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Colonialismo Italiano na Somália: questões de reparação pelos crimes cometidos

Italian Colonialism in Somalia: issues of reparation for the crimes committed

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Abstract: This paper is an attempt to deal with questions concerning the legal tools provided for the implementation of the right to reparation with regard to Italy's colonial domination of Somalia. In particular, it first endeavours to ascertain whether some of the acts of violence committed by Italy during its colonial occupation of Somalia might be deemed to be internationally unlawful at the time they were perpetrated. It then elaborates upon whether individuals have a right to reparation and especially by what means they have, at least in some cases, implemented their right. A few remarks will then be dedicated to the peculiar Italian position on the law of State immunity in case of serious violations of human rights and humanitarian law and the impact that this position might have on the question at issue. Lastly, it explores some interstate solutions for repairing colonial crimes.

Keywords: Reparations for Human Rights Violations. State Immunity. Colonialism.

Resumo: Este artigo discute questões relativas aos instrumentos jurídicos disponíveis para a implementação do direito à reparação em relação à dominação colonial italiana da Somália. Em particular, inicialmente tenta-se identificar se alguns dos atos de violência cometidos pela Itália durante a ocupação colonial da Somália poderiam ser considerados como atos ilícitos internacionais no momento em que foram perpetrados. Passa-se então à questão de verificar se indivíduos possuem um direito à reparação e especialmente por quais meios eles, pelo menos em alguns casos, implementaram esses direitos. Algumas observações serão dedicadas à peculiar posição italiana sobre o direito da Imunidade Estatal em casos de sérias violações de direitos humanos e direito humanitário e o impacto que essa posição pode gerar na questão em análise. Por fim, são exploradas algumas soluções interestatais para reparação de crimes coloniais.

Palavras-chave: Reparação por violações de Direitos Humanos. Imunidade Estatal. Colonialismo

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1 Introduction

The issue of reparation for crimes committed during the colonial era raises a number of moral, political and legal problems. As for the latter, some of the thorniest questions to be solved are related to the amount of time since the crimes were committed. It might be difficult, for example, to identify the victims of the violations or their descendants. A point could be made also in respect of the identification of the duty-bearers of the obligation to repair; in particular, one could argue that the present generations should not pay for the wrongs of their ancestors. Equally, a difficult task could be to determine the law applicable at the time of the facts.

Another set of questions concerns the legal tools provided for the implementation of the right to reparation as well as the determination of the amount of reparation due. In fact, it might be arduous to detect both effective remedies available for individuals affected and instruments at the State's disposal to invoke the international responsibility of the wrongdoer State and enforce the obligations breached. Eventually, one has to establish the extent and the different forms of reparation, a deed obviously implying a wide margin of discretion.

This paper is an attempt to deal at least with some of these reparation issues related to Italy's colonial domination of Somalia. Before going into the details of the present case study, however, I would like to provide, as an introduction, some elements of the ongoing debate on reparations for colonialism.

Questions of reparation related to historical facts were notoriously discussed at the United Nations Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001. The idea of the conference sprang out of the General Assembly resolution 52/111 and in the context of the implementation of the Programme of Action for the 3rd Decade to Combat Racism and Racial Discrimination[1]. The event was originally and mainly conceived to address a worldwide and, then, current phenomenon. However, the

[1] Researcher in International Law, Università degli Studi della Tuscia (Italy). General Assembly, Resolution 52/111, *Third Decade to Combat Racism and*

General Assembly resolution included, among its aims, the review of the historical origins of racism and racial discrimination, thereby paving the way to a debate on the wrongs of the past[2], and in particular on the question of reparation for slavery and, more generally, the consequences of colonialism.

Despite this backdrop, in Durban, due to the opposition of Western countries and some political controversies[3], the recognition of a specific obligation to repair for the injuries suffered during the time of colonization was avoided. In the Durban Declaration and Programme of Action, adopted by consensus, States only agreed on "the importance and necessity of teaching about the facts and truth of the history of humankind", the need to call upon "the international community and its members to honour the memory of the victims of these tragedies" and to take "appropriate and effective measures to halt and reverse the lasting consequences of those practices"[4].

In 2009, at the Durban Review Conference, these promising assertions did not prevent States from avoiding, again, making any commitment to compensate historical wrongdoings of colonial powers. They simply recalled that "slavery and the slave trade, including the transatlantic slave trade, apartheid, colonialism and genocide must never be forgotten" and welcomed "actions undertaken to honour the memory of victims"[5]. The outcome document, however, significantly recognizes the "actions of those countries that have, in the context of these past tragedies, expressed remorse, offered apologies, initiated institutionalized mechanisms such as truth and reconciliation commissions and/or restituted cultural artifacts since the adoption of the Durban Declaration

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Racial Discrimination and the Convening of a World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, 12 December 1997.

[2] Article 28 of Resolution 52/111. See, for an assessment of the results achieved at the conference, Lindgren Alves, *The Durban Conference Against Racism and Everyone's Responsibilities*, in *Netherlands Quarterly of Human Rigths*, 2003, pp. 361-384.

[3] In particular, the expressions of anti-Semitism coming from Iranian President Ahmadinejad that led US and Israel to leave the conference.

