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International Human Rights Adjudication, Subsidiarity, and Reparation for Victims of Armed Conflict

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I. INTRODUCTION

In their chapters, Shuichi Furuya and Cristián Correa have provided strong evidence to support the claim that there is a right to reparation for victims of armed conflict.¹ Both have also emphasised the extent to which the right to reparation is recognised, particularly under international human rights law and not only in relation to victims of armed conflict. Indeed, it is under this branch of public international law that States have explicitly recognised this right in various treaties such as the United Nations (UN) Convention on Enforced Disappearance² or the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment.³ Importantly, both chapters move away from a discussion about the existence of a substantive right to reparation of victims of armed conflict towards a discussion about its operationalisation.⁴

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¹ See Furuya, 'Right to Reparation', Chapter 1 in this volume, sections III and V.A; Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, sections II.A and B.

² Art. 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 UNTS 3.

³ Art. 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS, 85.

⁴ Shuichi Furuya states that 'an abstract discussion of the substantive right to reparation has little significance; the concrete substance of that right can and must be identified in the respective historical circumstances in which policy-makers found it necessary to set out a procedure': Furuya, 'Right to Reparation', Chapter 1 in this volume, section I. Cristián Correa also states

This chapter takes the same operationalisation approach. It argues that, under international human rights law, significant practice has accumulated on the right to reparation for victims of armed conflict as a result of the work of international human rights mechanisms and domestic courts adjudicating on this right, as well as States undergoing transitional justice processes and setting up domestic reparation programmes. This contrasts with the almost non-existent practice of international or domestic courts adjudicating on reparation as a direct result of violations of humanitarian law and the scarce, although growing, practice on the right to reparation for victims of armed conflict under international criminal law.

This practice needs to be distilled if we are to fully understand the challenges it raises and the complexities that go unnoticed when reparation for victims of armed conflict is at stake. Indeed, looking at actual practice can shed light on the substantive right to reparation for victims of armed conflict.

Current practice on the right to reparation for victims of armed conflict under human rights law occurs at the domestic and the international levels. Under international human rights law, States have the obligation to respect and ensure rights. This general rule 'to ensure rights' has been understood to include reparation for the harm caused as a result of human rights violations.⁵ When gross and systematic human rights violations, such as displacement, disappearance, or torture, happen as a result of armed conflict, States can discharge their obligation to provide reparation by means of at least two remedies. First, domestic courts adjudicate on the human rights violations that took place and order reparation against the State and/or against the perpetrator of the violation(s). Second, States undergoing a process of transitional justice can establish domestic reparation programmes to redress thousands or millions of victims by means of a more uniform, faster, cheaper, and simpler administrative process than that involved before a tribunal.⁶ Such administrative programmes have been established around the world, as

that '[t]here is little effect on recognising the existence of a right if the mechanisms available for the right bearer are non-existent, inaccessible, or compromised by a lack of independence from the respective government': Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, section III.

⁵ See, e.g., Art. 2 of the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 407, together with General Comment 31, CCPR/C/21/Rev.1/Add.13, 26 May 2004, or Art. 1(1) of the American Convention on Human Rights (ACHR), 22 November 1969, 1144 UNTS 123, and IACtHR, *Veldsquez Rodríguez v. Honduras*, Merits, 29 July 1998, para. 166.

⁶ OHCHR, Rule of Law Tools for Post-Conflict States, Reparations Programmes, 2008, 9–10, available at www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf.

illustrated by domestic reparation programmes in Sierra Leone, Germany, Morocco, Argentina, Chile, Peru, Guatemala, and Colombia.⁷

Human rights law places the duty on States to respond to human rights violations. However, victims can seek justice and reparation internationally when States fail to provide adequate and effective domestic remedies to address the violations suffered, provided that the States allegedly responsible have recognised the jurisdiction of international bodies to adjudicate on such violations, including reparation.

There are many international and regional bodies that can decide on human rights violations that occur in times of armed conflict, both judicial and quasi-judicial. They include UN treaty-monitoring bodies, such as the Human Rights Committee or the Committee against Torture, and regional mechanisms, such as the European Court of Human Rights (ECtHR), the Inter-American System on Human Rights (including the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, or IACtHR), and the African System on Human and Peoples' Rights (including the African Commission on Human and Peoples' Rights and/or African Court of Human and Peoples' Rights).

This chapter focuses on the interplay that takes place between international human rights mechanisms set up to adjudicate on disputes concerning human rights violations, including those that occur during armed conflict, and which have jurisdiction to order reparation and domestic reparation programmes. This interplay between the domestic and the international is of utmost importance given that it is here where the scope and reach of the substantive right to reparation of victims of armed conflict is at stake and can be defined. Unfortunately, despite its importance, reflections on this interplay are currently missing in the literature. This chapter aims to fill this gap: it is an original and timely contribution to a very important debate that continues to be unnoticed.

The interplay between the international and the domestic is regulated by the principle of subsidiarity. This principle underpins international law's architecture and manifests itself in different ways in adjudication. It means that international bodies do not have jurisdiction to adjudicate on a case unless the State that allegedly violated human rights has failed to address such violations.⁸

⁷ Cristián Correa analyses administrative processes in 'Operationalising the Right of Victims', Chapter 2 in this volume, section II.B.

⁸ Samantha Besson, 'Subsidiarity in International Human Rights Law: What Is Subsidiary about Human Rights', *American Journal of Jurisprudence* 61 (2016), 69–107 (79).

The principle of subsidiarity is key for a harmonious coexistence between domestic and international remedies. At least in theory, it would be expected that if a case were to reach an international human rights body because a State had failed to provide victims of armed conflict with adequate and effective remedies, the international body would assume full jurisdiction over the case, including over reparation. Nevertheless, as this chapter shows, this is far from the situation. Even if a case reaches international human rights bodies, such bodies might still be willing to exercise some deference to the State in question and, as a consequence, it is for the State to define, in practice, the scope and reach of the right to reparation for victims of armed conflict.

To reflect on the interplay of subsidiarity and coexistence among international and domestic remedies in relation to reparation for victims of armed conflict, this chapter begins with a consideration of subsidiarity under international human rights law. This is followed by two sections dedicated to a careful analysis of the jurisprudence of the Inter-American bodies on reparation for victims of armed conflict, particularly the IACtHR, and then of the jurisprudence of the ECtHR, where the interplay between domestic responses via domestic reparation programmes and these international mechanisms is palpable. The sections on the jurisprudence of these courts is then complemented by some reflections as to what these courts should do when dealing with reparation and subsidiarity. The chapter concludes with some legal observations on how these courts should address this interplay, and the type of legal analysis that is needed to help to define the scope and reach of the right to reparation of victims of armed conflict, but in a way that is faithful to what is at the heart of the right to reparation: by putting victims at the centre of the legal discussion and wiping out, as far as possible, the harm they have suffered.

II. SUBSIDIARITY IN INTERNATIONAL HUMAN RIGHTS LAW

As Nicholas Barber and Richard Ekins state, this principle ‘is at its heart a moral principle about how state and society ... should be structured’.⁹ Furthermore, as Paolo Carozza explains, ‘each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself’.¹⁰ This key moral and political principle is not alien to public international law. Indeed, this principle has

⁹ Nicholas W. Barber and Richard Ekins, ‘Situating Subsidiarity’, *American Journal of Jurisprudence* 61 (2016), 5–12 (5).

¹⁰ Paolo Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’, *American Journal of International Law* 97 (2003), 38–79 (38).

helped to shape international governance, by distinguishing, for example, between the sovereign power of States and that given to international organisations or bodies created by them, as well as the way in which such power should interact. From this perspective, the international system is built on the idea that States, the main subjects of international law, and within them their communities should be allowed to govern themselves; only if they are unable to do so will others be allowed to scrutinise their conduct and help them to fulfil their international obligations.

This principle has also shaped international human rights law, making it central to the design and work of this body of law and institutions. The key idea behind this concept in international human rights law is that States have the primary obligation to respect and ensure human rights under their jurisdiction. It is they that sign treaties, accept obligations, create international institutions, and transfer specific powers and functions to such bodies, but they do so under the assumption that it is the States' primary task to fulfil the international obligations that bind them. This means that when alleged violations take place, States have the prerogative to provide remedies to victims to address those violations. Only if States fail to act as expected under international law can international responses be triggered.¹¹

Samantha Besson has identified three forms of subsidiarity at work in international human rights law: procedural, substantive, and remedial. Her classification aims to make normative sense of existing law and practice under human rights law, where explicit reference to subsidiarity is rare.¹² *Procedural subsidiarity* refers to the establishment of institutions and procedures at both the domestic and international levels to monitor and protect human rights, and the relationship of complementarity that exists between those institutions.¹³ In the context of international tribunals, Besson defines it as 'the actual power or competence of the international human rights court or body to review'.¹⁴ In other words, what Besson calls procedural subsidiarity in international human rights adjudication is the legal recognition made by States that if they have failed to comply with their human rights obligations, international quasi-judicial and judicial bodies are able to adjudicate on those alleged violations.

Besson also identifies *substantive subsidiarity*. According to her, this type of subsidiarity refers to the scope of the powers granted to international bodies to

¹¹ Gerald L. Neuman, 'Subsidiarity', in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), 360–3.

¹² *Ibid.*; Besson, 'Subsidiarity in International Human Rights Law' (n. 8), 78.

¹³ Besson, 'Subsidiarity in International Human Rights Law' (n. 8), 77.

¹⁴ *Ibid.*, 78.

protect ‘the minimal and abstract content of ... rights against domestic levelling-down’.¹⁵ This type of subsidiarity is at stake once procedural subsidiarity has been triggered, because only when a body is able to exercise jurisdiction over a case can a discussion about the extent of its powers over the interpretation of specific rights take place.

Finally, Besson refers to *remedial subsidiarity*, which can be defined as the extent of the power conferred to the international body to order remedies that have to be provided by the State after the body finds that international human rights obligations have been breached – that is, after the body has been able to exercise substantive subsidiarity.

Human rights law incorporates various legal rules to safeguard subsidiarity. They are found in treaties, in the statutes, or in rules of procedure of international bodies, and they have been further developed in jurisprudence. They aim to provide legal certainty as to what powers these international bodies have and when they can be triggered. Examples of rules fleshing out subsidiarity in human rights law include the requirement of exhaustion of domestic remedies and the fourth-instance doctrine. According to the rule on exhaustion of domestic remedies, no case can be brought before a judicial or quasi-judicial international body until all relevant domestic remedies have been exhausted at the domestic level. While there are internationally accepted exceptions to this rule, such as when domestic remedies are not adequate or effective, the rule is broadly supported internationally.¹⁶ Furthermore, the application of the rule has become stricter in recent years, as has the potential application of exceptions to it.¹⁷ In turn, the fourth-instance doctrine notes that international judicial or quasi-judicial bodies cannot act as a court of fourth instance on top of domestic courts. In other words, they are not appellate courts that can quash domestic rulings¹⁸ and hence, when placed in a situation in which they can act as fourth instance, they should exercise judicial

¹⁵ *Ibid.*, 77.

¹⁶ See, e.g., Art. 5 of the Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Art. 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 221; Art. 46(1)(a) and (2) ACHR; Arts 50 and 56 of the African Charter on Human and Peoples’ Rights (ACHPR), 27 June 1981, 1520 UNTS 217.

¹⁷ See, e.g., Raffaella Kunz, ‘A Further “Constitutionalisation” to the Detriment of the Individual? On the ECtHR Stricter Reading of the Principle of Subsidiarity Regarding the Admissibility of Cases’, *Völkerrechtsblog*, 27 August 2018, available at <https://voelkerrechtsblog.org/a-further-constitutionalization-to-the-detriment-of-the-individual/>.

¹⁸ See CIDH, *Laureano Brizuela Wilde* (Mexico), Report on Admissibility, Report No. 64/14, Petition 806–06, 25 July 2014, para. 43.

restraint.¹⁹ These two examples illustrate requirements that must be met for procedural subsidiarity to be triggered.

Some consider that remedial subsidiarity ‘protects the States’ choice of remedial means’, as Besson argues,²⁰ and therefore that tribunals should grant great subsidiarity to States to deal with reparation. Others, such as Dinah Shelton, believe that tribunals should exercise the jurisdiction they have been granted when States, having had the opportunity to remedy the situation, do not act accordingly.²¹ How far international bodies can go in awarding reparation for victims of armed conflict is as much a question about how should one understand subsidiarity in such a context as it is about how remedial subsidiarity is framed by relevant human rights treaties. In the European system, for example, this question depends on the interpretation of Article 41 of the European Convention on Human Rights (ECHR). This provision limits the powers of the Court on reparation to just satisfaction ‘if the internal law of the High Contracting Party concerned allows only partial reparation to be made’ and ‘if necessary’.

Often, in the literature on subsidiarity and on legal discussions, one encounters references to ‘complementarity’ as either a term synonymous with subsidiarity or an entirely different term. The discussion on complementarity has gained currency particularly under international criminal law, where the preamble to the Rome Statute states that ‘the International Criminal Court ... shall be complementary to national criminal jurisdictions’.²² This principle is further reiterated in the first Article of the treaty. However, doctrine on complementarity under the Rome Statute appears to refer to subsidiarity. Mohamed El Zeidy, for example, defines it as a principle that ‘requires the existence of both national and international criminal justice functioning in a subsidiary manner for the repression of crimes of international law. When the former fails to do so, the latter intervenes and ensures that perpetrators do not go unpunished.’²³ Equally, Luke Moffett considers that complementarity is ‘meant to protect the sovereignty of states by recognising their primary responsibility to prosecute and punish perpetrators of international crimes, due to their obligations under the

¹⁹ ECtHR, Note by the Jurisconsult, Interlaken Follow-up, *Principle of Subsidiarity*, 8 July 2010, 11.

²⁰ *Ibid.*, 82.

²¹ Dinah Shelton, ‘The Jurisprudence of Human Rights Tribunals on Remedies for Human Rights Violations’, in J.F. Flauss (ed.) *International Protection of Human Rights and Victims’ Rights*, (Brussels: Bruylant, 2009), 57–75 (59).

²² Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3.

²³ Mohamed M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, *Michigan Journal of International Law* 23 (2002), 869–975 (870).

Rome Statute and international law'.²⁴ This is very similar to the idea underpinning subsidiarity under human rights law, according to which States are obliged to respect and ensure the rights they have recognised, including the obligations deriving from them, and only if they do not do other international mechanisms gain jurisdiction over such matters.

As this discussion on complementarity shows, complementarity and subsidiarity are closely related concepts. Complementarity is clearly an element of subsidiarity, but goes beyond it. One can identify at least two potential dimensions of complementarity. First is one that denotes its negative or reactive dimension, whereby international mechanisms are somehow residual because they are triggered to act or adjudicate only in the absence of relevant action by domestic systems (be it in human rights law or under international criminal law). This dimension is captured by the definitions given by Moffett and El Zeidy. This concept of complementarity can be taken as synonymous with subsidiarity. The second dimension, and a dimension of great importance, is positive complementarity, meaning that international mechanisms have powers to identify and define the reach and scope of international obligations, as well as to foster an environment of compliance with them. This element is not apparent in those definitions. At the International Criminal Court (ICC), for example, the Office of the Prosecutor, in interpreting its mandate under the Rome Statute, considers that encouraging 'genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance',²⁵ would promote a positive approach to complementarity.

The concept of complementarity is not alien to human rights law. It is found, for example, in the preamble to the American Convention on Human Rights (ACHR) when it states that human rights 'justify international protection in the form of a convention reinforcing or complementing the protection provided by domestic law of the American States'. Such reference to complementarity emphasises the functional role that international human rights institutions are called upon to play.²⁶ However, note that, here, the reference to complementarity is to the Convention itself and not to the Inter-American Commission of Human Rights or IACtHR as guardians of the instrument. Thus any discussion about

²⁴ Luke Moffett, *Justice for Victims before the International Criminal Court* (New York: Routledge, 2014), 51.

²⁵ International Criminal Court, *Prosecutorial Strategy 2009–2012*, 11 February 2010, para. 17.

²⁶ Besson, 'Subsidiarity in International Human Rights Law' (n. 8), 77.

remedial subsidiarity should also include a reflection on how complementarity in general, and positive complementarity in particular, could be fostered in this area. As a consequence, the relationship between these two terms is of relevance to this chapter and will be specifically addressed in section VI.

III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND ITS JURISPRUDENCE ON REPARATION

The Inter-American Court has the authority to award reparation under Article 63(1) of the ACHR, which states:

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

In interpreting this provision, the IACtHR has consistently maintained that States have an obligation to provide integral, full, or adequate reparation to victims whose rights under the ACHR or other applicable treaties have been violated.²⁷ Indeed, the Court has stated that:

Reparation for damages caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which is to reinstate the situation that existed prior to the commission of the violation. If, as in the instant case, full restitution is not possible, an international court must order a series of measures that will safeguard the violated rights, redress the consequences that the violations engendered, and order payment of compensation for the damages caused.²⁸

²⁷ In Spanish, the jurisprudence of the Court, as a general rule, refers to 'integral reparation', but in many cases it also uses the word 'adequate' to mean the same. Given that the word 'adequate' captures better the meaning given to the concept by the Court in English, this chapter will use the term 'adequate' rather than 'integral'. See, e.g., IACtHR, *Ituango v. Colombia*, Merits, Reparations and Costs, 1 July 2006, paras 341 and 345. See also Clara Sandoval-Villalba, 'The Concepts of Injured Party and Victim of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations', in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Leiden: Martinus Nijhoff, 2009), 243–82.

²⁸ IACtHR, *Cantoral-Benavides v. Peru*, Reparations and Costs, 3 December 2001, para. 41.

This position has been upheld by the Court since its judgment in *Velásquez Rodríguez v. Honduras*.²⁹ According to the Court, this obligation has the status of customary law, and it requires the existence of a direct causal link between the violation found by the Court and the harm caused.³⁰ While Article 63(1) of the Convention includes the words 'if appropriate', suggesting that the Court does not always need to award reparation, these words have been omitted from any interpretation of this provision by the Commission or the Court, or by relevant stakeholders in the region.³¹

In application of this principle, the Court has awarded various forms of reparation to victims of violations under the Convention or other applicable treaties, particularly to victims who are in a vulnerable situation, such as women, children, indigenous peoples, or those who suffered gross and systematic human rights violations as a result of armed conflict or dictatorships.³²

The Court has even stated, albeit in *obiter dictum*, that reparations should be transformative, meaning that reparations can never bring a person back to a situation of discrimination, but rather should change those conditions.³³

Another key feature of the reparations jurisprudence of the Court is its relatively flexible concept of 'victim'. According to its Rules of Procedure, a victim is 'a person whose rights have been violated, according to a judgment emitted by the Court'.³⁴ This means that the Court could recognise as victim any person who has proven that their rights were violated. This could include next of kin of persons who have suffered gross human rights violations or others. The Rules even indicate that 'when it has not been possible to identify one or more of the alleged victims who figure in the facts of the case because it concerns massive or collective violations, the Tribunal shall decide whether to consider those individuals as victims'.³⁵

This provision is particularly significant when the Court has to deal with gross human rights violations that took place in situations of armed conflict, as was the case in *El Mozote and Nearby Places*.³⁶ In this case, the

²⁹ IACtHR, *Velásquez Rodríguez v. Honduras*, Reparations and Costs, 21 July 1989, para. 25.

³⁰ IACtHR, *Ticona Estrada and Others v. Bolivia*, Merits, Reparations and Costs, 27 November 2008, para. 110.

³¹ Sandoval-Villalba, 'The Concepts of Injured Party' (n. 27).

³² IACtHR, *Street Children v. Guatemala*, Reparations and Costs, 26 May 2001; IACtHR, *Cotton Field v. Mexico*, Preliminary Exceptions, Merits, Reparations and Costs, 16 November 2009; IACtHR, *Yakye Axa v. Paraguay*, Merits, Reparations and Costs, 17 June 2005.

³³ IACtHR, *Cotton Field* (n. 32), para. 450.

³⁴ Rule 2 of the IACtHR Rules of Procedure, as approved in November 2009.

³⁵ *Ibid.*, Rule 35(2).

³⁶ IACtHR, *Massacres of El Mozote and Surrounding Areas v. El Salvador*, Merits, Reparations and Costs, 25 October 2012.

Inter-American Court dealt with various massacres that took place between 11 and 13 December 1981 in Morazán, El Salvador, where approximately 1,000 people were killed and in which there were clear difficulties identifying each of the individual victims.³⁷

As a result of its concept of adequate reparation, the Court has also recognised various forms of reparation in its jurisprudence. The more serious the violations, as is the case in situations of armed conflict, the more forms of reparation the Court has awarded. The Court has issued orders against States regarding the investigation, prosecution, and punishment of perpetrators of human rights violations,³⁸ restitution if applicable,³⁹ compensation for pecuniary (consequential damages, loss of earnings) and non-pecuniary damages,⁴⁰ and other forms of reparation that include satisfaction measures,⁴¹ rehabilitation (primarily for mental and physical care)⁴² and guarantees of non-repetition.⁴³ The Court has even recognised that reparations can be both individual and collective.⁴⁴

The work of the Court has not stopped there. Besides these substantive reparation principles, the Court has also crafted crucial procedural principles on reparation. For instance, the Court has applied a flexible approach to the standard and burden of proof in reparation, as illustrated by the value it attributes to circumstantial evidence and presumptions ‘when they lead to consistent conclusions as regards the facts of the case’.⁴⁵ An example of this is the Court’s presumption that all adults with a family spend most of their income providing for the needs of their dependants, or that the killing or disappearance of a loved one does serious emotional harm to the parents and children of the victim.⁴⁶ Equally, the Court has provided victims with the

³⁷ *Ibid.*, paras 1 and 310.

³⁸ The Court has ordered the duty to investigate in almost all of its decisions concerning gross human rights violations. See, e.g., IACtHR, *Molina Theissen and Others v. Guatemala*, Reparations and Costs, 4 July 2004, paras 78–84.

³⁹ IACtHR, *Kakmok Kasek Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, 24 August 2010, para. 288.

⁴⁰ IACtHR, *El Mozote* (n. 36), paras 379–84.

⁴¹ IACtHR, *Pueblo Bello v. Colombia*, Merits, Reparations and Costs, 31 January 2006, para. 278.

⁴² IACtHR, *Mapiripán v. Colombia*, Merits, Reparations and Costs, 15 September 2005, para. 312.

⁴³ IACtHR, *Rosendo Cantú and Others v. Mexico*, Admissibility, Merits and Reparations, 16 November 2009, paras 203–86.

⁴⁴ IACtHR, *Aloboetoe v. Suriname*, Reparations, 10 September 1993, para. 83; IACtHR, *Massacre of Plan de Sanchez*, Reparations, 19 November 2004, paras 86, 94–111; IACtHR, *Saramaka v. Suriname*, Admissibility, Merits, Reparations and Costs, 28 November 2007, paras 188, 190–202.

⁴⁵ IACtHR, *Gangaram Panday v. Suriname*, Merits, 21 January 1994, para. 49.

