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Christian Marxsen, Anne Peters (eds)

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ABSTRACT

The international law on reparation for victims of armed conflict is complex. Numerous subfields of international law are involved, among them international human rights law, international criminal law, international humanitarian law, and the law on State responsibility. In addition to this complexity, reparation-related questions are often highly politically charged. They are focal points of contestation about moral values, different conceptions of justice, and approaches to international law, including the status of the individual human being in this order. Against this backdrop, the collection of short essays explores whether and under which circumstances individuals have a right to reparation under international law. The introduction unpacks the legal dimensions and identifies the currently most controversial issues. One set of essays then analyses, from different angles, whether a right to reparation for individuals exists as a matter of law. Another set recounts experiences with the implementation of reparation mechanisms and discusses the challenges. A third group of essays addresses the role of domestic courts. The essays ('impulses') are one outcome of the Max Planck Trialogue workshop on reparation for victims of armed conflict, held in November 2017 in Berlin.

KEYWORDS:

Right to reparation, the individual in international law, international humanitarian law, international human rights law, international criminal law, State responsibility

Reparation for Victims of Armed Conflict: Impulses from the Max Planck Trialogues

Access Granted, Access Barred? Exploring the Interplay of Human Rights and States' Domestic Liability Regimes in the Context of Individual Reparation Claims

Leander Beinlich[*]

Victims of armed conflict have repeatedly filed reparation claims before domestic courts. These claims have often been based on states' domestic liability regimes (such as tort law) which *prima facie* provide a fitting legal basis for compensating state-inflicted harm arising from armed conflict. Successful proceedings are, however, rather isolated and exceptional incidents.[1] This contribution briefly fleshes out some of the legal concepts employed by domestic courts when dismissing reparation claims. It then looks at this practice through the lenses of the right of access to a court and the right to an effective remedy. It concludes that these procedural human rights could and should function as a lever to make domestic courts and liability regimes more accessible to victims of armed conflict.

I. State Liability as an Instrument to Compensate Damages – But not for Victims of Armed Conflict?

In several legal systems domestic courts dismiss claims relating to harm caused in the context of an (extraterritorial) armed conflict. Courts *inter alia* argue that otherwise they would necessarily rule on "political" or "governmental" acts which are subject to no, or to a strictly limited, judicial review. Doctrines such as the *irresponsabilité de la puissance publique* (France) or the *teoria dell'atto di stato* (Italy) serve as a legal basis to label such claims as non-justiciable or outside the courts' jurisdiction. While the question of

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[1] One of the very few proceedings in Europe resulting in the award of compensation was *Bici and Bici v. Ministry of Defence*, High Court of Justice [UK], EWHC 786 (2004) (QB). The claimants sought damages for injuries incurred during the United Nations Interim Administration Mission in Kosovo (UNMIK) at the hands of British soldiers.

what qualifies as "political" is highly contested, foreign affairs and defence are two of the fields these doctrines are most commonly applied to.

The *Markovic* Case[2] provides an instructive example in this regard: Claimants sued the State of Italy under Italian tort law arguing that it had participated in the North Atlantic Treaty Organization (NATO) bombing of a radio station in Belgrade in 1999. The Italian *Corte di Cassazione* ruled that Italian courts lacked jurisdiction due to the *teoria dell'atto di stato* as the claim involved a "governmental act". In contrast, the German legal system does not recognise such doctrines. Nevertheless, in the 2016 *Kunduz* Case the *Bundesgerichtshof* dismissed a similar claim by denying the applicability of the German state liability regime to extraterritorial military activities.[3]

National courts therefore currently do not constitute a promising forum. Is this the end of the story for claims of victims of armed conflict? Not necessarily.

II. Compatibility with the Right of Access to a Court and the Right to an Effective Remedy

The *status quo* raises several concerns from an international law and human rights perspective,[4] in particular with regard to procedural human rights norms such as the right of access to a court and the right to an effective remedy[5]. Guaranteed by Art. 6 European Convention on Human Rights (ECHR), the right of access to a court requires a state to enable claimants to pursue arguable civil claims – generally comprising compensation claims under state liability regimes – before a domestic court. Importantly, Art. 6 ECHR itself does not create a substantive right, but stipulates a *procedural* guarantee: the domestic legal systems must not employ procedural bars that disproportionately hinder the assertion of these civil

[2] *Consiglio Ministri v. Markovic*, Corte di Cassazione [Italy], RDI 85 (2002), 799 (English translation in: ILR 128 (2006), 652).

