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Introduction

1.1 Scope of the study

The Convention for the Protection of Human Rights and Fundamental Freedoms[1] (the Convention) has created a unique international system for defence of human rights. The judgments delivered by the European Court of Human Rights (the Court) benefit from worldwide recognition and authority. They cover a vast area of manifestation of fundamental rights attributes, and further develop the human rights theory. But while those rulings are often innovative and highly influential in particular fields – and thus merit acclamations for expanding the scope of protection – the adjudication on victims' claims for reparation usually raises questions. The main problem is that the judges offer scant reasoning for their awards: typically, they are evasive. When comparing the just satisfaction levied in a case with previous judgments in similar disputes, it is sometimes difficult to understand the departure from the precedent. While the Court is not formally bound by its precedent, it is a matter of consistency to construe a harmonious practice. The circumstances of a case may call for a departure, but then again the absence of argument undermines the Court's authority. The judges rely heavily on the discretion conferred by the general language of the treaty provision on just satisfaction and put forward the principles of necessity and equity, which they still need to define. The result is a divergent case law on reparation and a lack of clear valuation principles.

The main objective of this study is to demonstrate that the broad discretion that the Strasbourg judges enjoy in the field of reparation, coupled with the absence of well-defined and consistent principles either in the Convention or in practice, leads to an inconsistent approach to the matter and ultimately limits the efforts of the victims of human rights

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, 213 UNTS 221.

violations to access effective reparation for the prejudice suffered. A further aim is to perform a thorough analysis of the system of reparation, in order to depict the origins of those shortcomings and to propose improvements. It will not be argued that reparation offered in Strasbourg is fully ineffective, but that it is frequently subjected to a discretionary interpretation and application. Using the extensive practice of the Court, the scrutiny will reveal that there is neither consistency nor predictability in the case law. The judges refrain from defining criteria for compensation and prefer to rule under the shield of absolute discretion on the matter. That has largely generated an incoherent approach to reparation. It is a central aim of the present study to raise awareness of the fact that the system needs to evolve towards effective reparation.

National and international courts and tribunals normally enjoy discretion when deciding the appropriate redress. Such discretion is inevitably higher in the context of compensation for non-pecuniary injury, in so far as that category of harm is inherently impossible to transform into money in an accurate manner. The problem with the Strasbourg system is that, for more than fifty years now, the judges have been reluctant to engage in interpretive exercises. They use principles of reparation without defining them. In particular, it is often hard to perceive the way in which redress for moral damage is established, let alone the existence of a method of calculation. Awards are rather made by approximation with previous rulings, the judges using the diversity of an ample – but fluctuating – precedent when deciding an amount, instead of arriving at a certain result on the basis of a clear set of principles.

What is more striking, though, is that, even if the Court has already started to use a sort of standardized approach in respect of compensation for non-pecuniary damage, the case law has definitely not gained the expected consistency. It is known that, for a limited number of violations, the judges rely on tables which fix the limits of compensation in specific cases. For the time being, the amounts established and the method of calculation are confidential, the Court preferring instead to maintain a large margin of discretion and manoeuvrability. It is, nonetheless, possible to make fairly accurate speculations based on the existing practice in respect of each type of damage. More beneficial to an understanding of the theory of reparation under the Convention would be to extract the logic, if any, used by the judges when deciding the necessity and then the appropriate form of redress. This exercise will put in evidence the shortcomings of the traditional discretionary ruling.

In all probability, the existence of a public standard of compensation would generate more awareness regarding the need to adopt a coherent approach. The problem is that the Court's judges come from different legal and cultural backgrounds, which may pose difficulties as to their motivation and perception of the need to secure consistency for their judgments. Still, it is hard to believe that a clear practice would leave them indifferent to their own precedent. For example, the well-established principles of what amounts to breaching conduct from the state, such as ineffective investigation or unlawful expropriation, are always referred to by the Court in subsequent practice and altered only through the intermediary of a Grand Chamber judgment.

