

Reparation for victims of serious violations of international humanitarian law: New developments

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Abstract

This article aims to determine what important new developments have emerged in reparation for victims of serious violations of international humanitarian law (IHL). Our hypothesis is that there have been significant new developments in this

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area of particular relevance to IHL and that reparation for victims of serious violations of IHL is increasingly being incorporated into this body of law as one of its key components. It is submitted that the following developments are evidence of this gradual transformation of IHL: (i) broad recognition of the right of victims of serious violations of IHL to reparation; (ii) extension of the scope of the obligation to provide reparation under IHL to include non-State armed groups and individuals as well as States; (iii) the existence of innovative domestic reparation mechanisms complemented or supervised by regional courts, as evidenced by experiences in Latin America; and (iv) the reparation system of the International Criminal Court as a global mechanism.

Keywords: international humanitarian law, reparation, victims, serious violations, new developments.

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Introduction

Breaches of international obligations under international humanitarian law (IHL) entail international State responsibility and individual criminal responsibility.¹ Furthermore, as obligations arising from IHL, such as those set out in Article 3 common to the four Geneva Conventions (non-international armed conflicts; NIACs), refer to “Parties to the conflict”, IHL links armed groups involved in hostilities to other groups or a State.² This means that non-State armed groups must also undertake to comply with IHL.³

It is widely recognized that States are required to provide reparation when they are responsible for violations of the rules of international law, as has been consistently held in international case law.⁴ The Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission (ILC Draft Articles), seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts and the ensuing legal consequences, in particular, content on reparation for the harm caused by such acts.⁵ Article 31 establishes the principle of full reparation according to which a State bearing responsibility for an internationally wrongful act is under

- 1 See Marco Sassòli, *International Humanitarian Law*, Edward Elgar Publishing, Cheltenham, 2019, pp. 84–5 and 150–1.
- 2 Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, 31 May 2004, para. 22.
- 3 See M. Sassòli, above note 1, pp. 196–7; Marco Sassòli and Yuval Shany, “Should the Obligations of States and Armed Groups Under International Humanitarian Law Really be Equal?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011.
- 4 For example, Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland)*, Series A, No. 17, Judgment (Merits), 13 September 1928, p. 29; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 259.
- 5 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, p. 31.

an obligation to make full reparation for any material and moral damage caused by that act.⁶ There are, however, ongoing debates about the role of reparation in addressing the consequences of armed conflicts. These debates involve contestation about moral values, different conceptions of justice and approaches to international law.⁷

The article's main research question focuses on determining what important new developments there have been with respect to reparation for victims of serious violations of IHL and examining some of them. Our hypothesis is that there have been significant new developments in reparation for victims of atrocities that are part of or specific or relevant to IHL. Increasingly, IHL is incorporating reparation for victims of serious violations of IHL as one of its core components, adding an important reparative purpose to its more traditional and better-known preventive and punitive purposes. These recent developments are evidence of a gradual transformation of IHL. They include: (i) broad recognition of the right of victims of serious violations of IHL to reparation; (ii) the consideration of subjects of IHL other than States, such as non-State armed groups and individuals, as parties required to provide reparation; (iii) the consolidation of innovative domestic reparation mechanisms complemented or supervised by regional courts, as evidenced by experiences in Latin America; and (iv) the International Criminal Court (ICC) reparation system as a global mechanism with jurisdiction over reparation for victims of serious violations of IHL, as emerging practice shows.

This article seeks to fill some of the gaps in the literature. The issue of reparation for the victims of atrocities has mainly or traditionally been examined from the perspective of international human rights law (IHRL). Among other authors, Sandoval holds that IHL “has not evolved at the same pace as international human rights law”.⁸ Furthermore, academic articles or individual chapters on reparation in IHL tend to focus almost exclusively on a very specific aspect or a particular institution, largely ignoring other aspects. This article, in contrast, looks at a selection of important recent developments in reparation for victims of serious violations of IHL and aims to provide a more comprehensive analysis, albeit with an emphasis on certain aspects.

The article is divided into three parts. The first analyses the basis for reparation for victims of serious violations of IHL and some current developments in this regard. It examines the shaky start to the development of the obligation to provide reparation under IHL and current thinking on the subjective right of the victims of serious violations of IHL to reparation. It

6 Report of the International Law Commission on the work of its fifty-third session, 23 April–1 June and 2 July–10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, UN Doc. A/56/10, 2001.

7 Christian Marxsen, “Unpacking the International Law on Reparation for Victims of Armed Conflict”, in Christian Marxsen and Anne Peters (eds), *Reparation for Victims of Armed Conflict*, Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper No. 2018-19, Heidelberg, 2018, p. 3.

8 Clara Sandoval, “The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation”, in C. Marxsen and A. Peters, *ibid.*, p. 45.

provides an overall analytical mapping of the relevant sources of law, mechanisms and subjects of law relating to reparation for victims of armed conflict. The second part looks at experiences involving reparation for victims of armed conflict in Latin America. The countries examined are Colombia, whose experience is analysed in greater depth, as well as Peru, Guatemala and El Salvador. The analysis mainly focuses on domestic reparation programmes, reparation provided by non-State armed groups and the case law of the Inter-American Court of Human Rights (I/A Court HR) on reparation relating to these countries. The third part addresses reparation for victims of serious violations of IHL and the ICC. It takes a look at the reasons that justify that the ICC has a reparation system and examines its limitations, with an emphasis on IHL-related content. This is followed by discussion of the extent to which this system provides procedural and substantive justice for victims of serious violations of IHL.

Reparation in IHL: Basis and developments

The development of the notion of reparation within the normative and practical framework of IHL, centred on repairing harm caused in international armed conflicts (IACs), got off to a shaky start. In IHL, individuals were intuitively considered beneficiaries but not holders of rights. They were considered objects of protection but not actual subjects of IHL. Relevant treaty-based IHL provisions on reparation are Article 3 of Hague Convention IV of 1907 respecting the Laws and Customs of War on Land and Article 91 of the Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of IACs of 1977 (Additional Protocol I).

Article 3 of Hague Convention IV provides that a “belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation”. According to Article 91 of Additional Protocol I, parties to a conflict shall be “liable to pay compensation” for violations of the Geneva Conventions and Additional Protocol I. The commentary of the International Committee of the Red Cross (ICRC) on this article states that this obligation applies to all parties to an armed conflict and that those entitled to compensation will normally be parties to the conflict or their nationals.⁹ Article 38 of the Second Protocol of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict provides that individual criminal responsibility does not affect the responsibility of States “including the duty to provide reparation”.

Traditionally, these IHL treaty provisions were interpreted as giving rise to obligations between States, the fulfilment of which was owed only to other States parties in armed conflicts. It was only after IHL ventured beyond the inter-State/State sphere, increasing the focus on people in a “humanization” process, that

⁹ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, paras 3652 and 3656.

experts have considered that IHL can recognize the rights of individuals.¹⁰ The ICRC Commentary on Article 91 of Additional Protocol I clearly confirms this, observing that “since 1945 a tendency has emerged to recognize the exercise of rights by individuals”.¹¹ There is, as yet, no provision like Article 91 in treaty law applicable to NIACs that establishes an obligation for all parties to such conflicts to provide reparation. However, Rule 139 of customary IHL applicable in both IACs and NIACs stipulates that “[e]ach party to the conflict must respect and ensure respect for international humanitarian law”. Furthermore, the ICRC recognizes in Rule 150 of customary IHL that practice indicates that non-State armed groups are required to provide reparation for harm caused by violations.¹²

The reason behind this State-centric approach was that most IHL treaty provisions expressly stipulate State obligations and do not clothe them in the language of rights. However, as Peters observes, there are numerous precepts and prohibitions in IHL treaties that require not only the protection of individuals but also expressly refer to “rights”, “liberty”, “claims”, “entitlements” and “guarantees” in relation to individuals.¹³ Other noteworthy provisions are the non-renunciation of rights stipulated in Article 7 of the Third Geneva Convention and Article 8 of the Fourth Geneva Convention, the ban on scientific experiments in Article 11 of Additional Protocol I and the prohibition on special agreements that affect protected persons and safeguard clauses on most favourable treatment in Article 6 of the First, Second and Third Geneva Conventions and Article 7 of the Fourth Geneva Convention.

In sum, the wording of IHL provisions is mixed, making the textual analysis inconclusive.¹⁴ However, the preparatory work and the *telos* of the Geneva Conventions would suggest that the possibility of individual rights under IHL should be considered more seriously.¹⁵ This problem is not resolved by the ILC Draft Articles. While Article 33(2) establishes that direct obligations towards individuals can exist, especially regarding human rights violations and other breaches of international law where the primary beneficiary of reparation is not a State,¹⁶ it also specifies that such direct obligations towards individuals exceed the scope of the Draft Articles, which should not affect these obligations.¹⁷

In any event, the ICC is now established, through its recent practice, as a global mechanism where victims of serious violations of IHL can exercise their right to reparation. The ICC and hybrid criminal courts, such as the Extraordinary

10 See, for example, *ibid.*, para. 3657; Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000; Lawrence Hill-Cawthorne, “Rights under International Humanitarian Law”, *European Journal of International Law*, Vol. 28, No. 4, 2017.

11 Y. Sandoz, C. Swinarski and B. Zimmermann, above note 9, para. 3657.

12 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, p. 549.

13 Anne Peters, “Rights to Reparation as a Consequence of Direct Rights under International Humanitarian Law”, in C. Marxsen and A. Peters, above note 7, p. 29.

14 *Ibid.*

15 *Ibid.*, pp. 29–30.

