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Reparations in International Law: A Critical Reflection

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As a double-blind peer-reviewed publication, the Netherlands Yearbook of International Law offers a forum for the publication of scholarly articles of a conceptual nature in a varying thematic area of public international law. In addition, as of 2012 each Yearbook includes a section entitled 'Dutch Practice in International Law', which replaces the section previously dedicated to Documentation. Part of the Documentation is still available online (since 2011) here: www.asser.nl/nyil/documentation. The NYIL has been published under the auspices of the T.M.C. Asser Instituut since 1970.

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Introduction: New Frontiers in Reparations since *Factory at Chorzów*

Julie Fraser, Emmanuel Giakoumakis and Otto Spijkers

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Abstract Almost a century has passed since the judgment in the case concerning the *Factory at Chorzów* by the Permanent Court of International Justice in 1928. This judgment provided the principle for reparations under international law that is still applied today. This volume of the Netherlands Yearbook of International Law examines this case and subsequent developments to study the development of reparations around the world. It focuses particularly on the influence of international humanitarian, criminal, and human rights law on reparations and the shift from a State to a victim-centric approach. The chapters in the volume include traditional legal research as well as empirical studies that bring to light views of victims/survivors in places like Cambodia and Senegal. The chapters reveal the difficulty of reparations in practice and the need to reinvest in fulfilling the rights of victims to a remedy.

Keywords Reparations · Human rights · Historical wrongs · International law

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1.1 Introduction

Almost a century has passed since the much-celebrated judgment on the merits was delivered in the case concerning the *Factory at Chorzów*. In this 1928 judgment, the Permanent Court of International Justice (PCIJ) affirmed the essential principle of reparation contained in the actual notion of an illegal act. It held that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[1] The principle of 'integral' or 'full reparation' was subsequently accepted by the International Law Commission (ILC) as the basic tenet governing the consequences of internationally wrongful acts in Articles 34-39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ARSIWA),[2] and has since been applied by international courts and tribunals in a wide range of disputes.

Still, the precise contours of this normative proposition on reparations remain unclear, not least because of the profound transformations since the rendering of that judgment. Like all judgments, *Factory at Chorzów* is a child of its time, reflecting the strictly bilateral nature of the international legal order in the inter-War period and the State-centric character of international law at that time. As such, reparation in the judgment is focused on the loss sustained by the injured State and is intended to reinstate the *status quo ante* without much regard to additional considerations or to the interests of stakeholders other than the States involved. Moreover, the normative foundations underlying the standard of reparation propounded in *Factory at Chorzów* proceed from a close analogy with municipal private law governing torts: the responsible State is assimilated to a private tortfeasor whose transgression of responsibility generates consequences on the international plane. Yet, this construction does not sit comfortably with the public interests protected by the international legal order, or the legal consequences stemming from serious violations of international law, in particular human rights, humanitarian, and criminal law.

The rules governing reparation enunciated in the *Factory at Chorzów* have traditionally been dealt with by the ILC and academic scholarship as 'secondary' norms in the Hartian sense, governing the consequences of wrongfulness independent of the primary norms setting out States' rights and obligations. Whilst this classification may have been a useful analytical instrument for the purposes of the ILC's codification work, the ILC itself was cautious in not ascribing to it an intrinsic normative value. It affirmed that the content of the primary rules, as well as broader normative considerations and structural features of the international legal system, may inform the scope and content of the secondary norms governing responsibility.[3] As a result,

[1] PCIJ, *The Factory at Chorzów (Germany v. Poland)*, Merits, 13 September 1928, p. 47.

[2] ILC 2001, chap. IV.E.1.

[3] See, for example, ILC 2001, art. 41(3) and commentaries (13)–(14), which suggest that the gravity of the breach in question may inform the obligation to provide reparations and that international law may provide further obligations flowing from the commission of serious breaches of international law within the meaning of Article 40.

the precise scope and meaning of the rules governing reparation are in a constant state of dialogue with the primary rules to which they attach.

Since the judgment in *Factory at Chorzów*, the world has experienced remarkable changes with the creation of the United Nations (UN) as successor to the League of Nations, the prohibition on the use of force, the obligation to settle international disputes peacefully, and the adoption of the Universal Declaration of Human Rights in 1948[4] and treaties on the topic of international human rights law. Other significant developments include the progressive independence of formerly colonised states, the women's movement, globalisation, and the increasing role of non-State actors including corporations, intergovernmental organisations, and civil society. These structural changes have resulted in a gradual shift in the attention of the international community from (purely) power dynamics to a rule-based legal system, where the consequences of responsibility are articulated in norms and principles aimed at ensuring an equitable balance of interests between the various State and non-State actors. In this context, the rules governing reparation have evolved into a nuanced instrument of promoting compliance with international norms, ensuring accountability for potential violations, and caring for those harmed.

Moreover, the practice of awarding reparations has undergone a profound evolution—even predating the *Factory at Chorzów* judgment. International practice since the conclusion of the Treaty of Jay between the United States and Great Britain in 1794[5] was dominated by direct negotiations for the (more-or-less peaceful) settlement of claims or inter-State arbitration aimed at bringing about an 'appropriate' settlement of disputes. The 1919 Treaty of Versailles[6] following the First World War was influential regarding reparations and, in fact, was part of the rich legal background to the *Factory at Chorzów* dispute. This treaty, with the catastrophic consequences of the 'Carthaginian Peace' it imposed through the infamous 'guilt clause' against Germany, revealed the potential risks inherent in the strict adherence to the rules of reparation and the potential scope for abuse against vanquished or weaker nations.[7]

The period following the Second World War confirmed States' reluctance to resort to strict-liability mechanisms for the apportionment of responsibility and was marked by a general distrust of international legal institutions as a means for the settlement of international disputes. It therefore comes as no surprise that most international claims were typically settled diplomatically through inter-State lump sum agreements. Reparations were provided to war victims/survivors *inter alia* by establishing public compensation schemes, through the restitution of property, or by way of satisfaction through criminal trials, the erection of monuments, and the creation of national days of remembrance. However, following the creation of the Iran-US

[4] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III).

