

Education and the Law of Reparations in Insecurity and Armed Conflict

A Summary



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



**British Institute of
International and
Comparative Law**

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PREFACE

This document summarises the Report ‘Education and the Law of Reparations in Insecurity and Armed Conflict’. It is written specifically for a non-legal audience in order to provide an accessible, stand-alone, insight into the law of reparations for violations of international law which affect education in situations of insecurity and armed conflict. Readers are strongly encouraged to read the full Report, which provides detailed analysis and insights into this area.

‘Education and the Law of Reparations in Insecurity and Armed Conflict’ has been authored by Francesca Capone, Kristin Hausler, Duncan Fairgrieve and Conor McCarthy at the British Institute of International and Comparative Law (BIICL). It 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, UNESCO Special Envoy for Basic and Higher Education. A policy, research, and advocacy organization, PEIC is concerned with the protection of education during insecurity and armed conflict. PEIC’s Legal Programme 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. 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: <http://www.biicl.org>.

Electronic versions of Education and the Law of Reparations in Insecurity and Armed Conflict and the Summary are available at:
<http://www.biicl.org/research/reparations>
<http://www.educationandconflict.org>

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1. INTRODUCTION

This Summary of ‘**Education and the Law of Reparations in Insecurity and Armed Conflict**’ (referred to below as ‘the Report’) seeks to widen its readership to a non-legal audience by presenting its key points in an accessible manner. Therefore the primary audience for this Summary consists of those who do not have a legal training, including policy makers, those working for non-governmental organisations or international organisations in a non-legal capacity, and all those who are concerned with the loss of education in times of insecurity and conflict. In addition, legal practitioners may also find it valuable as it provides an overview of the main legal issues, which are analysed in-depth in the Report. In particular, members of the judiciary and others faced with the issue of providing reparation awards for education-related violations or considering education as a means of reparation, will also find this Summary helpful.

In times of insecurity and armed conflict, education is very important, as schooling may represent a glimpse of normality and hope for the whole community. Education is also a crucial tool for the development of any human being as it enables them to exercise their rights. Therefore, any attack on education has to be redressed. The Report seeks to answer how attacks on education have so far been redressed by the different mechanisms in place.

Educational facilities are often targeted during an armed conflict precisely because of their high-profile status. Students and education staff may also be threatened or physically harmed. 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 examples constitutes a form of attack on education which amount also to the violation of international law. As a result, these types of attacks may be referred to as ‘**education-related violations**’ because they violate international law which protects (directly or indirectly):

- education;
- students and education staff; or
- educational facilities.

A violation of the human right to education is the most obvious education-related violation. However, as mentioned above, other violations may also amount to education-related violations: violation of the right to life of students or education staff; violation of the prohibition of recruiting children into armed forces; and violation of the prohibition on targeting of civilian objects, such as educational facilities. Therefore, a violation of International Human Rights Law (IHRL), International Humanitarian Law (IHL) or International Criminal Law (ICL) may be an education-related violation if it has a specific negative impact on the exercise of the right to education.

The concept of ‘education-related violation’ was first developed in ‘Protecting Education in Insecurity and Armed Conflict: An International Law Handbook’ (the ‘Handbook’), which was published in 2012 by the British Institute of International and Comparative Law (BIICL) and Protect Education in Conflict (PEIC).¹

Like the Handbook, the Report focuses on education-related violations committed in times of insecurity and armed conflict. Armed conflict is a legal term which can refer either to an *international* armed conflict or a *non-international* armed conflict. Insecurity refers to situations of disturbance and tension within a State that disrupt the normal functioning of key political, social and legal institutions including those that are used to facilitate education. However, situations of insecurity do not reach the threshold of armed conflict.

As education-related violations need to be redressed, reparation mechanisms must be put in place for the victims of these violations. Reparations mechanisms must consider direct victims, such as students and education staff, and also indirect victims and, possibly, the community at large, which may also be negatively affected 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, both through awards to individuals, such as scholarships, and through actions at system level. 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 post-conflict areas, education may be an effective tool to support recovery and avoid (or at least diminish) the risk of future armed conflicts.

1 The Handbook and its accompanying Summary are available at: <http://www.biicl.org/research/education/> and <http://www.educationandconflict.org>.

