The Relationship Between Inter-State Reparations and Individual Entitlements to Reparation: Some Reflections

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In an inter-state reparations claim, the injured State's approach to reparations may differ from the vision of injured individuals and communities. An injured state may deem precise valuation of losses to be too time-consuming or simply impossible, due to a lack of evidence. It might take account of the offending state's inability to pay, or adopt a conciliatory approach to preserve or restore friendly relations or to reflect pre-existing debts or relationships between the two states.

For similar reasons, an injured state might waive the breach or fail to pursue a claim for reparations or unduly delay its consideration of the matter.[1] Or, it may refrain from appealing a ruling on reparations, even though the quantum and quality of the award do not reflect the injuries suffered. Furthermore, an injured state may not always apply the award towards addressing the harms caused to its nationals.

It has been nearly impossible for those who feel aggrieved by the settlement process – or fall outside the bounds of that settlement – to complain before the courts of their nationality[2] or the courts of the wrongdoing State[3] because rights are understood to vest in their State of nationality.[4] It has

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1 ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its 53rd Session (23.4.-1.6. and 2.7.-10.8.2001), UN Doc. A/CN.4/SER.A/2001/Add.1 [ARS], Art. 45.

2 *Shimoda* Case, Judgement, Tokyo District Court (7.12.1963), referred to in ICRC, Customary International Law Database, <www.icrc.org>, r 150.

3 There are a few exceptions, including the Korean "*Comfort Women*" case, where Japan was ordered to pay compensation because it had been aware of the violations but did not adopt legislation to compensate the plaintiffs. See, *Ko Otsu Hei Incidents* case, Judgement, Yamaguchi Lower Court (27.4.1998), referred to in ICRC, Customary International Law Database, r 150. See also, *Varvarin Bridge* case, 10.12.2003, No. 1 O 361/02 affirmed by the German Federal Constitutional Court, 13.8.2013, BVerfG, 2 BvR 2660/06.

4 *Case concerning the Barcelona Traction Light and Power Company Limited* (*Belgium v. Spain*), Second Phase, Judgement, ICJ Reports 1970, 4 at 44.

likewise been difficult for aggrieved individuals to make claims before some human rights courts.[5]

But, it has been recognised progressively that victims have a "right" to reparation for breaches of human rights law and international humanitarian law (IHL); in IHL, invariably what is recognised is States' obligation to afford reparation and victims' right to receive it.[6]

For at least part of a state's claim under the principle of injury to aliens, it is acting as a caretaker or enabler of its nationals' rights.[7] The International Court of Justice (ICJ) alludes to this in its Advisory Opinion on Legal Consequences of the Construction of a Wall;[8] nevertheless it has done little to ensure that the ultimate beneficiaries actually benefit, a problem raised by Judge *Cançado Trindade* in the context of the stalled reparations process in *Armed Activities on the Territory of the Congo* (*DRC v. Uganda*).[9]

Arguably the injured state is duty-bound to optimise its nationals' rights when they are the intended beneficiaries. But even with the best intentions, it can be hard to do so in practice when there are many victims and multiple points of view of what might be optimal.

A state requires latitude to conduct its international affairs. Are victims' rights to reparation capable of impinging on that latitude at all? Several arguments follow.

First, the failure to fully (or even partially) account for the interests of the intended beneficiaries invalidates the waiver or settlement of the claim. This is in part what Italy argued in *Germany v. Italy*;

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5 *Pad and Others v. Turkey*, Admissibility, ECtHR, Appl. No. 60167/00, 28.6.2007, paras. 33, 65.

6 C. *Ferstman*, The Right to Reparation for Victims of Armed Conflict, in: M. Lattimer/P. Sands (eds.) The Grey Zone: Civilian Protection Between Human Rights and the Laws of War, 2018.

7 ILC, Draft Articles on Diplomatic Protection and Commentaries, Report of the ILC on the Work of Its 58th Session (1.5.-9.6.; 3.7.-11.8.2006), UN Doc. A/61/10, Official Commentaries to Art. 1, para. 3.

8 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9.7.2004, ICJ Reports, paras. 145, 152-153. See for a narrower approach, Application of the *Genocide Convention* Case (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Reports 2007.