16 ILC, above note 5, p. 87.

17 *Ibid.*

Chambers in the Courts of Cambodia (ECCC), determine individual criminal responsibility for serious violations of IHL which constitute war crimes.¹⁸ In these courts, the victims of such violations and other atrocities committed during armed conflict can claim and receive reparation ordered against convicted individuals.¹⁹ The ICC reparation system is examined later.

Some contemporary international instruments also include provisions on reparation for victims. For example, the Rome Statute of the ICC (Article 75), the 2006 International Convention for the Protection of all Persons from Enforced Disappearance (Article 24(4)) and the 2019 ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity (Article 12(3))²⁰ are part of the growing trend towards the identification of an individual's right to reparation for serious violations of IHL and other atrocities committed during armed conflict.

Some regional systems, the I/A Court HR in particular, have recognized that the injured party has a subjective right to reparation.²¹ This court understands reparation in subjective terms and has always taken Article 63(1) of the American Convention on Human Rights (ACHR) seriously.²² In this vein, the I/A Court HR has developed an independent reparation system which, along with national transitional justice experiences, has served as a model for the ICC in interpreting Article 75 ("Reparations to victims") of its Statute.²³

The I/A Court HR and the European Court of Human Rights do not have the power to determine the international responsibility of States for serious violations of IHL or, strictly speaking, order them to provide reparation to victims of such violations. However, these courts have relied on sources of IHL for interpretation purposes²⁴ and, on this basis, awarded reparation to victims of armed conflict. I/A Court HR's practice, which is examined below, illustrates this. The African Court on Human and People's Rights also has the power, subject to certain jurisdictional requirements, to order reparation for victims of serious violations of IHL.²⁵

The International Court of Justice (ICJ) can order reparation for serious violations of IHL in an inter-State case in favour of the complainant State where the victims of such violations should be the ultimate beneficiaries of the reparation award.²⁶ This would suggest that, under the recent ICJ's judgment on

18 Rome Statute of the ICC, Art. 8; Law on the Establishment of the ECCC, Arts 6–7.

19 Rome Statute of the ICC, Art. 75; ECCC Internal Rules, Rules 23–23 *quinquies*.

20 Fourth Report on Crimes Against Humanity by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/725, 18 February 2019.

21 Ludovic Hennebel and Hélène Tigroudja, *Traité de droit international des droits de l'homme*, 2nd ed., Pedone, Paris, 2018, p. 1386.

22 *Ibid.*, p. 1441.

23 *Ibid.*

24 Françoise J. Hampson, "The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body", *International Review of the Red Cross*, Vol. 90, No. 871, 2008.

25 Protocol to the African Charter on Human and People's Rights, Art. 3(1).

26 See ICJ, *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)*, Compensation, Separate Opinion of Judge Cançado-Trindade, 19 June 2012, para. 100; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 6 December 2016, Separate Opinion of Judge Cançado-Trindade, paras 24–7.

reparations in the case of *Armed Activities on the Territory of the Congo*,²⁷ the Democratic Republic of the Congo should share out among the victims of the serious violations of IHL part of the compensation Uganda was ordered by the ICJ to pay to it. The ICJ found that people had suffered harm as a result of the violations committed and set the amount of the compensation to be paid.²⁸ There are also quasi-judicial bodies, such as the United Nations (UN) Compensation Commission²⁹ and the Eritrea–Ethiopia Claims Commission,³⁰ both of which have a mandate to deal with serious violations of IHL, among other things.

What has usually happened is that victims of serious violations of IHL have claimed and received reparation nationally. Domestic mechanisms consist mainly of administrative reparation programmes.³¹ Victims have also claimed and been awarded reparation in national civil and/or criminal proceedings against (former) officials and agents of the State, members of armed groups and corporations.³² International reparation mechanisms are complementary or subsidiary to domestic ones. Some such national developments in Latin America are examined below.

An instrument that has made a crucial contribution in this area is 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, adopted by the UN General Assembly in 2005³³ (UN Principles), which affirm the right of victims of serious violations of IHL to “full and effective reparation”.³⁴ Although this instrument is not legally binding, it reflects a strong consensus among stakeholders, including States. It marked an important step in the evolution of the right to reparation because it served as the conceptual catalyst that brought together the views of victims, civil society, the UN, regional organizations and States.³⁵

Generally speaking, academic positions on reparation for victims acknowledge the existence of a (customary) individual right to reparation for serious violations of IHL although certain aspects of implementation are defined according to specific contexts.³⁶ All in all, the vast majority of academics consider

27 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 9 February 2022.

28 *Ibid.*, paras 133–258.

29 UN Compensation Commission, Documents, available at: <https://uncc.ch/documents> (all internet references were accessed in March 2022).

30 Eritrea–Ethiopia Claims Commission, available at: <https://pca-cpa.org/en/cases/71/>.

31 See Cristián Correa, “Operationalising the Right of Victims of War to Reparation”, in Cristián Correa, Shuichi Furuya and Clara Sandoval, *Reparation for Victims of Armed Conflict*, Cambridge University Press, Cambridge, 2020, pp. 126–63.

32 *Ibid.*, pp. 101 and 107–108; Suichi Furuya, “The Right to Reparation for Victims of Armed Conflicts”, in C. Correa, S. Furuya and C. Sandoval, *ibid.*, pp. 46–51.

33 UN General Assembly, Resolution Adopted by the General Assembly on 16 December 2005: 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, 21 March 2006.

34 UN General Assembly, *ibid.*, UN Principle 18.

35 C. Sandoval, above note 8, p. 46.

36 For more details, see Christian Marxsen, “Introduction: The Emergence of an Individual Right to Reparation for Victims of Armed Conflict”, in C. Correa, S. Furuya and C. Sandoval, above note 31,

that the victims of serious violations of IHL are entitled to claim and receive reparation.³⁷ Based on international and national practice, some authors recognize victim-centred approaches and the existence or emergence of a right to reparation with substantive and procedural content.³⁸

It is not a stretch to concur with those who, considering that individuals are subjects of international law, conclude that a (customary) right to reparation has emerged for victims of serious violations of IHL. This is also practicable owing to the loose wording of IHL provisions. Although they were not originally interpreted in this way, a different interpretation can be adopted today in the light of changing circumstances and new developments and according to the principle of the dynamic interpretation of the law.

Furthermore, the same or similar developments in international and domestic practice concerning the entitlement of victims of serious violations of IHL and other atrocities committed during armed conflict to claim and receive reparation have also taken place in IHRL and international criminal law, as observed by a number of experts.³⁹ It is indeed difficult to accept that the situation should be any different under IHL.⁴⁰ Similarly, in relation to Rule 150 of customary IHL, which establishes that a State responsible for violations of IHL “is required to make full reparation for the loss or injury caused”, the ICRC identified practices enabling victims of serious violations of IHL to seek reparation directly from the State responsible.⁴¹ Such practices include Latin American experiences, which are examined below.

Additionally, there is clearly a growing trend towards victims being able to seek reparation from other entities, particularly non-State armed groups and convicted individuals, a development that is examined in detail below. It is important to mention here that the ICRC study on customary IHL concluded that armed groups can “incur responsibility for acts committed by persons forming part of such groups”.⁴² Indeed, some authors have considered theories

pp. 10–12; Anne Peters, “Conclusion: Reparation for Victims of Armed Conflict”, in C. Correa, S. Furuya and C. Sandoval, above note 31, pp. 268–70.

37 For example, Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge University Press, Cambridge, 2012, pp. 39–43 and 117–28; Paola Gaeta, “Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?”, in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, pp. 305–27; S. Furuya, above note 32, pp. 16–91.

38 See S. Furuya, above note 32, pp. 16–91; C. Evans, *ibid.*; P. Gaeta, *ibid.*, pp. 305–27; Clara Sandoval, “International Human Rights Adjudication, Subsidiarity, and Reparation for Victims of Armed Conflicts”, in C. Correa, S. Furuya and C. Sandoval, above note 31, pp. 179–264; M. Sassòli, above note 1, pp. 91–8; Emily Crawford and Alison Pert, *International Humanitarian Law*, 2nd ed., Cambridge University Press, Cambridge, 2020, pp. 289–90.

39 For example, Dinah Shelton, *Remedies in International Human Rights Law*, 3rd ed., Oxford University Press, Oxford, 2015; Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Brill, Leiden/Boston, 2020.

40 Rainer Hofmann, “The 2010 International Law Association Declaration of International Law Principles on Reparation for Victims of Armed Conflict”, in C. Marxsen and A. Peters, above note 7, p. 33.

41 J.-M. Henckaerts and L. Doswald-Beck, above note 12, pp. 541–9.

42 *Ibid.*, p. 550.

such as the organizational responsibility of armed groups⁴³ and the binding force of IHL on organized armed groups. There are various explanations as to why they are bound by IHL: via the State; as individuals; because customary IHL is applicable to them; by virtue of the fact that they exercise *de facto* governmental functions; or because they have consented to it.⁴⁴

However, the ICRC study on customary IHL observes that the consequences of such responsibility are not clear. In particular, it is unclear “to what extent armed opposition groups are under an obligation to make full reparation”.⁴⁵ The ICRC did, however, conclusively find that there is practice to the effect that armed groups are required to provide reparation for the damage resulting from serious violations of IHL.⁴⁶ Based on recent practice, a growing number of academics have also identified an emerging obligation for armed groups to provide reparation to victims of serious violations of IHL and other atrocities committed during armed conflict.⁴⁷

Developments relating to reparation in IHL and recent national practice in Latin America

Colombia

Colombia is an important case in terms of national developments in reparation for victims of serious violations of IHL and other atrocities committed during armed conflict. Following a NIAC spanning five decades, the Colombian Government and the Revolutionary Armed Forces of Colombia (FARC) signed the Final Peace Agreement in 2016, establishing the Comprehensive System for Truth, Justice, Reparation and Non-Repitition.⁴⁸

The Peace Agreement includes provisions on reparation and considers the FARC as a party required to provide reparation and adopt transitional justice measures consistent with international law. It is based on the principle of collective

43 For example, Luke Moffett, *Justice for Victims Before the International Criminal Court*, Routledge, Abingdon, 2014, pp. 149–50; Jann K. Klefner, “The Applicability of International Humanitarian Law to Organized Armed Groups”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 454–6.

