

# On the Power of a State to Waive Reparation Claims Arising from War Crimes and Crimes against Humanity

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## Abstract

Serious breaches of international law which a State commits against the civilian population or against the military personnel of another State in the course of an armed conflict certainly imply an obligation to repair the injuries inflicted. Nevertheless, after war it is common practice among States to conclude lump-sum agreements in order to settle the issue of reparations owed by one party to another. In most of these agreements, there are provisions in which a State waives any future reparation claims related to the injuries suffered during the armed conflict.

Notwithstanding this practice, it might be of some interest to assess whether the State's power to waive reparations is today subject to some limitation or whether it is a right which each State is freely entitled to exercise. Evolutionary trends in the law of State responsibility, in fact, seem to suggest the existence of some limitation to the State's power to waive reparation claims arising from violations of peremptory norms. In particular, the International Law Commission's (ILC) work on State responsibility encourages the idea that, in cases of *jus cogens* violations, the injured State cannot entirely dispose of the more general interest of the international

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community as a whole to find a just and appropriate settlement. This settlement, moreover, should take into account the interest of the victims. Limitations to the State's power to waive reparation claims might also be inferred from the interpretation of a number of provisions of the Geneva Conventions of 1949. To these legal arguments, one could add more general policy reasons based on the importance of collective and non-economic forms of reparation.

## I. Introduction

International armed conflicts are often marked by gross violations of fundamental human rights and humanitarian law. Once the conflict is over, there remains the problem of properly compensating the victims for said violations.

States' obligation to repair the consequences deriving from an international wrongful act has been famously recognized by the Permanent Court of International Justice in the *Chorzów Factory* case. According to the Permanent Court, it is "a principle of international law that the violation of an engagement involves an obligation to make reparation in an adequate form". In addition, this reparation must "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".<sup>1</sup> While there is no doubt that grave international wrongful acts committed by a State against the civilians or military personnel of another State imply an obligation to repair, it is more difficult to determine the subjects that may claim a right to reparation and those towards whom the obligation to repair is owed. The right to invoke the responsibility of the State which committed the wrongful act and to demand reparation certainly belongs to the injured State.<sup>2</sup> According to the International Law Commission, when the violation involves obligations owed to the international community as a whole, even States other than the injured State would have the right to invoke the international responsibility of the State which committed the

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<sup>1</sup> Permanent Court of International Justice, *Chorzów Factory Case (Germany v. Poland)*, 1928, Ser. A, No. 17, 29.

<sup>2</sup> Art. 42 (b) (i), ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, in: ILCYB, 2001, Vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12.12.2001, and corrected by document A/56/49(Vol. I)/Corr.4.

wrongful act and to seek reparation in the interest of the injured State or of the beneficiaries of the obligation breached.<sup>3</sup>

It is much debated whether, in cases where there are violations of international human rights and humanitarian law, individuals are also entitled to a right to reparation. Today, there is in fact a tendency to recognize the existence of an individual right to reparation for gross violations of international human rights and humanitarian law in customary international law.<sup>4</sup> According to some scholars, this trend has been confirmed through the adoption by the United Nations General Assembly of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Grave Violations of International Humanitarian Law*.<sup>5</sup> For example, according to *Theo van Boven*, whose work is central to the General Assembly resolution, there are good reasons to consider this document “as declaratory of legal standards in the area of victims’ rights”.<sup>6</sup> These standards include the principle which provides for an “adequate, effective and prompt reparation for harm suffered”.<sup>7</sup> Therefore, individuals are in principle entitled to receive compensation from the State which committed the wrongful act for the violations of international human rights and humanitarian law suffered during the armed conflict.

However, the existence of an individual right to reparation in customary international law is not supported by any specific element of State practice

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<sup>3</sup> Art. 48 (2) (b), Draft Articles on Responsibility of States (note 2).

<sup>4</sup> See C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflicts*, 2012, 38 et seq.; E. Cannizzaro, *Is There an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the Jurisdictional Immunity Case*, in: D. Alland/V. Che-tail/O. de Frouville/J. E. Viñuales, *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy/Unité et Diversité du Droit International*, Melanges en l’Honneur du Professeur Pierre-Marie Dupuy, 2014, 495 et seq. On the existence of an individual right to reparation for violations of international humanitarian treaty law, see, for two different perspectives, R. Pisillo Mazzeschi, *Reparation Claims by Individuals for States Violations of Humanitarian Law and Human Rights: An Overview*, in: *Journal of International Criminal Justice* 1 (2003), 339 et seq. and C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2003, 294.

<sup>5</sup> General Assembly, A/RES/60/147, 16.12.2005.

<sup>6</sup> T. van Boven, *Victims’ Right to a Remedy and Reparation: The New United Nations Principles and Guidelines*, in: C. Ferstman/M. Goetz/A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, 2009, 32. Other scholars expressed a critical view, arguing that the resolution does not reflect the real position of individuals in international law, see C. Tomuschat, *Human Rights and National Truth Commissions*, in: P. Baher/C. Flinterman/M. Senders, *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*, 1999, 152.

<sup>7</sup> Art. 11, letter b of A/RES/60/147 (note 5).

and is contested in the international law literature.<sup>8</sup> Moreover, even if the existence of an individual right to reparation in general international law were recognized, there would still be some thorny issues to deal with. Firstly, it is hard to determine which judicial or non-judicial remedies would be effectively available to an individual who wished to assert his or her right to reparation. In bringing a case before the courts of the State of nationality of the victim or of the State where the violation occurred, individual claims might face an insurmountable obstacle, namely the rules on the jurisdictional immunity of the foreign State.<sup>9</sup> On the other hand, it may be difficult for the victim to obtain reparation through recourse to the tribunals of the State responsible for the wrongful act itself.<sup>10</sup>

There may be other hurdles for victims' seeking reparation for violations suffered during an armed conflict. In particular, it is possible that the State of nationality of the victim – through an agreement signed in the aftermath of the armed conflict – has already received some form of reparation for the injuries caused by the war and/or has waived any form of future reparation.<sup>11</sup> In fact, it is common practice among States to conclude lump-sum

<sup>8</sup> See C. Tomuschat, Individuals, in: J. Crawford/A. Pellet/S. Olleson (eds.), *The Law of International Responsibility*, 2010, 989.

<sup>9</sup> The International Court of Justice has recently concluded that “under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of grave violations of international human rights law or the international law of armed conflict”, see International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, 3.2.2012, para. 91 (hereinafter *Jurisdictional Immunities Case*). Even the European Court of Human Rights has denied a possible exception to the immunity even in case of breach of *jus cogens* rules. See European Court of Human Rights, *Al-Adsani v. United Kingdom*, App. no. 35763/97, 21.11.2001, para. 79 and *Jones et al. v. United Kingdom*, App. nos. 34356/06 and 40528/06, 14.1.2014. Several authors highlight the possible and progressive affirmation of an individual right to reparation, but also the lack of adequate legal mechanisms to assert this right, see C. Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, in: A. Randelzhofer/C. Tomuschat, *State Responsibility and the Individual, Reparation in Instances of Grave Violations of Human Rights*, 1999, 1 et seq.; others affirm that States should always recognize an effective remedy for the breach of international human rights, see D. Shelton, *Remedies in International Human Rights Law*, 2005, 103.

