Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections

Briefing Paper No. 1 (2011)

By Octavio Amezcua-Noriega

Edited by Dr. Clara Sandoval

ETJN, Reparations Unit
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Foreword

It is with great pleasure that the Essex Transitional Justice Network (ETJN) of the University of Essex releases its first six briefing papers on reparations to the International Criminal Court. These briefing papers are the result of multiple talks held over the previous years with staff at the ICC, and specifically with the Victims Participation and Reparation Section (VPRS), about how to carry out its reparations mandate. These reports were possible thanks to the hard work of the staff team at the VPRS.

In the summer 2010, the VPRS of the ICC provided the ETJN with a list of questions on reparations, the answers to which would help the Court to better understand its possibilities and limitations in awarding reparations to victims of crimes under its jurisdiction. Drawing on the expertise in the area of reparations available at the University of Essex, specifically at the ETJN and its Reparations Unit, we endeavour to produce six briefing papers. The University of Essex supported this project as it awarded a Mini Knowledge Transfer Innovation Fund to publish and disseminate the papers.

Different members of the Reparations Unit of the ETJN, the majority of them students or former students of international human rights law at the University, were involved in the research and writing of these briefing papers. They were researched and written under the direction and guidance of Dr. Clara Sandoval, Director of the ETJN and of its Reparations Unit and Senior Lecturer at the School of Law. Different members of the ETJN were also instrumental in the preparation of these papers. In particular, Dr. Fabian Freyenhagen, Co-Convenor of the ETJN and Chair of the Normative Dimensions Unit; Professor Sabine Michalowski, member of the ETJN and Chair of the Economic Dimensions Unit; Diana Morales-Lourido, Programme Manager of the ETJN; and Sofie Johansen, Gil Surfleet and Rafael Charris, frontrunners of the ETJN. The ETJN expresses its gratitude to all of them. The views expressed in the briefing papers are not those of the International Criminal Court.

Each briefing paper complements the others so it is desirable to regard them as a whole. Nevertheless, each briefing paper could be read on its own. All papers are available as PDF files on the ETJN website and in printed version. The titles of the six briefings papers are:

**Briefing paper 1**: Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections (By Octavio Amezcua-Noriega)

**Briefing paper 2**: Collective Reparations and the International Criminal Court (By Sylvain Aubrey and María Isabel Henao)

**Briefing paper 3**: Prioritising Victims to Award Reparations: Relevant Experiences (By Paola Limón and Julia von Normann)

**Briefing paper 4**: The International Criminal Court and Reparations for Child Victims of Armed Conflict (By Evie Francq, Elena Birchall and Annick Pijnenburg)

**Briefing paper 5**: The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation (By Maria Suchkova)

**Briefing paper 6**: Adverse Consequences of Reparations (By Fiona Iliff, Fabian Maitre-Muhl and Andrew Sirel)

The VPRS provided the ETJN with the following question related to reparation principles under international law: What are the core principles in international law, in particular international customary law, of relevance to the International Criminal Court when...
developing its Principles on Reparations under Article 75 of the Rome Statute? This briefing paper provides important insights into it.

For more information on the ETJN, please visit http://www.essex.ac.uk/tjn/

Clara Sandoval
Colchester, July 2011
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Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections

By Octavio Amezcua Noriega

I. Introduction

1. Article 75 of the Rome Statute of the International Criminal Court (hereinafter ICC) states that the ICC shall establish principles relating to reparations to, or in respect of, victims of the crimes that the ICC deals with in accordance with its jurisdiction. The drafting of these principles is a necessary step for the ICC’s reparations procedures, since the principles “will be essential to ensure certainty and consistency as a general principle of law... [as well as for] the purposes of internal preparation, intra-organ coordination and the preparation of external stakeholders”. In this regard, international law has developed several principles on reparations that can be a useful reference for the ICC in the process of adopting its own principles.

2. The core principles on reparations under international law are mainly customary norms that apply exclusively to relations between States. However, some of those principles could apply in relation to breaches of international obligations owed not only by States but also by individuals. Furthermore, as a special branch of international law, international human rights law has also reinterpreted some of those principles and has even created its own ones to respond to the nature of the violations it deals with.

3. This briefing paper deals with the main principles on reparation that derive from international law and their application under international human rights law. It also deals with other principles exclusively developed under international human rights law. Finally, this paper considers the possible application of some of those principles by the ICC following its mandate under the Rome Statute and other regulations.