9 Judge *Cançado Trindade* argued that the judgement should have included a reasonable time limit for the provision of reparations for damages inflicted upon the victims. *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v. Uganda*), Order, 2015, Gen List No. 116, para. 3.

> "Italy never intended to waive those claims and could not have done so: […] they are the object of a *régime* of reparations which cannot be the object of derogation by States."[10]

Thus, according to Italy, an injured state would not be able to waive reparations for key violations of IHL because of the character of those violations as peremptory norms. This aligns with Judge *Cançado Trindade's* dissent in that case,[11] and also with the direction of some of the International Law Commission (ILC) deliberations, which noted in 2000 in respect of restitution, that

> "the draft articles needed to reflect the proposition that if a 'crime' in the sense of Article 19 had been committed, or a norm of *jus cogens* had been violated, restitution could not be waived by the injured State in favour of compensation, since the vital interests of the international community as a whole were at stake in such cases."[12]

Second, a related argument concerning peremptory norms – the victims' right to reparations is not extinguished because a waiver or settlement by the injured state would not preclude another state, operating on the basis of the injury committed to the international community as a whole, to pursue a claim for reparations in the interest of the injured State or of the ultimate beneficiaries.[13] Thus, an injured state's actions on the international plane cannot extinguish its nationals' rights to reparations, which have an independent existence.

Third, injured nationals may legitimately expect their state of nationality to faithfully pursue their interests on the international plane. The ILC's draft articles on diplomatic protection take us part way, encouraging states to "take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought",[14] and some case-law similarly recognises a legitimate expectation that states of nationality will "consider" making representations, though due deference is

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[10] *Jurisdictional Immunities of the State* (*Germany v. Italy*), Rejoinder of Italy, 10.1.2011, para. 3.13.

[11] *Jurisdictional Immunities of the State* (*Germany v. Italy*: Greece intervening), ICJ Reports 2012, 99, Dissenting opinion of Judge *Cançado Trindade*, para. 72. See also, the Dissenting opinion of Judge *Yusuf*.

[12] Report of the ILC on the work of its 52nd Session (1.5.-9.6. and 10.7.-18.8.2000), para. 179.

[13] ARS, Art. 48(2)(b) and Official Commentary to Art. 48, para. 12. See *M. Milanović*, State Responsibility for Genocide, EJIL 17 (2006), 553, 564.

[14] ILC, Draft Articles on Diplomatic Protection and Commentaries, 58th Session, (1.5.-9.6. and 3.7.-11.8.2006), Art. 19.

given to a state's ability to take into account foreign policy considerations.[15] Arguably there is room for greater consideration of these issues by the courts. For instance, where the only recourse to justice is an inter-state claim, should a state that refuses to take up a matter on behalf of its nationals or does so half-heartedly because of other (conflicting) interests, be required to compensate victims for foreclosing the possibility of an adequate and effective international settlement?

Could one imagine a victim successfully pursuing a claim for compensation against its state of nationality – before the municipal courts of that state or before an international human rights court? To do so is not far removed from compensating a victim whose land or property was expropriated by the state (to fulfil other legitimate state objectives). The few cases that have arisen before the European Court of Human Rights which concerned claimant's dissatisfaction with an inter-state resolution of their claim were deemed inadmissible for a combination of reasons including the claimants' loss of victim status and the wide margin of appreciation afforded to states.[16]

But the story does not seem finished; one could imagine other courts that afford less "flexibility" to states in how they implement their obligations – such as the Inter-American Court of Human Rights – would find differently. Courts have been unwilling to override procedural bars like immunities to open up avenues otherwise foreclosed to victims to pursue claims themselves; perhaps more attention should be paid to those states who, by their actions (legitimate or not) prevent victims from realising their right to reparation. The pendulum has not stopped swinging.

[15] *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2003] EWCA Civ 1598, para. 99

[16] *A. Vermeer-Künzli*, Unfinished Business: Concurrence of Claims Presented Before a Human Rights Court or Treaty Body and Through Diplomatic Protection, HRLR 10 (2010), 269.