

Economic and Social Rights, State Responsibility and Reparations: Setting Priorities in (Post)Conflict Settings¹

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Abstract

Societies recovering from armed conflict and other episodes of widespread violence face major socio-economic challenges. They must deal with the material deprivation and exclusion that often affect large numbers of people directly as a result of violence. State authorities must also address the plight of other disadvantaged people, not directly affected by violence, whose economic and social rights (ESR) have not been fully guaranteed. All this frequently occurs in contexts of scarce resources, where deprivation, status-based discrimination and socio-economic inequalities are acute. This thesis examines two normative frameworks to address the ESR of people affected by widespread violence and explores what each of them has to say about the plight of other disadvantaged people. This issue includes discussing the establishment of priorities between victims and non-victims in ensuring ESR considering cross-cutting patterns of poverty, social inequalities and discrimination.

According to the first framework, which will be dubbed here the ‘offending state-victimised individual paradigm’, the state is a threat to the individual. In shaping the scope of state responsibility, this approach emphasises a retrospective evaluation of the state authorities’ conduct regarding the occurrence of violations in terms of duties to *respect* and *protect* rights. This paradigm privileges the situation of those who found their lives disrupted by violence, namely victims, who are deemed to be entitled to special access to socio-economic goods and other monetary resources that are usually used to cope with daily life, as a means of redress. The second approach is forward-looking and understands the state as an active guarantor of rights in contexts of poverty and exclusion. In the aftermath of widespread violence, positive duties to *fulfil* ESR are foregrounded and existing socio-economic shortcomings are addressed on their own merits. Reparations play a secondary role in the context of this approach and are considered as a means to ensure ESR.

This study is carried out from the perspective of the Inter-American Court of Human Rights, the African human rights system and the Committee on Economic, Social, and Cultural Rights (ESCR Committee). The first part of the study examines the framework that portrays the state as a threat to the individual, drawing on the case-law of regional human rights bodies. The second part uses the work of the ESCR Committee to explore the alternative that understands the state as an active guarantor of rights. The possibilities and limitations of each approach will be examined by focusing on the moral views that underpin them, deontological ethics and consequentialist morality. If, as argued in this study, the second normative framework is

preferable in (post)conflict settings, acute distributive challenges arise in terms of the weight that should be accorded to victimisation, material deprivation, discrimination and socio-economic inequalities when guaranteeing ESR. To address these issues, a framework is developed to balance competing claims and establish priorities, using the ESCR Committee's work as a bridge to introduce distributive justice theories in (post)conflict settings. These theories are egalitarianism, the doctrines of sufficiency and the priority view.

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Abbreviations

ACERWC African Committee of Experts on the Rights and Welfare of the Child

ACHR American Convention on Human Rights

ACHPR African Charter on Human and Peoples' Rights

ACmHPR African Commission on Human and Peoples' Rights

ACtHPR African Court on Human and Peoples' Rights

ACRWC African Charter on the Rights and Welfare of the Child

AU African Union

CEDAW Committee on the Elimination of Discrimination Against Women

COs Concluding Observations

CUP Cambridge University Press

ECHR European Convention on Human Rights and Fundamental Freedoms

ECtHR European Court of Human Rights

ESR Economic and Social Rights

GC General Comment

IACmHR Inter-American Commission on Human Rights

IACtHR Inter-American Court of Human Rights

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

ICJ International Court of Justice

ICRC International Committee of the Red Cross

IDP Internally Displaced Person

ILC International Law Commission

OAS Organization of American States

OAU Organization of African Unity

OHCHR Office of the High Commissioner for Human Rights

OUP Oxford University Press

PCIJ Permanent Court of International Justice

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CHAPTER ONE

Two Frameworks to Address ESR in (Post)Conflict Settings

1 INTRODUCTION TO THIS STUDY

Societies recovering from armed conflict and other episodes of widespread violence are often seriously disrupted: thousands, even hundreds of thousands of persons may have been engulfed by violence and basic infrastructure, together with key governance institutions, have been destroyed or deeply deteriorated in many regions.¹ Given that in these contexts people affected by violence tend to fall into a seemingly endless cycle of deprivation and exclusion,² the guarantee of economic and social rights (ESR) becomes a priority for those affected,³ as well as access to reparation measures that are used to partially make up for their losses and resume their life.⁴ Those affected by violence, however, are not alone in their plight. Conflict-related situations tend to occur in contexts already facing considerable levels of deprivation, unequal distribution of wealth, and ingrained practices of discrimination on prohibited grounds, such as gender or ethnicity — with these factors also affecting people untouched by violence.⁵ In these contexts, state authorities have the major challenge of ensuring ESR for all. This task entails weighing simultaneous ESR claims of individuals and groups that bear the brunt of violence, poverty, socio-economic inequalities and status-based discrimination, setting priorities in contexts of scarce resources.⁶

Scholars consider that in the aftermath of widespread violence state authorities are standing at a crossroads where notions such as the individual and the collective, the past and the future, politics and law, are often fraught with tensions.⁷ For instance, in her influential 2006 speech on transitional justice and ESR, Arbour suggested that authorities are caught between the imperative of repairing individual damages suffered in the past and ensuring a brighter future

¹ See generally Duthie and Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (2017).

² Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development' (2007) 10 *Yale Human Rights and Development Journal* 141, 155.

³ Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21 *Social & Legal Studies* 171, 175; Laplante (n 2) 165.

⁴ Torres 'El Desplazamiento Forzado en los Intersticios de la Justicia Transnacional: Oportunidades y Riesgos' (2019) 69 *Revista de Estudios Sociales* 28, 35-6; Roht-Arriaza, 'Reparations and Economic, Social and Cultural Rights' in Sharp (ed), *Justice and Economic Violence in Transition* (2014), 116; Correa, *Integrating Development and Reparations for Victims of Massive Crimes* (2014), 9.

⁵ UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (S/2004/616) 23 August 2004, para 4.

⁶ Samar, Special Rapporteur on the Situation of Human Rights in Sudan: Advisory Services and Technical Cooperation in the Field of Human Rights (E/CN.4/2006/111) 11 January 2006, paras 64-9.

⁷ Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *The Yale Law Journal* 2009, 2014.

for all those facing marginalisation and discrimination.⁸ She did not, however, elaborate on what exactly this tension entails, as she limited herself to raising a topic that required further investigation. Magarrell took a similar position, commenting that the intersection of claims upon the state to redress past violations and ensure ESR more fully in the present requires careful examination after episodes of widespread violence.⁹ Yet despite these early calls, amongst others that stress the importance of addressing distributive justice issues in (post)conflict settings,¹⁰ legal scholarship has made little progress in developing principle-based frameworks to address ESR-related issues in these settings.¹¹ The indisputable recognition that authorities must take into account the concurrent and often competing interests of all those at a disadvantage has not been accompanied by proposals on how to weigh their interests and set priorities post-conflict.

This study does not question the view that state authorities are at a crossroads where they must address claims related to the past and the present. Nor does it question that these claims may involve conflicts between individual and collective interests. However, this study argues that a deeper tension underlies these dichotomies, one which needs unravelling in order to develop tools for weighing interests and setting priorities in (post)conflict settings. This tension is that of two different understandings of the state-individual relationship in (post)conflict settings. Each approach is examined later in this chapter and throughout the study. Suffice it to say here that the first approach, namely the offending state-victimised individual paradigm, portrays the state as a potential threat to the individual. According to it, in the aftermath of widespread violence state authorities are primarily responsible for redressing the consequences of wrongdoing that is attributed to them in the past. The second approach understands the state as an active guarantor of rights post-conflict, with the duty to take positive action against want and need becoming central. According to it, state authorities are responsible for guaranteeing the enjoyment of rights in the present, regardless of the reasons underlying existing shortcomings. This thesis will argue that these two understandings of the state-individual

⁸ Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40 *International Law and Politics* 1, 20.

⁹ Magarrell, 'Reparations for Massive or Widespread Human Rights Violations: Sorting out Claims for Reparations and the Struggle for Social Justice' (2003) 22 *Windsor Yearbook of Access to Justice* 85, 86.

¹⁰ See e.g. the special issue on the nexus between transitional justice and development in (2)3 *The International Journal of Transitional Justice* (2008).

¹¹ Notable exceptions include Pérez-Murcia, 'Social Policy or Reparative Justice? Challenges for Reparations in Contexts of Massive Displacement and Related Serious Human Rights Violations' (2013) 27 *Journal of Refugee Studies* 191; Fuller, 'Burdened Societies and Transitional Justice' (2012) 15 *Ethic Theory Moral Practice* 369; Kalmanovitz, 'Corrective Justice versus Social Justice in the Aftermath of War' in Bergsmo et al (eds), *Distributive Justice in Transitions* (2010) – noting that these authors come from the fields of economics, philosophy and political science.

relationship are at the base of the crossroads in which state authorities find themselves in terms of redressing past wrongdoings and guaranteeing ESR for all.

This study will examine the extent to which each approach is supported by rival ethical theories, deontological morality and consequentialist ethics. However complicated they may seem at first, these theories express and articulate what are, according to Rawls, the two main concepts of ethics, those of the right and the good.¹² As will be discussed later, while deontological morality attaches special importance to correcting past wrongdoing, consequentialist ethics emphasise the importance of improving bad states of affairs. This study argues that interpreting the state as a potential threat to the individual or as an active guarantor of rights post-conflict implies putting a different emphasis on ethical visions that moral thinking has not yet been able to articulate.¹³ The dual responsibility of state authorities to redress previous wrongdoing and guarantee ESR in the present can ultimately place conflicting moral demands on authorities, with the notions of the right and the good colliding against each other. Dilemmas arising post-conflict must be addressed at this moral level; otherwise, it may be impossible to develop a framework for weighing interests and setting priorities in these contexts.

This introductory substantive chapter is organised as follows. Section 2 outlines the scope of the dissertation and the theoretical framework that supports it, delving into the aspects of deontological morality and consequentialist ethics that are relevant to the discussion. Section 3 sets out the research questions that will guide this investigation and Section 4 explains the methodology that will be employed to answer them. As this study seeks to depart from the field of study and practice that has become the main avenue for addressing the legacy of widespread violations, namely transitional justice, Section 5 provides a justification of the chosen field of study and the human rights bodies selected for answering the research questions. Section 6 presents the main shape of the argument and the thesis structure. Section 7 closes with some clarificatory remarks about the use of terms such as ‘(post)conflict settings’, ‘the aftermath of widespread violence’ and related terminology. These terms will be used in a non-technical way, in terms of applicability of International Humanitarian Law (IHL), and interchangeably. This section also clarifies how ESR will be understood in this study, in terms of excluding cultural rights from the analysis.

¹² Rawls, *A Theory of Justice* (1990), 21.

¹³ See generally Scheffler, ‘Introduction’ in Scheffler (ed), *Consequentialism and its Critics* (1998).

2 SCOPE OF THE STUDY AND THEORETICAL FRAMEWORK

The overall goal of this study is to explore the two aforementioned understandings of the state-individual relationship in the aftermath of widespread violence, along with the underlying moral views. It interprets the work of regional human rights bodies with a mandate to promote and protect ESR and that of the Committee on Economic, Social and Cultural Rights (ESCR Committee) in light of each of the two approaches.¹⁴ The purpose of this analysis is to assess the strengths and weaknesses of each understanding of the state-individual relationship in terms of guaranteeing the ESR of people affected by generalised violence. The thesis also examines what each of these frameworks has to say about the plight of disadvantaged people untouched by violence. This issue includes discussing the establishment of priorities between victims and non-victims in ensuring ESR, taking into account cross-cutting patterns of poverty, socio-economic inequalities, and status-based discrimination.

To carry out this task, this thesis explores the scope of state responsibility post-conflict through the lens of the tripartite typology of duties to respect, protect and fulfil rights. This categorisation was developed by Shue for the first time,¹⁵ integrated into international human rights law by the ESCR Committee,¹⁶ and has been adopted to varying degrees by numerous regional human rights bodies.¹⁷ It has allowed human rights scholars and practitioners to identify and clarify the circumstances in which state authorities have a particular obligation to step in to ensure access to socio-economic goods for disadvantaged people, such as natural disasters or armed conflict.¹⁸ As will be discussed throughout this study, the tripartite categorisation also makes it possible to delineate the scope of state responsibility for human rights violations that occurred during violent events, including the scope of the obligation to make reparation in their aftermath. More importantly, the thesis will argue that depending on how the state is interpreted, as a potential threat to the individual or as an active guarantor of rights, a different emphasis is placed on duties to respect, protect and fulfil.

¹⁴ An explanation of the selection of human rights bodies that will inform this investigation is provided below.

¹⁵ See generally Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1980).

¹⁶ CESCR, General Comment (GC) No. 12: The Right to Adequate Food (E/C.12/1999/5) 12 May 1999; General Comment No. 13: The Right to Education (E/C.12/1999/10) 8 December 1999; General Comment No 14: The Right to the Highest Attainable Standard of Health (E/C.12/2000/4) 11 August 2000.

¹⁷ See Chapters 2 and 3 on the Inter-American Court of Human Rights and the African human rights system.

¹⁸ Eide, The Right to adequate food and to be free from hunger. Updated study on the right to food, submitted in accordance with Sub-Commission decision 1998/106 (E/CN.4/Sub.2/1999/12) 28 June 1999, para 15.

2.1 Duties to respect, protect and fulfil

The duty to respect requires state authorities not to interfere with the enjoyment of rights and to refrain from adopting measures that prevent such enjoyment.¹⁹ It also obliges state authorities to take positive measures to ensure that all branches of government at all levels do not violate rights.²⁰ The duty to protect requires from state authorities the adoption of general and concrete measures to avoid third party interference with rights enjoyment.²¹ These measures include the enactment of laws backed up by enforcement mechanisms that ensure rights enjoyment²² and the adoption of specific measures to prevent a person from being harmed at the hands of a third party.²³ The ESCR Committee currently considers that the duty to fulfil is broken down into three different duties, namely duties to facilitate, provide and promote.²⁴ While the obligation to facilitate requires the state to take positive actions ‘that enable and assist individuals and communities to enjoy’ their rights,²⁵ the duty to provide obliges the state to directly afford the content of the right if individuals or groups ‘are unable, for reasons beyond their control, to realise the right themselves by the means at their disposal’.²⁶ Finally, the obligation to promote requires the state to undertake long-term actions related to raising awareness and fostering recognition of human rights, through the provision of information, training, education and other campaigns.²⁷

With the tripartite categorisation of duties scholars and practitioners have sought to dismantle erroneous assumptions that end up placing ESR in the background of civil and political rights. Amongst them, the position that while civil and political rights only impose restrictions on authorities, which makes them immediately and unconditionally enforceable, ESR exclusively impose positive duties, which makes them deferrable, not enforceable and, therefore, belonging to the realm of politics.²⁸ However, although the tripartite typology shakes up the negative-positive dichotomy by showing that, regardless of its nature, every right imposes on authorities

¹⁹ CESCR, GC No. 12 (n 16) para 15; GC No 13 (n 16) para 47; GC No 14 (n 16) para 33.

²⁰ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 48th Ordinary Session of the ACHPR (24 November 2010), paras 5-6.

²¹ CESCR, GC No. 12 (n 16) para 15; GC No 13 (n 16) para 47; GC No 14 (n 16) para 33.

²² Principles and Guidelines (n 20) para 7.

²³ *Pueblo Bello Massacre v Colombia* IACtHR Series C 140 (31 January 2006) paras 119-123. Chapters 2 and 3 provide a detailed analysis of the application of this duty in episodes of widespread violence.

²⁴ GC No 14 (n 16) para 33.

²⁵ GC No 14 (n 16) para 37.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective of its Development* (1995), 14-6; Eide, ‘Realization of Social and Economic Rights: The Minimum Threshold Approach’ (1989) 43 *The Review: International Commission of Jurists* 40, 40-2.

multiple layers of duties, negative and positive, the truth is that hierarchies between rights and duties have not completely disappeared.²⁹

As will be discussed below, these hierarchies are at the core of the two discussed understandings of the state-individual relationship after widespread violence: while the framework that interprets the state as a rights violator tends to privilege duties to respect and protect, the alternative that conceives the state as a proactive guarantor of rights gives a central place to duties to fulfil. Each framework provides a different explanation of why and to what extent state authorities must address the ESR of people affected by violence. Each of them also opens up different avenues for authorities to weigh the simultaneous ESR demands of people affected and not affected by violence and set priorities.

2.2 The state as a potential threat to the individual: The prevalence of duties to respect and protect and deontological morality

The interpretation of the state as a potential threat to the individual informs traditional approaches to human rights law, as well as work done in other fields that deal with widespread abuses, such as transitional justice.³⁰ According to this interpretation, rights are mainly conceived in negative terms, as people's non-interference claims firstly against authorities and secondly against other individuals.³¹ Concomitant with this understanding of rights, state duties are understood first in terms of respecting rights and then in terms of protecting rights from violations by third parties.³² While intentional and arbitrary violations resulting from official conduct are absolutely prohibited, third-party violations provide authorities with a more flexible range of manoeuvre. In these cases, duties boil down to taking reasonable steps to prevent abuses from happening and investigating them after their occurrence, to avoid any suspicion that authorities authorised, required or were permissive with abuses.³³ State duties to make 'positive provision against want and need' fall down the ladder of legal significance and are often not seen as belonging to the realm of fundamental human rights.³⁴ According to

²⁹ Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *South African Journal on Human Rights* 164, 166; Craven (n 28) 9.

³⁰ Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) 3 *The International Journal of Transitional Justice* 163, 178.

³¹ Nickel, *Making Sense of Human Rights* (2007), 51.

³² Shue (n 15) 52 — criticising this scheme.

³³ Pogge, *World Poverty and Human Rights* (2013) 53, 65-70. Pogge's own understanding of human rights is more complex than the account presented here, since he considers that human rights should not bind governments and agents but the underlying institutions and citizens supporting them. With that caveat, he seems to support the discussed ranking of rights and duties.

³⁴ Fredman (n 29) 166.

Fredman, under this approach, ‘rights are characterised as restraints and social provision or welfare as policy’.³⁵

Deontological morality supports this ordering of rights and duties. It rejects rights violations resulting from intentional official conduct much more emphatically than shortfalls that arise from natural causes or follow from other events in which there is no official participation or tolerance.³⁶ This is the case because deontological morality focuses on the intrinsic rightfulness and wrongfulness of conduct,³⁷ which allows it to stress the importance of intentional harm and perceived mistreatment from the victim’s point of view. The intentionality of harm matters ‘because it seems to bespeak a fundamental lack of respect for the person who is victimised’.³⁸ From the victim’s perspective, ‘to be hurt by a natural force or by accident is different from being the object of an intentional attack even though the actual injury may be identical. The intention makes for the offence’.³⁹ Because of this emphasis on conduct, supporters of deontological morality argue that a harm that an agent intends and inflicts has a greater moral weight than an equivalent harm that an agent does but simply anticipated or should have anticipated. By the same logic, any harm that an agent does carries far more moral weight than an equivalent harm an agent merely allows to happen.⁴⁰ The corollary of this reasoning is, again, that positive duties to provide against want and need are placed at the bottom rung of the ladder of moral importance.⁴¹ Dire socio-economic states of affairs have little traction unless they can be attributed to intentional wrongdoing or reckless attitude, typically on the part of state agents or other actors for whom authorities are held to account.⁴²

Not only does deontological thinking provide strong restrictions on intentional action and weak reasons to help someone in need, but it also shapes claims that the individual can make once restrictions have been violated. The claim of someone who is in need because she was unjustly harmed carries greater moral weight than the claim of someone who is equally in need but has not been wronged.⁴³ Pablo de Greiff explains this with the difference between people affected by natural disasters and people affected by widespread violence. Although the two groups may experience similar difficulties, the harm that affects the first only represents a setback for their

³⁵ *ibid.*

³⁶ Pogge (n 33) 47-8, 65-70.

³⁷ Williams, ‘Consequentialism and Integrity’ in Scheffler (ed) (n 13), 20-1.

³⁸ Scheffler, *The Rejection of Consequentialism* (1982), 106.

³⁹ Fried, *Right and Wrong* (1978), 31.

⁴⁰ Pogge, *Realizing Rawls* (1989), 44.

⁴¹ Scheffler (n 38) 24; Nozick, *Anarchy, State and Utopia* (1974), 30.

⁴² Pogge (n 33) 47-8.

⁴³ *ibid.*

interests; it is not, as in the case of victims of violence, the product of wrongdoing.⁴⁴ In light of this, the approach that understands the state as a threat to the individual is concerned about the people who were wronged, not simply the ones who are badly off — with wrongdoing understood in restrictive terms, as the ‘unwelcome and disruptive’ interference in people’s autonomy.⁴⁵

Reparations play a key role in this framework. They serve the purpose of acknowledging the existence of wrongdoing for which state authorities are responsible⁴⁶ and making good the consequences derived from illegitimate interference in people’s lives.⁴⁷ Because this approach focuses on the evaluation of the intrinsic rightfulness and wrongfulness of conduct, more than on the states of affairs it produces, consequentialist reasons have no bearing upon reparation claims. Victims demand what they have the *right* to demand, that their due be fully restored without further considerations of what is necessary ‘for some greater *good*’ (emphasis added) or to achieve justice in a different sense, such as distributive justice.⁴⁸ Strictly speaking, reparations do not seek to make people better off but to restore as fair as possible ‘the original course of the harmed agent’s life’.⁴⁹

The offending state-victimised individual paradigm may well fit into contexts such as the dictatorships that took place in South America at the end of the twentieth century, which left a profound mark on the work of actors dealing with the legacy of serious human rights abuses, such as the Inter-American Commission and Court⁵⁰ and the transitional justice field.⁵¹ Indeed, in states such as Argentina and Chile authorities carried out a careful and selective ‘vertical’ exercise of violence against certain social groups that left intact the vast majority of citizens.⁵² Despite the context of impunity that surrounded human rights abuses, the institutional

⁴⁴ de Greiff, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence (A/HRC/21/46) 9 August 2012, para 29, fn 13.

⁴⁵ Kalmanovitz, ‘Compensation and Land Restitution in Transitions from War to Peace’ in López-Guerra and Maskivker (eds), *Rationality, Democracy, and Justice: The Legacy of Jon Elster* (2014), 194.

⁴⁶ de Greiff (n 44) 29-31.

⁴⁷ Kalmanovitz (n 11) 79.

⁴⁸ May, ‘Jus Post Bellum, Grotius, and Meionexia’ in Stahn *et al* (eds), *Jus Post Bellum: Mapping the Normative Foundations* (2014), 20.

⁴⁹ Kalmanovitz (n 11) 79.

⁵⁰ Goldman, ‘The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights’ (2009) 31 *Human Rights Quarterly* 856, 871-4; Burgorgue-Larsen and Úbeda de Torres ‘“War” in the Jurisprudence of the Inter-American Court of Human Rights’ (2011) 33 *Human Rights Quarterly* 149, 156-60.

⁵¹ See generally Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Quarterly* 321.

⁵² Kerr, ‘Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges’ in Duthie and Seils (eds) (n 1), 125-9.

framework worked in general terms.⁵³ Since abuses consisted mainly of forced disappearances, torture, illegal detentions and interrogations, intimidation, among other practices through which people were deprived of their freedom and security without guarantees of due process, civil and political rights were at the heart of the social struggle for justice.⁵⁴ As many victims were members of the middle classes, their ESR claims were not central and they found themselves in the ‘comfortable’ position of emphasising accountability measures while downplaying the importance of reparation-related resources by considering them ‘blood money’.⁵⁵ In short, the ranking of rights and duties discussed above, which places the duty to fulfil ESR at the bottom rung of the ladder of legal and moral importance, may sit well in these contexts. The difference between people who were wronged in the past and people who are badly off in the present also resonates in these settings, which explains why reparations were detached from any attempt to improve the living conditions of people affected by violence.

That said, the offending state–victimised individual paradigm cannot be taken for granted in (post)conflict settings. Generalised violence in conflict-related episodes is often ‘horizontal’, ‘muddling the “victim” and “perpetrator” categories’.⁵⁶ As will be seen in Chapters 2 and 3, violence tends to involve a plurality of non-state actors, including rebel groups and segments of the civilian population pitted against each other. Violence is messy and widespread, directly and indirectly affecting a considerable part of the population, in many cases with little control by authorities. State security forces have the prerogative to legitimately participate in law enforcement and potentially combat against armed groups, which often leaves a trail of destruction for which state authorities may not be held responsible. In short, human rights are likely to be affected in conflict-related scenarios in a myriad of ways that may exceed what can legitimately be expected of the state in terms of duties to respect and protect. Since the legacy of widespread violence is often accompanied by patterns of poverty and status-based discrimination, ESR claims are a priority for poor victims, who cannot afford not accepting reparation-related resources as middle-class victims can.⁵⁷ In this regard, academic work has shown that monetary compensation is crucial for poor victims as it transfers resources that they

⁵³ Sandoval, ‘Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition’ in Duthie and Seils (eds) (n 1), 179.

⁵⁴ *ibid.*

⁵⁵ Laplante (n 2) 167; Carrillo, ‘Justice in Context: The Relevance of the Inter-American Human Rights Law and Practice to Repairing the Past’ in de Greiff (ed), *The Handbook of Reparations* (2006), 507.

⁵⁶ Denney and Domingo, ‘Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development are Reshaping the Field’ in Duthie and Seils (eds), (n 1) 212.

⁵⁷ Laplante (n 2) 167; Torres (n 4) 36.

use to tackle daily shortcomings, such as access to housing or the payment of medical expenses and school fees.⁵⁸

Furthermore, reparations have served as a vehicle for courts, truth and reconciliation commissions, and domestic authorities to directly and indirectly guarantee ESR post-conflict.⁵⁹ Given the centrality of the offending state-victimised individual paradigm in the mindset of some of these actors, reparations are granted in response to traditional civil and political rights violations for which the state is held to account. This is well exemplified by the Inter-American Court of Human Rights (IACtHR), for instance, when it orders authorities to provide people affected by armed conflict with substantive socio-economic goods as a means of redressing breaches of duties to respect and protect civil and political rights.⁶⁰ Arbour explains that it is increasingly common for truth and reconciliation commissions and administrative reparation programmes to include in their mandate and recommendations the award of socio-economic goods, generally as reparations for civil and political rights violations.⁶¹ In addition, scholarly work shows that in (post)conflict settings domestic authorities tend to prioritise victims over other disadvantaged people when accessing social programmes *as a means of redress*.⁶² This priority treatment has been justified by domestic courts⁶³ and academics⁶⁴ in the fact that state authorities failed to respect and protect the victims' rights from undue interference — not because they are badly off.

A central aspect of this thesis is to discuss the extent to which access to goods and services which are important for victims to ensure ESR post-conflict should depend on the findings of the state's past misconduct. More precisely, the state's failure to respect and protect rights during episodes of widespread violence. Chapters 2 and 3 seek to bring to light the plight of victims who may find access to these resources compromised because certain past irregularities may not always be attributed to the state under international law. This is especially the case when certain non-state actors are involved, such as rebel groups, and when shortcomings are the product of the general circumstances of conflict, such as armed combat. Faced with this

⁵⁸ Roht-Arriaza (n 4) 116. *See also* Torres (n 4) 35; Correa (n 4) 9.

⁵⁹ Arbour (n 8) 17-9.

⁶⁰ *See e.g. Ituango Massacre v Colombia* IACtHR Series C 148 (1st July 2006) para 407; *Plan de Sánchez Massacre v Guatemala* IACtHR Series C 105 (29 April 2004) para 105. This point is fully addressed in Chapter 2.

⁶¹ Arbour (n 8) 17-9.

⁶² Roht-Arriaza 'Reparations Decisions and Dilemmas' (2004) 27 *Hastings International and Comparative Law Review* 157, 198-200; Correa (n 4) 9; Sandoval (ed), *Prioritising Victims to Provide Reparations: Relevant Experiences* (2011), paras 19-22, 55

⁶³ Constitutional Court of Colombia, *Auto 373* (23 August 2016) 18.

⁶⁴ Pérez-Murcia (n 11) 195-6, 199.

situation, the study suggests a paradigm shift, this is, the adoption of a framework that allows addressing the ESR of people affected by widespread violence on their own merit.

2.3 The state as an active guarantor of rights: The prevalence of duties to fulfil ESR and consequentialist ethics

There is a second approach to the state-individual relationship after generalised violence, which understands the state, not as a threat to the individual, but as an active guarantor of rights. The legacy of generalised violence is not addressed in terms of making good the consequences of violations attributed to the state, but in terms of positive obligations to ensure the conditions that allow individuals and communities affected by violence to continue with their lives.⁶⁵ According to this approach, the state's response should focus on how badly off people affected by violence are, and positive duties to facilitate ESR enjoyment and to provide the services and goods for such enjoyment are central. Therefore, considerations about the perpetrator of violations and the circumstances in which they took place are irrelevant.

Given that the guarantee of ESR is unrelated to any duty to repair the consequences of past wrongdoing, state responsibility towards victims is framed in the context of concomitant duties towards other disadvantaged people. Understood as active guarantors of rights, state authorities must weigh the burdens that violence and other social ills, such as poverty and discrimination, impose on people, seeking to achieve a balance that shows equal concern for all and makes 'economic sense for the common good'.⁶⁶ Priority setting is central to this framework, as it requires that competing ESR claims between people affected and not affected by violence be addressed in contexts of resource scarcity.⁶⁷

Certainly, the establishment of priorities raises thorny distributional questions after episodes of widespread violence. Focus on particular groups may exclude other disadvantaged people from the state's response and may obscure wider patterns of exclusion and discrimination.⁶⁸ However, ignoring the burdens that violence and marginalisation disproportionately place upon certain people also runs the risk of perpetuating their exclusion from ESR enjoyment.⁶⁹ This question is further complicated with regard to the victim/non-victim distinction and the possibility of granting victims some type of preferential treatment in terms of ESR enjoyment

⁶⁵ Correa (n 4) 6.

⁶⁶ *ibid.* 8.

⁶⁷ Samar (n 6) 64-9.

⁶⁸ Chinkin, *The Protection of Economic, Social and Cultural Rights Post-Conflict* (2008), 10.

⁶⁹ *ibid.* 14, 23.

given the authorities' failure to respect and protect their rights in the past. In this regard, Pérez-Murcia considers that it is difficult to explain to an 'ordinary' poor family that only victims have priority access to socio-economic goods, for instance, through free housing, free higher education, and complementary health schemes as a means of redress.⁷⁰ However, it is equally difficult to explain to a rural family mired in poverty due to violence, in many cases perpetrated by the state, that their ESR claims will be fulfilled at the same pace as that of poor urban dwellers, who did not find their life projects torn apart by widespread violence.

Taking for granted that the interests of certain people must be especially considered without ignoring those of others, additional questions arise regarding the scope of priority treatment in (post)conflict settings. For instance, the IACtHR suggested that internally displaced persons (IDPs) due to armed conflict are entitled to affirmative measures until their situation of 'weakness, vulnerability, and defencelessness' is reversed.⁷¹ Scholars from other disciplines have indicated that resources should be prioritised to bring disadvantaged people, affected and unaffected by violence, above a threshold in which everyone enjoys access to basic socio-economic goods, at which point those affected by violence should have access to special measures.⁷² Academics working on ESR and (post)conflict settings, including the field of transitional justice, have considered that the guarantee of substantive equality in rights enjoyment, not formal equality or equality of opportunities, should be the end result of state intervention post-conflict.⁷³

These proposals have quite a different understanding of the scope of special treatment for disadvantaged people in these contexts. Indeed, by raising concerns about social inequalities, the helplessness of those affected by violence, and the lack of access to basic socio-economic goods, these views are committed to different remedial action without a clear and articulated path for their implementation. They raise the question of *why* exactly the plight of disadvantaged people matters after widespread violence and *when* special treatment that is owed to them should be discontinued.

To address these distributional issues, an alternative ethical theory is called upon, namely consequentialism. Social scientists and philosophers have seen consequentialism as a way to

⁷⁰ Pérez-Murcia (n 11) 202-203.

⁷¹ *Mapiripan Massacre v Colombia* IACtHR Series C 134 (15 September 2005), paras 178-9.

⁷² Kalmanovitz (n 11) 85.

⁷³ Arbour (n 8) 5, 20. See also Cahill-Ripley, 'Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights' (2014) 32 *Netherlands Quarterly of Human Rights* 183, 189.

address the legacy of deep and systematic human rights violations,⁷⁴ in some cases, in societies in transition from communism to capitalism in Eastern Europe.⁷⁵ Scholars working on social justice issues, such as Sen,⁷⁶ and more specifically, ESR law, such as Bilchitz,⁷⁷ have also turned to consequentialism to support their approaches. Unlike deontological morality, which emphasises the intrinsic rightfulness or wrongfulness of conduct, consequentialism focuses on the intrinsic goodness or badness of states of affairs. Because of this, that an agent does harm by herself, and does it intentionally, bears no moral relevance in determining the goodness or badness of states of affairs to be improved.⁷⁸

Consequentialist reasoning ranks states of affairs from best to worst according to specific criteria,⁷⁹ in the context of the current discussion, with best and worst determined by the level of ESR enjoyment. Once a metric is defined to classify states of affairs, consequentialism privileges the decision that achieves the best available state of affairs,⁸⁰ the highest level of ESR enjoyment in this study. In determining which decision achieves the best states of affairs, the distribution of people's benefits and burdens is considered, giving equal importance to the interests of all.⁸¹ This assessment takes into account efficiency in decision-making since, as Elster states when referring to (post)conflict societies, the bigger the 'pie', the easier it is to distribute it among beneficiaries.⁸² However, consequentialism also gives value to the situation of disadvantaged people, whose interests should outweigh those of the better-off when adding and balancing the interests of all. This is a requirement to ensure that everyone's interests are treated with equal importance. For instance, the decision to sacrifice the fundamental interests of the disadvantaged in order to achieve non-essential gains for a greater number of better off people is a flawed decision because it distributes benefits and burdens unevenly.⁸³

The special concern for disadvantaged people draws a line in the sand between consequentialism and traditional utilitarianism. In deciding on two states of affairs, a utilitarian always favours the alternative that achieves the greatest total amount of satisfaction or

⁷⁴ Nickel, *Making Sense of Human Rights* (1997), 51.

⁷⁵ Offe, *Varieties of Transition: The East European and East German Experience* (1996), 125.

⁷⁶ Sen, 'Rights and Agency' in Scheffler (ed) (n 1), 190-1.

⁷⁷ Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (2007), 66.

⁷⁸ Pogge (n 40) 45.

⁷⁹ Scheffler (n 38) 1-3.

⁸⁰ *ibid.*

⁸¹ Scheffler (n 13) 1; Scheffler (n 38) 74.

⁸² Elster, 'Land, Justice and Peace' in Bergsmo *et al* (eds) (n 11), 20.

⁸³ Scheffler (n 38) 72-4.

pleasure.⁸⁴ In making this calculation, each person 'is accorded the *same* weight and the outcome is determined by the largest total' (emphasis added).⁸⁵ Utilitarianism was criticised in the second half of the twentieth century, among other reasons, because by giving the same weight to the interests of each person, unfair results are achieved in terms of distribution. Scheffler explains that 'for the utilitarian the best available state of affairs is always the one in which total satisfaction is maximised, no matter how benefits and burdens are distributed within the states of affairs'.⁸⁶ This is why a utilitarian finds nothing wrong with an outcome that maximises total satisfaction by increasing the pleasures of the many at the expense of inflicting great misery on a few.⁸⁷

To address these problematic outcomes, moral thinkers have developed alternative consequentialist theories that concern themselves with the bottom line in distribution of burdens and benefits among people. The most discussed theories are egalitarianism, the doctrines of sufficiency and the priority view.⁸⁸ These theories criticise the utilitarian assumption that the same weight should be attributed indistinctly to the interests of each when it comes to calculating the best state of affairs. As mentioned above, to avoid results in which insubstantial gains for the majority triumph over important interests of disadvantaged people, supporters of consequentialism argue that *greater* weight should be given to the interests of the latter. Although they share this basic point of view, supporters of egalitarianism, the doctrines of sufficiency and the priority view differ on the reasons why disadvantaged people have the right to have their interests specially weighed and when special treatment should be suspended.

An egalitarian considers that improving the position of the worst-off matters because it is morally important that people are as equal as possible when it comes to access certain goods and social advantages.⁸⁹ Therefore, special treatment for the worst-off should be discontinued when equality is achieved, which can be understood in different ways, such as equality of opportunities, substantive equality or material equality. Advocates of the doctrines of sufficiency emphasise that what matters is that people are not below a certain threshold of wellbeing, where living conditions are deemed to be intolerable.⁹⁰ Because of this, the interests

⁸⁴ Nagel *Mortal Questions* (2013) 112.

⁸⁵ *ibid.*

⁸⁶ Scheffler (n 38) 73.

⁸⁷ *ibid.* 72.

⁸⁸ See Chapter 5.

⁸⁹ Frankfurt, 'Equality as a Moral Ideal' (1987) 98 *Ethics* 21, 35.

⁹⁰ Freiman, 'Why Poverty Matters Most: Towards a Humanitarian Theory of Social Justice' (2012) 24 *Utilitas* 26, 26.

of disadvantaged people need to be especially treated until these people find themselves above that threshold. Unlike egalitarians, supporters of sufficiency believe that it is the ‘qualitative’ situation of disadvantaged people what matters, not the ‘quantitative’ difference between the haves and the have nots.⁹¹ Supporters of the priority view are somewhat in the middle of the two positions. They consider that when distributing a benefit between two people, priority should be given to the person who would fare worse in the absence of the benefit. However, the end result of prioritising the disadvantaged person is not to make the two people equal, but to make the disadvantaged person better off.⁹² Remedying the hunger of the hungry, not the difference in access to food between the hungry and the non-hungry, is what justifies prioritising the former.⁹³

Consequentialism will be discussed in this study for three reasons. First, given the emphasis it places on existing states of affairs, rather than evaluating the rightfulness or wrongfulness of conduct that originates them, consequentialism allows addressing existing socio-economic deficiencies after widespread violence on their own merits. If in these contexts the best available state of affairs is one in which the highest level of ESR enjoyment is guaranteed, the authorities’ success in complying with their duties to fulfil ESR can be measured under this benchmark. Second, consequentialism is a framework that allows the interests of individuals and groups to be weighed, balancing the imperative of efficiency with that of the special concern due to disadvantaged people, allowing for the establishment of priorities. Given that in (post)conflict situations state authorities are expected to address with particular attention the ESR demands of certain individuals and groups, within a context of scarce resources and competing needs, a consequentialist lens is needed. Third, as explained above, advocates of consequentialism have been reflecting on why exactly the plight of people who are badly off matters, providing insight into when the special weight given to their interests can be discontinued. This last issue is of utmost importance in (post)conflict situations since, as discussed before, academics working on ESR and (post)conflict situations have different understandings of these issues. These accounts express concern about equality of opportunities and substantive equality post-conflict, aspects that have been discussed by egalitarian versions of consequentialism. Scholars working on (post)conflict societies also express concern that people lack access to basic socio-economic goods after widespread violence, a point that resonates with the sufficiency claim that bringing disadvantaged people above a minimum

⁹¹ Frankfurt (n 89) 32-3.

⁹² Holtug, *Persons, Interests and Justice* (2010), 203.

⁹³ Raz, *The Morality of Freedom* (1986), 240.

threshold is a priority. Finally, the position of the IACtHR that IDPs are entitled to priority treatment until their situation of weakness, vulnerability and defencelessness is reversed can be interpreted under the priority view, since arguably what matters is to improve the lot of IDPs — not ‘closing the gap’ between IDPs and vulnerable non-displaced people.

Having outlined the scope of this research and the theoretical framework that supports it, the following are the research questions that will inform the thesis.

3 RESEARCH QUESTIONS

When addressing the plight of people affected by widespread violence, should access to goods and services that are important for them to ensure their ESR depend on a retrospective assessment of state responsibility over the occurrence of abuses, in terms of duties to respect and protect rights? If this option is deficient due to the limited scope of state responsibility during episodes of widespread violence, which can jeopardise the access of certain victims to key resources to cope with daily life, should a consequentialist framework be adopted, one that directly tackles existing shortcomings through positive duties to fulfil ESR? If a consequentialist framework is adopted, how should state authorities weigh and prioritise simultaneous ESR claims from individuals and groups that bear the brunt of violence, material deprivation and status-based discrimination? Why exactly does their plight *matter* in (post)conflict settings and *when* does the special weight attached to their interests *end*?

To answer these questions, this thesis will examine the work of regional and international human rights bodies with a mandate to promote and protect ESR. Before providing a justification for the selection of bodies, including an explanation of how their work fits into the theoretical framework explained above, it is important to mention them here for the purpose of explaining the methodology that informs this study. In addition to the work of the ESCR Committee, this thesis examines the jurisprudence of the Inter-American Court of Human Rights (IACtHR) and, to a lesser extent, the Inter-American Commission on Human Rights (IACmHR). In the African context, this study focuses on the jurisprudence of the African Commission on Human and Peoples’ Rights (African Commission), the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the African Court of Human and Peoples’ Rights (ACtHPR). The work of the European Court of Human Rights (ECtHR) will not have a central role in this study for the reasons explained below.

4 METHODOLOGY

This study will conduct a doctrinal analysis of law supported by moral thought and distributive justice theories. Doctrinal analysis can be defined as the handling and critical examination of primary legal materials, such as principles, norms, rules and interpretative guidelines, in order to ‘establish an arguably correct and complete statement of the law on the matter in hand’.⁹⁴ In dealing with regional human rights law, the purpose of the analysis is to identify, through the jurisprudence of the bodies responsible for applying and interpreting regional human rights provisions, the content and scope of state duties to respect, protect and fulfil in conflict-related episodes and their aftermath.

Certainly, regional human rights bodies do not equally resort to the tripartite categorisation of duties. While African bodies are already making open use of it,⁹⁵ the IACtHR has not yet decidedly taken the step. However, this is not an obstacle to the deployment of the categorisation when considering the practice of the IACtHR. As explained above, the tripartite conceptuality is an analytical tool intended to explain the structure of duties that accompanies any right, be it economic and social or civil and political. There is no reason why the provisions of the American instruments cannot be interpreted under the tripartite categorisation, a task that has already been carried out by scholars when interpreting the IACtHR’s work regarding the duty to protect.⁹⁶ Furthermore, it is possible to clearly spell out from the case-law of the IACtHR duties to respect (i.e. refrain from interference),⁹⁷ protect (i.e. prevent and investigate violations by third parties)⁹⁸ and fulfil (i.e. provide socio-economic goods).⁹⁹ In reflecting on the IACtHR’s jurisprudence, Judge Ferrer Mac-Gregor stated that the tripartite categorisation of duties ‘established by the ESCR Committee does not differ, apart from clarifications and terminological differences, from the regime established by Articles 1.1 and 2 of the Convention’.¹⁰⁰ This study, then, explores the content and scope of state duties to respect,

⁹⁴ Hutchinson, ‘Doctrinal Research: Researching the Jury’ in Watkins and Burton (eds), *Research Methods in Law* (2013), 13.

⁹⁵ See Chapter 3.

⁹⁶ See e.g. Nolan, ‘Regional Approaches to the Obligation ‘to Protect’ Social and Economic Rights’ (2009) 9 *Human Rights Law Review* 225, 236.

⁹⁷ *Velásquez-Rodríguez v Honduras*, IACtHR Series C 4 (29 July 1998) para 165.

⁹⁸ *ibid.* para 174.

⁹⁹ See e.g. *Sawhoyamaya Indigenous Community v Paraguay* IACtHR Series C 146 (29 March 2006) paras 171-3; *Case of the Xákmok Kásek Indigenous Community v Paraguay* IACtHR Series C 214 (24 August 2010) para 189; *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina* IACtHR Series C 4 (6 February 2020) para 229.

¹⁰⁰ Concurring opinion, *Yarce and Others v Colombia*, IACtHR Series C 325 (22 November 2016) para 81.

protect and fulfil in conflict-related episodes and their aftermath from the perspective of the Inter-American and African regional systems.

As for the ESCR Committee, the purpose of doctrinal analysis is to identify the scope of the duty to fulfil ESR in (post)conflict settings. General comments, concluding observations, and other relevant statements will be considered, with special attention to the work carried out regarding states affected by armed conflict and other episodes of generalised violence in the European, American and African context.¹⁰¹ This study does not address individual petitions under the Optional Protocol to the ICESCR since thus far all petitions have been filed against states not affected by episodes of generalised violence. Owing to this, the individual petition mechanism has little or nothing to say about ESR in these contexts so far.¹⁰² It is true that general comments, concluding observations and other statements are considered non-binding.¹⁰³ However, this does not mean that the Committee is simply gathering information of the authorities' best and bad practices in ensuring ESR. *Mutatis mutandi* to the Human Rights Committee (HRC) jurisprudence,¹⁰⁴ the work of the ESCR Committee is the leading source for interpreting the ICESCR and is instrumental in achieving 'the necessary clarity and the essential consistency of international law' regarding ESR-related issues.¹⁰⁵ More importantly, when the Committee considers state reports, it ends-up making quasi-judicial statements of state responsibility by determining whether or not authorities had fulfilled their obligations under the Covenant.¹⁰⁶

Doctrinal analysis will be complemented with moral thought and legal theory. As is clear at this stage, the discussion that takes place on the interaction of duties to respect, protect and fulfil has been carried out considering two ethical doctrines, deontological morality and

¹⁰¹ The Annex to this study specifies the selection of countries, as well as the criteria that guided it.

¹⁰² See generally Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42 *Human Rights Quarterly* 48.

¹⁰³ Craven (n 28) 91.

¹⁰⁴ Certainly, the ESCR Committee does not have exactly the same status as the HRC when it comes to monitoring and interpreting the respective treaties. The ICESCR was less detailed than the ICCPR in terms of defining the monitoring process and did not contemplate the creation of a specific committee for this purpose. The ESCR Committee was rather born due to a quite operative decision within the UN Economic and Social Council. That being said, these differences have not had a real impact throughout the practice of the ESCR Committee, as states have accepted its authority in terms similar to those of the HRC. See Craven (n 28) Chapter 2.

¹⁰⁵ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010 para 66. The ICJ has resorted to the ESCR Committee's work in interpreting the ICESCR in similar terms. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 para 112.

¹⁰⁶ Craven, 'The UN Committee on Economic, Social and Cultural Rights' in Eide, Krausse and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2001), 462.

consequentialist ethics. In resorting to moral thinking, the purpose of the study is to explicitly formulate the justification for emphasising certain duties over others in order to determine whether this justification is well suited to address ESR after widespread violence.¹⁰⁷

Regarding the duty to fulfil ESR, specific distributive justice theories will be considered to develop a framework that allows balancing the different claims of disadvantaged people and establishing priorities. Three consequentialist frameworks will be studied, namely egalitarianism, the doctrines of sufficiency and the priority view. The purpose of this exercise is not to express the author's personal opinion on how these claims should be ideally weighed. Nor is it about creating a particular theory of justice to solve them. Rather than engaging in deep moral theorising for its own sake, the goal is to distil which of the prevailing conceptions of distributive justice underlies the Committee's work. This exercise is intended to provide a workable explanation of the Committee's practice and to develop a framework to consistently address issues where the Committee does not provide clear answers. In short, the consequentialist framework that best fits the Committee's 'jurisprudence' will be used to address the distributive challenges posed by (post)conflict societies to state authorities when guaranteeing ESR. This methodological approach is not new to legal scholarship. Dubbed as 'mid-level theory' by Coleman, it has been used in different areas of law, from torts to legal theory.¹⁰⁸

5 JUSTIFICATION OF THE FIELD OF STUDY

5.1 Why focus on regional human rights bodies?

As captured in the first research question of this study, a central aspect of this thesis is to examine the extent to which access to goods and services that are important for victims to ensure ESR post-conflict should depend on the findings of the state's past misconduct in light of its duties to respect and protect. This question was raised because in the context of the offending state-victimised individual paradigm those affected by violence have access to these resources as a means of reparation; that is, because they were wronged and not because they are badly off. The possible failures of such a framework are laid bare after considering that certain non-state actors, such as rebel groups, often plunge people into dire states of affairs in which their ESR are seriously compromised. The very circumstances of armed conflict and

¹⁰⁷ Shue (n 15) 21.

¹⁰⁸ Coleman, *Risks and Wrongs* (2010) 8-14; Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 *The Journal of Legal Studies* 103, 107; Salomon, 'Judging Plaintiffs' (2007) 60 *Vanderbilt Law Review* 1747, 1753.

related episodes, such as armed combat, also come at a great cost in terms of ESR enjoyment. Since these wrongs may not always be attributable to the state, victims of abuses not sponsored by state authorities may find access to reparation-related resources which are important for them to cope with daily life in jeopardy.

Regional human rights bodies are key actors in addressing the strengths and weakness of applying the offending state-victimised individual paradigm post-conflict for at least three reasons. First, their jurisprudence provides a clear understanding of when state responsibility begins and ends during episodes of generalised violence, including the circumstances in which state authorities can be held responsible for violations by other actors and for the damage that accompanies the very circumstances of armed conflict and other deleterious forms of violence. Numerous academic studies attest to the fact that regional human rights law has become a central forum to address the scope of state responsibility in these settings.¹⁰⁹ Second, it is not uncommon for regional human rights bodies, particularly the IACtHR, to address the socio-economic legacy of widespread violence through the prism of reparations.¹¹⁰ For this reason, the IACtHR's case-law makes it possible to determine to what extent access to ESR-related resources should depend on a careful evaluation of the state authorities' conduct regarding the occurrence of abuses. Third, regional human rights law, especially through individual petition procedures, is conduct-centred and not result-based. Melish explains that through individual petitions regional bodies determine 'whether or not concrete individualised harm may reasonably be imputed to the state through the unreasonable acts or failures to act of its agents'.¹¹¹ This case-by-case analysis is crystallised in *rules of conduct* that determine what authorities can and cannot do in these contexts, configuring the ultimate scope of the rights recognised in regional instruments.¹¹² Given the emphasis that regional human rights bodies place on addressing the intrinsic rightfulness and wrongfulness of state conduct regarding the occurrence of abuses, a focus on those bodies makes possible an exploration of the strengths

¹⁰⁹ See e.g. Burgorgue-Larsen and Úbeda de Torres (n 50); Hailbronner, 'Laws in Conflict: The Relationship Between Human Rights and International Humanitarian Law under the African Charter on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 339; Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741.

¹¹⁰ See Chapter 2.

¹¹¹ Melish, 'The Inter-American Commission of Human Rights' in Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008), 372.

¹¹² 155/96 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, 30th Ordinary Session of the ACHPR (27th October 2001), para 43; *Third Report on the Situation of Human Rights in Colombia* IACmHR (26 February 1999) Chapter IV, Section B1.

and weaknesses of incorporating deontological arguments when dealing with ESR post-conflict.

As will be discussed in Chapters 2 and 3, in the aftermath of widespread violence regional human rights bodies have traditionally carried out a retrospective evaluation of state responsibility regarding the occurrence of abuses, thereby portraying the state as the assailant from whom the individual requires protection. Because of this, scholarly work on these bodies tend to reproduce the same understating of the state-individual relationship.¹¹³ However, as will be see, some important steps have already been taken by regional human rights bodies in the direction of considering the state as an active guarantor of rights after widespread violence, which tend to be ignored in academic literature. A key original contribution of this thesis to the literature on (post)conflict settings and ESR is to address and articulate the distributional dilemmas that arise after episodes of generalised violence as they appear in the jurisprudence of regional bodies.

