

CASTING A LEGAL SAFETY NET: A HUMAN SECURITY APPROACH TO ASSISTING FAMILIES FOLLOWING ARMED CONFLICT

Emily Camins* 

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Families often have particular vulnerabilities following armed conflict. As international humanitarian law focuses primarily on regulating the conduct of hostilities, its scope for addressing the vulnerability of families and other victims of armed conflict is, at present, conceptually and practically limited. A human security approach invites consideration of the shortcomings of existing legal frameworks in addressing vulnerability, and the development of such frameworks, in a manner that helps to build resilience and address threats. For families harmed during armed conflict, this means identifying features of the existing legal regime that operate in a manner that entrenches or fails to address their vulnerabilities, as well as structural challenges that hinder access to legal opportunities such as reparations. The article identifies several structural issues and features of the legal framework that overlook or entrench the vulnerability of families. Drawing on a human security approach, it suggests that supplementing the existing legal regime with a victim assistance framework could help to address the vulnerability of families and others harmed by armed conflict.

Keywords: indirect victims, reparations, international humanitarian law, international human rights law, human security

1. INTRODUCTION

The violence that is common in armed conflict – such as killing, enforced disappearance and the inflicting of serious injury – has a ripple effect on families. It destabilises not only the direct victim but also ‘a wider circle whose own autonomous entitlements are precariously in balance with the well-being and safety of others’.¹ Families – children and their parents or caregivers² – are also harmed through the general conduct of war, with contemporary armed conflict routinely causing family separation, displacement, and physical, mental and psychosocial harm.³ These and other factors result in particular vulnerability for families following armed conflict. Yet, the key rules of international law applicable to armed conflict, particularly international humanitarian law (IHL), have relatively little to say about this vulnerability, especially when it arises

* PhD Candidate, University of Western Australia; emily.camins@research.uwa.edu.au. This research was supported by an Australian Government Research Training Program Scholarship. I would like to thank Adjunct Professor Holly Cullen, Dr Philipp Kastner, and the academic editor and anonymous reviewers of the *Israel Law Review* for their input. Any remaining errors lie with the author.

¹ Fionnuala Ní Aoláin, ‘Sex-based Violence and the Holocaust: A Re-evaluation of Harms and Rights in International Law’ (2000) 12(1) *Yale Journal of Law and Feminism* 43, 77–78.

² Unless otherwise indicated, in this article ‘family’ means ‘a group of people living as a household, traditionally consisting of parents and their children’: Oxford English Dictionary, ‘*family, n. and adj.*’ (Oxford University Press).

³ See generally Ayesha Kadir and others, ‘The Effects of Armed Conflict on Children’ (2018) 142 *Pediatrics*, <https://doi.org/10.1542/peds.2018-2586>.

through the general (lawful) conduct of war. Drawing on a human security framework, this article seeks to shed light on the vulnerability of families affected by armed conflict, examine the adequacy of existing international legal responses, and ask how international law may be developed to improve their condition.⁴

The plight of families post-conflict is relatively scantily addressed in international law and scholarship.⁵ This is true of victims generally, with IHL concentrating primarily on how war is fought rather than the situation once conflict ends.⁶ To the extent that the law considers survivors post-conflict, it tends to focus on violation-based measures such as reparations or remedies.⁷ Relatives are sometimes included in reparative measures as indirect victims, a term that includes immediate family members of direct victims of violations.⁸ However, reparations are not well adapted to address the needs of families. Reparations awards, particularly by courts, have been limited in both number and amount, leaving many families facing ongoing insecurity. Moreover, families face doctrinal, conceptual and practical challenges in pursuing reparations. These include a lack of clear grounding for individual or collective reparations under IHL, the restitutive nature of remedies, the unresponsiveness of reparations to harm caused by lawful conduct, and the impracticability of judicial or quasi-judicial reparations as a response to mass violence.⁹ Such limitations render overreliance on violation-based models problematic for both direct and indirect victims. For families harmed by armed conflict, added structural vulnerability frequently amplifies the limitations of reparations.

⁴ While this article focuses on families post-conflict, it also acknowledges the potential vulnerability of other individuals and groups affected by war and other disasters. For instance, several categories of people – including women, children, refugees and internally displaced persons – have for some time been recognised as vulnerable: see Audrey R Chapman and Benjamin Carbonetti, ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights’ (2011) 33 *Human Rights Quarterly* 682, 683.

⁵ For a rare example of scholarship focusing on the rights of families harmed by conflict, see Ruth Rubio-Marín, Clara Sandoval and Catalina Díaz, ‘Repairing Family Members: Gross Human Rights Violations and Communities of Harm’ in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press 2009) 215, 215–16 (noting the traditional focus of reparations on violations that are committed primarily against men).

⁶ This is evident in the limited field of application of IHL (that is, to situations of armed conflict and occupation): see, eg, Article 2 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (entered into force 21 October 1950) 75 UNTS 31; further, ICTY, *Prosecutor v Duško Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para 70 (on the application of IHL ceasing when peace is reached).

⁷ eg, Yaël Ronen, ‘Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted during Armed Conflict’ (2009) 42 *Vanderbilt Journal of Transnational Law* 181, 186; further Rubio-Marín, Sandoval and Díaz (n 5) 215–16.

⁸ eg, Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute); UN General Assembly (UNGA), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UNGA Res 60/147 (16 December 2005), UN Doc A/RES/60/147 (UN Basic Principles), art 8. For a critique of the concept of direct and indirect victim, see Rubio-Marín, Sandoval and Díaz (n 5) 232. See further Section 3.1 below.

⁹ See Section 3 below; further Emily Camins, ‘Bridging Fault Lines: Exploring an Obligation under International Law to Assist Victims of Armed Conflict’ (2023) 36 *Harvard Human Rights Journal* (forthcoming).

Failing effectively to address the suffering of families in a post-conflict setting has implications beyond the security of individual members.¹⁰ The family unit plays a key role in ensuring children's wellbeing and social stability, and its breakdown can lead to further violence and long-term harm.¹¹ Conversely, sensitively designed family support post-conflict can have a positive impact on families and their communities.¹² It is timely to broaden the lens of international law in terms of how we address the suffering of families harmed by armed conflict.

This article advocates bringing a new focus to the needs of families and others, and proposes human security as a useful policy framework for identifying and addressing the limitations of the current legal structure. Human security, which aims to 'place people at the centre of decision-making and human suffering as the primary concern for the global community',¹³ has much to offer for the progressive development of international law on this issue.¹⁴ It seeks to identify and address inequalities and vulnerabilities, with a view to the universal realisation of human rights.¹⁵ For victims of armed conflict, this involves looking beyond remedies or reparations for violations of international law to measures that facilitate the fulfilment of such economic and social rights as are foundational to the development of human potential.¹⁶ Accordingly, the primary contribution of human security to the capacity of international law to address the needs of families post-conflict is threefold: first, as a lens to highlight the vulnerabilities that affect families harmed during conflict; second, as a normative concept for exploring the adequacy of existing international legal responses; third, to provide a policy framework for developing international law to more meaningfully and effectively address the threats that families face post-conflict.¹⁷

¹⁰ On the relationship between human insecurity and state security, see Gerd Oberleitner, 'Human Security: A Challenge to International Law?' (2005) 11 *Global Governance* 185, 190.

¹¹ eg, OECD, 'Reducing the Involvement of Youth in Armed Violence: Programming Note', May 2011, 37, <https://www.oecd.org/dac/conflict-fragility-resilience/docs/47942093.pdf>; Carol Djeddah, 'Children and Armed Conflict' (1996) 49(6) *World Health* 12; Ann Kangas, Huma Haider and Erika Fraser, 'Gender: Topic Guide' revised edition 2014, GSDRC, University of Birmingham, 102, <https://gsdrc.org/wp-content/uploads/2015/07/gender.pdf>.

¹² Anne Dutton and Fionnuala Ní Aoláin, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims under Its Assistance Mandate' (2019) 19 *Chicago Journal of International Law* 490, 515–18.

¹³ Shireen Emily Daft, *The Relationship between Human Security Discourse and International Law: A Principled Approach* (Routledge 2018) 242.

¹⁴ eg, Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press 2017); Oberleitner (n 10); Barbara von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Hart 2007); Dorothy Estrada-Tanck, 'A Feminist Human Security–Human Rights Lens: Expanding Women's Engagement with International Law' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019) 253.

¹⁵ See Dorothy Estrada-Tanck, *Human Security and Human Rights under International Law: The Protections Offered to Persons Confronting Structural Vulnerability* (Hart 2016) 266.

¹⁶ eg, UN General Assembly, Follow-up to Paragraph 143 on Human Security of the 2005 World Summit Outcome (10 September 2012), UN Doc A/RES/66/290 (2012 Resolution on Human Security); also Estrada-Tanck (n 15) 10.

¹⁷ On the contribution of human security, see Estrada-Tanck (n 15) 3; further Daft (n 13) 235; Oberleitner (n 10) 189. For critiques of human security see David Chandler, 'Human Security: The Dog that Didn't Bark' (2008) 39 *Security Dialogue* 427.

Section 2 of this article introduces the concept of human security and outlines the vulnerability of families harmed by armed conflict. Section 3 proceeds to explore the limitations of reparations in overcoming the vulnerability of families post-conflict. Reparations, the main legal response to the suffering inflicted by armed conflict, refer to the reparative measures awarded following violations of international law applicable during armed conflict.¹⁸ The article identifies several shortcomings and challenges of reparations, particularly for family members seeking redress for the loss of loved ones and other harm suffered during conflict. Finally, Section 4 explores what human security can offer as a policy framework post-conflict. Drawing on this discussion, it suggests that a victim assistance model for vulnerable survivors of armed conflict – inspired by the relevant provisions of the Convention on Cluster Munitions¹⁹ (CCM) and the Treaty on the Prohibition of Nuclear Weapons²⁰ (TPNW) – could provide a basis for meeting several human security objectives. Such a model could supplement existing reparations regimes, filling some of the conceptual and practical gaps in rights and remedies currently available for victims of armed conflict, and providing families with a safety net of measures presently unavailable to them under international law. Victim assistance has the potential to help to remediate some of the key vulnerabilities that exacerbate inequality and hinder the full enjoyment of rights of families harmed by armed conflict.

2. HUMAN SECURITY AND THE VULNERABILITY OF FAMILIES POST-CONFLICT

According to the 2015 United Nations (UN) Human Security Handbook, the human security approach ‘provides a new way of thinking about the range of challenges the world faces in the 21st century and how the global community responds to them’.²¹ In contrast to the traditional focus on security of the state as an abstract entity, human security underscores the importance of the security – ‘the well-being, safety, and dignity’ – of individual people.²² Human security aims

¹⁸ Reparations may be provided either judicially or administratively. As discussed below, the right to a remedy is grounded more strongly under international human rights law (IHRL) than under IHL. While soft international law establishes an obligation to compensate victims for harm sustained by serious violations of IHL as well as IHRL, international law does not elaborate clear standards for national reparations programmes, and negotiations are frequently subject to political negotiation and claims of lack of funding (see, eg, Pablo de Greiff, Report by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence (14 October 2014), UN Doc A/69/518, para 13. The proposal in this article could potentially help to fund and inform national reparations programmes. For further discussion of administrative reparations programmes, see REDRESS, ‘Articulating Minimum Standards on Reparations Programmes in Response to Mass Violations: Submission to the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence’, July 2014, <https://redress.org/wp-content/uploads/2017/12/submission-to-special-rapporteur-on-reparations-programmes-public.pdf>; see further below n 104. Where discussing national reparations programmes, more specific language will be used.

¹⁹ Convention on Cluster Munitions (entered into force 1 August 2010) 2688 UNTS 39 (CCM), art 5.

²⁰ Treaty on the Prohibition of Nuclear Weapons (entered into force 22 January 2021) (TPNW), art 6.

²¹ UN Human Security Unit, ‘Human Security Handbook: An Integrated Approach for the Realization of the Sustainable Development Goals and the Priority Areas of the International Community and the United Nations System’, January 2016, 6.

²² Oberleitner (n 10) 190.

to mitigate current threats and prevent the emergence of future challenges, such as armed conflict.²³ It is underpinned by the understanding that ‘there is no secure state with insecure people living in it’.²⁴ To this end, human security challenges the international community to bring to the fore issues previously left in the background and accord them ‘the same attention and sense of urgency as more traditional security issues’.²⁵ Families harmed by armed conflict have traditionally received relatively little attention under international law,²⁶ and human security presents a useful framework for shining a light on their plight.