As a result, the Report analyses the types of reparations which have been provided for education-related violations and also how education has been used as a reparation 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 (UN) treaty bodies. Examples from the regional human rights bodies are also considered. Finally, at the domestic level, a selection of national reparations processes of interest are identified and discussed. This wide-ranging approach allows for the suggestion of a number of general recommendations, which will assist those involved in the field of reparations to develop further good practice.

The Report has three major substantive sections, which are all outlined in this Summary:

- Concepts and Principles;
- Reparation Mechanisms; and
- Implementation Issues.

It then concludes with a set of recommendations.

2. CONCEPTS AND PRINCIPLES

The idea that the consequences of a wrongful act should be adequately and promptly redressed is a well-established principle of justice. The concept of 'reparations' 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 obtain reparation for the harm they suffered.

The rules of reparation are governed by three principles:

- **Primacy of Restitution;**
- **Proportionality; and**
- **Causality.**

Under the principle of primacy of restitution, reparations should be awarded to place the victim in the position he or she *would have been* in if the wrongful act had not occurred. However, it is often not possible to award restitution. In such case, another form of reparation, such as compensation, must be awarded. According to the principle of proportionality, reparation must be commensurate with the harm suffered. Finally, the principle of causality refers to the requisite link that must exist between the wrongful act and the harm caused in order for the obligation of reparation to arise.

2.1 Obligation to Make Reparation

Under international law, States bear the primary responsibility to redress violations of international law. This obligation to make reparation arises regardless of whether an international court or tribunal requires a State to make reparation. It is an immediate consequence of an internationally wrongful act which is a breach of an international obligation to which a State is bound.

For example, 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 that is part of customary international law or *jus cogens*, meaning the body of peremptory norms from which no derogation is permitted. For example, the prohibition of torture and other inhuman and degrading treatment is contained in a specific treaty, the

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but it is part of *jus cogens*. Therefore, a State is bound by the prohibition of torture whether it is a party to that specific convention or not.

With regard to the violations of IHL during armed conflicts, States are obliged to make reparation for violations committed during international armed conflict, on an inter-State basis. The *Hague Convention (IV) respecting the Laws and Customs of War on Land* specifically provides belligerent parties with an obligation to compensate when it violates its rules. The State in question is responsible for all acts committed by persons forming part of its armed forces. This obligation to provide compensation is reiterated in the *Additional Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflict*. With regard to non-international armed conflict, there is no similar obligation to make reparation and State practice is almost completely lacking.

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. Moreover, under certain circumstances, a State can also be held responsible for the actions of non-State actors. Education-related violations are often the consequences of actions of non-State actors. In regions affected by insecurity and armed conflict, non-State armed groups may target students, educational staff and educational facilities. Corporations are another form of non-State actor, the actions of which may have a negative impact on education (e.g., the use of child labour).

At present, non-State actors have no direct obligation to provide redress for education-related violations under international law. Given the way human rights treaties have been drafted, a State party is still the only entity directly responsible for compliance with the treaty in question, including any obligation to make reparation contained therein.

With regard to IHL, both States and non-State actors are bound by its rules, including customary law. However, this does not automatically mean that non-State actors have an obligation to provide redress for violations of IHL perpetrated in the context of international or internal armed conflict. In fact, there are only very limited examples that support the proposition that such an obligation exists.

ICL was developed to address the most serious international crimes and establish individual criminal responsibility for those wrongful acts. Therefore, it has not been concerned, at least until recently, with imposing on convicted individuals an obligation to make reparation. This has changed with the establishment of

the ICC, which has been awarded the power to order a perpetrator to provide reparation to the victims who have suffered as a result of his or her criminal actions.

2.2 Right to Reparation

The right of victims to obtain reparation is not part of customary international law at present, due to the lack of consolidated State practice recognising that right. Nonetheless, the right to reparation is well established within international treaty law, especially within human rights treaties both at the international and at the regional level.

The right to an effective remedy was first enshrined in the non-binding Universal Declaration of Human Rights. It has since been included in a number of binding human rights treaties. For example, Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR) provides for a right to an 'effective remedy', stating that State parties should

ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; [and] ensure that the competent authorities shall enforce such remedies when granted.