44 J. K. Klefner, *ibid.*, pp. 445–60. See also Andrew Clapham, “Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups”, *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, pp. 920–5.

45 J.-M. Henckaerts and L. Doswald-Beck, above note 12, p. 550.

46 *Ibid.*, pp. 549–50.

47 For example, Paloma Blázquez, “Does an Armed Group Have an Obligation to Provide Reparations to its Victims? Construing an Obligation to Provide Reparations for Violations of International Humanitarian Law”, in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations*, Brill/Nijhoff, Leiden, 2018, pp. 406–28; Laura Íñigo-Álvarez, “The Obligation to Provide Reparations by Armed Groups”, *Netherlands International Law Review*, Vol. 67, No. 3, 2020; S. Furuya, above note 32, pp. 62–4; Olivia Herman, “Beyond the State of Play: Establishing a Duty of Non-State Armed Groups to Provide Reparations”, *International Review of the Red Cross*, Vol. 102, No. 915, 2020.

48 See also Marcela Giraldo Muñoz and Jose Serralvo, “International Humanitarian Law in Colombia: Going a Step Beyond”, *International Review of the Red Cross*, Vol. 101, No. 912, 2019, pp. 1135–46.

responsibility under which those who directly or indirectly took part in the armed conflict and were involved in serious violations of IHL are considered accountable.⁴⁹

The above-mentioned Comprehensive System, which is made up of judicial and non-judicial mechanisms, was established to carry out the Peace Agreement.⁵⁰ These mechanisms have been implemented in a coordinated way to achieve the objectives set, including enforcing the rights of victims to the greatest extent possible. This complements the existing legal framework on reparation, consisting of Act 975/2005 (2005) on the reintegration of the members of armed groups who make an effective contribution to peace and Act 1448/2011 (2011) on measures for comprehensive reparation and assistance for victims of the NIAC. Although legally sophisticated and comprehensive, the administrative reparation programmes resulting from these two laws met with a number of difficulties in their implementation.⁵¹ For victims, reparation is the most tangible manifestation of the government's efforts to compensate for the harm caused.

The Colombian system currently comprises three entities: the Commission for Truth, Reconciliation and Non-Repetition, the Missing Persons Unit responsible for searching for people who disappeared as a result of the armed conflict and the Special Jurisdiction for Peace.⁵² There are various comprehensive reparation measures in place corresponding to the categories referred to in the UN Principles – restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition – and collective reparation measures for the geographic areas, communities and groups most affected by the conflict and most vulnerable.

The question of vulnerable groups and their entitlement to reparation in Colombia is dealt with in Act 1448/2011, which sets out gender and differentiated approaches to reparation.⁵³ Colombia's legal and institutional framework for reparation is consistent with the protection that the legal system provides for vulnerable groups, such as women, persons with disabilities, children, ethnic minorities, older people and internally displaced people.⁵⁴ Implementation of the reparation measures has been sketchy although the situation has begun to improve in recent years with the introduction of a fast-track procedure to give these groups priority access to reparation.⁵⁵ Even so, progress in implementing the measures to provide reparation to victims of sexual violence and ethnic minorities remains slow.⁵⁶

The Final Peace Agreement also seeks to strengthen the existing comprehensive reparation programme, facilitating its implementation and

49 Jurisdicción Especial para la Paz, *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, 24 November 2016, p. 127, available at: https://www.jep.gov.co/Marco%20Normativo/Normativa_v2/01%20ACUERDOS/N01.pdf.

50 *Ibid.*, p. 8.

51 Nelson Sánchez and Adriana Rudling, *Reparations in Colombia: Where to?*, Policy Paper, Queen's University, Belfast, 2019, p. 7.

52 Jurisdicción Especial para la Paz, above note 49, pp. 129–30.

53 N. Sánchez and A. Rudling, above note 51, p. 23.

54 *Ibid.*

55 *Ibid.*, p. 7.

56 María Cielo Linares, *Setting an Agenda for Sustainable Peace: Transitional Justice and Prevention in Colombia*, International Center for Transitional Justice, New York, 2021, pp. 46–8 and 61.

requiring all those who took part in the NIAC to contribute to providing reparation.⁵⁷ The reasoning behind the involvement of the FARC in the Peace Agreement and requiring it to provide reparation is that if the idea that those responsible for harm resulting from wrongful acts must provide reparation seems coherent, why should that logic not also apply to those cases where victims have been harmed by organized armed groups? In other words, what can be done to “fill the current accountability gap”?⁵⁸

According to the ILC Draft Articles (Article 10), the conduct of a rebel group such as the FARC, if it becomes the government of a State, is considered an “act of that State”. However, it is very difficult to determine this in practice, and it leaves victims unprotected, particularly in a context as complicated as post-conflict Colombia. The UN Principles have gaps in relation to the role of non-State actors, such as the FARC. Although UN Principle 15 recognizes that the obligation to provide reparation can apply to “a person, a legal person or other entity”, UN Principle 16 holds that “States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations”.

This principle apparently determines that the State has a subsidiary responsibility to provide reparation. However, the UN Principles could potentially indicate that there is an obligation on armed groups such as the FARC to provide reparation for harm caused to victims.⁵⁹ Furthermore, in relation to Rule 150 (“Reparation”) of customary IHL, the ICRC recognizes that there is “some practice to the effect that armed opposition groups are required to provide appropriate reparation for the damage resulting from violations of international humanitarian law”.⁶⁰

There is sufficient evidence to suggest that the collective responsibility of armed groups such as the FARC can be conceptualized in international law and that their obligation to provide reparation is simply a matter of the progressive development of the law.⁶¹ Analysis of the Colombian experience and other practices has led the ICRC⁶² and academics⁶³ to identify an emerging obligation requiring armed groups that have caused harm to victims as a result of serious violations of IHL and other atrocities committed during armed conflict to provide reparation to them. These practices include resolutions adopted by UN bodies, agreements between parties to armed conflict, instruments issued *motu proprio* by armed groups, domestic legislation, reports by international commissions and missions, etc.⁶⁴ In recent years, various UN bodies and international non-governmental organizations have repeatedly stated that both

57 N. Sánchez and A. Rudling, above note 51, p. 64.

58 P. Blázquez, above note 47, p. 428.

59 *Ibid.*, p. 409.

60 J.-M. Henckaerts and L. Doswald-Beck, above note 12, p. 549.

61 P. Blázquez, above note 47, p. 427.

62 J.-M. Henckaerts and L. Doswald-Beck, above note 12, pp. 549–50.

63 For example, C. Evans, above note 37, pp. 213–16; P. Blázquez, above note 47, pp. 418–26; L. Iñigo-Álvarez, above note 47; O. Herman, above note 47.

64 See, for example, J.-M. Henckaerts and L. Doswald-Beck, above note 12, pp. 549–50.

States and other parties to armed conflict must provide reparation for harm caused to victims. However, there are still key questions that need to be addressed, such as: Where can victims enforce their right to reparation? How realistic is it to expect armed groups such as the FARC to provide reparation? What kind of reparation suits each specific case?

In terms of temporal scope, transitional justice coexists with the rules of IHL that apply to the post-conflict period, including the right to reparation.⁶⁵ Transitional justice and IHL, along with IHRL, have been used as theoretical frameworks in Colombia to define different types of reparation for victims of serious violations of IHL during the armed conflict with the FARC. The starting point for the Colombian experience was the relationship between peace and reparation; reparation is important for establishing and consolidating peace.⁶⁶

The predominant focus of the Colombian model is collective and comprehensive reparation. The reason for this is the sheer scale of the harm caused as a result of the atrocities committed in this NIAC in which large numbers of victims were directly affected. In such circumstances, it is generally impracticable to assess individual claims on a case-by-case basis. The benefits of reparation awarded to groups of victims help to repair the harm caused by serious violations of IHL. The approach taken is that reparation should be regarded as a whole. Measures are therefore proposed to cover all aspects of the harm caused and cannot be considered in isolation.

In an example of a non-State armed group providing reparation, the National Liberation Army (ELN) publicly apologized in 2001 for the deaths of three children and the destruction of civilian houses as the result of an attack involving explosives and expressed its willingness to collaborate in the recuperation of the remaining objects.⁶⁷ The FARC participated in the Colombian reparation process in two ways. It undertook to carry out collective and symbolic reparation measures. However, the FARC no longer exists as an organized armed group and has been replaced by a political party known as the Common Alternative Revolutionary Force, which has taken up the political discourse of the former FARC guerrillas and represents them.⁶⁸ This could make it complicated to determine reparation against the actual party responsible.

The FARC has mainly conducted three reparation measures.⁶⁹ First, the FARC apologized even before the Final Peace Agreement was signed, and in August 2013 the guerrilla group issued a declaration in which it clearly recognized its partial responsibility for the violence and the need to provide

65 See Emily L. Camins, “Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law”, *International Journal of Transitional Justice*, Vol. 10, No. 1, 2016.

66 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General, UN Doc. S/2004/616, 23 August 2004, para. 2.