[5] Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty and the United States of America (signed 19 November 1794; entered into force 29 February 1796).

[6] Treaty of Peace with Germany (Treaty of Versailles) (signed 28 June 1919; entered into force 10 June 1920).

[7] Van Hoogstraten et al. 2017.

Claims Tribunal though the Algiers Claims Settlement Declaration in 1981,[8] and the establishment of the UN Compensation Commission by the UN Security Council[9] a decade later, reparation rules have increasingly been interpreted, applied, and reinforced as a means for ensuring the effectiveness of international norms. The end of the Cold War and the progressive embedding of the multilateral international legal system has resulted in renewed interest in and opportunities for the rules governing reparation. In this context, the development of new rules reflecting broader community interests such as human rights and the environment, and legal constructs such as peremptory norms (*jus cogens*) and obligations *erga omnes*, have had a profound impact on the articulation of the consequences of responsibility.

In response to such developments, scholars and practitioners have argued that the principles in *Factory at Chorzów* no longer adequately serve the needs of the international community and require recalibration to account for the structural shifts in international society and international law. This raises questions such as: what scope is there for a modern interpretation of the rules relating to reparation, and what should these modern rules be? Or, how to account for harm that can never be 'wiped out'? Should the *status quo ante* even be a goal of reparations? As we near the closing of a century since the PCIJ's dictum in *Factory at Chorzów*, it is important to re-examine the normative premise and appositeness of the principle to our 'brave new world'. In light of the structural, normative, and axiological changes in international law, this special volume of the Netherlands Yearbook of International Law critically assesses the practical application of the reparations principle and its limitations. It approaches this issue from three different angles: (1) the practice of international human rights law in international and domestic courts; (2) the role of international (or internationalised) criminal courts; and (3) the role of de-colonisation in the practice of reparations.

1.2 The Role of International Human Rights Law in the Development of Reparations

A key development in the evolution of the rules governing reparation at the international level was the wide range of mechanisms established after the Second World War to administer reparations beyond the strictly inter-State paradigm and the gradual recognition of reparation as part of a victim's right to a remedy.[10] The codification

[8] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981.

[9] United Nations Security Council resolution 687 (1991), 8 April 1991.

[10] See for example Art 2(3) of the International Covenant on Civil and Political Rights (1966) United Nations, Treaty Series, vol. 999, p. 171; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147.

of human rights law has had a significant influence on reparations, providing normative foundations for the obligation to repair individual victims/survivors of human rights violations or international crimes. The established mechanisms—including UN treaty bodies, regional human rights courts, and specialised criminal courts—have further developed and elaborated upon reparative norms in practice. Chapter 2 in this volume by Deborah Casalin illustrates how international law on reparations has shifted from State-centricity to victim-centricity and the role of human rights law as a catalyst in this process. She does this by charting the emergence in the last century of a right not to be displaced in international law as well as attendant rights for victims to receive reparations that may take different forms based on the needs of those displaced.

This reparative practice has been complemented by private, domestic, or hybrid mass-claims programmes aimed at repairing historical wrongs, such as public compensation schemes, the restitution of looted property or dormant accounts, or the establishment of numerous truth and reconciliation commissions. Particularly across the Americas, a wave of reparation measures was implemented as part of transitional justice processes in numerous States, including Argentina, Chile, and Colombia. Chapter 3 in this volume by Jemima García-Godos and Lisa Laplante focuses on reparations in the context of transitional justice, tracing the dilemmas, debates, and new directions. Based also on empirical insights, they note the distance travelled since *Factory at Chorzów* and the prevailing understanding now that harm often cannot be (simply) repaired or 'wiped-out'. When individuals are the victim of a wrongful act, restitution is almost always impossible, and even financial compensation may be inappropriate in cases. There is thus a need for more creativity from courts, States, donors, and all other stakeholders involved. Indeed, reparative bodies should be open to all forms of reparation as long as they are adequate, effective, prompt, and proportional to the gravity of the violations and the harm suffered.

Among the existing human rights mechanisms, the Inter-American Court of Human Rights (IACtHR) is generally recognised for its progressive approach to reparations.[11] In Chap. 4, Edward Perez examines the role of the IACtHR as a policy maker and concludes that the IACtHR has intervened in policy cycles through agenda setting, policy formulation, and ordering policy implementation or requiring policy evaluation (favouring the second of these alternatives). His chapter shows how various factors have influenced the Court's decision regarding how to design its structural remedy. These factors include the year the decision was issued, the State that is held responsible, and the participation of certain victim's counsel, among others. The chapter concludes by calling for further research on possible public policy tools that the Court could incorporate when issuing structural remedies, the role of the litigating parties in incorporating a policy perspective into their legal strategies, and possible alternatives to the Court's practices for improving policy intervention.