⁴⁶ IACtHR, *Mapiripán* (n. 42), paras 283–4; IACtHR, *Gomez Paquiyauri v. Peru*, Merits, Reparations and Costs, 8 July 2004, para. 218.

opportunity to participate in proceedings, including in relation to reparation, to explain the harm they have suffered and it has shown sensitivity in relation to their different cultural backgrounds.⁴⁷

As can be inferred from this section, the Court has crafted important substantive and procedural principles to provide reparation to victims. In the Americas region, these principles have allowed the Court to provide comprehensive reparations to victims of armed conflict in the absence of State action to comply with the provisions of the ACHR. Indeed, the Court had to decide many cases concerning gross human rights violations that occurred in times of armed conflict in the region, including against Colombia, Peru, Guatemala, and El Salvador. All of these countries have established their own domestic reparation programmes.

A. *Gross Human Rights Violations, Victims, and Domestic Reparation Programmes in Guatemala, Peru, and Colombia*

The three States of the region with the highest number of cases decided by the IACtHR are Peru, Guatemala, and Colombia. The majority of cases against these States also concern gross human rights violations that took place in the midst of non-international armed conflict. These States have engaged with more than one transitional justice mechanism to deal with the legacy of mass atrocities, including truth commissions. These countries have used subsidiarity as an argument to get the Court to order reparations by means of their own domestic reparation programmes. Therefore, a closer look at these countries and their domestic reparation programmes is important to set out the context for analysis.

1. Guatemala

A non-international armed conflict took place in Guatemala between 1962 and 1996.⁴⁸ Various rebel groups were created in Guatemala to resist the State. Those groups included the Rebel Armed Forces (*Fuerzas Armadas Rebeldes*, or FAR), the Organisation of the People in Arms (*Organización del Pueblo en Armas*, or ORPA) and the Army of the Poor (*Ejército Guerrillero de los Pobres*, or EGP). All of these joined forces in 1982, giving life to the Guatemalan

⁴⁷ IACtHR, *Aloeboetoe v. Suriname*, Reparations and Costs, 10 September 1993.

⁴⁸ Commission for Historical Clarification, *Guatemala Memory of Silence: Report of the Commission for Historical Clarification – Conclusions and Recommendations*, 25 February 1999, para. 1.

National Revolutionary Unit (*Unidad Revolucionaria Nacional Guatemalteca*, or URNG).

According to the National Commission for Historical Clarification (*Comisión de Esclarecimiento Histórico*, or CEH), established in Guatemala in 1994 as part of the Peace Agreement, the State responded to these armed groups in a totally disproportionate manner, since 'at no time during the internal armed confrontation did the guerrilla groups have the military potential necessary to pose an imminent threat to the State'.⁴⁹ The State's response was extremely violent and targeted in particular the Maya indigenous population. While the armed conflict lasted various decades, the bloodiest period took place between 1978 and 1984, during which time the CEH reports that at least 91 per cent of all human rights violations took place.⁵⁰ Violations included torture, killings, enforced disappearance, forced displacement, destruction of houses, health centres, and schools, as well as the destruction of cultural sites and identity. All these violations, together with their systemic and intentional nature, led the CEH to conclude that 'agents of the State of Guatemala, within this framework of counterinsurgency operations carried out between 1981 and 1983, committed acts of genocide against groups of Mayan people'.⁵¹ Peace talks began in 1987 and materialised in twelve peace agreements in December 1996. Some of these agreements, such as the Comprehensive Agreement on Human Rights, recognised that:

[I]t is a humanitarian duty to compensate^[52] and/or assist victims of human rights violations. Said compensation and/or assistance shall be effected by means of government measures and programmes of civil and socio-economic nature addressed, as a matter of priority, to those whose need is greatest, given their economic and social condition.⁵³

The CEH was established by one of the peace agreements. In its final report of 1998, the CEH recommended, as a matter of urgency, the establishment of a domestic reparation programme for victims of the armed conflict and their next of kin.⁵⁴ It is in this context that, five years after the report, a domestic reparation programme was established in Guatemala in 2003, by means of a gubernative agreement and not a law.⁵⁵ While Guatemala has no official

⁴⁹ *Ibid.*, para. 24.

⁵⁰ *Ibid.*, para. 82.

⁵¹ *Ibid.*, paras 108–26.

⁵² The UN English text of the Comprehensive Agreement for Human Rights translates *resarcimiento*, i.e. reparation, as 'compensation', which is not accurate.

⁵³ Comprehensive Agreement on Human Rights, A/48/928, S/1994/448, 29 March 1994, cl. VIII.

⁵⁴ Report of the Commission for Historical Clarification (n. 48), 49, at paras 7–21.

⁵⁵ Guatemalan Government, Acuerdo Gubernativo 258–2003.

registry of victims, the overall number is calculated to include between 130,000 and 200,000 people who were murdered, 50,000 who were disappeared, 1 million who were internally displaced, 100,000 refugees, and 200,000 children who were orphaned.⁵⁶ To identify the key principles that would guide the domestic reparation programme, a concerted effort took place in Guatemala that brought together civil society organisations, the government, and other stakeholders. The result was the ‘Blue Book’, which contains all of the reparation principles, including one that defines victims as ‘those who suffered directly or indirectly, individually or collectively, human rights violations included in this programme’.⁵⁷

Both the gubernative agreement and its amendments, and the Blue Book, establish, in general terms, five forms of reparation for victims: restitution of housing, land, or the like; compensation; reparation for cultural harm; satisfaction measures, such as support with exhumations; and rehabilitation.⁵⁸

Although the domestic reparation programme was in principle inspired by a holistic view of reparation, in practice it has prioritised compensation and lacks implementation.⁵⁹ As Cristián Correa states elsewhere in this volume, approximately 31,845 victims received compensation between 2005 and 2014.⁶⁰ The original agreement indicated that 300 million Guatemalan quetzal (approximately 37 million USD) would be given annually to the domestic reparation programme, equivalent, more or less, to 1 per cent of the national budget. The government has failed to provide the domestic reparation programme with such allocation and the money the domestic reparation programme has received annually – about 10 per cent of the original pledge – has not been sufficient to provide reparation.⁶¹ Furthermore, the programme was

⁵⁶ Report of the Commission for Historical Clarification (n. 48), appendix, 71–73.

⁵⁷ Guatemalan Government and Civil Society, *Texto El Libro Azul (Política de Resarcimiento)*, 2002, para. 59, 13, available at www.pnr.gob.gt/archivos/biblioteca/EL%20LIBRO%20AZUL.pdf.

⁵⁸ *Acuerdo Gubernativo* (n. 55), Art. 2; *Texto El Libro Azul* (n. 57), para. 68.

⁵⁹ OHCHR, *Informe Periódico del Estado de Guatemala al Comité de Derechos Humanos sobre la Aplicación del Pacto Internacional de Derechos Civiles y Políticos*, CCPR/C/GTM/3, 10, para. 41, available at www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR-C-GTM3_sp.pdf, and *Informe de la Evaluación Conjunta del Programa Nacional de Resarcimiento y de los Programas de Apoyo al PNR de GTZ y PNUD*, 14 December 2007, 67, available at www.berghof-foundation.org/fileadmin/redaktion/Publications/Other_Resouces/GT_Informe_Final_EC_PNR.pdf.

⁶⁰ See Correa, ‘Operationalising the Right of Victims’, Chapter 2 in this volume, section III. B.1.a.

⁶¹ Impunity Watch, *Monitoreo de la Justicia Transicional en Guatemala*, vol. III, *Derecho a la Reparación para las Víctimas del Conflicto Armado Interno*, 2014, 31, available at www.impunitywatch.org/docs/Tomo_III-compressed.pdf.

originally established for ten years, and its renewal faced serious political, financial, and legal obstacles.⁶² As indicated by civil society organisations at a hearing before the Inter-American Commission of Human Rights in December 2016, the domestic reparation programme was basically non-operational in the year 2015–16 and victims continue to go without reparation.⁶³ During the hearing before the Commission, the State representative also recognised that reparations are a pending issue in Guatemala.⁶⁴

2. Peru

Peru experienced a non-international armed conflict between 1980 and 2000.⁶⁵ It was fought by the State, the Shining Path (*Sendero Luminoso*, or SP) and other rebel groups, such as the Tupac Amaru Revolutionary Movement (*Movimiento Revolucionario Tupac Amaru*, or MRTA). The SP declared war against the State, and both the State and the SP carried out atrocious crimes. Indeed, an important finding of the Truth and Reconciliation Commission (TRC) in Peru is that the SP was responsible for 53.68 per cent of the deaths that occurred during the armed conflict.⁶⁶ The conflict also disproportionately impacted peasant and indigenous communities.⁶⁷ The bloodiest crimes took place in 1984, 1989 and 1990.⁶⁸ With the fall of President Alberto Fujimori from power, a transitional government led by Valentín Paniagua put in place important transitional justice measures, the first of which was a Truth Commission, established in 2001, later renamed the Peruvian Truth and Reconciliation Commission.⁶⁹ According to the report of the TRC, there were approximately 69,280 persons killed or disappeared in Peru during the armed conflict.⁷⁰ The TRC also looked into massacres, torture, sexual violence, violations of due process, and child rights violations, among others.

As with the Guatemalan TRC, the TRC in Peru recommended the creation of a domestic reparation programme, but, in contrast to Guatemala, it enacted

⁶² *Ibid.*, 17.

⁶³ CIDH, Hearing on the Right to Full Reparation for Victims of the Armed Conflict in Guatemala, 6 December 2016, available at www.youtube.com/watch?v=_XidZaM3yEE.

⁶⁴ *Ibid.*, Statement made by Victor Hugo Godoy, President of COPREDEH.

⁶⁵ Comisión de la Verdad y Reconciliación, Informe Final, Capítulo 1, 1.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, Capítulo 1, 2.

⁶⁸ *Ibid.*

⁶⁹ Supreme Resolution 304-2000-JUS, 9 December 2000, Art. 1; Supreme Decree 065-2001-PCM, 4 June 2001.

⁷⁰ Comisión de la Verdad, Informe Final (n. 65), Annex II.

Law 28592/2005 to establish the reparation framework for victims of the armed conflict.⁷¹ It also created a registry of victims, which includes 214,109 individual victims and beneficiaries, and 5,712 communities registered for collective reparation. The domestic reparation programme, which Cristián Correa explains well,⁷² included six different forms of reparation: a citizens' rights restitution programme; measures on education; measures on health; collective reparations; symbolic reparations; and housing.⁷³ Compensation was envisaged for the next of kin of those who were killed or disappeared, or persons who, as a result of attacks or torture, were left with permanent disability, and for rape victims.

This programme has been particularly praised for its approach to collective reparations. While, under international law, there is no treaty defining the concept of collective reparation, in practice this term has been used in multiple settings by the ICC, other supranational bodies such as the IACtHR and various domestic reparation programmes. They provided reparation not to an individual who suffered harm as a result of a human rights violation, but to a group of people 'to alleviate the collective harm that has been caused as a consequence of a violation of international law of either individual or collective rights'.⁷⁴ An example of a collective form of reparation is a development project to provide a community with water or sewage systems. In the case of Peru, the domestic reparation programme finances small infrastructure projects in specific communities for a total cost of up to 100,000 Peruvian soles (approximately 33,000 USD). The projects are chosen in consultation with the community and they must fit one of the modalities established in the domestic reparation programme, such as recovery and reconstruction of the economic, productive, and trade infrastructure, or the recovery and expansion of education, health care, sanitation, and other similar services. Up until 2016, approximately 2,350 collective reparation projects had been financed by the State.⁷⁵ Accordingly, this represents 40.70 per cent of the total number of collective victims in Peru.⁷⁶

⁷¹ Congreso de la Republica, Ley n. 28592, 29 July 2005, available at www.mimp.gob.pe/home/mimp/direcciones/ddep/normas/4_5_Ley_28592_Crea_el_PIR.pdf.

⁷² See Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, section II.B.

⁷³ Ley n. 28592 (n. 71), art. 2.

⁷⁴ Diana Odier-Contreras Garduno, *Collective Reparations: Tensions and Dilemmas between Collective Reparations with the Individual Rights to Receive Reparations* (Antwerpen: Intersentia, 2018), 23–4.

⁷⁵ CMAN, Informe Anual sobre la Implementación del Plan Integral de Reparaciones, January–December 2016, 41.

⁷⁶ *Ibid.*

3. Colombia

A non-international armed conflict has also taken place in Colombia since the 1960s. The signing of the peace agreement in 2016 did not put a full end to the conflict and negotiations are still ongoing with the National Liberation Army (*Ejército de Liberación Nacional*, or ELN). Besides the ELN, other armed groups involved in the armed conflict have included the Revolutionary Armed Forces (*Fuerzas Armadas Revolucionarias*, or FARC), the State armed forces and various paramilitary groups. Each has committed serious international crimes, some amounting to serious human rights violations and/or serious violations of humanitarian law, including massacres, disappearances, torture, sexual violence, displacement, and extrajudicial killings.

Negotiations took place between the government and paramilitary groups to secure their demobilisation.⁷⁷ As a result of this, the Justice and Peace Law⁷⁸ was adopted, setting the foundations of a transitional justice system, primarily judicial, to investigate and punish with alternative sanctions the atrocities committed by those that would demobilise. This justice mechanism also included, as the main form of redress, an *incidente de reparación*, meaning that, at the same time as there is a criminal trial against the perpetrators, victims are able to claim reparation from the perpetrator as part of the trial. The Justice and Peace Law also established the National Commission for Reparation and Reconciliation to, among other functions, make recommendations to the government on collective forms of redress and to follow up on the *incidente de reparación*. However, this reparation mechanism, basically conceived to provide victims with reparation according to the harm they suffered in each case, proved to be unworkable for two reasons: first, reparation was made on a case-by-case basis, taking into account the specific facts and harms of each case; and second, criminal justice takes time – so much so that, after a decade of work of the Justice and Peace Law, there had been only thirty-four judgments.⁷⁹ As a result, a domestic reparation programme became a necessity in the country, with more than 8 million victims.

⁷⁷ CIDH, Truth, Justice and Reparation: Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II. Doc. 49/13, 31 December 2013, paras 53–4, available at www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf.

⁷⁸ *Ibid.*, para. 51. See also CIDH, Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, OEA/Ser.LV/II.125 Doc. 15, 1 August 2006, para. 8, available at www.cidh.org/countryrep/Colombia2006eng/Pronunciamento.8.1.06eng.htm.

⁷⁹ OAS, Vigésimo Primer Informe Semestral del Secretario General al Consejo Permanente sobre la Misión de Apoyo al Proceso de Paz en Colombia de la Organización de los Estados Americanos (MAAPP/OEA), OEA/Ser.G, CP/Doc.5194/16, 27 May 2016, 8.

The Victims and Land Restitution Law was enacted in 2011 to put the programme in place.⁸⁰ This domestic reparation programme pre-dates the signing of the peace agreement between the government and the FARC in 2016; under the peace agreement, it remains the key mechanism to provide reparation to victims, although it is complemented by other reparation measures for peacebuilding.⁸¹ In the words of the peace agreement, ‘existing mechanisms will be strengthened, [and] new measures will be adopted’.⁸² Among the new measures are collective reparation for the most affected communities and territories in the country, acts of acknowledgement of responsibility, and public apologies by the government, the FARC, and others.⁸³ The FARC will also carry out particular reparation activities, such as ‘participating in infrastructure rebuilding work in the areas most affected by the conflict and in programmes to clear such areas of anti-personnel mines, . . . participat[ing] in programmes to substitute crops used for illicit purposes, . . . and participat[ing] in programmes to repair environmental damages’.⁸⁴

According to the Colombian national registry, at time of writing (August 2020), there have been 9,031,048 victims, of whom 1,226,121 are victims of killings or disappearances and 8,047,756 are victims of internal displacement.⁸⁵ The Colombian domestic reparation programme has been considered the ‘cutting-edge of reparation programmes worldwide’,⁸⁶ given that it is an incredibly ambitious programme aiming to provide transformative reparation to millions of victims, including individual and collective forms of redress, compensation, rehabilitation, satisfaction, and other measures. Furthermore, it provides a full framework to provide land restitution to victims.⁸⁷

Another important feature of the Colombian reparation landscape is the fact that victims can also claim reparation before the contentious-administrative

⁸⁰ Congreso de la Republica, Ley 1448 de 2011, por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones (Ley de Víctimas), 10 June 2011, available at www.justiciatransicional.gov.co/sites/default/files/LEY-1448-DE-2011-LEY-DE-VICTIMAS-DIARIO-OFFICIAL.pdf.

⁸¹ Colombian Peace Agreement, English version, 138.

⁸² *Ibid.*

⁸³ *Ibid.*, 188.

⁸⁴ *Ibid.*, 189.

⁸⁵ Colombian Government, Single Registry of Victims, available at www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394 [accessed August 2020].

⁸⁶ Kathryn Sikkink *et al.*, *Evaluation of Integral Reparations Measures in Colombia*, Executive Summary (Boston: Harvard Kennedy School and Harvard Humanitarian Initiative, 2015), 2 and 15.

⁸⁷ Ley de Víctimas (n. 80), art. 25. See also Correa, ‘Operationalising the Right of Victims’, Chapter 2 in this volume, section II, which provides a more detailed account of each of the reparation measures included in this domestic reparation programme.

jurisdiction through the writ of direct reparation for antijudicial harm caused by the State.⁸⁸ This chapter focuses on domestic reparation programmes and, for that reason, will not address this feature of the Colombian system. However, it certainly makes the Colombian reparation landscape more complex, challenging, and *sui generis*.

B. *The Jurisprudence of the Court on Domestic Reparation Programmes: From Rectification to Deference*

It is against this background of domestic reparation programmes, and those set up in countries such as Chile, Argentina, or Brazil that were moving away from dictatorships, that the Inter-American Court has been asked to adjudicate on cases concerning gross human rights violations and to provide adequate redress in the holistic terms it has crafted over the years.

The cases of *Massacre of Plan de Sánchez v. Guatemala* and *Génesis v. Colombia* illustrate the rectification and deference tendencies of the IACtHR. *Massacre of Plan de Sánchez* and *Génesis* were decided in 2004 and 2013, respectively, almost a decade apart.

Massacre of Plan de Sánchez is emblematic of the old approach of the Court – that for which the jurisprudence of the Court has been praised. The case concerns a massacre that took place in 1982 during which more than 268 persons were killed by the Guatemalan military and others acting with their acquiescence; many more suffered other serious human rights violations, such as torture, rape, displacement, and denial of justice.⁸⁹ Guatemala acknowledged its international responsibility in the case for multiple violations of the American Convention, but it argued that any form of reparation ordered by the Court should be implemented through its own domestic reparation programme.⁹⁰ The Court abstained from examining the arguments presented by Guatemala in relation to the domestic reparation programme and fully applied its holistic approach to reparation, awarding measures ranging from compensation to guarantees of non-repetition (see Table 3.1).

⁸⁸ See, e.g., the IACtHR cases of *Manuel Cepeda Vargas* (n. 19) or *La Rochela Massacre v. Colombia*, Merits, Reparations and Costs, 11 May 2007, in which the Council of State had already awarded some reparations to the victims. For more information, see Genevieve Lessard, 'Preventive Reparations at a Crossroads: The Inter-American Court of Human Rights and Colombia's Search for Peace', *International Journal of Human Rights* 22 (2018), 1209–28.

⁸⁹ IACtHR, *Massacre of Plan de Sánchez v. Guatemala*, Merits, 29 April 2004, paras 42–52 (45).

⁹⁰ Presidencia de la República, COPREDEH, 21 May 2004, RED-A-28–2004, points 7, 15.

TABLE 3.1 Massacre of Plan de Sánchez v. Guatemala (2004)

Forms of Reparation	Specific Form of Reparation	Beneficiaries
Obligation to investigate, prosecute and punish		All victims ⁹¹
Satisfaction	Public act acknowledging State responsibility in the village of Plan de Sánchez, with the presence of high-ranking State authorities and with the members of the different communities affected, in Spanish and in Maya-Achi ⁹²	To the members of the community
	Translation of the judgment of the Court into Maya-Achi ⁹³	To the members of the community
	Publication in a national newspaper of national circulation of the proven facts of the case and other parts of the judgment ⁹⁴	To the members of the community
Guarantee of non-repetition	25,000 USD for the members of the community as guarantee of non-repetition and to honour the collective memory of the victims, to be used to maintain the chapel in which the victims pay homage to those who were executed during the massacre ⁹⁵	To the members of the community
Restitution	Housing programme for the surviving victims of the massacre who lost their homes as a result of the State's actions ⁹⁶	To all victims
Rehabilitation	Medical and psychological treatment to victims, including medicines ⁹⁷	To all victims

(continued)

⁹¹ *Ibid.*, IACtHR, *Massacre of Plan de Sánchez* (n. 89), para. 99.

⁹² *Ibid.*, paras 100–1.

⁹³ *Ibid.*, para. 102.

⁹⁴ *Ibid.*, para. 103.

⁹⁵ *Ibid.*, para. 104.

⁹⁶ *Ibid.*, para. 105.

⁹⁷ *Ibid.*, paras 106–8.

TABLE 3.1 (continued)

Forms of Reparation	Specific Form of Reparation	Beneficiaries
Collective reparation	Development programmes for the members of the community (dissemination of Maya-Achi culture, maintenance and improvement of roads in the area, sewage system and potable water supply, supply of teaching personnel with intercultural skills and establishment of a health centre) ⁹⁸	To the members of the community
Compensation	Pecuniary damages	5,000 USD per victim ⁹⁹
	Non-pecuniary damages	20,000 USD per victim ¹⁰⁰
Legal costs	55,000 USD to the Centre for Human Rights Legal Action (<i>Centro para la Acción Legal en derechos Humanos</i> , or CALDH) ¹⁰¹	

Reparations in *Plan de Sánchez* awarded by the Court aimed at rectifying the situation of vulnerability in which surviving victims were left and which deprived them of the possibility of a decent life. The Court recognised that, during the massacre, vast damage was caused to all things that made the livelihood of the community possible. It presumed that all of this was done at a cost and awarded 5,000 USD to each victim for material damages.¹⁰² Equally, the Court ordered the State to implement a programme to provide surviving victims living in the village with adequate housing, and to provide them with free physical and mental health care, including medications.¹⁰³

Furthermore, the Court ordered the State to implement certain programmes ‘in addition to the public works financed by the national budget

⁹⁸ *Ibid.*, paras 109–11.

⁹⁹ *Ibid.*, para. 75.

¹⁰⁰ *Ibid.*, 88.

¹⁰¹ *Ibid.*, paras 115–16. The CALDH is the Guatemalan non-governmental organisation that represented the victims before the Court.

¹⁰² IACHR, *Massacre of Plan de Sánchez v. Guatemala*, Reparations, 19 November 2004, para. 74.

¹⁰³ *Ibid.*, paras 105–11.

allocated to that region or municipality'.¹⁰⁴ Those programmes included: a sewage system and potable water supply; the supply of teaching personnel for primary and secondary schools in the communities affected; the establishment of a health centre with adequate personnel and the ability to provide medical and psychological care to those affected; and the study and dissemination of the Maya-Achi culture. Thus the Court was not only repairing the harm that took place during and as a consequence of the massacre, but it was also rectifying a situation that it considered contrary to the spirit of international human rights law. In a case such as this, the Court exercised full jurisdiction over reparations and there was no consideration of subsidiarity as a potential tool to deal with reparation.

