Waiver or Limitation of Possible Reparation Claims of Victims

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A right to reparation for victims of armed conflict entails a responsible party's obligation to make *full* reparation: in the words of the Judgement of the *Factory at Chorzów* case, this must be sufficient to

> "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".[1]

However, full reparation might exceed the responsible party's economic capacity,[2] which could destabilise its community in the post-conflict phase.[3] Conversely, it is quite likely that, while a large number of victims will claim reparation in a short time period, the responsible party has limited financial and human resources available to fund compensation or in-kind benefits.[4] In practice, therefore, it is necessary to establish a politically and financially feasible reparation mechanism by treaty, United Nations (UN) organ resolution, domestic legislation, etc., under which limited funds are effectively and efficiently distributed among eligible victims. In fact, the *ad hoc* reparation mechanisms established to date, like the United Nations Compensation Commission (UNCC), did not necessarily provide *full* reparation to victims, but sometimes introduced a system for fixed-amount compensation payments in return for expeditious processing of claims.

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1 *Case concerning the Factory at Chorzów*, Merits, Judgement, 13.9.1928, P.C.I.J., Series A, No. 17 (1928), 47.

2 *W. M. Reisman*, Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas, in: A. Randelzhofer/C. Tomuschat (eds.), State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights, 1999, 63 et seq. (67).

3 *R. Hofmann*, Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues), in: ILA, Report of the Seventy-Fourth Conference held in The Hague 15.-19.8.2010, 295 et seq. (320).

4 *N. Wühler/H. Niebergall* (eds.), Property Restitution and Compensation: Practices and Experiences of Claims Programmes, 2008, 1 et seq.

Does this mean that political and/or financial considerations of a responsible State or community always prevail over the right to reparation? If so, can the individual right be entirely disregarded in extreme cases? This also raises the issue of whether a reparation waiver, as part of an inter-State agreement, is permissible under current international law.

In the lump sum agreements concluded in the aftermath of World War II, the economic capacity of each responsible State was taken into consideration. The San Francisco Peace Treaty with Japan, for instance, included a waiver by the Allied Powers of reparation claims against Japan.[5] The *en-bloc* waiver was also used in Japan's subsequent treaties with other States, including China and the Republic of Korea.

In the so-called "postwar compensation" cases, in which individual victims claimed reparations for the harm caused by Japan's conduct, the "claims" covered by these treaties' waivers were sometimes an issue. According to the judgements delivered to date, there are four different understandings. First, the San Francisco Peace Treaty, as well as other bilateral treaties, merely renounced a right of diplomatic protection, but not individuals' substantive right to reparation. This was the Japanese government's position in its pleadings in the *Shimoda* case,[6] and some judgements followed it.[7] The second, and opposing, view holds that the San Francisco Peace Treaty renounced not only a State's right of diplomatic protection over its nationals but also the nationals' substantive right to reparation.[8] The Japanese government has adopted this view since around the year 2000. The third view distinguishes between an individual right to reparation under domestic law and that under international law, and then insists that only the former was renounced by the San Francisco Peace Treaty. This was the view expressed by the Tokyo District Court in the *Shimoda* case.[9] The fourth view, expressed by the Supreme Court in 2007, is that the San Francisco Peace Treaty did not renounce the substantive claims of individuals, but did remove their ability to litigate such substantive claims before Japanese courts. The Supreme Court did not suggest any legal basis under Japanese

[5] Art. 14 (a), Treaty of Peace with Japan, signed at San Francisco on 8.9.1951, Art. 14 (a), U.N.T.S. 136 (1952), No. 1832, 45 et seq. (60 et seq.).

[6] *R. Shimoda v. the State*, Tokyo District Court, Judgement, 7.12.1963, Jap. Ann. Of Int'l L. 8 (1964), 212 et seq. (228 et seq.).

[7] *X et al. v. Y*, Hiroshima High Court, Judgement, 9.7.2004, Jap. Ann. Of Int'l L. 48 (2005), 154 et seq. (159).

[8] *X et al. v. the Government of Japan*, Tokyo High Court, Judgement, 8.2.2001, Jap. Ann. Of Int'l L.45 (2002), 142 et seq. (145); *X et al. v. State of Japan*, Tokyo High Court, Judgement, 18.3.2005, Jap. Ann. Of Int'l L.49 (2006), 149 et seq. (151 et seq.).

[9] *R. Shimoda v. the State* (note 6), 248 et seq.

law for removing the ability of private persons to litigate their claims. However, it pointed out that

> "a State has the power, on the basis of its sovereignty over its nationals, to dispose of claims including those held by individuals upon the conclusion of a peace treaty to terminate a war".[10]

Thus, according to the Supreme Court, individual victims retain a substantive right to reparation, but cannot lodge a lawsuit in a Japanese court on the basis of this right.