Chapter 5 in this volume by Pietro Sferrazza Taibi and Francisco Bustos examines the influence of international human rights law on Chilean case law on civil claims for crimes committed during Augusto Pinochet's dictatorship (1973–1990). It argues

[11] Contreras-Garduño and Fraser 2014, p. 175.

that, due to the inadequacy of reparations granted by the Chilean government, victims have taken their struggle to courts demanding compensation. A significant obstacle to be overcome was the statute of limitations. International human rights law provided the basis for national courts to conclude that all claims derived from crimes against humanity were not subject to the statute of limitations, regardless of their nature. This chapter shows how the application of international human rights law can lead to progressive developments at the national level towards achieving justice, truth, reparation, and guarantees of non-repetition. The 'domestication' of State practice on reparations is an interesting development, as such practice may provide valuable evidence of State practice and *opinio juris* for the purposes of tracking and ascertaining the existence of customary norms in the field of reparations in the future.

Two chapters in the volume relate to recent developments in the Netherlands as well as human rights. They serve a dual function: they are part of the Yearbook devoted to reparations, but they also constitute the part of the Yearbook that is traditionally reserved for a discussion of the 'Dutch Practice in International Law'. Chapters in this part of the volume seek to bring Dutch practice across the borders and to the attention of the wider international community, and as is custom, form the final part of the yearbook. The first of these (Chap. 13) relates to accountability for the 1995 genocide in Srebrenica. The second (Chap. 14), addresses the interaction between the international and domestic Dutch legal order in the context of reparation claims.

Chapter 13, by Alma Mustafić and Niké Wentholt, is entitled: 'Finding the Truth but Ending the Conversation: How Dutch Civil Court Cases on the Srebrenica Genocide Shaped the Space for Reparation'. The authors describe what efforts were made to seek reparation before, during, and after these Dutch national legal proceedings. They show that, whilst much academic attention was paid to these cases, much less attention was paid to the wider societal impact of these cases on the reparation process. They demonstrate that civil court cases hold potential for subsequent wider political and societal reparation, and detail various initiatives by the Bosnian-Dutch community including commemoration, an art movement, and a theatre play. These were creative means through which the Bosnian-Dutch community 'spoke back' to imagine and reinvigorate the reparation process. Where Dutch politics and society had failed to take up the court cases' potential the first time around, they were thus provided with a second chance to design and implement an inclusive and participatory reparation process. The chapter argues that both the Bosnian-Dutch community and Dutch society as a whole, deserve such reparation for their shared history of Srebrenica.

Anneloes Kuiper-Slendebroek's Chap. 14 is entitled 'No 'Effective Remedy' Without National Enforcement: A Dutch Perspective on the Obstacles for Application of the Right to a Remedy in Tort Law Cases'. It examines the interaction between international rules and the domestic legal order, with the Netherlands as a case study. National courts play an important role in ensuring adequate protection of individual rights based on international law, including the rights in the European Convention on Human Rights (ECHR). Central to the cooperative relationship between this regional human rights treaty and the Dutch domestic legal system is Article 13 ECHR, which

provides a right to an effective remedy. According to the author, for this cooperative relationship to succeed, the self-executing character and prevailing nature of ECHR provisions must be acknowledged, and national courts must be allowed to play a principal role in the enforcement of these rights. The Netherlands is an interesting case study because the Dutch Constitution gives priority to self-executing norms of international treaties over conflicting domestic law—even the Constitution itself[12]—and, as demonstrated by analysing some high-profile public interest cases including *Urgenda*,[13] because human rights are often implemented in the Netherlands through the open norms of tort law.

1.3 The Role of International Criminal Law in the Development of Reparations

Some of the most recent developments in the international law on reparations come from the branch of international, or internationalised, criminal law. The Rome Statute of the International Criminal Court (ICC) has been hailed as a highpoint for victim's rights in that victims can both participate in the criminal trial as well as apply to receive reparations from convicted persons.[14] This marks a sharp (and welcome) turn from the approach of the two *ad hoc* tribunals created by the UN Security Council in the 1990s to prosecute international crimes in the former Yugoslavia and Rwanda that did not include a role for victims. Much contemporary scholarship has examined the reparations regime unfolding in the ICC's jurisprudence at the horizontal level (i.e., between the victims of international crimes and the perpetrator of such crimes). Less attention has been paid to the complementary reparative obligations of States[15] and State organs involved in the perpetration of international crimes.

In Chap. 6, Meagan Wong focuses on the ICC's power to award reparation in the event of a crime of aggression under Article 8*bis* of the Rome Statute. This provision is quite exceptional, insofar as the wrongful conduct by a State (an act of aggression) constitutes an essential component of the definition of a crime. As the ICC is not an inter-State court, a question arises as to whether the ICC has the power to determine the legal consequences of responsibility arising from an internationally wrongful act as between the aggressor and aggressed State. The question is a direct emanation of a lesser known aspect of the *Factory at Chorzów* judgment, that a

[12] Fraser 2024.

[13] Netherlands Supreme Court, Judgment of 20 December 2019 in the case between the State of the Netherlands (Ministry of infrastructure and the environment) and the Urgenda foundation. English translation available at: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:2007 (Urgenda Supreme Court Judgment). See Spijkers 2020, pp. 192–206.

[14] See for example ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Appeals Chamber, Judgement on the Appeals Against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2 ICC-01/04-01/06-3129 (3 March 2015).

[15] See for example Moffett and Sandoval 2021.

'decision whether there has been a breach of an engagement involves no doubt a more important jurisdiction than a decision as to the nature or extent of reparation due for a breach of an international engagement'.[16] Wong argues that whilst the ICC does not have the authority to determine restitution and compensation at the inter-State level, the States Parties to the Rome Statute have conferred upon the ICC the authority to award satisfaction at the inter-State level for the crime of aggression. Tracing international practice on reparation, Wong argues that this may include—apart from the acknowledgement of a breach—the institution of penal proceedings, an apology, or collective reparations for the victims of aggression. Whilst the ICC has yet to be seized in a case involving the crime of aggression, the analysis introduces a new dimension in the conduct of criminal proceedings where the interests of one or more sovereigns are involved, and raises the question how the Court can safeguard those interests in a procedurally fair manner.

