



PEIC

PROTECT EDUCATION IN INSECURITY AND CONFLICT
حماية التعليم في ظروف النزاع وانعدام الأمن



British Institute of
International and
Comparative Law

EDUCATION AND THE LAW OF REPARATIONS in Insecurity and Armed Conflict

EDUCATION AND THE LAW OF REPARATIONS
In Insecurity and Armed Conflict

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Preface

This publication, entitled ‘Education and the Law of Reparations in Insecurity and Armed Conflict’, seeks to address the lack of attention paid to reparations for violations of international law during times of insecurity and armed conflict that affect education.

It is the result of a one-year project carried out by researchers at the British Institute of International and Comparative Law (‘BIICL’). As the research is based on scholarly analysis as applied to practical situations, the research was reviewed by an advisory board of experts in the field of reparations. Accompanying the publication is a Summary intended as a complement to the legal analysis and to guide future work in this area.

‘Education and the Law of Reparations in Insecurity and Armed conflict’ is the third in a series of legal research projects commissioned by Protect Education in Insecurity and Conflict (‘PEIC’) on the protection of education during insecurity and armed conflict. PEIC is a programme of the Education Above All Foundation, an independent organization chaired by Her Highness Sheikha Moza Bint Nasser of Qatar and UNESCO Special Envoy for Basic and Higher Education. As a policy, research and advocacy organization, PEIC contributes to such protection through the strategic use of international and national law. Its legal research papers are authored by academics and/or practising lawyers. They are aimed at a varied audience, including international and national lawyers, non-legally trained education experts, and policy-makers, governments, political, social and cultural bodies and civil society.

BIICL is one of the leading independent research centres for international and comparative law in the world, and is the only organization of its type in the UK. Since its foundation in 1958, BIICL has brought together a diverse community of researchers, practitioners and policy makers who are committed to the understanding, development and practical application of international and comparative law. Its high quality research projects and events encompass almost all areas of international law (both private and public) and comparative law and it is at the forefront of discussions on many contemporary issues. Further information on BIICL and its activities can be found at: www.biicl.org.

All webpages in this publication are current at 1 September 2013. Electronic versions of this publication and the policy summary are available at:

<http://www.biicl.org/research/reparations>

<http://www.educationandconflict.org>

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A Note from PEIC

The destructive impact on education of acts that violate international law during insecurity and conflict has attracted increased international attention in recent years. Significantly less attention has been paid to the victims who bear the brunt of those acts and the form of reparation that will best redress the consequences of those acts. This publication, *Education and the Law of Reparations in Insecurity and Armed conflict*, sets in motion the process of filling this gap.

The first publication in this legal research series, *Protecting Education in Insecurity and Armed conflict: An International Law Handbook*, examined the protection afforded to education in times of insecurity and conflict by international law. The second, *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed conflict*, scrutinized the relevant practice and processes of the core United Nations human rights mechanisms that monitor and supervise the implementation of that law. In this, the third in the research series, the lens is turned directly towards the victims - past, present and future - of violations of the law.

The study succeeds in its core aim of presenting to the reader emerging trends and examples of good practice of awards of reparation that redress the harm felt by victims of education-related violations of international law. Crucially, it also identifies education as a form of reparation that may contribute to the prevention of future violations of international law and of conflict more broadly.

It is imperative not to lose sight of the need to devise, fund and implement appropriate measures of reparation. PEIC is therefore pleased to present this publication, confident in its innovative and contemporary approach to the study and practice of reparations. Its analysis and recommendations will guide and facilitate measures to redress harm to education in times of insecurity and conflict and contribute to the protection of education, ensuring that such consideration is not put off ‘until later’, until ‘too late’.

Foreword

by Professor Theo van Boven

In conversations with friends and colleagues who as victims of brutal deportation and detention survived the sufferings of World War II, these survivors often recalled their passionate desire for education in the immediate post-war period. Education was valued as a means for shaping their lives in a future with better standards of life as well as greater freedom. What happened to victims and survivors in those days repeated itself in many situations of insecurity and armed conflict up till the present time. The Universal Declaration of Human Rights characterizes education as directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.

A special feature of the present report, a feature hitherto largely underestimated, is the connection of education with the law of reparations. The report opens up dimensions and perspectives which remained under-exposed in other commentaries on the law of reparations. It is generally recognized that violation of other basic rights often affects the right to education and must be considered, in the wording of the present report, as education-related violations. But it is less customary in the law and practice of awarding reparations to take these education-related violations duly into account. Further, the report identifies a significant and innovative trend to consider education not only as a basic right but also by and in itself as a form of reparation. This may happen with the aim to facilitate victims' professional and social integration in their communities and education as one of the means to help preventing the recurrence of violence and conflicts.

A core element of the report is its profound regard for the plight of victims. It is undeniable that in many situations victims are being ignored because of a series of obstacles, including legal shortcomings, political interests, economic factors and the incapacity of victims themselves to assert their rights and to pursue their claims. This was and still is a striking reality on the domestic scene and for long international law was not victim-oriented either. However, as the report recounts in discussing concepts and principles and reviewing international, regional and national reparation mechanisms and domestic reparation processes, there are now positive trends and developments in the recognition of reparation for victims as a right, a symbol and a process. Thus, the unanimous adoption by the UN General Assembly of 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 (2005) is a normative confirmation of these trends and developments. The same holds true for the recent establishment of the mandate of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2011) as it seeks to back up, conceptually and operationally, victims' rights to a remedy in the broader context of truth, healing and reconciliation.

The law and practice of reparations as progressively developing is facing challenges that require new and innovative responses. In this regard the report rightly draws attention to the issue of accountability of non-state actors, notably non-state armed groups and business enterprises and their engagement and liability for harm suffered by victims. Another, even more novel concept and notion, is the growing awareness, particularly experienced in connection with gender-based violence, that in situations of structural injustice, marginalization and discrimination, traditional forms of reparation aimed at restoring the previous situation are not sufficient and fall short in providing equal and social justice to victims who belong to the most vulnerable sectors of society. This awareness calls for "transformative reparations". It is a definite merit of the present report that it signals these significant trends.

In sum, the report is remarkable for taking education as the main entry point in discussing and outlining the law of reparations in Insecurity and Armed conflict. It offers enlightening perspectives regarding education as a basic right and entitlement to reparations and it values education as a means for the rehabilitation of victims and as a potential instrument to prevent recurrence of conflict and violence. Throughout the report the plight of victims is a matter of priority interest and major concern. It pays due attention to new and innovative trends and developments, in particular the engagement and the accountability of non-state actors and the advancement of “transformative reparations” so as to render social and political justice to victims belonging to the most vulnerable sectors of society.

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Acronyms

A2P1	Article 2 of the First Protocol
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court of Human and People Rights
ASP	Assembly of States Parties (to the Rome Statute)
AU	African Union
BIICL	British Institute of International and Comparative Law
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAVR	Commission for Reception, Truth and Reconciliation (East Timor)
CED	Committee on Enforced Disappearances
CEDAW	Convention to Eliminate All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CPA	Comprehensive Peace Agreement (Nepal)
CPR	Civil and Political Rights
CPRMW	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DDR	Disarmament, Demobilization and Reintegration
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia

ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EECC	Eritrea-Ethiopia Claims Commission
ESCR	Economic Social and Cultural Rights
HRC	Human Rights Council
HRCComm	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
IACCommHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICED	International Convention for the Protection of All Persons from Enforced Disappearance
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
IHRL	International Human Rights Law

ILC	International Law Commission
ILO	International Labour Organisation
IO	International Organisation
IOM	International Organisation for Migration
IRP	Interim Relief Program (Nepal)
NaCSA	National Commission for Social Action (Sierra Leone)
NGO	Non-Governmental Organisation
NSA	Non-State Actor
NSAG	Non-State Armed Group
OHCHR	Office of the High Commissioner of Human Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
PBF	Peacebuilding Fund (Sierra Leone)
PCIJ	Permanent Court of International Justice
PEIC	Protect Education in Conflict
RPE	Rules of Procedure and Evidence
SCSL	Special Court of Sierra Leone
SPSC	Special Panels for Serious Crimes
SRGBV	School-Related Gender-Based Violence
STL	Special Tribunal for Lebanon
TFV	Trust Fund for Victims
TRC	Truth and Reconciliation Commission
UN	United Nations
UNCC	United Nations Compensation Commission
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
VPRS	Victims Participation and Reparations Section (ICC)

1

Introduction

In times of insecurity and armed conflict, education is particularly important as schooling may represent a glimpse of normalcy and hope for the whole community.¹ In fact, educational facilities are often targeted during an armed conflict precisely because of their high profile status. In developing States, and in particular in rural areas, the school building is often the only permanent structure and its destruction has a devastating impact on the whole population.² Teachers and professors are also a prime target of violence, not only as they are often particularly distinguished and appreciated members of the community, but also because they may be considered to have political views or participate in a system which opponents regard as religiously or ideologically unacceptable.³

While education-related violations of international law have a widespread effect on the entire population, the most affected are often its youngest. According to the Committee on Economic Social and Cultural Rights ('CESCR'), education is "both a human right itself and an indispensable means of realizing other human rights."⁴ This is particularly true with regard to children for whom access to education represents an essential opportunity to improve their conditions and build a better future. It has been reported that more than half of all children who are out of school live in insecurity and armed conflict, which means that 28 million children of primary school age raised in conflict-affected States are deprived of one of their most fundamental rights, their right to education.⁵

Situations of insecurity and armed conflicts are more frequent in low income-developing States where some of the barriers which prevent the exercise of the right to education, such as poverty or the lack of qualified education staff, can generally be observed. Other barriers are the direct consequence of situations of insecurity and armed conflict, examples being attacks against education facilities and the persecution of education staff or students. The inadequacy of education infrastructures, the poor-quality of the curriculum taught and the gender-driven exclusion from certain school programmes, individually and combined, may amount to education-related violations and are illustrative of the factors that highlight the need to critically analyse the availability of reparations for violations in this context.

1 See the report by G Machel, *Impact of armed conflict on children: Note/By the Secretary-General*, UN General Assembly (26 Aug 1996) A/51/306.

2 Ibid at 43. For example, during the conflict in Mozambique, 45% of primary schools have been destroyed.

3 During the Rwandan genocide teachers and university's professors, due to their prominent role, were amongst the most persecuted. See N J Colletta and M L Cullen, *Violent Conflict and the Transformation of Social Capital: Lessons from Cambodia, Rwanda, Guatemala and Somalia* (World Bank Publications, Washington DC, 2000) at 40. On the politicization of teachers see in general J Marques and I Bannon, *Central-America: education reform in a Post-Conflict Setting, Opportunities and Challenges*, CPR Social Development Department, Working Paper No 4 (Apr 2003). According to the authors, in Nicaragua for instance, the Sandinistas used the education system as a tool to advance their socialist propaganda and in Guatemala teachers' unions became extremely politicized, particularly at the secondary school level. Available at: <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/2145781111661180807/20488027/CPRWPN04.pdf>.

4 CESCR General Comment No 13 on the Right to Education (Art 13 of the Covenant) 1999 (E/C.12/1999/10) available at: <http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument>

5 See EFA Global Monitoring Report, *The Hidden Crisis: Armed Conflict and Education* (UNESCO, 2011) at 2. See the Report by Save the Children, *The Future is Now: Education for Children in Countries Affected by Conflicts* (2010) available at: http://www.savethechildren.org.uk/sites/default/files/docs/The_Future_is_Now_low_res.pdf

Education and the Law of Reparations in Insecurity and Armed Conflict ('Report') focuses on reparations for violations of international law in the particular contexts of insecurity and armed conflicts, which is when education is particularly at risk. These education-related violations may take different forms.⁶ Students and education staff may be threatened or physically harmed. Populations may be forcibly displaced both within and outside the boundaries of their respective States and children should be removed from their local schools. Children may be recruited into the armed forces of States or into non-State armed groups. Educational facilities may be destroyed or used as training grounds leading to the discontinuation of education. Finally, education itself may also be directly affected when it is used as a tool for war propaganda through incitement to hatred or as a vehicle for discrimination.

Each of the above constitutes an education-related violation that requires reparation. As a result, reparations mechanisms must be put in place for all the direct victims of such violations, whether they are students or education staff. Reparations mechanisms must also consider indirect victims and, possibly, the community at large which may be affected one way or another by education-related violations.

In addition to the need for reparation mechanisms for education-related violations, education itself may be a key component of reparations awards for other types of violations. Therefore the Report also considers the use of education as a form of reparation. Human rights and peace education are particularly important in areas which have been affected by periods of insecurity or which have recently emerged from an armed conflict. In those post-conflict zones, education may be an effective tool to support recovery and avoid (or at least diminish) the risk of future armed conflicts.

As a result, this Report analyses the types of reparations which have been provided for education-related violations and how education has been used as a reparative measure. In doing so, it brings together practical examples from the international, regional and domestic levels of jurisdiction in order to offer a cross-cutting and comparative perspective. The international level includes cases from the International Criminal Court ('ICC') and claims before the United Nations treaty bodies. Relevant examples from all of the relevant regional courts are also presented, including those demonstrating the innovative approach adopted within the Inter-American system. Finally, at the domestic level, a selection of national reparations processes of interest are also identified and discussed.

1.1 BACKGROUND

The British Institute of International and Comparative Law ('BIICL') and Protect Education in Conflict ('PEIC') published *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook* (the 'Handbook') in 2012. This Handbook clarified the ways in which international law protects education. This is on the foundation that everyone must be provided with educational opportunities, even in times of insecurity and armed conflict.

This Handbook fills a gap in the examination of the different regimes of international law and their intersection on issues concerning education-related violations during insecurity and armed conflict. Such examination is essential for both the protection of education itself and for the benefits that derive from it. The Handbook explores the international legal protection afforded to both the right to education, as a human right, and education more generally under international human rights law ('IHRL'), international humanitarian law ('IHL'), and international criminal law ('ICL').

As it examines the three regimes in parallel, the Handbook adopts an innovative approach, which reveals similarities in the ways they protect education and shows how they can be combined to form a strong framework of protection. The Handbook also points out gaps where protection is lacking or when there is confusion or inconsistency.

⁶ The term 'education-related violation' is explained below at 1.2.2.

The Handbook and its accompanying Summary are available to download online on both:⁷
<http://www.educationandconflict.org/legalresources/>
<http://www.biicl.org/research/education/>

1.2 FOCUS ON REPARATIONS

The Handbook highlights the need for improved compliance by States and other parties with their existing legal obligations but it also demonstrates that remedy mechanisms are not always in place or, if they are, not always accessible to the victims of education-related violations. The present Report expands on the research undertaken for the Handbook in the area of reparations. It looks at international and regional mechanisms in depth and introduces the way reparations for education-related violations have been awarded within national systems.

The field of reparations has developed tremendously over the last few years. In 2011, the United Nations ('UN') agreed to dedicate a special mandate on the question of reparations, with the establishment of a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.⁸ The resolution which created this new independent advisory position called for particular attention to the victims, while also considering gender issues.⁹ The ICC issued its first decision on reparation in 2012.¹⁰

Given the current evolution in the area of reparations, this Report is particularly timely as it focuses on an issue that is often neglected in the reparations discourse: education. It is a useful resource for those working in the field as they need to consider the most appropriate mechanisms to deliver reparations for education-related violations or the ways education may be used as a form of reparation. This Report is also a tool for those who have been the victims of education-related violations as it presents the available mechanisms and the steps required to obtain reparation.

The ability to seek and obtain reparation for an education-related violation is a significant element of protecting education in situations of insecurity and armed conflict. For this reason, it is essential that States ensure that the mechanisms providing reparation to victims of education-related violations are adequate, effective and prompt.¹¹ Given the frequent absence of meaningful social assistance programmes in those situations, some form of appropriately designed reparations programme may provide one of the few avenues by which the harm inflicted by education-related violations can be addressed.

The Report considers not only the breaches of a State's obligation under international law but also those breaches which can be attributed to the State. As a result, it analyses whether a State has to provide reparation for the wrongful actions of non-State actors ('NSAs'), including non-State armed groups ('NSAGs'), as well as the possibility of obliging NSAs themselves in providing reparation.

The Report highlights the need for reparation mechanisms to recognise when violations of international law are *education-related violations*, and make orders which address the damage to education. In this respect, reparations are of particular significance. The Report responds to the need for greater clarification within the field of reparation and identifies the most effective and appropriate forms of redress for education-related violations.

7 Note that audio versions of the Summary are also available for download on those websites. A Braille version is available for consultation at the BIICL.

8 As the Special Rapporteur took up his functions on 1 May 2012, recommendations are yet to be issued. See UN OHCHR webpage at: <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx>

9 HRC Res 18/7 of 29 Sep 2011.

10 See the ICC Decision establishing the principles and procedures to be applied to reparations in the *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* ('Lubanga') (ICC-01/04-01/06) Trial Chamber I, 'Decision establishing the principles and procedures to be applied to reparations', 7 Aug 2012, available at: <http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf>

11 See the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('UN Principles and Guidelines'): victims have a right to adequate but also to effective, prompt and appropriate forms of reparation for the harm they have suffered.

1.3 SCOPE OF REPORT

The present Report focuses on reparations for education-related violations, as well as on educational forms of reparations for other types of violations. However, as the area of reparations for violations of international law is still very much in development at present, the Report does refer, when relevant, to reparations for other types of violations as these may be applicable to education-related violations.

While the topic of this Report may at first appear somewhat limited, it is in fact rather far-reaching and covers a large number of reparation processes. It covers both judicial and non-judicial processes. However, it does not extend to the so-called ‘political processes’,¹² and ‘affirmative action’ measures.¹³ Clearly, such processes contain a strong justice component, but cannot be classified as reparations *stricto sensu*.

In order to understand the scope of the Report, the terminology used in this Report is explained below, including the concepts falling under the terms relevant to education, education-related violations, insecurity and armed conflict, as well as the applicable legal regimes.

As the Report considers all forms of education-related violations, it looks at the mechanisms available at the international and regional level. This includes the complaint mechanisms with the UN Treaty Bodies and the regional courts in Africa, the Americas and Europe. It also considers the ICL mechanisms which have provided for reparation, inter-State commissions and similar mechanisms. In addition, as reparations mechanisms are often developed and operated within the domestic context this Report also considers those national mechanisms.

1.3.1 Education

Education must be understood as a broad concept which includes all types and levels of education, including for example adult education and vocational training. Article 13 of the International Covenant on Economic Social and Cultural Rights (‘ICESCR’) made the right to education a legally binding right for all State parties to the Covenant. It provides for the universal right to education.¹⁴ The CESCR has issued a General Comment which details the content of the right to education.¹⁵ The right to education entails positive obligations for the States, which must fulfil its core content (free and compulsory primary education for all) as soon as they become party to the Covenant and fulfil the rest of its content in accordance with the principle of progressive realisation, which obliges States to take immediate steps towards the full realisation of the right.

The Maastricht Guidelines state that the following constitutes the core content of the right to education:

to ensure the right of access to public educational institutions and programs on a non-discriminatory basis; to ensure that education conforms to the objectives set out in Article13(1); to provide primary education for all in accordance with Article13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards” (Article13(3) and (4) of the ICESCR).¹⁶

12 For example in South Africa, alongside a national reparation programme set up according to the recommendations embedded in the TRC’s report, the government developed a political process to redress past inequality caused by apartheid. This process of empowerment triggered access to higher education for example. Further info available at: http://teacher.scholastic.com/scholasticnews/indepth/upfront/features/index.asp?article=f010906_apartheid.

13 Affirmative action measures (known as ‘positive discrimination’ measures in the United Kingdom) are “the positive steps taken to increase the representation of women and minorities in areas of employment, *education*, and business from which they have been historically excluded”, see R Fullinwider ‘Affirmative Action’, in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2011) available at: <http://plato.stanford.edu/archives/win2011/entries/affirmative-action/>.

14 See International Covenant on Economic, Social and Cultural Rights (‘ICESCR’), GA res 2200A (XXI), 21 UN GA OR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 Jan 1976. For more on the right to education, see the Handbook at 66ss.

15 CESCR General Comment No 13 on the Right to Education (Art 13 of the Covenant) 1999 (E/C.12/1999/10) available at: <http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument>.

16 See Urban Morgan Institute for Human Rights, ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 *Human Rights Quarterly* 691, at 691-704, para 9.

The CESCR has established the so-called ‘4 As framework’, a useful tool to understand the content of the right to education further, according to which education must be accessible, available, acceptable and adaptable.¹⁷ In addition, States also have some negative obligations with regard to the right to education, for example by guaranteeing that the freedom to choose between State-organized and private education is guaranteed.¹⁸ The right to education was also enshrined in a number of other human rights treaties such as the Convention on the Rights of the Child (‘CRC’), applicable to all human being below the age of 18, the Convention on the Elimination of Discrimination against Women (‘CEDAW’), and the regional human rights treaties.¹⁹

The Report, in accordance with the approach taken by the Handbook, also adopts a broad understanding of the terms **students** and **education staff**. Students include those persons who benefit from education regardless of age or institution. Education staff refers to teachers and other non-teaching staff (including maintenance and technical staff) involved in the provision of both public and private education.

Finally, **educational facilities** do not only include classrooms and other structural facilities directly related to the provision of education. This term also covers other facilities where education is provided, including facilities for sanitation, drinking water, libraries, computers and other information technology.

1.3.2 Education-Related Violation

The term **education-related violation**, which was first introduced in the Handbook, refers to violations of the right to education, and of other related rights and protections affecting education. As a result, ‘education-related violation’ is a concept which incorporates the *legal aspects* of actions attacking education during situations of insecurity and armed conflict. An attack on education refers to an act against education itself, students and education staff, or educational facilities.²⁰

Under this understanding, an education-related violation does not only occur when the right to education itself is violated but also when another provision, which enables the right to education to be exercised, is violated. For example, engaging in torture of education staff, recruiting children into armed conflict or shelling educational facilities are all education-related violations.²¹ The condition for those violations to constitute an education-related violation is that they must affect negatively the enjoyment of education of students.

Given the above definition of education-related violations, the victims most relevant to the present Report consist mainly of persons who suffer educational harm as a result of a violation of international law. However, it also considers those victims who are awarded educational forms of reparations in relation to other violations of international law. The scope of the project is limited to situations of insecurity or armed conflict, which are defined below.

17 See supra n 15.

18 See also F Coomans, ‘Identifying Violations of the Right to Education’, in T van Boven et al (eds) *The Maastricht Guidelines on Economic, Social and Cultural Rights*, SIM Special No 20 (1998) at 125-146.

19 See Arts 28-29 Convention on the Rights of the Child (‘CRC’) (adopted 20 Nov 1989, entry into force 2 Sep 1990) UNTS Vol 1577, 3; Art 10 Convention to Eliminate All Forms of Discrimination Against Women (‘CEDAW’) (adopted 18 Dec 1979, entry into force 3 Sep 1981) UNTS Vol 1249, 13; Art 17 African Charter on Human and Peoples’ Rights (‘ACHPR’) (adopted 9 Jun 1998, entry into force 25 Jan 2004) OAU/LEG/MIN/ACHPR/PROT.1 Rev.2; Art 13(3)(a) Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (‘ACHR, Additional Protocol’) (adopted 17 Sep 1988, entry into force 16 Sep 1999) OAS Treaty Series No. 69; 28 ILM 156 (1989); Art 2 Additional Protocol 1 to the European Convention on Human Rights (‘ECHR, Additional Protocol’) (adopted 20 Mar 1952, entry into force 19 May 1954) ETS 9. For more on the regional protection of the right to education, see the Handbook at 82ss.

20 See the Handbook at 5.

21 See the Handbook at 6.

1.3.3 Insecurity and Armed Conflict

As the right to education is an enabling right, which means that it allows the exercise of other human rights, it is crucial that this right is protected, respected and fulfilled at all times, even in situations of insecurity or armed conflict.

Insecurity is a non-legal term which describes situations of disturbance and tension within a State that disrupt the normal functioning of political, social, and legal institutions, including those that are used to facilitate education. This includes internal disturbances, tensions and situations of fragility. ‘Insecurity’ does *not* include situations of intense violence that reach the threshold of armed conflict. However, the period preceding an armed conflict or subsequent to one (so-called ‘post-conflict situations’) are often situations of insecurity.

Armed Conflict is a term referring to the legal concepts of ‘international armed conflict’ and ‘non-international armed conflict’, which are different from situations of insecurity. An international armed conflict consists of a situation of violence which involves the use of armed force *between* States. This includes where States use force against each other by ‘proxy’ through a non-State armed group. Some armed conflicts involving non-State actors have been deemed to be examples of international armed conflict by treaty law. International armed conflict also includes situations of belligerent occupation, where the armed forces of one State have effective control over the territory of another. ‘Non-international armed conflict’ is a situation of violence between a State and a non-State armed group on its territory or a situation of violence between non-State armed groups on the territory of a State. In both situations the violence used must be ‘protracted’. This means that the violence must reach a level of intensity in order for the situation to be one of non-international armed conflict - as opposed to a situation of internal disturbance or tension that amounts to insecurity, to which international humanitarian law does not apply.

1.3.4 Applicable Legal Regimes

Depending on the type of situation in which the violation occurred, different legal regimes may apply. This is very relevant for this Report as different legal regimes provide for different reparations mechanisms.

International Human Rights Law (‘IHRL’) applies at all times, including in times of armed conflict.²²

International Humanitarian Law (‘IHL’), as established in Article 2 of the 1949 Geneva Conventions, applies only in armed conflict.²³

Finally, **International Criminal Law** (‘ICL’) constitutes a very different legal regime as it identifies the circumstances that attract individual criminal responsibility. The conducts criminalised under this regime have generally taken place during an armed conflict.

The relationship between ICL and IHRL is rarely, if ever, considered by IHRL treaty bodies, but the rules and procedures of IHL and IHRL are frequently considered by ICL mechanisms, including the ICC.²⁴

Given the different branches of international law applicable, reparations, in the contexts relevant to the Report, requires a transversal study, looking at the interplay of the three regimes and at the crosscutting issues thereof.

22 See Handbok at 15. Note that the simultaneous applicability of IHL and IHRL was not always accepted. See C Tomuschat, ‘Human Rights and International Humanitarian Law’ (2010) 21(1) *European Journal of International Law* 15, at 16.

See also A Orakhelashvili, ‘The Interaction between Human Rights and Humanitarian Law: A Case of Fragmentation?’ in *International Law and Justice Colloquium*, New York University (26 Feb 2007).

23 See the Handbook at 31.

24 See the Handbook at 54.

1.4 METHODOLOGY

1.4.1 Overall Approach

The Report is the result of research conducted at BIICL, including a review of data from both primary sources, such as legislation and jurisprudence, and secondary sources, such as academic scholarship. The approach adopted is not just scholarly but also practical. The Report reflects the current views on reparation in light of legal theory. As the field of reparations is still an emerging area, it is helpful to understand how the concept of reparation emerged in order to understand how it may be developed further. The practical aspect of the Report is evident through the number of examples used to illustrate the various concepts, mechanisms and issues faced by those providing reparation and those seeking reparation.

In addition to being both scholarly and practical, this Report adopts a comparative and transversal analysis. For example, in examining the award of reparations for education-related violations within the framework of IHRL for example, the research considers the circumstances in which reparations are available within universal human rights supervisory mechanisms, as well as within regional mechanisms. With regard to the latter, the regional human rights conventions, i.e. the European Convention on Human Rights ('ECHR'),²⁵ the American Convention on Human Rights ('ACHR')²⁶ and the African Charter on Human and Peoples' Rights ('ACHPR'), all provide for an individual right to an effective remedy.²⁷ Their respective courts have also been given the power to award reparation to individuals where they find a violation of a convention right. Research was thus conducted in respect of these regimes, through analysis of the primary sources, including the relevant international instruments as well as the case law. Secondary sources such as academic commentaries on the relevant mechanisms were also taken into account.

The research examined reparations that have been provided at the international, regional and national levels. the practice of certain Truth and Reconciliation Commissions ('TRCs'), a particular form of post-conflict transitional justice, were also considered. This comparative and transversal approach allows for a comparison of reparations awards and a consideration of the most adequate forms of reparations for education-related violations and the most appropriate use of education as a form of reparation.

The research conducted at BIICL was complemented by information provided by a number of actors in the field of reparations and transitional justice. That information was first collected through the completion of questionnaires which were developed by the authors of the report. This process enabled the authors to inject its findings with practical views, in particular when assessing the adequacy and feasibility of reparations schemes. Drafts of the Report were also submitted to an external review process involving a number of experts in the field.²⁸

Over the course of the research, the BIICL team also organised two public seminars to gain in-depth perspectives on particular issues in the field of reparations. The first event, entitled 'Reparations to Victims: the Recent International Criminal Court Decision and Beyond', took place in September 2012 in London. Participants included Carla Ferstman (REDRESS) and Mia Swart (University of Johannesburg).²⁹ The second seminar, made possible with the kind support of PEIC and Freshfields Bruckhaus Deringer, regarded the role of non-State actors in relation to education-related violations and speakers included Robert McCorquodale (BIICL), Math Noortmann (Oxford Brookes) and Jonathan Somer (Geneva Call).³⁰

25 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 Nov 1950, entry into force 3 Sep 1953) CETS No 5, as amended by Protocol 11 CETS No 155 (adopted 11 May 1994, entry into force 1 Nov 1998).

26 American Convention on Human Rights (adopted 22 Nov 1969, entry into force 18 Jul 1978) 114 UNTS 123.

27 Art 8 Universal Declaration of Human Rights ('UDHR') (adopted 10 Dec 1948) UNTS Vol 1465, 85; Art 25 ACHR; Art 13, ECHR.

28 For the list of the experts who were part of our consultation process, please consult the acknowledgment section at the beginning of this Report.

29 The Report of this event is available at: <http://www.biicl.org/events/view/-/id/723/>

30 The Report of this event is available at: <http://www.biicl.org/events/view/-/id/757/>

1.4.2 Audience

This Report is aimed at three main groups of readers. It is a useful resource for those having to provide for reparations for victims of education-related violations or victims of other violations who may benefit from education as one form of reparations. Therefore it is useful for law and policy makers who need to ensure that reparation mechanisms are in place in their jurisdiction and also accessible. Judges and court staff, who are faced with the issue of providing reparation awards for education-related violations or who need to consider education as a means of reparation, will also find this report particularly useful. Of course, those working in implementing reparations awards and all those working more generally with transitional justice initiatives will be interested in this Report.

The Report is also geared at the victims of education-related violations and victims of other violations who have an interest in obtaining education as a form of reparations. As a result, the Report is also useful to those defending those victims who may be children who were directly denied education or, for example, adults who are not able to pursue their studies or who are unable to teach.

Finally, the Report is relevant for all those who are participating in developing the field of reparations, in particular those who have an interest in post-conflict situations and in education. These include scholars, students and education staff.

Readers are encouraged to consult the Handbook on the protection of education under international law mentioned above.

1.5 TABLE OF CONTENTS

Following the Introduction, Section 2 details the reparation concepts applicable to education-related violations. As these concepts are evolving, this Section not only provides the reader with the various definitions of reparation currently in use, but it also presents emerging concepts such as transformative reparation. This Section answers three main questions:

- what is reparation?
- who can obtain reparation?
- what are the requirements for obtaining reparation?

The various forms of reparations are presented, as well as the concept of victim, harm and causality. Whenever possible, their application to education-related violations is highlighted. Section 2 also highlights a number of distinctions which are crucial in practice.

Section 3 and 4 are both practical in nature. Section 3 presents the reparations mechanisms which are available to the victims and their legal representatives, looking at both judicial and non-judicial mechanisms. It includes examples of reparations for education-related violations, as well as reparation awards which include educational measures as a form of reparation. In addition, it presents the steps a victim (or a victim's legal representative) has to take in seeking a reparation award in practice.

Section 4 is particularly relevant for those involved in the establishment and the implementation of reparations processes. It presents a series of issues in relation to the reparations mechanisms presented in Section 4. For example, a crucial implementation issue is the possible lack of resources and the need to prioritise resources. This Section also seeks to clarify the application of the principles mentioned in Section 2.

Section 5 looks back at examples, mechanisms, and processes presented throughout the Report and highlights their advantages and disadvantages. It also provides concluding remarks, which include a summary of findings, as well as recommendations.

2

CONCEPTS AND PRINCIPLES

INTRODUCTION

Education-related violations can result from various breaches of international law and not solely from breaches of the right to education itself. As explained in Section 1, any violation of international law which impacts negatively the enjoyment of education can be considered as an education-related violation. Therefore, this Report considers the various forms of reparations awarded for violations of IHRL, IHL and ICL, as far as they seek to redress education-related violations. The Report also looks at the way education itself is used as a mean of reparation.

The general concepts and principles of reparations are applicable to education-related violations. Therefore, the Report first presents those concepts and principles, before considering their application to education-related violations. This includes the general principles which have been developed with regard to gross violations of IHRL or serious violations of IHL.³¹ As with the recruitment and use of child-soldiers, these forms of IHRL and IHL violations may amount to education-related violations as they affect negatively the enjoyment of education. Therefore, this Section considers all those concepts and principles of reparations which are (or may be) relevant for education-related violations.

The idea that the consequences of a wrongful act should be adequately and promptly redressed has now become an established principle of justice. This idea was first developed within domestic systems, before being adopted at the international level, in particular for disputes among States.³² Now, individuals, including those who have suffered educational harm as a result of a violation of international law, may also have the right to have that harm repaired. This obligation of States to provide reparation directly to individuals has been largely adopted within the framework of IHRL. This Section considers the types of education-related violations which entail the obligation of States to provide reparation for violations of international obligations which affect students, education staff and educational facilities.

This Section also provides an overview of the applicable international and regional legal frameworks under which the right to reparation may be exercised. It will briefly explain the extent to which the different regimes (IHRL, IHL and ICL) depart from the notion of reparation enshrined in public international law in general.

31 Note that even though the focus is on gross IHRL and serious IHL violations, as stated in Principle 26 the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law are “without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law”, at XII. These Basic Principles and Guidelines are available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

32 See Lord Bingham MR in *X v Bedfordshire* [1995] 2 AC 633, at 6 63C-D, where he stated that “[T]he rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied” (CA, expressly adopted by Lord Browne-Wilkinson in House of Lords (Ibid, at 749G).

2.1 CONCEPT OF REPARATION

This Section examines the concept of ‘reparation’ under international law and analyses its scope, as well as the various forms it can take. For the purpose of this Report, the following terminology has been adopted:

Reparation has a specific legal meaning, which encompasses both the ‘obligation’ to provide reparation and the ‘right’ of the victims to claim it.

Reparations is used to refer either to the different forms of reparation (for example when issued in combination) or to the national reparations programmes set up to deal with violations perpetrated during armed conflicts and situation of insecurity.

The concept of reparation should also be distinguished from the concept of remedies.³³ Remedies can be defined as the means by which a right is enforced or the means by which the violation of a right is prevented or redressed.³⁴ Therefore, the concept of remedies encompasses a broader spectrum of mechanisms. It includes not only the mechanisms set up to provide redress (like reparation), but also those established to enforce the right and prevent further violations.³⁵ The term ‘redress’ may refer either to ‘reparation’ or to ‘remedies’.

Of course, this distinction may be blurred as some forms of reparation, such as guarantees of non-repetition, may also contribute to the prevention of violations of international law.³⁶ In that case, they are considered as a form of remedy by the Articles on Responsibility of States for Internationally Wrongful Acts (‘Articles on State Responsibility’),³⁷ and as a form of reparation within the IHRL framework.³⁸

As will be discussed in more detail below, Article 2(3) of the International Covenant on Civil and Political Rights (‘ICCPR’), as do other relevant treaties, refers to ‘effective remedy’, without mentioning ‘reparation’. The Human Rights Council (‘HRC’), the treaty body responsible for overseeing the implementation of the ICCPR, has stressed the link between the wider concept of remedies and reparation, affirming that “without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged”.³⁹

33 See D Shelton, *Remedies in International Human Rights Law* (OUP, Oxford, 2005), who uses the term ‘remedies’ when talking about ‘reparation’.

34 See C D Gray, *Judicial Remedies in International Law* (Clarendon Press, Oxford, 1987) at 11. See also F Capone, ‘Remedies’, in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP, Oxford, 2012).

35 The Basic Principles and Guidelines, by affirming that remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to: equal and effective access to justice, adequate, effective and prompt reparation and access to relevant information concerning violations and reparation mechanisms, underscore that the notion of remedies is wider than the notion of reparation.

36 See Principle 23 of the UN Basic Principles and Guidelines. Moreover it is trite to observe that every kind of reparation has a potentially preventive component since and that, although not punitive in nature, reparations may have a deterrent effect on the perpetrators.

37 ILC Articles on Responsibility of States for Internationally Wrongful Acts (UN GAOR, 56th Sess, Supp No 10, at 43, UN Doc A/56/10) (Nov 2001) at 91, available at <http://www.un.org/law/ilc>
Note that these Articles are not legally binding but many of these principles reflect existing international law.

38 The Articles on State Responsibility consider guarantees of non-repetition as a corollary of the primary obligation and not as part of the obligation to make reparation. With regard to the human rights framework, this is particularly the case in the IACtHR. See H S Galvan Puente ‘Legislative Measures as Guarantees of Non-Repetition: A Reality in the Inter-American Court and a Possible Solution for the European Court’ (2009) 49 *Revista IIDH* 70, at 69-106; T M Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’ (2008) 46(2) *Columbia Journal of Transnational Law* 351, at 351-419. See also C Ferstman, ‘Reparation as Prevention: Considering the Law and Practice of Orders for Cessation and Guarantees of Non-repetition in Torture Cases’ (2012) available at: http://oxford.academia.edu/CarlaFerstman/Papers/143260/Reparation_as_Prevention_Considering_the_Law_and_Practice_of_Orders_for_Cessation_and_Guarantees_of_Non-Repetition_in_Torture_Cases

39 HRCComm General Comment 31 *The Nature of the general Legal Obligation Imposed on State Parties to the Covenant* (2004) CCPR/C/21/Rev.1/Add.13, 26 May 2004, at para 16, available at: www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?OpenDocument

2.1.1 Core Principles of Reparation

There are three core principles of reparation:

- Primacy of Restitution
- Proportionality
- Causality

The first international court to award reparation was the Permanent Court of International Justice ('PCIJ'). In the case of the *Factory at Chorzow*, although the focus was on compensation, the PCIJ established the principle of primacy of restitution (*restitution in integrum* or 'full restitution'),⁴⁰ stating that

"[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".⁴¹

This means that reparations should not be awarded solely to restore the victim to the situation he or she was in prior to the wrongful act (also known as the *status quo ante*). Reparation should be awarded to place the victim in the position he or she *would be* in, if the wrongful act had not occurred. The principle of primacy of restitution also means that, when it is not possible to award full restitution to a victim, another form of reparation, such as compensation, should be awarded. The different possible forms of reparations are presented in more details below.

According to the principle of proportionality, reparation must be commensurate with the harm suffered. As mentioned by the Human Rights Committee ('HRCComm'), "[T]he nature of the procedural remedies (judicial, administrative or other) as well as the relief provided for such violations should accord with the substantive rights violated."⁴² In particular, compensation (as resulting from an administrative mechanism) should not be used as a substitute for judicial civil remedy.⁴³ In order to be adequate, compensation also excludes purely 'symbolic' amounts of compensation.⁴⁴ In fact, "the damage caused must be relevant to the form and quantum of reparation."⁴⁵ This will be discussed in more detail in Section 4.

Finally, the principle of causality refers to the link which must exist between the wrongful act and the harm caused in order for the obligation of reparation to arise.⁴⁶ The establishment of a causal nexus can be addressed through the application of a number of criteria, such as 'directness', 'foreseeability' or 'proximity'. However, each violation of international law is defined by its own peculiarities and an assessment of the causality link has to be made on a case-by-case basis.⁴⁷

40 See C Gray, 'The Choice between Restitution and Compensation' (2009) 10 *European Journal of International Law* 413, at 414.

41 *Factory at Chorzow Case (Germany v Poland)* 1928 PCIJ Ser A No 17 (Judgment of 13 Sep 1928) at para 47. In this case, the term 'victim' referred to the state since the controversy in question arose between Germany and Poland, at a time when individuals were still far from been recognised as subjects of international law.

42 HRCComm, Concluding Observations, Finland (08/04/98 CCPR/C/79/Add.91) as quoted in Redress, 'Justice for Victims: The ICC's Reparations Mandate' (Redress Report, May 2011), available at: http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf

43 See *Bautista de Arellana v Colombia*, Communication No 563/1993, UN Doc CCPR/C/55/D/563/1993 (1995) at para 8.2

44 See *Albert Wilson v Philippines*, Communication No 868/1999, UN Doc CCPR/C/79/D/868/1999 (2003) at para 5.14

45 See O Amezcua-Noriega, 'Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections' (Briefing paper 1, Reparations Unit, Essex University) available at: http://www.essex.ac.uk/tjn/documents/paper_1_general_principles_large.pdf

46 See the ILC Articles on State Responsibility, at 91.

47 Ibid. For more detailed analysis of causation, see Section 2.6.2.

2.1.2 Obligation to Make Reparation

Responsibility of States

Under international law, the obligation to provide reparation has traditionally referred to the State's duty to redress the harm caused to another State by the breach of an international obligation. This is confirmed by Article 31 of the Articles on State Responsibility as an "obligation arising from the commission of an internationally wrongful act which has caused injury, including any material or moral damages, to the claimant state".⁴⁸ This obligation arises regardless of whether an international court or tribunal seized with jurisdiction requires a State to make reparation. It is an immediate consequence of the internationally wrongful act.⁴⁹

An internationally wrongful act may consist of a violation of a human rights obligation contained in a treaty to which the State in question is a party. It may also consist of a violation of a human right which is part of customary international law or *jus cogens*.⁵⁰ For example, situations of insecurity and armed conflict may be ones where the State uses torture against students or education staff. The prohibition of torture and other inhuman and degrading treatment is a norm of *jus cogens*, protected by general IHRL,⁵¹ as well as by a specific treaty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT').⁵²

Moreover, the responsibility of the State (and its consequent obligation to redress the harm caused) may be the result of acts committed by the State itself or by its agents.⁵³ These agents and officials include, for instance, members of the State's executive, legislature, judiciary, armed forces, police and security services.⁵⁴ A State is also responsible for the actions of its agents and officials even where those actions are committed outside the scope of their apparent authority if they "acted, at least apparently, as authorized officials or organs, or that, in so acting, they... used powers or measures appropriate to their official character".⁵⁵

As discussed in more detail below, in certain circumstances, the responsibility of a State may also be engaged for the acts of NSAs.

The violation by a State of an obligation imposed upon it by IHL entails the State's international responsibility and gives rise to an obligation to make reparation, which is well established, at least on an inter-State basis.⁵⁶ Article 3 of Hague Convention IV states that

A belligerent party which violates the provisions of the [annexed] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁵⁷

48 ILC Articles on State Responsibility, at 91.

49 See ILC 'Commentary to Articles on State Responsibility' in *Yearbook of the International Law Commission* (2001) Vol II, Part Two, at 91.

50 Note that a State may object to a norm of customary international law but not if it has become a *jus cogens* norm, which is defined by Art 53 VCLT as Art 53 VCLT, which states that "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

51 Art 7 International Covenant on Civil and Political Rights ('ICCPR') (adopted 16 Dec 1966, entry into force 23 Mar 1976) UNTS Vol 999, 171; Art 37(a) CRC; Art 3 ECHR; Art 5 ACHR; Art 5 ACHPR.

52 See UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') (adopted 10 Dec 1984, entry into force 26 Jun 1987) UNTS Vol 1465, at 85.

53 Art 33 ILC Articles on State Responsibility.

54 Art 6 ILC Articles on State Responsibility.

55 *France v Mexico* ('Caire Claim') (1929) 5 RIAA 516.

56 See P D'Argent, 'Reparations after WWII', R Wolfrum (eds) *Max Planck Encyclopedia of International Law* (OUP, Oxford, 2012).

57 Hague Convention (IV) Respecting the Laws and Customs of War on Land ('Hague Convention (IV)') (adopted 18 Oct 1907, entry into force 26 Jan 1910) 9 UKTS (1910).

Article 91 of Additional Protocol I to the Geneva Conventions reiterates this obligation in relation to violations of its provisions.⁵⁸ It has been argued that the provision contained in Article 3 of the Hague Convention IV, and reiterated in Article 91 of Additional Protocol I, is not limited to the inter-State dimension, but provides also for an obligation to repair individuals for violations of IHL in international armed conflicts.⁵⁹ The finding by the International Court of Justice ('ICJ') in the *Wall Advisory Opinion* that Israel was obliged to make reparation to natural and legal persons in the Occupied Palestinian Territory "in accordance with the applicable rules of international law" may be interpreted to support this proposition. Equally, however, a narrower interpretation of the case is also possible in light of the fact that the ICJ was faced with the unusual situation in which there was no injured State to which reparation could be made.⁶⁰ Although there is a body of scholarly opinion in favour of the existence of such an obligation,⁶¹ as well as a number of judicial decisions,⁶² State practice is still scant, raising serious questions as to its status.

The obligation to provide reparation to individuals for violations of IHL perpetrated in non-international armed conflict is even more complicated and State practice in that regard is almost completely lacking. Rules of non-international armed conflict, including the obligations set out in Common Article 3 to the four Geneva Conventions of 1949 and the principles set out in Additional Protocol II to those Conventions, are binding upon both States and NSAs.⁶³

Finally, violations of ICL do not give rise in principle to an obligation to make reparation for States. ICL differs to IHRL and IHL in that it does not seek to protect individuals, but seeks instead to establish individual criminal responsibility for the most serious types of crimes. However, in certain contexts, it is possible that a perpetrator is obliged to make reparation to the victims. For example, according to the Rome Statute⁶⁴, the ICC must "establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".⁶⁵

58 Protocol Additional to the Geneva Conventions of 12 Aug 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) ('Geneva Conventions, AP I') (adopted 8 Jun 1977, entry into force 7 Dec 1978) 1125 UNTS 1979).

59 See F Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 *International and Comparative Law Quarterly* 827; C Greenwood, 'International Humanitarian Law (Laws of War)' in F Kalshoven (ed) *The Centennial of the First International Peace Conference* (The Hague, Kluwer, 2000) at 250; and L Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 498, at 506.

60 See R O'Keefe, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary' (2004) 37 *RBDI* 92, at 136-40.

61 E Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 536; R P Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview' (2003) 1 *Journal of International Criminal Justice* 343; A Randelzhofer, 'The Legal Position of the Individual under Present International Law', in A Randelzhofer and C Tomuschat (eds) *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, (The Hague, Martinus Nijhoff, 1999) at 231; R Bank and E Schwager, 'Is There a Substantive Right to Compensation for Individual Victims of Armed Conflict Against a State under International Law?' (2006) 49 *German Yearbook of International Law* 398; R Hofmann, 'Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation Against States under International Law?', in P-M Dupuy et al (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat*, (N P Engel Verlag, Kehl, 2006) at 357; M Frulli, 'When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The Markovich Case' (2003) 1 *Journal of International Criminal Justice* 406; M Sassoli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *International Review of the Red Cross* 419; L Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 498.

62 See for example: *Ferrini v Federal Republic of Germany*, Corte di Cassazione (Sezioni Unite) (Judgment No 5044 of 11 Mar 2004) (2004) 87 *Rivista di diritto internazionale* 539. This case and the subsequent attachment of German assets by Italian courts has led to Germany instigating proceedings before the ICJ. See *Jurisdictional Immunities of the State (Germany v Italy) (Application of Germany)* 22 Dec 2008.

63 The obligation of NSAs is developed below.

64 UN General Assembly, Rome Statute of the International Criminal Court ('ICC Statute') (adopted 17 Jul 1998, entry into force 1 Jul 2002) 37 ILM 1002 (1998) 2187 UNTS 90.

65 Art 75(1) ICC Statute.

The ICC can

...make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund...

Due to the perpetrator's lack of assets, in the landmark *Lubanga* decision on reparations of 7 August 2012, the Court decided to award reparations through the Trust Fund for Victims ('TFV').⁶⁶

Victims can apply for reparations before the ICC.⁶⁷ However, the Court may also decide to award reparations on its own initiative, even where victims have not submitted applications. Within the ICC framework, both natural persons, such as child soldiers and legal persons, such as schools, technical colleges, vocational training institutions, may receive reparations for the harm caused to them through the commission of crimes within the jurisdiction of the Court.

Territorial Scope of State Obligation

Treaty obligations are applicable on the territory of a State party. With regard to human rights obligations, this means that a State must meet its obligations towards all individuals situated on its territory, no matter their nationality or statelessness status.

Even when the victims of a violation, of which a State was responsible, leave the territory of that State, the obligation to provide an effective remedy remains. Indeed, it is often the case that victims of violations committed during situations of insecurity or armed conflict, including education-related violations, leave the territory of the State responsible for these violations. The victims may become refugees or asylum seekers in another State. In any case, the original State remains responsible to make reparation to these individuals, even if they are no longer within its territory.⁶⁸

The protection contained in human rights treaties is also applicable to individuals subject to the 'jurisdiction' of a State party and thus the treaty obligations may be applicable extraterritorially.

Extraterritoriality

In particular circumstances, certain treaties may apply extraterritorially when a State takes actions (or makes omissions) outside its territory or where there are consequences outside that territory of decisions taken within its territory.⁶⁹ A treaty may also apply extraterritorially with regard to general international legal obligations to take action, such as through international cooperation, to realize human rights internationally.⁷⁰ While not all international human rights treaties make their territorial scope explicit, it is now generally accepted that IHRL treaties may apply extraterritorially. When commenting on Article 2(1) of the ICCPR, which provides for the scope of application of the treaty, the HRCComm stated that the ICCPR is applicable to "anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".⁷¹ The International Court of Justice ('ICJ') has endorsed this interpretation.⁷²

66 *Lubanga*, 'Decision establishing the principles and procedures to be applied to reparations', 7 Aug 2012, available at: <http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf>.

67 See the website of the ICC at: <http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/VictimsEng.pdf>.

68 See D Cantor, 'Restitution, Compensation, Satisfaction: Transnational Reparations and Colombia's Victims' Law' (2011) UNHCR Research Paper No 215, at 9.

69 For more on the extra-territorial application of human rights, see the Handbook at 22-5.

70 See Principle 8 of the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (2011) (Maastricht Principles), which are available at: http://www.rtfm-watch.org/uploads/media/Maastricht_ETO_Principles_EN.pdf

These were drafted by experts in this field and so are persuasive but not legally binding.

71 HRCComm General Comment 31, at para 10.

72 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, ICJ Reports 2004 ('*Wall Advisory Opinion*') at para 111, where the ICJ found that the ICCPR was "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".

The CESCR has also found that the ICESCR may be applicable beyond the territory of a State party when it has effective control over a population not situated within its territory,⁷³ and the ICJ endorsed the extraterritorial application of the ICESCR.⁷⁴ This position has also been confirmed by the revised Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.⁷⁵ In addition, the ICESCR enjoins States to take positive action extraterritorially, when it provides in Article 2(1) that States must “take steps, individually and through international assistance and cooperation ... with a view to achieving progressively the full realization of [Covenant] rights”. Some means of such assistance are further spelled out in Article 23.

With regard to education, the extraterritorial application of the ICESCR is further supported by Article 14, which provides that any State which “has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education free of charge” at the time it became a party, must take measures for its progressive implementation.⁷⁶ Finally, the CESCR also issued a General Comment on the relationship between economic sanctions and economic social and cultural rights, noting that the international community must do everything possible to protect at the minimum the core economic, social and cultural rights of the people of the targeted State.⁷⁷

The CRC has a provision regarding its application that covers every child within a State’s ‘jurisdiction’ and so it is not territorially limited.⁷⁸ The Committee on the Rights of the Child determined that the Convention applies beyond the territory of a State party, a position which was also supported by the ICJ.⁷⁹ This means that, according to Article 39 of the CRC, States Parties remain responsible to provide all appropriate measures to promote child-victims’ physical and psychological recovery and social reintegration.

In *Catan and Others v Moldova and Russia*,⁸⁰ which concerned the closure of Moldovan-language schools by the separatist Transnistrian authorities, the European Court of Human Rights (‘ECtHR’) found that Russia had extra-territorial jurisdiction over the territory in question, although it was part of the sovereign territory of Moldova. The Court decided that the human rights obligations of Russia applied extraterritorially because it had supported the separatists who had the effective control of the region. Therefore, it was found responsible for the human rights violations, including the right to education, and had to provide the applicants with financial compensation for their non-pecuniary damage.

73 CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel* (2003) 05/23/2003 E/C.12/1/Add.90, at para 31. On this basis, the Committee found that the ICESCR applied to the occupied Palestinian territories under Israeli control.