<sup>10</sup> More generally, on the role of national courts in dealing with compensation for war damages, see M. Bothe, *Remedies of Victims of War Crimes and Crimes against Humanity: Some Critical Remarks on the ICJ's Judgment on the Jurisdictional Immunity of States*, in A. Peters/E. Lagrange/S. Oeter/C. Tomuschat, *Immunities in the Age of Global Constitutionalism*, 2014, 109-11.

<sup>11</sup> To mention one significant example, Japanese courts repeatedly opposed waiver clauses to the claims for reparation in the cases concerning “*Comfort Women*”. For an interesting analysis of this case law see S. H. Bong, *The Right of War Crimes Victim to Compensation Before National Courts: Compensation for Victims of Wartime Atrocities. Recent Developments in Japan's Case Law*, in *Journal of International Criminal Justice* 3 (2005), 187 et seq.

agreements after an armed conflict in order to settle the issue of reparations owed by one party to another. Most of these agreements contain provisions in which a State waives any future claims related to the injuries suffered during the war.<sup>12</sup>

The hypothesis of a State's waiver of war reparation raises some interesting legal questions concerning the relationship between the State's rights and any individual right to reparations. What is particularly interesting is that in many cases these waiver clauses also appear to include those reparation claims which could potentially be brought by citizens of the State waiving its right to reparation. In other words, through these provisions, States do not only waive their own future claims, but also dispense with the possibility of individual claims by their citizens. It is therefore worth considering whether the growing affirmation of individual rights and the emerging idea of the existence of collective interests of the international community as a whole might influence or reduce the State's entitlement to waive reparations – in the name of and on behalf of its citizens – for serious violations of international human rights and humanitarian law. In other words, the question is whether the State's right to waive reparations in cases of war crimes and crimes against humanity is today subject to some limitation or it is still a right that each State is freely entitled to exercise.<sup>13</sup>

The question of the existence of some limits to the State's right to waive reparation claims can be approached from different perspectives. One possible perspective is to consider whether such a waiver may infringe the human rights of the victims. In the relationship between the individual and his or her own State of nationality, for example, it could be argued that the State, through the waiver, has impinged on the right of the victim to receive an effective remedy.<sup>14</sup> In other words, it could be said that the waiver may influence the effectiveness of the protection which States must guarantee their citizens in the event that there is a violation of their fundamental hu-

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<sup>12</sup> See in general, *P. d'Argent*, *Les réparations de guerre en droit international public*, 2002.

<sup>13</sup> The problem of the legitimacy of the waiver to reparation is not entirely new. It is interesting to highlight that in a period when human rights did not yet exist, the recourse to waiver was justified mainly by political reasons than in light of some legal principle. See *G. G. Fitzmaurice*, *The Juridical Clauses of the Peace Treaties*, in: *RdC* 73 (1948), 341 et seq.

<sup>14</sup> It is useful to recall a recent decision of the Korean Constitutional Court related to the “*Comfort Women*” issue. The Court decided that the Korean government had not done enough to obtain reparations for the violence suffered by its own female citizens and that this inaction represented a breach of the individual rights safeguarded in the Korean Constitution. Therefore, the Korean Constitutional Court asked the government to activate all diplomatic means in order to solve interpretive disputes concerning the content of the peace treaty signed by the two States in 1965, see Korean Constitutional Court, KCCR, 30.8.2011, 2006Hun-Ma788/Unconstitutional.

man rights. This aspect will not be addressed here. In the present article the implications of the State's waiver of reparation claims and the emergence of possible limitations on this right will be observed only from the perspective of interstate relations. However, to deal with the question arising, one cannot ignore the fact that individual reparation can take different forms. An important role, in this respect, can be played by non-economic types of compensation and reparations of a collective nature.

The article is structured as follows. Section II. addresses some elements of State practice and the main questions under discussion in recent international disputes related to the State's power to waive reparation claims arising from international humanitarian law violations. Particular attention will be paid to some distinctive features at issue in such a debate, especially a number of intertemporal law issues (III.). Section IV. analyzes some developments of the law on State responsibility which seem to support the idea of the existence of some limitation to the State's power to waive reparations. As is shown in section V., a confirmation of this tendency can also be traced back to some provisions of the Geneva Conventions of 1949. The final section provides general reflections on the policy reasons supporting a possible limitation to the State's power to waive reparation claims arising from war crimes and crimes against humanity (VI.).

## II. Elements of State Practice: Some Clauses Contained in Settlements Related to World War II

State practice in relation to the waiving of the right to reparation in the name and on behalf of its own citizens is quite consistent and mainly dates back to World War II. One example is Art. 14 (b) of the San Francisco Treaty of 1951, according to which

“the Allied Powers waive (d) all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation”.<sup>15</sup>

The historical reasons which led to the inclusion of waiver clauses in peace treaties signed in the aftermath of World War II can be traced back to the experience following World War I and the signing of the Peace Treaty of

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<sup>15</sup> Peace treaty with Japan, 8.9.1951. We can also mention Art. 77 of the peace treaty with Italy in 1947 and Art. 23, para. 3 and Art. 27, para. 2 of the peace treaty with Austria in 1955.

Versailles. It has been argued that it was in fact the punitive nature of the Treaty on Germany that was one of the main causes of the political instability – which led to *Hitler's* rise to power and ultimately resulted in World War II.<sup>16</sup>

There are at least three cases in which the content and the effects of these clauses have recently become the subject of political debates or legal disputes.

The first example of this is the different points of view expressed by the Greek and German governments in relation to reparations due by Germany for some of the Nazi massacres carried out during the occupation of Greece. The disagreement between the two governments relates to several legal, political and economic issues. Among these, one major bone of contention revolves around the meaning and the content of the alleged Greek waiver of any claim for reparation.

According to the German government, this waiver occurred initially through the Greek ratification of the London agreement on German External Debt of 1953 and was confirmed in the so-called “Two Plus Four Agreement” (Vertrag über die abschließende Regelung in Bezug auf Deutschland) of 1990.<sup>17</sup> This agreement would have provided a definitive waiver of the right to reparation not only for the victorious States (which had signed the treaty: United States, USSR, United Kingdom, and France), but also for their Allied Powers (which nevertheless were not part of the agreement, like Greece). For its part, Greece deems that the agreement of 1953 merely postponed the question of reparations and that the Two Plus Four Agreement of 1990 did not at all deal with the problem of reparations.<sup>18</sup>

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<sup>16</sup> Although there is a general agreement on the failure of the Versailles Treaty of 1919, historical analyses diverge on the excess of economic sanctions to Germany. As is well known, *J. M. Keynes* deeply disapproved the severity of the Versailles Treaty, and exposed his ideas in *The Economic Consequences of the Peace*, 1919. Some scholars believe that the economic sanctions of the Versailles Treaty were restrained, and that the actual failure of the peace treaty is due to the fact that Germany did not respect the conditions imposed by the Allied Powers, see *R. Henig*, *Versailles and After: 1919-1933*, 1995, 61. A number of historical analyses mainly focus on the so-called “war-guilt clause”, contained in Art. 231 of the treaty, that attributed all war responsibilities to Germany, such as the true “gift to German nationalism”, see *E. Hobsbawm*, *The Age of Extremes: The Short Twentieth Century, 1914-1991*, 1994, 98.