The remedy of satisfaction is particularly relevant to the present volume, as it was not mentioned by the PCIJ in its much-celebrated dictum on reparations in *Factory at Chorzów*. Yet, the remedy has been repeatedly affirmed in diplomatic and judicial practice, and the ILC expressly included satisfaction in the forms of remedies available under customary international law.[17] In Chap. 7 Alice Ollino reappraises the role of satisfaction twenty years after the adoption of ARSIWA in light of inter-State judicial practice. She demonstrates that inter-State courts and tribunals award satisfaction as a form of reparation for internationally wrongful acts, but they do so in a way that does not necessarily reflect the principles in the ARSIWA and may occasionally appear controversial. Ollino considers that international courts tend to minimise the afflictive element of satisfaction and the 'private' character of the dispute, adopting a more 'public' dimension to the dispute, utilising satisfaction as an instrument to reaffirm the validity of primary obligations in a forward-looking manner.

Returning to criminal justice, it is important to note that the practice of reparations for victims of international crimes is by no means limited to the framework of the ICC. The chapter in this volume by Christoph Sperfeldt (Chap. 8) as well as Chap. 9 by Alina Balta, Mijke de Waardt and Marola Vaes examine reparations by the internationalised hybrid criminal courts in Cambodia and Senegal: the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Extraordinary African Chambers (EAC). These two chapters present vital empirical insights into how victims experience participating in criminal trials, the reparations process, and outcome of awards. Both chapters highlight the necessity of such insights and call for more empirical research with victim communities to complement the wide-ranging normative scholarship on the topic. In a way, these chapters are sobering reminders of the reality of reparations in practice and the extent to which they fall short of victim's expectations (and rights). While reparation awards or orders are often lauded in scholarship, most of them are un- or under-implemented in practice due to limited

[16] *Factory at Chorzów*, Jurisdiction (1927) PCIJ Ser A No 9, 23.

[17] ILC 2001, art. 37.

funding and political will.[18] As Sperfeldt notes, victims of Hissène Habré are yet to receive anything from the landmark award by the EAC of almost US$140 million, and most Cambodian civil parties were unaware or had limited knowledge of the ECCC's reparation projects. Ultimately, reparation orders by both courts are to be funded via donations—mirroring the experience of victims at the ICC.

In this context, it is noteworthy that several chapters in this volume emphasise the importance of victim/survivor participation and consultation in the reparations process—what Balta, de Waardt and Vaes recognise as the procedural part of reparative justice. Laplante and García-Godos in Chap. 3 similarly argue that victim consultation is part of the reparative process and 'is the constitutive act that restores full citizenship'.[19] The authors recommend consultations with victims to find answers to the question of what they need to *feel* repaired and encourage the development of new and different types of reparation based on cultural contexts and worldviews, urging that the process matters just as much as the outcome. In their study of the ECCC, Balta, de Waardt and Vaes reveal the role of culture (including religion) in designing reparations and the importance of understanding how victims give meaning to their lives, understand their (mental) health, and envisage/relate to their lost loved ones in the afterlife. The chapters in this volume reiterate the importance of tailoring reparations measures to the context in every situation.

1.4 De-colonialisation and the Law of Reparations

Another important aspect of the *Factory at Chorzów* judgment lies in its Western-centric focus. Indeed, the case dealt with a European dispute and the majority of judges were European. The chapters of this volume attempt to deconstruct this narrative by widening our perspective on the *international* practice of reparations. By looking at the practice of States, courts, and tribunals in Asia, Africa, and Latin America many chapters in this volume attempt to de-centre Europe/the West as the epistemic sites for developing international law, and seek to enhance the legitimacy and representative character of our understanding of reparations.

As noted above, decolonisation in the second half of the 20th century greatly impacted international law, but it has also given rise to new claims for reparations. Today, there are increasing calls for European States (including the Netherlands)[20] to pay reparations to former colonies for injuries caused by acts of oppression, the exploitation of natural resources, and enslaving people. This is an area where the law of reparations has been underdeveloped, but there is a growing interest amongst several States to pursue this issue.

In Chap. 10, entitled 'A Century on from the *Chorzów Factory*: Reparations, National Wars of Liberation and the Limits of Wiping out the Consequences of

[18] McGonigle Leyh and Fraser 2019, p. 52.

[19] Laplante 2013.

[20] See for example van den Herik 2012 and Immler 2022, Article 8.

Armed Conflicts', Luke Moffett focuses on the practice of reparations in settling claims after armed conflict, in particular those emerging from colonialism and occupation. Moffett discusses the challenges of redressing the harm caused to victims and examines the limits of international humanitarian and human rights law in providing a legal basis and (often) a forum for victims' claims. After a comprehensive assessment of international practice, he concludes that in the past century, reparations for violations have been inadequate and in many cases absent. This has been particularly acute in wars of national liberation that marked the mid-twentieth century and recent neo-colonial conflicts in the Middle East by Western powers. On that basis, he argues for a more rigorous implementation of the right to a remedy for the victims of armed conflict as an instrument for restoring a more enduring peace.

