

theory without destroying international law as such. I, for one, look forward to 'Hans Kelsen und das Völkerrecht II'.

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Pierre D'Argent. **Les réparations de guerre en droit international public: la responsabilité internationale des États à l'épreuve de la guerre.**

Bruxelles: Emile Bruylant, 2002.

Pp. 904. €150. ISBN: 2802715933

Andrea Gattini. **Le riparazioni di guerra nel diritto internazionale.**

Padova: CEDAM, 2003. Pp. 722. €59.

ISBN: 8813245149

The year 2002 should long be remembered by those dealing with the legal aspects of war reparations. In the course of that year two comprehensive books on the subject were completed: the first was Pierre d'Argent's book, *Les réparations de guerre en droit international public: la responsabilité internationale des États à l'épreuve de la guerre*, followed by Andrea Gattini's *Le riparazioni di guerra nel diritto internazionale*. These two publications fill a long-standing gap in international law. While many aspects of war have been codified by international law, there has been a surprising silence on the issue of war reparations. The failure of the Versailles system, which originally inspired several books on war reparations in the 1920s and 1930s,¹ made the topic of war reparations unpopular with both politicians and scholars. Furthermore, the emergence of a totally different

approach to war reparations after the Second World War and the waning importance of the topic during the Cold War years, did not help to inspire academics.

It was the process regarding compensation for damage caused by Iraq's invasion and occupation of Kuwait established by Resolution 687 (1991) of the Security Council that revived interest in the issue. Both d'Argent and Gattini participated in this new development by publishing papers on the UN Compensation Commission.² The finalization by the International Law Commission in 2001 of the long-awaited Draft Articles on State Responsibility, although making surprisingly little reference to war reparations in its comments on articles dealing with reparations in general, gave the topic new impetus.

The coincidence in timing of these two publications and the fact that they do not refer to each other make them an interesting pair to compare. A parallel review shows not only how different and how complementary approaches to this topic can be, but also serves as evidence that general principles for dealing with war reparations are beginning to emerge.

Both books start by presenting an overview of international practice. D'Argent, who devotes the whole first part of his book (six chapters) to this presentation, starts with antiquity, and works through the Middle Age and the French Revolution. When dealing with reparations between 1816 and 1918 he also indicates various general motivations behind requests for the payment of such reparations. Among these he mentions compensation for war expenses, for actual war damage or the simple lump-sum payment of a global amount, in which case it is not always clear what were the underlying reasons for the payment and whether it may be considered as

¹ For example, C. Bergmann, *The History of Reparations* (1927); J. Personnaz, *La réparation du préjudice en droit international public* (1939); L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (1938); L. Camuzet, *L'indemnité de guerre en droit international* (1928); M. Edmond, *Les dommages de guerre de la France et leur réparation* (1932).

² D'Argent, 'Le Fonds et la Commission de Compensation des Nations Unies', 25 *RBDI* (1992) 485; Gattini, 'La riparazione dei danni di guerra causati dall'Iraq', 4 *Rivista di diritto internazionale* (1993) 1000; Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations', 13 *EJIL* (2002) 161.

a sanction. He continues with a detailed discussion of the situation concerning Germany after World War I (the Versailles treaty and various plans for its implementation, the treaties of Berlin and Rapallo) as well as those of Turkey, Bulgaria, Austria and Hungary (the treaties of Saint Germain-en-Laye, Trianon, Vienna, Budapest, Neuilly-sur-Saine, Sèvres, Lausanne). Various reparation procedures following World War II are also described. Of particular interest are those sections dealing with the lesser-known reparations made by East Germany and the whole issue of war reparations in light of the reunification of Germany and the signature of the '2+4 Treaty'. D'Argent, having reviewed various arguments regarding this treaty, presents his own opinion indirectly in the second part of the book. He supports, in particular, the idea of extinguishing claims for reparations in light of the changed circumstances of overall relations between former enemies. Other peace arrangements, such as those involving Austria and Japan, and the 1947 peace treaties (Italy, Romania, Bulgaria, Hungary and Finland) have not been forgotten. D'Argent also highlights some rather inconclusive practice during the Cold War period. As might be expected, an analysis of the compensation process established by Resolution 687 (1991) following the end of Iraq's occupation of Kuwait has a significant place in his account of international practice. In general, d'Argent's presentation is based on state practice, and is extremely rich in references and detail. It is result of doctoral study that will provide an irreplaceable basis for any future research on this subject.