<sup>17</sup> It is worth stating that, in the context of a series of agreements signed by German government with twelve Western countries, in 1960 Greece received from Germany 115 million Marks in reparation for the occupation. See on this issue *A. von Arnould*, *Damages for the Infringement of Human Rights in Germany*, in: *E. Baginska*, *Damages for Violations of Human Rights, A Comparative Study of Domestic Legal Systems*, 2016, 122 et seq.

<sup>18</sup> The debate grew due to the economic and financial crisis of Greece. Nevertheless, it is worth underlining that the pressing claims of the *Tsipras* government were preceded by simi-

Another example is the waiver clause contained in Art. 77, para. 4, of the peace treaty between Italy and the Allied Powers of 1947.<sup>19</sup> According to this Article, “Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals”. The interpretation of this provision has been debated between Germany and Italy in the written proceedings of the recent dispute on *Jurisdictional immunities of the State*. Nevertheless, to come to a decision in the case, the International Court of Justice did not deem it necessary to establish the existence of an individual right to reparation for violations of humanitarian law and the content and scope of the Italian waiver.<sup>20</sup> In particular, the Court did not determine whether the waiver clause also related to reparations for grave violations of the law of armed conflicts nor did it clarify whether, as Italy had submitted, the agreement’s purpose was to deal only with economic and commercial relations among the two States.<sup>21</sup> Furthermore, Italy highlighted that, at the time of the agreement, many Nazi crimes were unknown, and consequently reparations for these facts could not be covered by the waiver.<sup>22</sup>

In another case, with the agreement signed on 28.12.2015,<sup>23</sup> Japan and South Korea finally may have put to an end a long-standing dispute concerning the issue of the so-called “comfort women”, the thousands of (not only) Korean women forced into sexual slavery for Japanese soldiers during World War II. What is interesting to note here is the fact that, from the nineties onward, independently of the dispute between the two States, many individuals brought their claims to Japanese courts. On many occasions these reparations claim were rejected by the Japanese Supreme Court.<sup>24</sup> The

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lar claims of the previous Prime Minister *Samaras*. Among the numerous steps of this political-diplomatic dispute, and in particular on the positions of the German finance minister *Schäuble* concerning the content of Greek waiver, see <<http://www.nytimes.com>>.

<sup>19</sup> Similar dispositions are contained in the treaties signed with Romania (Art. 28, para. 4), Bulgaria (Art. 26, paras. 1 and 2) and Hungary (Art. 19, lett. c). For a detailed investigation of the evolution of interstate relations in the reparation context, see *R. Buxbaum*, *A Legal History of International Reparations*, in: *Berkley Journal of International Law* 23 (2005), 314 et seq.

<sup>20</sup> *Jurisdictional Immunities Case* (note 9), para. 108.

<sup>21</sup> For the argument made by Italy to the Court, see the *plaidoirie* by *Zappalà* at the hearing of 16.9.2011, CR 2011/21, 17 et seq.

<sup>22</sup> In particular, see *Jurisdictional Immunities Case* (note 9), Rejoinder of Italy of 10.1.2011, 14 et seq. On the existence of an individual right to reparation, see also Greek written declaration of 3.8.2011.

<sup>23</sup> Indeed, many victims have already expressed their complete dissatisfaction and aversion to the content of the agreement. See for example the declarations written here: <<http://thediplomat.com>>.

<sup>24</sup> In particular, see *Nishimatsu Construction Co. v. Song Jixiao et al.*, Supreme Court of Japan (2<sup>nd</sup> Petty Bench), 27.4.2007, and *Ko Hanako et al. v. Japan*, Supreme Court of Japan (1<sup>st</sup> Petty Bench), 2.4.2007. The only judgment which had partially recognized a right to repara-

reason behind these rejections was the peace agreement signed by Japan in 1951, in particular Art. 14 (b) cited at the beginning of this paragraph, through which the Allied Powers waived any request for reparation for the injuries caused by the war.<sup>25</sup> As for the specific cases concerning South Korean victims, Japanese courts took advantage of Art. II of an agreement signed between South Korea and Japan in 1965. This provision states that

“the problem concerning property, rights, and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals (...) is settled completely and finally”.

This provision has been subjected to different interpretations. According to *Gay McDougall*, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the aim of the agreement was to settle exclusively property and commercial relations between the parties; consequently, the waiver clause would not include the violations caused by war crimes and crimes against humanity committed by Japanese soldiers. This would also be supported by the fact that, at the moment of the agreement, the nature and extent of the involvement of the Japanese government in the creation and functioning of the system of forced prostitution was unknown.<sup>26</sup> For its part, Japan recognizes its moral responsibility. However, it denies any legal obligation since the Geneva Convention of 1949 and other international humanitarian law instruments did not exist at the time of the Second World War. Moreover, according to Japan, all kinds

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tion for the victims (Yamaguchi District Court, sentence of 27.4.1998) has been overturned by the Supreme Court (25 March 2003).

<sup>25</sup> Moreover, the Supreme Court denied in a similar way a right to reparation to Chinese victims, see *Nishimatsu Construction Case* (note 24) and 1<sup>st</sup> Petty Bench of the Supreme Court, *Second Chinese “Comfort Women” Case*, 27.4.2007. For an analysis of these decisions, see *M. Asada/T. Ryan*, Post-war Reparations between Japan and China and Individual Claims: The Supreme Court Judgments in the Nishimatsu Construction Case and the Second Chinese “Comfort Women” Case, in: *The Italian Yearbook of International Law* 19 (2009), 207 et seq. The Court does not deny the existence of an individual right from the substantial point of view, but affirms that waivers would have the effect of “removing the competency to pursue these claims in litigations”. Similar arguments were presented by the Supreme Court about the cases concerning Dutch war prisoners, see Tokyo High Court, *Former Dutch Prisoners of War Injuries*, 11.10.2001 and 3<sup>rd</sup> Petty Bench of the Supreme Court, 30.3.2004.

<sup>26</sup> Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fiftieth session, Contemporary forms of slavery, systematic rape, sexual slavery and slavery-like practices during armed conflict, Final Report submitted by Ms. *Gay J. McDougall*, Special Rapporteur, E/CN.4/Sub.2/1998/13, 22.6.1998, paras. 57 and 62.

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of reparation claims have been settled under bilateral agreements with South Korea.<sup>27</sup>

### III. Peculiarities of the Problems Raised by Waiver Clauses Included in Peace Settlements Related to World War II

Before trying to establish whether potential limits to the State's right to waive a claim for reparation are nowadays emerging in light of the development of the law on State responsibility, it is worth underlining some elements which are unique to the disputes mentioned above. This clarification is necessary to properly assess the relevance which must be given to this practice today.