Therefore, the victim of any violation of the civil and political rights enshrined in the ICCPR, such as the right to be free from torture, possesses the right to a remedy.

Economic, social and cultural rights, such as the right to education, are contained in the *International Covenant of Economic, Social and Cultural Rights* (ICESCR). When this Covenant was adopted in 1966, in contrast to the ICCPR, the right to a remedy was not included. Regardless, the Committee on Economic, Social and Cultural Rights emphasised that effective measures to implement the Covenant might include judicial remedies with respect to rights that could be considered 'justiciable'. The absence of the legal right to remedy for economic, social and cultural rights in the Covenant has now been corrected with the adoption of an Optional Protocol to the ICESCR, which provides victims of ESCR violations specifically with the right to seek an effective remedy.

In addition to the ICCPR and the ICESCR, there are other international human rights treaties which contain rights which need also to be respected, protected and fulfilled to enable students to enjoy their right to education. Some of these

treaties also contain additional protection for certain groups of individuals such as children, women or persons with disabilities. Many of these treaties provide specifically for the right to reparation, such as the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention for the Protection of All Persons from Enforced Disappearance*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

The right to reparation is also found within regional human rights treaties, in particular the American Convention on Human Rights, the European Convention of Human Rights and the Protocol to the African Charter on Human and People's Rights. In Asia and the Pacific, there is no regional human rights treaty, which means that victims of education-related violations in these regions do not have a right to reparation at the regional level.

In relation to violations of IHL, while States have a right to reparation, there is no established right to reparation for individual victims. Although there is a body of scholarly opinion arguing that an individual right to reparation for violations of IHL exists, as well as a number of judicial decisions to that effect, relevant State practice remains scant.

Finally, with regard to violations of ICL, individual victims do not benefit from an established right to reparation under that regime. However, international criminal courts may award reparations to victims, who are increasingly included in their processes, at least before the ICC (where they can even apply for reparation). In its first decision on the principles and procedure to be applied to reparations in relation to the *Lubanga* case, in which Thomas Lubanga Dyilo was convicted of recruiting and using child soldiers, the ICC stated that

there is a need to go beyond punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims. There is a need for effective remedies to the victims.

2.3 Forms of Reparations

The existing provisions on reparation have been crystallised in the *United Nations 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*. This instrument identifies 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.

Full and effective reparation may be provided through the following forms:

- **Restitution** seeks to restore the victim to his or her original situation, before the wrongful act was committed. More broadly, restitution may seek to re-establish a victim in the situation he or she would be if the wrongful act had not occurred. Restitution may consist of the reinstatement of the student status of a victim, the restoration of liberty of students or education staff and the return of a school building to a community. Although restitution is the primary form which must be sought to repair a violation, it is often not a materially feasible option.
- **Compensation** should be provided for any damage which can be economically assessed, including physical and moral harm. This may also be awarded for loss of educational opportunities.
- **Rehabilitation** can include medical care and social services. Education support can be awarded to victims who have not completed their primary and secondary schooling for example. Specific training may also be awarded to increase a victim's employability and reinsertion in society.
- **Satisfaction** may include measures to stop the continuation of any violation, verification of the facts and disclosure of the truth, a public apology, commemorations of the event and of the victims. It can also consist of the inclusion in the school curriculum of an accurate account of the violations that occurred, where appropriate.
- **Guarantees of non-repetition** are preventative measures, which can include civilian control of armed forces, a strengthening of the rule of law and the independence of the judiciary, reforms of the law, and the provision of human rights training and education.

All of these forms, either singularly or in combination, can be used to redress education-related violations. As mentioned above, education itself can be 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 agents.

In addition to the traditional ways that can serve to redress education-related violations or promote the use of education as a tool to provide redress for victims, the Report identifies a new approach to reparation, called ‘transformative reparations’. The idea behind the notion of transformative reparations is that, in order to remedy fully a violation, the root causes behind it must also be addressed and corrected. For example, if women and girls were the target of IHRL or IHL violations because of a structural inequality, those awarding reparations should take into account the discriminatory policies, including a possible lack of access to education that victimised women and girls in the first place. Currently, the Inter-American Court of Human Rights and the ICC are the only institutions which consider the application of transformative reparations when awarding reparations to victims of education-related violations.