74 *Wall Advisory Opinion*, at para 112, where the ICJ noted that the lack of a provision in the ICESCR regarding the scope of its application “may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction”. This position has been confirmed by the revised *Maastricht Principles*.

75 See O De Schutter *et al*, ‘Commentary to the Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights’ (2012) 4 *Human Rights Quarterly* 34, at 1084-169.

76 This article is referred to by the ICJ in the context of the Court’s discussion on the extraterritorial application of the ICESCR in *Wall Advisory Opinion*, at para 112.

77 CESCR General Comment No 8, *The relationship between economic sanctions and respect for economic, social and cultural rights* (1997) E/C.12/1997/8, 12 Dec 1997.

78 Art 2(1) CRC provides that “[S]tates Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.

79 Committee on the Rights of the Child, *Concluding Observations: Israel*, at paras 2, 5, 52–57. See also para 58, where the Committee considered that the CRC also applied to Israeli army activities in Lebanon. See also *Wall Advisory Opinion*, at para 113, where the ICJ found that the Convention applied within the occupied Palestinian territory.

80 See *Catan and others v Moldova and Russia* (Judgment) App No 43370/04; 18454/06, 19 Oct 2012, HEJUD [2012] ECHR 1827.

Temporal Scope of State Obligation

The obligation to make reparation may be limited in time by a statute of limitation, which sets the period within which legal proceedings can be initiated following a violation. It is often very difficult to redress past wrong because the victims may have moved or passed away, the harm suffered may not be identifiable anymore, evidence may have disappeared, etc. Notwithstanding these obstacles to redressing violations which occurred in the distant past, there is some State practice that actively addresses them.

A successful example is the case decided by the UK High Court regarding three people from the Mau Mau community in Kenya who, more than 50 years ago, were tortured by British officials during the uprising of their community.⁸¹ In an attempt to have the case dismissed, the British government claimed the remoteness in time of the events, but the UK High Court clarified that non-statutory limitations can be applied to war crimes and crimes against humanity. A well-established principle of international criminal justice, this rule is also embedded in the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) and as well as in the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974).⁸² The rationale behind the prohibition on statutory limitations for these categories of crimes lies in the fact that providing a limitation period could not only prevent the prosecution of the most serious violations of international law,⁸³ but also hamper victims' search for justice. The same approach is promoted by the UN Basic Principles and Guidelines which affirm that

[W]here so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

With regard to education-related violations it is worthwhile stressing the work of the Canadian Truth and Reconciliation Commission (TRC) set up in 2008 to respond to "a painful story of destruction carried out in the name of civilization". For over a century, many Indigenous children in Canada were taken away from their families and sent to residential schools, where attempts were made at assimilating them to the settlers' society. In those schools, of which the first was opened in 1870 and the last one closed only in 1996, young aboriginal children were not allowed to speak their native language or live in accordance with their traditional culture.⁸⁴ In addition, many human rights violations occurred in those schools where students were routinely abused. The Canadian TRC's mandate, focuses on establishing historical facts and recognizing the abuses which occurred in the distant and not so distant past.

81 The High Court's ruling allows the victims to sue the British government to finally obtain compensation, see: <http://www.guardian.co.uk/world/2012/oct/05/mau-mau-veterans-win-torture-case>.

82 UN General Assembly, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (adopted 26 Nov 1968, entry into force 11 Nov 1970) A/RES/2391(XXIII); *European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes* (Strasbourg, 25 Jan 1974).

83 Noting that the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes

84 In Canada, there were over 130 residential schools which were government-funded, church-run establishments, where, over time, more than 150,000 Indigenous children (from First Nations, Métis or Inuit communities) were placed. There is an estimated 80,000 former residential school student living today and thus there has a need to reach a reparation agreement quickly in order to compensate those victims while they are still alive. The magnitude of the residential school programme means that its negative impact has been felt throughout generations and has contributed to ongoing social issues. See the Canadian TRC website at: <http://www.trc.ca/websites/trcinstitution/index.php?p=4>.

States' Obligation to Make Reparation for Violations committed by Non-State Actors

IHRL and IHL violations, including education-related violations, are often the result of the actions of NSAs.⁸⁵ NSAs include all those entities which are not a State entity, such as businesses, non-governmental organisations ('NGOs', also known as civil society organisations), and NSAGs.⁸⁶ In situations of insecurity and armed conflict, NSAGs are frequently responsible for education-related violations. For example, in Mali, members of the National Movement for the Liberation of Azawad ('MNLA') closed schools and hindered students' access to education which, according to UNICEF, disrupted the education of some 700,000 Malian children.⁸⁷ In Pakistan, a young education activist, Malala Yousafzai, was specifically targeted by Taliban gunmen.⁸⁸

The human rights obligations contained in a treaty are binding upon the States which have ratified that treaty, but not upon NSAs. Therefore, the violations perpetrated by NSAs must be attributable to a State bound by the human right obligation in order to trigger the international obligation to make reparation. The limited circumstances in which the acts of NSAs are attributable to a State are defined under the principles of State responsibility.⁸⁹

States may also be responsible to provide reparation when they fail to protect the human rights of persons in their territory or under their jurisdiction.⁹⁰ This form of State responsibility comes from the obligation of States to act with 'due diligence'.⁹¹ Therefore, when a NSA interferes with the human rights of individuals, the State will be responsible for the harm caused thereby if the State has not acted in a way to ensure that such harm does not occur. In such a situation the State will be required to provide reparation. For example, when a NSAG prevents women and girls from accessing education through intimidation and violence, the State is obliged to repair the harm caused if it does not take reasonable steps to ensure that members of the group in question have access to education.

Responsibility of Non-State Actors

Given the way human rights treaties have been drafted, State parties are the only entities bound by human rights treaties, including any obligations to make reparations. NSAs are bound by IHL rules, including customary IHL.⁹² This does not automatically entail that NSAs have an obligation to provide reparation for violations of IHL perpetrated in the context of international or internal armed conflict. In fact, there is limited practice to support such obligation. For example, in the Philippines, the Comprehensive Agreement on Respect for Human

85 Note that ILC Articles are only applicable to States and not to international organizations or other non-State entities (Arts 57-58). With regard to international organizations, the *Reparation for injuries incurred in the service of the United Nations Advisory Opinion* (ICJ Reports 1949) affirmed that the United Nations "is a subject of international law and capable of possessing international rights and duties... it has capacity to maintain its rights by bringing international claims"; see also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Advisory Opinion* (ICJ Reports 1999) in which the responsibility of the UN for the conduct of its organs or agents is affirmed.

86 "The concept of non-state actors is generally understood as including any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious groups, or corporations; the concept is occasionally used to encompass intergovernmental organizations." See A Clapham, 'Non-State Actors' in V Chetail (ed), *Post Conflict Peace building: A Lexicon* (OUP, Oxford, 2009) at 200-12, available at: <http://ssrn.com/abstract=1339810>.

87 See the data provided by UNICEF, available at: http://www.unicef.org/media/media_67961.html. Moreover, northern-based rebel groups and pro-government militias recruited and used child soldiers. The MNLA and Islamist groups recruited, trained, and used several hundred children, some as young as 11. See Human Rights Watch, *World Report 2013*, available at: <http://www.hrw.org/world-report/2013/country-chapters/mali?page=2>.

88 Malala Yousafzai was attacked on her way home from school in Mingora, the Swat region's main town on 9 Oct 2012, see: <http://www.bbc.co.uk/news/world-asia-19882799>

89 See the Handbook at 26-30.

90 Ibid.

91 *Velásquez Rodríguez v Honduras*, Reparations and Costs (21 July 1989) IACtHR Ser C No 7, para 25.

92 See A Roberts and S Sivakumaran 'Lawmaking by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 *Yale Journal of International Law* 108, at 108.

Rights and IHL provides for the indemnification of the victims.⁹³ Nonetheless, according to Rule 150 of the ICRC Customary IHL Database, the UN increasingly tends to support the obligation of armed opposition groups to provide appropriate reparation.⁹⁴

There are currently no direct international legal obligations requiring the NSA to make reparation. However, international law may eventually render NSAs directly responsible to provide reparation.

For example, such developments are underway in the area of corporate responsibility for human rights violations with the adoption of the Guiding Principles on Business and Human Rights.⁹⁵ Although non-binding, these Guiding Principles are of particular interest as they make ‘remedy’ a key component of their framework. According to these principles, States should take appropriate steps to investigate, punish and redress business-related human rights abuses.⁹⁶ Therefore, States should guarantee the effectiveness of domestic judicial and non-judicial mechanisms to award remedies which may include “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition”.⁹⁷ Even though States bear the primary responsibility to provide remedy for business related violations, the principles mention that “where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”⁹⁸

Similar developments are underway with respect to international organisations, as seen in the Draft Articles on the Responsibility of International Organisations.⁹⁹ This set of Articles, which mirrors the Articles on State Responsibility, states that “the responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act”,¹⁰⁰ and “full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”.¹⁰¹

2.2 RIGHT TO REPARATION

Although the obligation to make reparation constitutes an immediate corollary of an internationally wrongful act committed by a State, the reality is that this obligation is respected in breach more than in compliance. The obligation to make reparation was first developed in the context of inter-State disputes, meaning that both the wrongdoer and the injured party were States.¹⁰² At that time and until the rise of IHRL, individuals did not have

93 See Arts 1 and 6, Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, Part III, Art 2(3) and Part IV.

94 See J M Henckaerts and L Doswald-Beck ‘Customary International Humanitarian Law Volume I: Rules’ (ICRC and CUP, 2009). In a resolution on Liberia adopted in 1996, the UN Security Council called upon “the leaders of the factions” to ensure the return of looted property. In a resolution on Afghanistan adopted in 1998, the UN Commission on Human Rights urged ‘all the Afghan parties’ to provide effective remedies to the victims of violations of human rights and humanitarian law. See: <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

95 See the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework A/HRC/17/31, available at: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

96 Ibid, see Principle 25.

97 Ibid, see Commentary to Principle 25.

98 Ibid, at Principle 22.

99 ILC Draft Articles on the Responsibility of International Organisations (UN GAOR, 64th Session, Supp. 10, UN Doc. A/64/10 (2009) available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf.

100 Ibid, at Art 31(1).

101 Ibid, at Art 34. See G Verdirame, *The United Nations and Human Rights: Who Guards the Guardians?* (CUP, Cambridge, 2011) at 118.

102 This was consistent with Vattel’s paradigm of international law, see R Domingo, ‘Gaius, Vattel and the New Global Law Paradigm’ (2011) 22(3) *European Journal of International Law* 627, who mentions that States were considered “equal, free, and independent, arrayed and ordered under a positive law of nations”, at 634. See also E de Vattel, *The law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and S Indianapolis* (Liberty Fund, Indianapolis IN, 2008).

a right to reparation.¹⁰³ Now, when individuals possess a right to reparation, they may seek to enforce it through the mechanisms available to them.¹⁰⁴

As there is no general convention providing the right to reparation for victims of international law violations, one may first consider whether the right to reparation has reached the status of a rule of customary international law.¹⁰⁵ Some argue that it has not achieved such status as there is “no basis in practice as far as mass-scale injustices are concerned”.¹⁰⁶ Others recognise some development within IHRL towards a customary norm which enshrines this right.¹⁰⁷ As the customary status of the right to reparation remains controversial at present, this Report considers the way the right to reparation is enshrined in the framework of international treaty law, in particular IHRL.

2.2.1 Right to Reparation at the International Level

The right to an effective remedy was first enshrined in Article 8 of the non-binding UDHR. It was subsequently included in a number of binding human right treaties.

Article 2(3) ICCPR provides for a right to an ‘effective remedy’.¹⁰⁸ Therefore, the victim of any violation of civil and political rights (‘CPR’), which include the right to life of students and education staff or which prohibits the torture of students and education staff, possess the right to remedy. The HRCComm, in examining communications relating to the ICCPR, has established a practice of setting out its view as to the reparation that it considers ought to be made to affected individuals.¹⁰⁹ Alongside this practice, it also asserted in its General Comment 31 that the obligation to provide an effective remedy contained in Article 2(3) “requires that States Parties make reparation to individuals whose Covenant rights have been violated”.¹¹⁰ Other universal supervisory mechanisms have adopted a similarly broad stance.¹¹¹

With regard to economic, cultural and social rights (‘ESCR’), such as the right to education, a right to remedy was not included in the ICESCR when it was adopted in 1966. However, the CESCR has emphasised that effective measures to implement the Covenant might include judicial remedies with respect to rights that might be considered ‘justiciable’.¹¹² An Optional Protocol to the ICESCR, which provides victims of ESCR violations with the right to seek an effective remedy has now been adopted.¹¹³

103 See generally D Anzilotti, *Corso di Diritto Internazionale: Vol I* (Athenaeum, Roma, 1928) and L Oppenheim, *The Future of International Law* (Clarendon Press, Oxford, 1921). See also the application of the Alien Tort Claims Act which allows for civil liability for intentional torts and crimes, Alien Tort Claims Act (ATCA, also known as ATS or Alien Tort Statute) 28 USC 1350.

104 The mechanisms available are presented in Section 3 of the Report.

105 Pursuant to Article 38 of the Statute of the International Court of Justice (‘ICJ’), there are two elements necessary to identify a rule as customary: the opinion of the law and a widespread practice.

106 See Tomuschat *supra* n 22, at 183.

107 See P Mazzeschi, ‘Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview’ (2003) 1 *Journal of International Criminal Justice* 343, at 339-47. This view also reflects the jurisprudence of the IACtHR, see in general D Cassel, ‘The Expanding Scope and Impact of Reparations awarded by the Inter-American Court of Human Rights’, in K de Feyter, S Parmentier et al, *Out of the Ashes: Reparation for Victims of Gross Human Rights Violations* (Intersentia, Antwerpen, 2006) at 191-217.

108 Art 2(3)(b)(c) ICCPR.

109 See for example *Lantsova v Russia*, Communication No 763/1997, UN Doc. CCPR/C/74/D/763/1997 (1997) at para 11.

110 HRCComm General Comment No 31, 26 May 2004, at para 16. Other universal supervisory mechanisms have also adopted a broadly similar stance to that adopted by the HRC. For example, as regards CEDAW, the Committee on the Elimination of Discrimination Against Women (‘CEDAW Committee’) has interpreted sub-paragraph (b) of Article 2 as imposing an obligation on States parties to provide reparation where breach of the Convention had caused harm.

111 For example, the CEDAW Committee has interpreted sub-paragraph (b) of Art 2 as imposing an obligation on States parties to provide reparation where a breach of the Convention caused harm. See Section 3 below.

112 CESCR General Comment 3, *The nature of States parties obligations* (1990) 14 Dec 1990. Available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/94dbaf59b43a424c12563ed0052b664?Opendocument>

113 The Optional Protocol to the ICESCR (entry into force on 5 May 2013).

In addition to the ICCPR and the ICESCR, there are other human rights treaties which are also relevant when considering education-related violations and which contain the right to reparation. Article 14 of CAT establishes that

each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.¹¹⁴

Article 2(c) CEDAW also provides for the right to a remedy.¹¹⁵ Similarly, Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination ('CERD') provides for 'effective remedies' and the right to seek reparation for damage suffered as a result of racial discrimination, referring directly to remedies

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.¹¹⁶

Article 39 of the CRC does not contain the same language as it states that

State parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.¹¹⁷

Even though the CRC does not explicitly refer to reparation, it provides States parties with an obligation to take all the appropriate measures to promote children's recovery and reintegration following traumatic or harmful events, including war.

The Convention on the Rights of Persons with Disabilities ('CRPD') also does not make express reference to the right to reparations, as it states instead that

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.¹¹⁸

Moreover, Article 16 CRPD indicates that persons with disabilities should be free from exploitation, violence and abuse and that in such situations the State should take appropriate measures to promote their rehabilitation.¹¹⁹

Finally, Article 24(4)(5) of the Convention for the Protection of All Persons from Enforced Disappearance (ICED), contains a detailed provision on reparation, according to which

Each State Party shall ensure in its legal system that the victims of enforced disappearance ('ICED') have the right to obtain reparation and prompt, fair and adequate compensation.

114 See also generally UN Committee against Torture, General Comment 3, *The Implementation of Article 14 by States Parties*, (2012) 19 Nov CAT/C/GC/3. Available at: http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf

115 Art 2 (c) states that "[T]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination".

116 Convention on the Elimination of All Forms of Racial Discrimination ('CERD') (adopted 21 Dec 1965, entry into force 4 Jan 1969) *UNTS* Vol 660, at 195.

117 Art 39 CRC.

118 See Art 13 Convention on the Rights of Persons with Disabilities (CRPD) (adopted 24 Jan 2007, entry into force 3 May 2008) *UN Treaty Series*, Vol 2515, at 3. See Art 13(1) Convention for the Protection of all Persons from Enforced Disappearance ('ICED') (adopted 17 Jan 2007, entry into force 23 Dec 2010) RES 61/177.

119 See C Sandoval, 'Rehabilitation as a Form of Reparation under International Law' (2009) REDRESS, available at: <http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf>.

The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition.¹²⁰

Section 3 of this Report, which presents the reparations mechanisms, discusses how the right to remedy contained in the above mentioned treaties can be activated, under certain circumstances, through the complaint mechanisms of the UN Treaty Bodies.

With regard to IHL, as stated above a number of IHL treaty provisions, applicable in international armed conflict, set out the obligation of a State to make reparation for a violation of IHL, at least as between States. It has been argued that this obligation, enshrined in The Hague Convention and Additional Protocol I, also provides for the obligation to make reparation to individuals for violations of IHL in international armed conflict.¹²¹ Concerning violations of ICL, it should be noted that they do not give rise to an automatic right to remedy and reparation under international law. This is because, as a criminal law regime, the purpose of ICL is to determine when violations of international law attract individual criminal liability and to establish procedures to prosecute such violations.¹²²

2.2.2 Right to Reparation at the Regional Level

The right to reparation is also embedded in the relevant human rights treaties at the regional level. According to Article 63.1 of the ACHR,

if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall Rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also Rule, if appropriate, that the consequences of the measures or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.¹²³

This principle confers a broad mandate to the Inter-American Court of Human Rights ('IACtHR'). As the power to award reparations is determined under international law, it cannot be restricted by national law.¹²⁴ As a consequence, the IACtHR is free to award the full range of reparations as prescribed under international law.

With regard to the European human rights system, according to Articles 33 of the ECHR any alleged breach of the Convention committed by a High Contracting Party can be referred to the Court by any other High Contracting Party. Furthermore, and this represents the main difference between the European and the Inter-American human rights systems, according to Article 34 of the ECHR,

the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.¹²⁵

In terms of the possible remedies that the ECtHR can award to the victims upon finding a provision of the ECHR, has been breached by a State Party, it is noted that according to Article 41 of the ECHR the Court may only afford "just satisfaction" to the victims.¹²⁶ As stated in this provision a judgment which establishes a breach of the

120 Art 24 Convention for the Protection of all Persons from Enforced Disappearance ('ICED') (adopted 17 Jan 2007, entry into force 23 Dec 2010) RES 61/177.

121 See supra para 2.1.2., discussing States' obligation to provide reparations.

122 See the Handbook at 229.

123 Organization of American States, American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf

124 *Velásquez Rodríguez v Honduras* (Judgment on Merits of 29 Jul 1988) IACtHR Ser C No 4, at para 134; *Myrna Mack-Chang v Guatemala* (Judgment of 25 Nov 2003) IACtHR Ser C No 101.

125 Art 34 ECHR

126 On this point see V Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases', in *Human Rights Law Review* 7(2007) at 396-411.

Convention can only have a declaratory character and the respondent State must choose the necessary measures to remedy the violation. This traditional approach, which departs from that adopted by the IACtHR, has been exceeded in recent cases where the Court has ordered both individual and general measures in favour of the victims of the States who have not fulfilled their obligations under the Convention. For example the Court has ordered restitution of properties and the release of a person following an unlawful detention.¹²⁷

The newly established African Court of Human and People Rights ('ACtHPR') also provides individuals affected by violations of the rights enshrined in the African Charter on Human and People's Rights (ACHPR) with a right to remedy. Article 27 of the ACHPR affirms that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."¹²⁸

2.2.3 Guiding Principles

In addition to the binding treaties mentioned above, there are two non-binding instruments which are relevant for the right to reparation within the IHRL framework.¹²⁹

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power embodies a set of articles focused on the reparative measures that States should put into practice for victims of crimes and abuse of power.¹³⁰ In particular, the Declaration refers to 'restitution, compensation and assistance' the latter allegedly incorporates in itself the forms of reparation, 'satisfaction' and 'rehabilitation', identified in the most recent *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* ('UN Basic Principles and Guidelines').

The UN Basic Principles and Guidelines have been adopted by the UN General Assembly in 2005.¹³¹ As clarified in the Preamble, the UN Basic Principles and Guidelines

do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms¹³²

These principles crystallize the existing rules governing reparation. Applicable in peace and in war times, they focus explicitly on gross violations of IHRL and serious violations of IHL. However, in accordance with Principle 26, "the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights and international humanitarian law." They identify the following remedies: equal and effective access to justice, adequate, effective and prompt reparation for the harm suffered and access to relevant information concerning violations and reparation mechanisms. The Preamble also acknowledges that contemporary forms of victimization, "while essentially directed against persons", may nevertheless also be directed to groups of persons who are targeted collectively.¹³³

127 *Assanidze v Georgia*, 2004-II 221; (2004) 39 EHRR 653; 2004-V 1; (2005) 40 EHRR 495; *Broniowski v Poland* (Friendly Settlement) 2005-IX; (2006) 43 EHRR 1 (2006) 42 EHRR 360; *Sejdovic v Italy* (Grand Chamber), Judgment of 2 March 2006, Application No 56581/00.

128 See ACHPR Additional Protocol establishing the ACtHPR.

129 See *supra* 2.1.2.

130 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly Resolution 40/34 of 29 Nov 1985, available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>.

131 This proved to be controversial for many states in the course of their preparation. See T Van Boven, 'Introductory Note to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross IHRL Violations and Serious Violations of IHL' (2010) available at: http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf.

132 *Ibid*, Preamble.

133 See the Preamble of the UN Basic Principles and Guidelines.

2.2.4 Reparations and Other Assistance

In many States subject to insecurity, as well as in those emerging from conflicts, development programmes, including financial aid, are necessary to overcome social, economic and cultural disparities and support post-conflict recovery.¹³⁴ This is also, of course, true in the educational sphere, where it is often the case that educational infrastructure may be damaged or destroyed in the aftermath of conflict. In those instances, various measures may be put in place to restore order and stability and promote growth.

There is an important distinction between the concepts of reparation and development. The strategies elaborated to trigger development can be described as processes by which the general (and individual) prosperity and welfare of the citizens of a given society, which has for example been ravaged by war, is increased.¹³⁵ While development measures may be implemented in parallel to a reparation process, they do not depend on the violation of a right. As a result, they are not designed to address the issues faced by a particular category of victims but generally target members of the society as a whole.

In any case, reparation and development, although sometimes difficult to distinguish in practice, can co-exist and overlap. The distinction is nevertheless important because, in the case of the former, the purpose of reparation (and its direct link with victims) has to be fulfilled; victims have to obtain redress for the harm they have suffered. While indirect measures such as financial aid given to the victims as part of a development programme may have a positive impact on the victims, it is important for the victims that the harm they suffered is effectively recognised and repaired.

In practice, this distinction is also crucial with regards to the allocation of resources since, in the context of reparation, redress must be provided by way of obligation whereas in the context of development initiatives the discretion available is much broader. An example of this in the educational context will illustrate this distinction. In the course of an armed conflict many children may have been prevented from going to school owing to injuries inflicted in the course of hostilities or as a result of being unlawfully recruited to participate in combat. In such cases, in order to provide the victims with effective and adequate reparations, the denial of education and its consequences also need to be properly addressed.¹³⁶

A State which has an obligation to make reparation cannot exhaust its resources in the development of industrial infrastructures, for example, to the detriment of reparation for education-related violation. As a result, the obligation to make reparation has implications for the management of resources in post-conflict States, which must also meet their international obligations whilst contemporaneously, rebuild their societies. Clearly, it is not just economic forms of support which are necessary to rebuild societies, but also the provision of reparation for the harm suffered in times of insecurity and armed conflict, including reparation for education-related violations.

Another distinction might also be drawn between humanitarian relief and reparations. The former is generally a reaction to man-made or natural disasters, where assistance is offered to cope with an emergency situation. An example could be found in the interim relief programme ('IRP') administered in Nepal after the 2006 Comprehensive Peace Agreement (CPA), which formally ended ten years of armed conflict.¹³⁷ The implementation of the programme

134 See L. Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations and the Right to Development', (2007)10 *Yale Human Rights and Development Law Journal* 141. See also A Sen, *Development as Freedom* (OUP, Oxford, 1999). Sen describes development as "the removal of various types of un-freedoms that leave people with little choice and little opportunity to exercise their reasoned agency" in the Preface.

135 N Roht-Arriaza and K Orlovsky 'A Complementary Relationship: Development and Reparations', ICTJ Research Briefing, Jul 2009, available at: www.ictj.org/sites/default/files/ICTJ-Development-Reparations-ResearchBrief-2009-English.pdf. See also the UN Women and UNDP Report of the Kampala workshop 'Reparations, Development and Gender', Dec 2010, available at: <http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06A-Development-Gender.pdf>

136 See for instance the *Lubanga* case, at paras 239-40.

137 See generally R Carranza, 'Relief, Reparations and the Root Causes of Conflict in Nepal' (ICTJ, 2012) Report, available at: <http://ictj.org/sites/default/files/ICTJ-Nepal-Reparations-2012-English.pdf>. See also *Lubanga*, at para 197.

in 2008 was an important step, through which different kinds of benefits have been provided to certain categories of victims, including educational scholarships for children of persons killed, forcibly disappeared, or seriously disabled during the conflict, and skills development training for eligible conflict victims. As the International Center for Transitional Justice (‘ICTJ’) has pointed out in a recent report on the IRP in Nepal, relief is important and useful for victims but it cannot be a substitute for reparations. It is noted in that report that the IRP “does not fulfil the victims’ right to reparations, not only because it does not treat beneficiaries as victims of human rights violations, but also because it does not acknowledge the state’s responsibility for those violations.”¹³⁸

2.3 FORMS OF REPARATION

The aim of reparation is to place the victim in the situation he or she would be in if the violation had not occurred.¹³⁹ According to the principle of primacy of restitution which was presented above, restitution must be provided to the victims when possible. Of course, this form of reparation is often not materially feasible, even for education-related violations. For example, restitution is not possible if a student has died as a result of IHRL or IHL violation, or if a student, who could not pursue his or her education because of such violation, is no longer of school age. When restitution is not feasible, or not desirable for the victim, alternate modes of reparation must be considered in order to repair the harm suffered.

With regard to violations of international law in general, the Articles on State Responsibility list compensation and satisfaction as forms of reparation for inter-State claims. These Articles provide that restitution, compensation and satisfaction can all be awarded either singularly or in combination, with restitution listed as the primary form of reparation.¹⁴⁰

Additional forms of reparation have been recognised for IHRL violations. As presented in the UN Basic Principles and Guidelines,¹⁴¹ they include rehabilitation and guarantees of non-repetition.¹⁴² Finally, in the Articles on State Responsibility the UN Basic Principles and Guidelines consider ‘cessation’ as part of the eight non-exhaustive measures that define satisfaction.¹⁴³

With regard to ICL, the Rome Statute, which established the ICC, lists (non-exhaustively) restitution, compensation and rehabilitation as the forms of reparation that the Court is entitled to award.¹⁴⁴

With regard to IHL, restitution of properties and compensation are the principal forms of reparation awarded.¹⁴⁵

138 Ibid.

139 As it will be mentioned below, another goal may be to improve the situation of the victim prior to the violation, this is called ‘transformative reparation’, an emerging concept in the field of reparations.

140 See Art 34 ILC Articles on State Responsibility. See also C Gray, ‘The Choice between Restitution and Compensation’ (2009) 10 *European Journal of International Law* 413.

141 The UN Basic Principles and Guidelines present mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under IHRL and IHL. See Section 2 at 2.2.3.

142 Note that in the Articles on State Responsibility, guarantees of non-repetition are considered only with regard to their preventive function whilst they are deemed an actual form of reparation by the UN Basic Principles and Guidelines, which insist on their potential for redress.

143 The Articles on State Responsibility consider cessation as an independent obligation and a necessary precursor of making reparation. See G Zyberi, ‘The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations’, (2007) 7(1) *Utrecht Law Review* 204.

144 Art 75 (1) ICC Statute.

145 See Art 3 Hague Convention (IV); Art 91 Geneva Conventions, AP I.

When reparation for education-related violations is awarded, the most adequate form of reparation must be sought. Therefore, the presentation below details all five possible forms of reparation, as expressed in the UN Basic Principles and Guidelines:

- restitution,
- compensation,
- satisfaction,
- rehabilitation, and
- guarantees of non-repetition.

2.3.1 Restitution

Restitution (also called ‘*restitution in integrum*’ or ‘full restitution’) seeks to re-establish the situation which existed before the wrongful act was committed by restoring the original condition. Article 35 of the Articles on State Responsibility adopts a narrow definition of restitution as it refers to the re-establishment of the *status quo ante*, namely the situation that existed prior to the occurrence of the wrongful act, to the extent to which restitution is not materially impossible and the principle of proportionality is respected.¹⁴⁶ In the traditional inter-State context, restitution may take the form of material restoration or return of territory, persons or property (such as a school) or the reversal of some juridical act (or a combination of the two).

In general, under IHRL restitution also refers to the re-establishment of the situation that existed prior to the occurrence of the human rights violation. This position is adopted in Principle 19 of the UN Basic Principles and Guidelines. With regard to education, restitution may then include: restoration of liberty of students and education staff, enjoyment of the right to education, return to one’s place of residence where schooling is available, restoration of employment as a teacher and return of educational facilities.

However, restitution can also be understood more broadly, in accordance with the judgment of the PCIJ in the *Factory at Chorzów* case.¹⁴⁷ As already mentioned, this decision stated that reparation must re-establish the situation which would likely exist if the wrongful act had not occurred, through restitution if possible and compensation if not (or a combination of the two). This means that the victim should be put in the situation he or she would now be in if the violation had not occurred. In addition to the restoration of the original condition, reparation should include, for example, loss of future income which resulted from the wrongful act.

This broader concept of restitution has been applied on numerous occasions by the ICJ, the UN supervisory mechanisms, as well as by a multitude of international claims tribunals.¹⁴⁸ Unfortunately, restoring the victim to the position he or she would be in had the violation not occurred is often not materially feasible.¹⁴⁹ For example, with regard to Uganda, it has been reported that

[T]he violations which reparations benefits are meant to address frequently are the sort that are strictly speaking, irreparable. There is nothing that will restore the victim to the status quo after years of torture, illegal detention, loss of a parent, a sibling, a spouse or a child.¹⁵⁰

146 Restitution must not “involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”.

147 See *Factory at Chorzow Case (Germany v Poland)* 1928 PCIJ Ser A No 17 (Judgment of 13 Sep 1928).

148 *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) ICJ Reports 2004; *Wall Advisory Opinion; Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Judgment) ICJ Reports 2005. See G Zyberi, ‘The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations’, (2007) 7(1) *Utrecht Law Review* 204.

149 Especially with regards to gross human rights violations, Roht-Arriaza notes that “there is a basic paradox at the heart of reparations.” See N Roht-Arriaza, ‘Reparations Decisions and Dilemmas’ (2004) 27 *Hastings International and Comparative Law Review* 157. See also ICTJ Report, ‘What Became of Reparations? A Dialogue among Civil Society Actors on the Future of Reparations for Victims of Conflict in Northern Uganda’ (Aug 2011).

150 *Ibid*, at 3.

In *Bosnia and Herzegovina v Serbia and Montenegro*, concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ established that “in the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*.”¹⁵¹ Therefore, despite the principle of the primacy of restitution, it may not be the appropriate form of reparation, even if it is materially feasible.¹⁵² The victim must not put back in the position he or she was in before the violation (the *status quo ante*), if that position already amounted to a human rights violation. For example, if restitution includes the return to operation, after a conflict, of a school where discriminatory practices were in place, this school must not continue to operate according to the same discriminatory standards after restitution.

As restitution is not always possible or adequate, others forms of reparations are presented below.¹⁵³

2.3.2 Compensation

In its commentary on the Articles on State Responsibility, the International Law Commission (‘ILC’) stated that “of the various forms of reparation, compensation is perhaps the most commonly sought in international practice”.¹⁵⁴

Under international law in general, compensation covers any financially assessable damage, insofar as it is established.¹⁵⁵ Compensation has been sought and, awarded, before several international courts and tribunals.¹⁵⁶ For example, loss of life or loss of profits due to unlawful detention can be financially assessed through established formula.¹⁵⁷ Compensation is a form of reparation which may be adequate for certain education-related violations. For example, children who have missed out on education opportunities may claim a future loss of earnings.

The approach to compensation developed at the inter-State level has been adopted within the IHRL framework. National systems have sometimes also adopted this form of reparation in cases of wrongful breach of educational opportunities.¹⁵⁸ In addition, the IHRL framework has broadened the inter-State approach as it provides for the award of moral damage (or ‘non-pecuniary loss’), which is excluded under the ILC Articles on State Responsibility.¹⁵⁹ For example, the UN Basic Principles and Guidelines specifically provide for moral damage.¹⁶⁰

151 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) ICJ Reports 2007, at para 460.

152 C D Gray, *Judicial Remedies in International Law* (OUP, Oxford, 1987) at 13. See also A Buyse, ‘Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law’ (2008) 68 *Heidelberg Journal of International Law* 129; C McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP, Cambridge, 2012) at 161.

153 Law and economics analysis may question the primacy of restitution on grounds of efficiency, and, indeed, compensation might be more utilitarian than restitution in many cases. See D Shelton, ‘Righting Wrongs: Reparations in the Articles on State Responsibility’, (2002) 96 *American Journal of International Law* 833.

154 As quoted in B Saul, Compensation for Unlawful Death in International: a Focus on the Inter-American Court of Human Rights’, (2004) 19(3) *The American University International Law Review* 523, at 545.

155 See Art 36 ILC Articles on State Responsibility.

156 Including the international Tribunal for the Law of the Sea, the ICSID Tribunals, the Iran-United States Claims Tribunal and the ICJ where, in the *Gabcikovo-Nagymaros Project*, for example, the ICJ has affirmed it to be ‘a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.’ See *Gabcikovo-Nagymaros Project* (Hungary/Slovakia) ICJ Reports 1997, at para 114.

157 See for example a discussion of the *Lusitania* cases in D Shelton, *Remedies in International Human Rights Law* (OUP, Oxford, 2005) at 852, explaining that the formula coined by Umpire Parker to calculate the compensation due as result of wrongful death and unlawful detention has been used in both human rights and diplomatic protection claims.

158 M Andenas and D Fairgrieve, ‘A Tort Remedy for the Untaught?’ (2000) 12 *Child and Family Law Quarterly* 31.

159 Financially assessable damage excludes moral damage, defined as “the injuries caused by a violation of rights not associated with actual damage to property or persons and recognized as the subject matter of satisfaction”, see ILC Articles on State Responsibility, at 99.

160 See Principle 20 of the UN Basic Principles and Guidelines.

At the regional level, the ECtHR has frequently awarded compensation for moral damages such as for serious mental distress, “feelings of frustration and helplessness”,¹⁶¹ or “loss of relationship”.¹⁶²

Article 41 of the ECHR provides the ECtHR with the authority to award ‘just satisfaction’ to the victims of breaches of the Convention. ‘Just satisfaction’, especially at the early stage of the ECtHR jurisprudence, has been interpreted as a synonym of compensation. It often combines pecuniary losses, non-pecuniary losses, courts costs, and interest payments.¹⁶³

The ECtHR has awarded compensation in cases concerning education-related violations, such as in the case of *Catan and others v Moldova and Russia*, where school children were taught in a different script than their own.¹⁶⁴ In the case of *D H and others v Czech Republic*, the Court also awarded compensation to Roma children who had been discriminated against as they were unlawfully assigned to schools for children with learning disabilities.¹⁶⁵

The IACtHR has adopted a particularly innovative and flexible approach to compensation.¹⁶⁶ Article 63 of the ACHR explicitly refers to ‘fair compensation’.¹⁶⁷ The IACtHR has developed the concept of ‘life project’ (‘proyecto de vida’, also sometimes referred to as ‘life plan’), to redress loss of opportunities, including educational ones. The concept of ‘life project’ refers to the individual circumstances of each victim including their calling in life, their ambitions and their potential. As the IACtHR explained in the case of *Loyaza Tamayo v Peru*, “it is akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself.”¹⁶⁸ Damage to the ‘life project’ then refers to the victim’s inability to fully realise him or herself.¹⁶⁹ Education is central to this concept as it plays a prominent role in the development of an individual. Therefore, in the case of *Cantoral-Benavides v Peru*, the Court required the Peruvian government to fund a scholarship so that the victim of unlawful detention and torture could resume studying, thus repairing the damage caused to his life project.¹⁷⁰

161 For instance for depression, in *Estima Jorge v Portugal* (Judgment on Merits) App No. 24550/94, 21 Apr 1998, at para 52; *H v UK* (1988) 136-B ECtHR (ser. A) 13 EHRR 449. For an analysis of this case law see D Fairgrieve, ‘The Human Rights Act 1998, Damages and Tort Law’ (2001) *Public Law* 695.

162 *H v UK* (1991) 13 E.H.R.R. 449; *O v UK* (Judgment) (1988) 130 ECtHR (ser. A) 10 EHRR 82.

163 See D C Baluarte and C M De Vos, ‘From Judgments to Justice: Implementing International and Regional Human Rights Decision’ (2010) *Open Society Justice Initiative*, at 39. See also A Buyse, ‘Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law’ (2008) 68 *Heidelberg Journal of International Law* 129, at 144.

164 See *Catan and others v Moldova and Russia* supra n 80. The applicants claimed that the Moldovan Republic of Transnistria’s prohibition of using Latin scripts in education, and its related harassment of those participating in schools using Moldovan as the language of instruction, violated their rights to education under Art 2 of AP1 to the ECHR, as well as Art 8 (respect for private and family life) and Art 14 (freedom from discrimination).

165 See *D H and Others v the Czech Republic*, App. No. 57325/00, (Judgment of 13 Nov 2007) 43 EHRR 41, at para 217, where it stated that “[T]he Court cannot speculate on what the outcome of the situation complained of by the applicants would have been had they not been placed in special schools. It is clear, however, that they have sustained non pecuniary damage – in particular as a result of the humiliation and frustration caused by the indirect discrimination of which they were victims for which the finding of a violation of the Convention does not afford sufficient redress.” Each child received €4,000. See also the sub-section on regional human rights mechanisms in Section 3 of this Report.

166 See B Saul ‘Compensation for Unlawful Death in International: a Focus on the Inter-American Court of Human Rights’ (2004) 19(3) *The American University International Law Review* 523, at 545.

167 The *travaux préparatoires* of the IACHR highlight that an early draft of the Convention contemplated compensation as the only form of reparation. The scope of Art 63 was eventually expanded to foresee compensation as one of the possible forms of reparation; see C Evans, ‘The Right to Reparation in International Law for Victims of Armed Conflict’ (CUP, Cambridge, 2012) at 67.

See also *Velásquez Rodríguez v Honduras* (Judgment on Interpretation of the Compensatory Damages of 17 Aug 1990) IACtHR Ser C No 9, at para 27.

168 See *Loyaza Tamayo v Peru* (Judgment on Reparations and Costs of 27 Nov 1998) IACtHR Ser C No 42, at para 147.

169 See C McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP, Cambridge, 2012) at 122.

170 In this case, the victim had been incarcerated for a period of four and a half years when he was in his early 20s. During incarceration, he was subjected to torture and other forms of ill-treatment, see the *Cantoral Benavides v Peru* (Judgment of 3 Dec 2001) IACtHR Ser C No 88, at para 80.

Within the African human rights system, Article 27 of the Protocol to the ACHPR establishing the ACtHPR specifies that the payment ‘of fair compensation or reparation’ is one of the available forms of reparations in case of violation.¹⁷¹

As discussed in Section 3, *ad hoc* mass claims commissions, including the United Nations Compensation Commission (‘UNCC’) and the Eritrea-Ethiopia Claims Commission (‘EECC’), have also awarded compensation to redress educational harm.

In summary, compensation plays a prominent role in the reparation regime. Of course, it does not exclude the award of other, sometimes more appropriate, forms of reparation. As the IACtHR has stressed, reparations are not always exhausted by compensation for pecuniary and non-pecuniary damage and often other forms of reparation must be added.¹⁷²

2.3.3 Rehabilitation

Rehabilitation is the form of reparations which seeks to reverse the effects of the injury suffered by an individual. Therefore it is not listed as a form of reparations by the ILC Articles on State Responsibility as they focus on the inter-State dimension. The UN Basic Principles and Guidelines underline that rehabilitation should include medical and psychological care as well as legal and social services.¹⁷³ The concept of rehabilitation should be interpreted in close connection with other forms of reparation (in particular, compensation and satisfaction). Its scope is wider than what is explicitly set out in the Basic Principles as it also includes “medical and psychological care, legal and social services, education, housing, financing of paralegals, restoration of the good name of the victim, restoration of passports/travel documents and other elements.”¹⁷⁴

Importantly, rehabilitation must be tailored to the specific needs of the victims.¹⁷⁵ In fact, the content of rehabilitation cannot be standardised (or formulated) in the same way as compensation.¹⁷⁶

The IACtHR has ordered rehabilitation on several occasions, in particular for the victims and surviving relatives of mass human rights abuses. In the *case of the Plan de Sánchez Massacre v Guatemala* for instance, the Court imposed on the State, held responsible for the massacre of more than 250 people, the creation of a mental health treatment programme provided free of charge, “with the special circumstances of each person taken into account for individual, family or collective treatment”.¹⁷⁷

In the case of *Gómez Palomino v Peru* for example, the IACtHR awarded rehabilitative measures focusing on education. The Court found that the victim’s next of kin, particularly his mother, daughter and siblings, had suffered psychological and physical harm which deeply affected their ‘life projects’. To redress the damages adequately, the

171 See Art 27 Protocol to the ACHPR on the Establishment of an African Court on Human and People’s Rights, 10 Jun 1998.

172 See *Case of the Plan de Sánchez Massacre v Guatemala* (Judgment on Reparations and Costs of 19 Nov 2004) IACtHR Ser C No 116, at para 93.

173 See Principle 21 of the UN Basic Principles and Guidelines.

174 This view was expressed by T van Boven, in ‘Rehabilitation as a Form of Reparation’ (2010) Workshop Report, Redress and Essex University Transitional Justice Network, available at: www.redress.org/downloads/publications/Report_of_the_Expert_Seminar_on_Rehabilitation_October_2010.pdf.

175 See Redress, ‘Reintegration and Reparation for Victims of Rendition and Unlawful Detention in the War on Terror: A European Perspective’ (2008) Workshop Report, at 76.

176 See M Brinton Lykes and M Mersky, ‘Reparations and Mental Health Psychosocial Interventions towards Healing, Human Agency and Rethreading Social Realities’, in P de Greiff, *The Handbook of Reparations* (OUP, Oxford, 2006) at 593. According to the authors: “health workers (including psychiatrists, psychologists, psychiatric nurses and social workers) increasingly can be found in zones of armed conflict and, more specifically, as protagonists in the multiple arenas of recovery, reparations and reconciliation that emerge in their wake”.

177 See *Case of the Plan de Sánchez Massacre v Guatemala* (Judgment on Reparations and Costs of 19 Nov 2004) IACtHR Ser C No 116, at para 107.

Court awarded to the victim's siblings an adult programme to complete their primary and secondary school studies so that the lack of education would not hinder their employment opportunities.¹⁷⁸

The fact that education can be used as means to achieve the rehabilitation of victims of IHRL and IHL violations has also been acknowledged by the Committee Against Torture. The CAT imposes the obligation to redress victims with 'full rehabilitation', and not just with compensation.¹⁷⁹ In interpreting this provision, the Committee Against Torture stated that

Rehabilitation, for the purposes of this general comment, refers to the restoration of function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment. It seeks to enable the maximum possible self-sufficiency and function for the individual concerned, and may involve adjustments to the person's physical and social environment [...] each State party should adopt a long-term and integrated approach and ensure that specialised services for the victim of torture or ill-treatment are available, appropriate and promptly accessible.¹⁸⁰

The CAT Committee lists a wide range of possible interdisciplinary measures, including "vocational training and education."¹⁸¹

Article 16(4) of the CRPD also underlines the importance of rehabilitation, in particular it indicates that

States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.¹⁸²

Furthermore, Article 26 of the CRPD imposes on States Parties the obligation to take effective and appropriate measures to enable persons with disabilities to attain and maintain maximum independence, as well as full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive rehabilitation services and programmes with regard to health, employment, social services, but also education.¹⁸³

2.3.4 Satisfaction

Like restitution and compensation, satisfaction is also envisaged in the ILC Articles on State Responsibility. However, it is considered as a subsidiary mode of reparation as the responsible State must give satisfaction for the injury caused "insofar as it cannot be made good by restitution or compensation".¹⁸⁴ Satisfactory measures are not properly defined, but they generally consist of an acknowledgement of the breach, an expression of regret, a formal apology, or a declaratory judgment or another modality.¹⁸⁵

178 *Gómez Palomino v Peru* (Judgment on the Merits, Reparations and Costs of 22 Nov 2005) IACtHR Ser C No 136, at paras 144-8.

179 Art 14 CAT. See generally M Nowak et al, *The United Nations Convention Against Torture and Other Cruel, Degrading or Inhuman Treatments and Punishments: a Commentary* (OUP, Oxford, 2008).

180 Committee Against Torture, General Comment No 3 on the Implementation of Art 14 by State Parties (13 Dec 2012), at paras 11-13, available at: <http://www2.ohchr.org/english/bodies/cat/GC3.htm>

181 *Ibid*, at para 13.

182 See Art 16(4) CRPD.

183 See Art 26 CRPD.

184 See Art 37 ILC Articles on State Responsibility.

185 See Art 37(2) ILC Articles on State Responsibility; see also Redress 'A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law' (2003) at 19, available at: <http://www.redress.org/downloads/publications/SourceBook.pdf>

In the *Rainbow Warrior* case,¹⁸⁶ the Arbitral Tribunal has noted the “long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation for the breach of an international obligation”.¹⁸⁷ For example, the ICJ deemed satisfaction to be ‘a last resort remedy’, but the appropriate form of reparation in the case of *Bosnia and Herzegovina v Serbia and Montenegro*.¹⁸⁸ However, under international law in general, “the line between satisfaction as a remedy and satisfaction as an expression of disapproval or sanction has not always been clear”.¹⁸⁹

Under IHRL, satisfaction refers also to the range of measures that may contribute to the broader and longer-term restorative aims of reparation.¹⁹⁰ For example, the UN Basic Principles and Guidelines identify eight (non-exhaustive) measures to ensure satisfaction for gross violations of IHRL and serious violations of IHL, including the cessation of continuing violations and also the verification of historical facts and public disclosure of the truth, public apologies and tributes to victims.¹⁹¹ In addition, the UN Basic Principles and Guidelines advocate for the

Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.¹⁹²

Educational measures, such as a change in school curricula, have been used to repair educational harm directly or to repair other types of harm. Educational measures can amount, as mentioned in the UN Basic Principles and Guidelines, to a change in curricula to an accurate account of past violations.

Community education can also be awarded in order to raise cultural awareness and restore social bonds, such as through the establishment of intercultural or bilingual teaching and through the study of minority cultures, such as Indigenous culture for example.¹⁹³

Education-related violations may also be redressed through other forms of satisfaction or through a combination of measures. In the case of *García-Asto and Ramírez-Rojas v Peru*, where both victims had been unlawfully detained, the IACtHR determined that the State must offer Wilson García-Asto, who was enrolled in an evening undergraduate course, the possibility to receive professional and updating training by granting him a scholarship to complete his studies, as well as to receive professional training for the two years subsequent to his university graduation. Likewise, the Court stated that also Urcesino Ramírez-Rojas, who already held a university degree in economics, should be granted a scholarship to receive professional (updating) training for a term of two years.¹⁹⁴

Satisfactory measures may also include the establishment of monuments, memorials and public buildings to commemorate the life of the victims. In the *Case of the Street Children*, the IACtHR ordered the State “to designate an educational center with a name allusive to the young victims in this case and to place in this center a plaque with the names [of the victims]”.¹⁹⁵ In the case of *Escué-Zapata v Colombia*, where the victim dedicated his career

186 See *Rainbow Warrior Case* (New Zealand/France) (Decision of 30 Apr 1990) UNRIIAA, vol XX, at 217.

187 Ibid, para 122 at 272-3.

188 See *Bosnia and Herzegovina v Serbia and Montenegro*, Judgment, I.C.J. Reports 2007, para 463. ‘In an extremely short passage of its holdings, the Court concludes that a declaration to the effect that the Respondent has failed to abide by its duty of prevention is in itself appropriate satisfaction’. See C Tomuschat, ‘Reparation in Case of Genocide’, (2007) 2 *Hague Justice Journal* 57, at 39.

189 See D Shelton, *Remedies in International Human Rights Law* (OUP, Oxford, 2005) at 848.

190 See Redress Sourcebook supra n 185.

191 See Principle 22 of the UN Basic Principles and Guidelines. Note that cessation is here considered as a form of satisfaction but it is a separate duty under the ILC Articles on State Responsibility.

192 Principle 22(h) of the UN Basic Principles and Guidelines.

193 The study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization has been ordered by the IACtHR in *Plan de Sánchez Massacre v Guatemala* (Judgment on Merits, Reparations and Costs of 29 Apr 1994) IACtHR Ser C No 105, at para 110.

194 See *García-Asto v Peru* (Judgment on Preliminary Objections, Merits, Reparations and Costs of 25 Nov 2005) IACtHR Ser C No 137, at para 281.

195 Case of the “Street Children” (*Villagrán-Morales et al*) v *Guatemala* (Judgment of 26 May 2001 (Reparations and Costs)) IACtHR Ser C No 77, at para 103.

to the fight for Indigenous rights, the IACtHR fully endorsed the State's efforts to create a university chair named after the victim.¹⁹⁶ While reflecting on the life of the victim, this type of homage to the victim also benefits the entire community in which he exercised leadership.¹⁹⁷

In Canada, where many human rights abuses were committed against Indigenous children in the former residential school system, the government eventually presented a public apology to the victims.¹⁹⁸

2.3.5 Guarantees of Non-Repetition

Guarantees of non-repetition are preventive measures which seek to avoid relapses. Under international law, the duties of the infringing State consist of first ceasing the wrongful conduct, and then guaranteeing that it will not occur again ('assurances and guarantees of non-repetition').¹⁹⁹ Under the ILC Articles on State Responsibility,²⁰⁰ assurances and guarantees of non-repetition "are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases".²⁰¹

Within the IHRL framework, guarantees of non-repetition are also recognised as an essential component of reparation, in particular for continuing and systematic abuses.²⁰² As with satisfaction, the UN Basic Principles and Guidelines also identify eight (non-exhaustive) types of guarantees of non-repetition which combine redress and prevention.²⁰³ They highlight the need to provide protection to "persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders" but education staff are not explicitly mentioned. However, education appears as it is mentioned that guarantees of non-repetition include

Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces.²⁰⁴

The Committee Against Torture has listed a number of measures that should be undertaken in order to guarantee the non-repetition of torture and ill-treatment, including providing clear instructions and training to public officials on the prohibitions contained in CAT, protecting human rights defenders, providing training to armed forces, ensuring that judicial proceedings abide by international standards, etc.²⁰⁵

In post-conflict settings, it can be particularly important to reform the legislation to ensure the non-repetition of violations.²⁰⁶ The IACtHR often requires changes in the law as a form of guarantee of non-repetition "to remedy a

196 *Case of Escué-Zapata v Colombia*, Merits, Reparations and Costs (Judgment of May 11, 2007) IACtHR Ser C No 165 at paras 178-9.

197 Ibid.

198 Aboriginal children were deprived of the use of their culture and language within the residential schools, which they were forced to attend. See the Canadian TRC Report 'They Came for the Children' (2012), available at: http://www.attendancemarketing.com/~atmk/TRC_id/ResSchoolHistory_2012_02_24_Webposting.pdf.

199 See A J Carrillo, 'The Relevance of the Inter-American Human Rights Law', in P de Greiff, *The Handbook of Reparations* (OUP, Oxford, 2006) at 526.