The most common objection to claims for repairing historical wrongs is the difficulty of identifying the relevant norms that were applicable at the time of the act—also known as the issue of intertemporal law. Karina Theurer's chapter in this volume (Chap. 11), entitled 'Racism as an Obstacle to Reparations for Colonial Crimes? The Doctrine of Intertemporal Law in the German-Namibian Context' addresses this issue. Theurer looks at the controversial aspects of the doctrine of intertemporal law and argues that, when this doctrine is applied in the context of past events, we should ask: which laws *really* were in force at the time and which law do we apply to assess the lawfulness of these actions? Focusing on the example of the Ovaherero and Nama reparation claims, Theurer traces the extent to which the application of the doctrine of intertemporal law may be situated between the reproduction of colonial racism and the decolonisation of our retrospective perception of the laws at the time of German colonialism. She sketches what a decolonised application of the doctrine of intertemporal law might look like as well as its impact on reparations. Theurer argues that reparations for colonial crimes should consist of deconstructing colonial racism, refraining from reproducing it, and finding ways of overcoming it. This in itself is a form of reparation.

In this regard, lessons can be learned from the case-study of Sweden. In Chap. 12, Ebba Lekvall explores the process initiated by the Church of Sweden (itself a State institution) to repair colonial abuses against Sweden's indigenous people—the Sami. As the Church played an important role in the colonisation and oppression of the Sami (the effects of which are still felt today), it has worked since the 1990s to address its role in these abuses and embark on a path towards reparation and reconciliation. Lekvall provides a critical analysis of the lack of participation by the Sami in the process and of the limits of the Church's approach to reparation. She discusses whether the process can be a catalyst for adequate reparation for colonial harms to the Sami in Sweden. She argues that while there have been some good faith efforts on the part of the Church, more is needed for the process and substance of reparation to be adequate and effective.

1.5 Testing the Limits of *Factory at Chorzów* and Tracing New Frontiers

The present volume seeks to test the limits of the *Factory at Chorzów* standard of reparation and to flesh out the new frontiers in contemporary legal practice. The volume offers a diversified approach, focusing on new areas of growing importance to assess how the reparation standard has been interpreted, applied, and modernised. The chapters are situated in different legal contexts, and many are linked to efforts—often led by survivors—to come to terms with particularly problematic episodes of international, regional, or local history. Nevertheless, the volume does not profess to be comprehensive and some important areas of the modern practice of reparation are not included, such as the developing practice on environmental reparations and climate justice, or the intricate jurisprudence of international arbitral tribunals in the law governing the protection of foreign investments.

A consistent theme across the contributions in this volume is that reparations in modern international law should strive to adopt a more tailored, victim-centred approach. When reparations are not seen as (just) a consequence of a wrongful act, but as the right of a victim/survivor, this fundamentally changes the lens through which violations are viewed: the focus shifts from the wrongfulness of the perpetrators' conduct to the harms suffered and potential measures to respond to that harm, victims/survivors themselves must be involved in this (creative) process and help identify appropriate reparative measures, which may go beyond restoring the *status quo ante* or may fall far short of it. In practice, all reparations for serious violations of international law are ultimately symbolic. This does not mean, however, that adequate political, financial, and human resources should be not dedicated to the task. It must nonetheless be noted that this proposition is not free from ambiguities or complexities. On the contrary, it raises a wide spectrum of legal, moral, and political considerations and calls into question the very essence of the rules governing reparation. While not resolving these issues, we hope that this volume provides a source of discussion and further reflection.

In closing, we would like to thank the editors of the Netherlands Yearbook of International Law for their valuable assistance throughout the preparation of this edition—in particular the managing editor Carl Lewis—as well as the peer reviewers for performing the double-blind review process, and the authors for contributing to this project.

References

Contreras-Garduño D, Fraser J (2014) The Identification of Victims before the Inter-American Court of Human Rights and the International Criminal Court and Its Impact on Participation and Reparation: A Domino Effect? Inter-American and European Human Rights Journal (2014) 7(1–2)

Fraser J (2024) Bringing the Law to Life: Judicial Operationalisation of International Human Rights Law, in the Domestic Sphere. In: Riyadi E, Tømte A (eds) Human Rights and Legal Methodology in Indonesia. Routledge, Milton Park

ILC (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts (Nov 2001) Supp No. 10 (A/56/10)

Immler NL (2022) The Netherlands-Indies; Rethinking post-colonial recognition from a multi-voiced perspective. Wacana, Journal of the Humanities of Indonesia, 23:3

Laplante L (2013) Negotiating Reparation Rights: The Participatory and Symbolic Quotients. Buffalo Human Rights Law Review 19:217–250

McGonigle Leyh B, Fraser J (2019) Transformation reparations: changing the game or more of the same? (2019) Cambridge International Law Journal, Vol. 8 No. 1

Moffett L, Sandoval C (2021) Tilting at windmills: Reparations and the International Criminal Court. Leiden Journal of International Law (2021) 34:3 749–769, https://doi.org/10.1017/S092215652100025X

Spijkers O (2020) The Case Between Urgenda and the State of the Netherlands. In: Szabó M (ed) Hungarian Yearbook of International Law and European Law, Volume 8, Issue 1 (2020)

van den Herik L (2012) Addressing 'Colonial Crimes' through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia. (2012) Journal of International Criminal Justice 10:3 693–705

van Hoogstraten S, Schrijver N, Spijkers O, de Jong A (eds) (2017) The Art of Making Peace: Lessons Learned from Peace Treaties. Brill, Leiden

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Part I
The Practice of International Human Rights Law in International and Domestic Courts

Chapter 2
Reparations for Displacement since *Chorzów*: Moving from the 'Problems of Displacement' to the 'Problems of the Displaced' via International and Regional Human Rights Bodies