5.1.1 Why not focus on the European Court of Human Rights?

The exclusion of the ECtHR from this study may raise queries in the reader's mind, given the terms in which the work of regional human rights bodies will be examined. After all, the ECtHR's jurisprudence has been pioneering in the consolidation of a framework for the protection of human rights in conflict-related circumstances. However, a separate examination of the ECtHR's case-law will not be carried out because it would not advance the argument explored in this study beyond what the other regional bodies allow. This is the case for the following reasons.

First, as will be discussed in Chapters 2 and 3, the IACtHR and African human rights bodies have shaped their understanding of the scope of state responsibility during episodes of generalised violence in dialogue with the work of their European counterpart. This can be exemplified by the notion of due diligence obligations to protect and investigate abuses by non-state actors during episodes of widespread violence. Certainly, conceptual differences persist on the exact scope of due diligence obligations in the case-law of each body and its application varies from region to region.¹¹⁴ That being the case, the core elements of the notion largely

¹¹³ See e.g. Reidy *et al.*, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey' (1997) 15 *Netherlands Quarterly of Human Rights* 161; Buckley, 'The European Convention on Human Rights and the Right to Life in Turkey' (2001) 1 *Human Rights Law Review* 35.

¹¹⁴ See generally Nolan (n 96) making a comparative analysis of the duty to protect in regional human rights systems.

coincide with the ECtHR's understanding of state duties to protect the right to life¹¹⁵ and its general approach to 'risk prevention'.¹¹⁶ Owing to this, addressing in detail the framework developed by the ECtHR would imply repeating its position when dealing with the other regional human rights bodies.

Second, while the Strasbourg Court is a leading body in determining the scope of human rights protection in conflict-related situations, its contribution to addressing socio-economic challenges in (post)conflict settings, which are the topic of interest in this study, is limited. This is certainly explained by the mandate-related limitations that the European Convention on Human Rights (ECHR) impose on the Court, in terms of mainly enshrining civil and political rights. For instance, in *Dogan v Turkey* the ECtHR laid down that state authorities are obliged to guarantee an adequate standard of living for all those who cannot return to their property for security reasons, including the payment of compensation for loss of property.¹¹⁷ However, perhaps because the case was framed as a violation of Article 1, Protocol 1, when the ECtHR revisited the *Dogan* judgment in *Icver v Turkey*, it was satisfied with the implementation by Turkey of a compensation programme for loss of property.¹¹⁸ As a result, the ECtHR's groundbreaking considerations on the guarantee of an adequate standard of living after widespread violence were lost in translation.

Third, the ECtHR's contribution for developing a framework to weigh people's interests and establishing priorities after widespread violence is modest and cannot be mobilised to address the distributive tensions that are of concern here. It is true that balancing the interests of the individual and those of society has become part and parcel of the ECtHR's interpretation of various ECHR provisions.¹¹⁹ In conflict-related scenarios, this practice has been applied in cases involving, again, property rights as enshrined in Article 1, Protocol 1. The Strasbourg Court has held that when authorities restrict people's access to their property because security reasons demand it, they must strike a fair balance between the interests of the affected

¹¹⁵ See generally Leach, Murray and Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Buckley, Donald and Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (2006).

¹¹⁶ See generally Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?' (2015) 15 *Human Rights Law Review* 343.

¹¹⁷ *Dogan and others v Turkey* App no 8803-8811/02, 8813/02 and 8815-8819/02 (ECtHR, 29 June 2004) para 154.

¹¹⁸ *Icver v Turkey* App no 18888/02 (ECtHR, 12 January 2006) paras 77-82, 79, 85.

¹¹⁹ See generally Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 *Human Rights Law Review* 289.

individual and those of society.¹²⁰ However, although this ‘fair balance principle’ is at the heart of consequentialist ethics, as it implies weighing individual and collective interests, there is not much that can be derived from it in terms of the current discussion. This is so because the application of the ‘fair balance principle’ in conflict-related settings is generally limited to restrictions that authorities themselves and non-state actors can impose on the individual regarding access to property.¹²¹ It is not concerned with balancing the distribution of benefits and burdens when it comes to the guarantee of ESR in contexts of marginalisation and status-based discrimination.

Therefore, because the ECHR largely limits the jurisdiction of the Court to the protection of civil and political rights, the scope of positive duties in the field of ESR post-conflict, including the issue of priority setting, can best be addressed by analysing the work of human rights bodies mandated to promote and protect ESR. Finally, it is important to acknowledge that certain aspects of the remedial practice of the ECtHR regarding the calculation of damages are relevant from the perspective of African human rights bodies. This issue will be addressed in Chapter 3 and does not require separate elaboration.

5.2 Why focus on the Committee on Economic, Social and Cultural Rights?

Focusing on the ESCR Committee may not seem to be a very strategic choice for conducting this research. As mentioned before, the Committee has only recently begun to make decisions under the Optional Protocol to the ICESCR and so far, has nothing to say about ESR in (post)conflict situations. Furthermore, the Committee has not even issued a general comment on ESR in conflict-related settings, let alone (post)conflict settings, unlike the CEDAW.¹²² Regarding the Committee’s concluding observations (COs), the few scholars that have studied them in depth from a (post)conflict perspective have considered them to be inconsistent and cursory.¹²³ The reason for this is the apparent lack of ‘systematic guidance as to the resolution of conflict-related challenges in the protection of ESR’, which includes the absence of ‘assertive and substantial recommendations’ on the application of transitional justice

¹²⁰ *Dogan* (n 117) para 155.

¹²¹ *Sargsyan v Azerbaijan* App no 40167/06 (ECtHR, 16 June 2015) paras 219-224.

¹²² CEDAW, General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post Conflict Situations (CEDAW/C/GC/30) 1st November 2013.

¹²³ Schmid, ‘Socio-economic and Cultural Rights and Wrongs after Armed Conflicts. Using the State Reporting Procedure before the United Nations Committee on Economic, Social and Cultural Rights More Effectively’ (2013) 31 *Netherlands Quarterly of Human Rights* 241, 250; Riedel, ‘Economic, Social and Cultural Rights in Armed Conflict’ in Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2015), 450.

mechanisms.¹²⁴ To this it can be added that through COs the Committee distances itself from the practice of naming and shaming episodes of abuse of power or state terrorism, a crucial practice for prevailing approaches to human rights and transitional justice. Instead of foisting blame onto authorities, the Committee seeks to conduct a ‘constructive dialogue’ encouraging them to discharge their obligations.¹²⁵ The use of ‘explicit violations terminology’ in regard specific breaches is avoided, with the Committee preferring to express its principal ‘subjects of concern’ and to make suggestions and recommendations.¹²⁶

Perhaps because the Committee does not tend to adapt its views to the offending state-victimised individual paradigm, its ‘jurisprudence’ has received very little attention from academics and practitioners working on issues of ESR and post-conflict situations,¹²⁷ especially from transitional justice scholars. Nor has the Committee attracted much attention from special rapporteurs on transitional justice issues, a position that was created in 2011. In the only thematic report that has addressed ESR-related matters so far, the Committee is simply not mentioned.¹²⁸ Likewise, in a 2014 study on transitional justice and economic, social and cultural rights by the UN High Commissioner for Human Rights, apart from some general mentions to certain general comments, the Committee’s work is conspicuous for its absence.¹²⁹

This neglect is difficult to explain. When transitional justice began to consolidate as a field of study and practice with the turn of the twentieth century,¹³⁰ the Committee was already developing a consistent position on ESR in (post)conflict societies that has not undergone major changes up to date. The earliest, if not the first reports from the Inter-American region during the mid-1990s were submitted by states undergoing armed conflict and related episodes¹³¹ or in the aftermath.¹³² When transitional justice took a big leap in 2004 to become the language adopted by the UN Security Council, focused on (post)conflict situations, certain

¹²⁴ Schmid (n 123) 258, 262.

¹²⁵ Alston, ‘Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 332, 358-9.

¹²⁶ Chapman, ‘A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights’ (1986) 18 *Human Rights Quarterly* 18, 33-7, 41-2.

¹²⁷ For some exceptions, see Schmid and Nolan, ‘“Do No Harm”? Exploring the Scope of Economic and Social Rights in Transitional Justice’ (2014) 8 *The International Journal of Transitional Justice* 362; Schmid (n 123), Riedel (n 123); Pérez-Murcia (n 11); Arbour (n 8); Cahill-Ripley (n 73); Chinkin (n 68).

¹²⁸ de Greiff, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (A/68/345) 23 August 2013.

¹²⁹ Sandoval, ‘Transitional Justice and Economic, Social and Cultural Rights’ (2014), 24-32.

¹³⁰ Bell, ‘Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’ (2009) 3 *The International Journal of Transitional Justice* 5, 7.

¹³¹ See e.g. Colombia. See the Annex to this study.

¹³² See e.g. Nicaragua, Suriname, Guatemala.

European states had already reported to the Committee after the cessation of widespread violence.¹³³ Since the second half of the 2000s, a large number of states affected by armed conflict and related episodes reported to the Committee for the first time, both in Europe¹³⁴ and Africa.¹³⁵

It is clear that, since its first contact with many states, the Committee has gathered valuable knowledge on how to address socio-economic wrongs and distributive tensions that arise in conflict-related settings. Therefore, the lack of attention to the Committee should not be attributed to the absence of work carried out in these settings or the lack of expertise on its part to address sensitive socio-economic issues that arise from them. The point may rather be that because the Committee does not adopt the offending state-victimised individual paradigm, its work is simply ignored or described as inconsistent because it does not conform to the prevailing views on how to deal with the legacy of widespread violence.

This thesis contends that the same characteristics that reduce the usefulness of COs for promoting deontological arguments make COs suitable to be interpreted under a consequentialist lens. This is due to the very nature of the state reporting mechanism, which has important differences with individual petition procedures. As mentioned, through individual petitions, state responsibility is established by analysing the authorities' conduct regarding the occurrence of abuses, determining whether their acts or omissions abide by the rules of conduct that govern those circumstances. In contrast, state reports are 'collective-oriented' and 'result-based', as they tend to address 'the factual enjoyment of rights in [a] jurisdiction'.¹³⁶ They focus on the factual enjoyment of ESR by different groups in a specific setting regardless of conduct that might have caused harm. Since consequentialism seeks to evaluate existing states of affairs from an impersonal point of view, weighing with equal concern everyone's claims and selecting the result that achieves the best result, COs can be interpreted under a consequentialist framework.

That said, it is important not to reduce the potential of consequentialism for interpreting and explaining the Committee's work to the position set in COs. Although it is not yet possible to extend a consequentialist analysis to individual cases under the Optional Protocol, there are strong indications in the Committee's work to date to suggest that certain consequentialist

¹³³ See *e.g.* Armenia, Azerbaijan, Georgia, Croatia.

¹³⁴ See *e.g.* Bosnia and Herzegovina, Serbia and Montenegro, Macedonia.

¹³⁵ See *e.g.* Kenya, Chad, Angola, Burundi, Uganda.

¹³⁶ Melish (n 111) 348.

insights emerge from its understanding of the ICESCR and its application post-conflict. The centrality of the duty of state authorities to improve the lot of disadvantaged people in the Committee's practice, in contrast to the few reference to notions that emphasise the fact that people were wronged in the past, such as the 'victim' category, can be understood as expressing consequentialist ideas.¹³⁷ These ideas also seem to inform the Committee's position that state authorities must guarantee ESR to the greatest number of people,¹³⁸ preventing the search for efficiency from reproducing patterns of marginalisation.¹³⁹ Reference to priority setting,¹⁴⁰ along with the position established in recent COs that burdens should be well distributed among groups post-conflict,¹⁴¹ suggest that the Committee understands the progressive fulfilment of rights as an obligation that requires weighing individual benefits and burdens, seeking to achieve the best possible states of affairs.

There is a final set of reasons why the Committee's work is of interest in the present study. This is that regional human rights bodies increasingly rely on it when determining the scope of ESR-related obligations, including in conflict-related situations.¹⁴² When regional bodies have not decisively applied the Committee's framework to these settings, this thesis will argue that they should engage with it more seriously. It goes without saying that any attempt to place ESR at the centre of (post)conflict situations requires addressing the position of the leading international body in this regard. Crucially, while the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, and the Committee on the Rights of the Child monitor state compliance with treaties that address the situation of specific disadvantaged groups, the ESCR Committee deals with simultaneous and competitive claims among these groups. Since the distributive tensions raised in this investigation require weighing the claims of different disadvantaged groups, the ESCR Committee becomes the fundamental body to study.

The attempt to present an articulated and morally sound interpretation of the Committee's position on state duties in the field of ESR post-conflict, including the thorny issue of priority setting, is the main contribution of this study.

¹³⁷ See Chapter 4.

¹³⁸ See *e.g.* CESCR, Concluding Observations on the Central African Republic, 2018, para 38(b); Azerbaijan, 1997, para 34.

¹³⁹ CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (E/C.12/GC/20) 2 July 2009, paras 1 and 38.

¹⁴⁰ See *e.g.* CESCR Concluding Observations Burundi, 2015, para 58; RDC, 2009, para 30.

¹⁴¹ See *e.g.* CESCR Concluding Observations Ukraine, 2020, para 16.

¹⁴² See Chapters 2 and 3.

5.3 Why not a transitional justice framework?

From the above discussion it can be deduced that this thesis will not be developed from a transitional justice perspective. However, additional justifications may be needed to support this position, as transitional justice has become the *lingua franca* for addressing the legacy of human rights violations in (post)conflict settings. This is exemplified by the 2004 UN Security Council report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,¹⁴³ by the creation of a special rapporteur on the subject since 2011, and by the burgeoning transitional justice literature,¹⁴⁴ whose norms and mechanisms are currently applied mainly in (post)conflict settings.¹⁴⁵ The previously discussed neglect of the ESCR Committee's work by transitional justice advocates could be taken as a reason for adopting a different framework. Although this is not the ultimate reason for advocating a paradigm shift, it speaks volumes about why a study that places ESR at the centre of (post)conflict settings may find some uneasiness with certain characteristics of the transitional justice agenda.

To be clear, transitional justice is a broad and multidisciplinary field of study and practice and it is difficult, if not totally inappropriate, to refer to it in the singular.¹⁴⁶ More importantly, transitional justice is also a highly contested field and one of the reasons for internal controversies is precisely the extent to which it should deal with ESR-related issues.¹⁴⁷ The neglect of the work of the ESCR Committee, therefore, does not imply that the possibility of including socio-economic concerns within the transitional justice framework has not been discussed. The reasons for and against broadening the field to include these concerns will not be discussed here.¹⁴⁸ Suffice it to say that, after much thought, academics and practitioners have yet to come to terms with where to draw the line between doing 'too much' or 'too little' with respect to ESR in post-conflict situations.¹⁴⁹

¹⁴³ N 5.

¹⁴⁴ This can be exemplified by the fact that the field has its own specialised journal, *The International Journal of Transitional Justice*, which enjoys a very good state of health.

¹⁴⁵ Duthie, 'Introduction' in Duthie and Seils (eds) (n 1), 16.

¹⁴⁶ See generally Bell (n 130).

¹⁴⁷ McEvoy, 'Letting Go of Legalism: Developing a "Thicker" Version of Transitional Justice' in McEvoy and McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (2008) 33-5. See also Arbour (n 8) 3; Cahill-Ripley (n 73) 186-9.

¹⁴⁸ Sandoval (n 53), 172-5; de Greiff, 'Articulating the Links Between Transitional Justice and Development: Justice and Social Integration' in de Greiff and Duthie (eds), *Transitional Justice and Development: Making Connections* (2009), 33-41.

¹⁴⁹ Sharp, 'Addressing Economic Violence in Times of Transition: Towards a Positive-Peace Paradigm for Transitional Justice' (2012) 35 *Fordham International Law Journal* 780, 804-5.

That said, the main reason for departing from a transitional justice framework, or at least from the views that are taking root at the heart of the UN, is conceptual: that is, the victim-centred approach taken in dealing with (post)conflict settings. From the very beginning, in his first report submitted to the Human Rights Council, Special Rapporteur de Greiff stressed that the situation of people affected by serious abuses matters not so much because they are badly off but because they were wronged.¹⁵⁰ The main objective of transitional justice mechanisms, which generally comprise truth seeking, access to justice, the award of reparations, and guarantees of non-recurrence, is addressing wrongdoing and fostering recognition of victims *qua* victims of serious abuses — not to make beneficiaries of transitional justice measures socio-economically better off.¹⁵¹

Reflecting these assumptions, transitional justice literature has discussed at length the extent to which measures that benefit victims and non-victims alike, the guarantee of ESR for instance, can be considered reparatory. This alternative has been criticised for not recognising the distinctive character of victims.¹⁵² According to this argument, in securing ESR authorities end up distributing goods to which victims ultimately access because they are entitled to them as citizens, not as victims.¹⁵³ To the extent that ESR are fulfilled through ‘non-excludable goods’, this is, goods that can also be consumed by non-victims, they do not retain the victims’ distinctiveness and cannot be held to be reparatory.¹⁵⁴

This victim-centred framework leads either to placing ESR-related issues beyond the transitional justice field or addressing them in a way that places disadvantaged, non-victimised people in a difficult to justify situation. On the one hand, given the citizen-victim dichotomy, together with placing ESR in the ‘citizen’ category and transitional justice measures in the ‘victim’ category, practitioners and scholars tend to avoid addressing ESR. In this regard, de Greiff¹⁵⁵ and others¹⁵⁶ consider that the field of development and the sphere of politics are the appropriate places to meet ESR demands. On the other hand, addressing ESR through transitional justice mechanisms could be justified to the extent that the distinctive character of

¹⁵⁰ de Greiff (n 44) para 29.

¹⁵¹ *ibid.*

¹⁵² de Greiff (n 148) 40; Pérez-Murcia (n 11) 197.

¹⁵³ Roht-Arriaza (n 62) 186-192; Uprimny, ‘Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice’ (2009) 27 *Netherlands Quarterly of Human Rights* 625, 635-7; Kurban, *Reparations and Displacement in Turkey: Lessons Learned from the Compensation Law* (2012) 12-13; Magarrell (n 9) 93; Pérez-Murcia (n 11) 192.

¹⁵⁴ de Greiff, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (A/69/518) 14 October 2014, paras 40-2.

¹⁵⁵ de Greiff (n 148) 39-41.

¹⁵⁶ Waldorf (n 3) 179.

victims is maintained. Taking again the example of reparations, transitional justice advocates have considered that granting priority treatment to victims in access to the state offer can be considered as a means of reparation, since it contributes to the recognition that victims were wronged.¹⁵⁷ This is a familiar argument given the discussion so far. However, while this reasoning may be consistent from a transitional justice standpoint, in the sense that it is instrumental in affirming the centrality and distinctiveness of victims, it may lack solid justification from a broader ESR perspective. It is questionable that disadvantaged individuals and groups who have not suffered the effects of widespread violence are not prioritised or, in the worst case, are relegated from access to state services.

Either way, due to its victim-centricity, transitional justice does not offer a framework that considers both the interests of victims and non-victims and allows for the setting of priorities in a broader context of marginalisation and discrimination following widespread violence. A feasible alternative to carry out this task, as this study suggests, is approaching the situation of those affected by widespread violence under a consequentialist lens, namely in terms of how badly off they currently are rather than how wrongly they were treated. By displacing the category of victim from (post)conflict scenarios in this way, the approach advocated here distances itself from –and indeed may clash with– a transitional justice framework.

6 SHAPE OF THE MAIN ARGUMENT AND THESIS STRUCTURE

Following this Introductory Chapter, the dissertation is divided into two parts and each part consists of two chapters. While the first part deals with the work of regional human rights bodies, the second deals with the ESCR Committee.

Chapter 2 analyses the jurisprudence of the IACtHR. It begins with a historical account of why the offending state-victimised individual paradigm took root in the work of the Inter-American Commission and how this paradigm influenced from the beginning the IACtHR's understanding of the state-individual relationship after episodes of widespread violence. The chapter then explores how the IACtHR has applied this approach in conflict-related scenarios and the avenues it opens to partially address socio-economic wrongs after episodes of widespread violence. This analysis includes an evaluation of the celebrated remedial practice of the IACtHR, through which it orders the state authorities to award resources of a clear socio-economic nature in response to the lack of respect for and protection of civil and political rights.

¹⁵⁷ Pérez-Murcia (n 11) 199.

The chapter emphasises the limitations that arise in terms of developing an ESR framework from a paradigm that primarily sees the state as a rights violator rather than an active guarantor of rights. This criticism is made on two fronts. First, by questioning whether access to substantive socio-economic goods should depend on the findings of prior violations of civil and political rights, rather than the obligations that ESR law imposes on authorities. Second, by emphasising the limited responsibility of state authorities with respect to the conduct of certain non-state actors and the general circumstances arising from armed conflict, which compromises access to key resources by many victims.

Given these inconsistencies and protection gaps, the chapter argues that significant advances in the field of ESR achieved by the IACtHR in peacetime should be applied in situations following widespread violence. It continues to explore the distributive dilemmas and challenges that arise if the state is considered to be an active guarantor of rights after serious abuses. These challenges include weighing claims from different disadvantaged groups, affected and unaffected by violence, and establishing priorities in contexts of cross-cutting patterns of marginalisation and discrimination in the American context. The chapter concludes by arguing that the real factor that prevents the IACtHR from fully enforcing ESR in (post)conflict settings is not legal in nature, but attitudinal based on a particular moral approach. There is no apparent legal reason why the IACtHR's handling of ESR in peacetime should not be applied after widespread violence. The obstacle seems to be that at the crossroads where state authorities are expected to repair past abuses and ensure ESR in the present, the IACtHR has not been able to let go of its deontological commitments. Sanctioning wrongful conduct by authorities, and not improving the dire states of affairs affecting people, seems to be the main objective pursued from San José in these contexts.

Chapter 3 deals with the African human rights system. It addresses the two understandings of the state-individual relationship from the perspective of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. While the Commission has traditionally understood the state as a threat to the individual after episodes of generalised violence, the African Committee has taken the step of interpreting it as an active guarantor of rights. The core of the criticism against the offending state-victimised individual paradigm, formulated against the IACtHR, is mobilised against the African Commission. In the face of these criticisms, the chapter addresses the African Committee's approach of directly enforcing ESR after episodes of widespread violence, putting the duty to fulfil ESR at the heart of these contexts.

Although the African Commission and African Committee well exemplify the two approaches to the state-individual relationship in the merit phase of judgments, their remedial practice is still in the process of consolidation and does not seem to lean unequivocally in either direction. The African Court on Human and Peoples' Rights (ACtHPR) is also in the process of developing its own approach to reparations, which does not coincide either with that of the Commission and Committee. Since African bodies are actively searching for conceptual frameworks to address the intersection of claims upon authorities to redress past wrongdoings and address ESR fully in the present,¹⁵⁸ the chapter discusses the advantages and setbacks that stem from following in the African context the remedial path opened by other regional human bodies. As for the IACtHR, the question arises as to whether it is appropriate to order substantive socio-economic goods given the lack of respect for and protection of civil and political rights on the part of authorities, considering that the African Committee has already directly applied the obligation to fulfil ESR after widespread violence. At this stage of the discussion, a discreet aspect of the ECtHR's corrective practice is explored, as the ACtHPR is implementing an approach that resembles in certain respects that adopted in Strasbourg. The two Courts have in common that, with the granting of reparations, they seem to be more interested in sanctioning state misconduct than in improving the lot of people affected by generalised violence. This casts doubt on the adequacy of the offending state-victimised individual paradigm to address, albeit indirectly, the effects of violence on people's wellbeing.

The chapter ends by highlighting the importance of having a framework that allows weighing claims and establishing priorities post-conflict. This is a pressing matter in the African context since additional protocols to the African Charter on Human and Peoples' Rights and other African treaties include provisions that oblige authorities to prioritise the interests of children, women, persons with disabilities, the elderly and IDPs in all their actions, without guidelines on how to set priorities amongst them post-conflict. Ultimately, such a framework must determine the desirability of investing considerable amounts of resources in reparation programmes taking into account other imperatives that arise in post-conflict reconstruction, including addressing the pressing socio-economic needs of the many people who are not directly affected by violence.

¹⁵⁸ Resolution on Human Rights in Conflict Situations, ACHPR/Res. 332 (2016); Resolution on the Fight against Impunity in Africa, ACHPR/Res. 344 (2016); Resolution on Transitional Justice in Africa, ACHPR/Res. 235 (2013)

The conclusion of the first part of the study is that access to ESR-related resources should not depend on a retrospective assessment of state responsibility with regard to the occurrence of abuses in terms of duties to respect and protect. A paradigm shift is needed, one that addresses existing socio-economic shortcomings of people affected by violence in the broader context of the plight of different disadvantaged groups. Drawing on the work of the ESCR Committee and consequentialist ethics, the second part of the study proposes a framework to balance ESR claims of individuals and groups who bear the brunt of violence, poverty, socio-economic inequalities and status-based discrimination. This framework addresses the question of why exactly the plight of these people matters in (post)conflict settings and when the special weight attached to their interests can be discontinued.

Chapter 4 addresses the Committee's understanding of ESR-related duties in (post)conflict settings and argues that its work corresponds to a large extent to consequentialist ethics. On this basis, the question of whether the victim/non-victim distinction should have any bearing on people's access to ESR is addressed and answered in the negative. It is argued that, according to the COs issued for states affected by armed conflict and related scenarios, the difference between people who have been wronged and people who are badly off does not affect the scope of state duties in the field of ESR. This will be exemplified, amongst other things, by the relative lack of centrality of the 'victim' category in the Committee's work in these scenarios. Faced with this conclusion, the chapter addresses the role of remedies, and specifically reparations, after episodes of generalised violence in the Committee's COs. Focusing on recommendations to authorities to provide compensation in cases of forced eviction and sexual violence perpetrated during armed conflict and related episodes, it is argued that the Committee's remedial practice can also be explained from a consequentialist perspective. In other words, it can be interpreted that remedies and compensation are recommended more as a means to guarantee ESR than with the objective of sanctioning previous misconduct and repairing the consequences of wrongdoing. The chapter ends with an analysis of the Committee's approach to the interaction between status-based discrimination and material deprivation post-conflict. Given that people affected by violence often face mutually reinforcing patterns of discrimination and deprivation, which places them at the bottom rung of society, the chapter provides a preliminary framework that justifies giving special weight to their interests, while taking into account those of other disadvantaged people.

Chapter 5 develops a framework for priority-setting in (post)conflict settings. Given that the legacy of widespread violence coexists with patterns of poverty, socio-economic inequalities

and status-based discrimination, the chapter addresses the question of why exactly the situation of disadvantaged people, affected and unaffected by violence, is important in these contexts: Is it that people do not have equal opportunities and resources post-conflict? Is it rather that people have too little? Or is it that the worst-off people need to be better-off? As mentioned above, depending on the answer to these questions, the scope of special treatment for disadvantaged people will vary. If equality is at stake, their interests must be given special weight until equality is achieved. If sufficiency expresses the real concern for the disadvantaged, then their interests must be specially addressed until they have secured basic socio-economic goods. If the priority view better captures why the plight of the most disadvantaged is important, then their interests should take precedence over those of the better-off insofar as the needs of the former are more urgent. These issues will be addressed by interpreting the Committee's COs through the lenses of the aforementioned distributive justice theories.

7 THREE SHORT CAVEATS BEFORE STARTING

This study will make a flexible and interchangeable use of the terms '(post)conflict settings' and 'the aftermath of widespread violence'. In certain cases, ESCR Committee COs and decisions of regional bodies were issued after armed conflict clearly ended, such as Peru, Suriname, Sudan or in the Balkans.¹⁵⁹ In many other cases, however, linearity across the conflict and (post)conflict stage is lacking, making 'post-conflict' a difficult term to handle.¹⁶⁰ As exemplified by the recent upsurge in fighting in Nagorno-Karabakh, there is no clear dividing line in states with ceasefire arrangements that lack a political solution to bring the conflict to an end. Nor is there necessarily a clear division between conflict and the (post)conflict phase in states where the security forces have imposed themselves on the insurgent forces in a considerable but not absolute way, such as in south-eastern Turkey. In states facing more than one armed conflict, such as Colombia, the end of confrontations can bring a certain level of peace in certain regions, while others remain under the hardships of war. Although the highpoint of abuses has largely passed in most of these settings, they remain affected by what Bell calls a 'war-peace hybridity', that is to say, a 'no-war-no-peace situation that tends to prevail, where forms of violence often mutate in complex ways, rather than being eliminated.'¹⁶¹ On certain occasions, despite the fact that outbreaks of violence do not

¹⁵⁹ See the Annex to this study.

¹⁶⁰ Chinkin (n 68) 7.

¹⁶¹ Bell, 'Post-conflict Accountability and the Reshaping of Human Rights and Humanitarian Law' in Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (2011), 330.

disappear completely and other factors that can fuel new insurrections and clashes remain, the decision to implement reparation programmes and other transitional justice policies to address the legacy of abuses puts an emphasis on the prefix of the *(post)*conflict formula, such as in Southeast Turkey and Colombia.

Due to the flexible use of the concepts discussed above, the expressions ‘conflict’ and ‘(post)conflict’ should not be understood in any technical and legal sense for the purposes of applying International Humanitarian Law. Indeed, as will be clear in Chapters 4 and 5, the Committee makes non-technical use of these concepts and does not change its approach when episodes of widespread violence can be understood as belonging to the IHL framework. Furthermore, a number of scenarios that will be addressed in this thesis correspond to what would be understood as armed conflicts of a non-international character and do not involve occupation by one party to the territory of another. Therefore, the relevant IHL provisions established in the Fourth Geneva Convention,¹⁶² the only place where positive duties in the field of ESR towards the general civilian population are spelled out with some degree of specificity and systematicity, do not apply.

In short, this study does not deal with the scope of application of ESR and its relationship with IHL in the midst of armed conflict, a topic that has already been explored by academics who are better qualified to do so than the author.¹⁶³ Rather the purpose of this thesis is to address the challenges and distributive dilemmas that often arise as a consequence of widespread violence when it comes to guaranteeing ESR.

Finally, this thesis does not address cultural rights enshrined in the ICESCR¹⁶⁴ and in regional human rights instruments.¹⁶⁵ This decision is not intended to deny the importance of culture in the full enjoyment of ESR. As the Committee has emphasised in several General Comments, access to and distribution of goods related to ESR must be respectful of the culture of individuals and communities.¹⁶⁶ Likewise, the IACtHR has considered that culture plays a key

¹⁶² Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 75 UNTS 287, 12 August 1949, Articles 50-62.

¹⁶³ Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (2014); Müller, *The Relationship Between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health-Related Issues in Non-international Armed Conflicts* (2013).

¹⁶⁴ ICESCR Art. 15.

¹⁶⁵ See e.g. American Convention on Human Rights, Art. 26, in conjunction with Arts. 48, 52 and 95 of the Charter of the Organisation of American States; African Charter on Human and Peoples’ Rights, Art. 17; African Charter on the Rights and Welfare of the Child, Preamble and Art. 12.

¹⁶⁶ CESCR General Comment No. 4: The Right to Adequate Housing (E/1992/23) 13 December 1999, para 8(g); General Comment No. 13: The Right to Education (E/C.12/1999/10) 8 December 1999, para 6 (c); General

role for the effective enjoyment of the rights of ethnic minorities, closely linking, for example, the right to property with the communities' physical and cultural survival after episodes of generalised violence.¹⁶⁷ By focusing on ESR, this study assumes that their 'effective application and implementation require that they be culturally mediated'.¹⁶⁸ What this study leaves out, therefore, are cultural rights as such, covered broadly by the right to participate in cultural life and the right to enjoy the benefits of scientific progress and its applications.¹⁶⁹ This is not to say, again, that these rights are not important in (post)conflict situations. The Committee has recognised, for example, the importance of protecting cultural heritage in times of war,¹⁷⁰ and academics have underscored the importance of cultural heritage, inter alia, for efforts to secure and maintain peace.¹⁷¹ That said, these rights are not directly relevant to the research questions that inspire this study.

Comment No 14: The Right to the Highest Attainable Standard of Health (E/C.12/2000/4) 11 August 2000, para 12(c).

¹⁶⁷ *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* IACtHR Series C 270 (20 November 2013) para 354.

¹⁶⁸ Chinkin (n 68) 5.

¹⁶⁹ See n 163 and n 164.

¹⁷⁰ CESCR General Comment No. 21: Right of Everyone to Take Part in Cultural Life (E/C.12/GC/21) 21 December 2009, para 50.

¹⁷¹ See generally Vrdoljak. 'Cultural Heritage, Transitional Justice, and Rule of Law' in Francioni and Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (2020).

CHAPTER TWO

The Inter-American Court of Human Rights

Foregrounding ESR at the Heart of (Post)Conflict Settings

1 INTRODUCTION

As mentioned in the Introductory Chapter, this thesis explores two legal and moral frameworks to address the state-individual relationship in (post)conflict settings and evaluates their possibilities and limitations in terms of guaranteeing the ESR of those affected by widespread violence. One framework, which portrays the state as a potential threat to the individual, considers that state authorities are primarily responsible for redressing the consequences of wrongdoing that is attributed to them in the past. The plight of those affected by violence is addressed through the award of reparations, which directly and indirectly contribute to ESR enjoyment, in response to the authorities' failure to respect and protect rights. According to the alternative framework, which understands the state as an active guarantor of rights, authorities should address existing socio-economic shortcomings regardless of how they occurred. This framework highlights positive duties to fulfil ESR post-conflict and places the plight of those affected by violence in the context of ESR claims of other disadvantaged people. The first research question raised the issue of whether access to goods and services that are important for victims to ensure ESR post-conflict should depend on the findings of the state's past misconduct, as per the first framework, or whether a consequentialist approach is required — one that privileges the state's positive duties to fulfil ESR after widespread violence. Adopting a consequentialist approach raises distributional questions about how to balance competing claims between victims and non-victims in contexts of poverty and status-based discrimination.

This chapter focuses on answering the first research question from the perspective of the Inter-American Court of Human Rights (IACtHR). As will be discussed, the IACtHR has traditionally adopted the offending state-victimised individual paradigm and tends to address the legacy of widespread violence in light of the authorities' compliance with their duties to respect and protect civil and political rights. Although the Court has not turned a blind eye on socio-economic wrongs resulting from violence, it tends to approach them according to the offending state-victimised individual paradigm. The IACtHR has also developed pioneering remedial jurisprudence through which it tends to order the provision of substantive socio-economic goods for those affected by violence. The IACtHR's case-law, therefore, is an excellent place to answer the question of whether access to goods and services that are

important for victims to ensure ESR post-conflict should depend on the findings of wrongdoing by state authorities regarding the occurrence of abuses.

In light of the shortcomings that follow from the application of the offending state-victimised individual paradigm in terms of guaranteeing ESR, this chapter will also address some of the distributional challenges that arise if a consequentialist lens is adopted in (post)conflict situations. By arguing that the Court should apply in these contexts the ESR jurisprudence developed in peacetime, especially the ‘right to a dignified life’ and the direct enforceability of ESR, the chapter will discuss the extent to which the victim/non-victim distinction should have any bearing on the guarantee of ESR and what role anti-discrimination law should play in these contexts.

This chapter is organised as follows. Section 2 provides the historical background of the Inter-American human rights system. This serves the purpose of explaining the context in which the offending state-victimised individual paradigm took root in the work of the Inter-American Commission and how this background influenced the IACtHR. Section 3 explains how this paradigm has been stretched by the IACtHR to partially address socio-economic wrongs after serious abuses. Section 4 analyses the limitations of the paradigm after episodes of widespread violence and evaluates whether the Court’s remedial practice, which generally includes ordering the award of socio-economic goods, can counteract said limitations. Section 5 explains how the right to a ‘dignified life’ can be applied in the aftermath of widespread violence and Section 6 carries out the same task regarding the direct enforceability of ESR.

2 THE HISTORICAL NEGLECT OF ESR BY THE COMMISSION AND ITS INFLUENCE ON THE COURT

The Commission began its work in the early 1960s, almost three decades in advance of its sister organ. Due to initial arrangements by the OAS members and the narrow scope of functions defined in its internal rules of procedure, during the 1960s and early 1970s, the Commission focused on the protection of civil and political rights enshrined in the American Declaration of Rights and Duties.¹ This initial position is explained not by the content of the American Declaration, which very generously recognises ESR such as the rights to work, social security, alimentation, health and education, but by the anti-communist agenda driven by the

¹ Informe Anual de la Comisión Interamericana de Derechos Humanos 1986-1987 (IACmHR, 22 September 1987) ch 1, para 5; Reglamento de la Comisión Interamericana de Derechos Humanos, con las enmiendas de 1961, 1962 y 1966, aprobado por la Comisión en su décima y duodécima sesiones celebradas el 26 y 27 de abril de 1966 (IACmHR, 26 april 1966).

United States in the region.² It took until the 1969 Buenos Aires Protocol for the Commission to begin addressing ESR still in a rudimentary way, transcribing legislative measures adopted by states in some annual reports.³ In the years to come, the Commission's work largely emphasised the protection of civil and political rights through *in situ* visits and state reports in the emerging context of dictatorships over the Americas in countries such as Chile, Argentina, Brazil, Uruguay and Paraguay. By 1990, out of thirty-five state reports, only eleven mentioned ESR, in many cases this mention consisted of a squeezed chapter that added to longer considerations about civil and political rights affected by authoritarian rule.⁴ In a few cases, state reports addressed to greater and lesser extent questions relating to economic growth, levels of unemployment and literacy, the existence of disadvantaged groups, access to social services,⁵ and the situation of people living in poverty and wealth distribution.⁶ Only once did the Commission expand on the various ESR clearly enshrined in the American Declaration.⁷

In the late 1980s and early 1990s, the Inter-American system underwent important changes, which forged a new balance in the mechanisms used to promote and protect rights in the region. These included: the first contentious decisions by the IACtHR in 1988; the progressive decline of authoritarian rule over the region; and the avenue of more open societies in which individuals had more facilities to resort to international justice.⁸ Medina explains that prior to 1990 the examination of individual cases was a secondary practice, with the Commission handling them because it 'had the duty to do so' or to document the existence of gross and systematic abuses in state reports.⁹ With the turn of the century things changed significantly. Along with the issuing of precautionary measures and the achievement of friendly settlements, individual

² Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 *Human Rights Quarterly* 856, 867-871.

³ Informe Anual de la Comisión Interamericana de Derechos Humanos 1974 (IACmHR, 30 December 1974) s 2 pt I; Informe Anual de la Comisión Interamericana de Derechos Humanos 1973 (IACmHR, 14 February 1974) s 1 pt I; Informe Anual de la Comisión Interamericana de Derechos Humanos 1971, (IACmHR, 6 March 1972) pt I. Until 1977, annual reports are only available in Spanish. Thereafter, reference will be made to the English version.

⁴ Report on the Situation of Human Rights in Paraguay (IACmHR, 28 September 1987) ch VI (e.g. trade union rights); Report on the Situation of Human Rights in Bolivia (IACmHR, 1 July 1985) ch VII; Report on the Situation of Human Rights in Chile (IACmHR, 9 September 1985) ch X (e.g. trade union rights); Report on the Situation of Human Rights in Argentina (IACmHR, 11 April 1980) ch VIII (e.g. trade union rights).

⁵ Second Report on the Situation of Human Rights in Suriname (IACmHR, 2 October 1985) ch VIII; Report on the Situation of Human Rights in Guatemala (IACmHR, 13 October 1981) ch X; Report on the Situation of Human Rights in Colombia (IACmHR, 30 June 1981) ch VII.

⁶ Report Guatemala (n 5) ch X; Report on the Situation of Human Rights in Haiti (IACmHR, 13 December 1979) chs VIII-IX; Report on the Situation of Human Rights in El Salvador (IACmHR, 17 November 1978) chs X-XI; Report on the Situation of Human Rights in Nicaragua (IACmHR, 30 June 1981) ch IX.

⁷ Seventh Report on the Situation of Human Rights in Cuba (IACmHR, 4 October 1983) chs X-XIV.

⁸ Goldman (n 2) 875.

⁹ Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture' (1990) 12 *Human Rights Quarterly* 439, 442.

petitions became the most important and time-consuming activity of the Commission, which led to the consolidation of a ground-breaking jurisprudence in matters of accountability for civil and political rights violations.¹⁰

State reports and individual complaints subject states to different types of scrutiny, which helps explain why ESR were neglected during this period. The main objective behind the state reporting mechanism is to exert diplomatic and political pressure on state authorities by disclosing the findings in the forum of the OAS.¹¹ In contrast, the resolution of individual claims, both by the Commission and the Court, is a contentious process which involves the evaluation of the authorities' specific conduct according to the regional obligations assumed. Any infringement entails the international responsibility of the state, which, according to the Commission, is a censorship of a different nature than the diplomatic and political recommendations that inspire state reports.¹² Embedded in the momentum achieved in terms of bringing about accountability for civil and political rights abuses under authoritarian regimes,¹³ ESR were relegated to the realm of politics and diplomacy. Indeed, ESR were only addressed in squeezed chapters in the margins of state reports, as the Commission regarded ESR more as a matter of aspirational goals than legal responsibility.¹⁴ Things would not change until the turn of the century.¹⁵

As a result, the Commission could only address cosmetically the socio-economic harms that resulted from armed conflict that affected certain states in the region, such as Peru and Colombia. Commenting on the reports submitted by Colombia,¹⁶ for example, it found that: '[t]he phenomenon of widespread violence, together with the situation of [those] who have been displaced from their homes, has negative repercussions on the effective observance of ESCRs'.¹⁷ However, this finding was a matter of policy assessment. It led to aspirational recommendations instead of providing a basis for establishing state responsibility.¹⁸ In an unfortunate and highly descriptive manner, the Commission referred to widespread violence

¹⁰ Goldman (n 2) 874-5, 880-2.

¹¹ Medina (n 9) 442.

¹² Third Report on the Situation of Human Rights in Colombia (IACmHR, 26 February 1999) ch IV s B1.

¹³ Goldman (n 2) 885.

¹⁴ See e.g. Report Guatemala (n 5) Recommendations para 5; Report Salvador (n 6) Recommendations para 8; Report Haiti (n 6) Recommendations para 7.

¹⁵ Melish, 'The Inter-American Commission of Human Rights' in Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 339, 349.

¹⁶ Report Colombia (n 5) ch VII; Second Report on the Situation of Human Rights in Colombia (IACmHR, 14 October 1993) chs II, X; Third Report Colombia (n 12) chs III, IV, VI.

¹⁷ Third Report Colombia (n 12) ch III B 17.

¹⁸ *ibid.* chs III, IV and VI.

and its negative repercussion on the observance of ESR as a matter of ‘context’ — a question different from ‘real violations’ that trigger state responsibility in the Inter-American system.¹⁹

The newly established Court began to function against this background of dictatorships and the neglect of ESR. It is not surprising that from the very beginning it understood violence in the region as a matter that primarily involved practices of state terrorism.²⁰ That is to say, systematic practices affecting civil and political rights ‘tolerated or perpetrated by the state in a situation of general impunity’.²¹ Hence, the Court followed from its inception the Commission’s deontological approach to human rights law, according to which its main function is to address those situations in which the state, who is expected ‘to protect the individual, becomes his *assailant*’ (emphasis added).²²

As will be discussed next, this background exerted a considerable influence on the jurisprudence developed by the Court in countries affected by armed conflict. Despite its growing concern about socio-economic harms in these contexts, the evaluation of state conduct is carried out by stretching traditional duties to respect and protect civil and political rights, with a great emphasis on cases in which authorities directly violate rights or fail to prevent and investigate abuses in the context of state terrorism practices. Owing to this, the Court has failed to develop a solid ESR-based framework to establish state responsibility after episodes of widespread violence.

3 STRETCHING THE OFFENDING STATE-VICTIMISED INDIVIDUAL PARADIGM: A SHORT-SIGHTED APPROACH TO SOCIO-ECONOMIC HARMS DUE TO WIDESPREAD VIOLENCE

Since its first rulings, the IACtHR has consistently pointed out that ‘the very origin of [state] responsibility arises from the non-observance of the obligations recognised in Articles 1.1 and 2 of the [American] Convention’.²³ In *Velásquez-Rodríguez v Honduras* it laid down that Article 1.1 imposes two main duties on states. The first is a negative obligation that limits the exercise of public power in relation to the rights recognised in the American Convention (obligation *to respect*), while the second requires that state authorities ‘organise all the

¹⁹ Second Report Colombia (n 16) ch X ss A-B.

²⁰ Abramovich, ‘From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System’ (2009) 6 *Sur-International Journal of Human Rights* 7, 8-9; Burgorgue-Larsen and Úbeda de Torres, ‘“War” in the Jurisprudence of the Inter-American Court of Human Rights’ (2011) 33 *Human Rights Quarterly* 148, 156-160.

²¹ Burgorgue-Larsen and Úbeda de Torres (n 20) 160; Abramovich (n 20) 9, 11.

²² Annual Report of the Inter-American Commission on Human Rights 1990-1991 (IACmHR, 22 February 1991) ch V, s II 2.

²³ *Mapiripán Massacre v Colombia* IACtHR Series C 134 (15 September 2005) para 108.

structures through which public power is exercised, so that they are capable of *ensuring* the free and full enjoyment of human rights’ (emphasis added).²⁴ Sepúlveda points out that while the scope and content of the obligation to respect can be defined with relative ease, the obligation to ensure or guarantee human rights has a shape more difficult to grasp.²⁵ In contexts of abuse of power, this obligation has been framed first and foremost as the general duty to prevent and investigate violations perpetrated by state authorities, with their support or acquiescence.²⁶ As the Court consolidated in the region, the obligation to ensure has become an umbrella concept including a wide range of state duties. These include: taking preventive security measures to protect an individual from the conduct of non-state actors;²⁷ not imposing obstacles on communities to provide their own means of subsistence;²⁸ directly providing certain people with economic and social goods,²⁹ amongst many others.

Given the challenge posed in terms of the careful delineation of the different duties that are comprised under the obligation to ensure human rights, scholars have resorted to the tripartite structure of duties to respect, protect and fulfil developed by the ESCR Committee.³⁰ As explained in the Introductory Chapter, this study will also make use of the tripartite categorisation to address the jurisprudence of the IACtHR, a step that, as will be seen, has been promoted from San José. In so doing, this chapter will refrain from ‘granting a conventional hierarchy to norms contained in other international instruments related to ESCR’ and will not expect the Court to assume ‘jurisdiction over treaties over which it does not have it’.³¹

That said, this section delves into the Court’s understanding of the scope of state responsibility during and after episodes of generalised violence. The scope of state responsibility will be analysed in the following scenarios: state responsibility for violations attributed directly to official authorities, in cases involving state terrorism and legitimate use of force; and state responsibility for abuses perpetrated by non-state actors, with and without the complicity of state authorities. In outlining the scope of duties to respect and protect in these scenarios, this

²⁴ *Velásquez-Rodríguez v Honduras* IACtHR Series C 4 (29 July 1988) para 116.

²⁵ Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (2003), 172.

²⁶ *Velásquez-Rodríguez* (n 24) para 166.

²⁷ *Pueblo Bello Massacre v Colombia* IACtHR Series C 140 (31 January 2006) para 112.

²⁸ *Xákmok Kásek Indigenous Community v Paraguay* IACtHR Series C 214 (24 August 2010) para 189.

²⁹ *Sawhoyamaya Indigenous Community v Paraguay* IACtHR Series C 146 (29 March 2006) paras 171-3.

³⁰ Nolan, ‘Regional Approaches to the Obligation to Protect Social and Economic Rights’ (2009) *Human Rights Law Review* 2009, 230-6.

³¹ *Cuscul Pivaral v Guatemala* IACtHR Series C 359 (23 August 2018) para 110.

section will also examine the important, albeit insufficient attempts by the Court to address ESR-related concerns after serious abuses.

3.1 Duties to respect and protect in cases of state terrorism and legitimate use of force

3.1.1 State terrorism, impunity and socio-economic harms

From its foundational and more renowned case-law, the IACtHR has dealt with systematic violations of human rights resulting from deliberate breaches of the obligation to respect by state authorities. A solid body of jurisprudence has been consolidated defining the situations in which such practices directly engage state responsibility, be it because of the conduct of the state's own security forces³² and/or agents acting under their direction and control.³³ While state responsibility is triggered in these scenarios 'immediately with the wrong attributed to [the state]',³⁴ the lack of effective criminal investigation has consistently been considered, in addition to a breach of the Convention in itself, a crucial feature for determining the existence of practices of state terrorism or other forms of abuse of power.³⁵

Throughout these cases, the Court's commitment to deontological ethics emerges, as well as the special importance it attaches to official and deliberate wrongdoing. From a moral standpoint, one possible way to explain why official violations are utterly immoral is that they subvert the very ideas of the rule of law and justice. Pogge exemplifies this with abuses perpetrated in plain sight by authorities, where wrongdoings are masqueraded 'under the name of law and justice' and committed 'quite openly for all to see'.³⁶ These insights are part and parcel of the Court's reasoning. In *Velásquez-Rodríguez* the Court decried that state agents carried out illegal detentions 'openly and without any pretence or disguise' in contexts of blatant impunity.³⁷ The IACtHR, too, considered that through these acts the very idea of the rule of law is undermined, as they 'evidence a disregard of the duty to organise the state in such a manner as to guarantee [the Convention] rights'.³⁸ For the Court, 'the state is subject to law

³² See e.g. *Gómez-Paquiyaui Brothers v Peru* IACtHR Series C 110 (8 June 2004) para 88; *Members of the Village of Chichupac and Neighbouring Communities of the Municipality of Rabinal v Guatemala* IACtHR Series C 328 (30 November 2016) para 154; *Bámaca-Velásquez v Guatemala* IACtHR Series C 70 (25 November 2000) paras 121-4, 143.

³³ See e.g. *Blake v Guatemala* IACtHR Series C 36 (24 January 1998) paras 75-7, 83; *Velásquez-Rodríguez* (n 24) paras 147, 182.

³⁴ *Gómez-Paquiyaui Brothers* (n 32) para 75.

³⁵ *ibid.* paras 80-8; *Godínez Cruz v Honduras* IACtHR Series C 5 (20 January 1989) para 167.

³⁶ Pogge, *World Poverty and Human Rights* (2013), 45.

³⁷ *Velásquez-Rodríguez* (n 24) para 147(d).

