What 'reparations' for colonial 'crimes'?

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1. *Introduction*

The issue of reparations owed by States for large scale atrocities perpetrated during colonial rule – such as mass killings, deportations, torture and subjection to forced labour – fits into the realm of so-called 'crimes of history'[1] and highlights several legal problems that are not easy to solve.

The most complex issues are linked to the length of time that has elapsed since the conducts took place. First of all, it is not always straightforward to establish the exact extent of international obligations binding States at the time of the events. It may also be difficult to determine which States are obliged to make reparation and which States are the rightful beneficiaries because of a multiplicity of situations that, as time passes, may affect the life of the States involved. It also may not be easy to identify the victims of violations or their descendants, or to establish the extent of the damage they have suffered and the concrete implications this has for the determination of the amount of reparations due.[2] Nor is it easy to identify the tools available to States to invoke and enforce another

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[1] In this contribution the expression 'crimes of the history' refers to violations of international law rules which are nowadays considered such as *jus cogens* rules, which were committed before the Second World War such as the 'slave trade' or others conducts linked to colonialism, and which had an impact on the identity of the victims and their descendants.

[2] On the issue, see D Butt, *Rectifying International Injustice: Principles of Compensation and Restitution between Nations* (OUP 2009).

State's international responsibility or the remedies available to individuals directly injured by such conduct or, more frequently, to their descendants.

At the inter-State level, assessing whether the passage of time has extinguished a State's right to assert its claim requires a review of all the circumstances of the specific case. As the International Court of Justice (ICJ) made clear in *Nauru v Australia*,[3] a delay by a State in asserting a claim could render that claim inadmissible.[4] Although international law does not set specific time limits in this respect, the injured State's right to seek reparations for conduct that occurred far back in time could nevertheless come to an end where a valid waiver or acquiescence has taken place.[5] This would raise complex issues as regards the coordination with the position of the victims or their descendants.

Moreover, specific problems of 'intertemporal law' arise both with respect to the existence and scope of application of primary rules that have been violated and in relation to secondary rules in force during colonial rule.[6] As regards the first aspect, the 'general principle of law' – according to which *tempus regit actum*[7] – establishes that the lawfulness of a given conduct must be assessed in light of the legislation in force at the time the conduct was engaged in.[8] This means that it is first necessary to ascertain whether reparations are legally due in relation to conduct that took place at a time in history when, on the one hand, international rules for the protection of human rights had not yet been established and, on the other hand, international humanitarian law rules provided, in explicit

[3] ICJ, *Certain Phosphate Lands in Nauru (Nauru v Australia)* Preliminary Objections [1992] ICJ Rep 240.

[4] ibid para 32.

[5] 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) annexed to GA Res 56/83 of 12 December 2001 UN Doc A/RES/56/83 (28 January 2002) 9 art 45.

[6] On the distinction between primary and secondary norms of international law, see G Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014) 97 Rivista di diritto internazionale 981.

[7] See in this regard TO Elias, 'The Doctrine of Intertemporal Law' (1980) 74 AJIL 285, 285-286; Institut de Droit International, 'The Intertemporal Problem in Public International Law' (1975) 56 Annuaire de l'Institut de Droit International 536 art 1.

[8] On this principle see, among others, P Tavernier, 'Relevance of the Intertemporal Law' in J Crawford, A Pellet, S Olleson (eds) *The Law of International Responsibility* (OUP 2010) 397 ff and E Martin, *The Application of the Doctrine of Intertemporality in Contentious Proceedings* (Duncker & Humblot 2021).

terms, for certain specific exclusions from their subjective scope of application.[9]

With respect to secondary norms in force during colonial rule, it is necessary to consider what international law provided for in relation to State responsibility in colonial times and to assess, also in light of this determination, whether specific conduct can be attributed to a former colonial power, and whether any reparation should concern only inter-State relations or whether it is possible to pinpoint an individual right to reparation also for the victims of such conduct or their descendants.[10] The attribution of colonial 'crimes' to former colonial powers does not appear particularly problematic, as they were largely committed by State organs or by private persons or groups of persons, such as auxiliary or irregular forces, authorised by or under the direction or control of the State. The rules of attribution to States in such cases – currently incorporated under Articles 4 and 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the International Law Commission in 2001[11] – were, at least in their essential elements, already accepted in general international law in the early twentieth century.[12] Moreover, there are no problems of retroactivity with regard to the application of the rules on attribution contained in Part One, Chapter II of the ARSIWA, which are a codification of pre-existing law.[13] It is more problematic, however, to envisage an individual right to reparation for the victims of such conduct or their descendants.[14]

This article specifically seeks to highlight the main limitations inherent in current international law when it comes to offering concrete redress for atrocities perpetrated during the period of colonial domination[15] and to explore the possible avenues which can be pursued to provide some

[9] See below section 3.

[10] See below section 2.

[11] See ARSIWA (n 5).

