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## COMPENSATION FOR SERIOUS HUMAN RIGHTS VIOLATIONS BETWEEN SOLIDARITY AND REALISM

SUMMARY: 1. Introduction. - 2. The Right to Compensation as an Individual Human Right. – 3. The Right to Compensation as a Victim’s Right. – 4. Compensation as a form of Reparation vs. “Welfare Measures”. - 5. Reparation as an Internationally Shared Burden. - 6. Burden Sharing Between Compliance with *Erga Omnes* Norms and Effective Remedy to Human Rights Breaches. – 7. Concluding Remarks.

### 1. Introduction

Among the several and multifaceted aspects of the growing role of the individual in international law is the emergence of the idea, supported by at least part of doctrine, of his right to claim compensation as a consequence of a breach of his human rights. In this context, compensation constitutes a form of «substantial»<sup>1</sup> reparation - which, originally delegated to the inter-State dimension, is gradually transferred to the original owner. The aim of this paper is to reflect on the right to compensation as an individual human right, assessing if and to what extent instances of solidarity<sup>2</sup> emerge in current practice and are able to counterbalance

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<sup>1</sup> Authoritative doctrine (R. PISILLO MAZZESCHI, *La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea*, in *Com. int.*, 1998, p. 217) distinguishes between substantial reparation (in the form of restitution, compensation and satisfaction, as set out by Art. 34 of the ILC Draft Articles on State Responsibility) and procedural reparation, consisting of the obligation for States to provide individuals with effective internal remedies. On this point, see, also, the Committee against Torture, General Comment no. 3, 13 December 2012, par. 5.

<sup>2</sup> For the purposes of this work, and in line with authoritative doctrine, solidarity will be considered as a «structural principle of inter-State relations», able to inform different normative *régimes* of international cooperation (P. PICONE, *Gli obblighi erga omnes fra passato e futuro*, *Proceedings of the Ravenna Conference 7-8 May 2015*, in *QIL*, 31 July 2015, pp. 14-15 and quoted bibliography). Among the several contributions appearing on this theme, see H. HESTERMAYER, *Reality or Aspiration? Solidarity in International Environmental and Trade Law*, in ID. et al. (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum*, Leiden-Boston, 2012, pp. 45 ss.; D. CAMPANELLI, *Principle of Solidarity*, in *Max P. Enc. Pub. Int. Law* (2011); K. WELLENS, *Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations*, in R. ST J. MACDONALD, D. M. JOHNSTON (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden/Boston, 2005, pp. 804 ss. For a general reconstruction of the principle of solidarity in international law, see, among recent works, K.

the reality of international adjudication. Attention will be paid, in particular, to “burden sharing mechanisms” of compensation and to their impact on the right to access to justice, seen in conjunction with the need to guarantee compliance with the fundamental values of the international community. In an attempt to identify general trends that may be conducive to overcoming the traditional function and limitations of compensation, different areas of international law will be considered, ranging from State responsibility to international criminal law, coherently with the unifying function assigned by authoritative doctrine to the right to redress<sup>3</sup>.

## 2. *The Right to Compensation as an Individual Human Right*

The right of individuals to receive reparation - and therefore compensation - for the harm suffered is inextricably linked to that of the international legal personality of the individual which, as is known, has found growing consensus in doctrine as well as in jurisprudence, particularly since the second-half of the last century<sup>4</sup>. Originally, State responsibility for damage or injury suffered by physical persons was based upon «fiction», consisting of the identification of a prejudice for the State whose citizens had been affected<sup>5</sup>. Given that, at those times, the idea of individual legal personality was still in the making, it was the general consensus that no State responsibility existed towards the individual and thus no right to reparation; as a consequence, the harmed State would simply argue that its own right had been prejudiced through the injury caused to one of its citizens<sup>6</sup>.

Such a perspective has been called into question by the growing significance attributed to damage suffered by individuals in the conduct of the States concerned and in the assessment of their claim<sup>7</sup>, as well as by the idea of individual damage entailing a prejudice to «internationally protected goods and interests»<sup>8</sup>. Moreover, the recognition of legal prejudice caused by human rights breaches and of States' interests in re-establishing the previous situation has given rise to the possibility, for States other than the State of

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GOROBETS, *Solidarity as a Practical Reason: Grounding Authority of International Law* (1 March 2020). Available at SSRN: <https://ssrn.com/abstract=3548673> (last accessed 15 October 2020).

<sup>3</sup> On the progressive inter-penetration of different areas of international law in light of access to justice, see F. FRANCONI, *The Rights of Access to Justice under Customary International Law*, in ID. (ed.), *Access to Justice as a Human Right*, Oxford, 2007, pp. 36-37.

<sup>4</sup> Nowadays, the majority of authoritative doctrine tends to recognise individual legal personality; (see, amongst others, M. N. SHAW, *International Law*<sup>8</sup>, Cambridge, 2017, pp. 204-205); that said, Crawford defines the classification of the individual as a subject as «unhelpful», given the lack of some capacities; he further notes that international norms on human rights law are not yet considered to apply horizontally and that international law provides no means for their enforcement (I. BROWNLIE, *Public International Law*<sup>8</sup>, Oxford, 2012, p. 121).

<sup>5</sup> B. BOLLECKER-STERN, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, 1973, pp. 95 ss.

<sup>6</sup> D. ANZILOTTI, *La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers*, in *Rev. gén. dr. int. pub.*, 1906, pp. 5 ss.

<sup>7</sup> This point is analysed, in particular, by F. LATTANZI, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, Milano, 1983, pp. 169 ss.

<sup>8</sup> Cfr. G. SPERDUTI, *L'individuo nel diritto internazionale*, Cagliari, 1950, p.110. On the distinction between direct and indirect prejudice of the State, the latter being the prejudice suffered as a consequence of damage to citizens and to their assets, see M. IOVANE, *La riparazione nella teoria e nella prassi dell'illecito internazionale*, Milano, 1990, pp. 218 ss.

nationality, to invoke respect for international norms. As will be analysed below, such a perspective may be further supported by the rules on international responsibility.

Even though several authors tend to side in favour of the progressive creation of a customary norm<sup>9</sup> granting access to justice to individuals, it is still the case that an individual right to reparation may be hindered by institutional, procedural or economic factors<sup>10</sup>, with few examples of such an individual right being established on a treaty basis<sup>11</sup>. In this evolving landscape, two recent documents can be identified which convey the idea that individuals do enjoy the right to be compensated, the most recent of which is the ILC *Code on Crimes against Humanity*<sup>12</sup>, setting out the obligation for States to ensure that victims obtain reparation, including compensation<sup>13</sup>.

An equally valuable contribution can be drawn from the Report of the International Commission of Inquiry on Darfur, stating that:

Serious violations of international humanitarian law and human rights law can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or state-like entity) on whose behalf the perpetrator was acting. This international responsibility involves that the State (or the state-like entity) must pay compensation to the victim<sup>14</sup>.