Deborah Casalin

Contents

Abstract At the time the Permanent Court of International Justice was deliberating on the principles of reparation in the *Chorzów* case, mass displacement of people from their homes was not yet broadly recognized as wrongful in international law. The few displacement situations proscribed internationally were seen as affronts to state sovereignty or stability. The interests of displaced individuals and communities were not the main object of international legal protection, and reparation claims would have been an interstate matter. Since then, two major evolutions in international law

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on displacement have reflected and epitomized the broad shift in the international law of reparation from addressing state interests to addressing impacts on individuals and communities. These are: (1) recognition of a broader range of internationally unlawful forms of displacement; and (2) elaboration of various forms of reparation addressing the harms of displacement for individuals and communities. This chapter charts and analyses these two evolutions and demonstrates the important role of international and regional human rights bodies' decisions in response to the claims of displaced people. Given the particular tensions among the interests of states, individuals, and communities in resolving mass displacement, developments on this issue offer salient illustrations of the movement away from state-centricity in the international law of reparations. The role played by human rights bodies also offers a significant example of how actors beyond the state have contributed to this shift.

Keywords Displacement · International/regional human rights bodies · Normative development · Reparations · State responsibility · Victims

2.1 Introduction

In resolving situations of mass displacement, particular tensions arise between the macro-level political 'problems of displacement' and the human-centred 'problems of the displaced', with the former frequently taking precedence over the latter.[1] For example, a state may offer restitution to promote displaced people's return to their areas of origin, without reference to their own interests and choices. This could allow the state to consolidate territorial claims, relieve pressure on host communities, or address inter-group tensions. Alternatively, a state may have an interest in displaced people accepting compensation so that the housing or land they left behind can be made available for other uses, such as resource extraction. These tensions have manifested prominently in post-conflict situations. However, they can also be observed in cases of development-induced displacement, where often marginalized communities must make way for projects which will supposedly benefit the economic development of the country as a whole. In disaster situations, such as flooding, displaced people may also be under pressure to accept compensation and resettlement so that their land can be used for other purposes. As such, displacement is a particularly salient issue to illustrate the more general tension in international law on reparations between state and individual/community interests.

This chapter analyses two main legal developments regarding displacement since the time of the *Chorzów* judgment. These are: (1) the recognition of a broader range of internationally unlawful forms of displacement; and (2) the elaboration of various

[1] The terms 'problems of displacement' and 'problems of the displaced' are from Johansson 2019, p. 139.

forms of reparation which specifically address the harms of displacement for individuals and communities. These two developments reflect the broader shift in international law on reparation from safeguarding the interests of states to addressing impacts on individuals and communities. The main objective of this chapter is to demonstrate how the decisions of international and regional human rights bodies (such as the regional human rights courts/commissions and UN treaty bodies) have played a particularly important role in these normative developments in response to the claims of displaced people. This exemplifies how actors beyond the state—i.e. the human rights bodies and the rights-holders approaching them—have contributed to shaping international law on reparations in a more victim-centric manner.

For the purposes of this chapter, displacement is broadly defined as forced, involuntary, or coerced population movement, with lack of voluntariness as the key defining element.[2] This allows the analysis to trace how a growing range of such situations have been recognized as violations of primary rules of international law, giving rise to an expanding range of context-specific forms of reparation. In principle, no distinction is made between internal and cross-border displacement, as the destination of displaced people generally does not have a bearing on the lawfulness of their initial displacement, and therefore their entitlement to reparation. However, in Sects. 2.3 and 2.4, it will be seen that particularly internal displacement has gained prominence as a matter of international concern and as the subject of reparation claims. This in itself reflects how the focus of international law has evolved from regulating relationships among states to addressing situations within states. It also reflects the particular role played by international and regional judicial and quasi-judicial human rights bodies, where affected individuals or communities may advance their claims for reparation without requiring the diplomatic protection of a state.

Section 2.2 outlines the state of international law regarding displacement around the time of the *Chorzów* judgment. It focuses on conflict displacement (Sect. 2.2.1), population transfers (Sect. 2.2.2), as well as observations on the lack of regulation of other forms of displacement (Sect. 2.2.3). The sections thereafter address two key legal developments since then, i.e. the recognition of a broader range of internationally unlawful forms of displacement (Sect. 2.3) and the elaboration of a range of more victim-centric and context-specific forms of reparation (Sect. 2.4). Sections 2.3 and 2.4 disaggregate the contributions of interstate processes (Sects. 2.3.1 and 2.4.1.) and the role of decisions by international and regional human rights bodies in response to displaced rights-holders' claims (Sects. 2.3.2 and 2.4.2). Finally, Sect. 2.5 draws conclusions on the significance of these normative developments on displacement in shifting international law on reparation from state-centricity to victim-centricity, as well as the role of international and regional human rights bodies in this process.

[2] See Stavropoulou 1994, p. 692.

2.2 Displacement in International Law at the Time of the *Chorzów* Case

In the 1920s, as the Permanent Court of International Justice (PCIJ) was deliberating on the principles of reparation for breaches of international law in the *Chorzów* case, the displacement of people from their homes was not yet broadly viewed as an injustice in international law, or even a matter of international concern. The few forms of displacement which had started to be proscribed internationally were mostly sanctioned as an affront to state sovereignty (e.g. deportation from occupied territory) or the stability of nation-states (e.g. expulsions in breach of minority protection treaties). The tolerance—or even formalization—of large-scale displacement was visible in contexts of armed conflict, population transfer treaties, and forced removals for an array of other purposes, including colonization. The legal position at the time on these three broad types of displacement will be examined in the sub-sections below.