[12] On the issue see M Roscini, 'Establishing State Responsibility for Historical Injustices: The Armenian Case' (2014) 14 Intl Crim L Rev 291, 310 fn 82; see also *Charles S Stephens and Bowman Stephens (United States of America) v United Mexican States* (1927) 4 RIAA 265, 267.

[13] On the history of the rules of attribution, see JA Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' 36 New York University J Intl L & Politics (2004) 265.

[14] On this issue see below section 2.

[15] JA Kämmerer, 'Colonialism', in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (OUP 2018).

form of redress to populations that – directly or indirectly – experienced them. To this end, the analysis will first focus on the obligation of reparation under international law (section 2); obstacles to full reparation will later be examined, with a focus on the intertemporal issue (section 3); both the practice and *opinio juris* of States will be investigated to assess whether a customary rule of international law has been established with respect to reparations for colonial 'crimes' (section 4); and, finally, some viable avenues for establishing forms of reasonable redress on a case-by-case basis will be outlined (section 5).

2. *The obligation of reparation under international law*

The obligation for a State to provide 'full reparation' for damage caused by its own wrongful conduct is undisputed in international law. It was first stated by the Permanent Court of International Justice (PCIJ) in *Germany v Poland* in 1928[16] and it was later incorporated into Article 31 of the ARSIWA. The reparation must eliminate, to the extent possible, all detrimental consequences of the wrongful conduct and restore the situation that in all likelihood would have arisen if the conduct had not taken place.[17]

For a long time the rule was considered applicable only to interstate relations. More recently, however, in the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[18] the ICJ recognised that the principle is also applicable with respect to relations between States and individuals whenever the violation of international obligations protecting individual interests is at stake,[19] also in

[16] *Case Concerning the Factory at Chorzów (Germany v Poland)* Jurisdiction [1927] PCIJ Rep Series A No 9 at 21: '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'.

[17] PCIJ, *Case Concerning the Factory at Chorzów (Germany v Poland)* Merits [1928] PCIJ Rep Series A No 17 at 47: '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'.

[18] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion [2004] ICJ Rep 131.

[19] ibid paras 152-153. The court ruled that Israel is obliged to pay compensation directly to the victims of the damage caused by the violation of international humanitarian law and human rights law. On the issue see P D'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in PM Dupuy, B Fassbender, MN

the light of the *erga omnes* character of the latter obligations.[20] Although the ARSIWA do not mention any right to redress for individuals in the context of secondary rules, Article 33(2) specifies, with a closing rule, that the relevant part of the ARSIWA is:

> 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'.

The provision thus clarifies that the ARSIWA do not address the possibility of international State responsibility being invoked by individuals or entities other than States.[21] The right to 'adequate, effective and prompt' reparation for the harm suffered is instead expressly established for victims of gross violations of human rights and serious violations of international humanitarian law in the Principles adopted by the UN General Assembly on December 2005,[22] which in the concept of reparation also include the rehabilitation of victims.[23] Although the existence of an individual right to reparation in relation to 'non-historic' crimes appears to be uncontroversial under current general international law as regards the violation of international obligations protecting individual interests,[24]

Shaw, KP Sommermann (eds) *Essays in Honour of Christian Tomuschat* (Verlag 2006) 473-476.

[20] ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* Judgment [1970] ICJ Rep 32 para 33. On the issue, see G Bartolini, *Riparazione per violazione dei diritti umani e ordinamento internazionale* (Jovene 2009).

[21] See also para 4 of the ILC Commentaries to art 33 of the ARSIWA published in ILC, 'Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001)' UN Doc A/56/10 (2001) II/2 YB ILC 95.

[22] See 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147 (21 March 2006) UN Doc A/RES/60/147 para 11.

[23] ibid para 21. The individual right to reparation in general international law is recognised using criteria that do not fully align with the principle of 'full reparation' but rather to considerations of equity: see ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Judgment on Reparation [2012] ICJ Rep 344 para 57. In the literature, see G Ulfstein, 'According Compensation in a Fragmented Legal System: The Diallo Case' (2013) 4 J Intl Dispute Settlement 477.

[24] On the issue see, among others, S Forlati, 'La riparazione per violazioni dei diritti umani, fra ruolo dello Stato e posizione della vittima: Riflessioni alla luce del caso Cipro c. Turchia (equa soddisfazione)' in *Studi in onore di Luigi Costato: I multiformi profili del pensiero giuridico* (Jovene 2014) 287, 296.

it is worth noting that even the 2005 Principles do not help to unravel the knot concerning the non-retroactivity of secondary rules of international law.[25] Moreover, since 2001 States have shown that they find it preferable to act at the level of interstate relations between the former colonial power and the former colony[26] rather than at the level of State-individual relations.[27] In this respect, at the current state of development of international law it seems difficult to assert the invalidity or ineffectiveness of interstate agreements concerning reparations excluding the representatives of the victims or of their heirs unless the State itself has specifically conferred full powers on such individuals for this specific purpose.[28]

3. *Full reparation and the intertemporal 'dilemma'*

The first step towards establishing the existence of a legal obligation of reparation in relation to atrocities committed during colonial rule is to determine whether unlawful conduct were actually engaged in by the specific State concerned. It is then a matter of determining, on a case-by-case basis, whether the particular acts carried out by the colonial State – through its organs or by groups of persons authorised by or under the direction or control of the State[29] – were at the time prohibited by a primary rule in force and binding for that State.