The Court decided many other cases like *Plan de Sánchez* similarly.¹⁰⁵ However, in contrast to *Plan de Sánchez* and to its jurisprudence, a different and more nuanced approach to reparations is seen in the Court's judgment in *Operation Génesis v. Colombia*.¹⁰⁶ This case relates to a military operation (Operation Génesis) carried out in the area of the Salaquí and Truando rivers between 24 and 27 February 1997, which resulted in the killing of Marino López Mena and the displacement of hundreds of members of the Afro-descendant communities of the Cacarica river. In this case, the Court identified 372 victims, of whom 341 were displaced persons.¹⁰⁷ This is also the first judgment against Colombia in which the Court considers that Colombia violated Article 22 ACHR (freedom of movement) as a result of the displacement of the Cacarica communities caused during the military operation.¹⁰⁸ Colombia failed to ensure the right to personal integrity and not to be displaced forcibly of the Cacarica communities, and it offered insufficient basic assistance after that displacement.¹⁰⁹

In *Génesis*, a discussion arose about 'the sufficiency of the measures included in the Victims and Land Restitution Law to make reparation to the victims'.¹¹⁰ Indeed, Colombia used the subsidiarity argument, arguing that its 'administrative reparation programme constitutes an effective remedy for the fulfilment of the right to reparation, which needs to be exhausted before going

¹⁰⁴ *Ibid.*, para. 110.

¹⁰⁵ See, e.g., IACtHR, *Mapiripán* (n. 42); IACtHR, *Ituango* (n. 27); IACtHR, *Pueblo Bello* (n. 41); IACtHR, *El Mozote* (n. 36).

¹⁰⁶ IACtHR, *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Génesis) v. Colombia*, Preliminary Exceptions, Merits, Reparations and Costs, 20 November 2013.

¹⁰⁷ *Ibid.*, para. 431.

¹⁰⁸ *Ibid.*, para. 290.

¹⁰⁹ *Ibid.*, paras 322–4.

¹¹⁰ *Ibid.*, para. 414.

to the Inter-American System'.¹¹¹ It also added that 'based on the principle of subsidiarity, the [court should] abstain from ordering any reparation because the presumed victims had not requested reparations before the contentious-administrative jurisdiction, which was the competent jurisdiction'.¹¹²

In contrast to *Plan de Sánchez*, the Court partly accepted the argument made by Colombia about its domestic reparation programme, but it still ordered additional forms of reparation or qualified its orders. Table 3.2 outlines the forms of reparation awarded by the Court.

Table 3.2 illustrates that the Court has used deference to Colombia's domestic reparation programme in the case of *Génesis* in relation to those forms of reparation included in the programme: compensation, rehabilitation, and restitution. The following subsections explain the orders given by the Court in this area and why they differ from the standard approach of the Court in cases such as *Plan de Sánchez*.

1. Rehabilitation

In relation to rehabilitation, the Court considered that the victims in the case were entitled to timely health care, according to its substantive standards on rehabilitation as in *Plan de Sánchez*. However, it referred the victims to the services of the national health system as established in Colombia's domestic reparation programme, stating that:

[T]he State must provide this treatment through the national health services, and to this end, the victims should access the domestic reparation programs to which this judgment refers . . . , specifically the programs established to implement the measures of rehabilitation. The victims should be given immediate and priority access to health care services, regardless of the corresponding time frames established by domestic law, avoiding obstacles of any kind.¹¹³

This position differs from the Court's stance in other similar cases against Colombia, such as *Santo Domingo*, decided more than a year after the Victims and Land Restitution Law was adopted in 2011. *Santo Domingo* also involved a military operation, one carried out in December 1998, which culminated with the killing of various persons and displacement of others.¹¹⁴ In that case,

¹¹¹ República de Colombia, Alegatos Finales, *Marino López y Otros (Operación Génesis)*, March 2013, para. 469.

¹¹² *Ibid.*, para. 465.

¹¹³ *Ibid.*, para. 453.

¹¹⁴ IACtHR, *Massacre of Santo Domingo v. Colombia*, Preliminary Exceptions, Merits and Reparations, 30 November 2012, para. 3.

TABLE 3.2 Operation Génesis v. Colombia (2013)

Form of Reparation	Specific Order Given by Court	To Marino Lopez and His Family	To All Internally Displaced Persons
Obligation to investigate, prosecute and punish ¹¹⁵		×	×
Satisfaction ¹¹⁶	Publication and dissemination of the judgment	×	×
	Public act to acknowledge responsibility	×	×
Rehabilitation ¹¹⁷	Free-of-charge and adequate physical and mental care with priority through the domestic reparation programme, including medicines	×	×
Restitution ¹¹⁸	Restoration of the effective use, enjoyment, and possession of the territories to the Afro-descendant communities		×
	State guarantee that the conditions of those places to be restored, as well as those where victims are currently located, shall be safe and permit a decent life		×
	No other forms of restitution ordered, because the domestic reparation programme includes housing, land restitution mechanisms, satisfaction, rehabilitation, and guarantees of non-recurrence, etc. ¹¹⁹		×
Compensation	Priority access to compensation through domestic reparation programme ¹²⁰		×
	Compensation to next of kin of Marino Lopez (the deceased victim) ¹²¹	70,000 USD to partner of Mr Lopez for his	

(continued)

¹¹⁵ *Ibid.*, paras 439–40.

¹¹⁶ *Ibid.*, paras 444–7.

¹¹⁷ *Ibid.*, para. 453.

¹¹⁸ *Ibid.*, para. 459.

¹¹⁹ *Ibid.*, para. 461.

¹²⁰ *Ibid.*, para. 475.

¹²¹ *Ibid.*, para. 476.

TABLE 3.2 (continued)

Form of Reparation	Specific Order Given by Court	To Marino Lopez and His Family	To All Internally Displaced Persons
		pecuniary and non-pecuniary harm ¹²²	
		35,000 USD to each of Marino's children for pecuniary and non-pecuniary harm	
		10,000 USD to each of Marino's siblings for pecuniary and non-pecuniary harm	
Legal costs	80,000 USD for the Inter-Church Commission for Justice and Peace (<i>Comisión Intereclesial de Justicia y Paz</i> , or CIJP) ¹²³		

the Court ordered the provision of rehabilitation measures, free of charge, for the physical and mental health problems of each victim, with their previous consent and the evaluation of their health problems, for as long as necessary, including any specialised tests and access to free medicines. It also asked that the services be provided in the nearest places to victims' residences and that victims be provided with collective, family, and individual treatment as required.¹²⁴

¹²² If compensation ordered by the Court to Marino's next of kin, including his siblings, is compared with the compensation that an internally displaced family can get through Colombia's domestic reparation programme, the difference is alarming. A displaced family group, regardless of how many persons are part of that family, would receive compensation equivalent to seventeen times the minimum salary at the year of payment. In 2019, the minimum salary in Colombia is 828,116 pesos. This means that an internally displaced family would get 14,077,072 Colombian pesos – equivalent to 4,483.02 USD. This is less than 50 per cent of what each sibling of Marino was ordered to receive as pecuniary and non-pecuniary damages.

¹²³ República de Colombia, Alegatos Finales, *Marino López* (n. 111), para. 481.

¹²⁴ *Ibid.*, para. 309.

Santo Domingo is different from *Génesis* not only in relation to the institutions charged with implementation of the rehabilitation measures, but also, more fundamentally, in relation to the quality of the treatment that should be provided. In *Santo Domingo*, as opposed to *Génesis*, the Court was very specific about the quality of health services that should be provided, indicating that it should include specialised tests and free medicines. While Colombia did argue before the Court that it had enacted the Victims and Land Restitution Law, the Court considered there to be no reliable evidence to show that victims were accessing the services provided for in that Law or that access to the health system was for harm suffered as a result of the violations.¹²⁵

2. Restitution and Development Measures

In *Plan de Sánchez*, the Court ordered housing for the victims who had lost theirs as a result of Guatemala's actions. The Court also ordered important collective forms of reparation, including various development projects in the community.¹²⁶ In contrast, and despite the fact that *Génesis* was the first case against Colombia – the second in the overall jurisprudence of the Court – in which displacement was found to have taken place in violation of the Convention, the Court did not order any of the forms of restitution requested by the victims, for example decent housing for women, various development projects such as improvement of schools and construction of new ones, or the provision of public services.¹²⁷ Nevertheless, the Court indicated that 'the domestic reparation programs refer specifically to housing programs and to land restitution mechanisms, as well as to other measures of rehabilitation, satisfaction and non-repetition. Consequently, the victims in this case should also have access to these other forms of reparation within, at most, one year of notification of this judgment.'¹²⁸

3. Compensation

Compensation in *Plan de Sánchez* was ordered for both pecuniary and non-pecuniary damages for all victims. The Court used the equity principle to calculate such harms in the absence of other evidence. The award for non-

¹²⁵ *Ibid.*, paras 305 and 307–9.

¹²⁶ Development measures are not necessarily restitution. However, the Court dealt with them under that heading. Development measures could be forms of rectifying a wrongful situation rather than simply restoring victims back to the *status quo ante*.

¹²⁷ IACtHR, *Génesis* (n. 106), paras 455–6.

¹²⁸ *Ibid.*, para. 461.

pecuniary damages was relatively high, amounting to 20,000 USD in 2004 for each of the victims. In the case of Colombia, this was one of the strongly contested issues during the litigation. Colombia argued that its domestic reparation programme 'was the only way to satisfy the right to adequate, prompt and effective reparation of the victims of displacement in Colombia, including, if any, those that the Court recognizes as victims in this case'.¹²⁹

The Commission considered that reparations 'could not be channelled through and satisfied by this law, because: (a) it is a new law that is being implemented and adjusted, and (b) it distorts the nature of the Inter-American System and its scope'.¹³⁰ Indeed, a powerful argument put forward by the Inter-American Commission of Human Rights was that if victims have a right to reparation as a result of violations that have been adjudicated on at the international level, it is wrong, as a matter of principle, to impose on those victims new obligations and to expect them to go through new procedures at the domestic level to make that right effective.¹³¹

The representatives of the applicants maintained that the Victims Law:

... was insufficient, given the magnitude of the harm caused, as well as the nature and amount of the reparations that it included ... [that] the compensation that it provides for displaced persons is unclear and includes items that are not applicable in this specific case; also, that it confuses the provision of services for the displaced population with reparations.¹³²

The Court considered important efforts to be taking place in Colombia to provide reparation in that the victims in *Génesis* could benefit from individual and collective reparation, and that the principle of complementarity cannot be disregarded.¹³³ The Court recalled in the judgment that it had used complementarity in other cases to 'acknowledge the compensation granted at the domestic level ... when it is pertinent'.¹³⁴

As a result, the Court ordered Colombia to pay compensation, in the quantum established by the domestic reparation programme (seventeen times the minimum salary at the moment of payment in Colombia per

¹²⁹ *Ibid.*, para. 463.

¹³⁰ *Ibid.*, para. 464; CIDH, Observaciones Finales Escritas, *Marino López y Otros (Operación Génesis) Colombia*, 13 March 2013, paras 115–16.

¹³¹ Observaciones Finales Escritas, *Marino López* (n. 130), para. 115.

¹³² *Ibid.*, paras 50–73.

¹³³ It must be noted that the cases referred to by the Court as cases in which it has respected the principle of complementarity are cases against Colombia: IACtHR, *Santo Domingo* (n. 123); IACtHR, *Manuel Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, 26 May 2010.

¹³⁴ IACtHR, *Génesis* (n. 106), para. 474.

displaced family), to internally displaced persons within a year of the notification of the judgment regardless of any time bar.¹³⁵ Its approach to Marino López and his siblings was rather different. The Court considered that the next of kin suffered various types of harm that were a direct consequence of López's death, such as the cruel circumstances of his passing and the fact that no one had been punished for this act in over fifteen years.¹³⁶ A similar consideration of ensuing harm of internally displaced persons (IDPs) could have also taken place. However, the Court abstained from doing that, ordering compensation in equity for the pecuniary and non-pecuniary harm caused at a rate of 70,000 USD for Marino's companion, 35,000 USD for each of his children, and 10,000 USD for each of his siblings.¹³⁷

What *Génesis* shows is that the Court is ready to play a subsidiary role in relation to some forms of reparation, but that it may condition the modes of compliance of such orders. I refer to this as 'qualified deference'.¹³⁸ The Court does so by, for example, prescribing when the State has to provide the measure (immediately or within a year of the judgment) or by ordering priority treatment to victims.

But the Court has also shown other forms of deference to domestic systems in cases against Guatemala and Peru. In contrast to its approach to Colombia, the Court has been more cautious with those States, possibly because of the lack of evidence regarding the strengths of their domestic reparation programmes or as a result of bad litigation. For example, two other massacres, Río Negro and Chichupac, were adjudicated by the Court in 2012 and 2017. The *Río Negro Massacres* case¹³⁹ concerned five massacres against the Mayan community of Río Negro in which enforced disappearances, arbitrary killings, displacement, and torture took place, and which the State failed to investigate with due diligence. The massacres occurred between 1980 and 1982.¹⁴⁰

Guatemala claimed that some victims had received reparation under its domestic reparation programme.¹⁴¹ The representatives of the victims agreed that some compensation had been paid to some victims, but they argued that it did not constitute 'adequate' reparation.¹⁴²

¹³⁵ *Ibid.*, para. 475.

¹³⁶ *Ibid.*, para. 476.

¹³⁷ *Ibid.*

¹³⁸ Clara Sandoval, 'Two Steps forward, One Step back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes', *International Journal of Human Rights* 22 (2018), 1192–208 (1204).

¹³⁹ IACHR, *Río Negro Massacres v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, 4 September 2012.

¹⁴⁰ *Ibid.*, paras 68–82.

¹⁴¹ *Ibid.*, para. 297.

¹⁴² *Ibid.*, para. 299.

The Inter-American Commission of Human Rights recognised the efforts of the Guatemalan State to implement the domestic reparation programme, but considered that ‘this program does not guarantee that . . . [victims of human rights violations] will receive reparation in a manner consistent with inter-American standards’.¹⁴³ As a result, it requested the Court to ‘take them into account when ordering compensation so that they can be subtracted from the final amount ordered’ in favour of the victims.¹⁴⁴

The Court, following the views of the Inter-American Commission of Human Rights, ordered compensation for pecuniary and non-pecuniary damages in favour of the victims, arguing that it had to wipe out the harm caused by the violations declared in the judgment. Nevertheless, it indicated that:

[T]he amounts that have already been awarded to the victims in this case at the domestic level under the domestic reparation programme must be recognized as part of the reparation due to them and subtracted from the amounts established by the Court in this judgment for compensation. At the state of monitoring compliance, the State must provide proof of the effective delivery of the amounts ordered under said program.¹⁴⁵

The Court upheld its own reparation standards, but recognised that reparation through the domestic reparation programme was already a contribution towards that end to the extent that compensation under that programme was effectively paid to the victims. Thus it did not completely disregard Guatemalan efforts.

In the judgments on *Members of the Chichupac Village and other Communities in the Municipality of Rabinal*,¹⁴⁶ the Court followed its approach in *Río Negro*. The case related to a massacre in Chichupac in January 1982 and to various gross human rights violations, such as enforced disappearances, torture, sexual violence, extrajudicial executions, and forced labour, which occurred between 1981 and 1986.¹⁴⁷ Guatemala claimed to have a strong domestic reparation programme that should be used to provide redress to the victims and even considered it problematic that the Court:

. . . could in fact be a parallel mechanism for the redress of some victims of the armed conflict . . . , with different procedures and forms of reparation to

¹⁴³ *Ibid.*, para. 298.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, para. 304.

¹⁴⁶ IACtHR, *Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal vs. Guatemala*, Admissibility, Merits, Reparations and Costs, 30 November 2016 (available only in Spanish at time of writing).

¹⁴⁷ *Ibid.*, paras 75–123.

determine beneficiaries of reparation and to define the forms and amount of reparation that not only go beyond the financial capacity of the State, but that also obstruct the adequate work of the [domestic reparation programme].¹⁴⁸

The legal representatives criticised the programme, alleging that it faced serious operationalisation problems and indicating that compensation under the programme was not in accordance with international standards, because it did not address moral damage nor did it cover all violations of the conflict, such as internal displacement.¹⁴⁹

The Commission, instead, articulated new arguments to explain to the Court the irrelevance of the domestic reparation programme when adjudicating on the case. For the Commission, victims before the Court had already litigated domestically and exhausted domestic remedies, and the judgments of the Court had a different reach and scope from that of domestic reparations.¹⁵⁰

The Court was persuaded by the views presented before it, particularly by the fact that Guatemala could not prove that the domestic reparation programme was, indeed, an adequate and effective remedy for the victims. As a consequence, the Court considered that Guatemala had to provide victims with rehabilitation of certain quality and with priority,¹⁵¹ and had also to provide compensation to victims in the amount ordered by the Court.¹⁵² However, the Court recognised that any compensation paid to victims for the same reasons for which the judgment was handed down through the domestic reparation programme should be discounted from the compensation to be paid to those beneficiaries.

As the judgments in *Río Negro* and *Chichupac* illustrate, the IACtHR did not give full prevalence to subsidiarity in relation to Guatemala as it tried to reconcile its jurisprudence with the reparations given by the domestic reparation programme, at least as regards compensation. Victims who had received some form of compensation through the domestic reparation programme could expect that portion to be deducted from any award made by the Court.¹⁵³

¹⁴⁸ *Ibid.*, para. 276.

¹⁴⁹ *Ibid.*, para. 277.

¹⁵⁰ *Ibid.*, para. 278.

¹⁵¹ *Ibid.*, paras 302–4.

¹⁵² *Ibid.*, paras 326–7.

¹⁵³ One of the latest cases concerning gross human rights violations that occurred during the armed conflict against Guatemala is IACtHR, *Coc Max and Others (Massacre of Xamán) v. Guatemala*, Merits, Reparation and Legal Costs, 22 August 2018. In this case, Guatemala argued that victims had benefited from its domestic reparation programme to stop the Court from awarding reparation to victims. However, the Court did not entertain the argument, given that it was presented *ex temporis*, and it awarded reparation to victims: *ibid.*, para. 146.

In respect of Peru, the State has also put forward its domestic reparation programme to prevent the Court from awarding reparation. Most of the Peruvian arguments have dealt with rehabilitation or compensation, arguing that the victims in the cases are benefiting, or would benefit, from its domestic reparation programme. In contrast to the Colombian cases, the Court has ordered rehabilitation regardless of the service provided through Peru's domestic reparation programme.¹⁵⁴ The Court has also awarded compensation according to its own jurisprudence, given the lack of evidence provided to the Court by the State on the adequacy and effective payment of compensation.¹⁵⁵ Where relevant information has been provided to the Court, such as on education as a form of reparation, the Court has ordered the measure on the same terms as the domestic reparation programme.¹⁵⁶ Thus the jurisprudence of the Court on Peru remains closer to that on Guatemala than to that on Colombia.

C. *The Judgments in Yarce and Vereda La Esperanza v. Colombia:
Is the Court Revisiting Its Approach to Subsidiarity?*

Up until time of writing (August 2020), the case in which the Court showed greatest deference to a domestic reparation programme was *Génesis v. Colombia*.¹⁵⁷ Nevertheless, two other cases against Colombia have been decided since *Génesis* in which Colombia's domestic reparation programme was also at stake, among them *Yarce* and *Vereda La Esperanza*. Do they follow the precedent in *Génesis*? Has the legal reasoning of the Court changed in those cases? If so, why?

*Yarce*¹⁵⁸ concerned five women human rights defenders who worked in *comuna 13* in Medellín (Colombia) and who suffered various violations as a result of the Orion military operation.¹⁵⁹ Two of them were under threat of death and displaced; the other three were arbitrarily detained, two of them

¹⁵⁴ IACtHR, *Tenorio Roca et al. v. Peru*, Preliminary Objections, Merits, Reparations and Costs, 22 June 2016, paras 281–4.

¹⁵⁵ See IACtHR, *Comunidad Campesina de Santa Barbara v. Peru*, Preliminary Objections, Merits, Reparation and Costs, 1 September 2015, paras 333–6.

¹⁵⁶ IACtHR, *Tenorio Roca* (n. 154), paras 294–8.

¹⁵⁷ Genevieve Lessard, 'Preventive Reparations at a Crossroads: The Inter-American Court of Human Rights and Colombia's Search for Peace', *The International Journal of Human Rights*, 22 (2017), 1209–28 (1219 and 1222).

¹⁵⁸ IACtHR, *Yarce and Others v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, 22 November 2016.

¹⁵⁹ *Ibid.*, paras 75–125.

displaced and one killed. The investigations into the violations were not carried out with due diligence.¹⁶⁰

While in *Génesis* the Court used the subsidiarity principle and ordered compensation, rehabilitation, and restitution through Colombia's domestic reparation programmes, in *Yarce* the Court drew some important distinctions between the two cases and crafted a more nuanced approach to subsidiarity.

Responding to Colombia's argument that it should be allowed to redress victims through its domestic reparation programme,¹⁶¹ the Court, following *Génesis*, recognised that, in certain circumstances, the scope of the individual right to reparation could be adjusted to provide redress to massive numbers of victims, and that domestic reparation programmes are 'a legitimate form to fulfil this obligation and to allow reparations'.¹⁶² Nevertheless, in an important shift, the Court stated that, to uphold such a position:

Colombia would have to indicate not only in general terms the reparation measures established in the Law, but would have had to determine and individualise, in specific form or at least roughly, the way in which they would apply to the victims in the case, with the goal to determine if, in application of the complementarity principle, it was possible to refer the matter to the domestic mechanisms. . . . [T]herefore if the possible referral to domestic reparation programmes is at stake, sufficient information should be submitted for the Court to assess the compensation that victims could obtain; when that does not happen, the Court must establish the reparation measures that it considers appropriate, among them compensation¹⁶³

The position of the Court was based on the standard of evidence required for a State to successfully argue before it that the State's domestic reparation programme could effectively provide reparation to victims. In *Yarce*, lack of 'sufficient information' prevented the Court from referring the case to the domestic system. However, it did not explain what constitutes 'sufficient information'.¹⁶⁴

¹⁶⁰ *Ibid.*, paras 101–25.

¹⁶¹ *Ibid.*, para. 321.

¹⁶² *Ibid.*, para. 326.

¹⁶³ *Ibid.*, para. 328 (translation by the author).

¹⁶⁴ In this case, Colombia and the legal representatives of the victims requested an interpretation of the judgment to the Court on various aspects, including the views of the Court on reparation. Colombia, e.g., asked the Court to clarify what is needed to sufficiently support claims that reparations at the domestic level are adequate. The Court limited itself to repeating what it said in the judgment. See *Yarce and Others v. Colombia*, Interpretation of Judgment on Preliminary Exceptions, Merits, Reparations and Legal Costs, 21 November 2017, paras 44–5 and 48–9.