67 J.-M. Henckaerts and L. Doswald-Beck, above note 12, p. 550.

68 See Vicente Torrijos Rivera and Juan David Abella Osorio, “The FARC’s Behavior after the Signing of the Peace Agreement”, *Revista Científica General José María Córdova*, Vol. 16, No. 24, 2018.

69 See Olivia Herman, “Reparative Justice in Colombia: A Role for Armed Non-State Actors?”, *JusticeInfo.Net*, 17 December 2018, available at: <https://www.justiceinfo.net/en/39792-reparative-justice-in-colombia-a-role-for-armed-non-state-actors.html>.

reparation for the harm caused to victims.⁷⁰ This included a ceremony at which it issued a public apology and a video in which it admitted responsibility for the damage it caused during the NIAC.⁷¹ Second, the FARC undertook to take part in work to restore the infrastructure in areas of Colombia affected by the conflict. The third measure, which was controversial and has yet to be implemented, was the payment of monetary compensation by the FARC to victims, based on an inventory of properties and assets amassed by the FARC during the conflict. The FARC has handed over assets worth around US\$888,000, which have been or will be used solely to pay compensation to victims of the NIAC.⁷² However, by the end of 2020, the FARC had only delivered approximately US\$12.9 million of the US\$300 million pledged to compensate victims.⁷³

The continued existence of the armed group has been a problem in many aspects of the Colombian peace process, including in the matter of reparation for victims of serious violations of IHL. With the signing of the Final Peace Agreement in Colombia, the disarmament process was set in motion. On 1 September 2017, the FARC officially began the transition to become a legal political organization, changing its name but maintaining the acronym “FARC”. This means that responsibility for reparation lies with an armed group that no longer exists as such.

The Colombian experience therefore shows that armed groups have become part of national systems providing reparation to victims of serious violations of IHL either because they control parts of the State’s territory or because they have adversely affected the lives of millions of people.⁷⁴ The Colombian model also demonstrates that any assessment of the difficulties associated with reparation and potential solutions should take into account innovative and robust developments in transitional justice.

Peru, Guatemala and El Salvador

Peru

According to the Truth and Reconciliation Commission (CVR) of Peru, a NIAC took place in the country between 1980 and 2000 mainly between the terrorist organization known as the Peruvian Communist Party–Shining Path (PCP–SL) and the Peruvian State.⁷⁵ The CVR estimated the probable number of fatal victims to be 69,280.⁷⁶ In Peru, unlike in other Latin American countries, it was a non-State armed group (PCP–SL) that was responsible for most of the fatalities

70 BBC, “FARC reconoce por primera vez ‘crudeza y dolor provocados’ desde sus filas”, 20 August 2013, available at: https://www.bbc.com/mundo/ultimas_noticias/2013/08/130820_ultnot_farc_admision_mr.

71 L. Íñigo-Álvarez, above note 47, pp. 441–2.

72 *Ibid.*, p. 440.

73 See Luke Moffett, “Violence and Repair: The Practice and Challenges of Non-State Armed Groups Engaging in Reparations”, *International Review of the Red Cross*, Vol. 102, No. 915, 2020, p. 1077.

74 P. Blázquez, above note 47, p. 428.

75 CVR, *Informe Final*, Lima, 2003, Conclusiones, paras 1 and 12.

76 *Ibid.*, para. 2.

(54%).⁷⁷ Both the PCP–SL and State agents committed serious violations of IHL and IHRL which constituted war crimes and crimes against humanity.⁷⁸

The CVR proposed a Comprehensive Reparation Plan consisting of material and symbolic reparation provided through collective and individual measures.⁷⁹ The plan was set out in Act 28,592 (2005), including the creation of the Reparation Council.⁸⁰ The complexity of the reparation programme has made implementation difficult; only measures to provide collective reparation and monetary compensation have been widely implemented.⁸¹ The amount approved for the collective reparation programme was reduced to US\$37,000, and a limit of one project per community, chosen by the latter, was established. A total of 1852 communities have benefitted under the programme since 2007.⁸² In recent years, however, implementation has extended beyond collective reparation and compensation.⁸³ Compensation has been paid to 98,818 victims registered by the Reparation Council, and tens of thousands of people have benefitted from healthcare, education and housing schemes, although not all the registered victims were reached.⁸⁴

In Peru's reparation programmes, special attention has been paid to harm caused to members of particularly vulnerable groups, such as indigenous communities and women affected by sexual violence.⁸⁵ However, there are claims that have yet to be resolved concerning reparation for serious human rights violations that occurred in the 1990s, particularly forced sterilization of women in rural areas by the State, a case still being investigated.⁸⁶

Peru's legal framework for reparation refers to the NIAC, crimes committed during the conflict and the resulting harm to be repaired,⁸⁷ but there is no express reference to any obligation on the part of non-State armed subversive groups, such as the PCP–SL, to provide reparation. The members of rebel groups were, however, excluded from receiving reparation.⁸⁸ In spite of the fact that it committed serious violations of IHL, the PCP–SL has not, on its own initiative, provided any symbolic or material reparation or made any contribution to the work of the CVR.⁸⁹

77 *Ibid.*, para. 13.

78 *Ibid.*, paras 28 and 55.

79 Julie Guillerot, *Reparations in Peru: 15 Years of Delivering Redress*, Queen's University, Belfast, September 2019, p. 11, available at: <https://reparations.qub.ac.uk/assets/uploads/Peru-Report-ENG-LR-2.pdf>.

80 *Ibid.*, pp. 15–16.

81 C. Correa, above note 31, p. 132.

82 *Ibid.*, pp. 132 and 135.

83 Julie Guillerot, *Alive in the Demand for Change: Transitional Justice and Prevention in Peru*, International Center for Transitional Justice, New York, 2021, pp. 26–7.

84 C. Correa, above note 31, p. 135.

85 Consejo de Reparaciones, *Todos los Nombres*, Lima, 2018, pp. 20, 27 and 29.

86 Lucien Chauvin, "Forced Sterilization in Peru: 'After Decades in Limbo, There Will Finally be a Decision'", *JusticeInfo.Net*, 15 April 2021, available at: https://www.justiceinfo.net/en/76073-forced-sterilization-peru-decades-limbo-finally-decision.html?mc_cid=71b937d2f4&mc_eid=35e10b1c9f.

87 Act 28,592, Art. 3; Supreme Decree 015-2006-JUS, Art. 5.

88 Act 28,592, Art. 5.

89 Ron Dudai, "Closing the Gap: Symbolic Reparations and Armed Groups", *International Review of the Red Cross*, Vol. 93, No. 883, 2011, p. 792.

This failure to provide reparation is a major stumbling block, taking into account, for example, that public apologies by rebel groups that have committed atrocities during a NIAC, acknowledging the truth about past events and accepting responsibility are moral or symbolic reparations often seen by victims as equally or more important than material reparations.⁹⁰ As part of their sentence, PCP–SL leaders were ordered to pay the equivalent of almost US\$1000 million in civil reparations in 2007, but this was to go to the State not to the victims and remains unpaid.⁹¹

Guatemala

The Commission for Historical Clarification (CEH) of Guatemala estimated that the number of people who were killed or went missing during the NIAC (1960–1996) was more than 200,000 and that some 1.5 million people were displaced by the conflict.⁹² The army and related paramilitary groups (civil patrols) were responsible for 93% of the atrocities committed against the indigenous population, who were believed by the armed forces to be collaborating with the guerrillas.⁹³ The CEH went as far as to say that the government committed acts of genocide against indigenous communities.⁹⁴

Guatemala's Peace Agreement (1996) included the creation of a truth commission and stressed the humanitarian obligation to provide reparation to victims through government programmes.⁹⁵ The CEH recommended putting in place a reparation programme combining individual and collective measures and including monetary compensation, material restitution and medical and psychosocial rehabilitation.⁹⁶ However, the government ignored these recommendations and did not implement the proposed programme.⁹⁷ Guatemala's reparation programme was not implemented until much later (Government Decision 258-2003), and even then it did not provide details of the reparation measures to be carried out or who the beneficiaries would be; this was clarified in subsequent amendments.⁹⁸ The programme establishes the following reparation measures: restoration of the dignity of victims, cultural redress, psychosocial reparation, rehabilitation, material restitution and monetary compensation.⁹⁹ Guatemala's legal framework for reparation refers expressly to

90 *Ibid.* See also UN General Assembly, above note 33, UN Principle 22(e).

91 Supreme Court of Justice of Peru, *Abimael Guzmán Reinoso* et al., Judgment, 26 November 2007, p. 121.

92 CEH, *Guatemala, Memory of Silence: Conclusions and Recommendations*, UN Office for Project Services (UNOPS), Guatemala, 1999, pp. 17 and 30.

93 *Ibid.*, p. 20; Denis Martínez and Luisa Gómez, *Reparations for Victims of the Armed Conflict in Guatemala*, Queen's University, Belfast, 2019, p. 5.