As already said,[30] various attempts to find a legal solution to redress past injustices that today one would not hesitate to qualify as historical cases of gross violations of human rights law and/or serious violations of international humanitarian law have been hindered by the fact that the conduct was not considered unlawful at the time it took place and, in

[25] See above section 1.

[26] See also United Nations, Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence (2001) and, in literature, E Tourme-Jouannet, 'Reparations for Historical Wrongs: The Lessons of Durban' in E Tourme-Jouannet (ed), *What is a Fair International Society? International Law between Development and Recognition* (OUP 2013) 187, 193.

[27] See below sections 4 and 5.

[28] See arts 7 and 42 ff of the Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[29] See above section 1.

[30] See above section 1.

general,[31] international law rules, including the provisions of international human rights law and international humanitarian law, do not apply retroactively.[32] This inevitably ends up frustrating the legitimate expectations of the victims of such injustices (or their heirs) as they seek to obtain reparation for the atrocities suffered; they may have recourse to a domestic or international court, but this route is not always practicable and/or preferable for the intended purpose, since the provision of restorative measures may be precluded due to a multiplicity of obstacles of both a substantive (and in particular evidentiary) and procedural nature.

According to the intertemporal principle, first enunciated in *Netherlands v United States*, in 1928,

> '[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'.[33]

The principle is fundamental for safeguarding legal certainty and has been reiterated on several occasions by the ICJ;[34] it was also accepted by

[31] Notwithstanding that the argument itself is incontrovertible from a formal point of view, it should not be forgotten that there have been memorable exceptions to the principle of non-retroactivity with respect to the international criminal responsibility of individuals with the examples of the Nuremberg and Tokyo Tribunals. On the issue see D Zolo, *La justice des vainqueurs: De Nuremberg à Bagdad* (J Chambon 2009) 188 and R Gellately, B Kiernan (eds) *The Specter of Genocide: Mass Murder in Historical Perspective* (CUP 2003).

[32] The non-retroactivity of international treaties is set forth under art 28 of the Vienna Convention on the Law of Treaties (n 28). For a comment on this see, among others, K von der Decken, 'Article 28: Non-Retroactivity' in O Dörr, K Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 503. The principle of non-retroactivity also applies as regards international protection of human rights in respect to the *nulla poena sine lege* rule: see eg art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 April 1950, entered into force 3 September 1953) 213 UNTS 222) and art 15 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171) and in international criminal law (see art 22 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[33] See *Island of Palmas case (Netherlands v United States of America)* (1928) 2 RIAA 829, 845.

[34] ICJ, *Minquiers and Ecrehos (France/United Kingdom)* [1953] ICJ Rep 47, 53-54; ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* [2002] ICJ Rep 303 paras 31-38.

the *Institut de Droit International* in its 1975 resolution.[35] The rule is also set forth in Article 13 ARSIWA according to which:

> '[a]n act of State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs'.

and the ICJ also recently confirmed it also in *Germany v Italy*.[36] International law literature dealing with this issue clearly recognises that the wrongfulness of a particular conduct must be established on the basis of the obligations in force at the time it takes place.[37]

However, in order to prevent the application of the intertemporal principle from serving in such situations to confirm the substantial international non-responsibility of States in relation to so-called colonial 'crimes', some authors have argued that ethical principles already recognised between the late nineteenth and early twentieth centuries should be viewed as an integral part of the positive law in force.[38] According to this perspective, this argument finds confirmation in the 'Martens clause', enshrined in the Preamble of the Hague Conventions of 1899 and 1907,[39] which states:

[35] Institut de Droit International (n 7) art 1.

[36] ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 para 58.

[37] In this sense see, *ex multis*, D Bindschedler-Robert, 'De la rétroactivité en droit international public', *Recueil d'études de droit international en hommage a Paul Guggenheim* (Institut Universitaire de Hautes Etudes Internationales 1968) 184; P Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (LGDJ 1970) 119, 135 and 292; Elias (n 7) and R Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 ICLQ 501.

[38] See, in this respect, A von Arnauld, 'How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality' (2021) 32 Eur J Intl L 401.

[39] See the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907 (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 preambular para 8. See also Hague Convention (II) with respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) TS No 403 preambular para 8. On the clause see, among others, T Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 AJIL 78 ff and A Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 Eur J Intl L 187.

> '[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'.