200 Art 30 ILC Articles on State Responsibility.

201 See ILC Commentary to Art 30, at 89.

202 See C Ferstman, 'Reparation as Prevention: Considering the Law and Practice of Orders for Cessation and Guarantees of Non-repetition in Torture Cases' (Mar 2012) which is available at: http://oxford.academia.edu/CarlaFerstman/Papers/143260/Reparation_as_Prevention_Considering_the_Law_and_Practice_of_Orders_for_Cessation_and_Guarantees_of_Non-Repetition_in_Torture_Cases at 21. Note that cessation can be considered as a form of satisfaction under IHRL.

203 See Principle 23 of the UN Basic Principles and Guidelines.

204 Principle 23 (e) of the UN Basic Principles and Guidelines.

205 Committee Against Torture, General Comment No 3 on the implementation of Art 14 by State parties (13 Dec 2012) at para 18.

206 Principle 23 (h) of the UN Basic Principles and Guidelines; see J Torpey, 'Victims and Citizens: the Discourse of Reparation(s) in the Dawn of the New Millennium', in K de Feyter, S Parmentier et al, *Out of the Ashes: Reparation for Victims of Gross Human Rights Violations* (Intersentia, Antwerpen, 2006) at 38.

structural wrong that the Court has recognized in its examination of a case.”²⁰⁷ Guarantees of non-repetition may also consist of specific training to teachers or other persons working in public functions. On several occasions, the IACtHR has ordered States to design and implement comprehensive human rights training for their officials, as a mean of guaranteeing future compliance with human rights obligations and as a form of satisfaction. In the case of *Myrna Mack-Chang v Guatemala*, the Court focused on educating public officials about their responsibilities towards the protection of human rights as it ordered that

the State must adopt the necessary provisions for incorporating training and, specifically, those tending to educate and train all members of its armed forces, the police and its security agencies regarding the principles and rules for protection of human rights, even under state of emergency. The State must specifically include education on human rights and on International Humanitarian Law in its training programs for the members of the armed forces, of the police and of its security agencies.²⁰⁸

Moreover, with respect to guarantees of non-recidivism and as part of public recognition of the victim, the Court ruled that the State must establish a scholarship, in the name of Myrna Mack Chang, to cover the entire cost of a year of study at a prestigious national university. The said scholarship must be granted by the State permanently every year.²⁰⁹

TRCs have also recommended guarantees of non-repetition. For instance, the Canadian TRC emphasised the importance of the narrative to facilitate an understanding of what occurred in the residential schools and avoid recidivism.²¹⁰

2.4 THE EMERGING CONCEPT OF TRANSFORMATIVE REPARATIONS

As already mentioned, whenever possible, reparation should restore a victim to the position he or she would be in, if the violation did not occur. However, it should never restore a victim to a prior situation, which amounted to a human rights violation.²¹¹ In addition, reparations may also have a transformative role and improve a prior situation.²¹² For example, the Committee Against Torture mentions that

[F]or restitution to be effective, efforts should be made to address structural causes to the violation, including any kind of discrimination related to, for example, gender, sexual orientation, disability, political or other opinion, ethnicity, age and religion, and all other grounds of discrimination.²¹³

The aim of transformative reparations is to address and correct the root causes behind the violations. Therefore, transformative forms of reparations are particularly relevant for violations which occurred in situations of insecurity and armed conflict because these contexts are fertile grounds for IHRL and IHL violations. In areas prone to violence, certain categories of individuals generally already suffer from structural inequality because they are socially and economically disadvantaged; these may include children, women, persons with disabilities, IDPs or refugees, or persons stemming from minority groups. As a result of structural inequality, these persons may not

207 J Schonsteiner, ‘Dissuasive Measures and the Society as a Whole: A working Theory of Reparations in the Inter-American Court of Human Rights’, (2007) 23(1) *Academy on Human Rights and Humanitarian Law: Articles and essays analyzing reparations in International Human Rights Law*, American University International Law Review 127, at 147.

208 *Myrna Mack-Chang v Guatemala* (Judgment of 25 Nov 2003) IACtHR Ser C No 101, at para 282. Training of public officials has also been ordered in the *Pueblo Bello Massacre v Colombia* (Judgment on Merits, Reparations and Costs of 31 Jan 2006) IACtHR Ser C No 140.

209 *Myrna Mack-Chang v Guatemala* (Judgment of 25 Nov 2003) IACtHR Ser C No.101, at para 285.

210 See M Lang, ‘An Analysis of Canada’s Indian Residential Schools Truth and Reconciliation Commission’ (2013) 4 *Undergraduate Transitional Justice Review* 35. For more on the Canadian TRC, see: <http://www.trc.ca/websites/trcinstitution/index.php?p=7#one>

211 See supra 2.3.1.

212 See R Yepes, ‘Between Corrective and Distributive Justice: Reparations of Gross Human Rights Violations in Times of Transition’ (2010) at 19, available at: www.uu.nl/university/research/EN/international_collaboration/latinamerica/Documents/OratieRodrigoUprimny.pdf

213 Committee against Torture, General Comment No 3 on the Implementation of Art 14 by State Parties (13 Dec 2012) at para 8.

be able to enjoy their right to education. Therefore, when these individuals suffer from violations (such as torture for example), restoring these victims to the position they would be in (had an unlawful act not been committed) may not only be unsatisfactory but also reinforce the pre-existing inequality.

The concept of transformative reparations has been applied, to a limited extent, in a number of national reparations programmes, which are presented in Section 3.²¹⁴ With regard to international courts and tribunals, the concept of transformative reparation has not (yet) been adopted, with the exception of the IACtHR.

When determining the most appropriate forms of reparation to be awarded, the IACtHR emphasises any particular vulnerability (or existing structural inequality) associated with the victims as a result of their position in society. For example, in *Rosendo Cantú et al v Mexico*, it observed that

it does not lose sight that Rosendo Cantú is an Indigenous woman, a girl child at the time the violations occurred, and whose situation of particular vulnerability will be taken into account in the reparations awarded in this judgment.²¹⁵

The IACtHR then built on the acknowledgment of pre-existing structural inequality to develop its transformative approach to reparations. In *González et al v Mexico*,²¹⁶ which concerned crimes of sexual violence perpetrated against women in a particular region in Mexico, it stated that

Bearing in mind the context of structural discrimination in which the facts of this case occurred ... the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of *rectification*. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.²¹⁷

This was the first time an international court or tribunal had departed from the notion of reparation set out by the PCIJ in *Factory at Chorzów*.

There are two elements to this transformative approach to reparations which mark a potentially significant shift. The IACtHR first suggests that victims must not be placed in the position they would have been in (had the unlawful act not occurred) where this would serve to reinforce or perpetuate discrimination. This means that those victims who suffered from pre-existing structural inequality must be provided with reparations that rectify the pre-existing circumstance. The IACtHR indicates that reparations ought to be designed “to identify and eliminate the factors that cause discrimination”.

The purpose of reparation is then broader than merely addressing the consequences of the wrongful act. This understanding of reparation blurs the distinction between reparation and development, which also seeks to address structural social and economic inequality, a process where the provision of educational often plays an important role.²¹⁸ The blurring of these two notions may be particular problematic with regard to the allocation (and prioritization) of resources, as discussed in Section 4.

In addition to the issues associated with resources, the identification of structural inequalities and the role of those awarding reparations in determining how to address those inequalities are also problematic. The ways structural inequalities should be addressed are complex political questions, which courts and administrative reparations decision-makers are often not in a good position to answer.

214 See M P Saffon and R Uprimny ‘Distributive Justice and the Restitution of Dispossessed Land in Colombia’, in Morten Bergsmo et al (eds), *Distributive Justice in Transitions* (Torkel Opsahl Academic EPublisher, Oslo, 2010) at 403.

215 *Rosendo Cantú et al v Mexico* (Judgment of 31 Aug 2010) IACtHR Ser C No 216, at para 206.

216 *González et al (“Cotton Field”) v Mexico*, Merits, Reparations and Costs (Judgment of 16 Nov 2009) IACtHR Ser C No 205.

217 Ibid, para 450 ss.

218 According to Art 8 of the UN Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4 Dec 1986, “states should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process.”

In addition to the IACtHR, the ICC has also referred to transformative reparation in its decision on reparations in the *Lubanga* case, stressing that “reparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes”.²¹⁹ The TFV noted that the transformative quality of reparation may empower victims and that transformative reparation may serve as an opportunity to overcome structural conditions of inequality and exclusion.²²⁰ Following in the footsteps of the IACtHR, which applied the concept of transformative reparations to address human rights violations committed against women, the TFV also linked this concept to gender-based violence as it “generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization”.²²¹

Except for the IACtHR and the ICC, the idea of transformative reparation has not generally been adopted in the practice of international courts and tribunals.

2.5 WHO MAY OBTAIN REPARATION?

The purpose of reparation is to repair the harm suffered by the victims of violations. However, in the aftermath of an armed conflict or a situation of insecurity, where widespread international law violations may have occurred, it may be challenging to draw a line between the ‘victims’ (whether direct or indirect) and those who fall outside of this category, although they may still have been affected by the violations in some form. The Supreme Court of the Netherlands clarified this distinction, explaining that for the beneficiaries of the right to protection under IHL, notions such as legal remedies and compensation are not always workable. It stated that

rules of IHL do not protect persons against stresses and tensions that are consequences of air strikes as such and do not protect persons with regard to whom the rules and norms have not been violated *in concreto*. The right to invoke the rules of IHL (including the right to reparation) is therefore confined to those who personally were the victims of violations of IHL.²²²

This view refers to the principle of causality, according to which damage, loss or injury (the basis to award reparation) must have resulted from a wrongful act, to determine whether or not the status of victim arises.²²³ The HRCComm has further elaborated on the link between the harm and the violation, suggesting that two considerations are relevant

first, the need to exclude harm that is too remote (such as e.g. unrelated persons far removed from the conflict who are emotionally affected by news of the suffering); and second, the need not to unduly limit the number of victims. The two aspects should be balanced carefully.²²⁴

2.5.1 The Concept of Victim in General

The concept of ‘victim’ has been analysed through disciplines such as sociology, psychology and victimology,²²⁵ but it is also a legal concept, albeit one which does not have a consistent definition in the various norms of international law.

219 *Lubanga*, ‘Decision establishing the principles and procedures to be applied to reparations’, 7 Aug 2012, at para 192.

220 See *Lubanga*, ‘Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims’ First Report on Reparations’, 1 Sep 2011, at paras 72-77.

221 Ibid.

222 Case referred to by L Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’, (2003) 85 *International Review of the Red Cross* 498, at 497-526.

223 The principle of causality is explained below at 2.6.2.

224 See R M Letschert and T Van Boven, ‘Providing Reparation in Situations of Mass Victimization: Key Challenges Involved’, quoting the UN Human Rights Committee Communication 2000, at 11, in R M Letschert, R Haverman, A L M de Brouwer, & A Pemberton (eds), *Victimological Approaches of International Crimes*, (Intersentia, Cambridge-Antwerp, 2011) at 155-86.

225 Victimology, traditionally known as a branch of criminology, has been defined as ‘the sociology of victims’ which explores the victim-perpetrator relationship and analyses the crimes from the point of view of the victims. See F Wertham, *The Show of Violence* (Doubleday, New York, 1949) at 259. See E A Fattah, ‘Victimology: Past, Present and Future’, (2000) 33 *Criminologie* 17, at 17-46.

Under IHRL, the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power has given a definition of ‘victim’,²²⁶ which was replicated by the UN Basic Principles and Guidelines on Reparation as follows

victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.²²⁷

According to this definition, which can be translated to victims of other forms of IHRL or IHL violations, including the right to education, victims can be considered individually or collectively. In fact, although education-related violation can cause harm to a unique victim, they often affect a large number of them. For example, if a school is attacked and the provision of education interrupted as a result of it, all the students attending that school are collective victims of this education-related violation. In addition to a violation, the individuals (or entities) must have suffered a form of harm, as a result of an act or omission that amounted to a violation of IHRL or IHL, to be considered victims.

Therefore, victims of education-related violations are those victims who, individually or collectively, suffered harm as a result of a violation of IHRL, IHL, or ICL which protects education, directly or indirectly. In addition to individual and collective natural persons, legal entities may also be recognised as victims. According to the Rules of Procedure and Evidence (‘RPE’) of the ICC,

Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purpose, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.²²⁸

As a result, before the ICC, both natural persons such as child soldiers, and legal persons such as educational facilities like schools, technical colleges, or vocational training institutions, may be considered victims.

Therefore, the victims considered in this Report include all legal persons that have sustained direct harm as a result of an education-related violation in times of insecurity or armed conflict.²²⁹ They could be students (both children and adults) and education staff (teachers and all those working in the education sector), as well as their immediate family or dependents, but also be an educational facility (school, university, vocational training institution, etc).

2.5.2 Indirect Victims

As mentioned in the above definition of victims, they can be either direct or indirect victims. Students and education staff can be considered direct victims of education-related violations, while the relatives and dependants of the victims may be considered indirect victims. A streamlined approach to identify the next of kin who may obtain reparations has not yet been adopted at the international level. In general, ‘indirect victims’ are “those who are linked to direct victims in such a way that they too suffer because of that link.”²³⁰ In the explanatory note to the Basic Principles and Guidelines, the distinction between *direct* and *indirect* victims is clarified as follows

226 Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, A/RES/40/34, which defines victims as “[p]ersons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.”

227 UN Basic Principles and Guidelines at V para 8.

228 Rule 85 (b) ICC Rules of Evidence and Procedure (UN Doc PCNICC/2000/1/Add 1 (2000)).

229 Education harm is defined below at 2.6.1.1

230 See L Huyse, *Extracted from Reconciliation after Violent Conflict* (International IDEA, 2003) available at: http://www.idea.int/publications/reconciliation/upload/reconciliation_chap04.pdf.

a person is a victim if he or she suffered physical or mental harm, economic loss, or impairment of his or her fundamental rights; that there can be both direct victims and indirect victims, such as family members or dependents of the direct victim; those persons can suffer harm individually or collectively.²³¹

Indirect victims may also be those who suffered harm when *assisting* the victims of a violation. According to the Committee Against Torture, “the term victim also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization.”²³²

The same approach has been followed by the ICC which included among indirect victims “anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.”²³³

The ICC also considered the importance of the cultural context in determining who may be an indirect victim as it stated that

[I]t is to be recognised that the concept of “family” may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his/her spouse and children.²³⁴

The criteria to identify the family members and the dependants do vary culturally. Family members may consist of the nuclear family (the spouse, parents, children, as well as the siblings) or extend further depending on the society in question. The IACtHR developed a flexible approach to determine who qualifies as an indirect victim. It stated that, alongside the nuclear family of the victim, a cousin should also receive compensation for non-pecuniary damages as “it has been proven that he lived with the [...] family since he was small and that he is considered one more member of the family.”²³⁵

However, such flexible approach is not always adopted when awarding reparations. For example, in Nepal, the IRP excluded the victim’s parents as beneficiaries, even when the victim was a man who supported the entire family’s livelihood through his income. Moreover, according to the IRP, spouses and siblings of a victim are not entitled to receive scholarships, even though they were dependent on an individual who was either killed, disappeared or became disabled as a result of the violations.²³⁶

Determining whether someone qualifies as an indirect victim is crucial as it may allow the individual in question to claim and obtain reparation.

2.5.3 Collective Victims

Collective victims are created when violent actions are directed at a specific population, for example an ethnic, ideological or religious group. In those instances individuals are targeted because they belong or are somehow connected to an identifiable collective.²³⁷

Redressing the harm suffered by collective victims requires collective reparations.²³⁸ Collective reparations have been defined as “the benefits conferred on collectives in order to undo the collective harm that has been caused as

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- 231 T Van Boven, ‘Introductory Note to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross IHRL Violations and Serious Violations of IHL’ (2010) available at: http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf
 - 232 Committee Against Torture, General Comment on Article 14, CAT/C/GC/3, 22 Nov 2012. See *Lubanga*, ‘Redacted version of “Decision on ‘indirect victims”’, 8 Apr 2009.
 - 233 See *Lubanga*, ‘Decision establishing the principles and procedures to be applied to reparations’, 7 Aug 2012, at para 195.
 - 234 Ibid.
 - 235 *Myrna Mack Chang v Guatemala* (Judgment of 25 Nov 2003) IACtHR Ser C No 10, at para 264(g).
 - 236 See ICTJ Report ‘From Relief to Reparations: Listening to the Voices of Victims’ (2011) at 26.
 - 237 See Huyse, *supra* n 230.
 - 238 Under the UN Basic Principles and Guidelines, victims are defined as persons who individually or collectively suffered harm.

a consequence of a violation of international law”.²³⁹ Thus the elements of collective reparation are the benefits, a collective as beneficiary, collective harm, and a violation of international law, specifying that “the targeting of a collective can cause harm that differs from the harm caused by targeting the same number of individuals who are not part of a collective”.²⁴⁰ Notwithstanding the growing interest towards the notion of collective reparation, there is no legal definition of the term ‘collective reparation’ under international law.²⁴¹ Consequently ‘collective reparation’ has been used to refer to a number of different scenarios, encompassing the modalities of awarding reparation, the impact of the violation on the community, the types of goods distributed and so on.²⁴²

The IACtHR, confirming its pivotal role in the field of reparation, has issued several orders for collective reparation, especially in cases where gross and systematic human rights violations have occurred.²⁴³ Throughout the Court’s jurisprudence the notion of collective reparation has been broadly interpreted by awarding a wide variety of collective reparation measures. An example of the Court’s ability to deal with the consequences of mass-victimization in an innovative way can be found in the already mentioned *case of the Plan de Sánchez Massacre v Guatemala*.²⁴⁴ In its judgment on reparations, the Court never lost sight of the affected community’s peculiarities. On the contrary, it strongly underlined their importance by imposing also on the responsible State the obligation to promote the study and dissemination of the Maya-Achí culture through the Guatemalan Academy of Mayan Languages.²⁴⁵

Collective reparations are an essential element in any effort to redress the effects of widespread violations of international law, especially if occurring in the context of insecurity or armed conflicts affecting the vast majority of the population. The construction of educational facilities is a form of reparation which is “community oriented and not exclusive in character”.²⁴⁶ For example, building a school in a village where gross IHRL violations have taken place against a segment of the population will provide reparation to the victims themselves, as well as benefit the community at large, and even the perpetrators.²⁴⁷ In practice, the difference between an ‘individual’ and ‘collective’ form of reparation may be quite subtle. Reporative measures which are traditionally regarded

239 See F Rosenfeld, ‘Collective Reparations for victims of Armed Conflicts’, (2010) 92 *International Review of the Red Cross* 739, at 731-46. See The Rabat Report: The Concepts and Challenges of Collective Reparations (ICTJ, 2009) at 42, available at: <http://ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf>.

See also L Magarrell, *Reparations in Theory and Practice*, Reporative Justice Series (ICTJ, 2007) at 5-6.

240 See F Rosenfeld, ‘Collective Reparations for victims of Armed Conflicts’, (2010) 92 *International Review of the Red Cross* 739, at 734.

241 Lubanga, ‘Observations on Reparations in Response to the Scheduling Order of 14 Mar 2012’, 25 Apr 2012, at para 173.

242 Ibid.

243 See D Contreras-Garduno, ‘Defining Beneficiaries of Collective Reparations: The Experience of the Inter-American Court of Human Rights’ (2010) 4(2) *Amsterdam Law Forum* 40, at 41-57. *Mapiripán Massacre v Colombia* (Judgment on Merits, Reparations and Costs of 15 Sep 2005) IACtHR Ser C No 134, at para 316; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgment on Merits, Reparations and Costs, Judgment of 31 Aug 2001) IACtHR Ser C No. 79.

244 *Case of the Plan de Sánchez Massacre v Guatemala* (Judgment on Reparations and Costs of 19 Nov 2004) IACtHR Ser C No 116, at paras 93-111. On this point see T M Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’ (2008) 46(2) *Columbia Journal of Transnational Law* 351, who states that “[T]he breadth and depth of the remedies ordered are impressive, in addition to monetary compensation, the Court required the State to take the following measures, among others: the investigation, prosecution, and punishment of the responsible parties; a public acceptance of responsibility for the case’s facts; establishment of a village housing program; medical and psychological treatment for all surviving victims; implementation of educational and cultural programs; and translation of the judgment into the appropriate Mayan language.”

245 *Case of the Plan de Sánchez Massacre v Guatemala* (Judgment on Reparations and Costs of 19 Nov 2004) IACtHR Ser C No 116, at para 110.

246 Lubanga, ‘Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims’ First Report on Reparations’, 1 Sep 2011, at para 174, which states that “[T]he international Rabat symposium on collective reparations in 2010 has suggested that certain forms of reparations are ‘inherently collective and exclusive’ (i.e. specialised health services for specific categories of victims), while some are ‘community-oriented and not exclusive’ (i.e. schools).”

247 ‘Collective reparations deliver a benefit to people that suffer harms as a group which as a consequence often affects the social cohesion and community structures (especially in places with a strong sense of collective identity).’ Lubanga, ‘Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims’ First Report on Reparations’, 1 Sep 2011, at para 21.

as ‘individual’ can include a collective component. For instance the TFV highlighted how a scholarship fund set up to finance education of former child soldiers could be considered both a collective and an individual form of reparation.²⁴⁸ The recipients of the scholarships will be individually identified as victims but “the scholarship fund could be conceived as a collective award in the sense that it may be set up to be managed by a community and it may be addressing the collective harm experienced by a group of beneficiaries.”²⁴⁹

The Peruvian TRC (Comisión de la Verdad y Reconciliación or ‘CVR’) has established a ‘community-based’ approach to reparations, stating in its final report that the beneficiaries of collective reparations are:

- (a) peasant communities, Indigenous communities and other communities affected by the conflict, and
- (b) organised groups of displaced returnees from affected communities.²⁵⁰

The fact that collective reparations have not yet been ‘legally’ defined yet has given rise to different interpretations,²⁵¹ depending on the context, as can be seen from the work of the Peruvian TRC.²⁵²

2.5.4 Vulnerable Victims

While the notion of vulnerability has not been clearly defined at either the national or international level, the necessity of special treatment of certain categories of victims is well established and acknowledged.²⁵³ According to the Recommendation on assistance to crime victims of the Council of Europe, “[S]tate should ensure that victims who are particularly vulnerable, either *through their personal characteristics or through circumstances of the crime*, can benefit from special measures best suited to their situation.”²⁵⁴ Thus ‘vulnerable victims’ are those victims who find it especially difficult to fully exercise their recognised rights due to cultural, physical or psychological reasons. The following categories of victims may be identified as vulnerable: women, children, persons with by disabilities, refugees and IDPs.

Women are the main target of gender-based violence, especially in times of armed conflict and insecurity. Mass rape of women belonging to an enemy group has been practised as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.²⁵⁵ Moreover, sexual violence usually leads to serious social consequences for survivors, their families and communities. In fact, very often the victims are severely stigmatised and face social exclusion and marginalisation.²⁵⁶

Sexual assault is not the only form of conflict-related victimisation that is gender biased and makes women particularly vulnerable. A discriminative approach to rights and entitlements may also contribute to increase

248 Ibid, at para 25.

249 Ibid.

250 CVR Final Report, Volume IX – Chapter II, at 152-3.

251 *Lubanga*, ‘Observations on Reparations in Response to the Scheduling Order of 14 Mar 2012’, 25 Apr 2012, at para 173.

252 See also ICTJ Research Brief Indigenous Peoples and Reparations Claims: Tentative Steps in Peru and Guatemala (ICTJ, 2009) at 3, where it is stated that “so far, only collective reparations have begun to be delivered, consisting of grants for projects identified by the affected communities themselves.” This research brief is available at: <http://ictj.org/sites/default/files/ICTJ-Identities-Reparations-ResearchBrief-2009-English.pdf>.

253 See the Report ‘Victims in Europe: Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union’ (Jul 2009) at 39, available at: http://www.bkb.cz/files/uploaded/UserFiles/File/Project_Victims_Europe_Final_Report.pdf.

254 Art 3.4 of the Recommendation Rec (2006) 8 of the Committee of Ministers to Member States on Assistance to Crime Victims (Adopted 14 Jun 2006), available at: <https://wcd.coe.int/ViewDoc.jsp?id=1011109&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

255 See UNSC Res 1820(2008) S/RES/1820 on Women, Peace and Security.

256 See M Bastick, K Grimm, R Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Geneva Centre for the Democratic Control of Armed Forces, 2007) available at: http://www.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full%5B1%5D.pdf. See also J King, ‘Gender and Reparations in Sierra Leone: The Wounds of the War Remain Open, in R Rubio Marin, What Happened to the Women?’ (Social Science Research Council, New York, 2006) at 252.

women's economic and social vulnerability.²⁵⁷ In some countries, women are not even registered citizens, nor are they recognised as the holders of property rights.²⁵⁸ Consequently, it is difficult for them to protect their resources or to make claims for reparation. Therefore, "reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives."²⁵⁹ According to the principles enshrined in the Nairobi Declaration, to effectively redress the harm suffered by women, reparations should be conceived as a motor for legal and social reform in areas such as health, the judiciary and also education.²⁶⁰

Children are those who are most affected by education-related violations and they have also been recognised as a vulnerable group deserving special protection.²⁶¹ In Graca Machel's report on the impact of armed conflict on children, it is stated that children in war torn States face higher risk than their peers of experiencing

infant, child and adolescent mortality, low immunization, low access to health services, high malnutrition, high burden of disease, low school enrollment rates, high repetition rates, poor school performance and/or high drop-out rates; intra-household neglect; family and community abuse and maltreatment, in particular harassment and violence; economic and sexual exploitation, due to lack of care and protection'.²⁶²

This Report also identified the groups of children which are the most affected by armed conflicts and therefore which are the most vulnerable. They include child-soldiers, unaccompanied children, refugees and internally displaced children, children sexually abused or exploited, and children injured by landmines and unexploded ordnance.²⁶³

Many surveys show that education, particularly for children, ranks high on the list of what victims want from a reparations programme.²⁶⁴ Since reparations tend to take a long time to be established and implemented, education can be described as a multigenerational goal, able to respond to the intergenerational aspects of the harm. Very often, children who have been victimised during their childhood and have missed out on formal schooling remain illiterate into adulthood. Therefore, adult education may be an important component of economic betterment and a valuable way to redress, at least to some extent, the violations which occurred when the victims were children.²⁶⁵

Refugees and IDPs also merit special protection as they have been described as "a category of victims that can be easily forgotten."²⁶⁶ So far, little attention has been placed on their needs and rights. However, they may face particular hurdles when trying to exercise their right to reparation as they may have left the area where the violations occurred. They may even have fled the State in question all together. An increased focus on education is warranted, particularly as it is a right which may be difficult for them to exercise due to contingent factors,²⁶⁷ in addition to which it is a powerful means to redress a situation of injustice.

257 See Huyse *supra* n 230.

258 Ibid.

259 Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation (2007), available at: http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf

260 See V Couillard, 'The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence' (2007) 1(3) *International Journal of Transitional Justice* 444, at 451.

261 G Machel, UN Report on the Impact of Armed Conflict on Children, A/51/306, 1996, where it is stated that "[A]rmed conflicts across and between communities result in massive levels of destruction; physical, human, moral and cultural. Not only are large numbers of children killed and injured, but countless others grow up deprived of their material and emotional needs, including the structures that give meaning to social and cultural life. The entire fabric of their societies, their homes, schools, health systems and religious institutions are torn to pieces." The Report is available at: http://www.unicef.org/graca/a51-306_en.pdf.

262 Ibid.

263 Ibid.

264 See N Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' (2013) UC Hastings Research Paper No 53, available at: <http://ssrn.com/abstract=2177024>.

265 Ibid at 17.

266 See L Huyse, 'Reconciliation after Violent Conflict' (International IDEA, 2003) available at: http://www.idea.int/publications/reconciliation/upload/reconciliation_chap04.pdf.

267 See UNHCR Refugees Education: a Global Review, 2011, available at: <http://www.unhcr.org/4fe317589.html>.

Finally, people with disabilities are among the most neglected victims. According to the CRPD, a person with disabilities “include[s] those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”²⁶⁸ Such impairments can predate the situation of insecurity and armed conflict, meaning that the person affected by disabilities is already part of a vulnerable group and as such entitled to special protection, or can be the consequence of IHRL and IHL violations. As stated in the CRPD States parties have the obligation to guarantee to persons with disabilities the possibility of achieving maximum independence. To that end, States Parties shall organize, strengthen and extend comprehensive rehabilitation and rehabilitation services and programmes, particularly in the areas of health, employment, *education* and social services.²⁶⁹

2.6 WHAT ARE THE CONDITIONS FOR OBTAINING REPARATIONS?

In order to obtain one (or a combination) of the forms of reparation mentioned above, a victim must have suffered harm. According to the principle of causality, the harm must have resulted from the wrongful act committed. These conditions are necessary requirements to obtain reparation, whether awarded through a judicial or a non-judicial process.

2.6.1 Concept of Harm

Harm can be defined as the negative outcome resulting from the comparison of two conditions of a person or object, before and after the wrongful act.²⁷⁰ The notion of harm may be considered as “implicitly contained in the illegal character of the act”, since “the violation of a norm always disturbs the interest it protects as well as the right(s) of the person(s) having the interest”.²⁷¹

While distinct from the question of causation, the concept of harm is entwined with it. In order to be recoverable, the harm must be at least both recognised by law and sufficiently connected to the wrong in question.²⁷² The issue of causality is discussed further below.

There are two broad categories of ‘harm’ under international law:

- **Material damage**, which refers to damage to property or other interests of the State or its nationals and which can be assessed in financial terms.
- **Moral damage**,²⁷³ which includes individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s privacy.

According to the ILC Articles on State Responsibility, “full reparation is required for all material or moral damages caused by internationally wrongful acts”.²⁷⁴ The UN Basic Principles and Guidelines also state that harm includes “physical or mental injury, emotional suffering, economic loss or substantial impairment of [their] fundamental rights”.

268 Art 1 CRPD.

269 Ibid, at Art 26.

270 See S Vandeginste and H Robouts, ‘Reparations for Victims of Gross and Systematic Human Rights Violations: the Notion of Victim’ (2003) 16 *Third World Legal Studies* 89, available at: <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1004&context=twls>

271 See D Shelton, *Remedies in International Human Rights Law* (OUP, Oxford, 2005) at 142.

272 C McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP, Cambridge, 2012) at 96.

273 Ibid. The author clarifies that also ‘pecuniary’ and ‘non pecuniary’ loss are terms commonly used in the jurisprudence of arbitral tribunals and international courts (including regional human rights courts) to refer to the two broad classifications of harm.

274 See Art 31(2) ILC Articles on State Responsibility.

Harm can be direct or indirect. While the harm may be indirect, it must, however, be personal to the victim.²⁷⁵

2.6.1.1. Educational Harm

Educational harm limits an individual or an organization's ability to provide access, participate in or benefit from education. As UNICEF pointed out in its submission on the principles to be applied and the procedure to be followed by the ICC with regard to reparation in the *Lubanga* case

the victims, in addition to suffering from violations of their fundamental rights, were also denied basic needs. The denial of their rights and needs can have enduring and sometimes lifelong repercussions, for example when children *have lost access to education*.²⁷⁶

The denial of education, either through a violation of the right to education *per se* or through another form of education-related violation, can lead to various forms of harm. One of the most discussed forms of harm that can stem from education-related violations is the 'loss of opportunity'. This kind of harm has been widely recognised by the international jurisprudence. In *Campbell Cosans v United Kingdom* for example, the ECtHR found that the violation in question had deprived the victim "of some opportunity to develop his intellectual potential".²⁷⁷ In that case, a 15 year old student was suspended from school when he refused to be corporally punished.

The concept of 'loss of opportunity' has been sometimes referred to in relation to a 'life plan'. In the case of *Thlimmenos v Greece*, which did not regard an education-related violation but concerned the refusal of a job appointment due to religious beliefs, the ECtHR noted that the violation suffered by the victim had harmed "the applicant's access to a profession, which is a central element for the shaping of one's life plans".²⁷⁸ While this case did not concern an education-related violation, this approach to 'loss of opportunity' is evidently applicable to the harm resulting from an education-related violation.

The IACtHR has also identified the harm to a 'life project' (*proyecto de vida*) as a form of harm requiring reparation. In the *Street Children v Guatemala* case, the Court affirmed that "every child has the right to harbor a project of life that should be tended and encouraged by the public authorities so that he/she may develop this project for his/her personal benefit and that of the society to which he/she belongs."²⁷⁹ Again, in the case of *The Instituto del Menor Panchito López v Paraguay*, the IACtHR stressed the devastating impact that the lack of access to education has on the victims' existences, as it limits their chances of playing a role in society and fostering their project of life.²⁸⁰ Therefore, in the judgment on reparations, the Court imposed on the State the obligation to establish vocational training, as well as a special education programme, for the former detainees of the juvenile institution in question.²⁸¹

Given the long-term benefits of education, when assessing the harm due to an education-related violation, it is not only the short-term but also the long-term repercussions on the victim's life which must be considered. Of course, one of the main issues with regard to educational harm, in particular its long-term impacts, is the difficulty to quantify it. This issue of 'quantum' is discussed in Section 4.

275 See *Lubanga*, 'Decision establishing the principles and procedures to be applied to reparations', 7 Aug 2012, at 228 (emphasis added).

276 See *Lubanga*, 'Submission on the Principles to be Applied and the Procedure to be Followed by the Chamber with regard to Reparations', 10 May 2012, para 2.

277 *Campbell Cosans v United Kingdom* (Judgment) App No 7511/76, 22 Mar 1983, 13 EHRR 441, para 26; See also *T P and K M v United Kingdom* (Judgment) App No 28945/95, 10 May 2001, 34 EHRR 42, para 115.

278 *Thlimmenos v Greece* (Judgment), App No. 34369/97, 6 Apr 2000, 31 EHRR 411, para 70. This appears to be the only case in which the Court has referred to the harm to an applicant's life plan as a basis on which reparation is awarded.

279 Case of the "*Street Children*" (*Villagrán-Morales et al*) *v Guatemala* (Judgment of 26 May 2001 (Reparations and Costs)) IACtHR Ser C No 77, at para 191.

280 Case of "*Juvenile Reeducation Institute*" *v Paraguay*, (Preliminary Objections, Merits, Reparations and Costs of 2 Sep 2004) IACtHR Ser C No 112.

281 *Ibid*, at para 321.

2.6.1.2 Collateral Harm

The notion of collateral harm, more commonly referred to as ‘collateral damage’, is a term used in the military context. It covers damages resulting from attacks proportionate to a military objective, as well as damages resulting from errors or unintended actions.²⁸² Under IHL, students and educational staff, as civilians (as long as they do not participate directly in hostilities), and educational facilities, as civilian objects (and not military objects), are protected from deliberate attacks in accordance with the principle of distinction.²⁸³ As a result, a direct attack on a school or student would violate IHL. In the case of a school or student being harmed as a result of another attack, proportionate to military objective or as the result of an error or unintended action, they suffer collateral harm.

As spelled out in Article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and Article 91 of Additional Protocol I, only belligerent parties that *violate* IHL provisions are under an obligation to pay compensation.²⁸⁴ By listing the cases (such as requisition) in which States should make compensation (namely when a violation occurred), IHL excludes liability for any other damages, regardless of its relation to the armed conflict.²⁸⁵ Thus in the circumstances where there is no explicit proscription of such compensation, the default rule is the absence of a duty to pay. The rationale is that all wars necessarily cause combat-related damages. Any duty to compensate would involve an enormous financial and logistical burden.²⁸⁶

However, this does not mean that governments do not provide compensation, even if their actions do not fall within the IHL provisions mentioned above. For example, in Afghanistan and Iraq, British, American and Canadian governments made *ex gratia* payments to civilians injured in cross-fire.²⁸⁷

The fact that the consequences of a ‘lawful war’ do not give rise to an obligation to provide a form of redress to the victims of collateral harm deserves to be questioned.²⁸⁸ In fact, redressing the consequences of the damages occurred in the course of conflicts which did not violate IHL is an issue under scrutiny. The focus on civilian casualties is of growing concern. For example, the Making Amends Campaign,²⁸⁹ openly endorsed by the Security Council,²⁹⁰ seeks to foster a global standard of behaviour in order to allow civilians harmed by the warring parties to receive the recognition and assistance they need, in the form of compensation, public apologies, etc.

282 Note that the term reparation is not used with regard to collateral damages as those resulting from a lawful conduct under IHL. Reparation, instead, requires a wrongful act.

283 See the Handbook at 142ss and 192ss.

284 See generally P d’Argent, *Les Réparations de Guerre en Droit International Public: la Responsabilité Internationale des Etats à l’épreuve de la Guerre* (Bruylant, Brussels, 2002).

285 ‘Yet the laws of armed conflict acknowledge the futility of a general prohibition on causing injury to civilians, since the only way to comply with such a prohibition and ensure that civilians are not injured is to abstain from attack altogether.’ Y Ronen, ‘Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted during Armed Conflict’ (2009) 42 *Vanderbilt Journal of Transnational Law* 181, at 4.

286 See J Walerstein, ‘Coping with Combat Claims: An Analysis of the Foreign Claims Act’s Combat Exclusion’ (2009) 11(1) *Cardozo Journal of Conflict Resolution* 319, at 319-351. According to the author: “as a theoretical aside, imposing such a duty may be desirable because it would create a disincentive for states to use force: namely, the legal obligation to pay for all damage to civilians related to their military operations”.

287 The role of NGOs and civil society is sometimes instrumental in triggering States’ action. See for example the work of CIVIC, a Washington-based non-profit organization, which seeks the recognition of the civilians injured and the families of those killed by the warring parties involved, available at: <http://civicheldreports.wordpress.com/>

288 See Y Ronen, ‘Coping with Combat Claims: An Analysis of the Foreign Claims Act’s Combat Exclusion’, (2009) 11(1) *Cardozo Journal of Conflict Resolution* 319. From the same author, see also *Transition from Illegal Regimes in International Law* (CUP, Cambridge, 2011).

289 The Making Amends Campaign regroups a coalition of NGOs, including CIVIC which focuses on campaigning for innocent victims in conflict. More information is available at: <http://www.makingamendscampaign.org/faq/>

290 See Security Council Cross-Cutting Report on the Protection of Civilians in Armed Conflict, 31 May 2012 at 23.

So far, this has been advocated as a ‘principle of justice’ and it remains questionable whether it may also amount to a legal obligation.²⁹¹ Many difficulties are associated with this concept, in particular the determination of the beneficiaries. An armed conflict can have many deleterious lawful consequences and affect individuals in different ways. Students and education staff may be injured in a cross-fire or suffer from food shortages, and educational facilities may be damaged.

2.6.2 Causality

The notion of causality must be distinguished from the notion of harm as it is a separate prerequisite for obtaining reparation. This issue is important in practice as some forms of harm may lead to further consequential forms of harm. For example, the killing of a teacher results not only in a loss of life but also in the loss of educational opportunity for the students. The death of the teacher and the loss to the children are separately recognised, which means that they may lead (in principle) to separate recoverable forms of harm. In order to be recoverable, harm must be attributable to the wrongful act, which is the question of causation.

There is no streamlined practice under international law in addressing the question of causation as “the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation”.²⁹² In fact, “international tribunals have not consistently applied any causal test because the specificities of a given case will usually determine the tests employed, along with their variations.”²⁹³ In cases of inter-States disputes resolved through international arbitration, each arbitrator “seems to take for granted the notion of causality prevailing in his/her legal system”.²⁹⁴ Therefore, the existence of a causal link to legitimise the claim of the victims and, consequently, the award of reparation is generally determined by the courts on a case by case basis. However, some arbitral awards have been granted adopting general formulations, such as ‘line of natural sequences’ or ‘natural and normal sequences’, meaning a simple temporal sequence of phenomena.²⁹⁵

In its decision establishing the principles and procedures to apply to reparations, the ICC acknowledged that “there is no settled view in international law on the approach to be taken to causation”.²⁹⁶ It decided to apply the standard of ‘proximate cause’, according to which reparations should not be limited to ‘direct’ harm or the ‘immediate effects’ of the crimes, but should also be granted to indirect victims (the families of the child soldiers and those who have tried to assist them but have been victimised). In the case in question, the crimes were the enlistment and conscription of children under the age of 15 and their use as active participants in the hostilities.²⁹⁷ The “damage, loss and injury” forming the basis of the reparation claim must have resulted from those crimes.²⁹⁸ Therefore, given the limited scope of the charges, the criteria of ‘proximate cause’ established by the ICC will lead to the exclusion of the victims of crimes perpetrated by the child-soldiers, who will not be eligible to benefit from the reparations arrangements resulting from the *Lubanga* case.²⁹⁹

291 According to Y Ronen, ‘Coping with Combat Claims: An Analysis of the Foreign Claims Act’s Combat Exclusion’ (2009) 11(1) *Cardozo Journal of Conflict Resolution* 319, “the notion that the invasion of a right is a wrong which gives rise to compensation even in the absence of wrongfulness is suggested in Article 27 of the ILC Articles on State Responsibility”. Article 27 provides that “[T]he invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:...(b) the question of compensation for any material loss caused by the act in question”.

292 See Art 31 (10) ILC Commentary to Articles on State Responsibility. This is also true at the domestic level, where the issue of causality is dealt with differently according to the legal systems in force. In common law systems, courts make extensive use of the ‘proximity’ standard, whereas the civil law tradition favours criteria such as that of the ‘*conditio sine qua non*’ or that of the ‘adequacy’ of the causal connection. See A Gattini, ‘Breach of the Obligation to Prevent and Reparation thereof in the ICJ Genocide Judgment’, (2007) 18(4) *European Journal of International Law* 695, at 695-713.

293 See L Castellanos-Jankiewicz, ACIL Research Paper No 2012-07, available at: <http://www.sharesproject.nl/wp-content/uploads/2012/01/Castellanos-Causation-and-International-State-Responsibility1.pdf>.

294 See Gattini *supra* n 292 at 708.

295 *Maninat* case (France/Venezuela) 31 Jul 1905, X UNRIAA 55, at 81.

296 See *Lubanga*, ‘Decision establishing the principles and procedures to be applied to reparations’, 7 Aug 2012, at para 248.

297 *Ibid.*

298 See *Lubanga*, ‘Decision establishing the principles and procedures to be applied to reparations’, 7 Aug 2012, at para 247.

299 See The British Institute of International and Comparative Law (‘BIICL’), ‘Lubanga Reparations Decision: “Rapid Response” Seminar Report’ (2012), available at: <http://www.biicl.org/events/view/-/id/723/>.

With regard to educational harm, establishing causation raises a number of issues. For example, in the *Lubanga* case, the fact that educational harm suffered by child soldiers has to be assessed years after the missed education is problematic. In addition, while it is already difficult to establish a causal link between a violation and educational harm, it is even more difficult to establish this link with regard to the long term and ongoing effects of educational harm.

CONCLUSIONS

It has been shown in this Section that States have the obligation to repair the harm suffered as a result of an internationally wrongful act which the State itself committed or which can be attributed to it. At the international level, this obligation was originally developed in the context of inter-state claims, but individual victims have been also recognised as the legitimate holders of the right to reparation. The obligation to remedy the harm caused by an unlawful act or omission and the corresponding right to claim and obtain redress have been included to different extents in the relevant international law frameworks.³⁰⁰ In particular, within the context of the IHRL framework this right is enshrined in most of the relevant regional and international treaties. This Section also introduced the key principles which govern reparations, namely the primacy of restitution, the existence of a causal link and the principle of proportionality. All of these issues need to be taken into account when redressing education-related violations.

Education-related violations can be repaired through all the forms of reparations discussed above. In awarding reparation it is important that the chosen form is adequate to repair the harm, acceptable to the victim and feasible. When possible, restitution must be awarded according to the principle of primacy. Following situations of insecurity and armed conflict, it is often not possible, and in some instances not desirable, to restore a victim to his or her original state. In such instances, a combination of measures may be best suited to repair the harm suffered, including compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Education as a means to redress IHRL and IHL violations can be used in various ways. Scholarships, instead of monetary compensation, can be awarded to former child-soldiers to enrol back in schools, vocational training can be established for adult-victims who have missed out on formal education, schools can be built to benefit an entire community and facilitate the process of reconciliation. Guarantees of non-repetition which focus on education, such as a change in curriculum to reflect the historic truth or training of public officials and teachers, is often a crucial mode of reparation that can serve both to remedy the harm suffered by a victim and ensure that violations do not occur again. Of course, education can also be provided directly to the victims as part of his or her rehabilitation, especially when the victims belong to vulnerable groups and need special protection.

Finally, the emerging concept of transformative reparation is particularly worth considering for education-related violations which are committed in situations of insecurity and armed conflict. In those situations, there is generally an existing structural inequality which maximises the risk of these violations occurring. Therefore, addressing the root causes of the violations through transformative reparations is an avenue that needs further exploration.

300 Not only an individual right to reparation cannot be considered as part of international customary law, but as noted by the ICC Registrar: 'The Registrar first observes the absence of a general convention providing a right of victims to reparations in international law'. ICC-01/04-01/06-2865, Registrar's Observations on Reparations Issues', Apr 2012.

3

REPARATION MECHANISMS

INTRODUCTION

Section 2 explained the obligation to make reparation and the right to reparation, the different forms of reparations which can be awarded for education-related violations, as well as the basic requirements for obtaining reparations. Building on these concepts and principles, Section 3 presents the mechanisms which action them. It highlights the types of reparations which have been awarded for education-related violations, as well as the educational forms of reparations which have been awarded whether to remedy an education-related violation or another type of violation.

Within most of the mechanisms presented, the victims can exercise their right to reparation. These include the UN complaint mechanisms, some of the regional human rights bodies, and some domestic courts. A few other mechanisms may award reparations to a victim without the need for him or her to even claim for reparations. This is the system established by the ICC for example. Finally, a few mechanisms simply exclude the right of the victim to claim compensation but may still provide a form of reparations for the harm suffered.

The mechanisms which may award reparations may be judicial, quasi-judicial or non-judicial. The judicial mechanisms presented here are the ICC, the regional human rights courts, the *ad hoc* and mixed tribunals and national courts. The quasi-judicial mechanisms highlighted include certain UN human rights treaty bodies, regional human rights commissions and the *ad hoc* claims commissions. Finally, non-judicial mechanisms present an overview of the findings and recommendations issued by the TRCs, ICC TFV and the initiatives funded through voluntary contributions, such as international and national funds.

National reparations programmes established following an armed conflict or widespread IHRL violations may lead to court-ordered reparations or voluntary forms of reparations. In Rwanda for example, where several funds have been established to support the victims of the genocide, there is a fund which is geared towards the students who survived.³⁰¹ Voluntary forms of reparations have also been established at the international level, such as with the UN Voluntary Fund for Victims of Torture, the UN Trust Fund to End Violence against Women, or the TFV.

Therefore, while Section 2 focused on the general legal concepts and principles applicable to reparations for education-related violations and the use of education as a form of reparation, Section 3 offers a more practical presentation. Thus it focuses on the procedural dimension of the right to reparation. As already mentioned, the right to reparation cannot always be exercised. In practice, access to reparations mechanisms is as important as the award itself since the right to reparation has a dual dimension, embracing both the substance of relief as well as the procedure through which it may be obtained.³⁰² Therefore, Section 3 presents some of the key procedural steps required to claim for reparation, highlighting the degree to which victims have to (or can) actively take part in the proceedings. Finally, this Section also discusses some of those mechanisms through which a victim may obtain reparation, without being able or without needing to exercise their right to reparations.

301 It is associated with organisation of those survivors, the *Association des Etudiants et Elèves Rescapés du Genocide* ('AERG').

302 On the dual dimension of reparations see Redress, *A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law*, 2003, which is available at: <http://www.redress.org/downloads/publications/SourceBook.pdf>
See also CAT General Comment on Article 14, CAT/C/GC/3, 22 Nov 2012.

The international mechanisms are presented first, followed by the regional mechanisms and the national mechanisms. The non-judicial voluntary forms of reparations are presented at the very end of this Section.

3.1 INTERNATIONAL MECHANISMS

As explained in Section 2, the obligation to redress the consequences of a wrongful act perpetrated by a State is a customary norm of international law.³⁰³ In addition, individuals have been given the right to claim for reparation directly, under certain human rights treaties and some other international bodies. The various mechanisms allowing this right to be enforced are presented below.

At the international level, the mechanisms available which may award reparations for education-related violations or educational forms of reparations in general include:

- the complaint mechanisms of UN Treaty Bodies, and
- the international courts and tribunals:
 - The *ad hoc* tribunals
 - The ICC
 - The hybrid courts and tribunals
 - The ad hoc claims commissions (UNCC and EECC)

3.1.1 Complaint Mechanisms of UN Treaty Bodies

At the international level, a number of UN treaty-monitoring bodies, which are often called ‘committees’, have competence to consider individual complaints or communications on human right matters. As already mentioned, the enjoyment of education may be affected through many human rights violations, such as violation of the right to life, torture, as well as by a violation of the right to education *per se*.³⁰⁴ In fact, each of the UN complaint mechanisms in place monitors rights which, if violated, may impact education.

These complaints are usually brought by any individual, a group of individuals, or by someone else on behalf of the individual(s), claiming a violation of a right under a particular treaty, depending on the terms of that treaty.³⁰⁵ The perpetrator must be a State party to that treaty and it must have recognised the competence of the committee to consider such complaints.³⁰⁶ The treaty bodies do not examine complaints against private individuals, national or international organisations. In addition, the domestic remedies must have been exhausted (with the exception of local remedies which are not effective, not available, or unduly prolonged).

303 *Factory at Chorzow Case (Germany v Poland)* supra n 41, at para 47. See also B D Lepard, Customary International Law: a New Theory with Practical Applications (CUP, Cambridge, 2010) at 166-7. “The PCIJ implied [in the *Factory at Chorzow case*] that a customary norm had arisen, based on ‘international practice and in particular by the decisions of arbitral tribunals that reparation must, as far as possible wipe out all the consequences of illegal act and re-establish the situation which would in all probability have existed if that act had not been committed’. The PCIJ suggested that this obligation also existed by virtue of the general principle of international law. Thus, a customary norm was also a general principle by reason of its broad character.”

304 For more on the work of the UN Treaty Mechanisms in relation to the right to education, see T Karimova, G Giacca, S Casey-Maslen, *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed conflict, A study on behalf of Protect Education in Insecurity and Conflict* (PEIC, Doha, August 2013).

305 See generally, S Joseph, K Mitchell and L Gyorki, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (OMCT Series Volume 4, Geneva, 2006).

306 In order to know if a State has ratified a treaty, individuals may consult the website of the UN Treaty Collection, which is available at: <http://treaties.un.org/pages/UNTSONline.aspx?id=1>

The complaints must be submitted in writing,³⁰⁷ with the facts and alleged violations presented in chronological order and indication of the exhausted domestic remedies.³⁰⁸ They cannot be sent simultaneously to a different human rights mechanism.³⁰⁹

The following treaties (listed alphabetically) all allow for individuals to bring complaints to the relevant treaty body:

- CAT: The Committee Against Torture may consider individual communications in relation to CAT regarding States parties that have made the necessary declaration under Article 22 of CAT.
- CEDAW: Pursuant to the First Optional Protocol to CEDAW, the CEDAW Committee may consider individual communications in relation to alleged violations of CEDAW by States Parties to the Protocol.³¹⁰
- CERD: The Committee on the Elimination of All Forms of Racial Discrimination may consider individual communications in relation to CERD regarding States parties that have made the necessary declaration under Article 14 of CERD.
- CRC: In December 2011, the UN General Assembly approved a third Optional Protocol to the CRC. This Protocol will enable individuals to submit complaints in relation to States Parties to the Protocol regarding specific violations of their rights under the CRC and the first two Optional Protocols to the CRC. The Third Optional Protocol will enter into force once 10 States have ratified it.³¹¹ At present, child rights protected under other treaties may be raised before the other treaty-monitoring committees with competence to consider individual complaints.
- CRPD: The Committee on the Rights of Persons with Disabilities may consider individual communications in relation to the Convention on the Rights of Persons with Disabilities regarding States Parties to the Optional Protocol to the Convention on the Rights of Persons with Disabilities.
- CPRMW: The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families may consider individual communication under Article 77 of the Convention. This procedure is not yet in force.
- ICED: The Committee on Enforced Disappearances may consider individual communication under Article 31 of the Convention.
- ICCPR: Pursuant to the First Optional Protocol to the ICCPR, the Human Rights Committee (HRC) may consider individual communications in relation to alleged violations of the ICCPR by States Parties to the Protocol.
- ICESCR: The Optional Protocol to the ICESCR gives competence to the CESC to receive and consider individual complaints (“communications...by or on behalf of individuals or groups of individuals”) concerning States Parties to the Protocol.³¹² This is the most recent UN complaint mechanism and it is likely to play an essential role in the supervision of the ICESCR and thus in the protection of the right to education.