Therefore, the study will argue for the beneficial impact which a more objective, standardized approach based on equitable criteria of application would have on the theory of reparation for moral damage, and even on some heads of material loss. Certainly, it is impossible to conceive of and realistically to implement a fully objective system of compensation, given that moral injury, in particular, depends on the individual attributes of the victim. It is not impossible, however, to keep the judges' discretion within acceptable limits by establishing both lower and upper thresholds for the level of compensation to be allocated within the context of each type of violation.

One may further wonder why the Court, although operating with a human rights philosophy, has sometimes awarded higher compensation for less serious violations. There are several cases where the judges have granted comparable or even higher amounts for the non-pecuniary prejudice caused by interference with the right to protection of property than for moral harm suffered from unlawful killings or inhuman or degrading treatment. Is not that a perversion of human rights? A transparent method of the calculation of monetary compensation and a clear theory of equity, which would allow the adjustment of the award to the specific circumstances of the case and to the victim's condition, should absolutely reflect that situation.

There are many authors who have revealed occasional deficiencies in the Court's rulings on just satisfaction, but no effective solution has been proposed or adopted. It is therefore the purpose of the present survey to suggest appropriate modifications to the Convention mechanisms. Reference will be made to principles, theories and practical examples found in general international law and in other particular regimes of human rights protection. Special attention is given to the similar regime of human rights protection created by the American Convention on

Human Rights (the American Convention),[2] without, however, transforming the analysis of the European Convention into an in-depth comparison between the two mechanisms of control, but using instead some references in order to highlight the shortcomings of the European system. In spite of its specialized analysis, the study is intended not only for the academic discourse on reparations, but also as a tool for judges and legal practitioners who apply the treaty, as well as prospective petitioners, who may find a better understanding of the regime of just satisfaction under the Convention. The Court's judges and the Registry lawyers will also become aware of the shortcomings in the system and hopefully seek to improve the current state of affairs.

1.2 Methodology

The analysis will proceed as follows. After an introductory presentation of the system of control, Chapter 2 considers the particular features of the methods and principles that govern the notion of just satisfaction, with a view to establishing the basis of inquiry. Often, the inconsistency in the Court's approach to the issue of reparation seems to originate in the way the judges make use of the existing principles. In fact, their manifest reluctance to develop those principles and to lay down clear standards and guidelines in the field ultimately interferes with the Court's credibility. It is precisely on account of inconsistent practice that it is difficult to maintain legitimacy.

After the review of the general principles of reparation under the Convention, the analysis will progressively become more specialized. Chapter 3 will address the theoretical and practical aspects of the specific conditions for the application of Article 41 on just satisfaction, with a special emphasis on the right of individual petition, which is the distinctive feature of the Strasbourg system. There are quite a few inter-state cases, even if the conditions of admissibility for the member parties are less strict than for individuals. In the end, however, it is the Court that decides on the necessity to afford redress if a violation is found.

Looking deeper into the practical application of the article on just satisfaction, Chapter 4 will explore the prevalent case law for each type of damage, i.e., pecuniary and non-pecuniary, as well as reimbursement of costs and expenses. Special attention is given to reparation for moral

[2] American Convention on Human Rights, 22 November 1969, OEA/ser.L/II.23, Doc. 21, rev. 6 (1979), OASTS No. 36.

prejudice, where the Court's discretion is the greatest. The aim is to decipher the underlying logic used by the judges when they decide on the necessity to make reparation, when they choose the appropriate form of redress and when they establish the amount of compensation. The method of analysis employed is a qualitative review of the Court's rulings, as opposed to a quantitative survey of the practice that would transform the study into elementary statistics. The purpose is to reveal trends in the judicial process, and to ascertain whether there is consistency in the case law.