Given its broad wording, the clause was undoubtedly intended to establish standards of a universal character applicable in all circumstances. And it is no coincidence that this clause has often been identified as a normative basis for coordination with international human rights law applicable during armed conflicts.[40] In our view, however, the clause cannot always play a role with regard to atrocities committed in late 1800s and early 1900s against colonial peoples. For one, indeed, the Martens clause only applies in the context of international armed conflicts. For two, this solution is driven by the explicit delimitation of the subjective scope of the 1907 Hague Convention IV. In fact, Article 2 of the latter expressly states that the provisions of the Convention and the Regulations annexed thereto are applicable exclusively between the contracting parties and only in the event that all belligerents are parties to the Convention.[41] Ultimately, the fact that the law of armed conflict did not apply in relation to the so-called 'colonial wars' seems undeniable. The third section of the Hague Regulations of 1899 on the Laws and Customs of Land Warfare relating to military occupation had application only in relation to conduct engaged in on the territory of a different State, whereas there were no rules governing the conduct of a belligerent on its own territory, and the territory of the colonies was at that time mostly considered to belong to the colonizing power.[42] Furthermore, the 'Martens clause' itself, in seeking to identify the principles of the 'law of nations' applicable in all circumstances, expressly refers to the principle of humanity, the prescriptions of public conscience and the customs established among 'civilized

[40] See again Cassese (n 39) 207, 212.

[41] According to art 2 of the 1907 Hague Convention (IV) (n 39): '[t]he provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention'.

[42] See again Kämmerer (n 15) paras 12-15.

peoples', an expression traditionally intended precisely to exclude colonial peoples.[43]

It is worth noting that the 'Martens clause' may also be seen as merely reaffirming the relevance of general principles of international law in a particular context. In this regard, by referring to 'principles of the law of nations', it calls into consideration general principles of international law, as they can be inferred from legal rules in force at the time (*analogia iuris*). From this perspective the issue is therefore to assess whether at the relevant time general principles of international law prohibiting colonial 'crimes' did, indeed, exist. Again, it is not easy to give a clear-cut answer to the question which probably depends on the specific 'crime'. Thus, in conclusion, the reference to this clause does not seem able to offer a clear solution as regards every colonial 'crime'.

Entirely similar considerations have also been raised in relation to slavery. The Joint Commission established between the United States and the United Kingdom of Great Britain and Ireland in the mid-1800s was tasked with evaluating the conduct of the British authorities, which, at different times, had seized a number of US-flagged ships that were engaged in the slave trade. Slaves aboard the ships, considered to be the property of US citizens, were then freed. The incidents submitted for the Commission's consideration had occurred at different times, so it had to be determined whether, at the time each incident occurred, slavery was contrary to the law of nations.[44] According to the Commission, earlier incidents, which dated back to a time when the slave trade was considered lawful, amounted to a breach by the authorities of the United Kingdom of Great Britain and Ireland of their international obligations to respect and protect the property of foreign nationals. In contrast, no international responsibility was attributed to the United Kingdom in relation

[43] The discrimination between 'civilized' and 'uncivilized' nations (eg art 38 of the ICJ Statute) have been silently abandoned in legal practice: on the issue see, among others, A Pellet, 'Article 38' in A Zimmermann, CJ Tams (eds) *Statute of the International Court of Justice: A Commentary* (OUP 2019), 836. See also ICJ, *North Sea Continental Shelf (Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3; and Separate Opinion of Judge Ammoun at 133.

[44] See para 2 of the ILC Commentaries to art 13 of the ARSIWA published in ILC Report 2001 (n 21) 57-58.

to the entirely similar incidents which occurred when the slave trade had instead been prohibited by all 'civilized nations'.[45]

The intertemporal principle, in fact, finds application in relation to every international obligation without exclusion. Even when a new *jus cogens* rule is established, according to the terms of Article 64 of the 1969 Vienna Convention on the Law of Treaties, this does not entail any assumption of retroactive responsibility by States.[46] Article 71(2)(b), of the Vienna Convention makes it clear that the new peremptory norm:

> 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm'.[47]

This confirms that the previously cited Article 13 ARSIWA applies in relation to every international obligation without exclusions.[48]

4. *The current practice and* opinio juris *of States*

Despite the picture sketched above, there is nothing to prevent a State from voluntarily deciding to provide reparation, in one of the different forms established by international law and set forth in Article 34 ARSIWA, either singly or in combination. These include the formulation of formal apologies or the payment of a sum of money, in one or more

[45] See the cases *Enterprize*, *Hermosa* and *Créole* in JB Moore (ed), *History and Digest of the International Arbitrations to which the United States has been a Party* vol 4 (US Government Printing Office 1898) 4349, 4373. See para 2 of the ILC Commentaries to art 13 of the ARSIWA (n 21) 57-58. On the issue see in literature K Schwarz, *Reparations for Slavery in International Law: Transatlantic Enslavement, the Maangamizi, and the Making of International Law* (OUP 2022).