The idea of an individual right to redress finds further reflection in the notion of universal jurisdiction that, as is known, entails the possibility for any State to trial the individual responsible for the commission of international crimes, even in the absence of elements linking the crime to the forum of that State<sup>15</sup>. Beside universal criminal jurisdiction,

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<sup>9</sup> In favour of a «slow» development of an individual right to reparation, see, amongst others: R. PISILLO MAZZESCHI, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, in *Journal of International Criminal Justice*, 2003, p. 347. More optimistic views are expressed by C. EVANS, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge, 2012, p. 39; A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, Oxford, 2011, pp. 197 ss.; F. FRANCONI (ed.), *The Rights of Access to Justice under Customary International Law*, cit., pp. 54-55. An opposite view is expressed by Tomuschat, who emphasises the difficulty generally encountered by individuals in enjoying the rights stemming from customary norms, often because of jurisdictional obstacles (C. TOMUSCHAT, *Human Rights: Between Idealism and Realism*<sup>3</sup>, Oxford, 2014, pp. 415-416).

<sup>10</sup> R. PISILLO-MAZZESCHI, *International Obligations to Provide for Reparation Claims?*, in A. RANDELZHOFFER-C. TOMUSCHAT (eds.), *State Responsibility and the Individual*, The Hague, 1999, p. 165; D. SHELTON, *Remedies in International Human Rights Law*, Oxford, 2015, pp. 96 ss.

<sup>11</sup> Examples of a direct obligation for States to provide reparations to «the injured party» are found in the European Convention on Human Rights (Rome, 4 November 1950; entry into force 3 September 1953; Art. 41), in the American Convention on Human Rights (San José, 22 November 1969; entry into force 18 July 1978; Art. 63 par. 1) and in the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Maputo, 10 June 1998; entry into force 25 January 2004; Art. 27 par. 1). On this issue, see G. BARTOLINI, *Reparation for Violations of Human Rights: Possible Co-Ordination in the Case-Law of International Supervisory Bodies*, in *Federalismi.it*, 2009 (<https://federalismi.it/nv14/articolo-documento.cfm?artid=13780>, last accessed 19 February 2020).

<sup>12</sup> International Law Commission, *Draft Articles on Prevention and Punishment of Crimes Against Humanity, Report on the work of the seventy-first session* (2019), A/74/10.

<sup>13</sup> A/CN.4/L.935, 12 May 2019, Art. 12.

<sup>14</sup> *Report of the International Commission of Inquiry on Darfur, to the United Nations Secretary-General*, 25 January 2005, par. 593. The same paragraph recalls that the international obligation to pay compensation was first laid down in Article 3 of the 1907 Hague Convention on Land Warfare and restated in each of the 1949 Geneva Conventions (footnote no. 213).

<sup>15</sup> B.H. OXMAN, *Jurisdiction of States*, in *Max P. Enc. Pub. Int. Law* (2007).

generally accepted by doctrine, the need of a «direct and individual protection of victims»<sup>16</sup> may lead to the progressive emergence of the notion of universal civil jurisdiction. As far as treaty law is concerned, examples of universal jurisdiction are found in the Convention against torture<sup>17</sup> as well as in the *IV Geneva Convention*<sup>18</sup>, whose Article 146 sets out the obligation for each Contracting Party to enact any legislation necessary to provide effective penal sanctions for persons alleged to have committed grave breaches of the Convention and to bring them before its own courts<sup>19</sup>. Despite caution showed by doctrine and the reluctance emerging from States' practice<sup>20</sup>, universal civil jurisdiction clearly displays the progressive shift of attention towards the individual seen as a victim of human rights breaches.

### 3. *The Right to Compensation as a Victim's Right*

While the growing role of the individual is at the roots of the so-called «victimological revolution», it is also true that, as a paradigm shift focusing attention on the victim's «need to repair»<sup>21</sup>, such an approach offers a further avenue for affirming the right of individuals to receive compensation, especially in the case of gross violations.

In a nutshell, the victimological approach is premised on victims' right to reparation and redress, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition<sup>22</sup>. At national level, such an approach materialises, for example, in national compensation schemes for victims of very diverse phenomena, ranging from organised crime to car accidents<sup>23</sup>.

<sup>16</sup> Institut de droit international, *Universal Civil Jurisdiction with Regard to Reparation for International Crimes* (2015), par. 12.

<sup>17</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 10 December 1984, entry into force 26 June 1987, Art. 5, par. 2. The provision obliges States to exercise universal jurisdiction only if the alleged offender is present in any territory under the jurisdiction of a State party.

<sup>18</sup> *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, entry into force 21 October 1950.

<sup>19</sup> It is important to underline that the provisions mentioned above represent instances of «quasi-universal» jurisdiction, provided for by specific treaty provisions and applicable between States parties to that treaty only. As has been underlined, when matched with the principle *aut dedere aut iudicare*, «quasi-universal» jurisdiction is often compulsory between Contracting States, whereas universal jurisdiction usually entails a simple possibility (C. FOCARELLI, *Giurisdizioni internazionali*, Milano, 2017, p. 279).

<sup>20</sup> A. SU, *Rise and Fall of Universal Civil Jurisdiction*, in *Human Rights Quarterly*, 2019, pp. 849 ss.

<sup>21</sup> T. VAN BOVEN, *The Need to Repair*, in *Int. Jour. Hum. Rights*, 2012, p. 694.

<sup>22</sup> Committee against Torture, General Comment no. 3, cit., par. 2. See, also, *UN 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*, General Assembly resolution 60/147, 16 December 2005, Chapter IX (Reparation for harm suffered).

<sup>23</sup> Examples of this kind of legislation are, with reference to the Italian legal system, the law establishing a national fund for victims of car accidents, guaranteeing compensation to victims if the vehicle is not covered by insurance or the person liable has not been identified (Law 24-12-1969 no. 990, *Assicurazione obbligatoria della responsabilità civile derivante dalla circolazione dei veicoli a motore e dei natanti*, Official Journal of 3 January 1970, no. 2). Victims of organised crime can apply for compensation based on different funds, one of which is specifically devoted to victims of mafia crimes (Law 22 December 1999, no. 512, *Istituzione del Fondo di rotazione per la solidarietà alle vittime dei reati di tipo mafioso*, Official Journal of 10 January 2000, no. 6). On the establishment of the Victims' Rights Movement and on the first examples of the related legislation, see L.E. DAIGLE, *Victimology*, Los Angeles, 2013, pp. 7 ss.

At international level, the victims' perspective has found egregious expression, first of all, in the adoption of the *UN Basic Principles and Guidelines on the Right to a Remedy* (henceforth, the *UN Basic Principles*) adopted by the UN General Assembly<sup>24</sup>. The *UN Basic Principles*, premised on the existence of a right to remedy for victims, «represents the first comprehensive codification of the rights of victims of international crimes to reparations, remedies, and access to systems of justice»<sup>25</sup>. The *Basic Principles* set out the right to access to justice<sup>26</sup> and the right to reparation<sup>27</sup>, including compensation<sup>28</sup>, for all victims of gross violations and contain a number of specific obligations in relation to international crimes, including the duty to prosecute the perpetrator of the crime and to punish him<sup>29</sup>, as well as the prohibition on applying statutes of limitations<sup>30</sup>.