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’, a concept which 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 fully to realise him or herself. Clearly, education is fundamental to this concept as it plays a central role in the development of an individual.

2.4 Who May Obtain Reparation?

The purpose of reparation is to repair the harm suffered by the victims of violations. Victims can be considered individually or collectively. In fact, although education-related violations may affect an individual 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 that protects education, directly or indirectly. For example, a child injured in the explosion of an unlawfully placed landmine may be prevented from going to school, unless his or her mobility is improved through reparation. This means that this child is an individual victim of an education-related violation, even if it did not consist of a violation of the right to education in itself.

Collective victims are created when violent or discriminatory actions are directed at a specific population, for example a particular ethnic group. Redressing the harm suffered by collective victims requires collective reparations, which are benefits conferred on collectives to undo the collective harm suffered. 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. An example of collective reparation is the construction of educational facilities, which is a community-oriented (and not exclusive) form of reparations. Building a school in a village where gross human rights violations have taken place against a segment of the population provides reparation to the victims themselves, as well as benefits the community at large.

In addition to individual and collective natural persons, legal entities may also be recognised as victims. For example, before the ICC both natural persons, such as child soldiers, and legal persons, such as schools, technical colleges, or vocational training institutions, may be considered victims.

The Report also clarifies the distinction between direct and indirect victims, who may also obtain reparation. In the case of education-related violations, students and education staff can be considered direct victims, while their relatives and dependants may be considered indirect victims.

The Report identifies the categories of victims who can be classified as particularly vulnerable and therefore more prone to be affected by education-related violations. These vulnerable victims generally include women, children, persons with disabilities, refugees and internally displaced persons (IDPs), who find it especially difficult to exercise fully their recognized rights due to cultural, physical, bureaucratic, financial or psychological reasons. To prevent further marginalisation and to achieve social reintegration, such victims may need rehabilitative measures (perhaps in combination with other forms of reparations).

2.5 What are the Conditions to Obtain 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.

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. 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; and
- **moral damage**, which includes individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s privacy.

Educational harm limits an individual or an organization’s ability to provide, access, participate in or benefit from education. One of the most discussed forms of harm that can stem from education-related violations is the ‘loss of opportunity’, which has sometimes been referred to in relation to the concept of ‘life project’ mentioned above.

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 of quantifying it.

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 recognized, 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 different breaches of international obligation may entail different causality requirements. With regard to educational harm, establishing causation raises a number of additional concerns. For example, in cases where the educational harm suffered by child soldiers has to be assessed years after missing out on their educational opportunities, establishing causation 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 on-going effects of educational harm.

Despite the difficulties in assessing and quantifying harm and establishing a causal link between the wrongful act and the harm, those are necessary requirements for obtaining reparation.

3. REPARATION MECHANISMS

The availability of an effective route to obtain reparation is as important as the substance of reparation itself. IHRL is the most comprehensive and developed framework as it contains the largest number of relevant mechanisms that victims may resort to in order to claim for reparations.

Reparations can be awarded through various mechanisms, which can be separated into two broad categories:

- Judicial or quasi-judicial mechanisms; and
- Non-judicial mechanisms.

Judicial and quasi-judicial mechanisms, such as the UN treaty bodies or the Inter-American Commission on Human Rights, generally require the victims and their legal representative to abide by the procedures in place and take all the necessary steps to obtain reparation. For the most part, access to non-judicial mechanisms, such as national reparations programmes, is less procedural and, consequently, less challenging for the victims.

There are mechanisms at all levels (international, regional and domestic) through which reparations may be awarded for education-related violations.

3.1 International Mechanisms

Complaint Mechanisms of United Nations Treaty Bodies

A number of UN treaty-monitoring bodies (often also called ‘Committees’) have competence to consider individual complaints or communications on human rights matters. Each of the UN complaint mechanisms in place monitors rights that, if violated, may impact upon education in a negative way. In order for a complaint to be considered, the alleged perpetrator must be a State party to the treaty monitored by the Committee in question. The existing domestic remedies must also have been exhausted.

