Chapter X


Giovanni Carlo Bruno*

1. Introduction

The aim of this contribution is to take part in the largely debated question whether effective remedy is provided for victims of violations of international humanitarian law (IHL).

Euphemistically, in cases in which respect and protection of the civilian population is not ensured, states tend to speak of “collateral damages,” a military jargon designating the wounding or the killing of civilians and the damage of their private goods as a consequence of military operations.¹

What is highly controversial is whether an individual right to compensation for damage may arise from the ascertainment of state responsibility for “collateral damages.”

From 24 March to June 10, 1999 the North Atlantic Treaty Organization (NATO) conducted an air campaign against the Federal Republic of Yugoslavia (FRY) – Operation Allied Force. Although NATO has not released official estimates

* Giovanni Carlo Bruno is a Researcher in International Law at the Institute for International Legal Studies (Istituto di Studi Giuridici Internazionali) of the Italian National Research Council (Consiglio Nazionale delle Ricerche) – Napoli.

¹ In an Amnesty International report, it is said that “[b]roadly defined, collateral damage is unintentional damage or incidental damage affecting facilities, equipment or personnel occurring as a result of military action directed against a targeted enemy force or facilities. Such damage can occur to friendly, neutral, and even enemy forces.” Amnesty International, NATO/FRY, Collateral Damage or Unlawful Killings: Violations of the Laws of War by NATO During Operation Allied Force, AI Index: EUR 70/18/00 (June 2000), available at: www.web.amnesty.org/ai.nsf/index/EUR700182000 (last visited April 20, 2007), para. 2, note 6. The same document clarifies that “collateral damage” is not a term used in international humanitarian law.
of civilians or combatants killed, media have stated that a high number of civilians died in NATO air raids.

Several applications have been lodged by relatives of Yugoslav nationals killed during the air campaign with domestic and international courts. The applicants believed that civil liability for the deaths of their relatives lay within state authorities.

This contribution deals with the Varvarin and the Marković cases, brought in German and Italian courts, respectively.

While in the Varvarin case, declared admissible in 2003, the compensation claim was not recognised, the Italian Supreme Court affirmed, in a preliminary ruling on jurisdiction in 2002, that Italian courts lacked jurisdiction in the Marković case. An application against Italy was then lodged with the European Court of Human Rights, which declared it partially inadmissible in 2003 and examined the merits of the case at the same time as the issue of admissibility in 2006.

In this book it has been often recalled that, despite their different historical backgrounds and their own normative specificities, the central concern of human rights law and humanitarian law is “human dignity.”

May such a “common ground” be a valid basis for assessing effective and valid compensation for damage to “alleged victims” of any “grave” violations of human rights and humanitarian law?

The two cases under examination are an outstanding example of the complexity of the problem of ensuring an effective remedy when provisions of international humanitarian law are breached. Neither domestic courts and tribunals, nor the intervention of the Strasbourg Court – the organ established to supervise and implement the European system of protection of human rights – offered a valid safeguard. Should we conclude that complementarity between the two systems, as far as the use of protection tools is concerned, is possible only theoretically?

---

2 See the Section 1 – Chapter 1. In its Advisory Opinion of July 8, 1996 on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice confirmed the convergence and complementarity of human rights and humanitarian law. Recognising the continuing applicability of human rights law in time of armed conflict, the judges of the World Court affirmed: “the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.” Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, I.C.J. Reports 1996, para. 25. See, in general, Vincent Chetail, The Contribution of the International Court of Justice to International Humanitarian Law, 85 Int’l Rev. Red Cross 235 (2003).