

Symbolic Justice or Diluted Accountability? Examining Negotiated Reparations with Non-State Armed Groups under International Humanitarian Law

Introduction

International Humanitarian Law (IHL), at its core, is a body of international law designed to limit the conduct of armed conflict with its primary intention being the protection of civilians and those no longer participating in hostilities.¹ Yet, as armed conflicts evolve, so too must the mechanisms that enforce the safeguards under IHL. In recent decades, internal conflicts involving Non-State Armed Groups (NSAGs) have seen a drastic increase, presenting unique legal and moral challenges.² Traditional mechanisms of enforcing IHL often fail in these contexts due to lack of jurisdiction, political will or state capacity. In response, transitional justice has turned to symbolic and negotiated reparations as an alternative form of redressal, especially during peace processes involving NSAGs.³

These reparations aim to offer recognition and dignity to victims when formal mechanisms are inapplicable. However, their growing use raised an important question:

Can negotiated reparations result in meaningful justice or do they substitute true accountability with a diluted version?

This research paper explores this question by examining both the achievements and limitations of symbolic and negotiated reparations in circumstances that involve NSAGs.

This paper begins by outlining the main enforcement mechanisms of IHL and highlights why these mechanisms often fail to hold NSAGs accountable. It then moves onto discussing what symbolic and negotiated reparations are, how they function and where they have been used. Drawing on the work of scholars like Olivia Herman and Cyanne Loyle, the paper shows how these forms of justice can provide moral recognition and reconciliation.

The third section examines the criticisms of the mechanisms, particularly in NSAG contexts, by looking at the perspectives of Christine Bell, Phil Clark and Ruti Teitel. These scholars question the legitimacy, the substance and strategic use of symbolic reparations, warning that they can sometimes be used by perpetrators to escape legal consequences or manipulate public memory.

¹ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* xxix-xxxii (2005).

² Int'l Comm. of the Red Cross, *The Roots of Restraint in War* 9 (2018).

³ Clara Sandoval, *Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes*, 27 Int'l J. Hum. Rts. 1253, 1256 (2023).

Finally, the paper concludes by arguing that while these criticisms are significant and must be taken seriously, symbolic and negotiated reparations can still play a role in ensuring justice for victims.

Enforcement mechanisms of IHL and their limits

International Humanitarian Law are those body of rules that regulate the conduct of armed conflicts. Since its origin, its design is to reduce the subjection of civilians to the brutalities of war by limiting the means and methods of warfare.⁴ It is important to hold parties accountable for their violations of IHL as it deters others from committing similar atrocities, it helps uphold the integrity of the law and most importantly, it ensures justice for the victims. As such, IHL has developed accountability mechanisms such as the International Criminal Court (ICC), The International Court of Justice (ICJ), ad hoc tribunals and the United Nations Security Council (UNSC).

The ICC is a permanent tribunal and prosecutes individuals for genocide, crimes of aggression, war crimes and crimes against humanity as defined under the Rome Statute 1998.⁵ While the ICC has prosecuted NSAGs and their members (Eg: Joseph Kony and other leaders of the Lord's Resistance Army for crimes committed in Uganda), it relies on the state's cooperation.⁶ This cooperation is withheld when the NSAG is operating in a weak state or a state that allows the activities of the NSAG. Further this dependence of the state exempts those NSAGs that operate within the territory of a non-signatory state. This can be overlooked if the UNSC refers a situation to the ICC (which happened in the case of Darfur).⁷ The UNSC also has the power to impose sanctions and authorize peacekeeping operations. This however depends *heavily* on the agreement of all the five permanent members of the UNSC. Veto of a single permanent member can stop the interference of the UNSC. The ICJ settles disputes between *states* and not individuals. This clearly exempts NSAGs from their jurisdiction. The ICJ cannot persecute NSAG even if there is a clear violation. Ad hoc tribunals have been established in the past adjudicate over serious violations under specific situations. Examples of these Ad Hoc tribunals are the International Criminal Tribunal for Rwanda (tried leaders of the Interahamwe militia)⁸, and the International Criminal

⁴ JONATHAN CROWE & KYLIE WESTON-SCHEUBER, *Principles of International Humanitarian Law* 4-5 Edward Elgar Publishing Ltd. 2013.