Discussions of human security often begin with the 1994 UN Development Programme (UNDP) Human Development Report, which fully articulated the concept.²⁷ The 1994 Report urged a shift from ‘an exclusive stress on territorial security to a much greater stress on people’s security’, and from ‘security through armaments to security through sustainable human development’.²⁸ It identified seven key categories of human security:

- economic security (which requires an assured basic income);
- food security (requiring both physical and economic access to basic food);
- health security (which may be influenced by poor nutrition, an unsafe environment and lack of access to healthcare);
- environmental security (which relies on a healthy physical environment);
- personal security (security from physical violence);
- community security (security derived from membership of a group); and
- political security (which requires a society that honours basic human rights).²⁹

The concept of human security has since been further described and developed.³⁰ From a normative standpoint, however, human security has largely defied legal definition,³¹ at least partly because of the risk that defining it would prove counterproductive, given that the concept is ‘both an operational and a policy framework’.³²

The UN General Assembly, in its milestone 2012 Resolution on Human Security, described the concept as ‘identifying and addressing widespread and cross-cutting challenges to the

²³ See, eg, UN Human Security Unit (n 21) 8.

²⁴ Oberleitner (n 10) 190.

²⁵ Daft (n 13) 236. Further, Estrada-Tanck (n 15) 1, 251.

²⁶ See, eg, Rubio-Marín, Sandoval and Díaz (n 5) 215–16.

²⁷ See Estrada-Tanck (n 15) 22; further Chinkin and Kaldor (n 14) 481.

²⁸ UNDP, *Human Development Report 1994* (Oxford University Press 1994) 24, <https://hdr.undp.org/system/files/documents/hdr1994encompletenostatpdf.pdf>.

²⁹ *ibid* 25–32.

³⁰ See, eg, Commission on Human Security, *Human Security Now: Protecting and Empowering People* (2003) (describing human security as ‘creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity’).

³¹ See, eg, Oberleitner (n 10).

³² See UNGA, Follow-up to General Assembly Resolution 64/291 on Human Security: Report of the Secretary-General (5 April 2012), UN Doc A/66/763, para 14.

survival, livelihood and dignity’ of people.³³ It endorsed a ‘common understanding to guide the application of the human security approach’, which included:³⁴

- a. The right of people to live in freedom and dignity, free from poverty and despair. All individuals, *in particular vulnerable people*, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential;
- b. Human security calls for people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people and all communities; [and]
- c. Human security recognizes the interlinkages between peace, development and human rights, and equally considers civil, political, economic, social and cultural rights.

The Resolution further distinguishes human security from the responsibility to protect, and notes that it does not replace state security (although, as others have noted, it does have a bearing on its meaning).³⁵ Moreover, the Resolution notes that human security is based on national ownership and ‘strengthens national solutions which are compatible with local realities’.³⁶ Governments retain the primary ‘responsibility for ensuring the survival, livelihood and dignity of their citizens’, with the role of the international community being to complement and provide support to governments upon request.³⁷

The focus of human security on vulnerable people provides a useful tool for understanding the plight of families post-conflict and the limitations of existing international law in responding to it. As Daft argues, ‘[v]ulnerability must ... be central to future engagement between human security discourse and international law’.³⁸ Vulnerability, which refers to ‘[t]he diminished capacity of an individual or community to anticipate, cope with, resist, and recover from the impact of a hazard’,³⁹ is used here as a normative concept to help to identify deficiencies in how international law addresses families post-conflict.⁴⁰ Vulnerability is shaped by physical, social, economic and environmental factors.⁴¹ It is relational, in that people are dependent on the cooperation of others, including the state, for their security.⁴² This facet of vulnerability is especially relevant in the context of victims of armed conflict. Armed conflict often results in the destruction of social, legal, health, education and economic infrastructure, and violence and

³³ 2012 Resolution on Human Security (n 16).

³⁴ *ibid* para 3 (emphasis added).

³⁵ *ibid* para 3(d), (e); cf Oberleitner (n 10) 190.

³⁶ *ibid* para 3(f).

³⁷ *ibid* para 3(g).

³⁸ Daft (n 13) 241.

³⁹ *Oxford Dictionary of Disaster Management* (1st edn, 2017) ‘vulnerability’ (online at 29 Sept 2021). For a broader exploration of the concept, see Kate Brown, Kathryn Ecclestone and Nick Emmel, ‘The Many Faces of Vulnerability’ (2017) 16 *Social Policy and Society* 497.

⁴⁰ On the use of vulnerability as a basis for special protection under human rights law see Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 *International Journal of Constitutional Law* 1056.

⁴¹ UNDP, *Reducing Disaster Risk: A Challenge for Development* (UNDP 2004) 11, <https://www.undp.org/publications/reducing-disaster-risk-challenge-development>.

⁴² Peroni and Timmer (n 40) 1059–60; Estrada-Tanck (n 15) 50; UNDP (n 41) 11.

social tensions persist long after active hostilities cease.⁴³ This weakened fabric of society frequently exacerbates vulnerability, diminishing the capacity of individuals and communities to cope with and recover from the trauma of war, hindering the fulfilment of human rights, and worsening existing inequalities.⁴⁴

Various factors, several of which are gender-related, heighten the vulnerability of families. The welfare of families following armed conflict is inextricably linked with the prospects of women.⁴⁵ While women's experiences and needs during and after conflict are diverse, some general observations are warranted. Despite human rights obligations that affirm equal responsibilities within family life,⁴⁶ women largely remain the primary carers of children and the elderly,⁴⁷ carrying the burden of keeping the family together during armed conflict.⁴⁸ Women are central to creating a 'sense of family and community continuity that supports children's healing from war-related trauma',⁴⁹ and their survival, and physical and psychosocial health, are vital for the well-being of children, both during and after conflict.⁵⁰ Domestic tasks – such as finding food, water and fuel – fall primarily on women, as do the responsibilities of caring for children, the elderly and fighters who are injured physically or psychologically.⁵¹ In addition to their work in sustaining and rebuilding families and communities, women in post-conflict situations often carry the added burden of seeking justice on behalf of their families.⁵²

⁴³ See generally Kadir and others (n 3); see also Eran Bendavid and others, 'The Effects of Armed Conflict on the Health of Women and Children' (2021) 397(10273) *The Lancet* 522–32 (noting that armed conflict is also a marker of generalised underdevelopment: *ibid* 524); Hazem Adam Ghobarah, Paul Huth and Bruce Russett, 'Civil Wars Kill and Maim People—Long after the Shooting Stops' (2003) 97 *American Political Science Review* 189.

⁴⁴ See, eg, International Labour Organisation (ILO), *Employment and Decent Work in the Humanitarian-Development-Peace Nexus* (ILO 2021) 8–9, 50, https://www.ilo.org/wcmsp5/groups/public/—ed_emp/documents/instructionalmaterial/wcms_141275.pdf.

⁴⁵ See, eg, Declaration on the Protection of Women and Children in Emergency and Armed Conflict proclaimed by General Assembly Res 3318 (XXIX) (14 December 1974); UNICEF, 'Empower Women to Help Children', 11 December 2006, <https://www.unmultimedia.org/tv/unifeed/asset/U061/U061211c>.

⁴⁶ eg, Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), Preamble para 13; arts 11(2), 16(1).

⁴⁷ eg, UN Economic and Social Council, 'Caregiving Burden Must Be Valued, Shared, Supported by Governments as Crucial to Sustaining Society, Building Human Capital, Women's Commission Told', Press Release WOM/1715, 3 March 2009.

⁴⁸ Austrian Development Agency, 'Focus: Women, Gender and Armed Conflict', October 2009, <https://www.oecd.org/dac/gender-development/44896284.pdf>.

⁴⁹ Susan McKay, 'The Effects of Armed Conflict on Girls and Women' (1998) 4 *Peace and Conflict: Journal of Peace Psychology* 381, 381.

⁵⁰ *ibid* 381.

⁵¹ Hilary Charlesworth and Christine Chinkin, 'An Alien's Review of Women and Armed Conflict' in Dale Stephens and Paul Babie (eds), *Imagining Law* (University of Adelaide Press 2016) 171; Rubio-Marín, Sandoval and Diaz (n 5) 216.

⁵² Ruth Rubio-Marín and Pablo de Greiff, 'Women and Reparations' (2007) 1 *The International Journal of Transitional Justice* 318, 324. As discussed further below (Section 3.2), structural inequalities and social factors render this process especially difficult for women. On structural vulnerability see Estrada-Tanck (n 15) 254; Peroni and Timmer (n 40) 1065.

Women and children have been recognised as vulnerable, both during and after conflict.⁵³ Threats to personal security, such as sexual violence (including intimate partner violence) against women, are common in the aftermath of conflict.⁵⁴ This has severe physical, psychological and social consequences which extend beyond survivors to their children and families.⁵⁵ Moreover, proximity to conflict, in both time and space, substantially increases the mortality of women and children from non-violent causes.⁵⁶ In addition to personal and health insecurity, women also frequently lack the economic and social capacity to cope with other conflict-related threats, such as displacement and the detrimental environmental impacts of hostilities.⁵⁷ Female-led households often face particular vulnerabilities post-conflict, especially in patriarchal societies.⁵⁸ With men representing the majority of combat casualties,⁵⁹ women must often take on caring and breadwinning responsibilities following the death or injury of male family members.⁶⁰ Where male relatives are absent as a result of fighting, detention, disappearance or death, women may struggle to support their families economically and in other ways.⁶¹ The stigma and exclusion of female-headed households increases the risk of poverty, food insecurity, social isolation, violence and other threats.⁶²

These societal conditions may combine to create a disruptive environment that threatens the fulfilment of human rights or facilitates their violation, rendering families particularly vulnerable post-conflict. However, international law has not traditionally focused on vulnerability as a

⁵³ See, eg, UNDP, *Human Development Report 2014 – Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience* (UNDP 2014) 1, <https://hdr.undp.org/content/human-development-report-2014>; Vice-President of the International Committee of the Red Cross (ICRC), Christine Beerli, ‘Vulnerabilities in Armed Conflicts’, Keynote Address, 14th Bruges Colloquium, 17–18 October 2013, <https://www.icrc.org/en/doc/resources/documents/statement/2013/10-18-protected-person-bruges.htm>; Charlotte Lindsey-Curtet, Florence Tercier Holst-Roness and Letitia Anderson, ‘Addressing the Needs of Women Affected by Armed Conflict’, ICRC, March 2004, https://www.icrc.org/en/doc/assets/files/other/icrc_002_0840_women_guidance.pdf; Kadir and others (n 3); Peroni and Timmer (n 40) 1061–62; Estrada-Tanck (n 15) 18, 254; Fionnuala Ni Aoláin, Catherine O’Rourke and Aisling Swaine, ‘Transforming Reparations for Conflict-related Sexual Violence: Principles and Practice’ (2015) 28 *Harvard Human Rights Journal* 97, 102.

⁵⁴ eg, Rosanne Marrit Anholt, ‘Understanding Sexual Violence in Armed Conflict: Cutting Ourselves with Occam’s Razor’ (2016) 1 *Journal of International Humanitarian Action* 6.

⁵⁵ eg, *ibid*; Djeddah (n 11); see further Bendavid and others (n 43).

⁵⁶ Bendavid and others (n 43); further Christin Marsh Ormhaug, Patrick Meier and Helga Hernes, ‘Armed Conflict Deaths Disaggregated by Gender’, PRIO Paper, International Peace Research Institute, 23 November 2009, <https://www.prio.org/utility/DownloadFile.ashx?id=411&type=publicationfile>.

⁵⁷ ICRC, ‘When Rain Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflicts and the Climate and Environment Crisis on People’s Lives’, July 2020, 16, https://www.icrc.org/sites/default/files/topic/file_plus_list/rain_turns_to_dust_climate_change_conflict.pdf. On the vulnerability of displaced women, see, eg, Beerli (n 53).

⁵⁸ Austrian Development Agency (n 48).

⁵⁹ Ormhaug, Meier and Hernes (n 56) (noting also that women are more likely to die following armed conflict).

⁶⁰ See, eg, Rubio-Marin, Sandoval and Diaz (n 5) 215–16.

⁶¹ See Charlesworth and Chinkin (n 51) 175 (noting the struggle for Syrian women both in Syria and in refugee camps to support their families, as well as the challenges that the blockade of and military operations in Gaza have posed for women); see also Rubio-Marin, Sandoval and Diaz (n 5) 216.

⁶² See, eg, UNDP *Human Development Report 2014* (n 53) 72; Rubio-Marin, Sandoval and Diaz (n 5) 216.

trigger for measures of redress.⁶³ Rather, predominant responses such as reparations or remedies have developed around the need for a violation of the law as a precondition for awards, leaving a significant gap in the capacity of international law to respond to families post-conflict.

3. THE LIMITATIONS OF REPARATIONS FOR FAMILIES HARMED BY ARMED CONFLICT

Reparations or remedies for injury caused by violations of international law may go some way in addressing the harm some families suffer during conflict, and are an important way of providing justice to victims harmed by abuses of the law.⁶⁴ However, the potential for reparations to address the needs of vulnerable victims more broadly is conceptually and practically limited. This section identifies three main limitations of the current international legal response to addressing the needs of families harmed during armed conflict: (i) the limited legal scope of reparations, particularly in terms of who may be a beneficiary; (ii) structural or societal issues that render it particularly difficult for families to obtain reparation; and (iii) the top-down, restitutive nature of reparation, which traditionally seeks to return the victim to the status quo ante.