³⁸ *Velásquez-Rodríguez* (n 24) para 158. See also *Godínez Cruz* (n 35) para 167; *Gómez-Paquiyaui Brothers* (n 32) paras 80-8.

and morality’³⁹— with morality meaning here the obligation of the state authorities *to respect* the rights of the individual.⁴⁰

Flirting with a concept that comes and goes in its jurisprudence and remains obscure as to its consequences,⁴¹ and perhaps expressing its struggle to give shape to its moral intuitions, the IACtHR has considered that in episodes of state terrorism responsibility is ‘aggravated’.⁴² This term addresses the fact that official and deliberate wrongdoing is such an unacceptable conduct that it cannot be properly understood using the traditional framework of duties to respect and protect. In the Court’s own words, when state power is ‘orchestrated as a means to violate rights that should have been respected’, authorities are not only failing ‘abysmally to fulfil their obligations to respect and protect’ but they use ‘their official position and resources granted by the State to commit the violations’.⁴³

Despite the fact that the offending state–victimised individual paradigm is not the most fertile ground to develop positive duties to fulfil ESR,⁴⁴ it has brought to the surface relevant consequences for authorities in terms of securing ESR after widespread violence. The Court has addressed some of these consequences when dealing with a particular group of people affected by widespread violence, namely internally displaced persons (IDPs), in contexts where authorities have failed to bring to justice those responsible for acts of state terrorism. In the 2005 judgment *Moiwana Community v Surinam*, for instance, an expansive analysis of the duty to carry out criminal investigations was conducted to determine the authorities’ responsibility for the socio-economic wrongs that followed impunity.⁴⁵ In these and other cases, the Court laid down that the lack of investigation and prosecution of those who forced communities to flee entails a *de facto* restriction that makes it impossible for them to return to their lands and provide their means of subsistence, facing poverty and deprivation.⁴⁶

³⁹ *Velásquez-Rodríguez* (n 24) para 154.

⁴⁰ *ibid.*

⁴¹ Burgogue-Larsen and Úbeda de Torres (n 20) 156-160.

⁴² *Goiburú et al v Paraguay* IACtHR Series C 153 (22 September 2006) para 66.

⁴³ *ibid.* para 66.

⁴⁴ Sen, ‘Rights and Agency’ in Scheffler (ed), *Consequentialism and its Critics* (1998), 190; Fredman, ‘Providing Equality: Substantive Equality and the Positive Duty to Provide’ (2005) 21 *South African Journal on Human Rights* 164, 166.

⁴⁵ *Moiwana Community v Surinam* IACtHR Series C 124 (15 June 2005) para 39.

⁴⁶ *ibid.* paras 86, 102, 118-120. *See also* *Mapiripán* (n 23) paras 320-1; *Case of the Ituango Massacre v Colombia* IACtHR Series C 148 (1st July 2006) para 404 (bearing in mind that in the last three cases responsibility is not directly triggered by the conduct of state officials but the failure to prevent and investigate abuses by non-state actors).

This approach has the merit of partially addressing socio-economic wrongs by holding authorities to account. Undoubtedly, the obligation to protect communities by prosecuting perpetrators provides essential guarantees for the safe return to their lands. Nevertheless, the dire situation that IDPs usually face may require a response from a different angle, one that directly addresses existing socio-economic shortcomings after widespread violence. Studies make it clear that insecurity is not the only, and perhaps not the most important factor that prevents people from returning to their lands. The lack of guarantee of ESR at the place of return is an important factor that explains the decision of many to remain in the places where they settled following uprooting.⁴⁷

In the *Moiwana* case, the Court could have resorted to the duty to fulfil ESR developed by the CESCR Committee to address the socio-economic wrongs that affected displaced communities. As mentioned in the Introductory Chapter, the Committee explained in General Comment No. 14 that the duty to fulfil includes the obligation of authorities to provide ESR ‘when individuals or a group are unable, for reasons beyond their control, to realise [ESR] themselves by the means at their disposal’.⁴⁸ Expecting this reasoning from the Court is not unreasonable. Only two days after the *Moiwana* case was handed down, the Court issued a judgment in which it resorted to General Comment No. 14 to define the scope of duties related to the right to health in a case that also dealt with ethnic minorities without access to land.⁴⁹ In the latter case, the Court was referring to a state, such as Paraguay, that enjoys peacetime and where the violations were not perpetrated directly by the state authorities. As will be discussed throughout this chapter, the Court’s understanding of the state as a threat to the individual has prevented it from developing and applying an ESR framework following events of widespread violence.

In addressing the forms of violence that took place in the Americas through the offending state-victimised individual paradigm, the Court not only overlooked alternative frameworks to better secure ESR, but it also produced a considerably smaller amount of case-law evaluating the

⁴⁷ Surveys carried out in Colombia show that 45% of IDPs would return only if they have access to housing, 40% if the conditions of security are guaranteed, 37% if they have access to employment, 23% if they have access to livelihoods, 20% if their children receive education, 20% if the land is returned, 10% if alternative land is granted in the same municipality, 10% if they have access to health. Contraloría General de la República, *Primera Encuesta Nacional de Víctimas* (2015), 191.

⁴⁸ CESCR, General Comment (GC) No. 14: The Right to the Highest Attainable Standard of Health (E/C.12/2000/4) 11 August 2000, para 37.

⁴⁹ *Case of Yakye Axa Indigenous Community v Paraguay* IACtHR Series C 125 (17 June 2005) paras 166-8.

legitimate use of force by state security forces in situations in which the public order is affected.⁵⁰ In so doing, the Court has also failed to fully protect ESR in these scenarios.

3.1.2 Legitimate use of force and the neglect of socio-economic concerns

The two leading cases in regard to the conduction of legitimate security operations in armed conflict are *Santo Domingo Massacre* and *Operation Genesis*. Both judgments have in common the Court's focus on the planning and execution of military operations, which left unattended the full scope of socio-economic harms resulting from the wider context of violence. This was the case despite earlier judgments issued in peacetime where the Court developed a robust ESR conceptuality.

In the *Santo Domingo Massacre* case, the IACtHR found the state responsible for deploying bombs and conducting strafing in populated areas in the middle of legitimate combat with guerrilla forces. The conduct of the state security forces provoked killings, destruction of private property, and displacement of civilians. Besides the specific strafing and bombing, the IACtHR did not make additional considerations on personal and property damage resulting from hostilities and widespread violence that affected the area. For example, no responsibility was established for acts of theft and looting of property perpetrated by guerrilla forces following hostilities, nor for the general destruction of property provoked by combat between the security forces and guerrilla units. Concerning a town that was almost entirely destroyed as a result of hostilities, the assessment concerning the protection of property rights led the Court to meticulously hold the state responsible for three houses and two grocery stores affected by 'the fragments of the AN-M1A2 bomb'.⁵¹ Instead of analysing the state's positive obligations to address the socio-economic consequences derived from destruction of property, such as forced displacement, the Court narrowed the scope of state responsibility to the irregularities that occurred during the execution of the military operation.

Operation Genesis revolved around manoeuvres carried out by state security forces in tandem with paramilitary groups. These consisted of bombing military targets and land incursions to regain control over an area from the presence of guerrilla forces. Insofar as the bombing was not directed against the civilian population and did not represent a direct risk for their lives and personal integrity, the IACtHR considered that the state could not be held responsible for the

⁵⁰ Despite the strategy of some states to frame their conduct during armed conflict as a matter of legitimate use of force the Court has insisted in the paradigm of state terrorism. See e.g. *Pueblo bello* (n 27) 132-5.

⁵¹ *Case of the Santo Domingo Massacre v Colombia* IACtHR Series C 259 (30 November 2012) paras 269-82.

resulting mass displacements.⁵² Nor was the state responsible for the forced displacement of many other people in the area and nearby places given the situation of generalised violence before, during and after the incursion of paramilitary groups, including combat with guerrillas.⁵³ As if there were no other alternatives than the paradigm of state terrorism, the Court relied mainly upon the paramilitary incursion perpetrated with the cooperation of the security forces to hold the authorities to account, not for failing to respect but to protect civil and political rights from the conduct of non-state actors.⁵⁴ In this case, too, the Court did not analyse in-depth the socio-economic harms that stem from widespread violence, but rather tied its evaluation to factors such as the way the state behaved whilst conducting security operations.

The Court's deontological commitments transpire in these scenarios from the special attention that it has given to the intrinsic rightfulness or wrongfulness of conduct rather than the goodness or badness of the states of affairs it produces.⁵⁵ This is expressed by the fact that socio-economic harms that stem from these episodes were not fully analysed in their own right. On the contrary, their assessment was largely dependent on the way in which the state *behaved* during security operations and on acquiescence with the actions of paramilitaries — suggesting the state involvement in abuses.

To be fair, in *Operation Genesis* the IACtHR went a step further than in the *Moiwana* case by analysing certain ESR-related duties after the paramilitary incursion. In a few pages, the Court evaluated whether the authorities complied with the obligation to provide aid and socio-economic assistance to those displaced and quickly concluded that the response was insufficient. According to the Court, 'the physical and mental conditions that [IDPs] had to face for almost four years are not in accordance with the minimum standards required in this type of case'.⁵⁶ Unfortunately, no criteria were suggested to delineate the content of these minimum standards. The Court merely stated that the conditions of 'overcrowding, [access to] food, water supply and management, as well as the lack of adoption of health measures show a breach of the state's obligations to protect after the displacement'.⁵⁷ In the same vein, although the Court welcomed measures taken by the state to address the displacement caused

⁵² *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v Colombia* IACtHR Series C 270 (2013) paras 226, 239, 240, 285.

⁵³ *ibid.* paras 284, 429, 430.

⁵⁴ *ibid.* para 290.

⁵⁵ Williams, 'Consequentialism and Integrity' in Scheffler (ed) (n 44), 21.

⁵⁶ *Operation Genesis* (n 52) paras 320-4.

⁵⁷ *ibid.* para 323.

by the bombing in *Santo Domingo*, including the provision of humanitarian aid and access to housing, it found the state in breach of its international obligations without further elaborating on its duties to provide ESR after widespread violence.⁵⁸

At this stage (2012-2013), the lack of sound criteria to evaluate the guarantee of ESR in these contexts is frustrating and difficult to explain, especially when it comes to displaced communities — with *Operation Genesis* involving ethnic minorities. Earlier in three cases concerning certain indigenous communities against Paraguay (2005-2010), where people were also displaced and without access to land, the Court resorted to the international ESR framework in greater detail. While the full scope of this position will be addressed later, it suffices to mention here that the Court conducted a thorough analysis of the actions undertaken by the state authorities in light of the standards defined by the ESCR Committee.⁵⁹

3.2 Duty to protect against non-state actors: Acts of collusion and due diligence obligations

In *Velásquez-Rodríguez* the Court foresaw that conduct violating human rights which initially is not directly imputable to the state can trigger its responsibility ‘not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it’.⁶⁰ The evolution of this principle has not been free of complexities and tensions,⁶¹ acquiring a more defined shape nowadays, close to the *Osman Test* developed by the European Court.⁶² Accordingly, authorities not only have the general duty to establish a criminal system to prevent, suppress and punish abuses but also to protect people from the conduct of third parties in certain circumstances.⁶³ This last duty is restricted to those cases in which authorities were aware of a risk situation and did not take reasonable measures to prevent it from materialising.⁶⁴ The key element of this analysis is whether non-state actors collude with authorities in perpetrating abuses: as the level of complicity increases, the rigor with which the *Osman Test* is applied decreases.

⁵⁸ *Santo Domingo* (n 51) paras 262-8.

⁵⁹ *Yakye Axa* (n 49) paras 167-8.

⁶⁰ *Velásquez-Rodríguez* (n 24) para 172.

⁶¹ Abravovich, ‘Responsabilidad Estatal por Violencia de Género: Comentarios sobre el Caso “Campo Algodonero” en la Corte Interamericana de Derechos Humanos’ (2010) *Anuario de Derechos Humanos* 167, 173.

⁶² See *Osman v The United Kingdom* App no 87/1997/871/1083 (ECtHR, 28 October 1998) para 116. For a comparative analysis of the application of the *Osman Test* by the two courts, see generally Ebert and Sijniensky, ‘Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the *Osman Test* to a Coherent Doctrine on Risk Prevention?’ (2015) 15 *Human Rights Law Review* 343.

⁶³ *Pueblo Bello* (n 27) para 112.

⁶⁴ *ibid.* para 123. See also *Gómez Virula v Guatemala* IACtHR Series C 393 (21 November 2019) para 56.

3.2.1 The complicity of state authorities with non-state actors: Addressing the socio-economic harms affecting IDPs?

Scholars have underlined that the IACtHR tends to give paramount importance to contextual elements in defining the scope of state responsibility.⁶⁵ In Colombia, these have included enactment of laws that created non-state armed groups, such as paramilitary groups, to combat guerrillas; material assistance and logistical support to paramilitary groups for this purpose; and the lack of effective measures to dismantle paramilitary structures when their human rights abuses became manifest.⁶⁶ Within this context, the state authorities have been found in breach of the duty to prevent abuses by third parties in the absence of prior specific knowledge of the risk situation that threatened victims,⁶⁷ thereby applying the *Osman Test* flexibly.

One of the paradigmatic cases of complicity between security forces and paramilitary groups, the *Mapiripan massacre*, allowed the Court to go further in shaping the scope of socio-economic wrongs in conflict-related situations. In this case, the Court determined that the Colombian authorities were responsible for the displacement caused by paramilitaries by facilitating access to the area, not taking protective measures during the massacre, and not conducting appropriate investigations after abuses. The IACtHR carried out a detailed analysis of the plight of those forced to flee and concluded they were affected by a ‘*de facto* situation of lack of protection’.⁶⁸ They not only found their right to freedom of movement restricted (Article 22), but they lacked the minimum socio-economic conditions compatible with the dignity of the human person, in breach of Articles 1(1), 4(1), 5(1) and 19 ACHR. This was the case because of the hardships which followed uprooting and patterns of marginalisation and discrimination that resulted from cultural prejudices, as well as the challenges that people from rural areas generally face when it comes to providing their means of subsistence in cities.⁶⁹

These advances in addressing socio-economic wrongs, however, were still modest. Given the gravitational pull exerted by the understanding of the state as the *assailant*, the assessment of its positive duties to guarantee ESR after abuses was not developed. Reference made to a leading case on ESR issued in peacetime, namely the *Yakye Axa* case, had no real impact on

⁶⁵ Burgorgue-Larsen and Úbeda de Torres (n 20) 155-6. See also Lessard ‘Preventive Reparations at a Crossroads: the InterAmerican Court of Human Rights and Colombia’s Search for Peace’ (2018) 22 *The International Journal of Human Rights* 1209, 1213.

⁶⁶ *Case of 19 Merchants v Colombia* IACtHR Series C 109 (05 July 2004) paras 150-6; *Mapiripan* (n 23) para 114, 123; *Pueblo Bello* (n 27) paras 125-7.

⁶⁷ *Pueblo Bello* (n 27) paras 138-140.

⁶⁸ *Mapiripan* (n 23) paras 169-177; *Ituango* (n 46) paras 210-3.

⁶⁹ *Mapiripan* (n 23) paras 175-189.

the decision taken. As in the *Moiwana* case, ‘positive steps’ ordered by the Court were largely reduced to prosecuting perpetrators.⁷⁰ As in *Operation Genesis*, embryonic considerations about the authorities’ obligations regarding ESR were watered down in view of the duty to protect people’s civil and political rights from non-state actors.

3.2.2 Non-state actors not colluding with state authorities: An embryonic obligation to ensure the right to housing?

The IACtHR has conducted a strict application of the *Osman Test* in the few cases in which it has ruled over abuses perpetrated by ‘pure’ non-state actors, that is to say, violations in which there is no indication of complicity by security forces. Both in the *Cotton Field* and *Castillo* cases, the Court held that in the absence of a real and imminent risk the authorities knew or should be aware of state responsibility is not triggered.⁷¹ Despite that in *Cotton Field* it was widely proved that poor women were systematically victimised, state responsibility was compromised not because of the disappearance of the victim as such but because of the authorities’ delay in carrying out inquiries after they were informed about the events.⁷² In *Castillo*, the Court did not declare the state responsible for the killing of a human rights activist by non-state actors since there was no denunciation of the risk or request of protection measures.⁷³ This was the case despite public acknowledgement of a situation of insecurity and violence against human rights activists in the region.⁷⁴

Ebert and Sijniensky criticise that in the IACtHR’s case-law there seems to be no *general obligation* to protect people from pure non-state actors in contexts of generalised violence.⁷⁵ This is the case despite the fact that certain sectors of the population are visibly at risk, such as women or human rights advocates, or that a situation of internal disturbance has been declared in the area.⁷⁶ If the IACtHR found the state not responsible for the killing of a land restitution leader in a region where human rights advocates were targeted and persecuted at large in *Castillo*,⁷⁷ it seems that people affected by the atmosphere of generalised violence find themselves on the peripheries of state responsibility, as the Court seemingly recognised

⁷⁰ *ibid.* paras 178-181.

⁷¹ *González (“Cotton Field”) v Mexico* IACtHR Series C 205 (16 November 2009), paras 282, 463; *Castillo González v Venezuela* IACtHR Series C 256 (27 November 2012), paras 128-9. *See also* *Gómez Virula* (n 64) para 56.

⁷² *Cotton Field* (n 71) para 282.

⁷³ *Castillo* (n 71) para 131.

⁷⁴ *ibid.* para 126.

⁷⁵ Ebert and Sijniensky (n 62) 343, 362-4.

⁷⁶ *Yarce v Colombia* IACtHR Series C 325 (22 November 2016) para 271.

⁷⁷ *Castillo* (n 71) paras 34-7.

recently in *Yarce v Colombia*. In this case, the reasons provoking the victims' displacement included combat between insurgent and paramilitary groups, threats to human rights defenders and rumours about possible attacks.⁷⁸ State responsibility was not triggered by any of these factors.⁷⁹ In interpreting its case-law retrospectively, the Court clarified that to establish state responsibility it is required to demonstrate 'the collaboration, assistance, help, or State tolerance' with non-state actors, which is to say, that 'the wrongful act could not have been done without State acquiescence'.⁸⁰

To some extent, these conclusions are nothing new in the Inter-American human rights system. Already in 1999, the Commission acknowledged that in situations of widespread violence 'the state cannot always prevent, much less be held responsible for, the harm to individuals and destruction of private property occasioned by the hostile acts of its armed opponents'.⁸¹ What is rather striking is that after more than a decade has elapsed, including major advances on ESR enforcement in peacetime, the Court remains stuck to the categorical offending state–victimised individual paradigm after serious abuses.

To be fair, in *Yarce* the Court took another step towards the protection of ESR. The Court evaluated the reaction of the authorities to the displacement they were aware of, including the provision of humanitarian aid, measures to facilitate the return of IDPs to their homes, or the provision of alternative housing if return was impossible.⁸² Importantly, it made the point that authorities have to 'adopt the necessary measures to *protect* the assets of the victims [their houses] and *provide* them with mechanisms to obtain adequate housing' (emphasis added) once they are aware of the situation.⁸³ As Judge Ferrer Mac-Gregor rightly emphasised in a concurrent opinion, the Court is making here a not-so-implicit use of the tripartite categorisation developed by the ESCR Committee — though under the heading of the right to property.⁸⁴ However, what adequate housing entails, and the extent to which access to it depends on the state's failure to take protection measures, are crucial aspects that remained unresolved.

The analysis carried out so far reflects a steady interest of the Court in addressing socio-economic harms in conflict-related scenarios. However, given that these harms are addressed

⁷⁸ *Yarce* (n 76) paras 107-9, 117, 120, 218-9, 222.

⁷⁹ *ibid.* paras 239, 245.

⁸⁰ *Yarce* (n 76) para 180, fn 259.

⁸¹ Third Report Colombia (n 16) ch IV, para 4.

⁸² *ibid.* paras 240-5.

⁸³ *ibid.* para 259.

⁸⁴ Concurring opinion *Yarce* (n 76) paras 80-3.

through the framework that considers the state as a threat to the individual, the Court ends up addressing reactively and hesitantly what probably involves autonomous ESR violations from the perspective of the state as an active guarantor of rights.⁸⁵ The lack of an ESR-based framework after widespread violence is evident and the question arises as to why the peacetime approach to positive duties to fulfil ESR, significantly developed by 2010, has not been fully implemented after serious abuses. One possible explanation for this is the Court's remedial practice, which at times counteracts its focus on obligations to respect and protect civil and political rights by ordering the adoption of remedies with a clear socio-economic content.

The remedial practice of the Court is crucial for the present study. As mentioned above, the first question that inspires this research is whether, when addressing the plight of people affected by generalised violence, access to socio-economic goods should depend on a retrospective evaluation of state responsibility; or whether existing shortcomings should be tackled directly, through the state's positive duties to fulfil ESR. The Court's remedial practice will exemplify the limitations of adopting the first alternative.

4 REPARATIONS WITHIN THE OFFENDING STATE-VICTIMISED INDIVIDUAL PARADIGM

4.1 Reparations after widespread violence

Pursuant Article 63(1) ACHR, the IACtHR repeatedly holds that reparation of harm caused by the breach of an international obligation requires the reestablishment of the situation that would have existed in the present had the wrongdoing not been committed.⁸⁶ If *restitutio in integrum* is impossible, the 'court must order that steps be taken to guarantee the rights infringed, redress the consequences of the infringements, and determine payment of indemnification as compensation for damage caused'.⁸⁷ Although initially more prone to awarding only monetary compensation, the Court's remedial practice rapidly evolved and now it is deemed to be the most innovative and comprehensive in international law.⁸⁸

⁸⁵ Melish, 'The Inter-American Court of Human Rights' in Langford (ed), (n 15) 400.

⁸⁶ *Case of Velásquez Rodríguez v Honduras* IACtHR Series C 7 (21 July 1989) paras 25-6.

⁸⁷ *Case of Barrios Altos v Perú* IACtHR Series C 87 (30 November 2001) para 25.

⁸⁸ Sandoval, 'Two steps forward, one step back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes' (2017) 22 *International Journal of Human Rights* 1192, 1192; Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 *Columbia Journal of Transnational Law* 351, 371; Cassel, 'The expanding Scope and Impact of Reparations awarded by the Inter-American Court of Human Rights' in Bossuyt *et al* (eds), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (2006) 91, 92.

The breadth and depth of remedies issued by the IACtHR makes it difficult to provide a single form of classification. Scholars⁸⁹ propose the three headings enshrined in the ‘Basic Principles on the Right to a Remedy and Reparations for Victims’ as a possible taxonomy, namely (a) access to justice; (b) access to reparation, which encompasses *restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition*; and (c) access to information, which may include measures related to truth seeking.⁹⁰ The Court’s practice endorses these taxonomies with more or less rigour depending on the case; in many occasions, it only mentions compensation for material and moral damages and includes many of the other sub-categories under the heading ‘Other forms of reparation (*Satisfaction Measures and Guarantees of Non-Recurrence*)’.

The award of measures related to ESR has been part and parcel of the general remedial practice of the Court — though, in most cases, given the state’s failure to respect and protect civil and political rights.⁹¹ This trend has been followed to some extent in the aftermath of widespread violence, especially in the context of the armed conflicts that affected Guatemala, El Salvador, and Suriname over the 1980s. These were extreme cases of state terrorism, where the security forces deliberately and indiscriminately attacked the civilian population, killing many, razing entire towns and forcing the displacement of entire communities. Although these cases were strictly framed under a civil and political rights lens, remedies issued by the Court appear to provide a satisfactory response in terms of ESR enjoyment. In *El Mozote Massacres* case, for instance, the Court considered that the forced displacement that followed the massacres, together with the precarious living conditions facing IDPs, entailed a violation of their right to freedom of movement and residence (Article 22(1)).⁹² The Court delved into socio-economic wrongs by considering that the destruction of livestock, crops and houses by the security forces entails a violation of the right to property and an abusive interference in private life (Articles 11(2), 21(1) (2)). Although this case, as well as other ‘scorched earth operations’ perpetrated by the state authorities in Guatemala and Suriname,⁹³ were framed primarily in terms of

⁸⁹ Cassel (n 88) 92-3; Lessard (n 65) 1209.

⁹⁰ 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 (A/RES/60/147) 21 March 2006, paras 19-23.

⁹¹ González, *The Social Rights Jurisprudence in the Inter-American Court of Human Rights: Shadow and Light in International Human Rights* (2018), 2.

⁹² *Massacres of El Mozote and surrounding areas v El Salvador* IACtHR Series C 252 (2012) para 195.

⁹³ *Case of Plan de Sánchez Massacre v Guatemala* IACtHR Series C 105 (29 April 2004) paras 42(6); *Chichupac Village* (n 32) para 79.

requiring authorities to abide by their negative obligations to respect and protect,⁹⁴ positive socio-economic duties stemmed from these judgments. In the cases of *El Mozote* and *Chichupac Village*, the Court was clear that authorities are not only obliged to respect the victims' right not to be forcibly displaced and to protect them from forced uprooting, but also to provide the necessary conditions that allow a safe return to their lands in conditions of dignity.⁹⁵ In this connection, the Court ordered in *El Mozote* the adoption of a social development plan under the heading of *restitution*, which included: provision of public services of water and electricity; access to health centres, educational services and housing; and improvements to the public road system.⁹⁶ Similar development plans were ordered in the cases of the *Moiwana Community* and *Plan de Sánchez* under the heading of *Other forms of reparation (Satisfaction Measures and Guarantees of Non-Recurrence)*.⁹⁷ Along the same lines, when the applicants' property and homes have been affected, the Court has ordered the implementation of housing policies,⁹⁸ as well as the reopening of schools and the provision of medical services that were interrupted due to widespread violence.⁹⁹

In all these cases, then, the Court's expansive remedial practice can be considered to balance the emphatic assessment of the authorities' misconduct regarding the occurrence of abuses in terms of duties to respect and protect civil and political rights. For in issuing far-reaching measures, the IACtHR is fully eliminating the consequences of wrongdoing by ordering crucial socio-economic goods for those affected.¹⁰⁰ Perhaps because of this, scholars who appreciate the breadth of these decisions have not raised the issue of the autonomous application of ESR in the aftermath of serious abuses.¹⁰¹

That said, the Court's remedial practice may end up backfiring. For one thing, the Court is replacing an ESR-based framework to define state duties after widespread violence, which is the most natural avenue to order development plans and the provision of substantive socio-economic goods, with short-sighted considerations about the existence of official violations and compliance with due diligence obligations to protect and investigate abuses by non-state

⁹⁴ *Mozote* (n 92) para 195; *Plan de Sánchez* (n 93) paras 49.4, 49.5, 49.18, (52)3; *Chichupac Village* (n 32) para 34; *Moiwana Community* (n 45) paras 86, 102.

⁹⁵ *Mozote* (n 92) 186-8; *Chichupac Village* (n 32) paras 183-202.

⁹⁶ *Mozote* (n 92) paras 339, 350.

⁹⁷ *Moiwana Community* (n 45) paras 213-5; *Case of Plan de Sánchez Massacre v Guatemala* IACtHR Series C 116 (19 November 2004) paras 105-110.

⁹⁸ *Ituango* (n 46) para 407; *Plan de Sánchez* (n 97) para 105.

⁹⁹ *Case of Aloeboetoe et al v Suriname* IACtHR Series C 15 (10 September 1993) para 96.

¹⁰⁰ Feria Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 *Human Rights Quarterly* 431, 457-8.

¹⁰¹ Lessard (n 65); Sandoval (n 88); Cassel (n 88); Antkowiak (n 88).

actors. As Tuffi and Ferolla recently stated in another context, the Court is not developing the specific legal framework in which these far-reaching orders are inserted, nor is it establishing what this framework requires from the authorities in similar cases.¹⁰² As a result, the Court is ordering such remedies with a certain level of discretion. For example, if in the *Maiwana* case the lack of criminal investigations influenced the Court's decision to require the authorities to implement a development plan, in similar 'impunity cases' comparable socio-economic measures should have been granted or at least discussed, which did not happen.¹⁰³

Yet there are other compelling reasons why the Court's corrective practice fails to balance the narrow understanding of the state as a threat to the individual after widespread violence. In Guatemala, El Salvador and Suriname, the main actor responsible for violations was the state. However, as will be discussed below, it is not uncommon to find that 'pure' non-state actors, such as rebels, are equally responsible for the harm inflicted on the civilian population. Without forgetting that the very circumstances of armed conflict, such as legitimate combat, tend to leave a trail of socio-economic harm for which state authorities may not always be held to account. In these cases, then, the Court's expansive remedial practice may be addressing socio-economic wrongs only incompletely, running the risk of placing victims affected by forms of violence not sponsored by the state at the margins of state response.

4.2 The neglect of victims outside the offending state-victimised individual paradigm: People affected by rebel groups and the general circumstances of armed conflict

As discussed in the Introductory Chapter, the paradigmatic case of dictatorship which affected the south of the American region involved vertical and targeted violence, sponsored by state authorities against specific sectors of the population. In armed conflict, on the contrary, violence often assumes a horizontal nature and includes different armed actors and the dynamics of conflict itself.¹⁰⁴ 'Pure' non-state actors, for instance, may bear greater responsibility than authorities for abuses, as exemplified by the Peruvian experience. According to the Peruvian Truth and Reconciliation Commission, state agents were responsible for 30 percent of fatalities, while the insurgent group *Sendero Luminoso* was responsible for

¹⁰² Tuffi and Mariana Vallondro do Valle, 'The Inter-American Court of Human Rights and the Quest for Equality: The Fireworks Factory case' *EJIL: Talk!* <www.ejiltalk.org/the-inter-american-court-of-human-rights-and-the-quest-for-equality-the-fireworks-factory-case/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 29 January 2021.

¹⁰³ See e.g. *Operation Genesis* (n 52); *Ituango* (n 46); *Mapiripan* (n 23).

¹⁰⁴ Kerr, 'Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges' in Duthie and Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (2017), 125-9.

approximately 46 percent of them. Other unidentified agents, along with armed clashes and other conflict-related situations, explained the remaining 24 percent of deaths.¹⁰⁵ In Colombia, at least 40 percent of IDPs were forced to flee due to rebel groups.¹⁰⁶ Given the limitations that follow from due diligence obligations, these IDPs often face the risk of finding themselves on the margins of state responsibility. As discussed above, with regard to ‘pure’ non-state actors, authorities cannot be held responsible for violations unless they are aware of a risk situation/complaint and do not adopt reasonable measures to respond to it. However, these requirements cannot be taken for granted in the American context, since forced displacement usually takes place ‘drop by drop’, meaning discrete individual displacements or the displacement of no more than one household;¹⁰⁷ it occurs in regions where the state has little or no presence;¹⁰⁸ and it results from daily acts of coercion against specific members of the community that are often invisible, such as threats.¹⁰⁹ By the same token, the extent of state responsibility for socio-economic harms which generally follow combat between security forces and non-state actors ends up depending on a short-sighted analysis of whether there was an irregularity in the planning and execution of military operations. For this reason, many of those who were affected by combat and surrounding situations of violence also run the risk of being placed on the margins of state responsibility,¹¹⁰ including their socio-economic demands, especially when security operations were carried out lawfully (for example, the aerial bombardment in *Operation Genesis*).

The Court’s extensive remedial practice offers no relief for these people. Not only it obscures the importance of developing an ESR-based framework sensitive to their needs, but also places them in the harsh situation where they are denied access to much-needed socio-economic goods and development plans granted as reparations. It is difficult to defend a regime of state responsibility in which victims of rebel groups are not entitled to the goods and services that

¹⁰⁵ Comisión de la Verdad y Reconciliación, *Informe Final* (2003) Annex 2, 13.

¹⁰⁶ Around 36 percent of the displaced persons in Colombia fled due to paramilitary groups, 27 percent due to the FARC guerrilla, 14 percent to another guerrilla group, 10 percent to an unidentified armed group, 8 percent to more than one armed group, 1 percent to organised crime and 0.5 percent to the security forces of the state. Contraloría General de la República (n 47) 66.

¹⁰⁷ Drop-by-drop displacements, consisting of individual displacements or the displacement of no more than one household, amount to 55 percent of forced displacements, followed by uprooting of 2 to 10 households (23 percent) and massive displacements of more than 10 households (20 percent). *ibid.* 63.

¹⁰⁸ Centro Nacional de Memoria Histórica, *Una Nación Desplazada: Informe Nacional del Desplazamiento Forzado en Colombia* (2015), 93.

¹⁰⁹ If the causes provoking the displacement are analysed, the result is that around 66 percent of the displacements are the product of direct and indirect threats, 15 percent of the killing of neighbours, friends or family members, 8 percent of combats, and 5 percent of the fear of forced recruitment of children. Contraloría (n 47) 61.

¹¹⁰ In Peru these people could represent 24 percent of those affected, *see* n 105. While in Colombia it could be around 8 percent: Contraloría (n 47) 61.

the Court does recognise in favour of victims of state agents or paramilitary groups. This is even more difficult to accept if the Court has already developed an ESR protection framework in peacetime that could be mobilised to address the plight of those affected by violence, as will be explained below.

The Court's reasoning ends up forgetting that the impact of widespread violence on victims, as exemplified by IDPs, generally jeopardises their ESR regardless of who the perpetrator is and the causes of wrongdoing.¹¹¹ Because of this, rather than addressing socio-economic wrongs in their own right, the Court insists on tracing them to violations perpetrated or tolerated by authorities. In *El Mozote* the Court illustrates this point by differentiating general displacement due to armed conflict, from displacement purposefully perpetrated by authorities in light of the state terrorism paradigm. The socio-economic wrongs that accompanied uprooting were not the source of state responsibility by themselves but were considered 'direct consequences' of the massacres perpetrated by state agents.¹¹² Therefore, to a certain extent, the Court reaffirms the Commission's opinion, expressed in the 1993 report on Colombia, that generalised violence and its negative impact on the observance of ESR are *contextual* elements in which the 'real' civil and political rights violations are inserted.¹¹³ By adopting the offending state-victimised individual paradigm, the Court is placing ESR at the bottom rung of the ladder of moral and legal importance in (post)conflict settings. Dire states of affairs matter only to the extent that they can be attributed to intentional wrongdoing by state agents or conduct by other actors for whom authorities must be held accountable.

To address the shortfalls that arise from the IACtHR's predominant approach, it is required to resort to jurisprudence developed in peacetime, namely the right to a dignified life and the direct enforceability of ESR. As will be seen, these alternatives are somehow closer to consequentialism, as they loosen the strong grip that deliberate and arbitrary violations exercise in the evaluation of state responsibility, attaching to existing socio-economic shortcomings a new ring of importance. Instead of conceiving the state as the assailant, these alternatives open the path to understand it as an active guarantor of rights responsible for fulfilling ESR in contexts of inequality and exclusion. Applied after widespread violence, the right to a dignified life and the direct enforceability of ESR will raise difficult distributive issues captured in the

¹¹¹ Maria Stavropoulou, 'The Right Not to be Displaced' (1994) 9 *American University Law Review* 689, 738.

¹¹² *Mozote* (n 92) para 193.

¹¹³ Second Report Colombia (n 16) ch X ss A-B.

second research questions of this study. This question is how to weigh the ESR claims of disadvantaged groups that bear the brunt of victimisation, poverty and discrimination.

5 THE STATE AS ACTIVE GUARANTOR OF RIGHTS: APPLYING THE RIGHT TO A DIGNIFIED LIFE AFTER WIDESPREAD VIOLENCE

5.1 The right to a dignified life in the Court's peacetime jurisprudence

According to Beloff and Clérico, the notion of the right to a dignified life is an early attempt by the Court to underpin the judicial enforceability of ESR.¹¹⁴ Since the *Street Children* case, the IACtHR has understood that the right to life binds authorities not only to duties to respect life and protect it from non-state actors but also to ensure that people, especially vulnerable groups, have 'access to *the conditions* that guarantee a *dignified existence*'.¹¹⁵ From this formulation it follows that the right to a dignified life has a qualitative and quantitative element. The qualitative dimension is linked to the notion of a dignified existence, which encompasses the 'right to harbour a project of life',¹¹⁶ to pursue and achieve one's personal and professional goals.¹¹⁷ The quantitative dimension has to do with the minimum conditions that allow people to harbour a life project, meaning in the *Street Children* case that authorities should prevent people from living in misery.¹¹⁸ As the case-law consolidated, enjoying specific socio-economic goods was considered indispensable for carrying out one's life project, as carefully elaborated in the three cases involving certain indigenous communities in Paraguay, where the Court resorted to relevant General Comments of the ESCR Committee. While in *Yakye Axa*¹¹⁹ and *Sawhoyamaxa*¹²⁰ there is already some loose mention of General Comments No. 12, 14, and 15, in *Xákmok Kásek* there is a separate analysis of the right to food, water, education and health.¹²¹ The Court's reasoning is remarkable as it breaks down the notion of the right to a dignified life in a right-by-right analysis by considering positive measures undertaken by the state authorities in view of the standards that govern each of those rights.¹²²

¹¹⁴ Beloff and Clérico, 'Derecho a Condiciones de Existencia Digna y Situación de Vulnerabilidad en la Jurisprudencia de la Corte Interamericana' (2016) 14 *Estudios Constitucionales* 139, 140.

¹¹⁵ "*Street Children*" (*Villagrán Morales*) v *Guatemala* IACtHR Series C 63 (19 November 1999) para 144.

¹¹⁶ *ibid.* para 191.

¹¹⁷ *Loayza Tamayo v Peru* IACtHR Series C 42 (27 November 1998) para 147.

¹¹⁸ *Street Children* (n 115) para 191.

¹¹⁹ *Yakye Axa* (n 49) para 166.

¹²⁰ *Sawhoyamaxa* (n 29) para 164, fn 216.

¹²¹ *Xákmok Kásek* (n 28) paras 194-213.

¹²² *ibid.* para 217.

Certainly, in some of these cases the Court's deontological moral intuitions continue to play an important role. For instance, the authorities' permissiveness with practices of disappearances and 'social cleansing' affecting children living in the streets was decried with the same intensity as policies of state terrorism during armed conflict.¹²³ Likewise, the Court continues to resort to due diligence obligations to determine whether the authorities have failed to protect the right to a dignified life.¹²⁴ That said, there is a subtle but important shift in most of these cases, as well as others in which the Court protects rights in peacetime. This shift is that the Court attaches more importance to the *intrinsic* badness of states of affairs than to those factors that are at the heart of deontological morality, such as intentional wrongdoing and the authorities' complicity in rights abuses. In these judgments, the Court is dealing with states of affairs that are truly tragic, with people dying of easily preventable diseases¹²⁵ or being subject to slavery practices.¹²⁶ However, the wrongdoing of the authorities does not surpass a certain recklessness and insensitivity in carrying out ordinary administrative procedures, such as delays in titling land,¹²⁷ not conducting thorough and more effective labour inspections,¹²⁸ or not being more effective in obtaining food, providing health services and educational materials for disadvantaged people.¹²⁹ It is, to some extent, and borrowing a term from Arendt, the very 'banality' of wrongdoing that seems to upset the Court.¹³⁰ The source of evil in these cases is the 'shallow thoughtlessness of the wrongdoer', the fact that authorities are passive and behave on ordinary impulse when they should act decidedly differently.¹³¹ From San José, the judges simply could not bear the fact that the Brazilian police did not react immediately to a complaint made by two adolescents about the existence of modern slavery practices taking place on a nearby farm and asked them to return to the police station two days later because Carnival had begun.¹³²

Perhaps the reason why the Court is more sensitive to existing socio-economic shortcomings in these cases is that traditionally disadvantaged and discriminated groups are at stake, such as ethnic minorities, women or children. As Young made it clear in another context, addressing

¹²³ *Street Children* (n 115) para 190-2.

¹²⁴ *Sawhoyamaxa* (n 29) para 155; *Hacienda Brasil Verde Workers v Brazil* IACtHR Series C 318 (20 October 2016) paras 327-8.

¹²⁵ *Sawhoyamaxa* (n 29) paras 168-9.

¹²⁶ *Hacienda Verde* (n 124) paras 342-3.

¹²⁷ *Xákmok Kásek* (n 28) para 170.

¹²⁸ *Hacienda Verde* (n 124) paras 326-8.

¹²⁹ *Yakye Axa* (n 49) para 169.

¹³⁰ Arendt, *Correspondence with Scholem* (Library of Congress, Washington D.C. 1964) 1, 5-6

¹³¹ Burdman, 'Between Banality and Radicality: Arendt and Kant on Evil and Responsibility' (2019) 18 *European Journal of Political Theory* 174, 178-9.

¹³² *Hacienda Verde* (n 124) para 327.

group-related injustices requires a shift in our moral response, moving away from an ‘agent-oriented’ and ‘fault-oriented’ moral view that focuses on ‘perpetrators and intents’, to adopt a perspective that is centred on ‘victims and results’.¹³³ This result-oriented perspective requires directly addressing existing patterns of marginalisation that affect individuals due to their belonging to particular groups, patterns that are reproduced in everyday practices and institutions.¹³⁴ The Court may be sympathetic to this type of reasoning in these contexts, as considerations on equality and non-discrimination lie at the background of its understanding of the right to a dignified life.¹³⁵ Crucially, as will be seen soon, non-discrimination law also plays an important role in the few cases in which the Court has delved into the plight of people affected by violence under the notion of the right to a dignified life. Owing to this, a few words are required about the Court’s evolving position on non-discrimination and equality.

5.2 Non-discrimination law in the Court’s peacetime jurisprudence

The Court’s interpretation of the Convention provisions on equality (Articles 1(1), 24) takes the notion beyond the narrow confines of formal equality, or equality before the law, to include its ‘material or substantial dimension’.¹³⁶ The Court has repeated on many occasions that authorities cannot be blind to the personal and social characteristics of rights holders but are expected to give attention to their ‘particular needs of protection’.¹³⁷ With this bid beyond formal equality, the Court embraces the now deeply ingrained position of scholars¹³⁸ and the ESCR Committee¹³⁹ that non-discrimination implies the prohibition of both direct and indirect discrimination, as well as the duty to take positive steps to overcome existing discriminatory practices. The Court explains these notions by noting that states are forbidden to engage in arbitrary practices that place a person or group at a disadvantage on the basis of prohibited criteria.¹⁴⁰ It has also laid down that the adoption of rules or procedures that, despite being apparently neutral, entail *de facto* discriminatory practices are equally forbidden.¹⁴¹ Furthermore, states have an additional duty to take measures to reverse the situation of

¹³³ Young, *Justice and the Politics of Difference* (2011), 195-6.

¹³⁴ *ibid.* 197.

¹³⁵ Beloff and Clérico (n 114) 143-159.

¹³⁶ *Employees of the Fireworks Factory of Santo Antônio de Jesus v Brazil* IACtHR Series C 407 (15 July 2020) para 199.

¹³⁷ See e.g. *Sawhoyamaya* (n 29) para 154; *Hacienda Verde* (n 124) para 337.

¹³⁸ Fredman, *Discrimination Law* (2011), ch 4.

¹³⁹ See CESCR, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (E/C.12/GC/20) 2 July 2009, para 10.

¹⁴⁰ *Atala Riffo and daughters v Chile* IACtHR Series C 239 (24 February 2012) para 81; *Gonzales Lluy et al v Ecuador* IACtHR Series C 298 (1 September 2015) para 253.

¹⁴¹ *Girls Yean and Bosico v Dominican Republic* IACtHR Series 130 (8 September 2005) para 141; *Atala Riffo* (n 140) para 80.

disadvantage and discrimination affecting many in the region, taking into account the specificities derived from their personal characteristics, such as disabilities,¹⁴² or their belonging to particular groups, such as children,¹⁴³ women¹⁴⁴ or indigenous people.¹⁴⁵ These measures include ‘affirmative action’,¹⁴⁶ ‘preferential treatment’,¹⁴⁷ ‘priority action’,¹⁴⁸ amongst other special measures for disadvantaged groups.

While the Court’s approach to non-discrimination is largely based on the existence of traditionally prohibited grounds, such as ethnicity and gender, it has also taken the initiative to consider that living in poverty can subject people to discriminatory treatment on the grounds of ‘economic status’.¹⁴⁹ Equally important, in a few cases the Court has addressed the evils of poverty *per se*,¹⁵⁰ decrying the pressure that ingrained poverty places on people, for instance, by making them accept working conditions that are unacceptable under any standard.¹⁵¹

5.3 The right to a dignified life, non-discrimination law and people affected by violence

It is against the background of non-discrimination law that the situation of people affected by armed conflict must be framed when the right to a decent life is brought to the discussion. Both in the *Mapiripan* and *Ituango* cases the Court highlighted that IDPs were not only undergoing socio-economic hardship due to violence and uprooting. Their right to a dignified life was also jeopardised by patterns of marginalisation and discrimination given cultural prejudices and the difficulties facing rural dwellers to settle in cities and access livelihoods.¹⁵² Emphasis was also placed on the conditions of marginalisation affecting particular sub-groups of IDPs, such as women¹⁵³ and children.¹⁵⁴ Owing to the discrimination IDPs faced, the Court considered they were entitled to *preferential treatment*

In relation to this situation of inequality, it is pertinent to remember that there is an indissoluble link between the obligations to respect and guarantee human rights and the principle of equality and non-discrimination. In compliance with these obligations,

¹⁴² *Ximenes Lopes v Brazil* IACtHR Series C 149 (4 July 2006) paras 101-4.

¹⁴³ *Yean and Bosico* (n 141) para 134.

¹⁴⁴ *ibid.*

¹⁴⁵ *Sawhoyamaya* (n 29) para 154.

¹⁴⁶ *Yean and Bosico* (n 141) para 141.

¹⁴⁷ *Ximenes* (n 142) para 104.

¹⁴⁸ *Hacienda Verde* (n 124) para 332; *Yakye Axa* (n 49) para 162.

¹⁴⁹ *Ramírez Escobar and others v Guatemala* IACtHR Series C 351 (9 March 2018) paras 278-293.

¹⁵⁰ *Hacienda Verde* (n 124) para 339.

¹⁵¹ *Fireworks Factory* (n 136) paras 188-9, 203, 289.

¹⁵² *Mapiripan* (n 23) para 175.

¹⁵³ *Ituango* (n 46) para 212; *Yarce* (n 76) para 243.

¹⁵⁴ *Mapiripan* (n 23) paras 161-3, 186.

States must refrain from carrying out actions that in any way, directly or indirectly, create situations of *de jure* or *de facto* discrimination, and they must also take positive steps to revert or change existing discriminatory situations in their societies, to the detriment of a given group of persons (...) [T]he differentiated situation of displaced persons places States under the obligation to give them preferential treatment and to take positive steps to revert the effects of said condition of weakness, vulnerability, and defencelessness.¹⁵⁵

Unfortunately, given that these reflections were made under the paradigm of state terrorism, the scope of the invoked preferential treatment was not unpacked. As mentioned, positive duties were boiled down to ordering state authorities to carry out proper investigations into the abuses. That said, the very fact that the situation of these people was framed under the lens of non-discrimination should not be overlooked. Both *Mapiripan* and *Ituango* dealt with acts of violence affecting ‘white’ (*mestizo*) peasants. Given that, as explained, the Court does not usually address the evils of poverty in their own right, rather subjecting them to the existence of discrimination on traditionally prohibited grounds, using this framework to address the plight of ‘ordinary’ peasants is a breakthrough. This stance raises important distributive issues in light of the array of special measures that people discriminated against are entitled to. These issues are encapsulated in the second research question of this study of how to balance ESR claims of disadvantaged people on the basis of victimisation, material deprivation and status-based discrimination.

5.3.1 Affirmative action in favour of people affected by violence?

At face value it can be considered that people affected by violence, in the current discussion, IDPs, should be treated with *affirmative action* and thereby receive *preferential treatment* to overcome the condition of weakness, vulnerability, and defencelessness affecting them. The equality language used by the Court in the paragraph just cited, added to the mention of state duties to reverse situations of direct and indirect discrimination prevailing in the Americas, support this position. The immediate issue that comes up with this is a delicate one: Affirmative action and preferential treatment with respect to whom? It is not to forget that affirmative action, as the Court understands it, seeks reversing the hierarchical relationships between an advantaged and a disadvantaged group to achieve *equality*.¹⁵⁶

¹⁵⁵ *Mapiripan* (n 23) paras 178-9; *Yarce* (n 76) 225.

¹⁵⁶ *Atala Riffo* (n 140) para 79.

The situation of IDPs does not fit into this scheme with ease. If their situation is compared with that of non-displaced rural inhabitants, it is clear that the latter can be just as badly off given the deep impact of armed conflict in rural areas. ‘It is essential to repeat here’, Contat-Hickel stresses, ‘that those that have been unable to flee often suffer a fate very similar to that of the displaced persons themselves.’¹⁵⁷ When comparing the situation of IDPs with that of other city dwellers, host communities for example, it is also difficult to see how one group enjoys a privilege at the expense of the other, in such a way that the unprivileged is entitled to preferential treatment. Kälin and Money comment that the purpose of highlighting the plight of IDPs is not to privilege them over other people whose needs may be comparable, including the populations and communities that reintegrate them; rather, the question is to ensure that rights are equally guaranteed for all of them.¹⁵⁸

In view of Kälin and Mooney’s position, the special treatment to which people affected by violence are entitled is milder than affirmative action. Instead of seeking to bridge the gap between groups, for instance by reorganising the distribution of power between them, the purpose of special treatment is eliminating the burdens that prevent a certain person or group from enjoying rights on an equal footing with the rest of people. In the case of those who are forced to flee from rural to urban settings due to violence, it is necessary to level the playing field so that they can secure ESR ‘on the same basis as residents’.¹⁵⁹ This implies nothing more and nothing less than paying special attention to their characteristics, such as their predominant rural origin, their lower education levels, and other characteristics that place them at a disadvantage when it comes to provide for themselves in urban settings.¹⁶⁰ The basic objective of this special treatment is ‘to help the person who is badly off, not to bring about some preferred relation between what one person has and what others have.’¹⁶¹

5.3.2 The distinctive status of victims and the ‘ordinary’ poor

The *Mapiripan* case raises further questions about the specificity of victims’ ESR claims and how they relate to similar claims of other disadvantaged people. This issue, again, arises from the Court’s firm view that those affected by violence are entitled to preferential treatment. Even

¹⁵⁷ Hickel, ‘Protection of Internally Displaced Persons Affected by Armed Conflict: Concept and Challenges’ (2001) 83 *International Review of the Red Cross* 699, 708.

¹⁵⁸ Kälin, Framework on Durable Solutions for Internally Displaced Persons (A/HRC/13/21/Add.4) 29 December 2009, paras 21 (h), 68; Mooney, ‘The Concept of Internal Displacement and the Case of Internally Displaced Persons as a Category of Concern’ (2005) 24 *Refugee Survey Quarterly* 9, 19.

¹⁵⁹ Kälin (n 158) para 72.

¹⁶⁰ Mooney (n 158) 14-9.

¹⁶¹ Arneson, ‘Cracked Foundations of Liberal Equality’ in Burley (ed) *Dworkin and His Critics* (2004) 79, 90.

if the Court is not upholding affirmative action it can still argue that the interests of victims should be treated with preference over those of other disadvantaged population.

This position can be explained and justified by the possible compromise of the Court with the distinctive status of victims discussed in the Introductory Chapter, which is common amongst transitional justice scholars. It was seen that, according to the argument, the guarantee of ESR cannot be considered *prima facie* as reparation since it is about rights that are secured by virtue of the beneficiaries' status of *citizens* and not *qua victims* of serious abuses.¹⁶² In view of this, it has been accepted that victims receive preferential or priority treatment over the 'ordinary' poor when they access the state's social offer as a means of reparation.¹⁶³

The extent to which the Court endorses this position is not entirely clear, but it appears that it flirts with the idea. It certainly shares the view defended by transitional justice scholars that 'the social services that the state provides to individuals cannot be confused with the reparations to which the victims of human rights violations have a right, based on the specific damage arising from the violation'.¹⁶⁴ When requiring the state to provide applicants with free and preferential access to socio-economic goods, such as health services and housing, it has also made the point that: 'because they are victims they must receive *preferential treatment* in relation to access to public institutions'.¹⁶⁵ On other occasions, it has insisted that victims need to have *priority access* to health measures and other economic and social goods.¹⁶⁶ Furthermore, the Court laid down in *Plan de Sánchez Massacre* that in order not to mix the ESR claims of victims and non-victims, the former must have access to a full-fledged development plan that, to count as redress, must be distinct from the ordinary public policies implemented in the region.¹⁶⁷ Even if the Court does not explicitly consider that the victims' access to socio-economic goods takes precedence over that of other disadvantaged people, the very ordinary sense of these terms, coupled with the insistence on differentiating the two groups and treating victims in a special, sometimes more favourable way, lean in that direction.