⁵ Rome Statute of the International Criminal Court art.5, July 17, 1998, 2187, U.N.T.S. 90.

⁶ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05, Decision on the Confirmation of Charges (Mar. 7, 2008).

⁷ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.

⁸ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, (Sept. 2, 1998).

Tribunal for the former Yugoslavia (persecuted commanders of the Bosnians Serb paramilitary group)⁹. However it is important to understand that these tribunals can prosecute members of NSAGs but not the group itself. Further they are limited by time and geography i.e they are not permanent and have jurisdiction over only those matters for which they were established.

The limitations of these enforcement mechanisms can be summed up as follows:

The first and most obvious of these limitations, is the fact that NSAGs are not states (as defined by the Montevideo Convention)¹⁰ and cannot become parties to treaties in the manner that is generally accepted. While the Geneva Convention (through Article 3) and the Additional Protocol bring NSAGs within its ambit¹¹, the legal status of NSAGs remain ambiguous and bring complications in applying normative pressure, a mechanism of enforcement. Second, NSAGs are constantly changing their constitution - part of the group breaks to form another group, leaders change or a new group is formed through a shaky coalition. Holding entire groups accountable then becomes difficult. For example, post -2011 Libya saw the rise of several militias. Holding each individual accountable becomes practically difficult.¹² Fourth, it has been observed that states can be reluctant to allow international inspection of NSAGs that operate within the state or across its borders. Sometimes states support these groups as well making it difficult to gain their cooperation. The cooperation of states in these matters cannot be understated. The ICC and the established tribunals do not have their own enforcement arms. Arresting of individuals depends on the willingness of the states to comply with the ICC and the tribunals.

Institutions like ICJ, ICC, UNSC and the ad hoc tribunals have made great efforts in the enforcement of IHL. While they have made progress in holding states and individuals accountable, their reach is hindered when it comes to addressing non-state actors. Modern armed conflict has witnessed an increase in the participation of NSAGs and the state-centric framework of international law is unable to successfully regulate the involvement and conduct of these groups. This gap in enforcement undermines the main aim of the IHL - the protection of civilians. Wanting to address these issues, scholars looked for alternate methods of enforcement.

⁹ Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 6–9 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

¹⁰ Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19.

¹¹ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, June 8, 1977, 1125 U.N.T.S. 609.

¹² Frederic Wehrey, *The Burning Shores: Inside the Battle for the New Libya* (2018).

Rise of Symbolic Justice and Negotiated Reparations

Reparations are traditionally understood to be state-sponsored acts, intended to right violations of International Humanitarian Law. Generally, these include monetary compensation, rehabilitation, restitution and/or guarantees of non-repetition. As we have seen, due to various complications, this traditional course is difficult with NSAGs. In such a situation, symbolic and negotiated reparations have emerged as a practical alternative. It is important to note that the strides made by IHL to establish enforcement mechanisms are victim-centric, i.e they are made with the aim of first and foremost, ensuring justice to victims.

The non-monetary gestures made by perpetrators, with the intention to acknowledge the harm caused and restore the dignity of the victims, is referred to as Symbolic Justice. Symbolic Justice places moral recognition and societal healing over material compensation/restitution. It includes public apologies, truth-telling ceremonies and public acknowledgements of wrongdoing.

Negotiated Reparations are the voluntary, dialogue-based agreements in which NSAGs agree to perform acts of reparation in exchange for political inclusion, grants of official pardons or other transitional concessions. These agreements are often brokered during peace negotiations or during the process of transitional justice. Negotiated reparations are especially useful when the state lacks the capacity or the will to compensate victims or when the NSAG exercises de facto control over a particular community.

Scholars like Olivia Herman argue that symbolic reparations that are carried out in good faith act as a form of “moral capital” which serve as an important factor in transitional justice processes, especially in those societies where traditional accountability mechanisms are unavailable or are not practically or politically complicated to apply.¹³ Herman underlines the potential of symbolic acts in legitimizing peace processes. While it does not replace the formal system of ensuring justice, it displays the willingness of the perpetrator to acknowledge the harm that they have inflicted and can be the initial step of moral repair. She acknowledges that symbolic acts are not substitutes for full accountability but can be “deeply meaningful in communities where silence, denial, or neglect have prevailed”. Herman also states that symbolic reparations particularly cater to those situations where the survivor or victim prioritize public acknowledgement and respect

¹³ Olivia Herman, *Symbolic Reparations and the Politics of Recognition in Post-Conflict Peacebuilding*, 42 Int'l J. Transitional Just. 117, 120–23 (2021).

over retribution. By allowing public expression of remorse and responsibility, symbolic reparation reinstitutes victims as morally valued members of society. This is an important step towards rebuilding broken communities.