The case law is fairly impressive, given that it is made up of thousands of judgments and decisions. When there is only one judgment departing from the precedent, there may be an exception, but when there are already several rulings, they denote acceptance. For that reason, when accounting for principles, standards or new orientations, reference will only be made to some limited practical examples. All those pronouncements are available on the Court's website, through the intermediary of the Hudoc database. The analysis will not cover all of them, because the cases are highly repetitive. A list of selective cases is provided in the annexes at the end of the study, with reference to compensation for non-pecuniary damage for different types of violation, with the purpose not only of illustrating the lack of consistency in the Court's awards, but also of facilitating identification of some patterns in the practice of reparations.

In Chapter 5, the examination will then focus on the procedural incidents that may either facilitate or encumber the availability of compensation for the victim. Equally important for securing effective reparation is the enforcement of the Court's judgments and the specific recommendations made by the judges in respect of execution. Thus, in addition to pecuniary redress, the victim may benefit from individual measures or have the moral satisfaction that the breaching state has been directed to introduce legal amendments so as to prevent further infringements of the rights of persons in a similar position.

In Chapter 6, the study will switch perspective from the past to the future. Having offered a detailed account of the state of affairs, it is time to suggest further developments. The most imperative need is for the judges to provide an explanation for their rulings on just satisfaction and to make an effort to produce consistent practice. Questions also arise as to whether the Court should embark on a constitutional mission and, if so, what would be the effects on individual reparation. Guarantees of

non-repetition may also justify a place in the system of control. Finally, when everything has been considered, the question of the reform of the system of reparation should be brought to the fore.

1.3 Preliminary remarks about the Convention system

Before entering into an analysis of the system of reparation, a brief presentation of the control machinery is appropriate. The Council of Europe was created by ten states[3] after the end of the Second World War with the aim of enhancing co-operation in Europe and promoting human rights, democracy and the rule of law. It presently includes forty-seven member states with some 820 million citizens.[4] There are also six countries with observer status.[5] The headquarters are in Strasbourg. The Council of Europe has established a series of standards, charters and conventions, the most famous being the European Convention on Human Rights.[6] Signed in Rome on 4 November 1950 by the then members of the Council, the Convention came into force on 3 September 1953 following ratification by ten states.[7]

The Convention consecrated a series of fundamental rights, predominantly civil and political, but in a rather succinct language. It has been the role of the Court to interpret and give further meaning to those provisions. The special feature of the system is that rights and obligations are not provided on a reciprocal basis between the contracting states, as in the case of classical treaties. Instead, it has created a set of integral obligations, where states undertake commitments to the benefit of the private person. The Convention has been changed several times, the latest reforms being introduced by Protocol No. 14 or waiting for implementation by Protocols Nos. 15 and 16. Each amendment

[3] Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.
[4] The only state located in Europe which is not a member as of 2014 is Belarus.
[5] The Holy See, the United States of America, Canada, Japan, Mexico and Israel.
[6] For an analysis of the evolution of the Convention system, see E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010).
[7] In chronological order of ratification: the United Kingdom (8 March 1951), Norway (15 January 1952), Sweden (4 February 1952), Germany (5 December 1952), Saarland (14 January 1953), Ireland (25 February 1953), Greece (28 March 1953), Denmark (13 April 1953), Iceland (29 June 1953) and Luxembourg (3 September 1953). Saarland became an integral part of Germany on 1 January 1957.

necessitates ratification by all the member parties, but then forms a part of the treaty. In essence, new protocols have either introduced additional rights,[8] or improved the mechanism of control,[9] or added some procedural rights.[10]

Initially, the control machinery was made up of three bodies: a part-time Court, the now abolished European Commission of Human Rights (the Commission) and the Committee of Ministers. The novelty of the system resided in the creation of a right of individual petition. It was at first optional, with the possibility of renewal, but was then gradually accepted by all the contracting states and eventually made compulsory. Any individual, including a legal person, now has the possibility of bringing an application to Strasbourg.