On a parallel and related path are the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (henceforth, *Updated Principles*), adopted in 2005 by the UN Commission on Human Rights<sup>31</sup>. According to the *Updated Principles*, impunity is defined as «the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account»<sup>32</sup> and this conduct amounts to a «failure to meet [States'] obligations», including that of ensuring that victims receive reparations for the harm suffered<sup>33</sup>. Designed in a period when the international community was witnessing a number of mass atrocities, often perpetrated by the State, the *Updated Principles* can be considered as part of a «global anti-impunity discourse» and a reflection of a «trend towards accountability»<sup>34</sup>.

The adoption, by the *Updated Principles*, of a victimological perspective clearly emerges in the structure of the document, organised in terms of the right to know (Part II), the right to justice (Part III) and the right to reparation - including compensation<sup>35</sup> - and to guarantees of non-recurrence (Part IV). At the same time, the close link between these principles and the legacy of transitional justice materialises in the decision to insert, in Part II, a set of articles devoted specifically to the institution and functioning of inquiry commissions, as well as in the attention paid to reparation programmes<sup>36</sup>. The need to fight against impunity is

<sup>24</sup> *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*, cit.

<sup>25</sup> K. MCCracken, *Commentary on the 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*, in *Rev. int. dr. pén.*, 2005, p. 77. The adoption of the Principles is the outcome of a long process which began with the transfer, in 1950, to the United Nations, of the functions of the International Penal and Penitentiary Commission (IPPC). The IPPC was an international body created to promote cooperation in the development of international crime policies ([https://legal.un.org/avl/pdf/ha/dbpivcap/dbpivcap\\_ph\\_e.pdf](https://legal.un.org/avl/pdf/ha/dbpivcap/dbpivcap_ph_e.pdf); last accessed 10 February 2020).

<sup>26</sup> *UN Basic Principles*, cit., no. 12-14.

<sup>27</sup> *Ivi*, no. 15-23.

<sup>28</sup> *Ivi*, no. 20.

<sup>29</sup> *Ivi*, no. 4.

<sup>30</sup> *Ivi*, no. 6, 7.

<sup>31</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>32</sup> *Ivi*, point A.

<sup>33</sup> *Ivi*, no. 1.

<sup>34</sup> F. HALDEMANN, T. UNGER, *Introduction*, in ID., *The United Nations Principles to Combat Impunity - A Commentary*, Oxford, 2018, pp. 4-5.

<sup>35</sup> *Updated Principles*, cit., no. 34.

<sup>36</sup> *Ivi*, no. 32; the provision adds that reparation programmes can be addressed to individuals and to the community and should be implemented with the participation of victims and civil society, attempting to ensure the contribution of women and minority groups. On truth and reconciliation commissions see, among others,

particularly reflected in the invitation, addressed to States, to endow their courts with universal jurisdiction when dealing with international crimes<sup>37</sup>, as well as in provisions allowing «restrictive measures», *i.e.* «safeguards against any abuse of rules»<sup>38</sup>, including the prescription of prosecutions or penalties. The latter aspect is targeted, in particular, by Principle no. 23, barring prescription completely when international crimes are at stake and, in any case, allowing it only to the extent that effective remedy is not compromised.

As stated by the Preamble of the *UN Basic Principles*, the rationale of these instruments is not to «entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law»<sup>39</sup>. Notwithstanding this, and despite their non-binding nature, both sets of principles reinforce the idea that reparation and compensation are due to the individual victim of human rights breaches. That said, it is argued that the specificities of human rights protection make solidarity a key principle in this regard to the extent that, under the instruments quoted above, the main aim is to guarantee that victims are compensated regardless of what resources are made available by the responsible entity, be it a State or another individual<sup>40</sup>. By making the victim the central focus of judicial action, the “victimological revolution” has emphasised the need to reduce the uncertainties of tort law. In this perspective, compensation assumes the shape of a “social security” or “welfare” measure.

#### 4. *Compensation as a form of Reparation vs. “Welfare Measures”*

In a considerable number of cases, victims receive some form of compensation independently from judicial action. This frequently happens, at domestic level, as a result of the implementation of international human rights conventions, under which monetary compensation must be granted by the (even innocent) State for the sole purpose of restoring damage suffered by citizens. For the purposes of the present analysis, it is important to distinguish these cases from those where the source of the obligation to provide compensation is a ruling by human rights courts, such as the European Court of Human Rights or the Inter-American Court on Human Rights, whose jurisdiction is contingent on the exhaustion of domestic remedies. In those circumstances, compensation ordered by the Court follows a finding to the effect that the rights enshrined in the Convention have been breached at the domestic level, for example because compensation has not been granted or was insufficient. As a consequence, the action of the Court complements that of national

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T. SCOVAZZI, Considerazioni generali sulle commissioni di verità e riconciliazione, in F. FRANCONI et al. (eds.), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea*, Milano, 2008, pp. 599 ss. and quoted bibliography.

<sup>37</sup> *Ivi*, no. 21.

<sup>38</sup> *Ivi*, no. 22.

<sup>39</sup> *UN Basic Principles*, cit., Preamble.

<sup>40</sup> In this sense, see, for example, T. VAN BOVEN, *The United Nations 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*, United Nations Audiovisual Library of International Law, 2010, p. 2.

tribunals already called to assess potential violations and, necessarily, not keen to accede to victims' requests<sup>41</sup>.

Examples in this sense are the *European Convention on the Compensation of Victims of Violent Crimes*<sup>42</sup>, Article 2 of which sets out the obligation of States to contribute to compensating victims and their dependants, when compensation is not fully available from other sources. Similar provisions are enshrined in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>43</sup> and in the *Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power*<sup>44</sup>.

When considering the instruments targeting specific categories of victims, it is worth mentioning the *Convention on Preventing and Combating Violence against Women and Domestic Violence*, which states that «Adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions»<sup>45</sup>, as well as the *Convention on Action against Trafficking in Human Beings*<sup>46</sup>.

The same approach is taken by the provision, contained in the *EU Directive Relating to Compensation to Crime Victims*<sup>47</sup>, establishing the responsibility of the State where a crime has been committed and requiring the creation of national compensation schemes<sup>48</sup>. Finally, it is worth mentioning the statement, made by the Committee against Torture, according to which Article 14<sup>49</sup> of the Convention against Torture requires States to acknowledge the principle of «subsidiary liability» and the request, by the same Committee, for reparation schemes to be set up at national level<sup>50</sup>. Such an outcome has also to be seen in relation to the nature and function of the Committee that is entitled, under Article 22, to receive communications by individuals

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<sup>41</sup> As correctly underlined by doctrine, this is the reason why, when breaches are found at the domestic level, reparation measures include, as a priority, a serious investigation on the facts and the punishment of responsible persons (G. CITRONI, *La Commissione della verità e riconciliazione peruviana e l'accesso alla giustizia per le vittime del conflitto interno armato ed i loro famigliari*, in F. FRANCONI et al., *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea*, cit., p. 660).

<sup>42</sup> *European Convention on the Compensation of Victims of Violent Crimes*, Strasbourg, 24 November 1983, entry into force 1 February 1988. The Convention has so far received only three ratifications. According to Art. 3, compensation shall be paid by the State on whose territory the crime was committed to nationals of the States party to this Convention (a); or to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed (b).