Building on this idea, Cyanne Loyle introduces the concept of “justice provision by rebels”. This promulgates that NSAGs themselves take the initiative - even ahead of the state - as well as take up roles in transitional justice. Loyle argues that when the NSAGs are involved in the peace negotiations, they can be motivated to participate in reparative acts like symbolic gestures or community based-activities.¹⁴ She contends that this allows justice to emerge “from below”, more suited to meet local expectations rather than forced upon by an external legal system. Loyle highlights that negotiated reparations can help survivors regain social trust, especially when justice is framed to be restorative and rather than retributive. In the complicated situation of NSAGs, allowing them to participate in peace talks can provide a platform for moral engagement and reintegration into the community, reducing the risk of relapse into violence.

A compelling real-world application of both symbolic and negotiated reparations, is the Colombian peace process with the Fuerzas Armadas Revolucionarias de Colombia (FARC). In accordance with the 2016 accords, FARC members committed to participating in truth-telling ceremonies, attending public apology ceremonies and engaging in community service projects as part of reparative justice.¹⁵ One of the most symbolic acts was the Bojaya apology, in which former commanders of the FARC asked for forgiveness from survivors for the 2002 massacre which resulted in over a 100 civilian casualties. It was widely recognized as a genuine new found moral understanding and resonated deeply with the victims. It helped build public support for reconciliation and reintegration. This symbolic gesture allowed others to see them as not just former combatants but humans, allowing space for trust and reintegration and acknowledging the suffering of the victim, even in the absence of full judicial accountability.

The use of symbolic and negotiated reparations is seen as a practical approach to the complicated situation of holding NSAGs accountable. In conflicts involving NSAGs, it often happens that the NSAG has more control at the local level and states are unable or unwilling to deliver justice. Supporters of symbolic and negotiated justice claim that allowing these groups to participate in

¹⁴ Cyanne E. Loyle, *Justice During Armed Conflict: A New Dataset on Government and Rebel Justice Provision*, 60 J. Conflict Resol. 1390, 1392–93 (2016).

¹⁵ Julieta Lemaitre & Kristin Bergtora Sandvik, *Beyond Sexual Violence in Transitional Justice: Political Insecurity as a Gendered Harm in Colombia*, 23 Feminist Legal Stud. 199, 210 (2015).

symbolic acts of responsibility and negotiated reparations, provides a viable path towards some form of justice. They do acknowledge that these methods have their limitations. While they do not offer the closure of traditional legal approaches (criminal trials or monetary compensation), they fill accountability gaps and encourage change in NSAGs. It contributes to peacebuilding and in the centre of it all lies the most important aim of all, ensuring that the victims are visible and their voice heard.

Criticisms of Symbolic Justice

While symbolic and negotiated reparations may appear pragmatic especially when formal justice mechanisms are not applicable and the situation is politically sensitive, they have drawn criticisms from legal scholars. Christine Bell critiques negotiated reparations with NSAGs as often serving as political tools rather than tools to ensure justice. She argues that in peace negotiations involving NSAGs, reparative gestures are frequently brokered by elite bargains and are not victim-centric.¹⁶ Agreements are made behind closed doors by military and political actors who prioritize conflict resolution and power sharing. This removes victims from the centre of justice mechanisms in the name of pragmatism. Bell cautions that such an agreement runs the risk of becoming transactions for legitimacy - NSAGs offer symbolic gestures like public apologies, participating in truth-telling ceremonies, etc. not out of remorse but as part of a strategic trade-off to gain political recognition, official pardons or reintegration into society.¹⁷ In this situation, symbolic reparations act as an exchange for peace rather than a step towards ensuring justice. This exchange allows NSAGs to claim restoration of moral values without undergoing legal accountability or reform. Bell's main concern is the erasure of the victim's voice. These mechanisms and reparations must reflect the victim's needs. When victims are excluded from the process, their experience is diminished and goes unrepresented.