3.1. LIMITATIONS IN THE (PERSONAL) SCOPE OF REPARATIONS FOLLOWING ARMED CONFLICT

It is well established that an internationally wrongful act gives rise to a secondary obligation to make reparation for the injury caused.⁶⁵ Reparations may take the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition,⁶⁶ and may be provided on an interstate, individual or collective basis.

3.1.1. INTERNATIONAL HUMANITARIAN LAW

While interstate reparations for violations of IHL are well grounded in international law,⁶⁷ the legal foundation for claiming individual or collective reparations for violations is less solid. In recent decades there have been normative developments in favour of individual rights to reparations under international law. For example, such soft law instruments as the UN Basic Principles

⁶³ Note, however, the role of vulnerability in primary (as opposed to secondary) human rights obligations: see, eg, Estrada-Tanck (n 15); Peroni and Timmer (n 40).

⁶⁴ See generally Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2005) 8; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012); Rubio-Marín, Sandoval and Díaz (n 5). On the purposes of remedies see further n 141 below.

⁶⁵ *Factory at Chorzów (Germany v Poland)(Merits)* (1928) PCIJ (1928) Series A, No 17 *PCIJ Collection of Judgements (Chorzów Factory Case)*; International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), Report of the ILC, 53rd sess, UN Doc A/56/10, 2001(II) *Yearbook of the International Law Commission* 26 (ARSIWA), Annex, art 31.

⁶⁶ eg, ARSIWA, *ibid* art 34; UN Basic Principles (n 8).

⁶⁷ eg, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 91.

assert the right to prompt, effective and adequate reparations for victims of gross violations of international human rights law (IHRL) and serious violations of IHL.⁶⁸ However, the position under hard IHL treaty and customary law is less favourable for the individual victim. Even if individuals hold some primary rights in relation to offending states under international law, IHL lacks the procedural mechanisms to enable reparations claims, either individually or collectively, which makes the pathway to obtaining reparations challenging.⁶⁹ This lack of opportunities to claim appears even more pronounced in situations of non-international armed conflict, the most prevalent type of contemporary conflict. While there are numerous examples of IHL violations by insurgent groups, there is a relative dearth of reparations claims against such groups, indicating that ‘a violation of the rules governing non-international armed conflict does not entail reparation claims in the relationship between the parties to hostilities’.⁷⁰ Accordingly, in the absence of ad hoc international responses such as claims commissions, individual claimants must rely either on their state of nationality to claim reparations on their behalf as part of an international claim (in the case of international armed conflict), or on national laws enabling their claims directly from the offending state (in either non-international or international armed conflict).⁷¹ Most cases before national courts involving individual reparations claims for violations of IHL, including by surviving family members, have ultimately been unsuccessful.⁷²

⁶⁸ UN Basic Principles (n 8) Principles 11(b), 15.

⁶⁹ AP I (n 67) art 91 does not specify who may claim reparations but, based on national and international practice, jurisprudence and scholarship, the preferred view appears to be that it does not in itself enable direct claims by individuals; see, eg, Carla Ferstman, ‘The Right of Reparation for Victims of Armed Conflict’ in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War* (Bloomsbury 2018) 207, 213–14; René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002); Christian Tomuschat, ‘State Responsibility and the Individual Right to Compensation before National Courts’ in Andrew Clapham and others (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 811; Shuichi Furuya, ‘The Right to Reparation for Victims of Armed Conflict: The Intertwined Development of Substantive and Procedural Aspects’ in Cristián Correa, Shuichi Furuya and Clara Sandoval (eds), *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020) 16. See further ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* Judgment [2012] ICJ Rep 99 (*Jurisdictional Immunities* case) (which held that Germany was entitled to jurisdictional immunity from reparations claims in Italian courts for violations of IHL). On the lack of grounding for collective reparations in international law, see Diana Odier-Contreras Garduno, *Collective Reparations: Tensions and Dilemmas between Collective Reparations and the Individual Right to Receive Reparations* (Intersentia 2018) 13 (noting that collective reparation does not currently ‘enjoy a clear legal basis under international law’).

⁷⁰ Tomuschat (n 69) 816 (suggesting also a lack of reciprocity in such situations); Cristián Correa, ‘Operationalising the Right of Victims of War to Reparation’ in Correa, Furuya and Sandoval (n 69) 92, 174; cf Furuya (n 69), 62–64; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol 1: Rules* (ICRC and Cambridge University Press 2005, rev’d 2009) (ICRC Study) r 150.

⁷¹ Examples of reparations programmes under domestic law include the German (post-Holocaust) and Chilean (1990–2003) reparations programmes.

⁷² See, eg, Tokyo District Court, *X v Japan*, Judgment, 25 February 2015, 61 *Shomu Geppo* (9) 1737 [2015], translated by Kento Nisugi in ‘Public International Law Judicial Decisions’ (2016) 59 *Japanese Yearbook of International Law* 463, 473–74 (finding that as neither art 3 of the Hague Convention nor customary international law entitles individual victims to claim compensation, the plaintiffs were not entitled to claim compensation directly from the state); the decision of the Supreme Court of Japan in the *Second Chinese ‘Comfort Women’* case (27 April 2007) (discussed in Masahiko Asada and Trevor Ryan, ‘Post-War Reparations between Japan and China and the Waiver of Individual Claims: Japan’s Supreme Court Judgments in the *Nishimatsu Construction* Case and

3.1.2. INTERNATIONAL CRIMINAL LAW

Some international criminal tribunals, such as the International Criminal Court (ICC), provide avenues for victims to claim reparations before the Court against persons convicted of crimes, including war crimes.⁷³ Reparations ‘oblige those responsible for serious crimes to repair the harm they caused to the victims and ... enable the Court to ensure that offenders account for their acts’.⁷⁴ Pursuant to rule 85 of the Rules of Procedure and Evidence, reparations may be granted to indirect victims, including the family members of direct victims.⁷⁵ Reparations have been awarded in four cases since the Court commenced operation on 1 July 2002,⁷⁶ three of which included orders in favour of indirect victims.⁷⁷ Notwithstanding these successful claims, the ICC reparations regime is intrinsically limited in its capacity to address vulnerability by its dependence on cases being prosecuted and offenders convicted by the ICC.⁷⁸ Many victims have been precluded from claiming or obtaining reparations by, among other things, jurisdictional limitations, prosecutorial discretion about the pursuit of charges, and failure to secure

the *Second Chinese “Comfort Women” Case* (2009) 19 *The Italian Yearbook of International Law* 205); see further the decision of the German Supreme Court in *Distomo* (2003) 42 ILM 1027 (discussed in ICRC Study (n 70) rr 149, 150). For additional cases, see Lucas Bastin, ‘International Law and the International Court of Justice’s Decision in *Jurisdictional Immunities of the State*’ (2012) 13 *Melbourne Journal of International Law* 774 (noting that ‘[c]ourts in the UK, Canada, France, Poland, New Zealand and Slovenia [have] ruled that the immunity to which a state is entitled is not withdrawn simply because the allegations concern ... a serious violation of human rights law or the laws of war’).

⁷³ Rome Statute (n 8) art 75.

⁷⁴ ICC, *Prosecutor v Thomas Lubanga Dyilo*, Decision on Reparations, ICC-01/04-01/06-3129, Appeals Chamber, 3 March 2015 (*Lubanga*, Reparations Decision), Annex, paras 2, 17.

⁷⁵ *Lubanga*, Reparations Decision, *ibid* para 191, also Annex A, paras 6, 7 (finding that for the purposes of identifying indirect victims, ‘the concept of “family” may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his or her spouse and children’).

⁷⁶ ICC, *Prosecutor v Ahmad Al Faqi Al Mahdi*, Judgment on Reparations, ICC-01/12-01/15 A, Appeals Chamber, 8 March 2018 (finding Al Mahdi liable for 2.7 million euros in expenses for individual and collective reparations for the community of Timbuktu); ICC, *Prosecutor v Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07, Trial Chamber II, 24 March 2017 (*Katanga*, Reparations Decision) (which awarded 297 victims of Katanga’s attack on Bogoro symbolic compensation of USD 250 per victim plus collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support); *Lubanga*, Reparations Decision (n 74) (which awarded collective reparations to the victims of Lubanga’s war crimes, namely conscripting and enlisting children under the age of 15 into an armed group and using them to participate actively in hostilities).

⁷⁷ See *Lubanga*, Reparations Decision (n 74) para 191, also Annex A, para 53 (in which the offender was ordered to make collective reparations to victims, including compensating indirect victims for psychological harm from the sudden loss of a family member, material deprivation from the loss of family members’ contributions, and for psychological and/or material suffering as a result of aggression on the part of former child soldiers relocated to their families and communities); further *Katanga*, Reparations Decision (n 76); ICC, *Prosecutor v Bosco Ntaganda*, Reparations Order, ICC-01/04-02/06-2659, Trial Chamber VI, 8 March 2021 (*Ntaganda*, Reparations Order), paras 124–128, 183(d), 232 (noting that the appointed experts could not ascertain the number of indirect victims).

⁷⁸ See *Lubanga*, Reparations Decision (n 74) para 191; cf *Ntaganda*, Reparations Order (n 77) (which was handed down before the appeal process was finalised).

convictions.⁷⁹ Such limitations leave many unable to understand why their case is less deserving than that of another person,⁸⁰ and make overreliance on the ICC as a means for achieving reparations for victims of armed conflict problematic.⁸¹ Recent case law of ICC Trial Chamber VI suggests a slightly more victim-centred approach,⁸² which may assist some victims in their cases before the ICC.⁸³ However, such an approach arguably sits uncomfortably with the core criminal mandate of the ICC,⁸⁴ and does not alter the Court's jurisdictional limits in awarding reparations. This leaves victims of situations not currently before the ICC – that is, the majority of survivors of contemporary armed conflicts – without recourse.

3.1.3. INTERNATIONAL HUMAN RIGHTS LAW

International criminal law aside, individuals and relatives have somewhat stronger prospects of success in claiming for abuses of IHRL applicable in armed conflict (particularly non-international armed conflict) than under IHL. It is increasingly accepted that some key IHRL provisions continue to apply during armed conflict.⁸⁵ Human rights law establishes enforcement mechanisms and fora not found in IHL, potentially presenting an opportunity for victims who can satisfy jurisdictional requirements. In particular, several cases before the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have ordered remedies for victims of violations of IHRL during armed conflict, primarily for violations of the rights to life and liberty and the prohibition of torture.⁸⁶ The ECtHR and the IACtHR,

⁷⁹ See further Carla Ferstman, 'Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (2nd edn, Brill 2019) 446, 447–50 (noting also that strategic plans to focus prosecutions more narrowly or on lower-level accused will mean even fewer victims have access to reparations, that reparations before the ICC are unacceptably slow, and that victims cannot claim reparations if the accused is acquitted or was not charged with the offences which allegedly gave rise to harm). See further Dutton and Ní Aoláin (n 12) 537–38.

⁸⁰ Ferstman, *ibid* 451; Luke Moffett and Clara Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) *Leiden Journal of International Law* 749, 757.

⁸¹ For further discussion of the limitations of the ICC reparations regime, see Dutton and Ní Aoláin (n 12) 537–39; Moffett and Sandoval (n 80).

⁸² *Ntaganda*, Reparations Order (n 77); Marina Lostal, 'The Ntaganda Reparations Order: A Marked Step towards a Victim-Centred Reparations Legal Framework at the ICC', *EJIL: Talk!*, 24 May 2021, <https://www.ejiltalk.org/the-ntaganda-reparations-order-a-marked-step-towards-a-victim-centred-reparations-legal-framework-at-the-icc>.

⁸³ For discussion of the ICC's assistance mandate see below nn 170–172.

⁸⁴ See Liesbeth Zegveld, 'Victims as a Third Party: Empowerment of Victims?' (2019) 19 *International Criminal Law Review* 321, 342; Ferstman (n 79) 448–49 (noting that victim participation is viewed by some sitting judges as a 'distraction and hindrance' to the court in achieving its 'core mandate'); ICC, *Prosecutor v Bemba Gombo*, Appeal against Judgment, ICC-01/05-01/08-3636-Anx2, Appeals Chamber, 8 June 2018, separate opinion of Judge Christine van den Wyngaert and Judge Howard Morrison, para 75. See further Moffett and Sandoval (n 80) 764–65.

⁸⁵ eg, ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226 (*Nuclear Weapons* Advisory Opinion), [70]; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136; ECtHR, *Hassan v United Kingdom*, App no 29750/09, paras 104–105; International Law Commission, 'Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries' (2011) Vol II, Part Two *Yearbook of the International Law Commission*.