<sup>43</sup> *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, General Assembly resolution 40/34, 29 November 1985. According to Principle no. 12 «When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation».

<sup>44</sup> *Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power*, 8 February 2010, Art. 11.1. According to Art.11.4, «The establishment, strengthening and expansion of national, regional or local funds for compensation to victims should be encouraged. State Parties may consider providing funds through general revenue, special taxes, fines, private contributions, and other sources».

<sup>45</sup> *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, cit., Art. 30, par. 2. See, also, the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation* (2007), stating «that national governments bear primary responsibility to provide remedy and reparation» (point 6).

<sup>46</sup> *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16 May 2005, entry into force 1 February 2008, Art. 15, par. 4. The Convention has so far been ratified by ten States.

<sup>47</sup> Council Directive 2004/80/EC of 29 April 2004 *Relating to Compensation to Crime Victims*, OJ L 261, 6 August 2004, p. 15-18, Art. 2.

<sup>48</sup> *Ivi*, Art. 12, par. 2.

<sup>49</sup> The text of Art. 14 reads as follows: «Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible».

<sup>50</sup> Committee against Torture, *Decision adopted by the Committee under article 22 of the Convention, concerning Communication No.854/2017*, cit., par. 7, 9, letter d).

claiming to be victims of a breach of the Convention by a State party, provided that the State exercising jurisdiction on them has accepted the competence of the Committee. The assessment of the claim by this latter is, in turn, subordinate to the exhaustion of domestic remedies, with the consequence that the duty to set up domestic schemes is aimed at ensuring compliance with the right to fair and adequate compensation laid down by Article 14 when the Committee is faced with a breach of the Convention by Member States. In this sense, the logic underlying the action of the Committee is similar to that of regional human rights tribunals previously mentioned.

From the perspective of the logic underpinning these instruments, compensation is not just a form of reparation but is, above all, a “welfare measure” granted on the basis of solidarity towards the victim and of a presumed, at least partial, responsibility of the State, which was unable to prevent the crime from occurring and, on a general level, to maintain peace and good order<sup>51</sup>. Public intervention can also be seen as counterbalancing the impossibility, for the individual, to restore justice and the dangers to which he is exposed by reason of his duty to cooperate with the public authorities in the repression of crimes. This type of logic is applied both under purely national schemes as well as under international treaty law which essentially pursues the harmonisation of national law in this regard. In other words, solidarity works as a driver for sharing the reparation burden between the perpetrator of the crime - physical or legal person - and the State or, in extreme circumstances, for the fully-fledged substitution of the former by the latter.

These considerations do not, however, make the acknowledgment of the responsibility of the perpetrator and the idea of proper compensation less desirable, as judicial response is part and parcel of the right to access to justice to which victims are entitled<sup>52</sup>. Such a view is also reflected in the fact that, under classical international law categories, the punishment of the perpetrators of illicit acts is considered a form of satisfaction<sup>53</sup>. As effectively argued by the complainant in the case submitted to the Committee against Torture mentioned above, compensation granted on the basis of national schemes can be qualified as an administrative welfare measure that differs from compensation to which she is entitled pursuant to a court verdict and that can «complement, but not replace» fair and adequate compensation<sup>54</sup>.

Regardless of any consideration concerning the desirability of one scheme or the other, I would now like to discuss the role of solidarity at the upper level of governance, *i.e.* in the relationship between the internationally responsible entity and the other States of the international community.

##### 5. *Reparation as an Internationally Shared Burden*

In the context of victim protection, the State’s «subsidiary liability» often translates - or should translate - into a requirement for the territorial State (or the victim’s State of

<sup>51</sup> See, in this sense, M. GROENHUIJSEN, *The Development of International Policy in Relation to Victims of Crime*, in *International Review of Victimology*, 2014, pp. 37-38.

<sup>52</sup> D. SHELTON, *Remedies in International Human Rights Law*, cit., p. 19.

<sup>53</sup> See, for example, the *Rainbow Warrior* case, where declarations of material breaches by France of its obligations have been considered sufficient satisfaction for New Zealand by the arbitral tribunal (*Case concerning the difference between New Zealand and France on the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 30 April 1990, par. 123).

<sup>54</sup> Committee against Torture, *Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 854/2017*, cit., par. 5.3.

nationality) to set up national compensation schemes that, in turn, are not exclusively financed by that State, but also by other States.

Unlike the *Council of Europe Convention on the Compensation of Victims of Violent Crimes* and EU Directive 2004/80, the *UN Basic Principles* do not explicitly impose the reparation burden on a predefined State and refer generally to «States». Even assuming that the territorial State is the one called upon to provide compensation<sup>55</sup>, it is worth considering the fact that the application of universal jurisdiction<sup>56</sup>, advocated by the *UN Basic Principles* as a form of cooperation in the prosecution of crimes<sup>57</sup>, would inevitably shift the burden onto the State that institutes proceedings, irrespective of the location in which the violation occurred. Moreover, the possible involvement of non-responsible States in the context of the *UN Basic Principles* has been contemplated by a report by the High Commissioner for Human Rights: after mentioning solidarity as the basis of the State's effort in facilitating redress<sup>58</sup>, the report suggests the possibility of replacing the establishment of «national funds» with a reference to «programmes» embracing a much broader range of possible support mechanisms<sup>59</sup>.

A similar idea resounds in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which, while assuming that the reparation burden generally falls on the victim's State of nationality, envisages the creation of «other funds» when the latter is not in a position to compensate<sup>60</sup>. The *Updated Principles on Impunity*, according to which «Reparations may also be provided through programs, based upon legislative or administrative measures, funded by national or international sources», are more explicitly in favour of international participation in the reparation burden<sup>61</sup>.

Shifting the focus to international criminal justice, it is interesting to note how the idea of internationalising the reparation burden may affect the structure and functioning of judicial bodies. This is the case, first of all, of the International Criminal Court: according to Article 75 par. 1 of the Statute<sup>62</sup>, the Court «may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims». Reparation orders are implemented by the *Trust Fund for Victims* (TFV)<sup>63</sup>, established for the benefit of victims and of their families<sup>64</sup>; however, activities and projects set up by the Fund can benefit a wider range of victims other than those of a case in front of the Court.<sup>65</sup> Even if the TFV can

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<sup>55</sup> In this regard, the approach taken by the *Council of Europe Convention on Action against Trafficking in Human Beings* consists of setting out the grounds for jurisdiction (cit., Art. 31, par. 1) and of generically establishing States' duty to provide compensation (Art. 15, par. 1, 3). The same approach is followed by the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (cit., Art. 44, par. 1; Art. 30, par.1). Grounds for jurisdiction refer to State territory, as well as to the nationality of the perpetrator and the victim.

<sup>56</sup> See, on this point, the report adopted by the Institut de droit international, *Universal Civil Jurisdiction with Regard to Reparation for International Crimes* (2015).

<sup>57</sup> *UN Basic Principles*, cit., no. 4, 5.

<sup>58</sup> *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, Note by the High Commissioner for Human Rights, E/CN.4/2004/57, 10 November 2003, p. 9.

