for adaptation in the armed conflicts context. The ICJ did not embrace the full potential of tort law and created a vague regime that was not fully articulated or justified. Crootof's proposal uses tort law instrumentally, and the distinction between permissible harms and impermissible wrongs, as well as between the moral spheres of peace and war, are blurred. Each of these examples will now be discussed in turn.

6. My argument is not that tort law and theory must be adopted to develop international law. Rather, I argue that if one was to develop international law of state responsibility, as has been done, the Contextual Reliance Approach could yield a more coherent and optimal regime. I will not analyze whether private law and theory are appropriate and relevant to international law, or whether domestic tort law should be used to hold states liable. Such questions go beyond the scope of this Article, which acknowledges that private law and theory have been in use to develop international law and that states have been held liable in tort.

7. Existing scholarship on state responsibility has tended to have a narrow focus, either seeking to offer a descriptive account of the liability regime or an analysis of particular elements of it: Christine Gray, *The Choice Between Restitution and Compensation*, 10 EUR. J. INT'L L. 413, 422–23 (1999); Chiara Giorgetti, *Introductory Note to the International Court of Justice: Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation Owed by the Democratic Republic of the Congo to the Republic of Guinea*, 51 INT'L LEGAL MATERIALS 737 (2012). See generally Yoshifumi Tanaka, *Temporal Elements in the Valuation of Environmental Damage: Reflections on the Costa Rica v. Nicaragua Compensation Case Before the International Court of Justice*, 90 NORDIC J. INT'L L. 257 (2021).

8. Crootof, *supra* note 5 at 1066–69.

9. *Id.* at 1101.

10. *Id.* at 1109–20.

II. INSPIRED BY, BUT NOT COMMITTED TO

The Weak Reliance Approach reveals that international law of state responsibility, as is articulated in the Articles on Responsibility of States for Internationally Wrongful Acts and the ICJ's jurisprudence, has much in common with corrective justice. In particular, the doctrinal and theoretical foundations of international law of state responsibility appear to comply with a highly formal and structural approach to corrective justice, such as the one advanced by Ernest Weinrib.

According to Weinrib, a wrongful injury creates a normative imbalance between the wrongdoer and injured parties, and corrective justice is the obligation to restore balance through, for example, an imposition of liability.¹¹ Liability is bipolar, relational, and correlative, as it can only be understood by reference to the rights and obligations each party has towards the other. The liability of the wrongdoer corresponds to the right to reparation of the injured party.¹²

The ICJ's decision in the *Armed Activities* case is helpful in demonstrating the close links between international law of state responsibility and corrective justice.¹³ The ICJ reiterated well-established principles, according to which the commission of an international wrong creates an obligation of reparation for an injuring state towards a wronged state to undo the wrong as far as possible.¹⁴ It held that when a state breaches international law, it is obliged to make full reparation of the damage its breach caused, thus “wip[ing] out all the consequences of the illegal act.”¹⁵ Reparations are only meant to put the states back in the position they were prior to the wrongful breach of international law.¹⁶

The resemblance is apparent. According to both international law of

11. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 57, 60 (2012).

12. Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES IN L. 107, 116–19 (2001) [hereinafter Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*]; WEINRIB, *supra* note 11, at 60–64; Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 350–51 (2002) [hereinafter Weinrib, *Corrective Justice in a Nutshell*].

13. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2002 I.C.J. (Feb. 9) [hereinafter *Armed Activities* Judgment].

14. *Factory at Chorzów*, Judgment, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13); *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. Rep. ¶ 150 (Sept. 25); *Avena and Other Mexican Nationals (Mex. v. U. S.)*, Judgment, 2004 I.C.J. Rep. ¶ 119 (Mar. 31); *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Judgment, 2010 I.C.J. Rep. ¶ 161 (Nov. 30); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgment, 2018 I.C.J. Rep. ¶ 30 (Feb. 2); *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, arts. 1, 34, U.N. Doc. A/RES/56/83 (Dec. 12, 2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

15. *Armed Activities* Judgment, *supra* note 13, ¶¶ 100, 106. Note, ‘injury’, ‘damage’, and ‘loss’ are used interchangeably in this Article, as well as in the *Armed Activities* case. *Id.* ¶¶ 133–81.

16. While the ICJ holds that reparations are intended to benefit both individuals and states who suffer from international wrongful acts, individuals are the ultimate beneficiaries—not right bearers. *Id.* ¶ 102. They do not have the right to commence proceeding nor are awarded reparations directly.

state responsibility and corrective justice, liability is bipolar, relational, and correlative. An obligation of compensation arises for a commission of a wrong, by the wrongdoer towards the wronged party, and only to the extent that is required to make it so as if the wrong never happened. But the resemblance does not end here.

Both corrective justice and international law of state responsibility resist the availability of punitive damages. Punitive damages are incompatible with corrective justice, as they are not bipolar, relational, or correlative.¹⁷ Put differently, punitive damages are not based on or bound by the infringement of rights of the claimant and the duty the defendant owes to the claimant not to wrong them. Rather, they have entirely different goals of deterrence and retributive justice.¹⁸ Further, punitive damages can vastly exceed the scope of compensatory damages, and in some respects, they must be excessive to reach their desired effect. This position towards punitive damages is in line with that which has been advanced in the ICJ's jurisprudence, as well as by the Statute of the ICJ, which grants it power to declare the law, settle disputes, and award reparations,¹⁹ but not impose punishment on states. Indeed, reparations under international law of state responsibility cannot exceed the "costs" that followed their breach. Compensation, which is one of the possible forms of reparations,²⁰ can only be compensatory.²¹ The obligation that states are under is limited to eliminating the costs of their breach. There is no conceptual room for punitive damages, which go beyond the scope of these costs.