307 Complaints can't be anonymous (although the victims might request that their names are not disclosed when the final decision is published). A model complaint form can be downloaded at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/IndividualComplaints.aspx>

308 Information on the individual complaints procedure can be found here: <http://www2.ohchr.org/english/bodies/petitions/individual.htm#overview>

309 See UN Office of the High Commissioner for Human Rights, '23 Frequently Asked Questions about Treaty Body Complaints Procedures', available at: <http://www.ohchr.org/Documents/HRBodies/TB/23FAQ.pdf>

310 See the Australian Human Rights Commission, "Mechanisms for advancing women's human rights: a Guide to using the Optional Protocol to CEDAW and other international complaint Mechanisms" (2011), available at www.hreoc.gov.au/sex_discrimination/publication/mechanisms/opcedaw.pdf.

311 For further information on the Optional Protocol on a Communications Procedure, see the web page of the OHCHR on the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, available at: <http://www.ohchr.org/EN/HRBodies/HRC/WGCRC/Pages/OpenEndedWorkingGroupIndex.aspx>; and the web page of the OHCHR on the Committee of the Rights of the Child which is available at: www2.ohchr.org/english/bodies/crc/

312 Art 2 of the Optional Protocol to the ICESCR (GA resolution A/RES/63/117) of 10 Dec 2008, adopted by the HRC by its resolution 8/2 of 18 Jun 2008. In addition to communications, the OP-ICESCR also provides for inquiry procedures which allow the CESC to investigate particular situations, as well as inter-States complaint mechanisms.

The HRCComm has been in place the longest which may explain its having more complaints than any other committee so far. As already noted in Section 2, the HRCComm stated that the obligation to provide an effective remedy contained in Article 2(3) of the ICCPR “requires that States Parties make reparation to individuals whose Covenant rights have been violated.”³¹³ In general, when examining communications relating to the ICCPR,³¹⁴ the HRCComm expresses its view as to what reparation ought to be made to affected individuals.³¹⁵

The HRCComm has mostly dealt with education-related violations through freedom of religion,³¹⁶ as well as through the prohibition against discrimination, considering the lack of access to education for child-migrants or discrimination due to preference by denominational schools for teachers with certain beliefs.³¹⁷ For example, in *Waldman v Canada*, the HRCComm decided that Canada had violated Article 26 ICCPR by providing funding for the schools of one religious group and not another.³¹⁸ With regard to reparation, the HRCComm referred to Article 2 (3)(a) and the obligation of State parties to provide an effective remedy, able to eliminate the discriminatory situation in question. Therefore, Canada was asked to submit, within 90 days, information about the measures taken to give effect to the Committee’s Views. It also had to publish the Committee’s Views.³¹⁹ In relation to religious teaching, the HRCComm decided that compulsory religious classes must be taught in an impartial manner and students must be able to exempt themselves from such a class. Again, concerning the issue of repairing the victims, the Committee asked the State to submit within 90 days information on the implementation of the Committee’s views.³²⁰

In the case *X H L v the Netherlands*,³²¹ the HRCComm noted that the State, by rejecting Mr L’s asylum application, had violated his right to be awarded special protection as a child. The Committee took into account the government’s failure to ascertain whether he would be able to access health, education and social services once returned to China. In its conclusions, the Committee dealt with the issue of reparation, affirming that

the State party is under an obligation to provide the author with an effective remedy by reconsidering his claim in light of the evolution of the circumstances of the case, including the possibility of granting him a residence permit. The State party is also under an obligation to take steps to prevent similar violations occurring in the future [...] the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s Views. In addition, it requests the State party to publish the Committee’s Views.³²²

The CERD Committee, in *Kashif Ahmad v Denmark*, found that the facts as presented constituted a violation of Articles 14 and 6 of the Convention.³²³ Therefore it recommended to Denmark to ensure that the police and the public prosecutors properly investigate accusations and complaints related to acts of racial discrimination, occurring in a school.³²⁴

313 See HRCComm General Comment No 31, at para 16. However, the Committee’s position, including its recommendations regarding reparation, has often not been reflected in the conduct of States Parties to the Covenant.

314 A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

315 See, for example, *Lantsova v Russia*, Communication No 763/1997 (26 Mar 2002) at para 11.

316 *Hudoyberganova v Uzbekistan*, Communication No 931/2000.

317 See *D and E and their two children v Australia*, Communication No 1050/2002, and *Tadman and Prentice v Canada*, Communication No 1481/2006.

318 Communication No 694/1996. See the Handbook at 233.

319 See the Report of the HRCComm, 2000, A/55/40, Vol II, 99, which is available at: <http://www.un.org/documents/ga/docs/55/a5540vol2.pdf>

320 *Umm et al v Norway* (1155/2003).

321 Communication No 1564/2007.

322 Ibid, paras 12-3.

323 Art 1(4): special protections to eliminate racism; Art 6: effective remedy.

324 *Kashif Ahmad v Denmark*, CERD/C/56/D/16/1999.

In *Er v Denmark*,³²⁵ the CERD Committee considered an allegation of discrimination by a school which excluded students of non-Danish descent from being recruited as trainees by a carpentry firm. According to the Committee, this amounted to a violation of the right of students to vocational training. Therefore the Committee recommended to the State party to grant the petitioner “adequate compensation” for the moral injury caused by the above-mentioned violations of the Convention. Denmark was also requested to give wide publicity to the Committee’s opinion, including among prosecutors and judicial bodies.³²⁶

The CEDAW Committee interpreted Article 2(b) as imposing an obligation on States Parties to provide reparation where a breach of the Convention had caused harm. Article 2(b) provides that “[s]tates Parties ... undertake ... (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”. Interpreting this obligation, the CEDAW Committee put forward the view that:

Subparagraph (b) contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.³²⁷

This is applicable for breaches of Article 10, which provides women with the right of equal access to, and enjoyment of, education.

The CAT Committee has also dealt with education-related violations in two cases. In *Guridi v Spain* the CAT Committee stated that the restoration of the victim’s dignity is the ultimate objective of redress and that monetary compensation alone is insufficient to achieve it:³²⁸

The Committee considers that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case.³²⁹

In another case, the CAT Committee considered reports of child abuse and sexual violence within Bolivian educational institutes.³³⁰ A student was abducted from her public school before being raped and murdered.³³¹ To address the allegations of sexual violence the Committee recommended both steps to prevent it and measures of redress for the victim. It recommended that the State:

- (a) Urge all the relevant authorities to investigate such abuses and to bring the suspected perpetrators to trial;
- (b) Set up effective complaints mechanisms and mechanisms for the provision of comprehensive assistance to victims and their families that will afford them protection, access to justice and redress of the harm suffered;
- (c) Ensure that victims have access to specialized health-care services in the areas of family planning and the prevention and diagnosis of sexually transmitted diseases;

325 Communication No 40/2007.

326 Ibid, at para 9.

327 CEDAW Committee General Recommendation No 28, *Core Obligations of States Parties under Art 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 Dec 2010, UN Doc CEDAW/C/GC/28, para 32, which is available at: <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>

328 Communication No 212/2002, UN Doc CAT/C/34/D/212/2002 (2005) at para 6.8.

329 Ibid.

330 Committee Against Torture, Concluding observations on the second periodic report of the Plurinational State of Bolivia as approved by the Committee at its fiftieth session (6–31 May 2013) CAT/C/BOL/CO/2 (14 Jun 2013) at para 16.

331 See, Women’s Link Worldwide, ‘Sexual violence in Bolivian schools: a breach of the torture obligation’ Gender Justice Journal, available at: <http://genderjusticejournal.wordpress.com/2013/08/02/what-can-the-state-do-to-really-really-ensure-the-united-nations-committee-against-torture-and-the-girls-of-bolivia-that-they-are-safe-in-school/>

- (d) Develop ongoing awareness-raising and training programmes that focus on this problem for teachers and other civil servants involved in victim protection;
- (e) Compile a broader range of data on this issue.³³²

Moreover, the CAT Committee emphasised in a General Comment that rehabilitation is defined as “the restoration of function or the acquisition of new skills required as a result of the change circumstances of a victim in the aftermath of torture or ill-treatment”. It should “aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society”. When utilised rehabilitation should “be holistic and include medical and psychological care as well as legal and social services”.³³³ Within this, ‘vocational training [and] education’ are mentioned as a means to fulfil the purpose of rehabilitative reparations.³³⁴

In addition to the reparations mentioned in the above cases, the Committees have also recommended other types of remedies to redress human rights violations, including compensation, victims’ release from imprisonment, further investigation and commutation of death penalty. While the procedures of the complaint mechanisms lead to quasi-judicial adjudication, States are not legally bound to the Committees’ decisions. For example, in cases where the rights enshrined in the ICCPR are violated States, only have a ‘moral duty’ to comply in relation to the mandatory obligation to fulfil the terms of the Covenant, including Article 2(3).³³⁵

In 2002, the HRCComm reported that only about 30% of the follow-up replies it receives display a willingness to implement its views or to offer an appropriate remedy to the victims.³³⁶ More recently, a study conducted by the Open Society Initiative has showed, on the basis of 2009 data, that “the compliance rate hovers slightly above 12 percent, a low figure by any measure” and that the implementation record appears to have actually deteriorated over time.³³⁷

3.1.2 International Criminal Courts and Tribunals

International criminal justice arose out of the need to punish individual perpetrators who committed crimes that shocked the conscience of mankind.³³⁸ Reparations to the victims were not originally considered within its processes. The *ad hoc* tribunals set up to deal with the crimes committed in the Former Yugoslavia and in Rwanda paid little attention to the victims, focusing instead on deterrence and retribution.

Until the adoption of the Rome Statute, victims’ rights in international criminal proceedings were largely marginalised. Its entry into force marks a turning point in ICL, as it includes reparations within the mandate of the ICC.

3.1.2.1 Ad hoc Tribunals

An ad hoc tribunal was created to address the violations of international law committed during the conflict in the former Yugoslavia, the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’). Another one was

332 Ibid.

333 CAT Committee, General Comment No 3 (2012) CAT/C/GC/3, at para 11.

334 CAT Committee, General Comment No 3(2012) CAT/C/GC/3, at para 13.

335 M G Schmidt, ‘Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond’ in A F Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International, The Hague, 2000) at 233–49.

336 UN GA, 57th Session. Report of the Human Rights Committee, 11 Jul 2002, UN Doc A/57/19, volII, Supp (No 40) at para 225.

337 See D C Baluarte and C M De Vos, ‘From Judgment to Justice: Implementing International and Regional Human Rights Decision’, Open Society Foundations, 2010. Quoted in A Nollkaemper and R van Alebeek, ‘The Legal Status of Decisions by Human Rights Treaty Bodies in National Law’, ACIL Research Paper No 2011-02, finalized 11 Apr 2011, available on SSRN, *forthcoming in*: H Keller and G Ulfstein (eds), *On Human Right Treaty Bodies*.

338 See generally M C Bassiouni, ‘International Crimes: Jus Cogens and Obligations Erga Omnes’, in *Law and Contemporary Problems*, 59(1997) at 63–74.

created to address the international law violations committed during the Rwandan genocide, the International Criminal Tribunal for Rwanda ('ICTR'). In both contexts, education-related violations were committed. During the genocide in Rwanda, more than 600 primary schools were destroyed and 3,000 teachers were killed or forced to flee.³³⁹ In the Former Yugoslavia, schools and other educational facilities were the theatre of many atrocities an example being the Vuk Karadžić School massacre, in which 700 unarmed Bosniak men were brutally tortured and murdered in the gymnasium of the Vuk Karadžić primary school.³⁴⁰ However, neither of these tribunals awarded reparations to the victims nor did they focus on education-related violations.

The Statutes and Rules of Procedure and Evidence ('RPE') of each of these *ad hoc* tribunals focus mostly on retribution and deterrence. However, the restitution of property and proceeds is considered at Article 24(3) of the ICTY Statute, mirrored by Article 23(3) of the ICTR Statute, which states that "in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner".³⁴¹ A request for restitution must be presented by the Prosecutor or by the Chamber.³⁴² It cannot be initiated by the victims directly. However, since their establishment, the *ad hoc* tribunals have never ordered restitution, including in those cases where it was proven that properties were illegally taken.³⁴³

The *ad hoc* tribunals cannot award compensation. Pursuant to common Rule 106 of the RPE, compensation is a matter delegated to the national courts or 'other competent bodies', which may award compensation according to their relevant national legislation. For this purpose, the judgments of the *ad hoc* tribunals are to be considered final and binding as to the criminal responsibility of the convicted person.³⁴⁴

3.1.2.2 International Criminal Court

Unlike the *ad hoc* tribunals, the ICC is a permanent court which was established to prosecute individuals for genocide, crimes against humanity, war crimes and the crime of aggression.³⁴⁵ All of the crimes under the jurisdiction of the Court may affect students, education staff and education facilities.

The ICC departs from the *ad hoc* tribunals' approach toward reparations.³⁴⁶ It is the first international criminal court where individuals are entitled to submit claims to obtain redress. According to Article 75 of the Rome Statute

339 See the data provided by UNICEF, available at: http://www.unicef.org/infobycountry/rwanda_31708.html

340 HRCComm, Document submitted by Bosnia and Herzegovina on 27 Apr 1993, para 13, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/333378630589b6d680256674005bc280?Opendocument>

341 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, adopted by UN Security Council Resolution 827, UN SCOR 48th sess, 3217th mtg at 1-2 (1993); 32 ILM 1159 (1993). *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States*, between 1 Jan 1994 and 31 Dec 1994, adopted by Security Council resolution 955 (1994) of 8 Nov 1994.

342 As described in the RPE, Rule 105 common to both Tribunals. See C Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP, Cambridge, 2012) at 91.

343 See S Malmstrom, 'Restitution of Property and Compensation to Victims', in R May *et al* (eds) *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer Law International, The Hague, 2001).

344 See A M De Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and their Families', in *Leiden Journal of International Law* 20 (2007) at 207-37.

345 Note that on 11 Jun 2010, the Review Conference of the Rome Statute adopted a definition of the crime of aggression and a regime establishing how the Court will exercise its jurisdiction over this crime. The Court will not be able to exercise its jurisdiction over the crime until after 1 January 2017 when a decision is to be made by States Parties to activate the jurisdiction. More information is available at: <http://www.iccnw.org/?mod=aggression>

346 The *ad hoc* tribunals used the lessons learnt from their inability to deal with victims to successfully advocate for a victims compensation scheme during the negotiations leading to the adoption of the Rome Statute in 2002. See L Zegveld, 'Victims' Reparations Claims and International Criminal Courts: *Incompatible Values?*, 8 *Journal of International Criminal Justice* (2010) at 79-111.

[T]he Court shall establish principles relating to reparations or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and the extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which is acting.

The ICC Pre-Trial Chamber stated that “[t]he success of the Court is to some extent, linked to the success of its reparation regime”.³⁴⁷ In implementing reparations, the Court benefits from the TFV, which fulfils a dual mandate in relation to the victims of crimes under the ICC’s jurisdiction. The TFV implements Court-ordered reparations awards against a convicted person when directed by the Court to do so. It also uses voluntary contributions from donors to provide victims and their families, in situations where the Court is active, with physical rehabilitation, material support, and/or psychological rehabilitation.³⁴⁸

Victims before the ICC may apply for reparations at any time.³⁴⁹ Applications for reparations may be submitted:

- ‘spontaneously’ by the alleged victims (Rule 94), or
- following the notification of reparation proceedings made by the Registrar at the request of the Chamber acting on its own initiative (Rule 95(1)).³⁵⁰

Victims who decide to claim for reparations spontaneously may fill their applications at the commencement of the trial and send it to the Registrar. To be complete, the application must contain all the information listed in Rule 94 of the RPE. To make the procedure easier and more accessible for the victims, the Victims Participation and Reparations Section (‘VPRS’) prepared a standard application form through which victims apply for ‘participation or reparations’, or both.³⁵¹ Despite the fact that the Statute does provide for an individualised claims process, the Court is currently looking at ways to make the application process (and the participation itself) more streamlined.³⁵²

In order to claim for reparations, victims may be legally represented. When there are a large number of victims, the Chamber may request that they appoint a common representative.³⁵³ If the victims are unable to do so, the Chamber can ask the Registrar to select that representative, ensuring that the diverse interests of the victims are adequately taken into account.³⁵⁴

According to Rule 97, which regulates the assessment of reparations, the ICC may award individual or collective reparations, taking into account the scope and the extent of any damage, loss or injury. Experts, upon request of the victims, their representatives or the convicted person, or the Court itself, can be appointed to suggest types and modalities of reparations and to assist the judges in ‘quantifying’ the damages. According to Rule 98 of the RPE, there are four possible forms of implementation for the reparations that can be ordered by the Court, separately and/or in combination:

- In the case of conviction, the Court may order reparations for the victims by transferring the individuals’ awards directly from the assets of the perpetrator.³⁵⁵

347 Pre-Trial Chamber I, Situation in *the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a Warrant of Arrest, Art 58, ICC-01/04–01/06 (10 Feb 2006) at para 136.

348 More information is available at: <http://www.trustfundforvictims.org/two-roles-tfv>

349 Application forms can be downloaded at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/forms.aspx
See the Second Report of the Registry on Reparations ICC-01/04-01/06 submitted to the Trial Chamber I on 1 Sep 2011 (and reclassified as Public on 19/03/2012) at para 166.

350 Applications triggered under Rule 95(1) and those transmitted earlier according to Rule 94 shall be considered concurrently.

351 See Redress, ‘Justice for Victims: The ICC Reparations Mandate’ (May 2011) at 17.

352 Ibid.

353 Rule 90(2) of the Court’s RPE.

354 Rule 90(4).

355 See Art 75(2) first sentence, in combination with Rule 98(1).

- When the Court issues individual reparations' orders but it is "impossible or impractical" to make the award directly from the convicted person, the Court may deposit the award with the TFV.³⁵⁶ There are two circumstances when the award is deposited with the TFV, rather than transferred straight to the victims:³⁵⁷ When the information at the Court's disposal is incomplete, although the victims have been identified and recognised as legitimate beneficiaries. The forms submitted by the victims may be defective because details are missing or have changed since they have filed the claim.³⁵⁸ The TFV is then required to draft an implementation strategy to trace the victims and forward the award to them as soon as possible.³⁵⁹ The TFV may also have to step in for the distribution of the reparations if the Court's cannot identify the beneficiaries. In that case, the TFV must identify the eligible victims through statistical and demographic data.³⁶⁰
- The Chamber may order the award for reparation to be made through the TFV when the number of victims and the scope, forms, and modalities of reparations, make a collective award more appropriate.³⁶¹ In such cases, the TFV has to determine the nature of the collective award and establish the methods for its implementation.³⁶² However, in order for the reparations to be put into effect, the approval of the Court is still required. As set forth in its Regulations, the TFV may identify (local) intermediaries or partners which can contribute to the drafting stage with their proposals and/or be consulted at a later phase for the implementation of the awards.
- The Court may order the award for reparations to be made through the TFV to an intergovernmental, international or national organization identified by the TFV itself.³⁶³ The tasks of the TFV then include both endorsing the approved organization and developing a detailed implementation plan. Moreover, Rule 98(4) can be applied in combination with Rule 98(2), in the event of individual reparations which, due to impossibility or impracticability, cannot be made directly from the convicted person to the beneficiaries.

The Trial Chamber I issued its first decision establishing the principles and procedures to be applied to reparations in the *Lubanga* case. Thomas Lubanga Dyilo was declared indigent and unable to provide the victims with any kinds of reparations other than a public apology (at his discretion). The Chamber decided that the TFV will establish and implement the reparations (which may be initiated only after a decision in the pending appeals).³⁶⁴

In the *Lubanga* decision on reparations, the ICC made explicit the importance of education as a means to redress the harm suffered by the victims of the crimes tried. Discussing the possible forms of reparations, the Court underlined that, in order to address the harm suffered by the victims on an individual and collective basis, providing assistance through general rehabilitation and education should be considered.³⁶⁵ Moreover, to reduce the stigmatization and marginalization of the victims, the Court, assisted by the State Parties and the international community, is entitled to institute other forms of reparation designed to improve the situation of the victims, such as outreach and promotional programmes and educational campaigns.³⁶⁶

356 Rule 98(2) of the Rules of Procedure.

357 See the Regulations of the TFV.

358 See the report issued by the TFV to provide guidance and assistance to Trial Chamber 1 in the *Lubanga* case.

359 Regulation 59. See on this point the Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, at paras 261 ss.

360 Regulation 60 and 61.

361 Rule 98(3).

362 Regulations 69 to 72 of the TFV.

363 Rule 98(4) of the Court's RPE. This Rule is expanded upon in Regulations 73-75.

364 The TFV was called to implement a 'five steps plan' in conjunction with the Registry, the OPCV and the experts. See ICC-01/04-01/06-2904 07-08-2012, 'Decision Establishing the Principles and Procedures to be Applied to Reparations', at paras 281 ss.

365 Ibid, at para 221.

366 Ibid at para 239. See also Part 9 of the Statute on 'International cooperation and judicial assistance'.

As underlined by UNICEF in its submission to the Court, the ICC should give special attention to the role that schools can play in awarding rehabilitative measures

schools are important not only for children, but also for young adults by helping them recover their self-esteem and triggering acceptance and recognition by the community. Experience in DRC has shown that this is particularly important for girls who were victims of sexual violence: attending school helps them find or increase self-esteem and change the community's perception of them.³⁶⁷

3.1.2.3 Hybrid Courts and Tribunals

In addition to *ad hoc* tribunals and the ICC, there is another type of mechanism which is also concerned with ICL. These courts and tribunals may also assess the individual criminal responsibility of persons who committed education-related violations.

They are classified as 'hybrid' (or 'internationalized') because both the institutional apparatus and the applicable law consist of a blend of international and domestic laws, resulting in a mixed form of justice.³⁶⁸ Hybrid courts and tribunals were established because the international community became aware of various features of the *ad hoc* tribunals that militated against using them as a model for future international criminal courts. This led to the birth of a new form of international criminal justice institution—the hybrid tribunal.³⁶⁹

These courts and tribunals employ the efforts of both the international community and the State in which the alleged crimes occurred. Over the past two decades, several hybrid tribunals have been created, including the Regulation 64 Panels in Kosovo; the Special Panels for Serious Crimes ('SPSC') in Dili, East Timor; the Extraordinary Chambers in the Courts of Cambodia ('ECCC') in Phnom Penh;³⁷⁰ the Special Court for Sierra Leone ('SCSL') in Freetown; the Special Tribunal for Lebanon ('STL')³⁷¹ in The Hague and the War Crimes Chamber in the State Court of Bosnia and Herzegovina in Sarajevo.³⁷²

With the exception of the ECCC, which foresees the possibility of victims being awarded moral and collective reparation,³⁷³ none of the other hybrid courts and tribunals deal with victims' redress.³⁷⁴

3.1.3 *Ad hoc* Claims Commissions

In order to deal with the numerous victims of violations committed during armed conflicts, specific commissions have been established to award compensation. As students, education staff and education facilities are likely to be harmed during armed conflicts, their reparations systems are relevant. These *ad hoc* claims commissions include the UNCC and the Eritrea-Ethiopia Claims Commission ('EECC').

3.1.3.1 United Nations Compensation Commission

The UN Security Council ('UNSC') created a fund to compensate victims for losses and injuries resulting from the invasion of Iraq and occupation of Kuwait, which prevented many students from pursuing and completing their education and caused serious damages to schools and educational facilities.

367 See UNICEF, *Submission on the Principles to be Applied, and the Procedure to be Followed by the Chamber with regard to Reparations*, ICC-01/04-01/06, 10 May 2012, Guiding Principles, at para 41 (c).

368 See L A Dickinson, 'The Promise of Hybrid Courts', (2003) 97 *American Journal of International Law* at 295.

369 L Raub, 'Positioning Hybrid Tribunals in International Criminal Justice', (2009) 41 *NYU Journal of International Law and Politics*, at 1013-52.

370 See case 001/18-07-2007/ECCC/TC (KAING Guek Eav), 26 Jul 2010.

371 Even though the STL has no power to award reparation, it is one of only a few international tribunals which gives a role for victims in its judicial proceedings, see: <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/registry/victim-participation>

372 See Raub, *supra* n 369, at 1016.

373 See Rule 23 of the Internal Rules of Extraordinary Chambers in the Courts of Cambodia as revised on 17 Sep 2010.

374 For example, the STL does also not have power to grant compensation to victims. If an accused is found guilty, the Tribunal can only provide a certified copy of the judgment to victims, so that they may use it in order to seek compensation through national courts or other competent bodies

In addition to this fund, the Secretary General recommended the establishment of a commission to verify and value the claims, as well as to administer the payments. The UNCC was set up to that effect by the UNSC 1991.³⁷⁵ It was described as

...not a court or an arbitral tribunal before which the parties appear, it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving dispute claims. It is only in this late respect that a quasi-judicial function may be involved.³⁷⁶

The Commission accepted claims from individuals, corporations, as well as claims submitted by governments or by international organisations ('IOs') for individuals who were not in a position to have their claims filed by a government.³⁷⁷ Therefore, under certain circumstances, individuals were granted a right to compensation exercised by their State of nationality or by an IO.³⁷⁸ In exceptional cases, corporations were also entitled to directly submit claims to the Commission.³⁷⁹ A special procedure was also put in place to process the claims of stateless individuals.

The criterion for compensation was that the loss has to be a direct outcome of Iraq's invasion and occupation of Kuwait (the causal link).³⁸⁰ The claimant was required to demonstrate that the losses incurred were of calculable value.

With regard to education-related violations, this means that there were denials of compensation by the UNCC where the Commissioners concluded that:

- there was "no evidence of a commercial value" with regard to lost teaching and research materials;³⁸¹
- the loss of student files had "no commercial value" and damages should only be awarded for the materials and labour required to reassemble the data.³⁸²

More generally, compensation was not awarded if the loss was deemed "an expense that would have been incurred regardless of Iraq's invasion and occupation of Kuwait".³⁸³ For example, when claiming for compensation for the loss of a student allowance, the following evidence had to be adduced before the Commission:

- appropriate documentary evidence of the existence and amount of the original scholarship;
- evidence of enrolment at another educational institution;
- alternative means of funding obtained by the student to support their education.³⁸⁴

375 See F Wooldridge and O Elias, 'Humanitarian Considerations in the Work of the United Nations Compensation Commission', (2003) 85 *International Review of the Red Cross*, at 555-81.

376 See Report of the Secretary General pursuant to paragraph 19 of Security Council Resolution 687 (1991) S22559, which is available at: <http://www.uncc.ch/resolutio/res22559.pdf>

377 Since 1991, the Commission has received more than 2.6 million claims seeking a total of approximately US\$352 billion in compensation. Further information available at: <http://www.uncc.ch/theclaims.htm>

378 Its Provisional Rules for Claims procedure provides that "a government may submit claims on behalf of its nationals". Governments and international organisations were eligible to submit claims on their own behalf directly to the UNCC. However, as a matter of practicality, the claims of affected persons were only able to be lodged by the government of their nationality or permanent residency in a consolidated form. UNCC Governing Council, *Criteria for Additional Categories of Claims*, Doc No S/AC.26/1991/7/Rev.1 (17 Mar 1992) [30]; UNCC Governing Council, *Provisional Rules for Claims Procedure*, Doc No S/AC.26/1992/10 (26 Jun 1992), Art 5(1), 5(1)(d).

379 See Art 5 of the UNCC Provisional Rules for Claims Procedure (adopted on 26 Jun 1992).

380 See E Gillard, 'Reparation for Violations of International Humanitarian Law', (2003) 85 *International Review of the Red Cross*, at 541.

381 United Nations Compensation Commission Governing Council, *Report and Recommendations Made by the "D1" Panel of Commissioners Concerning Part Two of the Ninth Installment of Individual Claims for Damages Above US\$100,000 (Category "D" Claims)*, Doc No S/AC.26/2001/26 (14 Dec 2001) at 10.

382 United Nations Compensation Commission Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F3" Claims*, Doc No S/AC.26/1999/24 (9 Dec 1999) at 105.

383 For example the loss of school fees "sustained in an area [...] not found to be subject to military operations or [the] threat of military action." United Nations Compensation Commission Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "F1" Claims*, Doc No S/AC.26/2001/15 (22 Jun 2001) at 20.

384 Ibid.

With regard to claims for additional educational expenses incurred by a family forced to send their children to study abroad, the UNCC held that the following evidence needed to be adduced as concerns:

- the child's pre-invasion enrolment in an educational institution in Kuwait indicating the tuition fees;
- the child's departure from Kuwait after the invasion;
- the child's enrolment in another institution outside Kuwait and the fees paid to that institution.³⁸⁵

The claims filed for education-related violations could be classified as damages to real property, damages to personal property and other losses sustained by educational institutions. In relation to damages to real property, the UNCC determined that damage to buildings as a result of the Iraqi invasion was "in principle, compensable" and ordered the cost of their reconstruction.³⁸⁶ As for personal properties, the UNCC determined that damage to other tangible property in schools and universities was also compensable in principle, where it arose as the result of Iraqi military operations,³⁸⁷ or through damage caused by the provision of immediate humanitarian relief to refugees from the crisis.³⁸⁸ Concerning other losses sustained by educational institutions, both the Kuwait Ministry of Education and Kuwait University sought to claim damages for contractual agreements which were terminated through force majeure at the outset of the Iraqi invasion and subsequently renegotiated at a higher rate.³⁸⁹ While one panel of commissioners concluded that these price increases were compensable and awarded US\$79,000,³⁹⁰ another panel found that there was insufficient evidence to establish a causal link with the invasion and that such a price rise "could have resulted from a number of intervening factors not necessarily linked to the invasion".³⁹¹

The UNCC also granted Kuwait University US \$960,000 in damages for loss of research where projects were cancelled as the staff never returned to Kuwait after the invasion, projects were not resumed due to looting and destruction of facilities, or projects were not resumed because the supporting research and data was lost.³⁹²

The processing of claims concluded in 2005, with the final payments granted in 2007.

385 Ibid.

386 UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F3" Claims*, Doc No S/AC.26/1999/24 (9 Dec 1999) at 22; UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F3" Claims*, Doc No S/AC.26/1999/24 (9 Dec 1999) at 103–4. Reparations for damage to real property awarded to the Government of Kuwait included: substantial repair of 197 schools by the Kuwait Emergency Reconstruction Office and the removal of unexploded ordnances (US \$37,877,000); repair of 650 schools by the Kuwait Ministry of Education (US \$37,154,000); payments made to headmasters for immediate cleaning and minor repair works (US \$5,328,000); damages to real property sustained by Kuwait University (US \$15,209,002).

387 UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of "F2" Claims*, Doc No S/AC.26/2000/26 (7 Dec 2000) at 112. UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Third Instalment of "F3" Claims*, Doc No S/AC.26/2002/8 (13 Mar 2002) 65. On behalf of 650 Kuwaiti schools, the Ministry for Education was successful in claiming the following damages for personal property: loss of student files (US \$2,023,000); furniture and office equipment (\$14,820,000); laboratory equipment (US \$11,879,000); library books (US \$5,927,000); sports equipment (US \$3,212,000); musical instruments (US \$543,000); furniture and supplies in storage (US \$23,953,000); and vehicles (US \$123,000). In addition, Kuwait University was able to claim US \$107,930,000 for the loss of furniture and office equipment; office stationery, computers and accessories; laboratory equipment; library collection; kitchen tools; and various miscellaneous items.

388 Ibid.

389 UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the First Instalment of Claims by Governments and International Organizations (Category "F" Claims)*, Doc No S/AC.26/1998/4 (12 Mar 1998) at 8, 17; UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F3" Claims*, Doc No S/AC.26/1999/24 (9 Dec 1999) at 104.

390 UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F3" Claims*, Doc No S/AC.26/1999/24 (9 Dec 1999) at 104–5.

391 UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the First Instalment of Claims by Governments and International Organizations (Category "F" Claims)*, Doc No S/AC.26/1998/4 (12 Mar 1998) at 17.

392 UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Third Instalment of "F3" Claims*, Doc No S/AC.26/2002/8 (13 Mar 2002) at 91.

3.1.3.2 Eritrea-Ethiopia Claims Commission

The other *ad hoc* commission of interest is the EECC, established through the Peace Agreement signed in December 2000 between Ethiopia and Eritrea.³⁹³ In particular, as noted by the EECC, many schools and other educational facilities were damaged due to Ethiopia's invasion.

The Peace Agreement defines this claims commission as

a neutral Claims Commission charged with deciding, through binding arbitration, all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party.³⁹⁴

According to the Peace Agreement, the EECC, like the UNCC, was only authorised to award compensation. The Commission itself stated that monetary compensation is, in principle, the most appropriate remedy.³⁹⁵ Other forms of reparation could still be envisaged "if the remedy can be shown to be in accordance with international practice and would be reasonable and appropriate in the circumstances", but in practice the Commission awarded only compensation.³⁹⁶

The EECC was amenable to awarding compensation for the presumed injuries to civilians denied medical care because of damage to hospital facilities.³⁹⁷ With regard to education-related violations, it declined to award damages for "disruption to the lives and financial prospects of students deriving from the destruction of schools". According to the Final Award in relation to Eritrea's Damages Claims, the EECC stated that

As to Eritrea's claim for additional damages reflecting disruption of its education system, the Commission recognizes that many children's education, and their families' plans, were disrupted by damage to schools attributable to Ethiopia. (The record also includes evidence that Eritrean educators and their pupils often displayed admirable initiative and resilience in the face of adversity.) However, Eritrea's Damages Memorial made no serious attempt to identify the number of students affected, to quantify the extent of disruption, or to assess any financial or other consequences. The argumentation and evidence submitted to support this portion of the claim was anecdotal or conclusory. At the hearing, Eritrea acknowledged the difficulties and uncertainties of attempting to assess any quantum of damages associated with disruption of education. Given the paucity of the record, and the uncertainties of quantifying injury of the kind Eritrea asserts, this component of Eritrea's claim for fixed-sum damages in respect of hundreds of thousands of people fails for lack of proof. The Commission also notes that, in contrast with its arguments regarding medical care discussed below, Eritrea did not contend that international law rules extend special protection to education in the context of armed conflict or its aftermath.³⁹⁸

However, even though the EECC did not recognize the civilians' educational harm, it eventually awarded a total of US\$ 35,965,000 compensation to the Government of Eritrea for damage to and destruction of buildings, which included primary and secondary schools.³⁹⁹

On 17 August 2009, the EECC issued its final award which ordered the payment of compensation by each party to the other for the violations previously found in the partial awards.⁴⁰⁰ Unlike the UNCC, the EECC redressed only the damages caused to schools and educational facilities, without recognising educational harm resulting from such violations, nor the intrinsic value of the buildings devoted to education.

393 See generally A de Guttry, H Post and G Venturini, *The 1998–2000 War Between Eritrea and Ethiopia: An International Legal Perspective* (TMC Asser Press, The Hague, 2009).

394 Art 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, which can be accessed at: <http://www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf>

395 Decision No 3 of Jul 2001.

396 EECC, Decision No 3: Remedies, 24 Jul 2001.

397 See M Matheson, 'Eritrea-Ethiopia Claims Commission: Damage Awards', (2009) 13 *American Society of International Law Insights*, available at: <http://www.asil.org/insights090904.cfm>

398 Final Award Eritrea's Damages Claims (Erit-Eth) 17 Aug 2009, at paras 204-5. These claims are available at: www.pca-cpa.org/showfile.asp?fId=1260

399 Ibid. Eritrea Final Award at 95. The locations were on the Central and Western Fronts, in Serha, Senafe, Teseney, Alighidir, Guluj, Tabaldia, Gergef, Omhajer, Barentu and Tokombia, and Molki Sub-Zoba.

400 See Matheson supra n 397.

3.1.4 The International Committee of the Red Cross

The ICRC does not provide individuals with a remedy procedure for violations of IHL. However, its work with parties to conflicts and the armed forces of these parties aims to ensure their compliance with IHL. In this respect, the activities of the ICRC are wide-ranging and include, for example, gathering first-hand information in the field, including by receiving complaints or observing violations of IHL,⁴⁰¹ engaging in confidential dialogues with parties to the conflict, and ensuring a general protective presence in armed conflicts, including undertaking visits to potential or actual victims of conflict, especially those in detention.⁴⁰²

These processes can result in practical, informal and, often, the most immediate form of resolution for individual victims of education-related violations; facilitation of the provision of remedies and reparations by authorities; and overall improved compliance by parties with IHL.⁴⁰³ However, the need for confidentiality, and its neutral and independent position, means that the ICRC has adopted the policy of not publicizing breaches of IHL. It also does not operate on a formal level to restore victims' rights. Nevertheless, the ICRC is an important mechanism for reducing instances of violations of IHL, mitigating their effects, and ensuring that violations of IHL are addressed on a practical and individual level, albeit in a confidential and non-judicial way.

3.2 REGIONAL MECHANISMS

The regional human rights mechanisms provide victims with the possibility of claims for reparations. The ECHR,⁴⁰⁴ the ACHR,⁴⁰⁵ and the Optional Protocol to the ACHPR establishing the ACtHPR,⁴⁰⁶ all provide their respective courts with the power to issue binding judgments and award reparation to individuals in the case of violation of a convention right.

When education related violations were committed within their sphere of competence, the IACtHR and the ECtHR have provided the victims with access to education on several occasions, for example through the construction of school buildings or the establishments of trust funds and scholarships. Regional courts have not only recognised education as a rights-multiplier but also as an effective means to redress human rights violations.

Note that the following sub-sections focus on the Inter-American, European, and African systems because other systems, such as that under the Arab League, the Association of South East Asian Nations, or the Organization of Islamic Conference do not have a human rights mechanism in place that enables complaints.⁴⁰⁷

401 In accordance with the ICRC's Assistance Policy, available at: www.icrc.org/eng/assets/files/other/irrc_855_policy_ang.pdf

402 See the description of the ICRC's "protection and assistance activities", in T Pfanner 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims' (2009) 91 *International Review of the Red Cross*, at 290-9.

403 L Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', (2003) 85 *International Review of the Red Cross* 498, at 515.

404 Art 41 of the ECHR stipulates that if only partial reparation has been made under the internal law of a State Party "the Court shall, if necessary, afford just satisfaction to the injured party".

405 Art 63 of the ACHR requires, in relevant part, that the Court "shall rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

406 Art 27 of the Protocol provides that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation". See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (entry into force 25 Jan 2004) OAU/LEG/MIN/ACHPR/PROT.1. The African Court of Human Rights issued its first judgment in December 2009.

407 See the Handbook at 234.

3.2.1 The Inter-American Human Rights System

The Inter-American human rights system has two principal organs: the Inter-American Commission on Human Rights ('IACommHR') and the IACtHR, which was established with the entry into force of the ACHR in 1969 (also known as the 'Pact of San José').

The Commission is not able to provide victims with reparations. It can only make recommendations to the responsible State and, possibly, bring a case to the Court in case of non-compliance with its recommendations. It is then the Court which may award reparations to the victims. As victims of human rights violations do not have a direct access to the Court, they must first petition the Commission in order to obtain a remedy.

3.2.1.1 Inter-American Commission of Human Rights

According to Article 23 of the Commission's Rules of Procedure ('Rules'),⁴⁰⁸ any person or group of persons or nongovernmental entities legally recognised in one or more of the member States of the Organisation of American States may submit petitions to the Commission, on their behalf or on behalf of third persons.⁴⁰⁹

With regard to an individual complaint, in addition to the details of the person or organisation submitting it,⁴¹⁰ the petition must also include information about the alleged human right violation, the alleged victim(s) and the alleged perpetrators (when feasible). In particular, the petition must include an accurate description of the government's responsibilities in the human rights abuse in question. The State may be involved in the violation directly by committing the abuse, or indirectly, by failing to prohibit, prevent, or stop the human rights violation in question.⁴¹¹

In order to be admissible, the remedies available at the domestic level must have been exhausted,⁴¹² the petition must have been lodged within the prescribed time and not duplicate another petition. If admissibility is declared,⁴¹³ the petitioner is given two months to submit additional information on the merits. This information is then transferred to the State, which then also has two months to respond. Prior to deciding on the merits of the case, the IACommHR sets a time period for the parties to consider a friendly settlement.⁴¹⁴ In *Monica Carabantes Galleguillos v Chile*,⁴¹⁵ a girl was expelled from a subsidized private school for being pregnant. The applicants in this case alleged that, by virtue of its failure to punish or take appropriate measures against the private school for its conduct, the Chilean State was responsible for violations of the girl's rights. The cases led to a friendly settlement, which included the provision of a scholarship for the girl to complete her education, as well as 'symbolic reparation' through the publication of the measures taken by the State and a public recognition of the rights that had been violated. Furthermore, the State undertook to take steps to "disseminate recent legislation (Law No 19,688), amending the Education Act, which contains provisions on the rights of pregnant students or nursing mothers to have access to educational establishments".⁴¹⁶

408 See Rules of Procedure of the Inter-American Commission on Human Rights (Approved by the Commission at its 109 special session held 4-8 Dec 2000 and amended at its 116th regular period of sessions, held 7-25 Oct 2002). Art 23 of the Rules of Procedure mirrors Art 44 of the ACHR. According to Art 24 of the Rules of Procedure, "[T]he Commission may also, *motu proprio*, initiate the processing of a petition which, in its view, meets the necessary requirements". The Rules of Procedure are available at: http://www.oas.org/xxxivga/english/reference_docs/Reglamento_CIDH.pdf

409 In addition, States may opt to recognise the competence of the IACommHR to consider inter-State petitions, whereby one State party submits a petition alleging that another has violated rights set forth in the Convention, see Art 45(1) ACHR. So far, ten States have recognised this inter-State jurisdiction.

410 See in particular Art 28 of the Rules of Procedure which enlists all the criteria for the petition to be taken under consideration.

411 According to Art 28(f), the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognised in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated.

412 See Art 31 of the Rules of Procedure.

413 The report on admissibility is included in the Annual Report to the General Assembly of the OAS.

414 As provided for in Art 41 of the Rules of Procedure.

415 Case 12.046, *Monica Carabantes Galleguillos v Chile*, 12 Mar 2002, Report Number 33/02. Friendly Settlement, available at: www.cidh.oas.org/annualrep/2002eng/Chile12046.htm

416 Ibid, para.14.

When no friendly settlement is pursued, the IACommHR deliberates on the merits of the case. If it is established that there has been one or more violations of the ACHR, the IACommHR writes a preliminary report with recommendations. The concerned State must then report on the measures adopted to comply with the recommendations within a certain timeframe. Although non-binding, these recommendations are influential. For example, in the case of *Jehovah's Witnesses v Argentina*,⁴¹⁷ the IACommHR had to determine the legality of a decree passed by the President of Argentina on the closing of all halls of the Kingdom of the Jehovah's Witnesses and the outlawing of any literature and practice of that religion. The IACommHR concluded that the decree and its implementation violated, *inter alia*, the right to equal opportunity in education and, more generally, the right to education.⁴¹⁸ The Commission recommended Argentina repeal the decree, end the persecution of Jehovah's Witnesses, re-establish the observance of religious freedom, and provide information as to the manner in which it had implemented those recommendations. The Argentinean Government abided by the Commission's recommendations.

If a State does not comply with the recommendations, the IACommHR can bring the case to the IACtHR. To do so, the State must have ratified the ACHR and voluntarily accepted the IACtHR jurisdiction, either on a blanket basis or for a specific case.⁴¹⁹ The cases concerning education-related violations and those relevant because education was recognised as a means of redress are discussed below.

3.2.1.2 Inter-American Court of Human Rights

The IACtHR gives legally binding judgments and monitors their implementation but "only the State Parties and the Commission shall have the right to submit a case to the Court".⁴²⁰ Individuals, groups of individuals or non-governmental organisations cannot resort to the IACtHR directly.

Since 1996, through an amendment of its Rules of Procedure, the IACtHR recognised the victims' autonomy during the reparations phase.⁴²¹ This means that, while continuing to advise the Commission throughout the litigation of their case, the victims' and their representatives were able to participate in the reparation phase, without having to resort to the Commission.⁴²² In 2000, the participation of the victims was extended to the entire litigation period.⁴²³ Thus, once a case is brought before the IACtHR, the victims and their legal representatives can actively take part in each phase of the process. They are notified of each written submission and they are entitled to present their own views (in writing and through intervention at hearings) and to submit any supporting evidence.⁴²⁴

When the violation of a human right obligation is established, the IACtHR may award reparations to the victims. The right to an effective remedy, which is enshrined in Article 25 of the ACHR, has been interpreted by the Court as requiring States parties to provide reparation to individuals injured by violations of the Convention, where appropriate.⁴²⁵ Article 63 ACHR also states that the IACtHR must

rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

417 Case 2137.

418 Art XII of the ADHR.

419 Art 62 ACHR.

420 Art 61 para 1 of ACHR.

421 Art 23 Rules of Procedure of the IACtHR, adopted in Sep 1996.

422 F González, 'The Experience of the Inter-American Human Rights System', 40 (2009) *Victoria University of Wellington Law Review*, at 120.

423 Rules of Procedure of the IACtHR, adopted on 24 Nov 2000.

424 Ibid.

425 *Pueblo Bello Massacre v Colombia*, Merits, Reparations and Costs (Judgment of 31 Jan 2006), IACtHR Ser C No 140, at para 212; *19 Tradersmen v Colombia*, Merits, Reparations and Costs (Judgment of 5 Jul 2004) IACtHR Ser C No 109, at para 187; *Las Palmeras v Colombia*, Reparations and Costs (Judgment of 26 Nov 2002) IACtHR Ser C No 96, at para 65.

The Court stated that this provision codifies a rule of customary international law,⁴²⁶ recalling the *Factory at Chorzów case*.⁴²⁷ As a result, when a State party violates the Convention, it is under a “duty to make reparation and to have the consequences of the violation remedied.”⁴²⁸ When a State fails to accomplish this duty, the IACtHR then awards reparations pursuant to Article 63. This mandate given to the Court under Article 63 is broad, which means that it may award any of the forms of reparations recognised under international law.

As stated above, on several occasions the IACtHR has addressed education-related violations or used education as a mean to redress the victims. One of the first cases brought before the Court, the case of *Velasquez-Rodriguez v Honduras*, concerned the disappearance of a Honduran student, Angel Manfredo Velasquez Rodriguez.⁴²⁹ The Court found that the Honduran government had violated the American Convention by failing to “respect and ensure” the student’s right to personal liberty, humane treatment, and life.⁴³⁰ During the reparations phase, the victims’ representatives asked the Court to award different measures of redress, including forms of satisfaction such as to publicly apologise for the international violation committed, dedicate a public property such as a street, a school or a hospital to the victims of forced disappearances, and establish an educational fund and a retirement fund for the enjoyment of the victim’s next of kin.⁴³¹ The Court ordered Honduras to investigate the events and to punish those responsible for committing the acts of forced disappearances. Moreover, the IACtHR instructed Honduras to inform the victim’s relatives about the location of the victim’s remains. However, on the grounds that the ruling against Honduras was in “itself a type of reparation and moral satisfaction of significance and importance for the families of the victims”, the Court rejected all other petitions.⁴³²

The IACtHR referred the case of *Velasquez-Rodriguez* to the Court’s contentious jurisdiction in April 1986 along with the case of *Fairen Garbi and Solis Corrales* and the case of *Saul Godínez Cruz*, which both concerned forced disappearances in Honduras.⁴³³ In the first case, the victims were two Costa Rican citizens, Francisco Fairén Garbi, a student and public employee, and Yolanda Solís Corrales, a teacher.⁴³⁴ In the latter case, the victim was a school teacher, who acted also as leader of a teachers’ group. With regard to reparation, in the case of *Saul Godínez Cruz*, the Court awarded three-quarters of the monetary compensation calculated for moral damages to the daughter of the victim, making explicit reference to the importance of providing her with the possibility to pursue and complete her own education.⁴³⁵

In the case of *Aloeboetoe et al v Suriname*, which regarded seven members of a Maroon ethnic community killed by the military forces, the IACtHR ordered the reopening and operationalisation of the medical dispensary and the school in the village where most of the victims’ children lived.⁴³⁶

426 *Baldeón-García v Peru*, Merits, Reparations and Costs (Judgment of 6 Apr 2006) IACtHR Ser C No 147, at para 175; *Velásquez Rodríguez v Honduras*, Reparations and Costs (Judgment of 21 Jul 1989) IACtHR Ser C No 7, at para 25.

427 *Factory at Chorzów (Germany v Poland)*, Merits, 1928, PCIJ Series A, No 17, at 47 [*“Factory at Chorzów, Merits”*].

428 Ibid.

429 *Velásquez Rodríguez v Honduras*.

430 Ibid., at paras 2-3.

431 Ibid., at para 7.

432 Ibid., at paras 27-35.

433 See *Fairen Garbi and Solis Corrales Case*, (Judgment of Mar 15, 1989), IACtHR Series C No 6. *Godínez Cruz Cas*, (Judgment of Jul 21, 1989) IACtHR Ser C No 8.

434 The Court declared that it has not been proven that Honduras was responsible for the disappearances of Francisco Fairén Garbi and Yolanda Solís Corrales, therefore reparations have not been awarded. *Fairen Garbi and Solis Corrales*, (Judgment of Mar 15, 1989) IACtHR Ser C No 6.

435 Ibid., para 46.

436 *Aloeboetoe et al v Suriname*, Reparations and Costs, (Judgment of 10 Sep, 1993) IACtHR Ser C No. 15, at para 96, where it stated that “[M]ost of the children of the victims live in Gujaba, where the school and the medical dispensary have both been shut down. The Court believes that, as part of the compensation due, Suriname is under the obligation to reopen the school at Gujaba and staff it with teaching and administrative personnel to enable it to function on a permanent basis.”

In the case of the *Girls Yean and Bosico v Dominican Republic*, two girls born in the Dominican Republic to Haitian mothers had been denied citizenship and consequently prevented from attending school.⁴³⁷ The Court found that the State should comply with its obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special protection that must be provided to children. In addition to compensation for pecuniary and non-pecuniary damages, the Court ordered that the State should implement, within a reasonable time, a human rights training programme (with special emphasis on the right to equal protection and non-discrimination) for the officials in charge of registering births.⁴³⁸ Moreover, the State should publicly acknowledge its responsibility and apologise to the victims in the presence of State authorities, the victims, their next of kin, and their representatives. This should also be disseminated in the media (radio, press and television).⁴³⁹

In the case of *Juvenile Re-education Institute v Paraguay*,⁴⁴⁰ the Court held that the State had breached its obligation by failing to provide interned children with access to education. As a result, the Court ordered the State to establish educational programmes, job-training programmes and psychological and medical assistance for the victims.⁴⁴¹

In the case of *González et al ("Cotton Field") v Mexico*,⁴⁴² which related to crimes of sexual violence perpetrated against women in Ciudad Juárez, the Court clarified its approach as follows:

bearing in mind the context of structural discrimination in which the facts of this case occurred ... the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable[...]. In accordance with the foregoing, the Court will assess the measures of reparation requested by the Commission and the representatives to ensure that they: (i) refer directly to the violations declared by the Tribunal; (ii) repair the pecuniary and non-pecuniary damage proportionately; (iii) do not make the beneficiaries richer or poorer; (iv) restore the victims to their situation prior to the violation insofar as possible, to the extent that this does not interfere with the obligation not to discriminate; (v) *are designed to identify and eliminate the factors that cause discrimination*; (vi) are adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women, and (vii) take into account all the juridical acts and actions in the case file which, according to the State, tend to repair the damage caused.⁴⁴³

As a result, the IACtHR awarded the victims with compensation for pecuniary and non-pecuniary damages and ordered the State to investigate the facts and provide the victims' next of kin with information on progress in the investigation regularly and give them full access to the case files.⁴⁴⁴ Moreover, the Court found that

the State shall continue implementing permanent education and training programs and courses for public officials on human rights and gender, and on a gender perspective to ensure due diligence in conducting preliminary inquiries and judicial proceedings concerning gender-based discrimination, abuse and murder of women, and to overcome stereotyping about the role of women in society [...]. Every year, for three years, the State shall report on the implementation of the courses and training sessions. The State shall, within a reasonable time, conduct an educational program for the general population of the state of Chihuahua so as to overcome said situation.⁴⁴⁵

437 *The Yean and Bosico Children v Dominican Republic*, IACtHR, Preliminary Objections, Merits, Reparations and Costs (Judgment of 8 Sep 2005) IACtHR Ser C No 130.

438 *Ibid*, para 242.

439 *Ibid*, para 260.

440 *Case of the "Juvenile Reeducation Institute" v Paraguay* (Judgment of 2 Sep 2004) IACtHR, at paras 253 ss.

441 *Ibid*, at para 32, where it states that "[T]his Court orders, as a measure of satisfaction, that within six months the State provides vocational assistance and a special education program for former inmates of the center who were interned there in the period between August 14, 1996 and July 25, 2001."