In relation to rehabilitation, the Court ordered Colombia, as in cases before *Génesis*, to provide victims with free, adequate, and priority mental and physical health treatment, if they consented to it, for as long as needed. However, the Court added a caveat indicating that ‘the State could provide such treatment through its national health services, including the PAPSIVI as far as it complies with what the Court has ordered’.¹⁶⁵ The PAPSIVI is the national Health and Psychosocial Programme for Victims (*Programa de Atención Psicosocial y Salud integral a víctimas*). Thus the Court allowed Colombia to provide rehabilitation through healthcare services under its own domestic reparation programme and hence, while the order shows more restraint than *Génesis*, the door remained open to the State to decide to use its own programme to provide rehabilitation to victims, even if the Court qualified the terms of such services.

In contrast to rehabilitation, *Yarce* appears to mark a departure from *Génesis* on compensation, because the Court awarded compensation for material and non-material damages to victims based on equity. What caused the shift? While the position upheld by the Court in *Yarce* is different from that in *Génesis*, it cannot be taken to be a change of jurisprudence since the decision was based on the fact that the legal representatives of the victims presented their evidence on reparations outside the legal deadline given by the Court and Colombia did not present precise information to the Court about compensation for victims in the case through its domestic reparation programme.¹⁶⁶ Thus the Court had to adjudicate using its own jurisprudence and the equity principle. The Court awarded both pecuniary and non-pecuniary damages to the victims and their next of kin¹⁶⁷ – although, arguably, the amounts given as compensation are lower than those awarded in similar cases.¹⁶⁸

Given that *Yarce* was a case about women human rights defenders, the Commission and the victims requested guarantees of non-repetition.¹⁶⁹ Colombia presented information on measures taken, but the Court was not satisfied with the information received and noted, once again, that it needed specific information about guarantees of non-repetition in the specific case. As a result, the Court ordered the creation of a programme, course, or training on the work of human rights defenders to be given to people in *comuna 13*.¹⁷⁰

¹⁶⁵ IACtHR, *Yarce* (n. 158), para. 340.

¹⁶⁶ *Ibid.*, para. 362.

¹⁶⁷ *Ibid.*, paras 363–7.

¹⁶⁸ *Ibid.*, paras 363–70.

¹⁶⁹ *Ibid.*, paras 346–7.

¹⁷⁰ *Ibid.*, para. 350.

Another important case decided against Colombia in which its domestic reparation programme was at stake is *Vereda La Esperanza*.¹⁷¹ It dealt with the enforced disappearance of various persons, including three children, as well as the killing of another person in the village of that name.¹⁷² The case embraces qualified deference as in *Yarce* and provides important reasoning on subsidiarity at the reparations stage.

The Court dedicated various paragraphs to justify its shift in jurisprudence with respect to *Génesis* by resorting to subsidiarity. As already mentioned, while the ACHR refers to complementarity, that concept corresponds to that of subsidiarity as defined in this chapter. The Court used the preamble to the ACHR to indicate that 'the Convention system does not substitute national jurisdictions but complements them'.¹⁷³ This means that the State is the one called to act upon its international obligations, including on reparation, before the State has to respond before any international mechanism.¹⁷⁴ However, if a case reaches the Court, it is not sufficient for the State to allege that it has remedies in place or that it has provided reparation; rather, in such a situation, 'it needs to be assessed if [the State] effectively provided reparation of the consequences of the violations in a specific case, if reparations are adequate, or that there is a guaranty that domestic reparation mechanisms are sufficient'.¹⁷⁵

On rehabilitation, the Court followed *Yarce* and repeated, *verbatim*, the order on rehabilitation, which, if provided according to the standards of the Court, could be provided by the PAPSIVI.¹⁷⁶

In terms of compensation, the majority of the victims received reparation for pecuniary and non-pecuniary damages by means of the contentious administrative judicial system in Colombia. There was evidence of the payments made and clarity about who had not received compensation domestically. As a consequence, the Court considered that the amounts paid for pecuniary and non-pecuniary damages were reasonable.¹⁷⁷ However, the Court complemented said payments in relation to those victims who had not received compensation by the national judiciary, awarding the same amount of money that other victims had received for the same reason from national courts. It further noted that the direct victims of enforced

¹⁷¹ IACtHR, *Vereda La Esperanza v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, 31 August 2017.

¹⁷² *Ibid.*, para. 77.

¹⁷³ *Ibid.*, para. 260.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*, para. 263 (translation by the author).

¹⁷⁶ *Ibid.*, para. 278.

¹⁷⁷ *Ibid.*, paras 303–5 and 308–9.

disappearance also endured moral damage and that this should be compensated – something not supported by domestic jurisprudence – and it awarded compensation for this reason.¹⁷⁸

The victims and the Commission requested that the Court order collective reparation. The State argued that the community had been given priority for collective reparation in Antioquia as part of the domestic reparation programme, and that dialogue between the State and the community was ongoing.¹⁷⁹ The Court did not order collective reparation given that there were important domestic efforts to that end.¹⁸⁰ This is the only form of reparation in *Vereda La Esperanza* in which the Court exercised unqualified deference to Colombia.

Yarce and *Vereda La Esperanza* illustrate the Court's ability to revisit its approach to subsidiarity when it lacks concluding evidence that Colombia's domestic reparation programme has or would provide victims before the Court with integral reparation. Indeed, as rightly pointed out by one of the senior lawyers at the Inter-American Court, all of these cases show 'a Court trying to understand what was in place in Colombia in forms of reparation'.¹⁸¹ There was, however, another concern present during this process at the Court: how to take into account what States do to comply with human rights obligations. Indeed, the same lawyer indicated that, 'at the same time that the Inter-American System has evolved, domestic mechanisms in various countries have also done so. Then, the Court, and it is true that this did not happen at the beginning, takes more into account what the State has done.'¹⁸² Another senior lawyer at the Court reiterated that:

[T]he Court has to have some deference to States that really adopt human rights standards, that adopt policies that are, in principle, in accordance with human rights. What the Inter-American System has done during years is to say to the States: You have to do this, you have to ensure human rights, you have to have policies, you have to provide reparation to victims . . . OK. When States begin to react, begin to adopt policies, you cannot be indifferent to that, . . . for example, . . . Colombia has a very ambitious reparation law. I believe that it would not be an attitude, beyond what is legal, not even ethical, to say 'well, we will do as if nothing was in place.'¹⁸³

¹⁷⁸ *Ibid.*, paras 311–12.

¹⁷⁹ *Ibid.*, paras 288–90.

¹⁸⁰ *Ibid.*, para. 291.

¹⁸¹ Interview IACtHR10, 13 February 2018, conducted as part of the Human Rights Law Implementation Project, funded by the Economic and Social Research Council.

¹⁸² *Ibid.*

¹⁸³ Interview IACtHR15, 15 February 2018, conducted as part of the Human Rights Law Implementation Project, funded by the Economic and Social Research Council.

Importantly, *Yarce* and *Vereda La Esperanza* do not deal with hundreds of internally displaced victims as does *Génesis*, making the cases different in nature and therefore different in terms of the impact that the judgment of the Court could have in Colombia as a result of the change of case law. But these judgments also show that, even if that deference is now more qualified than it was in *Génesis*, the Court still considers it important to defer to Colombia on how best to repair victims in relation to certain issues such as rehabilitation or collective reparation.

At time of writing, the case of the Patriotic Union is pending at the Court. This case will test the position of the Court on domestic reparation programmes and subsidiarity.

D. *The Reasoning of the Court behind Deference in Relation to Domestic Reparation Programmes: Problems and Consequences*

The cases of Colombia, Guatemala, and Peru illustrate the changing approach that the Court has taken to reparations in recent years and the increasing attention that it is giving to subsidiarity on reparations. However, the legal reasoning behind the Court's departures from its constant jurisprudence on reparation needs to be scrutinised. How is the Court justifying its approach? What is the impact of the Court's approach to the right to reparation for victims of armed conflict? What role should subsidiarity play when international courts adjudicate on reparation? Basically, as Paolo Carozza indicates, 'subsidiarity cannot be reduced to a simple devolution of authority to more local levels'.¹⁸⁴ Supranational bodies called to adjudicate on reparation in relation to victims of armed conflict must provide careful legal analysis for the decisions they reach, including on subsidiarity, as well as an adequate assessment of evidence. This burden is heightened when what is at stake is the authority and legitimacy of a court such as the IACtHR, which, through adjudication on human rights violations, has also crafted a ground-breaking body of jurisprudence, in terms of both substantive and procedural principles, which has gained international recognition and is considered to be the jurisprudence to reckon with, even outside of the Americas region. So the jurisprudence of this Court on reparation is called upon to impact beyond the Inter-American System.

The Court has, to date, provided some reasons to justify deference in relation to domestic reparation programmes. The starting point for the Court has been context: the recognition that transitional justice experiences impose an enormous burden on States, particularly those moving away from

¹⁸⁴ Carozza, 'Subsidiarity as a Structural Principle' (n. 10), 79.

armed conflict into peace, to comply with various international obligations, including, but not limited to, providing truth, justice, reparation, and guarantees of non-recurrence. The Court is mindful of the challenging circumstances in which reparation takes place: a very difficult political context in which the financial, human, and institutional resources to implement reparation are limited.

Additionally, the Court has acknowledged that domestic reparation programmes are a legitimate tool to provide reparation for victims in such contexts. In *Génesis*, the Court stated that:

[I]n scenarios of transitional justice in which States must assume their obligations to make reparation on a massive scale to numerous victims, which significantly exceeds the capacities and possibilities of the domestic courts, administrative programs of reparation constitute one of the legitimate ways of satisfying the right to reparation. In these circumstances, such measures of reparation must be understood in conjunction with other measures of truth and justice, provided that they meet a series of related requirements, including their legitimacy – especially, based on the consultation with and participation of the victims; their adoption in good faith; the degree of social inclusion they allow; the reasonableness and proportionality of the pecuniary measures; the type of reasons given to provide reparations by family group and not individually; the distribution criteria among members of a family (succession order or percentages); parameters for a fair distribution that take into account the position of the women among the members of the family or other differentiated aspects, such as whether the land and other means of production are owned collectively.¹⁸⁵

The position of the Court is not that all domestic reparation programmes will always be adequate to provide reparation, but that they might be if they comply with various requirements such as the proportionality and reasonableness of compensation, the criteria adopted for victims' eligibility and consultation. However, such criteria, while important, have not been explained or applied to the specific facts of the cases in *Génesis*, *Yarce*, or *Vereda La Esperanza*, or in any of the other cases dealing with domestic reparation programmes. This is particularly problematic because States and victims need to understand the criteria and arguments of the Court even if they disagree with the Court's views.

The criteria and their application must also be clear to relevant stakeholders where the scope and reach of the right to reparation of victims of armed

¹⁸⁵ IACtHR, *Génesis* (n. 106), para. 470.

conflict is involved. Under current international human rights law and international law more broadly speaking, precise answers are needed. For example, when the Court refers to consultation of victims and social inclusion, what is it actually saying? When would victims need to be consulted? What kind of consultation would fulfil the standards of the Court? Is it consultation about the process, or about the forms of reparation to be given to victims, or about who should be eligible and for what violations? In relation to compensation, how does the Court understand what is proportional and reasonable when it comes down to providing monetary reparation for pecuniary and non-pecuniary damages? Could States award less compensation than that awarded by the Court when adjudicating in individual cases? If so, why? Could States legitimately argue that they do not have the financial means to provide reparation following the standards of the Court, so that, for instance, Colombia and Guatemala could provide different amounts of money to compensate cases of enforced disappearances through their domestic reparation programmes? From an evidentiary point of view, what kind of evidence would the Court need to be able to decide what is reasonable and proportional in the circumstances? Or to assess whether adequate consultation took place and/or women were allowed a tangible role? Is it evidence related to the specific victims in the case or about the overall performance of the domestic reparation programme, or both?

All that is evident from the qualified deference approach developed by the Court is that it is revisiting its approach to reparation regarding domestic reparation programmes when it sees that States, in good faith, are taking measures to provide reparation to victims.

E. The Court's Shift towards Subsidiarity: What Explains This Approach?

The previous section has carefully analysed the changes in the jurisprudence of the Court in relation to reparation for victims of gross human rights violations that took place in armed conflict. It has concluded that the Court has indeed changed in nuanced ways its constant jurisprudence on reparation and is giving more room to States on reparation – a phenomenon I am referring to as ‘qualified deference’. This analysis contrasts with that of those who believe ‘considerations of subsidiarity play a fairly small role in the IACtHR’s remedial practice’,¹⁸⁶ that ‘the Inter-American Court embraces a maximalist model of adjudication – one that leaves very little, if any, room

¹⁸⁶ Newman, ‘Subsidiarity’ (n. 11), 373.

for states to reach their own decisions¹⁸⁷ and/or that ‘the Court’s intrusive approach to remedies cannot be seen in isolation from its resistance to a margin of appreciation’.¹⁸⁸ Four possible reasons explain this shift: the political context in the region; the perceived nature of the human rights violations taking place in the region; the nature of the litigation taking place before the Inter-American Court; and the belief that subsidiarity on reparations, particularly domestic reparation programmes, could enhance implementation.

1. The Political Context in the Region

The first factor, the political context, refers to the worldwide political landscape, particularly that of the Americas region, where the Court must adjudicate on human rights. While human rights law has, to a certain extent, been able to evolve and consolidate despite the many challenges it faces, a new and hard backlash has unleashed against this body of law and its international institutions – one that is having an impact on the way in which they can respond to human rights violations. The situation is palpable in the Americas region.

The political systems in various States in which autocracies have gained power, such as Venezuela, Nicaragua, and Honduras, and in which right-wing governments have risen to power, as in the case of Bolsonaro in Brazil, have had an impact on the Inter-American System and will continue to impact its work.¹⁸⁹ This was very visible in the complaint by various States in the region arguing that the Commission and the Court were exceeding their mandates. Indeed, during the so-called strengthening process of the Inter-American Commission of Human Rights, which took place between 2011 and 2013,¹⁹⁰ the Report of the Special Working Group to Reflect on the Working of the Inter-American Commission of Human Rights with a view to Strengthening the Inter-American Human Rights System, in December 2011, stated that ‘the

¹⁸⁷ Jorge Contesse, ‘Contestation and Deference in the Inter-American Human Rights System’, *Law and Contemporary Problems* 79 (2016), 123–45 (124).

¹⁸⁸ Başak Çalı, ‘Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders’, *International Journal of Constitutional Law* 16 (2018), 214–34 (231).

¹⁸⁹ Ximena Soley and Silvia Steininger, ‘Parting Ways or Lashing back? Withdrawals, Backlash and the Inter-American Court of Human Rights’, *International Journal of Law in Context* 14 (2018), 237–57 (241). See also Par Engstrom, ‘Introduction: Rethinking the Impact of the Inter-American Human Rights System’, in Par Engstrom (ed.), *The Inter-American Human Rights System: Impact beyond Compliance* (London: Palgrave Macmillan, 2019), 1–22 (16).

¹⁹⁰ DPLF, ‘The Reform of the Inter-American Commission of Human Rights’, *Aportes*, 19 (2014), available at www.dplf.org/sites/default/files/aportes_19_english.pdf.

promotion and protection of human rights in the Hemisphere is primarily the responsibility of the member states, emphasizing the complementary or supplementary role of the IAHRs [Inter-American Human Rights System].¹⁹¹

Equally, Venezuela denounced the ACHR in 2012, arguing that both the Commission and the Court were acting against their mandates. For instance, in a letter to the Organization of American States' Secretary-General, Venezuela stated that 'both the Inter-American Commission as well as the Inter-American Court of Human Rights have gone beyond the sacred principles [of the Convention], becoming politicised institutions aiming to destabilise certain governments, particularly ours, intervening in the internal affairs of our government, breaching basic and essential principles fully recognised in international law such as state sovereignty'.¹⁹² The letter added, referring to the Court, that '[it] cannot pretend to exclude, dismiss or substitute the constitutional legal order of the States party, because its jurisdiction is complementary to that of the States at the domestic level'.¹⁹³

To these challenges should be added the scandal in Costa Rica in February 2018, as a result of the publication by the Court of Advisory Opinion 24 on Gender Identity, and Equality and non-Discrimination with Regard to Same-Sex Couples. In response, Costa Rica, one of the principal supporters of the Inter-American System, threatened to denounce the American Convention.¹⁹⁴ All of this has called into question the legitimacy of the system and has triggered more caution on the judicial activism of the Court.

2. Changes in the Types of Human Rights Violation Taking Place in the Region, Coupled with the Idea that Democracy Has Taken Hold in OAS Member States

Another key factor to explain the change in approach is the growing belief in the region that gross systematic human rights violations, dictatorships, and

¹⁹¹ Permanent Council of the Organization of American States, Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the IAHRs, OEA/Ser.GGT/SIDH-13/11 rev.2, 13 December 2011, para. 2.

¹⁹² Letter of the Minister of Foreign Affairs of the Bolivarian Republic of Venezuela to the OAS Secretary-General, 6 September 2012, 2, available at www.minci.gob.ve/wp-content/uploads/2013/09/Carta-Retro-CIDH-Firmada-y-sello.pdf.

¹⁹³ *Ibid.*, 3–4.

¹⁹⁴ Elena Abrusci, 'The IACtHR Advisory Opinion: One Step forward or Two Steps back for LGBTI Rights in Costa Rica', EJIL: Talk!, 27 February 2018, available at www.ejiltalk.org/the-iacthr-advisory-opinion-on-gender-identity-equality-and-non-discrimination-for-same-sex-couples-one-step-forward-or-two-steps-back-for-lgbti-rights-in-costa-rica/.

conflicts are a matter of the past and that other human rights problems are relevant today. While it is undeniable that the nature of human rights violations is changing, and that new and serious challenges are emerging that need to be addressed, from LGBTQ+ rights to human rights and mega projects, it is also the case that violations from the past remain present, from enforced disappearances to torture and unlawful killings. Justice for violations of the past remains an unfinished business.

However, while new human rights violations are taking place that demand new responses and strategies at both the domestic and international levels, it is also the case that while the majority of States in the region are, in theory, democracies, they remain very fragile and impunity continues to be rampant. The consequence of the belief that democracy has taken hold is that the system is more likely to operate under deference to the domestic level, given that it believes that rule of law and democracy are present and therefore that human rights can be better protected. As Par Engstrom suggests, ‘the formal democratic credentials of governments have made the balancing act for the IAHRs, between its role as a supranational human rights arbiter on the one hand, and the principle and practice of subsidiarity on the other, increasingly delicate’.¹⁹⁵

3. Subsidiarity Could Enhance Implementation

The belief that subsidiarity on reparation in countries undergoing transitions, particularly those moving away from conflict, could enhance implementation is also present in the Court’s reasoning towards deference, even if the Court has not articulated this position more explicitly.¹⁹⁶ Problems of implementation are not new in international law generally and particularly in international human rights law. As De Vos and Baluarte stated in 2010, ‘an implementation crisis currently afflicts the regional and international legal bodies charged with protecting human rights’,¹⁹⁷ and compliance with reports of the Inter-American Commission of Human Rights or judgments of the IACtHR are no exception to this crisis. Indeed, up to the last annual report published by the Court in 2019, 223 cases were pending full compliance, which entails monitoring implementation of 11,153 different forms of

¹⁹⁵ Engstrom, ‘Introduction’ (n. 189), 16.

¹⁹⁶ See the concurring opinion by former judge Diego Garcia-Sayán in IACtHR, *Cepeda Vargas* (n. 133).

¹⁹⁷ Christian de Vos and David C. Baluarte, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (New York: Open Society Justice Initiative, 2010), 11.

reparation. This number should be a cause for alarm because the vast majority of these cases concern gross human rights violations that took place in times of armed conflict or dictatorship.¹⁹⁸

Judgments on reparation for victims of armed conflict are perceived to be a burden by the States charged with implementing them – a perception that impacts negatively on overall levels of implementation. Indeed, the Court's orders are seen as generating a high financial burden on States not only because of Court orders of compensation for pecuniary and non-pecuniary damages, but also because of the financial costs of implementing other measures, such as rehabilitation or development projects. From an institutional point of view, States undergoing a transition have only weak institutions, making it challenging to put in place all that is required to effectively implement the orders of the Court.¹⁹⁹ Equally, some orders are seen as politically problematic because they aim to provide reparation to victims who are seen to be undeserving of reparation, perhaps because they were combatants or had a leftist ideology, or because those behind the violations are very powerful perpetrators.²⁰⁰ Finally, the orders are also seen as creating precedents for other victims who would like to be redressed on the same terms specified by the Court, all at a time when the State is trying to deal with the legacy of mass atrocities in its own way and with thousands, if not millions, of victims.

The Inter-American Court, like any other international or supranational body, aims to be an effective mechanism to protect human rights. To this end, it should have the 'basic ability to compel or cajole compliance with its judgments'.²⁰¹ In this context, in which the Court is looking for tools to trigger implementation, subsidiarity appears as an option, particularly in relation to States, such as Colombia, in which steps have been taken to comply with human rights obligations.

4. A Change in the Nature of the Litigation before the System

Before the turn of the century, the Inter-American Court did not have to take into account domestic reparation programmes to order reparations in individual cases for two reasons. First, the right to reparation gained prominence in

¹⁹⁸ IACtHR, Annual Report 2019, 61.

¹⁹⁹ Lars Waldorf, 'Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts', in Roger Duttie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (New York: ICTJ, 2017), 40–83 (42 and 45).

²⁰⁰ IACtHR, *Bánaca Velázquez v. Guatemala*, Reparations and Costs, 22 February 2002.

²⁰¹ Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication', *Yale Law Journal* 107 (1997) 273–391 (278).

international legal discourse and litigation only in the 2000s.²⁰² As a consequence, for many years, litigants working before the Inter-American System had focused their attention on the merits of the litigation, but not on the potential ways in which harm caused to victims could be repaired or on whether implementation of orders was actually taking place. The Court itself, with its ground-breaking jurisprudence on reparation, helped States and litigants to better articulate their arguments on the subject. Second, the first domestic reparation programmes to be established in the Americas regions were in States moving away from dictatorship and into democracy, as was the case in Argentina and Chile, aiming to redress the gross human rights violations that took place when the Court did not have jurisdiction over such atrocities.²⁰³

The landscape of adjudication on reparation and domestic reparation programmes began to change as transitional justice – alongside transition to democracy – made its way into various countries in the region already moving away from armed conflict situations, such as in Guatemala, Peru, or Colombia. Importantly, States were the first to argue before the Court that it should award reparation in line with those ordered by their domestic reparation programmes. Nevertheless, the Court did not entertain such arguments. For example, in *Castro Castro Prison v. Peru*,²⁰⁴ the State argued that, given the significant amount of money it was paying to comply with judgments of the Court and friendly settlements of the Commission, the Court should order ‘that the reparations consequence of the international responsibility of the State be fixed by the State through its reparatory policies’.²⁰⁵ Indeed, as Julie Guillerot and Lisa Magarrell show, if Peru had to provide reparation to the 23,969 killed or disappeared victims (according to the Peruvian TRC) applying the same standards of the Inter-American Court, the State would have to pay approximately 4.4 billion USD instead of the 771.7 million USD that the Peruvian government envisaged as the cost of compensation in its domestic

²⁰² For the historical development and the turn from state-centred to victim-centred reparation, see Furuya, ‘Right to Reparation’, Chapter 1 in this volume, sections II and III.