Among the main reasons for underlining the uniqueness of this practice, there are a number of intertemporal law issues. In fact, in relation to the waiver clauses contained in the peace treaties concluded in the aftermath of World War II, it can be puzzling to recall and attribute legal relevance to relatively recent normative concepts and categories such as *jus cogens* norms, *erga omnes* obligations, or the secondary norms on State responsibility in cases of serious breaches of obligations under peremptory norms of general international law.

The importance of the principle of *tempus commissi delicti* has been affirmed repeatedly in international case law<sup>28</sup> and is also recognized by Art. 13 of the International Law Commission's Draft Articles on State Responsibility.<sup>29</sup>

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<sup>27</sup> See Centre for Research and Documentation on Japan's War Responsibility, The First Report on the Issue of Japan's Military "Comfort Women", 31.3.1944, 5 et seq. See also R. Coomaraswamy, Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime, United Nations, Economic and Social Council, Commission on Human Rights, E/CN.4/1996/53/Add. 1, 4.1.1996, 22 et seq.

<sup>28</sup> The starting point of each analysis on the principle of non-retroactivity is the statement of Judge Max Huber in the case of the *Island of Palmas*: "Both parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled.", See Reports of International Arbitral Awards, *Island of Palmas Case* (Netherlands, USA), 4.4.1928, Vol. II, 829 et seq., at 845.

<sup>29</sup> The matter has been the subject of particular attention since the earliest works of the Commission, in particular Arts. 24-26 of the first part of the Draft Articles published in the Yearbook of the International Law Commission 1980, Vol. II (part. 2); for an analysis of those provisions see W. Karl, Time Factor in the Law of State Responsibility, in: B. Simma/M. Spinedi (eds.), United Nations Codification of State Responsibility, 1987, 95 et seq. See also

It is not especially controversial to say that atrocities committed during World War II were already at that time unlawful, since they were in flagrant violation of existing humanitarian law. More controversial is the *jus cogens* nature of those humanitarian law rules at the time. In fact, it might be argued that it is only from the end of the 1960's, that the works of the ILC on the law of treaties indicated the emergence of this category of norms as one of the latest developments of international law.<sup>30</sup> Nevertheless, some interpretations consider the existence of peremptory norms prior to the Vienna Convention of 1969. For example, in the above-mentioned dispute with Germany, Italy affirmed that "the concept of *jus cogens* had already emerged before the Second World War", in particular as to what concerns the treatment of prisoners of war.<sup>31</sup> The Court did not consider this matter and denied – as is well known – the very existence of a conflict between the norms on State immunity and *jus cogens* rules.<sup>32</sup>

It is also important to bear in mind that the Commentary to Art. 13 of the Draft Articles on State Responsibility highlights another relevant aspect of intertemporal law. The ILC, in fact, clearly affirms that even the emergence of a new rule of *jus cogens* "does not entail any retrospective assumption of responsibility".<sup>33</sup> However, different positions have been taken on this issue. Some scholars affirm the possible retroactive application of *jus cogens* rules, at least in some limited circumstances.<sup>34</sup> According to a number of contributions, the possibility cannot be excluded, and it "would depend on each norm to determine how far rights and obligations that have previously arisen are affected".<sup>35</sup>

A further intertemporal uncertainty concerns the effect of some unilateral acts of the State, such as waiver, in case of serious breaches of international

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the resolution of the Institut de droit international, *Le problème intertemporel en droit international public*, Wiesbaden, 1975.

<sup>30</sup> See ILC, *Draft Articles on the Law of Treaties*, in: ILCYB, 1966, Vol. II, UN Doc. A/CN.4/SER.A./1966/Add.1, 247 et seq.

<sup>31</sup> *Jurisdictional Immunities Case* (note 9), Counter-Memorial of Italy, para. 4.57 et seq. For authoritative doctrine confirming this thesis, see in particular, *A. von Verdross*, *Forbidden Treaties in International Law*, in: AJIL 31 (1937), 571 et seq. Contra see *S. Schmahl*, *An Example of Jus Cogens: The Status of Prisoners of War*, in: C. Tomuschat/J.-M. Thouvenin, *The Fundamental Norms of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, 2006, 50.

<sup>32</sup> *Jurisdictional Immunities Case* (note 9), para. 93.

<sup>33</sup> See ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries, in: ILCYB, 2001, Vol. II, Part Two, A/56/10., 58.

<sup>34</sup> *P. Tavernier*, *Recherches sur l'application dans le temps des actes et des règles en droit international public*, 1970, 162 et seq.

<sup>35</sup> *G. Gaja*, *Jus Cogens Beyond the Vienna Convention*, in: RdC 172 (1981), 293 and footnote 58.

law. This matter belongs to the sphere of the consequences of breaches of obligations under peremptory rules on secondary norms of State responsibility.<sup>36</sup> For a long time, a regime of aggravated State responsibility has been considered by the ILC and has eventually found a normative framework through the adoption of the Draft Articles in 2001. Even assuming that this regime reflects current customary international law, it may be difficult to argue that this regime should apply to events which occurred long before the more recent developments of international law.

As for waiver clauses contained in the peace treaties signed at the end of World War II, may not be decisive for the purposes of either ascertaining a general States' right to waive all claims of reparation or affirming the existence of some limitation to this right in cases of grave breaches of human rights and humanitarian law. In fact, these clauses do not lend themselves to an unequivocal interpretation and, as illustrated through the complex disputes already recalled, the States involved have expressed different views as to their scope of application. In particular, the problem is normally dealt with as a matter of treaty interpretation rather than as a matter of validity or related to the legal effects of these clauses. In other words, the interpretative dispute is about determining the scope of the waiver included in the relevant treaty provisions. Such a matter must be analyzed in each individual case, by considering the specific formulation of the waiver, the context in which the treaty has been signed and in light of the object and the purpose of the agreement.

For example, an argument frequently raised in order to exclude gross violations of international humanitarian law from the scope of application of waiver clauses is based on the consideration that, at the moment of the agreement's conclusion, the significance and the severity of unlawful conduct was still unknown. Furthermore, both Italy and Greece attempted to base their narrow interpretation of the scope of the waiver clauses by relying on the purposes of the respective treaties. They insisted on the temporary nature of those agreements and their contingent scope: Allowing the

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<sup>36</sup> According to several authors, this distinction would be at the basis of the legitimacy of the right to waive, even for grave violations of *jus cogens* norms, see in particular, *P. d'Argent* (note 12), 773 and *E. Benvenuti*, Individual Remedies for Victims of Armed Conflicts in the Context of Mass Claims Settlements, in: H. Hestermeyer/D. König/N. Matz-Lück/V. Röben/A. Seibert-Fohr/P.-T. Stoll/S. Vöneky (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, 2012, 1097. Differently, *L. Condorelli*, Conclusion Générales, in: L. Boisson de Chazournes/J.-F. Queguiner/S. Villalpando (eds.), *Crimes de l'histoire et réparations: les réponses du droit et de la justice*, 2003, 297 et seq., according to whom legitimacy of these acts should be excluded for "des atrocités qui choquent la conscience collective".