[4] Durban Conference, 2001, paras. 98 ff.

[5] Durban Review Conference 2009, para. 62.

and Programme of Action". In addition, and more importantly, the conference "calls on those who have not yet contributed to restoring the dignity of the victims to find appropriate ways to do so"[6]. It is unclear whether this restoration of dignity implies an obligation to repair and which form this reparation should possibly take. What is sure is that Italy did not take any step towards restoring the dignity of the Somali people.

Bearing in mind the principles expressed in Durban and the importance of reopening a discussion on colonialism and its enduring effects, this essay will explore some of the several issues that the question of reparation for historical injustice could raise. In particular, I will first endeavour to ascertain whether some of the acts of violence committed by Italy during its colonial occupation of Somalia might be deemed to be internationally unlawful at the time they were perpetrated (para. 2). I will then elaborate upon whether individuals have a right to reparation and especially by what means they have, at least in some cases, implemented their right (para. 3). A few remarks will then be dedicated to the peculiar Italian position on the law of State immunity in case of serious violations of human rights and humanitarian law and the impact that this position might have on the question at issue (para. 4). Lastly, I will explore some interstate solutions for repairing colonial crimes (para. 5).

2 The Applicable Law and the Inter-Temporal Question

It is quite common among Italians to see themselves as "*brava gente*" ("goodhearted people"). The basic idea of this stereotypical image is an alleged and intrinsic goodness of the Italian people. This self-representation has its roots precisely in the colonial era. In practice, Italian colonialism would have been marked by a gentle attitude towards local people and would have contributed to the economic and cultural development of the colonized countries.

[6] *Ibidem*, para. 63.

The hollowness of this self-representation has already been illustrated[7]. As an example one could mention the De Vecchi's governorship (1923-1928), when thousands of indigenous people were subjected to forced labor. In the same period, the Italian governor undertook a campaign of aggressive military expansion marked by a violent repression against the civilian population. Moreover, and notwithstanding the attempt to ignore or try to explain away evidence of the atrocities occurred, it is a fact that at the end of 1935 Italy extensively used poison gas in Africa. Thirty-six tons of mustard gas were apparently sent in Somalia in September 1935[8]. In addition, in the very same year, a concentration camp was built at Danane, not far from Mogadishu.

Indeed, the acts of violence against civilians date back to before the advent of Fascism. In the early twentieth century, the Italian army wiped out entire populations stationed on Somali territory, for instance the Bimàls and Majerteens. In 1905, slavery was formally outlawed, but in practice widely tolerated for many years[9]. In fact, the Benadir officials' practice to purchase female slaves or coerce local women to be their mistresses has not been particularly obstructed when the Italian government asserted its direct administration of Somalia[10].

This section aims at determining which treaties concluded or ratified by Italy, and which customary international rules existing during the colonial period, could possibly have been breached by the Italian colonial administration. The analysis will especially focus on slavery and forced labour since their practice can be assumed.

As briefly mentioned in the introduction, the intertemporal question can prevent a State from being held responsible for conduct that is, nowadays, generally regarded as unlawful. In particular, it is

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[7] Del Boca, *Italiani, brava gente?*, Vicenza, 2005 e *I crimini del colonialismo fascista*, in Del Boca (ed.) *Le guerre coloniali del fascismo*, Roma-Bari, 1991, p. 232-255.

[8] Rochat, *L'impiego dei gas nella guerra di Etiopia 1935-1936*, in *Rivista di storia contemporanea*, 1988, p. 95, fn. 84.

[9] Reese, *Renewers of the Age, Holy Men and Social Discourse in Colonial Benaadir*, Leiden-Boston, 2008, p. 147 ff.

[10] Hess, *Italian Colonialism in Somalia*, London, 1966.

a well-established principle in international law that States can be held responsible only for the breach of an international obligation in force at the time the act was committed[11]. The principle *tempus commissi delicti* has been set forth in Article 13 of the International Law Commission (ILC)'s Draft Articles on State Responsibility. Indeed, the non-retroactivity principle is considered to be so fundamental for granting the certainty of the legal relations among States, that according to the ILC's Commentary to Article 13, even the emerging of a new *jus cogens* rule "does not entail any retrospective assumption of responsibility"[12]. However, this does not imply that, under certain circumstances, international rules might be retroactively applied. States can always conclude a new agreement dealing with a certain past situation. In other words, States are free to determine the temporal application of a norm and decide, for example, that serious breaches of international norms should be subject to a less stringent statute of limitation. According to some scholars, moreover, the possible retroactive application of an international rule cannot be entirely excluded and, in practice, "would depend on each norm to determine how far rights and obligations that have previously arisen are affected"[13]. After all, the *nullum crimen sine lege principle*, a cornerstone of modern criminal law, can hardly be considered a rule to which no derogation is admitted when it comes to State responsibility[14].

In any case, at least as regards slavery and forced labour, a retroactive application of the law might be unnecessary. To support this assertion, it is crucial to assess whether Italy was under an obligation not to allow the practice of slavery at the relevant time, say, the last decade of the nineteenth century and the first two decades of the twentieth century.