The Weak Reliance Approach also helps to demonstrate why the *Armed Activities* case is a jurisprudential milestone. By using the Weak Reliance Approach's conceptual framework, it becomes possible to better articulate and appreciate the character and scope of how the *Armed Activities* case adds

17. WEINRIB, *supra* note 11, at 135 n.25; ARTHUR RIPSTEIN, PRIVATE WRONGS 259–61 (2016); ROBERT STEVENS, TORTS AND RIGHTS 85–88 (2007). For an account that holds that punitive damages are consistent with corrective justice if they are seen as a response to a moral injury inflicted on the claimant, see Pey-Woan Lee, *Contract Damages, Corrective Justice and Punishment*, 70 MOD. L. REV. 887, 894–98 (2007).

18. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 490–93 (2008); Opati v. Republic of Sudan, 140 S. Ct. 1601, 1609 (2020); Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, 736 (Can.); James Goudkamp & Eleni Katsampouka, *Punitive Damages: Ten Misconceptions*, in PUNISHMENT AND PRIVATE LAW 187, 208 (Elise Bant et al. eds., 2021). Other goals for punitive damages have also been recognized, such as restraining the misuse of public power and strengthening the rule of law. R v. Sec'y of State for the Home Department [2011] 4 All ER 1, 50; Rookes v. Barnard [1964] UKHL 1 (HL) 40–41. On the use of punitive damages in the context of warfare, see Haim Abraham, *Tort Liability, Combatant Activities, and the Question of Over-Deterrence*, 47 L. & SOC. INQUIRY 885, 906–09 (2022).

19. Rome Statute of the International Criminal Court, arts. 36–38, July 17, 1998, 2187 U.N.T.S. 3.

20. The ICJ holds reparations to include restitution, compensation, and satisfaction, and while all three seem to be available simultaneously, there appears to be a preference for restitution over compensation. *Armed Activities* Judgment, *supra* note 13, ¶ 101.

21. *Id.* ¶ 102.

to the doctrinal foundations of international law of state responsibility.

For instance, the Weak Reliance Approach demonstrates that the ICJ clarified what the “standard of care” that is required of states is, a breach of which will result in a duty for the infringing state to make reparations to the wronged state. The ICJ distinguished between ordinary obligations during peacetime and warfare, and obligations owed during belligerent occupation. Ordinarily, the standard of care is compliance with international law obligations.²² However, in occupied territories, the standard of care is higher, as states ought to *ensure* that human rights law and international humanitarian law are adhered to within an occupied territory, even by non-state actors.²³

The Weak Reliance Approach also reveals that a similar distinction between ordinary and belligerent occupation obligations was drawn in relation to the “burden and standard of proof” that must be established for compensation to be imposed. The ICJ reiterated that generally, the burden of proof is on the party who alleges a fact, and it must provide the evidence to support its claim, but that in occupied territories, the burden of proof falls mostly on the occupying state.²⁴

However, the ICJ does not require strict adherence to either rule under all circumstances. Instead, it held that these rules are “flexible,” enabling burden shifting to another party when it might be in a better position to establish a fact, or if the subject-matter or circumstances of a dispute support flexibility.²⁵ Furthermore, the burden of proof could be shared by all parties when the circumstances are appropriate, though what circumstances might be deemed as appropriate was not clearly articulated by the court.²⁶ Such flexibility is a characteristic of the Weak Reliance Approach, but as I will argue below, this flexibility raises concerns about clarity and consistency of the liability regime.

As for the standard of proof, the ICJ held that a state must ordinarily establish “a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered.”²⁷ But this is not an absolute rule, and the degree to which the establishment of a causal connection is required depends on both the rule that was violated when the injury was inflicted as well as the scope and character of the injury.²⁸ For instance, for wrongful injuries that occurred in an occupied territory, the injured state need only

22. *Id.* ¶ 73 (distinguishing between occupied territories and other areas in which losses were inflicted); *id.* ¶ 93 (holding that the ICJ will award compensation in instances that do not involve belligerent occupation when the loss was inflicted by “the internationally wrongful act of a State”).

23. *Id.* ¶¶ 73, 78.

24. *Id.* ¶¶ 78, 115.

25. *Id.* ¶¶ 116–17.

26. *Id.* ¶ 117.

27. *Id.* ¶ 93.

28. *Id.* ¶¶ 93, 120.

prove that the injury happened.²⁹

Following this line of flexibility towards rules, the ICJ also held that in some cases in which there are evidentiary difficulties in establishing the exact scope (or materialization) of wrongs, global sums of damages could be awarded without having to pinpoint and calculate each and every wrong. In cases of mass injuries, the injured state is not required to establish the existence and extent of each injury. Instead, the Court can award compensation based on its general appreciation of the existence and extent of the injury suffered from a range of possibilities allowed by the evidence at hand.³⁰

The Weak Reliance Approach allows for such flexibility in rules that would not be permitted under domestic tort law, but it therefore cannot assist with the criticisms in the declarations and separate opinions of Judges Tomka, Salam, Robinson, and Yusuf. These judges expressed reservations regarding the consistency, coherence, and clarity that the flexible rules advanced by the court in the *Armed Activities* case generate.³¹ The strongest critiques were articulated in relation to the quantification of global sums, which were described as “snatched from thin air,”³² and as failing to correspond with and address the wrongs in full.³³ These criticisms followed ICJ ordering Uganda to pay the DRC 325 million US dollars for wrongful injuries to people, property, and the environment, without the Court stating explicitly how it quantified the global sums awarded.³⁴

There is merit in these critiques. In applying theory to practice, formal and structural commitments to domestic tort law and theory have been loosened. The ICJ’s opinion in *Armed Activities* advanced concrete general rules, as well as wide exceptions that make the regime almost entirely flexible and fluid. In doing so, the ICJ maintains ultimate discretion. As the Weak Reliance Approach does not require strict adherence to the form and substance of domestic tort law and theory, these developments would not be deemed as necessarily problematic. Still, it does not address the criticisms but simply sets them aside. The *Armed Activities* case essentially created a moving target for states that wish to obtain compensation for international wrongs they have sustained. The court seems to view the role of the exceptions it created as limited, since they would only arise in complicated

29. The occupying state then bears the burden of establishing that the injury did not materialize due to its failure to meet its obligations as an occupying power, and failing to provide evidence will support a presumption that the standard of care was breached. *Id.* ¶¶ 78, 116.