94 CEH, above note 92, pp. 38–41.

95 C. Correa, above note 31, p. 130; Comprehensive Agreement on Human Rights, March 1994, para. 8(1).

96 CEH, above note 92, pp. 49–52; C. Correa, above note 31, p. 130.

97 C. Correa, above note 31, p. 130.

98 *Ibid.*

99 Government Decision 258-2003, Art. 2 (amended).

human rights violations and crimes against humanity committed during the NIAC.¹⁰⁰

Implementation has focused on providing monetary compensation to individuals, but results have been limited, with most victims yet to receive anything: 31,845 victims were paid compensation between 2005 and 2014 in the amount of US\$3300 for the relatives of those killed and US\$2750 for survivors of torture or sexual violence.¹⁰¹ The implementation of other measures seems to have been rather patchy, with only a few thousand victims benefitting from measures such as housing subsidies, psychological care and seed capital for income-generating activities.¹⁰² Furthermore, the reparation policy does not have a gender or differential focus, failing to establish specific procedures for women and other vulnerable people.¹⁰³

With regard to reparation by non-State armed groups, after the CEH report was published, the Guatemalan guerrillas offered a public apology to victims and their families and communities and acknowledged responsibility for the crimes committed,¹⁰⁴ a symbolic form of reparation that contributed to victim satisfaction.¹⁰⁵ This also shows how armed groups can make a major contribution to reconstructing the facts and disclosing the truth.¹⁰⁶ Verification of the facts and full and public disclosure provide satisfaction, which is an additional form of reparation.¹⁰⁷

The CEH found that armed rebel groups, which were responsible for 3% of the violations recorded, had an obligation to comply with the minimum standards of IHL.¹⁰⁸ It did not, however, address the question of the potential obligation of the guerrillas to provide reparation to victims or contribute financially to the national reparation programme.¹⁰⁹

El Salvador

The Chapultepec Peace Agreement (1992) ended the NIAC in El Salvador (1980–1992) between the Government of El Salvador and the Farabundo Martí National Liberation Front (FMLN).¹¹⁰ In 1993, The Commission on the Truth for El Salvador (backed by the UN) established that over 75,000 people had been tortured or killed or had gone missing during the conflict.¹¹¹ The Commission

100 *Ibid.*, Art. 1 (amended).

101 C. Correa, above note 31, p. 131.

102 *Ibid.*

103 D. Martínez and L. Gómez, above note 93, p. 23.

104 R. Dudai, above note 89, p. 792.

105 UN General Assembly, above note 33, UN Principle 22(e).

106 P. Blázquez, above note 47, p. 420.

107 UN General Assembly, above note 33, UN Principle 22(b).

108 CEH, above note 92, paras 127–8.

109 P. Blázquez, above note 47, p. 421.

110 See Commission on the Truth for El Salvador, *From Madness to Hope: The 12-Year War in El Salvador, The Report of the Commission on the Truth for El Salvador*, San Salvador/New York, 1993.

111 *Ibid.*

recommended material compensation and moral reparation for victims and their families.¹¹²

Initially, El Salvador prioritized the issues of land and benefits for former combatants, and this was maintained in Legislative Decree 416 (1992) on the protection of people who suffered permanent injury during the conflict.¹¹³ It was not until 2010 that the National Commission on Reparations for victims of human rights violations committed during the NIAC (Executive Decree 57) developed a reparation programme for victims of the conflict, which came into operation in 2013 (Executive Decree 204).¹¹⁴ This programme provides for a variety of rehabilitation measures in the field of health and education, monetary compensation and the honouring of victims, including through cultural acts, public apologies and historical memory initiatives. It also establishes guarantees of non-repetition, including human rights training for police and military personnel.¹¹⁵

There is a register of programme beneficiaries, and in 2016 a scheme was set up to provide compensation in the form of a pension.¹¹⁶ While the reparation programme is an important step, it does not go far enough; only around 5000 victims are registered.¹¹⁷ The instability and lack of legislative backing means that the massive material reparation programme seems to be more of a declaratory initiative than a genuine effort to provide comprehensive reparation.¹¹⁸ Urgent measures are also needed to assist older adults and other vulnerable victims.¹¹⁹

On the question of reparation and rebel groups, the Commission on the Truth found that IHL was binding on both the FMLN and the State and that while the FMLN must provide compensation where it is found to have been responsible, the State has a wider obligation.¹²⁰ As a guarantee of non-repetition and as part of law enforcement reforms,¹²¹ FMLN combatants were transferred to the police force following the signing of the Peace Agreement.¹²²

After the signing of the Peace Agreement, the FMLN became a political party, formed by the guerrilla group, and governed the country. It maintained the reparation programme although it was beset by a number of problems, including a lack of institutional support and instability.¹²³ The FMLN government also promoted isolated commemoration initiatives and raised awareness about issues related to the conflict and the agreements.¹²⁴

112 *Ibid.*, pp. 196–7.

113 Martha Gutiérrez, “Negar el pasado: Reparaciones en Guatemala y El Salvador”, *Colombia Internacional*, Vol. 97, 2019, p. 200.

114 Visit to El Salvador: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN Doc. A/HRC/45/45/Add.2, 9 July 2020, para. 49.

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*, para. 53.

118 M. Gutiérrez, above note 113, p. 200.

119 Special Rapporteur, above note 114, para. 104.

120 Commission on the Truth for El Salvador, above note 110, p. 20–2 and 185.

121 UN General Assembly, above note 33, UN Principle 23.

122 Special Rapporteur, above note 114, para. 62.

123 M. Gutiérrez, above note 113, pp. 178 and 191.

124 *Ibid.*, p. 198.

Some comparisons

Unlike in Colombia, the reparation processes in Peru, Guatemala and El Salvador were undertaken only after the end of the NIAC and following the recommendations of the truth commissions. The Colombian reparation programme is considered the most comprehensive in the world;¹²⁵ the others are much more modest and more limited in comparison although the Peruvian reparation programme has been acclaimed for its innovative approach to collective reparation involving community development projects.¹²⁶

The processes for the implementation of the reparation programmes in the four countries examined have faced considerable challenges and limitations, which have been or are being addressed, with varying degrees of success, by the respective domestic mechanisms. The domestic reparation systems examined – in particular those of Colombia and Peru – have incorporated the most recent international standards, including those contained in IHL.

While in Colombia non-State armed groups have been actively involved in providing symbolic and material reparation, in Guatemala the rebel groups have only provided moral reparation in the form of public apologies. The Commission on the Truth for El Salvador concluded that the FMLN has an obligation to provide reparation, which it did as a political party in power, not as a rebel group. In Peru, the PCP–SL has not provided any form of reparation.

In all four countries, different internationally recognized forms and types of reparation have been adopted to varying degrees and have benefitted victims of serious violations of IHL and other atrocities committed during armed conflict. These measures have been implemented largely through administrative reparation programmes. There have also been interactions between domestic reparation mechanisms and the I/A Court HR, particularly in the form of supranational judicial assessment and supervision of these programmes.¹²⁷ This is examined in detail in the next sub-section.

National reparations and the I/A Court HR

Although the I/A Court HR does not determine State responsibility for violations of IHL, it has used this body of law to interpret the ACHR and other Inter-American instruments and develop an approach involving the direct use of humanitarian rules, invoking the *lex specialis* nature of IHL and making selective use of it to expand human rights content.¹²⁸ Strictly speaking, the Court does not order

125 C. Sandoval, above note 38, p. 196.

126 *Ibid.*, p. 194.

127 C. Correa, above note 31, pp. 158–9.

128 See Elizabeth Salmón, “Institutional Approach Between IHL and IHRL: Current Trends in the Jurisprudence of the Inter-American Court of Human Rights”, *Journal of International Humanitarian Legal Studies*, Vol. 5, No. 1–2, 2014; Elizabeth Salmón, “Entre la *lex specialis* y la metodología *pick-and-choose*: aproximaciones al derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos”, *Anuario Iberoamericano sobre Derecho Internacional Humanitario*, Vol. 1, 2020.

reparation for violations of IHL by a State. However, in application of Article 63(1) of the ACHR, it has developed robust case law on reparation for harm caused to victims as a result of serious violations of their rights in NIACs.

Of particular importance is the concept of “comprehensive reparation”, a term coined by the I/A Court HR and developed over several decades. In the words of the Court, “comprehensive reparation of the abridgment of a right protected by the Convention cannot be restricted to payment of compensation to the next of kin”,¹²⁹ which means that reparation for harm caused by a violation of an international obligation requires “whenever possible, full restitution (*restitutio in integrum*), which is to reinstate the situation that existed prior to the commission of the violation”.¹³⁰ Under this comprehensive reparation approach, the Court has developed and ordered a variety of reparation measures involving monetary compensation, rehabilitation, symbolic reparation (satisfaction) and guarantees of non-repetition to be provided individually or collectively to direct and indirect victims.¹³¹ These standards have made an important contribution to reparation in the region and have been taken into account by other supranational courts, such as the ICC.¹³²

As Sandoval points out, the approach of the I/A Court HR to domestic reparation programmes has evolved.¹³³ Some Latin American countries that have experienced a NIAC have used subsidiarity as an argument in cases against the State in a bid to get the Court to order reparation to be provided through their own existing domestic reparation programmes.¹³⁴

In its original approach in the case of the *Plan de Sánchez Massacre v. Guatemala* (2004), concerning the massacre that occurred during the NIAC, the I/A Court HR did not take into account Guatemala’s arguments about its national reparation programme and instead applied its comprehensive reparation approach,¹³⁵ ordering a number of specific measures.¹³⁶ The Court ordered, among other things, monetary compensation, ceremonies to honour the memory of the victims and the provision of decent housing, water supply, a sewage system and a health centre.¹³⁷ The Court did not consider subsidiarity, opting to exercise full jurisdiction over reparations and not defer to Guatemala’s national reparation

129 For example, I/A Court HR, *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, para. 214.

130 For example, I/A Court HR, *Cantoral Benavides v. Peru*, Reparations and Costs, Judgment, 3 December 2001, para. 41.

131 Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed., Cambridge University Press, Cambridge, 2013, pp. 188–250.

132 For example, ICC, *Lubanga*, ICC-01/04-01/06-3129-AnxA, Order for Reparations, 3 March 2015, paras 33 and 39–40.

133 See C. Sandoval, above note 38, pp. 197–221. See also Juan-Carlos Ochoa-Sánchez, “Review by the Inter-American Court of Human Rights and Domestic Reparation Programmes: Towards a More Nuanced Approach”, *International Journal of Human Rights*, Vol. 25, No. 6, 2021.