¹⁶² Uprimny, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 *Netherlands Quarterly of Human Rights* 625, 635-7; Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 *Hastings International and Comparative Law Review* 157, 186-192; Kurban, *Reparations and Displacement in Turkey: Lessons Learned from the Compensation Law* (2012), 12-3.

¹⁶³ Pérez-Murcia, 'Social Policy or Reparative Justice? Challenges for Reparations in Contexts of Massive Displacement and Related Serious Human Rights Violations' (2013) 27 *Journal of Refugee Studies* 191, 195-6, 199; Correa, *Integrating Development and Reparations for Victims of Massive Crimes* (2014), 8-9.

¹⁶⁴ *Cotton Field* (n 71) para 529. See similarly *Mozote* (n 92) para 350.

¹⁶⁵ *Chichupac* (n 32) para 303.

¹⁶⁶ *Operation Genesis* (n 52) para 453; *Yarce* (n 76) para 340.

¹⁶⁷ *Plan de Sánchez* (n 97) paras 109-110.

That said, the exact scope of this position, as well as the Court's calls to preferentially address the victims' situation remain obscure. The lack of development of the right to a dignified life and non-discrimination law in conflict-related contexts, coupled with little theorisation of the distinctive condition of victims, make it difficult to advance these reflections any further here. But this is not a reason to abandon the task but rather to explore further these distributional questions, as will be done in Chapters 4 and 5 from the perspective of the ESCR Committee. There are two crucial things to keep in mind here, though.

The first is that whatever the need to further develop the notion of the right to a dignified life, its very emphasis on existing shortcomings provides a sound basis to order development plans and other socio-economic goods in the Inter-American context. Liberated from a short-sighted evaluation of the authorities' failure to respect and protect civil and political rights in the past, the Court can delve into the material conditions that states must guarantee to people affected by violence so that they can re-establish their life project as much as possible. Given that existing shortcomings are addressed in their own right, victims' access to socio-economic goods is no longer dependent on the perpetrator of violations and the circumstances in which abuses occurred, thereby avoiding the selective remedial practice criticised above.

The second point to keep in mind is that once ESR are directly addressed, the distinction between victim and non-victim begins to blur. From the very moment in which the understanding of the state as an assailant is replaced by that of the state as an active guarantor of rights, a completely different grammar enters into play, one that encompasses the fate of other disadvantaged groups. As Young mentioned, an agent-oriented and fault-oriented framework that focuses on perpetrators and intentions is supplanted by one that expects authorities to tackle existing undesirable states of affairs, undermining the prospects of people affected and unaffected by violence. With this change of perspective, questions of distributive justice become central, which are related to how to balance the claims of disadvantaged people on the basis of victimisation, social inequalities, and status-based discrimination. Some of these questions also emerge after analysing the direct enforceability of ESR by the IACtHR — although this practice, too, remains restricted within the boundaries of peacetime situations.

6 THE STATE AS ACTIVE GUARANTOR OF RIGHTS: THE POSSIBILITIES OF DIRECTLY ENFORCING ESR AFTER EPISODES OF WIDESPREAD VIOLENCE

6.1 Direct enforceability of ESR

The Court is competent to apply under its individual complaints procedure two treaties that incorporate ESR, namely the American Convention, read in conjunction with the OAS Charter, and the Additional Protocol in the Area of Economic, Social and Cultural Rights (San Salvador Protocol). While the San Salvador Protocol offers well-detailed provisions on a wide range of ESR that are relevant from the perspective of the state reporting mechanism, Article 19(6) only grants jurisdiction over individual petitions for violations of the rights to unionise (Article 8.1.) and education (Article 13). Melish explains that instead of adjudicating directly on these provisions, the Court tends to use them to interpret certain rights in the Convention, making the latter the main instrument for ESR enforcement,¹⁶⁸ as exemplified by the *Girls Yean and Bosico* case.¹⁶⁹

As the position stands today, the Court differentiates the *immediate* and *progressive* nature of obligations regarding ESR, having the competence to rule over non-compliance with both sorts of obligations. Violations of immediate obligations concerning the rights to health,¹⁷⁰ work,¹⁷¹ and water¹⁷² have been declared due to the authorities' failure to protect rights and, more broadly, secure them without discrimination. The duty of progressivity concerning the right to health has been violated once.¹⁷³ In deciding which rights can be the object of judicial review under Article 26 ACHR, the Court first resorts to the OAS Charter and the American Declaration.¹⁷⁴ Reference to other human rights provisions and decisions of monitoring bodies serves as interpretative guidelines to define the right's content, including the work of the ESCR Committee.¹⁷⁵ The particular situation of plaintiffs is generally addressed through the lens of

¹⁶⁸ Melish (n 85) 376-7.

¹⁶⁹ *Yean and Bosico* (n 141) para 185.

¹⁷⁰ *Poblete Vilches v Chile* IACtHR Series C 349 (8 March 2018), paras 104, 134-143 (i.e. duty to secure rights without discrimination); *Cuscul Pivaral* (n 31) paras 98, 139, 141.

¹⁷¹ *Lagos del Campo v Peru* IACtHR Series C 340 (31 August 2017) paras 141-154, 166 (i.e. duty to protect); *Fireworks Factory* (n 136) paras 154, 173-176 (i.e. duty to protect).

¹⁷² *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina* IACtHR Series C 400 (6 February 2020), para 272 (i.e. duty to protect).

¹⁷³ *Cuscul Pivaral* (n 31) para 147.

¹⁷⁴ *ibid.* paras 98-102; *Fireworks Factory* (n 136) para 155.

¹⁷⁵ *ibid.* paras 103-107.

state duties to immediately guarantee ESR.¹⁷⁶ General policies, regulations and laws are addressed under the duty of progressivity.¹⁷⁷

The Court's decision to directly enforce ESR opens up a hitherto unexplored path to address socio-economic wrongs after widespread violence. The purpose of the following remarks is not to develop a full-fledged account of ESR in these contexts, in part due to the very recent nature of the Court's judgments, but rather to suggest possible avenues that can be explored in the future considering the available case-law. In so doing, the nature of the challenges facing the IACtHR when it comes to directly addressing ESR in (post)conflict settings will be laid bare — challenges that are better explained by the Court's entrenched deontological views rather than by the nature of ESR law.

6.2 Enforcing ESR after widespread violence

The very existence of a framework to directly enforce ESR has immediate repercussions in (post)conflict settings, which cannot be ignored given traditional misconceptions about the nature of ESR and their differences from civil and political rights. Fundamentally, ESR violations can now be addressed by the Court on their own merit, through a right-by-right analysis focused on existing shortcomings. The scope of state responsibility is therefore not restricted to the authorities' failure to respect and protect civil and political rights in the most appalling cases of state terrorism, in very narrow military operations, and in the absence of a timely and reasonable response to prevent and investigate violations by non-state actors.

As Schmid and Nolan have made clear, there is nothing intrinsic to ESR that prevents their autonomous application in the wake of widespread violence. Enforcing ESR is not equivalent to imposing unfeasible obligations on states, nor is it tantamount to trying naively to resolve historical patterns of marginalisation and exclusion.¹⁷⁸ As with civil and political rights, violations to *respect* and *protect* ESR are too common in conflict-related scenarios, such as when the authorities themselves arbitrarily evict people from their residences or fail to protect the right to housing from non-state actors.¹⁷⁹ Addressing ESR violations after widespread violence, for instance, providing people with basic access to water, food, and health can be

¹⁷⁶ *ibid.* paras 119-139.

¹⁷⁷ *ibid.* paras 144-154.

¹⁷⁸ Schmid and Nolan, "Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 *The International Journal of Transitional Justice* 362, 371-4.

¹⁷⁹ CESCR, General Comment No. 7: The Right to Adequate Housing: Forced Evictions (E/C.12/GC/20) 20 May 1997, para 4.

even easier than dismantling criminal structures and bringing perpetrators to justice.¹⁸⁰ Likewise, both sets of rights require the implementation of complex policies after generalised violence: strengthening a housing policy does not seem to require more resources, nor is it more challenging than strengthening domestic judicial systems.¹⁸¹

Equally important, the Court's attempt to directly enforce ESR allows it to explore the scope of the duty to fulfil in the aftermath of widespread abuses, regardless of the causes that led to socio-economic deprivation and the perpetrator. This is crucial since, as has been insisted throughout these pages, the scope of duties to respect and protect is very limited in these contexts. By shifting the focus from the state's reactive response to violations to its proactive role in fulfilling ESR, the path is opened to address the plight of *all* those affected by violence without neglecting other disadvantaged people facing similar circumstances.

In the Court's burgeoning ESR jurisprudence there are already important precedents regarding duties to fulfil specific rights that can be tailored to (post)conflict settings, such as the right to work. In the *Fireworks Factory v Brazil* case, the Court held the defendant responsible for the explosion of a fireworks factory that killed many. The Court addressed the chronic and systemic unemployment that afflicted certain poor communities, which forced its members to accept the jobs offered by the factory, despite the fact that basic labour standards were not met.¹⁸² Given the lack of education and skills affecting accident survivors and community members, the Court ordered the authorities to implement a programme to boost their job opportunities. In so doing, the Court remarked, authorities should be very aware of the specific traits of beneficiaries, this is, their situation of ingrained poverty coupled with factors such as age, gender and ethnicity.¹⁸³

There is no reason why this reasoning cannot be applied regarding access to work and livelihoods by people affected by armed conflict. The Court has already recognised that the rural origin of many of them makes it difficult to generate income in cities, and that women bear additional burdens due to the care tasks they usually undertake.¹⁸⁴ If in peacetime the Court has already ordered the implementation of measures related to access to work to tackle poverty, and if the Court has also stressed that armed conflict plunges people into poverty,¹⁸⁵

¹⁸⁰ Schmid and Nolan (n 178) 373.

¹⁸¹ *ibid.* 375-6.

¹⁸² *Fireworks Factory* (n 136) para 189.

¹⁸³ *Fireworks Factory* (n 136) paras 172, 289.

¹⁸⁴ *Mapiripan* (n 23) para 175.

¹⁸⁵ *Mapiripan* (n 23) para 180.

it seems clear that violence-induced poverty must be addressed through the direct application of the right to work.

The Court's emerging treatment of the obligation of progressivity also provides a fertile ground to inform the authorities' response in the aftermath of widespread violence, including balancing the interests of different groups with ESR claims. In *Cuscul Pivaral*, the Court established that Guatemala was responsible for violations of the right to health of a group of people affected by HIV. The Court determined that the state authorities failed to comply with both their immediate obligations to ensure access to state services without discrimination, to the detriment of individualised victims, and their obligation to progressively achieve the full realisation of the right to health, to the detriment of people in similar circumstances. In this regard, in addition to assessing the state's conduct *vis-à-vis* the plaintiffs, the Court took into account the situation of individuals facing similar circumstances when analysing the relevant policies, regulations, and laws.¹⁸⁶ The Court ruled that the evaluation of state compliance with the duty of progressivity implies determining whether ESR are exercised in such a way that 'social inequalities are corrected and the inclusion of vulnerable groups is facilitated'.¹⁸⁷

In the wake of widespread violence, a few minor analytical steps are in order to develop a framework that allows weighing the interests of different disadvantaged groups, affected and unaffected by violence, to tackle inequalities and promote the inclusion of marginalised people. Kälin suggests that a relevant indicator of the progressive realisation of ESR of those affected by violence is whether they 'face specific obstacles to access public services compared to local residents with comparable needs'.¹⁸⁸ This principle has already been put into practice domestically in the region. The Colombian Constitutional Court laid down that in progressively ensuring income generation programmes and job opportunities for those suffering the effects of violence, authorities must be wary not to relegate them in meeting the poverty reduction goals established for the rest of the disadvantaged population. According to the Colombian Court, while it will not always be possible to secure employment for all or restore the livelihoods they enjoyed prior to violations, those affected by violence must be on an equal footing with other disadvantaged people.¹⁸⁹

¹⁸⁶ *Cuscul Pivaral* (n 31) paras 144-154.

¹⁸⁷ *ibid.* 146.

¹⁸⁸ Kälin (n 158) paras 69-70.

¹⁸⁹ Colombian Constitutional Court, *Auto 373* (23 August 2016) ss. 1.3.2.3.

Certainly, these considerations are still very tentative and require further elaboration. It is reasonable to let the IACtHR's fairly recent ESR jurisprudence settle in to fully grasp its potential in the aftermath of violence. Nevertheless, these considerations are revealing in that they show the real nature of the challenges facing the Court if ESR are to be directly addressed after widespread abuses. Crucially, challenges do not come from ESR law itself, which, as suggested, is flexible enough to address the consequences of widespread violence. Rather, perhaps the real obstacles the Court must grapple with if it is to fully secure ESR in these contexts lie in its deep moral commitments to deontological ethics.

6.3 The (normative) nature of the challenges facing the Court to directly enforce ESR after widespread violence

In a region that is increasingly moving away from the shadows of dictatorships and where practices of state terrorism are less common than some decades ago, it may be time for the Court to set aside the offending state-victimised individual paradigm after episodes of widespread violence. The continuity of the armed conflict in Colombia and the emergence of organised crime in the region, which is deemed to have a toll on the ESR of affected people as serious as armed conflict,¹⁹⁰ require a different mindset to address socio-economic wrongs. Perhaps it is time to incorporate into these contexts the Court's moral commitments developed in peacetime. As discussed in the previous sub-section, the Court is more willing to adopt a result-oriented perspective in regard to the right to a dignified life and non-discrimination law. In some of the cases examined, it became clear that states of affairs had their own ring of importance, triggering state responsibility for conduct of the authorities that did not surpass a certain recklessness in the performance of their ordinary functions.

The same can be said about the judicial enforceability of ESR. In the *Nuestra Tierra* case state responsibility was triggered because the measures adopted by the authorities to prevent and control the construction of fences by third parties and the movement of livestock that negatively affected the lands of indigenous populations were not efficient enough, undermining access to food and water.¹⁹¹ In *Cuscul Pivaral* the IACtHR considered that the lack of access to adequate medical services, including the interrupted and insufficient provision of antiretrovirals for

¹⁹⁰ See generally Cantor, 'As deadly as armed conflict? Gang violence and forced displacement in the Northern Triangle of Central America' (2016) 23 *Agenda Internacional* 77.

¹⁹¹ *Nuestra Tierra* (n 172) para 287.

people affected by HIV, as well as the lack of adequate testing and insufficient social support for affected people, triggered state responsibility.¹⁹²

It is remarkable that for senior philosophers deeply committed to human rights like Pogge, the sources of violations in *Nuestra Tierra* and *Cuscul Pivaral* rank very low on the scale of moral significance. According to Pogge, shortfalls that arise from social institutions avoidably leaving unmitigated the effects of a natural or a self-caused defect are outweighed in moral importance by shortfalls which are officially mandated.¹⁹³ They also have less moral importance than: shortfalls that result from legally authorised conduct of non-state actors; shortages that are stimulated by public authorities; and shortages that are legally prohibited by authorities but barely deterred.¹⁹⁴ For him and other scholars with this view, what matters is not only the ‘causal role’ of the authorities’ conduct in bringing about shortfalls but their ‘implicit attitude’ towards the shortfall in question.¹⁹⁵ This is why Pogge and others consider that violations in which victims are officially and deliberately disrespected are worse than similar states of affairs that result from other causes.

The IACtHR is pleased to adopt these deontological positions in episodes related to armed conflict, using expressions such as ‘aggravated responsibility’ to describe practices of state terrorism so reprehensible that they escape the traditional framework of duties to respect and protect. However, recent ESR rulings show a different moral sensitivity on the part of the Court. They show that the mediocrity of authorities in performing their ordinary duties often carries dire consequences, which should not be underestimated because of the banality, not the monstrosity, by virtue of which damage is done. These rulings complement the Court’s position on equality and non-discrimination, where it shows greater concern for harmful social patterns that are reproduced in daily practices and institutions than for ‘perpetrators and intents’.¹⁹⁶

In the Introductory Chapter it was suggested that the crossroads at which state authorities find themselves post-conflict, where they must address claims related to the past and the present, must be understood in moral terms. As a dilemma where deontological and consequentialist approaches to morality lean in different directions. This chapter has shown that these conflicting moral points of view underlie relevant aspects of the IACHR’s practice, including its understanding of the state-individual relationship in armed conflict and in peacetime.

¹⁹² *Cuscul Pivaral* (n 31) paras 119, 126.

¹⁹³ Pogge (n 36) at 47-8.

¹⁹⁴ *ibid.* 48.

¹⁹⁵ *ibid.*; Schemmel, ‘Distributive and relational equality’ (2012) 11 *Politics, Philosophy & Economics* 124, 125.

¹⁹⁶ Young (n 133) 195-6.

Whether the IACtHR manages to articulate these opposing moral views colliding like tectonic plates in (post)conflict settings, time will tell. That is what is at stake when considering the state not as an assailant, but as an active guarantor of rights in the aftermath of abuses.

7 CONCLUSION

This chapter lays bare an important conclusion regarding the first research question that inspires this study. When addressing the plight of people affected by widespread violence, a retrospective evaluation of state responsibility, which focuses on assessing the authorities' conduct over the occurrence of abuses, is both misplaced and overwhelmed by circumstances. Such a retrospective evaluation is misplaced because it distracts the Court's attention from developing an ESR-based framework responsive to the needs of those affected by violence. It is overwhelmed by circumstances because it runs the risk of placing on the margins of state responsibility the plight of people affected by the general circumstances of armed conflict and those who saw their rights violated due to certain non-state actors. For these people, the Court's far-reaching remedial practice offers no relief. Because of these reasons, then, access to resources that are important for those affected by violence to cope with daily life should not depend on the authorities' compliance with duties to respect and protect in the past. The flaws of this approach are compounded by the fact that, despite having an ESR framework at hand to address the plight of those engulfed by violence, the Court refrains from using it given its commitments to deontological morality.

That said, the IACtHR's case-law allows to envision alternatives that are more sensitive to the socio-economic states of affairs that lay before authorities after violence. The right to a dignified life coupled with non-discrimination law, as well as the direct enforceability of ESR, revealed a set of moral ideas on the part of the Court completely different from the ones that govern the aftermath of widespread violence. Likewise, by understanding the state as an active guarantor of rights, a new grammar emerges to address the socio-economic wrongs of people affected by violence. This raises difficult distributive questions related to the weight that should be attached to factors such as victimisation, poverty and non-discrimination when authorities secure ESR. The Court's case-law showed some of the edges of these issues in terms of the suitability of resorting to affirmative action to address the plight of victims, as well as their distinctive standing with regards to the rights of the non-victimised poor.

Certainly, lessons to be learnt from the Court's jurisprudence in terms of securing ESR after episodes of widespread violence remain very provisional given its traditional understanding of

violence in the region. Addressing these issues in greater depth requires taking a step towards the African human rights system and examining how these subjects are dealt with by regional bodies in that region. As for the IACtHR, as the title of this chapter suggests, it is fair to say that strong reasons have been provided to bring positive duties in the field of ESR to the heart of (post)conflict settings, gaining a better understanding of some of the distributional problems that are likely to arise with this approach and the moral decisions that must be made to address them.

CHAPTER THREE

The African Human Rights System

Enforcing ESR in (Post)Conflict Settings

1 INTRODUCTION

This chapter brings to completion previous reflections on the first research question of this study. That is, the question of whether access to goods and services that are important for people affected by widespread violence to ensure their ESR should depend on a retrospective assessment of state responsibility regarding the occurrence of abuses, in terms of duties to respect and protect rights; or whether a consequentialist framework should be adopted, one that directly addresses existing socio-economic shortcomings and privileges states' positive duties to fulfil ESR. This question was addressed in the last chapter through two different understandings of the state-individual relationship after widespread violence, one interpreting the state as a rights violator and the other as an active guarantor of rights. This chapter examines the two approaches discussed according to the case-law of the African Commission on Human and Peoples' Rights (African Commission), the African Committee of Experts on the Rights and Welfare of the Child (African Committee) and the African Court on Human and Peoples' Rights (ACtHPR or African Court).

Closing these reflections on the first research question by examining the African system has many advantages. First, the African Commission decided, in 2013 and 2016, to entrust two of its members with the preparation of studies related to human rights in conflict and post-conflict situations, which were published in 2019.¹ Underlying these studies is concern about constant reports of widespread violence faced by civilian populations, who continue to seek reparation.² In addition, the Commission has highlighted that people engulfed by widespread violence are 'disproportionately affected by a failure of the state to respect, protect and fulfil' their ESR.³ The Commission is aware that the guarantee of ESR continues to be marginalised despite their enshrinement in regional instruments, thereby 'excluding the majority of Africans from the full enjoyment of human rights'.⁴ Therefore, the African Commission is currently reflecting on

¹ ACHPR, *Study on Transitional Justice and Human and Peoples' Rights in Africa* (2019); *Addressing Human Rights Issues in Conflict Situations: Towards a More Systematic and Effective Role for the African Commission on Human and Peoples' Rights* (2019).

² Resolution on Human Rights in Conflict Situations, ACHPR/Res. 332 (2016); Resolution on the Fight Against Impunity in Africa, ACHPR/Res. 344 (2016).

³ Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res. 73 (2004), Annex I: Pretoria Declaration.

⁴ *ibid.*

how best to address the crossroads where state authorities are expected to repair past abuses and ensure ESR after episodes of widespread violence. As such, the considerations in the preceding chapters are highly topical in the African context.

Second, African human rights bodies have yet to consolidate their approaches to reparations. As will be discussed in this chapter, while the Commission and Committee have not fully endorsed the international standard of *restitutio in integrum*, the African Court has done so by closely observing international law, including the work of the IACtHR and the ECtHR. Therefore, African human rights bodies are at a crucial point at which they have to determine whether they will follow a path similar to that of the IACtHR, in such a way that access to socio-economic goods is made dependent on the authorities' failures to respect and protect rights, or if said bodies decide to address ESR directly by emphasising the state's duties to fulfil ESR.

Third, African bodies have consistently made use of the case-law of other regional bodies to interpret regional provisions and decide on certain cases. In this regard, the work of the ECtHR has been relied on by the African Commission in some of the cases in which it has dealt with the legacy of widespread violence.⁵ It has also helped shape the Commission's overall approach to the use of force in these contexts.⁶ Likewise, the jurisprudence of the IACtHR on due diligence obligations and its remedial practice have played a key role in certain cases of the Commission,⁷ the African Committee,⁸ and in the consolidation of the African Court's case-law on reparations.⁹

For these reasons, the African system rounds off the discussion of the previous chapter and provides a comprehensive conclusion from the perspective of regional human rights law to the first research question that inspires this study. As will be discussed, it is notable that the African Commission supports the traditional offending state-victimised individual paradigm, while the African Committee interprets the state as an active guarantor of rights post-conflict, making the two angles of the discussion carried out so far fully visible.

⁵ 245/02 *Zimbabwe Human Rights NGO Forum v Zimbabwe*, 39th Ordinary Session of the ACHPR (11 May 2006), paras 153, 207; 279/03, 296/05 *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v Sudan*, 45th Ordinary Session of the ACHPR (13 May 2009), paras 147, 150, 161.

⁶ See General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), (12 December 2015).

⁷ *NGO Forum* (n 5) paras 144-6; *COHRE* (n 5) para 148.

⁸ 3/2015 *Minority Rights Group International (MRGI) and others v Mauritania*, 30th Ordinary Session of the ACERWC (15 December 2017) para 52.

⁹ 013/2011 *Beneficiaries of Late Norbert Zongo and others v Burkina Faso* (5 June 2015) paras 47, 55, 61.

This chapter is organised as follows. Section 2 provides a brief overview of the African human rights system and clarifies the main bodies and instruments that will be addressed. It also explains how the tripartite structure of duties to respect, protect and fulfil has been developed in the African system. Section 3 analyses how the two understandings of the state-individual relationship after episodes of generalised violence are manifested in the work of the Commission and the Committee. As will be seen, while the Commission tends to highlight duties to respect and protect after episodes of widespread violence, the Committee emphasises compliance with the duty to fulfil ESR. Section 4 addresses the position of the Commission, the Committee and the African Court on reparations and discusses, against the background of the remedial practice of the IACtHR and certain aspects of the ECtHR, the role that reparations should play after episodes of widespread violence. Section 5 explores the distributive challenges that follow from directly ensuring ESR in these contexts, including balancing calls for special treatment in favour of African women, children, the elderly, persons with disabilities and IDPs, as contemplated in several regional treaties and protocols. The need for a priority-setting framework is defended, which can provide guidance about the final decision to implement reparation policies in contexts with scarce resources and pressing social needs.

2 DUTIES TO RESPECT, PROTECT AND FULFIL IN THE AFRICAN HUMAN RIGHTS SYSTEM

2.1 General remarks on the African human rights system

2.1.1 The African Charter on Human and Peoples' Rights and the African Commission

The African Charter on Human and Peoples' Rights (ACHPR) and the subsequent establishment of the African Commission represent the foundations of the African human rights system.¹⁰ Since it came into full operation in 1989, the Commission has taken a proactive role regarding the protection of human rights in the region and continues to be the main body that surveys compliance with the Charter.¹¹ The consolidation of the Commission's work, however, has not been free of certain bumps along the way. A quasi-judicial body empowered to make recommendations, the Commission has been considered to lack compulsory jurisdiction,¹² a position that seems to be supported by the lack of mention of the binding force

¹⁰ Ssenyonjo 'Preface' in Ssenyonjo (ed), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (2012), ix.

¹¹ Ssenyonjo, 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter' (2011) 29 *Netherlands Quarterly of Human Rights* 358, 363.

¹² Naldi, 'The African Union and the Regional Human Rights System' in Evans and Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006* (2008), 35-6.

of its decisions in the Charter.¹³ Given the political and financial dependence of the Commission on the former Organisation of African Unity (OAU) and the current African Union (AU), it has also been criticised for being ‘subservient to the political machinery’ of the African states.¹⁴ The initial adherence by the Commission to the confidentiality clause of Article 59(1) ACHPR contributed to the criticism on the lack of transparency of its decisions.¹⁵

Without engaging in a deep debate on these accusations, it is important to acknowledge that from the beginning of its activities and on its own initiative, the Commission has taken jurisdiction over individual complaints and developed a track record of substantive recommendations far beyond the powers expressly recognised in the Charter.¹⁶ While it remains true that the Commission is not a court, an ‘expectation of compliance does appear to have been engendered’ from its decisions.¹⁷ Since the ACHPR foresaw the creation of the Commission as its sole supervisory mechanism, the protection mandate set up thereby would be ‘rendered meaningless if states do not accept its findings.’¹⁸ According to the Commission, once a state ratifies the African Charter it voluntarily submits to its findings and recommendations.¹⁹ Putting aside the discussion on the accuracy of tagging the Commission’s rulings as ‘legal’ or ‘binding’, it is uncontested that it is currently conducting an increasingly better-reasoned evaluation of state responsibility.²⁰ Indeed, the Commission is of the view that the purpose of the individual petition mechanism is to ‘establish what is generally expected of government under the Charter and more specifically vis-à-vis the rights themselves’;²¹ which is to say, an evaluation of state responsibility in terms similar to those of other regional human rights bodies.²²

¹³ Murray, ‘Decisions by the African Commission on Individual Communications under the African Charter on Human and People’s Rights’ (1997) 46 *International and Comparative Law Quarterly* 412, 413.

¹⁴ Bekker, ‘The African Commission on Human and Peoples’ Rights and Remedies for Human Rights Violations’ (2013) 13 *Human Rights Law Review* 499, 500.

¹⁵ ‘All measures taken within the provisions of the Present Charter shall remain confidential until such a time as the Assembly of Heads and Government otherwise decide’.

¹⁶ Murray (n 13) 413.

¹⁷ Naldi (n 12) 36-7.

¹⁸ Viljoen and Louw, ‘The status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation’ (2004) 48 *Journal of African Law* 1, 2.

¹⁹ See generally Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples’ Rights, 2nd Extraordinary Session of the ACHPR (18 December 1995).

²⁰ Ssenyonjo, ‘The Development of Economic, Social and Cultural Rights under the African Charter on Human and Peoples’ Rights by the African Commission on Human and Peoples’ Rights’ (2015) 4 *International Human Rights Law Review* 147, 159.

²¹ 155/96 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC)*, 30th Ordinary Session of the ACHPR (27th October 2001) para 43.

²² Melish, ‘The Inter-American Commission of Human Rights’ in Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008), 372.

Therefore, the time in which the Commission's work has been marginalised from the landscape of international and regional human rights law appears to be water under the bridge.²³ As the discussion below exemplifies, the Commission has defined the scope of state responsibility in conflict-related episodes with a degree of detail and elaboration similar to that of other regional human rights bodies. Although the number of cases dealing with these episodes is not large,²⁴ the Commission is already consolidating a position that has attracted the attention of academics interested in conflict-related situations.²⁵ The Commission has also taken the step to develop the tripartite structure of duties to respect, protect and fulfil rights, whose application has been carried out in peacetime scenarios. Owing to this, it is clear that the Commission's case-law is sufficiently developed to be subject to scrutiny of the same type of that carried out regarding the work of the IACtHR in the previous chapter.

2.1.2 The African Court

With the primary purpose of complementing and reinforcing the functions of the Commission, the member states of the former OAU adopted in 1998 the Protocol on the establishment of an African Court on Human and Peoples' Rights ('the Court's Protocol').²⁶ While the Court's Protocol entered into force in 2004, the Court became fully operational in 2006 and has since slowly begun to build 'a docket deserving of attention'.²⁷ Debates that have hampered the work of the Commission about the 'legal' and 'binding' nature of its decisions are not raised with regard to the Court, since Article 30 establishes that the Court's judgments are mandatory. The effective operation of the Court, therefore, appears to mark a turning point with respect to the 'jurisprudence' of African semi-judicial bodies.

That said, the Court's scope of action remains significantly limited given that individuals and NGOs, the most frequent actors appearing before human rights bodies in the region, do not have direct access to the Court unless states make an additional declaration permitting so (Articles 5(3) and 34(6)).²⁸ Owing to this, most of the cases that have reached the Court have

²³ Ssenyonjo, 'An Introduction to the Development of the African Regional Human Rights System: 30 Years after the Adoption of the African Charter on Human and Peoples' Rights' in Ssenyonjo (ed) (n 10), 3.

²⁴ 227/99 *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, 33rd Ordinary Session of the ACHPR (May 2003); 431/12 *Thomas Kwoyelo v Uganda*, 23rd Extra-Ordinary Session of the ACHPR (22 February 2018); *NGO Forum* (n 5); *COHRE* (n 5).

²⁵ See e.g. Hailbronner, 'Laws in Conflict: The Relationship Between Human Rights and International Humanitarian Law under the African Charter on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 339.

²⁶ See Preamble of the 'Court's Protocol'

²⁷ Murray, *The African Charter on Human and People's Rights: A Commentary* (2019), 816.

²⁸ To date, out of thirty states parties to the Protocol, only nine have made the Article 34(6) declaration.

been concentrated in a handful of African states, which tend not to be affected by episodes of widespread violence. The few episodes of this type on which the ACtHPR has had the opportunity to rule over,²⁹ despite the expectations generated,³⁰ ended-up without a substantive decision.³¹ The contribution of the African Court to the present thesis, therefore, will be limited to a discussion on the appropriateness of applying its understanding of the obligation to make reparation in (post)conflict settings.

2.1.3 Additional protocols to the African Charter

Under Article 66 ACHPR, which allows states to adopt ‘special protocols’ to ‘supplement’ the Charter’s provisions, African states have adopted additional instruments for the protection of the rights of the groups explicitly recognised in Article 18. This is how they have adopted the ‘Women’s Protocol’,³² the ‘Elderly’s Protocol’³³ and the ‘Protocol for Persons with Disabilities’.³⁴ These protocols contain provisions related to the protection of these groups in conflict and (post)conflict settings. For instance, the Women’s Protocol shed some light on the gendered impact of armed conflict by imposing on state authorities the duty to protect migrant women ‘against all forms of violence’.³⁵ Elaborating on the Women’s Protocol, the Commission stressed that authorities must give particular attention to the situation of women in conflict-related scenarios by adopting measures ‘to prevent third parties from interfering with the enjoyment of women’s sexual and reproductive rights’.³⁶ The Elderly’s Protocol establishes duties on the state to provide the elderly with priority assistance and ensure that they ‘are not left without medical assistance and care’ in conflict-related scenarios.³⁷ The Protocol for Persons with Disabilities foresees the obligation of African states to ‘take specific

²⁹ 004/2011 *African Commission on Human and Peoples’ Rights v Libya* (Provisional measures) (25 March 2011), 1 AfCLR, paras 2, 21.

³⁰ Oder, ‘The African Court on Human and Peoples’ Rights’ Order in Respect of the Situation in Libya: A Watershed in the Regional Protection of Human Rights?’ (2011) 11 *African Human Rights Law Journal* 495, 504-8.

³¹ 004/2011 *African Commission on Human and Peoples’ Rights v Libya* (Striking out) (15 March 2013), 1 AfCLR, paras 14-26.

³² Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Adopted by the Second Ordinary Session of the Assembly Union, 11 July 2003. The ‘Women’s Protocol’ entered into force in 2005.

³³ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa. Adopted by the Twenty-Sixth Ordinary Session of the Assembly Union, 31 January 2016.

³⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa. Adopted by the Thirtieth Ordinary Session of the Assembly Union, 29 January 2018.

³⁵ Arts. 1(j) and 11.

³⁶ General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, ACHPR (28 November 2014) para 43.

³⁷ Art. 14.

measures to ensure the protection and safety of persons with disabilities in situations of armed conflict [and] forced displacements'. It also contemplates the duty to 'ensure that persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre and post-conflict reconstruction and rehabilitation'.³⁸

Despite the potential of these instruments for the consolidation of a protection framework sensitive to the impact of widespread violence on disadvantaged groups, there is no case-law of the Commission and the Court applying them in these contexts. The Women's Protocol vaguely establishes that states must submit periodic reports before the African Commission for its examination.³⁹ Whether individual complaints can be brought before the Commission is not entirely clear since the protocol does not explicitly expand the scope of the Commission's mandate.⁴⁰ Although the Court has the power to apply this protocol, as well as any other human rights instrument ratified by the state concerned,⁴¹ the Court's limited scope of action discussed above has prevented it from fully developing the gender guarantees established in the Women's Protocol. Unlike the Women's Protocol, Article 22 of the Elderly's Protocol and Article 34 of the Protocol for Persons with Disabilities define with greater clarity their enforcement avenues. States not only have to report to the African Commission on the measures taken to comply with the protocols' provisions but also the Commission and the African Court are invested with clear powers to interpret and enforce them. However, these protocols have not yet entered into force or have done so only recently.⁴²

Because of these reasons, this chapter focuses on the work carried out by the Commission and the Court in relation to the application of the African Charter in (post)conflict settings. Additional protocols will only be considered at the end of the chapter, highlighting the distributive tensions that may arise as they come into force. These tensions take place in terms of balancing the different priority provisions that each of these instruments contains with respect to the disadvantaged groups they deal with.

2.1.4 The African Charter on the Rights and Welfare of the Child and the African Committee

To the work of the Commission and the Court it is important to add that of the African Committee, a quasi-judicial body responsible for monitoring observance of the African Charter

³⁸ Art. 12.

³⁹ Art. 26 of the Women's Protocol in conjunction with Art. 62 of the African Charter.

⁴⁰ Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11, 39.

⁴¹ Arts. 3 and 6 of the 'Court's Protocol'.

⁴² The 'Elderly's Protocol' entered into force on 11 September 2018.

on the Rights and Welfare of the Child (ACRWC). Like the protocols discussed, the ACRWC contains guarantees for the protection of children in conflict-related scenarios. The Preamble gives special attention to the ‘unique’ socio-economic, cultural, traditional and developmental circumstances affecting African children, including armed conflict. The ACRWC highlights, amongst other issues, that states must take ‘all feasible measures to ensure the protection and care of children who are affected by armed conflicts’, as well as to give ‘the highest priority to the special needs of children living in states subject to military destabilisation’, including the protection of refugee and internally displaced children.⁴³

Although the ACRWC was adopted a few years after the 1989 UN Convention on the Rights of the Child, its slow pace of ratification,⁴⁴ as well as other operational difficulties, led to its supervisory body, the African Committee, to start activities slowly.⁴⁵ The Committee seems to be affected from its inception by some of the factors that have undermined the effectiveness of the African Commission’s work. In a request for an advisory opinion from the African Court, the Committee stated that ‘it has been facing the same major challenges that the African Commission’s protective mandate has encountered over the years, namely, noncompliance because of non-binding findings and absence of effective remedies’, amongst others.⁴⁶ To date, the Committee has issued few decisions, the first of which dates from 2017.

Despite these difficulties, the Committee has carried out a remarkable analysis of state responsibility in the cases it has dealt with so far. The reflections made earlier on the work of the African Commission, in the sense that its more recent jurisprudence has a level of elaboration similar to that of other regional human rights bodies, also apply to the Committee’s budding work. Crucially, as will be discussed shortly, the African Committee is the first regional human rights body to directly apply ESR after episodes of widespread violence. Since this decision marks a watershed in the way the state-individual relationship is conceived in these contexts, this chapter will carry out a detailed analysis of the implications of said decision in terms of ESR satisfaction.

Finally, this chapter will not address in detail the ESR-related obligations assumed by African states through the Convention for the Protection and Assistance to Internally Displaced Persons

⁴³ See Arts. 22, 26 and 33.

⁴⁴ The ACRWC entered into force on 29 November 1999.

⁴⁵ Bekker, ‘The African Committee of Experts on the Rights and Welfare of the Child’ in Ssenyonjo (ed) (n 10), 252-262.

⁴⁶ 2/2013 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (Advisory Opinion) 5th December 2014, 1 AfCLR, para 81.

in Africa (Kampala Convention).⁴⁷ This is the case because the Kampala Convention has weak enforcement mechanisms and the steps taken for its implementation are modest to date. Article 14 contemplates the establishment of a Conference of state parties to monitor and review its implementation, as well as the general duty of states to report to the African Commission on the measures taken to give effect to the Kampala Convention. In a 2016 study, the International Committee of the Red Cross (ICRC) found that the implementation of the Kampala Convention still lagged behind. Amongst the recommendations made in the study, the ICRC stressed the importance that ‘the first Conference takes place as soon as possible and adopts a comprehensive plan of action/road map on the operationalisation of the Convention.’⁴⁸ It took four years for states to convene the first Conference and the expected results of the first meeting were quite modest, as they were limited to providing a forum for states to deliberate on ‘how to implement the Convention and in addressing forced displacement issues’.⁴⁹ Like with the additional protocols to the African Charter, this chapter will only address the Kampala Convention when discussing the importance of developing a framework for weighing the ESR claims of different disadvantaged groups and setting priorities.

2.2 Duties to respect, protect and fulfil

The Commission’s early case-law was centred in the protection of civil and political rights and was very ‘fact-specific’.⁵⁰ This is, it limited itself to ascertaining that certain conducts entailed a rights violation, without defining the rights’ normative content nor clarifying the nature of state obligations.⁵¹ Even so, it is possible to trace in the Commission’s early jurisprudence a latent use of the structure of duties to respect, protect and fulfil. This was manifested, for instance, when it spelt out duties equivalent to the typology *to respect* property rights, by not arbitrarily closing private facilities or confiscating belongings;⁵² *to protect* rights against the

⁴⁷ The *Kampala Convention* entered into force on 6 December 2012.

⁴⁸ Young, ‘Translating the Kampala Convention into Practice: A Stocktaking Exercise’ (2017) 99 *International Review of the Red Cross* 365, 369-371, 374.

⁴⁹ First session of Conference of states parties for the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa: From norm setting to implementation (Zimbabwe 2017), 3.

⁵⁰ Ssenyonjo (n 11) 358, 362.

⁵¹ *ibid.* 363.

⁵² 105/93, 128/94, 130/94 and 152/96 *Media Rights Agenda and Others v Nigeria*, 24th Ordinary Session of the ACHPR (October 1998) para 77.

conduct of non-state actors;⁵³ and to *provide (fulfil)* people with basic socio-economic services.⁵⁴

With the turn of the twentieth century, the ACHPR began to develop a substantive jurisprudence on ESR,⁵⁵ with the tripartite structure of obligations rapidly becoming an important conceptual tool. Obligations to respect and protect individual economic and social rights and related collective rights were first sketched in the renowned *SERAC* case.⁵⁶ By facilitating non-state actors in the production of oil without the slightest concern for its environmental impacts, including the lack of previous studies on environmental and health risks provoked by the oil operation, Nigeria was found responsible for the environmental degradation and resulting health problems affecting the Ogoni People. Nigeria's conduct represented a breach of the obligation to protect since states are required to regulate and monitor the activities of non-state actors that have an impact on people's access to and enjoyment of ESR.⁵⁷ Since the duty to respect requires from the state not to interfere with rights enjoyment, as well as to respect 'the freedom of individuals and peoples to use all of the resources at their disposal',⁵⁸ Nigeria breached this obligation due to the deliberate destruction of the housing of the members of the community and the obstruction of their efforts to return to rebuild their houses.⁵⁹

The obligation to fulfil, understood as 'the adoption of measures that enable and assist individuals and communities to gain access to ESCR on their own',⁶⁰ was first addressed through a right-by-right evaluation. Unlike the ICESCR, the African Charter does not expressly incorporate notions related to the progressive realisation of ESR. Nevertheless, the Commission has understood that, given the pervading situation of poverty and resource constraints affecting many African states, the full realisation of rights cannot be immediately

⁵³ 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 *Malawi African Association and Others (MAA) v Mauritania*, 27th Ordinary Session of the ACHPR (11 May 2000) paras 14, 17, 128.

⁵⁴ 25/89, 47/90, 56/91 and 100/93 *Free Legal Assistance Group and Others (FLAG) v Zaire*, 18th Ordinary Session of the ACHPR (October 1995) para 47.

⁵⁵ Ssenyonjo (n 11) 363-384.

⁵⁶ *SERAC* (n 21).

⁵⁷ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Principles and Guidelines), 48th Ordinary Session of the ACHPR (24 November 2010), para 7.

⁵⁸ The obligation to *respect* also demands states 'to take positive measures to ensure that all branches and organs of government at all level do not violate economic, social and cultural right.' Principles and Guidelines (n 57) paras 5-6.

⁵⁹ *SERAC* (n 21) paras 59-62.

⁶⁰ Principles and Guidelines (n 57) para 10.

demanded from authorities.⁶¹ Concerning the right to health, the Commission concluded that states are primarily bound to the duty to ‘take concrete and targeted steps, while taking full advantage of [their] available resources, to ensure that the right to health is fully realised’.⁶² Regarding the right to education, the Guidelines for National Periodic Reports require states to inform about ‘the progressive implementation of the principle of compulsory education free of charge’.⁶³ Commenting on the notion of progressive realisation, the Commission recalls that the duty to take concrete and targeted steps to realise ESR is immediate, as well as the duty to prioritise the basic needs of members of vulnerable and disadvantaged groups in resource distribution.⁶⁴ In case of demonstrable resource constraints that prevent the state from fulfilling its minimum core obligations, ‘the state should still implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups, particularly by prioritising them in all interventions’.⁶⁵

At present, the scope of the general obligations that Article 1 ACHPR imposes on African states is fairly understood by the African Commission according to the tripartite categorisation of duties.⁶⁶ This categorisation also inspires other regional human rights protocols and treaties. General Comment No. 1 understands several provisions of the Women’s Protocol in terms of duties to respect, protect and fulfil.⁶⁷ The Protocol for Persons with Disabilities includes said categorisation of obligations in Article 4. As to the ACRWC, the African Committee has endorsed this structure of state duties in most cases in which it has dealt with children’s ESR.⁶⁸

Having provided a snapshot of the African human rights system, the next section focuses on the duties to respect, protect and fulfil that the ACHPR and the ACRWC impose on state authorities during episodes of widespread violence and their aftermath, as interpreted by the African Commission and Committee. It addresses the crossroads in which state authorities find themselves in terms of redressing past wrongdoings and guaranteeing ESR in the present by

⁶¹ 241/2001 *Purohit and Moore v The Gambia*, 33rd Ordinary session of the ACHPR (29 May 2003) para 84.

⁶² *ibid.* para 84.

⁶³ Guidelines for National Periodic Reports, 2nd Annual Activity Report of the ACHPR (1988-1989).

⁶⁴ Principles and Guidelines (n 57) para 14.

⁶⁵ *ibid.* para 17.

⁶⁶ 368/09 *Abdel Hadi and Others v Republic of Sudan*, 54th Ordinary Session of the ACHPR (22 October 2013), paras 91, 92; 272/03 *Association of Victims of Post Electoral Violence and Interights v Cameroon*, 46th Ordinary Session of the ACHPR (11 November 2009) paras 87-8.

⁶⁷ General Comment No. 1 on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (6 November 2012) paras 20-4.

⁶⁸ 1/2012 *The Centre for Human Rights (University of Pretoria) and others v Senegal*, 22th Ordinary Session of the ACERWC (15 April 2014) para 47; 2/2009 *Institute for Human Rights and Development in Africa (IHRDA) v Kenya*, 17th Ordinary Session of the ACERWC (22 March 2011) para 58; 2/2015 *The Institute for Human Rights and Development in Africa (IHRDA) v Cameroon*, 31st Ordinary Session of the ACERWC (May 2018) para 44.

analysing the different understandings of the state-individual relationship by the two bodies in (post)conflict settings. Whether interpreting the state as a threat to the individual or as an active guarantor of rights, the Commission and the Committee will place different emphasis on duties to respect, protect and fulfil, making evident the limitations and possibilities that follow from each approach in terms of addressing ESR in these contexts. Conducting this analysis is a first step to consolidate an answer to the first research question that inspires this study, that is, whether access to goods and services that are important for victims to ensure ESR should depend on the findings of prior wrongdoing attributed to state authorities. If the scope of duties to respect and protect regarding the occurrence of abuses is too narrow, as will be argued in the next section, access to ESR should be decoupled from reparation measures and should be based on positive duties to fulfil ESR.

3 THE TWO UNDERSTANDINGS OF THE STATE-INDIVIDUAL RELATIONSHIP IN THE AFRICAN SYSTEM AND THEIR IMPACT ON ESR ENJOYMENT

3.1 The state as a threat to the individual: The Commission's neglect of ESR after widespread violence due to its emphasis on duties to respect and protect

Ssenyonjo explains that the African Commission has traditionally embraced the view of the state as a threat to the individual, in part because 'most African states were for a long time under a dictatorship where violations of civil and political rights were more widely reported'.⁶⁹ This understanding of the state-individual relationship is at the heart of the cases that will be discussed in this section. Certainly, these decisions are not the only ones in which the Commission has addressed human rights violations in armed conflicts and related settings.⁷⁰ However, they are the relevant cases for the purposes of this investigation, as they raise ESR-related issues and ESR played an important role in the plaintiffs' claims before the Commission.

Human Rights NGO Forum v Zimbabwe dealt with the situation of civil strife that followed the 2000 Constitutional Referendum, where abuses perpetrated by the state security forces and proxy militias were reported, as well as generalised violence that affected different sectors of the population. The plaintiffs alleged violations of civil and political rights and ESR, including farm invasions by war veterans and landless peasants, burning and looting of homes and businesses in rural and urban areas, the disruption of education and health services, and forced

⁶⁹ Ssenyonjo (n 20) 154.

⁷⁰ See cases at n 24.

displacement.⁷¹ The Commission addressed the case in terms of the existence of practices of state terrorism,⁷² which is to say, the authorities' involvement in rights violations directly or, given their non-compliance with due diligence obligations to prevent and investigate the conduct of non-state actors, indirectly. After a lengthy discussion on state duties with regard to non-state actors inspired by the IACtHR and ECtHR's case-law, the African Commission concluded that the authorities' complicity with proxy militias was not demonstrated,⁷³ dismissing most claims against the state.

By dedicating most of its analysis to assessing compliance with duties to respect and protect, the Commission's deontological insights were laid bare. The evaluation of the intrinsic rightfulness or wrongfulness of the authorities' conduct in terms of respecting and protecting the individual from illegitimate interference left in the background the assessment of positive duties in the field of ESR. The finding that people were not wronged in circumstances that triggered state responsibility was the end of the story and the very fact that many people were badly off socio-economically after widespread violence did not raise any concern on the part of the Commission. This is difficult to understand given that the plaintiffs alleged ESR violations, including the disruption of education and health services, as well as the plight of IDPs. Although the tripartite structure of duties was expressly incorporated in *NGO Forum*,⁷⁴ the clarity obtained by the Commission in its internal documents about positive duties to fulfil ESR,⁷⁵ as well as relevant precedents on the subject⁷⁶ were conspicuous by their absence. Very much like the IACtHR, the Commission missed the opportunity to develop an ESR-based framework to address the plight of people affected by widespread violence despite having at hand a solid ESR conceptuality developed in peacetime.

The argument here is not to put unfeasible and naive expectations on the Commission to resolve the colonial legacy of disputes related to unequal access to land, education and other social services that still affect large segments of the population.⁷⁷ Assuming that dealing with ESR is tantamount to seeking structural change can be misleading and loses sight of their pragmatic nature and flexibility, including 'the acceptance that states' ability to fully realise ESR will be

⁷¹ *NGO Forum* (n 5) paras 3-11.

⁷² *ibid.* paras 73-8, 137.

⁷³ *ibid.* para 210.

⁷⁴ *ibid.* paras 151-3.

⁷⁵ Guidelines for Periodic Reports (n 63).

⁷⁶ See e.g. *(FLAG) v Zaire* (n 54) para 47; *Purohit v The Gambia* (n 61) para 84.