2.2.1 Displacement in Armed Conflict

The only form of conflict displacement which had been explicitly addressed in international law by the time of the *Chorzów* judgment was deportation from occupied territory.[3] The prohibition on this practice was first articulated in the Lieber Code, drafted in the context of the American Civil War, through the injunction that '[p]rivate citizens are no longer … carried off to distant parts'.[4] This provision was not explicitly carried over into the 1899 and 1907 Hague Regulations. Apparently, the practice of deportation was deemed to have fallen into disuse and its prohibition was considered too self-evident. Deportation from occupied territory would in any case have breached the occupying power's duties to maintain order and safety, as well as the prohibition of collective punishment.[5] However, the Hague Regulations proved inadequate to deal with deportations from occupied territories in the context of the First World War (WWI) in Europe. As a result, in the interwar period, the International Committee of the Red Cross began work on a draft convention on the protection of civilians. This would later form the basis for the Fourth Geneva Convention of 1949 (GCIV).[6]

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[3] For an example of the contemporary relevance of this prohibition (regarding arrest warrants issued for the alleged deportation of children from occupied areas of Ukraine to Russia as from February 2022), see International Criminal Court 2023.

[4] Instructions for the Government of Armies of the United States in the Field, adopted 24 April 1863, accessed 31 August (Lieber Code), art 23.

[5] Katselli Proukaki 2018, pp. 5–6; Jacques 2012, pp. 22–25; Dawson and Farber 2012, pp. 48–50; de Zayas 1975, pp. 210–212.

[6] Arai-Takahashi 2012, pp. 61–62.

The law of occupation in the interwar period was strongly rooted in the conservationist principle, of which the primary rationale was not to protect civilians as such, but rather to preserve the underlying sovereignty of the occupied state and the social order established through private property rights.[7] It can thus be supposed that the prohibition on deportation also stemmed largely from this state-centric rationale. As can also be seen in the Lieber Code's explicit reference to the 'modern regular wars of the Europeans, and their descendants in other portions of the globe',[8] the prohibition on deportation was conceptualized in the context of conflicts amongst European states or settlers. Preserving the independence of colonized peoples and protecting them from displacement was not envisaged. Indeed, the pursuit of colonization was actively excluded from the paradigm of the law of occupation as developed and codified in Europe and the United States in this period.[9]

Outside situations of occupation, the League of Nations and the PCIJ were also called upon to take action on situations of conflict displacement which affected (mostly European and/or Christian) minorities. This endeavour was viewed as central to preserving the stability of the system of independent, sovereign nation-states in and around Europe.[10] For example, in response to the displacement of civilians from Eastern Carelia into Finland by Russia, the Finnish government invoked a minority protection treaty between the two countries before the PCIJ. Besides decrying its own economic difficulties in receiving the refugees, Finland emphasized that 'a national minority, which is in imminent danger of complete annihilation, stands in urgent need of all the guarantees and of all the direct assistance which the League of Nations can offer.'[11] However, the PCIJ declined to admit the case, as Russia did not consent to its jurisdiction or cooperate in the proceedings.[12] This may be contrasted with the later approach of the International Court of Justice (ICJ) following the advent of the UN Charter and the recognition of *erga omnes* obligations in relation to the right to self-determination, as well as the fundamental norms of international humanitarian law (IHL) as they later developed.[13]

Furthermore, the League's Fifth Committee was tasked with investigating reports on the situation of Armenian and Greek women and children who had reportedly been forced into adoption, marriage and/or service in Turkish households after being displaced during WWI and the Armenian genocide. On examining the reports, the Committee made recommendations which largely focused on humanitarian measures. These entailed recovering women and children from households and

[7] Ibid., pp. 53–61.

[8] Lieber Code, above n.4, art 25.

[9] Arai-Takahashi 2012, pp. 72–79.

[10] JR 1944, pp. 579–588; Watenpaugh 2010, pp. 1315–1339.

[11] Finnish Minister of Foreign Affairs 1921, pp. 29–30.

[12] PCIJ, *Status of Eastern Carelia*, Advisory Opinion, 23 July 1923, Series B No 5, pp. 28–29.

[13] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136, para 155–160.

placing them in rescue homes, rather than measures to remedy their initial displacement from their homes and/or other associated harms. In any event, these recommendations were never implemented, as the Lausanne Convention (to be discussed in Sect. 2.2.2 below) subsequently superseded earlier agreements and arrangements regarding minorities in Turkey.[14]

2.2.2 Population Transfers

In the era of the *Chorzów* judgment, the form of displacement which was most prominently addressed in the practice of the League of Nations and the PCIJ was the mass cross-border transfer of members of minority groups in terms of bilateral treaties. This particularly concerned treaties concluded in the context of the dissolution of the Ottoman Empire, which were overseen by the League of Nations. Population exchange treaties generally aimed at allowing members of minorities to move to a state where the majority shared their ethnic and/or religious identity, thus further homogenizing the nation-states in question. These treaties—for example, the Convention of Neuilly concluded between Greece and Bulgaria after WWI—usually entailed agreements facilitating voluntary migration of members of minority groups in both directions and compensation for immovable property. However, the voluntary nature of migration in practice was often highly questionable, as minority communities were often directly or indirectly pressured to move.[15]

The Convention of Lausanne, concluded after Turkey prevailed in the Greek-Turkish War of 1919—1923, went a step further by mandating bilateral population exchange of Greek and Turkish minorities. While this exchange had grave consequences for the people involved, the practice of compulsory population exchange in terms of a treaty was not considered to be prohibited by positive law at the time. Indeed, member states of the League rather saw this as a solution to the perceived problem of heterogeneity within nation states and the resultant need to regulate the situation of minorities, in a context which was deemed too unstable to be dealt with by a minority protection treaty (as in Central Europe) but also not amenable to far-reaching intervention (as in the colonies).[16] The former type of treaty would have provided indirect protection from displacement, as the expulsion of members of minority groups from their homes and expropriation of their properties in a discriminatory manner would most likely have constituted a breach of the protections agreed to in the treaty. This was established by the PCIJ in connection with Poland's attempted expulsion of former German settlers (who had been granted Polish nationality) from their lands. Although Poland had adopted a law to this effect which was ostensibly neutral, the PCIJ found that the situation was governed by the

[14] Watenpaugh 2010, pp. 1323, 1333–1337.