II. General Substantive Principles on Reparation under International Law

4. The core principle on reparation under international law was formulated by the Permanent Court of International Justice (PCIJ) in the case concerning the Factory at Chorzow: “reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed.” This statement refers to the principle of reparation as

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1 LLM in International Human Rights Law (University of Essex, 2011) and member of the Reparations Unit of the Essex Transitional Justice Network.
3 As established in their codification by the International Law Commission, known as the Draft Articles on State Responsibility (hereinafter “Draft Articles”), UN doc A/56/10. See Text with commentaries by the special rapporteur John Crawford (hereinafter “Commentaries”), adopted by the ILC at its 53th session, 2001, (Yearbook of the International Law Commission, 2001, vol. II, Part Two), on art. 28, para. 3. The UN General Assembly (UNGA), in its resolution 56/83 of 2001, commended the draft to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.
4 Case concerning the Factory at Chorzow (Merits), PCIJ, Series A, No. 17, 1928, p. 47.
restitutio in integrum. This concept has been interpreted in different ways by international tribunals and other bodies, which determine the forms and quantity of reparations that can be awarded. Under traditional State responsibility, a retributive view of reparations tends to prevail, with an emphasis on measures such as restitution and compensation to provide redress.

5. By virtue of the principle of proportionality, reparation should be proportional to the injury caused by the wrongful act, the term “injury” incorporating both material and moral damages. In this regard, it should be highlighted that whereas the damage will be relevant to the form and quantum of reparation, the existence of material damage is not a requirement for seeking reparation.

6. An important consequence of the principle of proportionality is that reparations are not punitive in nature. This is so regardless of the gravity of the breach. Reparations should exclusively be aimed at remedying the damage committed through the wrongful act, and not conceived as an exemplary measure.

7. Closely related to the principle of proportionality and regarding the nature of the link between the illegal act and the harm suffered, the principle of causality states that reparations should redress only direct damages produced by the illegal act, leaving out those damages which are too indirect or remote. However, the former Special Rapporteur of the International Law Commission on State Responsibility, John Crawford, established that other elements of the breach, such as the wilful misconduct of the State organs, should be taken into account, because “...the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation...”.

8. There is a subordinate rule to the principle of causality, which is relevant in cases where the harm is due to concurrent causes and it is not possible to attribute all the harm to a single responsible cause or subject. For example, in the case of the Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), in which Albania did not warn the British ships about the existence of mines in its seas placed by other States, Albania was nevertheless ordered to comply with all the reparation measures awarded to the United Kingdom. Thus, international law has established that unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible subject, the latter is held responsible for all the not too remote consequences of the wrongful conduct.

9. International law has also established several forms of reparation which, on their own or combined, aim to provide full reparation for the harm caused. Following the principle of restitutio in integrum as stated by the PCIJ, the first of these forms is restitution. It aims to put things as they were before the wrongful act took place. Restitution is the preferred form of reparation under international law, but in many

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5 Draft Articles, art. 31.
6 Commentaries, supra, n. 3, art. 31, paras. 5 and 7.
7 Commentaries, ibid, chapter III, para. 5.
8 Commentaries, ibid, art. 31, para. 10.
10 Commentaries, supra, n. 3, art. 31, paras. 12-13.
11 Commentaries, ibid, art. 35, para. 2.
situations it is not possible given the nature of the violation or because it is insufficient in providing adequate reparation for the harm suffered.

10. In the case concerning the Factory at Chorzow, the PCIJ stated that when restitution is not possible, there should be a payment of a sum corresponding to the value which restitution in kind would bear. This form of reparation is usually known as compensation and it is ordered when there are damages that cannot be redressed by restitution alone. As mentioned by Crawford, “…awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment…”.

11. Finally, satisfaction is another form of reparation recognised by international law. In inter-State adjudication it has a rather exceptional character, since it only emerges when restitution and compensation do not achieve full reparation, and refers to injuries which are not financially assessable, which amount to an affront to the State. Moreover, although satisfaction measures under general international law usually take the form of declaratory statements in relation to the wrongfulness of the conduct, stronger measures such as formal apologies or construction of memorials, cannot be discarded. Indeed, the Draft Articles refer to “serious breaches of obligations under peremptory norms of general international law”, and they presume that such violations cause severe non-material damages that require other forms of reparation such as formal apologies.