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[11] *Island of Palmas Case* (Netherlands, United States), in *Reports of International Arbitral Awards*, 4 April 1928, Vol. II, pp. 829-871.

[12] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, A/56/10, p. 58, para. 5.

[13] Gaja, *Jus Cogens Beyond the Vienna Convention*, in *Recueil des Cours*, 1981-III, p. 293; see also, Tavernier, *Recherches sur l'application dans le temps des actes et de règles en droit international public*, Paris, 1970, pp. 162-165.

[14] See on this aspect, Condorelli, *Conclusions générales, in Crimes de l'histoire et reparation: les réponses du droit et la justice*, Bruxelles, 2004, pp. 297-298.

Italy became part of the 1926 Slavery Convention only in 1954. However, prohibitions against slavery were already part of customary international law by the time of the Second World War[15], although it is not easy to establish when this customary rule would have come into existence.

In this respect, it is of some interest to report the words of Dionisio Anzilotti, Italian delegate at the international commission, established at the Paris Peace Conference of 1919 and entrusted to revise the General Acts of Berlin and Brussels on the activities of the European powers in Africa. Anzilotti proposed an article that would have committed States to prevent slave trade "*conformément aux principes du droit des gens*"[16]. More interestingly, Anzilotti suggested a general provision aimed at governing States parties' behaviour towards indigenous people. This article began with the following words: "*Au nom de la civilisation, les méthodes colonisatrices contraires à l'existence, au bien-être et à la graduelle élévation des populations indigènes sont à jamais bannies*"[17]. Following a number of objections received regarding the need to introduce such a provision, Anzilotti simply replied that "*la Délégation italienne voulait rappeler que ces principes font partie de la conscience*

[15] This clearly emerges from Trials of the Major War Criminal before the International Military Tribunal, Nuremberg. See the "Blue Series", International Military Tribunal Secretariat, 1947-1949.

[16] "Article A. *Conformément aux principes du droit des gens tels qu'ils sont reconnus par les Puissances signataires (la traite des esclaves étant interdite, et les opérations qui sur terre ou sur mer, fournissent des esclaves à la traite devant être également considérées comme interdites), chacune des Puissances signataires du présent Acte ou qui adhéreront de suite, s'engage à continuer à employer tous les moyens en son pouvoir pour empêcher ce commerce et pour punir ceux qui s'en occupent*", *Commission pour la revision des Actes Généraux de Berlin et de Bruxelles*, Parigi, 1st August 1919, ASE, CPA, 370).

[17] The Article continued stating that: "*En conséquence, la législation concernant la propriété foncière devra respecter autant que possible les coutumes en vigueur dans les territoires et les intérêts des populations indigènes. Les terrains et les droits réels appartenant à des indigènes ne pourront être transférés à des non-indigènes sans le consentement du Gouvernement local et aucun droit sur lesdits terrains ne pourra être créé au profit de non-indigènes sans le même consentement. De sévères dispositions contre l'usure seront adoptées par tous les Gouvernements exerçant leur autorité dans les territoires visés à l'article 1*°", in *ibidem*.

juridique universelle"[18]. Although the general provision was not included in the treaty, no objection to this conclusion and principle was raised. As Anzilotti underscored, then, some fundamental principles protecting indigenous people from slavery were probably well-established before Italian intervention in Somalia. Italian practice would therefore constitute a violation of some basic rules of international law already existing at the time of the colonial domination[19].

Similar reasoning applies to forced labour practices. Also the prohibition of forced labour is nowadays widely recognized to be part of customary international law[20]. At Nuremberg, the Military Tribunal included forced labour in the category of both war crimes and crimes against humanity[21]. Recently, the International Court of Justice had the opportunity to examine a number of international and national legal materials on forced labour and concluded that its practice was a war crime under international law during the Second World War[22]. In the last few decades, some governments, in particular Germany and Japan, have established a number of mechanisms to compensate victims of forced

[18] *Ibidem*, this passage is also avalaible at: <http://www.prassi.cnr.it/prassi/content.html?id=1867#nota2>.

[19] Several scholars support the view that prohibition of slavery was part of customary law at least since the beginning of the twentieth century, see, for example, Bassiouni, *Enslavement as an International Crime*, in *New York University Journal of International Law and Politics*, 1991, p. 445 ff.

[20] International Committee of the Red Cross, *Customary International Humanitarian Law*, rule 95: "*State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts*".

[21] See, in particular, "Slave Labor Policy", International Military Tribunal, 1° October 1946, in The Trial of the German Major Criminals, Proceeding of the International Military Tribunal sitting at Nuremberg, pt. 22, 1950, p. 460 ff. and US Military Tribunal, Nuremberg, 17 april 1947 (Milch Trial), in Trials of War Criminals, vol. II, p. 773 ff. For an overview of the relevant case law see Villalpando, *Forced Labour/Slave Labour*, in *Max Planck Encyclopedia of Public International Law*, available at: <http://opil.ouplaw.com>.

[22] ICJ, *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), Judgment, ICJ Reports 2012.

labour[23]. Moreover, several individual compensation claims have been brought before national tribunals of those countries[24]. Although most of the claims have been, for different reasons, rejected, humanitarian law violations have never been denied.