[3] *Kunduz*, Bundesgerichtshof [2016, Germany], NJW 69 (2016), 3656 (judgement only available in German).

[4] While this contribution concentrates on the European Convention on Human Rights, these concerns also arise with regard to other regional or international systems of human rights protection.

[5] In this contribution, the term *remedy* is referred to as encompassing the procedural means to invoke a violation of individual rights, possibly resulting in *reparation*, which in turn is understood as material redress including financial *compensation* as one form of reparation.

claims. Restrictions, such as immunities, can be justified if they are proportionate and do not impair the very essence of the right of access to a court.[6]

Against this background, the way some states deal with reparation claims might prove problematic. In *Markovic* the European Court of Human Rights (ECtHR) concluded that the *a priori* denial of jurisdiction by the Italian courts on the basis of the *teoria dell'atto di stato* does not constitute a procedural barrier but rather concerns the "principles governing the substantive right of action in domestic law".[7] Therefore, the Court found that the dismissal of the applicants' claim by the Italian courts did not even amount to an interference with Art. 6 ECHR. Yet, what measure could be "more restricting" than dismissing a claim right at the outset solely because it relates to a "governmental act"?

Rather, denying jurisdiction should be understood as a restriction which has to be measured against the principle of proportionality – an exercise regularly undertaken by the Court with regard to different kinds of immunities. Viewed in this way, the right of access to a court would require states not to disproportionately "close" their courts and domestic state liability regimes *a priori,* but to carefully justify and explain dismissals. The proportionality test can function as a basis to balance (legitimate) interests of states against the interests of the affected individuals. While less clear with regard to the practice of other states such as Germany, the "Italian way" of denying jurisdiction can hardly be perceived to be the result of a (fair) balancing exercise and raises serious doubts about its compatibility with the right of access to a court under Art. 6 ECHR.

At this point, it is important to bear in mind that other provisions of human rights treaties such as Art. 13 ECHR oblige states to provide effective – not necessarily judicial – remedies in cases of an alleged violation of a Convention right. At least when a violation of a core Convention right is at issue, Art. 13 ECHR may oblige states to create an avenue for procuring substantial redress in the form of compensation. If there is no non-judicial remedy in place, the domestic state liability regime would be the only remedy available. Denying claimants access to this regime would then result in the overall absence of remedies and give rise to a potential violation of Art. 13 ECHR. In conclusion, the procedural human rights guarantees – as shown

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[6] See ECtHR, *Al-Adsani v. The United Kingdom*, judgement of 21.11.2001 (GC), Appl. No. 35763/97, paras. 52 et seq., where the Court found the dismissal of a claim on the basis of the principle of state immunity to constitute a restriction which, however, was proportionate.

[7] ECtHR, *Markovic and others v. Italy*, judgement of 12.12.2006 (GC), Appl. No. 1398/03, para. 114. However, this finding, as most of the other issues of the case, was a contested issue even within the Court itself as reflected by and in the various concurring and dissenting opinions.

with respect to the European system – entail important legal implications in the framework of reparation claims.

III. Benefits of the Suggested Approach

What are the merits of the suggested approach that aims at making domestic courts and state liability regimes (more) accessible for compensation claims of victims of armed conflict? First, national courts are often the only domestic remedy that is, in principle, available. Challenging doctrines that bar access to this remedy is therefore essential in order to enhance the legal protection of victims and, arguably, warranted by international law. Second, emphasising the role of procedural human rights, and consequently the proportionality test, allows for balancing the interests of the involved parties without dismissing one of the two sides at the outset. Finally, doctrines such as the *teoria dell'atto di stato* are not necessarily limited to claims based on states' domestic liability regimes, but could be applied to claims based on a potential (general) right to reparation under international law. Critically reviewing these barriers is thus also crucial in order to appreciate the potential of domestic courts to act as a meaningful forum with regard to individual reparation claims based on international law.

The role and potential of domestic courts in this context is, of course, a contentious and disputed issue. However, their role must be embedded in the overall context: Advocating for domestic state liability regimes in no way implies that they should replace other solutions such as administrative mechanisms. On the contrary, court proceedings often both trigger and increase public and political pressure on states to find broader and more inclusive reparation mechanisms. As soon as a political solution is agreed, individual claims before domestic courts could relate to the mechanisms established by the political process as subsidiary or mutually exclusive. Either way, the possibility of filing a claim before domestic courts plays a crucial role. Consequently, the tensions between the right of access to a court and the right to an effective remedy on the one hand and the existing legal barriers on the other hand ought to be resolved in a way that is favourable to individual claims.