In terms of reparations, the Committees have generally adopted a comprehensive approach, ordering the States to award not only compensation but also consider the other forms of reparations presented above. These mechanisms are an important avenue for victims of education-related violations, although the compliance rate with the decisions of the UN treaty bodies is generally low.

International Criminal Courts and Tribunals

As mentioned above, reparations to the victims were not originally considered within international criminal processes. However, the reparation discourse is now expanding beyond the IHRL framework, in particular through the establishment of the ICC. The decision establishing the principles and procedures to be applied to reparations in the *Lubanga* case has emphasised 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 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.

As stressed by UNICEF in its submission on the principles and procedures to be applied to reparations, the ICC should give special attention to the role that schools can play in awarding rehabilitative measures. It should do so as 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.

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 them compensation. In particular the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission have both dealt to some extent with education-related violations, such as the destruction of schools and other educational facilities.

The United Nations Compensation Commission has specifically recognised educational harm and awarded compensation for education-related violations. It has awarded compensation for victims of education-related violations, including compensation for damages to real property (i.e. schools and other educational facilities), damages to personal property (i.e. loss of student files, furniture and office equipment, laboratory equipment, library books, sports equipment, musical instruments) and other losses sustained by educational institutions (i.e. damages for contractual agreements).

Unlike the United Nations Compensation Commission, the Eritrea-Ethiopia Claims Commission declined to award damages for disruption to the lives and financial prospects of students deriving from the destruction of schools. Instead, it only provided redress for damages caused to schools and educational facilities. It did not recognise the educational harm caused by such violations, nor the intrinsic value of the buildings dedicated to the provision of education.

3.2 Regional Mechanisms

So far, regional human rights courts have played the most prominent role in redressing victims of education-related violations. In particular, the Inter-American Court of Human Rights has developed some important concepts and approaches, such as the victim's 'life project' and the concept of transformative reparations that expand the traditional definition of reparation to adapt it to the actual needs of individual victims. Given the role played by the regional mechanisms in providing effective reparations for victims of education-related violations, it is crucial that similar mechanisms are established in the regions where they are not yet in place.

Regional courts, however, also have shortcomings. For example, the fact that victims are not provided with direct access to the Inter-American Court of Human Rights and that there is no automatic standing for individuals or non-governmental organisations before the African Court of Human and Peoples' Rights are both reasons for concern. Although individuals have automatic standing before the European Court of Human Rights, the current backlog of cases before it is an issue. In addition, there is in general limited enforcement and supervisory mechanisms in the regional systems, which are further obstacles to the effective provision of reparations.

3.3 National Mechanisms

Domestic Courts

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 in its own domestic legal system before its responsibility can be challenged at the regional or international level.

Despite the obvious differences in legal systems and procedures, a common general trend can be detected with regard to reparations in domestic courts. In this regard, it appears that courts are particularly keen to award restitution to restore a situation to its position before the wrong occurred.

Also in some cases domestic courts have 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. Of course, in situations of insecurity and armed conflict, domestic 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.

National Reparations Programmes

The Report also points out that a large number of Truth and Reconciliation Commissions have been set up at the national level to address 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. These commissions 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.

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. These mechanisms have been established in several States: for example, in Sierra Leone where the problem of child soldiers reached an unprecedented scale; in Peru where schools and universities served as recruitment places for the Shining Path; in Colombia where teachers and pupils have been targeted; and in Nepal where extrajudicial killings, torture and enforced disappearances have been committed on a large scale.

Voluntary Forms of Reparations Provided by Non-State Actors

Victims of education-related violations may also be provided with some form of relief from non-judicial mechanisms based on voluntary contributions. Funds to assist victims and their families have been established out of solidarity at international and domestic levels but without any legal duty to do so. They include the various UN voluntary funds, the ICC Trust Fund for Victims, national voluntary funds and other voluntary forms of reparations provided by non-State actors.

Overall, the mechanisms which may award reparations for education-related violations are extremely varied and are present at both the international (and regional) level and at the domestic level. A number of important disparities and limitations are also noted.