Again, the problem might be to determine when a customary rule on the prohibition of forced labour came into existence. Before tackling this issue, it is important to underline that, at least with regard to forced labour and related practices put in place in the Thirties, the conduct of Italian officials might be deemed unlawful and prohibited by the same 1926 Slavery Convention. The Convention adopts a restrictive definition of slavery and does not take a clear position on the prohibition of forced labour. However, States parties committed themselves "to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery"[25]. In this respect, it is important to bear in mind that forced labour could sometimes be considered as a condition similar to slavery. And this seems to be the case with regards to several Italian practices towards Somali people[26]. Although it is sometime difficult to distinguish between forced labour and slavery situations, it would seem that, when forced labour involves total control and subjugation of the victim, inhumane conditions of life

[23] See, in particular, the German Foundation "Remembrance, Responsibility and Future", established in August 2000.

[24] See, for example, as regards some "comfort women" cases, 2nd Petty Bench of the Japanese Supreme Court, Nishimatsu Construction Case, 27 April 2007 and 1st Petty Bench of the Japanese Supreme Court, Second Chinese "Comfort Women" Case, 27 April 2007.

[25] Article 5, Slavery Convention. Moreover, another provision of the Convention excludes from the scope of the treaty a number of activities, such as compulsory military service or work which is part of the normal civic obligations, prison labour or work exacted in cases of emergency (Article 2, para. 2).

[26] See the clear words on the conditions of the native forced labourers, expressed by Marcello Serrazanetti, Secretary of the National Fascist Party in Somalia (then removed from his position), *Considerazioni sulla nostra attività coloniale in Somalia*, Bologna, 1933. See also, more generally, Bertizzolo and Pietrantonio, *A Denied Reality? Forced Labour in Italian Colonies in Northeast Africa*, in *Africana Studia*, 2004, p. 227-246.

or forms of sexual exploitation, it shall be qualified as a crime under international law[27].

However, forced labour practices can be considered unlawful since before World War Two. In this respect, it is important to recall Article 52 of the 1907 Hague Convention IV Regulations. These provision states that "requisitions in kind and services shall not be demanded from municipalities or inhabitants" of the occupied territories. The Nuremberg Tribunal applied this norm, affirming that forced deportation and inhumane treatment of civilian workers was "in flagrant violation" of Article 52[28]. The only, limited, exception to this provision concerns "the needs of the army of occupation". Although not much material is available, it seems beyond doubt that forced labour was a widespread practice both in liberal and fascist Italian colonialism[29]. Mostly, this labour, based on the exploitation of indigenous people, was not needed for the military occupation, but was destined for the development of the agricultural sector and aimed at favouring the installation of Italian agrarian companies[30].

With regard to the Hague Regulations, the question remains open as to which provisions were, at the time of their adoption, declaratory of existing customary law and which ones constituted rather an advancement in the laws of war. Another problem concerns the applicability of the law of occupation to colonial domination. The so-called "European project" of the law of occupation, in fact, considered colonialism as an exception to the application of this part of the *jus in bello*[31]. It is a fact, however, that the law of occupation has constantly shifted towards an emphasis on the need to protect the population in the occupied territory, rather

[27] See Ratner, Abrams, Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford, 2009, p. 118 ff.

[28] Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945 – 1 October 1946, vol. I, pp. 243-247.

[29] Onor, *La Somalia italiana. Esame critico dei problemi di economia rurale e di politica economica della colonia*, Torino, 1925, p. 226 ff.

[30] Bertizzolo and Pietrantonio, *A Denied Reality?*, supra, p. 236.

[31] Benvenisti, *The Origins of the Concept of Belligerent Occupation*, in *Law and History Review*, 2008, p. 622 ff.

than on the nature and the scope of the occupant's intervention[32]. More generally, to answer these further questions, one could take into account the interpretive role possibly played by the Martens clause and consider that "in case of doubt, international rules […] must be construed so as to be consonant with general standards of humanity and the demands of public conscience"[33]. Although forced labour was not an uncommon practice in the pre-First World War period, it has been in many occasions censured by States[34]. This would support again the idea that, even when reprehensible practices of forced labour were tolerated, there was at least a common *opinio juris* among States on the unlawful nature of a conduct which offended the conscience of the international community[35].

3 Individual Claims to Reparation for Colonial Violence: a scant, but potentially successful, practice

There is little doubt that serious breaches of international human rights and humanitarian law that a State commits against civilians or military personnel of another State imply an obligation to make full reparation. In general, the obligation to repair injuries resulting from an internationally wrongful act was historically consecrated in the words of the Permanent Court of International Justice in the famous *Chorzow*

[32] See, for a detailed analysis on this and others developments, Ronen, *A Century of the Law of Occupation*, in *Yearbook of International Humanitarian Law*, 2014, p. 169-188.

[33] Cassese, *Martens Clause: Half a Loaf or Simply a Pie in the Sky?*, in *European Journal of International Law*, 2000, p. 212.

[34] See for example, in relation to the deportation of Belgian workers in German factories during the First World War, *Violations of the Laws and Customs of War: Reports of Majority and Dissenting Reports. American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Foreign Relations of the United States, 1919: The Paris Peace Conference, vol. III*, reprinted in *American Journal of International Law*, 1920, p. 95.