30. *Id.* ¶¶ 106, 114.

31. *Id.* at 140, ¶ 9 (separate opinion by Tomka, J.); *id.* at 185, ¶¶ 18, 21, 23 (separate opinion by Salam, J.); *id.* at 165, ¶ 15 (separate opinion by Robinson, J.); *id.* at 145, ¶¶ 21, 25–26, 36, 41–42 (separate opinion by Yusuf, J.).

32. *Id.* at 165, ¶ 15 (separate opinion by Robinson, J.).

33. *Id.* at 145, ¶¶ 25–26 (separate opinion by Yusuf, J.).

34. *Id.* ¶ 405.

cases, such as war.³⁵ However, this view is unconvincing.

Firstly, the compensation regime that was established will not fully address the wrongs that have been inflicted or their accurate scope. The ICJ held that the standard of proof is higher in the merits phase, in which the court finds whether a state committed an international wrong, than in the compensation phase, when the scope of loss is established and calculated.³⁶ As the compensation phase cannot be pursued unless the merits phase was successful, losses that do not meet the higher bar in the merits phase will go uncompensated even if they would have been recoverable in the compensation phase. The result is an under-inclusive compensation regime.

Secondly, the ICJ seems to treat warfare as an exceptional phenomenon that rarely occurs, and as such will not be a significant element in the court's compensation jurisprudence. This view seems to maintain the effectiveness of general rules to most cases, and the necessity for flexibility in rare and complicated cases. Unfortunately, armed conflicts are more common than the court seems to acknowledge.³⁷ If indeed warfare is prevalent, there is a risk that the exception to the rules will become the rule.

Thirdly, by characterizing warfare as a rarity and outlier in the international law on state responsibility regime, a coherent account of what would amount to an international wrongful loss during warfare was not fleshed out. For instance, the ICJ did not clarify if an infringement of either *jus ad bellum* or *jus in bello* outside occupied territories would amount to an international law wrong.³⁸ Nor did the Court specify whether a continuation

35. *Id.* ¶ 94.

36. Note that the ICJ does not use ordinary standard of proof terms such as 'beyond reasonable doubt' and 'balance of probabilities.' Instead, for the merits phase, the standard is what the court deems to be to "its satisfaction," "persuasive evidence," "convincing evidence," and "credible evidence." *Id.* ¶¶ 71, 209–11. In contrast, in the reparations phase, the ICJ holds that the standard is lower than in the merits phase, without providing clearer guidance beyond rejecting a need to identify exactly the time, location, and scope of the injuries, as well as the identity of the parties involved. *Id.* ¶¶ 114, 124.

37. For instance, the facts of the *Armed Activities* case are similar to those of the Russia-Ukraine war, in which one state engages in warfare while acting in violation of *jus ad bellum*, *jus in bello*, and the ICJ's provisional order. *Id.* ¶ 1; STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10710, THE LAW OF WAR AND THE RUSSIAN INVASION OF UKRAINE (2022).

38. Recently, Adil Haque suggested that Russia could be liable to make reparations for all of the damage it caused directly during combat, regardless of whether its use of force was a violation of international humanitarian law. Adil Ahmad Haque, *An Unlawful War*, 116 AJIL UNBOUND 155, 155 (2022). Haque's interpretation of the *Armed Activities* case seems accurate, but only in relation to states' liability for losses inflicted in occupied territories. Haque based his suggestion on paragraphs 145, 173, and 214 of the *Armed Activities* case [*Id.* at 155]. Yet, paragraphs 145 and 173 reiterate that an obligation of reparation arises out of international wrongful acts, without clearly stating that such an obligation arises merely out of inflicting losses while engaging in an unlawful war. Rather, the paragraphs discuss *ad bellum*, *in bello*, and human rights violations, and the obligation of reparation is made in relation to the commission of an international wrongful act generally. In contrast, in paragraph 214, the ICJ explicitly holds that injuries suffered in occupied territories will establish an obligation of reparations only in instances in which only *jus ad bellum* was infringed.

It seems reasonable to conclude that Haque's interpretation should be qualified as follows. An obligation to make reparations under international law arises when a sufficiently direct and certain

of armed activities in breach of the ICJ's order to the contrary means that all losses following this breach are wrongful and compensable.³⁹ Treating warfare as a rarity, as the ICJ seem to view it, and therefore refraining from identifying a need to fully articulate the norms relating to reparations for it, will inevitably fail to capture and redress the true extent of the wrongs caused in armed conflicts.

III. ADOPTING WITHOUT ADAPTING

A recent and helpful example of the Strong Reliance Approach is Rebecca Crootof's argument in her article entitled "War Torts." In her article, Crootof offers a framework that picks up where existing international law stops, aiming to create a new liability regime under which states will owe a duty of compensation for injuring civilians during warfare.⁴⁰ The ideal regime, according to Crootof, will be one that imposes a duty of compensation on states towards civilians for losses inflicted during armed conflicts regardless of whether combatant activities complied with international law.⁴¹ She argues that such a regime is ideal for a range of reasons. For instance, holding states liable, rather than individual combatants, could assist in overcoming evidentiary and causal challenges, ensure the existence of a solvent defendant, and place the burden on a defendant that is well-situated to avoid wrongful conduct and spread the costs of liability.⁴² Moreover, by imposing a duty of compensation whether the actions that led to their losses were lawful or unlawful, Crootof argues that states could be indirectly incentivized to act with greater care, and many factual and legal questions would not arise.⁴³

causal nexus exists between the breach of an international norm and the injury suffered. If warfare is *ad bellum* unjust, liability could be imposed for any loss that is inflicted in an occupied territory. However, for losses inflicted outside of belligerently occupied territories, it is unclear whether liability can be imposed if warfare complied with *jus in bello* and international human rights law.