The drafters of the system had different views on the creation of a court. While the supporters considered that only courts may ensure observance of the law, that a judicial settlement of disputes on treaty interpretation should be accepted and that the notion of sovereignty should not constitute an obstacle, the opponents perceived a too ambitious aim in establishing an authority that would interfere in internal affairs, and rather preferred to bestow upon the Commission the task of solving legal questions, or were simply against the proliferation of international organizations.[11] The compromise solution was to set up a court, but with jurisdiction under an optional clause. The Court was thus established on 21 January 1959, when eight signatory states acknowledged its jurisdiction.

In the beginning, the Court's activity was fairly scant. The system was in its running-in phase; litigants had to become familiar with the supranational procedure. The judges delivered the first judgment on the merits of a case in 1961, in *Lawless v. Ireland*,[12] and then the next three rulings only in 1968.[13] The Court received only eleven cases in its first

[8] Protocols Nos. 1, 4, 6, 7, 12 and 13.
[9] Protocols Nos. 3, 5, 8, 10, 11 and 14.
[10] Protocols Nos. 2 and 9.
[11] See discussions within the Conference of Senior Officials held at Strasbourg between 8 and 17 June 1950, in Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights* (8 vols., The Hague: Martinus Nijhoff Publishers, 1975–85), Vol. IV, at 114–16 and 128.
[12] *Lawless v. Ireland (no. 3)*, 1 July 1961, Series A no. 3.
[13] *Wemhoff v. Germany*, 27 June 1968, Series A no. 7; *Neumeister v. Austria*, 27 June 1968, Series A no. 8; and *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium* (merits), 23 July 1968, Series A no. 6 (*'Belgian linguistic'*).

fifteen years of existence, but the situation changed in the late 1970s.[14] In addition to pronouncements on the merits, the Court also dealt with some incidental matters, such as preliminary objections, procedural questions and awards of just satisfaction. Progressively though, as more states joined the organization and accepted jurisdiction, disputes before the old Court increased in number and also diversified in respect of subject matter. The drafters of the system had not anticipated that the judges would need to work so hard; the initial text of the Convention merely specified that '[t]he members of the Court shall receive for each day of duty a compensation'.[15]

The new permanent, full-time Court came into being on 1 November 1998, following modifications introduced by Protocol No. 11. It comprises a number of judges equal to that of the members of the Council of Europe and it is assisted by a Registry in its daily work. The Registry is currently made up of some 640 staff members, which include lawyers and other administrative and technical staff and translators. The lawyers do not decide cases, but only examine and prepare applications for adjudication. They draft analytical notes for the judges, in one of the two official languages, advise judges in respect of national law, and correspond with the parties on procedural matters. In other words, they give an opinion on the facts and legal questions, but the judges may or may not endorse that view.

The Court functions in accordance with the Convention and with its own Rules.[16] Its role is to examine and decide both individual and inter-state applications. If found in violation of the rights or freedoms provided in the treaty, a state may be ordered to make reparation. The Court's judgments are binding on the states concerned and execution is supervised by the Committee of Ministers. But the role of the Committee was not always limited to the execution phase. Before entry into force of Protocol No. 11, it also had significant quasi-judicial powers. Former Article 32 of the treaty provided that an application declared admissible by the Commission and then transmitted to the Committee of Ministers, but not referred to the Court within three months, was to be decided by a two-thirds majority vote of the Committee.

[14] R. Bernhardt, 'Human Rights and Judicial Review: The European Court of Human Rights', in D. M. Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht: Martinus Nijhoff Publishers, 1994), at 300.
[15] Former Article 42 of the Convention.
[16] See the latest Rules of Court which entered into force on 1 January 2014, available on the Court's website (www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c=).