III. Principles on Reparation under International Human Rights Law

12. The majority of international human rights instruments are silent about the principles that should apply to reparations. This has allowed different human rights bodies to develop their own principles. Of all possible experiences, the one crafted by the Inter-American Court of Human Rights (hereinafter “IACtHR”) deserves careful attention. This Court has the most far-reaching jurisprudence on reparations under international law.

12 Commentaries, ibid, note 4.
13 Commentaries, ibid, art. 36, para. 19.
14 Commentaries, ibid, art. 37, para. 1.
15 Commentaries, ibid, art. 37, para. 3.
16 Commentaries, ibid, art. 37 para. 6.
17 Draft Articles, art. 41.3; and Commentaries, ibid, art. 41, paras. 13-14.
18 For example, 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, UN doc A/Res/60/147. First commended by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the special rapporteur Theo van Boven, they were finally adopted by the United Nations General Assembly in its resolution 60/147 of December 16th, 2005. The resolution recommends States to take the UN Basic Principles into account, promote respect thereof and bring them to the attention of members of the governments. In words of the Chairperson-Rapporteur Alejandro Salinas, the UN Basic Principles “…did not introduce new principles of international law, but rather consolidated and clarified already existing obligations…”, and therefore, “…mandatory language had been used only where a particular international obligation existed.” (Report on the third consultative meeting, UN doc E/CN.4/2005/59, paras. 10-11). See also the preface of the UN Basic Principles, para. 7.
13. The practice of international human rights law bodies, like the IACtHR, is relevant for the ICC, not only because the Rome Statute clearly states that “the application and interpretation of law pursuant to [article 21] must be consistent with internationally recognised human rights” but also because most of the time the crimes that the ICC deals with also constitute a breach of international human rights law.

14. International human rights law has also based the award of reparations on the same principle of *restitutio in integrum* introduced in paragraph 4 and as stated in the *case concerning the Factory at Chorzow*. However, human rights bodies like the IACtHR have reinterpreted the international law formula so as to include “the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.”

15. The **principle of proportionality** has also been applied in international human rights law, even when dealing with gross human rights violations. In this regard, the 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 (hereinafter “UN Basic Principles”) state that reparation should be proportional to the gravity of the violations and the harm suffered. A consequence of the proportionality principle in the realm of international human rights is that reparation measures should neither enrich nor impoverish the victim of a human rights violation, as they are intended to eliminate the effects of the violations that were committed.

16. International human rights law has also adopted the **principle of causality**, stating that reparation entails the existence of a causal link between the violation found, the harm produced and the reparations sought. Thus, by giving full effect to the principle of causality, the IACtHR has developed concepts such as the “life plan”, which “…is (…) akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself (…). Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.”

17. The **principle of due recognition of victimhood** plays a very important role in reparations granted by international human rights law. It is worth recalling that in international law the notion of harm has not only material but also moral dimensions. In international human rights law this has translated into the recognition that violations are capable of causing mental damage and emotional

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20 Ibid., para. 38.
21 UN Basic Principles, principle 15.
25 Commentaries, supra, n. 3, art. 31, para. 5.
suffering, which has allowed international human rights bodies to consider the next of kin of direct victims of human rights violations, their dependants and persons who have suffered harm in intervening to assist them or to prevent victimisation, as victims in their own right.

Related to the above principle and regarding the procedural principles of reparation, it is possible to infer from the practice of human rights bodies that there is an implicit principle that applies a flexible approach to the standard and burden of proof in reparations claims. As the Human Rights Committee says, “...[the] burden cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information...”. So, in order to balance this situation in accordance with the victim’s capacity to prove the damage suffered, international adjudicatory bodies have relied on presumptions and circumstantial evidence “when they lead to consistent conclusions as regards the facts of the case”.

Subordinate to the due recognition of victimhood, is the procedural principle of effective victim participation. Principle 6a) of the Declaration of Justice for Victims establishes that victims should be informed of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information. For example, it should be noted that the first time victims were provided with standing before the IACtHR was at the reparations stage, given the importance of their role in such part of the judicial proceedings.

Also linked to the principles of due recognition of victimhood and effective participation, is the principle of taking due account of the victims situation in any given case. In this regard, principle 10 of the UN Basic Principles states that victims should be treated with humanity and respect for their dignity and human rights, and calls for the adoption of appropriate measures to ensure their safety, physical and psychological well-being and privacy, as well as those of their families.