Haque's interpretation might also meet some resistance given arguments that go beyond a textual analysis of the Court's ruling. See Martins Paporinkis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83 MOD. L. REV. 1246 (2020); Seth Lazar, *Skepticism About Jus Post Bellum*, in MORALITY, JUS POST BELLUM, AND INTERNATIONAL LAW 204 (Larry May & Andrew Forcehimes eds., 2012).

39. These circumstances arise after a breach of the ICJ's ruling in *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)*, Order, 2022 I.C.J. Rep. 208 (Mar. 16).

40. Crootof, *supra* note 5, at 1070.

41. *Id.* at 1109.

42. *Id.* at 1110–11.

43. *Id.* at 1113. However, Crootof doubts that a war torts regime will directly incentivize states to act more carefully. *Id.* at 1112. This argument is supported by findings from theoretical and empirical analyses on the possible deterrent effects of tort liability on state actors in relation to whether and how to engage in combat. Abraham, *supra* note 18. Still, this study has shown that a war torts regime can have regulatory side-effects on state actors that could not be properly defined as deterrence in the ordinary sense to which it is referred to by tort scholars. *Id.* at 913–15.

Crootof leaves several details of her ideal regime to be filled in future work. For instance, she flags the advantages and disadvantages of opting for a strict liability rule or a reasonable care standard, with the former being more plaintiff-oriented and the latter being more defendant-oriented.⁴⁴ Crootof also does not take a stand on a range of doctrinal and institutional questions, such as which body should oversee claims, what evidentiary rules it should have, and what remedies should be available.⁴⁵ Additionally, while Crootof clearly articulates who should owe a duty of compensation, she does not clarify who should hold the corresponding right to bring a claim.⁴⁶

Two main critiques could be raised in relation to Crootof's war torts regime, with the first being general and the second specific to the challenges raised by the Strong Reliance Approach. Crootof skillfully articulates the various tort liability regimes that could be adopted under international law, as well as the different justifications that support such development. She articulates the overarching advantage to her suggested regime as mitigating and minimizing civilians' harms, through incentives to states to act more carefully, provision of remedies to civilians, and improving information about civilian harms in conflict zones.⁴⁷ Arguably, these aims are more likely to be achieved if individuals would have a right to claim compensation against the states that harmed them directly. Politics will not be a factor in determining whether a claim will be pursued, and compensation will be paid directly to the injured individuals as opposed to being allocated at the discretion of her state.

However, Crootof does not explicitly argue that a right to claim compensation should be granted to civilians. Instead, she leaves open the possibility that this right will be granted either to the injured individuals or their states. If only states will have a right to bring a claim directly, then Crootof's main motivation in advocating for a war tort regime—minimizing civilians' harm—would not be as effective as it could be. Under existing international law, states already owe a duty of compensation for injuring civilians during armed conflicts. However, as the *Armed Activities* case demonstrated, this duty is qualified as it is only owed to other states upon infringement of international law. Crootof's framework is more expansive than existing international law as she includes losses that were inflicted without violating international law. Still, part of the force of her framework would be lost if only individuals' states have the right to bring a claim.

Second, Crootof is arguing that domestic tort law doctrines and ideas can be deployed through international law for losses inflicted on civilians during warfare. The Strong Reliance Approach is challenging, as it is strictly

44. Crootof, *supra* note 5 at 1118–20.

45. *Id.* at 1140–41.

46. *Id.* at 1140.

47. *Id.* at 1102–04, 1120–24.

committed to the form and substance of tort law and does not account for the context in which its deployment is sought. As a result, theory and practice could be misaligned.

For instance, Crootof argues that a duty of compensation should arise when a loss was inflicted on civilians through both lawful and unlawful acts.⁴⁸ She justifies this broad duty of compensation based on existing domestic tort law practices:

Domestic tort law regularly holds entities strictly liable for injuries **incidental to permitted action**: It is not unlawful to own a dog, to build a reservoir, to put on a fireworks show, or sell a product, but if one entity causes harm to another in the course of engaging in these lawful activities, there may be an obligation to provide compensation.⁴⁹

The point that Crootof is driving is clear: given that liability can be imposed under domestic tort law for losses that were inflicted through faultless lawful conduct, international law of state responsibility could also impose liability under similar circumstances. In doing so, Crootof places the onus of justification for lack of liability on those who argue that it should not be imposed.

However, by deploying domestic tort law without accounting for the new context in which it will be applied, Crootof's regime blurs the distinction between permissible harms and impermissible wrongs, as well as between the moral spheres of peace and war. Permissible harms are those we accept as side effects of the ordinary use of our body and means, and the chances of their realization are minor. Impermissible wrongs, on the other hand, are violations of others' rights without authority or consent.⁵⁰ Bumping into someone on a busy train station or omitting odors while cooking are permissible harms that are simply the reality of being a part of a larger community. In contrast, punching someone or constantly omitting repugnant odors are impermissible wrongs if these acts are done without authority or consent, as they are not ordinary uses of our body and means. Moreover, if your dog bites someone, liability is not imposed due to the permitted action (i.e., owning a dog), but due to the impermissible infliction of a wrong (i.e., dog bite).

As these examples demonstrate, permissible harms and impermissible wrongs are not necessarily synonymous with lawful and unlawful conduct respectively. There might be an overlap, as is the case with punching

48. *Id.* at 1109.