4. IMPLEMENTATION ISSUES

The establishment and the implementation of reparation processes present practical issues for those in charge of them. While reparations are not systematically provided following situations of insecurity or armed conflict, a number of actors, such as the victims themselves or the civil society as a whole, may provide the impetus to create them. Specific events, such as a change in government or a period of transition towards peace and democracy, may also set reparations in motion.

Truth and Reconciliation Commissions have often been instrumental in the establishment of national reparations programmes. Alongside these commissions, international organisations and non-governmental organisations have also significantly contributed to catalyse or facilitate the establishment of post-conflict reparations mechanisms.

The main goal of reparations is to redress the harm suffered by the victims. To provide forms of redress that are effective and include lasting benefits, long-term goals should be identified at the establishment stage. These generally include:

- Preventing repetition of the violations or abuse suffered, for example with educational forms of reparations, including change in curriculum, re-training of teachers, or the inclusion of the findings of Truth and Reconciliation Commissions in curriculum;
- Promoting healing and reconciliation, for example through education programmes or symbolic forms of reparations such as apologies; and
- Responding to the needs of victims through a victim-centered approach.

Generally, victims seek a wide-reaching and comprehensive reparations process that is able to address the long-term effects of the violations they suffered. Moreover, the procedures to access the remedies must be victim-friendly and ensure a wide participation of victims in the process.

Victims of education-related violations who have been deprived of educational opportunities may wish to complete their education. However, in many instances, their needs will have changed; for instance, they may no longer be 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 and established, the issues

related to its implementation arise. Of particular importance, 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 prioritisation; and
- Verification and monitoring, looking at both judicial and administrative approaches.

4.1 Victims' Participation

Participating in a reparations process can be extremely challenging for vulnerable victims, especially where these processes require them to apply for reparations. In addition, 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 access to education may have been entirely barred to these victims, they may be illiterate. Consequently, these victims may be unable to claim for reparations on their own initiative. Therefore a strict requirement that they must do so would lead to substantial injustice.

Instead, non-application based processes, which identify victim communities and put in place arrangements for reparation in relation to such groups, are easier to access for vulnerable victims. They also often provide for reparations which are inclusive and community-based. Locating the victims through a mapping exercise can be useful to select the appropriate forms of reparations, to identify the victims, and to set up the implementation stage when the reparations awards are given 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. 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 is also 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, the Special Court for Sierra Leone developed a series of activities to inform and educate victims and students in that country about its work.

Once they are aware of the processes available, victims are better placed to access them 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 formally register in order to receive the benefits they may be entitled to. 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. In fact, it may be difficult for certain categories of victims of education-related violations to register themselves, given, for example, their possible disabilities or illiteracy. Moreover, certain categories of victims who suffer from social stigmatisation tend to be left out of a reparations process.

To overcome some of the procedural hurdles identified (such as lack of exhaustive lists of crimes, time limitation, centralised procedures, lack of confidentiality, lack of participation, inadequate payment mechanisms and high evidentiary standards), the Report explains that educating those in charge of reparations processes and investigation of crimes, as well as educating 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 specific groups of victims is also essential. Finally, procedural amendments may help ensure that all victims of education-related violations are included in the reparations process.

4.2 Assessing and Quantifying Harm

The forms of reparation which may be awarded depend on a number of factors, including the needs of victims and the harm suffered, but the type of reparations process selected is also important. Restitution is often not possible with regard to education-related violations. Therefore, 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. One example of note is where the harm suffered includes missed educational opportunities. In those circumstances loss of future earning may be considered for students who have missed out on education and thus did not manage to reach their career potentials. This kind of calculation emerges especially in relation to non-pecuniary damages, as the work of the Inter-American Court of Human Rights has proved.

The assessment and quantification of the harm also requires the prioritisation of the resources available and, in the context of insecurity and armed conflict, resources can be very limited. Resources are often prioritised for the benefit 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 prioritise their resources to favour certain persons. In Peru, the Truth and Reconciliation Commission 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. 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. A further example can be found in Sierra Leone where the Truth and Reconciliation Commission recommended the identification of primary beneficiaries of the Sierra Leone Reparations Programme in accordance with the following groups of victims: amputees, war wounded civilians, war widows, orphans, and victims of sexual abuse.