[46] See *Land and Maritime Boundary between Cameroon and Nigeria* (n 34) 303. Contra, however, see Separate Opinion of Judge Ranjeva at 470 para 3. On non-retroactivity of *jus cogens* rules see M du Plessis, 'Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery' (2003) 25 Human Rights Quarterly 624, 636.

[47] See para 5 of the ILC Commentaries to art 13 of the ARSIWA published in ILC Report 2001 (n 21) 58.

[48] See above section 3.

tranches, by way of compensation for damage resulting from conduct which, at the time it took place, did not constitute a violation of specific obligations in force for that State.[49] The Commentary to Article 13 ARSIWA clarifies that these cases of unilateral or negotiated assumption of legal responsibility constitute special regimes of international responsibility under Article 55 ARSIWA.[50]

Cases of a State assuming legal responsibility for 'crimes of history', and for colonial 'crimes' in particular, however, are rare. In fact, even in cases where States have issued formal apologies and/or paid sums of money for atrocities committed in their colonial domains, they have done so by acknowledging only moral and historical (but not also legal) responsibility for their conducts. The sums sometimes paid by the former colonial powers would seem to constitute forms of voluntary indemnity for a lawful act rather than forms of reparation for damage resulting from unlawful conduct within the meaning of Article 36 ARSIWA. Interstate agreements, in fact, often stipulate the payment of sums of money for purposes other than the reparation of damage with a view to pursuing an actual reconciliation between the parties involved, and often rather have to do with specific economic (or other) interests of the former colonial powers; accordingly, the expectations of the victims or their descendants are largely disappointed.

Thus, for example, the 2021 Joint Declaration of Reconciliation between the Federal Republic of Germany and Namibia[51] in relation to acts committed against the Herero and Nama peoples during German colonial rule in South West Africa between 1890 and 1910, including massacre, deportations, expropriations, and subjection to forced labour, would seem to come closer in terms of its objectives and functions, to an allocation of development aid rather than an interstate reparation agreement aimed at achieving reconciliation between the parties. Such an agreement would have probably required the full involvement of the legitimate

[49] See para 6 of the ILC Commentaries to art 13 of the ARSIWA published in ILC Report 2001 (n 21) 58.

[50] ibid.

[51] See Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, 'United in Remembrance of our Colonial Past, United in our will to Reconcile, United in our Vision of the Future' <www.parliament.na/wp-content/uploads/2021/09/Joint-Declaration-Document-Genocide-rt.pdf>. On this issue, see R Marconi, 'Il passato (coloniale) che non passa: la Dichiarazione congiunta di riconciliazione fra Germania e Namibia del 2021' (2022) 16 Diritti umani e diritto internazionale 400.

representatives of the communities concerned, as also highlighted in the joint communications addressed to Germany and Namibia by several UN Special Rapporteurs in February 2023.[52] On the other hand, in the same case, since 2004 the German Government has acknowledged (only) its historical and moral responsibility for the conduct in question. It has never acknowledged a legal responsibility with respect to colonial atrocities nor, consequently, any obligation to provide full reparation.[53]

The same can be said in relation to the interstate agreement between Italy and Libya, allegedly aimed at redressing the past wrongs committed by the former colonial State. Indeed, in 2008, the Italian Prime Minister issued formal apology for the crimes committed in Libya during its colonial domination, including mass executions, torture and deportation of the civilian population. It does not seem coincidental that on the very same day, the leaders of the two States, Berlusconi and Gaddafi, signed a Treaty on Friendship, Partnership and Cooperation,[54] which created the framework for cooperation between the two countries in various areas, including investments in basic infrastructure in Libya and immigration. As a whole, the agreement seems to be designed to favour Italy's interests, as it includes a clause establishing exclusive rights for Italian companies with respect to the implementation of tax-exempt development projects in Libya as well as the implementation of a system of

[52] See the communications AL DEU 1/2023 and AL NAM 1/2023 of the Special Rapporteurs on the promotion of truth, justice, reparation and guarantees of non-recurrence; in the field of cultural rights; on extrajudicial, summary or arbitrary executions; on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; on the rights of indigenous peoples; on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and on violence against women and girls, its causes and consequences <https://spcommreports.ohchr.org>. On this issue see also C Stahn, 'Reckoning with Colonial Injustice: International Law as Culprit and as Remedy?' (2020) 33 Leiden J Intl L 823, 834 and, below, the analysis developed by A Bufalini in the present Zoom-out.

[53] See Joint Declaration (n 51) paras 10-11. In literature, among others, see J Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904–1908* (Westport 2009); H Melber, 'Germany and Namibia: Negotiating Genocide' (2020) 22 J Genocide Research 502.