49. *Id.* at 1115 (emphasis added).

50. Haim Abraham, *Tort Liability for Belligerent Wrongs*, 39 OXFORD J. LEGAL STUD. 808, 822, 826 (2019); RIPSTEIN, *supra* note 17, at 167; Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, *supra* note 12, at 148–50.

someone, where an act is both an unlawful crime and an impermissible private law wrong. However, constantly omitting repugnant odors might be an impermissible private law wrong, but it is ordinarily not an unlawful crime.

By maintaining that permissible harms can be inflicted during warfare just as they would during peacetime takes too strong of an approach to the adoption of tort law. Permissible harms are permissible as either the harms themselves or the chances of their realization are fairly minor. The same cannot be said to be true during warfare. Bumping into someone's shoulder is not the same as bombing their house, and while peacetime is generally safe, warfare is inherently dangerous.⁵¹

Moreover, warfare is not another example of engaging in an ultra-hazardous activity during peacetime. It is an entirely distinct moral and legal sphere. Deducing strict liability rules based on the fact that both activities are dangerous seems to ignore this distinction. During peacetime, liability can be imposed for ultra-hazardous activities by imputing fault to the fact that the loss materialized. Such imputation gives effect to the great magnitude and likelihood of the risk such activities entail, thus creating a rebuttable presumption that if the loss materialized, the defendant acted negligently.⁵² Nevertheless, the basic structure in which tort liability operates during peacetime is that individuals are not allowed to injure one another without consent or authority. Warfare is different as injuring others without their consent (albeit with authority) is not only allowed, in some ways it is the point.

Consequently, if we were to adopt ordinary tort law without accounting for the unique features of warfare, we will necessarily end up with an over-inclusive liability regime for two reasons. First, such a regime sees any infliction of a loss on civilians as wrongful.⁵³ Second, there will be a contradiction in international humanitarian law as some losses inflicted on civilians will be deemed as permissible collateral damage *and* as wrongful losses that require reparations.

According to Crootof, such a regime would not necessarily be over-inclusive, as she holds that, ideally, states should be held liable for *all* losses they inflict on civilians during warfare.⁵⁴ Ultimately, one's approach to the adequate degree of inclusivity will depend on their theoretical approach to the liability regime. But peacetime and warfare are not fungible in the way that Crootof appears to suggest.

Crootof suggests that it is possible to alleviate some of the concerns

51. Abraham, *supra* note 50, at 826.

52. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, *supra* note 12, at 184; JULES COLEMAN, *RISKS AND WRONGS* 371–73 (2002).

53. Abraham, *supra* note 50, at 816–17.

54. Crootof, *supra* note 5, at 1109.

raised here by having two complementary regimes, one that is adversarial and fault-based and one that is administrative and operates with no-fault rules.⁵⁵ This conclusion is apt. Yet, seeing it through seems to transform Crootof's argument from an articulation of a new liability regime into a conceptual directive to develop international law on state responsibility and administrative reparations regimes in the spirit of tort law and theory. Put differently, under this reading of Crootof, seeking inspiration from tort law to develop a reparations regime for civilians in armed conflicts should be done openly and with less hesitation.

IV. LIABILITY IN CONTEXT: A STORY OF WAR AND PEACE

The discussion thus far illustrates that both the Weak Reliance and Strong Reliance Approaches advance liability regimes that encounter similar issues regarding their coherence and clarity due to their respective under- and over-commitment to domestic tort law. These issues can be resolved by adopting a Contextual Reliance Approach, which requires a stronger commitment to tort law and theory, but entails adapting their form and substance to the unique features of warfare. By understanding how and why the theoretical basis for liability operates in peacetime and in warfare, the Contextual Reliance Approach could develop international law more coherently.

I will now turn to highlight some of the ways in which the Contextual Reliance Approach could indicate a way forward for international law of state responsibility during warfare. In doing so, I do not intend to exhaust all that the Contextual Reliance Approach has to contribute to this subject area. Rather, my analysis is simply meant to be illustrative of the Contextual Reliance Approach's potential, leaving room for future analysis.

A. Who Has a Right to Be Compensated

The current position under international law of state responsibility is that violations of international humanitarian law generally give rise to an obligation of reparations by the infringing state towards the infringed state.⁵⁶

55. *Id.* at 1115.

56. Convention Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 91, June 8, 1977; *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, arts. 31, 33(1), U.N. Doc. A/RES/56/83 (Dec. 12, 2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

While the states are the right and duty holders, private individuals are viewed as ultimate beneficiaries despite lacking a clear right.⁵⁷

This is not to say that there are no instances in which international law could create an obligation to make reparations to private individuals. For example, the Rome Statute provides the International Criminal Court with the authority to order defendants to make reparations to their victims.⁵⁸ However, defendants in these cases are private individuals, even if they have held a public office, not states.

A question that could arise in this context is whether private individuals should have a right to compensation under international law, and not just states. The Weak Reliance Approach is likely to leave this question unresolved. While the Weak Reliance Approach draws on domestic tort law and theory to interpret international law, strict adherence to domestic tort law's form and substance is not required. This flexibility would mean that international law could similarly extend a right to individuals, but there is no conceptual obligation to do so under the Weak Reliance Approach.