[35] One could make reference here to a famous contribution basically aimed at supporting the idea that, as regards all norms protecting human beings, "principles have always preceded practice", cf. Simma and Alston, *The Sources of Human Rights Law: Custom,* Jus Cogens *and General Principles*, in *Australian Yearbook of International Law*, 1992, p. 82-108.

Factory case. According to the Court, it would be "a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form". According to the Permanent Court, this compensation 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"[36].

Under certain circumstances it may be difficult to determine the subjects that may claim a right to reparation and those (not necessarily the same subjects) towards whom the relevant obligation is owed. The injured State is certainly entitled to invoke the responsibility of the wrongdoer State and seek for reparation, as provided by Article 42(b)(i) of the ILC's Draft Articles on State Responsibility. In case of human rights and humanitarian law violations, it could be argued that such a right belongs also to those individuals who are victims of the wrongful act. There is, in fact, a tendency to recognize the existence of an individual right to reparation in customary international law in case of gross violations of human rights and humanitarian law. This tendency would have been confirmed through the adoption by the United Nations General Assembly of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of the International Human Rights Law and Serious Violations of International Humanitarian Law*. Theo Van Boven, whose work is at the origin of the General Assembly Resolution, argued that there are good reasons to consider this document "as declaratory of legal standards in the area of victims' rights, in particular the right to a remedy and reparation"[37]. The individual would then hold a right to be compensated for the damages suffered by the State that committed a serious breach of international law. In general,

[36] *Chorzow Factory Case* (Ger. V. Pol.), 1928, Sr. A, No. 17, p. 29

[37] Van Boven, *Victims' Right to a Remedy and Reparation Reparations: The New United Nations Principles and Guidelines*, in Ferstman, Goetz, Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Leiden-Boston, 2009, p. 32. Other scholars expressed their critical view, by affirming that the resolution does not reflect the real position of individuals in international law, cf. Tomuschat, *Human Rights and National Truth Commissions*, in Baher, Flinterman, Senders (eds.)*, Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rigths*, Amsterdam, 1999, p. 152.

the assertion of an individual right to reparation would result from the development and the importance that the protection of human rights has acquired in international law. In this respect, regional conventions for the protection of human rights would be a tangible, albeit limited, sign of this evolution. Principles and fundamental rights enshrined in those conventions – in particular the right of access to a court and to an effective remedy and the obligation for States to ensure adequate redress to individuals – may have contributed to the formation of a customary rule recognizing the individual right of reparation.

Should one accept that there exists nowadays an individual right to reparation, it must be acknowledged, however, that General Assembly's *Basic Principles* do not say anything about colonialism and reparation for historical injustices. Furthermore, the existence of an individual right to reparation in general international law is anything but unproblematic[38]. In particular, one could observe that the affirmation of a substantial right to reparation has not been followed by the creation of procedural mechanisms to enforce it. Practical application of an individual right to reparation is actually quite scant, in particular with regard to reparation for colonial crimes. However, individual compensation claims have proved at times to be successful.

An interesting case concerns the violence suffered by Mau Mau rebels in their fight against British colonial rule in Kenya in the 1950s. During the insurgency against British domination, in fact, Kenyan Mau Mau were victims of multiple forms of abuse, including torture, rape

[38] There are several contributions on this issue, see, for example, Evans, *The Right to Reparation in International Law for Victims of Armed Conflicts*, Cambridge, 2012, pp. 38-42; Cannizzaro, *Is there an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the Jurisdictional Immunity Case*, in Alland, Chetail, de Frouville, Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy/Unité Et Diversité Du Droit International, Melanges En L'Honneur Du Professeur Pierre-Marie Dupuy*, Leiden-Boston, 2014, pp. 495-502; Pisillo Mazzeschi, *Reparation Claims by Individuals for States Violations of Humanitarian Law and Human Rights: An Overview*, in *Journal of International Criminal Justice*, 2003, pp. 339-347 and Tomuschat, *Human Rigths: Between Idealism and Realism*, Oxford, 2003, p. 294 ff.

and castration[39]. In 2009, five elderly victims brought an action before a High Court in London for damages for personal injuries against the Foreign and Commonwealth Office, as representing the government of the United Kingdom[40]. The United Kingdom used two main reasoning as a bar to subsequent trial. The first argument of the United Kingdom Foreign and Commonwealth Office aimed at asserting the status of the Colonial Government and Administration in Kenya as "separate and distinct from that of the UK Government" and as the only entity that could "conceivably have been held liable for the torts at the time when they were committed". This argument was rejected on the basis of the United Kingdom's direct involvement in the widespread and systematic practice of torture[41]. The second defensive argument lay on the amount of time elapsed between the facts and the trial, considered as a limitation to a fair solution of the case. Mr. Justice McCombe, however, concluded on this point that "a fair trial on this part of the case does remain possible and that the evidence on both sides remains significantly cogent for the Court to complete its task satisfactorily"[42]. In 2013, in order to avoid an embarrassing and presumably losing trial, the British government proposed an historical settlement of the Mau Mau claims[43]. More than five thousands elderly Kenyans were compensated. A new lawsuit has very recently begun in the High Court in London; the new case has been

[39] See Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire*, New York, 2005 and Maloba, *Kenya: Mau Mau Revolt*, in Shillington (ed.), *Encyclopedia of African History*, New York, 2005.