<sup>59</sup> *Ivi*, p. 10.

<sup>60</sup> *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, cit., Principle 13. Similar language is found in the *Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power* (cit., Art. 11.6).

<sup>61</sup> *Updated Principles*, cit., no. 32.

<sup>62</sup> *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, entry into force 1 July 2002.

<sup>63</sup> *Ivi*, Art. 75, par. 2.

<sup>64</sup> *Ivi*, Art. 79, par. 1.

<sup>65</sup> *Regulations of the Trust Fund for Victims*, no. 48.

receive money and other property collected through fines or forfeiture transferred by the Court<sup>66</sup>, «its use of funds goes well beyond individual reparation orders».<sup>67</sup>

According to Article 79 of the Statute, the Fund is managed on the basis of criteria to be determined by the Assembly of States Parties<sup>68</sup>. Part II of the Regulations of the *Trust Fund*, named «Receipt of Funds», lists the sources through which the Fund is financed, therein including voluntary contributions from governments, international organisations, individuals, corporations and «other entities»<sup>69</sup>. According to the Regulations, the Board presents an annual appeal for voluntary contributions to the Fund<sup>70</sup> and establishes contact with governments, international organisations, individuals, corporations and other entities to solicit the<sup>71</sup>. The intermediary<sup>72</sup> function assigned to the TFV in the handling of compensation can be seen from the wording of Article 75 of the Statute, according to which «the award for reparations [is] made through the Trust Fund»; however, such a strict mandate will be overridden if the perpetrator is indigent and therefore unable to fund reparation<sup>73</sup>.

A further example comes from the International Commission of Inquiry on Darfur, cited above, whose final report encouraged the creation of a Compensation Commission to deal with compensation claims for any international crime perpetrated in Darfur<sup>74</sup>. The report - which, interestingly, draws the notion of victim from the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* mentioned above<sup>75</sup> - proposes a double track for funding compensation: as stated by the report, the Commission should rule upon compensation claims whether or not the perpetrator has been identified and brought to trial<sup>76</sup>. Whereas the Sudanese authorities should fund compensation for crimes committed by Government forces or *de facto* agents of the Government, a Trust Fund, to be established on the basis of international voluntary contributions, would fund compensation relating to acts committed by rebels<sup>77</sup>. In this latter hypothesis, the identification and prosecution of the responsible

<sup>66</sup> Rome Statute of the International Criminal Court, cit., Art. 79 par. 2.

<sup>67</sup> W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*<sup>2</sup>, Oxford, 2016, p. 1182.

<sup>68</sup> *Ivi*, par. 3.

<sup>69</sup> *Ivi*, Art. 21, letter a); the *Regulations* also list other sources: money and other property collected through fines or forfeiture, resources collected through awards for reparations ordered by the Court and such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate (Art. 21, letters b), c) and d)).

<sup>70</sup> *Ivi*, Art. 22.

<sup>71</sup> *Ivi*, Art. 23.

<sup>72</sup> T. DANNEBAUM, *The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims*, in *Wisconsin International Law Journal*, 2010, pp. 258-259. The same expression is found in Article 98 of the Rules of Evidence of the Court (par. 3), referring to the case where a collective award is deemed more appropriate. According to the same provision, individual awards for reparations shall be made directly against a convicted person (par. 1) and they can be deposited with the Trust Fund only when it is impossible to make individual awards directly to each victim. In this case, they shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible (par. 2).

<sup>73</sup> A. BALTA, M. BAX, R. LETSCHERT, *Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System*, in *International Criminal Justice Review*, 2019, pp. 233-234.

<sup>74</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, par. 601.

<sup>75</sup> *Ivi*, par. 595.

<sup>76</sup> *Ivi*, par. 601.

<sup>77</sup> *Idem*. Such an idea was reflected on a limited basis in the Darfur Peace Agreement, where the participation of the Government, of the Darfurian community, of the African Union and of other «international partners» refers to a special trust fund (*Darfur Peace Agreement*, 5 May 2006, par. 493) established for the purposes of the Darfur-Darfur Dialogue and Consultation, a conference gathering representatives of all Darfurian stakeholders (par. 458).

persons would not be relevant<sup>78</sup>, coherently with the idea, underlined by the UN High Commissioner for Human Rights, of legal principles of accountability and social principles of solidarity calling for victims' protection in cases where the perpetrator could not be held accountable<sup>79</sup>.

A similar mechanism is that identified in the context of the Special Panels for Serious Crimes in East Timor, established in the context of the United Nations Transitional Administration in East Timor (UNTAET). The Special Panels, formed by Cambodian judges and "foreign judges"<sup>80</sup>, were endowed with exclusive jurisdiction to deal with serious criminal offences<sup>81</sup> committed in East Timor prior to 25 October 1999<sup>82</sup>. The Rules of procedure set up an «integrated» mechanism for victims' compensation, by allowing them to pursue civil actions before competent courts and, at the same time, establishing that any amount paid pursuant to a Court's order shall be credited toward satisfaction of any civil judgment in the matter<sup>83</sup>.

Such a mechanism is complemented through the possibility of establishing a Trust Fund to the benefit of victims of crimes and their families<sup>84</sup>. The Fund may be financed through money and other property collected through fines, forfeiture, foreign donors or other means<sup>85</sup>.

A further example is found within the system of the Extraordinary Chambers in the Courts of Cambodia (ECCC), established in order assess claims relating to crimes committed during the period from 17 April 1975 to 6 January 1979<sup>86</sup>. The Chambers have been set up on the basis of an agreement between Cambodia and the United Nations<sup>87</sup> and are formed by Cambodian judges and «international judges».<sup>88</sup> According to the Rules, victims can participate in criminal proceedings as civil parties, seeking collective and moral reparations; if, at the pre-trial stage, Civil Parties participate individually, at the trial stage and beyond they shall comprise a single group, represented by the Civil Party Lead Co-Lawyers<sup>89</sup>.

Assistance to victims in obtaining compensation is provided by the *Victims Support Section* (VSS). After it became clear that reparation from the accused persons would be impossible due to their indigence, and after the ECCC declined the possibility of seeking

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<sup>78</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, par. 602.

<sup>79</sup> *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, Note by the High Commissioner for Human Rights, E/CN.4/2003/63, 27 December 2002, par. 13.

<sup>80</sup> *Regulation no. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, Art. 11 new.

<sup>81</sup> *Ivi*, Art. 1 par. 1. In 2005, the Special Panels suspended operations indefinitely.

<sup>82</sup> *Ivi*, Art. 2, par. 4. As has been underscored, the Special Panels could not be considered as an autonomous jurisdictional body, as they performed their functions within an existing ordinary Court in Timor East (E. CIMIOTTA, *I tribunali penali misti*, Padova, 2009, pp. 149-150).

<sup>83</sup> *Regulation no. 2000/30 on Transitional Rules of Criminal Procedure*, Art. 49 par. 1,2.

<sup>84</sup> *Ivi*, Art. 25, par. 1.

<sup>85</sup> *Ivi*, Art. 25, par. 2.

<sup>86</sup> *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, Art. 1.

<sup>87</sup> *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea*, Phnom Penh, 6 June 2003, entry into force 29 April 2005.