The principle of non-discrimination in international human rights law is based on a right which is recognised in almost every human rights instrument and it is related to all acts of the State which affect the people under its jurisdiction. Accordingly, when providing redress for human rights violations, States must implement reparation measures without discrimination on any of the grounds recognised by international law.

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27 Ibid, principle 2.
22. Regarding the forms of reparation required for achieving full restitution, international human rights law has awarded a range of measures, that combined, seek to provide full redress for the harm caused. International human rights bodies follow what international law has established in this regard, although they have crafted new forms of reparation. This comprehensive approach has also led to the acknowledgment that reparations can be both individual and collective. 31

23. For example, with regard to compensation, international human rights law has applied a principle of equity in order to calculate both material and non-material damages, when such damages are not fully proven. Thus, when a calculation for the loss of earnings cannot be made because there are no bases to determine the income that the victim would have had if the violation had not taken place, the IACtHR has referred to the minimum wage applicable in the State where the violation occurred, to calculate such loss. 32

24. On the other hand, satisfaction measures under international human rights law play a central role in the award of reparations, unlike their exceptional character in inter-State adjudication. Under international human rights law, satisfaction refers to a whole range of measures that the State must comply with in order to redress the harm and to restore the dignity of the person that was affected by the violations; 33 in this sense, the IACtHR has mentioned that they must have public repercussion. 34 Accordingly, measures such as the public disclosure of the truth, besides being relevant for restoring the dignity of those directly affected by the violation, can be essential for the healing process of whole communities.

25. Although non-existent as a form of reparation under general international law, rehabilitation under international human rights law is most of the time necessary for redressing the harms caused by gross human rights violations. 35 It is under this form of reparation that the idea of “full restitution” can be materialised, 36 if rehabilitation is interpreted as a holistic measure which not only comprises physical and psychological care, but also social and financial services which may involve the community where the victim belongs.

26. Finally, another measure that international human rights law has adopted in order to award comprehensive reparations, is the guarantee of non-repetition. Under international law, it has been disputed if guarantees of non-repetition are a reparation measure or another consequence of State responsibility. 37 Nevertheless, under international human rights law, they play an important role in bringing some relief to

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33 UN Basic Principles, principle 22.
34 IACtHR case of Plan de Sánchez Massacre, supra note 30, para. 93.
35 Rehabilitation has been developed as a reparation measure under international human rights law. See UN Basic Principles, principle 21; and the Declaration of Justice for Victims, principle 14.
36 For a comprehensive approach on this measure, see REDRESS Rehabilitation as a form of reparation under international law, research by Clara Sandoval, December 2009.
37 Commentaries, supra, art. 30, para. 9.
victims. Guarantees of non-repetition, together with rehabilitation measures, are without doubt the most far-reaching forms of reparation that can be awarded to redress a human rights violation, with measures such as institutional reform, vetting, training of police personnel, and development programs. It is also by using this form of reparation measure that some international bodies have aimed at materialising transformative reparations. The latter are measures which seek to address the root and structural causes of the violations.  

IV. The Adoption by the ICC of International Law Principles on Reparations

27. Any criminal procedure considered respectful of human rights standards, besides identifying and punishing those responsible for the crimes committed, must aim to repair the consequences of the crimes. The Rome Statute and the ICC’s Rules of Procedure and Evidence provide an adequate legal framework for the ICC to accomplish this purpose.

28. The principle of proportionality is not explicit in the ICC’s regulations but article 75.1 of the Rome Statute says that the Court may determine the scope and extent of any damage, loss and injury in reparation procedures. Also, article 97 of the Rules of Procedure and Evidence states that the ICC may appoint experts in order to determine the scope and extent of damage, loss and injury, regarding the assessment of reparations.

29. The principle of causality should be correctly applied by the ICC, taking due account of the extent of the damage caused to victims and communities, and its relationship (direct or not) with the crimes and the conduct carried out by the alleged perpetrator. Here the involvement of experts might also be vital to establish a causality link that goes beyond material damages and also looks carefully at non-material damages such as the level of trauma or emotional harm.

30. As for the achievement of full reparation or restitutio in integrum, the ICC will always deal with hard cases from a reparations perspective: on the one hand, because of the number of victims and amount of harm that they have potentially suffered; on the other hand, because the offender is not a State but an individual, with limited or non-existent resources to repair the atrocities for which he or she is responsible. In addition, an individual lacks the capabilities of the State to implement the reparations ordered by the Court and he/she will most likely be in prison.