²⁰³ For example, the domestic reparation programme in Argentina was the result of various laws that were sanctioned by National Congress starting in 1991. See Maria Jose Guebbe, ‘Economic Reparations for Grave Human Rights Violations: The Argentinian Experience’, in Pablo de Greiff (ed.), *The Handbook of Reparations* (New York: Oxford University Press, 2005), 21–54 (31–44).

²⁰⁴ IACtHR, *Castro Castro Prison v. Peru*, Merits, Reparations and Costs, 25 November 2006.

²⁰⁵ Final Pleadings of the State of Peru in *Castro Castro Prison*, presented by Oscar Ayzanoa Vigil, State agent, 3 August 2006, 13, available at www.corteidh.or.cr/docs/casos/expedientes/alefi_est.pdf.

reparation programme.²⁰⁶ It is probable that the Court dismissed the argument because the law creating the domestic reparation programme had been adopted in Peru only recently.²⁰⁷ The Commission and the common intervenor in the case did not refer in their pleadings to Peru's domestic reparation programme, probably because of the belief that, once a case reaches the Court, the supranational body is the one mandated to order reparation.²⁰⁸

As the litigation of the cases concerning gross human rights violations have begun to change, as noted in section III.B of this chapter, domestic reparation programmes have become an area of litigation before the system and, in this context, the discussion of subsidiarity has emerged. The Court has had no choice but to address the issues put forward for adjudication.²⁰⁹

IV. THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS JURISPRUDENCE ON REPARATION

A. *The Court's Standard Approach to Subsidiarity and Reparation*

The approach to subsidiarity of the Inter-American Court stands in stark contrast with that of the European Court of Human Rights (ECtHR), where the subsidiarity principle has been so fundamental that even specific concepts such as the 'margin of appreciation' have been crafted to defer to States important decisions in relation to how to comply with human rights law.²¹⁰ In the words of the former president of the ECtHR, Judge Spielmann, '[t]he judgments which refer to the subsidiary role of the Convention mechanism are very old, since the Court referred to that concept as early as 1968 in the *Belgian Linguistic* case. Since then the principle has been reaffirmed many times, to the point where it has become one of the keystones of our system.'²¹¹

²⁰⁶ Julie Guillerot and Lisa Magarrell, *Memorias de un Proceso Inacabado* (Lima: ICTJ/Aprodeh, 2006), 131.

²⁰⁷ IACtHR, *Castro Castro Prison* (n. 204), para. 412.

²⁰⁸ *Ibid.*, paras 410–11.

²⁰⁹ Sandoval, 'Two Steps forward, One Step back' (n. 138), 1192–208.

²¹⁰ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerpen: Intersentia, 2002); George Letsas, 'Two Concepts of the Margin of Appreciation', *Oxford Journal of Legal Studies* 26 (2006), 705–32.

²¹¹ ECtHR, President Dean Spielmann, Seminar Subsidiarity: A Two-Sided Coin?, Opening Speech, 30 January 2014, 2, available at https://echr.coe.int/Documents/Speech_20150130_Seminar_2015_ENG.pdf, referring to ECHR, *Belgium Linguistics*, Judgment of 23 July 1968, App. Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64.

Subsidiarity is not only prominent in the jurisprudence of the Court, as noted in the coming pages, but also a foundational principle of the Council of Europe's institutional and normative design. As explained by Harris and colleagues, 'the original purpose of the Convention was not primarily to offer a remedy for particular individuals who had suffered violations of the Convention but to provide a collective interstate guarantee that would benefit individuals generally by requiring the national law of the contracting parties to be kept within certain bounds'.²¹²

In harmony with this foundational idea, Article 41 of the European Convention on Human Rights (ECHR) establishes that 'if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'.

In line with Article 41, as Hawking and Jacoby explain, 'the ECtHR exercises what [can be called] "delegative compliance", whereby its rulings will identify a violation, but not make orders on how to end the violation, compensate for its effects, or prevent future infringement'.²¹³ From this point of view, a judgment of the European Court is merely declaratory because, in principle, 'the Court does not tell states how to remedy any violations that it finds'.²¹⁴ Under this approach, the ECtHR defers to States how to redress human rights violations, even if the Committee of Ministers is able to monitor compliance with judgments. Even in 1998, the ECtHR held that:

[A] judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they 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. It falls to the Committee of Ministers of the

²¹² David Harris, Michael O'Boyle, and Colin Warbrick, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 3rd edn, 2014), 37.

²¹³ Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights', *Journal of International Law and International Relations* 6 (2010–11), 35–85 (37).

²¹⁴ Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 'Execution of Judgments of the European Court of Human Rights', 12 July 2000, Doc.8808, para. 2, available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9013&lang=en>.

Council of Europe, acting under Article 54 of the Convention, to supervise compliance in this respect.²¹⁵

As a general rule, the ECtHR has treated compensation as a form of just satisfaction. It awards compensation 'solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied',²¹⁶ and, even then, only if necessary. Thus the Court does not always award compensation. The Court also considers the judgment itself to be a form of just satisfaction.²¹⁷

In relation to widespread and systematic human rights violations in times of armed conflict or repression, such as killings, torture, enforced disappearances, or property loss, the Court has often awarded compensation, at least for non-pecuniary damages, as a form of just satisfaction. In *Isayeva, Yusupova and Bazayeva v. Russia*,²¹⁸ a case concerning the bombing of a convoy of civilian cars leaving Grozny (Chechnya) in 1999 and the subsequent lack of investigation with due diligence, the Court found that Russia violated the right to life of the three applicants and of two children because it failed to protect the lives of the victims.²¹⁹ It also found a failure to investigate with due diligence and a violation to property rights of one of the applicants because three of her cars were destroyed during the bombardment.²²⁰ The Court awarded 12,000 EUR as pecuniary damages for the loss of the applicant's cars,²²¹ based on equity and non-pecuniary damages in the amounts requested by the three applicants: 25,000 EUR, 15,000 EUR and 5,000 EUR, respectively.²²²

Similarly, in *Timurtas v. Turkey*,²²³ a case concerning the enforced disappearance of the applicant's son, who had been detained by authorities in south-east Turkey,²²⁴ the Court found that Turkey was responsible for his death after his unacknowledged detention,²²⁵ that there had been a failure to

²¹⁵ ECtHR, *Selçuk and Asker v. Turkey*, Judgment of 24 April 1998, Application Nos 12/1997/796/998–999, para. 125.

²¹⁶ ECtHR, *Scozzari and Giunta v. Italy*, Grand Chamber, Judgment of 13 July 2000, Application Nos 39221/98 and 41963/98, para. 250.

²¹⁷ ECtHR, *Hanif v. United Kingdom*, Judgment of 20 December 2011, Application Nos 52999/08 and 61779/08, para. 155.

²¹⁸ ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005, Application Nos 57947/00, 57948/00 and 57949/00, paras 11–42.

²¹⁹ *Ibid.*, para. 199.

²²⁰ *Ibid.*, paras 225 and 230–4.

²²¹ *Ibid.*, para. 246.

²²² *Ibid.*, para. 252.

²²³ ECtHR, *Timurtas v. Turkey*, Judgment of 13 June 2000, Application No. 23531/94.

²²⁴ *Ibid.*, paras 10–22.

²²⁵ *Ibid.*, paras 86 and 106.

investigate with due diligence, and that the father of the applicant had suffered inhuman treatment as a result of the disappearance of his son.²²⁶ The Court awarded 20,000 GBP in favour of the disappeared son and 10,000 GBP for the father of the applicant, both as non-pecuniary damages.²²⁷

Even in cases concerning the extraterritorial application of the ECHR for violations of procedural obligations in times of armed conflict, the Court has also awarded compensation. An important example is *Al-Skeini and Others v. United Kingdom*,²²⁸ in which the Grand Chamber was asked to exercise jurisdiction over the procedural obligation under Article 2 ECHR, as a result of the lack of an effective investigation into the deaths of various relatives of the applicants who died while under the jurisdiction of the United Kingdom in Iraq. The Grand Chamber considered that it was reasonable to ‘compensate each of the first five applicants for the distress caused by the lack of a fully independent investigation into the deaths of their relatives’ and awarded 17,000 EUR per applicant for non-pecuniary damages.²²⁹ It must be noted that while the extraterritorial application of the Convention was at the heart of the litigation in the case, the issue did not turn on the reparation arguments presented by the parties.

While the ECtHR does not use a flexible concept of victim when awarding reparation as the IACtHR does, the ECtHR recognises that, in cases concerning gross human rights violations, particularly those involving killings or disappearances, some members of the family, such as the parents or the children of the direct victim, can also be victims of violations of the ECHR, for example under Article 3 ECHR (prohibition of torture, inhuman, or degrading treatment). By way of illustration, in *Timurtas*, the father of the victim was awarded non-pecuniary damages for the suffering he underwent as a result of the disappearance of his son and the conduct of State authorities in the search of his son.²³⁰

While the Court has awarded compensation in relation to the nature of the violations at stake and the lack of effective investigations of gross human rights violations in times of armed conflict, subsidiarity remains present in these decisions. Indeed, when awarding compensation according to its own Practice

²²⁶ *Ibid.*, para. 98.

²²⁷ *Ibid.*, paras 125–8.

²²⁸ ECtHR, *Al-Skeini and Others v. United Kingdom*, Grand Chamber, Judgment of 7 July 2011, Application No. 55721/07, paras 3 and 161–77.

²²⁹ *Ibid.*, para. 182.

²³⁰ ECtHR, *Timurtas* (n. 223), paras 125–8.

Directions, 'the Court will normally take into account the local economic circumstances' and could 'take guidance from domestic standards'.²³¹

Furthermore, the Court can take into account subsidiarity, beyond compensation. In *Al-Skeini*, the applicants asked the Court to order a due diligence investigation into the deaths of their relatives.²³² The Court used its standard formula to note that:

[T]he respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. Consequently, it considers that in these applications it falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance.²³³

This leads to discussion of a second provision in the European Convention – one of paramount importance when considering the execution of judgments handed down by the Court: Article 46. This provision states that States party to the ECHR 'undertake to abide by the final judgment of the Court in any case to which they are parties'. The provision also establishes the powers of the Committee of Ministers as the body responsible for supervising the execution of judgments. Furthermore, the Article establishes the various tools available to the Committee of Ministers to address issues of interpretation of the judgments that may be problematic for their execution or how to deal with States that refuse to execute judgments. In recent years, the Court has used this provision to broaden the individual or general measures it orders in relation to certain cases.²³⁴

B. *Changes in the Court's Treatment of Subsidiarity and Reparation*

While the principle of subsidiarity remains strongly embedded in the ethos of the Council of Europe, the nature and the scale of certain violations, as well as implementation challenges, have triggered a more nuanced approach by the Court to reparations and to subsidiarity. This is well illustrated by pilot and

²³¹ ECtHR, Practice Direction, Just Satisfaction Claims, 28 March 2007, available at https://echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf.

²³² ECtHR, *Al-Skeini* (n. 228), para. 179.

²³³ *Ibid.*, para. 181.

²³⁴ Linos-Alexandre Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of Its Judgments: Recent Developments under Article 46 ECHR', *Netherlands Quarterly of Human Rights* 32 (2014), 235–62.

semi-pilot judgments, as well as by inter-State complaints, as this chapter now proceeds to show.

1. The Pilot Judgment Procedure

With the growing expansion of the Council of Europe and the many cases arriving at Strasbourg, the ECtHR faces the challenge of how to adjudicate on human rights violations in a changing landscape. As a consequence of the large and systematic violations, gross or not, that are reaching the Court, the pilot judgment procedure has been one of its answers in relation to repetitive cases that indicate a systemic problem in a State. Repetitive cases can be defined as to ‘two-thirds of the admissible complaints’.²³⁵

The Court has indeed received many cases in which the roots of the human rights violations are the same. In such situations, the Court may decide to follow the pilot judgment procedure; as a consequence, it may identify the structural problem and deliver its views to the State in question about the types of general remedy it should adopt. Such views are expressed also in the operative paragraphs of the judgment. The Court does not resolve each single case; rather, by deciding one or a few of the cases, it expects the State to resolve the underlying problem of all ‘repeated cases’.²³⁶ Pilot judgments have dealt with, for example, land restitution,²³⁷ excessive length of proceedings²³⁸ and inadequate conditions of detention.²³⁹

Importantly, pilot judgments are a step towards increasing intrusion into States’ prerogative.²⁴⁰ The Court, with the blessing of the Committee of Ministers, gives less deference to States and exercises less judicial restraint, instead providing guidance in its judgment on the general measures that the States should adopt. Indeed, as Fynys states, ‘by issuing a substantively programmed lawmaking obligation pilot judgments impose the legal arguments

²³⁵ Markus Fynys, ‘Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights’, *German Law Journal* 12 (2011), 1231–60 (1233).

²³⁶ ECtHR, Factsheet: Pilot Judgments, February 2018, 1, available at https://echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf. See also Lize Glas, ‘The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice’, *Netherlands Quarterly of Human Rights*, 34 (2016), 41–70 (42–5).

²³⁷ ECtHR, *Broniowski v. Poland*, Judgment of 22 June 2004, Application No. 31443/96.

²³⁸ ECtHR, *Rutkowski and Others v. Poland*, Judgment of 7 July 2015, Application Nos 72287/10, 13927/11 and 46187/11.

²³⁹ ECtHR, *Ananyev and Others v. Russia*, Judgment of 10 January 2012, Application Nos 42525/07 and 60800/08.

²⁴⁰ Çalı, ‘Explaining Variation’ (n. 188), 223–4.

on the political process at the supervisory level. This form of judicialization of the political mechanisms of supervision restricts the Committee of Ministers' competence to supervise the implementation of judgments.²⁴¹ However, as Başak Çalı highlights, intrusion in the form of pilot judgments is 'negotiated': the Court first consults the respective State to see if it agrees to a pilot judgment. Furthermore, the pilot judgment is not fully prescriptive, but rather constitutes an important guide to what States could do to resolve the systemic problem identified by the Court. Unlike the IACtHR, the ECtHR does not prescribe the form of reparation but gives a certain margin of choice to States.²⁴² This means that an important balancing exercise takes place at the Court between its judicial authority to address reparation and the principle of subsidiarity. In this balancing exercise, subsidiarity is not sacrificed, but it is certainly more limited than when the Court deals with other types of case.

Dilek Kurban has noted an important feature of pilot judgments in that they were put in place by people who 'had in mind cases raising transitional justice issues that Central and Eastern European countries (CEECs) should have "dealt with" before they ratified the European Convention on Human Rights'.²⁴³ For Antoine Buyse, '[i]ssues ranging from the implementation of judgments to large-scale restitution and compensation schemes for properties nationalised in the communist era all surfaced. This partially changed the role of the Strasbourg Court from fine-tuning the situation in relatively stable and functioning societies to having to deal with large-scale and systemic human rights problems.'²⁴⁴ Kurban's statement is correct. States transitioning from one political and economic system to another in Europe triggered important responses from the ECtHR. However, while the great majority of pilot judgments have been used in relation to such States, they have also been used in relation to well-established democracies and long-term members of the Council of Europe, such as Germany or the United Kingdom.²⁴⁵ Still, it must be noted that less deference tends to be given by the Court to States where systemic problems are at stake. Çalı explains this differential approach of the Court when looking at substantive violations by arguing that the Court

²⁴¹ Fynys, 'Expanding Competences' (n. 235), 1250.

²⁴² Glas, 'The Functioning of the Pilot-Judgment Procedure' (n. 236), 51–5.

²⁴³ Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations', *Human Rights Law Review* 16 (2016), 731–69 (735).

²⁴⁴ Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges', *Law of Ukraine* (2013), 303–17 (313).

²⁴⁵ ECtHR, *Rumpf v. Germany*, Judgment of 2 September 2010, Application No. 46344/06; ECtHR, *Greens and M.T. v. United Kingdom*, Judgment of 23 November 2010, Application Nos 60041/08 and 60054/08.

grants more deference – a margin of appreciation – to those ‘who the Court deems to be good faith interpreters and thus guardians of the Convention’.²⁴⁶ While Çalı is looking at substantive violations, her reasoning could also be applied to pilot judgments: the Court becomes more intrusive into systemic problems and how they should be addressed where a State, having been given the opportunity to rectify a problem, has failed to take the necessary measures to respond to the situation. However, this does not apply to an overwhelming amount of cases against particular States, because the Court appears to be mindful of ‘whether specificity/or prescriptiveness will indeed aid implementation’.²⁴⁷

The procedure of pilot judgments began in 2004, when the Committee of Ministers invited the Court to deal with repetitive cases by identifying the ‘underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments’.²⁴⁸

The very first case of this nature was *Broniowski v. Poland*, concerning Poland’s refusal to compensate a Polish man whose family was forced to leave his property near the Bug River and move to western Poland during World War II.²⁴⁹ This case deals with large-scale violations of the right to property. According to the Court, this was not an isolated case but rather ‘the consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens, namely the *Bug River* claimants’,²⁵⁰ that was affecting approximately 80,000 people.²⁵¹ At the time of the judgment, there were 189 similar cases pending decision at the Court and many more were expected.²⁵²

In its decision, the Court went beyond compensation and referred to ‘general measures’. This is a prerogative that the Court has under Article 46 ECHR to ensure that States ‘adopt measures to prevent repetitive

²⁴⁶ Başak Çalı, ‘Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights’, *Wisconsin International Law Journal* 35 (2018), 237–76 (243).

²⁴⁷ Alice Donald and Anne-Katrin Speck, ‘The European Court of Human Rights’ Remedial Practice and Its Impact on the Execution of Judgments’, *Human Rights Law Review* 19 (2019), 1–35 (10).

²⁴⁸ Committee of Ministers of the Council of Europe, Resolution Res(2004) 3, on judgments revealing an underlying systemic problem, 12 May 2004, I.

²⁴⁹ ECtHR, *Broniowski* (n. 237), paras 13–38.

²⁵⁰ *Ibid.*, para. 189.

²⁵¹ *Ibid.*, para. 193.

²⁵² *Ibid.*

cases'.²⁵³ What the Court calls general measures is equivalent to guarantees of non-repetition under both public international law²⁵⁴ and international human rights law.²⁵⁵ These are measures of reparation ordered to ensure that the violations that took place do not happen again and they are intended to have a systemic reach. Importantly, they aim to protect persons other than the victims in the case from suffering similar harm as a result of the same violations, but they also have a reparatory impact on victims in the specific case. The views of the Court were to apply not only to the individual applicant in the case, but also to all other victims in the same situation.²⁵⁶ The Court stated:

Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause. Such measures should therefore include a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant.²⁵⁷

The Court went further and noted that Poland 'should, therefore, through appropriate legal and administrative measures, secure the effective and expeditious realisation of the entitlement in question in respect of the remaining Bug River claimants, in accordance with the principles for the protection of property rights laid down in Article 1 of Protocol No. 1, having particular regard to the principles relating to compensation'.²⁵⁸

²⁵³ Elisabeth Lambert, *The Execution of Judgments of the European Court of Human Rights* (Strasbourg: Council of Europe, 2nd edn, 2008), 27.

²⁵⁴ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, pt 2, 31–143, Art. 30 and its commentary.

²⁵⁵ See, e.g., 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, annex to GA Res. 60/147 of 16 December 2005, Principle 23.

²⁵⁶ Buyse, 'The Pilot Judgment Procedure' (n. 244), 304–7.

²⁵⁷ ECtHR, *Broniowski* (n. 237), para. 193.

²⁵⁸ *Ibid.*, para. 194.

The Court did not expressly order Poland to reform its legislation, but it did suggest this, as well as the establishment of a domestic reparation programme to provide redress to victims of the Bug River situation. This is a landmark case that shows that the Court is willing to engage with other forms of reparation, including general measures and guarantees of non-repetition, in relation to large-scale human rights violations that evidence the existence of a structural problem.

While pilot judgments apply only to a minority of cases,²⁵⁹ the Court codified this practice in 2011, in Rule 61 of its Rules of the Court. Of significant importance, the Rule indicates that the Court can initiate such a procedure of its own motion, that such cases will be processed with priority and the types of remedial measure required (individual and/or general), even establishing a time frame for compliance. Furthermore, it is noteworthy that the Court may not decide on just satisfaction in whole or in part pending compliance with the remedial measures specified in the pilot judgment.²⁶⁰ In the case of *Broniowski*, for example, the Court adjourned its decision under Article 41, pending the response of Poland in relation to the remedial measures indicated by the Court.²⁶¹

2. Quasi-Pilot Judgments

Quasi-pilot judgments also deal with structural problems arising out of cases to be decided by the Court. As with pilot judgments, they are based on Article 46 ECHR, but quasi-pilot judgments do not include 'binding obligations in the operative provisions of the judgments'.²⁶² Mowbray refers to them as 'judgments where the Court has indicated non-financial remedial measures without invoking the pilot judgment procedure'.²⁶³

Quasi-pilot judgments have also been used to deal with large-scale gross human rights violations that have taken place during armed conflict.²⁶⁴

²⁵⁹ According to Alice Donald and Anne-Katrin Speck, the Court decided twenty-nine pilot judgments between 2004 and 2016. See Donald and Speck, 'The European Court of Human Rights' Remedial Practice' (n. 247), 5.

²⁶⁰ Rules of the Court, as amended in 14 November 2016, available at https://echr.coe.int/Documents/Rules_Court_ENG.pdf.

²⁶¹ ECtHR, *Broniowski* (n. 237), para. 198.

²⁶² Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford: Oxford University Press, 4th edn, 2017), 91.

²⁶³ Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures', *Human Rights Law Review* 17 (2017), 451–78 (452).

²⁶⁴ Sicilianos, 'The Involvement of the European Court' (n. 234), 240.

An important example is *Aslakhanova and Others v. Russia*,²⁶⁵ in which the Court had to deal with the lack of investigation of eight cases of enforced disappearance in Chechnya and Ingushetia.

This judgment is ground-breaking because, here, the Court recognised that there was a systemic or structural problem related to the lack of investigation of disappearance cases. The ECtHR indicates in the judgment that, by 2012, it had already decided more than 120 similar cases and that many more were pending.²⁶⁶ As a consequence, the Court addresses both individual and general measures that Russia should take to deal with the victims of the case, as well as with other victims in the same situation. Furthermore, given the gravity of the violations the Court found, it did not adjourn its decision in similar cases.²⁶⁷

The Court indicated that Russia should implement individual and general measures under the supervision of the Committee of Ministers, but that 'it is not for the Court to determine what measures of redress may be appropriate for a respondent State to take in accordance with its obligations under Article 46 of the Convention'.²⁶⁸ Nevertheless, the Court included seven pages of 'guidance' on the types of measure that Russia should adopt to deal with the situation of the victims' families and to safeguard the effectiveness of the investigations.²⁶⁹ The level of advice that the Court gave to the State is remarkable. For example, it advised creation of 'a single, sufficiently high-level body in charge of solving disappearances in the region, which would enjoy unrestricted access to all relevant information and would work on the basis of trust and partnership with the relatives of the disappeared'.²⁷⁰ In relation to the investigations, the Court advised that 'the investigatory authority would have to identify the leading agencies and commanding officers of special operations aimed at identifying and capturing suspected illegal insurgents in given areas and at given times, and the procedure for recording and reporting such operations'.²⁷¹

The guidance provided by the Court on the general measures to Russia echoed the recommendations made by Council of Europe bodies such as the European Committee for the Prevention of Torture and Inhuman or

²⁶⁵ ECtHR, *Aslakhanova and Others v. Russia*, Judgment of 18 December 2012, Application Nos 2944/06, 8300/07, 50184/07, 332/08, 42509/10, para. 3.