⁷⁷ Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) 3 *The International Journal of Transitional Justice* 163, 164.

limited by resource availability.’⁷⁸ Specific situations such as the interruption of education and health services due to the forced displacement of approximately 10,000 rural inhabitants⁷⁹ could have been addressed by referring, for instance, to the African Charter on the Rights and Welfare of the Child (ACRWC) (Article 11(3)) to interpret the right to education enshrined in the African Charter (Article 17). As the African Committee stressed in a later judgment, even in contexts affected by the greatest violence and the most pressing social demands, Article 11 ACRWC places on authorities the duty to fulfil the right to education: if ‘a State closes a school, it has to make other options available, however makeshift or problematic these alternative arrangements might be’.⁸⁰ Given the broad powers to draw inspiration from other African and international human rights treaties under Article 60 ACHPR, it is reasonable to expect from the Commission a more thorough interpretation of the ESR provisions enshrined in the African Charter after episodes of widespread violence.⁸¹

Furthermore, there is already enough jurisprudence by the African Committee defining the scope of ESR-related duties in peacetime that exemplifies how obligations to fulfil can be tailored to address the challenges that arise as a result of widespread violence. The Committee’s position will be discussed in detail in the next section. It suffice to say here that, reflecting on the aggravated risks to the health of children living in the streets, slums, and overcrowded and underserved camps, the Committee affirmed that the full implementation of the right to health (Article 12 (2) (g)) requires prioritising the provision of health services in the communities where children live.⁸² There is nothing in this argument that excludes its application to displaced children affected by post-electoral violence in Zimbabwe. Despite the existence of limitations that prevent the full realisation of rights, either in times of peace or after generalised violence, duties to fulfil ESR remain in force. However, none of this was explored in *NGO Forum* due to the Commission’s emphasis on portraying the state as the aggressor from whom the individual requires protection. Taking ESR seriously in Zimbabwe would have required to ‘move beyond the categorical offending state-victimised individual paradigm and present a

⁷⁸ Schmid and Nolan, ““Do no harm”?: Exploring the Scope of Economic and Social Rights in Transitional Justice” (2014) 8 *The International Journal of Transitional Justice* 362, 379.

⁷⁹ *NGO Forum* (n 5) para 6.

⁸⁰ 1/2005 *Hunsungule and Others v Uganda*, 21st Ordinary Session of the ACERWC (15 April 2013) para 66.

⁸¹ For instance, the Commission found Guinea responsible for breaches of the 1974 OAU Convention Governing Specific Aspects of Refugee Problems in Africa. The Commission reached this finding even though the plaintiffs did not allege such breach, and regardless that said convention did not grant any power to the Commission for monitoring its compliance since it preceded the African Charter. See 249/02 *Institute for Human Rights and Development in Africa IHRDA v Guinea*, 36th Ordinary Session of the ACHPR (23 November 2004) para 74.

⁸² *IHRDA v Kenya* (n 68) para 61.

more nuanced approach that takes cognisance of other factors that impinge on social and economic rights.’⁸³

Similar neglect of ESR occurred in *COHRE*, where the Commission dealt with the widespread and systematic violations of human rights that stemmed from the 2003 Darfur War.⁸⁴ Claimants alleged that Sudan was responsible for extrajudicial executions, trials without due process guarantees and large-scale killings. Charges of forced eviction and displacement were also raised, along with indiscriminate bombings of populated areas that destroyed public facilities, property, markets and water wells, especially targeting some black African tribes.⁸⁵ Sudan’s responsibility was alleged due to the activities of its security forces, proxy militias (i.e. *Janjaweed*) and the lack of adequate criminal investigations.⁸⁶

As in *NGO Forum*, the Commission devoted most of its reasoning to assessing the existence of wrongdoing regarding duties to respect and protect civil and political rights. The framework that regulates the use of force in the conduct of security operations developed by the ECtHR, recently gathered in the Commission’s General Comment No. 3,⁸⁷ was also central to solve the case. Given the emphasis of this framework on tackling practices of arbitrary use of force and preventing illegitimate inferences in people’s lives,⁸⁸ ESR violations were analysed in a few paragraphs, again from the perspective of state duties to respect and protect. After mentioning the tripartite structure of obligations and referring to the ESCR Committee’s General Comment No. 14, Sudan was held responsible for ‘the destruction of homes, livestock, and farms as well as the poisoning of water sources’, exposing victims to serious health risks.⁸⁹ The right of black African tribes to their economic, social and cultural development was violated as a consequence of military attacks, as well as the children’s right to education due to forced displacement.⁹⁰

At first glance, *COHRE* seems to be a strong case demonstrating that the offending state-victimised individual paradigm is well suited to address the legacy of widespread violence when socio-economic wrongs sponsored by state authorities are also acknowledged. As in this case most of the abuses were attributed to the state’s deliberate conduct against the

⁸³ Muvingi (n 77) 178.

⁸⁴ *COHRE* (n 5).

⁸⁵ *ibid.* para 3.

⁸⁶ *ibid.* paras 8, 15, 11 and 112.

⁸⁷ N 6.

⁸⁸ GC No. 3 makes only a few passing references to ESR at paras 3, 6 and 41-3: n 6.

⁸⁹ *COHRE* (n 5) para 212.

⁹⁰ *ibid.* para 224.

communities from which the two main rebel groups originate,⁹¹ emphasis on duties to respect and protect seems appropriate. However, it can be misleading to reduce the situation of widespread violence in the region to state-led action. Violence between different armed actors, as well as the activities of rebel groups and foreign actors must also be considered,⁹² especially when it undermines the population's ability to provide their means of subsistence.⁹³ For instance, in Greater Equatoria, the Ugandan Lord's Resistance Army (LRA) displaced persons, destroyed livelihoods and hampered humanitarian operations.⁹⁴ This happened in a context of protracted clashes between different ethnic groups who have been armed for decades and threatened to destabilise parts of the south.⁹⁵ This full picture explains that the incipient basic socio-economic infrastructure of rural areas was devastated, as well as hospitals, schools and police stations in several villages, many of them abandoned and destroyed.⁹⁶ It also accounts for the scope of widespread violence and the magnitude of forced displacement in the region. In the most affected sub-region, West Darfur, half of the population was affected by violence, with the vast majority becoming internally displaced — a pattern that was reproduced in the whole of Darfur.⁹⁷ In sum, the ESR of the population were encroached or severely jeopardised by a trail of violence that cannot be reduced to the state's duties to respect rights and protect them from the action of non-state actors.

In a context of mass destruction like this, it may be more appropriate to foreground positive duties to fulfil ESR rather than emphasising the failure of authorities to comply with duties to respect and protect in the past. By privileging the second set of duties, the Commission ended up lacking a solid basis to address urgent states of affairs that needed to be improved, even though they could not be clearly attributed to prior misconduct by the state. This is the case of socio-economic harms resulting from the conduct of rebel groups, foreign actors, the civilian population and the very dynamics of war, which were vaguely recognised by the Commission without a clear account of the authorities' responsibility in this regard.⁹⁸

⁹¹ Cassese *et al*, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005), paras 47-49, 268, 296.

⁹² *ibid.* paras 534-7.

⁹³ Samar, Special Rapporteur on the Situation of Human Rights in Sudan (E/CN.4/2006/111) 11 January 2006, para 64.

⁹⁴ Kālin, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Mission to the Sudan (E/CN.4/2006/71/Add.6) 13 February 2006, para 9.

⁹⁵ *ibid.* para 9.

⁹⁶ Cassese (n 91) para 236.

⁹⁷ *ibid.* para 229.

⁹⁸ COHRE (n 5) paras 180-5 and 194.

This short-sighted approach is also problematic because certain socio-economic wrongs are only visible through the lens of the state as an active guarantor of rights, such as the Availability, Accessibility, Acceptability and Quality of health services in these contexts.⁹⁹ In a context of widespread sexual violence taking place in plain sight, recognised by the Commission itself,¹⁰⁰ it is disappointing that the emphasis on duties to respect and protect is made at the expense of evaluating the authorities' effectiveness in the provision of treatment and health services to victims of sexual violence. The First Independent Expert on the situation of human rights in Sudan found that burdensome administrative procedures prevented many victims to access health services¹⁰¹ — a situation that passed well under the Commission's radar, despite its awareness of reports on the subject.¹⁰²

These shortcomings are difficult to explain considering that the framework of duties to respect, protect and fulfil was already well developed in the Commission's jurisprudence, as explained in the previous section. Without a careful delineation of the obligations of immediate and progressive realisation in (post)conflict settings, including the special weight that needs to be given to the interests of certain groups, the general recommendation to the authorities to guarantee ESR in the Darfur region was as well-intentioned as it was empty.¹⁰³

In light of these findings, an alternative worth highlighting is to directly address ESR after episodes of widespread violence, following the lead of the African Committee in this regard and exploring the understanding of the state as an active guarantor of rights in these contexts.

3.2 The state as an active guarantor of rights: Addressing ESR in the aftermath of widespread violence through the African Committee

Hunsungule v Uganda is a landmark case concerning the protection of ESR in the aftermath of widespread abuses, as it is the first ruling by a regional human rights body to directly address ESR in these scenarios. As a matter of context, it is important to note that the state was not the perpetrator responsible for most of the abuses in Uganda; rather, rebel groups that challenged

⁹⁹ See generally General Comment No 14: The Right to the Highest Attainable Standard of Health (E/C.12/2000/4) 11 August 2000, para 12.

¹⁰⁰ *COHRE* (n 5) para 178.

¹⁰¹ Akwei, Report of the independent expert on the situation of human rights in the Sudan (E/CN.4/2005/11) 28 February 2005, para 13.

¹⁰² *COHRE* (n 5) paras 81-5.

¹⁰³ *COHRE* (n 5) para 229(e).

the central government¹⁰⁴ and tribal groups¹⁰⁵ were largely responsible for them. Although the African Committee carried out a brief evaluation to determine whether the state violated IHL by indiscriminately attacking school facilities or using them for military purposes,¹⁰⁶ the analysis did not revolve around state compliance with duties to respect rights and protect them from militias with connections to state security forces. On the contrary, the Committee focused on state responsibility with regard to the duty to protect rights enjoyment from interference caused by rebels that attacked civilians,¹⁰⁷ along with the duty to fulfil ESR in a situation in which the state itself did not plunge the population into socio-economic deprivation.¹⁰⁸ To put it simply, the state looked like an active guarantor that sought to secure ESR in the face of restrictions posed by rebels.¹⁰⁹

This approach allowed the Committee to assess whether the state authorities met their positive obligations to directly fulfil ESR. Thus, in stark contrast to *NGO Forum* and *COHRE*, the range of duties regarding the survivors of violence was not viewed by the Committee as exhausted by the possibility that they were wronged, in terms of undue interference for which the state is held to account. To underpin this approach, the Committee first considered that both in peacetime and after widespread abuses authorities are bound to the same general obligation to take immediate steps to ensure ESR consistently with the use of maximum available resources.¹¹⁰ The Committee also stressed that children are entitled to ‘special measures’ in conflict-related scenarios.¹¹¹ Under these two premises, the Committee analysed state duties regarding the rights to education and health.

Concerning the right to education, the Committee referred to the ‘reasonableness’ standard so familiar in discussions about ESR and enshrined in the Optional Protocol to the ICESCR (Article 8). Accordingly, ‘the state has a duty to be continually taking measures to build, maintain, improve and when attacked, repair its education system’.¹¹² The conduct of Uganda, consisting of: setting up schools/learning centres in IDP camps; the award of bursary schemes

¹⁰⁴ Deng, Report of the Representative of the Secretary-General on Internally Displaced Persons: Uganda (E/CN.4/2004/77/Add.1) 3 March 2004, para 17 and Appendix I.

¹⁰⁵ *ibid.* para 23 and Appendix I.

¹⁰⁶ *Hunsungule* (n 80) paras 67-8.

¹⁰⁷ Deng (n 104) para 31.

¹⁰⁸ *ibid.* para 25.

¹⁰⁹ *ibid.* para 29.

¹¹⁰ The Committee interpreted Art. 14 on the right to enjoy the highest attainable standard of health similarly in *Hunsungule* (n 80) para 72 and in *IHRDA v Kenya* (n 68) para 59 — the first case related to a region devastated by war and the second in peacetime.

¹¹¹ *Hunsungule* (n 80) para 63.

¹¹² *ibid.* para 69.

in areas affected by violence; increasing the budget for children in conflict-affected areas; and other activities aiming to maintain children in schools, were considered ‘reasonable steps’ to fulfil its obligations under the ACRWC.¹¹³

As to the right to the highest attainable standard of health, the Committee laid down that its fulfilment is inconsistent with the lack of ‘a minimal access to health facilities, a lower level of contact with health-promoting measures and medical assistance, and a lack of provision of primary and therapeutic health resources and programmes’.¹¹⁴ The Committee considered that Uganda was diligent in its efforts to fulfil the right to health considering that: state authorities did not mismanage public funds; they did not withhold available medicines and medical treatment; they did not discriminate in fulfilling their duties; and they did not truncate the efforts of humanitarian actors.¹¹⁵ The Committee was aware of the existence of several obstacles to the effective enjoyment of the right. Amongst them, the Committee took note that: food insecurity was extremely high; the local population was dependent on humanitarian assistance to children; potable water was not provided with ease; health and sanitation services were strained; and access to livelihoods outside the camps was seriously reduced.¹¹⁶ However, in the Committee’s view, these limitations were not attributed to the Ugandan authorities, as they were explained by the situation of generalised violence affecting the region, such as widespread insecurity attributed to raids and destruction of property by the main rebel group (LRA).¹¹⁷

With this reasoning, the Committee is applying criteria initially developed by the Commission in peace situations, under the understanding of the state as an active guarantor of rights, in the aftermath of widespread violence. As early as 1995, the African Commission held that mismanagement of public finances, manifested in the shortage of medicines, as well as the lack of provision of social services, may constitute a violation of the African Charter.¹¹⁸

Certainly, some aspects of *Hunsungule* might well be open to criticism. The ‘inhuman conditions’ suffered by people living in camps, whose minimum needs were barely met and mainly through the assistance provided by international actors and NGOs, cast doubt on Uganda’s compliance with obligations to fulfil ESR.¹¹⁹ In a state with acute wealth inequalities

¹¹³ *ibid.* paras 66-9.

¹¹⁴ *ibid.* para 72.

¹¹⁵ *ibid.* para 75.

¹¹⁶ *ibid.* para 74.

¹¹⁷ *ibid.*

¹¹⁸ *(FLAG) v Zaire* (n 54) paras 4, 48.

¹¹⁹ *Deng* (n 104) para 53.

between urban-south and rural-north, the fact that humanitarian actors had to pay authorities to be escorted to deliver assistance prompted concerns that the government was not taking immediate steps to ensure with its maximum available resources the basic ESR of those affected by violence.¹²⁰

That said, the different understandings of the Commission and the Committee on the state-individual relationship sum up the main aspects of the discussion carried out in Chapter 2. With respect to the American context, it was concluded that socio-economic wrongs that stem from armed conflict are such that they can easily escape the findings of state misconduct over the occurrence of abuses. This conclusion was reached in relation to the trail of damage that accompanies armed combat and widespread abuses perpetrated by rebel armed groups. In the African context, the same conclusion is exemplified by violations attributed to foreign armed actors and the violence perpetrated between different segments of the civilian population. These findings make it clear that emphasising duties to respect and protect during violent episodes often runs the risk of leaving unresolved socio-economic wrongs that authorities can reasonably address in light of duties to fulfil ESR. The Commission cases on lack of access to education and health services by displaced children (*NGO Forum*) and to adequate health services by victims of sexual violence (*COHRE*) discussed above illustrate this point.

Unlike the African Commission, the Committee established that the lack of state responsibility regarding the occurrence of abuses does not exempt authorities from their duties to fulfil ESR. This conclusion, as simple and powerful as it is, has not yet been devised by the IACtHR. The reason for this is that taking ESR seriously in these contexts implies portraying the state less as the aggressor from whom the individual requires protection and rather as an active guarantor of rights in the aftermath of widespread violence. This lens makes it possible to require authorities to discharge their immediate and progressive duties in the field of ESR, including the obligation to secure adequate access to ESR-related goods and services.

In light of these conclusions, what remains to be explored is what role remedies, especially reparations, can and should play in the aftermath of widespread abuses. This is an important issue in the African context, as the Commission and Committee's fairly clear understanding of the scope of state responsibility in these contexts contrasts with their remedial practice, which has yet to be consolidated. To examine possible avenues that these bodies may take in the future when dealing with the intersection of claims to redress past wrongdoings and to honour

¹²⁰ *ibid.* paras 10-29.

ESR in the present, it is important to engage in dialogue with the remedial practice of the African Court, as well as that of the ECtHR and the IACtHR.

4 REPARATIONS IN THE AFRICAN HUMAN RIGHTS SYSTEM

4.1 Unpacking the African Court's understanding of reparations

Explicitly empowered to order redress under Article 27(1) of the Court's Protocol, the ACtHPR adheres to public international law when defining the scope of the obligation to make reparation.¹²¹ The understanding of Article 27(1) was developed for the first time following the judgment *Zongo v Burkina Faso*, a case dealing with the state's failure to investigate and sanction the killing of a journalist critic of the government and his companions perpetrated by non-state actors.¹²² In the reparation phase of the proceedings, the ACtHPR resorted to the well-known *restitutio in integrum* formula outlined by the Permanent Court of International Justice in *The Factory at Chorzów* case,¹²³ which was relaunched by the 2001 International Law Commission Articles on State Responsibility (Article 31).¹²⁴ According to it, 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.¹²⁵ The ACtHPR went on to say that reparation can take the form of restitution, compensation and satisfaction, and resorted to the case-law of the ECtHR and IACtHR to address different issues such as causality and moral damages.¹²⁶ As a result, it ordered the payment of compensation for moral damages that resulted *not for the killing as such* — which was attributed to non-state actors — but for the grief resulting from the 'duration of the lengthy legal procedure which is entirely ascribable to Burkinabe authorities'.¹²⁷

Despite its repeated reference to the IACtHR, the African Court adopted a narrow understanding of the duty of reparation in cases that involve due diligence obligations, which is more common in public international law than in the IACtHR's jurisprudence.¹²⁸ The precise contours of the African Court's position can be well understood against the foil of the

¹²¹ *Zongo* (n 9) para 53.

¹²² 13/2011 *Beneficiaries of Late Norbert Zongo and others v Burkina Faso* (Merits) 28 March 2014 1 AfCLR.

¹²³ *Factory at Chorzów (Germany v Poland)* PCIJ Series A No 17 (13 September 1928), 125.

¹²⁴ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (A/56/10), 2001, 91-4

¹²⁵ *Factory at Chorzów* (n 123) 125.

¹²⁶ *Zongo* (n 9) paras 47, 55, 61.

¹²⁷ *ibid.* para 31.

¹²⁸ The IACtHR has explained the extent to which its understanding of the attribution of responsibility differs from that of public international law in *Pueblo Bello Massacre v Colombia* IACtHR Series C 140 (31 January 2006) paras 116-7.

IACtHR's case-law. According to the IACtHR, in cases that involve breaches of due diligence obligations to prevent and investigate, the state is required to make good all damages caused, even though the violation is perpetrated by non-state actors and without the authorities' participation or complicity. In the *Cotton Field* case, for instance, although authorities themselves did not kill the victims nor were they complicit in abuses, the IACtHR determined that they were responsible for making good all damages resulting from the victims' death, which included pecuniary damage, encompassing consequential damage and earnings no longer produced by the dead, and non-pecuniary damage.¹²⁹ On the contrary, in *Zongo* the ACtHPR did not hold the state responsible for repairing the consequences of the killing. The authorities were only obliged to repair the damage resulting from the shortcomings in the investigation that affected the next of kin, such as the stress and anguish that follow 'unduly prolonged procedure which in the end turned out to be fruitless'.¹³⁰ In so doing, the African Court adopts a long-standing position in public international law, which can be traced at least to the USA-Mexico Claims Commission¹³¹ and arguably has been reaffirmed by the International Court of Justice¹³² and scholars working in the field.¹³³ Accordingly, the obligation to repair breaches of due diligence obligations does not require that authorities 'make good all of the damage caused by the crime itself'.¹³⁴ Since responsibility arising from the lack of due diligence is never as serious as when the authorities commit wrongdoing 'with their own hands',¹³⁵ the fixation of the quantum of compensation for which they are liable 'cannot be computed by merely stating the damages caused by the private delinquency'.¹³⁶

When applying the *restitutio in integrum* standard as the ACtHPR did, which is a position also suggested by the African Commission in *NGO Forum*,¹³⁷ it emerges that the award of reparation ends up oriented towards the objective of sanctioning or addressing the authorities' previous misconduct, not to make victims whole again. This position is not centred on those

¹²⁹ *González et al ("Cotton Field") v Mexico* IACtHR Series C 205 (2009), paras 285-6, 388-9, 561-578.

¹³⁰ *Zongo* (n 9) para 56.

¹³¹ Torres, 'Revisiting the *Chorzów Factory* Standard of Reparation—Its Relevance in Contemporary International Law and Practice' (2021) 90 *Nordic Journal of International Law* 190, 205.

¹³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 paras 415, 424, 461-3.

¹³³ Milanovic, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *European Journal of International Law* 669, 690.

¹³⁴ *Laura M. B. Janes et al (U.S.A) v United Mexican States*, 16 November 1925, Mexico-USA General Claims Commission, RIAA, Vol. iv, United Nations, 2006, para 22.

¹³⁵ *ibid.* para 20.

¹³⁶ *ibid.* para 25.

¹³⁷ The Commission made it clear that 'the fact that all the allegations could not be investigated does not make the State liable for the human rights violations alleged to have been committed by non-state actors.' *NGO Forum* (n 5) para 201.

affected by violence as it overlooks the fact that for them it does not matter who the perpetrator of abuse is. They want the consequences of wrongdoing to be eliminated as completely as possible, not just the uneasiness that arises from the state's recklessness in investigating abuses by third parties.

To some extent, the ACtHPR is following the suit of the remedial practice of the ECtHR regarding the setting of compensation for non-pecuniary damage. A quick comparison of the amount of damages awarded by the Strasbourg Court suggests that it may be especially interested in sanctioning certain practices, namely those in which the *deliberate* and *arbitrary* nature of state conduct is more salient. For instance, the ECtHR has considered that the 'seriousness' of the violation is greater when there is a finding of arbitrary killing directly perpetrated by state authorities compared with unintended killing resulting from security operations, granting higher awards in the first case.¹³⁸ Likewise, in cases of destruction of property, villages and forced evictions arbitrarily perpetrated by security forces, compensation for non-pecuniary damages is consistently recognised; however, when the state's involvement is less transparent, compensation is discarded¹³⁹ or awarded in smaller amounts.¹⁴⁰ In other contexts, the Court has explicitly established that if authorities openly violate their obligations to respect the right to life or if they just fail to secure it by not taking precautions, is decisive to establish the quantum of compensation.¹⁴¹ As a result, the Court awards greater sums in the first case.¹⁴²

In an empirical study, Fikfak found that the amount of compensation increases when the case involves deliberate and arbitrary violations of Article 3, such as acts of torture, and Article 5,

¹³⁸ In cases of killings directly perpetrated by state agents in contexts of abuse of power, the victim's death was estimated at GBP 25,000 (e.g. *Çakici*) and GBP 20,000 (e.g. *Ertak*): *Cakici v Turkey* App no 23657/94 (ECtHR, 8 July 1999) paras 128-130; *Ertak v Turkey* App no 20764/92 (ECtHR, 9 May 2000) paras 131-133, 151. In contrast, the amount awarded for errors in planning and conducting a security operation was estimated at GBP 5,000 when the civilian population was exposed to cross-fire: *Ergi v Turkey* App no 66/1997/850/1057 (ECtHR, 28 July 1998) para 110 and operative part (3)(4).

¹³⁹ *Dogan and others v Turkey* App no 8803-8811/02, 8813/02 and 8815-8819/02 (ECtHR, 13 July 2006) para 61.

¹⁴⁰ In *Sargsyan v Azerbaijan* App no 40167/06 (ECtHR, 12 December 2017) paras 52, 57, the plaintiff was granted EUR 5,000 both for pecuniary and non-pecuniary damages. Compare it with the amounts recognised exclusively for non-pecuniary damages in *Akdivar* (GBP 8,000); *Selçuk* (GBP 10,000), and *Ayer* (EUR 14,500); *Akdivar and Others v Turkey* App no 21893/93 (ECtHR, 1 April 1998); *Selçuk and Asker v Turkey* App no 12/1997/796/998-999 (ECtHR, 24 April 1998); *Ayer and others v Turkey* App no 23656/94 (ECtHR, 8 January 2004).

¹⁴¹ *Finogenov and Others v Russia* App no 18299/03 and 27311/03 (ECtHR, 4 June 2012) at para 289.

¹⁴² Compare in this sense *Benzer and Finogenov*. The first dealt with an indiscriminate bombing of villages that resulted in *substantive* violations of Art 2. The second involved a counter-terrorist and rescue operation to solve a hostage crisis in which authorities committed errors in the operation's execution, provoking the death of certain civilians, committing a *procedural* violation of Art. 2. While in the first case the victim's death was estimated at EUR 80,000, in the second it was EUR 26,400. Likewise, compensation for non-pecuniary damage for each survivor directly affected by the event was EUR 25,000 in *Benzer*, while in *Finogenov* it was EUR 13,200: *Benzer and Others v Turkey* App no 23502/06 (ECtHR, 24 March 2014); *Finogenov* (n 141).

such as arbitrary detention.¹⁴³ She also found that in Article 2 cases (i.e. the right to life), substantive violations give rise to more compensation than procedural ones.¹⁴⁴ Given that the ECtHR is seemingly adjusting the amounts based on how the authorities' conduct is qualified rather than on the consequences faced by those affected, Fikfak holds that the ECtHR ends up forgetting about the victim by overemphasising addressing state conduct. According to her study, '[the victim's] vulnerability, individual circumstances and consequences she may have suffered' are not seriously considered when the ECtHR fixes the compensation for non-pecuniary damage.¹⁴⁵

The uneasiness underlying Fikfak criticism can well be explained by recalling that deontological morality underlies the traditional offending state-victimised individual paradigm. This paradigm is most clearly expressed in the practice of ECtHR when it increases the amount of compensation when deliberate and arbitrary violations are at stake. In the Introductory Chapter it was explained that because of its emphasis on conduct, partisans of this moral view consider that a harm that an agent intends and inflicts has a greater moral weight than an equivalent harm that an agent does but simply anticipated or should have anticipated. By the same token, any harm that an agent does carries far more moral weight than an equivalent harm an agent merely allows to happen.¹⁴⁶ The ECtHR is simply modifying the amount of compensation in light of this ladder of moral importance, which focuses on the intrinsic rightfulness or wrongfulness of conduct more than the states of affairs it produces, as Fikfak pointed out regarding the neglect of the victim's plight. As discussed in the Introductory Chapter, under deontological understandings of human rights, reparations are not expected to make victims better off, but rather to redress the consequences of wrongdoing and rebuke certain conducts that are considered especially problematic.

Therefore, under the approach taken by the ACtHPR and the ECtHR, the link between reparations and ESR of affected people is only indirect. That said, however indirect this link may be, it must not be forgotten that reparations have an impact on the victims' welfare, since

¹⁴³ Fikfak, 'Non-pecuniary Damages Before the European Court of Human Rights: Forget the Victim; It's All About the State' (2020) 33 *Leiden Journal of International Law* 335, 356.

¹⁴⁴ *ibid.* 356-7

¹⁴⁵ *ibid.* 360.

¹⁴⁶ Pogge, *Realizing Rawls* (1989), 44.

disadvantaged victims tend to make use of reparation-related resources such as monetary compensation to secure ESR, which generally occurs after widespread violence.¹⁴⁷

The position of the IACtHR on these issues departs to some extent from the conclusions reached so far. True, the IACtHR has construed the American Convention's provision on reparation (Article 63 (1)) in terms of ensuring *restitutio in integrum*,¹⁴⁸ clarifying that reparations seek 'to make disappear the effects of the violations committed (...) they cannot imply neither enrichment nor impoverishment for the victim'.¹⁴⁹ However, as exemplified by the *Cotton Field* case discussed above, the San José Court imposes on states the obligation to fully repair the consequences of wrongdoing for which they are not directly responsible, unlike the ACtHPR. It also refrains from adjusting the amount of damages according to how state conduct is qualified, in contrast to the ECtHR.¹⁵⁰ But the most important thing is that the IACtHR is more sensitive to the specific situation of victims when it comes to shaping remedies, including their socio-economic impoverishment. As discussed in Chapter 2, although findings on state responsibility in conflict-related settings tend to revolve around civil and political rights violations, generally in terms of illegitimate interference in people's lives, the way remedies are devised ends up trying to ensure ESR thoroughly.¹⁵¹ This trend is particularly evident when the IACtHR orders the implementation of development programmes for people affected by widespread violence, including access to free medicines, education and housing, as well as the construction of health centres and the maintenance and improvement of roads.¹⁵²

Therefore, while the remedial practice of the ACtHPR and the ECtHR only has an *indirect* impact on the wellbeing of victims, the practice of the IACtHR has a *direct* bearing, raising the question of the role that reparations should play when guaranteeing ESR after episodes of generalised violence in the African context.

¹⁴⁷ Torres, 'El Desplazamiento Forzado en los Intersticios de la Justicia Transicional: Oportunidades y Riesgos' (2019) 69 *Revista de Estudios Sociales* 28, 35; Roht-Arriaza, 'Reparations and Economic, Social and Cultural Rights' in Sharp (ed), *Justice and Economic Violence in Transition* (2014), 116.

¹⁴⁸ *Case of Velásquez-Rodríguez v Honduras* IACtHR Series C 7 (1989) paras 25–6.

¹⁴⁹ *Case of the Mapiripán Massacre v Colombia* IACtHR Series C 134 (2012) para 245.

¹⁵⁰ Leach, Murray and Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Buckley, Donald and Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (2006), 58–9.

¹⁵¹ Melish, 'The Inter-American Court of Human Rights' in Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008), 400.

¹⁵² *Plan de Sánchez Massacre v Guatemala* IACtHR Series C 105 (2004), paras 109–111, 125–9 and subsequent; *Massacres of El Mozote and surrounding areas v El Salvador* IACtHR Series C 252 (2012) paras 336–340.

4.2 Applying the principle of full reparation in the African context

The main difficulty that arises when incorporating the *restitutio in integrum* formula in the aftermath of widespread violence is that it depends on the authorities' success in complying with duties to respect and protect during conflict-related episodes. This is compounded by the fact that deontological ethics, the conceptual framework that supports the primacy of these duties, privileges correcting flagrant violations of duties to respect, such as those involving episodes of state terrorism, while diminishing the moral importance of addressing wrongdoing that results as a more remote result of state conduct.¹⁵³ In light of the *indirect* and *direct* effects that reparations have on people's wellbeing, insisting on the *restitutio in integrum* formula can be problematic for the following reasons.

First, it is now clear that attaching greater weight to violations perpetrated by the authorities themselves than to those perpetrated by non-state actors, as exemplified by the African Court in *Zongo v Burkina Faso*, is actually an attempt to sanction the state's misconduct over the occurrence of abuses instead of taking seriously the situation of affected people. The same is true of the ECtHR's practice of increasing the amount of compensation for non-pecuniary damages in cases of deliberate and arbitrary violations. This practice is problematic from the perspective of victims, as they run the risk of receiving varying amounts of monetary resources for debatable reasons, instead of, for instance, the effects of the violation on their standard of living.¹⁵⁴ Increasing these amounts in cases of official violations could be justified if, as Pogge suggests, deliberate breaches of the duty to respect always make people worse off than involuntary or private wrongs.¹⁵⁵ However, this is a matter of evaluating existing states of affairs, not a matter of principle. After all, people's ESR are not more or less encroached because their houses were destroyed due to deliberate and systematic actions, caught in unintended cross-fire, or simply abandoned due to the circumstances of war. Certainly, accountability measures are sorely required to address practices that, for one reason or another, are more blameworthy, such as intentional killing or the authorities' complicity with wrongdoing. Nevertheless, the distribution of resources with a direct and indirect bearing on the victims' wellbeing should be left out of these discussions.

Second, emphasis on state-led violence tends to obscure the situation of people indirectly affected by armed conflict and the conduct of rebels and other actors not acting under the

¹⁵³ See Introductory Chapter.

¹⁵⁴ Fikfak (n 143) 357.

¹⁵⁵ Pogge, *World Poverty and Human Rights* (2013), 65.

authorities' control. As discussed in the previous section, excessive focus on state-led violence raises serious concerns as certain rebel groups (the LRA, for example) are largely responsible for the harm caused to the population. Not forgetting cases in which different factions of the civilian population end up pitted against each other in contexts of historical enmity. These people will hardly access reparation-related resources which are instrumental to cope with daily socio-economic shortcomings. This is the case since in order to trigger state responsibility it is required that authorities were, or should have been aware of a specific risk and refrained from taking reasonable measures to prevent it, according to the standards developed by the ECtHR and IACtHR, which were recently reaffirmed by the African Commission.¹⁵⁶ However, the scope of this obligation is very narrow in contexts in which there are structural risks on the population,¹⁵⁷ for example, where entire regions lack the presence of authorities, which endangers access to reparations for many.

In this sense, the breadth and depth of reparations issued by the IACtHR should not obscure the very limited scope of due diligence obligations in conflict-related scenarios. As discussed in Chapter 2, victims of rebel groups¹⁵⁸ and people affected by the general consequences of armed conflict¹⁵⁹ tend to be excluded from the scope of state responsibility, thereby lacking access to substantive socio-economic goods issued as reparations. It is therefore not entirely clear what the advantage is of ordering substantive socio-economic goods as a means of reparation for illegitimate interference in people's lives, in violation of duties to respect and protect, as the IACtHR does. This is the case since African bodies have the possibility, already put into practice by the Committee in *Hunsungule v Uganda*, to directly adjudicate ESR.

Third, despite the special stigma that practices of state terrorism have in the imagination of regional human rights bodies, the reality is that these bodies very sparingly hold the authorities accountable for them, for both operational and political reasons. Demonstrating the existence

¹⁵⁶ *Kwoyelo* (n 24) paras 210-2.

¹⁵⁷ Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?' (2015) 15 *Human Rights Law Review* 343, 362-4.

¹⁵⁸ The complaints of acts of theft and looting of property perpetrated by guerrillas after combat with authorities were dismissed as they were not attributed to the state in *Santo Domingo Massacre v Colombia* IACtHR Series C 259 (30 November 2012) paras 269-282.

¹⁵⁹ The Court did not find the state responsible for the forced displacement that was caused by legitimate bombings against guerrillas in highly disturbed areas in *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v Colombia* IACtHR Series C 270 (2013) paras 226, 239, 240, and 285.

of a systematic plan behind direct abuses is a complex task¹⁶⁰ and faces considerable opposition from states.¹⁶¹ Perhaps because of this, in the African system,¹⁶² as well as in the European¹⁶³ and Inter-American systems,¹⁶⁴ is commonplace to find that states are held responsible not for committing gross violations themselves but rather for failure to protect and investigate abuses by proxy militias and other non-state actors. However, although compliance with due diligence obligations has become an important avenue when establishing state responsibility in the African context,¹⁶⁵ the existing case-law of African bodies requires considerable legal refinement,¹⁶⁶ or in the worst case, reflects the political pressures that hinder human rights protection in the region.¹⁶⁷ It must also be recalled that judicial systems in certain conflict-torn states are structurally weak, such as in Sudan,¹⁶⁸ making it difficult to evaluate whether the authorities fulfilled their obligations to investigate and sanction abuses by non-state actors.¹⁶⁹ Given these *realpolitik* considerations and institutional limitations faced by domestic judicial systems, it becomes difficult to link access to key reparation-related resources to the authorities' fulfilment of obligations to respect and protect.

4.3 The alternative remedial practice of the African Commission and Committee

Although the African Commission has adopted a quite proactive role in ordering remedies and started to develop a 'system of remedies',¹⁷⁰ it has yet to establish an articulated approach to reparations. Even though General Comment No. 3 explains that 'reparation should be proportional to the gravity of the violations and the harm suffered' and that 'full and effective reparation (...) should include the implementation of guarantees of non-repetition',¹⁷¹ the basis and scope of reparations remain often unclear throughout the Commission's practice, as

¹⁶⁰ Buckley, 'The European Convention on Human Rights and the Right to Life in Turkey' (2001) 1 *Human Rights Law Review* 35, 36-44; Reidy *et al.*, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey' (1997) 15 *Netherlands Quarterly of Human Rights* 161, 171-2.

¹⁶¹ Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16 *Human Rights Law Review* 731, 749-750.

¹⁶² See *e.g.* *NGO Forum* (n 5).

¹⁶³ Buckley (n 160) 54-5; Reidy (n 160) 167-8.

¹⁶⁴ See *e.g.* *Mapiripan Massacre v Colombia* IACtHR Series C 134 (15 September 2005); *Pueblo Bello Massacre v Colombia* IACtHR Series C 140 (31 January 2006); *Operations Genesis* (n 159).

¹⁶⁵ See *e.g.* *Zongo* (n 9); *MRGI* (n 8); *IHRDA v Cameroon* (n 68).

¹⁶⁶ Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9 *Human Rights Law Review* 222, 239-240.

¹⁶⁷ Bekker (n 14) 500.

¹⁶⁸ Kälén (n 94) 58.

¹⁶⁹ Reidy (n 160) 167.

¹⁷⁰ Naldi, 'Reparation in the Practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681, 685.

¹⁷¹ N 6 para 19.

reflected when compensation is awarded. In delving into the underpinnings of compensation, the Commission limits itself to mentioning but not fully articulating some principles that inform redress such as ‘fairness’, ‘adequateness’, ‘effectiveness’, ‘sufficiency’, ‘appropriateness’ or being ‘victim-friendly’.¹⁷² In well-known cases in which compensation is recommended, it is not clear whether it depends on a general obligation to repair the consequences of international wrongdoing, as conceived by the PCIJ in *Chorzów Factory*, or a right-by-right analysis.¹⁷³ States are more likely to be free to choose how to meet their compensatory obligations, with the Commission noting that compensation must abide by *domestic standards*.¹⁷⁴ Only rarely has the Commission issued more detailed recommendations that define what compensation should include or requested a specific amount of damages.¹⁷⁵ In very few cases the Commission considered explicitly that compensation should abide by international standards, without clarifying what these standards are.¹⁷⁶

These gaps extend to situations in which ‘serious and massive violations’ are involved, which makes it difficult to discern what the Commission’s remedial position is after armed conflict and related scenarios.¹⁷⁷ On the one hand, the Commission has called upon authorities to grant compensation in many cases. For instance, authorities have been required to ‘take appropriate measures to ensure payment of a compensatory benefit’ (i.e. *COHRE*),¹⁷⁸ create a Commission of Inquiry to ‘ensure the payment of adequate compensation’ (i.e. *NGO Forum*),¹⁷⁹ and establish a Joint Commission ‘to assess the losses with a view to compensate the victims’.¹⁸⁰ On the other hand, the Commission has limited itself to drawing the attention of the Heads of

¹⁷² 318/06 *Open Society Justice Initiative v Côte d’Ivoire*, 17th Extraordinary Session of the ACHPR (19 February 2015) para 199; 292/04 *Institute for Human Rights and Development in Africa (IHRDA) v Angola*, 43rd Ordinary Session of the ACHPR (7 May 2008) para 87; *Interights v Cameroon* (n 66) para 138; *NGO Forum* (n 5) para 215; *SERAC* (n 21) para 70.

¹⁷³ *SERAC* (n 21) para 55.

¹⁷⁴ 59/91 *Embaga Mekongo v Cameroon*, 17th Ordinary Session of the ACHPR (22 March 1995) para 2; 313/05 *Kenneth Good v Botswana*, 47th Ordinary Session of the ACHPR (26 May 2010) para 244(i); 253/2002 *Bissangou v Dem. Rep. Congo*, 40th Ordinary Session of the ACHPR (29 November 2006) para 84(5); *Interights v Cameroon* (n 66) para 138.

¹⁷⁵ *Bissangou* (n 174) paras 64-8; 341/2007 *Equality Now v Ethiopia*, 57th Ordinary Session of the ACHPR (4 November 2015) para 158.

¹⁷⁶ 334/06 *Interights v Egypt* 9th Extra-Ordinary Session of the ACHPR (23 February 2011) para 233 (II).

¹⁷⁷ About the lack of clarity of the expression ‘serious and massive violations’ see Murray ‘Serious or massive violations under the African Charter on Human and Peoples Rights’ (1999) 17 *Netherlands Quarterly of Human Rights* 109, 110-1. See also Bekker (n 14) 523.

¹⁷⁸ *COHRE* (n 5) paras 201, 229(d); *MAA v Mauritania* (n 53) para 142.

¹⁷⁹ *IHRDA v Angola* (n 172) para 87; *NGO Forum* (n 5) para 215.

¹⁸⁰ *IHRDA v Guinea* (n 81) para 72.

State and Government to rights violations and issuing mere declaratory relief,¹⁸¹ denying compensation on the grounds of the high number of affected people.¹⁸²

The practice of the African Commission seems to suggest that the principle of full reparation should be tempered when widespread abuses are at stake. ‘When placed in the context of human rights’, the Commission contends, ‘this principle, which requires that the victim is reinstated in the situation prior to the violation, is mitigated’.¹⁸³ Rather than the ‘impossible’ task of restoring the situation that would have existed had the wrongdoing not been committed, the Commission seems to favour the *cessation* of wrongdoing and the *mitigation* of its consequences. In its own words, in the aftermath of widespread violations ‘the adoption of prompt and effective measures to finally put an end to the sufferings of the past may in themselves constitute an effective redress.’¹⁸⁴ Rather than full reparation, measures for the rehabilitation of those affected, the construction of memorial sites and the prevention of the occurrence of ‘fresh violations’ were recommended.¹⁸⁵

Like the African Commission, the Committee lacks an articulated understanding of the duty to make reparation, developing its views about reparation when it recommends compensation.¹⁸⁶ The Committee does not usually approach reparation as a general obligation derived from a breach of international law attributable to the state but largely as a duty related to abuses committed by non-state actors.¹⁸⁷ The Committee’s emerging case-law also appears to be less oriented towards full reparation than ceasing the wrongdoing and mitigating children’s suffering. Criteria such as promoting the ‘full recovery’¹⁸⁸ of children, ‘redress[ing] the exclusion’¹⁸⁹ they endure, or ‘ensuring that children are [no longer] deprived of their basic [socio-economic] rights’¹⁹⁰ stem from its reasoning.

Criticising what appears to be an excessively deferential practice to states, Bekker argues that the Commission should abide by international standards of reparation, including the provision

¹⁸¹ 64/92, 68/92, and 78/92 *Achutan and Amnesty International v Malawi*, 16th Ordinary Session of the ACHPR (22 March 1995) (operative part); 74/92 *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, 18th Ordinary Session of the ACHPR (11 October 1995), paras 15 and 26; *FLAG v Zaire* (n 54) (operative part).

¹⁸² *Open Society* (n 172) para 203.

¹⁸³ *ibid.* para 199.

¹⁸⁴ *ibid.* para 200.

¹⁸⁵ *ibid.*

¹⁸⁶ *MRGI* (n 8) para 98(G); *IHRDA v Cameroon* (n 68) para 84(b).

¹⁸⁷ *MRGI* (n 8) paras 41-57, 81-2, 84(b); *IHRDA v Cameroon* (n 68) paras 45-58, 98(G).

¹⁸⁸ *University of Pretoria* (n 68) para 82(a)(c).

¹⁸⁹ *MRGI* (n 8) paras 74 and 98 (C-D)

¹⁹⁰ 1/2015 *African Centre of Justice and Peace Studies (ACJPS) and others v Sudan* 31st Ordinary Session of the ACERWC (May 2018), para 105 (F).

of more robust compensation — a position that could be extended to the Committee. In her opinion, this is particularly true when serious or massive violations occurred, namely when individuals' rights 'have been violated as a result of a systematic government programme'.¹⁹¹ In light of the discussion in the previous section, material reparations should not depend on the imperative to sanction this type of conduct. However, accountability measures should be enforced consistently in these cases to avoid impunity practices, as well as giving authorities wrong incentives, such as the belief that they can fulfil their obligations after generalised violence solely by ceasing violations. Therefore, measures ordered by the Commission and the Committee, such as the requirement of criminal proceedings¹⁹² and the rejection of blank amnesties¹⁹³ should be encouraged in these contexts.

That said, the very emphasis by the Commission and the Committee on the authorities' duty to mitigate the consequences of wrongdoing and putting an end to ongoing suffering should be taken seriously. Seeking the recovery of those affected, addressing the exclusion they face, and effectively ensuring their ESR requires putting duties against want and need to the fore, a task that requires an understanding of the state as an active guarantor of rights in the aftermath of widespread violence. As discussed in Chapter 2 with regard to the IACtHR, this shift in the state-individual relationship implies moving away from an agent-oriented and conduct-based moral view that focuses on 'perpetrators and intents' towards a perspective that focuses on existing patterns of marginalisation.¹⁹⁴ In so doing, medium- and long-term distributive questions arise, which require weighing claims and establishing priorities in terms of access to socio-economic goods and public spending.

5 THE IMPORTANCE OF A PRIORITY SETTING FRAMEWORK TO ADDRESS ESR AFTER WIDESPREAD VIOLENCE

The massive and sudden migration flux in Darfur¹⁹⁵ posed dilemmas regarding the satisfaction of competing demands between those affected by violence, 'common' poor urban residents,¹⁹⁶ and other deprived rural communities.¹⁹⁷ This occurred in a region with a 'lack of basic infrastructure and public services after decades of civil war, with millions living in extreme

¹⁹¹ Bekker (n 14) 509 fn. 27 and 523 fn. 134.

¹⁹² *MRGI* (n 8) para 98(A).

¹⁹³ *NGO Forum* (n 5) para 215.

¹⁹⁴ Young, *Justice and the Politics of Difference* (2011), 195-6.

¹⁹⁵ Kälén (n 94) para 2.

¹⁹⁶ Cassese (n 91) para 229.

¹⁹⁷ Kälén (n 94) para 35.

poverty’.¹⁹⁸ Despite the recognition of relevant human rights law standards by local authorities, Kālin found with worrisome frequency that they simply could not cope with the situation.¹⁹⁹ In these contexts, then, all levels of government ‘will have to make decisions about what resources to allocate where’.²⁰⁰ ‘It is paramount’, Samar continues, to ensure that authorities are ‘not violating [their] immediate obligations under the ICESCR’.²⁰¹

The need for a framework that allows priority setting becomes increasingly urgent to the extent that the African states continue to ratify several regional protocols. For instance, the Women’s Protocol contains a strong mandate to prioritise resource allocation in favour of women over military spending (Article 10(3)). It also contemplates other general positive duties such as the adoption of a ‘gender perspective’ in policy, administrative and legal measures, including ‘corrective and positive action in those areas where discrimination against women in law and in fact continues to exist’ (Article 2 (d)). The Elderly’s Protocol (Article 14(1)) and the Protocol for Persons with Disabilities (Preamble) also contemplate that these groups are entitled to access authorities with priority and to ‘special measures of protection in keeping with their physical or moral needs’ in conflict-related scenarios. Other regional treaties, such as the ACRWC (Article 26) and the Kampala Convention (Article 9(2)), also establish priority treatment measures for children and IDPs.

Taken together, these instruments present the authorities with the challenge of ensuring ESR by expressing equal concern for all in the aftermath of widespread violence. This task requires exploring the scope of notions such as material equality or equality of opportunity in (post)conflict societies, since the Women’s Protocol calls upon state authorities to implement affirmative action measures when social and cultural patterns place certain groups as inferior to others (Article 2). An opportunity conception of justice seems to emerge from the Protocol for Persons with Disabilities, when it establishes that these people must enjoy their rights on an equal footing with ordinary people (Articles 7, 12). In addressing these distributional issues, it is also important to come to terms with the victim/non-victim distinction in terms of ESR enjoyment, given the special treatment in favour of people affected by armed conflict, such as IDPs.

¹⁹⁸ Samar (n 93) para 67.

¹⁹⁹ Kālin (n 94) para 2.

²⁰⁰ Samar (n 93) para 69.

²⁰¹ *ibid.*

In conducting this discussion on priority-setting in the African context, strengthening domestic judicial systems must also be balanced with other imperatives. This task is not independent of discussions about resource scarcity and achievement of rights over time just because civil and political rights are involved.²⁰² Likewise, the final decision on the need for reparation measures must also be filtered through a prioritisation exercise. In (post)conflict settings it is just reckless to invest significant amounts of resources in reparations without ensuring that they provide the highest possible economic return for victims and society in general.²⁰³ Under this consequentialist lens, reparation measures such as individual compensation that runs into the hundreds of thousands of dollars according to the IACtHR standards, recently adopted by the African Commission,²⁰⁴ are difficult to justify. The same occurs with the award of material reparations to well-off victims, especially when segments of the population have yet to secure basic ESR.²⁰⁵ On the contrary, the implementation of a land restitution policy is easy to justify, as it provides IDPs with the basis for securing ESR, such as housing. It can also be the first step in a broader attempt to ensure more equitable access to land in societies where this good is highly concentrated.²⁰⁶ In light of the discussion carried out thus far, these measures are welcome provided that they do not depend on the authorities' failure to respect and protect rights in the past.

In this regard, international soft law instruments, such as the Principles on Housing and Property Restitution for Refugees and Displaced Persons (*Pinheiro Principles*),²⁰⁷ closely link reparation measures with ESR enjoyment. The *Pinheiro Principles* open with the recognition of the precarious conditions facing those who are forced to flee and establish that compensation measures are subsidiary to the obligation to ensure the restitution of land, housing and property (Article 21). Crucially, access to these measures does not depend on a retrospective assessment of state conduct in terms of duties to respect and protect, as the *Pinheiro Principles* clearly state that they apply to all those who are forced to flee 'regardless of the nature or circumstances by which displacement originally occurred' (Article 1.2). Restitution of land, housing and

²⁰² Schmid and Nolan (n 78) paras 373-4.

²⁰³ Van der Auweraert, 'The Potential for Redress: Reparations and Large-Scale Displacement' in Duthie (ed), *Transitional Justice and Displacement* (2012) 139, 146.

²⁰⁴ *Equality Now* (n 175) para 158.

²⁰⁵ Kalmanovitz, 'Corrective Justice versus Social Justice in the Aftermath of War' in Bergsmo *et al* (eds), *Distributive Justice in Transitions* (2010), 85; Uprimny, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 *Netherlands Quarterly of Human Rights* 625, 644.

²⁰⁶ Saffon and Uprimny, 'Distributive Justice and the Restitution of Dispossessed Land in Colombia' in Bergsmo *et al* (eds) (n 205), 410-8.

²⁰⁷ Pinheiro, Principles on Housing and Property Restitution for Refugees and Displaced Persons (E/CN.4/Sub.2/2005/17) 28 June 2005.

property is understood in terms of ‘positive measures’ to address the plight of all who are forced to flee, as set out in the Preamble.

By framing the discussion on reparations in this way, which is not entirely unfamiliar to societies in transition,²⁰⁸ the underpinnings of the traditional *restitutio in integrum* formula are shaken. As discussed in the Introductory Chapter, the moral support of reparations is linked to the special rejection generated by illegitimate and disruptive interference by the state or third parties in people’s life plans and projects. This stance is clear in the case-law of the IACtHR, for instance, when it stresses that forced displacement caused by state authorities is reprehensible as it entails an abusive disruption of the private life of those affected and an interference with their right to freedom of movement and residence.²⁰⁹ Under this deontologically oriented understanding of human rights, reparations do not seek to make people better off but to restore their due in order to secure and sustain ‘the plans and projects that were upset by the harm’.²¹⁰

However, it is clear that the very possibility of having a life project presupposes certain features that cannot be taken for granted in societies ravaged by armed conflict. These include, as elaborated by the IACtHR in its doctrine of the right to a dignified life, access to basic socio-economic goods.²¹¹ But in (post)conflict settings it is not uncommon that large numbers of people struggle to meet basic needs,²¹² while many others can only carry out activities that open up a horizon that does not go beyond daily urgencies.²¹³ When this happens, it seems reasonable that the more ‘modest’ duty to make those vulnerable and disadvantaged better off, regardless of how shortcomings took place, should prevail over the duty to restore people’s life plans had the authorities not breached their obligations to respect and protect. This line of reasoning leads to the following paradox formulated by Kalmanovitz

The more widespread and extensive the destruction caused by war, the weaker the rights to receive reparations. In the limiting case of a war that affects directly a large majority of the population, rights and obligations of social justice should trump all rights of corrective justice.²¹⁴

²⁰⁸ Offe, *Varieties of Transition: The East European and East German Experience* (1996) 125.