For the Strong Reliance Approach, the picture is slightly different given that this approach holds that states' responsibility under international law should follow the form and substance of domestic private law to a considerable degree. It could therefore be argued that to see this approach through would require acknowledging that individuals have a right to compensation under international law, not just states. While some scholars have committed to such a view, others like Crootof have not and left the question unresolved.⁵⁹

The Contextual Reliance Approach could shed light on this question and show that the right to reparation and corresponding duty to make reparation should remain between states. According to this approach, the

57. *Armed Activities* Judgment, *supra* note 13, ¶ 102. One way of understanding this view could be that when the wronged state discharges its duty to the injured state, reparations “trickle down” until they reach individuals who have suffered a loss. Another way of interpreting the view that individuals are the ultimate beneficiaries of states' rights under international law is that there is a degree of association between a state and its subjects. For example, Avia Pasternak distinguished between intentional and unintentional citizenship, arguing that the latter cannot be morally responsible for the actions of their state, whereas the former can be based on affiliation, democratic participation, benefit from the wrong, capacity to address the wrong, or special obligations towards the wronged. See AVIA PASTERNAK, RESPONSIBLE CITIZENS, IRRESPONSIBLE STATES: SHOULD CITIZENS PAY FOR THEIR STATE'S WRONGDOINGS? 125–27 (2021). Given this association, inflicting a wrong on an individual is an infliction of a wrong on their state, and providing reparations to the state also addresses the wrong suffered by the individual. However, under both interpretations, individuals might not receive the full cost of the losses they sustained, as the injured state is in the position to decide how to allocate compensation it might receive. For instance, it could dedicate it all to rebuilding infrastructure if so desired, leaving private individuals to shoulder the costs of their losses.

58. Rome Statute of the International Criminal Court art. 75, July 17, 1998, 2187 U.N.T.S. 3.

59. Dieter Fleck, *Individual and State Responsibility for Violations of the Jus in Bello: An Imperfect Balance*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 171, 179 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007); Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529, 536 (2003); Crootof, *supra* note 5, at 1140.

normative framework of international law of state responsibility could follow that of domestic tort law but will require adaptation to the relevant context. The basic structure would follow that of corrective justice, which means that by inflicting a wrong, a bipolar, relational, and correlative duty of redress is triggered.⁶⁰

In this context, a wrong would be constituted when a loss was inflicted by an act or omission that infringed the law of war.⁶¹ Given that the law of war is currently viewed as creating rights and obligations only between states,⁶² it follows that under the Contextual Reliance Approach, an infringement of the law of war by one state is a wrong against another state. Such infringements are not wrongs against individuals.⁶³

Consequently, the Contextual Reliance Approach suggests that only states should have a right to claim reparations. Liability is bipolar in the sense that it is a duty owed by the infringing state to the wronged state. Furthermore, liability is relational as it can only be understood as one party infringing the rights of another when it had a duty not to do so. However, this position could change if private individuals would not be viewed only as ultimate beneficiaries but also as right bearers under international law. Lastly, liability should be correlative, holding the infringing state accountable precisely for the scope of the wrong it inflicted on the wronged

60. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, *supra* note 12, at 116–19; WEINRIB, *supra* note 11, at 60–64; Weinrib, *Corrective Justice in a Nutshell*, *supra* note 12, at 350–51.

61. On this point I disagree with Crootof, who argues that liability could be imposed even for losses that do not infringe the law of war. Crootof, *supra* note 5, at 1114–16. The basis for this disagreement is that, in my view, wrongful and non-wrongful losses must be treated differently. Tort law generally requires the infliction of a wrong for liability to be imposed. If I place a lavender plant outside my window without securing it properly and it falls on a bystander and injures her, I wronged her and should be liable for this wrong. It is a wrong not because we cannot injure other people, but because placing an object that could fall and injure other people without properly securing it is unreasonably risky and that risk materialized. In contrast, if the bystander was severely allergic to lavender and suffered an anaphylactic shock by walking near it, I might have harmed her by placing the lavender plant outside my window, but I have not wronged her. Tort law would not generally deem growing plants outside people's property as unreasonable, and if individuals suffer an injury, it would most likely be viewed as non-wrongful given the extraordinary character of such injuries materializing. Having a liability regime that offers compensation regardless of whether the law of war was infringed fails to track this structure and extends a remedy for non-wrongful losses as well as wrongful ones. In the context of warfare, the law of war demarcates the difference between the two, and while there can be good policy and practical reasons to offer remedies for non-wrongful losses, doing so would mean that the regime will not be governed by corrective justice and would require an independent justificatory basis (as was done in the domestic law context relating to workers' compensation schemes or mandatory insurance).

62. *Armed Activities* Judgment, *supra* note 13, ¶ 102.

63. I have argued elsewhere that as rights remain relevant during warfare, losses that are inflicted on civilians are *prima facie* wrongs committed against them. Compliance with the law of war or rules of engagement provides states and combatants with a justification to inflict such losses, making them non-wrongful. Yet, a breach of the law of war or rules of engagement means that the justification does not exist, and therefore a corrective justice duty to address the wrong arises. See Abraham, *supra* note 50, at 827–33.

state.

B. Standard of Liability

With a better understanding of who should have a right to claim compensation for losses inflicted during warfare under international law of state responsibility, it is now possible to turn the question of when such a right might arise. Above, I argued that wrongdoing in combat should be understood as an infliction of a loss while acting in breach of the law of war. Consequently, the infringing state has a duty to correct its wrong, and the injured state has a right against the infringing state that this wrong be corrected. Framing liability in this way means that the Contextual Reliance Approach requires an element of fault for reparations to be owed—the fault being the infringement of the law of war that resulted in the loss. In domestic tort law terms, this is the “standard of care” that is required by states, to conduct themselves in a way that does not breach international law.

On this point, the Contextual Reliance Approach seems aligned with the Weak Reliance Approach. For instance, in the *Armed Activities* case, the ICJ held that states are ordinarily required to comply with international law obligations, but if they are an occupying force, states need to ensure human rights law and the law of war are adhered to.⁶⁴ Failing to comply with these standards creates a risk that, if materialized, will result in a duty of reparations.