134 C. Sandoval, above note 38, p. 190.

135 *Ibid.*, p. 197.

136 I/A Court HR, *Plan de Sánchez Massacre v. Guatemala*, Reparations, Judgment, 19 November 2004, para. 125.

137 *Ibid.*

programme.¹³⁸ This jurisprudential approach was also adopted in other cases involving armed conflicts,¹³⁹ including cases related to the Colombian NIAC, such as the *Mapiripán Massacre* (2005),¹⁴⁰ and to El Salvador's NIAC, for example, *El Mozote* (2012).¹⁴¹ Between 2004 and 2013, the Court adopted an approach based on the specific case before it and did not review domestic reparation programmes.¹⁴²

The I/A Court HR later adopted a more balanced approach in the case of *Operation Genesis v. Colombia* (2013) concerning the Colombian NIAC. It partly accepted the argument put forward by Colombia, which invoked the principle of subsidiarity and asked the Court not to order reparations on the grounds that the presumed victims had not claimed compensation from domestic reparation mechanisms.¹⁴³ The Court did, however, order additional forms of reparation or qualify its orders. In this case, the Court therefore deferred to Colombia's domestic reparation programme on those forms of reparation included in it, namely compensation, rehabilitation and restitution.¹⁴⁴ The case shows that the Court can play a subsidiary role for some forms of reparation but may impose conditions on how its orders are to be carried out, such as deadlines for implementation or giving priority to certain beneficiaries.¹⁴⁵ In fact, the Court established a number of requirements that domestic reparation programmes have to meet if decisions on reparation were to be wholly or partly deferred to them.¹⁴⁶

The I/A Court HR has given some form of deference to domestic programmes in cases against Peru and Guatemala related to their NIACs. However, in contrast to its approach with Colombia, the Court has been more cautious with these States, possibly because of the lack of evidence regarding the merits of their domestic reparation programmes, etc.¹⁴⁷ Although Peru invoked its reparation programme in relation to the matter of compensation and rehabilitation in the case of the *Peasant Community of Santa Bárbara* (2015) so as to avoid the Court ordering it to provide these forms of reparation, the Court, based on its own case law, issued reparation orders to this effect, owing to evidentiary issues relating to the payment of compensation. It did the same in the case of *Tenorio Roca* (2016),¹⁴⁸ regardless of the rehabilitation measures available under the domestic reparation programme. The Court did, however, order

138 C. Sandoval, above note 38, p. 200.

139 *Ibid.*

140 I/A Court HR, *Mapiripán Massacre*, above note 129; I/A Court HR, *Ituango Massacres v. Colombia*, Judgment, 1 July 2006; I/A Court HR, *Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006.

141 I/A Court HR, *Massacres of El Mozote and Surrounding Areas v. El Salvador*, Judgment, 25 October 2012.

142 J.-C. Ochoa-Sánchez, above note 133, p. 900.

143 I/A Court HR, *Operation Genesis v. Colombia*, Judgment, 20 November 2013, para. 465.

144 C. Sandoval, above note 38, p. 201.

145 *Ibid.*, p. 206.

146 I/A Court HR, *Operation Genesis*, above note 143, paras 470–1; J.-C. Ochoa-Sánchez, above note 133, p. 901.

147 C. Sandoval, above note 38, p. 201. See also J.-C. Ochoa-Sánchez, above note 133, pp. 900–3.

148 I/A Court HR, *Peasant Community of Santa Bárbara v. Peru*, Judgment, 1 September 2015, paras 327–36; I/A Court HR, *Tenorio Roca et al. v. Peru*, Judgment, 22 June 2016, paras 281–4; C. Sandoval, above note 38, p. 209.

reparation in the form of scholarships for higher education, in line with Peru's reparation programme, when the State provided sufficient information.¹⁴⁹

In relation to Guatemala's NIAC, in the cases of *Río Negro Massacres* (2012) and *Chichupac and Rabinal* (2016), the I/A Court HR ordered the State to provide compensation but specified that the amounts already awarded to victims under the domestic reparation programme must be recognized as part of the compensation due to them and deducted from the amounts ordered by the Court.¹⁵⁰ In this way, the Court was able to reconcile its case law on reparation with the country's domestic reparation measures, particularly monetary compensation, giving only partial and limited deference to Guatemala.¹⁵¹ In *Chichupac and Rabinal*, the Court assessed reparation according to its own standards and based on the specific case before it.¹⁵²

In the *El Mozote* case (2012) concerning El Salvador's NIAC, Judge García-Sayán indicated that in the case of massive and widespread human rights violations, domestic reparation programmes require effective mechanisms for the participation of the victims receiving reparation under them.¹⁵³ In *Rochac Hernández et al.* (2014), also relating to El Salvador's NIAC, the I/A Court HR assessed positively the measures taken by the State to provide medical care to some of the victims in this case.¹⁵⁴ However, the Court also found it necessary to order the State to provide rehabilitation measures, including immediate and appropriate care offered free of charge to victims suffering physical and psychological ailments as a result of the violations found to have been committed.¹⁵⁵

More recently, the I/A Court HR revisited its approach to subsidiarity in relation to reparation developed in the case of *Operation Genesis*,¹⁵⁶ examined above. In *Yarce et al. v. Colombia* (2016), concerning the Colombian NIAC, the Court recognized that domestic administrative reparation programmes are legitimate mechanisms for providing reparation when there are large numbers of victims that exceed the capacity of domestic courts.¹⁵⁷ Nonetheless, the Court denied Colombia's request for it to defer to its domestic reparation programme on the grounds that it was not enough for Colombia to indicate the reparation measures included in its programme in general terms and that it must specify how the measures would be applied to each individual victim in order to determine whether it could defer to the country's own programme under the principle of complementarity.¹⁵⁸

149 I/A Court HR, *Tenorio Roca*, *ibid.*, paras 294–8; C. Sandoval, above note 38, p. 209.

150 I/A Court HR, *Río Negro Massacres v. Guatemala*, Judgment, 4 September 2012, para. 304; *Members of the Village of Chichupac and neighbouring communities of the Municipality of Rabinal v. Guatemala*, Judgment, 30 November 2016, para. 326.

151 C. Sandoval, above note 38, p. 208.

152 J.-C. Ochoa-Sánchez, above note 133, p. 902.

153 I/A Court HR, *El Mozote*, above note 141, Concurring Opinion of Judge Diego García-Sayán, para. 33.

154 I/A Court HR, *Rochac Hernández et al. v. El Salvador*, Judgment, 14 October 2014, para. 219.

155 *Ibid.*, paras 219–23.

156 C. Sandoval, above note 38, pp. 201–13; N. Sánchez and A. Rudling, above note 51, p. 27.

157 I/A Court HR, *Yarce et al. v. Colombia*, Judgment, 22 November 2016, para. 326.

158 *Ibid.*, para. 328.

Similarly, in *Vereda La Esperanza v. Colombia* (2017), while the I/A Court HR acknowledged and appreciated the efforts made by Colombia to provide reparation to victims of the NIAC through domestic mechanisms, it found that, by virtue of the principle of subsidiarity/complementarity, it was not prevented from ruling autonomously on reparation measures because the victims in this case had not received domestic reparation and the domestic reparation programme did not exclude access to complementary domestic or supranational judicial reparation processes.¹⁵⁹

The I/A Court HR has therefore engaged with reparation for victims of NIACs in the countries examined. There are a number of important developments that should be mentioned in relation to the implementation and impact of the judgments of the I/A Court HR on reparation in the countries in question. In Colombia, the Council of State has been consolidating the case law on reparation for victims of the NIAC, incorporating reparation criteria developed by the I/A Court HR since 2002. The Council has added measures such as rehabilitation, satisfaction and guarantees of non-repetition to its traditional package of compensation and presumes moral harm suffered by direct and indirect victims.¹⁶⁰

There are approximately thirty I/A Court HR judgments against Peru concerning its NIAC.¹⁶¹ In the majority of cases, Peru has paid the compensation ordered by the Court but has failed to implement other measures also ordered by the Court, namely providing physical and psychological rehabilitation, establishing the whereabouts of the missing and returning remains to families.¹⁶²

The I/A Court HR has issued some fifteen judgments against Guatemala in relation to its NIAC, in which it has ordered measures including compensation, rehabilitation, acknowledgement of the truth by the State, the erection of monuments and guarantees of non-repetition.¹⁶³ Guatemala has failed to comply with the judgments for reasons including a lack of resources although it has carried out some of the reparation measures ordered by the Court in some of the cases.¹⁶⁴

Finally, the I/A Court HR has ruled on four cases concerning El Salvador's NIAC, and the State has implemented reparation measures ordered by the Court, consisting of symbolic reparation (public apologies), development programmes, monetary compensation, medical and psychological care and the establishment of a register of victims.¹⁶⁵ However, El Salvador has yet to implement other measures ordered by the Court, in particular, the tracing of missing persons and criminal investigation and prosecution.¹⁶⁶

159 I/A Court HR, *Vereda La Esperanza v. Colombia*, Judgment, 31 August 2017, paras 264–5.

160 N. Sánchez and A. Rudling, above note 51, p. 26.

161 J. Guillerot, above note 79, p. 49.

162 *Ibid.*

163 D. Martínez and L. Gómez, above note 93, pp. 41 and 43–4.

164 *Ibid.*, p. 44.

165 Special Rapporteur, above note 114, paras 51–2.

166 *Ibid.*, para. 69.