²⁰⁹ *Mozote* (n 152) paras 186-8.

²¹⁰ Kalmanovitz (n 205) 79.

²¹¹ See Chapter 2, Section 5.1.

²¹² Kälén (n 94) 51.

²¹³ *ibid.* para 30.

²¹⁴ Kalmanovitz (n 205) 72.

Even if an individual has a right to reparation for a wrong attributable to the state, as can easily be deduced, for instance, in the Sudanese case, justice is not necessarily secured in (post)conflict by giving people their due, as May provocatively suggests. On the contrary, justice can also be delivered by adopting an approach that has an economic sense for the common good.²¹⁵ Unfortunately, because of its constant recourse to the offending state-victimised individual paradigm and its emphasis on state duties to respect and protect, the African Commission ends up adopting a ‘western reformism’ attitude according to which ‘Africa merely needs a liberal democratic, rule-of-law state to be freed from despotism’.²¹⁶

6 CONCLUSION

This chapter reiterated the conclusions reached in Chapter 2, according to which the devastating effects of armed conflict and related scenarios on ESR enjoyment exceed what can legitimately be expected of authorities in terms of their duties to respect and protect. In addition to the death toll and economic damage that results from the conduct of rebel groups and armed combat, addressed in the Inter-American context, the African region also showed that the presence of foreign armed actors and clashes between communities leave a balance of destruction for which the state cannot be easily held to account. The eventual lack of responsibility in terms of duties to respect and protect by no means implies that the state is exempt from carrying out its duties to fulfil ESR in the aftermath of abuses. However, excessive insistence on the first couple of duties led the African Commission to ignore bad socio-economic states of affairs that could have been reasonably addressed by the state, understood not as the aggressor from whom the individual requires protection, but as an active guarantor of rights.

In contrast, the African Committee demonstrated that there is room to evaluate state compliance with duties to fulfil ESR after widespread violence, even if there is no finding of wrongdoing regarding past abuses. In *Hunsungule v Uganda* the Committee made it clear that authorities are obliged to take immediate steps to guarantee ESR even in these adverse contexts. This was exemplified by the duty to ensure access to educational services when regular schools were closed, no matter how improvised or problematic these arrangements might be. Obligations of immediate compliance were also spelled out in the statement that

²¹⁵ May, ‘Jus Post Bellum, Grotius, and Meionexia’ in Stahn, Easterday, and Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (2014), 20.

²¹⁶ wa Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (1995) 35 *Virginia Journal of International Law* 339, 341.

discriminatory practices are not accepted when ensuring ESR after episodes of generalised violence. As to the duty of progressive realisation, the Committee's practice made it clear that it makes no difference whether states enjoy peacetime or are overcoming armed conflict. In both cases state authorities must, *inter alia*, avoid practices such as mismanagement of public funds and be diligent in procuring available medicines and medical treatment.

In light of these conclusions, the duty to make reparation as a result of the authorities' failure to respect and protect rights loses important ground. From the very first judgment on reparations issued by the ACtHPR, it was clear that reparations often pursue the objective of sanctioning certain conduct by authorities that is considered more reprehensible, not to make the victim whole again. This position, also suggested by the African Commission, is in tune with the remedial practice of the ECtHR in calculating the quantum of compensation for non-pecuniary damage. This approach to reparations is open to the criticism that the ECtHR ends up modifying the amount of compensation according to how state conduct is evaluated. Since impoverished victims tend to use reparation-related resources to guarantee ESR, this state-centred approach to reparations ends up ignoring the effects of violations on their wellbeing and creates the risk of handing over disparate amounts of monetary resources for reasons which may not correspond to the hardships often experienced by those affected by violence. Ordering substantive socio-economic goods and development programmes, as examined with respect to the IACtHR in Chapter 2, is not a sound alternative either, as it ignores the plight of all those who found their ESR undermined by conduct not attributable to authorities. Finally, *realpolitik* considerations in the African context, such as the undue pressure that some states may exert on African bodies, as well as institutional limitations faced by domestic judicial systems, also make it undesirable to link access to reparation-related resources with compliance by state authorities with duties to respect and protect rights by investigating abuses. Instead of following the paths opened by the ECtHR and the IACtHR, African bodies should focus on the direct enforceability of ESR after episodes of widespread violence, following the example of the African Committee.

These considerations allow to consolidate an answer to the first research question of this study: in addressing the plight of people affected by widespread violence, access to goods and services that are important for them to ensure their ESR should not depend on a retrospective assessment of state responsibility over the occurrence of abuses, in terms of duties to respect and protect rights. On the contrary, a consequentialist framework should be adopted, one that directly tackles existing shortcomings regardless of how they occurred. This conclusion does not

definitively rule out the possibility of implementing reparation policies in (post)conflict settings; however, it rejects that the granting of these measures is based on a retrospective evaluation of state responsibility, rather than on the authorities' positive duties to address the plight of those affected by violence. Anchored in positive duties, the final decision on the implementation of reparation measures should depend on consequentialist calculations and priority setting, in the sense that they must be an effective means to the end of ensuring the ESR of the population, taking into account the interests of those affected and unaffected by violence.

This consequentialist lens is accompanied by acute distributive challenges, including developing a more refined framework that allows priority-setting between those affected and unaffected by violence, expressing special concern for certain disadvantaged groups. Treaties and additional protocols establishing special treatment for African women, children, the elderly, people with disabilities and IDPs raise the question of how to balance ESR claims considering factors such as victimisation, poverty and status-based discrimination. The remainder of this thesis addresses this issue from the perspective of the ESCR Committee.

CHAPTER FOUR

The ESCR Committee and (Post)Conflict Settings

Balancing ESR Claims in Contexts of Victimisation, Material Deprivation and Status-Based Discrimination

1 INTRODUCTION

In the Introductory Chapter it was explained that this study is organised in two main parts. The first, which is made up of Chapters 2 and 3, dealt with regional human rights bodies. Through these chapters the following conclusion was reached regarding the first research question: in addressing the plight of people affected by widespread violence, a consequentialist framework should be adopted, one that addresses existing socio-economic shortcomings and privileges positive duties to fulfil ESR after widespread violence. This conclusion opens up the remaining research questions to be addressed in this study. When ensuring ESR in these contexts, how to balance the claims of disadvantaged people on the basis of victimisation, material deprivation, and status-based discrimination? Why exactly does the situation of disadvantaged people matter in the aftermath of widespread violence and when does the special weight attached to their interests end?

The second part of this study, which comprises Chapters 4 and 5, seeks to answer these questions from a consequentialist perspective. The full scope of this perspective will be explored progressively throughout this chapter. Suffice it to mention here that consequentialism privileges the decision that achieves the best available state of affairs, judged from an *impartial standpoint* which treats everyone's interest with *equal concern*.¹ The current chapter unpacks the principles of impartiality and equal concern for all and applies them in the aftermath of widespread violence. The purpose of this analysis is to provide a principle-based framework upon which the second research question just mentioned, on how to balance ESR claims of disadvantaged people, affected and unaffected by violence, in contexts of widespread deprivation and status-based discrimination, can be answered.

While regional human rights bodies were the main protagonists of the discussion carried out so far, the rest of the study will be conducted in dialogue with the ESCR Committee. As explained in the Introductory Chapter, the ESCR Committee is often ignored in scholarly work on ESR in (post)conflict settings. It was suggested that the reason for this may be the Committee's reluctance to adopt the naming and shaming approach that seeks to hold

¹ Scheffler, 'Introduction' in Scheffler (ed), *Consequentialism and its Critics* (1998) 1.

authorities accountable for violations perpetrated or tolerated by them, as well as the lack of ‘assertive and substantial recommendations’ on the application of transitional justice mechanisms.² However, as will be explored throughout this chapter, by not focusing on the state authorities’ previous compliance with duties to respect and protect rights, but rather emphasising their ongoing obligations towards people in an unfavourable socio-economic situation, the Committee may be consistently endorsing a consequentialist understanding of state duties in the field of ESR. Therefore, instead of ignoring the Committee’s lessons because they do not conform to mainstream deontologically-oriented human rights law, the remainder of this study seeks to make visible and justify the consequentialist moral commitments that transpire from the Committee’s reasoning.

Focusing on the Committee is further justified given the increasing attention it pays to societies affected by episodes of widespread violence. The time when states destabilised by these events were somewhat exempt from their reporting obligations to the Committee, dating back to the 1980s and early 1990s, is now water under the bridge.³ The fairly informal discussions between Committee members and states that did report in the first sessions during the 1980s, without delving into the effects of widespread violence on the enjoyment of ESR, nor defining precise recommendations, are also a matter of the past.⁴ As mentioned in the Introductory Chapter and can be found in the Annex to this study, the Committee began to define its position on ESR in (post)conflict settings from the mid-1990s, as a result of the standardisation of the reporting procedure and the growing number of reporting states.

Crucially, the earliest, if not the first reports from the Inter-American region, since the mid-1990s, were submitted by states experiencing armed conflict and related episodes, or in their aftermath. Certain European states affected by conflict-related episodes began to report with greater delay after the cessation of violence, such as the states that arose from the former Yugoslavia. With the exception of the Nagorno-Karabakh conflict, the Cyprus dispute, and certain belligerent activities involving Russia, where concluding observations (COs) were issued in the same period as in the Inter-American context, most of the first COs issued on conflict-affected states in Europe date back to the early 2000s. A significant number of them

² Schmid, ‘Socio-economic and Cultural Rights and Wrongs after Armed Conflicts. Using the State Reporting Procedure before the United Nations Committee on Economic, Social and Cultural Rights More Effectively’ (2013) 31 *Netherlands Quarterly of Human Rights* 241, 258, 262.

³ Riedel, ‘Economic, Social and Cultural Rights in Armed Conflict’ in A Clapham and P Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2015), 450.

⁴ See e.g. CESCR Concluding Observations Colombia, 1980, paras 1-28; Peru, 1984, paras 1-29; Nicaragua, 1985, paras 1-47.

were issues in the second half of that decade and to a lesser extent throughout the 2010s. Concerning the African region, while some countries began reporting with great delay after the peak of widespread violence, many of them reported shortly after or while still affected by violence. With the exception of some cases, most of the COs dealing with conflict-related scenarios date from the second half of the 2000s and extend through the 2010s.

As Schmid and Riedel note, in these settings the Committee tends to address the plight of groups affected by widespread violence and highlight certain typically endangered rights.⁵ As will be seen, the Committee's reasoning is now distinct enough to distinguish different patterns of deprivation and status-based discrimination that disproportionately affect certain people post-conflict. This means that the Committee has clarity about the burdens that, for instance, women, children, persons with disabilities and ethnic minorities have to bear in the aftermath of widespread violence. This has been done without losing sight of the situation faced by other disadvantaged groups not affected by violence. Although recommendations for special and priority treatment in favour of disadvantaged people have been made in a disorderly way at times,⁶ the Committee's recent work shows an important level of consistency and depth.

This chapter, then, will draw on the Committee's general comments and sixty COs issued on thirty-six states affected by armed conflict and related episodes in the European, American, and African regions (*see* Annex). The purpose of this analysis is to answer the second research question of this study, that of how to balance the claims of disadvantaged people on the basis of victimisation, material deprivation and status-based discrimination, by considering the principles of impartiality and equal concern for all that inform consequentialism — and arguably the Committee's practice.

Section 2 addresses the victim/non-victim distinction as it stands in the Committee's work in order to have a broad idea of how it understands the situation of people affected by violence. Section 3 examines the role that remedies and reparations play in these contexts, especially in cases of forced evictions and sexual/gender-based violence. Section 4 breaks down the general position of the Committee on status-based discrimination and its relation to material deprivation. Section 5 explores how the interaction between discrimination and material deprivation affects people engulfed in widespread violence, what steps need to be taken to

⁵ Schmid (n 2) 255-7; Riedel (n 3) 451-3.

⁶ Chapman and 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, 686.

address their plight according to the Committee's recommendations, and how to balance competing ESR claims of different disadvantaged groups in these contexts.

2 ON VICTIMS AND NON-VICTIMS: THE COMMITTEE'S APPROACH TO SOCIO-ECONOMIC WRONGS AFTER WIDESPREAD VIOLENCE

2.1 What is at stake

Throughout this study it has become clear that deontologically oriented approaches to human rights law lead to the interpretation of the situation of people affected by violence under a distinctive lens, well encapsulated in the category of 'victims' of serious abuses. As discussed in the Introductory Chapter, the characteristic feature of 'victims' is that the bearers of the notion were *wronged* in terms of illegitimate and unwelcomed interference by authorities or third parties, not the fact that they are socio-economically *badly off*. Pablo de Greiff exemplified this by highlighting the difference between victims of serious abuses and those affected by natural disasters, noting that although their plight may be identical, the latter only saw a setback in their interests.⁷ Victims of serious abuses, therefore, have a particular status that differentiates them from non-victims although in all relevant aspects the situation is similar. Owing to the distinctive status of victims, access to ESR should not be considered *prima facie* as a means of redress.⁸ According to the argument, since ESR address the entitlements that victims have as *citizens*, they should not be conflated with reparations, which are bestowed upon them *qua victims*.⁹

This victim-centred approach has led some to argue that victims should have preferential access to socio-economic goods and services over the non-victimised poor.¹⁰ The fact that the state failed to respect and protect the victims' rights in the past justifies, in their opinion, priority treatment over other disadvantaged population. In this sense, domestic experiences show that it is not unusual to place victims at the front of the queue when accessing the state's offer, and that this is often done as a means of recognising their distinctive character and offering some

⁷ de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence* (A/HRC/21/46) 9 August 2012, para 29.

⁸ Magarrell, 'Reparations for Massive or Widespread Human Rights Violations: Sorting out Claims for Reparations and the Struggle for Social Justice' (2003) 22 *Windsor Yearbook of Access to Justice* 85, 94.

⁹ Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 *Hastings International and Comparative Law Review* 157, 186-192; Uprimny, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 *Netherlands Quarterly of Human Rights* 625, 635-7.

¹⁰ Pérez-Murcia, 'Social Policy or Reparative Justice? Challenges for Reparations in Contexts of Massive Displacement and Related Serious Human Rights Violations' (2013) 27 *Journal of Refugee Studies* 191, 199, 203; Colombian Constitutional Court, *Sentencia SU-1150* (30 August 2000) para 41; T-563 (26 May 2005) 8; *Auto* 008 (26 January 2009) para 90; *Auto* 373 (23 August 2016) 18.

kind of redress.¹¹ In Chapter 2 it was discussed that the IACtHR supports the assertion that social services provided to citizens should not be confused with reparation to victims; that victims should have preferential treatment or priority access to public institutions; and that victims have the right to comprehensive development programmes that, to count as reparation, must be different from ordinary social services. Although it is not clear if the IACtHR considers that priority treatment consists of privileging victims over other disadvantaged persons, it was argued that the very meaning of these terms could suggest it.¹²

On the contrary, in Chapter 3 it was argued that when ordering public spending and guaranteeing ESR in contexts with scarce resources and basic needs that yet have to be met, the imperative of making disadvantaged people, affected and unaffected by violence, better off should be a priority. This should be placed over the obligation to make good the consequences that follow from illegitimate interference in people's lives. This position was defended by explaining that the moral foundations of reparations may presuppose that people have life projects and plans which are illegitimately disrupted.¹³ However, it was recalled that in the aftermath of episodes of widespread violence it is common for certain people not to have their basic needs met. Likewise, it is common that many others have limited access to income, a situation that does not allow them to organise their lives beyond what they are going to put on the table the following night. Thereby the purpose of making disadvantaged people better off should be prioritised so that their life prospects have some stable ground to unfold. From this consequentialist standpoint, it follows that existing socio-economic shortcomings should inform how victims and non-victims should fare when accessing the state's offer, establishing priorities in light of the burdens that prevent them from enjoying their ESR *qua disadvantaged citizens*.

Whether the deontological or consequentialist approach to human rights law is taken, it is clear that the stakes are high and neither of them will offer a completely satisfactory answer. As mentioned in the Introductory Chapter, it is difficult to explain to an 'ordinary' poor family struggling to provide for their children that only victims have fast-track access to social policy as a means of redress.¹⁴ Yet it is equally difficult to explain to a rural family that lost everything

¹¹ Correa, *Integrating Development and Reparations for Victims of Massive Crimes* (2014), 9; Sandoval (ed) *Prioritising Victims to Provide Reparations: Relevant Experiences* (2011), paras 19-22, 55; Roht-Arriaza (n 9), 198-200.

¹² Chapter 2, Section 5.3.2.

¹³ Chapter 3, Section 5.

¹⁴ Perez-Murcia (n 10) 202-203.

and plunged into poverty due to widespread violence, that they have to overcome poverty at the same pace as their new neighbours in the belts of misery surrounding the cities. Faced with this dilemma, the ESCR Committee has adopted the consequentialist alternative.

2.2 The Committee's consequentialist approach to the aftermath of widespread violence: A preliminary assessment

Throughout its COs the Committee consistently focuses on the situation of particular groups that were affected by armed conflict and widespread violence and, consequently, are facing appalling socio-economic conditions. Amongst them, it has addressed in detail the plight of stateless persons,¹⁵ asylum-seekers,¹⁶ refugees,¹⁷ returnees,¹⁸ IDPs,¹⁹ 'victims of the armed conflict/war'²⁰ and 'victims of gross human rights and humanitarian law violations'.²¹ The Committee sheds light on the general situation of distress affecting these groups by addressing specific rights endangered because of armed conflict, such as limited access to land, housing, employment, education, social protection or documentation. It also highlights additional patterns of disadvantage affecting them such as gender, age, ethnicity or social condition.²²

These groups stand out for the specific shortcomings they face in enjoying ESR, especially the right to an adequate standard of living. Owing to this, the Committee does not place them in a preferential position on the grounds of *victimisation* over other groups with comparable ESR deficits. For instance, when the Committee addressed the Colombian and Azerbaijani authorities to urgently meet the basic needs of certain deprived people, it meant those affected by violence, namely IDPs and demobilised children, in exactly the same terms as other similarly deprived groups, such as homeless people and children living in the streets.²³ In many

¹⁵ See e.g. CESCR Concluding Observations Azerbaijan, 2004, para 15; Croatia, 2001, para 22.

¹⁶ See e.g. CESCR Concluding Observations Albania, 2013, para 14; Cyprus, 2009, para 18; Angola, 2016, paras 23-4.

¹⁷ See e.g. CESCR Concluding Observations Azerbaijan, 2004, para 15; Rwanda, 2013, para 11; Sudan, 2015, paras 25-6, Kosovo, 2008, para 27.

¹⁸ See e.g. CESCR Concluding Observations Bosnia, 2006, para 9, 12; Rwanda, 2013, para 11; Sudan, 2015, para 23-6.

¹⁹ See e.g. CESCR Concluding Observations Colombia, 2001, para 32; Russia, 2003, paras 30, 58; Serbia and Montenegro, 2005, para 14; Croatia, 2001, para 8; Kosovo, 2008, para 27; Macedonia, 2008, para 24; Angola, 2008, paras 27-8; Cameroon, 2019, para 8-9; CAR, 2018, para 11-12.

²⁰ CESCR Concluding Observations Bosnia, 2006, para 39.

²¹ CESCR Concluding Observations DRC, 2009, para 33.

²² See e.g. CESCR Concluding Observations Colombia, 2001, paras 11, 43; Guatemala, 1996, para 20; Guatemala, 2003, para 42; Bosnia, 2006, paras 12, 47; Sudan, 2000, para 26; Serbia and Montenegro, 2005, para 23.

²³ See e.g. CESCR Concluding Observations Colombia, 1995, para 22; Colombia, 2001, para 41; Azerbaijan, 1997, paras 24, 37; DRC, 2009, para 27-8; Kenya, 2008, para 34.

other cases, deprived people are treated on an equal footing with people affected by widespread violence,²⁴ with the Committee often overlapping and conflating both categories.²⁵

Perhaps because it understands the relevant characteristic of both groups mainly in terms of the difficulties they face in achieving an adequate standard of living, whether affected by armed conflict or not, the Committee has been reluctant to resort to the notion of ‘victim of armed conflict’.²⁶ This is not to say that the ‘victim’ category is uncommon in the Committee’s general practice. It has been used in a variety of contexts, ranging from victims of gender-based violence,²⁷ through to victims of child labour, forced labour and human trafficking,²⁸ to ‘victims’ of discrimination on prohibited grounds.²⁹ However, in few cases people affected by armed conflict and widespread violence have been labelled as ‘victims’.³⁰ In all these cases, the use of the notion sought that ‘victims’ enjoy protection similar to that of other disadvantaged groups or that state authorities fulfil certain ESR specifically endangered because of violence.³¹ In a few cases, the Committee used the ‘victim’ notion because it was already incorporated into domestic legislation, recommending that the different groups of ‘victims’ recognised at the national level be treated without discrimination.³² The sparing use of the category in these settings is not accompanied by a call to privilege ‘victims’ over other equally disadvantaged people.

The Committee, therefore, distances itself from deontologically-oriented approaches to human rights law, according to which having been wronged in armed conflict and related episodes places victims in a somewhat different position than ordinary disadvantaged citizens — a privileged position that justifies treating them with priority when accessing socio-economic goods. However, in addressing the situation of those affected by armed conflict as ‘ordinary citizens’, the Committee enters a disputed moral ground. Because by adopting a

²⁴ See *e.g.* CESCR Concluding Observations Suriname, 1995, para 13; Guatemala, 1996, para 17; Serbia and Montenegro, 2005, paras 14, 56-57; Cyprus, 2009, para 21.

²⁵ See *e.g.* CESCR Concluding Observations Algeria, 2010, paras 18-9; Angola, 2008, para 19; Angola, 2016, para 44.

²⁶ See *e.g.* CESCR Concluding Observations Colombia, 2017, para 48; Mali, 2018, para 37.

²⁷ See *e.g.* CESCR Concluding Observations Rwanda, 2014, para 10; Burundi, 2015, para 36.

²⁸ See *e.g.* CESCR Concluding Observations Rwanda, 2014, paras 19-21; Russia, 2003, para 51; Burundi, 2015, para 30.

²⁹ CESCR Concluding Observations Azerbaijan, 2013, para 8.

³⁰ See *e.g.* CESCR Concluding Observations DRC, 2009, paras 25, 33; Colombia, 2010, para 16; Colombia, 2017, para 43; Ukraine, 2020, paras 40-1; Bosnia, 2006, paras 19, 38, 41; Argelia, 2010, para 13; Mali, 2018, para 35(c).

³¹ See *e.g.* CESCR Concluding Observations DRC, 2009, paras 25, 33; Colombia, 2017, para 43; Argelia, 2010, para 16; Angola, 2008, para 36; Mali, 2018, para 35(c); Bosnia, 2013, para 23.

³² See *e.g.* CESCR Concluding Observations Bosnia, 2006, paras 18; Bosnia, 2013, para 22.

consequentialist approach, it ends up overlooking aspects that are important from the perspective of victims and are well captured by deontological morality.

As discussed in the Introductory Chapter, by focusing on the intrinsic rightfulness or wrongfulness of conduct, deontological morality addresses two things that escape consequentialism, namely the intention with which someone engages in conduct and the perceived mistreatment from the victim's point of view. From the agent's perspective, the intentionality of harm matters 'because it seems to bespeak a fundamental lack of respect for the person who is victimised'.³³ From the victim's perspective, 'to be hurt by a natural force or by accident is different from being the object of an intentional attack even though the actual injury may be identical. The intention makes for the offence'.³⁴ Something crucial for the current discussion follows from this structure of the deontological argument: deontological considerations do not only tell an agent what they can and cannot do, but they 'also tell victims what sort of treatment they may or may not object to, resist or demand'.³⁵ Whenever a particular conduct is deemed intrinsically incorrect, such as intentionally harming an innocent person, the victim of that conduct has moral reasons to *object to* it. Once the victim objects, deontological reasoning justifies the victim *resisting* the conduct and *demanding*, for example, redress.

The specificity of the victims' *demands* is well illustrated by what Nagel calls their 'personal standpoint' — in contrast to the impersonal or impartial standpoint that informs consequentialism. The personal standpoint recognises that the individual perspective on the world is 'inherently complex' and includes a strong subjective component,³⁶ namely the 'personal aims, interests, and desires of individuals'³⁷ that are often torn apart by widespread violence. The personal viewpoint also includes diverse perspectival motives, ranging from self-interest to strong personal allegiance to family members and friends, as well as particular communities of interest or emotional identification.³⁸ To illustrate the difference between both perspectives, the following claim is characteristic of the personal standpoint: 'my family, close friends and life project are more important to me than someone else's family, friends and life project'; while the following claim expresses the impersonal point of view: 'your family, close

³³ Scheffler, *The Rejection of Consequentialism* (1982), 106.

³⁴ Fried, *Right and Wrong* (1978), 31.

³⁵ Nagel, *The View from Nowhere* (1986), 183-4.

³⁶ *ibid.*

³⁷ Nagel, *Equality and Partiality* (1991), 12.

³⁸ *ibid.*

friends, and life plans are important to you as much as they are to anyone else, so no one is more important than anyone’.³⁹

In the light of their personal point of view, the victims’ ESR claims have a distinctive strength that is lacking when considering them as ordinary citizens entitled to ESR, *just like anyone else*. Victims do not seek impersonal access, for example, to housing and livelihoods like any other citizen with whom they share comparable needs. They rather demand access to these goods because their *own* home and their *particular* life project, including the community bonds in which their life unfolded, were often destroyed in a clear expression of lack of respect towards them. ‘Almost without fail’, de Greiff explains, ‘one of the first demands of victims is to obtain recognition’ of the fact that they have been wronged — not only that they are enduring difficulties like other people.⁴⁰ When securing ESR, therefore, victims do not want to be considered as a mere unit that can be aggregated to the otherwise normal calculation of social policy. They rather want *their* harm to be recognised as extremely and uniquely important for them and redressed accordingly. This is why supporters of prioritising victims over non-victims in the progressive realisation of ESR consider that to avoid resentment among non-victims, a ‘complex social pedagogy’ is required so that the latter understand the singularity of damages suffered by victims.⁴¹

Against this background the scope of the normative commitment undertaken by the Committee is now clear. In interpreting victims’ enjoyment of ESR as having the same value as that of any other citizen, the Committee is adopting ‘a thoroughly impersonal morality’ that requires ‘that victims be dominated by impersonal values in their judgements about how others treat them’ and how they can object and resist such a treatment.⁴² Their personal experience of disrespect is excised from the socio-economic distress that affects them, eliminating the possibility of contesting the impoverishment that violence inflicts on them from their own perspective. This could be considered an excessive demand to make on victims and, to a certain extent, a denial of justice that amounts to re-victimisation. Paraphrasing Nagel from a different context, it could be argued that the significance of treating victims as any other citizen is ‘that it compounds their personal wretchedness with a perception that they do not really count in the eyes of the

³⁹ *ibid.* 11.

⁴⁰ de Greiff (n 7) para 29.

⁴¹ Pérez-Murcia (n 10) 203.

⁴² Nagel (n 35) 184.

world’.⁴³ To be wronged, Nagel continues, ‘is bad enough; to suffer because others do not accord one’s life its true value is worse’.⁴⁴

It is true that by adopting the impersonal point of view something related to the experience of victimisation is definitely excluded. However, the conclusion that has just been reached should not be as harsh as it seems at first glance. For one thing, by treating victims and their ESR claims like those of ordinary citizens, the Committee is not denying justice to victims, but interpreting both ‘justice’ and ‘victims’ differently, not deontologically but consequentially. Deontological claims are replaced by consequentialist claims that those affected by armed conflict can still present to authorities. Although not under the label of ‘victims’ of armed conflict, consequentialism provides ‘citizens’ affected by armed conflict with normative criteria about what they can or cannot *object to*, *resist* or *demand* in (post)conflict scenarios — in a similar way as deontological considerations do.⁴⁵ More precisely, under consequentialism people affected by armed conflict can *object to* unequal treatment in the distribution of socio-economic benefits by *demanding* that state authorities fulfil duties to secure ESR expressing equal concern for all of them. Chapter 2 provided an example of unequal treatment that people affected by violence can object to. As discussed in the Inter-American context, victims of rebel groups lack access to development programmes and substantive socio-economic goods, unlike victims of state-led violence.⁴⁶ Consequentialism makes it possible to challenge the injustice of this treatment and demand that everyone be treated with equal concern.

Equally important, consequentialist reasoning does not imply denying each person’s life its true value. On the contrary, in ensuring ESR by expressing equal concern for all citizens, consequentialism makes it possible for each person affected by violence to receive a *separate* and experience-sensitive treatment. This point will be developed later. Suffice it to say here that the Committee does not reject the idea that state authorities give special weight to the interests of people affected by widespread violence in certain cases. What it does is justify this treatment not in the category of victim, but in the socio-economic deficits experienced by those who bear the brunt of violence. What matters to the Committee is how badly-off citizens are more than how wrongly they were treated in terms of being affected by undue interferences in their lives.

⁴³ Nagel (n 37) 15.

⁴⁴ *ibid.*

⁴⁵ Nagel (n 35) 184.

⁴⁶ See Chapter 2, Section 4.2.

Before continuing, it is important to address the perhaps elusive notions of remedies and reparations as they stand in the Committee's 'jurisprudence' on conflict-related settings. Addressing this edge of the Committee's practice offers some guidance on how access to reparations may fit into a consequentialist framework in which the state authorities take the interests of people affected and unaffected by widespread violence into account expressing equal concern for all. As Chinkin points out,⁴⁷ although the ICESCR does not refer to remedies, the Committee made it clear that the implementation of the Covenant 'by all appropriate means' (Article 2) includes the making available of remedies, administrative or legal.⁴⁸ In more recent General Comments, the Committee has developed its approach to remedies by considering that violations of the right to health⁴⁹ and non-discrimination⁵⁰ entitle victims to full reparation, that is, restitution, compensation, satisfaction and guarantees of no repetition. However, the practice of recommending remedies and reparations after episodes of widespread violence has not really taken off in state reports.⁵¹ Without a clear reason for it, only in cases of forced eviction and sexual/gender-violence has the Committee consistently issued recommendations requiring reparations, usually compensation.

3 REMEDIES AND REPARATIONS FOR FORCED EVICTION AND SEXUAL AND GENDER VIOLENCE: MAINSTREAMING ESR AFTER WIDESPREAD VIOLENCE

As discussed in previous chapters, in the prevailing practice of regional human rights bodies the award of reparations mainly seeks to wipe out the consequences of wrongdoing and rebuke certain conducts that are especially rejected. It was also seen that, according to deontological thinking, breaches of duties to respect and protect are ranked from highest to lowest importance on a ladder whose bottom rung is occupied by positive duties to fulfil ESR. The Committee's consequentialist understanding of reparations distances itself from these conclusions. As will be explored next, the Committee tends to understand reparations instrumentally, this is, as a means to the end of securing ESR by expressing equal concern for all. In so doing, positive duties to fulfil will come to the fore.

⁴⁷ Chinkin, *The Protection of Economic, Social and Cultural Rights Post-Conflict* (2008), 33.

⁴⁸ CESCR General Comment No. 9: *The Domestic Application of the Covenant* (E/C.12/1998/24) 3 December 1998, para 9.

⁴⁹ CESCR General Comment No 14 (GC No. 14): *The Right to the Highest Attainable Standard of Health* (E/C.12/2000/4) 11 August 2000, para 59.

⁵⁰ CESCR General Comment No. 20 (GC No. 20): *Non-discrimination in Economic, Social and Cultural Rights* (E/C.12/GC/20) 2 July 2009, para 40.

⁵¹ See Schmid (n 2) 247-250, where she makes the claim that the Committee should engage more seriously with the obligation of states to provide remedies for past violations related to the legacy of the conflict.

3.1 Compensation in cases of forced eviction

The right not to be forcibly evicted imposes on authorities obligations of immediate and progressive realisation.⁵² On the one hand, state authorities are expected to refrain from perpetrating forced evictions and ensuring that the law is enforced against agents that carry them out (i.e. obligation to respect).⁵³ State authorities are also obliged to adopt legislative and other general measures to prevent forced evictions by third parties and sanction them when necessary (i.e. obligation to protect).⁵⁴ On the other hand, when people forcibly evicted are unable to provide for themselves, states are obliged to fulfil the right to housing, namely to ‘take all appropriate measures, to the maximum of [their] available resources, to ensure that adequate alternative housing, resettlement or access to productive land is available.’⁵⁵ According to the Committee, forced evictions are *prima facie* incompatible with the requirements of the Covenant, with those affected being entitled to adequate alternative housing to avoid homelessness and related scenarios, as well as payment of compensation for any affected property.⁵⁶ Crucially, in fulfilling duties related to the right to housing, states are required to prioritise social groups living in unfavourable conditions by giving them particular consideration, whether they are affected by forced eviction or not.⁵⁷ This means that housing shortcomings that arise from failures to respect and protect the right not to be forcibly evicted are not *prima facie* more relevant than, for instance, comparable patterns of homelessness otherwise generated. This also means that the duty to fulfil ESR does not lag behind duties to respect and protect rights.

The Committee has consistently applied this reasoning in (post)conflict scenarios. This has been the case both to address cases of forced eviction that took place during armed conflict,⁵⁸ as well as the situation of people affected by armed conflict who were forcibly evicted from informal settlements in the conflict’s aftermath, such as IDPs and refugees.⁵⁹ However, the Committee does not conceptualise the prohibition of forced eviction as a matter that mainly

⁵² Forced eviction is ‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy without the provision of, and access to, appropriate forms of legal or other protection’. CESCR General Comment No. 7 (GC No. 7): The Right to Adequate Housing: Forced Evictions (E/C.12/GC/20) 20 May 1997, para 3.

⁵³ *ibid.* para 8.

⁵⁴ *ibid.* para 9.

⁵⁵ *ibid.* para 16.

⁵⁶ *ibid.* paras 1, 10, 13, 16.

⁵⁷ CESCR General Comment No. 4 (GC No. 4): The Right to Adequate Housing (E/1992/23) 13 December 1991, paras 11 and 13.

⁵⁸ See e.g. CESCR Concluding Observations Bosnia, 2006, 25; Croatia, 2001, 21; Azerbaijan, 2004, para 54.

⁵⁹ See e.g. CESCR Concluding Observations Serbia and Montenegro, 2005, paras 31, 57-58; Serbia, 2014, para 30; Sudan, 2015, para 24; Cyprus, 2016, paras 36-7.

revolves around these contexts.⁶⁰ Nor does it link it specifically to people affected by violence.⁶¹ Forced eviction is rather just one more phenomenon that drives people, whether affected by armed conflict or not, towards inadequate housing conditions.⁶²

To put it simply, a person who has been forcibly evicted by state authorities as part of a systematic plan to promote ethnic cleansing is equally entitled to alternative housing and/or compensation as someone who has been evicted by a private constructor who participates in infrastructure projects to hold the Olympic Games.⁶³ Contrary to the practice of regional human rights bodies discussed above, instead of backwards-looking considerations on the reasons and motives that led to a breach, the Committee considers that special regard is owed to those who cannot support themselves and suffer disproportionately from homeless-related situations.⁶⁴ Tellingly, although the right not to be forcibly evicted requires punishing those responsible, in the COs issued in (post)conflict situations emphasis is placed on positive duties to provide substitute adequate housing or the payment of compensation.⁶⁵ Even in the Chechnya and Ukrainian contexts, where the Committee exceptionally recommended that the state authorities compensate houses and property destroyed during military operations without explicit reference to forced eviction,⁶⁶ housing issues were addressed as a whole, taking into account the needs of other disadvantaged groups.⁶⁷ This means, borrowing from Fredman from another discussion, that for the Committee ‘remedies are not simply compensatory. Instead, they require steps to be taken which are also forward looking, structural and group based’.⁶⁸

The consequentialist reasoning underlying the Committee’s position is easy to grasp here. The rightfulness and wrongfulness that can be attributed to a particular conduct has no *intrinsic* value, since it does not play a relevant role in determining the goodness and badness of the

⁶⁰ Besides some references *in passing* to armed conflict, including the 1949 Geneva Conventions and 1977 Protocols, there is no further elaboration in General Comment No.7 on the protection and redress of forced eviction in conflict-related scenarios. See CESCR GC No. 7 (n 52) paras 5-7 and 12.

⁶¹ CESCR Concluding Observations Azerbaijan, 2004, para 54.

⁶² See e.g. CESCR Concluding Observations Serbia and Montenegro, 2005, paras 31, 58; Serbia, 2014, para 30.

⁶³ General Comment No. 7, paras 5-7. See also e.g. CESCR Concluding Observations Turkey, 2011, paras 27-8; Rwanda, 2013, para 24; Uganda, 2015, para 30; DRC, 2009, para 15.

⁶⁴ CESCR GC No. 7 (n 52) paras 10, 16; GC No. 4 (n 57) paras 8-11.

⁶⁵ Only in one case does the Committee hold authorities responsible to provide victims, in addition to adequate housing or compensation, with access to ‘effective remedies against agents of the State party, who should be made accountable for their actions and not be immune from criminal prosecution’. With this mention to prosecutions, still, the Committee introduced no difference when it comes to guaranteeing housing needs of people involved. See CESCR Concluding Observations Sudan, 2015, para 48.

⁶⁶ CESCR Concluding Observations Russian, 2003, para 56.

⁶⁷ CESCR Concluding Observations Russian, 2003, para 55; Ukraine, 2020, paras 35-6.

⁶⁸ Fredman, ‘Redistribution and Recognition: Reconciling Inequalities’ (2007) 23 *South African Journal on Human Rights* 214, 232.

states of affairs it produces.⁶⁹ If a forced eviction due to the Olympics produces inadequate housing conditions greater than an eviction resulting from the plan to promote ethnic cleansing, the state of affairs in the first case is still considered worse than the second, even if the latter conduct deserves a greater opprobrium. Hence, it is the urgency of addressing undesirable states of affairs, in the present discussion inadequate housing conditions, that informs the Committee's reasoning.

Crucially, reparations for forced evictions aim at improving the living conditions of affected people. For instance, the Committee has made the point that alternative housing and compensation ought to be provided to people 'with a view to preventing loss of access to productive resources and homelessness'.⁷⁰ While it is true that every citizen is entitled to compensation in cases of forced eviction, only in few cases has the Committee made such a recommendation in favour of well-off people in (post)conflict settings.⁷¹

3.2 Compensation in cases of sexual violence

States have been requested by the Committee to secure access to remedies in cases of rape and other forms of sexual violence that took place in armed conflict, including monetary compensation.⁷² In the Committee's view, duties to make remedies available reflect the immediate and more general duty of states to enable legislation to prevent and redress these abuses without discrimination,⁷³ in light of its understanding of Articles 2,⁷⁴ 3⁷⁵ and 10 ICESCR concerning the protection of family, mothers and children. Because of this, access to remedies is not restricted to conflict-related scenarios, but must also be guaranteed for people not affected by it.⁷⁶ In the first COs on the DRC, for instance, in addition to denouncing the alarming rate of sexual violence during the armed conflict, the Committee noted with concern

⁶⁹ Williams, 'Consequentialism and Integrity' in Scheffler (ed) (n 1), 20-1.

⁷⁰ CESCR Concluding Observations Russia, 2017, para 49.

⁷¹ CESCR Concluding Observations Azerbaijan, 2013, para 22.

⁷² See e.g. CESCR Concluding Observations DRC, 2009, para 17; Colombia, 2010, para 15.

⁷³ See e.g. CESCR Concluding Observations Georgia, 2002, paras 18, 36; Azerbaijan, 2003, paras 49, 50; Guatemala, 2014, para 10.

⁷⁴ Accountability measures for victims of sexual violence are part of the immediate commitment of states to adopt legislative measures that recognise the rights enshrined in the CESCR (Art. 2), as well as other 'appropriate means' such as available and effective remedies for violations, be it judicial or administrative. General Comment No. 3 (GC No. 3): The Nature of States Parties' Obligations (E/1991/23) 14 December 1990, paras 5-7. The Committee approached sexual violence this way, for instance, in the first COs on DRC. For a discussion, see Riedel (n 3) 453.

⁷⁵ The Committee considers that gender-based violence is a form of discrimination that inhibits the ability to enjoy ESR on a basis of equality (Art. 3). General Comment No. 16 (GC No. 16): The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (E/C.12/2005/4) 11 August 2005, para 27.

⁷⁶ CESCR Concluding Observations DRC, 2009, para 25. Similarly, see CESCR Concluding Observations Colombia, 2010, para 15.

the pervading impunity regarding sexual abuses perpetrated ‘outside conflict zones, as well as for domestic violence which is widespread in the State party’.⁷⁷ As a result, the Committee stressed the duty to investigate and compensate cases of sexual abuse ‘in the wider context of gender-based violence’.⁷⁸ In the same vein, the Committee has widened its scrutiny to include other forms of gender-based violence beyond scenarios related to armed conflict, such as domestic violence,⁷⁹ trafficking of women,⁸⁰ the murder of women/femicides,⁸¹ and forced sterilisation,⁸² calling upon state authorities to provide compensation in some of these cases. The corollary of this is that people affected by armed conflict find themselves in the same position as other citizens not affected by it when it comes to accessing remedies and reparations.

By addressing sexual violence beyond the confines of armed conflict and interpreting it as part of other forms of gender-based violence that are ordinarily entrenched in many societies, the Committee once again makes its consequentialist commitments explicit. To see this, it is important to recall that in conflict-related settings sexual violence has been used as a tool of war to damage the morale of enemy troops, control enemy populations, or exterminate the rival ethnic group.⁸³ These forms of violence have in common a particular intention of the perpetrators and a particular feeling of mistreatment from the perspective of victims that the Committee is not addressing because it does not focus on the specificities of the conduct that lead to ESR violations. What appears to be the central concern of the Committee is to ensure the ESR that are jeopardised by these practices. As discussed with forced eviction, here too reparation measures seek to improve the living conditions of affected people, with compensation being recommended alongside with, or often been replaced by, other social and rehabilitation measures.⁸⁴

⁷⁷ CESCR Concluding Observations DRC, 2009, para 25.

⁷⁸ CESCR Concluding Observations DRC, 2009, para 25. *See also* CESCR Concluding Observations Colombia, 2010, para 15.

⁷⁹ *See e.g.* CESCR Concluding Observations Azerbaijan, 2004, para 49; Georgia, 2002, paras 36-7; Guatemala, 2014, para 10.

⁸⁰ *See e.g.* CESCR Concluding Observations Russia, 2003, para 51; Bosnia, 2006, para 44; Nicaragua, 2008, para 28.

⁸¹ *See e.g.* CESCR Concluding Observations Nicaragua, 2008, para 20; Guatemala, 2014, para 19; Colombia, 2017, para 45.

⁸² CESCR Concluding Observations Peru, 2012, paras 24-5.

⁸³ Omanyondo Ohambe *et al*, *Women's Bodies as a Battleground: Sexual Violence Against Women and Girls During the War in the Democratic Republic of Congo South Kivu (1996-2003)* (RFDA 2005), 48.

⁸⁴ *See e.g.* CESCR Concluding Observations Russia, 2017, para 24; Bosnia, 2013, para 23; Serbia and Montenegro, 2005, para 63; Rwanda, 2013, para 10; Burundi, 2015, para 36; Uganda, 2015, para 25; Bosnia, 2006, para 41; Algeria, 2010, para 16; CAR, 2018, para 14(c); Ethiopia, 2012, para 14.

Therefore, the Committee's consequentialist understanding of reparations in cases of forced eviction and sexual/gender-based violence is closely related to the objective of guaranteeing the ESR of those affected by armed conflict and related episodes. As such, the Committee places the duty to make reparation in the context of the general duties of state authorities to fulfil the ESR of other disadvantaged persons. To be sure, armed conflict usually takes a huge toll on the lives of those affected, who are likely to fare worse than other disadvantaged groups. This is the case, amongst other reasons, due to overlapping patterns of socio-economic deprivation and status-based discrimination that tend to precede and are often reinforced by violence. The Committee is aware that these patterns pose greater challenges to state authorities than those that typically arise immediately after a conflict, such as reparation measures. In the 1997 COs on Peru, the Committee laid down that what poses the greatest obstacles to ESR fulfilment after many years of internal violence is: 'the persistent and serious problems of poverty'; 'the acute forms of discrimination that particularly afflict women, indigenous people and other minority groups'; and 'the great inequalities permeating Peruvian society'.⁸⁵ Addressing these issues requires unravelling the Committee's understanding of the relationship between deprivation and status-based discrimination as a first step to address the specific challenges that arise in the aftermath of widespread violence. In the absence of this comprehensive analysis, one is left with the distorted impression that socio-economic wrongs are no more than 'individual infractions in an otherwise equal social order'.⁸⁶

4 STATUS-BASED DISCRIMINATION AND ITS RELATIONSHIP WITH MATERIAL DEPRIVATION

Chapter 2 explained that when the IACtHR resorted to the notion of the right to a dignified life and non-discrimination law to address the plight of people affected by widespread violence it left some loose ends.⁸⁷ This was exemplified by the *Mapiripan* case, where the IACtHR considered that the special treatment IDPs are entitled to is grounded on the socio-economic deprivation they face and discriminatory practices affecting them. By arguing that those who suffered the effects of violence deserve special protection through the lens of non-discrimination, the IACtHR placed them in the middle of a cocktail of overlapping claims, some of them aiming at overcoming deprivation, while others seeking to achieve equality of status between different groups, without a clear framework for articulating them. The imperative to gain clarity on these issues becomes an urgent task in the African system since,

⁸⁵ CESCR Concluding Observations Peru, 1997, para 12.

⁸⁶ Liebenberg and Goldblatt, 'The Interrelationship Between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 *South African Journal on Human Rights* 335, 342.

⁸⁷ See Chapter 2, Section 5.3.

as explained in Chapter 3, states are ratifying instruments expressly recognising special treatment and non-discrimination measures for women, children, the elderly, persons with disabilities and IDPs post-conflict.⁸⁸

It is clear that when socio-economic wrongs are addressed autonomously in these contexts, the answer to the second question inspiring this research, namely how to weigh ESR demands of disadvantaged people on the basis of victimisation, material deprivation, and status-based discrimination is a complicated one. The consequentialist insights developed so far make it possible to address this question in terms of the burdens that armed conflict imposes on affected people *qua disadvantaged citizens*, blurring the distinction between victims and non-victims. The time has come to gain more clarity on the relationship between deprivation and discrimination and how it bears on those affected by violence, who tend to fare worse than other disadvantaged groups.

4.1 The Committee's general position on non-discrimination

In General Comment No. 20, the Committee defines discrimination as any treatment, positive or negative, based on the prohibited grounds enlisted in Article 2(2) ICESCR, which has 'the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.'⁸⁹ From this definition, it is possible to identity two different dimensions of discrimination. The first refers to any treatment that restricts the enjoyment of ESR due to prohibited reasons, in contravention of the recognition of equal rights for all contained in the Covenant's Preamble. To avoid discrimination, thus understood, access to and distribution of socio-economic goods must be carried out showing *equal concern for all*. This expression embodies the impersonal stand point underlying the form of consequentialism endorsed in previous sections, according to which the life of each person is as important as that of any other person. The second dimension of discrimination deals with the unequal standing of people in participation in society on the same grounds (Article 2(2)), as it transpires from the caveat that the Covenant rights have to be recognised and exercised 'on an equal footing'. This second notion is *relational*, as it addresses the way in which individuals relate to one another in society.⁹⁰ Non-discrimination, thus understood, pursues a *relationship of equals* by tackling hierarchies between superior and inferior persons, together with the restrictions they impose on the full participation of people in society. What is at stake in this case, according to

⁸⁸ See Chapter 3, Section 5.

⁸⁹ CESCR GC No. 20 (n 50) para 7.

⁹⁰ Anderson, 'What is the Point of Equality?' (1999) 109 *Ethics* 287, 313.

Anderson and Fredman, is the marginalisation of certain groups when accessing public positions and participating in social life.⁹¹

4.1.1 Discrimination as restricted enjoyment of ESR for prohibited motives

The Committee, both descriptively and normatively, closely binds together discrimination and socio-economic deprivation, in some cases *almost* to the point of their total equivalence, opening itself to positions that criticise it for not addressing these categories with sufficient rigor.⁹² This is the case, for instance when the Committee considers that levels of poverty and exclusion that overwhelmingly affect certain groups express by themselves ‘structural’,⁹³ ‘*de facto*’⁹⁴ or ‘widespread’⁹⁵ discrimination against them.⁹⁶ However, in the jurisprudence of the Committee is clear that restricted enjoyment of ESR due to certain status-based characteristics (Article 2(2)), rather than general material deprivation, underlies its understanding of discrimination.⁹⁷ Discrimination tends to manifest itself in that people that share certain characteristics, such as national or social origin, or belong to groups traditionally excluded, such as ethnic and religious minorities or women, face deprivation disproportionately when compared to other people.⁹⁸ Certain people have two or more of these characteristics, facing a more acute deprivation than other disadvantaged people.⁹⁹ The Committee has also considered that living in poverty may result in pervasive discrimination,¹⁰⁰ disclosing avenues to address social inequalities through a non-discrimination lens.¹⁰¹

The Committee’s understanding of the non-discrimination principle does not imply that state policies must be *prima facie* oriented towards addressing status-based characteristics and their impact on ESR enjoyment to be considered non-discriminatory. State policies are rather bound to the general obligation to *refrain* from discriminatory actions; in other words, they must ensure that access to and distribution of ESR-related goods and services take place without

⁹¹ Anderson (n 90) 317; Fredman (n 68) 214, 227.

⁹² Chapman and Carbonetti (n 6) 686, 697, 724-5.

⁹³ See e.g. CESCR Concluding Observations Colombia, 2017, para 23; Macedonia, 2016, para 23.

⁹⁴ CESCR Concluding Observations Azerbaijan, 2004, para 15.

⁹⁵ CESCR Concluding Observations Serbia and Montenegro, 2005, para 12.

⁹⁶ See e.g. CESCR Concluding Observations Serbia, 2014, para 12; Sudan, 2000, para 28.

⁹⁷ See e.g. CESCR Concluding Observations Croatia, 2001, para 24; Albania, 2013, para 16; Guatemala, 1996, para 15; Guatemala, 2003, para 11; Nicaragua, 2008, paras 11, 23-5; Cameroon, 2019, para 25; Morocco, 2015, para 17.

⁹⁸ See e.g. CESCR Concluding Observations Bosnia, 2006, para 29; Albania, 2013, paras 16, 34; Morocco, 2015, para 41.

⁹⁹ CESCR GC No. 20 (n 50) para 17. See also CESCR Concluding Observations Ukraine, 2020, paras 10, 14.

¹⁰⁰ CESCR GC No. 20 (n 50) para 25.