[54] Treaty on Friendship, Partnership and Cooperation between Italy and Libya (adopted 30 August 2008, entered into force 2 March 2009).

control of the Libyan coasts aimed at preventing migrant departures from the country.[55]

This does not preclude the possibility that a rule of customary international law may be established in the future requiring States to provide a form of redress – not necessarily taking the same forms provided for under the ARSIWA – for past conduct that – if evaluated by applying the norms of international law currently in force – would undoubtedly constitute serious violations of international law. In our view, in this case a new regime of liability stemming from lawful conduct would be established. The current practice of States, however, does not indicate that such a customary norm has been established, and, as a result, current international law does not provide the means to remedy all the reprehensible conduct engaged in against colonial peoples.[56]

The *opinio juris* of States also seems to support this conclusion. Indeed, various declarations of principles adopted in the UN General Assembly over the past 20 years on issues related to colonialism have highlighted the enduring 'resistance' of States in this regard. Thus, for example, the issue of reparations for colonial 'crimes' was raised during the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001[57] and later also during the 2009 review conference held in Geneva and the conferences held in New York in 2011 and 2021.[58] On these occasions, racism, racial discrimination and xenophobia were to some extent placed among the long-term consequences (also) attributable to colonialism. The opposition expressed by Western States, however, prevented the recognition of a specific obligation of reparation for former colonial powers in connection with past injustices. In this regard, notwithstanding that many of the effects of colonial 'crimes' are still felt to be ongoing by individuals, peoples

[55] For an assessment of the agreement see N Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' (2009) 1 Bulletin of Italian Politics 125 and C De Cesari, 'The Paradoxes of Colonial Reparation: Foreclosing Memory and the 2008 Italy-Libya Friendship Treaty' (2012) 5 Memory Studies 316.

[56] In this regard see also Stahn (n 52) 832.

[57] See 'Third Decade to Combat Racism and Racial Discrimination and the Convening of a World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' UNGA Res 52/111 (18 February 1998) UN Doc A/RES/52/111 and Durban Declaration and Plan of Action (n 26). For a comment see Tourme-Jouannet (n 26) 187.

[58] See UN A/CONF.211/8; UNGA Res 66/3 (18 October 2011) UN Doc A/RES/66/3; UNGA Res 75/237 (4 January 2021) UN Doc A/RES/75/237.

and communities,[59] it is undeniable that the fact that some of their consequences still endure does not constitute grounds for considering them wrongful acts having a continuing nature.[60]

The Final Declaration adopted in Durban in 2001 contained only a generic affirmation of the need to remember the historical events of the past and to honor the memory of the victims of these tragedies and, finally, to take appropriate and effective measures to halt and reverse the lingering consequences of this conduct.[61] At the 2009 Review Conference, moreover, the participating States expressed appreciation for the initiatives promoted since 2001 (on a voluntary basis) by some countries that had issued formal apologies or activated institutionalised mechanisms for reconciliation between the parties, such as, for example, truth and conciliation commissions.[62] In addition, States have been spurred on to take meaningful action in order to restore the dignity of victims by identifying appropriate means for achieving this goal.[63] However, it can hardly be said that these generic statements adopted within soft law acts imply a specific obligation of redress for States.

5. *What are the avenues for redress?*

It thus seems essential to try to assess what avenues are available to provide some form of redress to victims of colonial 'crimes' (and to their descendants).

First of all, the international responsibility of a given State for atrocities carried out in its colonial domains can be established, in accordance with the intertemporal rule, whenever it is possible to identify a specific norm of international law, treaty-based or of a customary nature, which specifically prohibited it and was binding for that State when the conduct

[59] Tourme-Jouannet (n 26) 197.

[60] According to art 14 of the ARSIWA, an act does not have a continuing character merely because its effects or consequences extend in time. See para 6 of the ILC Commentaries to art 14 of the ARSIWA published in ILC Report 2001 (n 21) 60.

[61] See Durban Declaration and Plan of Action (n 26) paras 98 and 158.

[62] On this issue see further R Marconi, in the present Zoom-out.

[63] See 'Comprehensive implementation of and follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' UNGA Res 56/266 (15 May 2002) UN Doc A/RES/56/266 para 62.

took place.[64] Some attempts to this end have been made in the literature; it has been pointed out, for example, that a customary rule prohibiting slavery and forced labour was in effect established in the last decade of the nineteenth century and the first two decades of the twentieth century, the specific aim being to establish Italy's international responsibility[65] for engaging in such prohibited conduct in Somalia during its colonial domination.[66] In my opinion, however, this route is not always preferable for the purpose of addressing colonial 'crimes'. In addition to the aforementioned difficulties in accurately reconstructing the legal framework of reference for situations dating very far back in time, this method of ascertaining international responsibility has the additional disadvantage of being inevitably 'selective', in the sense that some conduct – and not necessarily violations of a minor entity – might be completely excluded from an obligation of reparation based on assessments made using this approach. In such situations, ascertaining legal responsibility of a limited or partial nature would not be consistent with the aim of achieving full reconciliation with the victims of atrocities (and/or their descendants) committed during a colonial domination by building a shared memory in relation to past events, and would thus end up defeating the very purpose of reparation.