<sup>88</sup> *Ivi*, Art. 3.

<sup>89</sup> *Extraordinary Chambers in the Courts of Cambodia - Internal Rules (rev.9) as revised on 16 January 2015*, Rule 23 quinquies.

reparations from the Cambodian State<sup>90</sup>, the Court Rules were amended in order to consider, subject to Court approval, some externally funded projects as reparations<sup>91</sup>. According to the *Guidebook to Judicial Reparations*, issued in 2004 by the Civil Party Lead of the Co-Lawyers' Section, civil parties must choose between one of the two implementation methods: for reparation awards, the expenses will be borne by the convicted person, whereas reparation projects will be funded externally<sup>92</sup>. The *Guidebook* further specifies that, in the second method, externally funded reparation projects must have secured funding; this can occur through a funding agreement with the project partner or through an agreement with the VSS. Upon submission of a reparation project, it will therefore be the responsibility of the victims to prove to the Chamber, through a Verification of Secured Funding, that the project can be properly funded<sup>93</sup>. In order to fulfil its task, the VSS organises «fundraising meetings» where potential donors and relevant stakeholders are informed of the projects and of the opportunities of funding them.

Further examples originate from the African continent: the Extraordinary African Chambers within the courts of Senegal<sup>94</sup>, created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990, can award reparations for the benefit of victims<sup>95</sup>, who may join the proceedings as civil parties at any time.<sup>96</sup> The Statute sets out the establishment of a Trust Fund «for the benefit of victims of crimes within the jurisdiction of the Extraordinary African Chambers, and of the beneficiaries of such victims», financed by voluntary contributions from foreign governments, international institutions, non-governmental organisations and other entities wishing to support victims<sup>97</sup>.

The (now Residual) Special Court for Sierra Leone (SCSL)<sup>98</sup> receives external donors' contributions and the same applies to the Special Tribunal for Lebanon, through a Management Committee established in 2007<sup>99</sup>. In both cases, and in analogy to the solution

<sup>90</sup> *Prosecutor vs. Kaing Guek Eav, Appeal Judgment*, 3 February 2012, par. 654 ss.

<sup>91</sup> R. KILLEAN, *Pursuing Retributive and Reparative Justice within Cambodia*, cit., p. 484. One example of an externally funded reparation project is that set up in Case 002/02; on this point, see A. BALTA, *Extraordinary Chambers in the Courts of Cambodia, Regulation of Marriage, and Reparations: Judgment in Case 002/02 Under Review*, in *Opinio Juris*, 20 November 2018.

<sup>92</sup> *Guidebook to Judicial Reparations* in Case 02/02 before the ECCC, p. 3.

<sup>93</sup> *Ivi*, p. 7.

<sup>94</sup> *The Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union* was signed on 22 August 2012; the Chambers were inaugurated in February 2013. According to the Agreement, the Chambers are composed of judges of Senegalese nationality and non-Senegalese judges from another African Union Member State (Art. 11).

<sup>95</sup> *Statute of the Extraordinary African Chambers*, Art. 27.

<sup>96</sup> *Ivi*, Art. 14, par. 1.

<sup>97</sup> *Ivi* Art. 28, par. 1.

<sup>98</sup> The SCSL was established by an agreement between the UN and the Government of Sierra Leone (Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone; Freetown, 16 December 2002) to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Court is composed of judges appointed by the Government of Sierra Leone and judges appointed by the Secretary-General of the United Nations (*Statute of the Special Court for Sierra Leone*, Art. 12). Following the termination of the Courts' activities in 2013, the Residual Court was established, dealing with the remaining legal obligations of the SCSL.

<sup>99</sup> The Special Tribunal for Lebanon was set up under UN Resolution 1757(2007) to deal with claims relating to the terrorist attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafik Hariri. The Agreement between the United Nations and the Lebanese Republic on the establishment of the Tribunal was signed by the Government of Lebanon and the United Nations, respectively, on 23 January and

adopted in the case of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Court's rulings do not directly award compensation, but they can only be transmitted to other judicial bodies or competent authorities of the State concerned in order to bring an action for this purpose<sup>100</sup>.

One peculiar aspect of the cases illustrated above consists of the fact that the right to financial compensation, established by the tribunal as a form of redress, is conditional upon "crowdfunding" activity, if not by the tribunal itself, by a closely related structure. Such a system has two main consequences: on one side, the right to compensation is not absolute but, rather, contingent on a set of external circumstances and, while it is true that such an insolvency risk is inherent in most legal proceedings, in the examples illustrated above, it appears to be embedded in the very structure of the system. Secondly, the link between compensation and the responsible person or entity is weakened, which risks undermining one of the purposes of compensation itself, *i.e.* the retributive aspect.

Even assuming that sharing the reparation burden may be advantageous for victims, it should not be confused, especially in the context of mass claims, with the idea of an unlimited extension of the scope of potential responsible entities or of potential victims. As effectively explained by the ECCC in the judgement concerning *Kaing Guek Eav*, the Statute of each tribunal is specific in this regard and sets precise limitations as to the definition of victim and the identification of perpetrators of crimes. Faced with the request, by some applicants, to assess Cambodia's compliance with the international standards of justice and generally recognised human rights precepts, the Court clarified that, under its Statute, civil action proceedings may only be brought against the accused<sup>101</sup>, *i.e.* «senior leaders of Democratic Kampuchea and those who were most responsible for the crimes», and therefore not against the State - of which the Court is an emanation<sup>102</sup>. «*On the policy level*», the Court continues, «*ECCC criminal proceedings ought to be considered as a contribution to the process of national reconciliation, possibly a starting point for the reparation scheme, and not the ultimate remedy for nation-wide consequences of the tragedies during the DK. As such, the ECCC cannot be overloaded with utopian expectations that would ultimately exceed the attainable goals of transitional justice*»<sup>103</sup>. While some of these procedural limitations are specific to the ECCC when compared with other international or hybrid criminal tribunals<sup>104</sup>, the Court's statement is a strong reminder of the insurmountable distinction between individual and State responsibility, with all the consequences that such a distinction entails in terms of the reparation effort.

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on 6 February 2007. The Tribunal is composed of judges of Lebanese nationality and «international judges» (*Statute of the Special Tribunal for Lebanon*, Art. 8).

<sup>100</sup> According to the Statute of the SCSL, the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda apply *mutatis mutandis* (Art. 14). ICTR Rules of Procedure and Evidence set out that, pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation (Rule 106). Art. 25, par. 3 of the Statute of the Special Tribunal for Lebanon contains a similar provision.

<sup>101</sup> Case no. 001/18-07-2007-ECCC/SC, par. 656.

<sup>102</sup> *Ivi*, par. 654.

<sup>103</sup> *Ivi*, par. 655.

<sup>104</sup> See the comparison with the procedure of the ICC and the STL, which provide avenues for dealing with reparation claims separately from the main proceedings (*ivi*, par. 657). On victims' participation in reparation proceedings, see P. AMBACH, *Reparation Proceedings at the International Criminal Court – A Means to Repair or Recipe for Disappointment?*, in U. SIEBER, V. MITSILEGAS, C. MYLONOPOULOS, E. BILLIS, N. KNUST (eds.), *Alternative Systems of Crime Control*, Berlin, 2018, pp. 117 ss.