Allied Powers which controlled Germany “to use all German resources for their own purposes, without having to divert them for the payment of reparations to Germany’s former ally”. Therefore, the issue of reparations for violations of humanitarian law against Italian citizens would have been resolved “at a later stage, in a different context”.<sup>37</sup> On the contrary, Germany underlined that the main purpose of waiver clauses was the need to settle definitively all questions concerning reparations and of sanctioning States allied with the Third Reich. More generally, according to Germany, the scope of all-inclusive provisions “was to lay the foundations for a fresh start in a peaceful Europe”.<sup>38</sup>

The need to refer to the political aims of the peace agreement in order to determine the content of the waiver clause is a clear sign of the poor drafting of the relevant provisions. On the one hand, waiver clauses seem to have a wide scope of application which would include all kinds of claims that nationals of the State waiving the right to reparation could potentially make in the future; on the other hand, no waiver provision includes explicitly – in its scope of application – reparations due for grave breaches of human rights and humanitarian law. For this reason, according to certain interpretations, it would be possible to have recourse to principles of justice and equity or the principle of systemic interpretation to restrictively construe those clauses, thus excluding the most grave violations by the object of the unilateral act of waiver.<sup>39</sup>

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<sup>37</sup> See Counter-Memorial of Italy, 22.12.2009, para. 2.9 et seq., available at <<http://www.icj-cij.org>> and the literature therein quoted, in particular, W. *Wilmanns*, Die Forderungen der Verbündeten des Deutschen Reiches gegen deutsche Schuldner nach dem Londoner Schuldenabkommen, in: BB 10 (1955), 821. See also G. *Henn*, Forderungen der “Eingegliederten” und “Verbündeten” gegen deutsche Schuldner nach dem Londoner Schuldenabkommen, in: BB 10 (1955), 1117.

<sup>38</sup> *Jurisdictional Immunities Case* (note 9), Reply of the Federal Republic of Germany, 5.10.2010, paras. 15 and 16.

<sup>39</sup> The principle of equity referred to by *Gay McDougall* supports the idea that the violations included in the waiver must be explicitly expressed; according to this principle, “when jus cogens norms are invoked, States that stand accused of having violated such fundamental laws must not be allowed to rely on mere technicalities to avoid liability”. From this principle one could infer that the scope and the content of waiver clauses must be disciplined clearly and unequivocally. In other words, even a broad and (apparently) all-inclusive waiver clause could not be construed as including reparation claims for the gravest violations of fundamental norms of international law. See Commission on Human Rights, Sub-Commission on Prevention of Discrimination ..., Final Report submitted by Ms. *Gay J. McDougall* (note 26), para. 62. Similarly, one could recall the principle of systemic interpretation to affirm that a restrictive interpretation of waiver clauses is imposed by the gravity of violations committed and the exigency to construe their content in light of customary international law. This might be the key reading of some doctrinal positions according to which the concept of *ordre public*

To sum up, the examined disputes can be seen as rather unique, generally characterized by many complex and much debated matters of intertemporal law. Moreover, the interpretive nature of legal problems arising during the recent disputes on the content of waiver clauses does not allow one to infer clear indications about the existence of general limitations on the exercise of the State's power to waive reparation. It is now time to see whether some of these limits may be detected in the light of the evolution of the law on State responsibility.

#### IV. Waiver and Collective Interests in the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts

While World War II practice is not especially helpful in determining the existence of general limitations to the State's right to waive reparation, it may be interesting, from a *de lege ferenda* perspective, to look at some of the major developments of the law of State responsibility. ILC's Draft Articles on State Responsibility do not deal directly with the matter at issue. However, they may give some guidance on the potential limitations on the State's right to waive reparation in cases of gross violations of peremptory norms that protect the fundamental rights of the individual. In particular, an analysis of the ILC's work may support the idea that, when a collective interest is involved, the rights that the Draft Articles bestow to the injured State might be limited. Moreover, despite the fact that the Draft Articles deal exclusively with interstate relations,<sup>40</sup> the position of the individual assumes – in cases of serious breaches of obligations under peremptory norms – a considerable relevance.

Draft Art. 45 is crucial to the present investigation. It deals with the valid exercise of a waiver by the injured State, and it states that, as a consequence of this act, the injured State loses the right to invoke the responsibility of

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*international* “may operate as a climate of the intention of the parties”, see *W. Jenks*, *The Prospect of International Adjudication*, 1964, 458.

<sup>40</sup> As is well known, the Draft Articles on Responsibility of States (note 2) include a general provision (Art. 33, para. 2), according to which articles included in Part Two, on the content of the responsibility of the State, do not affect “any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”. The decision not to regulate the position of individuals towards States responsible for grave violations of human rights has been subject of many criticisms among international law scholars. See, for example, *E. Brown Weiss*, *Invoking State Responsibility in the Twenty-First Century*, in: *AJIL* 96 (2002), 798 et seq.

the wrongdoer State.<sup>41</sup> Nevertheless, in the Commentary to this provision, the ILC highlighted peculiar consequences deriving from the waiver in cases of violations of peremptory norms. In particular, the ILC observed that, since peremptory norms safeguard an interest of the international community, “even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law”.<sup>42</sup> This passage suggests that the injured State, by waiving its right to invoke the responsibility of the State which committed the violation, cannot entirely dispose of an interest which belongs to the international community as a whole. In other words, the fact that the injured State waives the right to invoke the international responsibility of the wrongdoer State cannot negatively affect the more general interest of the international community to claim all the consequences of a violation of peremptory norms.

Other elements of interest can be inferred from Draft Art. 41, dedicated to the particular consequences deriving from serious breaches of peremptory norms. In the Commentary to para. 2 of that provision – concerning the obligation not to recognize a situation created by the serious breach of a *jus cogens* obligation as lawful – the ILC observed that the injured State’s waiver to invoke the responsibility of the State responsible for the wrongful act “cannot preclude the international community interest in ensuring a just and appropriate settlement”.<sup>43</sup> In other words, when the injured State renounces the right to invoke the responsibility of the State responsible for the wrongful act, it still remains a collective interest to grant the achievement of a fair and appropriate solution. A settlement, therefore, not only “in conformity with international law” (as underlined in the Commentary to Draft Art. 45), but also one that is “just and appropriate”.

More interestingly, the fairness and appropriateness of this solution – in the light of another provision contained in the Draft Articles – should safeguard the interests of the subjects who suffered the consequences of the violation. A hint in this direction could be deduced by the fact that – in case of breaches of obligations owed towards the international community as a whole – Draft Art. 48 (2) (b), entitles each State of the international com-

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<sup>41</sup> The Art. 45 of the Draft Articles on State Responsibility (note 2) says: “The responsibility of a State may not be invoked if:

(a) the injured State has validly waived the claim;  
(b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

<sup>42</sup> See Draft Articles on Responsibility of States, with Commentaries (note 33), 122, para. 4.

<sup>43</sup> See Draft Articles on Responsibility of States, with Commentaries (note 33).

munity to invoke the compliance of the obligation to repair by the State responsible for the wrongful act “in the interest ... of the beneficiaries of the obligation breached”.