Gattini covers the same epochs of world history. His presentation of international practice provides, in addition to state practice, valuable examples of little-known jurisprudence. In it some fundamental concepts, such as the guarantee of non-repetition as a form of reparation in the context of the German reparations following the Second World War, are reflected upon and discussed. The extensive chapter devoted to the reparations of Italy in the same period becomes especially enlightening when read in the wider context of the

book. The sections on war reparations and civil wars, and, in particular, on post-conflict involvement explore thought-provoking topics that merit further attention, such as the process of property-related compensation in Bosnia and Herzegovina. Gattini also introduces a novel discussion on new techniques of war, namely, the war against terrorism and cyber wars, although their direct link to war reparation is not obvious at this stage. In general, his presentation is very richly annotated and useful.

Both books contain a separate section on theoretical exchange on state responsibility for war in terms of repatriation. These discussions are clearly influenced by the work of the International Law Commission on state responsibility for internationally unlawful acts. Gattini even devotes an entire detailed chapter to how the International Law Commission treated war reparation in its works on state responsibility, beginning with 1981 up to its final draft.

Can war reparation be analysed simply in the light of draft articles on state responsibility for internationally wrongful acts? Although the determination of an unlawful act does not create too many problems following a war (as it is the violation of *ius ad bellum*, or aggression), the consequences of this act go beyond those of other violations of international law and require particular attention. The aggressor becomes responsible for all consequences of this act and not only of acts imputable to its authority in accordance with the rules of international law. Consequently, the responsibility of the aggressor covers not only all damage caused by isolated acts, regardless of whether they were or were not committed in violation of *ius in bello*, but also by acts of opposing forces, to the extent that they act in respect of *ius in bellum*. This conclusion seems both logical and necessary in a situation in which it becomes impossible to establish responsibility for each particular act, as would be the case in an armed conflict.

The examples of total amounts claimed in the past as war reparation also call into question the capability of the wrongdoer to 'wipe out all the consequences of the illegal act', as the

Permanent Court of International Justice established in the *Factory at Chorzów* case and the International Law Commission's Article 31 of its Draft Articles confirmed in terms of 'full reparation for the injury caused'. As d'Argent rightly points out, history has shown that insisting on such an obligation is neither in the interest of the victim of aggression nor within the capabilities of the aggressor. Gattini, who basically agrees with this view, goes a step further: he argues that a request for full reparation already contains elements of sanction against the aggressor.

Another major issue is who can claim reparations where damage affects a wider community of states? Gattini, citing the example of the environmental damage caused by Iraq's occupation of Kuwait, admits the possibility that international organizations and states not directly affected by the oil fires could have claimed reparation. D'Argent is not against this view, but suggests that the possibility of claiming reparation for violation of obligations *erga omnes* be established in relation to the damage inflicted on the particular state, which naturally gives priority to direct victims of aggression.

As regards forms of war reparation, both authors agree with the International Law Commission and mention restitution, satisfaction and compensation. On restitution, d'Argent argues, supporting his claim by examples from the post-World War II reparations, that restitution in kind by a comparable object could have more chance of success in war reparations than simple restitution of the original object. Gattini, who considers that such replacement should be permitted only where it is impossible to restore the original object, finds interesting examples of restitution by replacement of cultural objects after World War II. It would have been interesting to learn more in both books about so-called legal restitution, i.e., the restitution of rights.