⁸⁶ See Rubio-Marín, Sandoval and Díaz (n 5) 216. For examples of cases, see generally Evans (n 64) 44.

moreover, have held that relatives may claim on behalf of deceased or disappeared family members if the victim has disappeared or died as a result of the breach or during the proceedings.⁸⁷ Both courts recognise as heirs or successors the spouse or companion and the children of a person who has been killed or disappeared unlawfully.⁸⁸ Family members may also, or alternatively, be entitled to remedies as victims under the relevant convention in their own right.⁸⁹ This right has been narrowly construed by the ECtHR, particularly in cases not involving a substantive violation of the right to life.⁹⁰ The IACtHR takes a somewhat broader approach to interpreting whether victims' next of kin are 'injured parties' entitled to remedies.⁹¹ Other human rights fora have also acknowledged the right of indirect victims to claim reparations.⁹²

⁸⁷ See Rubio-Marín, Sandoval and Díaz (n 5) 221; Shelton (n 64) 243. See further ECtHR, 'Practical Guide on Admissibility Criteria', Council of Europe, 30 April 2020, para 24, https://www.echr.coe.int/documents/admissibility_guide_eng.pdf. This is despite the fact that the constituting conventions of both the ECtHR and the IACtHR specifically reference family members in their provisions empowering the respective courts to receive applications: see European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 221, art 34; American Convention on Human Rights (entered into force 18 July 1978) 1144 UNTS 123, art 63(1).

⁸⁸ See Rubio-Marín, Sandoval and Díaz (n 5) 227 (on the ECtHR), 230 (on the IACtHR). If there is no spouse or any descendants, both courts will award pecuniary damages to the victim's parents (ibid 227). Where diverse family relationships based on traditional or tribal culture are involved, the IACtHR has taken a more expansive view of survivability of claims, resulting in a wider range of family beneficiaries: see, eg, IACtHR, *Aloeboetoe et al v Suriname*, Judgment (Reparations), 10 September 1993, (Ser C), No 15; further Shelton (n 64) 243–44.

⁸⁹ See ECtHR, *Vallianatos and Others v Greece*, App nos 29381/09 and 32684/09, Grand Chamber, Judgment, 7 November 2013, para 47 (finding that art 34 ECHR, which allows for victims to claim before the Court, 'concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end'); ECtHR, *Van Colle v United Kingdom*, App no 7678/09, 13 November 2012, para 86 (finding that 'close family members, such as parents, of a person whose death is alleged to engage the responsibility of the State can themselves claim to be indirect victims of the alleged violation of Article 2, the question of whether they were legal heirs of the deceased not being relevant'). See further Rubio-Marín, Sandoval and Díaz (n 5) 224.

⁹⁰ Rubio-Marín, Sandoval and Díaz (n 5) 239. In such cases the ECtHR grants standing only where the family member 'could, exceptionally, demonstrate an interest of their own': ECtHR, *Nassau Verzekering Maatschappij NV v The Netherlands*, App no 57602/09, Third Section, 4 October 2011, para 20; further ECtHR, *Karpynenko v Ukraine*, App no 15509/12, 11 February 2016, para 104. The ECtHR has held that family members may be considered victims of art 3 ECHR (prohibition of torture and inhuman treatment) if the violation against their relative '[gives] their suffering a dimension and character distinct from the emotional distress inevitably stemming from the aforementioned violation itself': ECtHR, *Janowiec and Others v Russia*, App nos 55508/07 and 29520/09, Grand Chamber, 21 October 2013, para 177. Successful claims under Article 3 have included the case of a family member suffering a long period of uncertainty about the fate of a disappeared person arising from the 'callous' failure of the authorities to respond to the quest for information (eg, ECtHR, *Varnava and Others v Turkey*, App nos 16064–16073/90, Grand Chamber, 18 September 2009, paras 200–202), situations where applicants were direct witnesses to the unlawful killing of their family members (see *Janowiec v Russia*, ibid para 181), and a case in which applicants were unable to bury the brutally mistreated bodies of their children in a proper manner (ECtHR, *Khadzhialiyev and Others v Russia*, App no 3013/04, 6 November 2008, para 121). See further ECtHR (n 87) paras 26, 30.

⁹¹ See, eg, IACtHR, *Loayza Tamayo v Peru*, Reparations and Costs, Judgment of 27 November 1998, (Ser C) No 42, paras 89–92 (finding it is for the Court 'to determine which of the victim's "next of kin" are, in the instant case, "injured parties"' for the purposes of remedies, and that the term 'next of kin' of the victim should be interpreted broadly to include 'all persons related by close kinship'). See further Rubio-Marín, Sandoval and Díaz (n 5) 239.

⁹² eg, Human Rights Committee (HRCtee), *Quinteros v Uruguay*, Comm No 107/1981, UN Doc CCPR/C/OP/2 (holding that the mother of a disappeared person was a victim of the violation of art 7 ICCPR against her daughter); UN Human Rights Council, Report of the Independent Expert on Human Rights and International Solidarity,

In practice, however, the prospects of victims of violations of IHRL – whether direct or indirect – succeeding in claiming remedies remain relatively slim.⁹³ The application of IHRL to armed conflict is complex and subject to caveats,⁹⁴ and is especially fraught in respect of its extra-territorial application.⁹⁵ Moreover, human rights mechanisms are not well equipped to address mass suffering such as that which occurs following armed conflict.⁹⁶ In addition to requirements of personal, territorial and subject-matter jurisdiction,⁹⁷ victims must satisfy various other requirements, such as exhaustion of local remedies,⁹⁸ and onerous rules of procedure and evidence. These requirements may significantly prolong proceedings, and often result in the exclusion of victims, particularly those who are more vulnerable.⁹⁹ Accordingly, while critically important in many situations, remedies under IHRL do not represent a comprehensive or effective response to the vulnerability of many victims of armed conflict, including families.

Human rights law also frequently forms the basis for national administrative reparations programmes. While such programmes have significant potential in addressing harm caused to vulnerable victims of armed conflict, they lack consistency, being highly dependent on political will and subject to claims of lack of resources.¹⁰⁰ They are, moreover, conceptually limited.¹⁰¹ As a result, most people harmed during armed conflict do not receive any reparations, with Pablo de Greiff describing the implementation gap as being ‘of scandalous proportion’.¹⁰²

UN Doc A/38/40, para 14; HRCtee, *Sharma v Nepal*, Comm 1469/2006, 28 October 2008, UN Doc CCPR/C/94/D/1469/2006, para 9. For additional cases, see International Commission of Jurists, ‘The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners’ Guide’, 35–41, <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

⁹³ Pablo de Greiff, Report by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (8 October 2014), UN Doc A/69/518.

⁹⁴ See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) Introduction, para 39; Noam Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87(860) *International Review of the Red Cross* 737–54; Oona A Hathaway and others, ‘Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law’ (2012) 96 *Minnesota Law Review* 1883.

⁹⁵ See, eg, ECtHR, *Georgia v Russia [III]*, App no 38203/68, 21 January 2021, paras 126, 141; Floris Tan and Marten Zwanenburg, ‘One Step Forward, Two Steps Back? *Georgia v. Russia*, European Court of Human Rights’ (2021) 22(1) *Melbourne Journal of International Law* 136; further Naz K Modirzadeh, ‘The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict’ in US Naval War College (ed), (2010) 86 *International Law Studies (Blue Book) Series* 349, 377–79.

⁹⁶ See, eg, *Georgia v Russia [III]* (n 95) para 141 (declining to develop the Court’s case law on jurisdiction having regard to ‘the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict)’). See further Evans (n 64) 127.

⁹⁷ See generally Shelton (n 64) 189–92, 216–19.

⁹⁸ See, eg, Shelton, *ibid* 124 (on the ECtHR), 141, 142 (on the African Commission on Human Rights) (noting, though, that the various tribunals tend to approach this rule with some flexibility).

⁹⁹ De Greiff (n 93) para 71. See further below Section 3.2.

¹⁰⁰ De Greiff, *ibid* para 6; further, UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (UNHCHR 2008) 32, <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>.

¹⁰¹ See below n 104 and Section 4.2.

¹⁰² De Greiff (n 93) para 6.

3.2. CONCEPTUAL LIMITATIONS OF REPARATIONS

Questions of jurisdiction and implementation aside, the conceptual limitations of reparations or remedies as a response to victims of war are substantial. Reparations are predicated on notions of accountability and are inextricably linked to violations of the law.¹⁰³ Even collective reparations and administrative reparations programmes remain, by and large, accountability-based responses tied to serious violations of IHL or IHRL.¹⁰⁴ For victims of armed conflict this has important implications. IHL balances considerations of military necessity with those of humanity, tolerating a significant degree of violence.¹⁰⁵ Because of the focus on rights violations for reparations under international law, the families of those harmed as a result of lawful conduct – such as civilians injured or killed as non-excessive ‘incidental loss’ as part of a military attack – lack recourse to compensation or other forms of redress.¹⁰⁶ As judicial reparations (and the procedures for claiming them) are also largely insensitive to context or structural vulnerability, this leads to a risk of unequal or unjust distribution and stigmatisation, potentially inflaming tensions.¹⁰⁷

Moreover, because they must be linked to violations, reparations have a small role to play in situations not involving direct violence to family members, such as the displacement of civilian populations. At the time of writing, there are over 89 million people, around 36.5 million of whom are children, displaced by conflict.¹⁰⁸ It is well recognised that displaced people face additional challenges,¹⁰⁹

¹⁰³ eg, ARSIWA (n 65) art 31; UN Basic Principles (n 8); *Lubanga*, Reparations Decision (n 74) paras 69–70. See further Shelton (n 64) 189 (on the ECtHR), 218 (on the IACtHR).

¹⁰⁴ While there is a lack of clear definition and standards in relation to administrative reparations (see REDRESS (n 18) 3, 20), most reparations programmes are based on violations of the law; see, eg, UN High Commissioner for Human Rights (n 100) 1 (noting that under the UN Basic Principles ‘gross violations’ and ‘serious violations’ denote ‘types of violations that, systematically perpetrated, affect ... the most basic rights of human beings, notably the right to life and the right to physical and moral integrity of the human person. It is generally assumed that genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfer of population, and systematic racial discrimination fall into this category’), 19 (noting that the definition in the UN Basic Principles is likely to be adopted in future national reparations programmes). On the need for a violation to ground collective reparations, see Friedrich Rosenfeld, ‘Collective Reparation for Victims of Armed Conflict’ (2010) 92(879) *International Review of the Red Cross* 731, 734–35 (noting that ‘[a] regime of liability for lawful conduct has not yet developed in international law’). See further Camins (n 9) Part 2C.

¹⁰⁵ See, eg, Chris Jochnick and Roger Normand, ‘The Legitimation of Violence 1: A Critical History of the Laws of War’ (1994) 35 *Harvard International Law Journal* 49; William H Shaw, *Utilitarianism and the Ethics of War* (Taylor and Francis 2016) 164–5.

¹⁰⁶ See, eg, Ronen (n 7); Emily Camins, ‘Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law’ (2016) 10 *International Journal of Transitional Justice* 126.

¹⁰⁷ Ferstman (n 69) 208; Rubio-Marín and de Greiff (n 52) 322; cf *Lubanga*, Reparations Decision (n 74) Annex, paras 2, 17 (noting that ‘the Court should avoid further stigmatisation of the victims and discrimination by their families and communities’).

¹⁰⁸ UN High Commissioner for Refugees, ‘Global Trends: Forced Displacement in 2021’, report, UNHCR, 2022, <https://www.unhcr.org/flagship-reports/globaltrends>; UNICEF, ‘Child Displacement’, June 2022, <https://data.unicef.org/topic/child-migration-and-displacement/displacement>.

¹⁰⁹ See, eg, ICRC, ‘Displacement in Times of Armed Conflict: How International Humanitarian Law Protects in War, and Why it Matters’, 12 June 2020, <https://www.icrc.org/en/publication/displacement-times-armed-conflict-how-international-humanitarian-law-protects-war-and>.

women and children particularly so,¹¹⁰ yet they are not entitled to reparations unless specifically affected by violations. This disparity between the risks or harm that a person faces and their entitlement to reparations reflects the gap between vulnerability, as a sociological concept, and violation-based victimhood, as a legal concept.

3.3. STRUCTURAL AND GENDER ISSUES AFFECTING THE PROCEDURES AND MODALITIES OF REPARATIONS FOR FAMILIES

In addition to limitations in the personal scope of reparations, the procedures and modalities of reparations may inadvertently disadvantage families. This is because women (and their dependants) are likely to interact differently with reparations processes than other members of society, yet ‘there is an underlying presumption that remedies are a neutral legal space, unfettered by the complexities of gender’.¹¹¹ The well-being of families following armed conflict is intricately connected with the prospects of women.¹¹² In the words of Ann Veneman, former UNICEF Executive Director, ‘[g]ender equality and the well-being of children are inextricably linked. ... When women are empowered to lead full and productive lives, children and families prosper’.¹¹³ On the other hand, when women are unable to provide for their own needs or those of others, their dependants are less likely to thrive.¹¹⁴ Accordingly, in considering the impact of reparations on families, it is both helpful and necessary to consider how women experience the current system.