²⁶⁶ *Ibid.*, para. 216.

²⁶⁷ *Ibid.*, para. 220.

²⁶⁸ *Ibid.*, para. 212.

²⁶⁹ *Ibid.*, paras 221–39.

²⁷⁰ *Ibid.*, para. 225.

²⁷¹ *Ibid.*, para. 233.

Degrading Treatment of Punishment and the International Committee of the Red Cross on how to address these problems, but it stressed those measures that, in its view, were essential to address the structural issues at stake.²⁷² It based its views on international and national consensus about the problems at stake and possible solutions.

The Court also awarded compensation to the victims in the case under Article 41 ECHR. All of the applicants received non-pecuniary damages jointly or individually (approximately 60,000 EUR), as well as costs and expenses. Some also received pecuniary damages.²⁷³

3. Inter-State Complaints Concerning Large-Scale Violations during Armed Conflict

Of the few inter-State complaints presented before the ECtHR (twenty-four), some concern large-scale violations of human rights and/or other types of human rights violation suffered by citizens of the applicant State as a result of actions of the respondent State.²⁷⁴ The most significant one, from a reparation perspective, is *Cyprus v. Turkey*.²⁷⁵ It is also the first inter-State complaint in which the Court ordered just satisfaction. The case dealt with Turkish military operations in Northern Cyprus and involved various alleged violations of the European Convention, including Greek Cypriot missing persons and the harm suffered by their next of kin, violations of the right to property and home of displaced people, and the rights of Greek Cypriots living in Northern Cyprus, of the Turkish Cypriots and of the Gypsy community.²⁷⁶ According to the Court, approximately 1,491 Greek Cypriots were missing²⁷⁷ and more than 211,000 of them had been displaced.²⁷⁸

When the Court decided the merits of the case in 2001, it adjourned its decision on just satisfaction because the topic was not yet ready for decision.²⁷⁹ This was partly because, in 1999, both Turkey and Cyprus had agreed that if the Court were to find violations, they would agree on a separate procedure to

²⁷² *Ibid.*, paras 225, or 72, 74, 77 and 80–2.

²⁷³ *Ibid.*, Annex II to the judgment, 68.

²⁷⁴ ECtHR, *Ireland v. United Kingdom*, Court (Plenary), Judgment of 18 January 1978, Application No. 5310/71, or ECtHR, *Georgia v. Russian Federation*, Grand Chamber, Judgment of 3 July 2014, Application No. 13255/07.

²⁷⁵ ECtHR, *Cyprus v. Turkey*, Grand Chamber, Judgment of 10 May 2001, Application No. 25781/94.

²⁷⁶ *Ibid.*, para. 3.

²⁷⁷ *Ibid.*, para. 20.

²⁷⁸ *Ibid.*, para. 28.

²⁷⁹ *Ibid.*, operative paragraph VIII.

settle claims under Article 41 ECHR.²⁸⁰ Given the lack of action by Turkey in relation to the views of the Court, Cyprus asked the Court to hand down a judgment on just satisfaction in March 2010.²⁸¹ The Grand Chamber decided on just satisfaction in 2014.

Whether the Court could order reparation in an inter-State complaint and if it could do so nine years after the initial judgment were the key issues in the litigation. The Court dismissed Turkey's objections, noting that 'the obligation to take individual and/or general measures and the payment of just satisfaction are two distinct forms of redress, and the former in no way precludes the latter'.²⁸²

The ECtHR had considered only once before – in *Ireland v. United Kingdom*²⁸³ – the use of Article 41 in an inter-State complaint, deciding then that it was not necessary to award just satisfaction. The Court further emphasised that Article 41 clearly reflects the general principle of international law established by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów* case,²⁸⁴ according to which 'the breach of an engagement involves an obligation to make reparation in an adequate form'.²⁸⁵ For the Court, while this principle evokes the idea of diplomatic protection, the ECHR aims to protect the human being, and hence 'if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims'.²⁸⁶

This reasoning allowed the Court to order just satisfaction for 1,456 missing persons – 30,000 EUR for non-pecuniary damages to the surviving next of kin – and 60,000 EUR to the enclaved Greek Cypriots of the Karpas Peninsula,²⁸⁷ including any tax chargeable.²⁸⁸

In his concurring opinion, Judge Pinto de Albuquerque (joined by Judge Vučinić) described the judgment as 'the most important contribution to peace in Europe in the history of the European Court of Human Rights', because the Court awarded what is equivalent to punitive damages against Turkey:

²⁸⁰ ECtHR, *Cyprus v. Turkey*, Grand Chamber, Judgment on Just Satisfaction, Application No. 25781/94, 12 May 2014, para. 2.

²⁸¹ *Ibid.*, para. 13.

²⁸² *Ibid.*, para. 27.

²⁸³ ECtHR, *Ireland v. United Kingdom* (n. 274).

²⁸⁴ PCIJ, *Case concerning the Factory at Chorzów*, Merits, Judgment, 13 September 1928, Series A, No. 17 (1928).

²⁸⁵ ECtHR, *Cyprus v. Turkey* (n. 280), para. 41.

²⁸⁶ *Ibid.*, para. 46.

²⁸⁷ *Ibid.*, para. 47.

²⁸⁸ *Ibid.*, paras 57–9.

[T]he message to member States of the Council of Europe is clear: those member States that wage war, invade or support foreign armed intervention in other member States must pay for their unlawful actions and the consequences of their actions, and the victims, their families and the States of which they are nationals have a vested and enforceable right to be duly and fully compensated by the responsible warring State. War and its tragic consequences are no longer tolerable in Europe and those member States that do not comply with this principle must be made judicially accountable for their actions, without prejudice to additional political consequences.²⁸⁹

Judge Pinto de Albuquerque's understanding of punitive damages could be disputed under international law, where compensation is not punitive in nature, not even in times of armed conflict,²⁹⁰ and because the amounts awarded to victims are not disproportionately high. However, the judge is correct in indicating that a significant shift in the jurisprudence of the Court has taken place.

This case is remarkable from a subsidiarity perspective. At first glance, some might argue that no subsidiarity operated in the 2014 judgment because the Court awarded compensation. However, the issue is more nuanced than that. The Court acted on just satisfaction only after having given Turkey plenty of opportunity to comply with the Grand Chamber's judgment on the merits. Indeed, thirteen years and three days elapsed between the first judgment and the decision on just satisfaction, and during this time various other cases related to similar issues were decided by the Court. The failure of Turkey to act meant that leaving the issue of reparation at its discretion could not continue to be the operating principle and the Court, responding to Cyprus's request, considered that it was necessary and legitimate for it to order compensation for victims. The Court became prescriptive: it not only ordered compensation, but also awarded it in a higher amount than that ordered in other cases concerning similar facts, as seen in *Vamava and Others v. Turkey*,²⁹¹ concerning missing people in Northern Cyprus. In *Vamava*, in which the applicants even requested punitive damages, the Court dismissed such claims, but recognised that victims suffered non-pecuniary damage as a result of the intense suffering of not knowing what happened to their loved ones for so many decades, awarding 12,000 EUR to each of the applicants.²⁹²

²⁸⁹ *Ibid.*

²⁹⁰ International Law Commission, Draft Articles on Responsibility of States 2001 (n. 254), Art. 36 and its commentary.

²⁹¹ ECtHR, *Vamava and Others v. Turkey*, Grand Chamber, Judgment of 18 September 2009, Application Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90.

²⁹² *Ibid.*, para. 225.

Varnava was decided in 2009, almost five years earlier than *Cyprus v. Turkey*. While the amount of money is higher, it does not exceed what would be the full compensation owed for both pecuniary and non-pecuniary harm to each single victim. The amount certainly represents the seriousness of the matter, but it does not indicate that, in its decision, the ECtHR wished to punish Turkey.

C. *The Court's Jurisprudence on War-Related Large-Scale Human Rights Violations and Domestic Reparation Programmes*

These developments in the jurisprudence of the Court on systematic and gross human rights violations that took place during armed conflict show that, in these types of case, the ECtHR does not follow its otherwise usual practice of issuing declaratory judgments that give discretion to States, in dialogue with the Committee of Ministers, to identify the best means to provide reparation to victims. Quite the contrary, the ECtHR has often awarded compensation, generally for moral damages, for the violations suffered, including for the lack of an effective investigation – something that, as already explained, does not happen in all of the cases it decides.

The ECtHR has been willing to employ Article 46 ECHR to address some large-scale violations that occurred during armed conflict – and their structural roots. Nevertheless, the pilot judgment mechanism has not been used to deal with some of the underlying structural problems that can be identified in relation to gross violations of human rights. For example, by the time of writing (August 2020), the Court had not issued pilot judgments to address problems related to the lack of diligent investigations of gross human rights violations, such as enforced disappearances or killings in countries such as Turkey or Russia.²⁹³ The approach of the Court in such cases is to order compensation under Article 41 and, exceptionally, to indicate, but not order, possible general measures. Next, the Committee of Ministers deals with the execution of the judgments, grouping them and putting them under enhanced supervision. It is then down to the State in question to decide on the measures that are needed to deal with the violations, while the Committee of Ministers monitors compliance. That pilot judgments have not been used in these cases might be the consequence of these States not consenting to the procedure, but

²⁹³ Some would dispute this statement. According to Kurban, ECtHR, *Doğan and Others v. Turkey*, Judgment of 10 November 2004, Application Nos 8803–8811/02, 8813/02 and 8815–8819/02, is a pilot judgment: Kurban, 'Forsaking Individual Justice' (n. 243), 740.

also of the fact that lack of implementation of the pilot judgments by these countries could harm the legitimacy and authority of the ECtHR.

The reasons for this approach of the Court to systemic violations might be the need not only to address, once and for all, systemic problems that have a detrimental impact on people living in those States, but also to control the volume of cases that reach the Court. Equally, the Court is mindful of the increasingly challenging context in which the Council of Europe operates and of the need to respond, as required, to those challenges. This means that the ECtHR uses different degrees of subsidiarity when dealing with reparation for large-scale and systematic violations. The more serious the violations and the less likely that the State will act, as in *Cyprus v. Turkey*, the less deference is given to the State. Some, clearly limited, deference is given in pilot judgments to help States that consent to the procedure to address structural problems. Quasi-pilot judgments also exhibit less deference to States and more prescription as to what should be done.

These cases and practices at the Court illustrate a different treatment of subsidiarity in relation to reparation. The analysis, however, has not taken into account the ECtHR's approach to domestic reparation programmes. Certainly, domestic reparation programmes have also been set up in Europe, albeit, as will be shown, in different contexts from those in the Americas region. In relation to these, the Court has been asked to decide on cases in which existing domestic reparation programmes have allegedly failed to provide reparation and/or the Court has advised States to set up compensation mechanisms, meaning domestic reparation programmes, to deal with a large number of cases.

The next part of this chapter considers the ECtHR's treatment of domestic reparation programmes.

1. *Broniowski*

It is not a coincidence that the first pilot judgment handed down by the ECtHR was in *Broniowski v. Poland*.²⁹⁴ Indeed, a representative number of pilot judgments deal with the right to property cases under Article 1 of Protocol 1 to the European Convention. Many of them concerned decisions taken during a transition from totalitarianism to democracy or during World War II. At stake in *Broniowski* was compensation owed to thousands of victims who lost their land in what were, before World War II, the eastern provinces of Poland. After the War, the eastern border of Poland was fixed along the Bug

²⁹⁴ ECtHR, *Broniowski* (n. 237).

River, resulting in Poland losing 19.78 per cent of its territory.²⁹⁵ The Republican Agreements were signed at the time by Poland, Lithuania, Ukraine, and Belarus. Under these Agreements, Poland agreed to pay compensation to persons who had to abandon their properties. Many of the victims had been compensated by Poland, but not all, as in the case of the applicant, Mr Broniowski.²⁹⁶ The Court ordered Poland to take all necessary legal and administrative measures to ensure that victims of Bug River cases could obtain adequate compensation.

The Court therefore deferred to Poland the choice of legal and administrative measures to be implemented to solve the structural problem. Poland amended legislation, put in place a domestic reparation programme, and provided the Committee of Ministers with a careful account of the steps taken to comply with the execution of the judgment.²⁹⁷ The Committee closed the examination of the execution of the case in 2009.

Importantly, the Bug River claims before the ECtHR did not stop with *Broniowski*. Indeed, new claims arrived, challenging the 20 per cent ceiling established by the new legal framework, meaning that victims would receive only up to 20 per cent of the current value of the original property they had lost.²⁹⁸ Poland argued that financial reasons explained the 20 per cent ceiling and that ‘any increase could only be possible at the expense of other members of society’.²⁹⁹ The applicants considered the ceiling unjustifiable and in contravention of Protocol 1 to the ECHR. Furthermore, since 1946, Poland had recognised their right to equivalent compensation and their accrued right, even if they had not yet received compensation.³⁰⁰

The assessment of the Court is carefully substantiated with two arguments: that the right to property is not absolute; and that the principle of subsidiarity should apply. For the Court, the right to property under Protocol 1 does not imply ‘full compensation in all circumstances’ because the public interest might be at stake.³⁰¹ Equally, the Court reiterated that ‘the State has a wide

²⁹⁵ *Ibid.*, para. 12.

²⁹⁶ *Ibid.*, paras 2 and 10–12.

²⁹⁷ Committee of Ministers, Interim Resolution ResDH(2005)58 concerning the judgment of the European Court of Human Rights of 22 June 2004 (Grand Chamber) in the case of *Broniowski against Poland*, 5 July 2005 and Final Resolution CM/ResDH (2009) 89, Execution of the Judgments of the European Court of Human Rights, *Broniowski against Poland*.

²⁹⁸ ECtHR, *Wolkenberg and Others v. Poland*, Judgment of 4 December 2007, Application No 50003/99, paras 25–6.

²⁹⁹ *Ibid.*, para. 40.

³⁰⁰ *Ibid.*, paras 45–6.

³⁰¹ *Ibid.*, para. 60.

margin of appreciation when passing laws in the context of a change of political and economic regime and that in such contexts there might even arise situations where the lack of any compensation would be found compatible with the requirements of Article 1 of Protocol No. 1.³⁰² A further point raised by the Court was that Poland had to pay compensation for a situation it did not cause. Indeed, as stated by the Court, 'the purpose of the compensation was not to secure reimbursement for a distinct expropriation but to mitigate the effects of the taking of property which was not attributable to the Polish State'.³⁰³ This led the Court to conclude that the 20 per cent ceiling was not 'unreasonable or disproportionate'.³⁰⁴ Based on this, and respectful of the pilot judgment in *Broniowski*, plus the fact that the applicants had not sought redress domestically, the Court concluded that it should not award compensation to the applicants of the case.³⁰⁵ Nevertheless, the Court indicated that failures of the compensation scheme in Poland to redress Bug River claimants could trigger the Court to reopen the cases it had struck out.³⁰⁶ The Court decided in a similar manner other cases against Poland with relatively identical claims.³⁰⁷

This case shows that the Court grants a margin of appreciation to States when transitions are at stake and when non-fundamental rights, such as the right to property, are in play. This appears to indicate that while the Court is ready to put pressure on the State to sort out structural problems for large-scale violations of the right to property, the Court is ready to accept strong limitations on compensation, and even to waive it, if the case so requires.

2. *Maria Atanasiu and Others v. Romania*

Another example of a pilot judgment dealing with the right to property under Article 1 of Protocol 1 and domestic reparation programmes is *Maria Atanasiu and Others v. Romania*.³⁰⁸ In 1989, Romania also underwent a change of political regime. During the Communist era, various properties were expropriated. When democracy was established, Romania pledged full compensation for such properties. While Romania had in place a legal framework and

³⁰² *Ibid.*

³⁰³ *Ibid.*, para. 64.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*, para. 75.

³⁰⁶ *Ibid.*, para. 77.

³⁰⁷ ECtHR, *Witkowska-Tobola v. Poland*, Decision to strike out of 4 December 2007, Application No. 11208/02.

³⁰⁸ ECtHR, *Maria Atanasiu and Others v. Romania*, Judgment of 12 October 2010, Application Nos 30767/05 and 33800/06.

mechanisms to provide compensation, they were ineffective, and victims turned to the ECtHR.

The Court had decided individual cases on the very same issue against Romania without using the pilot judgment system,³⁰⁹ and it had given deference to Romania to let it address the problem. However, given that no changes took place domestically to ensure that victims would secure compensation, the Court adopted a pilot judgment recommending that the State adopt some general measures to address the structural problem. The Court recommended that Romania remove any obstacles to access restitution or compensation, or obstacles to 'the establishment of simplified and effective procedures as a matter of urgency on the basis of legislation and of coherent judicial and administrative practice'.³¹⁰ Furthermore, the Court decided to adjourn decision in other cases for eighteen months, to give Romania the opportunity to adopt measures to remedy the situation.³¹¹

Finally, the Court awarded compensation for material and non-material damages to the three applicants in the case, given their ages and the unreasonable period of time they had to wait to secure reparation. It considered it to be 'a final and exhaustive settlement'³¹² of the case, awarding two of them 65,000 EUR and the other 115,000 EUR.

The Court recognised that Romania has a margin of appreciation – as a corollary of subsidiarity – to decide on how best to address its structural problems.³¹³ Nevertheless, the Court did not want the applicants to wait any longer to obtain reparation; rather, the Court considered it had the authority to resolve their situation by directly ordering compensation. Importantly, the Court became the last instance (remedy) for the applicants, because the indication it gave when awarding compensation could be taken to mean that they would not be able to use a domestic reparation programme to obtain further compensation.

However, as these cases and others show,³¹⁴ the Court also appears to believe that an important mechanism to provide reparation for structural violations is a domestic reparation programme. In neither *Broniowski* nor

³⁰⁹ ECtHR, *Viașu v. Romania*, Judgment of 9 December 2008, Application No. 75951/01; ECtHR, *Faimblat v. Romania*, Judgment of 13 January 2009, Application No. 23066/02; ECtHR, *Katz v. Romania*, Judgment of 20 January 2009, Application No. 29739/03.

³¹⁰ ECtHR, *Atanasiu* (n. 308), paras 229–36.

³¹¹ *Ibid.*, para. 241.

³¹² *Ibid.*, para. 253.

³¹³ *Ibid.*, para. 236.

³¹⁴ ECtHR, *Suljagic v. Bosnia and Herzegovina*, Judgment of 3 November 2009, Application No. 27912/02; ECtHR, *Manushage Puto and Others v. Albania*, Judgment of 31 July 2012, Application Nos 604/07, 43628/07, 46684/07 and 34770/09.

any of the subsequent cases against Poland, nor in the case of *Atanasiu and Others v. Romania*, did the Court consider a domestic reparation programme to be an inadequate or ineffective remedy to provide reparation.

3. *Kurić and Others v. Slovenia*: Recommending a Domestic Reparation Programme

Not only has the Court considered domestic reparation programmes as potentially adequate and effective domestic remedies, when faced with structural problems causing systemic human rights violations, but also it has even gone further, to recommend the establishment of such programmes. For example, in another war-related case, *Kurić and Others v. Slovenia*,³¹⁵ the Court was asked to make a decision concerning the ‘erased’ – that is, those persons who were citizens of any of the six former republics of Yugoslavia, but who, upon independence of Slovenia after the war, were erased from the system of permanent residence in Slovenia, depriving them of pensions, as well as access to healthcare services and other services, thus making them stateless. The Court used the pilot judgment system to address ‘the prolonged failure of the Slovenian authorities, in spite of the Constitutional Court’s leading judgments, to regularise the applicants’ residence status following their “erasure” and to provide them with adequate redress’,³¹⁶ ordering that Slovenia should set up a domestic reparation programme to compensate victims.³¹⁷ Importantly, the Grand Chamber considered that possible compensation for pecuniary damage under Article 41 ECHR was not ready for decision, but awarded the payment of 20,000 EUR as non-pecuniary damages to each applicant because of the suffering they had experienced.³¹⁸

4. *Doğan and Others v. Turkey* and *İçier v. Turkey*

The case of *Doğan and Others v. Turkey* deals with a systemic problem of mass evictions from properties in south-east Turkey and related human rights violations as a result of government actions to deal with the threat posed by the Kurdistan Workers’ Party (PKK).³¹⁹ This was not the first of such cases. Indeed, *Akdivar v. Turkey* was decided first, in 1998, and the Court ordered

³¹⁵ ECtHR, *Kurić and Others v. Slovenia*, Judgment of 26 June 2012, Application No. 26828/06.

³¹⁶ *Ibid.*, para. 408.

³¹⁷ *Ibid.*, para. 416.

³¹⁸ *Ibid.*, paras 424–5.

³¹⁹ ECtHR, *Doğan* (n. 293), para. 3.

compensation for pecuniary and non-pecuniary damages suffered by all applicants in that case.³²⁰

In *Doğan and Others*, Turkey argued lack of exhaustion of domestic remedies and provided information to the Court about the remedies available to the victims domestically. The Court considered that such remedies were neither adequate nor effective, because when a claim relates to forced eviction and destruction of property, an effective investigation leading to the identification of those responsible needs to take place besides compensation, if appropriate, to fulfil the requirements of Article 13 ECHR.³²¹ This allowed the Court to assess the merits of the case and to pronounce on the proportionality of the interference with the properties of the applicants in their village, as well as with their other rights. The Court stressed that remedies were inadequate and ineffective, and that:

[T]he refusal of access to Boydaş [the applicants' village] had serious and harmful effects that have hindered the applicants' right to enjoyment of their possessions for almost ten years, during which time they have been living . . . in conditions of extreme poverty, with inadequate heating, sanitation and infrastructure . . . Their situation was compounded by a lack of financial assets, having received no compensation for deprivation of their possessions, and the need to seek employment and shelter in overcrowded cities and towns, where unemployment levels and housing facilities have been described as disastrous . . .³²²

Despite the lack of remedies at the domestic level to address the violations suffered by the applicants and obtain reparation, the Court adjourned decision on compensation, expecting Turkey and the applicants to agree on a settlement.³²³ At the time of the decision by the ECtHR, Turkey was in the process of adopting a National Compensation Law to deal with the harm caused to those evicted in south-east Turkey and hence the Court gave Turkey an opportunity to address the problem. The Law on Compensation for Losses resulting from Terrorism and the Fight against Terrorism was adopted some days after the judgment in July 2004. The ECtHR decided on just satisfaction in 2006 because the parties did not reach an agreement, in the face of very strong arguments from Turkey that the applicants should use the domestic

³²⁰ ECtHR, *Akdivar and Others v. Turkey*, Judgment of 1 April 1998, Application Nos 99/1995/605/693, paras 15–38.