In contrast, the Strong Reliance Approach does not necessarily provide clear guidance on what the standard of care should be, perhaps because under domestic tort law we can find instances of both fault and strict liability regimes. Crootof, for example, leaves this question entirely open.⁶⁵ She maintains that both have advantages and disadvantages, and that international law of state responsibility can apply both standards in different contexts.⁶⁶

The Contextual Reliance Approach rejects the possibility to adopt both forms of standard of care for wrongs inflicted during armed conflicts and suggests that international law of state responsibility should be fault-based. Given the close links between international law of state responsibility and corrective justice, the Contextual Reliance Approach would require following a corrective justice understanding of domestic tort law. Accordingly, there are narrow set of circumstances in which liability can be imposed due to the infliction of a loss without need to prove fault, but only

64. *Armed Activities* Judgment, *supra* note 13, ¶ 70.

65. Crootof, *supra* note 5, at 1118–20.

66. *Id.* at 1118–20.

because fault is imputed.⁶⁷ These include vicarious liability, liability for ultra-hazardous activities, liability for private nuisance, and private necessity. Rules that require no fault at all, not even one that can be read in implicitly, such as product liability, are generally viewed as incompatible with corrective justice.⁶⁸

It follows that liability should only be imposed when fault can be proved or imputed. A subsequent question arises as to whether the rules governing an imputation of liability can be extended from peacetime to the context of warfare. I argued above that the Contextual Reliance Approach indicates that the rule for ultra-hazardous activities cannot be extended in such a way as doing so would fail to account for the moral and legal spheres in which warfare operates. A similar difficulty does not seem to arise in relation to the rules governing vicarious liability, private nuisance, and private necessity.⁶⁹ There is nothing about the unique features of warfare that suggest that these rules cannot apply, though the scope of their applicability will be determined by what would be considered as wrongdoing during warfare.⁷⁰

C. Proving Wrongdoing

The Contextual Reliance Approach would also be able to assist in overcoming some of the issues regarding burden and standard of proof that neither the Weak Reliance Approach, as illustrated by the *Armed Activities* case, nor the Strong Reliance Approach, such as Crootof's, have fully articulated. In the *Armed Activities* case, the ICJ held that while the burden and standard of proof are generally placed on the state that claims reparations, these rules are flexible and the court maintains broad discretion to shift these burdens.⁷¹ For the ICJ, the reasons for flexibility are practical and based on the difficulties of establishing wrongdoing in the context of international armed conflicts. In contrast, Crootof only goes as far as

67. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, *supra* note 12, at 184; COLEMAN, *supra* note 52, at 371–73.

68. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, *supra* note 12, at 177–84.

69. The applicability of private necessity seems to have been articulated in the case that established the rule. The Minnesota Supreme Court held that “a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.” *Vincent v. Lake Erie Transp.*, 109 Minn. 456, 460 (Minn. 1910). Moreover, Blum and Goldberg have relied on it to interpret the unwilling and unable doctrine. Blum & Goldberg, *supra* note 1, at 118–24.

70. For example, the scope of private necessity might be limited to a state's own subjects, as otherwise it would appear that any loss inflicted during warfare, even on enemy combatants, might require compensation.

71. *Armed Activities* Judgment, *supra* note 13, ¶¶ 93, 116–17, 120.

suggesting that issues relating to the burden and standard of proof can be resolved or at least minimized if an indemnification system was devised.⁷²

The Contextual Reliance Approach offers guidance in this respect. This approach would require broad exceptions to address the practical concerns regarding burden and standard of proof. Domestic law resolves such issues by deploying regulative norms that aim to ensure that proceedings could follow clear norms and reach a resolution that is grounded in clearly articulated law. Limitation periods and the doctrine of delay, for example, assist courts in this context, by incentivizing parties to gather and maintain evidence, as well as by prompting them to pursue relevant proceedings in a timely manner. It seems reasonable for international law on state responsibility to develop similar norms in the future, which will enable international courts to articulate a more concrete liability regime without compromising its efficacy or coherence.

D. Understanding Compensation

Correcting a wrong in a physical sense is challenging. If I accidentally break my colleague's mug, I might be able to glue it back together, but it will not be as it was before. I could also buy her a new mug, but it will not be the same mug I broke, just a replacement. Certain wrongs cannot be rectified at all in the physical sense, such as injuries to life and body. Through compensation, it is possible to correct things between the wrongdoer and wronged individual on a normative level. We might not be able to undo the wrong completely, but we could make it as if it never happened, normatively.⁷³ To correct the wrong in full through compensation, it ought to reflect as completely as possible the full extent of the loss that was suffered. Below, I will demonstrate how the Contextual Reliance Approach can assist in clarifying the ambiguities that currently exist in this context under international law of state responsibility.

1. Aggravated Damages

It is currently unclear whether or how an infringement of *jus ad bellum* alone constitutes an international law wrong. An unjust war could be declared, but not engaged in. Such a declaration is a breach of international law, but it is unclear that a duty of reparations would arise absent any loss. Furthermore, even if combat was to ensue and losses inflicted, liability could only be compensatory—not punitive.⁷⁴ Intuitively, the resulting regime does not appear to correct the wrongs in full, at least normatively, as inflicting a

72. Rebecca Crootof, *Implementing War Torts*, 63 VA. J. INT'L L. 319, 341–42 (2023).

73. John Gardner, *What Is Tort Law For? Part 1. The Place of Corrective Justice*, 30 L. & PHIL. 1, 33, 39–40, 48 (2011); RIPSTEIN, *supra* note 17, at 233–54.

74. *Armed Activities Judgment*, *supra* note 13, ¶ 102.

loss by engaging in an unjust war seems more severe than inflicting a loss by engaging in a just war. Existing international law of state responsibility does not have the conceptual and doctrinal tools to address this added moral wrongfulness.