The main idea that emerges from the Draft Articles is that in cases where there are violations of peremptory rules, the waiver of the injured State does not have any impact on the other States of the international community, since they would be entitled to act for the protection of the collective interest. In particular, in case this interest of the international community revolves around individual rights, the injured State and all the other States of the international community have the right to invoke the international responsibility of the wrongdoer State, for the benefit of the individual victims of the violation.

The law of State responsibility then recognizes the inadequacy of the bilateral relationship of responsibility in regulating the consequences of violations involving the international community as a whole, especially when the primary norms which are violated safeguard the rights of subjects who are no States. Indeed, according to some scholars, and in light of several decisions of international jurisdictions,<sup>44</sup> in these hypotheses there is not even a State specially affected by the breach, being the injured State just one among the *omnes*.<sup>45</sup>

Yet, what is interesting to underline here is that, besides the rights which derive directly from its status as an injured State, the injured State itself also has (like all other States) a range of so-called “functional powers” for safeguarding the interest of the international community.<sup>46</sup> As regards this dis-

<sup>44</sup> ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, para. 68. According to the Court, for example, in the case of torture it does not really matter about the victim’s nationality, the nationality of the perpetrator or the place where violations occurred, but what really counts is just the obligation of the State to prosecute the responsible person who is in its own territory; in this case, the International Court of Justice recognized that, as regards this kind of obligations, “each State party has an interest in compliance with them in any given case”. Even the European Court of Human Rights clearly affirmed that the interest safeguarded by the European Convention is that of the community of States parties to protect the respect of human rights and not the individual right of the victim’s State of nationality, see *Cyprus v. Turkey*, App. no. 25781/94, 12.5.2014 (Grand Chamber).

<sup>45</sup> G. Gaja, *Is a State Specially Affected When Its Nationals’ Human Rights Are Infringed*, in: L. C. Vorah/E. Pocar/Y. Featherstone/O. Fourmy/C. Graham/J. Hocking/N. Robson (eds.), *Man’s Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese*, 2003, 373 et seq.

<sup>46</sup> The idea of this distinction comes from several writings by P. Picone, *Obblighi reciproci ed obblighi erga omnes degli Stati nel campo della protezione internazionale dell’ambiente marino dall’inquinamento*, in: V. Starace (ed.), *Diritto internazionale e protezione dell’ambiente marino*, 1983, 84, and *La distinzione tra norme internazionali di jus cogens e norme che producono effetti erga omnes*, in: *Riv. Dir. Int.* 91 (2008), 9. After all, the same

tion, it has been rightly affirmed that only in relation to the former – the individual rights of the injured State – States can exercise a full discretionary power, and possibly, waive their rights.<sup>47</sup>

Functional powers then cannot be waived. At the same time, it could hardly be argued that there is an obligation for the victim's State of nationality (and for all the other States) to exercise those powers, i.e. to seek reparation in the interest of the beneficiaries of the breached norm. This would be an obligation towards the international community, whose interest in a just and appropriate settlement in case of violations of peremptory norms must be protected. However, the Draft Articles do not give any indication in this regard. It is also difficult to find some elements of State practice supporting the existence of a State's obligation to invoke the responsibility of the wrongdoer State in case of violation of *jus cogens* rules.<sup>48</sup>

It also seems doubtful that the State's waiver in relation to reparations would render the treaty void, since it would be contrary to *jus cogens*. The State's waiver can be considered in conflict with peremptory norms only if one deems the obligation to repair as having been imposed by a *jus cogens* rule. However, there is little evidence to support the idea that, when violations of primary norms of *jus cogens* occur, the corresponding secondary

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Commentary to Art. 48 affirms that a State other than the injured State, when invoking the responsibility of the wrongdoer State, "is acting not in its individual capacity", but rather "as a member of the international community as a whole", see Draft Articles on Responsibility of States, with Commentaries (note 33), 126, para. 1.

<sup>47</sup> P. Picone, Il ruolo dello Stato leso nelle reazioni collettive alle violazioni di obblighi erga omnes, in: Riv. Dir. Int. 95 (2012), 986.

<sup>48</sup> The possible existence of a "power-obligation" ("potere-dovere") of the States, and thus of an obligation to react to breaches of peremptory norms and *erga omnes* obligations would be limited to some hypothesis, see P. Picone, Obblighi reciproci (note 46), 84, footnote 153. The author justifies this possibility from a theoretical point of view, but he considers it as in contrast with the trend of international customary law (it does not seem that since 1983 this trend has significantly changed in State practice); on the matter see also P. Picone, Obblighi erga omnes e codificazione della responsabilità degli Stati, in: Riv. Dir. Int. 88 (2005), 908. According to some interpretations, the obligation for all States, enshrined in Draft Art. 41, to cooperate to bring to an end any serious breaches of peremptory norms would also imply an obligation to invoke the responsibility of the State responsible for the wrongful act. In fact, as has already been affirmed, in case of breach of *erga omnes* obligations, the existence of collective interests can lead to an imposition "on all States the duty to ensure compliance by other States with obligations protecting those interests", see G. Gaja, Do States Have a Duty to Ensure Compliance with Obligations Erga Omnes by Other States?, in: M. Ragazzi (ed.), International Responsibility Today, Essays in Memory of Oscar Schachter, 2005, 35. Even other authors believe that "every state is responsible also to seek compliance by all other states with their obligation under the customary international law of human rights", see L. Henkin, Inter-State Responsibility for Compliance with Human Rights Obligations, in: L. C. Vorah/F. Pocar/Y. Featherstone/O. Fourmy/C. Graham/J. Hocking/N. Robson (note 45), 383 et seq.

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norms on State responsibility have a peremptory nature, too. There are no clear elements of State practice which would support this idea. On the contrary, the judgment of the International Court of Justice in the case of *Jurisdictional Immunities of the State* seems to deny the peremptory nature of the obligation to make reparation. According to this decision, in the light of a constant practice concerning the conclusion of lump-sum agreements, it would be difficult to affirm

“that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted”.<sup>49</sup>

However, it could still be argued that the State which renounces its right to invoke the international responsibility of the wrongdoer State for grave violations of *jus cogens* norms would commit an international wrongful act. The wrongfulness of this act would stem from the violation of the obligation set forth in the Draft Art. 41, para. 2, which provides that a situation created by the violation of peremptory norms must not be recognized as lawful. This obligation may be considered as having an *erga omnes* nature.