³²¹ ECtHR, *Doğan* (n. 293), para. 106.

³²² *Ibid.*, para. 153.

³²³ *Ibid.*, paras 165–8.

reparation programme.³²⁴ The Court ordered pecuniary damages as a result of deterioration or lack of care of property, loss of earnings, and costs of alternative accommodation. Each of the fifteen applicants was awarded an average of 18,633 EUR, as well as costs and expenses. No moral damages besides the judgments were awarded to the victims.³²⁵

After the Court decided *Doğan and Others*, but prior to its decision on just satisfaction in the same case, the ECtHR decided *İçyer v. Turkey*.³²⁶ This case is of great importance since the Court examined in it whether the domestic reparation programme established in Turkey was adequate and effective. Providing a brief description of the domestic reparation programme's working methods and of the data Turkey submitted about the achievements of the programme, the Court arrived at the conclusion that 'the remedy in question is available not only in theory but also in practice'.³²⁷ Among the various grounds put forward by the applicant on why Turkey's domestic reparation programme should not be used was the fact that he had lodged the application with the ECtHR long before Turkey adopted its new Law, and he argued that the rule of exhaustion of domestic remedies applies in relation to the moment at which the application is presented before the Court and not after.³²⁸ The Court responded by saying that there are exceptions to this rule. Among them, it noted that it is the State that has to act under the supervision of the Committee of Ministers to resolve the problem or else the Court will have to decide a 'lengthy series of comparable cases', which could impact negatively on the Court.³²⁹

The Court dismissed the case, given that the applicants had not exhausted the remedy established under the new Law. The Court also dismissed approximately 1,500 similar applications on the same ground.³³⁰ The Court had not referred to *Doğan and Others* as a pilot judgment, but it did so in its decision in *İçyer v. Turkey* – possibly out of the need to strike out the list of 1,500 comparable cases.³³¹

This line of cases has been strongly criticised by many who dispute the effectiveness of domestic reparation programmes and who see the cases as

³²⁴ ECtHR, *Doğan and Others v. Turkey*, Judgment on Just Satisfaction of 13 October 2006, paras 25–44.

³²⁵ *Ibid.*, paras 45–64.

³²⁶ ECtHR, *İçyer v. Turkey*, Decision on Admissibility of 12 January 2006, Application No. 18888/02.

³²⁷ *Ibid.*, para. 77.

³²⁸ *Ibid.*, paras 79–83.

³²⁹ *Ibid.*, para. 84.

³³⁰ ECtHR, *Doğan*, Judgment on Just Satisfaction (n. 324), para. 6.

³³¹ ECtHR, *İçyer*, Decision on Admissibility (n. 326), para. 94.

closing a door in Strasbourg for victims of gross human rights violations. In the words of Kurban:

Having conducted fact-finding hearings in 66 Kurdish cases in the early 2000s and having issued hundreds of judgments against Turkey for its treatment of its Kurdish citizens, the ECtHR was the best placed international authority to make an informed assessment about the effectiveness of the new remedy. But, due to political expediency and/or fatigue, it chose not to do so.³³²

These cases demonstrate the Court's deference to Turkey on the reparation of harm caused to victims in the south-east of the country. The exception to this is *Doğan and Others*, in which, in the judgment handed down in 2006, the Court awarded pecuniary damages to the fifteen victims, probably because it had already decided the case in 2004 and had given the opportunity to the parties to settle the issue. Thus, while the Court awarded just satisfaction in the case, it did so only after giving Turkey the opportunity to provide reparation to victims.

The case of *İçyer* shows not only deference but also a Court ready to refrain from considering similar cases to *Doğan and Others* that had already been filed before the Court for its decision, before Turkey set up its domestic reparation programme. Furthermore, the decision is the result of a *prima facie* analysis of Turkey's domestic reparation programme that failed to establish clear criteria as to how such programmes should be assessed under the ECHR. What was at stake here was not simply the right to reparation of victims for harm suffered; it was also the possibility of an effective remedy before a supranational body when States do not act according to their obligations under international treaties. The ECtHR gave prevalence to subsidiarity over the right to a remedy before an international body.

D. *What Explains the Approach of the Court to Subsidiarity when Dealing with Reparation?*

The previous sections have highlighted the important changes on reparation and subsidiarity that have taken place at the ECtHR. Certainly, as Judge Sicilianos puts it, 'the traditional approach, according to which the judgments of the Court are only of a declaratory nature and the Committee of Ministers has an exclusive competence to supervise their execution, does not correspond to recent practice'.³³³ Başak Çalı has also noted this important shift, indicating

³³² Kurban, 'Forsaking Individual Justice' (n. 243), 750.

³³³ *Ibid.*, 235.

that ‘the system has . . . evolved from being purely declaratory to adopting a more subtle and selective intrusiveness over time’.³³⁴ This can be taken to mean that the Court is, in practice, giving less deference to States. However, the previous sections have also shown that the Court is not renouncing subsidiarity, but rather preserving it in different ways. For example, it gives time to States to take action before stepping in; after giving guidance to States, it defers to them the cases.

Alice Donald and Anne Katrin Speck provide important statistical information to show that, while the Court is engaging more with non-declaratory judgments³³⁵ and is dealing with other measures, including general ones, the number of cases between 2004 and 2016 in which the Court included ‘specific remedial measures was tiny as a percentage of all adverse Chamber and Grand Chamber judgments’³³⁶ – another way of showing that subsidiarity remains strongly embedded in the Court’s jurisprudence. They indicate that, at its peak in 2014, specific remedial measures ‘represented only six percent of such judgments’ (i.e. 34 of 548). Furthermore, statistics show that, of all pilot judgments and Article 46 judgments combined, the indication of general measures prevails over individual measures.³³⁷ Once again, this shows that the Court is trying to help States to address the structural problems that challenge the ECHR machinery by means of the indication of general measures, but is leaving to States decisions on individual measures.

That subsidiarity continues to take hold in the European System is also shown by the adoption of Protocol 14 to the ECHR, which added new admissibility criteria to that already applied by the Court, or by Protocol 15, not yet in force, which amends the preamble to the European Convention to include both the principle of subsidiarity and the margin of appreciation.³³⁸ Article 1 of Protocol 15 reads:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

³³⁴ Çalı, ‘Explaining Variation’ (n. 188), 221.

³³⁵ They are taking into account all pilot judgments and all decisions under Art. 46 ECHR.

³³⁶ Donald and Speck, ‘The European Court of Human Rights’ (n. 247), 6.

³³⁷ *Ibid.*, 7.

³³⁸ Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24 June 2013, available at https://echr.coe.int/Documents/Protocol_15_ENG.pdf.

Rask Madsen has also concluded, after conducting quantitative analysis of the use of subsidiarity and margin of appreciation by the ECtHR, that ‘the ECtHR is indeed providing more subsidiarity following the Brighton Declaration’,³³⁹ which was adopted by the High-Level Conference on the Future of the ECtHR in 2012. While his comments particularly relate to decisions of the Court concerning merits, his remarks resonate with the findings of this chapter on subsidiarity in relation to reparation.

What explains the approach of the Court to reparations and to subsidiarity? Three factors could help to explain and contextualise the approach of the Court: the unmanageable volume of cases arriving before the Court; the nature of the violations alleged to have taken place, linked to the virtual inability of some of the signatories to the ECHR to adequately respond to alleged violations of it; and the lack of implementation of the Court’s judgments.

1. The Volume of Cases Arriving before the Court

The membership of the Council of Europe expanded from ten states in 1949 to forty-seven Member States in 2019. Indeed, with the fall of the Berlin Wall in the 1990s, various States in Eastern Europe joined the Council, such as Russia, Latvia, Romania, the Czech Republic, and Ukraine. Other States also joined the organisation at the beginning of the new century, such as Serbia, Bosnia and Herzegovina, and Montenegro.

As membership of the system has broadened, so has the number of cases brought to Strasbourg. During the period of accession of new Member States, for example, applications to the then operational European Commission on Human Rights rose from 404 in 1981, through 2,307 in 1993, to 4,750 in 1997.³⁴⁰ The Court decided ten cases in 1960; in 2017, it decided 15,595 cases on the merits, declaring inadmissible or striking out a further 70,356 applications.³⁴¹

Equally, as the number of cases before the ECtHR has increased, there has also been a high influx of cases concerning large-scale human rights violations arising out of armed conflicts.³⁴² According to the Steering

³³⁹ Mikael Rask Madsen, *Rebalancing European Human: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?* ICourts Working Paper Series 100 (2017), 32.

³⁴⁰ ECtHR, Annual Report 2001, para. 6.

³⁴¹ ECtHR Statistics 2017, available at https://echr.coe.int/Documents/Stats_annual_2017_ENG.pdf.

³⁴² Steering Committee for Human Rights, CDDH Report on the Longer-Term Future of the System of the European Convention on Human Rights, 2015, 49, available at <https://rm>

Committee for Human Rights, there were more than 3,000 such cases arriving before the Court in 2015.³⁴³ Equally, as the ECtHR indicates, ‘many of the about 57,350 cases pending before the [Court] are . . . “repetitive cases”, which derive from a common dysfunction at the national level’.³⁴⁴ While not all such cases concern gross and large-scale human rights violations of the European Convention in times of armed conflict, many of them do relate to such.

2. The Fragile Political Context of the New Council of Europe Member States and Gross Human Rights Violations

An important feature of the States that joined the Council of Europe following the fall of the Berlin Wall is that they were, and remain, fragile democracies with weak rule of law. In a way, the new Member States of the Council of Europe are similar to various countries in the Americas region and, indeed, several of them were emerging from conflict (such as those in the former Yugoslavia). Some of these countries are still facing armed conflicts or dealing with the legacy of mass atrocities, such as Armenia and Azerbaijan concerning the Nagorno–Karabakh conflict/occupation, Croatia, Bosnia and Herzegovina, Russia, and Georgia in the two autonomous regions of Abkhazia and South Ossetia, or Russia and the situation in Chechnya.

Turkey became a member of the Council of Europe in 1950, but its political situation is as fragile as that of some of the States mentioned above. Conflict was and remains present in Turkey, as evidenced by the occupation of Northern Cyprus since 1974, the conflict with the PKK in south-east Turkey (including with Iraq) and the conflict in Syria.³⁴⁵

All of these conflict situations put extra pressure on Strasbourg, because persons under the jurisdiction of these States, believing that their domestic systems do not provide them with an effective and adequate remedy to deal with alleged violations, have turned to the ECtHR to protect their rights. Indeed, and by way of illustration, the Court dealt with 8,042 applications

.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-human-rights/1680695ad4.

³⁴³ *Ibid.*

³⁴⁴ ECtHR, Factsheet: Pilot Judgments (n. 236), 1.

³⁴⁵ Other countries in the region are also involved in conflict situations, such as the United Kingdom. However, those are different types of conflict, given that the UK is working extraterritorially in occupied territories such as Iraq, and therefore, while the violations might be very serious and the victims many, the cases arriving to Strasbourg are never comparable to those coming from countries such as Russia or Turkey.

against Russia in 2017³⁴⁶ and 31,053 against Turkey in the same year.³⁴⁷ The majority of judgments the Court has handed down have been against Turkey, Italy, and Russia.³⁴⁸

Furthermore, the nature of the violations brought to the attention of the Court has also changed. Of the total number of cases decided by the Court up until 2017, 15 per cent involved a violation of the right to life, or the prohibition of torture or of inhuman or degrading treatment or punishment. This number could rise because, according to the Court, in recent years these types of violation have increased in frequency.³⁴⁹ If this data is compared to that of 2010, it is clear that the number has become significant: in 2010, violations of these rights were not relevant enough to be classified as self-standing violations in the statistics of the Court and were counted as part of ‘other violations’ when considering the subject matter of the judgments handed down.³⁵⁰

3. Strengthening Implementation of the Court’s Judgments

A key concern of the ECtHR is to secure that its judgments are implemented by national authorities. This has been recognised in Europe by means of the Committee of Ministers indicating that the ‘speedy and efficient execution of judgments is essential for the credibility and efficacy of the [Convention] as a constitutional instrument of European public order on which the democratic stability of the continent depends’.³⁵¹ Furthermore, the High-Level Conference meeting in Brussels in March 2015 adopted the Brussels Declaration on the Implementation of the European Convention on Human Rights, ‘Our Shared Responsibility’. This Declaration specifically indicates that the High-Level Conference ‘emphasises the importance of the full, effective and prompt execution of judgments and of a strong political commitment by the State Parties in this respect, thus strengthening the credibility of the Court and the Convention system in general’.³⁵²

³⁴⁶ ECtHR, Russia, March 2018, available at https://echr.coe.int/Documents/CP_Russia_ENG.pdf.

³⁴⁷ ECtHR, Turkey, March 2018, available at https://echr.coe.int/Documents/CP_Turkey_ENG.pdf.

³⁴⁸ ECtHR, Overview: 1959–2017, March 2018, 3.

³⁴⁹ *Ibid.*, 7.

³⁵⁰ ECtHR, 50 Years of Activity: The European Court of Human Rights – Some Facts and Figures, April 2010, 6, available at https://echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf.

³⁵¹ Committee of Ministers, Reply to Parliamentary Assembly Recommendation 1576 (2002), 26 March 2003.

³⁵² High-Level Conference on the Implementation of the European Convention on Human Rights, ‘Our Shared Responsibility’, Brussels Declaration, 27 March 2015, available at https://echr.coe.int/Documents/Brussels_Declaration_ENG.pdf.

The payment of compensation as just satisfaction has not been a problem, as a general rule.³⁵³ However, complying with other forms of reparation, such as general measures and guarantees of non-repetition, remains a challenge in Europe.³⁵⁴ The other big obstacle faced by the ECtHR and the Committee of Ministers is the excessive amount of time States take to comply with judgments.

A close look at the statistics provided by the Committee of Ministers confirms that implementation is a major challenge in the region. For example, in the majority of leading cases (which reveal structural problems), pending compliance remains very high, with 1,555 still open in 2015 and only 153 closed in the same year.³⁵⁵ Equally, the number of leading cases pending compliance increased year on year from 1996, although it has slightly decreased since 2017.³⁵⁶ Indeed, it grew from 73 in 1996 to 1,245 in 2019; by 2015, there had been 10,652 cases pending compliance before the Committee of Ministers.³⁵⁷ This number had decreased to 9,941 in 2016³⁵⁸ and to 7,500 in 2017.³⁵⁹ By 2019, there were 5,231 cases pending compliance.³⁶⁰ Furthermore, Russia, Ukraine, and Turkey remain the States with the majority of cases under enhanced supervision.³⁶¹

The Steering Committee for Human Rights identified two key problems regarding lack of implementation: first, political reasons, particularly in relation to serious large-scale violations where lack of political will to do what the Court orders remains an obstacle;³⁶² and second, technical/financial problems in the execution of relatively complex measures.³⁶³

³⁵³ CDDH Report on the Longer-Term Future of the System of the European Convention on Human Rights (n. 342), para. 151.

³⁵⁴ Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2017, 14.

³⁵⁵ Committee of Ministers, Statistics: Developments in the Number of Cases from 1996 to 2015, 3 June 2016, 3–4.

³⁵⁶ Committee of Ministers, Annual Report, 2019, 52; Department for the Execution of Judgments of the European Court of Human Rights, Length of the Execution Process: Pending Cases, 2017, 1.

³⁵⁷ Committee of Ministers, Annual Report, 2019, 52.

³⁵⁸ Committee of Ministers, Annual Report, 2016, 47.

³⁵⁹ Committee of Ministers, Annual Report, 2017, 7.

³⁶⁰ Committee of Ministers, Annual Report, 2019, 52.

³⁶¹ Since 2011, the Committee of Ministers put in place two procedures for the execution of judgments: a standard procedure and an enhanced one. The latter is used for cases requiring urgent individual measures or revealing important structural problems (in particular pilot-judgments) and for inter-state cases. See Council of Europe, 'The Supervision Process', available at www.coe.int/en/web/execution/the-supervision-process.

³⁶² Marinella Marmo, 'The Execution of Judgments of the European Court of Human Rights: A Political Battle', *Maastricht Journal of European and Comparative Law* 15 (2008), 235–58 (238).

³⁶³ CDDH Report on the Longer-Term Future of the System of the European Convention on Human Rights (n. 342), paras 134–5.

E. *The Reasoning of the Court on Remedial Measures: Problems and Consequences*

Various aspects of the engagement of the Court with domestic reparation programmes are to be noted. First, the ECtHR has dealt with domestic reparation programmes to remedy, as a general rule, not gross human rights violations but rather large-scale and systematic violations in European States, prominently related to the right to property.

Given that various countries in Europe have undergone transitions from repressive regimes and face, or are facing, the legacies of armed conflicts, it must be remarked that there is not a single case in Europe in which the ECtHR has had to deal with questions related to the adequacy and effectiveness of domestic reparation programmes set up to provide redress for gross human rights violations. The closest could be Turkey's domestic reparation programme to compensate the disproportionate evictions in its south-eastern area.

The ECtHR had the opportunity to deal with the German Forced Labour Compensation Programme to provide reparation to surviving victims of the Holocaust who were used as forced labourers in Germany and in the occupied territories during World War II.³⁶⁴ However, as important as those decisions are, they do not deal with the scope and reach of the right to reparation for victims of armed conflict, or the adequacy or effectiveness of domestic reparation programmes, but rather with related rights. Consider the example of a case the ECtHR found admissible and decided on its merits, *Woś v. Poland*. This case concerned the lack of access to a court under Article 6(1) ECHR in relation to claims before the Polish-German Foundation, a mechanism established to provide reparation in Poland with money from the German government. The applicant did not believe that he had received all compensation

³⁶⁴ See also ECtHR, *Pozmamski and Others v. Germany*, Judgment on Admissibility of 3 July 2007, Application No. 25101/05. The Court declared this case inadmissible. It concerned the domestic reparation programme set up in Germany to deal with forced labour. The applicants claimed that the Foundation Law did not provide adequate compensation for forced labourers and they considered that the waiver of any further claims against Germany or any of the companies connected to Nationalist Socialist injustice was contrary to the ECHR. All applicants had received compensation from the domestic reparation programme, but they brought civil actions under tort law. They were not successful, given the waiver of the Foundation Law. They claimed that this violated their right to property under Protocol 1 ECHR. The Court found that this right could be limited in the public interest, and that the public interest of legal certainty for companies and Germany of no more civil claims was appropriate. The issue then turned to the proportionality of the measure. The Court considered that the applicants all got compensation, even if it was lower than they expected, and that the system as it was constituted a 'fair balance' between the right to property and the general interest. *Ibid.*, at point 3.

owed for the entire period of his forced labour, and he argued that he did not have a judicial remedy to challenge this because the remedies he tried were disregarded by authorities claiming lack of jurisdiction over the matter.³⁶⁵ Since substantive rights under the ECHR were at stake, particularly the right to property, the Court could not abstain from exercising jurisdiction,³⁶⁶ noting that 'the applicant could claim, at least on arguable grounds, the right to receive compensation from the Foundation in respect of the overall period of his forced labour'.³⁶⁷ The Court concluded that there was a violation to the applicant's right to access a court³⁶⁸ and awarded 5,000 EUR as non-pecuniary damages.³⁶⁹

The second aspect of the Court's engagement to be noted is that the majority of the domestic reparation programmes set up in Europe are limited to compensation as a form of reparation. They omit other forms of reparation, such as restitution, rehabilitation, and satisfaction, crucial for survivors of gross human rights violations or large-scale violations. This generates questions about how comprehensive domestic reparation programmes are in Europe and, more importantly, about the views of the Court on this point. Does the silence of the Court mean that it leaves it to States to decide the appropriate forms to provide reparation for such violations? Or does it mean that the Court considers that it is adequate for a State to provide just compensation for such violations? Cases such as *Doğan and Others* appear to indicate that an investigation is also an important form of reparation. But the Court's position in *İçyer* seems to suggest the contrary, given that the focus of the Court when considering the existence of an effective remedy was precisely on the compensation dimension of the claim, not on the effectiveness of the investigation. This raises questions about the approach of the Court to guarantees of non-repetition and to other forms of reparation.

The third aspect to be noted is that the ECtHR continues to embrace the principle of subsidiarity, balancing the level of prescriptiveness of its orders or views against the margin of appreciation it recognises States should have on deciding what to do to comply with the ECHR. However, if the Court, having given a State the opportunity to take the necessary measures to amend the situation and provide reparation, considers that the State has failed to so, it will, in the majority of cases, step in and adopt a pilot judgment, as happened

³⁶⁵ ECtHR, *Woś v. Poland*, Judgment on Admissibility of 1 March 2005, Application No. 22860/02, para. 51.

³⁶⁶ *Ibid.*, para. 80.

³⁶⁷ *Ibid.*, para. 84.

³⁶⁸ ECtHR, *Woś v. Poland*, Judgment of 8 June 2006, Application No. 22860/02, paras 92–112.

³⁶⁹ *Ibid.*, 116.

in *Atanasiu v. Romania*, and/or decide to provide just satisfaction under Article 41 ECHR. So, the Court is ready to use less deference, but this appears to be an exceptional decision, as illustrated, for example, by the eviction cases in Turkey, where the Court had the opportunity, and reasons, to give less deference to Turkey but refrained from doing so, closing the door to 1,500 applications of the same nature.

It is to be noted that even if the Court decides to defer to the State the question of how best to comply with the Convention, the Court, in certain situations, considers that the harm caused to applicants has been so strong that, at the very least, it orders non-pecuniary damages in addition to any other form of redress that might be applicable at the domestic level, as illustrated by cases such as *Kurić and Others v. Slovenia*.

Finally, *Wolkenberg and Others v. Poland* is the case that stands out in terms of legal argumentation. In this case, the Court had to consider whether the 20 per cent of the current value of the property as the ceiling, established in Poland to provide compensation for Bug River claims, was legal. The Court indicated that the right to property admits legitimate limitations when the public interest is at stake; it is not an absolute right. Also, the Court noted that Poland had to provide reparation for a harm it did not cause. As a consequence, it would create an undue burden for Poland if it was expected to provide a high amount of compensation when it was not to blame for the situation.³⁷⁰ More of this type of reasoning is essential to provide victims and applicants before the Court with legal certainty as to why certain views are upheld by it and why the consequence of such views is, or is not, to enhance subsidiarity. Furthermore, more legal grounding is essential to understand how the ECtHR recognises the scope and reach of the right to reparation for such violations under the ECHR.

V. WHAT SHOULD REGIONAL HUMAN RIGHTS COURTS DO WHEN FACED WITH CHALLENGES TO DOMESTIC REPARATION PROGRAMMES?

It has been argued that the right to reparation for victims of armed conflict has a strong hold in international human rights law. Nevertheless, the scope and reach of this right remains to be fully defined. This is an area in which the jurisprudence of supranational bodies such as the IACtHR and the ECtHR could make a significant contribution. However, as noted, these bodies' deference to States means that an important opportunity has been missed to

³⁷⁰ ECtHR, *Wolkenberg* (n. 298), paras 60–4.

interpret the right to reparation. Deference also means that States are those framing how they understand the reach and scope of this right when domestic reparation programmes are at stake.

