Bring Claims if You Can – On the Intricate Arrangements for Claims Arising from Extraterritorial EU Security and Defence Activities

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Is a person who suffered harm in an armed conflict entitled to reparation? In the Inter-American context, jurisprudence on massive human rights violations occurring in intra-state conflicts might stir expectations about the formation of a (regional) customary rule; suffice to mention the concept of transformative reparation coined by the Inter-American Court.[1] But would we be equally tempted to see signs of an emerging customary norm on victim reparation if we focused on state practice instead of jurisprudence, if we examined reparation in international(ised) instead of intra-state conflicts, and if we adopted a European instead of a Latin American perspective? I argue that the answer to this question is negative: European state practice on the handling of claims against missions and operations as well as against deployed personnel arising in the context of multi-national security and defence activities does not reveal that a customary norm on victim reparation has evolved or is about to evolve.

As an exhaustive assessment of state practice related to all conflict constellations with European involvement would go beyond the scope of this impulse, the analytical focus is on activities carried out under the Common Security and Defence Policy of the European Union (EU). The argument unfolds in three steps, starting with an outline of the context of EU security and defence activities. Then, the contribution unpacks the legal framework on the settlement of claims arising from these activities, prior to discussing (some) implications of the current regime.

Understanding the Context: Far Away Armed Conflicts at High Political Risk

For many centuries, armed conflict was omnipresent in Europe. Nowadays, the continent experiences an unprecedented period of enduring peace.

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[1] See the contribution by *Franziska Brachhäuser* and *Anton Haffner* in this issue.

However, almost all European governments undertake (often jointly) extra-territorial security and defence activities with a view to maintaining international peace and stability. Operational commitments of European nations span from multilateral campaigns under the umbrella of the United Nations (UN), North Atlantic Treaty Organization (NATO), or the Organization for Security and Co-operation in Europe (OSCE) to national operations (e.g. the French *Opération Serval* in Mali). Yet, and this is often neglected, European States also undertake security and defence activities under the auspices of the EU. Indeed, over the last 15 years, more than 80,000 persons have been sent to Europe, Asia, and Africa in more than 30 EU peace operations. Currently, more than 4,000 staff work in ten civilian missions and six military operations on behalf of the Union and its Member States. And the recent institutional boost of EU security and defence leads me to assume that operational action will be on the rise in the near future.

It is precisely on these expanding EU-led activities that this impulse focusses as they offer remarkable insights into the responses of European States when confronted with claims arising from their multi-national extra-territorial security and defence activities. Prior to scrutinising the claims settlement regime of EU-led missions and operations, it is important to flesh out three contextual factors as they have repercussions for redress conditions and mechanisms. First, hostilities involving European (military) actors take place at relative geographical distance from contributing States. Secondly, potential victims of belligerence are most likely to be locals, that is non-European (and non-EU) citizens. The combination of these two factors undoubtedly raises the bar for potential plaintiffs because of both *locus standi* rules before European judicial bodies and practical hurdles to access faraway courts. Thirdly, the political stakes – both international and domestic – linked to troop deployment are high for European governments. It is hence unlikely that contributing States will inflate these political risks by adding jurisdictional complications. Therefore, mitigating measures have been taken, in particular when designing the international legal framework.

The Legal Framework: Extensive Immunities and Intricate Procedures

As it is common for peacekeeping activities, the EU concludes bilateral or multilateral treaties with the respective host State(s) prior to deployment.[2] Next to determining the legal position of the mission/operation in the territory of the host State (e.g. regulations on entering and leaving the

[2] An exception in this regard is the naval operation Sophia (EUNAVFOR MED) in the Mediterranean Sea as it primarily operates in the High Seas (and the territorial waters of Member States).

territory, taxation, or the carrying of arms), these so-called Status of Mission Agreements (SOMA) for civilian missions and Status of Force Agreements (SOFA) for military operations govern privileges and immunities of both the respective mission/operation and its personnel, and set out the conditions for the settlement of claims. The EU concludes such treaties on the basis of two model agreements (one for military operations and one for civilian missions[3]) which combine, on the one hand, the provisions of the Vienna Convention on Diplomatic Relations (VCDR) (1961) on the privileges and immunities of diplomatic agents (in particular Arts. 29 through 32 VCDR), and on the other hand, the UN Model SOFA (1990).[4]

Paramount in our discussion on reparation are the stipulations on immunities and liability. The model agreements confer extensive immunities from jurisdiction and execution to both missions/operations and their staff. With the exception of local staff, all mission and operation members enjoy – regardless of their rank or function – absolute immunity from criminal jurisdiction (and execution) in the host State, and functional immunity from jurisdiction and execution for all civil and administrative matters before host State courts.[5] Hence, the EU accords its international personnel *de facto* full diplomatic protection. Even though these arrangements offer a higher level of protection for deployed staff than peacekeeping practice would warrant,[6] they do not *per se* constitute an unjustified restriction on access to court.[7]

Regarding liability claims the two EU model agreements contain a disclaimer clause according to which neither the mission/operation nor its members

> "shall […] be liable for any damages to or loss of civilian or government property which is related to operational necessities or caused by activities in connection with civil disturbances or the protection of the [mission/operation]".[8]

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[3] The EU Model SOFA was adopted on 20.7.2007 (Council Doc. 11894/07), and an EU Model SOMA was endorsed on 15.12.2008 (Council Doc. 17141/08).