Reparations are often sidelined as part of the peace process,¹¹⁵ and the choice of rights that will trigger reparations frequently exclude women’s experiences.¹¹⁶ In practice, even where a forum for submitting a claim is available, the application process can be prohibitively difficult, particularly for women.¹¹⁷ Women are more likely to be excluded by the administrative, evidential and procedural requirements of reparations.¹¹⁸ They are ‘[o]verrepresented among the poor, the illiterate and those with little information, and overburdened with family-related obligations that make traveling large distances a difficult task’.¹¹⁹ These factors make it particularly hard for women to access the court system on behalf of families.¹²⁰ In short, women are less likely than

¹¹⁰ See, eg, Beerli (n 53).

¹¹¹ See Ní Aoláin, O’Rourke and Swaine (n 53) 103.

¹¹² See, eg, UNICEF (n 45); McKay (n 49) 381; further, Declaration on the Protection of Women and Children in Emergency and Armed Conflict (n 45) Preamble, para 8.

¹¹³ UNICEF (n 45).

¹¹⁴ eg, McKay (n 49).

¹¹⁵ Ní Aoláin, O’Rourke and Swaine (n 53) 102.

¹¹⁶ de Greiff (n 93) paras 26–27, 90.

¹¹⁷ *ibid* paras 6, 90.

¹¹⁸ *ibid* paras 70–71, 90. On the exclusion of women from peacemaking processes more generally, see Ní Aoláin, O’Rourke and Swaine (n 53) 105, 127.

¹¹⁹ Rubio-Marín and de Greiff (n 52) 322.

¹²⁰ *ibid* 322.

men to be able to claim compensation, particularly through a judicial process.¹²¹ This will have consequential effects on their dependants.

As a matter of practice, where women are successful in claiming reparations awards on behalf of family members, such awards are often insufficient in addressing the harm suffered by families. While acknowledging the efficacy of the ECtHR in enforcing human rights, in the context of claims by relatives of victims of violations, the Court's treatment of awards of damages to successors is conservative.¹²² For example, the ECtHR will award only moral (not pecuniary) damages unless successors present a claim to the court and can prove harm.¹²³ In addition, the burden of proof required to establish harm can be very onerous, and the ECtHR has tended to award less than the amount claimed for pecuniary and material loss.¹²⁴ Accordingly, Rubio-Marín and co-authors argue:

[T]he court fails to award proper material damages to successors. This has serious consequences for the family in general, and for women in particular, as often the person killed or disappeared was also the breadwinner of the house, which means that women and children are often left without proper redress for these damages.¹²⁵

Moreover, in contrast with the practice of the IACtHR, the ECtHR tends not to award moral damages to successors unless the victim was 'arbitrarily detained or tortured before being killed or disappeared'.¹²⁶ Rubio-Marín and co-authors also criticise the reparations jurisprudence of the ECtHR for failing to 'give proper weight to the emotional and the material harm experienced by close family members of victims of gross human rights violations such as disappearances, arbitrary killings, torture, or arbitrary detention'.¹²⁷ They argue that families do not receive proper redress for the suffering, expenses, loss of opportunities, and physical and psychological harm they endure as a result of the loss and suffering of their loved ones.¹²⁸

¹²¹ See, eg, *ibid* 324; Eugenia Date-Bah, Martha Walsh and unnamed others, 'Working Paper on Gender and Armed Conflicts: Challenges for Decent Work, Gender Equity and Peace Building Agendas and Programmes', March 2001, 59, https://www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/-ifp_crisis/documents/publication/wcms_116392.pdf.

¹²² Rubio-Marín, Sandoval and Díaz (n 5) 227.

¹²³ *ibid* 226.

¹²⁴ *ibid* 226.

¹²⁵ *ibid* 226.

¹²⁶ *ibid* 226 (noting also the lack of 'systematic calculation rules' for compensation of moral damages). Moral damages refer to 'non-pecuniary injury such as harm to reputation, dignity, and other wrongs for which monetary value must be assumed as it cannot be assessed': Shelton (n 64) 37–38.

¹²⁷ Rubio-Marín, Sandoval and Díaz (n 5) 239.

¹²⁸ *ibid* 239. The approach of the IACtHR tends to be more generous for the victim's successors than that of the ECtHR. For example, in contrast to the practice of the ECtHR, the IACtHR has found that there is a presumption that the death or disappearance of the victim has caused successors actual and moral damage, and the burden is on the government to prove that such damage does not exist: *ibid* 246. See further Shelton (n 64) 241; Evans (n 64) 75; *Aloeboetoe et al v Suriname* (n 88) para 54.

From a conceptual perspective, the top-down, restitutive nature of reparations limits their capacity to address the particular vulnerabilities of families affected by conflict.¹²⁹ Under the principles of state responsibility, soft law documents and decisions of most tribunals, the primary goal of decision makers in awarding reparations is *restitutio in integrum*, which means putting applicants in the position they were in prior to the breach.¹³⁰ In situations in which victims and their family members are already disadvantaged or disempowered, as is often the case for women, this limits the potential impact of reparations on pre-existing vulnerability. As Rubio-Marín and de Greiff observe, '[o]ne of the problems of conceptualizing reparations primarily as actions to restore the *status quo ante* is that prior to the violence or abuse, the victim often suffered all sorts of disadvantages, such as in the holding and exercise of rights'.¹³¹

Historically, there has been little focus on ensuring that the chosen procedures facilitate women in accessing reparations, or that the benefits are well adapted to women's needs and to empowering women.¹³² A lack of effective consultation may be particularly disadvantageous for women and families because of the risk that, without women's input, the reparations process may inadvertently entrench or exacerbate existing inequalities. The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparations highlights the importance of consulting and engaging with victims during the reparations process. It provides that '[p]rocesses must empower women and girls, or those acting in the best interests of girls, to determine for themselves what forms of reparation are best suited to their situation'.¹³³ The Declaration goes on to state that '[f]ull participation of women and girl victims should be guaranteed in every stage of the reparation process, i.e. design, implementation, evaluation, and decision-making'.¹³⁴ Failing effectively to empower women in the formulation of reparations claims represents at best a missed opportunity for women and families, and at worst a factor that exacerbates gender inequality.

There is some evidence of progressive development in this respect. Several fora have demonstrated increasing awareness of the importance of addressing the potential vulnerability of

¹²⁹ eg, Ferstman (n 79) 448, 455, 459 (on the ICC's lack of emphasis on what the victims themselves want or need).

¹³⁰ See, eg, UN Basic Principles (n 8); ARSIWA (n 65) commentary to art 35 (at 96); *Lubanga*, Reparations Decision (n 74) Order for Reparations, Annex A, para 67. See further Rubio-Marín, Sandoval and Diaz (n 5) 222 (on the ECtHR), 224 (on the IACtHR); Helen Keller and Cedric Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2016) 26 *European Journal of International Law* 829, 844; Leiry Cornejo Chavez, 'New Remedial Responses in the Practice of Regional Human Rights Courts: Purposes beyond Compensation' (2017) 15 *International Journal of Constitutional Law* 372, 382, 387; Ruth Rubio-Marín and Dorothy Estrada-Tanck, 'Transitional Justice Standards on Reparations for Women Subjected to Violence in the CEDAW Committee's Evolving Legal Practice' (2020) 14 *International Journal of Transitional Justice* 566, 580; Elisabeth Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (Council of Europe 2002), [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19\(2002\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2002).pdf).

¹³¹ Rubio-Marín and de Greiff (n 52) 325.

¹³² *ibid* 320, 324; Rubio-Marín and Estrada-Tanck (n 130) 580; Ni Aoláin, O'Rourke and Swaine (n 53).

¹³³ Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 19–21 March 2007, Principle 1(D).

¹³⁴ *ibid* Principle 2(B).

women. The ICC, for example, advocates a gender-inclusive approach to guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation.¹³⁵ The ICC Appeals Chamber has stated that reparations ‘need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes’.¹³⁶ Similarly, in the *Cotton Field* case, which involved violence against women, the IACtHR held that reparations must be designed with the context of structural discrimination in mind.¹³⁷ It was found in that case that reparations that would re-establish ‘the same structural context of violence and discrimination’ were unacceptable.¹³⁸ The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has also started to order transformational reparations – ‘actions that have a potential, however minimal, for the subversion of structural conditions (economic, social, political and cultural) that facilitated the violation’¹³⁹ – in order to address women’s underlying individual and social inequalities.¹⁴⁰

Such developments may herald a welcome change of approach to the award of reparations for violations, particularly for women and marginalised groups. It may be particularly beneficial in certain contexts, such as before UN human rights bodies. However, the use of reparations for ‘righting socio-historical wrongs’ more generally is controversial, and is seen by some as beyond the purpose of reparations, particularly in the criminal law context.¹⁴¹ Moreover, such responses are still reactive: they rely on violations occurring, and require women to overcome many hurdles before change can be achieved. Given their grounding in repairing the effects of violations, reparations cannot – and in many contexts should not be expected to – single-handedly effect the social change needed to facilitate the fulfilment of rights by women, families and others harmed by armed conflict. The structural vulnerability of families, particularly those led by women, indicates the need for a complementary approach that is more accessible and less adversarial.

In short, the conceptual limitations of reparations – the lack of reparations for victims of lawful conduct, limited accessibility for victims of violations, and the primarily top-down, restitutive (as opposed to transformative) nature of most reparations – raise questions about the capacity of

¹³⁵ *Lubanga*, Reparations Decision (n 74) Annex, para 18.

¹³⁶ *ibid* Annex, para 17; further, *Ntaganda*, Reparations Order (n 77) paras 60–62.

¹³⁷ IACtHR, *González et al. v Mexico*, Judgment of 16 November 2009, (Ser C) No 205 (*Cotton Field Case*), para 450.

¹³⁸ *ibid* para 450. See further Rubio-Marín, Sandoval and Díaz (n 5) 224.

¹³⁹ Rubio-Marín and Estrada-Tanck (n 130) 580, 585.

¹⁴⁰ See UN Committee on the Elimination of Discrimination against Women (CEDAW Cttee), ‘General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations’, CEDAW/C/GC/30, 1 November 2013, para 79, discussed below at n 235; CEDAW Cttee, *AS v Hungary*, Communication No 4/2004, 29 August 2006, UN Doc CEDAW/C/36/D/4/2004. See further Ní Aoláin, O’Rourke and Swaine (n 53) 115–17; Rubio-Marín and Estrada-Tanck (n 130) 580, 585.

¹⁴¹ See, eg, *Prosecutor v Bemba Gombo* (n 84) separate opinion of Judge Christine van den Wyngaert and Judge Howard Morrison, para 75; Zegveld (n 84) 342. On the purposes of remedies, see Shelton (n 64) 10–16 (describing the purposes as compensatory or remedial justice, condemnation or retribution, deterrence, and restorative justice or reconciliation).

reparations to address the suffering of victims of contemporary armed conflict, including families. This is exacerbated by the considerable implementation gap that already exists between normative developments and reparations practice, particularly for women.¹⁴² More is needed to address families affected by armed conflict, many of whom face particular vulnerabilities in the assertion of rights. In the words of Christine Chinkin and Mary Kaldor, '[i]nternational law needs to be adapted to address today's realities'.¹⁴³ In this vein, it may be timely to expand our thinking about how international law responds to vulnerable victims of armed conflict, including families.

4. DEVELOPING INTERNATIONAL LAW: HUMAN SECURITY, VICTIM ASSISTANCE AND FAMILIES

This section proposes supplementing existing legal measures in a way that more effectively addresses the needs of vulnerable victims, including families, harmed by armed conflict. Human security offers an opportunity to broaden our thinking from the traditional security-oriented model offered by international law. IHL has long involved a balancing act between considerations of humanity and those of military necessity, the latter being used by states to safeguard national interests such as state security and sovereignty.¹⁴⁴ To the extent that IHL focuses on individuals, it is concerned primarily to limit human suffering in the particularly violent and chaotic context of armed conflict, and is therefore largely focused on protecting acute personal security needs.¹⁴⁵ Other categories of human security – such as economic, community and health security – receive relatively little attention in the face of the demands of military necessity, and the attention they do garner is generally not sustained beyond the end of the conflict.¹⁴⁶ In the aftermath of armed conflict, however, military necessity is of less relevance.¹⁴⁷ This opens the door for broader human security considerations beyond acute personal security demands.

The remainder of this section explores what human security offers as a policy framework for families affected by armed conflict, before considering victim assistance as a model for implementing key aspects of human security. It suggests that such a model could help to address key vulnerabilities of families post-conflict and meet several goals of human security.

¹⁴² De Greiff (n 93) paras 81, 90; Ní Aoláin, O'Rourke and Swaine (n 53) 126.

¹⁴³ Chinkin and Kaldor (n 14) 20.

¹⁴⁴ See, eg, Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2009–10) 50 *Virginia Journal of International Law* 795, 799.

¹⁴⁵ See, eg, ICRC, 'Rules of War: Why They Matter', 12 August 2021, <https://www.icrc.org/en/document/rules-war-why-they-matter> (describing the main purpose of IHL as 'to maintain some humanity in armed conflicts, saving lives and reducing suffering'). See further Provost (n 69) 116 (on the need of individuals to be protected rather than empowered during armed conflict).