It is complex to identify the content of the obligation set forth in Draft Art. 41, para. 2, especially in cases of violations of international human rights and humanitarian law.<sup>50</sup> However, such content should be broadly

<sup>49</sup> *Jurisdictional Immunities Case* (note 9), para. 94. The peremptory nature of a State obligation to make reparation could come from a respectively imperative individual right. In the sense of the imperative nature of the obligation to make reparation seems to point some Italian considerations concerning the right of access to a judge expressed in the written proceedings of the case on the *Jurisdictional Immunities of the State*. In fact, the Italian defense, recalling the case law of the Inter-American Court of Human Rights, affirmed that the access to justice can be considered as “a peremptory norm of international law in a case in which the substantive rights violated were also granted by *jus cogens* norms”. See Counter-Memorial of Italy, 22.12.2009, para. 4.94, available at <<http://www.icj-cij.org>> and the decision of Inter-American Court of human rights, *Goiburú and others v. Paraguay, (Fondo, Reparaciones y Costas)*, 22.9.2006, Ser. C, No. 153, para. 131. In relation to the already mentioned agreement “two plus four” of 1990, the German Federal Constitutional Court (Bundesverfassungsgericht) affirmed the validity of German waiver because – even in view of the possible violation of peremptory norms by URSS during the occupation, “[T]he waiver is not precluded by any peremptory norms of general international law”, see Bundesverfassungsgericht, Decision of 26.10.2004, 2 BvR 955/00, 1038/01, BVerfGE 112, 1, 32. See the considerations which support this thesis by S. Talmon, *Jus Cogens after Germany v. Italy: Substantive and Procedural Norms Distinguished*, in LJIL 25 (2012), 997.

<sup>50</sup> In fact, there are no relevant elements of State practice concerning the non-recognition of grave violations of human rights and humanitarian law. The reason for this absence has been reasonably found in the circumstance that these hypotheses – differently from the cases of wrongful occupation and acquisition of a territory – “do not automatically give rise to any legal consequences which are capable of being denied by other States”, see S. Talmon, *The*

interpreted. In fact, as the ILC illustrated, this obligation aims at prohibiting not only the formal recognition of the situation created by the violation of *jus cogens* norms, but also those acts “which would imply such recognition”.<sup>51</sup> Moreover, a relationship between the obligation of non-recognition and an act of waiver can be found in the already cited commentary to Draft Art. 41, para. 2. In the relevant passage previously quoted, the waiver to invoke the consequences of that wrongful act by the injured State is considered comparable to the recognition of a wrongful situation created by the violation of peremptory rules. The need to extensively interpret the content of this obligation and the relationship traced by the ILC itself between waiver and recognition indicate a possible development of international law in the sense of limiting the possibility of exercising these unilateral acts by the injured State in case of serious breaches of peremptory norms.

It may be asked at this stage what practical consequences might stem from the recognition of the existence of an obligation aimed at limiting the State’s right to waive reparation. One might argue that such a rule would be more exhortatory than normative. In fact, it is difficult to imagine that States not directly affected by the violation would invoke the responsibility both of the State which has waived its right to seek reparation and of the State which has committed the violation of peremptory norms, by asking them to comply with the obligation to repair in the interest of the beneficiaries of the norm breached.<sup>52</sup>

## V. Possible Limitations to the Right to Waive Reparation Deriving from Conventional Humanitarian Law

Potential limitations on the State’s right to waive reparation may find early recognition in some treaty provisions of the law of armed conflict, at least

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Duty Not to “Recognize as Lawful” a Situation Created by the Illegal Use of Force or Other Grave Violations of a Jus Cogens Obligation: An Obligation Without Real Substance?, in: C. Tomuschat/J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, 2005, 120.

<sup>51</sup> ILC, Commentary to the Art. 41, para. 2 of the Draft Articles on Responsibility of States, with Commentaries (note 33), 114, para. 5. For a reference to the practice of the Security Council and the General Assembly oriented toward an extensive interpretation of the obligation see *M. Dawidowicz*, *The Obligation of Non-Recognition of an Unlawful Situation*, in: J. Crawford/A. Pellet/S. Olleson (note 8), 684.

<sup>52</sup> As observed in the literature, the hypothesis that the right to reparation is invoked by other States than the one of nationality of the victims of the international wrongful act “seems quite theoretical”, see *B. Stern*, *The Obligation to Make Reparation*, in: J. Crawford/A. Pellet/S. Olleson (note 8), 568.

in relation to the commission of war crimes. A common provision of the four Geneva Conventions of 1949 affirms that no State is authorized “to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party” in case of grave violations of the norms of the Conventions.<sup>53</sup>

In light of this norm, the waiver to the right to reparation for serious violations of humanitarian law could be compared with an absolution of the international responsibility of the State responsible for the wrongful act.<sup>54</sup> Despite the ambiguity of the provision, the interpretation of the International Committee of the Red Cross may act to confirm this idea; it asserts that the aim of this norm is

“d’empêcher que, dans une Convention d’armistice ou dans un traité de paix, le vaincu soit contraint de renoncer à toute réparation due à raison d’infractions commises par des personnes se trouvant au service du vainqueur”.<sup>55</sup>

The content of this article common to the four Conventions has been invoked once again by Italy in the dispute on *Jurisdictional Immunities of the State*. According to Italy, the provision must not be read in the sense of denying the existence of the States’ power to decide the amount of the reparations through a treaty. However, Italy believes that, in concluding any peace treaty, States must consider the fundamental scope of the Geneva Conventions “which is ultimately to ensure effective reparation to the victims of the violations”.<sup>56</sup> On the contrary, Germany underlined the irrelevance of the common provision in establishing the existence of an individual right to reparation for grave breaches of humanitarian law. According to Germany, in fact, these norms “relate to international reparation claims held by States against other States”.<sup>57</sup> In other words, the common provision would not entitle individuals to claim reparation against States.

Furthermore, the Commentary of the International Committee of the Red Cross to the common provision also highlights that it “would seem

<sup>53</sup> Convention I, Art. 51; Convention II, Art. 52; Convention III, Art. 131; Convention IV, Art. 148.

<sup>54</sup> In this sense some reflections by *F. Kalshoven*, State Responsibility for Warlike Acts of the Armed Forces: From Art. 3 of Hague Convention IV of 1907 to Art. 91 of Additional Protocol I of 1977 and beyond, in: ICLQ 40 (1991), 843.

<sup>55</sup> See Comité international de la croix-rouge, Commentaire. La convention de Genève pour l’amélioration du sort des blessés et des malades dans les forces armées en campagne (sous la direction de *J. Pictet*), Genève, 1952, Art. 51, 420; see also *F. Domb*, Human Rights and War Reparation, in: Isr. Y.B. Hum. Rts. 1993, 108.

<sup>56</sup> *Jurisdictional Immunities Case* (note 9), Italy Counter-Memorial, para. 5.14.

<sup>57</sup> *Jurisdictional Immunities Case* (note 9), Reply of the Federal Republic of Germany, 5.10.2005, para. 47.

unjust for individuals to be punished while the State in whose name or on whose instructions they acted was released from all liability”.<sup>58</sup> One rationale of this provision, according to the Committee, is to prevent the State being absolved of its responsibility, simply because it prosecutes the perpetrators of the crimes. Putting it differently, it cannot use those prosecutions as a “protective shield” for its own responsibility.