[40] During the proceedings one claimant passed away and another one decided to waive its claim. For a commentary on these cases, see Hovell, *The Gulf between Tortious and Torturous UK Responsibility for Mistreatment of the Mau Mau in Colonial Kenya*, in *Journal of International Criminal Justice*, 2013, 223-245.

[41] High Court of Justice, Queen's Bench Division, 21 July 2011, [2011] EWHC 1913 (QB), *Ndiku Mutua, Paulo Nzili, Wambugu Claimants Nyingi, Jane Muthoni Mara & Susan Ngondi vs. and The Foreign and Commonwealt Office.*

[42] High Court of Justice, Queen's Bench Division, 5 October 2012, [2012] EWHC 2678 (QB), para. 95.

[43] See https://www.theguardian.com/world/2013/jun/06/uk-compensate-kenya-mau-mau-torture.

brought by more than forty thousands Kenyans and the trial is supposed to open next year[44].

Another interesting case relates to Dutch crimes committed in Indonesia. As it is well known, Indonesia was a Dutch colony, part of Dutch East Indies until 1949. According to the Linggadjati Agreement of 25 March 1947, Indonesia was supposed to become independent on 1° January 1949. However, a disagreement between the two States about the interpretation and execution of the treaty led to a military intervention in Indonesia by the Netherlands. The most violent episode of this intervention is the mass executions perpetrated in Rawagede on 9 December 1947.

On 14 September 2011, taking an historic decision, the District Court of the Hague required the Dutch State to compensate the survivors and the relatives of the victims killed in summary executions, during the Indonesian war for independence, especially in Rawagede[45]. For the eight widows and one survivor, the Netherlands paid twenty thousand euros each in compensation. Moreover, as we will see later on, following the decision, the Dutch government formally apologised for the atrocities committed by its military personnel[46].

Other claims were brought against private corporations before U.S. courts under the Alien Tort Claims Act. A famous case concerns the Herero People's Reparations Corporation that – through its Paramount Chief Riruako and other members of the tribe – sued the German government and a number of German companies allegedly taking part in the genocide committed at the beginning of the twentieth century

[44] See https://www.theguardian.com/law/2016/may/22/mau-mau-kenya-compensation-lawsuit-high-court.

[45] District Court of the Hague, *Wisah Binti Silan et al. v. The State of The Netherlands (Ministry of Foreign Affairs)*, Case No. 354119/HA ZA 09-4171, Judgment, 14 September 2011.

[46] For some interesting reflections on the case, see van den Herik, *Addressing "Colonial Crimes" Through Reparation? Adjudicating Dutch Atrocities Committed in Indonesia*, in *Journal of International Criminal Justice*, 2012, pp. 693-705.

in Namibia[47]. In particular, the claimants accused Deutsche Bank of financing almost all the activities of the colonial enterprise and being directly involved in the crimes against humanity committed against the Herero tribe. Herero people's compensation claims were eventually rejected for lack of evidence, since almost all witnesses were deceased. As we will see, however, the issue of reparation for the genocide is anything but closed.

In conclusion, despite the uncertainty still surrounding the notion of individual right to reparation, individual claims may at times be successful. It remains that this is not an easy way to achieve reparation. The outcome of individual claims may be affected not only by complex evidentiary challenges, but also by the economic capacities of the victims and complete awareness of their rights. An important role can be played also by the different sensibilities of jurisdictional institutions called to make a decision. Yet, actual state of political and diplomatic relations among the States involved can influence judicial attitudes. Nevertheless, even in case of rejection, they can have an important impact on pressing States to reach a diplomatic solution.

4 Remarks on the Peculiar Position of Italy on State Immunity for International Crimes

Before dealing with interstate reparation settlements, attention has to be paid also to the peculiar Italian position on the law of State immunity, which could, to a certain extent, have an impact on the issues of reparation for colonial crimes. As it is well known, in 2012, the International Court of Justice condemned Italy for not recognizing

[47] *Herero Peoples' Reparation Corp. v. Deutsche Bank AG*, Civ. No. 01-1868, slip op. (D.C.C. 31 June 2003); *Herero Peoples' Reparations Corp. v. Deutsche Bank AG*, 370 F. 3d 1192 (2004), cert. denied 125 S. Ct. 508 (2004). For an analysis of this case-law, see Fawler and Sarkin, *Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims Act Genocide Case of the Herero of Namibia*, in *Human Rights Review*, 2008, p. 331-360.

immunity from jurisdiction to Germany before Italian tribunals[48]. The dispute originated from a number of cases related to the reparation for war crimes committed by the Nazis against the Italian Military Internees (IMIs). In particular, the case arose after the famous *Ferrini* judgment, where the Italian *Corte di Cassazione* denied the possibility for Germany to oppose the law on State immunity from jurisdiction in case of *jus cogens* violations[49].