In its capacity as a political organ, the Committee relied heavily on the specialist advice of the Commission's experts, without being officially bound by those views. It regularly used to endorse the Commission's opinion, and thus to endow it with a binding effect. The solution was laudable in so far as it conferred a judicial basis to their decisions. What was quite striking, though, was that the individual petitioner had no representation before the Committee, whereas the state accused of breaching the treaty even had a right to vote in respect of the solution to the case. Simply stated, the government concerned was defendant and judge at the same time.[17] In practice, however, the fact that the Committee used to endorse the Commission's reports limited to the maximum its political involvement in the mechanism of control. In the end, when Protocol No. 11 established a permanent Court, it also took away from the Committee its quasi-judicial powers. The result is that it has transformed the procedure into an entirely judicial process.

The Commission was a non-judicial body of independent experts, one from each state party. The first members were elected by the Committee of Ministers on 18 May 1954. Their role was to receive and examine applications from both states and individuals, reject those which were inadmissible and transmit to the Court or to the Committee those which raised important issues in respect of the Convention guarantees. At times, in its opinion on the merits of a case – the so-called 'Article 31 Report' – the Commission made propositions to the applicant's benefit even when it had not established a breach.[18] This was rightly considered a sort of humanitarian action, unjustifiable though because its task was to apply the treaty, not to launch into sympathetic activities.[19]

The Commission played an important role for the system in its capacity as a filtering body. It was 'the gatekeeper to the Convention's system of collective enforcement'.[20] Even if the drafters reserved for the Court the most intellectually challenging activity of deciding state responsibility, and left to the Commission the routine work, that task was very significant. As at present, more than 90 per cent of applications have been declared inadmissible. Basically, the Commission acted as a quality checker of what came to Strasbourg and sent upward only what

[17] P. Leuprecht, 'Article 32', in L.-E. Pettiti, E. Decaux and P.-H. Imbert (eds.), *La Convention européenne des droits de l'homme. Commentaire article par article* (Paris: Economica, 1999), at 705.
[18] *Austria v. Italy*, no. 788/60, Commission's report of 30 March 1963.
[19] S. Trechsel, 'Article 31', in Pettiti, Decaux and Imbert, note 17, at 695–6.
[20] Bates, note 6, at 120.

deserved particular attention. It used to suggest reparation in situations disclosing a breach of the treaty, but the Court was not bound by the Commission's findings on the merits or by the recommendations for recovery of damage. The judges sometimes used their power to give a more restrictive solution. Such has been the case when the Court has not upheld the Commission's findings and thus ruled for the inadmissibility of a claim.[21]

In the early years of the system of protection, there were few cases that reached the old Court for a review against the Convention standards. That situation occasionally generated tension between the two institutions, to the extent that some judges even questioned the future of the Court's role. In the mid-1960s, while the Court included 'some of the finest international judges in the world', they were prevented by 'this usurpation of authority by the Commission' from starting to create the Strasbourg jurisprudence.[22] However, one should not ignore that the control mechanism was in its incipient stage. Its subsequent evolution largely proves that the judges have had countless occasions to build and refine a solid case law, not only in respect of violations on the merits, but also in respect of reparation. Eventually, the Commission was abolished in 1998, when Protocol No. 11 entered into force.

1.4 Evolution of the system of compensation

The formula of an award of just satisfaction after the finding of a breach of treaty obligations is not an innovation of the Strasbourg system, but was transposed from traditional international law. During its first ruling on the matter in the *Vagrancy* cases, the Court mentioned that the provision on reparation had its origin in similar clauses which were present in classical treaties such as the 1921 German–Swiss Treaty on Arbitration and Conciliation and the 1928 Geneva General Act for the Pacific Settlement of International Disputes.[23] While those instruments dealt with inter-state remedies, the concept has been

[21] See, e.g., in the case of *Mellacher and Others v. Austria* (nos. 10522/83, 11011/84 and 11070/84), the Commission's decision of 11 July 1988 and the Court's judgment of 19 December 1989, Series A no. 169.
[22] Bates, note 6, at 214.
[23] *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, Series A no. 14, para. 16.