442 *González et al ("Cotton Field") v Mexico*, Merits, Reparations and Costs (Judgment of 16 Nov 2009), IACtHR Ser C No 205.

443 *Ibid*, para 450 ss (emphasis added).

444 *Ibid*, para 602(12).

445 *Ibid*, para 602(22).

As already mentioned in Section 2, the IACtHR has been particularly innovative in its approach to reparations. It has applied the concept of ‘transformative reparation’ to address pre-existing situations of structural inequality.⁴⁴⁶ Accordingly, reparations should attempt to place the injured parties in a situation of structural equality, in order to avoid the violations re-occurring. With regard to education, this may implicate a need to ensure that female victims gain access to education through reparations if, prior to the violations, they were not provided with it.

As evident from above, the Inter-American Human Rights system has been effective in awarding reparations to the victims. In fact, since 2001, more than two thirds of the Court’s decisions included reparations.⁴⁴⁷ It has also attempted to go beyond the traditional aim of the right to reparation by considering the ‘transformative’ potential of reparations. However, one aspect that may be criticised is the fact that there is not direct access to the Court for victims of human rights violations. As discussed below, this direct access is granted before its European counterpart.

3.2.2 The European Human Rights System

The ECtHR has established a more cautious and less substantial body of jurisprudence regarding the individuals’ right to reparation than the IACtHR. In addition to the ECtHR, the European Committee of Social Rights (‘ECSR’), which also operates within the framework of the Council of Europe, is also considered here. Finally, the Court of Justice of the European Union (‘CJEU’), which is the Court of the European Union, is also briefly analysed below.

3.2.2.1 The European Court of Human Rights

The ECtHR monitors compliance with the ECHR. It hears complaints regarding States’ violations of the human rights contained within the ECHR and makes binding and final decisions. Complaints can be made either by other State Parties or by individuals. An individual does not need to be a national of one of the States bound by the ECHR to file a complaint but he or she must be under one of those States’ jurisdiction.⁴⁴⁸ Complaints must be lodged by the direct victim of the alleged violation.⁴⁴⁹

The complaint letter (or application form) must contain a summary of the facts and the rights allegedly violated.⁴⁵⁰ In addition, and in accordance with the principle of exhaustion of the domestic remedies, the applicant must indicate the remedies already used and provide copies of the decisions already given in relation to that case.

If the application (or at least one of the complaints) is declared admissible, the Court first encourages the parties to reach a friendly settlement. If no settlement is reached, the Court considers the application on the merits to determine whether or not there has been a violation of the ECHR.⁴⁵¹ Given the current backlog of cases, the Court’s initial examination takes place about a year after submission. However, some applications may be treated urgently and dealt with as a matter of priority, particularly if the applicant is said to be in imminent physical danger.

The supervision of the implementation of a judgment of the ECtHR falls under the mandate of the Council of Europe’s Committee of Ministers.⁴⁵² In contrast, the IACtHR retains jurisdiction to ensure that adequate arrangements have been put in place to implement the terms of its judgment.

446 *Rosendo Cantú et al v Mexico*, Merits, Reparations and Costs (Judgment of 31 Aug 2010), IACtHR Ser C No 216, at para 206.

447 See the ‘Informe Anual de la Corte Interamericana de Derechos Humanos’, available at : http://www.corteidh.or.cr/docs/informes/2010_esp.pdf

448 This generally refers to the territory of a State, see however the discussion on extra-territoriality in Section 2 of this Report.

449 It is not possible to complain on behalf of other people and general complaints, for example because a law or measure seems unfair, are not admissible, see: http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf

450 The application form is available here: <http://appform.echr.coe.int/echrrequest/request.aspx?lang=gb>

451 See Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14* (4 Nov 1950) ETS 5.

452 Art 46(2) ECHR.

In relation to the right to an effective remedy, enshrined in Article 13 ECHR, the Court held that the State in question must provide compensation “where appropriate” to the individuals concerned by serious violations involving death, torture or enforced disappearance by State agents.⁴⁵³ The reference to compensation “where appropriate” reflects the Court’s position that the right to an effective remedy does not require that compensation be paid in respect of every violation of the Convention, even of the right to life.⁴⁵⁴ In several judgments, the ECtHR held that “a breach imposes on the respondent State a legal obligation to ... make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach”.⁴⁵⁵ However, State parties are “free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.”⁴⁵⁶

With regard to education, it is worth noting that Article 2 of the First Protocol (‘A2P1’) provides for the right to education in a negative formulation

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.⁴⁵⁷

Therefore A2P1 does not so much confer any positive right on an individual as prohibit the State from ‘denying’ certain rights.⁴⁵⁸ This is reflected in the approach of the ECtHR, where restrictions on the right to education are considered according to whether or not they “impair its very essence and deprive it of its effectiveness.”⁴⁵⁹

The ECtHR ruled on an alleged violation of A2P1 in the *Belgian Linguistic Case*, where it considered the situation of a group of French-speaking parents whose children were denied access to the French schools in some Dutch-speaking suburbs of Brussels in Belgium on the grounds that the families did not live in those districts. The Court found that there had been a violation of Article 14 of the ECHR (non-discrimination) as the legislation prohibited the children from having access to French-language schools solely on the basis of the residence of their parents. However, the Court did not find a violation of A2P1 on its own. The Court held that the right to education does not require States to establish at their own expense education of any particular type and therefore does not guarantee children a right to obtain instruction in a language of their choice. The Court added that “the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be”.⁴⁶⁰ The Court did not award reparations, but “reserved for the Applicants concerned the right, should the occasion arise, to apply for just satisfaction” with regard to the breach of Article 14 of the ECHR.⁴⁶¹

453 See *Tanrikulu v Turkey*, Merits, Grand Chamber, (Judgment of 8 Jul 1999) at para 117, 30 E.H.R.R. 950; *Aydin v Turkey*, Merits, Grand Chamber (Judgment of 25 Sep 1997) at para 103, 25 E.H.R.R. 251; *T P and K M v United Kingdom*, Merits, Grand Chamber (Judgment of 10 May 2001) at para 110, 34 E.H.R.R. 42.

454 See *McCann v United Kingdom*, Merits, Grand Chamber, (Judgment of 5 Sep 1995) at para 219, 21 E.H.R.R. 97. See also *Kelly et al v United Kingdom*, Merits (Judgment of 4 May 2001) 37 E.H.R.R. 52.

455 See for example *Akdivar et al v Turkey*, Just Satisfaction, Grand Chamber (Judgment of 1 Apr 1998) at para 47, unreported, Application No 21893/93; *Iatridis v Greece*, Just Satisfaction, Grand Chamber, (Judgment of 19 Oct 2000) at para 32, unreported, Application No 31107/96.

456 Ibid. As a consequence, in contrast to the IACtHR, the ECtHR does not award forms of reparation such as rehabilitation. However see *Assanidze v Georgia*, Merits, Grand Chamber, (Judgment of 8 Apr 2004), at paras 203, 39 E.H.R.R. 32, where, unusually, the Grand Chamber of the Court required Georgia to release the applicant at the earliest possible opportunity.

457 The original draft of the article that became Art 2 P1 set out the right in a positive formulation which began: “Everybody has the right to education”. Volume VIII of the Collected Edition of the “Travaux Préparatoires” records that the negative formulation was used in the first sentence of art 2 P1 because: “While education is provided by the State for children, as a matter of course, in all member States, it is not possible for them to give an unlimited guarantee to provide education, as that might be construed to apply to illiterate adults for whom no facilities exist, or to types or standards of education which the State cannot furnish for one reason or another.”

458 See, for example, Arts 8(2) (“interference”), 9(2) (“limitations”) and 11(2) (“restrictions”).

459 See eg *Sahin v Turkey* (2007) 44 EHRR 5.

460 *Case Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium v Belgium*, (Merits) Application No 1474/62, Interpretation adopted by the Court, para 3.

461 Ibid.

The case of *Catan and others v Moldova and Russia* also concerned education-related violations.⁴⁶² It held Russia responsible for violations of A2P1 perpetrated in the Transdniestrian region of Moldova. The Court awarded compensation to the 170 applicants, students, parents and teachers, who were recognised as victims of blatant discrimination on grounds of language and ethnicity.⁴⁶³ The case was also interesting as the Court extended the application of human rights obligations extra-territorially.⁴⁶⁴ Similarly, in the case of *DH and others v Czech Republic*,⁴⁶⁵ the ECtHR found a violation of A2P1, in combination with Article 14 of the ECHR, due to a discriminatory practice perpetrated against Roma children. In fact, Roma children were confined to 'special schools' originally established for children with learning disabilities. The court awarded symbolic damages to the amount of €4,000 per child. While the proceedings were ongoing, on the Czech Republic amended its law on public education and officially abolished those 'special schools'.⁴⁶⁶

Unlike the IACtHR, the ECtHR has not been particularly creative in its consideration of reparations awards. To repair education-related violations, it has mainly focused on compensation or restitution without considering rehabilitation and guarantee of non-repetition, even though they can play an important role in redressing educational harm.

3.2.2.2 European Committee of Social Rights

Within the framework of the Council of Europe, there is also the ECSR, which monitors compliance with the European Social Charter and revised Charter.⁴⁶⁷ In 1995, an Additional Protocol to the Charter introduced a system of collective complaints for violations of the Charter.⁴⁶⁸ However, only certain categories of non-governmental organizations, trade unions and employers' organizations can lodge a complaint.⁴⁶⁹ In addition, the complaint must concern a general (and not an individual) situation. The ECSR's decision on the complaint is forwarded to the parties and the Committee of Ministers. It is then the Committee of Ministers which adopts a resolution which may (if appropriate) contain recommendations to the State concerned to take specific measures in order to bring the situation in line with the Charter.

In a number of cases, the ECSR has dealt with education-related violations. In the case of *International Commission of Jurists v Portugal*, it found evidence that children under the age of fifteen were forced to work and that the duration of work exceeded what may be considered compatible with children's health and schooling.⁴⁷⁰ In the case of *Autism-Europe v France*, the ECSR stated that France had failed to achieve sufficient progress in advancing the provision of education for persons with autism. The proportion of children with autism being educated in either public or specialist schools was much lower in comparison to non-autistic children.⁴⁷¹ In the cases of *World Organisation against Torture v Greece*,⁴⁷² *v Ireland*,⁴⁷³ and *v Belgium*,⁴⁷⁴ the Committee recalled that the prohibition

462 See *Catan and others v Moldova and Russia* supra n 80.

463 See *Catan and others v Moldova and Russia*, supra n 80. The compensation awarded by the ECtHR amounted to EUR 6,000 (in respect of non-pecuniary damage) to each applicant, as well as EUR 50,000 (in respect of costs and expenses) to all the applicants jointly.

464 See Section 2.3.2.

465 Ibid.

466 The summary of the case is available at: http://www.crin.org/docs/FileManager/Summary_of_Cases.pdf

467 The European Social Charter of 1961, its Additional Protocols, and the Revised European Social Charter of 1996 are available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp

468 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Additional Protocol) 1995, in force since 1998; it has 12 States Parties.

469 The organizations authorized to access the procedure are listed here: http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/aboutcharter_EN.asp#Une_proc%C3%A9dure_de_r%C3%A9clamations_collectives

470 ECSR, *International Commission of Jurists V Portugal* (Complaint No 1/1998).

471 ECSR, *Autism-Europe v France* (Complaint No 13/2002).

472 ECSR, *World Organisation Against Torture v Greece* (Complaint No 17/2003).

473 ECSR, *World Organisation Against Torture v Ireland* (Complaint No 18/2003).

474 ECSR, *World Organisation Against Torture v Belgium* (Complaint 21/2003).

of all forms of corporal punishment against children must have a legislative basis and be explicitly prohibited. Finally, in *Interights v Croatia*, the Committee considered that health, including sexual and reproductive education in school, must be provided throughout the entire period of schooling without discrimination on any ground.⁴⁷⁵

The main limitation of the ECSR is the fact that it has no power to order remedies.⁴⁷⁶ Although the 1995 Additional Protocol established a complaint mechanism, it only provided the ECSR with the power to declare situations to be incompatible with the Charter and revised Charter. Therefore, the Committee can only make declaratory decisions and reject any claim for compensation.⁴⁷⁷

3.2.2.3 Court of Justice of the European Union

Within the framework of the European Union, the Court of Justice ('CJEU') interprets EU law to ensure it is applied in the same way throughout the EU zone. The CJEU can answer requests for EU law interpretation from national courts. It can also rule on various types of actions, including direct actions brought by individuals, companies or organisations against EU decisions or acts.⁴⁷⁸ Natural or legal persons may bring an action before the CJEU against an act of one of the institutions, bodies, offices or agencies of the EU, which is addressed to him or which is of direct and individual concern. They may also bring an action against a regulatory act which concerns them directly and which does not entail implementing measures. In addition, EU citizens also have the possibility to submit their observations to the CJEU where a national court, called upon to decide a dispute which concerns them, decides to refer questions for a preliminary ruling to the Court.

Under the Charter of Fundamental Rights of the European Union,⁴⁷⁹ it is provided that EU nationals cannot claim a right to education in their home State, but can do so if they move to another Member State.⁴⁸⁰ Concerning education, the CJEU has generally concentrated its case law on two aspects: the right to equal access and non-discrimination.⁴⁸¹ The right to equal treatment applies to admission to education, as well as to measures which facilitate attendance at educational establishments. EU nationals also have equal access to vocational training.⁴⁸² The CJEU has interpreted 'vocational training' in a broad manner to include any form of education which prepares for a qualification or provides the necessary training and skills for a particular profession, trade or employment irrespective of both the age and level of training or of whether the training programme includes an element of general education,⁴⁸³ including university education.⁴⁸⁴

475 ECSR, *Interights v Croatia* (Complaint No 45/2007).

476 See H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 *Human Rights Law Review* 61, and T Novitz, 'Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter' (2002) *European Human Rights Law Review* 50.

477 For example, a claim for compensation was made in *Confederation française de l'Encadrement v France* (Complaint No 9/2000) at para 58. However, it has made requests to the Committee of Ministers to make a contribution to the costs of a successful complaint in *European Roma Rights Centre v Greece* (Complaint No 15/2003) although the Committee did not agree to these requests.

478 European Union, Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, (18 Dec 2000) OJ C 364/01.

479 The Charter of Fundamental Rights of the European Union of 2000 is available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

480 Art 51.

481 See, for example, CJEU Case 293/83, *Gravier v City of Liège* (Judgment of 13 Feb 1985) ECR 593; CJEU Case 9/74, *Casagrande v Landeshauptstadt München* (Judgment of 3 Jul 1974) ECR 773. The right of equal access to education is separately covered under EU legislation such as Regulation 1612/68 OJ L 257, 19 Oct 1968, which provides children of EU migrant workers with access to education on the same basis as nationals in the host State. For further information, see 'Developing indicators for the protection, respect and promotion of the rights of the child in the European Union', European Union Agency for Fundamental Rights, Nov 2010, available at: fra.europa.eu/fraWebsite/attachments/FRA-report-rights-child-conference2010_EN.pdf.

482 Some assistance given by Member States to their nationals to undertake vocational training may fall outside the scope of EU law. CJEU Case 39/86, *Sylvie Lair v University of Hannover* (Judgment of 21 Jun 1988) ECR 3161.

483 CJEU Case 293/83, *Gravier v City of Liège* (Judgment of 13 Feb 1985) ECR 593, at para 30.

484 CJEU Case 24/86, *Blaziot v University of Liège* (Judgment of 2 Feb 1988) ECR 379.

3.2.3 The African Human Rights System

The African human rights system includes not only the regional framework with the African Court of Human and Peoples' Rights ('ACtHPR') and the African Commission on Human and Peoples' Rights but also the sub-regional framework of the Economic Community of West African States ('ECOWAS').

3.2.3.1. The African Commission on Human and Peoples' Rights

Until the establishment of the ACtHPR, it was only the African Commission on Human and Peoples' Rights which could receive complaints of violations of the ACHPR and issue non-binding reports to the State in question. Unlike other human rights instruments, the ACHPR does not provide for an obligation to remedy harm caused by a violation. Nevertheless, the African Commission has recognised that

The main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the State concerned, which remedies the prejudice complained of (*sic*).⁴⁸⁵

It has recommended that States, which it viewed as having violated the ACHPR, take as range of measures to remedy the harm caused by the violation in question. The forms of reparation recommended have included declarations of wrongfulness,⁴⁸⁶ restitution,⁴⁸⁷ and compensation.⁴⁸⁸

So far, the African Commission has received nine communications concerning alleged violations of the right to education.⁴⁸⁹ In *Centre for Minority Rights Development and Minority Rights Group v Kenya*, the African Commission noted that⁴⁹⁰

Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.

In its conclusions, the Commission recommended the Kenyan Government to pay adequate and prompt compensation to the community for all the loss suffered due to the infringement of its rights, including the right to education.⁴⁹¹

3.2.3.2 The African Court of Human and Peoples' Rights

The newly established ACtHPR, like its American and European counterparts, also provides the individuals affected by violations of the rights enshrined in the ACHPR with a right to remedy. Article 27 of the Protocol to the ACHPR affirms that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall

485 *Free Legal Assistance Group v Zaire*, Communication No 25/89, 4 International Human Rights Reports 89, at para 39 (1997).

486 See *Alhassan Abubakar v Ghana* Communication No 103/93, 6 IHRR 832, at 833 (1999).

487 *Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v Nigeria* Communication No 60/91, 3 IHRR 132, at para 133 (1996).

488 *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Senegal and Association Malienne des Droits de l'Homme au Angolav. Angola* Communication No. 159/96, 6 IHRR 1139, at para 1141 (1999).

489 Art 17 of the African Charter.
Four communications have been ruled inadmissible by the Commission, see:
<http://www.achpr.org/communications/decisions/?a=873>

490 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, 25 Nov 2009.

491 Ibid.

make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”⁴⁹²

In terms of accessibility to the Court, Article 5 of the Protocol to the ACHPR establishes that cases can be submitted by the Commission, the State party which has lodged a complaint to the Commission, the State party against which the complaint has been lodged at the Commission, the State party whose citizen is a victim of the human rights violation and African Intergovernmental Organizations. In addition, Article 5(3) specifies that the Court may entitle relevant “non-governmental organizations with observer status before the Commission, *and individuals* to institute cases directly before it, in accordance with Article 34 (6) of this Protocol”, according to which

At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.⁴⁹³

At a very late stage of the negotiations which led to the drafting of the Protocol, the African States voted to deny automatic standing to individual victims of human rights abuses and NGOs.⁴⁹⁴ Therefore, as stated above, individuals and NGOs only have direct access to the Court if the State against which they are complaining has lodged a special declaration accepting the competence of the Court to hear human rights cases brought in this way. As far as NGOs are concerned, they face the additional hurdle of requiring accreditation to the African Union (‘AU’) or to its organs. This affects victims’ access to justice even further. In fact, due to widespread illiteracy and poverty, NGOs were the main complainants before the African Commission but they are not able to play the same role before the Court.⁴⁹⁵

Whilst the limited access to justice granted to victims can already be considered, it is premature to analyse the substance of the relief awarded and the way the rulings are implemented as the ACtHPR only issued its first judgment in 2009.

3.2.3.3 The ECOWAS Community Commission and Court

Among the institutions of the ECOWAS, which includes 15 West African States, there is the Community Court of Justice, which hears claims of human rights violations. The Court can be accessed by the Member States, the Commission and individuals and corporate bodies, for any act of the Community which violates the rights of such individuals or corporate bodies.⁴⁹⁶ The decisions issued by the Court are not subject to appeal and are binding on Member States.

In *SERAP v Nigeria*,⁴⁹⁷ the NGO Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) rested its claim on violations of the ACHPR, including Article 17 on the right to education. It argued that, as a result of the mismanagement and looting of funds allocated for basic education, Nigeria was depriving millions of children from access to primary education. The Court found the right to education as justiciable under the ACHPR and decided that all Nigerians are entitled to education as a legal and human right.⁴⁹⁸ In terms of reparation the Court stated that “[...]it is in order that the first defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme.”⁴⁹⁹

492 See Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights, 9 Jun 1998 (entry into force 25 Jan 2004), OAU/LEG/MIN/ACHPR/PROT.1 rev.2 (1997).

493 Ibid, Art 34(6).

494 See S Sceats, ‘Africa’s New Human Rights Court: Whistling in the Wind?’, Chatham House Briefing Paper, Mar 2009, available at: <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp0309sceats.pdf>

495 Ibid, at 10.

496 Further info on the ECOWAS Court of Justice is available at: http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5

497 See *SERAP v Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, 30 Nov 2010).

498 See the Handbook at 237.

499 *SERAP v Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, 30 Nov 2010), at para 28. As of August 2013, the judgment has not yet been implemented.

The above analysis of the regional human rights mechanisms demonstrates that reparations have not been awarded in a consistent manner throughout the different regions. Of course, one major issue is the fact that entire regions, that of the Asia-Pacific region for example, are deprived of a human rights complaint mechanism. The Inter-American system, despite not allowing direct court access to individuals, has been the most innovative in terms of awarding reparations.

3.3 NATIONAL MECHANISMS

As mentioned above, the principle of prior exhaustion of local remedies applies with regard to international and regional mechanisms. This means that a State must be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its responsibility can be challenged at the regional or international level.⁵⁰⁰ In addition to domestic courts, there are also national reparations programmes established at the domestic level, which may also provide victims of education-related violations with redress measures. Of course, both of these mechanisms can also use education as a means to repair the consequences of different kinds of wrongful conducts.

Truth commissions have often played a prominent role in the establishment and design of national reparations programmes. Therefore, the overview of the national reparations programmes that follow will be preceded by a discussion of the role of truth commissions in dealing with the consequences of IHL and IHRL violations, including education-related violations.

In situations of insecurity and armed conflict, which are characterised *inter alia* by insufficient infrastructures and an impaired judicial sector, national governments often lack the resources and the will to deal with IHRL and IHL violations at the domestic level.⁵⁰¹ In those situations, IOs often play also a crucial role in assisting national reparations programmes and overcoming some of the practical obstacles that may hamper the success of local initiatives.

3.3.1 Domestic Courts

Despite the obvious differences, in terms of legal systems and procedures, it is possible to detect a common general trend with regard to reparations among domestic courts. It appears that Courts are particularly keen to award restitution, in order to restore a situation to its state before the wrong occurred. However, domestic courts issuing judgments on education-related violations have also gone beyond restitution, for example by ordering amendments to regulations that prejudiced the enjoyment of students of their right to education.

In the same manner as the UN Treaty Bodies, domestic courts have often addressed education-related violations through non-discrimination. In their judgments, domestic courts have overturned policies which segregated students on the grounds of race, religion, gender, etc. Ever since the landmark case *Brown v Board of Education of Topeka*,⁵⁰² in which the US Supreme Court ruled that racial segregation in schools was unconstitutional, domestic courts globally have been at the centre of efforts to protect the right to education from discrimination. For example, in *Multani et al v Commission scolaire Marguerite-Bourgeoys*,⁵⁰³ the Supreme Court of Canada ruled that a total ban on wearing a kirpan to school violated an individual's freedom of religion protected by Section 2(a) of the *Canadian Charter of Rights and Freedoms* and that this ban on religious expression was not reasonable or justifiable. With regard to reparation, the Supreme Court stated that "given that Gurbaj Singh no longer attends

500 S D'Ascoli and K M Scherr, 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection', EUI Working Paper 02/2007, available at: http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf?sequence=1

501 See for instance A E Tiemessen, 'After Arusha: Gacaca Justice in Post-Genocide Rwanda' (2004) 8 *African Studies Quarterly*, at 57-76. See also International Crisis Group, 'Five Years after the Genocide in Rwanda: Justice in Question', Report Rwanda No 1, 7 Apr 1999, at 4.

502 *Brown v Board of Education of Topeka*, 347 U S 483 (1954).

503 *Case Singh-Multani c Marguerite-Bourgeoys* (1 SCR 256, 2006 SCC 6) 2006, Supreme Court of Canada

Sainte-Catherine-Labouré school, it would not be appropriate to restore the judgment of the Superior Court, as requested by the appellants. The Court accordingly considers that the appropriate and just remedy is to declare the decision prohibiting Gurbaj Singh from wearing his kirpan to be null.”⁵⁰⁴

A district Court in Slovakia ruled that an elementary school had discriminated against Romani children because they were taught in separate classrooms.⁵⁰⁵ It rejected the arguments presented by the school, according to which the education of Romani children from socially disadvantaged background in separate classes was the only option to provide equal quality of education for all pupils. The school further justified its policy affirming that separate classes allowed teachers to adopt a more individualized approach. However, there was no evidence of the benefits for the Romani children of being taught in separate classes. Therefore the Court ordered the restoration of the original system. Similarly, the municipal court in Mostar ruled that schools should no longer segregate Croat and Bosnian children.⁵⁰⁶ According to the “two schools under one roof” system, which was established after the war, children of different ethnicity were attending the same institution but taught separately. The court required the government to cease this discriminatory practice.

In Latin American States, domestic courts have also addressed education-related violations through the prohibition of discrimination. For example, the Peruvian Constitutional Court has ordered in more than one occasion the readmission of indigent students expelled from the schools for not paying the school fees on time.⁵⁰⁷ In Argentina, the Constitutional Court declared that children, who refused to participate in patriotic events on the grounds of their religious beliefs, could not be expelled by the school.⁵⁰⁸ The Colombian Constitutional Court has protected the right to education on many occasions. For example, it ordered a school to keep awarding scholarships to children who had no means to pay the fees.⁵⁰⁹ It also compelled a school to provide the children living far away with transport services.⁵¹⁰ In relation to the right to freedom of religion and free development of the personality, the same court ruled that a school should modify existing regulation concerning the use of uniforms in order to guarantee inclusion and pluralism within the community.⁵¹¹

Domestic courts have also been called to rule on education-related violations perpetrated in situations of insecurity and armed conflict. For example, in the Democratic Republic of Congo, the Ituri Military Tribunal convicted the founder of the Party for Unity and Safeguarding of the Integrity of Congo, on six charges, including the war crime of intentionally directing attacks against a building dedicated to education.⁵¹² However, in a later decision, he was acquitted over procedural flaws by an appellate military court in respect to certain charges, including that concerning the destruction of the school.⁵¹³

The Colombian Constitutional Court ordered the relocation of a school as the existing one was in appalling

504 Ibid, at para 82.

505 See the Joint press release by Amnesty International and the Centre for Civil and Human Rights, available at: <http://www.amnesty.org/en/for-media/press-releases/slovak-court-rules-against-segregation-education-2012-01-09>

506 See Institute for War and Peace Reporting TRI issue 740, 12 May 2012, available here: <http://iwpr.net/report-news/bosnian-court-rules-against-segregated-schools>

507 Case Feliciano Contreras Arana, 17 May 2007, Constitutional Court of Peru, available at: <http://www.tc.gob.pe/jurisprudencia/2008/04646-2007-AA.html>; Case Callao, 1 Sep 2004, Constitutional Court of Peru, available at: <http://www.tc.gob.pe/jurisprudencia/2004/00052-2004-AA.html>

508 Supreme Court Judgment, Buenos Aires, 6 Mar 1979, available at: <http://www.csjn.gov.ar/data/intsupn.pdf>

509 Case against the Education Secretariat of the District Bucaramanga, Bogota, DC. 6 Sep 2010 (T-698/10), available at: <http://www.corteconstitucional.gov.co/relatoria/2010/T-698-10.HTM>

510 Case against the Saboyan Community Mayor, Bogota DC. 20 Oct 2011 (T-779/11), available at: <http://www.corteconstitucional.gov.co/relatoria/2011/T-779-11.htm>

511 Case against the High School Demetrio Salazar Castillo de Tado, Choco Bogota, DC 3 Nov 2011 (T-832/11), available at: <http://www.corteconstitucional.gov.co/relatoria/2011/T-832-11.htm>

512 Tribunal Militaire de Garnison de l'Ituri, Jugement Contre Kahwa Panga Mandro, RPA No. 039/2006, RMP No. 227/PEN/2006 (2 Aug 2006). Quoted in Human Rights Watch Report, ‘Schools and Armed Conflict: a Global Survey on Domestic Law and State Practice Protecting Schools from Attacks and Military Use’, Jul 2011, available at: <http://www.hrw.org/sites/default/files/reports/crd0711webcover.pdf>

513 Ibid.

conditions and located in a high-risk area, the theatre of several IHRL violations.⁵¹⁴ The Indian Supreme Court ordered armed security forces to vacate all schools buildings occupied in the northeast states of Assam and Manipur affirming that schools should not be allowed to be occupied by the armed or security forces, regardless of the purpose pursued.⁵¹⁵ The same Court, in a case against the state of Chhattisgarh, strongly reiterated its approach by ordering the state government to vacate all the schools occupied by security forces.⁵¹⁶

The role of domestic courts is crucial in addressing education-related violations. With regard to reparations, domestic courts have gone beyond restitution to address situations of inequality. Of course, in situations of insecurity and armed conflict, domestic court systems are often ineffective. In order for victims to obtain reparations, the rule of law must be incorporated in every domestic judicial system and maintained at all times. Victims of education-related violations must be guaranteed access to courts, as well as a fair and equal treatment by those courts.

3.3.2 National Reparations Programmes

In States undergoing periods of transition, national reparations programmes have often been established in order to remedy mass violations which occurred in the past, either during an armed conflict, a situation of insecurity or a protracted period of discrimination. Very often, the violations committed during these times had an impact on education, even if they were not direct violations of the right to education. For example these mechanisms were established in Sierra Leone where the problem of child soldiers reached an unprecedented scale and in Peru where schools and universities served as breeding grounds for the Shining Path. In Colombia, teachers and pupils continued to be targeted and threatened for preventing the recruitment of children. The Office of Special Representative of the Secretary General for Children and Armed Conflict has reported that in September 2012, for example, three teachers and a head teacher in Arauca, Colombia, were forcibly displaced following threats from an unidentified armed group.⁵¹⁷

National reparation programmes are often established according to the recommendations issued by a TRC. A truth commission is “an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specified period of time.”⁵¹⁸ The general aim of a TRC is to provide a comprehensive record and analysis of the violations committed during a conflict or a military dictatorship.⁵¹⁹ Therefore they are among the most common mechanisms set up to cope with the consequences of IHRL and IHL violations, including education-related violations. In fact, since the 1970s, at least 40 TRCs have been established in over 30 countries.⁵²⁰

Even though each TRC has a different mandate, there are some commonalities. For instance, TRCs are required to contribute to reconciliation, to the disclosure of truth and to provide the government with recommendations to help preventing relapses and further abuses. As TRCs usually represent the first forum where victims have an opportunity to tell their stories, they are often perceived by the population as a form of immediate and grassroots justice, unlike the traditional judicial mechanisms. TRCs often assist the government in question with the drafting and establishment of the national reparation programmes, such as in Peru for example. However, not every TRC has the mandate to consider reparations.

514 It is available at: <http://www.corteconstitucional.gov.co/relatoria/2012/T-500-12.htm>

515 Ibid. at 53, quoting *Exploitation of Children in Orphanages in the State of Tamil Nadu v Union of India & Others*, W P (Crl) 102/2007 (Order of 1 Sep 2010), para (a).

516 *Nandini Sundar & Ors v State of Chhattisgarh*, W P (Civ) 250/2007, order of 15 Dec 2010.

517 Report of the Secretary-General to the Security Council (A/67/845-S/2013/245) issued on 15 May 2013. Moreover, the military use of schools by the army was reported in several departments. In July 2012, the army used a school for military purposes in fighting against FARC-EP in Cauca. The infrastructure of the school was damaged and unexploded ordnance found in the vicinity.

518 R G Teitel, ‘Human Rights in Transition: Transitional Justice Genealogy’, (2003) 16 *Harvard Human Rights Journal*, at 69-94.

519 G J Knoop, ‘Truth and Reconciliation Commission Models and International Tribunals: a Comparison’, Symposium on *The Right to Self-Determination in International Law*, organized by Unrepresented Nations and People Organization (UNPO), 29 Sep-1 Oct 2006, The Hague, The Netherlands, available at: <http://www.unpo.org/downloads/ProfKnoops.pdf>

520 Data is available at: <http://www.amnesty.org/en/international-justice/issues/truth-commissions>

TRCs have recommended different forms of reparations, including educational forms of reparations such as the provision of scholarships, the establishment of reintegration programmes or educational facilities. Often, the TRCs' reports themselves are used as educational means to teach the public about historic injustices and abuses. Sometimes they are even introduced in the national curriculum. The following paragraphs will hence present some national reparations programmes, it should be noted that not all of them have been set up following recommendations issued by a TRC. For example, in Colombia no truth commission has been yet established to shed light on violations committed during the armed conflict.

National reparations programmes have been heterogeneous, varying widely in their administration, the forms of assistance provided, the range of victims to whom assistance has been afforded and their generosity. As already mentioned, international organizations have often played a crucial role in supporting the local entities involved in the process. Organisations within a domestic context may also support victims in seeking and obtaining remedies. Below is a selection of national reparations programmes, which illustrates the different forms of reparative measures that may redress education-related violations committed in situations of insecurity and armed conflict.

3.3.2.1 National Reparation Programme in Colombia

In Colombia, Article 51 of the Victim's Law instructs all the various education authorities to adopt necessary measures to ensure that all identified victims have access to, and are exempted from the costs of, pre-primary and secondary school. The provision underlines that enhancing the right to education is an indispensable component of the ambitious integral reparation plan pursued by the Colombian Government.⁵²¹

In order to benefit from the far-reaching reparations programme in place in Colombia, victims have to be listed in the Victims' Registry. Victims are defined as all persons who, individually or collectively, suffered harm as a result of violations of IHRL and IHL committed after 1985, during the internal armed conflict.⁵²² Victims have to apply at a governmental office (such as a prosecutor's office or a municipal office) to be entered into the Victims' Registry. They are expected to provide a declaration of the relevant facts and bring supporting documents. In determining whether someone qualifies as a victim, the authorities are required to exercise the principle of good faith.⁵²³

The Victims' Law devotes specific provisions to the victims' right to education. In particular, it affirms that victims shall have access not only to formal education, but also to the training programmes set up by the Servicio Nacional de Aprendizaje ('SENA').⁵²⁴ Article 145 of the Victims' Law, which addresses historical (or 'collective') memory, imposes on the Ministry of Education the responsibility to develop programmes that promote the full exercise of children's rights, including projects which support reconciliation and ensure that violence is not repeated.

521 Ley de Víctimas y Restitución de Tierras, June 2011, available at: <http://www.derechoshumanos.gov.co/Documents/130220-1-cartilla-ley-victimas-restitucion-tierras.pdf>

522 Ibid, at Art 3.

523 Victims are not required to identify the perpetrators of their crimes. The Victims' Unit reviews the declaration, verifies the facts provided and decides whether to grant the applicant victim status, independent of any proceedings relating to the perpetrator. See the annual report of the UN OHCHR on the situation of human rights in Colombia, A/HRC/19/21/Add.3, 31 Jan 2012, para 50; Amnesty International, 'Colombia: The Victims and Land Restitution Law' (Jun 2012) at 8.

524 In English: 'National Service for Training'. See Art 51 of the Victims' Law.

3.3.2.2. National Reparations Programme in Peru

In Peru, educational institutions played a significant role during the armed conflict. For example the Shining Path, one of the movements that generated the internal armed conflict against the Peruvian government from 1980 to 2000, used schools and universities to spread its ideology and attract young people into its ranks.⁵²⁵ In order to defeat the movement, the Government suppressed the activities of many educational institutions, thus also committing crimes against students and education staff.⁵²⁶

In 2001, a TRC (also known as ‘CVR’ in Spanish, for Comisión de la Verdad y Reconciliación) was set up to disclose the truth about the violations perpetrated during Peru’s armed conflict.⁵²⁷ For three years, it investigated human rights violations and then made proposals to prevent such violence from reoccurring.⁵²⁸ In its final report, the TRC acknowledged the political and social role of universities.⁵²⁹ It also designed a national reparation programme (‘PIR’ for Plan Integral de Reparaciones), which was established in 2005.⁵³⁰

The TRC found that the internal armed conflict resulted in the loss of educational opportunities for many young people, either because they had to defend their communities or because they suffered from a situation (such as the disappearance of a family member or physical displacement) which prevented them from pursuing their studies.⁵³¹ One of the main goals identified by the PIR was “to facilitate and provide opportunities for new or improved access to people who, as a result of internal armed conflict, lost the opportunity to receive an adequate education or complete their studies.”⁵³²

Seven specific reparation programmes were established by decree. They covered the restitution of civil rights, health care, collective reparations, symbolic reparations, housing, economic reparations and education.⁵³³ Within the education programme,⁵³⁴ the measures are directed at individuals whose schooling was interrupted as a result of violence, children of victims, and those forcibly recruited by self-defence committees. As reported by the ICTJ,

[O]f direct victims registered by the Reparations Council up to June 2012, 92 percent were 30 years old or older, and 72 percent were over 40 years old. Among children of victims entitled to reparations after the narrowed targeting defined by the 2011 modification, 74 percent were 30 years old or older, and 34 percent were over 40 years old.⁵³⁵

In September 2012, the High Level Multisectoral Commission (‘CMAN’)⁵³⁶ and the Ministry of Education in September 2012 established a scholarship to provide the eligible victims with access to university education. However, the number of scholarships is limited to 50 (although 13,511 children of victims of killings, disappearance, and rape between ages 18 to 29 were registered at the time) and only individuals under the age of 30 can apply. In

525 The CVR Final Report found that the Shining Path’s infiltration of the State education system was focused on 5 areas: teacher training centres, management structures, schools and colleges, pre-university academies and the teaching profession. CVR Final Report, Volume III - Chapter III, at 566.

526 For example, the massacre committed on 18 July 1992 led to the death of one university professor and nine students in la Cantuta University in Lima. Other episodes of violence took place in other universities.

527 Supreme Decree 065-2001-PCM, entered into force on 4 Jun 2001, available at: <http://www.cverdad.org.pe/lacomision/nlabor/decsup01.php>

528 See R Barrantes Segura, ‘Reparations and Displacement in Peru’ (ICTJ, 2012) at 8, available at: <http://ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Reparations-Peru-CaseStudy-2012-English.pdf>

529 See CVR Final Report, Book III, Chapter III, at 603.

530 The PIR has been set up pursuant Act 28592 and further developed with Supreme Decree No 015-2006-JUS.

531 Reparaciones en la Transición Peruana: Memorias de un Proceso Inacabado, APRODEH, 2006, at 43.

532 Reparaciones en la Transición Peruana: Memorias de un Proceso Inacabado, APRODEH, 2006, at 43. See Art 17 of the Supreme Decree No 015-2006-JUS, available at: <http://www.idl.org.pe/educa/PIR/reglamentopir.htm>

533 Executive Decree 015-2006-JUS. See C Correa, ‘Reparations in Peru: From Recommendations to Implementation’ (ICTJ, 2013) at 8, available at: http://ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf

534 Decreto 047-2011-PCM, May 24, 2011.

535 Ibid, 22.

536 In Spanish: Comisión Multisectorial de Alto Nivel.

order to overcome such restrictions, the Ombudsman's Office recommended increasing the number of scholarships and allowing victims entitled to educational reparations to transfer this right to their children.⁵³⁷

3.3.2.3 National Reparations Programme in Nepal

In Nepal, the Maoist-led coalition government committed to establish a truth commission and pursue other transitional justice measures, as provided in the 2006 Comprehensive Peace Agreement ('CPA'), which formally ended ten years of armed conflict.

Among the various possible transitional justice measures contemplated in the CPA, the Interim Relief Program ('IRP') administered by the government's Ministry of Peace and Reconstruction ('MoPR') has so far been the only one implemented. The IRP established scholarships available exclusively for specific categories of victims, namely children of deceased or disappeared persons, students disabled by the conflict and children of persons disabled by the conflict. However, the Ministry of Education, mainly due to lack of financial resources, has not been able to award scholarships to all the eligible children. Therefore, in many cases, families have been compelled to advance school fees or cover unpaid balances.⁵³⁸

Despite the evident lack of economic resources, the Government has not explored the possibility of awarding symbolic measures, such as dedicating a school building to the victims of the armed conflict or establishing a scholarship programme to commemorate them.⁵³⁹

3.3.2.4 National Reparations Programme in Sierra Leone

In Sierra Leone, four years after the TRC report was launched, the National Commission for Social Action started the process of victim's registration envisaged by the TRC. The number of victims counted, verified and registered across the country was close to 30,000, "including children, amputees, and others wounded in the fighting, war widows, and victims of sexual violence."⁵⁴⁰ The reparation programme was set up in 2008 to implement (some of) the recommendations made by the TRC. In order to overcome the lack of financial resources at the national level, which would have hampered any remedial efforts, a mechanism which has been called the 'Year One Project' was set up.⁵⁴¹ The Year One Project received a USD 3 million funding grant from the UN Peacebuilding Fund ('PBF'), and its recipient organization, the International Organization for Migration ('IOM').⁵⁴² It had to be implemented through the National Commission for Social Action ('NaCSA'), a governmental organization.⁵⁴³

With regard to education, the project originally included reimbursement of school fees, uniforms and books for the children identified as victims. In particular, there was a focus on children amputees, war wounded children, children victims of sexual violence, children who suffered abduction or forced conscription, as well as children with a parent who is an amputee or suffers from another type of disability, or who is war wounded or suffered sexual

537 A precedent for this proposal can be found in Chile, where after several years of demands and out of consideration that the average age of victims of political imprisonment and torture was 60, victims were authorized to pass on university scholarships as reparations to one of their children or grandchildren. Law 20,405 of 2009 [Chile], provisional Art 6.

538 The amount of the scholarships, paid annually by the District Education Office, corresponds to NPR 10,000 for Primary School Students; NPR 12,000 for Secondary School Students and NPR 16,000 for higher secondary. See the IOM Report 'Mapping Exercise and preliminary Gap Analysis of the Interim Relief and Rehabilitation Programme' (IOM, Dec 2010). See also R Carranza, *supra* n 137.

539 Ibid, at 4.

540 Submission to the Universal Periodic Review of the UN HRC 11th Session (ICTJ, May 2011), available at: <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Periodic-Review-2010-English.pdf>

541 The term was coined by C Correa and M Suma, 'Report and Proposals for the Implementation of Reparations in Sierra Leone' (ICTJ, Dec 2009), available at: <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf>

542 In 2012, the UN PBF allocated an additional USD 1.1 million to the IOM/NaCSA partnership to complete the delivery of reparations benefit to the remaining 10,753 registered and eligible victims. This data was provided by Mr Igor Cvetkovski in response to the questionnaire submitted by BIICL to IOM in January 2013.

543 See C Correa and M Suma, *supra* n 541.

violence. The children had to still be eligible for primary or middle school education.⁵⁴⁴ Despite this programme, wide scale poverty, as well as long distances to schools and late disbursement of grants, are still major bottlenecks to school attendance. Orphaned children appear to be the most disadvantaged with regard to access to education as about 26 per cent of orphaned children aged 10-14 years are not attending school (compared to 16 per cent of children with both parents alive).⁵⁴⁵

The armed conflict which took place in Sierra Leone was characterised by the unlawful recruitment of children. It has been reported that 5,000 child combatants served among government and opposition forces, and a further 5,000 have been recruited for labour among armed groups.⁵⁴⁶ Most of them were aged between 15 and 18, but some were as young as six years old. The TRC had to deal with the consequences of this phenomenon and therefore, pursuant to its recommendations, two *ad hoc* educational programmes have been established to reintegrate children returning from the war.⁵⁴⁷

The National Commission for Disarmament Demobilization and Reintegration, with the support of UNICEF, implemented the Community Education Investment Programme ('CEIP') and the Complementary Rapid Education for Primary Schools ('CREPS'). CEIP activities focused in particular on teacher training and provided new furniture and recreational supplies to the schools that accepted demobilized child ex-combatants amongst the students. Through collaboration with community leaders, parents and teachers, the programme helped overcoming the mistrust and the resentment against children associated with the armed forces and non-state armed groups. The CREPS programme also pursued the education of adolescent-age former child-soldiers. The programmes provided the children with future opportunities and, although a conspicuous number of children benefited from these initiatives, the reach of the programmes was limited by certain factors, such as the lack of resources and the weak government commitment to secure teachers' support and salaries. Both programmes fall within the initiatives established to promote the disarmament, demobilization and reintegration⁵⁴⁸ of children formerly associated with armed forces or non-state armed groups. Even though such initiatives cannot be classified as forms of reparations *stricto sensu* it is important to note here that disarmament, demobilization and reintegration ('DDR') programmes which target children are different from those that focus on adults. In fact

Unlike adults, children cannot legally be recruited; therefore, measures that aim to prevent their recruitment, or that attempt to reintegrate them into their communities, should not be viewed as a routine component of peace-making, but as an attempt to *prevent or redress* a violation of children's human rights. This means that child DDR is not the same as that for adults.⁵⁴⁹

Reintegration is notably the most challenging phase of any DDR process, especially in the case of children formerly associated with armed forces or groups. As the programmes established in Sierra Leone have shown, the focus on education is indispensable to increase children's opportunities to be effectively reintegrated in their communities.⁵⁵⁰

544 Ibid, at 3.

545 See UNICEF, Country Programme Document, Sierra Leone, 2013/14, available at: http://www.unicef.org/about/execboard/files/Sierra_Leone-2013-2014-final_approved-English-14Sept2012.pdf

546 Child Soldiers International, Child Soldiers Global Report 2001 - Sierra Leone, 2001, available at: <http://www.refworld.org/docid/498805d15.html>

547 UNICEF Innocenti Research Centre in cooperation with the International Center for Transitional Justice 'Report on Children and Truth Commissions', (Aug 2010) at 61.

548 DDR programmes are different from reparation programmes as the latter focus on victims (civilians) affected by the conflict, while the former target ex combatants for the purpose of triggering their reinstatement as productive members of the society. See generally United Nations. Note by the Secretary-General on Administrative and Budgetary Aspects of the Financing of UN Peacekeeping Operations. A/C.5/59/31, May 2005, at 24.

549 See Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS, 1 Aug 2006) Module 5.30 Children and DDR, available at: <http://cpwg.net/wp-content/uploads/2011/09/IDDRS-5.30-Children-and-DDR.pdf>

550 On DDR and children see E Pualetto and Patel, 'Challenging Child-Soldier DDR Processes and Policies in the Eastern Democratic Republic of Congo', (2010) 16 *Journal of Peace, Conflict and Development* at 35-57; and also M Drumbl, *Reimagining Child-Soldiers in International Law and Policy* (OUP, Oxford, 2012) at 174 ss.

3.4 VOLUNTARY REPARATIONS MECHANISMS

In addition to all the judicial and non-judicial mechanisms mentioned above, victims of education-related violations may also be provided with some form of relief from non-judicial mechanisms based on voluntary contributions. Funds have been established at the international or domestic levels, in order to assist the victims and their families out of solidarity but without any legal duty to do so. They include the various UN voluntary funds, the TFFV, national voluntary funds and other voluntary forms of reparations provided by NSAs.

3.4.1 UN Voluntary funds

The UN has set up various funds which may provide relief to victims of education-related violations.

The Trust Fund to End Violence against Women provides grants to support initiatives fighting violence against women and girls.⁵⁵¹ Some of the initiatives funded focus specifically on education. For example, in Malawi, it supports a project to end School-Related Gender-Based Violence ('SRGBV'),⁵⁵² promoting equal access to primary education for girls and at risk children in twenty-five schools across a region. It also supports a project in Belize, which focuses on prevention by addressing the root causes of violence against women through the development of a specialised school curriculum and teacher training.⁵⁵³ Eligible applicants can apply to these funds online.⁵⁵⁴

The UN Voluntary Fund for Victims of Torture distributes voluntary contributions to NGOs, associations of victims and family members of victims, private and public hospitals, legal clinics, public interest law firms and individual lawyers. The recipients then provide "humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of torture," and their relatives who have been directly affected by the victim's suffering.⁵⁵⁵

3.4.2 ICC Trust Fund for Victims

As mentioned in the above section on the ICC, the TFFV was established by the Assembly of States Parties ('ASP') to the Rome Statute for the benefit of the victims of the crimes under the Court's jurisdiction and their families.⁵⁵⁶ The TFFV has not only a function in implementing the reparations awards ordered by the ICC,⁵⁵⁷ but also a humanitarian role, entirely based on states voluntary contributions. As this humanitarian mandate is not dependent on the Court's decisions, the TFFV may support victims irrespective of the outcome of the judicial proceedings.

Target beneficiaries may be divided into six different categories. They include (1) victims of Sexual and Gender Based Violence ('SGBV'), including rape, forced pregnancy, sexual slavery, also comprising girls abducted and/or recruited into armed groups and forcefully impregnated; (2) widows and widowers, namely those whose partners were killed; (3) former child-soldiers and abducted youth, i.e. children and youth forced and or recruited into armed groups under the age of 15 (regardless of their particular role(s) played during abduction or conscription); (4) orphans and vulnerable children, i.e. children whose parent(s) were killed or children otherwise made vulnerable by the violence; (5) victims who suffered a physical injury and or who were psychologically traumatised by violence;

⁵⁵¹ Established by UN General Assembly resolution 50/166 in 1996 and administered by UN Women on behalf of the UN system.

⁵⁵² SRGBV include rape, unwanted sexual touching or comments, corporal punishment, bullying and verbal harassment. It is rooted in gender inequality and the unequal power relations between adults and children, males and females. More information is available at: <http://www.unwomen.org/how-we-work/un-trust-fund/grantees/>

⁵⁵³ Ibid.

⁵⁵⁴ The list of eligible applicants and more information on the application procedure are available at: http://www.unwomen.org/-/media/Headquarters/Attachments/Sections/Trust%20Funds/UNTrustFundEVAW/UNTF_2012_Call4Proposals_en.pdf

⁵⁵⁵ Through this unique humanitarian fund, some 70 000 victims are reached on a yearly basis, further information on the fund is available at: <http://www.ohchr.org/EN/Issues/Torture/UNVFT/Pages/WhattheFundis.aspx>

⁵⁵⁶ See Art 79(1) of the Rome Statute. The TFFV Regulations were adopted by the ASP in 2005 and it was officially operative in Feb 2007, see the Resolution ICC-ASP/4/Res.3 Regulations of the Trust Fund for Victims.

⁵⁵⁷ See Rule 98 of the ICC RPE.

(5) family members of victims (with the exception of widows and orphans) and others who do not fall within the above categories, but are affected by violence.⁵⁵⁸

Even though victims of education-related violations are not explicitly mentioned in the TFV's mandate, education is one of the key sectors in which the TFV has invested since its establishment. For instance, from November 2008 until July 2012, the TFV supported 'School of Peace', in partnership with Missionnaires d'Afrique. This project affected several thousand children in DRC, namely in the Ituri and North Kivu, including war orphans, former child-soldiers and adolescent-mothers who survived rape. Its principal scope was to diffuse amongst young people (aged between 10 and 17) the culture of reconciliation, peace and forgiveness. With the cooperation of the formal education system and the national authorities, the project organized a two-day 'Peace School'. This was hosted in turn by each school involved and allowed the children to express collectively "their trauma, construct messages of hope, and share them with the community through drawings, drama, and other forms of artwork".⁵⁵⁹ The TFV deems counselling, vocational training and education as indispensable, especially when it comes to children and young people who face complex challenges to overcome stigmatization and trauma stemming from violations suffered during armed conflicts.⁵⁶⁰

3.4.3 Voluntary Forms of Reparations at the National Level

At the national level, voluntary forms of assistance for victims of IHRL and IHL have also been established. For instance, in Rwanda, there are funds to support the victims of the genocide, including the *Fonds d'Assistance aux Rescapés du Génocide* (FARG).⁵⁶¹ Beneficiary groups include orphans, surviving spouses, elderly people whose families have been killed, people deprived of property or shelter, persons with disabilities, persons with incurable diseases, and children of parents with disabilities or incurable diseases. In order to help such persons, the fund engages in a range of programmes including: the construction of houses and the provision of medical treatment.

Another relevant voluntary mechanism set up in Rwanda after the genocide is AERG (Association des Etudiants et Elèves Rescapés du Génocide), an association of student survivors established in 1996 at the National University of Rwanda.⁵⁶² AERG was founded as a support mechanism for genocide orphans studying at secondary and higher institutions. The main scope pursued by AERG (liaising with FARG) is to build a network, represent and support, not only financially, all the student-survivors (largely defined as those whose parents and relatives were killed during genocide) who are currently enrolled in secondary school or involved in higher learning.