31. Other practical problems include getting states to cooperate and assist the Court with, for example, the forfeiture of proceeds, property and assets of the offender. For these reasons, the role of the Trust Fund for Victims (TFV) is crucial for the ICC to try and provide adequate and effective reparations.

32. The limitations that the ICC has regarding its capacity to award full restitution do not affect the right of the victims to claim reparations before other bodies for the human rights violations.

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rights violations they might have also suffered. According to article 75.6 of the Rome Statute, the rights which emanate from this instrument are without prejudice of other rights that the victims may have under other treaties.

33. Regarding the forms of reparation, article 75.1 of the Rome Statute mentions restitution, compensation and rehabilitation as measures that the ICC can implement. However, the statement is not exhaustive, so other forms of reparation, such as satisfaction, can be ordered. Nevertheless, due to the difficulties described above regarding the capacity of the offender to comply with reparation measures, and because of the limited capacity of the TFV to fully repair all the harm caused, the ICC will have to choose carefully among different forms of reparation. Thus, for example, although compensation is the most common measure ordered by international bodies for redressing both material and non-material damages, the funds that can be obtained either from the offender or from the TFV will hardly be enough to bring relief to all the victims that can be affected by war crimes and/or crimes against humanity. Therefore, measures such as collective forms of reparation might be far more adequate to deal with the harm suffered.

34. Rule 85 of the Rules of Procedure and Evidence defines victims as natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court, as well as organisations and institutions under specific circumstances. Although not explicitly mentioned in article 75 of the Rome Statute, the Working Group on Procedural Matters at the Rome Conference mentioned that the use of the expression “to, or in respect of victims” in article 75.1 was intended to relate to the next of kin of victims. The ICC’s principles on reparation should clarify this matter and establish under which criteria the next of kin should be awarded with reparations.

35. Finally, with regard to victims’ participation for the award of reparations, the ICC’s regulations provide an important legal framework for the intervention of victims in the proceedings. Article 68 of the Rome Statute establishes the conditions under which this participation is possible, which has to be done through legal representation, while article 75.3 allows this participation in reparation proceedings. Furthermore, rules 89 to 93 of the Rules of Procedure and Evidence establish with detail the victims’ intervention in the proceedings, with rule 91.4 clarifying that in hearings that are limited to reparation issues, the legal representatives of the victims, with the permission of the Chamber, can freely question witnesses, experts and the person concerned. Although under these rules the victims’ participation through legal representation is granted, the participation of the victims themselves in the hearings should be particularly encouraged. In this regard, procedures before international bodies (particularly the IACtHR) have demonstrated that the testimony from the victims is one of the best ways to prove the harm suffered, besides having the potential to provide some healing to the victims.

V. Concluding Observations

1. Despite their comprehensive formulation, it is not clear to what extent the principles on reparation of general international law apply in international criminal law, where

40 REDRESS, Justice for victims, supra note 2, p. 16.
the State is not the one committing the crimes.\textsuperscript{41} Nonetheless, international law as it applies to individuals is not a separate body of law, but a variation of the application of regular international norms.\textsuperscript{42} In this regard, international criminal liability developed under international law to further regulate wrongful acts that were threatening international peace and security and the protection of human rights.\textsuperscript{43} Moreover, the attempt by international criminal law (as reflected by article 75 of the Rome Statute) to provide the ICC with jurisdiction to award reparations against the individual perpetrator, illustrates how relevant the principles of international law are becoming to other branches of this law which apply to subjects other than States.

2. As the ICC continues to face great challenges in the area of reparations with an increasing number of reparation proceedings, the issuing of the ICC’s principles on reparation will be necessary for guidance and to provide everyone including perpetrators, victims and states, with legal certainty. International law, particularly international human rights law, has developed a body of standards that can be a good reference for the ICC when creating its own principles even if the principles need to be adapted to fit the demands of international criminal law.

\textsuperscript{41} Draft Articles, art. 58.

\textsuperscript{42} This was the assumption under which the Nuremberg Tribunal found the liability of individuals. In Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nuremberg 1947, p. 223, it was stated that international law imposes duties and liabilities upon individuals as well as upon States.

\textsuperscript{43} For example, art. 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) grants the Tribunal the power to prosecute persons violating the customs of war.
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