## 6. Burden Sharing Between Compliance with *Erga Omnes* Norms and Effective Remedy to Human Rights Breaches

As seen at the beginning of this work, the theme of compensation for human rights breaches has traditionally been considered in the context of the law of international responsibility and only later has it been analysed within the framework of victims' rights. Starting from the first point of view, and in the light of reparation being a consequence of an unlawful act, one may wonder how instances of participation of other States in the compensation effort may be justified.

As underlined by authoritative doctrine, beside a bilateral structure, international responsibility can also assume the shape of a collective relationship when common interests and values of the international community have been breached<sup>105</sup>. Such a collective dimension, it is submitted, can be relevant when one inquires about how such a breach is to be repaired. In this respect, regard is to be had to Article 48, par. 1, letter b) of the *ILC Draft Articles on State Responsibility* entitles «other States than the injured State» to invoke responsibility. The latter may claim, under paragraph 2 of that provision, the performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the breached obligation<sup>106</sup>. As emphasised by the Commentaries to the Draft Articles<sup>107</sup>, Article 48:

«intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew “an essential distinction” between obligations owed to particular States and those owed “towards the international community as a whole”. With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*».<sup>108</sup>

On the other side, as highlighted by authoritative doctrine, such a provision constitutes a «weak version» when compared to the «strong version» adopted in 1996 under the direction of Roberto Ago, Article 19 of which defined international crimes as violations of obligations owed to the international community «as a whole»<sup>109</sup>. Aside from this, the new *Draft Articles*, by assuming the existence of an injured State, have completely disregarded the case where such a State does not exist and the injury only concerns the international community as a whole, which might well be the case in relation to mass human rights violations committed by the State of nationality of the victims<sup>110</sup>.

<sup>105</sup> E. Cannizzaro, *Diritto internazionale*, Torino, 2018, pp. 451-452.

<sup>106</sup> Letter b).

<sup>107</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, p. 127.

<sup>108</sup> International Court of Justice, *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3, 32.

<sup>109</sup> P. PICONE, *Gli obblighi erga omnes fra passato e futuro*, cit., p. 7. As specified by the Commentary, international crimes as defined by Article 19 explicitly recalled Article 53 of the Vienna Convention on the Law of Treaties with respect to *jus cogens* norms (*Draft Articles on State Responsibility with Commentaries thereto adopted by the International Law Commission on First Reading*, 1997, p. 112). Article 19 was then to be read in conjunction with Article 40, par. 4 of the ILC Draft Articles, according to which, in case of commission of a crime, the term «injured State» was to mean «all the other States». In the transition from the first to the second reading, Articles 19 and 40 of the old Draft were removed and the reference to States other than the injured one was inserted into Articles 48 and 54 of the new Draft.

<sup>110</sup> P. PICONE, *Gli obblighi erga omnes fra passato e futuro*, cit., p. 10.

Based on these elements, and in a *de lege ferenda* perspective, questions might arise as to whether, in reparations for serious human rights breaches, the right of other States of the international community to invoke responsibility could translate into a right to replace the responsible State if the latter is not willing or able to offer financial redress<sup>111</sup>. As highlighted by the resolution on *Universal Civil Jurisdiction with Regard to Reparation for International Crimes* adopted by the Institut de droit international, the breach of *erga omnes* obligations would also imply the right of other States to react, and therefore to adopt measures to guarantee implementation of the individual right<sup>112</sup>. Such a right would expand into an «individual and collective obligation» to adopt measures in this regard, as the duty of solidarity entails obligations to «facilitate and support»<sup>113</sup>.

Considering, further, the peremptory nature of the norms prohibiting gross violations of human rights, the obligation of States to cooperate to bring the breach to an end through lawful means, set out by the *Draft Articles*<sup>114</sup>, also comes into play. While the Institut de droit international explicitly ruled out the capacity of international law to oblige States other than the perpetrator of the crime in guaranteeing compensation *in lieu* of the perpetrator, it also observed that, in principle, victims' right to redress would not oppose such an extension<sup>115</sup>. Based on the examples illustrated above, it can be said that, to some extent, solidarity has made its way into different national and international mechanisms on victims' rights, offering the latter additional possibilities of enjoying their right to redress and, therefore, to compensation.

If, therefore, the participation of the international community can be based on the need to repair breaches of fundamental norms and values, at the same time, the experience drawn from international human rights law as well as international criminal law shows us that, in several cases, the enforcement of such a “subsidiary liability” can become problematic both from a practical and a moral point of view. In particular, when a considerable number of victims has been affected, courts are faced with the same challenges that traditionally characterize mass claims processes, among which a certain degree of opaqueness as to the rationale of reparation and compensation. This is particularly evident in the case of criminal justice where, has been underlined, «the mixing of a right to reparation and the principle of individual responsibility has led to the notion that those responsible for international crimes must provide reparations»<sup>116</sup>. Beside the theoretical issues surrounding such a «mixing»<sup>117</sup>, the frequent situation of indigence of the accused makes individual compensation impossible

<sup>111</sup> In this sense, see G. BARTOLINI, *Riparazione per violazione dei diritti umani e ordinamento internazionale*, Napoli, 2009, pp. 88-89.

<sup>112</sup> Institut de droit international, *Universal Civil Jurisdiction with Regard to Reparation for International Crimes*, 2015, par. 107.

<sup>113</sup> *Ivi*, par. 108. The duty of solidarity was also mentioned by the Institute in the resolution on *The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States*, 1989, Art. 1. On the relationship between *erga omnes* obligations and solidarity, see, also, P. PICONE, *Gli obblighi erga omnes fra passato e futuro*, cit., pp. 14-15.

<sup>114</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, cit., Art. 41, par. 1.

<sup>115</sup> *Universal Civil Jurisdiction with Regard to Reparation for International Crimes*, cit., par. 110-111.

<sup>116</sup> F. MÉGRÉT, R. VAGLIANO, *Transitional Justice and Human Rights*, in C. LAWTHORP et al., (eds.), *Research Handbook on Transitional Justice*, Cheltenham/Northampton, 2017, p. 105.

<sup>117</sup> A. O'SHEA, *Reparations under International Criminal Law*, in PETÉ, DU PLESSIS (eds.), *Repairing the Past?: International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerpen/Oxford, 2007, pp. 179 ss.; A. BISSET, *Truth Commissions and Criminal Courts*, Cambridge, 2012, pp. 21 ss.; F. MÉGRÉT, *Les angles morts de la responsabilité pénale individuelle en droit international*, in *Revue interdisciplinaire d'études juridiques*, 2013, pp. 129-131.

and is one of the causes of trust funds acting «like a humanitarian non-governmental organization»<sup>118</sup>.

However, burden sharing mechanisms may well discourage victims from bringing the responsible entity to trial, not only jeopardising their enjoyment of the right to redress, but also watering down the very idea of international responsibility. From a practical point of view, compensation based on projects funded by voluntary contributions gathered in “crowdfunding” style might result in uncertainty and frustration for the victims, also in light of the need to conciliate compensation with other reparation measures. As highlighted in the context of transitional justice, donors should not assume the cost of reparations as the latter «should be concrete expressions of an individual State’s responsibility and an important form of acknowledgment; they would lose much of their reparative effect if other governments should take on the burden in lieu of the individual State»<sup>119</sup>.