The Contextual Reliance Approach helps filling this gap and suggests that wiping out a breach of international law during armed conflict in full requires treating lawful and unlawful wars differently. Indiscriminately targeting civilians is clearly an international wrongful act, but the wrongfulness of the infringement of the norm is much greater if in addition the warfare was *ad bellum* unjust. Under existing international law, an imposition of liability that would reflect this additional wrongfulness is prohibited, as they would be punitive in character and punitive damages are not an available remedy.⁷⁵ The Contextual Reliance Approach enables addressing this gap through aggravated damages.

In domestic tort law, aggravating circumstances could be accounted for in the quantification of compensatory damages, and such quantification does not conflict with the corrective character of responsibility. Indeed, punitive damages and aggravated damages are not one and the same. Whereas the former aim to punish and deter, the latter address an accessory wrong of infringing the injured party's dignity through the conduct that constitutes the primary injury.⁷⁶ It is one thing to accidentally key someone's car, it is another thing to do that intentionally while writing derogatory terms against the owner on it. Compensation that will just cover the cost of repainting the car would not fully address the wrong that has been inflicted, as they would not correct the injury to the car owner's dignity. It is in this sense that aggravated damages cohere with corrective justice and do not have a punitive character. Putting things back in an international law context, it seems possible that when violations of international law are severely flagrant, as is the case in unlawful wars, aggravated damages could be required to fully address the wrongs that are inflicted.

While the *Armed Activities* case did not raise the possibility of imposing aggravated damages, it most certainly did not rule it out. Yet, lacking the tools and vocabulary of the Contextual Reliance Approach, it seems very unlikely that the ICJ would have the means of explaining what aggravated damages are, as well as why and how they should apply under international law.

2. *Global Sums*

Another point of contention arises from the opaque approach to the quantification of global sums in the *Armed Activities* case. As I mentioned

75. *Id.* ¶ 102.

76. Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 289–90 (2011).

above, the majority's approach to global sums was deemed as "snatched from thin air."⁷⁷ Not being able to calculate and quantify the scope of certain injuries meant that it was hard for some judges to see how the compensation that was awarded redressed the wrongs suffered.

The Contextual Reliance Approach helps illuminate the relevance of global sums. In domestic tort law, the practice of awarding compensation without proving the exact scope of the damage caused is ordinary. Some forms of damage can clearly be quantified, such as the cost of replacing damaged property, medical bills, or lost earnings. Yet, the quantum of other forms of damage, for example pain and suffering or non-pecuniary losses more generally, cannot be calculated in a robust, scientific manner. Nevertheless, courts calculate and order compensation in both instances, defining the former as "specific damages," and the latter as "general damages" or "global sums" interchangeably.⁷⁸

By following the Contextual Reliance Approach, it becomes possible to offer a more nuanced critique of the award of global sums in the *Armed Activities* case, as it was not inherently necessary. The Contextual Reliance Approach suggests that the ICJ conflated the establishment of international law liability with identifying the scope of the injury. The former is achieved even without exact identification of each individual who suffered an injury and each piece of property that was damaged, whereas the latter should depend on the character of the injury, not on the degree of evidentiary difficulty. The differentiation between the standard of proof in the merits and compensation phases reflect a similar mis-conceptualization and under-theorization of the unique attributes of each phase, and the differences between criminal and civil responsibility. A clearer separation between these phases would better reflect the character of each proceeding and more accurately capture the scope and range of international wrongs.

When an exact quantification of damage is notionally possible, such as in property and some environmental damage, then specific damages should be awarded upon proof of that damage. Failure to prove that an injury occurred, that it was caused by the international wrongful act, or the extent of the injury, should mean that compensation cannot be awarded. In contrast, general/global damages should be awarded for losses that cannot be scientifically calculated, such as death, rape, pain, and suffering.

V. CONCLUSIONS

International law of state responsibility is not only dynamic and evolving, but it is still very much in the process of being created. This Article

77. *Armed Activities* Judgment, *supra* note 13, ¶ 15 (separate opinion by Robinson, J.).

78. *See* Pinney v. Carrera, 469 P.3d 970, 980 (Utah 2020); Lloyd v. Google LLC [2021] UKSC 50; SIMON DEAKIN & ZOE ADAMS, TORT LAW 790–800 (8th ed. 2019).

showed that while questions on how state responsibility will develop remain unresolved for the moment, drawing on domestic tort law could point to some possible directions. The Weak Reliance Approach sees tort law and theory as a means of comprehending elements of liability under international law. But the approach's loose commitment to the theory and structure raises concerns about coherence and clarity, as the *Armed Activities* case demonstrates. The Strong Reliance Approach gives rise to similar concerns, but due to an application of tort law and theory that is too strict and does not account for the unique contexts in which it and international law operate.

The Contextual Reliance Approach offers a possible way forward that provides clarity by drawing on domestic tort law and theory while being attentive to the ways in which it ought to be adapted under international law to maintain the regime's clarity and coherence. In the context of armed conflicts, this approach shows that international law of state responsibility should only extend a right to compensation to states for losses they suffered from acts that infringed the law of war. While there is no space for punitive measures, compensatory and aggravated damages are permissible and cognizable.

These conclusions demonstrate that the Contextual Reliance Approach offers additional protections to civilians' rights in conflict zones. Shortcomings that stem from civilians' lack of a right to bring a claim of reparation directly against their perpetrator should not come at the expense of legal uncertainty and theoretical incoherence. Instead, these problems could be addressed through domestic tort law if states were to allow civilians, whether their own or foreign nationals, to pursue tort damages for wrongs inflicted during combat.⁷⁹

Liability under international law would then serve two functions. First, it would allow states to bring claims for wrongs that do not give rise to a claim by private individuals, such as destruction of infrastructure and illegal exploitation of natural resources. Second, there would be an incentive for states to offer effective remedies for civilians under their domestic law if they wish to avoid potential liability under international law of state responsibility. Having two clear and coherent "war torts" regimes would be better than one.

79. Abraham, *supra* note 18, at 915. *See generally* Abraham, *supra* note 50.