[4] UN model status-of-force agreement for peace-keeping operations, annexed to the report of the Secretary general dated 9.10.1990 (A/45/584).

[5] Art. 6(4)-(7) EU Model SOMA, Art. 6(3)-(6) EU Model SOFA, and Art. 8 respectively.

[6] On this point, see *A. Sari*, Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice, EJIL 19 (2008), 67.

[7] The immunity *ratione materiae* conferred to (state) officials for civil claims reflects a generally recognised customary rule of public international law and does not constitute a violation of Art. 6 ECHR. See ECtHR, *Jones and others v. the UK*, judgement of 14.1.2014, Appl. nos. 34356/06 and 40528/06, paras. 202, 214-215.

[8] Art. 16 Model SOMA; Art. 15 Model SOFA.

This general exclusion of liability for property-related harm caused by the fulfilment or protection of the mandate is common peacekeeping practice. Usually, however, the absence of liability for this type of harm implicitly derives from the functional immunity conferred to staff members.[9] The status agreements further stipulate that claims related to death of or injury to persons as well as claims for damage or loss of civilian property not covered by the disclaimer clause are to be forwarded to the mission/operation via the competent authorities of the host State and follow a three-step procedure. This procedure consists of (1) the attempt to reach an amicable settlement, the lack thereof leading to (2) a possible settlement by a specifically established claims commission composed by an equal number of EU and host State members, and if a settlement is not possible either, (3) recourse to diplomatic means for claims under 40,000 EUR, or to a claims tribunal for a binding decision for claims above 40,000 EUR is programmed. A civil procedure against deployed personnel can only be instituted in a local court under the condition that the Head of Mission/Force Commander together with the competent authority of the sending State or institution certify that the disputed act was *not* caused in the exercise of official functions.

Implications – For Victims and the Law

What do these provisions imply? In my view, there are two major and intertwined implications. First, standing courts are not part of the EU's claims settlement equation – which, however, is not contrary to remedy requirements as the codified three-step mechanism offers potential plaintiffs alternative (non-judicial) means to bring claims.[10] Nonetheless, this leaves little jurisdictional room for manoeuvre and makes a jurisprudential development of the content and scope of a possible right to reparation improbable. According to the disclaimer clause, neither the courts of the sending nor those of the host State have jurisdiction to hear the bulk of civil liability cases. And for those claims not falling under the liability disclaimer, including death of or injury to persons, the procedure is primarily extra-jurisdictional (amicable settlement, claims commission, diplomatic means, and arbitral tribunal). What is more, the Court of Justice of the European Union lacks general jurisdiction over EU security and defence matters.[11] Secondly, this

[9] See § 46 read in conjunction with § 49(a) of the abovementioned UN model SOFA of 1990.

[10] Art. 13 ECHR is not violated if jurisdictional immunity is counterbalanced by alternative redress routes. See ECtHR, *Waite and Kennedy v. Germany*, merits, judgement of 18.2.1998 (GC), Appl. no. 26083/94, para. 68. For further discussion of the requirement to offer (alternative) redress options, see the impulse by *Leander Beinlich*.

[11] Art. 24 TEU, read in conjunction with Art. 275(2) TFEU.

legal construction tells us much about state practice and *opinio iuris* of European States and the EU as a whole when it comes to claims arising from multi-national security and defence activities. The extensive immunities granted to deployed personnel taken together with the non-jurisdictional claims settlement mechanism result in (a) personnel not ending up before (local) courts and in (b) plaintiffs' redress option being somewhat intricate, not least because claims need to be channelled through authorities of the host State before the settlement mechanism is even kicked off, which in turn allows for diplomatic screening (and filtering) of claims. In other words, the currently existing claims settlement regime operates like a bulwark against the incremental jurisdictional development of a right to reparation.

To conclude, a glance at the status agreements concluded between the EU and the respective host States clearly indicates that immunity standards of European peacekeepers are comparatively high, while redress for potential plaintiffs is conditional and rather complex. State practice in the context of the Union's security and defence activities provides therefore little ground to believe that a conventional or customary right to reparation for victims of armed conflict has evolved or is about to evolve – at least on the old continent.