¹⁰¹ This point is discussed in more detail in Chapter 5.

prohibited distinctions.¹⁰² The Committee exemplifies this when considering that ‘ensuring that all individuals have access to adequate housing, water and sanitation will help to overcome discrimination against women’.¹⁰³ Owing to this, people affected by general socio-economic deprivation and those facing status-based discrimination stand on the same footing when it comes to accessing ESR, as manifested in their overlapping and joint treatment.¹⁰⁴

In light of this argument, state policies that are in principle impartial or impersonal do not conflict with the non-discrimination principle. Since impartiality entails an equal concern for everyone’s enjoyment of ESR, state authorities are expected to favour states of affairs where more people benefit.¹⁰⁵ Which is to say that efficiency and maximisation considerations in rights enjoyment are part and parcel of the impersonal reasoning that should inspire state policies in the field of ESR. This is clear when the Committee calls upon state authorities to deliver ESR in a more ‘efficient’,¹⁰⁶ ‘rational’,¹⁰⁷ ‘effective’¹⁰⁸ or ‘expedient’¹⁰⁹ way, including the devotion of ‘a substantial proportion of [their] budget to creating conditions leading to a *higher number of people*’ enjoying ESR (emphasis added).¹¹⁰ In this regard, authorities are not only expected to take steps to the maximum of their available resources (Article 2(1)), but arguably also to *maximise* the use of these same resources attending to their scarcity.¹¹¹

That said, the call upon authorities to maximise ESR satisfaction is accompanied by a warning that the situation of disadvantaged and discriminated groups cannot be ignored.¹¹² Policies are expected to be not only more effective but also ‘socially just’¹¹³ and avoid the reproduction of patterns of marginalisation.¹¹⁴ The reason for this is simple. As recognised in General Comment No. 20, efficiency imperatives often lead to socio-economic inequality.¹¹⁵ Owing to

¹⁰² CESCR GC No. 20 (n 50) paras 26 and 36.

¹⁰³ CESCR GC No. 20 (n 50) para 8.

¹⁰⁴ See e.g. CESCR Concluding Observations Bosnia, 2006, para 47; Guatemala, 1996, paras 10, 17; Nicaragua, 2008, paras 23-4, 25; Peru, 1997, para 27; Serbia, 2014, para 11; Burundi, 2015, para 15; Kosovo, 2008, paras 17, 26; Montenegro, 2014, para 10; Ukraine, 2020, paras 21-2.

¹⁰⁵ Nagel (n 37) 46.

¹⁰⁶ CESCR Concluding Observations Azerbaijan, 1997, para 34; Colombia, 1995, para 21.

¹⁰⁷ CESCR Concluding Observations Burundi, 2015, para 46.

¹⁰⁸ CESCR Concluding Observations Armenia, 2014, para 23(a); Azerbaijan, 2004, para 52.

¹⁰⁹ CESCR Concluding Observations Azerbaijan, 2004, para 54.

¹¹⁰ CESCR Concluding Observations CAR, 2018, para 38(b). See also CESCR Concluding Observations Azerbaijan, 1997, para 34.

¹¹¹ See e.g. CESCR Concluding Observations Russia, 2017, para 16; Georgia, 2000, para 26; Sudan, 2000, para 40.

¹¹² See e.g. CESCR Concluding Observations Azerbaijan, 1997, para 34; Azerbaijan, 2004, paras 52-4; Georgia, 2000, para 26; Burundi, 2015, para 46.

¹¹³ CESCR Concluding Observations Russia, 2017, paras 16-7.

¹¹⁴ CESCR GC No. 20 (n 50) paras 1 and 38.

¹¹⁵ *ibid.* para 1

this, the Committee has been emphatic that authorities are expected to adopt ‘temporary special measures’, including ‘affirmative action’ or ‘targeted policies’ in favour of disadvantaged people. Given that people affected by general material deprivation¹¹⁶ and those facing status-based discrimination¹¹⁷ have been included in these recommendations, in some cases without making distinctions between the two groups,¹¹⁸ the full scope of these measures is unclear.

To start with, the basic idea that access to and distribution of socio-economic goods must show equal concern for all does not answer the question of ‘how to combine distinct and conflicting claims’.¹¹⁹ This problem becomes central when measures that promote the interests of one disadvantaged group conflict with the interests of another disadvantaged group, or when the interests of the two groups cannot be fully satisfied at the same time.¹²⁰ In General Comment No. 20 the point is made that eliminating discrimination will often require devoting greater resources to guarantee the ESR of traditionally neglected groups,¹²¹ suggesting that ‘ordinary’ deprived people, namely those who do not experience discrimination, do not benefit from these additional resources. One possible interpretation of this position is that discriminated groups find themselves in a preferential position to access ESR compared to ‘ordinary’ deprived people. Although this alternative has the virtue of accommodating the special importance given to non-discrimination, it does not acknowledge the importance that the Committee also attaches to addressing general socio-economic deprivation. It also fails in a deeper sense, as it may imply that treatment of certain groups takes place at the expense of others. In contrast to this position, scholars explain that addressing the plight of discriminated groups through targeted measures must not be understood in the sense of denying other people in need access to the same benefits. The accurate meaning of a non-discrimination policy is that, in the absence of special treatment, traditionally neglected groups would not have access to the benefits that other disadvantaged people have.¹²² In other words, these actions are not intended to give preferential treatment to discriminated groups over other disadvantaged people, but rather to

¹¹⁶ See e.g. CESCR Concluding Observations Angola, 2016, para 44; Burundi, 2015, para 16(c); Montenegro, 2014, para 10.

¹¹⁷ See e.g. CESCR Concluding Observations Angola, 2016, para 20; Burundi, 2015, para 15; Colombia, 2017, paras 23-4; Azerbaijan, 2013, para 8; Macedonia, 2016, para 24; Cameroon, 2019, paras 26-8.

¹¹⁸ See e.g. CESCR Concluding Observations Peru, 2012, para 28; Montenegro, 2014, para 10.

¹¹⁹ Nagel (n 37) 46.

¹²⁰ Liebenberg and Goldblatt (n 86) 359.

¹²¹ CESCR GC No. 20 (n 50) para 39.

¹²² Liebenberg and Goldblatt (n 86) 340, 349; Brodsky and Day, ‘Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty’ 14 *Canadian Journal of Women and the Law* (2002) 185, 214.

recognise the particular needs of said groups and the importance of addressing them specifically so that they have equal access to the benefits offered by a particular programme.

Hence, according to this argument, the Committee's impersonal or impartial evaluation of states of affairs is coupled with a *separate* concern for people discriminated against, which means that the Committee considers their needs and experiences 'differently situated'.¹²³ According to Nagel, '[t]he separateness of the concerns introduces a significant element of non-aggregative, pairwise comparison between the persons affected by any policy', whereby the situation of each is compared separately with that of every other.¹²⁴ This perspective-sensitive approach, however, must still accommodate the mandates of equal consideration for all: the perspective of each individual is taken into account not so much because it represents an end in itself but because it is a *means* of granting everyone equally considered the enjoyment of ESR without restrictions based on prohibited grounds. This is why special measures for discriminated people are in principle temporary and are only justified as *a last resort*. According to the Committee, these measures are only legitimate to the extent that they are reasonable, objective and proportionate means to suppress discrimination and are discontinued when substantive equality has been achieved.¹²⁵ However, in emphasising the exceptional nature of specific measures, one cannot lose sight of the fact that their implementation can be required very often and for long periods of time. As Sen has pointed out, patterns of discrimination are so entrenched that '*equal consideration* for all may demand very unequal treatment in favour of the disadvantaged' (emphasis added).¹²⁶

That said, a major tension arises between the pro-aggregative approach that seeks to guarantee ESR for as many 'ordinary' deprived people and the 'exceptional' alternative that attributes a separate concern to discriminated people and offers special treatment accordingly. This can be seen from the COs in which the Committee simultaneously recommends that state authorities implement general social policies while paying attention to specific discriminated groups.¹²⁷ In all these cases, it is not difficult to imagine that the most efficient measure in addressing general material deprivation may not do enough justice to the situated claims of those discriminated against. From the converse angle, it is not unlikely that the full realisation of

¹²³ Liebenberg and Goldblatt (n 86) 340.

¹²⁴ Nagel (n 37) 47

¹²⁵ CESCR GC No. 20 (n 50) para 9.

¹²⁶ Sen, *Inequality Re-examined* (1992) 1.

¹²⁷ See e.g. CESCR Concluding Observations Albania, 2013, para 17; Cyprus, 2016, paras 19-20; Kosovo, 2018, para 17.

ESR of discriminated people requires dedicating a disproportionately vast amount of resources — risking to deprive others of the resources that enable them to cope with basic concerns.¹²⁸ Even if the protection of one group cannot be taken as an excuse for not protecting the other, all interests cannot be equally satisfied at the same time even in the most optimistic scenario.¹²⁹ Therefore, trade-offs between general and specific concerns must be balanced, including through priority setting.¹³⁰

This issue will be addressed later in this chapter and in greater detail in the next. For the moment, it is important to recapitulate that, be it through general or targeted measures, to avoid discrimination state authorities need to ensure that access to and distribution of socio-economic goods is carried out ‘without undue restrictions’ on the grounds prohibited in Article 2(2).¹³¹ This approach still needs to be complemented by the Committee’s understanding of non-discrimination as equal standing between people in participating in social life.

4.1.2 Discrimination as lack of equal standing in participation in social life

Enjoying ESR without restrictions based on prohibited grounds is only one dimension of the Committee’s understanding of discrimination. The second dimension deals with the equal standing between different people in participation in social life. In adopting this second perspective on discrimination, the Committee remains true to other ‘objectives that inform the international human rights normative framework’, including the Covenant, namely ‘full participation and equality within society for all persons’.¹³² Although this formulation was first intended to address the situation of persons with disabilities, in reality, it refers to all groups with an unequal standing in society, as the Committee further developed in relation to the equal right of men and women to the enjoyment of ESR. In General Comment No. 16, the Committee stressed that ‘women are often denied equal enjoyment of their human rights, in particular by virtue of the *lesser status* ascribed to them by tradition and custom’ (emphasis added).¹³³

Certainly, status-based subordination has an adverse impact on ESR enjoyment.¹³⁴ For instance, gender-biased restrictions in accessing employment often result from assigning

¹²⁸ Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007), 212.

¹²⁹ Liebenberg and Goldblatt (n 86) 359.

¹³⁰ Bilchitz (n 128) 210-3.

¹³¹ See e.g. CESCR Concluding Observations Azerbaijan, 2004, para 41; Russia, 2017, para 10; Burundi, 2015 para 15.

¹³² CESCR General Comment No. 5 (GC No 5): Persons with Disabilities (E/1995/22) 9 December 1994, para 9.

¹³³ CESCR GC No. 16 (n 75) para 5.

¹³⁴ See e.g. CESCR Concluding Observations Angola, 2016, para 25; Cameroon, 2019, paras 23-5.

women a secondary, private role in society.¹³⁵ This is also due to the fact that the labour market itself is deeply gendered, as women's work is less recognised and valued than men's,¹³⁶ with women swelling the ranks of the informal economy and certain manual jobs.¹³⁷ Gender also has a direct impact in mortality rates among children, with young girls having higher rates 'due to the fact that better care is provided for boys'.¹³⁸ Conversely, lack of ESR enjoyment reinforces patterns of status subordination: poverty affecting women diminishes their options to exit a failed marriage,¹³⁹ to the same extent that 'being poor exacerbates the impact of disability discrimination'.¹⁴⁰

However, in this second approach to discrimination, the unequal standing between people cannot be reduced to mere socio-economic deprivation. Since discrimination implies a hierarchical relationship that places some groups as inferior to others, overcoming it requires the adoption of measures that suppress these hierarchies in the first place. Owing to this, guaranteeing discriminated groups an adequate standard of living does not necessarily contribute to redressing their unequal standing in society.¹⁴¹ It does not, for instance, contribute to recognise equal wages for work of equal value by women and men, nor to break 'the glass ceiling for female executives'.¹⁴² Nor does it redress entrenched patterns of contempt and hostility against sexual minorities or systematic barriers to disabled people that prevents them from participating productively in society. In all these cases, Anderson explains, no mere redistribution of divisible resources can secure equal treatment and participation in society.¹⁴³

As with the previous dimension of discrimination, many of the measures recommended by the Committee are of a general character, in some cases of immediate application, since they require abolishing legislation that is discriminatory or has a discriminatory effect, very often rooted in family law, labour law and criminal law.¹⁴⁴ Other measures include the enactment of

¹³⁵ CESCR GC No. 16 (n 75) para 11. See also CESCR Concluding Observations Albania, 2013, para 16; Montenegro, 2014, para 11.

¹³⁶ Fredman (n 68) 218. See also CESCR Concluding Observations Ukraine, 2020, paras 19-20; Cameroon, 2019, paras 34-5.

¹³⁷ See e.g. CESCR Concluding Observations Angola, 2016, para 31-2; Cameroon, 2019, paras 32-3; Morocco, 2015, para 25.

¹³⁸ CESCR Concluding Observations Algeria, 1995, para 21.

¹³⁹ Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser and Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003), 83-4.

¹⁴⁰ Liebenberg and Goldblatt (n 86) 339.

¹⁴¹ Fraser (n 139) 18-20.

¹⁴² Anderson (n 90) 317.

¹⁴³ *ibid.* 320.

¹⁴⁴ See e.g. CESCR Concluding Observations Guatemala, 1996, para 28; Salvador, 1996, para 15; Serbia and Montenegro, 2005, paras 37, 40; Serbia, 2014, para 16; DRC, 2009, para 17; Uganda, 2015, para 18(a); Sudan, 2015, para 20; Cyprus, 2016, paras 13-4

laws and policies to progressively modify customs and attitudes that place some people as inferior to others.¹⁴⁵ In some cases, the adoption of ‘affirmative action’¹⁴⁶ and other ‘temporary special measures’¹⁴⁷ to ‘bring disadvantaged or marginalised persons or groups of persons to the same substantive level as others’ may be required,¹⁴⁸ such as gender, racial or disability quota policies.¹⁴⁹ Equal wages between men and women for work of equal value is widely recommended by the Committee.¹⁵⁰ The adoption of effective pedagogic measures in the field of education ‘to promote understanding, tolerance and mutual respect among all groups’ is also relevant in its practice.¹⁵¹

Since equal standing between people cannot be reduced to a pattern of distribution of socio-economic goods, decisions that successfully address certain socio-economic shortcomings can be problematic in terms of fuelling contempt and hostility towards beneficiaries. Fraser has highlighted the extent to which social programmes that specifically target the poor have a ring of stigmatisation of beneficiaries.¹⁵² Beneficiaries claiming social benefits are usually considered to be ‘inferior to others in the worth of their lives, talents, and personal qualities’.¹⁵³ To overcome this, Sepúlveda advocates, for instance, that social security programmes should have universal coverage. Reasons for this range from a lower efficiency of targeted programmes in terms of cost/benefit, through to difficulties to actually reaching the most in need, to the creation of social-stigma of beneficiaries.¹⁵⁴ A similar point is made by Liebenberg with regard to a universal basic income grant. In her view, this measure is in line with the purposes of addressing people’s urgent needs, avoiding undesirable side effects in terms of mutual respect, and setting in motion further deeper reforms in terms of tackling hierarchical relationships. After all, a universal basic income provides ‘women in poor communities with

¹⁴⁵ See e.g. CESCR Concluding Observations Suriname, 1995, para 16; DRC, 2009, para 20; Guatemala, 1996, paras 28, 33; Sudan, 2000, para 34; Albania, 2013, para 33; Montenegro, 2014, para 11; Ukraine, 2020, para 11.

¹⁴⁶ See e.g. CESCR Concluding Observations Guatemala, 1996, para 27; Russia, 2003, para 48; Guatemala, 2003, para 30.

¹⁴⁷ See e.g. CESCR Concluding Observations Colombia, 2017, para 26; Algeria, 2010, paras 8-9.

¹⁴⁸ CESCR GC No. 16 (n 75) para 15.

¹⁴⁹ See e.g. CESCR Concluding Observations Macedonia, 2016, paras 27-30; Montenegro, 2014, para 12; Ukraine, 2020, paras 21-2; Angola 2008, para 18.

¹⁵⁰ See e.g. CESCR Concluding Observations Colombia, 1995, paras 14, 24; Guatemala, 2003, para 30; Serbia, 2014, para 16; Russia, 2017, para 24(b); Albania, 2013 para 18; Cyprus, 2009, para 13.

¹⁵¹ See e.g. CESCR Concluding Observations Serbia and Montenegro, 2005, para 64; Croatia, 2001, para 35-7; Macedonia, 2008, para 48; Kosovo, 2008, para 32; Morocco, 2015, para 48.

¹⁵² Fraser (n 139) 65.

¹⁵³ Anderson (n 90) 289; Liebenberg, ‘Needs, Rights and Transformation: Adjudicating Social Rights’ (2006) 17 *Stellenbosch Law Review* 5, 9.

¹⁵⁴ Sepúlveda, Report of The Independent Expert on the Question of Human Rights and Extreme Poverty (A/64/279) 11 August 2009, paras 65-8.

an independent source of income, expand[ing] the set of choices available to them and assist[ing] in challenging women's subordination within the family and community'.¹⁵⁵

5 STATUS-BASED DISCRIMINATION AND MATERIAL DEPRIVATION IN (POST)CONFLICT SETTINGS

Having discussed the Committee's general approach to general material deprivation and status-based discrimination, the time has come to apply it in (post)conflict settings. The Committee is aware that discriminatory traditional customs and attitudes against women,¹⁵⁶ indigenous peoples and other ethnic minorities,¹⁵⁷ together with the socio-economic deprivation of its members are deeply rooted in these contexts. For this reason, it has issued general recommendations regarding the implementation of socio-economic reforms as well as carrying out 'changes in attitudes and policy' to achieve an equal standing between different social sectors in the conflict's aftermath.¹⁵⁸ As such, this approach is not very different from the Committee's general understanding of discrimination just discussed. There is no additional reasoning about the impact of armed conflict on pre-existing patterns of discrimination and related socio-economic deprivation. Therefore, it is important to elaborate further on the framework of non-discrimination developed by the Committee and its application in (post)conflict settings. First, how people affected by widespread violence conform to the Committee's understanding of discrimination; second, how the framework developed so far allows socio-economic deprivation and discrimination to be tackled in these scenarios; and, third, how to weigh ESR claims between those affected and unaffected by armed conflict *qua disadvantaged citizens*.

5.1 People affected by armed conflict as a special category of disadvantaged people

People affected by armed conflict face discrimination along three different but complementary axes, with the consequent burden they bear in coping with daily life in the conflict's aftermath. First, the dynamics of widespread violence themselves lead to discrimination and related socio-economic pauperisation, as experienced, for instance, by stateless persons and forced migrants.¹⁵⁹ These groups are likely to be discriminated against by the resident population or

¹⁵⁵ Liebenberg (n 153) 10.

¹⁵⁶ See e.g. CESCRC Concluding Observations Guatemala, 1996, para 12; Suriname, 1995, para 8; Armenia, 2014, para 13; Serbia, 2014, para 16; Croatia, 2001, para 13; Albania, 2013, para 16.

¹⁵⁷ See e.g. CESCRC Concluding Observations Peru, 1997, para 12; Bosnia, 2006, para 50.

¹⁵⁸ See e.g. CESCRC Concluding Observations Peru, 1997, para 27; Guatemala, 1996, para 28.

¹⁵⁹ See e.g. CESCRC Concluding Observations Sudan, 2015, para 28; Croatia, 2001, para 11, 22; Cyprus, 1998, para 12, 19, 26.

the authorities when looking for work or earning a living in the communities in which they settle.¹⁶⁰ State policies and regulations in place can also isolate stateless persons and forced migrants regarding access to health care and housing.¹⁶¹ Second, people affected by violence often face discrimination due to their belonging to traditionally neglected groups, in the terms explained above. As the Committee noted in relation to Colombia, ‘IDPs come from the most disadvantaged and marginalised groups, predominantly women and children, peasants and members of the country’s indigenous and Afro-Colombian communities’.¹⁶² In certain cases, moreover, members of these groups represent the highest percentage of those affected by violence, meaning they are affected disproportionately by the socio-economic impact of widespread violence. This situation has been recorded in Peru,¹⁶³ Guatemala,¹⁶⁴ Nicaragua,¹⁶⁵ Mali,¹⁶⁶ and to a lesser extent Colombia.¹⁶⁷ Third, armed conflict dramatically reinforces pre-existing patterns of deprivation and status-based discrimination.¹⁶⁸ Domestic and other forms of gender violence, for instance, are exacerbated amongst displaced and returnee families due to the unemployment of husbands and alcoholism.¹⁶⁹ Levels of sexual violence have been reported to be higher in refugee and IDP camps.¹⁷⁰ Forbidden practices of forced marriage are also more acute among minorities affected by armed conflict¹⁷¹ and IDPs.¹⁷² From a broader perspective, the Committee has shown its concern about ‘the persistent marginalisation, poverty and extreme vulnerability of indigenous populations (...) a situation which has worsened as a result of the situation of conflict’.¹⁷³

As Ní Aoláin *et al* state regarding gender, these dynamics challenge ‘the premise that the gains at conflict’s end are experienced in the same way by women and men.’¹⁷⁴ The alternative to

¹⁶⁰ See *e.g.* CESCR Concluding Observations Ukraine, 2002, paras 12-13.

¹⁶¹ *ibid.*

¹⁶² CESCR Concluding Observations Colombia, 2001, para 11.

¹⁶³ In Peru around 70% of those affected by armed conflict were indigenous people and other ethnic minorities. Deng, Report of the Representative of the Secretary-General: Peru (E/CN.4/1996/52/Add.1) 4 January 1996, paras 67, 75-9.

¹⁶⁴ CESCR Concluding Observations Guatemala, 1996, para 10.

¹⁶⁵ Bourgeois, ‘The Miskitu of Nicaragua: Politicized Ethnicity’ (1986) 2 *Anthropology Today* 4, 8 fn 19.

¹⁶⁶ CESCR Concluding Observations Mali, 2018, para 5(b).

¹⁶⁷ CESCR Concluding Observations Colombia, 2017, para 25.

¹⁶⁸ See *e.g.* CESCR Concluding Observations Bosnia, 2006, para 51; Albania, 2013, para 34; Montenegro, 2014, para 23.

¹⁶⁹ Deng (n 163) para 72.

¹⁷⁰ CESCR Concluding Observations Chad, 2009, para 20.

¹⁷¹ CESCR Concluding Observations Montenegro, 2014, para 19.

¹⁷² CESCR Concluding Observations Azerbaijan, 2013, para 19.

¹⁷³ See *e.g.* CESCR Concluding Observations CAR, 2018, para 21. Similarly, see Burundi, 2015, para 45; Colombia, 1995, para 22; Colombia, 2001, para 11; Colombia, 2010, para 17; Colombia, 2017, para 25; Peru, 1997, para 11, 30; Peru, 2012, para 28; Guatemala, 2003, para 40; Nicaragua, 2008, para 23.

¹⁷⁴ Aoláin *et al*, *On the Frontlines: Gender, War, and the Post-Conflict Process* (2011), 46.

endure domestic violence may require many women to simultaneously undertake care tasks and be the breadwinner in single households.¹⁷⁵ This is so despite the fact that women are in a disadvantaged position compared to that of men in accessing employment. In the aftermath of the Peruvian conflict, for example, women faced more difficulties than men in finding formal employment due to traditional access to a lower quality education. In the case of indigenous women, this was compounded by their general lack of command of Spanish — a situation that, again, affects women more often than men by virtue of the lesser status ascribed to them by tradition and custom.¹⁷⁶

Owing to the different axes of discrimination and socio-economic deprivation at play, the Committee has considered that those affected by armed conflict ‘are among the poorest groups’ in certain states.¹⁷⁷ This characterisation compares to similar findings at the international level, for example, by the Special Rapporteur on forced displacement, who explained that ‘the internally displaced in Peru are the *poorest among the poor*’.¹⁷⁸ The same conclusion has been reached in certain domestic jurisdictions, where those affected by widespread violence have been considered ‘the most vulnerable among the vulnerable’.¹⁷⁹ In this connection, under a right-by-right analysis, the Committee found that refugees and IDPs, especially women and children, find themselves at the bottom rung of society in terms of the satisfaction of the rights to adequate food¹⁸⁰ and the highest attainable standard of health.¹⁸¹ When addressing the situation of disadvantaged groups, it is usual for the Committee to spot the situation of those affected by widespread violence indicating that state authorities must ensure ESR with an ‘especial’ or ‘particular’ concern for them.¹⁸²

5.2 Tackling socio-economic deprivation and discrimination in (post)conflict settings

There is no one-size-fits-all formula to address the complex inheritance of status-based discrimination and socio-economic deprivation amplified by armed conflict. In these settings, as in the Committee’s general approach, both *general* and *targeted* measures are at order. *General* measures such as the provision of nationality or citizenship, personal identification, or other official documentation have been recommended to overcome restricted access to ESR

¹⁷⁵ See e.g. CESCR Concluding Observations Ukraine, 2020, paras 12,16; Colombia, 2017, paras 25-6.

¹⁷⁶ Deng (n 163) paras 48, 67-8, 75-9.

¹⁷⁷ CESCR Concluding Observations Angola, 2008, para 27.

¹⁷⁸ Deng (n 163) para 75.

¹⁷⁹ Colombian Constitutional Court. *Auto 373* (23 August 2016), 30.

¹⁸⁰ CESCR Concluding Observations Colombia, 2010, para 21.

¹⁸¹ CESCR Concluding Observations Azerbaijan, 2004, para 29.

¹⁸² See e.g. CESCR Concluding Observations Suriname, 1995, para 21; Colombia, 2017, para 64.

due to status-based discrimination on the ground of nationality, which affects stateless persons and forced migrants.¹⁸³ To ensure the general enjoyment of ESR and access to other state services by these groups, the Committee has recommended the provision of free-legal aid or the easing of burdensome administrative procedures.¹⁸⁴ Tackling discrimination may also require speeding up the adoption of general policies, such as return and reintegration programmes for people affected by armed conflict who, due to their belonging to ethnic minorities, are treated unfavourably compared to other people also affected by violence who constitute an ethnic majority.¹⁸⁵ In the Balkan context, the Committee has taken the initiative to recommend measures that promote the equal standing among different ethnic groups, such as teaching children of different ethnic backgrounds, including Roma affected by violence, the same curricula in joint classes and schools.¹⁸⁶

It is important to bear in mind the catalytic role that certain general measures can play in addressing the unequal standing between groups in social life and the feasibility of applying them in post-conflict situations. As mentioned, Liebenberg and Sepúlveda consider that universal basic income and other social security programmes have a direct impact on people's wellbeing, avoid stigmatisation and resentment that can arise with targeted policies, and can even contribute to establishing the bases for deeper social changes.¹⁸⁷ Rees and Chinkin make a similar point in (post)conflict settings, when they argue that measures that ensure equal access to ESR 'allow for economic redistribution and decrease women's vulnerabilities by facilitating their economic empowerment. This in turn challenges the prevailing masculinities constructed by conflict'.¹⁸⁸

The Committee recently appeared to be flirting with the idea of bringing general measures, such as social security policies to the hearth of (post)conflict settings, as expressed in the first COs on Niger, a country that ranks 187th out of 188 countries on the human development index. In this case, the authorities are facing serious socio-economic challenges, ranging from widespread malnutrition and limited access to education and health care, through to epidemics

¹⁸³ See e.g. CESCR Concluding Observations Sudan, 2015, para 28; Croatia, 2001, paras 11, 22; Cyprus, 1998, paras 12, 19, 26; Cyprus, 2009, paras 10, 12; Angola, 2016, paras 24, 41-2; Serbia and Montenegro, 2005, para 42; Macedonia, 2016, paras 21-2; Ukraine, 2020, paras 31-2.

¹⁸⁴ See e.g. CESCR Concluding Observations Cyprus, 2009, para 18; Cyprus, 2016, paras 9-10; Ukraine, 2020, paras 29-30.

¹⁸⁵ See e.g. CESCR Concluding Observations Croatia, 2001, para 21; CAR, 2018, paras 21-2.

¹⁸⁶ See e.g. CESCR Concluding Observations Bosnia, 2006, para 50; Macedonia, 2008, para 48.

¹⁸⁷ Liebenberg (n 155) 10; Sepúlveda (n 154) para 63.

¹⁸⁸ Rees and Chinkin, 'Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and Social Rights' (2016) 48 *International Law and Politics* 1211, 1223.

and natural disasters, to a toll of forced displacement that reaches the hundreds of thousands.¹⁸⁹ Faced with these challenges, the Committee urged the state authorities ‘to introduce, as quickly as possible, social protection floors guaranteeing a minimum level of benefits to enable the most disadvantaged and marginalised groups to enjoy a decent standard of living’.¹⁹⁰ A similar recommendation has been issued regarding Colombia, the state with the highest number of IDPs in the Western Hemisphere.¹⁹¹ As Chinkin argues, even if more substantive measures may be needed to close the gaps between certain groups in terms of ESR enjoyment post-conflict, a crucial avenue to underpin non-discrimination is ‘by ensuring that basic social protections for the most vulnerable are secured’.¹⁹²

In addition to general measures, the Committee has recommended *targeted* measures to ensure equal standing between men and women in participation in post-conflict life. The Committee has recently shown growing concern about the disproportionate burdens that prevent women from ‘fully participating in public life and the labour market’ in the aftermath of conflict.¹⁹³ For instance, the Committee highlighted the ‘disproportionate burden of unpaid domestic and care work’ affecting displaced women.¹⁹⁴ It has also addressed customary norms and social practices that make it difficult for women to access landownership and inheritance, despite the fact that they are left in charge of their households in case of separation from or the death of their spouses due to armed conflict.¹⁹⁵ As a result, the Committee recommended the implementation of social programmes that contribute to releasing women from certain care-duties and enhancing their equal participation in the labour market, such as childcare programmes.¹⁹⁶

To a large extent, general measures do not pose great challenges in terms of balancing the simultaneous ESR claims of disadvantaged groups in (post)conflict settings. This is the case given the universal scope of general measures and the potential to offset burdens that disproportionately affect certain disadvantaged groups. Difficulties related to priority setting and trade-offs between the interests of people are more likely to arise when it comes to adopting

¹⁸⁹ Jimenez, Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons: Niger (A/HRC/38/39/Add.3) 9 May 2018, paras 7, 17.

¹⁹⁰ See e.g. CESCR Concluding Observations Bosnia Niger, 2018, para 43.

¹⁹¹ See e.g. CESCR Concluding Observations Bosnia Colombia, 2017, para 42.

¹⁹² Chinkin (n 47) 22.

¹⁹³ CESCR Concluding Observations Ukraine, 2020, para 13.

¹⁹⁴ *ibid.*

¹⁹⁵ CESCR Concluding Observations CAR, 2018, para 25.

¹⁹⁶ CESCR Concluding Observations Ukraine, 2020, para 13. See similarly CESCR Concluding Observations Bosnia, 2013, para 11- addressing the intersectionality between displacement and ethnicity.

special and targeted measures. It is in these cases that the second research question that inspires this study, namely the question of how to balance the ESR demands of those affected by violence, material deprivation and status-based discrimination, is more acute. Fully answering it requires the development of a principle-based framework that makes it possible to pay special attention to particularly disadvantaged groups among others in distress. The last section of this chapter deals with this issue by considering the situation of people affected by violence, often the *poorest among the poor*.

5.3 Justifying priority enjoyment of ESR by people affected by widespread violence

As discussed previously, in contrast to deontologically oriented human rights law, the Committee is not of the opinion that victimisation due to armed conflict entitles victims to priority treatment over people not affected by violence. However, this is not tantamount to rejecting the accordence of special treatment, even priority treatment, to those affected by violence. The point is that such treatment is not justified by the category of ‘victim’, but rather by the acute burdens that those affected by widespread violence tend to face *qua disadvantaged citizens*, given the factors of material deprivation and status-based discrimination just examined.

Under this light, the Committee is of the view that in certain circumstances the Covenant requires that state authorities dedicate *greater* resources to certain disadvantaged people given mutually reinforcing patterns of deprivation and status-based discrimination. This is not contrary to the idea of equal concern for all after widespread violence. As explained, equal concern for all also requires addressing each person’s situation separately, acknowledging that each has differently situated experiences and needs. Moreover, equal concern requires taking each other’s position seriously, attaching to their separate needs and experiences the same importance as if they were ours. Inspired in this concern towards other people, ‘a society founded on treating each being with equal importance will attempt to prioritise the meeting of interests that are of the greatest urgency and importance to persons.’¹⁹⁷ Following this premise, it is possible to propose two criteria that justify according special treatment for people affected by generalised violence. The first is a pairwise comparison that determines which of two disadvantaged individuals or groups requires priority access to ESR. The second is to prevent people from falling below an unacceptable level of deprivation, without the need to compare.

¹⁹⁷ Bilchitz (n 128) 86.

5.3.1 Pairwise comparison

In balancing competing claims it is paramount to identify which interests are of the greatest urgency and importance to people in a given situation, so as to favour the alternative that is less unacceptable to the person to whom it matters the most.¹⁹⁸ Bilchitz exemplifies this by explaining that providing shelter for those without protection from the elements has greater urgency and importance than meeting the interests of those who are protected from the elements but do not have comfortable housing.¹⁹⁹ It is reasonable to infer here that access to basic shelter is more important for the homeless than enjoyment of improved housing for those who already have protection from the elements. The reason for this is that the failure to provide basic shelter has more serious implications than the failure to provide comfortable housing, making homelessness the most unacceptable situation. In this case, then, equal concern for all requires prioritising the provision of basic shelter to avoid homelessness. This reasoning leads to what Nagel calls ‘a ranking of urgency’ — meaning that the claim of someone who is socio-economically badly off should have some priority over the claims of each individual who is better off.²⁰⁰

Given that people affected by armed conflict are amongst the most vulnerable among the vulnerable population in certain cases, equal concern for everyone justifies dedicating greater resources to satisfy their specific socio-economic deficiencies through targeted and temporal policies. This may involve providing benefits that disadvantaged people not affected by violence lack. For instance, special measures related to access to livelihoods, such as professional knowledge and the acquisition of skills, are justified in favour of forced migrants from rural to urban settings to address the loss of practical knowledge that usually takes place with uprooting.²⁰¹ By the same token, the Committee has recommended that authorities provide children belonging to ethnic minorities affected by war, such as Roma returnees, with special temporary measures, such as the granting of scholarships and the reimbursement of travel expenses and schoolbooks, to foster school attendance.²⁰²

In these cases, the allocation of greater resources or special programmes for those affected by armed conflict may benefit them more than if the same resources are distributed to other people

¹⁹⁸ Nagel (n 37) 47.

¹⁹⁹ Bilchitz (n 128) 86.

²⁰⁰ Nagel (n 37) 47.

²⁰¹ CESCR Concluding Observations Ukraine, 2020, paras 21-2.

²⁰² See *e.g.* CESCR Concluding Observations Bosnia, 2006, para 51; Albania, 2013, para 34; Montenegro, 2014, para 25 (b).

in need, taking into account the worst situation in which the first group may be in the absence of the benefit. Reimbursement of travel expenses for Roma refugee children can be the game-changer in determining whether they attend or not attend school, assuming that Roma families lead an itinerant life. Therefore, failure to provide Roma children with these resources has more serious implications than failure to provide said resources to other disadvantaged families who do not depend on them to send children to school. Similarly, failure to dedicate additional resources for the training of forced migrants of rural origin may jeopardise their access to livelihoods in a way that does not apply with regard to the native urban poor, placing the former group in a situation that is more unacceptable in light of the more serious socio-economic challenges they have to go through in the absence of special training.

In the two cases, then, targeted measures do not attempt to privilege members of these groups affected by armed conflict over other disadvantaged people, but to level the playing field so they can enjoy their ESR on ‘equal terms’.²⁰³ That said, it is not to forget that targeted measures tend to be accompanied by stereotypes and degrading attitudes that undermine the capacity of beneficiaries to participate fully and equally in social life. Because of this, in providing forced migrants with special measures, state authorities must be wary not to relegate hosting communities that (re)integrate them to a secondary status, especially when they share comparable socio-economic needs. The reason for this is to avoid creating a feeling amongst the members of hosting communities that those affected by violence are receiving ‘undeserved privileges’ and thus mitigate tensions between them.²⁰⁴ In these contexts, the Committee has called upon the authorities to ‘facilitate community mediation’ to reduce the risk of conflict in the new places where migrants resettle. Likewise, the Committee has recommended programmes aiming at raising public awareness of the challenges faced by those affected by widespread violence to avoid stigmatisation and related negative attitudes against them.²⁰⁵

5.3.2 Preventing people from falling below an unacceptable level of deprivation

Since everyone’s needs and experiences in (post)conflict situations should be subject to a pairwise comparison rather than a pure aggregative calculation of everyone’s interests, allocating more resources to those affected by widespread violence is justified. This is the case, as explained above, because in certain circumstances they face worse socio-economic

²⁰³ CESCR Concluding Observations CAR, 2018, paras 11-2.

²⁰⁴ Kälén, Framework on Durable Solutions for Internally Displaced Persons (A/HRC/13/21/Add.4) 29 December 2009, para 21(h).

²⁰⁵ CESCR Concluding Observations Ukraine, 2020, para 13.

conditions than people not affected by armed conflict. Furthermore, those affected by violence may be entitled to preferential treatment based on how badly off they are in ‘absolute terms’, that is, without needing to compare badly to others. Bilchitz contends that ‘alleviation of urgent needs and serious deprivation has particularly strong importance in the acceptable resolution of conflicts of interest.’²⁰⁶ Liebenberg and Goldblatt consider that state authorities should prioritise in their actions the provision of ‘relief to those who are living in intolerable conditions’.²⁰⁷ If it is conceded that equal concern for all requires ascribing to each one’s separate needs and experiences the same importance as if they were ours, then it is reasonable to suppose that securing basic needs and alleviating severe deprivation is part of the interests that must be treated with greater urgency and importance.²⁰⁸ In light of this, adopting special measures to provide basic access to housing, food, water and clothing to those who cannot provide for themselves becomes a matter of the highest priority, even if the state demonstrates that its resources are ‘inadequate to satisfy everyone’s basic needs’.²⁰⁹ Owing to the urgency of what is at stake, the Committee has recommended that the authorities ‘do everything within [their] power’²¹⁰ to ensure that forced migrants ‘are guaranteed to enjoy at least the main aspects of their economic, social and cultural rights, in particular through basic services such as education, health services and adequate accommodation’.²¹¹

That said, the reflection carried out so far is still affected by the same tension discussed above between the pro-aggregative approach to guarantee ESR for the largest possible number of deprived people and the ‘exceptional’ alternative that attributes a separate concern to each person affected by armed conflict and offers special treatment accordingly. The source of the tension is that measures that maximise the enjoyment of ESR for the greatest number of people may fail to accord the special treatment certain disadvantaged groups deserve; just as fully addressing these groups’ concerns may involve spending a disproportionate amount of resources at the expense of the interests of other people in need.

²⁰⁶ Nagel (n 37) 11.

²⁰⁷ Liebenberg and Goldblatt (n 86) 349.

²⁰⁸ Bilchitz (n 128) 86.

²⁰⁹ Liebenberg and Goldblatt (n 86) 359.

²¹⁰ CESCR Concluding Observations Cameroon, 2019, para 9.

²¹¹ See *i.e.* CESCR Concluding Observations Cameroon, 2019, para 9; CAR, 2018, para 12.

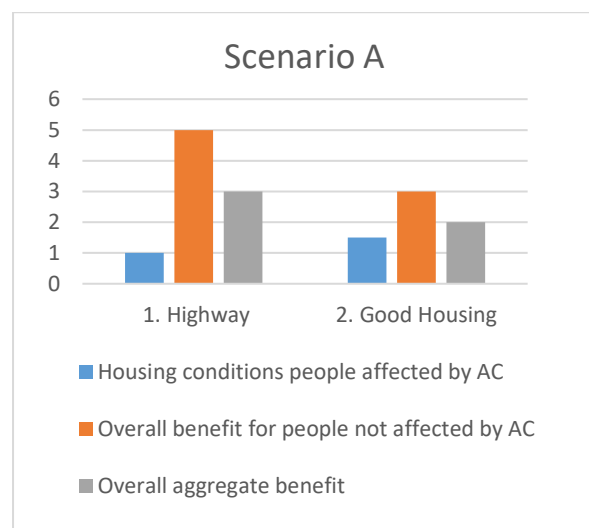
5.3.3 Efficiency calculations versus the special concern that we owe each other in (post)conflict settings

The first COs on Suriname illustrates the tension between efficiency considerations and the special concern that we owe each other after episodes of widespread violence. In this COs, the Committee recommended authorities to give ‘special attention to laying an infrastructure and providing basic facilities in the interior [of the country], particularly houses for persons displaced during the recent armed conflict’.²¹² From this recommendation it is possible to draw two hypothetical scenarios to address the tension at hand. In **Scenario A**, the Surinamese authorities find two alternatives to comply with the Committee’s recommendation. On the one hand, the construction of a highway that connects the interior region with the capital city, Paramaribo, *indirectly* benefiting those affected by armed conflict by allowing them to have better access to markets and social services by considerably reducing commuting time. Said highway also benefits the poor population not affected by armed conflict that lives in the country’s interior. Given that the construction of the highway will require a considerable amount of resources, the authorities will only be able to provide those affected by armed conflicts with basic housing (Option 1: Highway). On the other hand, the authorities can construct houses for people affected by the armed conflict in full compliance with the requirements imposed by the right to adequate housing, even to the point of providing additional comforts as a means of redress. Since the greater resources dedicated to this task will make the construction of the highway impossible, only the improvement of some rural roads will be feasible. As a result, access to social services and markets in Paramaribo will be more burdensome, depriving both groups of the indirect benefits that would be obtained with the construction of the highway (Option 2: Comfortable housing). In other words, in Option 1, the authorities underline the first part of the recommendation, consisting of laying an infrastructure and providing basic facilities in the interior of the country; while in Option 2, they privilege the provision of housing for those affected by armed conflict. Both options are shown in the following graph.²¹³

²¹² CESCR Concluding Observations Suriname, 1995, para 21.

²¹³ The following use of graphics is inspired by a similar exercise carried out by Holtug, *Persons, Interests and Justice* (2010).

The blue lines reflect the quality of the housing conditions of people affected by armed conflict (AC). The orange lines reflect the total benefit for poor people not affected by the armed conflict. The grey lines express the overall aggregate benefit, this is, the compound of the benefits of the two groups.



In Option 1, housing conditions are only basic, but the overall benefits for disadvantaged people not affected by violence (orange line) and for both groups (grey line) are greater. Still, because of the difference in housing conditions, those affected by the armed conflict have worse living conditions than those of other poor people. With Option 2, housing conditions are better for those affected by the conflict but at the expense of the overall benefit both of disadvantaged people not affected by violence (orange lines) and the two groups (grey lines). In light of the notion of equal concern for all advanced here, which interpretation of the Committee's recommendation should prevail?

Arguably in this case, the benefit that will be obtained for those affected by the armed conflict with the provision of comfortable housing (see the difference between the blue line in Options 1 and 2) does not outweigh the general benefits for both groups that derive from constructing the highway (see the difference between the grey lines in Options 1 and 2). It does not outweigh the overall benefit for other disadvantaged people not affected by violence either (see the difference between the orange lines in Options 1 and 2). After all, basic housing, while still leaves much to be desired, is decent enough not to impede access to livelihoods and not worsen household health conditions. Because of this, in **Scenario A** efficiency calculations justify that those affected by violence take the brunt of an alternative in which they remain in worse socio-

economic circumstances than other disadvantaged people with access to better housing conditions.

This reasoning certainly leads to conclusions that may not be accepted by many. The source of the disagreement is that the urgency of addressing the material deprivation of the greatest number of people may justify those affected by violence enjoying worse living conditions than those of other disadvantaged people. This is an unavoidable conclusion that follows from consequentialist reasoning. For one thing, treating the interests of each person separately, giving greater weight to the interests of certain people, does not rule out ‘all ranking of alternatives involving different persons, nor does it mean that benefiting more people is not in itself preferable to benefiting fewer’.²¹⁴ The significant element of non-aggregative comparison introduced by this analysis is not absolute, meaning that special consideration that is owed to each person separately does not attach absolute priority to the claim of someone who is worse over the claim of someone who is better. ‘To some extent’, Nagel continues, ‘the combined claims of larger numbers, or of greater quantity of benefit can pull in the contrary direction’.²¹⁵

The unease with this reasoning is accentuated if it is assumed that the victims of the armed conflict in Suriname were predominantly members of a traditionally discriminated group, while the non-victimised poor who inhabit the country’s interior belong to an ethnic majority. Given that in this case investing additional resources to close the housing gap between the two groups would be too high, consequentialist thinking would justify keeping the gap open for the sake of a general improvement in people’s material conditions. This means that what consequentialism censures about discrimination is fundamentally, though not exclusively based on the effects it produces on people’s wellbeing.²¹⁶ According to Arneson, discrimination on prohibited grounds such as age, gender or ethnicity matters ‘insofar as these characteristics cause weighted wellbeing to rise or fall’.²¹⁷ For better or for worse, then, this reasoning finds in the difference between the size of the overall benefit and the severity of the losses in people’s wellbeing the ultimate criteria for informing priority-setting.

That said, a slightly different scenario casts a better light on consequentialism from the perspective of those affected by violence. In **Scenario B** everything remains equal with the difference that Option 1, that of building the highway, requires so many resources that the

²¹⁴ Nagel (n 37) 47.

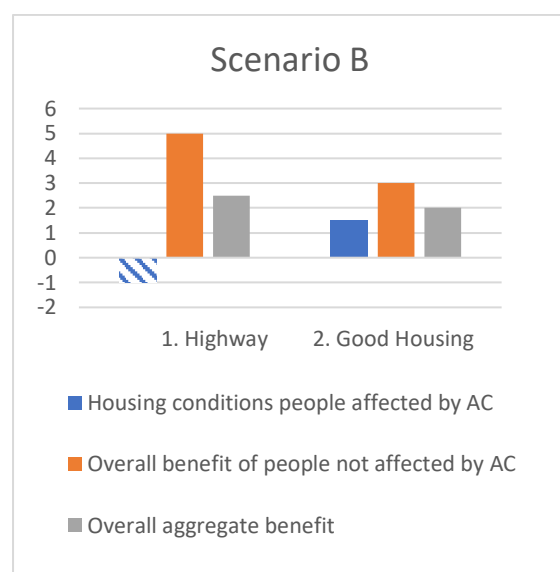
²¹⁵ *ibid.*

²¹⁶ Arneson, ‘Discrimination, Disparate Impact and Theories of Justice’ in Hellman and Moreau (eds), *Philosophical Foundations of Discrimination Law* (2013), 94.

²¹⁷ *ibid.* 94, 99.

authorities cannot provide those affected by armed conflict with basic housing. For these people, the *indirect* advantages of granting better market access become somewhat illusory, since in the absence of basic housing conditions it becomes increasingly difficult to access livelihoods and trade them. In addition, poor housing conditions worsen the health of the household members, so the gains in terms of time when commuting to Paramaribo to access social services are offset by the need to access health services more frequently.

In **Scenario B** due to inadequate housing conditions, the socio-economic situation of people affected by the armed conflict worsens with Option 1 - as reflected in the negative points in the blue column. Moreover, the blue column has stripes that highlight that those affected by violence are struggling to meet their basic needs. Certainly, this drop has repercussions in the overall aggregate benefit (compare grey columns in Scenarios B (1) and A (1)). However, other disadvantaged people enjoy the socio-economic benefits of the highway in B as in A. Likewise, the aggregate overall benefit is still greater in Option 1 than 2 (compare grey columns in B). This is so notwithstanding the disproportionate burden that people affected by the conflict have to bear.



In this scenario, a reasoning that only relies on efficacy calculations would dictate implementing the highway. This is the case since, in the Committee's own words, by laying infrastructure and providing basic facilities in the interior, the authorities are creating 'the conditions leading to a higher number of people' enjoying ESR.²¹⁸ This approach, however, leaves without any meaning the caveat that particular regard is also owed to the housing

²¹⁸ CESCR Concluding Observations Azerbaijan, 1997, para 34.

conditions of those affected by the armed conflict. The authorities would not guarantee the enjoyment of ESR by showing equal concern for all since the benefit of many comes with a disproportionate burden on those affected by violence. What is entailed by the principle of equal concern for all in this case is to assign a greater weight to the interests of those who are in a worse situation, even if so doing results in a less optimal outcome from an aggregate perspective.²¹⁹ In light of the discussion so far, the justification for choosing Option 2 in Scenario B is twofold.

On the one hand, as already seen, taking each person seriously implies prioritising the relief of the situation of those who are worse-off in ‘absolute terms’, which means addressing urgent needs and severe deprivation. The meaning of the negative striped column in Scenario B is that the more people are below the 0 threshold, meaning not meeting basic needs, the greater the justification for sacrificing a more optimal outcome considered from an aggregate perspective.²²⁰ Even if the highway in question allows the poor inhabiting the interior of Suriname to improve their standard of living beyond what was expected, the importance of these extra benefits is less than that of the benefits of people below the basic needs threshold.²²¹ On the other hand, it was also discussed that treating everyone with equal importance implies that the claims of someone who is badly off has some priority over the claims of each individual who is better off. To the extent that those affected by armed conflict are considerably worse off than other disadvantaged people, it is justifiable to prioritise the claims of the former over those of each person who is better off, even if the overall aggregate benefit is less.

These examples illustrate that the way out of the tension between the approach that seeks to guarantee ESR for the greatest number of people and the alternative that attributes special concern to especially disadvantaged people, consists in attributing greater weight to the interests of the latter. Since this is not an absolute position, the size of the overall benefit at stake and the severity of the implications for disadvantaged groups of not receiving special treatment, measured in comparative and absolute terms, will determine whether efficiency calculations take precedence over the special concern that we owe each other.

Finally, it is important to bear in mind that state responsibility towards these groups does not end when a decision that prioritises one group over the other is made. If the highway option is preferred, the authorities still have progressive duties with regard to the right to housing of

²¹⁹ Nagel (n 37) 47.

²²⁰ Bilchitz (n 128) 86.

²²¹ Holtug (n 213) 226-7.

IDPs. Likewise, privileging the housing of IDPs does not exempt the authorities from their obligations to ensure basic infrastructure and facilities in the country's interior. The priority setting exercise carried out above provides a framework to assess whether authorities are meeting their progressive obligations when trade-offs between general and specific interests arise in (post)conflict settings. The exact scope of when special treatment for disadvantaged groups in these contexts will be addressed in the next and final chapter.

6 CONCLUSION

This chapter considered the ESCR Committee's understanding of state duties after widespread violence from the perspective of consequentialism. By analysing existing socio-economic deficiencies autonomously, a completely different reasoning emerged compared to that of the regional human rights bodies discussed in previous chapters. Essentially, the situation of people affected by episodes of widespread violence matters because of how badly off they are in their aftermath, not because they have been wronged in terms of having their lives interrupted by conducts attributable to state authorities in terms of duties to respect and protect.