This part of the chapter argues that the regional Courts should follow a two-pronged approach to the examination of domestic reparation programmes to decide whether subsidiarity is a legitimate and legally viable way of fulfilling the right to reparation of victims – one that is coherent and consistent with international law: the ‘international law test’ and the ‘public policy test’.

A. *The International Law Test*

The IACtHR and the ECtHR need to consider whether, in light of international law and their constitutive treaties (the ACHR and the ECHR), specific domestic reparation programmes are in accordance with States’ international obligations on reparation. This test is surprisingly absent in the reasoning of these Courts in the various judgments referred to in this chapter.

The international law test implies the need to address one of the difficult questions surrounding discussions about the right to reparation for victims of mass atrocities: whether international human rights law standards on reparation are also applicable to domestic reparation programmes in times of transition. If they are not, then these courts should establish which standards should govern, providing strong reasoning why others do not apply. For example, a court would need to deal with the question of legitimate limitations to the right to reparation in light of general welfare or public interest reasons. The tribunal should then apply such standards to domestic reparation programmes and decide whether such mechanisms pass the international legal test.

There are two relevant international human rights standards at stake: one crafted by the Inter-American Court following international law (*restitutio in integrum*), according to which ‘reparation should be adequate’³⁷¹ (*reparación integral*) to redress the harm caused to the victim; the other included in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of Humanitarian Law, according to which reparation should be adequate, prompt, and effective for harm suffered.³⁷² While the meaning and reach of

³⁷¹ IACtHR, *Velásquez Rodríguez* (n. 29), para. 25; IACtHR, *Heliodoro Portugal v. Panama*, Preliminary Objections, Merits, Reparations and Costs, 12 August 2008, Series C No. 186, para. 217.

³⁷² Basic Principles (n. 255), Principle VII(b).

these concepts is yet to be established, key elements of this principle are that ‘reparation should be proportional to the gravity of the violations and the harm suffered’, and that reparation should be ‘full and effective’.³⁷³

The tension between these standards and domestic reparation programmes is more than apparent. Domestic reparation programmes pose a problem since they do not provide reparation to victims according to the harm each victim has suffered, but rather put victims who suffered similar violations (not necessarily similar harm) in the same situation, usually by giving them the same form(s) of reparation. Domestic reparation programmes might also be limited to compensation as a form of reparation, as seen in various cases that have reached the ECtHR in relation to large-scale violations, or might include other forms of reparation, as in the Americas region. They might prioritise some victims over others or limit eligibility to certain violations that happened during a specific period of time.³⁷⁴

The relatively recent jurisprudence of the IACtHR appears to suggest that extraordinary situations, such as those in which serious violations take place, be it in a dictatorship or in a conflict, call for extraordinary measures, and therefore that it is not possible to uphold the same international human rights standards when it comes to reparation. The Court seems to espouse such a belief particularly in relation to victims of armed conflict in post-conflict situations. In the words of Judge García-Sayán, in a concurring opinion in *Massacres of El Mozote and nearby places v. El Salvador*:

[T]he component of reparation has its own difficulties – and even impossibilities – in the case of massive and widespread violations of human rights. In these situations, it would seem that the objectives of these massive programs of reparations is not so much to reinstate the victims to the status quo ante, but rather to provide clear signals that the rights and dignity of people will be fully respected.³⁷⁵

The full Court appears to have supported this position in *Génesis*³⁷⁶ and *Yarce*,³⁷⁷ yet it does not resolve the legal question of how to reconcile international law with the rules applied by domestic reparation programmes.

³⁷³ *Ibid.*, Principles IX.15 and IX.18.

³⁷⁴ See Correa, ‘Operationalising the Right of Victims’, Chapter 2 in this volume, section II.

³⁷⁵ Concurring Opinion of Judge Diego Garcia-Sayán in IACtHR, *El Mozote* (n. 36), para. 33. This concurring opinion was endorsed by four other judges, meaning that five out of seven judges sitting at the Court upheld these views.

³⁷⁶ IACtHR, *Génesis* (n. 106), paras 469–76.

³⁷⁷ IACtHR, *Yarce* (n. 158), para. 326.

Even if the IACtHR recognises the difficult context under which a domestic reparation programme is established, particularly during or after conflict situations, it should not be sufficient for the State to argue the existence of difficulties; rather, the State should provide evidence to the Court in that regard so that the Court could arrive at the conclusion that it might be in the public interest to limit the right to reparation.

The ECtHR, as well as the IACtHR, considers domestic reparation programmes to be capable of being adequate and effective remedies under their respective Conventions. The IACtHR has provided some general criteria as to what needs to be present if such domestic reparation programmes are to be in accordance with the Convention, such as adoption in good faith, inclusion of victims' consultation and participation, and the proportionality of compensation. Yet the Court has failed to explain what each criterion means.

Nor has the ECtHR provided sufficient reasoning to explain what these mean in such situations. In the cases against Turkey on evictions or in *Broniowski* and those that followed it, the Court simply limited itself to addressing, in very general terms, the objections presented by the applicants; it did not engage in a careful analysis of the remedies.

Legitimate limitations to the right to reparation of victims of armed conflict is one of the areas on which these Courts needs to elaborate further in the coming years. The ECtHR has important jurisprudence on legitimate restrictions to rights for the public interest, but not in relation to domestic reparation programmes. Likewise, the IACtHR has not used Article 32(2) of the ACHR to justify possible limitations. The provision states that '[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society'; despite its relevance, the Court has barely referred to it.³⁷⁸

According to the Court, Article 32(2) ACHR 'contains a general statement that is designed for those cases in particular in which the Convention, in proclaiming a right, makes no special reference to possible legitimate restrictions',³⁷⁹ adding that 'restrictions on the exercise of certain rights and freedoms can be justified on the ground that they assure public order'.³⁸⁰ Equally, the Court is mindful of possible abuse of Article 32(2) and establishes a limitation by stating that 'public order' or 'general welfare' may, under no

³⁷⁸ IACtHR, Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Requested by the Government of Costa Rica, 13 November 1985, paras 63–7.

³⁷⁹ *Ibid.*, para. 65.

³⁸⁰ *Ibid.*

circumstances, be invoked as a means of denying a right guaranteed by the Convention, or to impair or deprive it of its true content.³⁸¹

In this regard – and this is a job for both the IACtHR and the ECtHR – it might be useful to approach the right to reparation as a right with minimum core obligations that must always be respected and fulfilled, even if the State is dealing with reparation in a post-conflict setting and even if some limitation might be legitimate. Here, the views of the Committee on Economic, Social and Cultural Rights on core obligations resonate:

The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent, upon every State party. . . . If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.³⁸²

While the objective of this chapter is not to define the minimum core obligations of the right to reparation, there are some obligations that arguably have such status. For instance, when reparation for gross human rights violations is at stake, domestic reparation programmes have the obligation to include all forms of reparations and not only compensation or restitution. This is not the same as saying that each form of reparation should be proportional to the extent of the damage. Proportionality, in a post-conflict context, should be the result of providing various forms of reparation to victims of gross and/or large-scale human rights violations, which, when combined, constitute the best reparation effort the State could give victims without undermining the essence of the right. This is what Pablo de Greiff has called the ‘completeness’ of a reparation programme.³⁸³

There are forms of reparation that are essential to put victims in a position to uphold their rights, such as rehabilitation. If victims do not have, at the very least, the necessary physical and mental health, no other reparation measure would be useful to them and, in most cases, they will be unable to avail themselves of other remedies to claim their entitlements.³⁸⁴ Thus the completeness of a domestic reparation programme is not sufficient; particular attention must also be given by the Court to how domestic reparation programmes provide rehabilitation to victims.

³⁸¹ *Ibid.*, para. 67.

³⁸² CESCR, General Comment No. 3 (1990): The Nature of States Parties’ Obligations, E/1991/23:1, para. 10.

³⁸³ Pablo de Greiff, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (New York/Geneva: UN, 2008), 22.

³⁸⁴ Basic Principles (n. 255), Principle IX.21.

Once the minimum core obligations of the right to reparation are established, the regional human rights courts should consider whether they are fulfilled by the domestic reparation programme at stake. It is not sufficient for the State to argue the effectiveness and adequacy of the domestic reparation programme in general terms; the State should also explain why the victims in the case at stake have not benefited from the domestic reparation programme, or if they have, how and when, so that the Court can fully assess that information.

If those minimum core obligations are fulfilled by the domestic reparation programme and if there is evidence that even though they have not been fulfilled in the specific case at stake, they will be in a prompt manner, the ECtHR and the IACtHR could decide not to order new reparations and could defer reparation to the domestic reparation programme. Such a decision could be conditional on the State complying with minimum core obligations within a set period of time, at the end of which the Court may still be able to order reparations to the victims if the State has not done so.

If the violations over which the regional human rights courts have jurisdiction are not incorporated within the domestic reparation programme, then the courts, despite the ‘completeness’ of the domestic reparation programme, should order reparation for the harms that have ensued.

The standard of prompt reparation also faces enormous challenges in the jurisprudence of both courts. Most of the violations where domestic reparation programmes are at stake happened decades ago and the human rights courts have to deal with them many years later. In this context, the question of subsidiarity also becomes relevant. How long should victims wait before regional human rights courts decide on reparation? Is it reasonable for a victim to be told, after so many years waiting for justice, that they need to go back to their domestic systems and use domestic reparation programmes to obtain reparation? When these questions are asked, the promptness of remedies appears to be at odds with subsidiarity. Furthermore, the courts are dealing with some of the most vulnerable victims of human rights violations who are in urgent need of attention.

B. *The Public Policy Test*

This takes the discussion to the consideration of the public policy reasons – general welfare reasons or public interest reasons – that the State took into account when designing and implementing a domestic reparation programme that, *prima facie*, is in conflict with international human rights law. Such a test would include, but not be limited to, gaining a better understanding of the

political, cultural, and economic reasons taken into account when setting up the programme.

Arguments frequently raised by States before the regional human rights courts include the lack of financial means to provide reparation in other ways, as in the case of Colombia or Guatemala, or the difficulties of providing compensation given the many claims for restitution and compensation as a result of the transition from a totalitarian regime, as in the case of Poland. Any such claim needs to be substantiated with evidence – something that was missing in the pleadings of all of these States. The IACtHR and the ECtHR should request from each State reliable information about the grounds considered to justify the measures adopted under the domestic reparation programme. States can indeed argue general welfare or public interest issues, but they need to substantiate them and the two Courts need to consider whether those measures balance, in an adequate manner, the interests and the right to reparation of the victims at stake. The ECtHR, depending on the provision at stake, engages in this type of analysis. It has done so particularly with the right to property under Article 1 of Protocol 1, as in the case of *Broniowski v. Poland*,³⁸⁵ but it has not done so in relation to domestic reparation programmes, such as the Turkish one.

Given that the human rights courts decide cases far away from where the violations took or are taking place, and form their views based on the facts and the law by means of the litigation of cases and previous cases, other mechanisms are necessary to provide these bodies with the information required to adequately assess domestic reparation programmes. In the case of the IACtHR, it could request evidence, at its own motion, from anyone the Court considers relevant;³⁸⁶ it could also send some members of the Court to the country in question to obtain more information of the domestic reparation programme;³⁸⁷ and it could obtain affidavits from experts on domestic reparation programmes and related issues, answering particular questions about the suitability and effectiveness of the measures established domestically.

³⁸⁵ ECtHR, *Broniowski* (n. 237), paras 182–7.

³⁸⁶ Rule 58 of the Rules of Procedure of the Court.

³⁸⁷ An on-site visit by the Court to Guatemala took place in March 2017, to monitor compliance with some reparation measures in the judgments in *Río Negro* and *Plan de Sanchez*. This was the first on-site visit of its kind in which the Court was able to learn more about Guatemala's domestic reparation programme through the lenses of two cases it had decided against this country.

It is not suggested here that the regional courts should decide how States must allocate their resources. The courts must, however, consider whether the States' expenditure is reasonable in relation to the harms the programmes intend to redress.

In the case of the Inter-American System of Human Rights, the representatives of the victims, particularly the Inter-American Commission of Human Rights, should make use of the procedural opportunity to controvert what the State is saying. The Inter-American Commission of Human Rights is particularly well placed to comment on this, given that one of its functions is to monitor the human rights situation in all members of the Organization of American States (OAS).³⁸⁸ Thus it has important structural information that it should present to the Court. Indeed, important thematic hearings have taken place before the Commission on various domestic reparation programmes at which information has been provided about their achievements and challenges, such as in relation to Peru or Guatemala. The Inter-American Commission of Human Rights has presented expert affidavits on domestic reparation programmes to the Court. For example, Cristián Correa, one of the contributors to this volume, presented one in *Chichupac*.³⁸⁹ Amicus should also be presented before the Court both before a case is decided and during the process of monitoring compliance with orders given by the Court in the judgment.

In the case of the ECtHR, various tools are at its disposal to assess the political, cultural, and economic policy choices behind domestic reparation programmes. The burden should be on the State to explain why it has adequate and effective mechanisms to redress the violation(s) and to explain why it faces legitimate public interest issues. The Court, based on Article 36 ECHR, could permit third-party interventions, allowing another Council of Europe Member State to participate if one of the applicants is its national. Equally, any individual or a non-governmental organisation (NGO) could act as a third-party intervener, as was the case of REDRESS in 2014 in *Cyprus v. Turkey*. The Council of Europe Commissioner for Human Rights could also intervene, as of right, according to Article 36. Finally, the Committee of Ministers responsible for monitoring the execution of judgments handed down by the Court has valuable information in relation to each State and particular violations – information that could be important for the Court.

³⁸⁸ OAS General Assembly, Resolution 447 1979, Statute of the Inter-American Commission on Human Rights, Art. 18.

³⁸⁹ IACtHR, *Aldea Chichupac* (n. 146), para. 8.

VI. CONCLUSIONS

This chapter has established that subsidiarity remains a shaping principle of international law and international relations. It has also illustrated the impact of this principle on reparation. It has shown that the two major regional human rights courts have dealt with subsidiarity differently, probably as a result of their mandates, institutional set-up, history of human rights violations, and the contexts in which they have to adjudicate. In this regard, a shift has been noted on the jurisprudence of the IACtHR. It has moved from being a Court that would not exercise subsidiarity on reparation for victims of mass atrocities to one that is open to the engagement. This engagement appears to be triggered by the changing landscape of human rights violations in the region, the arrival of more cases to the Court, the year-on-year increase of cases before the Court for monitoring compliance, and the deceiving signs that Inter-American law has penetrated States' environment and culture, including on reparation.

The concept of subsidiarity is embedded in the ECtHR's work and, as Madsen shows, it is getting stronger. While the Court has taken important steps towards ordering reparation beyond compensation and is engaging more with general measures, this practice, as noticed in this chapter and supported by the work of Donald and Speck, remains small if compared to the overall case law of the Court. Lack of adequate, prompt, and effective reparation for victims of armed conflict in Europe will only bring many more cases before the Court. The ECtHR, mindful of this risk for the Convention system, has tried to use pilot and quasi-pilot judgments to trigger State behaviour. It believes that subsidiarity should be the solution to the problem. However, it is to be noted that the Court also acknowledges the failure of States to act when given the opportunity to do so and, in relation to these cases, the Court has stepped in to order reparation at least in the form of compensation under Article 41 ECHR. This also means that the Court is exceptionally ready to revisit subsidiarity for the sake of the Convention system.

That subsidiarity should be a key regulating principle of international law appears to be not only based on the belief that States know best how to deal with the problems they face, but also supported by the idea that States are more likely to fulfil the right of victims to reparation. This latter idea has gained currency in the practice of regional human rights courts. Nevertheless, the evidence in this chapter refutes this claim. More deference to countries emerging from or dealing with conflict, such as Colombia, Guatemala, Turkey, or Russia, has not yielded better implementation. On the contrary,

it has caused more harm to victims who have been unable to enjoy their right to reparation.

Guatemala is a paradigmatic case and one in which the Inter-American Court has attempted, by different legal and diplomatic means, to secure compliance with its orders. Nevertheless, its work has not produced the desired results. Of the thirty-four cases decided by the Court up until November 2019, all but *Maldonado Ordoñez*,³⁹⁰ a case not related to violations that occurred during the armed conflict, remain pending full compliance.³⁹¹

The situation is not that different when Russia or Turkey are considered. As explained earlier, they remain problematic cases from an implementation perspective in Europe. The Committee of Ministers is currently examining the execution of *Aslakhanova and Others v. Russia* as part of the *Khashiyev and Akayeva* litigation – a group of 251 similar cases, the oldest of which was decided in 2005.³⁹² All of these cases are pending compliance. During a recent examination of this group of cases, the Committee deplored the lack of progress in the search for the disappeared.³⁹³ What these 251 cases show is the size of the challenge faced both by the ECtHR and the Committee of Ministers to ensure compliance with their judgments and with the obligations deriving from the ECHR.

A key problem in ensuring the implementation of reparation orders (be they international or domestic) is the political will of those in power to implement them. In post-conflict situations in which State institutions tend to be very weak or do not exist, and in which democracy and the rule of law are not in place, complying with reparation orders depends on the will of particular individuals rather than institutions and on the politics of the moment. The problem increases depending on the way in which victims are perceived by those in power. If they are seen as combatants, terrorists, or people who are abusing the State, they are not likely to get reparation. The situation becomes even more problematic if root causes of conflict have not been addressed. It is no coincidence to find that the measures that tend to be the least implemented in post-conflict situations are precisely guarantees of non-repetition or general measures. If those who remain in power are the perpetrators, the incentives for social change remain slight, and complying with domestic reparation

³⁹⁰ Resolution of the IACtHR, *Maldonado Ordoñez v. Guatemala*, Resolution Monitoring Compliance, 30 August 2016.

³⁹¹ IACtHR, Annual Report 2016, 7.

³⁹² ECtHR, *Zara Isayeva v. Russia*, Judgment of 6 June 2005, Application No. 57950/00.

³⁹³ Council of Europe, Committee of Ministers, 1310th Meeting (13–15 March 2018), available at www.coe.int/en/web/cm/-/1310th-human-rights-meeting-of-the-ministers-deputies-13-15-march-2018-?inheritRedirect=true.

programmes or international judgments is out of the question.³⁹⁴ This is an important consideration that regional human rights courts should take into account when considering subsidiarity and reparation.

The analysis of subsidiarity and reparation at these courts has also shown that there are issues related to the rule of exhaustion of domestic remedies that need to be clarified by the case law of these bodies. Under international human rights law and under the subsidiarity principle, victims shall exhaust domestic remedies before going to an international body for adjudication. Exceptions to the rule exist, such as when remedies are not adequate or effective at the time of the application before the international body. However, when victims reach the international bodies and said bodies exercise jurisdiction and adjudicate on the merits of cases and find violations, the reasons to relinquish jurisdiction over reparation, while in some cases legal, as in the case of Article 35 ECHR, could be questioned from a fairness point of view. Victims of armed conflict are often in a highly vulnerable situation and have been waiting for reparation for years, which, as a consequence, has worsened their situation. When they finally reach regional courts, they are asked to use domestic reparation programmes to obtain reparation despite the challenging contexts in which reparation for these victims takes place and, on many occasions, such as shown by the Turkish cases, when those domestic reparation programmes were not even in place when the cases reached Strasbourg. In relation to victims of armed conflict, the regional human rights courts should not relinquish jurisdiction over reparation unless they have been provided with all of the necessary evidence that domestic reparation programmes were in place, and were adequate and effective to obtain reparation, at the time the application was filed, but the victims did not use them.

The interplay between international human rights courts and domestic reparation programmes has, for the most part, relied on subsidiarity as a way of relinquishing jurisdiction – the negative concept explained in section II of

³⁹⁴ This is exactly why Shuichi Furuya asks for international bodies to step in:

[I]f this right to choose is admitted, it may become a positive incentive for policy-makers to establish mechanisms that are more attractive than domestic fora in terms of procedure, remedies and expeditiousness, which would avoid the responsible parties being forced to participate in another forum and spreading their limited resources across parallel proceedings. This would also be beneficial to victims.

[...]

... [I]t is totally *unrealistic to expect the victims' State, or its domestic courts, to settle reparations.*

Furuya, 'Right to Reparation', Chapter 1 in this volume, sections VII.C and III.C (emphasis added).

this chapter. From this perspective, there is not really coexistence, because the international bodies are referring back to States the issues connected to reparation and domestic reparation programmes. As a result, a very important dimension of subsidiarity – that of complementarity – is somehow lost when subsidiarity in its negative sense takes priority.

But this chapter has indicated that complementarity must also be read as positive complementarity, meaning that international and regional courts have the authority to define the meaning of international obligations and to foster an environment – a landscape – for compliance with them, including reparation. These international bodies are not making the best use of this authority to help to define the scope and reach of the right to reparation for victims of armed conflict when gross and/or large-scale human rights violations are at stake. This appears to be particularly the case of the ECtHR. The IACtHR, probably as a result of its long and significant jurisprudence on reparation for victims of gross human rights violations, has not fully relinquished its authority over reparation, although subsidiarity has gained force in its jurisprudence. What this chapter has called ‘qualified deference’ constitutes the IACtHR’s embryonic attempt to reconcile subsidiarity in its negative dimension with the virtues of complementarity.

This chapter concludes that a healthy coexistence between international and regional human rights courts and domestic reparation programmes would be one in which these courts provide strong legal reasoning for their views on reparation for victims in general, but particularly for victims of armed conflict, helping to flesh out the scope and reach of this right, even in extraordinary times such as those faced by States during or after armed conflict. The legal reasoning of these courts might not be shared by everyone. However, if the argumentation is strong, it will bring legal certainty to the discussion and to the litigants of a case; it will not generate false expectations for victims and it could even have a positive impact on the minimalistic approach States take to reparation for victims of armed conflict, encouraging higher standards. At its best, it can also encourage greater positive complementarity: a landscape of domestic and international institutions all working towards ensuring reparation for victims of mass atrocities. Furthermore, careful legal reasoning will protect the legitimacy and authority of these bodies. It could also help States to take more seriously their approach to reparation for victims of mass atrocities because they would know that failure to act in a diligent manner would imply these bodies exercising jurisdiction.

Key to providing proper legal reasoning in judgments on domestic reparation programmes is the application of the two-pronged test developed in this chapter: the ‘international law test’ and the ‘public policy test’. As has been

argued, there are various ways in which the regional human rights courts could address the legality, adequacy, and effectiveness of domestic reparation programmes under international law. The key tasks for the future are precisely to indicate if and how the human right to reparation for such atrocious violations could be limited in a legal and legitimate way by domestic reparation programmes, as well as which are the core obligations of this right without which it will lose its meaning. These tasks are crucial in the years to come or else, through subsidiarity, States will continue to apply different standards on reparation that respond to the demands of the moment and which do not always take into account the essence of the right to reparation – that is, to repair, as far and as promptly as is possible, the harm done to victims.