¹⁴⁶ On the scope of IHL, see above n 6. For further exploration of the ongoing applicability of IHL post-conflict, see Camins (n 9) Part IIC1.

¹⁴⁷ While state security and sovereignty remain important considerations after conflict, they are (at least theoretically) manifested in different ways, such as through law enforcement or other state-based measures.

4.1. HUMAN SECURITY AS A POLICY FRAMEWORK FOR INTERNATIONAL LAW POST-CONFLICT

Human security invites a people-centred and comprehensive approach that strengthens the protection and empowerment of people and communities.¹⁴⁸ Of particular relevance in the post- or peri-conflict setting are human security goals and measures that focus on mitigating existing insecurities and preventing the emergence of future conflict by addressing the root causes of insecurity.¹⁴⁹

In their work on international law and ‘new’ wars, Chinkin and Kaldor suggest human security as a model for responding to armed conflict and its aftermath. They conceptualise second-generation human security as:¹⁵⁰

a rights-based approach to peacemaking and intervention that is both top-down and bottom-up, both international and local, and that requires extensive political, economic, legal and security tools. Instead of a single top-down peace agreement, second generation human security involves a hybrid process of peacemaking, whereby talks from above complement and harmonise with talks at local and regional levels aimed at individual, community and gender security rather than (or possibly as well as) a grand overall solution, and where localised cease-fires combined with political, social and economic initiatives expand secure areas.

Chinkin and Kaldor note the connection between a bottom-up approach and individual empowerment, and the importance of cooperation between countries, international organisations, non-governmental organisations and civil society in achieving this.¹⁵¹ They argue that the complex challenges involved in human security demand an ‘inclusive, multisectoral response involving regional, local and community bodies and individuals, as well as the international’.¹⁵² Chinkin and Kaldor notably advocate the involvement of civil society in political discussions, made up of ‘civilians or active citizens, including women, youth groups, [and] faith groups’.¹⁵³

The contextual, bottom-up aspect of human security¹⁵⁴ is particularly important for the protection and empowerment of women post-conflict and, by extension, families.¹⁵⁵ Beginning with Resolution 1325, UNSC resolutions have affirmed ‘the important role of women in the prevention and resolution of conflicts and in peace-building’, and stressed ‘the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and

¹⁴⁸ 2012 Resolution on Human Security (n 16).

¹⁴⁹ UN Human Security Unit (n 21) 8.

¹⁵⁰ Chinkin and Kaldor (n 14) 480.

¹⁵¹ *ibid* 489 (citing the work of the Japanese Ministry of Foreign Affairs), further 493–94 (on the bottom-up aspect and individual empowerment).

¹⁵² *ibid* 490.

¹⁵³ *ibid* 519.

¹⁵⁴ See 2012 Resolution on Human Security (n 16) para 3(b) (calling for ‘people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people and all communities’); Chinkin and Kaldor (n 14) 480 (on the importance of the bottom-up aspect), 517 (on the contextual nature of human security).

¹⁵⁵ See Chinkin and Kaldor (n 14) 489, 495, 525; Estrada-Tanck (n 15) 11.

security, and the need to increase their role in decision-making with regard to conflict prevention and resolution'.¹⁵⁶ Research strongly indicates that policies which pursue women's input and empowerment result in favourable outcomes for families.¹⁵⁷ More broadly, research suggests that empowering women and maximising their role in society reduces the risk of violent conflict, promotes development, health and education, and may help to achieve reconciliation after conflict.¹⁵⁸ It also appears that a state with higher levels of gender equality is less likely to threaten or use force, and less likely to experience internal conflict.¹⁵⁹ As conflict appears to exacerbate existing inequality and vulnerability,¹⁶⁰ a reduction in violence is likely to result in significant benefits for women and their families by helping to prevent or end a vicious cycle of increasing vulnerability.

The contextual nature of human security also allows for an approach that enables local people to consider cross-cutting risk factors and threat multipliers in post-conflict situations, such as climate-related vulnerability.¹⁶¹ As most threats, including environmental crises, have a disproportionate effect on vulnerable people (including women and dependants),¹⁶² a contextual approach is likely to benefit families in the long term. More generally, an approach that considers broader local factors may help to '[bolster] the transition from humanitarian crisis to longer term sustainable development'.¹⁶³

Several aspects of human security demand a broadening of focus in terms of how international law addresses victims of armed conflict. For instance, in contrast with reparations (which fall to the offending state or, in the case of international criminal law, the offending individual), human security is seen as a universal concern and responsibility.¹⁶⁴ Concomitantly, while responses should be contextual, the human security model involves 'a coordinated and long-term international response',¹⁶⁵ expanding the focus from legal rights based on violations towards an approach that both protects and empowers people and communities to meet their needs. By

¹⁵⁶ UN Security Council (UNSC) Res 1325 (31 October 2000), UN Doc S/RES/1325. UNSC Res 1889 (5 October 2009), UN Doc S/RES/1889, similarly called for women's participation in 'all stages of peace processes, particularly in conflict resolution, post-conflict planning and peacebuilding': *ibid*, para 2; see further para 8, calling for a gender perspective when negotiating and implementing peace agreements.

¹⁵⁷ UNICEF (n 45); UNICEF, 'The State of the World's Children 2007: The Double Dividend of Gender Equality', <https://www.unicef.org/media/84811/file/SOWC-2007.pdf> (noting the importance of Millennium Development Goal 3).

¹⁵⁸ Chinkin and Kaldor (n 14) 500–01.

¹⁵⁹ *ibid* 501.

¹⁶⁰ Sirianne Dahlum and others, 'The Conflict–Inequality Trap? How Internal Armed Conflict Affects Horizontal Inequality', Background Paper for the 2019 UNDP Human Development Report, December 2019, <http://prio.org/publications/12328>.

¹⁶¹ Chinkin and Kaldor (n 14) 517. On climate change as a threat multiplier, see Patrick Huntjens and Katharina Nachbar, 'Climate Change as a Threat Multiplier for Human Disaster and Conflict: Policy and Governance Recommendations for Advancing Climate Security', Working Paper 9, Hague Institute for Global Justice, May 2015, <https://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2015/10/working-Paper-9-climate-change-threat-multiplier.pdf>.

¹⁶² ICRC (n 57) 16.

¹⁶³ UN Human Security Unit (n 21) 5.

¹⁶⁴ Daft (n 13) 240; Chinkin and Kaldor (n 14) 489, 526.

¹⁶⁵ Chinkin and Kaldor (n 14) 526.

underlining positive obligations of the state and international community, such an approach might help to secure the fulfilment – rather than simply the non-violation – of human rights.¹⁶⁶ This has particular potential in the case of families harmed by armed conflict, whose vulnerabilities will often prevent them from securing their legal rights and accessing the goods and services necessary to ensure well-being, safety and dignity.

The following section considers how a victim assistance regime for victims of armed conflict might accommodate several critical features of human security and could help to address the suffering of vulnerable victims of armed conflict, such as families.

4.2. VICTIM ASSISTANCE FOR SURVIVORS OF ARMED CONFLICT

Victim assistance models aim to facilitate certain types of support for survivors based primarily on the harm suffered and resultant needs. This section first provides an overview of key assistance models and their implementation. It then discusses how victim assistance satisfies several human security considerations, and suggests that expanding victim assistance to survivors of armed conflict *de lege ferenda* could usefully supplement international law and create a safety net for vulnerable victims, including families.¹⁶⁷

4.2.1. EXISTING VICTIM ASSISTANCE MODELS

In recent decades, victim assistance has emerged in pockets of IHL or adjacent branches of international law.¹⁶⁸ In the context of international criminal law, for example, the Trust Fund for Victims established under the Rome Statute¹⁶⁹ is mandated to provide physical and psychological rehabilitation and material support in situations before the ICC without the need for a reparations

¹⁶⁶ See Estrada-Tanck (n 15) 266 (on the need to underline positive state obligations to prevent violations of human rights and ensure their realisation).

¹⁶⁷ While noting the humanitarian catastrophe that armed conflict represents, this discussion accepts the existing *jus ad bellum* and *jus in bello*, not going as far as Chinkin and Kaldor ((n 14) 536) in calling for all wars to be considered illegitimate. The upshot of this approach is that under existing *jus ad bellum* and *jus in bello*, the conduct of war might well accord with international law, yet still result in significant harm to people affected by conflict, thereby depriving families of the opportunity to claim reparations, either as direct or indirect victims. The discussion below accepts the primacy of state security considerations in the development of the *jus in bello* and *jus ad bellum*, but equally emphasises the significance of human security post-conflict (see, eg, Oberleitner (n 10) 189, 191, remarking ‘[w]hereas it will remain the goal of state security to provide protection from external aggression or military attack, a human security approach means that providing within the state an environment that allows for the well-being and safety of the population is an equally important goal’).

¹⁶⁸ On the relationship between victim assistance under the CCM and IHL, see President of Second Review Conference of States Parties to the Convention on Cluster Munitions, ‘Review Document of the Dubrovnik Action Plan’, 1 October 2020, CCM/CONF/2020/13, Agenda Item 8 of the provisional agenda, para 63 (noting ‘[t]he Convention sets a new standard advancing International Humanitarian Law in the context of rights-based approaches, ultimately improving and facilitating victim assistance and fostering the victims’ right to inclusion in their societies on an equal basis’).

¹⁶⁹ Rome Statute (n 8) art 79.

order against a convicted person.¹⁷⁰ This victim assistance model is intended to complement the accountability-based reparations mandate and, because it is able to reach a much wider population in a timelier manner, is considered crucial in helping to repair the harm that victims have suffered.¹⁷¹

Victim assistance obligations, as set out in recent disarmament treaties such as the CCM and the TPNW,¹⁷² are of particular relevance as legal precedents in the context of victims of armed conflict. These treaties impose a primary responsibility on states within their jurisdiction to assist victims affected by certain prohibited weapons.¹⁷³ They build on earlier victim assistance provisions in such treaties as the Ottawa Convention,¹⁷⁴ and are inspired by and consistent with human security as a policy framework.¹⁷⁵ The CCM provides in Article 5:¹⁷⁶

Each state party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each state party shall make every effort to collect reliable relevant data with respect to cluster munition victims.

Article 5(2) of the CCM goes on to particularise several obligations of states, which include: (i) assessing the needs of cluster munition victims; (ii) developing national laws and policies; (iii) developing a plan and budget, and taking steps to mobilise national and international resources; (iv) designating a focal point within the government for coordination of victim assistance; and (v) incorporating good practice in medical care, rehabilitation and psychological

¹⁷⁰ See, eg, ICC Rules of Procedure and Evidence, reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st session, New York, 3–10 September 2002, ICC-ASP/1/3 and Corr.1, part IIA, r 98(5); Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res. 3, adopted at the 4th plenary meeting on 3 December 2005, regs 48, 50(1); see further Trust Fund for Victims, ‘Programme Progress Report 2015 – Assistance & Reparations: Achievements, Lessons Learned, and Transitioning’, 10, <https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Programme%20Progress%20Report%202015.pdf>.

¹⁷¹ Trust Fund for Victims (n 170) 10. For an informative overview of how the assistance mandate is operationalised, and its strengths and limitations, see Dutton and Ní Aoláin (n 12); further Ferstman (n 79) 462, 464–66. cf below n 246.

¹⁷² CCM (n 19) art 5; TPNW (n 20) art 6. For a more comprehensive discussion of victim assistance as a potential response to victims of armed conflict, see Camins (n 9).

¹⁷³ Emily Camins, ‘Addressing Victim Suffering under Disarmament Law: Rights, Reparations and Humanising Trends in International Law’ in Treasa Dunworth and Anna Hood (eds), *Disarmament Law: Reviving the Field* (Routledge 2021) 102.

¹⁷⁴ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (entered into force 1 March 1999) ATS 3 (Ottawa Convention). See Alexander Breitegger, *Cluster Munitions and International Law: Disarmament with a Human Face?* (Taylor and Francis 2011) 198.

¹⁷⁵ Bonnie Docherty, ‘Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law’ (2010) 15 *Austrian Review of International and European Law Online* 7–44, 25, 38–44; generally Gro Nystuen, ‘A New Treaty Banning Cluster Munitions: The Interplay between Disarmament Diplomacy and Humanitarian Requirements’ in Cecilia M Bailliet (ed), *Security: A Multidisciplinary Normative Approach* (Brill 2009) 137.