Nevertheless, this reading has been contested by those who believe that the *ratio* of the norm is “exactement l’inverse”: to absolve criminal responsibility through an interstate agreement. In other words, the aim of the provision would be to avoid a situation where a State’s waiver prevents the prosecution of war criminals.<sup>59</sup> The latter is more likely the fundamental purpose of the common article. This would also be confirmed by several elements of State practice.<sup>60</sup>

Still, one could maintain that the norm has a double rationale. In fact, in the commentary to another provision, Art. 91 of the First Additional Protocol of 1977, the Committee – recalling the common article to all four Geneva Conventions here under discussion – underlines that, in concluding a peace treaty, States “can in principle deal with the problems relating to war damage in general”. However, when reaching an agreement, on the one hand, “they are not free to forego the prosecution of war criminals” and, on the other – and more significantly for our purposes – they cannot “deny compensation to which the victims of violations of the norms of the Conventions and Protocols are entitled”.<sup>61</sup>

If one accepts this interpretation, it is possible to state that a limitation on the State’s power to waive reparation claims arising from war crimes already existed in 1949. Moreover, in light of the evolutionary trends emerging from the ILC’s work on secondary norms on State responsibility in cases of violations of *jus cogens* rules, that limitation would nowadays be extended to all violations of peremptory norms.<sup>62</sup>

<sup>58</sup> Comité international de la croix-rouge (note 55), 421.

<sup>59</sup> *P. d’Argent* (note 12), 771.

<sup>60</sup> See, for example, United States: Department of Defense Report to the Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War, 10.4.1992, 31 ILM 1992, 633 et seq. See also ICTY, Kupreškić *et al.*, Trial Chamber, Judgement, 14.1.2000, IT-95-16-T, para. 517.

<sup>61</sup> *Y. Sandoz/C. Swinarski/B. Zimmermann* (eds.), International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, 1055.

<sup>62</sup> In fact it has already been highlighted how “[L]a ratio della norma è tale da essere perfettamente estensibile a tutti i casi di violazioni di norme cogenti nel diritto internazionale generale” (the *ratio* of the norm is that of being perfectly extensible to all cases of violation of *jus cogens* rules), see *A. Gattini*, Alcune osservazioni sulla tutela degli interessi individuali nei

## VI. Concluding Remarks

No reparation can really compensate for the consequences of grave violations of international human rights and humanitarian law, as any form of reparation is likely to be inadequate when measured against the suffering caused by such violence. Moreover, reparation cannot always take the same form. Each transitional justice process should try to adapt (even in the forms of reparation) to the specific post-conflict context. In fact, reparation should take the forms which can guarantee at best both the social and economic reconstruction of war-torn societies and the respect for the victims' dignity. The State's waiver of reparation claims can be a useful tool for reaching the first of these fundamental aims, but it could negatively affect or limit the protection of the second. It is not easy to reconcile these needs, but some general reflections can be useful in finding a proper balance between the two.

There are several reasons to affirm that States should preserve their right to waive reparations for some violations which involve its own citizens during an armed conflict. It might be argued that the prospects for concluding an agreement or implementing a treaty concluded in the aftermath of a conflict will be jeopardized by the bringing of individual claims.

Moreover, it is likely that the defeated State will not be able to provide redress to all victims. Excessive economic sanctions also risk preventing the State obliged to make reparation from restoring its economy which has already been compromised by the outcomes of the war, thus hindering a reconciliation between the parties and fostering new conflicts.

From a broader perspective, however, and in the light of these economic reasons intended to preserve a State's right to waive reparation, it must be considered that individual economic compensation for injury is only one of the forms of reparation for serious breaches of international human rights and humanitarian law. It is not the purpose of the present article to underestimate the fundamental role of pecuniary compensation for the victims of those violations. However, it might be useful to point out the importance that alternative forms of reparation can have in guaranteeing fair reparation. In particular, among the forms of reparation listed in the above-mentioned General Assembly resolution on remedies feature also the guarantee of non-

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progetti di codificazione della Commissione di diritto internazionale sulla responsabilità dello Stato e sulla protezione diplomatica, in: M. Spinedi/A. Gianelli/M. L. Alaimo (eds.), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti*, 2006, 454.

repetition and, more importantly, rehabilitation and satisfaction.<sup>63</sup> These forms of reparation have shown their usefulness in the jurisprudence of the Inter-American Court of Human Rights, and can have a relevant restorative role, complementary (or even alternative) to economic compensation.<sup>64</sup> It is worth recalling the recent agreement between Japan and South Korea on the complex issue of comfort women, which has been heavily criticized by victims, not for the amount of the economic compensation, but rather for the ambiguity of the apologies of the Japanese government.<sup>65</sup>

In addition to the alternative forms of reparation, which can make up for the inability of a State to pay an appropriate amount of economic compensation to every single victim, it is important to underline the potentially important role played by collective forms of reparation. In fact, individual reparation can be at the heart of unequal treatment among the victims in both judicial and administrative proceedings. In particular, two elements can cause a disparity of treatment and inequality: The impossibility of identifying all the victims – with the consequent lack of recognition for some of them of a right to reparation – and the uncertain result of individual claims – whose outcome can be influenced by the economic capacities of the victims, the different sensibilities of jurisdictional institutions, or by the actual state of political and diplomatic relations among the States involved.

Even as regards collective reparations, the Inter-American Court of Human Rights explored some interesting possibilities, including the restoration of the victims' dignity (for example, through the realization of celebrative buildings and the nomination of places in memory of the victims) or the building of educative or sanitary centers for particular groups (minors, women or ex-soldiers) affected by mass violations.<sup>66</sup>

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<sup>63</sup> Art. 9 of A/RES/60/147 (note 5). Also Art. 75, para. 1, of the Statute of the International Criminal Court recognizes the importance of rehabilitation of victims in determining the forms of reparation.

<sup>64</sup> The first example of this interesting case law is the famous *Aloeboetoe v. Surinam*, 10.9.1993 (*Reparaciones y Costas*), Ser. C No. 15, paras. 11-15, in which the Inter-American Court ordered both economic compensations and the construction of a school and some sanitary structures. Some empirical studies carried out by different non-governative organizations show that the interest of the victim is more often linked to a moral reparation of the injury rather than to economic compensations, sometimes even rejected because considered as "blood money", see *N. Roht-Arriaza*, Reparations Decisions and Dilemmas, in: *Hastings Int'l L. & Comp. L. Rev.* 27 (2004), 157 et seq.

<sup>65</sup> In particular, according to the organizers of protest demonstrations, Japan did not clarify nor entirely recognize the involvement and the role of its own soldiers in the creation of exploitation systems (see for example <<http://www.voanews.com>>).

<sup>66</sup> See the most significant decisions: *Villagràn Morales et. al. (Niños de la Calle) v. Guatemala*, 26.5.2001; *Masacre de Plan de Sánchez v. Guatemala*, 19.11.2004; *Servellón Gracia et*

The emergence of more stringent limitations on the State's right to waive reparation for violations of international human rights or the rules of international humanitarian law (even of a non-peremptory nature) could be fostered by a wider promotion of alternative and collective forms of reparation of the injury, especially when an adequate economic compensation for each victim is materially impossible or politically unsuitable.

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*al. v. Honduras*, 21.9.2006; *Caso de la masacre de La Rochela v. Colombia*, 11.5.2007; *Vargas Areco v. Paraguay*, 26.9.2006.

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