Reparation for victims of serious violations of IHL and the ICC

Importance and limitations of the ICC reparation system

Although IHL and international criminal law are separate bodies of law, there are significant overlaps and direct connections between them as the criminalization of serious violations of IHL gives rise to war crimes and entails criminal responsibility.¹⁶⁷ IHL not only deals with the responsibility of States and armed groups, but also individual criminal responsibility,¹⁶⁸ including the obligation to provide reparation for harm caused.¹⁶⁹ The ICC and other international and hybrid criminal courts are therefore mechanisms that apply, enforce and implement IHL, particularly in relation to serious violations of IHL which constitute war crimes.¹⁷⁰

Traditionally, the victims of serious violations of IHL, which are war crimes, were not able to claim reparation in international and hybrid criminal courts. The ICC was the first such court to introduce a reparation system under which victims of war crimes and other atrocities committed during armed conflict can claim and receive reparation from those convicted. Most hybrid criminal courts have followed this model.

Recent and emerging ICC practice on reparation began in 2012 with the *Lubanga* case. As this practice shows, the ICC is able to act as an important global or international mechanism allowing victims of serious violations of IHL to exercise their right to claim and receive reparation. There are various reasons for this. The first is that IHL forms part of the applicable law of the ICC. The ICC has jurisdiction over war crimes, which are serious violations of IHL committed in IACs and NIACs, namely grave breaches of the Geneva Conventions, serious violations of common Article 3 and other serious violations of the laws and customs applicable in IACs and NIACs.¹⁷¹ In addition, the applicable (subsidiary) sources of law of the ICC include “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”.¹⁷²

A second reason is that the award of reparation to victims by the ICC derives from individual criminal responsibility for war crimes and other international crimes committed in armed conflicts. As of April 2022, the ICC has issued orders for reparations for victims of war crimes in four cases. The crimes in question are: enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (*Lubanga*);¹⁷³ murder, attack against civilians,

167 M. Sassòli, above note 1, pp. 151–67 and 443–51; Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, Oxford, 2008, pp. 81–97.

168 M. Sassòli, above note 1, pp. 151–67; E. Crawford and A. Pert, above note 38, pp. 280–7.

169 S. Furuya, above note 32, pp. 62–5.

170 *Ibid.*, pp. 287–9; M. Sassòli, above note 1, pp. 159–67 and 443–51.

171 Rome Statute of the ICC, Art. 8.

172 Rome Statute of the ICC, Art. 21(1)(b).

173 ICC, *Lubanga*, ICC-01/04-01/06-2904, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012.

destruction of property and pillaging (*Katanga*),¹⁷⁴ attacking religious and historic buildings (*Al-Mahdi*),¹⁷⁵ and murder, attacks against civilians and civilian objects, sexual crimes, forced displacement of civilians and enlisting and conscripting children under the age of 15 years and using them to participate in hostilities (*Ntaganda*).¹⁷⁶

The third reason is that, in its case law on reparation and war crimes, the ICC has invoked provisions of IHL as a source of law on reparation for victims of serious violations of IHL. The ICC has, for example, used the UN Principles to interpret provisions of its instruments on reparation and to rule on matters such as categories of beneficiaries of reparation (direct and indirect victims), forms of reparation (compensation and satisfaction) and types of harm to be repaired (physical, psychological and material harm).¹⁷⁷ When analysing the legal elements of war crimes, with a view to determining sentences and reparation, the ICC has invoked IHL treaties, including the Geneva Conventions and their Additional Protocols and the Second Hague Protocol for the Protection of Cultural Property, on the one hand, and the case law of other international and hybrid criminal courts on war crimes on the other.¹⁷⁸

The fourth reason has to do with the characteristics of the ICC reparation system, which differ from those of other international mechanisms. One of the differences with other international courts is that under the ICC reparation system, individuals exercise their status as subjects of IHL actively¹⁷⁹ by exercising their right, as victims of serious violations of IHL, to claim and receive reparation and also passively because those convicted have an obligation to provide reparation to victims. Unlike non-judicial international mechanisms, the ICC's reparation orders are binding.

A fifth reason is that, when domestic mechanisms fail, the ICC can be the last chance for victims of serious violations of IHL to get justice. The ICC can only act when States are unable or unwilling to deliver justice under the principle of complementarity.¹⁸⁰ Such failings on the part of the State also generally result in a failure to provide reparation to victims of serious violations of IHL. Even when there are domestic reparation mechanisms in place, international judicial reparation measures may also be necessary, including those ordered by the ICC. This is the case when domestic reparation programmes trivialize the suffering of the victims¹⁸¹ or when truth and reconciliation commissions play only a symbolic role and do not result in reparation for victims.¹⁸²

174 ICC, *Katanga*, ICC-01/04-01/07-3728-tENG, Order for Reparations, 24 March 2017.

175 ICC, *Al-Mahdi*, ICC-01/12-01/15-236, Reparations Order, 17 August 2017.

176 ICC, *Ntaganda*, ICC-01/04-02/06-2659, Reparations Order, 8 March 2021.

177 ICC, *Lubanga*, above note 132, paras 13–44.

178 For example, ICC, *Al-Mahdi*, ICC-01/12-01/15-171, Judgment and Sentence, 27 September 2016, paras 14–16.

179 Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, Cambridge University Press, Cambridge, 2016, pp. 60–232 and 255–81; C. Evans, above note 37, pp. 117–28.

180 Rome Statute of the ICC, Art. 17.

181 Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Beacon Press, Boston, 1998, p. 93.

182 Pablo De Greiff, "Introduction", in Pablo De Greiff (ed.), *The Handbook of Reparations*, Oxford University Press, Oxford, 2006, p. 2.

The ICC reparation system also has some significant shortcomings and limitations in ensuring reparation for harm caused to victims of serious violations of IHL. The main issue is that, under the principle of individual criminal responsibility, the ICC can only issue reparation orders against convicted individuals¹⁸³ and not against States or non-State armed groups. Article 75(2) of the Rome Statute of the ICC articulates this principle: “The Court may make an order directly against a convicted person specifying appropriate reparations.” The ICC has applied this principle in its case law on reparation.¹⁸⁴

The ICC cannot therefore issue reparation orders against States, armed groups or corporations involved in armed conflicts. Such a limited legal mandate leads to problems in practice because it ignores the complex realities of contemporary armed conflicts and the need to provide reparation for harm caused to victims by actors responsible for serious violations of IHL and other atrocities committed during armed conflict.

As the ICC can only issue reparation orders against convicted individuals, implementation of the reparation measures ordered is highly problematic. All the convicted individuals that the ICC has ordered to provide reparation have so far (as of April 2022) been declared indigent. The Trust Fund for Victims, which is responsible for enforcing ICC reparation orders, has faced funding problems, having to rely on voluntary contributions, and has encountered difficulties in delivery due to security issues and the challenges of practical implementation in complex contexts.¹⁸⁵ This has prevented more substantial and comprehensive reparation orders from being issued and implemented for victims of serious violations of IHL. As other authors have pointed out,¹⁸⁶ the ICC should have jurisdiction to order reparations against (or related cooperation from) States and other entities, especially non-State armed groups. This would require the applicable provisions of the ICC Statute, particularly Article 75, to be amended.

In this context, the universe of claimants/beneficiaries of reparation, the forms and types of reparation and their implementation are restricted and limited in the ICC reparation system. In spite of these limitations, the reasons explained above justify the importance afforded to the system. Victims of armed conflict have exercised their right to reparation and obtained at least some measure of justice through this system, as described in the sub-section below.

183 See Carsten Stahn, “Reparative Justice after the *Lubanga* Appeals Judgment: New Prospects for Expressivism and Participatory Justice or ‘Juridified Victimhood’ by Other Means?”, *Journal of International Criminal Justice*, Vol. 13, No. 4, 2015.

184 ICC, *Lubanga*, above note 132, paras 20–1.

185 See Luke Moffett and Clara Sandoval, “Tilting at Windmills: Reparations and the International Criminal Court”, *Leiden Journal of International Law*, Vol. 34, No. 3, 2021.

186 Eva Dwertmann, *The Reparation System of the International Criminal Court*, Martinus Nijhoff, Leiden/Boston, 2010, pp. 51–6; Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, Cambridge, 2012, pp. 317–18.

Justice for victims of serious violations of IHL and reparation at the ICC

Along with the supranational courts that determine State responsibility and domestic mechanisms, the ICC reparation system too has begun to make an important contribution to operationalizing the right of victims of serious violations of IHL to reparation in terms of procedural and substantive justice. While procedural justice entails fair proceedings and procedural rights of victims, substantive justice refers to the outcomes obtained for victims at the ICC.¹⁸⁷ Procedural and substantive justice for victims of serious violations of IHL under the ICC reparation system also includes elements of restorative justice.¹⁸⁸ victims are at the centre of justice mechanisms and the delivery of reparation is a priority.¹⁸⁹

As far as procedural justice is concerned, although the “civil party” does not exist as such at the ICC, victims of serious violations of IHL, as claimants of reparation, are actual parties to the proceedings at the ICC, along with the convicted party, at the post-conviction reparation stage, as the Court itself has repeatedly maintained.¹⁹⁰ While in the stages of the proceedings prior to the conviction, including the trial and proceedings directly related to affirming or reversing the conviction, victims can be participants under Article 68(3) of the Rome Statute of the ICC, but not parties to the proceedings, at the reparation stage which takes place after the conviction, if there is one, the victims are parties to the proceedings.¹⁹¹ This is a crucial development and contrasts with what has happened at other international and hybrid criminal courts, where victims have only been involved as witnesses or participants.