In Bosnia and Herzegovina, there is an organisation called Education Builds BiH, funded by private individuals, which seeks to assist children who have been victimised during the Yugoslav wars, using education to achieve the reconciliation process among the different ethnic groups. The organisation has so far granted access to education to more than 5,000 children, assisting them on their educational path, from primary school to higher education.⁵⁶³

558 See The Trust Fund for Victims 'Empowering Victims and Communities toward Social Change', Summer 2012 Programme Progress Report, available at: http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20PPR%20Summer%202012%20ENG%20Final_.pdf

559 All the projects are listed in the TFV website, available at: <http://www.trustfundforvictims.org/projects/tfvdrc2007r1019>

560 For example the Trust Fund has established in DRC a programme to provide 67 girls abducted by armed forces who bore children while in captivity with 'accelerated education'. The programme also includes a day care centre integrated into the school to promote the bond between girls and their babies, supply basic healthcare, and reduce the stigma of being a student and a mother. It is available at: <http://www.trustfundforvictims.org/projects/tfvdrc2007r2029>

561 It was created by Law No 2/1998 (as modified by Law No 69/2008).

562 Now AERG is represented nationally at 26 Universities and institutes of higher learning and 272 secondary schools in Rwanda, with a total country-wide membership of 43,397. The national AERG coordination office is based in Kigali, which liaises with the AERG University and Secondary School AERG sections. Available at: http://www.ibuka.rw/index.php?option=com_content&view=category&id=34&layout=blog&Itemid=11

563 Further information is available at: <http://www.ogbh.com.ba/en/donatori.html>

In Colombia, there is a reparation fund comprised of the assets or resources voluntarily given to the State by members of the illegal armed groups during the demobilization process.⁵⁶⁴ It also includes contributions from the national budget, as well as other national and international donations. It is administered by the Special Administrative Unit for Victim Support and Reparations, which is responsible for managing the resources.⁵⁶⁵

3.4.4 Voluntary Forms of Reparations Provided by NSAs

As mentioned in Section 2, holding NSAs directly accountable for reparations remains a challenge. Nevertheless, it is possible for NSAs to voluntarily provide some form of relief to victims of education-related violations, despite having no legal duty to do so. Recent developments with regard to businesses are illustrative in this regard. For example in South Africa, following the Marikana massacre that took place in 2012, British company Lomnin offered to provide for the education of the children of the miners killed or injured by the police while they were peacefully striking.⁵⁶⁶ The company expressed the commitment to cover education costs from primary school to university.⁵⁶⁷

With regard to NSAs, Common Article 3 and Additional Protocol II provide for the possibility of 'special agreements' or 'unilateral declarations' regarding the implementation of the rules of IHL.⁵⁶⁸ It is possible for these agreements or declarations to contain provisions relating to the making of reparations to individual victims of non-international armed conflict. There is some practice to suggest that NSAs may agree to make such reparations. For example, in the agreement concluded in 1998 between the Government of the Philippines and the National Democratic Front of the Philippines, the parties to the non-international armed conflict in the Philippines agreed to comply with IHRL and IHL during the conflict and to provide justice, including compensation, to victims of violations.⁵⁶⁹ As stated in Section 2, this practice does not support the conclusion that NSAs are liable for reparations for violations of IHL in non-international armed conflict outside of agreements or declarations setting out their consent for such liability.

CONCLUSIONS

As demonstrated in this Section, the mechanisms which may award reparations for education-related violations are extremely varied and they are present at both the international (and regional) level and at the domestic level. However, important disparities may be noted. At the regional level, the ECtHR allows for individuals and NGOs to bring claims for violation of IHRL, and therefore to seek remedy or reparation directly against a State. The IACtHR, in contrast, does not afford individuals standing, as only States can bring an action against another State party. Individuals under the inter-American system must first bring their claim to the IACommHR. In African, the ACtHPR, like the ECtHR, permits individuals to bring claims directly. However, this possibility is limited as States must acquiesce to this.

The human rights mechanisms at the UN level, although available for individuals situated in States throughout the world, have so far had a limited impact in the reparations discourse. However, IHRL is the area of international law where the procedural dimension of the right to reparation is better enforced and developed both at the international and at the regional level. At the international level, it is notable that, ICL and IHL mechanisms are still reluctant to recognise victims' legal standing, and the progress achieved through the entry into force of

⁵⁶⁴ This fund was created by Art 54 of the 2005 Law of Peace and Justice.

⁵⁶⁵ N Summers, 'Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?', (2012) 25 *Harvard Human Rights Journal* 219.

⁵⁶⁶ A total of 44 people lost their lives in the incident. Another 78 were injured.

⁵⁶⁷ As reported in the Post, 'Trust formed for Marikana Victims' (20 Aug 2013), available at: <http://www.thepost.co.za/trust-formed-for-marikana-victims-1.1565459#.UhYwWWNtFkQ>

⁵⁶⁸ Common Art 3.

⁵⁶⁹ Art 2(3) of Part III of the Comprehensive Agreement of Respect for Human Rights and International Humanitarian Law between the Government of the Philippines and the National Democratic Front of the Philippines.

the Rome Statute and the establishment of the ad hoc claims commissions is far from being sufficient to satisfy victims' need (and right) to obtain redress. In order to claim for reparations several procedural hurdles fall on the victims, from the exhaustion of local remedies in the case of IHRL violations, to the formal requirements, such as the (compulsory) written format of the submissions (UN treaty bodies).

The various limitations present at the international and regional levels highlight the importance of the domestic courts in providing effective reparations to the victims of education-related reparations. As stated at the beginning of this Section, the route to obtain reparation is as important as the substance of reparation.

These general remarks of course have an impact also on reparations for education-related violations. It is important to note that in many instances educational harm does not constitute the "core" of the claim brought before the competent forum, but it is addressed in the reparative phase of the proceeding.⁵⁷⁰ For example, the ICC in the *Lubanga* decision on the principles and procedures to be applied to reparations has devoted great attention to victims' rehabilitation, stressing the importance of education to achieve the reintegration and rehabilitation of the former child-soldiers.⁵⁷¹ In this specific case, it seems that the inclusion of schools among the legal persons entitled to take part in the trials has drawn additional attention to the victims' loss of educational opportunities, justifying and encouraging the adoption of a sharper approach towards education in the decision on reparation.

With regard to non-judicial mechanisms, victims are more likely to be included in the processes and benefit from collectivised and open forms of assistance. Reparations programmes at the national level but also voluntary funds have so far proven themselves more capable of focusing on education than their judicial counterparts. Due to their different scope and nature, these mechanisms are more attentive towards the initiatives that can increase the well-being of the victims and the communities they belong to, including the construction of schools and the establishment of vocational training to facilitate victims' reintegration.

Regardless of the forms of reparation awarded in a specific case, or context, many issues arise in relation to the implementation and oversight mechanisms of the reparative measures adopted. These issues are addressed in Section 4 of this Report, where the forms of reparation will be further discussed in light of their practical application.

⁵⁷⁰ See for instance the IACtHR.

⁵⁷¹ See Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904 07-08-2012, at 234.

4

IMPLEMENTATION ISSUES

INTRODUCTION

Section 3 presented the various mechanisms in place which offer reparations to victims of education-related violations. The perspective adopted was that of the beneficiaries of reparations processes. In contrast, the analysis contained in Section 4 focuses on the concerns of those responsible for establishing and implementing reparations processes and raises associated issues. Before examining some of the issues associated with the implementation *per se*, this Section presents some of the questions surrounding the establishment of *ad hoc* reparations mechanisms.

Section 4 begins with an overview of specific contexts where reparative processes have been established and the main obstacles encountered. This overview is followed by a brief analysis of the considerations that should precede the award of reparations, including their forms and objectives. Section 4 further discusses the key issues that emerge during and after the establishment of the reparation process, including the degree of victims' participation, the assessment of harm, the factors affecting the forms of reparation, the prioritization of resources and, finally, verification and monitoring.

Through a comparative approach, this Section analyses how challenges have been addressed in different contexts. In doing so, it also reviews the shortcomings and limits of less effective reparative measures which have failed to provide adequate redress to victims of education-related violations or to those who have experienced impairment of their right to education. The use of this comparative approach allows the identification of key advantages and disadvantages of these measures, in addition to a number of recommendations, which will be presented in Section 5 of this Report.

4.1 ESTABLISHMENT OF REPARATIONS MECHANISMS

As mentioned above, States are under an obligation to redress violations of international law obligations. In many instances, individuals also have a right to remedy for education-related violations. Section 3 presented the various judicial and quasi-judicial systems through which this right can be exercised. With regard to those mechanisms, the legal basis is clear. Section 3 also presented the non-judicial mechanisms which may be established to provide reparations following a conflict or when the number of victims is particularly large. The legal basis for those mechanisms may stem from various sources. They may have been created through the adoption of a new legal provision (such as for example the Victims' Law in Colombia),⁵⁷² the recommendation of a TRC (such as the Valech Commission in Chile and the TRC in Sierra Leone),⁵⁷³ or through a peace agreement (like the Nepalese IRP which stems from the 2006 Peace Agreement between Nepal's government and Maoist insurgents).⁵⁷⁴ These non-judicial mechanisms are established to address specific situations and are therefore very context-dependent. A number of elements must be taken into account such as the scale and character of the violations in question, the needs of victims and the harm they have suffered as well as the characteristics of the categories of victim.

⁵⁷² Victims' Law 1448, Jun 2011.

⁵⁷³ Chile, Supreme Decree No 1040, available at: <http://www.usip.org/publications/commission-of-inquiry-chile-03>. For Sierra Leone, see the TRC Act 2000, Part V: 17, 18. Unlike other TRC's, the Commission's recommendations were legally binding.

⁵⁷⁴ See R Carranza, *supra* n 137.

There are often obstacles to the establishment of reparations processes. While the origins of each reparations scheme are context specific, there are common factors influencing the establishment of any reparation process, as well as common obstacles which may hinder this establishment. Obviously, the political will to establish reparations processes may be lacking, such as when the leader who committed abuses remains in power. In certain circumstances, the need to reach a peace agreement may lead to an impunity gap if perpetrators are offered amnesties. Providing amnesties should not impact on the reparations owed to the victims. However, victims may perceive the criminalisation of the perpetrators as a form of reparations and regard amnesties as yet another violation of their rights as victims.⁵⁷⁵ Therefore granting amnesties may disenfranchise victims from a transition process, including from a reparations process.

A lack of financial resources is another obvious obstacle to the establishment of reparations processes. It is not only reparations awards which may be costly but the establishment and the administration of the reparations processes themselves. Therefore the decision to establish a reparation process and the considerations that shape its design are also dependent on economic considerations. In States emerging from conflicts or suffering from economic insecurity, shortages or unjust distributions of resources are often the norm. The issue is often made worse by the fact that most conflicts lead to a very large number of victims, putting additional stress on any proposed reparation regime. In such circumstances the intervention of external donors is often required to supplement otherwise insufficient resources. For example, in Sierra Leone, the UN Peacebuilding Fund granted USD 3 million, not only to provide redress to the victims identified by the TRC,⁵⁷⁶ but also to build a reparations unit to fulfil the TRC recommendations in relation to reparations.⁵⁷⁷ As the issue of financial resources pervades the entire reparations process, it will be discussed further in relation to the implementation of reparations processes.

The actors establishing the context specific reparations processes are also presented below. The discussion examines reparations mechanisms which are established to address mass violations perpetrated in specific contexts.

4.1.1 Who Establishes Reparations Processes?

Reparations are not systematically provided following situations of insecurity or armed conflict. Therefore it is important to consider the role of those actors which underlie a decision to establish (or not to establish) a reparations process. A number of actors, such as victims or civil society, may provide an impetus to set up a reparations process. Specific events, such as a change in government or a period of transition towards peace and democracy, may also set in motion the process. In addition, the identity of these actors or events also influence the type of reparations scheme put in place. This means that a decision to establish (or not to establish) a reparations process, as well as the type of process selected, is generally dependent on the contextual background. This is particularly true at the national level.

Given the obligation of States to provide reparation, governments should play the primary role in establishing reparations processes. However, mass IHRL and IHL violations are often the result of actions for which governments themselves are responsible. Therefore, a political change is often necessary for a reparations process to be established in order to repair the violations committed by a previous government. For example, in Argentina, it was just such a change that triggered the development of the country's reparations regime. In fact, the new president inaugurated in 1989, Carlos Menem, had himself been held a political prisoner during the dictatorship and had been successful in his claim for indemnification against the State.⁵⁷⁸

During situations of insecurity or armed conflict, or in periods following such difficult times, governments and/or courts are often not able to put in place reparations programmes. However, it is often during these transitional periods that reparations processes are initiated. While governments have sometimes been able to initiate

⁵⁷⁵ For example the Amnesty Act, 2000 (Uganda's national amnesty law).

⁵⁷⁶ In fact, 75% of the amount had to be spent in direct benefits to victims. See M Suma and C Correa supra n 541.

⁵⁷⁷ Ibid. According to the authors this was called the 'Year One Project' because the grant had to be used within one year.

⁵⁷⁸ M J Guembe, 'Economic Reparations for Grave Human Rights Violations: The Argentinean Experience', in P De Greiff (ed), *The Handbook of Reparations* (Oxford, OUP, 2006) at 29.

reparations processes during these periods, it is often the TRCs which provide the basis for their establishment. Although the main role of TRCs is generally the investigation into allegations of past abuses to establish impartial historical records, they may also be mandated to make recommendations for reconciliation and reparations.⁵⁷⁹ For example, the TRCs in South Africa, Sierra Leone, Guatemala, Haiti, Liberia, East Timor and Peru have all made recommendations in relation to reparations.⁵⁸⁰ Therefore, at the national level, the establishment of reparations processes following situations of armed conflict (or of mass discrimination) often results from the inquiries conducted by TRCs.

However, TRCs often lack the specific mandate to even consider reparations. According to a study commissioned by the OHCHR and undertaken by the current Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence,

there seems to be a trend towards establishing truth commissions in post-conflict societies and societies in transition and entrusting them with making recommendations concerning reparations. However, it is worth remembering that many truth commissions have not been given this responsibility (e.g., Argentina and El Salvador).⁵⁸¹

Highlighting the importance of the contextual background, this study also highlights the shortcomings of the work of TRCs in relation to reparations as it states that

[...] some truth commissions that did receive this mandate formulated recommendations that went unheeded or that have been implemented only partially (e.g., South Africa, Guatemala, Haiti and, at least until late 2006, Peru). Finally, some countries have implemented reparations initiatives that did not stem directly from truth commission recommendations (e.g., Argentina, Brazil and Germany). Countries can therefore decide the way to go about designing reparations measures that best suits their different contexts.⁵⁸²

Therefore TRCs must be given the mandate to make recommendations in relation to reparations and their recommendations must then be fully implemented.

In addition IOs and NGOs have also often played an important role in catalyzing or facilitating the establishment of post-conflict reparations mechanisms.⁵⁸³ They may assist with capacity development, advisory and technical assistance, as well as the operation and management of reparations programmes, in partnership with local organizations or in a freestanding capacity. Thus IOs may be a valuable resource for national organisations in considering whether and how best to establish reparations programmes, in developing options for such programmes and, if necessary, in providing technical and logistical expertise and resources in respect of reparations.

Finally, civil society may also contribute significantly to the development of reparations programmes.⁵⁸⁴

579 See for example Section 15(2) of the Act of the Sierra Leone TRC and its recommendations, which are summarised in Volume Two, Chapter One of its Report, available at: <http://www.sierraleonetrc.org/index.php/view-report-text-vol-2/item/volume-two-chapter-one>

580 With regard to Sierra Leone, see C Correa and M Summa, *supra* n 541.

In Peru, This process was initiated by the interim administration of Valentín Paniagua, which was in place from 16 December 2000 to 28 July 2001. Note that the Peruvian TRC is known as Comisión de la Verdad y Reconciliación or 'CVR'. It was created by the Supreme Decree 065-2001-PCM, which entered into force on 4 Jun 2001, at 1-3. It is available at: <http://www.cverdad.org.pe/lacomision/nlabor/decsup01.php>

International Center for Transnational Justice, *Reparations and Displacement in Peru*, Jul 2012, at 4, available at: <http://ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Reparations-Peru-CaseStudy-2012-English.pdf>

581 See P De Greiff, *Rule of Law Tools for Post-Conflict States: Reparation Programmes*, (OHCHR, New York and Geneva, 2008) at 11 (internal citations omitted), available at: <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>

582 Ibid.

583 UN agencies such as the UNHCR have on occasions established facilitating schemes to locate potential beneficiaries of reparations programmes given that such persons are often displaced within a state or have been moved across borders.

584 For example, in Colombia, NGOs have been very critical in relation to the reparations regime in place and the amnesties given to former paramilitary leaders. See N Summers, *supra* n 565, at 224.

When there are actors willing and/or able to establish a reparations process and when the possible obstacles to the establishment of those processes are not insurmountable, a number of considerations must still be taken into account when establishing a reparations process. In particular, the objectives of the reparations process must be identified in order to select the most appropriate reparations process.

4.1.2 What are the Necessary Considerations?

The objective of reparations processes is to redress the harm suffered by the victims. In order to provide a form of redress that is effective and includes long-term benefits, the required actions need to be identified at the establishment stage. This will allow the selection of the most appropriate form of reparations process. The necessary actions generally include:

- Preventing repetition of the violations or abuses suffered, for example with educational forms of reparations, including change in curriculum, re-training of teachers, or the inclusion of TRCs findings in curricula.
- Promoting healing and reconciliation, for example through education programmes or symbolic forms of reparations such as apologies.
- Responding to the needs of the victims through a victim-centered approach, which takes into account victims' views.

In general, victims seek a wide ranging and comprehensive reparations process, which also addresses the long-term effects of the violations they suffered.⁵⁸⁵ The procedure must be victim-friendly to ensure a wide participation in the process. This means for example that the application period to claim for reparations must be long enough to provide an opportunity to join the process.

Victims also favour a more complex process that includes a range of material and symbolic, individual and collective reparations. For example, they contend that victims should have the ability to access and choose among numerous forms of reparation, such as public acknowledgement of harm and apologies; specialised health care; help with education; compensation for looted, pillaged and destroyed property; and assistance with proper treatment of the dead.⁵⁸⁶ In particular studies have revealed that both young and adult victims have identified education as a top priority.⁵⁸⁷ Consequently reparation efforts should enable victims to access free of charge primary, secondary and higher education, but also vocational training able to provide marketable skills.

Victims of education-related violations, who have missed out on educational opportunities, may wish to complete their education. However, in many instances, their needs will have changed, for example because they are no longer of school age. Therefore, the needs and wishes of the victims need to be identified in order for the reparations process to be both adequate and acceptable.⁵⁸⁸

In order to identify the needs of the victims, all categories of victims must be located. As situations of insecurity and armed conflict often lead to the displacement of victims, a victim mapping may be necessary. Once victims have been located, a sample of them should be approached in order to identify their needs. This is a particularly delicate process as it may raise expectations in the victims' minds.

The type of reparations awarded should depend on the objectives of the reparations processes, as identified at the establishment stage. In order to fulfil certain objectives, such as the prevention of repetition of the violations committed or the promotion of reconciliation, educational forms of reparations may be particularly well suited. In order to respond to the needs of victims, other forms of reparations may have to be considered, even if the violations suffered were education-related violations.

585 OHCHR and Uganda Human Rights Commission, 'The Dust Has Not Yet Settled: Victims' Views on Remedy and Reparation' (Feb 2011), available at: <http://www.ohchr.org/Documents/Press/WebStories/DustHasNotYetSettled.pdf>

586 Ibid.

587 See for example the surveys conducted by the Human Rights Center of the University of Berkeley, California, which has published reports on victims' attitude about social reconstruction, accountability and justice in Cambodia, Northern Uganda, Central African Republic, and Liberia. They are available at: <http://www.law.berkeley.edu/11979.htm>

588 See Section 2 at 2.5.4.

4.1.3 What type of Mechanism?

Once all the short and long-term goals of the reparations process are identified, the process which is the best suited to reach these goals can be selected. The reparations process selected should be:

- **Appropriate:** process must be appropriate to fulfil to the aim of the reparations process (for example change in curriculums and train teachers to provide guarantees of non-repetition, etc.)
- **Acceptable:** the needs and wishes of the victims must be taken into account (when possible)
- **Inclusive:** the mechanism must not exclude certain categories of victims.
- **Efficient:** consideration must be given to the resources available, as well as any time limitation (for example if victims are already elderly). As reparations processes are often established many years after the occurrence of the violations which caused harm to the victims, efficiency is of particular importance.
- **Fair:** the mechanisms must respect the rule of law.
- **Feasible:** given the resources and time available. Victims' hopes must not be raised to unrealistic levels.

All components noted above must all be considered and balanced when selecting the most appropriate reparations process.

The various forms of reparations processes, which are detailed in Section 3, all entail a variety of advantages and disadvantages.

Judicial or quasi-judicial reparations processes assess the nature and extent of the harm suffered by the claimants in light of a careful examination of the evidence. Victims or groups of victims may be represented by a lawyer who may make submissions on the extent of quantum justified or the form of reparation which is appropriate. Examples of these kinds of reparations processes include regional human rights mechanisms such as the Inter-American Court of Human Rights, but also mechanisms such as the ICC and the Eritrea-Ethiopia Claims Commission.⁵⁸⁹

Non-judicial reparations processes resolve claims administratively and bureaucratically, often without the involvement of lawyers (although dissatisfied claimants sometimes have a right of appeal). These processes can offer different degrees of due process.⁵⁹⁰ Non-judicial claims processes may or may not require an application from the victim or the claimant to provide reparations.

The type of process selected affects the substance and scope of the reparations mechanism, including the categories of recognised victims (and other beneficiaries), the forms of harm recognised, and the nature of the remedies deployed to remedy that harm. Therefore, the design of reparations process must take into account the methods by which ways harm is assessed. The assessment of harm is discussed in more detail below.

Also, large scale reparations processes may be bureaucratic and impersonal, as the involvement of victims is generally limited to administrative steps such as filling out application forms and submitting documentation in support of their claims. The limited involvement of victims in the process may reduce their sense of redress. For victims who have suffered education-related violations, this may be problematic as they may lack the knowledge to comprehend these large scale reparations processes. In addition, mass claims processes generally offer a very limited (if any) chance to provide a public account of events, although they may be a crucial part of a victim's healing process.⁵⁹¹ Therefore, the overall experience of victims with processes which prioritize efficiency is likely to be very different from other forms of adjudication and may lead to a high level of dissatisfaction.

589 See Section 3.

590 See for example the 'Transitional Justice: Information Handbook', (United States Institute for Peace, Sep 2008) according to the Information Handbook with regard to truth commissions: The publicity reduces the possibilities of denying past abuses and increases the visibility of the commission. But considerations of security, resources and due process should be taken into account. Also vetting procedures require a certain degree of due process as the loss of one's job can be perceived as a "life sentence" if the procedure is not fair. The Information Handbook is available at: <http://www.usip.org/sites/default/files/TRANSITIONAL%20JUSTICE%20formatted.pdf>

591 In Colombia for example, given the on-going nature of the armed conflict, there appears to be a consensus that an official national truth commission should be postponed to a future, post-conflict period. See R Vidal-López 'Truth-Telling and Internal Displacement in Colombia' (ICTJ 2012) at 14, available at: <http://ictj.org/publication/truth-telling-and-internal-displacement-colombia>

In addition to the fact that victims of education-related violations may be entirely excluded from the process or that their educational harm may not be recognised, education as a mean of reparation may also be left out from these processes. Large scale financial compensation schemes may exhaust the resources available. As a result, the long-term role of education programmes in ensuring non-repetition of violence may be overlooked.

4.2 IMPLEMENTING REPARATIONS MECHANISMS

Once a decision to establish a reparations process has been made, the short and long term objectives of the reparations process have been identified, and the type of reparations process selected, those responsible for the implementation of the reparations processes must ensure that the processes are successful. Specific attention must be given to the following matters:

- Victims Participation in the Reparations Process, including victim mapping and methods for victim mapping.
- Assessment of Harm, including the methods for quantifying the harm and the issue of causation.
- Type and Extent of Reparations, including the issue of resources and the methods to diminish the constraints stemming from limited resources, in particular prioritisation techniques.

4.2.1 Victims Participation

Reparations processes may require victims to identify themselves as victims in order to be part of a reparations process, or they may be identified by those implementing the reparations award directly. When a reparations process requires the victims to apply for reparations, individuals (or a State on their behalf) must submit applications for reparation. These are therefore known as ‘application-based’ processes. In addition to courts and quasi-judicial bodies such as the UN Treaty bodies, many of the international mass claims processes also follow this model, including the UNCC, the US-Iran Claims Tribunal, the Kosovo Property Claims Commission, the Iraq Property Claims Commission, or the Commission for Real Property Claims for Bosnia Herzegovina (CRPC) to name a few.⁵⁹² The steps required by the victims in order to apply for reparations through this model are explained in Section 3 of this Report.

Application-based reparations processes make sense when the form of reparation is compensation and/or the restitution of property, but this type of processes may not be suitable to deal with other forms of reparation. This is in particular the case when reparation is provided for a collectivity of victims.

The other types of reparations processes do not (or do not exclusively) require victims to apply for reparation. This approach is common among claims processes which are administrative and programmatic in character. Victims of education-related violations are often marginalized and vulnerable, and include children, women, those injured and/or disabled as a result of violations, refugees and displaced persons.⁵⁹³ As access to education may have been entirely prevented, then illiteracy may become common-place amongst these persons. As a result, these victims may be unable to claim for reparations on their own initiative. Therefore, a strict requirement that they do so would

592 The ICC Statute was originally also predicated on a claims approach but this is proving to be increasingly unworkable, with the VPRS having major resource problems. The *Lubanga* reparations decision (and the recent victim participation decision in *Prosecutor v Muthaura & Kenyatta; Prosecutor v Ruto & Sang*) seems to indicate a move away from that approach. See *Decision on Victims’ Representation and Participation*, (ICC-01/09-02/11) 3 Oct 2012.

593 See, for example, C Aptel and V Ladisch, ‘Through a New Lens: A Child-Sensitive Approach to Transitional Justice’ (ICTJ Aug 2011) at 28, which states that “Research in Colombia found that it took time for children and those working with children to understand that they were eligible for reparations and to mobilize to apply. Application deadlines should be long enough to give child victims time to learn about their right to access benefits and to submit their application.” This Report is available at: <http://ictj.org/sites/default/files/ICTJ-Children-Through-New-Lens-Aptel-Ladisch-2011-English.pdf>
On the displacement of victims, see ICTJ Research Unit ‘Report Transitional Justice and Displacement Challenges and Recommendations’ (ICTJ and LSE, Jun 2012) available at: <http://ictj.org/sites/default/files/ICTJ%20and%20Brookings-LSE%20Transitional%20Justice%20and%20Displacement%20Report.pdf>

lead to substantial injustice.⁵⁹⁴ Non-application based processes identify victim communities, through a mapping system, and put in place arrangements for reparation in relation to such groups. In those cases, reparations are often collective in nature, as they will apply in the same way to an entire group of victims.

In many of the administrative reparations programmes such as those established in Colombia, Nepal and Sierra Leone, an initial mapping exercise was conducted in order to identify the scale of victimization. Outreach efforts were also carried out in order to ensure that potential beneficiaries were informed about the possibility of claiming and obtaining reparations. This type of process presents specific challenges for those implementing reparations awards, starting with the identification of victims through victim mapping.

4.2.1.1 Identification of Victims

In order to ensure that all victims are included in a reparations process, they must first be identified.

Victim Mapping

Victim mapping is often necessary to identify the number and categories of victims affected by a situation of insecurity or armed conflict. Generally, the initial mapping exercise should be as comprehensive as possible to ensure that the interests and needs of all victims, including those who are dispersed, geographically isolated or particularly vulnerable are considered in the initial phase for formulating a reparations programme.

It may often be necessary for victim mapping to be conducted in a phased manner. Once the scope of the victim class and their broad needs have been established at the outset and the outline of the reparations programme formulated further, more in-depth mapping may be necessary to consider the needs of particular groups to enable forms of reparations to be appropriately tailored to their needs, injuries and social position. For example, mapping may be needed to assess the communities that may benefit from the establishment of educational facilities as a form of reparations. This is a typical example of a form of reparation which is not suited to an application-based process, due to the fact that it is community-oriented.

It is not only the type of reparations process which may be tailored to the needs of victims but also the reparations programmes themselves.⁵⁹⁵ Therefore, in addition to selecting potential eligible beneficiaries of reparations programmes, victim mapping may be used to design the most effective reparations programme. In the case of large scale violations, those needs have to be assessed on a collective basis in order to determine common needs among different groups of victims.

Mapping may be required also during the last implementation stage when the reparations awards are made to the victims. This is often problematic as victims may have moved since the violation(s) occurred. In the case of child soldiers for example, children may have been taken from their homes and have had no contact with their communities for many years.⁵⁹⁶ Displaced victims may be living in an entirely different locality and be dispersed throughout a region.⁵⁹⁷ Victims may even have crossed borders to seek security.

Victim mapping can be conducted in accordance with the following three main criteria, which should be combined:

- The individual victims and the communities, including their demographic characteristics (such as age, gender, disabilities, as well as cultural, social and ethnic backgrounds).
- The type of violations committed, and
- The type of harm suffered.

⁵⁹⁴ See Section 2 at 2.5.4.

⁵⁹⁵ OHCHR and Uganda Human Rights Commission, *The Dust Has Not Yet Settled: Victims' Views on Remedy and Reparation* (Feb 2011) at 43, available at: <http://www.ohchr.org/Documents/Press/WebStories/DustHasNotYetSettled.pdf>

⁵⁹⁶ Ibid.

⁵⁹⁷ See for example the case of Colombia, see D Cantor, *supra* n 68.

In order to highlight education-related violations, a specific mapping of these violations could be conducted to identify all students, education staff and education facilities affected. Such a process may assist in highlighting the need for awarding educational forms of reparations. Collaboration with government departments, NGOs and others collecting statistical and qualitative information on educational facilities and damage caused by education-related violations may be important in this regard. Relevant questions may be included in data collection for the national Education Management Information System and in development of assistance projects, as well as in damage assessments by the UN-led Education Cluster and Local Education Donor Group, and with the Country Task Team for the Monitoring and Reporting Mechanism in relevant countries.⁵⁹⁸ The trend towards decentralization of education planning and management may make it easier in future years to work with education managers in locations specifically affected by education-related violations, and this issue can be included in staff training where appropriate.

Outreach to Victims

In order to facilitate the mapping of victims and thus allocate reparations to the beneficiaries of a reparations process, information about the reparations processes must be disseminated widely. Therefore outreach to victims is a crucial step towards full and effective implementation of reparations. At the national level, it is often TRCs which have made victims aware of the existence of reparations processes. In fact, outreach has been described as

a set of tools, the combination of materials and activities that a transitional justice measure puts in place to build direct channels of communication with affected communities, in order to raise awareness of the justice process and promote understanding of the measure.⁵⁹⁹

The media is often the primary tool for raising awareness among the victims. In Peru, the Reparations Council (the 'Consejo de Reparaciones') published a press release stating which provinces would first access the benefits of the PIR. This enabled initial meetings with community representatives in each province, in order to establish the number of potential victims. Communities were then informed of the process through their representatives, as well as through the distribution of leaflets.⁶⁰⁰ This was followed by workshops with the victims and the establishment of regional offices in affected areas.⁶⁰¹ In Chile, there were several notices in the newspapers.⁶⁰² The newspapers also published lists of victims who qualified for benefits, so their families could submit requests. Another list was published again two years later, identifying the victims whose families had not yet come forward.

However, the media may not always be a viable tool to reach victims of education-related violations, such as those living in remote areas with no access to television or radio or those who are illiterate.⁶⁰³

The internet can also play an important role in the dissemination of information about reparations initiatives, for example via the websites of the local authorities involved in the reparations programmes. In Argentina, the website of the national Secretary for Human Rights includes summaries of the reparations laws, with information about their beneficiaries and the application process.⁶⁰⁴ In Nepal, information on the IRP, including the form to apply for

598 UNESCO International Institute for Educational Planning, *Guidebook for Planning Education in Emergencies and Reconstruction* (UNESCO, Paris, 2010) and Margaret Sinclair (personal communication, 30 Aug 2013).

599 See C Ramirez-Barat *Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (ICTJ, Jun 2011) at 7, available at: <http://ictj.org/sites/default/files/ICTJ-Global-Making-Impact-2011-English.pdf>

600 A copy of the leaflet is available on the Victims' Registry website at: <http://www.ruv.gob.pe/MatDifusion/bannerinformativo.pdf>

601 'Consejo de Reparaciones abrirá oficinas en departamentos más afectados', 18 Feb 2008, available at: http://www.ruv.gob.pe/noticias_7.html

602 See 'Beneficios para prisioneros y torturados politicos', available at: http://www.bcn.cl/leyfacil/recurso?item_id=4085&leng=es

603 See C Correa and M Suma, *supra* n 541, at 6, where the authors highlight that limited information reached those victims in remote areas and that often "information came too late to allow victims to travel the long distances required."

604 For summaries of these laws, see Secretary of Human Rights, Dirección Nacional de Asuntos Jurídicos en Materia de Derechos Humanos, available at: <http://www.derhuman.jus.gov.ar/leyes.html>.

reparations and scholarships, can be found on the website of the Ministry of Peace and Reconstruction.⁶⁰⁵ While it is common practice to find relevant information on the websites of governments or other authorities in charge of the reparation programmes, this practice is not adopted worldwide.⁶⁰⁶

As victims of education-related violations are often students, specific outreach methods may be used. The Special Court of Sierra Leone ('SCSL') has developed a series of activities with the aim of informing and educating them about its work

for elementary school students, the court sends high-level officials to local schools and arranges for students to visit the court. For youth audiences, SCSL worked with universities to create Accountability Now Clubs, the main goal of which was to promote understanding of the SCSL among university-level students and their peers and engage students in discussions of broader justice issues, including transitional justice and human rights.⁶⁰⁷

The issue of outreach is particularly problematic with regard to situations of insecurity and conflict, where populations have often been displaced. For example in Colombia, an estimated 80-90% of the victims who are covered by the Victims' Law are IDPs.⁶⁰⁸ Note that under the Victims' Law, IDPs are recognized as victims, but the level of awareness and knowledge of the Victims' Law among the diaspora is low. This issue is further reinforced by the fact that television and radio channels are not easily accessible in certain areas.⁶⁰⁹

In addition to IDPs, outreach must also extend to those who have found refuge in the territory of another State, following the violation. In Colombia, Article 204 of the Victims' Law attempts to address the hurdle of reaching victims outside of Colombia by providing for the adoption of measures designed for disseminating information outside the State.⁶¹⁰ It states that the Ministry of Foreign Affairs shall ensure that externally displaced victims are informed of their rights.⁶¹¹

It is important that the victim outreach process does not raise unreasonable expectations in the minds of the victims. Victims need also to be provided with all necessary information as to the operation of the reparations process. At the same time, local, regional and national groups and organizations which could serve as intermediaries in the reparations process should be identified.

Registration of Victims

Once they are aware of the processes available, victims have to access them in order to claim and obtain reparations. As mentioned earlier, some processes are not based on application. In such a case victims are automatically registered in the process. In others, they are required to formally register in order to receive the benefits they are entitled to.

In Sierra Leone, victims participated in the registration process which was led by the National Commission for Social Action. In order to reach victims located in rural areas, mobile teams were deployed so as to compensate for

605 The website has been established with the support of IOM, see also the brochure which is available at: http://www.nepal.iom.int/images/stories/Employment_Self_Employment_Service_Programme_for_Conflict_Victims_English_Brochure.pdf

606 See for example the Sierra Leone NaCSA website, where no information are available for the victims at: <http://www.nacsa.gov.sl/>. Similarly, the website of the Liberian government does not provide any information regarding the reparation process and the development related to the implementation of the TRC's recommendations, see: <http://www.emansion.gov.lr/>

607 See C Ramirez-Barat, 'Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice' (ICTJ, Jun 2011) at 6, available at: <http://ictj.org/sites/default/files/ICTJ-Global-Making-Impact-2011-English.pdf>

608 M Hanson, 'Colombia: Transformational Change Must Include Urban IDPs' (2012) Refugees International, at 3; see also D Cantor, *supra* n 68, at 28. Note that the estimated number of IDPs may vary greatly, see Internal Displacement Monitoring Centre, *Colombia: Property restitution in sight but integration still distant*, 29 Dec 2011, at 25-6; see also R Vidal-Lopez, *Truth-Telling and Internal Displacement in Colombia* (ICTJ and Brookings LSE, 2012) at 7, available at: <http://ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Truth-Telling-Colombia-CaseStudy-2012-English.pdf>

609 D Cantor, *supra* n 68, at 30.

610 Art 204 of the Victims' Law.

611 Victims' Law, art 204. See also D Cantor *supra* n 68 at 31.

the lack of local offices and facilitate victims' access to reparations.⁶¹² This initial period allocated for registration had to be extended several times. Even after the official period for registration ended, a restricted open door policy continued to allow the registration of more victims, in particular women.⁶¹³

In Colombia, where authorities are less centralised, applicants can go to any regional centre, a prosecutor's or public defender's office or an office of a municipal government to apply to enter the registry, in accordance with the requirement under the Victims' Law.⁶¹⁴ In order to be entered into the registry, victims are expected to provide a declaration of the relevant facts and supporting documents.⁶¹⁵

In Peru, the registration process is conducted through the RUV which is a public and permanent victims' register (the 'Registro Único de Víctimas de la Violencia').⁶¹⁶ It identifies the potential beneficiaries, including both individual persons and communities that have been affected during the periods of political violence.⁶¹⁷ Being listed in this register is the necessary first step for the victims to obtain any of the forms of reparation contained in the Comprehensive Reparations Plan.⁶¹⁸ Registration can also be made by the Peruvian authorities on behalf of a victim. In that case, it is the State which identifies victims, by collating information from other existing registers or collecting data.⁶¹⁹ Registration can also be undertaken directly by the affected individuals.⁶²⁰

For victims of education-related violations, it appears that the preferable method would be to adopt a mixed approach, both allowing victims to register themselves and having the government registering the victims it is able to identify. It may be difficult for certain categories of victims of education-related violations to register themselves, due to possible disabilities or illiteracy.

Vulnerable Victims

As mentioned above, distance may be an obstacle to entering a reparations process. There may also be other hurdles based on discrimination or procedural difficulties. Reparations must be inclusive to be effective. Access to reparations cannot be the object of any restriction based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".⁶²¹ Disability should not either be an obstacle to obtaining reparations.

Women, who are often the victims of sexual violence, face particular difficulties in accessing reparations processes.⁶²² In Sierra Leone, the needs of women in general were somewhat neglected when setting up the reparation process,

612 M Suma and C Correa, *supra* n 541.

613 Ibid.

See also the IOM website at: <http://www.iom.int/cms/en/sites/iom/home/what-we-do/reparation-programmes/support-for-the-sierra-leone-reparations.html>

Despite the fact that over 30,000 victims have been registered and have already received either a cash allowance (including to support their educational needs), thousands of victims have not yet been successfully registered in the process. See M Suma and C Correa, *supra* n 541, at 4.

614 See SENA 'ABC del SENA y la Ley de Víctimas', available at: http://periodico.sena.edu.co/_img/uploads/inclusion/Ley%20de%20victimas.pdf.

615 Ibid.

616 Consejo de Reparaciones, Principales Funciones, see: http://www.ruv.gob.pe/cons_funcion.html#1

The RUV replaced former registers, such as the Census for Peace, see: http://www.ruv.gob.pe/archivos%5Cprotocolo_censo.pdf

617 Art 3.3, Título Preliminar, Reglamento de inscripción en el Registro Único de Víctimas de la Violencia a cargo del Consejo de Reparaciones ('RUV Regulation'), available at: www.ruv.gob.pe/archivos/Reglamento_RUV.doc

618 Art III (3.1.) of the RUV Regulation.

619 Arts 44 to 48 of the RUV Regulation.

620 See the special registration procedure in Chapter III and Art 37 of the RUV Regulation.

621 See Art 2(1) ICCPR and Art 2(2) ICESCR.

622 The difficulties encountered by women participating in the reparations process in Sierra Leone has been examined by Amnesty International, see Amnesty International, 'Sierra Leone: Getting Reparations Right for Survivors of Sexual Violence' (2007), available at: <http://www.amnesty.org/en/library/asset/AFR51/005/2007/en/4eb8bab3-d370-11dd-a329-2f46302a8cc6/afr510052007en.html>

despite the findings of the TRC which specifically recognised women as victims of sexual violence.⁶²³ During the disarmament, demobilization and reintegration (DDR) process, former girls-soldiers were not included despite the fact that they made up 30 percent of the fighting forces.⁶²⁴ Consequently, only about 500 girls received disarmament benefits.⁶²⁵ Therefore, the Sierra Leone's DDR process has been often described as 'largely gender-blind'.⁶²⁶

During the conflict in Peru, women and girls were also the targets of attacks of a sexual nature.⁶²⁷ The CVR established that both government agents and members of non-State groups (such as the Shining Path or the MRTA) had perpetrated violence against women.⁶²⁸ However, only a limited number of victims filed claims against their aggressors, either because they feared their aggressors' reprisals, or because of the stigma attached to the few cases that were judged.⁶²⁹ NGOs have assisted victims and provided education to their communities to prevent stigmatization.⁶³⁰ Despite these efforts, many victims of sexual violence in Peru have not obtained the necessary support or any form of reparation.⁶³¹ In addition, although the reparations programme provides monetary compensation for crimes of a sexual violence, evidence must be gathered to prove the crime. However, evidence of this type of crimes is particularly difficult to gather after the passage of a certain period of time.⁶³² Consequently, the units investigating these sexual offences should use flexible criteria for evaluating evidence in the reparations context.⁶³³

In Colombia, women and girls have also suffered widespread and systematic sexual violence.⁶³⁴ There is also a cultural stigma associated with sexual crimes, which leads to widespread impunity, as these crimes are underreported.⁶³⁵ In addition to the hurdles generally associated with the recognition of those types of crimes, Colombian authorities

623 For example, NaCSA conducted medical examinations on only 235 victims of sexual violence around the country, out of the 3,181 who registered. This was done through the assistance of the NGO Mercy Ships International. See M Suma and C Correa, *supra* n 541.

624 Of the 6,845 child-soldiers disarmed, 92% were boys and only 8% girls. UNICEF, *The Disarmament, Demobilisation and Reintegration of Children Associated with the Fighting Forces: Lessons Learned in Sierra Leone 1998-2002*, UNICEF West and Central Africa Regional Office, Emergency Section, Jun 2005.

625 S Anderlini and D Mazurana, 'Boys and Girls Who Also Carried Guns: Forgotten in the peace', *International Herald Tribune* op-ed of 12 Mar 2004.

626 In order to overcome this issue, UNICEF established the Girls Left Behind project for young women who, as children, were associated with fighting forces. Among other services, it sought to reunite these young women with their schools. See 'The impact on Women and Girls in West and Central Africa and the UNICEF Response', UNICEF 2005, at 17, available at: http://www.unicef.org/publications/files/Impact_final.pdf

627 CVR Final Report – Book VI, at 263-384. See also CVR Final Report – Anexo Estadístico, at 357.

628 *Ibid*, at 277.

629 Informe Defensorial No 80 – 2003, 'Violencia Política en el Peru: 1980-1996 - Un acercamiento desde la perspectiva de género', Peruvian Ombudsman Office, at 86, available at: <http://www.defensoria.gob.pe/grupos-eatencion.php?des=23>.

630 See for example the *Manta and Vilca* cases, in which 'Red para la Infancia y la Familia' worked alongside the lawyers of the 'Instituto de Defensa Legal' 'to provide support and counselling for [female victims of sexual violence] throughout the judicial proceedings.' *Ibid*, at 67. See also the work of Cooperation for the Andes, which promoted contact between victims and the 'Instituto de Defensa Legal' and offered logistical support to attorneys when they travelled to the area. Cooperation for the Andes also trains community leaders and educates children and adolescents about their rights. It is also working with teachers to develop ways of disseminating the historical record in the community.

631 See C Correa, *supra* n 533.

632 L Magarrell, L Filippini (eds) 'The Legacy of Truth: Criminal Justice in the Peruvian Transition', at 61, available at: <http://heller.brandeis.edu/academic/coex/pdfs-docs/transitional-justice/ictj-peru-legacy-truth-2006-english.pdf>.

633 *Ibid*.

634 See, Amnesty International 'This is what we demand. Justice! Impunity for Sexual Violence against Women in Colombia's Armed Conflict' (Sep 2011) at 9.

635 Human Rights Watch, *Colombia Country Summary* (Jan 2012) at 6, available at: http://www.hrw.org/sites/default/files/related_material/colombia_2012_0.pdf
See also Annual report of the UN OHCHR on the situation of human rights in Colombia, A/HRC/19/21/Add.3, 31 Jan 2012, para 69.

have also been criticised for their unwillingness to investigate and prosecute them.⁶³⁶ In order to remedy these deficiencies, the Victims' Law adopted a gender-sensitive approach and expanded its sensitivity to include the characteristics of age, sexual orientation and any disabilities.⁶³⁷ The Victims' Law offers special guarantees and protective measures for those who are particularly exposed to risks of human rights violation in the context of armed conflict and internal forced displacement such as women, children, the elderly, persons with disabilities, rural inhabitants, as well as leaders of social movements, trade unionists, human rights defenders and victims of forced displacement.⁶³⁸ The rights of women are protected by principles guiding the use of evidence in cases of sexual violence perpetrated in the context of armed conflict. For example, according to Article 39 of the Victims' Law, victims of sexual violence are entitled to testify behind closed doors.⁶³⁹ The Victims' Law also provides that women who are victims of dispossession or forced abandonment of property shall be granted priority in accessing the land restitution procedure.⁶⁴⁰ For these cases, prioritisation is ensured through special services windows at the Land Restitution Units, measures promoting women's networks,⁶⁴¹ and specific training on gender issues for the staff at the Land Restitution Unit.

Accessing reparations can also be difficult for certain individuals who were the subject of social discrimination before the situation of insecurity or armed conflict occurred. This may be the case of girls, persons with disabilities, person issued or minority groups, refugees or IPS. With regard to girls, the issue is often exacerbated because their access to education is limited, for example because of child marriage or child labour.⁶⁴² Therefore, in contexts where the right to education is not provided for girls,⁶⁴³ scholarships and vocational training awarded through reparations processes must not only benefit boys as this perpetuates the cycle of discrimination.⁶⁴⁴ This is of course valid for all categories of victims who may be discriminated against.

636 Amnesty International, 'This is what we demand. Justice!' Impunity for Sexual Violence Against Women in Colombia's Armed Conflict' (Sep 2011) at 10. See also Human Rights Watch, 'Rights Out of Reach: Obstacles to Health, Justice, and Protection for Displaced Victims of Gender-Based Violence in Colombia', (Nov 2012) at 3. The Report is available at: <http://www.hrw.org/sites/default/files/reports/colombia1112forUpload.pdf>

637 See D Merteens, Colombia's law on victims and restitution: a challenge for gender-sensitive transitional justice, UN Women, Jun 2012, at 2, available at: http://www.globalprotectioncluster.org/_assets/files/field_protection_clusters/Colombia/files/HLP%20AoR/Colombia_Gender_Sensitive_Transitional_Justice_2012_EN.pdf

638 See Art 13 of the Victims' Law.

639 Art 38-39 of the Victims' Law.

640 Art 114 of the Victims Law. See also above Section 4.2.3. on the issue of victims' prioritization.

641 Further info on the women networks is available at: http://www.peacewomen.org/assets/file/report_1325_colombia.pdf

642 With regard to child marriage, see for example Human Rights Watch, 'This Old Man Can Feed Us, You Will Marry Him: Child and Forced Marriage in South Sudan,' at 42: "Government statistics for 2011 show that only 39 % of primary school students and 30 % of secondary students are female. Girls face several barriers to accessing education, and may be withdrawn from school to marry, to help with household chores or care for smaller children, which is viewed as training for their future roles as wives and mothers. Despite lack of accurate statistics, it is also believed that teenage pregnancy and sexual harassment by teachers and the community affects girls' ability to stay in school." This report is available at: http://www.hrw.org/sites/default/files/reports/southSudan0313_forinsertWebVersion_0.pdf

With regard to child labour, see for example A Latif, Alarming Situation of Education in Pakistan (UNESCO, Press International Reports Grassroots stories) which states that "[A]ccording to UNICEF, 17.6 per cent of Pakistani children are working and supporting their families. Indeed, children working as domestic help are a common phenomenon in Pakistan, and this sector employs more girls than boys." It is available at: http://www.unesco.org/education/efa/known_sharing/grassroots_stories/pakistan_2.shtml

643 Ibid. "The situation is especially alarming in rural areas due to social and cultural obstacles. One of the most deplorable aspects is that in some places, particularly northern tribal areas, the education of girls is strictly prohibited on religious grounds. This is a gross misinterpretation of Islam, the dominant religion in Pakistan (96 % of the population), which like all religions urges men and women to acquire education."

644 See Human Rights Watch, 'How Come You Allow Little Girls to Get Married? Child Marriage in Yemen', (Dec 2011) at 36, where it states that "[T]he majority of the women we interviewed could not read or write. Some had never attended school while others left school after two or three years of basic education. Almost all of those who had attended school were forced to leave their education to get married."

Concerning people with disabilities, there are common barriers that limit their access to justice and, therefore, reparations.⁶⁴⁵ People with disabilities have expressed their concern about the fact that reparation processes do not properly reach and include them. In Liberia for example, persons with disabilities have explicitly asked for individual reparation including a monthly compensation and the establishment of academic and vocational schools to assist those with disability caused by conflict.⁶⁴⁶ In Sierra Leone, it has been reported that over half of all disabled respondents cannot read, write or count. Equally striking, 12% of respondents with severe or very severe disabilities did not believe that education was useful (compared to less than 3.4% of non-disabled respondents) and more than double the number of non-disabled people (22.9%) thought that education would improve their chances of getting a job compared to persons with disabilities (10.5%).⁶⁴⁷ This highlights once again their particular vulnerability, which creates a number of additional challenges in resorting to reparations mechanisms.

As highlighted above, certain categories of crimes and certain categories of victims may be excluded from a reparations process. Educating those in charge of reparations processes, investigation of crimes and the victims and their communities may assist in diminishing the stigma attached to certain crimes and certain categories of victims. Prioritisation and administrative support to certain victims is also essential. Finally, procedural amendments may provide the legal framework ensuring that all victims are included in a reparations process. In order to include reparations for all education-related violations and all education-related victims, the relevant procedures may need to be adapted. It is therefore necessary to be aware of some of the legal obstacles, including procedural obstacles, which may hinder victims' participation.

4.2.2 Assessing the Requirement for Reparations

Once victims have been recognised as such and have entered the process, there are still requirements for the award of reparations which must be assessed. As explained in Section 2, the victim must have suffered harm and it must have been caused by the violation in question. While these legal requirements are clear, they raise a number of practical issues, in particular regarding the burden of proof and the quantification of harm.

4.2.2.1 Evidentiary Standards

It is very difficult, if not impossible, to prove certain types of education-related violations, in particular when a lot of time has passed since the occurrence of the crime. This is particularly problematic for certain categories of crimes, such as crimes of a sexual nature or torture. Therefore, in order for victims to obtain reparations, high evidentiary standards have often been adapted or lowered. In certain circumstances, the burden of proof has even been reversed.

In Argentina, the national reparations programme took account of the fact that human rights violations took place under clandestine conditions and that there was a considerable time gap between the violation and the application for reparations. Potential beneficiaries had to submit applications, comprised of a standard form with supporting evidence.⁶⁴⁸ However, the burden of proof was simplified for relatives claiming benefits for deceased persons. While a certificate of death still had to be presented, the burden of proving the circumstances of the death was placed with the government.

645 See for example, Australian Human Rights Commission, 'Access to Justice in the Criminal Justice System for people with Disabilities' (Issues Paper, Apr 2013) at 5, where it states that "negative attitudes and assumptions about people with disability often resulting in people with disability being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings." It is available at: <http://www.humanrights.gov.au/sites/default/files/document/publication/Access%20to%20Justice%20in%20the%20Criminal%20System%20for%20People%20With%20Disability%20-%20Issues%20Paper%20April%202013.pdf>

646 Information on the situation of Liberian persons with disabilities is available at: <http://newliberian.com/?p=882>

647 M Kett, 'Skills development for youth living with disabilities in four developing countries' (Background paper prepared for the Education for All Global Monitoring Report, 2012) at 10, available at: <http://unesdoc.unesco.org/images/0021/002178/217882e.pdf>

648 For the requirement regarding the applications, see Secretary of Human Rights, Dirección Nacional de Asuntos Jurídicos en Materia de Derechos Humanos, available at: <http://www.derhuman.jus.gov.ar/leyes.html>.