Similar considerations regarding the limited value of the determination – in this case both at an objective level, ie, regarding conduct that can be concretely proven, and at a subjective level, given the small number of victims who can find satisfaction of their claims – can also be raised in relation to the attempts – admittedly not very numerous when it comes to colonial 'crimes' –, to judicially ascertain the responsibility of a State on the basis of individual applications submitted to national courts.

This is the case, for example, of applications filed in 2009 by some representatives of the Mau Mau before the British courts[67] to seek compensation for damage resulting from the systematic torture and violence

[64] For an accurate methodologic overview see again Roscini (n 12) 291.

[65] Italy became part to the 1926 Slavery Convention only in 1954.

[66] See for instance A Bufalini, 'Reparation for Colonial Crimes: The Case of Somalia' in E Carpanelli, T Scovazzi (eds) *Political and Legal Aspects of Italian Colonialism in Somalia* (Giappichelli 2020) 215, 219.

[67] See High Court of Justice (Queen's Bench Division) *Ndiku Mutua, Paulo Nzili, Wambugu Claimants Nyingi, Jane Muthoni Mara & Susan Ngondi vs The Foreign and Commonwealth Office* (21 July 2011) EWHC 1913 (QB) and (5 October 2012) EWHC 2678 (QB) para 95.

committed by the British colonial government during its repression of Kenya's independence movement,[68] or the applications submitted with the aim of obtaining compensation from the Netherlands for atrocities committed by the Dutch military forces in Indonesia during the Indonesian war of independence (1945-1949), including the torture of prisoners, conflict-related sexual violence and mass executions carried out in 1947 in Rawagede.[69] Individual claims have also been brought before US domestic courts, on the basis of the 'Alien Tort Claims Act', against the German government and certain German companies deemed to have been involved in the massacre of the Herero and Nama peoples in the early 1900s in southwest Africa.[70]

However, the strategy of seeking individual remedies before domestic courts, as noted above,[71] has many limitations; among other things, there is the thorny issue of establishing an individual right to reparation for the descendants of victims of colonial 'crimes' and the fact that issues of intertemporal law may also arise at the domestic level.[72] The path of individual remedies is also not smooth due to the limited financial resources of victims and their descendants who may be deterred by the costs of the

[68] On the issue, see C Elkins, 'History on Trial: Mau Mau Reparations and the High Court of Justice' in J Bhabha, M Matache, C Elkins (eds) *Time for Reparations: A Global Perspective* (U Pennsylvania Press 2021) 101 ff. For a commentary on these cases, see D Hovell, *The Gulf between Tortious and Torturous: UK Responsibility for Mistreatment of the Mau Mau in Colonial Kenya* (2013) 11 J Intl Crim Justice 223-245 and, more generally, T Scovazzi, 'Le forme di riparazione non pecuniaria dovute alle vittime di gravi violazioni dei diritti umani' (2013)16 I sentieri della ricerca: Rivista di storia contemporanea 93.

[69] District Court of the Hague, *Wisah Binti Silan et al v The State of The Netherlands (Ministry of Foreign Affairs)* (Case no 354119/HA) (14 September 2011) ZA 09-4171. For some interesting reflections on the case, see L van den Herik, 'Addressing "Colonial Crimes" through Reparation? Adjudicating Dutch Atrocities committed in Indonesia' (2012) 10 J Intl Crim Justice 693; NL Immler, S Scagliola, 'Seeking Justice for the Mass Execution in Rawagede: Probing the Concept of "Entangled History" in a Postcolonial Setting' (2020) 24 Rethinking History 1; E de Volder, A-M de Brouwer, *The Impact of Litigation in relation to Systematic and Large-Scale Atrocities committed by the Dutch Military Forces in the 'Dutch East Indies' between 1945–1949* (Nuhanovic Foundation 2019).

[70] United States Court of Appeals for the Third Circuit, *Herero Peoples' Reparation Corp v Deutsche Bank AG* (Civ no 01-1868) (31 June 2003); United States Court of Appeals for the District of Columbia Circuit (370 F 3d 1192 (11 June 2004). For an analysis see J Sarkin, C Fawler, 'Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims Act Genocide Case of the Herero of Namibia' (2008) 9 Human Rights Re 331.

[71] See above section 3.

[72] See above sections 1 and 3.

process. The longer the facts being judged dates back, the more the outcome of domestic judgments will be affected by evidentiary hurdles. Thus, for example, claims raised before US domestic courts against the German government in connection with the massacre against the Herero and Nama peoples were rejected due to lack of evidence, since almost all the witnesses had died in the meanwhile. Further procedural obstacles can also be found in the rule of immunity granted to States against the domestic jurisdiction of other States, which was upheld by the ICJ in *Germany v Italy* even in relation to the most serious international crimes.[73]

A further limitation is to be found in the limited subjective efficacy of the judgments since, even where a judgment favourable to the plaintiffs could be obtained, it would only affect the parties to the trial. Thus, there would be a real risk that many other individuals who consider themselves victims (or descendants of victims) of the same conduct would be denied any reparation. To this we may add the difficulties in obtaining concrete enforcement of any judgment against a State due to the abovementioned rule of immunity from the executive jurisdiction of other States.