This is the reason why collective and symbolic reparations, despite their practical advantages<sup>120</sup> and their coherence with the idea of a «political project»<sup>121</sup> that often underlies contexts of transitional justice, do not adequately address the “need to repair” in so far as they lack the direct link to the victims that should characterize reparations<sup>122</sup>.

The lack of a proportionate and direct relationship between damage suffered and remedy leaves room to the idea that this kind of measures is very likely to result in forms of satisfaction more than in forms of reparation. In this respect, it is interesting to note that, as far as the ICC is concerned, such a conclusion finds its basis in the Statute of the Court, whose wording makes clear that only the Court can order reparations and that “activities and projects” by the TFV do not qualify as such<sup>123</sup>.

On the other side, as has been underscored, in the field of breaches of human rights norms, «punitive damages» - *i.e.* the payment of a sum that is not directly commensurate to the injury - are permissible forms of satisfaction<sup>124</sup>. This would therefore be the case when a limited amount of money is corresponded to victims or to their next of kin or, as in the case of some of the tribunals mentioned above, when victims can “spend” the ruling issued by a criminal tribunal in front of ordinary courts in order to claim for compensation. This last option could be assimilated, in our opinion, to a declaration of the wrongfulness of the act which, as stated by the International Law Commission in the *Draft Articles on State Responsibility*, «may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought»<sup>125</sup>.

<sup>118</sup> W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*<sup>2</sup>, cit., p. 1182.

<sup>119</sup> International Centre for Transitional Justice, *Reparation and the Darfur Peace Process: Ensuring Victims’ Rights*, November 2007, p. 42. The text also notes how international assistance may be more appropriate to peace-building measures. A similar opinion has been expressed by A. SEGOVIA, *Financing Reparations Programs: Reflections from International Experience*, in P. DE GREIFF (ed.), *The Handbook of Reparations*, Oxford, 2006, p. 659.

<sup>120</sup> Beside economic feasibility, collective and symbolic reparations can avoid hierarchies amongst victims and better respond to common interests, such as those of indigenous communities (L. MOFFETT, *Transitional Justice and Reparations: Remediating the Past?*, in C. LAWYER et al., (eds.), *Research Handbook on Transitional Justice*, cit., p. 387). On the positive aspects of reparation programs see also M. WIERDA, P. DE GREIFF, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims*, 2011, pp. 4 ss.

<sup>121</sup> *Ivi*, p. 381. The Author also underlines the risk of reparations being subsumed within development programs, therefore representing more distributive, rather than corrective or remedial justice (*ivi*, p. 382).

<sup>122</sup> P. DE GREIFF, *Report by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, 8 October 2014, par. 10.

<sup>123</sup> E. DWERTMANN, *The Reparation System of the International Criminal Court: The Implementation, Possibilities and Limitations*, Leiden/Boston, 2010, p. 286.

<sup>124</sup> F. LATTANZI, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, pp. 230-231.

<sup>125</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, p. 107.

## 7. Concluding remarks

Based upon what has been observed thus far, some preliminary conclusions can be outlined on the role of solidarity insofar as compensation for human rights violations is concerned.

The above analysis reveals the tendency, in different areas of international law, to share the reparation effort with States or other entities not involved in the crime and the idea, also present in domestic legal systems, of a “subsidiary liability” of the international community for granting reparation, or at least of the right of other States to act in substitution of the liable State. We believe that such a process is coherent with the idea of a duty of solidarity of the international community when it comes to the protection of fundamental rights, framed as *Erga Omnes* obligations, of which the right to redress is no doubt part.

In light of this idea, two further observations can be made, adding to the value assumed by solidarity *vis-à-vis* the reality of international law. In the first place, solidarity may act as an analytical tool to bridge the separation that still exists between the law of international responsibility, on one side, and the victims’ approach, on the other, when it comes to ensuring the individual right to compensation. Notwithstanding the lack of reference, both in the *UN Basic Principles and Guidelines on the Right to a Remedy* and in the *Updated Principles on Impunity*, to the issue of responsibility, the need to guarantee fundamental human rights and to fight against impunity can only be seen from the common perspective of the right to redress. This could be particularly relevant in the delicate field of jurisdictional immunity which, as is known, is far from being settled and, also considering the stance taken by the ICJ in the *Jurisdictional Immunities* case, can still lead to a remarkable restriction of individual rights. Conversely, as emphasised by the International Commission of Inquiry on Darfur, «the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State responsibility for war crimes and other international crimes»<sup>126</sup>.

Secondly, solidarity can and should play a role in the complex task of remedying crimes committed by States or individuals, especially when the difficulties inherent in transitional justice mechanisms can discourage victims from starting proceedings. Though full reparation and compensation can be complicated and, to some extent, utopian, the value of solidarity should warn against any watering down of the reparation burden and encourage the participation of the international community in the process.

At the same time, we believe that, in this context, “paradoxical” uses of such a notion should be avoided: as a driver of judicial solutions, solidarity must not be diverted towards situations that shift the compensation burden back to the victim. We refer, in particular, to the tendency to manage compensation as a sort of crowdfunding exercise which, in the case of the ECCC, can even lead to victims being obliged to prove the existence of external funding for reparation projects. Especially in the context of transitional justice, where compensation by the perpetrator of the crime is nearly impossible, solidarity by entities other

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<sup>126</sup> *Report of the International Commission of Inquiry on Darfur*, cit., par. 597. See, also, the Final Award rendered by the Eritrea-Ethiopia Claims Commission, where it states that: «The size of the Parties’ claims raised potentially serious questions involving the intersection of the law of State responsibility with fundamental human rights norms» (*Final Award, Ethiopia’s Damages Claims between The Federal Democratic Republic of Ethiopia and The State of Eritrea*, 17 August 2009, par. 19).

than the perpetrator can help to maintain the sense of the judicial process, at least as far as remedy is concerned.

A final thought concerns the very rationale of compensation and the - positive - influence that solidarity can play in this regard. As the drafting history of the *Updated Principles against Impunity* shows, and with a certain degree of simplification, compensation issues often lie at the crossroads between criminal policy, on one side, and the protection of fundamental rights, on the other: while, in the first context, compensation is mainly seen as a punitive instrument against the perpetrator, in the second, it is aimed at granting a remedy to an injured individual. It would be erroneous to assume any kind of hierarchy between the two aims, both of which pursues a legitimate societal objective. At the same time, particularly in situations where full compensation from the perpetrator of the crime is not available, the priority of the right to redress over the punitive aspect should be guaranteed<sup>127</sup>. Solidarity can thus be valuable in helping to ensure that the reality of the judicial process does not overcome the utopia of universal human rights.

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<sup>127</sup> On this point, see A. CASSESE, *A Plea for a Global Community Grounded in a Core of Human Rights*, in ID., *Realizing Utopia - The Future of International Law*, Oxford, 2012, p. 142.