Although both authors discuss the issue of satisfaction or moral damage, more importance is given to compensation or reparations *stricto sensu*. D'Argent, having concluded that the post-conflict practice did not pay too much attention to the issue of symbolic satis-

faction for violation of *ius ad bellum*, suggests that the recognition of responsibility of the aggressor in a peace treaty may be a particular form of satisfaction. He also points out that the practice surprisingly does not reveal any attempts to claim other forms of reparation, such as material compensation, for the very fact of violation of *ius ad bellum*. More attention could have been paid to symbolic acts by which an aggressor tries to provide satisfaction to victims, as is the case even 50 years after the end of World War II.³ Gattini, on the same subject, devotes considerable space to debating the obligation of a state to initiate judicial proceedings against individuals responsible for a war. He also puts emphasis on apology as a means of re-establishing peace between peoples. On the inclusion of guarantees of non-repetition in war reparation, the authors appear to hold slightly different views: Gattini sees them as a part of war reparations, while d'Argent, in line with the ILC's final Draft Articles, considers them a separate category, albeit closely related to reparations.

In a separate section on the definition of damage, d'Argent touches upon one of the most complex problems of war reparation: the question of causation and the extent to which types of damage, or loss, may be subject to reparation. He underlines the inadequacy of the 'but for' test and opts rather for the criterion of "'natural" and "foreseeable" consequences' in determining the damage caused by an illegal war. Among examples of damage that could be claimed, d'Argent considers it legitimate to claim for the expenses of waging war against an aggressor, although accepting Brownlie's limitation that these expenses must be 'reasonable'. Gattini also concludes that such expenses have an obvious causal link to the aggression, but notes that they are not compensated in practice due to the enormous amounts they represent. Among types of damage that could be claimed as part of war reparation, d'Argent, inspired by the

³ Like, e.g., Germany's compensation of forced and slave labourers or Japan's Prime Minister Obuchi's apology to Korea in 1989.

UN Compensation Commission, highlights the example of environmental damage.

Both authors devote particular attention to the issue of war reparation to individuals. Gattini dedicates an entire section to this issue, while d'Argent deals with reparations to individuals throughout his account of international practice. He also concludes his book with a discussion on this issue. While admitting his rather conservative approach to the solution of seeking justice before national courts, d'Argent nevertheless recognizes the limits of state immunity in cases involving war reparations, and the inadequacy of international law where states have a decisive role in dealing with the damage inflicted on individuals. While his arguments are sound, some consideration could have been given to mass-claims processing methods, which may have helped in overcoming some of d'Argent's concerns.

The applicability of traditional criteria for diplomatic protection is also called into question. In the case of armed conflict, D'Argent calls for a presumption that the local remedies have been exhausted and goes even further by proposing to declare this traditional criterion inapplicable in the case of diplomatic protection relating to aggression. Gattini, considering that various peace treaties, national War Claims Commissions, and the UN Compensation Commission provide a clear and coherent idea of what damage could be claimed for by individuals, places the emphasis, instead, on procedural aspects. In the process, he gives an interesting review of national jurisprudence and various international mechanisms involving individuals claiming reparations for war damage. He also argues that states should not be able to refuse to pay reparations for damage caused by serious breaches

of fundamental norms of humanitarian law, as *ius cogens* norms, and that such treaties would be null and void in light of Article 53 of the 1969 Vienna Convention on the Law of Treaties.

It is regrettable that Gattini did not provide readers with a summary of conclusions and a list of bibliographical sources. Nevertheless, the systematic approach taken by each of these books is a valuable contribution to international law. Their differences in approach and complementarity of discussion and their choice of international practice offer clear evidence of the need to continue research in this field. There will surely be more to write about recent reparation processes carried out either on traditional state-to-state grounds, such as compensation between Ethiopia and Eritrea, or innovative, more individual-oriented procedures such as the Claims Resolution Tribunal in Zurich or the compensation based on the German 'Remembrance, Responsibility and Future' law (in particular its German Forced Labour Compensation Programme administered by the International Organization for Migration). Some post-conflict reconciliation measures, such as property commissions in Bosnia and Herzegovina and in Kosovo, and the peace plans for Cyprus, also deserve attention. The overall impression is that we will witness the increasing importance of war reparations in international law. These books will certainly encourage informed interest in this topic and serve as pillars for future research.

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