The burden of proof can also be alleviated by the application of the principle of ‘good faith’. This is the case in Colombia for example, where the Victims’ Law states that it is sufficient for the victim to ‘summarily’ prove the damage by any legally accepted means to be considered a victim.⁶⁴⁹ In instances where investigations involve crimes of sexual violence, the Victims’ Law identifies specific evidentiary rules to be applied by the judge, particularly with respect to determining consent.⁶⁵⁰ Furthermore, the credibility, character or alleged promiscuity of a victim cannot be inferred⁶⁵¹ from prior or subsequent conduct, and the judge is not permitted to admit evidence of prior sexual conduct.⁶⁵¹

In Peru, the RUV Regulation provides that information presented to the CVR by alleged victims is considered a declaration under oath and that its veracity is presumed.⁶⁵² Evidence to the contrary can then be admitted to rebut this presumption.⁶⁵³ Further, the Regulation establishes that documentary evidence will be sought in order to certify any purported human rights violations and that special attention will be given to the existence of claims filed before the establishment of the reparations programme or made public at the time the events took place.⁶⁵⁴ If such information cannot be obtained, sworn declarations will be requested from witnesses (at least one of whom must be a civil or ecclesiastical authority) and this testimony must correspond with those given by the victim or family members requesting enrolment into the register.⁶⁵⁵ If neither method is possible, then cases can be established through certain corroborative data. In cases where it is impossible to obtain direct evidence, the unit in charge of assessing that evidence can organise meetings *in situ* with the communities or groups affected and conduct interviews with family members or people who knew the victim, in order to confirm the information and affirm the facts with a reasonable degree of certainty.

This ‘victim-friendly’ approach adopted at the domestic level by governments dealing with a large number of potential beneficiaries has also been embraced at the international level. In particular, in relation to education-related violations, the UNCC established that reparations could be obtained if the claimants could:

- provide sufficient evidence to substantiate their claim;
- show that the loss in question was of value; and
- show that the losses in question were incurred or expenses accrued as a direct result of Iraq’s unlawful occupation of Kuwait.⁶⁵⁶

However, claimants were not required to prove the culpability of the Iraqi state for the annexation of Kuwait as this was deemed to have been determined by the UNSC.⁶⁵⁷ Nevertheless, claimants were still responsible to submit those “documents and other evidence which demonstrate *satisfactorily* that a particular claim or group of claims is eligible for compensation”.⁶⁵⁸ Whether the evidence was satisfactory or not was determined in a flexible

649 Art 5 of the Victims’ Law.

650 Art 38 of the Victims’ Law which states that consent cannot be inferred from: silence or lack of resistance; any words or conduct of the victim when the victim was unable to give voluntary and genuine consent; or words or conduct of a victim made under force, threat of force or coercion, or in an environment of coercion which undermined the victim’s ability to give voluntary and genuine consent.

651 Art 38(4)-(5) of the Victims’ Law.

652 Art 5 of the RUV Regulation.

653 Art 5 of the RUV Regulation.

654 Art 11 to 28 of the RUV Regulation refer to the types of victims (for example, victims of forced disappearance, torture or sexual violation) and establish the definition, criteria and required documentation to prove the violation in question. It is significant that the RUV Regulation states in some of these Articles that if there is no direct evidence, an evaluation of the context of violence that corresponds to the date and place where the violation took place will be made, as well as of information from other cases that took place in the same place and timeframe, in accordance with the conditions of Article 10 of the RUV Regulation.

655 Ibid.

656 See Section 3 at 3.1.3.1.

657 H van Houtte, H Das and B Delmartino, ‘The United Nations Compensation Commission’, in P de Greiff (ed), *The Handbook of Reparations* (OUP, Oxford, 2006), at 346.

658 Art 35 (1) UNCC Governing Council, *Provisional Rules for Claims Procedure*, Doc No S/AC.26/1992/10 (26 Jun 1992).

way. For example, an associate professor of biochemistry made a claim to the UNCC seeking US \$69,204 for “the loss of teaching materials” affirming that these were the foundation of a textbook he intended to write for medical students (regarding which he had already been in contact with a publisher).⁶⁵⁹ The claimant also sought US \$103,206 for “the loss of unpublished research material” which would have generated additional publications and enhanced his professional standing.⁶⁶⁰ The UNCC found that “there is no evidence of a commercial value for the lost teaching and research materials”, but nonetheless awarding US \$5,000. Moreover, “[t]aking account of the claimant’s professional qualifications, the effect of the loss of teaching and unpublished research materials as well as the fact that the claimant was unable to find employment for five years, the Panel also finds that the claimant suffered damage to his career and recommends an award of USD 50,000 for this loss”.⁶⁶¹

Similarly, in its decision on the principles and procedures to apply to reparations in the Lubanga case, the ICC has clarified that

At trial, the prosecution must establish the relevant facts to the criminal standard, namely beyond a reasonable doubt. Given the fundamentally different nature of these reparations proceedings, a *less exacting* standard should apply. Several factors are of significance in determining the appropriate standard of proof at this stage, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence. This particular problem has been recognised by a number of sources, including Rule 94(1) of the Rules, which provides that victims’ requests for reparations shall contain, to the extent possible, any relevant supporting documentation, including names and addresses of witnesses.⁶⁶²

The ICC has concluded that the standard of ‘a balance of probabilities’ is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person.

In some specific cases, no evidence at all may actually be required. When reparations are awarded through the TFV, a fully flexible approach to determining factual matters can be adopted, taking into account the extensive and systematic nature of the crimes and the number of victims involved.⁶⁶³ The TFV does not request the victims and the potential beneficiaries of to provide any evidence other than the characterization of the crimes. The characterization of the crimes is undertaken by the organisations running the projects funded by the TFV. These organisations are only invited to explain how and when the intended project area was the scene of war crimes, crimes against humanity and genocide after 1 July 2002, and to describe the procedure that will be used to identify the victims of these crimes.⁶⁶⁴

4.2.2.2 Assessing Causation

Once it is established that the victim suffered harm, the causation link must be assessed. As explained in Section 2, the injury sustained must have been caused by a wrongful act. The standard for assessment of whether a sufficient nexus exists between a wrongful act and a recoverable form of injury is a complex matter. The test of causation determines whether the harm is attributable to the wrongful act, as well as the extent to which the consequences of a wrongful act should be compensated. As already noted, initial harm may lead to further consequential form of injury. For example, if a teacher is killed or seriously injured, then over and above the loss of life or serious injury, then the pupils or students of that teacher will be affected in their education.

659 UNCC Governing Council, *Report and Recommendations Made by the “D1” Panel of Commissioners Concerning Part Two of the Ninth Instalment of Individual Claims for Damages Above US\$100,000 (Category “D” Claims)*, Doc No SI/AC.26/2001/26 (14 Dec 2001) 10.

660 Ibid.

661 Ibid.

662 Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06 (7 Aug 2012) at para 251 ss.

663 Ibid.

664 The application form to submit a proposal to the TFV is available at: http://www.icc-cpi.int/NR/rdonlyres/C1E72EBF-BE02-4510-9A53-08E9929AA51E/283584/EOIQAEnglishtrans11_1435_ENG.pdf

At a domestic level, the issue of causation is contentious and complex, and a comparative law analysis reveals a number of competing tests.⁶⁶⁵ Within a common law context, the issue of causation is generally broached by means of a two stage analysis,⁶⁶⁶ encompassing a test of cause in fact, and then the question of cause in law (the exclusion of remote harm). In other legal systems, however, the courts have not adopted a bifurcated approach to the causal enquiry,⁶⁶⁷ but similar issues are nonetheless incorporated in the analysis.

In terms of the actual assessment of causation, a variety of tests have been used, including:

- causa sine qua non
- adequate causation
- proximate cause

In many legal systems, the *causa sine qua non* theory, otherwise known as the but-for test, is the preliminary filter of factual causation. According to this test, those events without which the resultant harm would not have occurred are to be regarded as conditions of the harm.⁶⁶⁸ While the 'but-for' test is a useful filter for causal assessment, it nonetheless suffers from major drawbacks, in that it can be both overly inclusive and also overly restrictive. It is inherently over-inclusive, tracing back causation historical antecedents, especially in presence of 'domino effects' when events follow and condition each other.⁶⁶⁹ There are also occasions when the results dictated by the test are unhelpful, for instance in the case of multiple sufficient causes.⁶⁷⁰ This has been an issue at an international level.⁶⁷¹ It is a well-established position under customary international law that, in circumstances of concurrent liability where several States or a State and one or more private groups are responsible for international wrongful conduct, any single responsible State is liable to provide full reparation for the damage caused by the wrongful act.⁶⁷² Thus, the position of concurrent causation is tackled head-on by the ILC commentary on the Articles of State Responsibility which maintains that where

...injury is caused by a combination of factors, only one of which is to be ascribed to the responsible state, international practice and the decisions⁶⁷³ of international tribunals do not support the reduction or attenuation of reparation for concurrent causes...

Another theory is that of adequate causation,⁶⁷⁴ which is premised upon the concept that one should distinguish an adequate cause from only incidental or accidental factors of the injury. This approach to causation is that amongst

665 See generally T Honoré, 'Causation and Remoteness of Damage' in A Tunc (ed), *Torts*, Volume 11, *International Encyclopedia of Comparative Law*; H L A Hart and T Honoré, *Causation in the Law* (Oxford, 1985).

666 S Deakin, A Johnston and B Markesinis, *Tort Law* (OUP, Oxford, 2007) at 174-6.

667 In French law, the majority of authors have asserted a unitary conception of causation, thus denying recourse to a two stage test of factual and legal causation. See F H Lawson and B Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* (CUP, Cambridge, 1982) at 107.

668 In English law, see *Barnett v Chelsea* [1969] 1 QB 428. The test of standard of proof is of course an entirely different one. In English law, the claimant must show on the balance of probabilities that 'but for' the act of the defendant, loss or injury would not have been sustained, and this means that full recovery will be made for loss which was more likely than not caused by the defendant; a probability less than that will exclude liability entirely (all or nothing standard).

669 See P Catala and T Weir, 'Delict and Torts: a Study in Parallel' (1965) 39 *Tulane Law Review* 701, at 710.

670 See discussion in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

671 See the critique of the application of the sine qua non approach by the ICJ in *Bosnia-Genocide* case: C McCarthy, 'Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making', in C Ferstman, M Goetz, A Stephens (eds) (Martinus Nijhoff, Leiden, 2009).

672 For example, in the *United States Diplomatic and Consular Staff* case, Iran was required to provide full reparation for the detention of hostages by the students because of its failure to take "all appropriate steps to protect the premises of the mission" for the purposes of the Vienna Convention on Diplomatic Relations. The Court did not consider the possibility that the injury, which was caused in the incident, may have occurred even if Iran had not failed to take appropriate steps to protect the United States personnel and premises (*United States Diplomatic and Consular Staff in Tehran, (Merits)*, ICJ Reports (1980) 3, para 90).

673 ILC Commentary to Article 31 of Articles on State Responsibility, at 93, para 12.

674 This theory was initially developed by German jurists, see L von Bar, *Die Lehre vom Kausalzusammenhange im Rechte, besonders in Strafrechte* (1871).

potential causes, the determining cause of an ultimate event is the factor which departs from the ordinary course of events.⁶⁷⁵ The adequacy theory also has its purpose in establishing a hierarchy between different factors, but its weakness is that it is inherently difficult to determine the notion of normality.

Another approach is enshrined in the standard of ‘proximate cause.’⁶⁷⁶ In the *Lubanga* decision, the ICC indicated that reparations should not be limited to ‘direct’ harm or the ‘immediate effects’ of the crimes, in the case under consideration enlisting and conscripting children under the age of 15 and using them participate actively in the hostilities. It was thus indicated that ‘damage, loss and injury’ forming the basis of the reparation claim must have resulted from the crime within the case.⁶⁷⁷ Therefore, given the limited scope of charges, the criteria of ‘proximate cause’ established by the ICC will lead to the exclusion of the victims of crimes perpetrated by the child-soldiers, who will not be eligible to benefit from the reparations arrangements resulting from the *Lubanga* case.⁶⁷⁸

It is difficult to be prescriptive about the test of causation to be applied in reparations cases. Decision-makers must simply be aware of the features of each test. In many ways, the appropriate approach is context-specific in terms of the reparations programmes in question, the types of injury, and the broader circumstances. The Commentary to the ILC Draft Articles on State Responsibility recognises this point and affirms that “the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation.”⁶⁷⁹ In reality, in international practice, a variety of approaches have been adopted.⁶⁸⁰

There are however pitfalls in not being clear about the test to be applied. The ECtHR has in particular adopted a broad-brush approach to causation. According to the case law of the ECtHR, there must be a ‘direct’⁶⁸¹ and ‘clear’⁶⁸² causal link between the damage suffered by the applicant and the violation of the ECHR, but the Court has never articulated clearly the principles of causation which it uses.⁶⁸³ No general test of causation has been laid down and this has led to uneven results. While some have considered that causation is an important control mechanism,⁶⁸⁴ the Court has sometimes taken a more liberal approach to causality, being prepared to presume that causation existed,⁶⁸⁵ and in others it has even appeared to award compensation whilst admitting that the link of cause and effect was not present.⁶⁸⁶

675 French authors have thus considered that a condition is an adequate cause when it is likely to produce the effect according to the ordinary course of things and in light of the experience of everyday occurrences. See P le Tourneau, *op cit.* para 1716 ; P Malaurie, L Aynès, P Stoffel-Munck, *op cit.* para 92; F Terré, P Simler, Y Lequette, *op cit.* para 860; M Fabre-Magnan, *op cit.* para 46; P Brun, *Responsabilité civile extra-contractuelle*, (2e éd Paris, 2009), at para 227.

676 *Administrative Decision No. II*, United States-Germany Claims Commission, *ibid*; *Dix*, American-Venezuela Commission, 9 RIAA 119 (1902) at 121; *War-Risk Insurance Premium Claims*, 7 RIAA 44 (1923) at 55.

677 See ICC-01/04-01/06-2904 07-08-2012 ‘Decision Establishing the Principles and Procedures to be Applied to Reparations’, at para 247.

678 See the BIICL Seminar Report on the Lubanga Reparations Decision (BIICL, 12 Sep 2012), which is available at: <http://www.biicl.org/events/view/-/id/723/>

679 See Art 31 (10) of the International Law Commission, the Draft Articles on State Responsibility, UN doc A/56/10 Commentaries,

680 In cases of inter-States disputes resolved through international arbitration, each arbitrator “seems to take for granted the notion of causality prevailing in his/her legal system” (see A Gattini, ‘Breach of the Obligation to Prevent and Reparation thereof in the ICJ Genocide Judgment’, in *European Journal of International Law* 18(2007) at 695-713.

681 See eg *Sekanina v Austria* (1994) 17 EHRR 221.

682 See eg *Barberà, Messegué and Jabardo v Spain* (1994) A 285-C.

683 See J L Sharpe, ‘Article 50’, in L-E Pettiti, E Decaux, and P-H Imbert, *La Convention Européenne des Droits de l’Homme* (Paris, 1995) at 816.

684 See M Supperstone, J Goudie, and J Coppel, *Local Authorities and the Human Rights Act* (LexisNexis, Butterworths, 1999) at 26.

685 S Grosz, J Beatson, and P Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, London, 2008) at 6-21. See e.g. *Open Door Counselling and Dublin Well Woman v Ireland* (1993) 15 EHRR 244.

686 *Halford v UK* (1997) 24 EHRR 523: the court found that the stress of which the applicant complained had not been shown to derive from the breach of the Convention right but nonetheless awarded her £10,000 as “just and equitable amount of compensation.” This might be an example of the award of punitive damages.

With regard to educational harm, establishing causation raises a number of specific issues. As already mentioned, establishing causality between a wrongful act and pure financial harm (such as impact on livelihood) is challenging. This applies similarly to other types of educational harm, and particularly so when time has passed since the violation. For example, in the *Lubanga* case, the fact that educational harm suffered by child soldiers has to be assessed years later is problematic. In addition, while it is already difficult to establish a causal link between a violation and education harm, it is even more difficult to establish this link with regard to the long term and ongoing effects of educational harm.⁶⁸⁷

One way of side-stepping such issues is to shift the lens of analysis from the ultimate harm to focus instead on the loss of educational opportunities. This kind of harm has been widely recognised by the international jurisprudence, and the causal analysis is less problematic. In *Campbell Cosans v United Kingdom* for example, the ECtHR found that the violation in question had deprived the victim “of some opportunity to develop his intellectual potential”.⁶⁸⁸ The concept of ‘loss of opportunity’ has been sometimes referred to by IACtHR as part of the aforementioned ‘life plan’. In the case of *The Instituto del Menor Panchito López v Paraguay*, the Court stressed the devastating impact that the lack of access to education has on the victims’ existences as it limits their chances of playing a role in society and fostering their project of life.⁶⁸⁹ Therefore, in the judgment on reparations the Court has imposed on the State the obligation to establish vocational training and a special education programme for former inmates of the centre.⁶⁹⁰

4.2.2.3 Qualifying and Quantifying Harm

As restitution is often not possible, in particular with regard to education-related violations, those awarding reparations must consider the type of harm suffered and quantify it, in order to provide the victim with the appropriate form of reparation. After having established that the harm suffered by the victim was the result of a violation, the harm must be qualified and/or quantified. In order to award an adequate form of reparations, those awarding reparations must consider the type of harm suffered. With regard to education-related violations, this means that the harm suffered might include missed educational opportunity but also the missed opportunities for the longer term.⁶⁹¹ As a result, loss of future earning may be considered for students who have missed out on education and thus not managed to reach their career potentials.

In practice, compensation is the most commonly sought form of reparations to redress harm caused by internationally wrongful acts.⁶⁹² The assessment of that value can still often be a challenge. The issue of quantification of harm for the purposes of compensation is examined below, before considering other forms of reparation. In fact, with regard to education-related violations, compensation is not always an adequate form of reparations. In addition, education as a form of reparation should also be considered for education-related violations but also for other types of violations.

The basic principle applying to quantum in most domestic fora is that of restitution in full (also known as *restitutio in integrum*). It has also been espoused at an international and regional level.⁶⁹³ Restitution in full is not however a self-executing concept and it thus relies upon much subjective evaluation on the part of the decision-maker,

687 On the consequences of educational harm see B O'Malley, 'Education under Attack', (UNESCO, 2010) at 95 ss, which is available at: <http://unesdoc.unesco.org/images/0018/001868/186809e.pdf>

688 *Campbell Cosans v United Kingdom*, Just Satisfaction (22 Mar 1983) para 26, 13 EHRR 441 (1983). See also *T P and K M v United Kingdom*, Grand Chamber (10 May 2001) para 115, 34 EHRR 42.

689 *Case of the Juvenile Reeducation Institute v Paraguay*, Preliminary Objections, Merits, Reparations and Costs (Judgment of 2 Sep 2004) IACtHR Ser C No 112.

690 Ibid at para 321.

691 *Case of Villagran Morales et al*, IACtHR Ser C No 63 (19 Nov 1999) at para 191

692 In its commentary on the Articles on State Responsibility, the ILC stated that “of the various forms of reparation, compensation is perhaps the most commonly sought in international practice”.

693 See Section 2 on the application of this notion by the PCIJ in *Factory at Chorzow*. For application of this principle by the ECtHR, see *Ringeisen v Austria* (1979-1980) 1 EHRR 504 (just satisfaction); *Papamichalopoulos v Greece* (1996) 21 EHRR 439.

particularly in terms of non-pecuniary loss.⁶⁹⁴ Over and above the acceptance of the principle of restitution in full, it is important to determine how the individual rules for determining quantum are conceived.⁶⁹⁵ The difficulty with many international and regional courts is that the rules are not spelled out.⁶⁹⁶ In many fora, it seems that the courts merely prefer to be award compensation on an equitable basis.⁶⁹⁷

Even though restitution in full remains the privileged form of reparation, very often in the aftermath of gross IHRL and IHL violations, ‘chasing’ restitution can generate what has been defined as the ‘basic paradox at the heart of reparation’, namely the conflict between a promised return to the situation the victim was in before the violation occurred (*status quo ante*) and the knowledge that such a situation could not, in any case, be restored if concerning, for example, a violation of the right to life.⁶⁹⁸ Hence, in applying the principle of the restitution in full in practice, the aim of the provision of compensation under the general framework of international law is to cover any financially assessable damage, insofar as it is established.⁶⁹⁹ Monetary awards may be made for a wide variety of injuries, including physical harm, pecuniary loss and moral harm.

However, as discussed in Section 2, reparation should not only restore a person to the ‘status quo ante’ but it should put the victim in the situation he or she would be in if the violation had not occurred in the first place. This means that any compensation must also cover any future loss of earnings, damages to one’s life project and generally all the consequences that hamper the fulfilment of the victim as a human being.

4.2.2.4 Repairing Pecuniary Loss

In terms of pecuniary loss, a variety of methods of quantification have been applied. At the national level, for instance, Chile developed an innovative system of pensions.⁷⁰⁰ In Argentina, economic reparations were calculated by reference to the salary of the highest ranking civil servant.⁷⁰¹

With regard to education-related violations, compensation may be sought for the financial costs sustained. Before the UNCC, individual claimants have sought compensation not just for the loss of their income but also for the loss of other employment benefits, including allowances for school fees.⁷⁰² The UNCC determined that these “[b]enefits and allowances, such as ... education allowances ... which were often part of employees’ remuneration packages, also should be reflected in the compensation payable”.⁷⁰³ However, given the expedited nature of the UNCC claims procedure and the varied nature of the evidence presented to support claims for employment benefits, the amounts of compensation awarded were eventually only based on a multiplication of each claimant’s monthly salary.⁷⁰⁴

694 D Shelton, *Remedies in International Human Rights Law* (Oxford, 1999) at 261. See generally in domestic systems, P Pierre and F Leduc, *La Réparation Intégrale en Europe* (Larcier, 2012).

695 The quantum is the amount deserved.

696 The ECtHR even refused a request to provide clarification of a damages award in one case: *Allenet de Ribemont v France* (1996) 22 EHRR 582 (interpretation).

697 This is the case of the ECtHR in terms of just satisfaction. See generally D Fairgrieve, ‘The Human Rights Act 1998, Damages and Tort Law’ [2001] Public Law 695.

698 N Roht-Arriaza, ‘Reparations in the Aftermath of Repression and Mass Violence’, in E Stover and H M Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (CUP, Cambridge, 2004) at 122.

699 See Art 36 of the Articles on State Responsibility supra n 37.

700 Law 19,123 (Feb 1992) provides for a monthly pension for families of the victims of human rights violations or political violence identified by the Truth Commission’s report. See Art 17, available at: http://www.ddhh.gov.cl/filesapp/Ley_19123.pdf

701 In Argentina different levels of economic reparations were available depending on the harm suffered (such as arbitrary detention, injuries sustained during detention or death). See Art 4 Act 24,043, available at: <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/442/texact.htm>

702 See Section 3.

703 UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to US\$100,000 (Category “C” Claims)*, Doc No S/AC.26/1994/3 (21 Dec 1994) 190.

704 Ibid at 192–3.

Children or young adults who have lost educational opportunities due to a wrongful act may also consider that the loss of an educational opportunity has had an impact on their livelihood, and may thus then claim a future loss of earning (over and above the direct harm). This approach has been applied in domestic systems in cases of wrongful breach of educational opportunities.⁷⁰⁵ There are also some examples in international practice. In *Gomez Paquiyauri Brothers v Peru*, the IACtHR took into account future loss of earning in its compensation award because the victims, who were students at the time of the events in question, “would have entered the job market actively once they finished studying.”⁷⁰⁶

4.2.2.5 Repairing Non-Pecuniary Loss

Another head of loss in respect of which difficulties can arise is that of non-pecuniary loss. Certain domestic courts have on occasion acted cautiously in making monetary awards for non-pecuniary loss or ‘moral harm’, but awards are now made for a broad spectrum of injury. From an international perspective, it should be noted however that whilst the award of moral damage (or ‘non-pecuniary loss’) is excluded under the ILC Articles on State Responsibility,⁷⁰⁷ the UN Basic Principles and Guidelines specifically provides for compensation for moral damage, specifically mentioning education as a potentially lost opportunity.⁷⁰⁸ As mentioned in Section 3, this has already been applied at a regional level, with the ECtHR being particularly liberal in this respect.⁷⁰⁹ It has awarded compensation for a wide variety of moral damage, covering elements as diverse as “feelings of frustration and helplessness”,⁷¹⁰ and free-standing “moral damage”,⁷¹¹ as well as cases of serious mental distress.⁷¹² Nevertheless, associating a figure to such harm is not simple and further difficulties have arisen in translating the ECtHR awards for non-pecuniary loss into domestic systems.⁷¹³

As discussed in Section 3, the IACtHR has also considered the damages to the life plan of the victim and his/her self-fulfilment. The Court has stressed that reparation should recognise the individual as more than a mere agent of economic production and should acknowledge needs and aspirations which go beyond purely economic measurement of projection.⁷¹⁴ Consistently, the Court has often used the right to education, rather than monetary compensation, as an instrument to redress moral damages caused by the impairment of one’s project of life.⁷¹⁵

705 In France, liability has been imposed in a series of cases for schools’ failure to teach children the core subjects of the national curriculum, on the basis that this violates the education legislation, see *Conseil d’Etat*, 27 Jan 1988, Giraud, [1988] *Recueil des Décisions du Conseil d’Etat* 39.

706 *Caso de los Hermanos Gomez Paquiyauri v Peru* (8 Jul 2004) IACtHR Ser C No 110, at para 206.

707 Financially assessable damage excludes moral damage, defined as “the injuries caused by a violation of rights not associated with actual damage to property or persons and recognized as the subject matter of satisfaction”, see ILC Draft Articles on State Responsibility at 99.

708 See Principle 20 (b) of the UN Basic Principles and Guidelines and Section 2.

709 See Section 3 at 3.2.2. See generally C McCarthy, ‘Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making’, in C Ferstman, M Goetz, A Stephens (eds) (Martinus Nijhoff, Leiden, 2009); D Fairgrieve, ‘*The Human Rights Act 1998, Damages and Tort Law*’ [2001] Public Law 695.

710 *H v UK* (1991) 13 EHRR 449 (just satisfaction).

711 See eg *H v UK* (1991) 13 EHRR 449 (just satisfaction). See detailed analysis of the ECtHR case law in D.Fairgrieve ‘*The Human Rights Act 1998, Damages and Tort Law*’ [2001] Public Law 695-716.

712 For instance “bouts of depression” - *Estima Jorge v Portugal*, 1998-II 762, para 52.

713 See generally on this Law Commission and Scottish Law Commission, *Damages under the Human Rights Act 1998* (Law Com No 266, 2000; Scottish Law Com No 180, 2000). For a recent example of the difficulties, see the UK Supreme Court judgment in *R (on the application of Faulkner) v The Secretary of State for Justice* [2013] UKSC 23.

714 See in particular the opinions of Judges Cançado-Trindade and Abreu-Burelly. See C McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP, Cambridge, 2012) at 122.

715 See Cantoral Benavides Case, Judgment of 3 Dec 2001, IACtHR Ser C No 88 at para 80.

4.3 AWARDING REPARATIONS

Once it is established that the victim has suffered a form of harm which was caused by the wrongful act, reparations must be awarded. As mentioned in Section 2, reparations may take different forms with the preferred form of reparations being restitution. However, it is often not possible to provide restitution and other forms of reparations must then be provided. Compensation is the most sought after form of reparations but there are other types of reparations that must also be considered by those awarding reparations, including rehabilitation, satisfaction and guarantees of non-repetition.

With regard to education-related violations, forms of reparation other than compensation may be of greater relevance for victims than purely monetary redress.⁷¹⁶ Rehabilitation may often be an adequate form of reparations which may be awarded in combination with others. Education itself may often be particularly appropriate to repair other forms of violations committed during situations of insecurity and armed conflict. Scholarships, teachers' training, changes in curriculum, human rights training for civil servants, etc., may all be educational forms of reparations which may be awarded to guarantee the non-repetition of conflicts.

In addition, the wishes of the victims of education-related violations should also be taken into account. While the primary principle of restitution may call for a loss of education to be restored through the provision of education opportunities, the victim may not have the will to resume schooling or studying.

4.3.1 Types and Extent of Reparations Provided

As already mentioned, in lieu of restitution, compensation is often the mean chosen to repair education-related violations. In Canada, in order to redress the human rights abuses which were committed in the residential schools,⁷¹⁷ which Indigenous children were forced to attend, the government agreed with the Assembly of First Nations to pay a lump sum.⁷¹⁸ That commitment became a formal Settlement Agreement which provided for an individual Common Experience Payment.⁷¹⁹ While former students had to apply to receive compensation, there was also an advanced payment schemes put in place for former students who had reached the age of 65. This is a typical example where victims were no longer able to resume schooling. There was not only a need to find an alternative form of reparations but there was also a sense of urgency in providing a form of reparations in a swift manner to victims who were reaching an advanced age.

In the Canadian context, individual compensation was complemented by the provision of funding for a healing foundation and commemoration, as well as for establishment of a TRC. A public apology was also given by the Prime Minister on behalf of the government and of the leaders of all political parties represented in the Canadian House of Commons.⁷²⁰ Therefore, a combination of different reparations was provided to the Indigenous victims of education-related violations because of the residential school system.

Reparation for education-related violations may be provided through the establishment of an educational facility or the creation of a scholarship fund for affected victims. Such forward looking measures carry long-term benefits which are absent from purely compensatory awards. For example, in the case of *Gomez Paquiyauri v Peru*, the IACtHR said that

The State must also officially *name a school* in the province of El Callao after Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, in a public ceremony and in the presence of the next of kin of the victims.

716 As the IACtHR stated "reparations are not exhausted by compensation for pecuniary and non-pecuniary damage, other forms of reparation must be added." See *Case of the Plan de Sánchez Massacre v Guatemala*, IACtHR Judgment of 19 Nov 19, Reparations and Costs, 2004, at para 93.

717 Many Indigenous children who attended residential schools were abused physically, including sexually. They were all forcefully removed from their families and forbidden to practice their languages and cultures.

718 This political decision was announced on 23 Nov 2005.

719 Payment was based on the number of years a student resided in a school. It amounts to CAD\$ 10,000 for the first year attended and then \$3,000 for every year thereafter. Claims for physical and sexual abuse can be compensated up to \$275,000.

720 Prime Minister Stephen Harper apology was given on 11 Jun 2008.

This will contribute to enhancing public awareness of the need to avoid repetition of injurious acts such as those that occurred in the instant case and to ensure remembrance of the victims. (Moreover) as a form of satisfaction, the State must establish a scholarship up to university level education, in favor of Nora Emely Gómez Peralta, which will also include educational materials, study texts, uniforms, and school utensils.⁷²¹

This approach has been adopted through the concept of ‘life project’ developed by the IACtHR. When considering the ‘life project’ of a victim, the Court has generally provided for an educational scholarship or a vocational training fund.⁷²² Educational provisions have also been awarded by the IACtHR to honor the memory of the victim. For instance, in the case of *Molina Theissen v Guatemala*, the Court ordered the government to:

- create a ‘Hall of the Rights of the Child: Marco Antonio Molina Theissen’;
- establish a radio programme on the national radio station to discuss issues pertaining to children’s rights;
- dedicate a national day to the missing children who were victims of the domestic armed conflict in Guatemala;
- grant a scholarship for children’s development and, specifically, one named after Marco Antonio Molina Theissen to provide access to a career in engineering for low-income youths. This was because the victim was about to conclude his third year of secondary school and therefore was only two years away from obtaining his high school diploma, after which he planned to study civil engineering.⁷²³

In Peru, the reparation programme provides improved access to adequate education (including at the primary, secondary, technical and/or university level) to victims whose education was disrupted by its armed conflict, including children of direct and indirect victims and children who were part of self-defence committees.⁷²⁴ Article 19 of the Regulation of the PIR Law sets out the following forms of education reparation:

- exemption from the payment of tuition fees;
- the right to admission in educational institutions;
- dining and housing services related to study programmes;
- implementation of a full scholarships programme;
- education for adults;
- access and restitution of right to regular basic education; and
- access to opportunities of appropriate labour qualification.⁷²⁵

In Argentina, the Never Again Report recommended that laws be passed which “make the teaching of the defense and diffusion of human rights obligatory in state educational establishments, whether they be civilian, military or police.”⁷²⁶ Its Law on Education provides that the national curriculum should include education about the

721 *Caso de los Hermanos Gomez Paquiyauri v Peru* (Judgment of 8 Jul 2004) IACtHR Ser C No 110, at paras 236-7(emphasis added).

722 See *Cantoral Benevides v Peru*, Merits, Reparations and Costs, IACtHR Ser C No 88. The victim had been incarcerated for a period of four and a half years when he was a 20-year-old student. During his period of incarceration he was subjected to torture and other forms of ill-treatment. With regard to these events, and bearing in mind the particularly young age of the victim, the Court noted that violations inflicted upon him had, “[D]ramatically altered the course that [the victim’s] life would otherwise have taken. The pain and suffering that those events inflicted upon him prevented the victim from fulfilling his vocation, aspirations and potential, particularly with regard to his preparation for his chosen career and his work as a professional. All this was highly detrimental to his “life project.” In consequence, the Court stated that: “the best way to restore [the victim’s] life plan is for the State to provide him with a fellowship [...] at a learning institution of recognized academic excellence”.

723 See *Case of Molina Theissen v Guatemala*, Reparations and Costs, (Judgment of 3 Jul 2004), IACtHR Ser C No 108, at para 76 (d, e, f, g).

724 Arts 17 and 18 of Supreme Decree No 015-2006-JUS, available at: <http://proyectocotabambas.files.wordpress.com/2012/04/ds015-2006-jus.pdf>

725 Ibid.

726 Comisión Nacional sobre la Desaparación de Personas (CONADEP), Informe ‘Nunca Más’, available at: <http://www.derechoshumanos.net/lesahumanidad/informes/argentina/informe-de-la-CONADEP-Nunca-mas.htm>

historical and political processes that led to the sources of the conflict.⁷²⁷ An earlier piece of legislation provided that the school calendar marks a national remembrance day for truth and justice in order to generate opposition to authoritarianism and respect for human rights in the national consciousness.⁷²⁸

As demonstrated by the aforementioned examples, education may be used as a form of reparations for education-related violations. In addition, education may be used as a form of reparations to redress violations that are not related to education. In particular, education can serve to guarantee non-repetition. Guarantees of non-repetition are reforms that seek to prevent future abuses. They can consist of a strengthening of the judiciary or the adoption of new legislative measures. They can also consist of other measures that promote human rights, including human rights education in order to instruct individuals about their rights and what constitutes violations of those rights. In addition to recognising past violations, teaching about the past is also crucial to prevent the repetition of crimes.⁷²⁹

4.3.2 Factors Affecting the Type and Extent of the Reparations Provided

The forms of reparations which may be awarded depend on a number of factors, including the need of the victims, the harm suffered but also the type of reparations process selected.

For example, as it emerges from the above examples, the various forms of reparations can be awarded to victims collectively or to each victim individually. The type of reparations process selected has an impact on whether reparations will be collective or individual in nature. If the process is individualised, the reparations process may not be apt to determine whether and to whom a collective form of reparation, such as the establishment of a school or the provision of educational services to a community, should be awarded.⁷³⁰ Nevertheless, the need to ensure the efficacy (and maximum impact) of the reparations process tends to favour a collective form of reparation. These may include educational reparation such as the establishment of a school or the training of teachers in a community subjected to substantial violations. The reason is that many more victims are likely to benefit from these forms of initiatives rather than from individual payments.

4.3.3 The Issue of Resources

As already mentioned, the resources available have an impact on the decision to establish a reparations process in the first place. They also have an impact on the implementation of the reparations process, including the categories of victims and/or claimants included and the categories of harm to be addressed. For example, limited resources may lead to focusing redress on those who have suffered the gravest forms of harm. However, prioritisation may also be based on criteria unrelated to the gravity of harm suffered by victims, such as the vulnerability of the victims.

Section 2 above explains that the purpose of reparation is to “so far as possible, wipe out all the consequences of the illegal act, and re-establish the situation which would, in all probability, have existed if that act had not been committed”.⁷³¹ However, in practice, this will usually not be possible. Almost inevitably, there will be insufficient

⁷²⁷ Act 26, 206 (enacted in Dec 2006) available at: <http://www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/123542/norma.htm>.

⁷²⁸ Act 25, 633, Art 2, enacted in August 2002, states that “[T]he Federal Council of Culture and Education, the Ministry of National Education and the educational authorities of the various jurisdictions agree on the inclusion in the respective academic calendar of conferences alluding to a National Day instituted by the previous article, to consolidate the collective memory of society, generate feelings opposed to any kind of authoritarianism and sponsor the permanent defense of the rule of law and full respect for human rights.” It is available at: <http://www1.hcdn.gov.ar/dependencias/educacion/leyes/25633.html>.

⁷²⁹ Organisations such as the Auschwitz Institute for Peace and Reconciliation develops programmes in order prevent genocide. That organisation, for example, conducts education seminars on the sites of former concentration camps. Providing human rights training in places where violations occur adds another dimension to the education received therewith and may, as a result, be even more effective.

⁷³⁰ See Section 4 at 4.2.3.

⁷³¹ *Factory at Chorzów (Germany v Poland)*, Merits, 1928, PCIJ Ser A No 17, at 47.

resources for reparations awards to provide redress for the entirety of the harm that victims have suffered or even to provide redress to every category of victim.

As a result, those implementing reparations processes must consider the prioritisation of resources carefully and establish the criteria required for the categories of potentially eligible beneficiaries. A delicate balance must be reached in order not to defeat the constructive purpose of the reparations processes and not to exacerbate the negative experiences of the victims. Of course, different victims or groups of victims may have diverging or conflicting interests to protect with regard to the form and scope of a reparations award. Some may wish to see priority given to redressing certain forms of harm or to the harm suffered by a particular sub-set of victims. Others may wish to see a reparations award give priority to those victims who are most vulnerable or those with the greatest need. Some victims may also favour particular forms of reparations like compensation, rehabilitation or vocational training.

In the case of child-soldiers, given the complexity of the feelings which accompany their reintegration within the society, recent studies have shown that offering lump-sum payments as reparations tends to be problematic and confusing for the children and for those who may have been their victims. For example in Liberia, where girls received \$300 as part of the demobilization programme, the payment of compensation had a negative impact on their reintegration into their families.⁷³² The provision of compensation for having been a child soldier may be seen as a paradox by their communities, as these children are receiving payment after having joined armed forces.

A possible route to surmount the financial obstacle is to identify the perpetrator responsible for the violations committed and attempt to render them liable to provide reparations for the victims. This process is used in judicial proceedings involving a State, which is then held responsible for redressing the victims who suffered from violations or omissions committed by it and/or its agents. This mechanism may also be used in criminal processes, despite the fact that the main object of these types of proceedings is to determine the culpability of the alleged perpetrator. In fact, it is possible to incorporate the victims' civil claims in the criminal proceedings in certain jurisdictions.⁷³³

Although it is possible to render individual perpetrators responsible for the provision of reparations, they often lack the necessary financial means to pay. When assets are missing, courts may still encourage individual perpetrators to provide a symbolic form of reparation. In the *Lubanga* case, although the perpetrator was indigent, the ICC suggested "a voluntary apology to individual victims or to groups of victims, on a public or confidential basis".⁷³⁴ However, as purely symbolic forms of reparations only are often not satisfactory or sufficient to repair the harm suffered, external donors may fill this financial gap and allow reparations processes to be established.

Another route to provide reparations despite a lack of financial resources is the prioritization of resources. Some modes of prioritization techniques are presented below.

4.3.3.1 Prioritisation Techniques

As resources are an issue for reparations processes involving a large number of victims and/or claimants, prioritisation techniques may be drawn from mass claims processes. The prioritisation of resources may be based on the categories of victims, for example on their status with regard to vulnerability. Prioritisation based on vulnerability emphasises the personal characteristics of victims, such as age, disability or gender, which may make it particularly difficult for them to cope with the harm they have suffered and re-establish their lives. Prioritisation may also be based on the needs of victims. It then assesses the ability of a specific category of victims to provide for themselves and their families in light of these needs. This includes the possibility of excluding victims who already benefit from another form of aid.

732 See C Aptel and V Ladisch, 'Through a New Lens: A Child-Sensitive Approach to Transitional Justice', (ICTJ, Aug 2011) at 29, available at: <http://ictj.org/sites/default/files/ICTJ-Children-Through-New-Lens-Aptel-Ladisch-2011-English.pdf>

733 See for example the French 'partie civile' model, which incorporate the victims' civil claims in the criminal proceedings through the so-called 'adhesion'.

734 See ICC 'Decision establishing the principles and procedures to be applied to reparations', supra n 10, at para 241.

In addition to an approach based on vulnerability and/or needs, prioritization can also be undertaken in accordance with the harm suffered or in relation to the effectiveness of the reparations in repairing the harm cause. These various techniques are discussed below.

Prioritisation Based on the Vulnerability of the Victims

Resources may be deployed in favour of the most vulnerable victims. As some victims are generally better able to cope with their experiences than others, it is common practice for reparations programmes established at the national level to expressly prioritize the latter.

In Peru, the CVR identified vulnerable groups among the many potential beneficiaries of its reparations programme. Those regarded as the most vulnerable, and in respect of whom it proposed resources to be prioritized, included older persons, orphans, widows and persons with disabilities.⁷³⁵ Similarly, in Guatemala, the Historical Clarification Commission suggested in its reparations recommendations that resources should be prioritised, *inter alia*, according to the economic position of beneficiaries, giving priority to older persons, widows, minors, and those in a situation of abandonment.⁷³⁶ Prioritizing resources in favour of the most vulnerable was also a practice commonly adopted in the post-Soviet reparations programmes. For instance, the *Ukrainian Law on the Rehabilitation of Victims of Political Repression*, afforded special rights to rural populations, pensioners and disabled persons.⁷³⁷ In Liberia, the Truth and Reconciliation Commission (TRC) also recommended the prioritisation of limited resources based on vulnerability. In recognition of the particular vulnerability of women affected by the conflict it suggested

... a reparation program for the empowerment of women devastated by the civil war ...to advance their academic and economic pursuits in the form of soft microcredit economic programs, small enterprise and marketing programs with education on small business management for sustainability, including free education for [women victims] and children from primary to secondary as well tertiary education.⁷³⁸

Trauma counselling and medical services were also suggested in respect of female victims of sexual violence, as well as scholarships for their children.⁷³⁹ Vulnerability was also a criterion according to which resources for reparations were prioritised in Rwanda. Special welfare provisions were made for survivors of the 1994 genocide, and amongst these, the Constitution gives priority to “the disabled, the indigent and the elderly as well as other vulnerable groups”.⁷⁴⁰

In Sierra Leone, the TRC recommended the identification of primary beneficiaries of the SLRP in accordance with the following groups of victims: amputees, war wounded civilians, war widows, orphans, and victims of sexual abuse.⁷⁴¹ Similarly, the so called ‘Year One Project’ singled out vulnerable children entitled to receive reimbursement of school fees, uniforms and books as a form of reparation for the harm suffered. These included children who were amputees, war wounded, victims of sexual violence and children who suffered abduction or forced conscription, as well as children who had a parent who is an amputee, disabled, war wounded or suffered sexual violence. These children had still to be eligible for primary or middle school education.⁷⁴²

735 Final Report of the CVR in Peru (27 Aug 2003) Volume IX, Chapter 2.2, at 156, available in Spanish at: <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20IX/2.2.%20PIR.pdf>

736 Guatemala Historic Clarification Commission, ‘Guatemala: Memoria del Silencio’ Conclusions & Recommendations (25 Feb 1999) Recommendations Chapter III, para 14, available in Spanish at http://srhrl.aaas.org/projects/human_rights/guatemala/ceh/sp/anexo3_1.pdf

737 Law N° 962-XII, available in Ukrainian (with English Summary), available at: <http://zakon.rada.gov.ua/cgi-bin/laws/annot.cgi?nreg=962-12>

738 Liberia TRC Final Report (11 Dec 2009) available at: <http://trcofliberia.org/reports/final-report>
See also Vol II: Consolidated Final Report, at 379, available at: http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf

739 Ibid.

740 Art 14 Constitution of the Republic of Rwanda, adopted on 26 May 2003, Official Gazette, special edition of 4 Jun 2003, at 119a, available at <http://www.mhc.gov.rw/services/the-constitution-of-the-republic-of-rwanda-of-june-2003.html>.

741 See the webpage of the IOM at: <http://www.iom.int/cms/en/sites/iom/home/what-we-do/reparation-programmes/support-for-the-sierra-leone-reparations.html>

742 See M Suma and C Correa, *supra* n 541.

In Liberia, the TRC recommended a wide range of mental health, physical health, economic, educational, and infrastructural services to both individual and community victims of the conflict. It stressed the need to prioritise two vulnerable groups, namely women and children.

In Colombia, the Victims' Law provides that women who are victims of dispossession or forced abandonment of property shall be granted priority in both the judicial and administrative steps of the land restitution procedure.⁷⁴³ Also, women are given priority application benefits for social security, education, child benefit plans and other services.⁷⁴⁴ The Victims' Law has also recognised child-victims as a particularly vulnerable group whose needs shall be prioritized. Child-victims who have lost one or both parents as a result of a violation of IHRL or IHL during the relevant period (including those victims of child conscription) are entitled to full compensation. In the case of child conscription, the child victims must have demobilized from the illegal armed group while still minors in order to receive compensation.⁷⁴⁵

In East Timor, the Commission for Reception, Truth and Reconciliation (CAVR) has recommended providing reparations for the 'most vulnerable', including "those who live in extreme poverty, are disabled, or, who [...] are shunned or discriminated against by their communities". The victims belonging to those categories should be prioritised and granted "access to basic services and opportunities provided to the general community".⁷⁴⁶

In summary, since the limited availability of resources is a factor common to many post-conflict or post-repression reparations programmes, such programmes often prioritize resources in one way or another to ensure that reparations are distributed in a manner which is both equitable and effective. Vulnerability is one factor commonly used in this context. As a criterion for prioritization, vulnerability is context specific. In some circumstances, it may be that living in a rural community, with poor communications and infrastructure, renders a particular group of victims vulnerable. In other situations it may be gender, disability or social stigmatization as a result of the crime a victim experienced which render a victim particularly vulnerable.

Prioritization based on the Victims' Needs

The other approach to prioritisation based on the victims can be made in accordance with their needs. The focus is then on victims who suffered the greatest levels of social and economic deprivation and are the least able to fend for themselves in the aftermath of situations of insecurity or armed conflict. This approach is not common practice but it has been adopted in some circumstances. For example, the Liberian TRC recommended that "reparation for members of the disadvantaged communities should be prioritised considering their inability to equally compete under normal circumstances without affirmative action", in light of the impact the conflict had on them.⁷⁴⁷

In Rwanda, the *Fonds d'Assistance aux Rescapés du Génocide* (FARG) provides for reparations programmes to groups of particularly vulnerable victims but it also prioritises further within these groups on the basis of their needs.⁷⁴⁸ Beneficiary groups include orphans, surviving spouses, elderly people whose families have been killed, people deprived of property, shelter, persons with disabilities, persons with incurable illnesses and children of victimised parents with incurable diseases or disabilities.

The needs of the victims may also be assessed on the basis of the assistance they have already received. This factor is taken into account to avoid duplicating programmes for redress by concentrating on those victims who have not yet received any form of assistance. This approach was adopted in Sierra Leone for example, where its TRC stated that reparations programmes should exclude from their ambit "those children who were already benefiting from

⁷⁴³ Art 114 Victims' Law.

⁷⁴⁴ Ibid, Art 117.

⁷⁴⁵ Ibid, Art 190.

⁷⁴⁶ 'Chega..!', The report of the Commission for Reception, Truth and Reconciliation in East Timor (CAVR), 2005, Part 11: Recommendations, available at: <http://www.cavr-timorleste.org/cheqaFiles/finalReportEng/11-Recommendations.pdf>

⁷⁴⁷ See Liberia TRC, Vol 3 Appendices Title VIII: Accounting for the 'Less Fortunate' and their Psychosocial Needs, at 1-5, available at: http://trcofliberia.org/resources/reports/final/volume-three-8_layout-1.pdf

⁷⁴⁸ The FARG was created by Law No 2/1998 (as modified by Law No 69/2008).

education and training as part of ongoing Disarmament, Demobilization and Reintegration (DDR) programmes.”⁷⁴⁹

However, there are difficulties with regard to the prioritization of resources on the basis of needs. For those victims who have suffered the gravest forms of harm as a result of the crime in question it may appear inequitable for resources to be prioritised in favour of victims who were less severely affected by the crime in question, merely because they have more significant needs based on their situation before the violation occurred.

Prioritisation Based on the Harm and/or the Unlawful Act

Prioritisation may also be based on the nature and the severity of the harm suffered and/or the unlawful act itself.

In various national legal systems, in particular that of the United States, it is common in mass claims litigation to adopt a so-called ‘*cy pres* remedy’, which provides reparations to those victims who suffered the most severe injuries.⁷⁵⁰

In Guatemala, the Historical Clarification Commission recommended that reparations should be prioritised, *inter alia*, according to the nature and severity of the violation suffered by victims. The same approach was adopted in the German-sponsored post-war reparations schemes. The *Federal Indemnification Act* (BEG) accorded lifetime pensions for ‘victims of national-socialist persecution’, meaning persecution on grounds of political opinion, race, faith or belief.⁷⁵¹ In addition, compensation was limited to certain forms of harm, namely for loss of life, deprivation of liberty, loss of limbs, health, property, career and economic advancement.⁷⁵² In East Timor, eligible victims were “direct survivors of human rights violations such as rape, imprisonment and torture” and “those who suffered indirectly through the abduction, disappearance or killing of family members.”⁷⁵³

The nature of the act and the harm caused to victims has also been adopted or proposed as a criterion for prioritisation in various reparations initiatives in Africa. The Liberian TRC recommended collective reparations “for [the] communities most victimized by years of conflict”.⁷⁵⁴ Similarly, in Morocco, the Equality and Reconciliation Commission identified eleven regions where particularly grave violence had occurred which it proposed should benefit from specialized reparations programmes.⁷⁵⁵ In Colombia, the reparations programme includes the distribution of lump-sum awards, ranging from \$5,000 to \$9,000, among surviving victims and the family members of the killed and disappeared. The amount for torture, physical, and psychological injury not leading to permanent impairment; crimes against sexual liberty and integrity; and illegal recruitment of minors is approximately \$6,750. The sum for assassination, forced disappearance, and injuries that led to permanent impairment is \$9,000.⁷⁵⁶

749 Report of the Sierra Leone TRC, Vol II, Chapter IV, para 178.

750 The purpose of the *Cy Pres* remedy was described by the US Federal Court of Appeals in *Re Agent Orange*, where the Court stated that where a settlement fund cannot “satisfy the claimed losses of every class member”, it is ‘equitable’ to limit the provision of redress to “those with the most severe injuries” or to “give as much help as possible to those who are in most need of assistance”. See *re Agent Orange* 818 F.2d. 145, 158, (2nd Cir 1987). See also *re Holocaust Victim Assets* 424 F.3d 132, 141, No 10 (2nd Cir 2005). See generally C McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP, Cambridge, 2012).

751 *Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* (BEG), in force 1 Oct 1953, amended 2009. For translated excerpts of the original law and the amended law of 1965, see P de Greiff (ed), *The Handbook of Reparations* (OUP, Oxford, 2006) at 898 ss.

752 Sections 15, 28, 43 and 51 BEG 1956. See P De Greiff (ed), *The Handbook of Reparations* (Oxford, OUP, 2006), at 898 ss and 951 ss.

753 ‘Chega...!’, The report of the Commission for Reception, Truth and Reconciliation in East Timor (CAVR), 2005, Part 11: Recommendations, available at: <http://www.cavr-timorleste.org/chegaFiles/finalReportEng/11-Recommendations.pdf>

754 Liberia TRC Final Report (11 Dec 2009) available at: <http://trcofliberia.org/reports/final-report>
See Volume 2, the Consolidated final report, available at: http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf

755 Morocco, Equity and Reconciliation Commission, Final Report, Vol 3: Justice and Reparation for Victims, Dec 2005, at 33.

756 See C Aptel and V Ladisch, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (ICTJ Aug 2011) at 29, available at: <http://ictj.org/sites/default/files/ICTJ-Children-Through-New-Lens-Aptel-Ladisch-2011-English.pdf>

The UNCC also adopted a harm-based approach providing compensation to individuals who suffered from certain identified forms of harm that had passed a particular threshold level of gravity.⁷⁵⁷

Prioritisation Based on the Impact of Reparations

Another (and somewhat more controversial) method of prioritisation takes into account the impact that the reparations will have or are likely to have.⁷⁵⁸ In contrast to an approach which seeks to use limited resources to alleviate the harm suffered by those who have been most gravely affected by a crime, an impact-maximization approach to victim redress would instead support those forms of redress that would have the greatest impact amongst the beneficiary class as a whole.