On 22 October 2014, despite the ICJ's judgment, the Italian Constitutional Court declared unconstitutional the implementation in the Italian legal order of the ICJ's judgment (decision No. 238/2014). While recognizing the ICJ's authority in determining the content of customary international law, the Italian Constitutional Court deemed that Article 2 (on the basic rights of every human beings) and Article 24 (on the right to a judge) of the Italian Constitution would be unlawfully sacrificed by the application of the customary international rule as spelt out by the ICJ's judgment in the *Germany v. Italy* case. What would be contrary to Italian constitutional principles and values is the part of the customary norm that excludes the existence of an exception to State immunity in case of serious violations of human rights and humanitarian law.

As it is often the case with judicial decision, the Italian Constitutional Court's position has been praised and criticized. Some supported the Constitutional Court's attitude with respect to the importance of balancing a State's prerogatives with individual rights.

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[48] Literature on the ICJ judgment is immense, but see, in particular, Higgins, *Equality of States and Immunity From Suit: a Complex Relationship*, in *Netherlands Yearbook of International Law*, 2012, pp. 129-149 and Talmon, Jus Cogens *after Germany v. Italy: Substantive and Procedural Rules Distinguished*, in *Leiden Journal of International Law*, 2012, pp. 979-1002.

[49] See Cass., Sez. Un., 11 March 2004, No. 5044 (It), reprinted in *Rivista di diritto internazionale,* 2004, p. 53 ff., translated in *Ferrini v. Federal Republic of Germany*, 128 I.L.R 658, 659; see, among many others, De Sena and De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, in *European Journal of International Law*, 2005, pp. 89-112; Gattini, *War Crimes and State Immunity in the Ferrini Decision*, in *Journal of International Criminal Justice*, 2005, pp. 224-242; Gianelli, *Crimini internazionali ed immunità degli Stati dalla giurisdizione nella sentenza "Ferrini"*, in *Rivista di diritto internazionale*, 2004, pp. 643-684.

Others disapproved the Court's strong dualistic approach, the lack of compliance with customary international law and the ICJ's judgment, or criticized the result of the balancing allegedly made by the Court[50]. Be that as it may, the impact of this decision on the Italian attitude towards potential reparation claims for the crimes committed during the colonial era might be very significant. While judgment No. 238/2014 only concerns the application of the customary rule on State immunity in the Italian legal order, coherence would impose Italy not to invoke its jurisdictional immunity when cases involving gross violations of human rights and humanitarian law are brought against it before foreign tribunals. In this respect Somali citizens might feel encouraged to bring their compensation claims before Somali domestic courts or the domestic courts of another State.

5 Interstate Reparation Settlements

As already mentioned at the end of the third paragraph, individual claims have, at times, encouraged diplomatic interstate solutions. Regarding the Herero case, for example, in 2004 the German government admitted its moral responsibility for the genocide[51]. Indeed, despite the active role of a political minority[52], on that occasion Germany did not

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[50] For an extremely intersting debate, see the contributions by Kolb, *The Relationship between the International and the Municipal Legal Order: Reflections on the Decision No. 238/2014 of the Italian Constitutional Court*; De Sena, *The Judgment of the Italian Constitutional Court on State immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law*; Pinelli, *Decision No. 238/2014 of the Constitutional Court: Between Undue Fiction and Respect for Constitutional Principles*, and Palchetti, *Judgment 238/2014 of the Italian Constitutional Court: In Search of a Way Out,* in *Colliding Legal Systems or Balancing of Values? International Customary Law on State Immunity vs. Fundamental Constitutional Principles in the Italian Constitutional Court Decision No. 238/2014*, in *Questions of International Law*, Zoom-out (II), 2014, pp. 5-47.

[51] See, for example, <https://www.theguardian.com/world/2004/aug/16/germany.andrewmeldrum>.

[52] See the last motion on the issue by *Die Linke*: <http://www.linksfraktion.de/pressemitteilungen/abgeordnete/reconciliation-with-namibia-recognize-the-genocide/>.

recognize having an obligation to repair for the genocide. However, whereas the Herero's tribe addressed U.S. courts, Namibia and Germany came quite close to an agreement on colonial reparation for an amount of twenty million euros over a period of ten years. In November 2005, the Namibian government, at that time opposing Herero's right to reparation, refused to sign the agreement, asserting the need to consult the affected communities[53]. In 2006, following these consultations, the Namibian government conceived the so-called Namibian-German Special Initiative Programme (NGSIP)[54]. The programme aims at financing a number of borehole rehabilitation projects and agricultural investments. The Special Initiative is indeed closer to a development aid, since the reconciliatory and compensative connotation of the material assistance have disappeared. The debate on the question of reparation is still ongoing. The idea that reparation may take the form of a development aid has recently been questioned by some members of the Bundestag. Some argue, in particular, that development assistance and restorative justice have completely different purposes[55].

According to some scholars, however, the commitment of Western States to ensuring an increase in development aids represents the "most realistic" solution for dealing with the colonial past[56]. This consideration, as true as it might look, should carefully take into account two aspects. On the one hand, the material assistance should be expressly considered part of a process of reconciliation and a form of compensation for the wrongs of the past. Labeling it as reparation for the violence suffered would help victims to perceive the restorative nature of the economic aid. On the other hand, it is important to pay close attention to the real purpose of these kinds of agreements. It is crucial to assess, in fact, whether

[53] Kössler, *Namibia and Germany: Negotiating the Past*, Windhoek, 2015, pp. 262-263.