[15] See JR 1944, pp. 579–585; Özsu 2015, pp. 3–12.

[16] Özsu 2015, pp. 4–5, 12; see also Katselli Proukaki 2018, p. 9; JR 1944, pp. 585–588.

Treaty of Versailles (which guaranteed the protection of minorities in Poland) and that the actions of Poland were not in conformity with the treaty.[17]

The PCIJ was called upon to settle disputes relating to the Conventions of Lausanne and Neuilly, and issued the relevant judgments in 1924 and 1925 respectively.[18] In these judgments, the legality of the population transfers (ostensibly voluntary in the first case and compulsory in the second) was not questioned, nor were issues of reparation raised. Rather, the PCIJ's role was confined to interpreting the treaties' scope of application and terms. Thus, the PCIJ did not associate these population transfers with the principles on reparation it was developing concurrently in the *Chorzów* case. Rather, it contributed to legitimating population transfers agreed between states, regardless of the actual conditions of implementation and their effects on the individuals and communities concerned.[19]

2.2.3 Other Forms of Displacement

At the time of the PCIJ's decision in *Chorzów*, besides minority protection treaties and a largely implicit prohibition on deportations from occupied territory, there were no explicit protections against or prohibitions of displacement in international law. Other contemporary forms of displacement, such as the forced removal and dispossession of colonized peoples in favour of settlers, appeared to meet with little reaction at the legal level and certainly not internationally.[20] Indeed, de Zayas highlights how displacement through colonial violence and dispossession, along with other forms of internal displacement at the time, was considered to be a domestic issue rather than a matter to be regulated by international law.[21] However, for purposes of applying the principle of inter-temporality, a further examination of dissenting legal opinions (including those of displaced peoples themselves) would be warranted to nuance this view and avoid perpetuating the 'standard of civilization' into the present day.[22] For example, Tzouvala points out that colonized peoples were at least considered to be owed the basic 'obligations of humanity' at the time and were in some cases also parties to treaties.[23] Nevertheless, internal displacement was largely unregulated in international law at the time owing to sovereignty concerns. This effectively remained the case well into the 20th century. The changing status of displacement in

[17] PCIJ, *German Settlers in Poland*, Advisory Opinion, 10 September 1923, Series B No 6.

[18] PCIJ, *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation)*, Judgment, 12 September 1924, Series A, No. 3; PCIJ, *Exchange of Greek and Turkish Populations*, Advisory Opinion, 21 February 1925, Series B No. 10.

[19] Katselli Proukaki 2018, pp. 6–7; Özsu 2015, p. 12.

[20] For examples roughly contemporary to the *Chorzów* case (in South Africa and Kenya respectively), see Schechla 1993, pp. 254–255; Veit 2011, p. 5.

[21] De Zayas 1975, pp. 250–251.

[22] See Tzouvala 2023.

[23] Ibid.

international law—from an inevitable by-product of international or internal affairs to a frequently wrongful act giving rise to reparation claims by displaced individuals and communities—is discussed further in Sect. 2.3 below.

2.3 From Inevitability to Wrongful Act: Recognition of a Broader Range of Internationally Unlawful Forms of Displacement

2.3.1 Interstate Processes

Since the 1940s, interstate legal processes leading to the progressive prohibition of a growing range of forms of displacement have proceeded along four largely concurrent and interconnected tracks.[24] The first track was the codification of further IHL prohibitions on certain forms of conflict-related displacement and their crystallization as rules of customary international law. The second was the accompanying criminalization of these forms of displacement as war crimes and/or elements of crimes against humanity or genocide. The third was the (mostly implicit) broadening of the prohibitions or legal limitations on displacement beyond contexts involving armed conflict and/or international crimes, via the adoption of global and regional human rights treaties. The fourth track entailed the coalescence and growing recognition of an emerging, overarching 'right not to be displaced', mainly via global soft law instruments and African regional treaties. These legal developments helped to move the focus of international law on displacement from state interests to the impacts on individuals and communities. However, a number of protection and accountability gaps remain, which are outlined briefly in this sub-section. Subsequently, Sect. 2.3.2 highlights how decisions on displaced rights-holders' claims before international regional human rights bodies have contributed to addressing these gaps regarding reparation for displaced people.

Regarding conflict-related displacement, the relevant body of IHL has developed via piecemeal prohibitions with differing material and personal scopes. These consist of the prohibitions on deportation from or forcible transfer within an occupied territory, or causing cross-border displacement or ordering internal displacement of civilians in non-international armed conflict.[25] The prohibition of deportation from occupied territories (see Sect. 2.2.1 above) is widely considered to have

[24] For extensive accounts of legal developments along these four tracks, as well as discussions of their relative limitations and gaps, see generally: Katselli Proukaki 2018; Moffett 2015; Morel 2014; Dawson and Farber 2012; Jacques 2012; Acquaviva 2011; de Zayas 1975.

[25] Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, 75 UNTS 287, entered into force 21 October 1950, art 49; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, 1125 UNTS 609, entered into force 7 December 1978 (Additional Protocol II), arts 17 (1) and (2).