Conversely, the Government of the People's Republic of China insisted that Section 5 of the Joint Communiqué, which declared the waiver of China's demand for war reparation from Japan,[11] does not include the claims of its nationals. In the same manner, the Government of the Republic of Korea announced that the 1965 Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation was not signed to claim compensation for Japan's colonial rule but, rather, to resolve the financial and civil debtor/creditor relationship between Korea and Japan; therefore, the rights to claim reparation for unlawful acts involving the Japanese government, such as the issue of comfort women, have not been resolved by that agreement.[12] This view was confirmed by the Korean Constitutional Court in 2011 and the Supreme Court in 2012.

From a contemporary legal point of view, it is rational that a State cannot waive the rights of its nationals under international law, since those rights are completely independent of that State's sovereign power over its nationals. Art. 51 of the 1949 Geneva Convention I stipulates that

> "[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches referred to in the preceding Article".

According to the International Committee of the Red Cross (ICRC) commentary to this provision, all Parties to armed conflicts, vanquished and victors alike, are obliged to make full reparation for the loss or injury caused by grave breaches. Thus Art. 51 aims, in particular, to prevent the defeated Party from being compelled, in an armistice agreement or peace

[10] *X v. Y*, Supreme Court, Judgement, 27.4.2007, Japanese Yearbook of International Law 51 (2008), 518 et seq. (526).

[11] Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, done at Beijing, 29.9.1972, Section 5.

[12] Decision of the Joint Government-Private Committee, 26.8.2005, only Japanese translation, available at <www.koreanbar.or.kr>.

treaty, to abandon all claims in respect of grave breaches committed by persons in the service of the victor.[13] There is no explicit mention in Art. 51 and its commentary of whether all parties are obliged to make full reparation to individual victims. Nevertheless it seems irrational to conclude that a victor State cannot compel a vanquished State to abandon its own claims under Art. 51, but can compel to abandon the claims of nationals of the vanquished State. In light of the peace treaties concluded in the aftermath of World War II, there was no clear distinction between the claims of a State and of its nationals. Those were mostly abandoned *en bloc*. In this respect, Art. 51 appears to be supporting evidence that the claims of individual victims by grave breaches cannot be waived by a peace treaty.

However, the commentary also emphasises that Art. 51 does not cover special financial arrangements, under which a State can liquidate a damages claim through an agreed lump sum payment or a compensatory settlement, and States are free to negotiate between themselves any financial settlements relating to the end of an armed conflict.[14] Nevertheless, some scholars argue that the waiver, through lump sum agreement, of claims arising from violations of international law would be incompatible with general international law as it exists today.[15]

In this author's view, there is no practice demonstrating the existence of a *jus cogens* norm requiring full reparation to each and every individual victim. To this extent, States may restrict the scope of reparation by concluding an agreement. However, through the practices of establishing *ad hoc* reparation mechanisms since 1990s, the necessity of victim-oriented reparation has been gradually acknowledged among policy makers who were involved in drafting peace treaties and envisaged the creation of a reparation mechanism. This practice has led to the emergence of a set of minimum common principles of substantive and procedural rights to reparation, not in the least because policy makers are inclined to refer to past similar mechanisms in establishing a new one and to follow what has been done in past ones. At the same time, these practices have formed the social consciousness of broader scope of people including the civil society that an effective reparation should be made for victims, and this social consciousness in turn has pressed policy-makers involving in the reparations issues of another armed conflict to establish a mechanism from a more victim-oriented perspective.

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13 ICRC, Commentary on the First Geneva Convention, 2016), 1082 et seq.

14 ICRC (note 13), 1084.

15 *M. Sassoli*, State Responsibility for Violations of International Humanitarian Law, Int'l Rev. of the Red Cross 84 (2002), 401 et seq. (419); *Shin Hae Bong*, Compensation for Victims of Wartime Atrocities: Recent Developments in Japan's Case Law, JICJ 3 (2005), 187 et seq. (203).

Looking at those cumulative practices, the restriction to the reparation for individual victims is subject to some requirements: (a) a *comprehensive* waiver of reparation claims by agreements among relevant States/entities is completely incompatible with the trend of victim-oriented reparation under current international law, and is, therefore, impermissible; (b) appropriate grounds are required for restricting the scope of reparation; (c) in taking the measures for restriction, all eligible victims should be treated equally;[16] and (d) the reparation shall be effective, if not full, to wipe out the harms suffered by the victims. In fact, these requirements have been taken into account in the *ad hoc* reparation mechanisms established to date as common and basic principles guiding them.

[16] *R. Bank/F. Foltz*, Lump Sum Agreements, (Article last updated: August 2013), para. 2708, in: MPEPIL, available at <opil.ouplaw.com>.