An alternative approach to prioritisation of resources is to prioritise reparations on the basis of the victims' 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 Truth and Reconciliation Commission 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.

4.3 Verification and Monitoring

Verification and monitoring are crucial 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 fail to do so. Moreover, if implementation issues go unresolved, they may cause further tension and acrimony among 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.

In some contexts, the fact that reparations must reach the victim may be a challenge itself. This can be the case where there are pre-existing structural gender inequalities as, for example, where the law limits women's right to property. When receiving compensation, women may be forced to give the money to male relatives. In case of child-victims, compensation may be given to the parents, who may not use it for the benefit of the child. In particular, with

regard to former child-soldiers, it may be contentious to award them financial reparations as this may be perceived by the community as a form of reward for the crimes they committed.

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.

The Report examines the advantages and shortcomings 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 instance, under 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 Trust Fund for Victims, with the Court retaining only a very general oversight function.

5. CONCLUSIONS AND RECOMMENDATIONS

Attacks on education in situations of insecurity and armed conflict can result in many education-related violations. They can consist of violations of the right to education itself but also of other human rights such as the right to life of students and education staff, their right to freedom from discrimination, their right to cultural life, and many other human rights. Education-related violations can also consist of violations of IHL, in particular the protection it provides to students and education staff as civilians and to schools as civilian objects. Violations of ICL, such as war crimes or crimes against humanity, can also be education-related violations when the victims are students, education staff or their relatives. Redressing these violations is fundamental to repair the damage caused to individuals and communities. Therefore it is important to enshrine the right of victims to reparation for all forms of education-related violations. In accordance with the rule of law, it must then be possible to enforce this right in an accessible, fair and efficient manner.

Moreover, education can be, and has been, used as a means to repair other kinds of violations perpetrated in insecurity and armed conflict. Many surveys have shown that education, particularly for children, ranks high on the list of what victims want from a reparations programme. 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.

Reparations for education-related violations, as well as education as a means of reparation, may take various forms, including:

- Reconstructing or rehabilitating an educational facility, as a collective form of reparation.
- Reinstating a victim's student status or 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 curriculum of schools to include human rights and peace education.

In order to strengthen the right to reparation for education-related violations and promote the use of education as a means to repair the harm caused by other kinds of wrongful acts, a set of recommendations directed to all the actors potentially involved in the reparations discourse are identified below.

Implement the State Obligation to Provide Reparation

States should ensure they are party to all treaties providing an individual right to reparation, including the newly adopted Optional Protocol to the ICESCR. States should also report on reparations activity undertaken by them as part of the reviews undertaken by the UN treaty bodies, 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 Rapporteurs' mandates) and raise issues of reparations in review mechanisms, 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 for already-suffering individuals.

Engage Non-State Actors

Non-State actors 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 Monitoring and Reporting Mechanism for grave violations against children in armed conflicts, non-State actors have been actively involved in the attempt to increase the protection of this particular group of victims. Incorporating a remedial component into these action plans, as well as with any other agreement engaging non-State actors, should be considered. The International Committee of the Red Cross, as well as other organisations such as non-governmental organisations, should be encouraged to consider education-related violations in their work. Soft law instruments, such as the *United Nations Guiding Principles on Business and Human Rights* should be

implemented to require that corporations provide effective non-State-based grievance mechanisms, and that States promptly award judicial remedies for education-related violations by corporations.

Promote Victims' 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. More generally, procedural hurdles, such as a lack of 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 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN general Assembly in 2005, should be considered by all international, regional and national institutions and mechanisms in seeking and awarding reparations for education-related violations. Rehabilitation (including where it addresses the social reintegration of victims) and guarantees of non-repetition, especially where they include education and training, may be particularly well-suited to redressing education-related violations, including for former child-soldiers, victims of sexual violence and persons with disabilities.

Consider the 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.

Educate All About Reparation

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 relevant actors, including States, international organisations, non-governmental organisations, and non-State actors will consider adopting these recommendations and develop further protocols to ensure that education-related violations are redressed. If such actions are taken then the goal of everyone being provided with educational opportunities, and with reparations where such is denied, can be better attained worldwide.

Education and the Law of Reparations
in Insecurity and Armed Conflict

A Summary