Phil Clark brings his own understanding from post genocidal fieldwork (from Rwanda and other African communities in the process of transitional justice). Clark critiques symbolic reparations offered by NSAGs as often being hollow and easily manipulated.¹⁸ He warns that symbolic gestures risk being performative than reparative, particularly when they are delivered without

¹⁶ Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* 203–06 (2008).

¹⁷ *Id.* at 211–12.

¹⁸ Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* 142–49 (2018).

keeping local expectations in mind. Clark particularly points out the ability of post-conflict narratives to be turned around to favour them.¹⁹ If there is no challenge to their claims or narratives from formal legal fact-finding or accountability mechanisms, perpetrators can frame themselves as peacebuilders. In essence, symbolic gestures without judicial oversight can be used by perpetrators to fuel their political agendas. Clark also points out a very evident lack of nexus between symbolism and material needs. Post-war conditions often require healthcare, housing and economic support. Apologies and ceremonies cannot provide necessities. When victims have expectations of such necessities and are in turn offered symbolic gestures, they may feel silenced, unheard or pacified into a process that does not reflect their priorities.

Ruti Teitel offers a theoretical criticism of symbolic and negotiated reparations. She argues that symbolic and negotiated reparations with NSAGs portray a thin idea of justice. It prioritises political stability over a widely accepted manner of ensuring accountability.²⁰ When symbolic acts are used in place of legal mechanisms, they can be seen as diluting the legal and moral force of IHL. The legitimacy and credibility of the symbolic gestures by NSAGs are weak without interference of legal procedures. Teitel questions whether NSAGs that have committed gross violations of IHL, have a firm ground to stand on while making symbolic reparations without having undergone legal scrutiny.²¹ According to Teitel, justice in these situations requires a measure of public truth, vetting and legal responsibility. These aspects are often missing in negotiated reparations. Her criticisms also highlight a danger of allowing symbolic reparations as an alternative for formal reforms. In the absence of a legitimate guarantee of non-repetition, these reparations may unintentionally exempt perpetrators from consequences without taking away their coercive power.

Conclusion

The criticisms raised against symbolic and negotiated justice when applied to NSAGs strike at the core of what it means to pursue justice under IHL. Scholars like Christine Bell, Phil Clark and Ruti Teitel have rightly intimated the risks of embracing these mechanisms without caution. These mechanisms provide a political bargain and dilute the weight and value of legal responsibility.

¹⁹ Id. at 154–55.

²⁰ Ruti Teitel, *Transitional Justice* 123–26 (2000).

²¹ Id. at 130.

These critiques are not minor and must not be brushed under the rug. They are much needed reminders of what hangs in the balance when justice is negotiated rather than enforced.

Since its inception, IHL has designed itself around the protection of civilians - a formal legal system that safeguards those who face the atrocities and brutalities of armed conflict. Any mechanism introduced to enforce IHL must therefore remain victim-centric. While symbolic and negotiated reparations may offer moments of healing and acknowledgement, it cannot substitute the entirety of justice. Apologies, truth-telling ceremonies may acknowledge harm, but without legal enforcement, material restitution and reform, they leave victims with acknowledgement but no redress.

Yet, the enforcement of IHL in NSAG driven conflicts is without a doubt, complex. These situations block formal legal mechanisms and weaken state authority especially where NSAGs have more power locally. In such circumstances, symbolic and negotiated reparations provide a pragmatic step forward - not as endpoints but as starting points in a comprehensive approach to pursue justice and peace. Their imperfections do not nullify their value rather, they highlight the need for a more robust, inclusive and accountable framework going forward.

This paper has examined the question: *Can negotiated reparations result in meaningful justice or do they substitute true accountability with a diluted version?* The answer is evidently not simple and lies in the nuance. Symbolic and Negotiated justice have the capability of providing meaningful justice, but they are conditional. Only when they are truthful, legally scrutinized and are victim-centric can they be of substance. If reduced to performance, they risk becoming masks. But if delivered thoughtfully and transparently, they may contribute to the form of justice that IHL envisions: one where victims are not only known but truly restored.