¹⁷⁶ CCM (n 19) art 5(1). See also TPNW (n 20) art 6 (in similar terms).

support, as well as economic and social inclusion.¹⁷⁷ These victim assistance provisions may provide a model for supplementing the response of international law to vulnerable victims of armed conflict more broadly.¹⁷⁸

In terms of implementation, the victim assistance model appears to be having some success in mitigating harm caused to cluster munitions victims and their families. A 2020 review document of the Dubrovnik Action Plan, submitted by the President of the Second Review Conference of States Parties to the CCM, states: ‘As well as being a legal obligation, assistance to survivors, families of those killed and injured and affected communities, is recognized as a key component in the mitigation of the harm caused by cluster munitions’.¹⁷⁹ Several states have passed legislation which includes comprehensive victim assistance provisions, and others have legislated to provide international cooperation and assistance as required by the CCM.¹⁸⁰ Twelve states parties to the CCM have acknowledged having obligations under Article 5 of the CCM.¹⁸¹ It was reported to the Second Review Conference in 2020 that ‘[a]lthough none of the States Parties with obligations under Article 5 have fully implemented all the actions dedicated to victim assistance within the DAP, notable progress has been achieved by many of them’.¹⁸² Eight states parties had reported on the mobilisation of resources leading to an improvement in the assistance provided to victims.¹⁸³ In addition, ‘all States Parties with victim assistance coordination structures in place have successfully involved survivors or their representative organizations in victim assistance or disability coordination mechanisms’.¹⁸⁴ Most of the 12 states parties that acknowledge responsibility for cluster munitions victims report ‘efforts to improve the quality and quantity of rehabilitation programs for survivors’.¹⁸⁵ There are also reports of some states providing psychological support,¹⁸⁶ and progress towards survivor inclusion in social, economic and

¹⁷⁷ CCM, *ibid* art 5(2)(a), (b), (c), (d), (g) and (h) respectively.

¹⁷⁸ See Section 4.2.2; further Camins (n 9).

¹⁷⁹ Review Document of the Dubrovnik Action Plan (n 168) para 63.

¹⁸⁰ Bulgaria, Colombia, Guatemala and Hungary have passed comprehensive legislation. The legislation of Colombia, Hungary, Italy and Spain has committed to international assistance and cooperation, with Italy requiring the establishment of an assistance fund: Human Rights Watch and Harvard Law School, ‘Implementing the Convention on Cluster Munitions: Components of Strong Law and Supporting Examples’, updated November 2020, 9, https://www.hrw.org/sites/default/files/media_2020/11/202011arms_cluster_legislation_1.pdf.

¹⁸¹ As at September 2021 the following countries had reported such obligations: Afghanistan, Albania, Bosnia and Herzegovina, Chad, Croatia, Guinea-Bissau, Iraq, Lao People’s Democratic Republic (PDR), Lebanon, Montenegro, Sierra Leone, and Somalia: Cluster Munition Monitor, ‘Cluster Munition Monitor 2021: 12th Annual Edition’, International Campaign to Ban Landmines–Cluster Munition Coalition, September 2021, http://www.the-monitor.org/media/3299952/Cluster-Munition-Monitor-2021_web_Sept2021.pdf. As at November 2020, 11 states with victims within their jurisdiction had designated a national focal point: Review Document of the Dubrovnik Action Plan (n 168) para 68.

¹⁸² Review Document of the Dubrovnik Action Plan (n 168) para 69.

¹⁸³ *ibid* para 70. The countries mentioned were Afghanistan, Albania, Bosnia and Herzegovina, Croatia, Iraq, Lao PDR, Lebanon and Montenegro.

¹⁸⁴ *ibid* para 70.

¹⁸⁵ Cluster Munition Monitor (n 181).

¹⁸⁶ For example, Lao PDR reported that, in 2020, 40 survivors received psychosocial support, and in Lebanon, the ICRC provided mental health support. In Afghanistan, psychosocial support was provided to 20 to 30 people through a peer-to-peer programme: *ibid* 3, 77.

educational activities.¹⁸⁷ There have been challenges, however, in implementing victim assistance obligations under Article 5 of the CCM. General obstacles include insufficient funding and resources, difficulties in ensuring access to services in remote or rural areas, recent or ongoing armed conflict¹⁸⁸ and, since 2020, the COVID-19 pandemic.¹⁸⁹ In addition, psychological support has been lacking in most affected states,¹⁹⁰ and some have queried the sustainability of health-care, rehabilitation and economic inclusion, and financial assistance measures.¹⁹¹

The victim assistance model in the CCM is relatively new and improving understanding of how best to maximise its potential in the long term is an ongoing project.¹⁹² The CCM framework and associated Action Plans¹⁹³ establish a regime to help in ensuring its implementation, including through the nomination of state coordinators on victim assistance and annual reporting obligations.¹⁹⁴ Other lessons identified at the Second Review Conference for improving assistance delivery include the importance of strengthening national ownership of and capacity for victim assistance;¹⁹⁵ of integrating victim assistance into legal and policy frameworks relating to the rights of persons with disabilities, and to health, education, employment, and poverty reduction;¹⁹⁶ and of improving collaboration and cooperation both between states and between states and organisations.¹⁹⁷ There is significant potential within the victim assistance framework to develop efficient, sustainable and inclusive measures.¹⁹⁸ To this end, additional lessons could be drawn from the most successful aspects of the Rome Statute victim assistance regime¹⁹⁹ and assistance programmes under other conventional weapons regimes.²⁰⁰ Notably, these regimes appear to have had considerable success in addressing the needs of women and families, despite their relative infancy.²⁰¹

¹⁸⁷ For example, survivors of cluster munitions in Afghanistan, Bosnia and Herzegovina, Lao PDR and Lebanon received economic support and vocational training through local organisations, with international assistance. In Chad, survivors with disabilities received training and income-generation support, and children with disabilities (or with parents with disabilities) received free education: *ibid* 3, 77.

¹⁸⁸ ICRC, 'The Convention on Cluster Munitions: The First Ten Years', Fact Sheet, August 2018, <https://shop.icrc.org/download/ebook?sku=4364/002-ebook>.

¹⁸⁹ Cluster Munition Monitor (n 181) 38–39.

¹⁹⁰ *ibid* 3, 38–39. One state, Lao PDR, reported psychological support reaching cluster munitions victims. Cluster Munition Monitor (n 181) notes (at 39) the lack of, and potential for, peer-to-peer approaches as a sustainable psychosocial support measure.

¹⁹¹ *ibid* 3, 38–39.

¹⁹² See Review Conference of States Parties to the CCM, Lausanne Declaration (23–27 November 2020), UN Doc CCM/CONF/2020/WP.1, para 14, <https://undocs.org/en/ccm/conf/2020/wp.1>.

¹⁹³ See exchange of views on the preparation of documents for the Second Review Conference: Review Conference of States Parties to the CCM, Informal Draft – Lausanne Action Plan' (4 September 2020), UN Doc CCM/CONF/2020/PM.2/WP.4, <https://undocs.org/en/CCM/CONF/2020/PM.2/WP.4>.

¹⁹⁴ CCM (n 19) art 7.

¹⁹⁵ Review Document of the Dubrovnik Action Plan (n 168) para 72. This includes the need to strengthen nationwide surveillance systems to help to identify cluster munition victims: *ibid* para 64. See further Lausanne Declaration (n 192) para 15.

¹⁹⁶ Review Document of the Dubrovnik Action Plan (n 168) paras 64–65; Lausanne Declaration (n 192) para 14.

¹⁹⁷ Review Document of the Dubrovnik Action Plan (n 168) para 79.

¹⁹⁸ See, eg, Lausanne Declaration (n 192) paras 14–15.

¹⁹⁹ See, eg, Dutton and Ni Aoláin (n 12).

²⁰⁰ eg, Ottawa Convention (n 174); Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention on Certain Conventional Weapons) (entered into force 12 November 2006) 2399 UNTS 100.

²⁰¹ See, eg, Dutton and Ni Aoláin (n 12).

Given the apparent successes of victim assistance in supporting vulnerable victims, and the limitations of reparations outlined above, it is worth considering expanding victim assistance to survivors of armed conflict more broadly. This could potentially help in meeting several human security goals. The following section considers in more detail the interaction between victim assistance and human security.

4.2.2. VICTIM ASSISTANCE AND HUMAN SECURITY

Certain aspects of the victim assistance provision in Article 5(2) of the CCM bear particular mention in the context of human security, families and armed conflict. First, Article 5(2)(e) prohibits discrimination ‘against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes’; it goes on to provide that ‘differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs’.²⁰² An approach based on need has resonances in human rights jurisprudence, which provides for special protection based on vulnerability.²⁰³ In contrast with judicial reparations – and, generally, collective and administrative reparations²⁰⁴ – such a model does not require proof of a violation of the law to give rise to a legal obligation.²⁰⁵ Rather, consistent with the focus of human security on vulnerability, states parties are obliged to provide assistance based on need. As such, victims of armed conflict harmed either directly or indirectly could potentially be eligible to access the services available if they can demonstrate relevant need. In practice, certain groups of people are likely to have heightened vulnerability and need, including victims of sexual and gender-based violence, widows and widowers, and orphans and vulnerable children.²⁰⁶ Depending on the circumstances, many of these people may be ineligible for reparations based on IHL or IHRL.²⁰⁷ Given the increase in sexual and family violence following armed conflict, empowering women and addressing their physical and mental care needs is particularly important.²⁰⁸ Indeed, given their interconnectedness, measures that target women,

²⁰² CCM (n 19) art 5(2)(e).

²⁰³ See Peroni and Timmer (n 40).

²⁰⁴ On the need for a violation of the law, see text and sources at n 104 above.

²⁰⁵ While art 5 CCM is unlikely to give rise to a right directly enforceable by individuals, it nonetheless represents an international legal obligation consistent with human rights law: see Markus Reiterer and Tirza Leibowitz, ‘Article 5: Victim Assistance’ in Gro Nystuen and Stuart Casey-Maslen (eds), *The Convention on Cluster Munitions: A Commentary* (Oxford University Press 2010) 328, 353; Camins (n 173) 120–23.

²⁰⁶ Dutton and Ní Aoláin (n 12) 506 (noting that the Rome Statute Trust Fund for Victims has identified these groups of people as priorities for assistance, along with former child soldiers and abducted youth).

²⁰⁷ Sexual or intimate violence, for example, may not be considered a war crime if the offences were not sufficiently connected with the armed conflict; see, eg, ‘International Criminal Court Elements of Crimes’ (2011), art 8(2)(b)(xxii), <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>. However, there might be an opportunity for reparations claims under CEDAW (n 46); cf CEDAW General Recommendation No 30 (n 140) paras 74–76 (noting the importance of, but also the failure to deliver, post-conflict reparations for victims of violations of CEDAW). On tolerance of violence more generally under IHL, see above nn 105–106. Victim assistance would also allow for harm by private or non-state actors to be addressed (on the importance of addressing harm by private perpetrators, see Rubio-Marín and Estrada-Tanck (n 130) 573).

²⁰⁸ Ní Aoláin, O’Rourke and Swaine (n 53) 110–11.

children and widows or widowers are likely to have a beneficial impact on their families more generally.

Second, the focus of victim assistance on age- and gender-sensitive mental and physical health and social and economic inclusion measures resonates with several of the categories of security identified by the 1994 UN resolution.²⁰⁹ It directly targets economic, health and community insecurity, and potentially has an impact on other forms of insecurity. For instance, ameliorating socio-economic vulnerability is especially important for empowering women,²¹⁰ and may result in improved personal and political security²¹¹ and economic access to food. This is likely to benefit families given the close correlation between the economic prospects of women and those of their dependants.²¹² In practice, the assistance work of the Rome Statute Trust Fund for Victims, which provides victims and families with physical and psychological rehabilitation and material support, has been found to result in direct benefit to families. Rehabilitative programming was found to reduce within families the stigma of sexual violence, previous experiences of abduction, and mental illness.²¹³ It also led to improved family relationships, reconciliation of spouses, and increases in economic power of families following the return to work of a beneficiary.²¹⁴

Third, Article 5(2)(f) of the CCM requires states to '[c]losely consult with and actively involve cluster munition victims and their representative organisations'.²¹⁵ This aspect of the CCM victim assistance regime accords with the human security focus on empowering victims to be part of the response to their predicament.²¹⁶ The Dubrovnik Action Plan, which aimed to ensure effective and timely implementation of the CCM between 2015 and 2020, emphasised the importance of '[including] cluster munitions victims and their representative organizations actively in policy-making and decision-making in the work under Article 5 of the Convention in a manner that is gender and age sensitive, sustainable, meaningful and nondiscriminatory'.²¹⁷ It required states to:²¹⁸

[p]romote and enhance the capacity of organisations representing women, men and survivors and persons with disabilities as well as national organizations and institutions delivering relevant services, including financial and technical resources, leadership and management training and exchange programmes, with a view to strengthen ownership, the effective delivery of services, and sustainability.

²⁰⁹ UNDP (n 28).

²¹⁰ See Estrada-Tanck (n 15) 251 (on socio-economic vulnerability as a point of intersection between human rights and human security).

²¹¹ See, eg, Chinkin and Kaldor (n 14) 501; Ní Aoláin, O'Rourke and Swaine (n 53).

²¹² See UNICEF (n 45).

²¹³ Dutton and Ní Aoláin (n 12) 516–17.

²¹⁴ *ibid* 516–17.

²¹⁵ CCM (n 19) art 5(2)(f).

²¹⁶ See Estrada-Tanck (n 15) 11 on 'bottom-up' empowerment as one of the 'twin pillars' of human security (the other being protection, provided primarily by the state).

