

Reparations to Be Paid to a Third State on Whose Territory Military Actions Are Taken Against Non-State Actors

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Wars in a classical sense were armed conflicts between States. The question of reparations for material damage caused by war concerned the relationship between the State parties to such a conflict. Whereas under international law, every State violating international law by an action attributable to it is responsible for it and may be obliged to compensate for the damage caused by the internationally wrongful act (also in the context of a war), in most cases only those States that lost the war have to pay reparations.

With the – still disputed – extension of the notion of armed conflict to the fight against terrorism, new problems arise. Under such premises actions taken against terrorists who have committed heavy attacks against a State can arguably be qualified as self-defence. As terrorists do not have a territory, the State will act within the borders of another State that does not necessarily support or approve of their activities. Therefore, actions against terrorists being qualified as self-defence, even if they imply a military engagement on the territory of such a State, are not internationally wrongful acts. If one assumes this position one may wonder whether damage caused by such an intervention will entail any responsibility, because State responsibility presupposes wrongful acts.

However, a closer look into the International Law Commission (ILC)-Articles on State Responsibility may lead to a different conclusion. Chapter V of this text enumerates the “Circumstances Precluding Wrongfulness”, among them Art. 21 self-defence. Art. 27 lit. b states that the invocation of circumstances precluding wrongfulness is without prejudice “to the question of compensation for any material loss caused by the act in question”. This norm does not establish a regime of compensation to this end, which would have to be different from the regime of compensation in the ILC-Articles, as the text only addresses compensation for wrongful acts. However, it draws attention to the fact that the preclusion of wrongfulness is not equivalent to the exemption from an obligation to pay a compensation for

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damages caused without wrongfulness (so-called “strict liability”). In this respect, Art. 27 of the Articles refers to compensation regimes established in other areas of international law.

The potential obligation to pay damages can not be owed to the international legal person that is conducting an armed attack (as far as the self-defence exercised against it respects the rules of international law such as the principle of proportionality and humanitarian law). Otherwise the wrongdoer (the attacker) would receive compensation, whereas the ILC-Articles expressly assign the obligation to pay compensation to the State that violated the international law. And this is, of course, the State (or *mutatis mutandis* the non-State actor) that conducts the armed attack and not the State that exercises legitimate self-defence.

More difficult to answer is the question whether third States, i.e. States that are not involved in an attack, may be entitled to compensation if the act of self-defence causes damages to them. This question has to be answered when the newly emerging concept of self-defence against non-State actors is invoked by a State. As there is very little and only very recent practice to this end, one has to look for analogies. Some ideas could be derived from the well-established law of neutrality. The International Court of Justice underlined that the law of neutrality applies in all types of war; neutrality has to be respected.¹ As far as a State violates the neutrality of another State it has to pay damages. Here, a breach of international law entails the obligation to pay compensation. This is a situation perfectly governed by customary international law as “codified” by the Articles on State Responsibility. On the other hand, the neutral State is obliged to defend its neutrality. If it does not live up to this obligation it loses its neutrality, and a belligerent may take military actions against it.

There may be situations when a State uses the territory or airspace of a neutral State against the will and the resistance of the latter for an armed attack against another State. The neutrality of the State whose territory or airspace is used does not end with the violation; it still has to be respected. In such a situation, the attacked State has the right to exercise self-defence – or to act under military necessity – on the territory of the neutral State as long as it is under attack from there and the neutral State proves unable to stop this attack. This is implied by the judgement of the Nuremberg Tribu-

¹ ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8.7.1996, para. 89.

nal dealing with the occupation of Norway by Germany in 1940.² It was also the underlying argument of the United Kingdom and the Soviet Union for the occupation of Iran during the Second World War.³ The act of self-defence may have a dual character, i.e. not illegal with regard to the attacking State as far as wrongfulness is excluded by the justifying circumstance, but at the same time an interference in the right of a third State.

The situation of self-defence implies the permission to strike back where the attack originates. However, it does not mean that the State exercising legitimate self-defence on the territory of a third State is exempt from the obligation to pay damages for the violation of the latter's neutrality. The USA bombed Swiss territory during the Second World War several times leaving open the question of wrongfulness; they paid compensation to Switzerland during and after the war.⁴

When in 1914 Germany trespassed Belgian territory (Belgium being a neutral State by that time), it argued with military necessity, thereby referred to a circumstance excluding responsibility and offered compensation to Belgium.⁵ Even if the States did not always act according to this rule – neither the United Kingdom nor the Soviet Union/the Russian Federation paid any compensation to Iran for the violation of its neutrality – general State practice seems to confirm a norm under customary law, which requires compensation to the third State even if the action as such was not wrongful.

A rule under international law to this end might also be found among the “general principles recognised by civilised nations”. The provision on necessity of the German civil code is an example:

Section 904 Necessity

“The owner of a thing is not entitled to prohibit the influence of another person on the thing if the influence is necessary to ward off a present danger and the imminent damage is disproportionately great in relation to the damage suffered

² International Military Tribunal, Judgement, 1.10.1946, in *The Trial of the Major German War Criminals*, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, part 22, 435.

³ *R. A. Stewart*, *Sunrise at Abadan, The British and Soviet Invasion of Iran, 1941*, 1988, 60; military necessity was also the justification for the occupation of neutral Iceland by the United Kingdom, *W. Gerald Downey*, *Claims for Reparation and Damages Resulting from Violation of Neutral Rights*, *Law and Contemp. Probs.* 16 (1951), 488 et seq.

⁴ *W. Gerald Downey* (note 3), 490.

⁵ *Documents Diplomatiques 1914: La Guerre Européenne* [Diplomatic Documents 1914: The European War] (Paris: Ministère des Affaires Étrangères [Ministry of Foreign Affairs], 1914), 201, LCCN: <<https://lcn.loc.gov>>.

by the owner as a result of the influence. The owner may require compensation for the damage incurred by him.”⁶

This provision does not only allow for interference in the property of another person in case of necessity, but also establishes an obligation to compensate that damage. Such provisions might also be identified in the legal order of other States⁷ contributing to the establishment of a general principle.

Referring to the rules on compensation of neutral States – and to general principles of international law – one could develop a model for the compensation of a State on whose territory another State takes actions against non-State actors. If a State violates its obligations with regard to non-State actors by supporting or harbouring them, it might be argued that the State loses a right to compensation, as might be derived from the idea behind Art. 39 of the Articles on State Responsibility.⁸ Even if this conduct is not considered to be equivalent to an armed attack, as in traditional international law, one could defend the position that a State granting support somehow provoked a reaction and thereby contributed to the damage on its territory, forfeiting its right to compensation. Likewise, if a State violates its duty to prevent non-State actors from taking armed actions against another State from its territory, the same rule may apply, although the omission to prevent an armed attack is not the same as an armed attack and therefore would not justify self-defence against the territorial State. However, if a State proves unable to prevent attacks from its territory (e.g., the case of Lebanon with regard to Hezbollah in 2006), the victim of such attacks, even if entitled to exercise self-defence on the territory of the first State, nevertheless has to pay compensation – just as in the case of bombing a neutral State.

The future development of the law on the use of force against non-State actors may see the elaboration of rules of their own that are more sophisticated than those sketched above; however, the basic ideas will be informed by the norms that already exist.

⁶ German Civil Code of 1900, last amendment BGBl. 2013 I, 3719.

⁷ For the English, Canadian and US Law see *F. B. Sussmann, The Defence of Private Necessity and the Problem of Compensation*, Ottawa L. Rev. 2 (1967), 184 et seq.

⁸ Art. 39 of the Articles on State Responsibility reads: “In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”