[54] For more details on the programme: <http://www.npc.gov.na/?page_id=512>.

[55] See the positions expressed by Niema Movassat, chairperson of the Left Party in the Committee on Economic Cooperation and Development of the Bundestag, available at: <http://www.aljazeera.com/indepth/opinion/2015/07/forgotten-genocide-namibia-quest-reparations 150730090349305.html>.

[56] Tourme-Jouannet, *What is a Fair International Society? International Law between Develpoment and Recognition*, Oxford, 2013, p. 194.

the material assistance is truly aimed at compensating the colonial past through the economic support of important national activities or whether it rather conceals other purposes.

In this respect, another, very peculiar, interstate reparation settlement may be illustrative of the pitfalls that this kind of agreement can hide. On 30 August 2008, Silvio Berlusconi, at that time Italian Prime Minister, officially apologised for the crimes committed in Libya during the colonial era and returned to the latter the statue of the Venus of Cyrene[57]. That same day Berlusconi and Gaddafi signed the Treaty on Friendship, Partnership and Cooperation between Italy and Libya. The Agreement envisaged a new important framework of cooperation in many areas, including investments in basic infrastructures and immigration[58]. In particular, Italy agreed to pay Libya five billion dollars over twenty years for infrastructural projects. Apart from a few scholarships for Libyan students, the restitution of the Venus and the (important) apologies of the Italian government, the Agreement seemed to be aimed at favouring economic interests of Italy, since the projects would have been tax-exempt and carried out exclusively by Italian companies. Moreover, in exchange for this important investment in fundamental infrastructures, Article 19 of the Agreement provided for the implementation of a system of control of the Libyan coast in order to prevent the arrival of migrants. According to some studies, this part of the Agreement would have favoured the trafficking of human beings and the systematic violation of human rights committed on the Libyan soil[59].

Also individual claims filed against the Netherlands for the massacre of Rawagede had a significant impact on the interstate level. After the historical decision of September 2011, in fact, the Dutch government did something it has always refused to do: apologising for

[57] The restitution of the statue was a consequence of the administrative decision rendered by the *Consiglio di Stato* on 23 June 2008, No. 3154.

[58] For an assessment and a first comment on the agreement, see Ronzitti, *The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?*, in *Bulletin of Italian Politics*, 2009, pp. 125-133.

[59] De Cesari, *The Paradoxes of Colonial Reparation: Foreclosing Memory and the 2008 Italy–Libya Friendship Treaty*, in *Memory Studies*, 2012, pp. 316–326.

the atrocities committed. On 9 December 2011, the Dutch Ambassador to Indonesia, attending a ceremony in Rawagede before hundreds of villagers, apologised in English and Indonesian for the killing of more than 431 young men. A more formal and comprehensive public apology was expressed in 2013 by the same Ambassador for all the "excesses committed by Dutch forces" in the four years preceding Indonesian independence in 1949, when thousands of people were killed[60]. With regards to economic compensation, in addition to the individual compensation granted to the claimants before Dutch tribunals, the Netherlands assured that all widows can now claim compensation for their husbands' deaths.

These cases show that individual claims can sometime lead to and push for a diplomatic solution. However, what seems to emerge from the relevant practice is States' reticence to cope with reparation for the wrongs of the past. Namibia, for example, due to some internal issues related to the relations with the Herero minority, did not always take steps to achieve prompt and effective reparations. Gaddafi's Libya was certainly engaged in searching for an Italian apology, but perhaps more to please a nationalist rhetoric, useful for the regime propaganda, than for achieving a true reparation in the interest of the victims (or their relatives). In some cases, a crucial role was eventually played by non-governmental organizations or political parties of the responsible State, as shown by the activism of the Foundation *Komite Utang Kehormatan Belanda* (Committee of Dutch Honorary Debt) in the Netherlands and *Die Linke* in Germany.

With regards to the possibility of achieving a diplomatic settlement on reparation for crimes committed by Italy in Somalia, some critical elements seem to render such an option particularly unlikely. On the one hand, Somalia is a country long driven by violence and political instability. Famine, never-ending inter-clan rivalries, endemic corruption and (in the last few years) radical Islamist groups make Somalia, often defined as an "outlaw State", one of the most precarious countries in the

[60] For a summary of the ceremony, see <http://www.bbc.com/news/world-asia-24060913>.

world[61]. Given these conditions, and a lack of a stable and strong political authority, it is hard to foresee a convincing diplomatic action aimed at seeking reparation for crimes committed in colonial times. On the other hand, issues of reparation for colonial crimes do not seem to be a topic at the centre of the political debate in Italy. The abovementioned myth of "good" colonialism and an historical inability to deal with its own past render difficult the formation of a mature civic consciousness on the damages caused by colonial domination. As a consequence, one could hardly imagine a political initiative of the Italian government aimed at apologising and repairing the wrongs of the past committed in Somalia.

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[61] See for example: <https://www.theguardian.com/books/2013/feb/04/most-dangerous-place-fergusson-review>.

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