The Rights of Victims to Reparation: The Importance of Clear Thinking

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"Reparation" or "reparations", "human rights" or "international humanitarian law", "victim", "international armed conflict" or "non-international armed conflict". Words are – or should be – important for lawyers, including international lawyers. But many use them loosely, perhaps deliberately so. A careful use of language is as important for the field of "reparation for victims of armed conflict" as for any other area of international law.

A significant contribution of the United Nations (UN) International Law Commission (ILC) to the "common language" of international law has been to promote uniformity of terminology (and to do so across the six United Nations languages, with hopefully some influence in other languages too). With common terminology should come a common understanding of concepts, and clarity of thought. Such clarity is not always present; perhaps, again, it is sometimes deliberately absent, particularly in what might seem to be exercises in advocacy rather than objective legal analysis.

We see the ILC's contribution to a common terminology in much of its output. For example, in its current topic *Identification of customary international law*, the term "customary international law" is preferred to others, such as "international customary law" (which may carry the misleading implication that customary international law is part of some wider class of "customary law"); or "custom", or "international custom" (which, when isolated from the context of Art. 38.1 of the ICJ Statute, does not necessarily carry the implication of being law).

A particularly important ILC contribution to terminology is to be found in the law of international responsibility (both of States and of international organisations). The law of State responsibility is, or should be, central to the present *Trialogue*.

For example, the word "reparations" is best reserved for its traditional meaning of payments and other transfers of resources imposed at the end of an armed conflict ("war reparations"), in particular under peace treaties or similar arrangements. "Reparation", on the other hand, is best used with the meaning given to it in the ILC's 2001 Articles on State responsibility (that is, as a legal consequence of an internationally wrongful act). While in this

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respect the 2001 Articles are applicable as such only to secondary obligations owed to other States or to the international community as a whole, they are

> "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State" (Art. 33).

Thus, as a general remark, I would suggest that, in so far as we are dealing with a legal right to reparation in respect of internationally wrongful acts, it would be helpful to frame the debate in terms of the Articles on State responsibility. These Articles offer useful guidance on a wide range of matters that are closely related to the subject of this *Trialogue*, such as the obligation to make "full reparation" for an injury caused (including any material or moral damage). Full reparation may take various forms: restitution, compensation, and satisfaction, either singly or in combination. Other legal consequences are the obligation to cease the internationally wrongful act, if it is continuing; and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Of course, a State may decide to go further than is required by general international law. If it does, that may be a policy choice, or dictated by a binding treaty or domestic law.

A related point is this. As international lawyers, we should be clear about the limited role of international courts and tribunals. We should not look to courts to give detailed policy guidance. That is not their function, which is generally set out in their statutes as being to decide on the basis of law such legal disputes as are properly before them. It is not for international courts and tribunals to tell Governments how best to organise reparation mechanisms (unless they have been mandated to do so, which seems unlikely). That is surely as it should be since there are other factors at play apart from legal considerations.

It should also be kept in mind that great care is needed when seeking to draw general conclusions about general (customary) international law from particular treaties or resolutions, or from the decisions or views of various human rights bodies or international criminal courts and tribunals, each of which offer interpretations (not infrequently hotly contested) under their own specific treaties or resolutions. Quite apart from the fact that the international instruments concerned differ in substance, the decisions of the bodies concerned vary greatly in authority, not least given their varying quality and reception by States. Some decisions are complied with, others not. Some instruments have no enforcement mechanisms, others are weak in this respect. Soft law instruments, in particular, need to be examined with

particular circumspection. There may be a reason why such instruments have remained "soft", that is to say, non-law. For example, in the context of the *Trialogue*, there may be a need seriously to examine the legal standing of the oft-invoked 2005 *Basic Principles and Guidelines on the Right to a Remedy and Reparation*.[1]

Lawyers do play several roles. An important role is that of assisting policy-makers, including in such matters as designing reparation mechanisms, or in advocacy for causes. In such cases (as in others), it is imperative that lawyers distinguish between what the law is and what it may or should become. They should also bear in mind that they are not only advising on the law; they are assisting in the development of policy. Another important distinction is between advising on the law before decisions are taken, and the advocacy role of defending decisions once they have been taken. These are all important distinctions; what matters above all is that lawyers should be clear in their own minds, and if necessary in public, about the role they are playing on any particular occasion. Hopefully that will be seen in the various contributions to this *Trialogue*.

[1] See *C. Sandoval's* contribution to this focus section.