Strategies of impact-maximization influence many reparations programmes at the national level, particularly those where resource constraints are especially acute. Nonetheless, such strategies can also prove controversial, not least because those victims who have been most gravely affected, whose injuries may tend to require resource-intensive forms of redress, may feel overlooked by processes designed with a view to their overall impact.⁷⁵⁹

With regard to the impact of reparations, educational forms of reparations must be considered: they have the potential to reach many victims, have a sustainable impact and, notably, may also be cost effective in the long run. This is for example the case of changes in curricula and associated teachers' training. This form of reparations may avoid the recurrence of instances of insecurity or even armed conflict. Providing human rights training to civil servants and even to students and communities may also be a form of reparations which may be cost effective and benefit numerous individuals. Likewise, awarding vocational trainings to former child soldiers who missed out on formal education can assist their personal rehabilitation while at the same time creating a qualified labour force.

States which emerge from situations of insecurity or armed conflict are likely to lack resources to repair fully the harm caused to victims of education-related violations. The aforementioned techniques offer some guidance as to the way in which prioritization can be undertaken. In this regard, the fact that educational forms of reparations may be cost-effective and reach numerous beneficiaries warrants specific consideration.

Once a decision on the type and extent of the reparations award has been made, it must reach the victim, with its actual implementation being verified and monitored.

4.4 VERIFICATION AND MONITORING REPARATIONS AWARDS

In some contexts, the fact that reparations must reach the victim may be a challenge. This can be the case where there are pre-existing structural gender inequalities, where the law limits women's right to property for example.⁷⁶⁰ When receiving compensation, women may be forced to give the money to male relatives.⁷⁶¹ In case of child-victims, compensation may be given to the parents, who may not use it for the benefit of the child. According to the ICTJ

in Nepal, when the claimant is the child of a disappeared or deceased person, the chief district officer (CDO) deposits the amount in the child's name under the legal guardianship of a close relative. The child can access the money once he or she turns 16. However, in an emergency, the child can withdraw the money earlier with approval from the CDO.⁷⁶²

⁷⁵⁷ See for example Decision 4, UNCC Governing Council, S/AC.26/1991/3, 23 Oct 1991.

⁷⁵⁸ See C McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP, Cambridge, 2012) Chapter VIII.

⁷⁵⁹ Ibid.

⁷⁶⁰ A Bernstein, 'Tort Theory, Microfinance, and Gender Equality Convergent in Pecuniary Reparations', in R Rubio Marin (ed) *The Gender of Reparations, Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP, Cambridge, 2009) at 291-324.

⁷⁶¹ R Rubio-Marín, 'Introduction', in R Rubio-Marín (ed) *What Happened to the Women?* (Social Science Research Council, New York, 2006) at 20-47.

⁷⁶² See C Aptel and V Ladisch, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (ICTJ Aug 2011) available at: <http://ictj.org/sites/default/files/ICTJ-Children-Through-New-Lens-Aptel-Ladisch-2011-English.pdf>

With regard to former child-soldiers, it may be indelicate to award financial reparations to them as this may be perceived by the community as a form of reward for the crimes they committed.⁷⁶³ In such cases, reparations may be awarded to the community as a whole instead.

In practice, arrangements for the verification and monitoring of reparations awards are crucial to ensure the success of reparations programmes.

With regard to court-awarded reparations, verification and monitoring arrangements ensure that a reparations scheme is implemented in accordance with the terms and parameters of the award laid down by the Court in its reparations order. Similarly, with regard to administrative reparations programmes, these arrangements seek to ensure that the implementation of awards adheres to the legislation and rules providing the mandate of the programme in question. Specific arrangements for verification and monitoring generally concern:

- the beneficiaries,
- the form and scope of reparations provided to individuals or groups,
- the manner in which a specific programme (such as the establishment of a school or scholarship scheme) is implemented, and
- the administration of a reparations scheme to deter and detect fraud, corruption or financial mismanagement.

Without adequate verification and monitoring arrangements, there is a risk that those who are intended to benefit from a reparations award may not, in fact, benefit. Moreover, implementation issues may cause tension and acrimony among victims. Most importantly, the potential of a reparations award to redress the harm with which it is concerned may go unfulfilled. For example, in respect of ongoing forms of reparation such as the establishment of a school or educational institution, failure to ensure that the institution has adequate resources, training and staff, may severely undermine the role and impact of the award.

Monitoring and verification arrangements vary significantly between different reparations programmes. In broad terms, there are two different forms of reparations verification and monitoring arrangements:

- judicial arrangements, and
- administrative arrangements.

4.4.1 Judicial Verification and Monitoring

Judicial verification and monitoring arrangements are adopted much less often in practice than administrative ones. Typically, they involve judicial oversight and, if necessary, review of compliance with a reparations award. Such oversight may be limited to a macro-level, with the court intervening if a dispute arises or, where appropriate, on its own motion. Equally, judicial verification and monitoring can occur at the micro-level, with the court determining whether specific persons or groups are eligible to benefit from a reparations award or in determining whether a particular form of reparation (such as a civic education initiative concerning the violations for which reparation was granted) has, in fact, been adequately implemented.

Judicial verification and monitoring of reparations awards (or settlement agreements as part of which victims obtain reparations) have been adopted at the international and national level for those mechanisms which provide binding decisions. This sub-Section focuses on the international verification and monitoring.⁷⁶⁴

⁷⁶³ Ibid at 30, where it states that “[P]articularly with former child soldiers, community members may feel jealousy or resentment and may even perceive that such children are being rewarded for having taken part in hostilities.”

⁷⁶⁴ It should be noted though, that the reparation process envisaged by the ICC in its decision on the Lubanga case has neither been established nor implemented yet and therefore it is not possible to further discuss about its monitoring and verification. See Section 3.

Amongst the regional human rights bodies, the IACtHR plays a prominent role in dealing with education-related violations perpetrated in situations of insecurity and armed conflict. Therefore the current paragraph will focus in particular on the IACtHR's system for monitoring and verifying the implementation of reparations awards.⁷⁶⁵

Alongside the jurisdiction and merits/reparations phase of proceedings before the IACtHR, the Court will commonly hold proceedings for monitoring and verifying compliance with the reparations award made by the Court.⁷⁶⁶ This includes all aspects of reparations, including the payment of compensation, the establishment of scholarships or educational institutions, measures of satisfaction such as the publication of a record of past events or guarantees of non-repetition such as civic education initiatives. The IACtHR has often reiterated that “owing to the final and non-appealable nature of the judgments of the Court, as established in Article 67 of the ACHR they must be complied with fully and promptly by the State”.⁷⁶⁷

In practice, the IACtHR monitors compliance with reparations arrangements at both the macro and micro levels. At the macro level, in cases where the Court has established very complex arrangements for reparations (for instance involving hundreds of victim beneficiaries or ongoing reparations programmes involving the establishment of infrastructure in a community including educational institutions), the Court has considered the extent to which the State Party has fulfilled its obligations in relation to the implementation of the reparations order as a whole, at a somewhat more abstract level.

Equally, however, the Court is also willing to consider the implementation of reparations awards at a micro level where appropriate. For instance, it will consider whether certain persons have been excluded from compensation payments who should have been included in the reparations scheme.⁷⁶⁸ It may also consider whether the manner in which a State Party has published the Court's judgment on the facts of a case (by way of public education in relation to a violation) are sufficient to meet the terms of what the Court has ordered.⁷⁶⁹

In order to enable the Court to fulfil its task of monitoring compliance with its reparations orders, including in respect of ongoing programmes such as the establishment of scholarship programmes or the establishment of educational or medical institutions in victimized communities, State parties must also assist with various procedural obligations. Notable features of the IACtHR's framework for monitoring the implementation of reparations awards include the following:

- **Reporting Obligations:** The Court has held that as a result of its compulsory jurisdiction and the obligation of States to implement the orders of the court adequately and promptly, States are, as a corollary, under a duty “to advise the Court of the steps taken comply with the measures ordered by the Court in [the Court's] decisions”.⁷⁷⁰ There is therefore, in effect a reporting obligation to facilitate the monitoring and verification of the implementation of reparations awards.
- **Structural Remedies for non-compliance:** Often the Court may be confronted with a situation of large scale or mass human rights violations and, as a result, make reparations awards in a series of cases in respect of a particular state. This has occurred, for instance, in Colombia and Guatemala as a result of the civil unrest in that jurisdiction. Where a series of reparations awards against a state are outstanding, structural problems sometimes emerge (for instance, failure properly to fund ongoing reparations programmes). Where these structural problems emerge in relation to the implementation of reparations orders the Court will group cases together and conduct monitoring proceedings on the element of the award in relation to which

765 The ECtHR and the African Court have been briefly introduced and discussed above in Section 3.

766 The Court has repeated this on many occasions. See for example *Apitz Barbera v Venezuela*, Monitoring Compliance, 23 Nov 2012, Order of the IACtHR, para 2; *Salvador Chiriboga v Ecuador*, Monitoring Compliance, 24 Oct 2012, Order of the IACtHR, para 1. Moreover, the IACtHR has consistently adopted the position that “one of the inherent attributes of the jurisdictional functions of the court is to monitor compliance with its decisions”.

767 See *Apitz Barbera v Venezuela*.

768 See *Baena Ricardo et al v Panama*, Monitoring and Compliance, 28 Jun 2012, Order of the IACtHR.

769 See *Salvador Chiriboga v Ecuador*, Monitoring Compliance, 24 Oct 2012, Order of the IACtHR.

770 Ibid.

problems have emerged. This was the approach adopted recently, for instance, in a series of Colombian cases where victims raised concerns about the manner in which Colombia was implementing ongoing reparations programmes concerned with medical and psychological assistance for victims.⁷⁷¹

- **Interparty Cooperation:** Where issues arise between the State and beneficiaries as to the proper implementation of a reparations award the Court will sometimes encourage or facilitate dialogue between groups of victims and the State responsible for the implementation of the reparations award in order to ensure compliance with the terms of the order.
- **Hearings on Monitoring and Compliance:** Victims/beneficiaries, communities and the IACommHR (as well, of course, as the State responsible for providing reparations) may all be heard by the Court in relation to the issues arising in relation to the implementation of reparations. A variety of controversies have, for instance, arisen in relation to the implementation of ongoing programmes for medical and psychological assistance to victims identified by the Court in a series of Colombian cases which have come before it. At a private hearing before the Court in 2010 the parties and the state agreed to engage in a “process of rapprochement” and to present a “timetable of actions as well as substantive proposals in order to resolve the dispute as to implementation between the parties”.⁷⁷²
- **Sanctions:** the IACtHR has no power to impose sanctions on states for failure to comply with a reparations order. It may, however, determine whether, in view of the non-compliance of a state with the reparations ordered, it is appropriate to inform the Organization of American States Assembly of States Parties which does have discretion to adopt a range of measures in respect of a state which fails to comply with a reparations award. Most recently, the IACtHR adopted this procedure in respect of Venezuela as a result of its non-compliance with the reparations decision of the Court in the case of *Apitz Barbera et al v Venezuela*.⁷⁷³

With regard to the ECtHR judgments, it is the Committee of Ministers which monitors compliance. In doing so, it is assisted by the Department for the Execution of Judgments which works with respondent States to ensure the effective execution of the Court’s ruling.⁷⁷⁴ After being issued, the Court’s judgments are transmitted to the Committee of Ministers, and this terminates officially the role of the ECHR. If the judgment has found the State responsible of the alleged violation, the Committee ‘invites’ the state to report on the measures it has taken to address the violations found by the Court. The Committee revisits the case at regular intervals to assess state compliance with the rulings of the Court.⁷⁷⁵

Within the African human rights system, the judgments of the ACtHPR are binding and States are obliged to ‘guarantee’ their execution.⁷⁷⁶ Compliance will be monitored by the Court itself and any failure by a state to implement a judgment may be referred to the AU Assembly, which will decide on the action to be taken.⁷⁷⁷ The Assembly has been granted the power to impose sanctions, for example economic sanctions, on any non-compliant State. However, this is likely to be invoked only in exceptional circumstances.

4.4.2 Administrative Verification and Monitoring

In contrast to judicial processes for monitoring and verification, where judicial oversight and, if necessary, court proceedings play a central role, administrative monitoring and verification relies on bureaucratic processes. These

771 19 *Tradesmen v Colombia* (and seven other cases), Monitoring and Compliance (8 Feb 2012) Order of the President of the IACtHR.

772 19 *Tradesmen v Colombia* (and seven other cases), Monitoring and Compliance (8 Feb 2012) Order of the President of the IACtHR.

773 *Barbera et al v Venezuela*, Monitoring and Compliance (23 Nov 2012) Order of the IACtHR.

774 In accordance with Art 46 of the Convention as amended by Protocol No 14 (CETS No 194).

775 The Committee meets four times a year with private deliberations; although, the agendas for the meetings are made public as well as its decisions.

776 Art 30 Protocol to the ACHPR.

777 Art 31 Protocol.

bureaucratic processes are conducted by civil servants or programme officers to ensure that a reparations award is promptly and adequately implemented. Such an arrangement may arise where a court has established a reparations scheme and devolved all responsibility for implementation to an administrative process. It may also arise where, for instance, a reparations programme is established at the national level without any judicial involvement or oversight. Many national reparations schemes operate in this manner.

Where large numbers of claims must be processed, judicial proceedings may be impractical and time-consuming.⁷⁷⁸ Mass claims processes, such as the UNCC, have utilised a number of very effective administrative procedures and technologies in order to verify claims. Matching, as well as grouping and sampling are examples of administrative verification techniques which are presented below.

4.4.2.1 Matching

Matching (or ‘database matching’) involves the creation of two databases, with one set of data relating to those persons who claim to be eligible as beneficiaries (the ‘application database’), while the other set relates to objectively verified data that those administering a claim have managed to compile (the ‘evidence database’). Claims in the application database are then matched and verified against the facts and evidence contained in the evidence database. This is often done using information technology with claims being reviewed by an administrative officer. This procedure has obvious application in relation to mass compensation claims (of the type with which the UNCC was concerned). It is also potentially applicable in respect of ongoing reparations programmes such as educational foundations or scholarships. If, for instance, an educational and training scheme were to be established in respect of former child soldiers, the numbers of potential claimants may run into the thousands. It may be impracticable for a court or tribunal to consider eligibility individually, meaning that administrative verification techniques are necessary. Matching technology of the type used by the UNCC or the claims resolution process established following the Holocaust Victims Assets litigation, would enable such claims to be processed efficiently (for instance by reference potentially to records held by intergovernmental organizations in relation to child soldiers) but with a degree of fairness, even if not equivalent to that which is available through judicial proceedings.

4.4.2.2 Grouping and Sampling

This technique involves the grouping of claims with similar evidential characteristics together. For instance, in respect of those claiming to have formerly been child soldiers, different applicants may have similar forms of evidence. Some may have records or documentation from international organizations such as UNICEF (which provides a high degree of assurance that a claim is well founded). Others may have military identification documents or insignia of some form which may provide a lesser degree of proof. Sampling claims enables decisions to be made about the weight to be attached to particular forms of evidence and the claims of those relying on them in order for a claim to be verified. Sampling leads to the setting of threshold standards so that certain forms of evidence may be taken as providing conclusive proof as to eligibility. This approach was adopted, for instance, in the German Forced Labour Compensation Programme where processing team leaders were required to identify the types of evidence which were sufficient to establish eligibility.⁷⁷⁹

Other methods of administrative process may also be adopted in practice to monitor and verify the implementation of reparations awards. It is very common for partner organizations (national NGOs and intergovernmental organizations) to be involved in the implementation of a reparations award on the ground. This is likely to be in the case in relation to an educational or training programme which will need some form of ongoing, on the ground, presence to deliver educational or training services to beneficiaries. A number of administrative arrangements are essential in order to monitor the work of such groups.

⁷⁷⁸ Although the verification and monitoring techniques adopted by the IACtHR often relate to awards applicable to many hundreds of victims.

⁷⁷⁹ H Holtzmann and E Kristjansdottir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (OUP, Oxford, 2007) at 252.

First, it is standard practice, as part of administrative reparations monitoring arrangements for a sufficiently clear and detailed memorandum of understanding to be agreed between the institution responsible for administering a reparations scheme and the NGO or IGO responsible for delivering it. The UN Voluntary Fund for Victims of Torture and the UN Fund to End Violence against Women, both of which are organizations which used funds for the assistance of victims (usually through partner organizations), establish memoranda of understandings between each side setting out clearly the services that are expected to be provided, the funds available for these services, the groups who are expected to benefit (in line with the fund's respective remit) as well as the specific requirements of monitoring, reporting and verification.

Second, those responsible for implementing reparations awards are placed under quite specific reporting requirements, and both a financial/audit and 'narrative' report must be produced. As a consequence, the implementing partner may be required to collate information on matters including (i) the identity and personal information in relation to beneficiaries; (ii) a personal history file detailing the background of the beneficiary and the assistance provided through the reparations award; (iii) the location and costs of the assistance provided (where relevant); (iv) the harm that the beneficiary has suffered; and (v) the outcome of the assistance for the beneficiary and the benchmark against which this is assessed; (vi) budgetary information regarding the money spent on the administration of awards, financial statements and invoices regarding the purchase of goods and services. In addition to information in relation to each victim the UN voluntary funds generally require that organisations shall provide disaggregated data on numbers of victims assisted under the following categories: a. gender; b. age; c. country of origin; d. legal status (nationals/ refugees/asylum-seekers); e. type of assistance provided (medical, psychological, legal, social, economic, etc.).

In addition, projects with funding above a certain level (in and around US\$50,000) must be audited by an independent financial auditor. Requirements are laid down as to the nature of this auditing process. A certificate as to the audit must be provided by the partner organization alongside the annual narrative reports.

Alongside stringent reporting requirements, of the kind detailed above, site visits (both with and without notice) are carried out on partner organizations to ensure the accuracy of the reports as well as, more generally, to review the implementation of the agreed assistance programme. The UN Voluntary Fund for Victims of Torture notes that "[a]ll Organizations are expected to fully cooperate with the officials undertaking the visit. A confidential report on this evaluation will be prepared for consideration by the members of the Board at their annual session".⁷⁸⁰ As part of the site visit, the trust funds may consult appropriate professionals in order to assess the impact and quality of the work being undertaken.

4.4.3 The Possibility of a Hybrid Approach

Judicial and administrative approaches to verification and monitoring are not necessarily mutually exclusive. A Court may issue a reparations order while, at the same time, devolving responsibility for monitoring arrangements to an administrative organization established for this purpose or even to a partner organization active in the field. Such arrangements are possible, for instance, under the reparations arrangements in place under the International Criminal Court's regime of victim redress.

In its *Decision Establishing the Principles and Procedures to be applied to Reparations* in *Prosecutor v Lubanga*, the Trial Chamber left arrangements as to the implementation, monitoring and verification of reparations awards largely to the discretion of the TFV, with the Court retaining only a very general oversight function.⁷⁸¹ Beyond this, however, the TFV has a good deal of discretion as to the arrangements it adopts for verification, particularly where collective reparations awards are approved by the Court and implemented in practice.

780 Guidelines of the Fund, UN Voluntary Fund for Victims of Torture, para 82, available at: <http://www.ohchr.org/Documents/Issues/UNVFTguidelines2011EN.pdf>

781 In accordance with Art 64 (2) and (3) (a) of the Statute, which is concerned with the adoption of such procedures as are necessary to enable the fair and expeditious conduct of the proceedings.

Administrative and judicial approaches to monitoring and verification can operate alongside one another. Inevitably no single model of monitoring and verification is suitable for all reparations processes. The comparative practice identified above does illustrate the possibilities available.

CONCLUSIONS

With regard to victims' participation, those establishing and implementing reparations processes must ensure that all categories of crimes are listed in the reparations process. There is a risk that certain crimes will not be included if they are not listed in an exhaustive manner. For example, if the lists are 'gender-blind', they may overlook the violations suffered by women and girls.⁷⁸² While victims of rape have been prioritized by a number of transitional justice mechanisms, other forms of sexual violence are often omitted, including sexual slavery.⁷⁸³ They must also ensure that all categories of victims, including those that are often neglected such as child victims, people affected by disabilities and refugees, are listed as potential beneficiaries in the reparations process. In order to identify the various categories of victims, a mapping process is often crucial.

In addition to addressing adequately the types of crimes and the categories of victims, they must also ensure that victims are duly and promptly informed of the reparations through adequate outreach methods. Victims must also have physical access to the place of registration, if registration is required to enter a reparations process. There is a risk in operating solely centralised procedures as victims often live in remote areas and lack of resources may thus prevent them from reaching the offices designated for the registration. In the case of women, they are often overburdened with family-related obligations which render travelling long distances very challenging. For example, in Timor-Leste, single mothers, including victims of sexual violence and war widows, are expected to travel to an organization once a month in order to receive funds convertible in scholarships for their school-aged children, and access other services (such as counseling, peer support, livelihood skills training) and access microcredit for their livelihood activities.⁷⁸⁴

This Section also underlined the importance of considering education in assessing and quantifying the harm suffered by the victims. This emerges especially in relation to the calculation of non-pecuniary damages, as demonstrated by the work of the IACtHR. The assessment and quantification of the harm has clearly an impact on the prioritisation of the resources available, which are often limited (or entirely lacking) when emerging from situations of insecurity and armed conflict. Thus resources are often prioritised in favour of the most vulnerable victims, in order to recognise that the harm caused by serious violations can affect the victims in different ways and to different extents.

Finally, with regard to the issues of verification and monitoring, the Section has demonstrated their importance in terms of ensuring efficiency of reparation processes. Without adequate verification and monitoring there is a real risk that those who are intended to benefit from a reparations award may not receive what they are legitimately entitled to. Moreover, problems in implementation may exacerbate tension among the victims and generate conflict within the community. As this Section has discussed, both judicial and administrative approaches to monitoring and verification present advantages and shortcomings. Therefore, this Report concludes that they are not necessarily mutually exclusive and that a hybrid approach may be considered.

782 See D Mazurana and K Carlson, 'Children and Reparation: Past Lessons and New Directions', Innocenti Working Paper No 2010-08 (UNICEF Innocenti Research Centre, 2010) at 10ss. The authors identify the categories of crimes which have triggered the right to reparation for children, including girls.

783 M Urban Walker, 'Gender and Violence in Focus' in R Rubio Marin (ed) 'The Gender of Reparations, Unsettling Sexual Hierarchies While Redressing Human Rights Violations' (CUP, Cambridge, 2009) at 18-63.

784 G Wandita, K Campbell-Nelson, and M Leong Pereira, 'Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims, in R Rubio-Marin (ed) *What Happened to the Women?* (Social Science Research Council, New York, 2006) at 284 ss.

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SUMMARY AND RECOMMENDATIONS

Repairing education-related violations and using education as a means of reparation has a positive impact on reconstruction and reconciliation, and represents a valuable tool to prevent future insecurity and armed conflict. Drawing on the findings made in the Report, this Section reiterates that education can, and should, play an essential role in assisting long-term peace building processes and preventing recurrence of conflicts.

Education has a key role both in conflict prevention and in the reconstruction of post-conflict societies. It warrants high priority in both humanitarian response and in post-conflict reconstruction because every education system has the potential to exacerbate the conditions that contribute to violent conflict, as well as the potential to address them.⁷⁸⁵

In addition, it concludes the Report by providing a summary of some of the key issues analysed in the previous Sections. Given the fact that reparations are context-dependent, it is not possible to identify procedures which should be followed by all those establishing and implementing reparations. Instead the Report offers a number of general recommendations. These are directed at all of those who are (or may be) involved in the reparations discourse, including both the victims of education-related violations entitled to receive redress for the harm suffered and those who bear the duty to provide reparations for those violations.

5.1 REPORT SUMMARY

The idea that the victim of a wrongful act should be adequately and promptly redressed is a well-established principle of justice. The concept of reparation was first developed within domestic systems, before being adopted at the international level, in particular for disputes among States. Under certain circumstances, individuals, including those who suffered educational harm as a result of a violation of international law, can now expect to obtain reparation.

As stated in Section 2, the rules of reparations are governed by the principle of the primacy of restitution, the principle of proportionality, and the principle of causality. States bear the primary responsibility to redress violations of international law, whether they result from the actions of their agents or can be attributed to them.

It emerges also from the analysis conducted that IHRL and IHL violations, including education-related violations, are often the consequences of the actions of NSAs. Examples from Mali, Pakistan and many other States affected by insecurity and armed conflict show that NSAs regularly target students, educational staff and educational facilities. Despite this fact, in accordance with the current international law framework, NSAs have no direct obligation to provide redress for these types of crimes. Thus the obligation is on the State where the actions of the NSA are attributable to it and where the State has not acted with due diligence to prevent the harm caused by the NSA's actions.

The obligation of States to redress the harm caused through a violation of international law is mirrored within the context of the right to reparation. The Report recognises that such right cannot yet be regarded as part of international customary law, due to the lack of a consolidated practice. However, from the legal analysis undertaken

785 P Buckland, *Reshaping the Future: Education and Postconflict Reconstruction* (World Bank Publications, 2005) at 1.

it is possible to affirm that the right to reparation is well established within international treaty law, especially under the IHRL framework, both at the international and at the regional level.

The breadth of the existing provisions on reparation has been crystallised in the UN Basic Principles and Guidelines, which identify the following remedies: equal and effective access to justice; adequate, effective and prompt reparation for the harm suffered; and access to relevant information concerning violations and reparation mechanisms. Moreover, the UN Basic Principles and Guidelines specify the forms of reparation available for the victims of IHRL and IHL violations, namely:

- restitution,⁷⁸⁶
- compensation,⁷⁸⁷
- rehabilitation,⁷⁸⁸
- satisfaction,⁷⁸⁹ and
- guarantees of non-repetition.⁷⁹⁰

As demonstrated in Section 2, all of these forms, either singularly or in combination, can be used to redress education-related violations. Also, in many instances, education itself has been used as a means to repair other violations, for example through the establishment of scholarships, the construction of schools and other educational buildings, changes in the national curriculum, community education, and vocational training for members of the police and other State's agents.

In addition to the way in which education-related violations can be repaired or in which education can be used as a tool to redress victims, the Report identifies a new approach to reparation, termed 'transformative reparations'. The idea behind the notion of transformative reparations is that, in order to fully remedy a violation, the root causes behind it must also be addressed and corrected. For example, if women and girls are the target of IHRL or IHL violations because of a structural inequality, those awarding reparations should take into account and address the pre-existing, underlying discriminatory policies, including a possible lack of access to education, which victimised women and girls. Currently, the IACtHR and the ICC are the only mechanisms which have considered the application of transformative reparations.

The Report clarifies the distinction between direct and indirect victims, and between individual and collective victims.⁷⁹¹ It also identifies the categories of victims which can be classified as more vulnerable and therefore more

786 For example restitution can be awarded by reinstating a victim's student status and education staff status as happened respectively in Peru, upon recommendation of the TRC, and in Chile, where a civil servant in an educational post was dismissed by the repressive regime

787 The ECtHR has awarded compensation for education-related violation in the case *Catan and others v Moldova and Russia*, see *supra* n 80.

788 In the case of *Gómez Palomino v Peru*, the Inter-American Court of Human Rights found that the victim's next of kin had suffered psychological and physical harm which deeply affected their 'life project'. To redress the damages adequately, the Court awarded the victim's siblings an adult education programme to complete their primary and secondary school studies, in order to increase their chances of employment.

789 For instance in South Africa, the reparations programme recommended by the TRC included the "reform of education at the national level" and the introduction of a human rights curriculum into the formal education system; In Argentina, the law on education states that the national curriculum must include the respect for human rights and information on the historical and political processes that broke the constitutional and information on the historical and political processes that broke the constitutional order and led to the establishment of State terrorism. Similarly the report of the Peruvian TRC stressed the need of educational reform to promote human rights, democratic values and the development of a 'peace curriculum'. UNICEF Report on Children and Truth Commissions (UNICEF Innocenti Research Centre in cooperation with the ICTJ, Aug 2010) at 61-3.

790 According to Art 145 of the Colombian Victims and Land Restitution Law, the Ministry of Education must also develop programmes to encourage citizenship, reconciliation and *non-repetition*.

791 The reconstruction of an educational facility can be seen as a collective form of reparation. This approach was adopted in Suriname. For more examples see J Paulson, '(Re)Creating Education in Post-conflict Contexts Transitional Justice, Education, and Human Development' (ICTJ Nov 2009) at 19, available at: <http://ictj.org/sites/default/files/ICTJ-Development-Education-FullPaper-2009-English.pdf>

prone to education-related violations. With regard to those victims, rehabilitation and other measures capable of preventing further marginalisation and stigmatisation may be awarded (perhaps in combination with other forms of reparations) to achieve social reintegration and reconciliation.⁷⁹²

When awarding reparations, attention should also be paid to the loss of opportunities suffered by the victim and to the damages to his or her 'life project'.⁷⁹³ The concept of 'life project' refers to the individual circumstances of each victim including their calling in life, their ambitions and their potential. Damage to the 'life project' then relates to the victim's inability to fully realise him or herself.⁷⁹⁴ Clearly, education is central to this concept as it plays a prominent role in the development of every individual.

Section 3, which is devoted to the mechanisms that may award reparations to victims of education-related violations, maintains that IHRL is the most comprehensive and developed framework as it contains the largest number of relevant mechanisms. Reparations can be awarded through various IHRL mechanisms, which can be separated into two broad categories:

- Judicial or quasi-judicial mechanisms, and
- Non-judicial mechanisms.

Judicial and quasi-judicial mechanisms generally require that the victims and their legal representatives abide by the procedures in place (where access to them is available) and take all the necessary steps. As the Report highlights, victims tend to have easier access to more non-judicial mechanisms.

When a functioning judicial mechanism is in place, victims of education-related violations may obtain reparations. As the Report highlights, the regional human rights courts have so far played the most prominent role in redressing victims of education-related violations. However, the fact that access to justice is limited for victims in the Inter-American and African systems is disappointing. The current backlog of cases at the ECtHR, as well as the general limited enforcement and supervisory mechanisms in the regional courts, are also obstacles to the effective provision of reparations. Nevertheless, regional human rights courts have contributed extensively to the enhancement of the right to reparation for victims of education-related violations. In particular, the IACtHR has developed some relevant concepts and approaches, such as the victim's life project and transformative reparations, which expand the traditional definition of reparation to adapt it to the actual needs of individual victims. Given the importance of the regional courts in this area, it is crucial that similar mechanisms are established in the regions where they are not yet in place.

The expansion of the reparation discourse beyond the IHRL framework, in order to include victims of IHL violations, is taking place through the establishment of the ICC reparation regime.⁷⁹⁵ The Decision Establishing the Principles and Procedures to be applied to Reparations in the *Lubanga* case has emphasised the importance of education as a mean to redress the harm suffered by victims. Discussing the possible forms of reparations, the ICC has underlined that, in order to address the harm suffered by the victims on an individual and collective basis, providing assistance through general rehabilitation and education should be considered.⁷⁹⁶ Violations of IHL have also been brought before the *ad hoc* mass claims commissions. In fact, the UNCC has specifically recognised educational harm and awarded compensation for education-related violations.

The quasi-judicial mechanisms analysed in this Report are the UN treaty-monitoring bodies, often called 'Committees', which have the competence to consider individual complaints or communications on human rights

792 For example Art 51 of the Colombian Victims and Land Restitution Law provides for increased access to universities to certain categories of vulnerable victims such as women and persons with disabilities.

793 See the practice of the IACtHR, illustrated for instance in the case of *Villagran Morales et al*, IACtHR Ser C No 63 (19 Nov 1999) at para 191.

794 See C McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP, Cambridge, 2012) at 122.

795 Remarkably before the ICC, victims are allowed to communicate their own interests and concerns. See 'Victims before the ICC: a Guide for the Participation of Victims in the Proceedings of the Court', at 10, available at: <http://www.icc-cpi.int/NR/rdonlyres/C029F900-C529-46DB-9080-60D92B25F9D2/282477/160910VPRSBookletEnglish3.pdf>

796 See *Loyaza Tamayo v Peru*, Reparations and Costs, (Judgment of 27 Nov 1998) IACtHR Ser C No 42, at paras 147 and 221.

matters. Each of these mechanisms monitors rights which, if violated, may have a negative impact on education. In terms of reparations, the Committees have generally adopted a comprehensive approach, ordering the States to award not only compensation, but a range of the forms of reparation, which have now been enshrined in the UN Basic Principles and Guidelines.

As far as non-judicial mechanisms are concerned, the Report points out that a large number of TRCs have been set up at the national level to address the IHRL and IHL violations committed by governments during periods of insecurity, armed conflict and other times during which discriminatory or abusive policies were in place.⁷⁹⁷ These TRCs are generally part of wider transitional justice processes. In those national transitional justice processes, reparation is an indispensable component, along with the establishment of truth, accountability, and reconciliation. The Report shows that national reparations programmes, such as those established in Colombia, Nepal, Peru and Sierra Leone, tend to devote some attention to education programmes. Similarly, other kinds of non-judicial mechanisms, like the ICC TFV, have also invested in education, highlighting its importance in fostering a culture of reconciliation, peace and forgiveness.⁷⁹⁸

Section 4 presents some of the practical issues faced by those establishing and implementing reparations processes. While reparations are not systematically provided following situations of insecurity or armed conflict, a number of actors, such as the victims themselves or civil society as a whole, may give the impetus to establish them. Specific events, such as a change in government or a period of transition towards peace and democracy, may also set reparations in motion.

IOs and NGOs have also significantly contributed as catalysts or facilitators in the establishment of post-conflict reparations mechanisms.⁷⁹⁹ They may assist with capacity development, advisory and technical assistance, as well as operation and management of reparations programmes, in partnership with local organizations or in a freestanding capacity. Since the purpose of reparations is to redress the harm suffered by the victims the Report identifies some long-term goals that should be considered as early as the establishment stage to provide a form of redress that is effective. These objectives generally entail the undertaking of action over a long period of time such as:

- Preventing repetition of the violations or abuses suffered, for example with educational forms of reparations, including changes in curriculum, re-training of teachers, or the inclusion of TRCs findings in curricula.
- Promoting healing and reconciliation, for example through education programmes or symbolic forms of reparations such as apologies.
- Responding to the needs of the victims through a victim-centered approach.

797 The TRCs considered in the Report had incorporated in their recommendations a specific focus on education. For example, in Sierra Leone, the TRC developed a child-friendly version of its report and UNICEF supported the distribution of this version of the report to primary schools across the State. It is available at: <http://www.unicef.org/infobycountry/files/TRCCF9SeptFINAL.pdf>

The TRC in Peru made specific recommendations on education, focusing on improving the quality of the schools located in remote villages and rural areas, prioritizing inter-cultural education, improving girls' literacy, eliminating authoritarian pedagogy and violence in schools, and encouraging the teaching of democratic values. An educational resource was developed following the presentation of the final report of the TRC in 2003. This resource is entitled *Recordándonos*, which means 'reminding ourselves'. See J Paulson, 'Truth Commission and National Curriculum: the Case of *Recordándonos* Resource in Peru', (UNICEF Innocenti Working Paper, 2011) available at:

<http://www.unicef-irc.org/files/documents/d-3726-Truth-commissions-and-nat.pdf>

798 For example, the UN Trust Fund to End Violence against Women and the ICC TFV have both financed projects focused on the implementation of right to education, see Section 4 of this Report. Alongside voluntary forms of reparation for education-related violations it is worth to list here also the fund established by Malala Yousafzai, which is operating since 2013 in order to support girls' education in Pakistan, see: <http://www.guardian.co.uk/world/2013/apr/05/malala-yousafzai-girls-schooling-fund>

799 UN agencies such as the UNHCR have on occasions facilitated schemes to locate potential beneficiaries of reparations programmes given that such persons are often displaced within a state or have been moved across borders. The International Organization for Migration ('IOM') has also been involved in facilitating the establishment of reparations programmes in Colombia, Sierra Leone, Nepal, Iraq and the former Yugoslavia. The International Centre for Transitional Justice ('ICTJ') is another organisation which has played an important role in reparations programmes at the national level.

Generally, the Report highlights that victims seek a wide-reaching and comprehensive reparations process, which is able to address the long-term effects of the violations.⁸⁰⁰ Moreover, the procedures to access remedies must be victim-friendly and ensure an accessible process with effective participation of victims.

Victims of education-related violations who have missed out on educational opportunities may wish to complete their education. However, in many instances, their needs may have changed, for example because they are no longer of school age. This example shows the importance of identifying the wishes of victims in order for the reparations process to be both adequate and acceptable. Once the reparation mechanism has been selected, then implementation issues will arise. In particular the Report has explained that specific attention must be given to the following matters:

- Victims' participation in the reparations process, including victim mapping and methods for victim mapping.
- Assessment of harm, including the methods for quantifying the harm and the issue of causation.
- Type and extent of reparations, including the issue of resources and the methods for addressing constraints caused by limited resources, for instance by adopting prioritisation techniques.

Ensuring victims' participation can be extremely challenging for vulnerable victims, especially in cases of application-based reparations processes. In particular, vulnerable victims of education-related violations, namely children, women, those injured and/or disabled as a result of violations, refugees and displaced persons, are often marginalized. As these persons may not have had any access to education, their understanding of the process may be limited, and in many cases they may even be illiterate. As a result, these victims may be unable to participate in the reparations process by themselves. Therefore, a strict requirement that they do so without assistance would lead to substantial injustice.

Instead, non-application based processes, which identify victim communities through a mapping system and put in place arrangements for reparation in relation to such groups, provide easier access for vulnerable victims and often provide for reparations that are inclusive and community-based. The importance of victims' mapping is highlighted in Section 4 of the Report, which underlines how this exercise can be useful to design the reparations, to identify the victims, and to carry out the implementation stage when the reparations awards are actually made to the victims. This final part of the process is often problematic, as victims may have moved since the violation(s) occurred. In the case of child soldiers for example, children may have been taken from their homes and have had no contact with their communities for many years. Displaced victims may be living in an entirely different locality and be dispersed throughout a region. The Report also stresses that, in order to facilitate the mapping of victims and thus allocate reparations to the beneficiaries, information about the reparations processes must be disseminated widely. Therefore, outreach to victims has been identified as a crucial step towards full and effective implementation of reparations. As victims of education-related violations are often students, specific outreach methods may be used. For example, in Sierra Leone, the SCLS has developed a series of activities with the aim of informing and educating victims and students about its work.⁸⁰¹

Once they are aware of the processes available, victims have to access them in order to claim and obtain reparations. As mentioned earlier, some processes are not based on application, with victims being automatically registered in the process. In others, they are required to register formally in order to receive the benefits to which they may be entitled. For victims of education-related violations, it appears that a better method would be to have a mixed approach, both allowing victims to register themselves and having the government registering the victims it is able to identify. It may be difficult for certain categories of victims of education-related violations to register themselves, given their possible disabilities or illiteracy for example. Moreover, certain categories of victims who suffer from social stigmatisation tend to be left out of reparations processes. In order to overcome some of the procedural hurdles identified by the Report (such as exhaustive lists of crimes, time limitation, centralised procedures, lack of

800 OHCHR and Uganda Human Rights Commission, *The Dust Has Not Yet Settled: Victims' Views on Remedy and Reparation* (2011), available at: <http://www.ohchr.org/Documents/Press/WebStories/DustHasNotYetSettled.pdf>

801 For example the SCSL has sent high-level officials to local elementary schools and arranged for students to visit the Court. See *supra* Section 4 at 4.2.1.1.

confidentiality, lack of participation, inadequate payment mechanisms and high evidentiary standards), Section 4 presents an overview of examples where a victim-friendly approach has been adopted to overcome these various obstacles.

The Report also underlines the importance of considering education in assessing and quantifying the harm suffered by the victims. This emerges especially in relation to the calculation of non-pecuniary damages, as the work of the IACtHR has proved. The assessment and quantification of the harm also infers the prioritisation of the resources available, which in the context of insecurity and armed conflict can be scant. The Report highlights the fact that resources are often prioritised in favour of the most vulnerable victims to recognise the fact that the harm caused by wrongful conduct can affect victims in different ways. As some victims are generally better able to cope with their experiences than others, it is common practice for reparations programmes established at the national level to expressly prioritise those most affected.

With regard to the issues of verification and monitoring, the Report underlines their importance for the overall success of a reparation process. Without adequate verification and monitoring arrangements, there is a risk that those who are intended to benefit from a reparations award may not do so. Moreover, if implementation issues go unresolved, they may cause further tension and acrimony for the victims. Most importantly, the potential of a reparations award to redress the harm with which it is concerned may then go unfulfilled. For example, in respect of ongoing forms of reparation, such as the establishment of a school or educational institution, failure to ensure that the institution has adequate resources, training and staff may all serve to undermine the role and impact of the award.

The Report examines the advantages and disadvantages of both judicial and administrative approaches to monitoring and verification and concludes that they are not necessarily mutually exclusive. A court may issue a reparations order while, at the same time, devolving responsibility for monitoring arrangements to an administrative organisation established for this purpose, or even to a partner organisation active in the field. Such arrangements are possible, for example in respect of the reparations arrangements in place under the ICC regime of victim redress. In its Decision Establishing the Principles and Procedures to be applied to Reparations in the *Lubanga* case, the Trial Chamber left arrangements as to the implementation, monitoring and verification of reparations awards largely to the discretion of the ICC Trust Fund for Victims, with the Court retaining only a very general oversight function.

5.2 RECOMMENDATIONS

The recommendations proposed are drawn from the findings in the Report. They refer to selected illustrative examples and good practices where relevant.

Implement the Obligation to Provide Reparation

States should ensure they are party to all treaties providing an individual right to reparation, including the OP-ICESCR. States should also report on reparations activity undertaken by them as part of treaty bodies' periodic review and under the Universal Periodic Review, as well as fully implementing recommendations on reparation made by the relevant monitoring mechanisms, including the UN treaty bodies. In addition, States should support the inclusion of reparation matters in UN special procedures (such as in Special Rapporteur's mandates) and raise issues of reparations in the Universal Periodic Review, especially in regard to education and education-related issues.

At the domestic level, States should provide for the individual right to a remedy for both violations of the right to education *per se* and for all other forms of education-related violations, including violations of international law. The implementation should also be prompt and efficient, as delays in implementing reparations awards lead to discontent among victims, which may lead to additional trauma to already suffering individuals.

Engage Non-State Actors

NSAs should be engaged closely in the reparations discourse at all levels. For example, through the action plans prepared and implemented under the aegis of the UN MRM, NSAs have been actively involved in the attempt to increase the protection of children in armed conflict. However, neither the action plans nor the Geneva Call's Deeds of Commitments have incorporated a remedial component yet, which should be done. The ICRC and national and international NGOs should be encouraged to consider education-related violations in their work. The Guiding Principles on Business and Human Rights should be implemented to require that corporations operate grievance mechanisms quickly and effectively, and with transparency and accountability, and that States provide judicial remedies for education-related violations by corporations.

Promote Victim's Access to Reparation

Victims' access to reparation mechanisms – both judicial and non-judicial – for education-related violations should be increased. This requires the ability of victims to have direct communication to courts, tribunals and other bodies of their position and the removal of procedural obstacles. Procedural obstacles, such as funding and registration for the reparation processes should be removed, so that victims can take part in the reparations process, from its inception to the implementation.

In particular victims of education-related violations could benefit from the adoption of a combined approach to registration, which allows victims to register themselves and at the same time have the government register the victims that it is able to identify. More generally, procedural hurdles, such as an exhaustive list of crimes, time limitations, centralized procedures, lack of confidentiality, inadequate participatory mechanisms and high evidentiary standards, should be removed to promote vulnerable victims' access to reparations.

Identify Educational Harm

States should be proactive in investigating and facilitating the identification of all potential educational harm. Victims and their representatives should explicitly indicate in their claims the educational harm suffered, highlighting the loss of opportunities, the damages to their 'life project', and all the consequences which resulted from this particular form of harm. All mechanisms established to provide reparations (whether judicial, quasi-judicial or non-judicial) should seek to recognise educational harm even when it is not drawn specifically to their attention.

Consider All Available Forms of Reparation

All forms of reparations listed in the UN Basic Principles and Guidelines should be considered by all international, regional and national institutions and mechanisms in seeking and awarding reparations for education-related violations. In particular rehabilitation (including where it addresses the social reintegration of victims) and guarantees of non-repetition, especially where they include education and training, may be well-suited to redress education-related violations, including for former child-soldiers, victims of sexual violence and persons with disabilities.

While reparations for education-related violations may take various forms, some innovative examples of the types of reparations awarded for such violations are:

- Reconstructing or rehabilitating an educational facility, as a collective form of reparation.
- Reinstating a victim's student status and education staff status.
- Guaranteeing subsidised access to primary and secondary education for victims who do not have the means to pay for that education.
- Guaranteeing access to higher education for certain categories of victims through affirmative action measures for under-represented categories of individuals such as women and persons with disabilities.
- Guaranteeing access to education through the provision of bursaries.
- Offering vocational training, in particular for those adult victims who are beyond school-age and for whom attending school may be too challenging.
- Changing the curricula of schools to include human rights education.
- Developing new educational courses, such as in respect of human rights and peace. This form of repetition responds to the need to guarantee the non-recurrence of the violations committed.

Transformative Potential of Reparations

More attention should be placed on the potential transformative component of reparations, in particular to address structural inequalities which may render some categories of victims as the on-going targets of education-related violations. When determining the more appropriate forms of reparation to be awarded, the actors invested with this task should take into account any particular vulnerability (or existing structural inequality) associated with the victims as a result of their position in society.

Access to Information for All

The key aspects of reparation should be disseminated in socially and culturally appropriate forms to all within a community, both as a form of education to prevent future harms and to assist victims to know their rights.

It is hoped that all the relevant actors, including States, international organisations, non-state actors and victims, with the assistance of leading applied research bodies and other non-governmental organisations, will take the necessary steps recommended here. In so doing, they will contribute to ensuring the long-term protection from education-related violations in Insecurity and Armed conflict. If such action is taken then the goal of everyone being provided with educational opportunities, and with reparations where such is denied, can be better attained worldwide.

APPENDIX A

INTERNATIONAL AND REGIONAL TREATIES AND OTHER RELEVANT INSTRUMENTS

GENERAL INTERNATIONAL TREATIES AND INSTRUMENTS

1945

United Nations Charter, entered into force on 24 October 1945 and available at www.un.org/en/documents/charter/

1969

Vienna Convention on the Law of Treaties (VCLT), entered into force on 27 January 1980 and available at untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

2001

International Law Commission Draft Articles on Responsibility of States for Intentionally Wrongful Acts, available at untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

STATUTES OF INTERNATIONAL COURTS AND TRIBUNALS

1946

Statute of the International Court of Justice, entered into force on 24 October 1945 and available at www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

1993

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY Statute)—UN Security Council Resolution 827 adopted 25 May 1993, available at www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

1994

UN General Assembly Resolution Establishing the International Criminal Tribunal for Rwanda and attaching its Statute (ICTR Statute)—Resolution 955 adopted 8 November 1994, available at www.unicttr.org/Portals/0/English/Legal/Statute/2010.pdf

1998

Statute of the International Criminal Court (Rome Statute), entered into force on 1 July 2002, available at untreaty.un.org/cod/icc/statute/rome.htm

2002

Statute of the Special Court for Sierra Leone—pursuant to UN Security Council Resolution 1315, adopted 14 August 2000, available at: www.sc-sl.org/LinkClick.aspx?fileticket=uCInd1MJeEw%3D&

2004

The Law of the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea (ECCC Law), available at www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf

International Human Rights Law

1948

American Declaration on the Rights and Duties of Man, adopted 2 May 1948, available at www.unesco.org/most/rr4am1.htm

Charter of the Organization of American States (“Pact of Bogota”), entered into force on 13 December 1951, available at www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm

Universal Declaration of Human Rights—UN General Assembly Resolution 217A (III), adopted 10 December 1948, available at www.un.org/en/documents/udhr/

1950

European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 3 September 1953, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf

1952

Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 18 May 1954, available at <http://www.hri.org/docs/ECHR50.html>

1960

Convention against Discrimination in Education, entered into force 22 May 1962, available at www.unesco.org/education/information/nfsunesco/pdf/DISCRI_E.PDF

1961

European Social Charter, entered into force 26 February 1965, available at conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CM=1&CL=ENG

1965

International Convention on the Elimination of All Forms of Racial Discrimination, entered into force 4 January 1969, available at www2.ohchr.org/english/law/cerd.htm

1966

International Covenant on Economic Social and Cultural Rights, entered into force 3 January 1976, available at www2.ohchr.org/english/law/cescr.htm

International Covenant on Civil and Political Rights, entered into force 23 March 1976, available at www2.ohchr.org/english/law/ccpr.htm

Optional Protocol I to the International Covenant on Civil and Political Rights, entered into force 23 March 1976, available at www2.ohchr.org/english/law/ccpr-one.htm

1969

American Convention on Human Rights, entered into force 18 July 1978, available at www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf

1979

Convention on the Elimination of All Forms of Discrimination against Women, entered into force 3 September 1981, available at www.un.org/womenwatch/daw/cedaw/text/econvention.htm

1981

African Charter of Human and Peoples' Rights (the Banjul Charter), entered into force 21 October 1986, available at www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf

1984

United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987, available at www2.ohchr.org/english/law/cat.htm

1985

UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration), adopted 29 November 1985, available from www.un.org/documents/ga/res/40/a40r034.htm

1989

United Nations Convention on the Rights of the Child, entered into force 2 September 1990, available at www2.ohchr.org/english/law/crc.htm

1996

European Social Charter (Revised), available at conventions.coe.int/Treaty/en/Treaties/html/163.htm

1998

Protocol to European Social Charter Providing for a System on Collective Complaints, entered into force 1 July 1998, available at conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=158&CM=8&CL=ENG

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf>

2005

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Vienna Convention on the Law of Treaties (VCLT)	treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en
Statute of the International Court of Justice	treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&lang=en
Statute of the International Criminal Court (Rome Statute)	treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en
Charter of the International Military Tribunal (Nuremberg Charter)	avalon.law.yale.edu/imt/imtconst.asp
Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention)	treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en
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European Convention for the Protection of Human Rights and Fundamental Freedoms	conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG
Convention relating to the Status of Refugees	treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en
Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms	conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=009&CM=7&DF=25/04/2012&CL=ENG
Convention against Discrimination in Education	portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html#STATE_PARTIES
European Social Charter	www.coe.int/t/dghl/monitoring/socialcharter/presentation/SignaturesRatifications_en.pdf

International Convention on the Elimination of All Forms of Racial Discrimination	treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en
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International Covenant on Civil and Political Rights (ICCPR)	treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en
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Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol)	www.oas.org/juridico/english/sigs/a-52.html
United Nations Convention on the Rights of the Child (CRC)	treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en
African Charter on the Rights and Welfare of the Child	www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf
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Protocol to European Social Charter Providing for a System on Collective Complaints	www.coe.int/t/dghl/monitoring/socialcharter/presentation/SignaturesRatifications_en.pdf

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Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11-b&chapter=4&lang=en
Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)	www.africa-union.org/root/au/documents/treaties/list/Convention%20on%20IDPs%20-%20displaced.pdf
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Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict	www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf
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APPENDIX B

RELEVANT CASES

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APPENDIX C

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EDUCATION AND THE LAW OF REPARATIONS in Insecurity and Armed Conflict

Education is an important element of the protection of human rights. Itself a human right, it enables access to other human rights, to meaningful and inclusive participation in society, and to the promotion of universal respect for the dignity of all. In times of insecurity and armed conflict, education is particularly at risk. It is essential therefore that any attack on education at such times is redressed, both for the individuals and communities concerned and to reinforce the need to affirm the vital role of education in a society.

This publication, *Education and the Law of Reparations in Insecurity and Armed Conflict*, considers how attacks on education during insecurity and armed conflict have been redressed in the past and may be redressed in the future. In identifying innovative approaches and new trends in the field of reparation, it reflects on how education can be used as a means of reparation and as a means to minimise the risk of conflicts recurring. In doing so, the publication brings together wide-ranging examples of law and practice from the international, regional and domestic spheres through an analysis of the relevant law in each sphere. This approach provides a strong foundation for recommendations for relevant future legal and policy decisions. These will assist those involved in the field in strengthening the right to reparation for education-related violations of law, as well as promoting the use of education as a means to repair the harm caused by other kinds of wrongful acts.

“The report is remarkable for taking education as the main entry point in discussing and outlining the law of reparations in insecurity and armed conflict. It offers enlightening perspectives regarding education as a basic right and entitlement to reparations and it values education as a means for the rehabilitation of victims and as a potential instrument to prevent recurrence of conflict and violence.”

Professor Theo van Boven

Former United Nations Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms

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