²¹⁷ Dubrovnik Action Plan, adopted at the First Review Conference of the Convention on Cluster Munitions in September 2015, 15 para 4.2(a).

²¹⁸ *ibid* 18 para 4.2.

Such a model, if applied more broadly to vulnerable survivors of conflict, could help to address some of the current disadvantages that the top-down restitutive framework of reparations poses for women and children post-conflict.²¹⁹ By requiring victim assistance to be integrated within government and offering international support to meet this obligation, the model could also facilitate the inclusion of reparations in peace processes.²²⁰ Moreover, it could help to overcome the significant conceptual limitations posed by reparations, which focus on violations and therefore do not account for the needs of those harmed by the lawful conduct of war, such as many displaced persons.²²¹ With children representing a large proportion of those displaced,²²² this has particular potential to benefit families.

Finally, the burdens of responsibility in the above victim assistance regime are consistent with the focus of human security on universality and international cooperation.²²³ The primary assistance obligation lies with the state with jurisdiction or control over victims²²⁴ (as opposed to the wrongdoing state). This is appropriate given the high levels of displacement involved in modern conflict.²²⁵ In addition, Article 6 of the CCM establishes a regime for international assistance and cooperation,²²⁶ and the TPNW contains provisions in similar terms.²²⁷ These provisions also allow for the involvement of non-state actors such as international, national and non-governmental organisations in the provision of assistance.²²⁸ This reflects not only the emphasis of human security on the need for international cooperation to address global issues, but also the shift advocated in human security discourse from exclusive reliance on states in protecting populations to an increased role for non-state actors in achieving human security.²²⁹

In sum, a broader victim assistance model for survivors of armed conflict, drawn along the lines of those found in the CCM and the TPNW, could improve the plight of families post-conflict in a manner consistent with a human security approach. Existing international trust funds²³⁰ could provide useful frameworks for implementing a victim assistance model for survivors of armed conflict. While less far-reaching than some proposed models,²³¹ this approach accords with several of the key human security ideas and is largely consistent with the values it embodies. A victim assistance model is responsive to context and is gender-sensitive, it

²¹⁹ On the challenges of creating local ownership of reparations programmes, see Ní Aoláin, O'Rourke and Swaine (n 53) 134.

²²⁰ See *ibid* 102 (on the side-lining of reparations in peace processes).

²²¹ See further Camins (n 9) Part IV.

²²² See above n 108.

²²³ On the focus of human security on universality and cooperation, see Daft (n 13) 239–40.

²²⁴ See, eg, Camins (n 173).

²²⁵ See, eg, ICRC (n 109) 5 (describing displacement as 'part and parcel of war'); Chinkin and Kaldor (n 14) 14.

²²⁶ See especially CCM (n 19) art 6(7).

²²⁷ TPNW (n 20) art 7.

²²⁸ CCM (n 19) art 6; TPNW (n 20) art 7(5). See further Camins (n 9) (proposing a tax on the manufacture, transfer or brokerage of weapons to help fund victim assistance).

²²⁹ See, eg, Oberleitner (n 10) 196.

²³⁰ eg, UN Trust Fund for Victims of Contemporary Forms of Slavery, the UN Trust Fund to End Violence against Women, the UN Trust Fund for Human Security, and the Fund for the Protection of Cultural Property in the Event of Armed Conflict.

²³¹ eg, Chinkin and Kaldor (n 14) discussed above n 167.

facilitates empowerment and the inclusion of victims (including women), imposes the primary responsibility on governments of territorial states, and facilitates international cooperation and a universal approach to victims.²³² It has the potential to help to address several key vulnerabilities of families harmed by armed conflict.

4.2.3. VICTIM ASSISTANCE AND THE INTERFACE WITH REPARATIONS AND TRANSITIONAL JUSTICE

In some respects the victim assistance model mirrors trends that may be starting to emerge in some areas of reparations and transitional justice.²³³ The CEDAW Committee, for instance, has emphasised the importance of reparations for all violations of CEDAW suffered during conflict, whether or not reparations or remedies are ordered by courts or administratively.²³⁴ It has also encouraged transformative reparations,²³⁵ a departure from the traditional approach of *restitutio in integrum*. Such developments reflect a growing understanding of, and focus on, the pressing needs of victims of armed conflict and the deficiencies in seeking to return to the status quo ante.²³⁶ It might, accordingly, be suggested that the existing reparations regime – judicial or administrative – be expanded in accordance with human security considerations rather than adopting a complementary but separate approach. There is, indeed, some attraction in this argument; in particular, if the proposed measures were viewed as a component or particularisation of the existing framework, there may be fewer hurdles to developing the law and obtaining assistance for families affected by armed conflict.

However, this approach has negative potentialities for reparations, and lacks the advantages of victim assistance as an independent regime. First, this more expansive approach would rest on a broad reading of reparations not currently accepted in international law,²³⁷ and is likely to generate confusion and dispute about both the purpose of reparations and who is entitled to what reparative or assistance measures.²³⁸ It may also weaken the accountability-based, justice-oriented foundations of reparations, which many consider a critical aspect of reparations.²³⁹ By contrast, adopting victim assistance as an independent but complementary obligation has some key advantages, particularly when considered through a human security lens. Victim assistance disconnects

²³² See Daft (n 13) 240.

²³³ See above nn 135–140.

²³⁴ CEDAW General Recommendation No 30 (n 140) para 79.

²³⁵ *ibid* para 79.

²³⁶ See, eg, International Red Cross and Red Crescent Conference, Resolution Addressing Mental Health and Psychosocial Needs of People Affected by Armed Conflicts, Natural Disasters and Other Emergencies, 33rd International Conference of the Red Cross and Red Crescent, 33IC/19/R2 (adopted 12 December 2019). See further Rubio-Marín and Estrada-Tanck (n 130) 572.

²³⁷ See above Section 3.1 (on reparations being tied to violations of the law, and the tolerance of IHL for a relatively significant degree of violence: see especially nn 103–107).

²³⁸ See generally Ní Aoláin, O'Rourke and Swaine (n 53) 136–37; *Prosecutor v Bemba Gombo* (n 84) separate opinion of Judge Christine van den Wyngaert and Judge Howard Morrison, para 75; further Anne Peters, 'Conclusion: Reparation for Victims of Armed Conflict: At the Interface of International and National Law' in Correa, Sandoval and Furuya (n 69) 265–84, 279.

²³⁹ eg, Zegveld (n 84) 340–44.

the obligation to assist victims harmed through armed conflict from liability based on findings of fault. This has several potential benefits. For example, as it is not based on accountability, victim assistance is conceptually free from the implicit ceiling of *restitutio in integrum*, enabling a more forward-looking approach that can accommodate the needs of vulnerable victims beyond their legal rights. In addition, as it is based primarily on humanitarian considerations, it may remove some of the politico-legal barriers to state participation for both the responsible state and the contributing state. For the responsible state it obviates the need for a finding or admission of fault on the part of the government. If internationally or externally funded, at least in part, victim assistance may also be less exposed to claims of lack of resources, and able to be operationalised more swiftly. Moreover, the provision of victim assistance, being humanitarian in nature, should require less engagement with knotty political, legal and moral questions that arise in the formation of reparations programmes,²⁴⁰ thereby reducing delay and ensuring a modicum of timely assistance to the vulnerable. For the contributing state, there is arguably greater humanitarian impetus and fewer political impediments to providing assistance as opposed to reparations based on acknowledgment of fault. Finally, there is, potentially, the additional advantage of international collaboration in the provision of specialised training and services for trauma-affected victims. These factors may facilitate a forward-looking system that helps to address vulnerability, reduce tensions and ultimately bridge the gap between war and peace²⁴¹ in a manner consistent with human security considerations. Accordingly, a preferable approach might be to view victim assistance as an essential complement to violation-based reparations, with both regimes representing integral parts of broader transitional justice measures.

There is, conceptually, scope for a victim assistance model for survivors of armed conflict to operate alongside reparations.²⁴² Under rules of state responsibility, reparations represent a secondary obligation dependent on norm violation.²⁴³ By contrast, the victim assistance model would represent an independent primary obligation. As it would be based not on legal rights contingent on norm-violation but rather on needs, it would form a safety net for those who are harmed yet unable to obtain reparations. This resonates with human rights obligations and is an important aspect of a human security approach.²⁴⁴ By lessening the administrative, evidential and procedural burden, more vulnerable survivors, including families, would be likely to be able to access redress or support in a timely manner.²⁴⁵ Moreover, broadening the focus of international law to include harm rather than solely rights based on violations would allow ‘initiatives

²⁴⁰ See, eg, UN High Commissioner for Human Rights (n 100) 24–25.

²⁴¹ These considerations are explored further in Camins (n 9) Pt III.

²⁴² See *ibid* Pt IV.

²⁴³ International Law Commission, ‘Commentary on the Articles on the Responsibility of States for Internationally Wrongful Acts’ (2001) II *Yearbook of the International Law Commission* 31, 95.

²⁴⁴ Estrada-Tanck (n 15) 51–52 (on risk and vulnerability in human rights law), 100 (on prioritising the most vulnerable under the human security-human rights synergy). See further 2012 Resolution on Human Security (n 16); Daft (n 13) Conclusion.

²⁴⁵ See, eg, Rubio-Marín and de Greiff (n 52); Rubio-Marín, Sandoval and Díaz (n 5). Despite shortcomings in its implementation, the ICC victim assistance model provides a useful example of how reparations and assistance measures can operate alongside one another for the benefit of vulnerable survivors of armed conflict, including families; see further Dutton and Ní Aoláin (n 12); Ferstman (n 79) 462, 464–66.

to go beyond the right-holder and incorporate both the social tissue and the relationships disrupted by violations, especially in a family context'.²⁴⁶ The fact that a victim assistance obligation is not enforceable by individuals directly under international law does not deprive the obligation of its legal character.²⁴⁷ Such obligations remain an important part of the machinery of international law²⁴⁸ and potentially a means of providing an equitable response to families harmed during armed conflict. To this end, developments in the engagement between domestic courts and treaty bodies offer opportunities to strengthen such international obligations.²⁴⁹

5. CONCLUSION

Human security provides a valuable lens for drawing attention to the plight of families post-conflict and exploring the adequacy of existing legal responses. As discussed above, reparations represent, at best, an incomplete response to victims of armed conflict and their relatives. Not only are reparations difficult to obtain, but only certain categories of victims are likely to succeed before courts or human rights tribunals. Indirect victims, such as family members, must jump through additional hoops. The scope or modalities of reparations awarded may also be inadequate or poorly adapted for the needs of families. More generally, reparations tend to have a differential impact on women, whose prospects are inextricably linked to those of families. Women, who are often primary caregivers (and following the loss or incapacity of their male partners in conflict may be sole caregivers), are less likely to be able to access reparations because of social and other factors. In addition, judicial reparations generally seek to restore the status quo ante, with the result that structural disadvantages and inequalities are likely to endure. As there tends to be relatively limited scope for victim input, particularly in judicial reparations, women are quite unlikely to be involved in the formulation of reparations in a manner that is beneficial for them and their families.

The human security framework seeks to protect and empower the most vulnerable members of society. For families this means facilitating the involvement of women and potentially dependants in the formulation of responses to insecurity. This article has suggested that a human security approach could be partially operationalised in the form of a victim assistance model for survivors of armed conflict. This model has the advantage of already existing in pockets of IHL. By mandating assistance – including medical care, rehabilitation and psychological support, as well as social and economic inclusion measures – based primarily on need or vulnerability, the victim assistance model could provide the inclusive approach needed to complement judicial reparations and facilitate the security of families post-conflict. This has the potential to enhance

²⁴⁶ Rubio-Marín and de Greiff (n 52) 329, 336.

²⁴⁷ See generally Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21 *European Journal of International Law* 25, 27.

²⁴⁸ See Estrada-Tanck (n 15) 3–4.

²⁴⁹ See Machiko Kanetake, 'Giving Due Consideration: A Normative Pathway between UN Human Rights Treaty Monitoring Bodies and Domestic Courts' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021) 133.

not only the human security of victims but also the security of the state more broadly. Provision for third states to contribute funds for victim assistance would feed into notions of universal obligations for human security, while placing the primary responsibility on states with jurisdiction over the victims.

The proposal in this article is intended to operate as a safety net, supplementing (not supplanting) existing reparations measures. Such an approach could facilitate assistance for the most vulnerable victims of armed conflict, including relatives of those injured who, for a variety of reasons, are unable to obtain reparations. In this way, victim assistance could act as a means of reconciling the tension between the humanitarian and state security considerations that underpin IHL.²⁵⁰ Ultimately, by circumventing the need for violations of international law as a precondition for redress, expanding the sources of funding, and ensuring age- and gender-sensitive involvement of local communities, such an approach has the potential to improve the plight of families harmed by armed conflict.

²⁵⁰ See Oberleitner (n 10) (on human security as a means of reconciling human rights and security considerations in the UN Charter framework). On the tensions between considerations of humanity and those of military necessity in IHL, see Schmitt (n 144).