This role as party to the proceedings gives victims of serious violations of IHL procedural rights enabling them to effectively exercise their right to reparation during the post-conviction reparation stage. According to ICC instruments and practice, these rights include the following:¹⁹² first, present written and oral arguments on substantive and procedural aspects of reparation; second, present evidence and call witnesses and experts to testify in support of their reparation claims, particularly on the existence and type of harm suffered and the causal relationship between the crimes committed and the harm caused; third, respond to arguments on reparation and object to evidence presented by the defence in reparation proceedings; fourth, appeal decisions on reparation and participate as a party to such proceedings; fifth, fulfil their role as parties in the

187 L. Moffett, above note 43, pp. 29–38.

188 *Ibid.*, pp. 41–3.

189 See David O’Mahony and Jonathan Doak, *Reimagining Restorative Justice: Agency and Accountability in the Criminal Process*, Hart Publishing, London, 2017, pp. 76–89.

190 For example, ICC, *Lubanga*, ICC-01/04-01/06-2953, Decision on the Admissibility of the Appeals Against Trial Chamber I’s “Decision Establishing the Principles and Procedures to be Applied to Reparations”, 14 December 2012, para. 67; ICC, *Katanga*, above note 174, para. 15. See also Juan Pablo Pérez-León-Acevedo, *Victims’ Status at International and Hybrid Criminal Courts: Victims’ Status as Witnesses, Victim Participants/Civil Parties and Reparations Claimants*, Åbo Akademi University Press, Åbo, 2014, pp. 678–93; Christoph Safferling and Gurgun Petrossian, *Victims Before the International Criminal Court: Definition, Participation, Reparation*, Springer, Cham, 2021, p. 269.

191 See ICC, *Lubanga*, *ibid.*, para. 67; ICC, *Katanga*, above note 174, para. 15.

192 Rome Statute of the ICC, Arts 75 and 82(4). See also case law: above notes 173–8.

implementation of reparations ordered by the ICC, particularly before the Trust Fund for Victims which is responsible for enforcing reparation orders; and sixth, benefit from legal representation, psychological counselling and protection to ensure their safety and well-being during the reparation proceedings.

The ICC reparation system also has a number of significant procedural shortcomings. First, the procedural rights of victims as parties to the proceedings are mainly exercised through lawyers representing groups of victims. This is necessary because of the large number of claimants seeking reparation at the ICC and for the sake of procedural efficiency. However, this permanent legal intermediation means that the role of victims as parties to post-conviction reparation proceedings and their procedural rights as such are more symbolic than real.

A second issue is that the universe of victims has been procedurally limited because although reparation claimants and beneficiaries include both direct victims and indirect victims (those who suffer harm as a result of harm caused to direct victims),¹⁹³ only the victims of crimes for which there is a conviction can receive reparation.¹⁹⁴ Additionally, the ICC, as a criminal court, applies high evidentiary and procedural standards in relation to the causal nexus between the crime and the harm caused, among other things, which reduces the universe of beneficiaries of reparation.¹⁹⁵

The third problem is that victims have no recourse to procedural remedies to claim reparation at the ICC when there is no conviction. The fact that a conviction is required for the ICC to issue a reparation order means that if the accused is acquitted, the Court does not award reparation to the victims. Lastly, when those convicted and ordered by the ICC to provide reparation are declared indigent, which is most often the case at the ICC, the victims cannot ask the Court to order States or non-State armed groups to provide the corresponding reparation instead.

In terms of substantive justice, the ICC has ordered various forms of reparation corresponding to the different categories referred to in the UN Principles – compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition¹⁹⁶ – as individual and/or collective measures. At the ICC, the outcomes have been mixed. In the case of *Lubanga*, the ICC ordered compensation, restitution and rehabilitation as collective reparation measures and did not order individual reparation or compensation.¹⁹⁷

In *Katanga*, individual reparation was confined to monetary compensation measures, but they consisted of the award of a token amount of US\$250 per person.¹⁹⁸ *Katanga* was declared indigent, and the funds used to pay this compensation were donated by the Netherlands. In this case, collective reparation only involved measures to provide support for housing, income-generating

193 ICC, *Lubanga*, above note 132, para. 6.

194 *Ibid.*, paras 20–1.

195 *Ibid.*, paras 10–11.

196 UN General Assembly, above note 33, UN Principles 19–23.

197 ICC, *Lubanga*, above note 132, paras 67–8.

198 ICC, *Katanga*, above note 174, para. 230.

activities, education and psychological well-being,¹⁹⁹ that is, rehabilitation and (partially) restitution measures. The victims asked the ICC not to order measures such as broadcasts of the trial, the erection of monuments, commemorative events or the tracing of missing persons for reasons bound up with the sociocultural context and a sense that such measures were pointless or could lead to social unrest or revictimization.²⁰⁰ Such measures fall into the category of satisfaction and guarantees of non-repetition.²⁰¹

In the case of *Al-Mahdi*, the ICC ordered individual compensation, but only for a very limited group of victims, and collective reparation consisted of rehabilitation, guarantees of non-repetition and satisfaction measures, including apologies, memorials, commemoration and forgiveness ceremonies.²⁰² The ICC also concluded that the destruction of protected historic and religious buildings in Timbuktu caused suffering to the people of Mali and to the international community.²⁰³ It did not, however, order specific reparation measures for these extremely large and indeterminate groups.

In *Ntaganda*, the ICC adopted a novel approach; it ordered what it called collective reparations with an individual component.²⁰⁴ Such measures can include different forms of reparation, such as restitution, compensation, rehabilitation and satisfaction for direct and indirect victims.²⁰⁵

At the ICC, collective reparation may be more appropriate than individual reparation because war crimes and other international crimes are collective in nature and cause collective harm.²⁰⁶ Furthermore, collective reparation is focused on providing redress to people victimized as a group or a collective of victims,²⁰⁷ and can be easier to deliver than individual reparation²⁰⁸ and can have a broader impact in a transitional justice scenario.²⁰⁹ However, individual reparations should also be provided because some victims prefer them²¹⁰ and because they address individual aspects of victimization and explicitly acknowledge the individual right of each victim to reparation.²¹¹

In terms of forms of reparation, where practicable, measures should combine monetary, material and symbolic components rather than relying on a

199 *Ibid.*, para. 302.

200 *Ibid.*, para. 301.

201 UN General Assembly, above note 33, UN Principles 22–3.

202 ICC, *Al-Mahdi*, above note 175, paras 67–71 and 90–104.

203 *Ibid.*, paras 60–2.

204 ICC, *Ntaganda*, above note 176, paras 7–9 and 186.

205 *Ibid.*, paras 82–8 and 97.

206 E. Dwertmann, above note 186, p. 122.

207 Lisa Magarrell, *Reparations in Theory and Practice*, International Center for Transitional Justice, New York, 2007, p. 5; M. Cherif Bassiouni, “International Recognition of Victims’ Rights”, *Human Rights Law Review*, Vol. 6, No. 2, 2006, p. 257.

208 Frédéric Mégret, “The Case for Collective Reparations Before the International Criminal Court”, in Jo-Anne Wemmers (ed.), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation*, Routledge, London, 2014, pp. 177–79.

209 *Ibid.*, p. 179.

210 For example, ICC, *Lubanga*, ICC-01/04-01/06-2864-tENG, Observations on the Sentence and Reparations by Victims a/0001/06 *et al.*, 18 April 2012.

211 L. Magarrell, above note 207, pp. 5–6.

single measure or excluding a particular one.²¹² This is consistent with UN Principle 15, which refers to “[a]dequate, effective and prompt reparation”.

In conclusion, the ICC reparation system has generally provided procedural and substantive justice for victims of serious violations of IHL and other atrocities committed during armed conflict. This does not mean that it is alright to ignore the system’s shortcomings and limitations, which restrict its impact in terms of restorative justice for victims. This is also reflected in the mixed perceptions of victims.²¹³ As other authors have observed,²¹⁴ it is questionable whether the ICC reparation system can contribute to other transitional justice goals, such as reconciliation or transformative justice, even if ICC case law has, on occasions, invoked such goals.²¹⁵

Conclusion

The international and domestic rules, practices and mechanisms that make up IHL or are closely related to it have become increasingly engaged with the question of reparation for victims of serious violations of IHL and other atrocities committed during armed conflict. IHL is now therefore inextricably involved in addressing the complex problems relating to reparation that arise after an armed conflict. It is a crucial and constantly evolving issue that has generated much discussion of the theoretical and practical challenges involved. In spite of the limitations, shortcomings and unresolved issues, the strengthening of the reparative dimension of IHL, especially with regard to victims of serious violations of IHL, is an important new development in this body of law. Significant advances have been made and new developments are currently taking shape in the matter of reparation for victims of serious violations of IHL.

These developments include the following aspects. First, it is now widely recognized that victims have a legitimate individual right to claim and receive reparation as redress for the harm caused as a result of serious violations of IHL and other atrocities committed during armed conflict. Second, the scope of the obligation to provide reparation under IHL is increasingly being extended: not only States but also non-State armed groups and individuals. Third, innovative domestic systems capable of effectively implementing the rules and principles of IHL on reparation are being consolidated, with regional courts playing a significant complementary and supervisory role, as evidenced by experiences in Latin American countries to varying degrees. Lastly, the legal framework and recent practice of the ICC reparation system have resulted in its emergence, in spite of its limitations, as a global forum for enforcing the right of victims of serious violations of IHL and other atrocities to claim and receive reparation.

212 *Ibid.*, p. 4.

213 For example, Stephen Cody *et al.*, *The Victims’ Court: A Study of 622 Victim Participants at the International Criminal Court*, Human Rights Center, Berkeley, 2015.

214 For example, L. Moffett and C. Sandoval, above note 185, p. 4.

215 For example, ICC, *Lubanga*, above note 132, paras 34 and 71.