Despite the numerous limitations described above, individual applications can nevertheless be an excellent tool to encourage States to seek a negotiated diplomatic settlement to escape the risk of trials and avoid a tide of negative public opinion. Indeed, in 2013, to avoid an embarrassing trial, the British Government sought a negotiated settlement and more than five thousand Kenyans were awarded monetary compensation. In 2011, after the Hague District Court ordered the Netherlands to pay compensation to survivors of summary executions perpetrated in Indonesia and to close relatives of the victims,[74] the Government of the Netherlands formally apologised for the atrocities committed by its military personnel.[75] Similarly, despite the dismissal of claims before the US courts in connection with the massacre of the Herero and Nama peoples in South West Africa, the judgments gave strong impetus to negotiations between Germany and Namibia.[76]

[73] See again *Jurisdictional Immunities of the State* (n 36) para 58.

[74] See *Wisah Binti Silan et al v The State of The Netherlands (Ministry of Foreign Affairs)* (n 69).

[75] On this case, see van den Herik (n 69).

[76] See above section 4.

6. *Concluding remarks*

The above analysis shows that although contemporary international law offers some means of redressing atrocities committed by States in the course of colonial rule, they do not appear to be entirely satisfactory. The preferable way to attribute some form of redress to the victims (or their descendants) seems, however, to be to stipulate specific interstate agreements. Indeed, some States have shown a preference for this solution;[77] however at the same time, a diplomatic solution makes it possible to avoid the substantive and procedural obstacles associated with State[78] and individual[79] legal action. Although some doubts have been raised in the literature as to the possibility for various types of programmes and development aid to mitigate the suffering of victims of gross human rights violations,[80] interstate agreements including such programmes incorporate forms of collective reparations,[81] even though their beneficiaries are not necessarily only victims or direct descendants of victims.

The concrete effectiveness of such interstate agreements with respect to the goal of achieving real reconciliation between the parties in relation to the 'crimes' committed in colonial times appears to be conditioned by certain elements: (i) the ability to arrive at the construction of a shared memory as regards the events of the past; (ii) the efforts to obtain the concrete involvement of the communities that experienced colonial 'crimes' in all phases of preparation and negotiation of the relevant agreements; and, finally, (iii) the development of interstate agreements as consistent as possible in their contents with the objective of achieving reparation from the perspective of international law. Such agreements, indeed – taking the form of development aid, lump sum agreements, or others – seem more likely to realise the goal of reconciliation between the parties where they are perceived as instruments reflecting a concrete assumption

[77] On the issue see above sections 4 and 5.

[78] See above section 1.

[79] See above section 5.

[80] See, for instance, E Malarino, 'Activismo judicial, punitivización y nacionalización. Tendencias antidemocráticas y antiliberales de la Corte interamericana de derechos humanos' in G Elsner, K Ambos, E Malarino (eds), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional* vol 1 (Konrad-Adenauer Stiftung 2010) 25, 59.

[81] D Contreras-Garduño, 'Defining Beneficiaries of Collective Reparations: The Experience of the IACtHR' (2012) 4 Amsterdam L Forum 40, 46-47.

of responsibility on the part of the former colonial powers, in accordance with the 2001 ARSIWA.[82] Lastly, it cannot be overlooked that the former colony could also play an important role in securing reparation for the victims, for example through funds paid by the former colonial power, or even by other States belonging to the so-called Global North, following to some extent the model recently inaugurated in Italy with the 'relief decree' for victims of gross violations of human rights and serious violations of international humanitarian law committed by Nazi Germany during World War II.[83]

[82] See above section 4.

[83] Art 43 of the Italian Decree-Law no 36 of 30 April 2022, enacted into Law no 79 of 29 June 2022. On the issue, see G Berrino, 'Quale effettività della tutela giurisdizionale nel caso Germania c. Italia? L'art. 43 del d.l. n. 36/2022 come "rimedio" costituzionalmente legittimo' (2023) 17 Diritti umani e diritto internazionale 201 ff; G Berrino, 'La sentenza della Corte costitzionale n. 159/2023 tra precisazioni e suggestioni: verso l'epilogo della controversia italo-tedesca?' (2023) 17 Diritti umani e diritto internazionale 589 ff and A Bufalini, 'The Italian Fund for the Victims of Nazi Crimes and the International Court of Justice: Between Compliance and Dispute Settlement' SIDI Blog (16 May 2023) <www.sidiblog.org/2023/05/16/the-italian-fund-for-the-victims-of-nazi-crimes-and-the-international-court-of-justice-between-compliance-and-dispute-settlement/>.