With this shift from deontological to consequentialist morality, a relevant element of victimisation is lost in translation, namely the experience of being wronged from the perspective of those affected and the very personal nature of their ESR claims. Perhaps as a consequence of the decentralisation of the notion of 'victim', in the COs addressed in this chapter remedies and reparations play a secondary role and are better understood in instrumental terms. The Committee tends to recommend reparations, including monetary compensation, as a means to improve the ESR of affected people and reparations are placed in the broader context of positive duties towards people facing deprivation, bringing to the fore an understanding of the state as an active guarantor of rights.

Consequentialism allows each person affected by violence to receive a separate and experience-sensitive treatment, so that they are not an anonymous data in the balance and aggregation of the interests of all. This is exemplified by the burden placed on individuals by status-based discrimination and material deprivation, which is amply recognised in the Committee's work and provides valuable insight for understanding the plight of people affected by violence. With this mind-set, a series of distributive dilemmas outlined in the second research question come to the fore, related to how to balance ESR of people affected and unaffected by violence in contexts of pervasive deprivation and status-based discrimination.

These dilemmas are exacerbated when the Committee recommends that state authorities adopt targeted measures for particularly disadvantaged people: how much resource is justifiably invested in particularly disadvantaged people when other sectors of the population are also in distress? When analysing this tension from the perspective of those affected by armed conflict, the chapter suggested that their interests should be given a greater weight. This weighing exercise was carried out under two guiding criteria of distributive justice. First, under a pairwise comparison, priority should be given to the person who would be most severely affected if her situation is not addressed with priority. Second, priority should be given to people living in intolerable conditions, without the need to compare how badly one person fares with another. Given that this is not an absolute stance, a sufficiently large benefit to other disadvantaged people may outweigh the specific interests of those affected by violence.

However, as formulated, these two principles are fraught with tensions. The next and final chapter will explain the origin of these tensions and unravel them, thus giving an answer to the final question of this study, that of why exactly the situation of disadvantaged people after generalised violence *matters* and when the special weight attached to their interests *ends*. In addressing this question, social inequalities after widespread violence will be addressed, which have so far not been dealt with.

CHAPTER FIVE

The ESCR Committee and (Post)Conflict Settings

On the Meaning and Scope of Priority Treatment Amongst Disadvantaged People

1 INTRODUCTION

The previous chapter used consequentialist ethics to make explicit and justify the normative framework underlying the Committee's approach to ESR in (post)conflict societies. Applied in these contexts, the main characteristic of this normative lens is that authorities must guarantee ESR disregarding the causes or reasons that lead to socio-economic shortcomings, this is, whether they were the product of state led-violence, non-state actors or, more broadly, the result of conflict-related episodes. Owing to this, it was argued that people affected by armed conflict stand *prima facie* on an equal footing with the rest of the society's disadvantaged population when it comes to the guarantee of ESR. Certainly, the consequentialist framework that arguably underlies the Committee's practice inevitably dissects from victims the experience of being wronged. However, it was argued that this framework is still flexible enough to offer each citizen affected by violence a separate and experience-sensitive treatment. Since these people usually face serious socio-economic difficulties due to entrenched patterns of material deprivation and status-based discrimination, which tend to be amplified by violence, the consequentialist reasoning that transpires from the Committee accords special weight to their interests. The basis of this treatment is either the situation of severe deprivation they will to go through below minimum accepted standards, or the greater severity that will affect them in comparison with other people if their plight is not addressed with priority. The special attention owed to the least advantaged members of society is not absolute, though, since the possibility that their interests may be outweighed by a sufficiently large benefit for other people in distress always remains open and consequentialism requires a careful balancing of interests in each case. It was also discussed that, when improving the living conditions of the most disadvantaged members of society, state authorities must be wary of not incurring stigmatisation and other practices that portray some individuals as inferior to others. Authorities also have a duty to address hierarchical relationships whereby certain groups face additional burdens when they participate in society after episodes of widespread violence. This framework was considered an application of the requirements of impartiality and equal concern for all that must guide the citizens' treatment by authorities after widespread violence.

This framework requires considerable refinement, though. For the justification in favour of especially weighing the interests of certain groups, in its present form, involves three different

normative standpoints that are often fraught with tension, namely *egalitarianism*, *the priority view*, and the *doctrines of sufficiency*. Indeed, when it is asserted that the plight of certain groups needs to be treated with priority because, otherwise, they will face consequences of greater gravity than other people, egalitarian ideas immediately emerge. This is the case because, at first glance, there seems to be something wrong with some people doing worse *than others* and equality may require that everyone is equally well-treated.¹ This position is in line with egalitarianism. That said, another slightly different moral idea -the priority view- can be triggered by the fact that certain people will fare worse than others if their plight is not addressed with priority. Supporters of the priority view argue that it is important to care for the person who is badly off because they need to be better off than they are — not as well as everybody else.² Finally, when the last chapter argued that addressing the difficult situation of the disadvantaged is justified by the serious deprivation they would go through in the absence of priority treatment, below some minimum standard, a different moral vision emerges. This view is encapsulated in the doctrines of sufficiency, which emphasise that what matters is that people are not below a certain level of wellbeing that is considered intolerable.

Despite their differences, these three accounts express the consequentialist principles of impartiality and equal concern for all developed in the last chapter. However, they differ in that each of them has a different answer to the last research question inspiring this study; namely, *why* the situation of disadvantaged people *matters* in the aftermath of widespread violence and *when* the special concern owed to them *ends*? This is a crucial question in (post)conflict settings, as one of the greatest difficulties related to resource allocation is determining when the plight of those affected by violence has been well served by the authorities.³ The purpose of this chapter is to unravel the egalitarian, sufficientarian and prioritarian accounts of the principles of impartiality and equal concern for all and determine which of them best fits the Committee's practice. This is done in the hope of enhancing the principle-based framework for priority setting developed so far.

As mentioned in the Introductory Chapter, in turning to moral thinking and now to distributive justice theories the purpose is not to carry out a deep moral theorisation in search of the *ideal* answer to the distributive challenges faced by (post)conflict societies. The purpose is rather to spell out a workable interpretation of the Committee's existing practice, shaping and

¹ Holtug, *Persons, Interests, and Justice* (2010), 203.

² *ibid.*

³ Van der Auweraert, 'The Potential for Redress: Reparations and Large-Scale Displacement' in Duthie (ed), *Transitional Justice and Displacement* (2012), 143-4.

articulating the moral insights that underlie its understanding of state duties in these contexts. This task was justified, in part, by the considerable neglect on the part of scholars of the Committee's contributions to addressing the distributive dilemmas and challenges that arise when it comes to ensuring ESR. A valuable way to bring the Committee to the fore is to make its normative and theoretical commitments explicit, so that discussions on ESR and (post)conflict settings have a more stable ground on which to unfold.

That said, Section 2 deals with distributive egalitarianism in two variations: material equality and equality of opportunities. As will be seen, an egalitarian considers that attempts to improve the circumstances of those who are socio-economically worst-off *matter* because it is morally important for people to be as equal as possible concerning access to certain goods and social advantages.⁴ In (post)conflict societies, this position would hold that disadvantaged people, including those facing the effects of violence, have the right to have their interests weighed with priority *until* equality, however understood, is secured. Section 3 addresses the doctrines of sufficiency. Supporters of this perspective attach the highest moral importance to the distribution of benefits in favour of people who do not have enough and find themselves in intolerable conditions, below a minimal baseline.⁵ According to this view, in the wake of generalised violence, authorities should prioritise the provision of socio-economic goods for the least advantaged people *until* they reach the minimum threshold. Finally, Section 4 examines the priority view, according to which the situation of disadvantaged people matters because they are worse off *than they could be* — not worse off *than others*. In the aftermath of widespread violence, prioritarrians would argue that the interests of disadvantaged people should have a greater weight to the extent that their ESR claims are *more pressing*. For these people, the toll of not receiving a benefit would be greater than that of someone who is better off and is denied the same benefit. In other words, this view attaches a greater moral value to the interests of people who are socio-economically badly off to improve their situation, without aiming at equality as the ultimate goal.

Exploring these theories is the final step in answering the final research question of why exactly the situation of disadvantaged people, affected and unaffected by widespread violence, matters in (post)conflict settings and when the special treatment accorded to their interests can be discontinued.

⁴ Frankfurt, 'Equality as a Moral Ideal' (1987) 98 *Ethics* 21, 35.

⁵ Freiman, 'Why Poverty Matters Most: Towards a Humanitarian Theory of Social Justice' (2012) 24 *Utilitas* 26.

2 DISTRIBUTIVE EQUALITY, ESR AND (POST)CONFLICT SETTINGS: MATERIAL EQUALITY AND EQUALITY OF OPPORTUNITIES

2.1 Distributive equality in the spotlight: Beyond the non-discrimination paradigm

To start with, it is important to delve a little deeper into the exact meaning of distributive equality, what are its main characteristics, and how it differs from similar notions, such as substantive or *de facto* equality, which are most used in ESR scholarship. Distributive egalitarianism is a featured topic in discussions of distributive justice, which skyrocketed in the decade of the 70s in Anglo-American scholarship.⁶ It addresses the question of whether and to what extent the fact that people dispose of socio-economic goods unequally, because of their belonging to a certain class, because they have certain talents and preferences, or because they make a different effort to get them, is justified.⁷ Disparities that arise for other reasons, such as discrimination and other practices of subordination, are not the main concern of distributive egalitarians. This is so not because they bluntly ignore them, as some critics have suggested.⁸ The point is rather that, from a normative point of view, these practices are already generally condemned.⁹ ‘Discrimination’, Nagel explains, ‘is the product of a bad motive, prejudice, and there is nothing to be said for it’.¹⁰

In other words, distributive egalitarians take as their point of departure the existence of a certain consensus that began to crystallise from the mid-twentieth century in Western societies, on the unacceptability of treating people unfavourably on the basis of criteria such as gender, ethnicity or religious preferences.¹¹ Such a consensus, however, was and still remains thin. Provided that unfair discrimination is not evident, the fact that people have varying levels of wealth and income, with the corresponding ability to secure socio-economic goods differently, lacks the same level of rejection. That these disparities may be attributed to factors such as class, talent, or effort, which can somehow be related to people’s choices for which they are expected to assume responsibility, makes it difficult to reach a consensus.¹² These are amongst the issues that are normatively salient from a distributive approach to equality.

⁶ Scheffler, ‘What is Egalitarianism?’ (2003) 31 *Philosophy and Public Affairs* 5, 5.

⁷ Nagel, *Equality and Partiality* (1991), Chapter 10.

⁸ Anderson, ‘What is the Point of Equality?’ (1999) 109 *Ethics* 287, 288-9.

⁹ Scheffler (n 6) 5-6.

¹⁰ Nagel (n 7) 74.

¹¹ Nagel (n 7) 66.

¹² Scheffler (n 6) 6.

The previous chapter explored the Committee's understanding of the notion of non-discrimination and the framework it provides for weighing ESR claims of different groups. As explained, the Committee understands that the principle of non-discrimination unfolds in two different state obligations. On the one hand, states cannot restrict access to and distribution of socio-economic goods on the basis of prohibited distinctions, typically those related to race, gender and religion, according to the ordinary meaning of Article 2(2) ICESCR. On the other hand, state authorities have the duty to secure equality of status by tackling hierarchical relationships in society. This is, relationships in which certain individuals and groups are treated as inferior to others and are prevented from enjoying their rights on equal terms, as clarified in General Comments No. 5 and 16.¹³

This reasoning provides little guidance on differences in wealth and income that are not associated with discrimination on prohibited grounds. True, Article 2(2) includes social origin and property as prohibited grounds for discrimination. General Comment No. 20 takes this position forward explaining that 'individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society'.¹⁴ From this prohibition it follows that people's access to ESR cannot be restricted, for instance, because they are poor, and that authorities must adopt measures to avoid stigmatisation and other forms of prejudice against beneficiaries of social policies.¹⁵ However, these non-discrimination claims are not exactly an argument as to whether socio-economic equality is something to be sought, for instance. Scholars have highlighted that at present there is no explicitly stated right to material equality¹⁶ or socio-economic equality¹⁷ under international human rights law, despite that non-discrimination provisions span across most human rights instruments. And the Committee has yet to link more tightly distributive inequality with non-discrimination under the prohibitions enshrined in Article 2(2).¹⁸

Something similar occurs with equality of opportunities. Although the Committee has implied that equality of opportunities should be sought, the precise scope of this position is not clear

¹³ CESCR General Comment No. 5 (GC No. 5): Persons with Disabilities (E/1995/22) 9 December 1994, para 9; General Comment No. 16 (GC No. 16): The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (E/C.12/2005/4) 11 August 2005, para 5.

¹⁴ CESCR General Comment No. 20 (CG No. 20): Non-discrimination in Economic, Social and Cultural Rights (E/C.12/GC/20) 2 July 2009, para 35.

¹⁵ *ibid.*

¹⁶ Buchanan, 'The Egalitarianism of Human Rights' (2010) 120 *Ethics* 679, 686.

¹⁷ Alston, Report of the Special Rapporteur on Extreme Poverty and Human Rights (A/HRC/29/31) 27 May 2015, para 54.

¹⁸ *ibid.* 55.

and it does not seem to revolve around distributive equality. The rationale behind references to the notion is best understood either individually, according to the right at stake,¹⁹ and/or as belonging to the non-discrimination clause established in Article 2, read in conjunction with Article 3 on the equal right of men and women to the enjoyment of ESR.²⁰ This point can be exemplified with COs on Cyprus, where the Committee rebuked the persistence of ‘*de facto discrimination* against women (...) particularly with regard to working and promotion opportunities in employment’.²¹ Provided that gender or other form of status-based discrimination are not at stake, in these cases the Committee says little about socio-economic inequalities that are explained, for example, by talent or class. As will be seen below, unlike some UN special rapporteurs, the Committee has not endorsed discussions on distributive equality that have led some to defend the position that social inequalities are fine as long as equality of opportunities are ensured for all.

Distributive equality, therefore, must be differentiated from the related notions of substantive equality or *de facto* equality. These notions have garnered attention from ESR scholars such as Fredman,²² Liebenberg and Goldblatt,²³ and Brodsky and Day²⁴ within the framework of discrimination law. The distinctiveness of *de facto* equality is that non-discrimination measures must go beyond the narrow confines of formal equality, this is, equality before the law, to recognise and address all practices that make some people inferior to and subjugated by others.²⁵ In other words, the foil against which substantive equality is to be understood is that of formal equality, not distributive equality. The mere existence of social disparities and poverty that escape the framework of status-based discrimination is often isolated from a substantive equality perspective.²⁶ The Committee has resorted in similar terms to the notion of substantive equality within the boundaries of non-discrimination law in General Comment

¹⁹ In what concerns the right to work, Articles 6 and 7 ICESCR contemplate that everyone has the right ‘to the opportunity to gain his living’, as well as the ‘equal opportunity to be promoted in his employment’. This approach has been used *e.g.* CESCR Concluding Observations Cameroon, 2019, paras 34-5; Macedonia, 2016, paras 27-30; Angola, 2016, paras 27-8.

²⁰ See *e.g.* CESCR Concluding Observations Cameroon, 2019, paras 34-35; Chad, 2009, para 33; Cyprus, 1998, para 12; Macedonia, 2008, para 13; Angola, 2016, paras 25-6.

²¹ CESCR Concluding Observations Cyprus, 2009, para 13.

²² Fredman, ‘Substantive Equality Revisited’ (2016) 14 *International Journal of Constitutional Law* 712.

²³ Liebenberg and Goldblatt, ‘The Interrelationship between Equality and Socio-Economic Rights under South Africa’s Transformative Constitution,’ 23 *South African Journal on Human Rights*, 2007.

²⁴ Brodsky and Day, ‘Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty’ (2002) 14 *Canadian Journal of Women and the Law* 185.

²⁵ CESCR GC No. 20 (n 14) paras 8-9. See also Fredman (n 22) 728-738.

²⁶ Fredman (n 22) 735.

No. 20²⁷ and in COs.²⁸ The neglect of distributive equality by an approach that heavily emphasises non-discrimination was criticised by Alston, who has joined the chorus calling for the establishment of connections between international human rights law and the philosophical literature on distributive equality.²⁹

Having underlined the basic differences between distributive equality and equality as non-discrimination, a few more words are needed to have a better picture of the notion which is of interest here. At face value, a distributive egalitarian can fairly be taken to believe that ‘there is something that justice requires people to have equal amounts of, not no matter what, but to whatever extent is allowed by values that compete with distributive equality’.³⁰ From this formulation, it follows that an egalitarian values equality, but that is not all she values, such that other principles, utility or the respect for liberty, for instance, can override calls for equality.³¹ Therefore, an egalitarian can be better understood as someone who considers that ‘an outcome in which everyone has the same share of benefits is in *one respect intrinsically better* than an outcome in which individuals have different shares’.³² This definition, in addition to encapsulating the fact that equality is valuable in only *one respect*, so that other values can override equality *all things considered*, it also encompasses perhaps the most distinctive feature of distributive egalitarianism. This is that, at least in one respect, an equal distribution of socio-economic benefits is *in itself* better than an unequal one.

The *intrinsic value* of equality implies at least two things. First, that what matters is not the good or bad effects of (in)equality, but (in)equality itself. For instance, egalitarian societies are commended for producing good effects, that is, they prevent some people from being under the control of others, they discourage the emergence of violent conflict, and they tend to have lower levels of poverty.³³ A true egalitarian, however, considers that equality is ‘in itself good’ beyond these *instrumental* considerations, regardless of the goodness of the effects that follow from it.³⁴ The second consequence that derives from supporting the intrinsic value of equality,

²⁷ Without clearly breaking down the content of the notion, the Committee waved the flags of substantive equality in General Comment No. 20 (n 14) para 9, stressing that measures implemented to ‘redress de facto discrimination’ must be ‘discontinued when substantive equality has been achieved’.

²⁸ CESCR Concluding Observations Russia, 2017, para 25(b).

²⁹ Alston (n 17) para 55; Buchanan (n 16); Buchanan, ‘Equality and Human Rights’ (2005) 4 *Politics, Philosophy and Economics* 69; Besson, ‘The Egalitarian Dimension of Human Rights’ (2013) 136 *Archiv für Rechts-und Sozialphilosophie* 19; Song, ‘Human Rights and Inequality’ (2019) 47 *Philosophy & Public Affairs* 347.

³⁰ Cohen, ‘On the Currency of Egalitarian Justice’ (1989) 99 *Ethics* 906, 906.

³¹ Nagel, *Mortal Questions* (2013), 107-8.

³² Holtug (n 1) 175.

³³ Parfit, *Equality or Priority?* (1991), 5-6.

³⁴ Nagel (n 31) 108.

is that an outcome in which individuals have equal socio-economic benefits is better in one respect, even if no good consequences follow, even if no one *benefits* from it. In other words, egalitarians consider that eliminating an inequality is good in one respect, even if it is done by making certain people worse and no one better. Thus understood, egalitarians open themselves to what Parfit has coined the Levelling Down Objection, this is, the critique of egalitarianism on the grounds that there is nothing good in producing equality by levelling down.³⁵

2.2 Material equality in (post)conflict settings

Concern for material equality is not rare in (post)conflict settings. Indeed, armed conflict very often increases socio-economic inequalities in the societies in which it takes place,³⁶ for example by devastating rural regions and leaving city dwellers largely unaffected and relatively well off. Owing to this, it is reasonable to hold the view that to undo the armed conflict's consequences, it is worth pursuing material equality.³⁷ Giving this argument more shape in terms of the third research question of this study, it can be argued that the situation of people who are socio-economically worst-off *matters* because they lack the same socio-economic goods enjoyed by the general population. As a result, their interests must be accorded a greater weight, although not absolute, than those of other people *until* material equality is achieved. This position was suggested by certain civil society organisations in Colombia, who argued that the situation of people affected by armed conflict can only be considered acceptable once they achieve a level of ESR enjoyment equal to that of the average people untouched by violence.³⁸

The Committee's work does not demonstrate an *intrinsic* concern for material equality in the aftermath of widespread violence, but rather it shows an instrumental one. The problem with inequality in the distribution of wealth and income,³⁹ and other socio-economic disparities, such as unequal access to land⁴⁰ and disparities between rural and urban areas,⁴¹ is that they

³⁵ Parfit (n 33) 16-7.

³⁶ Uprimny, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 *Netherlands Quarterly of Human Rights* 625, 631.

³⁷ *ibid.* 646.

³⁸ Comisión de Seguimiento a la Política Pública de Desplazamiento Forzado, *El Reto ante la tragedia humanitaria del desplazamiento forzado: Análisis sobre el estado de cosas institucional* (2016), 260-8

³⁹ See e.g. CESCER Concluding Observations Colombia, 1995, para 7; Salvador, 2007, para 17.

⁴⁰ See e.g. CESCER Concluding Observations Peru, 1997, para 12(a); Guatemala, 1996, paras 10, 24-5; Guatemala, 2003, para 24; Salvador, 1996, para 13; Burundi, 2015, para 45.

⁴¹ See e.g. CESCER Concluding Observations Salvador, 2007, para 17; Colombia, 2017, paras 61-2; Peru, 2012, para 19; Turkey, 2011, para 13; Azerbaijan, 2013, para 16; Bosnia, 2013, para 29 (d); Rwanda, 2013, para 22; Burundi, 2015, para 52; Morocco, 2015, paras 43(a), 48.

‘hinder the full enjoyment’ of ESR.⁴² Calls for implementation of redistributive policies are thereby made *instrumentally*, ‘with the objective of effectively combatting poverty’⁴³ or with a view towards ‘increasing the resources available for the implementation’ of ESR.⁴⁴ On other occasions, the Committee has noted that tackling socio-economic inequality is essential to alleviate social unrest⁴⁵ and guarantee ‘social peace’,⁴⁶ ‘break[ing] the vicious circle of violence and counter-violence’ that led to armed conflict in the first place.⁴⁷ In very few cases, (high) socio-economic inequality appears to be a problem in its own right, such as with regressive tax systems or when high levels of poverty persist despite steady economic growth. In the Committee’s opinion, the very existence of these tax schemes, as well as the misuse of public resources, perpetuate high levels of inequality, reflecting the lack of allocation of the maximum available resources for the realisation of ESR.⁴⁸ However, with these statements there seems to be only an instrumental concern for socio-economic equality, since they are related to fighting poverty or the maximisation of resources to guarantee ESR in (post)conflict societies.⁴⁹

The possibility that the Committee considers that material equality has an intrinsic value is further ruled out after analysing whether it seeks to level people down or up. On the one hand, repeated calls to address material deprivation reflect a concern with improving people’s levels of ESR enjoyment rather than seeking to make people equally badly off. In this regard, the Committee has expressed deep concern about states, such as Azerbaijan, in which most of the population lived in poverty after the war’s ending — finding no relief whatsoever in the widespread nature of deprivation.⁵⁰ On the other hand, the Committee does not appear to be pursuing material equality by stating that people’s levels of ESR enjoyment must be levelled up. Certainly, alleviating poverty and guaranteeing an adequate standard of living for all have clear egalitarian inspiration, as these measures reduce the risk that people with fewer resources

⁴² See e.g. CESCR Concluding Observations Guatemala, 1996, para 14; Guatemala, 2003, para 24; Uganda, 2015, para 17; Sudan, 2015, para 21; Russia, 2003 (3), para 25.

⁴³ See e.g. CESCR Concluding Observations Colombia, 1995, para 21; Salvador, 1996, para 26; Russia, 2003, para 25; Angola, 2016, paras 43-4.

⁴⁴ See e.g. CESCR Concluding Observations Colombia, 2017, para 20; RDC, 2009, para 13.

⁴⁵ CESCR Concluding Observations Guatemala, 1996, para 17.

⁴⁶ CESCR Concluding Observations Salvador, 1996, para 27.

⁴⁷ See e.g. CESCR Concluding Observations Peru, 1997, para 27; Guatemala, 1996, para 10.

⁴⁸ See e.g. CESCR Concluding Observations Sudan, 2015, para 15; RDC, 2009, para 13; Angola, 2016, para 9.

⁴⁹ See e.g. CESCR Concluding Observations Colombia, 2017, para 20; Guatemala, 2014, para 8; Russia, 2017, paras 16-7; Cameroon, 2019, para 14; Sudan, 2015, para 15; RDC, 2009, para 13; Salvador, 1996, para 12.

⁵⁰ CESCR Concluding Observations Azerbaijan, 1997, para 9. See also CESCR Concluding Observations Salvador, 1996, para 12.

become subordinate to those with more.⁵¹ In addition, funding these programmes usually requires taking away resources from the well-off sectors of society, applying ‘downward pressure on the ceiling on inequality’.⁵² The Committee itself made this argument concerning war-torn Central African Republic, when considering that recognition of ESR ‘may alleviate the seizure of resources by a few individuals’.⁵³

That said, it would be misleading to consider that with these statements the Committee is attaching an intrinsic value to material equality. For one thing, the Committee does not seem to care about the division of society in classes or the very existence of rich and poor people. The language of class is seldom used and when reference is made to ‘the growing polarisation between rich and poor’, or other situations in which ‘the rich are made even richer and the poor even poorer’, the Committee does so *instrumentally*. Indeed, the Committee is concerned about these social differences due to the social instability they can produce and the deterioration of the population’s standard of living,⁵⁴ not because it attaches an intrinsic value to material equality. Likewise, the Committee is silent in the face of other social practices that contribute to the perpetration of socio-economic inequalities. These include: hereditary advantages; the special interest people take in their children’s success; peoples’ tendency to socialise and creating bonds with fellows of the same class;⁵⁵ and praising intellectual labour and professional careers much more seriously than manual work and technical expertise.⁵⁶

There is, however, one instance in which the Committee may have an *intrinsic* concern for material equality. On gender issues, for example, the Committee has consistently upheld the principle of equal pay for work of equal value, in (post)conflict societies and elsewhere.⁵⁷ Although the expected application of this principle is that the salary of women rises when they have jobs of equal value to those of men, it also runs downwards, since decreasing the salary of men would ‘reduce the wage gap between men and women’.⁵⁸ Taking the example of corporate executives, even if women’s salaries are not improved by reducing men’s, equality may be justified despite the fact that no one *benefits* from it. This is a nice example showing that achieving material equality by levelling down is sometimes well justified. As Temkin

⁵¹ Buchanan (n 16) 686.

⁵² Song, ‘Human Rights and Inequality’ (2019) 47 *Philosophy & Public Affairs*, 347.

⁵³ CESCR Concluding Observations CAR, 2018, para 10.

⁵⁴ See e.g. CESCR Concluding Observations Salvador, 2007, para 17; Kenia, 2008, para 7.

⁵⁵ Nagel (n 7) 74-5.

⁵⁶ Young, *Justice and the Politics of Difference* (2011), 56-8.

⁵⁷ See e.g. CESCR Concluding Observations Nicaragua, 2008, para 12; Armenia, 2014, para 15.

⁵⁸ CESCR Concluding Observations Colombia, 2001, para 37.

defends, human beings are not just sentient animals whose socio-economic welfare is the only thing that matters. They are first and foremost moral agents that ‘stand in certain relations to each other’, such that their standing as equals is a source of value even if achieving it *does not benefit anyone*.⁵⁹ This reasoning holds true for historical structures of oppression, such as gender subordination and racial segregation,⁶⁰ so it is better explained by non-discrimination law than by distributive equality. That said, this reasoning has little traction in (post)conflict settings. Given the Committee’s concern for making disadvantaged people better off, it seems difficult for it to consider that there is anything good in a policy that, for instance, reduces the wages of internally displaced men to match those of women. As Klug and Wildbore point out in another context, ‘everyone being treated equally badly is not a human rights concept’.⁶¹

Therefore, the analysis conducted here simply does not support the view that the Committee ascribes an intrinsic value to material equality in (post)conflict societies. The criticism of socio-economic inequality is rather instrumental, as it ultimately seeks to improve the enjoyment of ESR. Although people affected by armed conflict, as well as other disadvantaged people, have the right to have their interests given a greater weight than those of the rest of the population, the reason for this is not material inequality. The special concern that authorities owe them, therefore, does not end when material equality is achieved.

2.3 Equality of opportunities in (post)conflict settings

If material inequality is not a real concern in (post)conflict societies, perhaps the notion of equality of opportunity is. Or to put it differently, perhaps the problem with armed conflict is that it undermines people’s equal opportunities to secure socio-economic goods by themselves. Kälén considers, for instance, that IDPs should receive special treatment so that ‘they not face obstacles that prevent them from accessing livelihoods on the same basis as residents’.⁶² A more precise formulation is provided by Gaviria, who deems that special treatment for those affected by violence should be extended only until they fare as well as the rest of the poor; this is, during the first years it takes to equalise income-generation prospects.⁶³ Under this metric, the situation of those who are worse off *matters* to the extent that they lack equal opportunities

⁵⁹ Temkin, ‘Equality, Priority or What?’ (2003) 19 *Economics and Philosophy* 62, 68.

⁶⁰ Wolff, ‘Levelling Down’ in Dowding, Hughes and Margetts (eds), *Challenges to democracy: Ideas, Involvement and Institutions* (2001), 25.

⁶¹ Klug and Wildbore, *Equality, Dignity and Discrimination under Human Rights Law; selected cases* (2005), 2

⁶² Kälén, Framework on Durable Solutions for Internally Displaced Persons (A/HRC/13/21/Add.4) 29 December 2009, para 72.

⁶³ Gaviria, ‘Generación de Ingresos Para la Población Desplazada: Entre lo Deseable y Posible’ in Cepeda (Coord) *Desplazamiento Forzado: Reflexiones para Salir de la Encrucijada* (2012), 27-9.

to guarantee socio-economic goods by themselves. Their interests must be accorded a greater weight, although not absolute, than those of other people *until* equality of opportunities is secured.

2.3.1 Equality of opportunities and luck-egalitarianism

Different UN special rapporteurs who have dealt with the relationship between income distribution and the enjoyment of ESR,⁶⁴ and with extreme poverty,⁶⁵ have emphasised that the Covenant must be regarded in terms of requiring the guarantee of equality of opportunity, not material or socio-economic equality. In their view, ‘a certain degree of inequality and reasonable differentiation is both equitable and necessary’.⁶⁶ When societies reach ‘intolerable levels’ of income and wealth inequality,⁶⁷ however, disparities become problematic as they undermine people’s *equal opportunities*.⁶⁸

This position seems to resonate with the COs in which the Committee dealt with sharp socio-economic disparities, for instance, when addressing states like Colombia and Guatemala that rank in the top-20 of the most unequal countries according to the Gini Index.⁶⁹ Elsewhere the disparities between rich and poor in accessing quality education, as well as the lack of economic opportunities affecting certain segments of the population, exemplify the Committee’s concern about ‘the denial of equal opportunities’ to low-income sectors of society.⁷⁰ This uneasiness extends to (post)conflict settings, as COs on Peru and Turkey may suggest. As part of the social inequalities that must be overcome after the Peruvian armed conflict, the Committee regretted that ‘poor women with no education have a maternal mortality rate 10 times higher than that of educated women’.⁷¹ Perhaps what matters the most after many years of widespread violence is not ‘the high cost of rebuilding the infrastructure

⁶⁴ Eide, The Relationship Between the Enjoyment of Human Rights, in Particular ESCR, and Income Distribution: Preparatory Document (E/CN.4/Sub.2/1994/21) 5 July 1994; Bengoa, The Relationship Between the Enjoyment of Human Rights, in Particular ESCR, and Income Distribution: Preliminary Report (E/CN.4/Sub.2/1995/14) 10 July 1995; Bengoa, The Relationship Between the Enjoyment of Human Rights, in Particular ESCR, and Income Distribution: Provisional Report (E/CN.4/Sub.2/1996/14) 24 July 1996; Bengoa, The Relationship Between the Enjoyment of Human Rights, in Particular ESCR, and Income Distribution: Final Report (E/CN.4/Sub.2/1997/9) 30 July 1997.

⁶⁵ Alston (n 17).

⁶⁶ Eide (n 64) para 43. *See similarly* Bengoa, Preliminary Report (n 64) para 30; Alston (n 17) para 12.

⁶⁷ Eide (n 64) para 21. *See similarly* Bengoa, Preliminary Report (n 64) para 30; Bengoa, Final Report (n 64) paras 20-1.

⁶⁸ Eide (n 64) para 91. *See similarly* Bengoa, Provisional Report (n 64) para 34; Bengoa, Preliminary Report (n 64) paras 36, 42, 46; Alston (n 17) para 14.

⁶⁹ <https://data.worldbank.org/indicator/SI.POV.GINI>

⁷⁰ *See e.g.* CESCR Concluding Observations Morocco, 2006, paras 30, 57; Salvador, 2007, para 21.

⁷¹ CESCR Concluding Observations Peru, 1997, para 16.

destroyed’, but the ‘[g]ross inequality in the distribution of wealth among the population’.⁷² Likewise, in referring to the concentration of high poverty in south-eastern Turkey, the Committee called upon the authorities to provide the traditionally marginalised and strongly affected by violence Kurdish communities ‘with the *full opportunities* to enjoy their ESR’ (emphasis added).⁷³ Due to stark inequalities between the different regions of the country, the Committee considered that in south-eastern Turkey ‘*the opportunity* to enjoy the full rights under the Covenant is lacking’.⁷⁴

Besides these examples, the Committee’s use of the notion of equality of opportunity under a distributive metric is rare. In order to gain more clarity on the matter, the work of special rapporteurs is once again relevant. Crucially, Eide introduced in the early 1990s an understanding of ESR under the equality of opportunity framework. Overly influenced by certain discussions on distributive justice that problematised the retreat of welfare provisions in the US and UK since the 1980s,⁷⁵ he expanded on the ‘broad consensus’ over distributive equality and ESR as follows:

[W]hat should be achieved is greater equality of opportunity, not necessarily equality of outcome. Equality of opportunity means the provision of equal chances, from the outset of life, for human beings to manage their own future, and of *arrangements to eliminate the negative consequences of accidental misfortune*, such as serious illness, disability and structural unemployment, that otherwise could destroy *the efforts* made in goodwill by the human being concerned (emphasis added).⁷⁶

This position bears a striking resemblance to the central idea of one of the most salient approaches to distributive egalitarianism discussed above, dubbed ‘luck egalitarianism’ by Anderson.⁷⁷ The core thesis of luck-egalitarians is that an egalitarian society should only aim to correct inequalities for which individuals cannot be held responsible, this is, inequalities that arise from unchosen features of people’s circumstances.⁷⁸ Dworkin, for instance, believed that social inequalities than can be traced to a birth disability, unforeseen illness, or other

⁷² *ibid.* para 12(b).

⁷³ CESCR Concluding Observations Turkey, 2011, para 10.

⁷⁴ *ibid.* para 13.

⁷⁵ Scheffler (n 6) 14.

⁷⁶ Eide (n 64) para 91.

⁷⁷ Anderson (n 8) 289-295.

⁷⁸ Scheffler (n 6) 5.

disadvantage produced by brute luck must be addressed in a fair society.⁷⁹ On the contrary, inequalities in the advantages that people enjoy are acceptable if they stem from the choices that people have voluntarily made. There is nothing wrong with social inequalities that arise after people with similar opportunities use their talents and efforts differently. Under luck-egalitarian assumptions, therefore, equality of opportunity is a ‘starting-gate theory’: ‘as long as people enjoy fair shares at the start of life, it does not much concern itself with the suffering and subjection generated by people’s voluntary agreements in free markets’.⁸⁰

The notion of equality of opportunity and the divide of choices and circumstances, if taken together, easily lead to a very narrow understanding of state duties towards disadvantaged people in the field of ESR. Buchanan, for instance, defends a ‘modest view’ according to which commitment to ESR only requires ensuring that every individual has the opportunity for a ‘decent or minimally good life’, without facing undue burdens in achieving it.⁸¹ The more ambitious position of guaranteeing that everyone indeed enjoys a decent life, in his view, is excessive ‘if only because this would ignore, or attempt to negate, *the role of the individual’s choice in determining her opportunities and the costs of realising them*’ (emphasis added).⁸² Under this modest view, the proper role of human rights is only ‘to protect individual wellbeing from serious threats’, namely: ‘torture, prosecution and physical insecurity’;⁸³ living in misery; and being subject to practices in which people are marked as inferior to others.⁸⁴ Similarly, Special Rapporteur Bengoa considered that state authorities should not be expected to ‘ensure the observance and full realisation of ESR’, but only ‘to provide the opportunities for this to come about’.⁸⁵ According to him, the proper role of ESR is that of offering ‘equality of opportunity, by sweeping away the barriers that prevent particular sections of the population from fully enjoying [ESR]’.⁸⁶ An ESR violation only occurs, then, due to discriminatory practices as well as other ‘objective barriers and circumstances’ that prevent people, especially ‘marginal, disabled and underprivileged groups’, from having equal opportunities to enjoy ESR.⁸⁷

⁷⁹ Dworkin, ‘What is Equality? Part 2: Equality of Resources’ (1981) 10 *Philosophy & Public Affairs* 283, 297-304.

⁸⁰ Anderson (n 8) 308.

⁸¹ Buchanan (n 29) 71, 75.

⁸² *ibid.* para 75.

⁸³ *ibid.* para 73.

⁸⁴ Buchanan (n 16) 687, 707-8.

⁸⁵ Bengoa, Preliminary Report (n 64) para 10.

⁸⁶ *ibid.* paras 12-3.

⁸⁷ *ibid.* para 11.

Applied in (post)conflict situations, this reasoning casts a different light on *why* the situation of disadvantaged people, affected and unaffected by violence, *matters*. It also sheds light on the question of *when* the special concern due to them *ends*. The plight of these people is important insofar as they experience barriers that prevent them from the opportunity to secure ESR by themselves — these obstacles not being attributable to their choices, but the result of circumstances for which they are not responsible. Following Buchanan and Bengoa, these circumstances primarily consist of discrimination and other evident practices that embody status inequality. The impact of armed conflict on people's standard of living would also belong to the array of unchosen circumstances that require rectification in (post)conflict settings. After all, being subject to serious bodily injury, as well as other 'blatant violations involving physical attack, war, or violence',⁸⁸ 'undercut the possibility of having a decent human life'.⁸⁹ Under this framework, ensuring subsistence, tackling discriminatory practices, and removing any other burden that prevents the individual from securing ESR determine the scope of special treatment. The key issue of equality of opportunities is levelling the playing field to ensure that everyone freely exercises their rights,⁹⁰ so *the efforts* made with goodwill by the person concerned are protected.⁹¹ The effective enjoyment of ESR is thus made conditional on the individual making the appropriate choices and on her personal decision to try to live a good life.

This reasoning fits with the first COs issued on Turkey, where ethnic prejudice against the Kurdish population and the violent rejection of their claims for autonomy explain the marginalisation they go through.⁹² The Committee's concern appears to be reduced in this case to poverty that disproportionately affects these communities as a result of status-based discrimination and the ensuing undermining of their opportunities to enjoy ESR on equal terms with the rest of the population. This is an interpretation of equality of opportunity with very little distributive justice, as it boils down to a very weak mandate to ensure equality of status. This interpretation is compatible with Turkish policies whose primary objective is to ensure subsistence for those affected by violence and seek that the region benefits from the general effects of development programmes carried out there,⁹³ leaving gross income inequalities

⁸⁸ *ibid.* para 19.

⁸⁹ Buchanan (n 29) 72.

⁹⁰ Bengoa, Provisional Report (n 64) para 36; Bengoa, Final Report (n 64) para 15.

⁹¹ Eide (n 64) para 91

⁹² Kurban, *Reparations and Displacement in Turkey: Lessons Learned from the Compensation Law* (2012), 13.

⁹³ *ibid.* 12.

untouched.⁹⁴ Provided that status-discrimination is confronted, the full enjoyment of ESR seems to be made dependent on each Kurd making the right individual decisions.

This approach to equality of opportunity, however, has little support in the text of the Covenant and the overall work of the Committee. An immediate reading of the ICESCR makes it clear that what states are obliged to is to ‘achieve’ the ‘full realisation’ of the rights enshrined therein, to ‘guarantee their exercise’ and ‘ensure their enjoyment.’ There is simply no general provision limiting the scope of state duties to guarantee the opportunity to enjoy ESR.⁹⁵ Elsewhere the Committee also consistently emphasises states duties to actually *ensure* people’s rights, not barely the opportunities to do so.⁹⁶ This is a constant trend that does not vary in light of the mere existence of conflict-related issues and other factors that may prevent the full implementation of the Covenant within a given period. Certainly, the Committee is very aware of these difficulties and avoids interpreting the Covenant as imposing obligations on the authorities that are impossible to comply with. A myriad of COs open with a caveat that recognises the specific challenges posed by (post)conflict contexts for the full enforcement of the Covenant.⁹⁷ The very flexible nature of the Covenant, with references to the progressive realisation of rights based on the availability of resources, supports the Committee’s cautious approach, which makes it a very suitable framework to deal with these settings.⁹⁸ But nothing in this approach means that states’ obligations boil down to providing people with equal opportunities to enjoy ESR.

That said, the concepts of individual responsibility and equality of opportunity outlined so far have played a huge, albeit implicit and little-theorised role in discussions about ESR in (post)conflict settings. These notions provide a justification for deontologically oriented approaches to human rights law, which, as extensively discussed during this study, highlight the fact of victimisation. As explained, for these approaches, what raises concern is the fact that people have been wronged by undue interference rather than being badly off, leading some

⁹⁴ By 2017, 1 percent of the Turkish population controlled around 55 percent of total wealth, <https://www.worldpoliticsreview.com/trend-lines/20830/turkey-s-government-shows-little-concern-for-growing-income-inequality>

⁹⁵ See the exceptions related to the right to work (n 19).

⁹⁶ See e.g. CESCR Concluding Observations Colombia, 1995, para 22; Colombia, 2001, para 16; Peru, 2012, para 19; Guatemala, 2003, para 30; Guatemala, 2014, para 15.

⁹⁷ Riedel, ‘Economic, Social, and Cultural Rights in Armed Conflict’ in Clapham *et al* (eds) *The Oxford Handbook of International Law in Armed Conflict* (2014), 448-9; Schmid, ‘Socio-economic and Cultural Rights and Wrongs after Armed Conflicts: Using the State Reporting Procedure before the United Nations Committee on Economic, Social and Cultural Rights More Effectively’ (2013) 31 *Netherlands Quarterly of Human Rights* 241, 251-4.

⁹⁸ Schmid and Nolan, “‘Do no Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice” (2014) 8 *The International Journal of Transitional Justice* 362, 379.

to justify a differentiated and preferential treatment for ‘victims’ over non-victims in access to social services. Adherence to notions of individual responsibility and equality of opportunities provides additional justification for emphasising victimhood — making explicit little theorised biases about common poverty, which may be utterly unacceptable. Only after addressing these issues will the full scope of the Committee’s position on equality of opportunities and its application post-conflict become tangible.

2.3.2 The ‘undeserving’ victims and the ‘deserving’ poor

Within certain political narratives, there is an opinion that poor people are poor because they deserve it to some degree. ‘If you set out to help people who are in trouble’, the argument goes, ‘you almost always find that most of them are to some extent responsible for their present troubles. Few are completely innocent’.⁹⁹ Arneson explains that this approach to poverty, which gained traction during the 1990s, has been coupled with a new consensus that ‘policies should be designed to reward the deserving and punish the undeserving’.¹⁰⁰ Accordingly, to the extent that people are responsible for their own socio-economic misfortune, state authorities have no duty towards them in terms of distributive justice. Measures such as cash, food, or housing benefits to healthy non-aged persons with low incomes should be restricted.¹⁰¹ Other programmes such as benefits for disability and serious illness related to birth, or unemployment benefits in the midst of structural unemployment, may remain in force.¹⁰² For equality of opportunities only provides the individual with protection against obstacles beyond their control that threaten to undermine their capacity to ensure ESR on equal terms with their fellow citizens, if they decide to do so.

Civilians caught up in widespread violence do not fit the deserving poor narrative, as these contexts upset the level playing field presupposed under an equality of opportunity perspective. The Inter-American Commission, for example, has expressed its concern towards those engulfed in widespread violence in terms of the illegitimate interruption of their life project, a situation that prevents them from enjoying their rights in freedom, on equal terms with other citizens.¹⁰³ The Inter-American Court has also resorted to this reasoning when framing the

⁹⁹ Jencks, *Rethinking Social Policy: Race, Poverty and the Underclass* (1992), 88.

¹⁰⁰ Arneson, ‘Egalitarianism and the Undeserving Poor’ (1997) 5 *The Journal of Political Philosophy* 327, 328.

¹⁰¹ Arneson (n 100) 327, 337.

¹⁰² *ibid.* 327.

¹⁰³ Derechos Humanos de Migrantes, Refugiados, Apátridas, Víctimas de Trata de personas y Desplazados Internos: Normas y Estándares del Sistema Interamericano de Derechos Humanos (IACmHR, 31 December 2015) para 234.

situation of IDPs,¹⁰⁴ as well as other victims of state-led violence.¹⁰⁵ The fact that the economic hardship they usually go through is completely ‘unwelcome and disruptive’¹⁰⁶ allows for differentiation of their claims from those of the ‘ordinary’ poor. For what authorities have to redress is not this or that social shortcoming but the opportunities interrupted by violence.¹⁰⁷ Since the individual has the ultimate responsibility to carry out their life project authorities are expected to redress undue interference with personal autonomy,¹⁰⁸ not making people better off.

This emphasis on the distinctiveness of ‘victims’ easily leads to constructing the notion in stark opposition to the ‘ordinary’ poor. In the Peruvian Truth and Reconciliation Commission, the possibility of addressing social problems also affecting ‘other parts of the population’ through reparations was considered problematic, since specific recognition of victims was jeopardised.¹⁰⁹ To sort things out, it was agreed that benefits should only seek to redress negative violations of personal liberty,¹¹⁰ thereby addressing direct damage resulting from civil and political rights violations¹¹¹ rather than existing socio-economic shortcomings,¹¹² which would include ‘ordinary’ poor people.

As often happens in the construction of dichotomies, one term ends up relegating the other.¹¹³ If innocent victims are sometimes understood as moral beacons of society,¹¹⁴ the poor are portrayed as less deserving. Referring to the Peruvian authorities and other social elites immediately after the armed conflict, a survivor expressed the view that

[T]hey look at us poor people like dogs, as they say “how much you have is how worthy you are, and if you have nothing you are worth nothing”. But they blame us for

¹⁰⁴ *Members of the Village of Chichupac and Neighbouring Communities of the Municipality of Rabinal v Guatemala* IACtHR Series C 328 (30 November 2016) para 190.

¹⁰⁵ *Loayza Tamayo v Peru* IACtHR Series C 42 (27 November 1998) paras 147-8, 151.

¹⁰⁶ Kalmanovitz, ‘Compensation and Land Restitution in Transitions from War to Peace’ in López-Guerra and Maskivker (eds), *Rationality, Democracy and Justice: The Legacy of Jon Elster* (2014), 194.

¹⁰⁷ *ibid.* 195.

¹⁰⁸ *Loayza* (n 105) paras 147, 150.

¹⁰⁹ Magarrell, ‘Reparations for Massive or Widespread Human Rights Violations: Sorting out Claims for Reparations and the Struggle for Social Justice’ (2003) 22 *Windsor Yearbook of Access to Justice* 85, 93.

¹¹⁰ *ibid.* 94.

¹¹¹ Laplante, ‘On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development’ (2007) 10 *Yale Human Rights and Development Law Journal* 141, 144.

¹¹² Magarrell (n 109) 94, 97; Laplante (n 111) 160-1.

¹¹³ Sharp, ‘Addressing Economic Violence in Times of Transition: Towards a Positive-Peace Paradigm for Transitional Justice’ (2012) 35 *Fordham International Law Journal* 780, 798-9.

¹¹⁴ Rudling, ‘“I’m Not that Chained-Up Little Person”: Four Paragons of Victimhood in Transitional Justice Discourse’ (2019) 41 *Human Rights Quarterly* 421, 424.

becoming poor. But in our villages, we had cows, goats, potatoes...but we had to escape the violence and they forced us to become poor.¹¹⁵

This testimony embodies the narrative spread across the Peruvian society that poor people are poor because they deserve it. It also expresses the importance for the stigmatised to shake off the guilt of being poor. According to the interviewee, they and members of the community were not really poor, since they had livelihoods. Their poverty was rather induced by violence. But in shifting blame this way, the stigma of the stereotype remains. There are still deserving and undeserving poor — the problem with the interviewee was that they were placed on the wrong side of the dichotomy, that of the deserving poor. Someone not affected by violence living in dire poverty, without access to livelihoods, remains deprived of the esteem and respect that citizens should have for one another.

To be clear, the purpose of this account of poverty and victimhood is not affirming what deontologically-oriented human rights partisans actually believe. Most likely, many of them would reject the very idea of the deserving vs undeserving poor. The argument is rather revealing because it explains that bringing the category of victim to the fore in permanent opposition to non-victims may implicitly depend on stigmas about ‘ordinary’ poverty that are difficult to accept. Otherwise, it is not entirely clear why the fact of not being responsible in bringing about one’s misfortune carries such normative weight. Deep moral intuitions about individual responsibility, coupled with societal attitudes that seek to reward the deserving at the expense of the undeserving, may implicitly underpin the positions that defend the distinctive status of victims. An opportunity conception of distributive justice also justifies drawing a line in the sand between the ‘underserving’ victim and the ‘deserving’ poor, as the ultimate evil of armed conflict is undermining everyone’s equal chances to provide for themselves free from violence. The normative salience of being badly off is watered down since, in the end, effective enjoyment of ESR is made dependent on people making the right decisions and personal efforts to secure a decent life. This means that decoupled from violence, poverty casts a different and dimmer light. While it may be considered an evil in its own right, it definitely lacks the normative pull that it has when it is the product of illegitimate interference, typically as a result of serious abuses.¹¹⁶

¹¹⁵ Laplante (n 111) 157.

¹¹⁶ Pérez-Murcia, ‘Social Policy or Reparative Justice? Challenges for Reparations in Contexts of Massive Displacement and Related Serious Human Rights Violations’ (2013) 27 *Journal of Refugee Studies* 191, 195; Uprimny, ‘Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice’ (2009) 27 *Netherlands Quarterly of Human Rights* 625, 626.

The Committee does not endorse these positions. By relentlessly repeating that states are obliged to *ensure* ESR for all after widespread violence, it is silent about the distinctions and dichotomies that make such stances possible. Citizens are not required under the ICESCR to appear before state authorities and claim that they were victimised in order to have priority access to ESR. Nor are the rights of the poor protected on the understanding that they are reckless people ‘entitled to special paternalistic protection by society against their poor choices’.¹¹⁷ The Committee’s attitude stands away from ‘an opportunity conception of justice’ whose implementation ‘will lead to [some] sort of loss of respect-standing for individuals’.¹¹⁸

If this is true, then it is clear that equality of opportunities is an approach to distributive justice that not only fails to explain the Committee’s overall work, but is also one with little normative appeal. It is therefore necessary to explore other distributive justice theories to properly grasp why the situation of those who were affected by armed conflict, as well as that of other people experiencing similar circumstances *matters* post-conflict. Without an answer to this question, it is impossible to determine with accuracy when their right to have a special weight tied to their interests *ends*.

3 SUFFICIENCY, ESR AND (POST)CONFLICT SETTINGS

3.1 What we talk about when we talk about sufficiency

Although equality and sufficiency have not been rival moral views at every point in modern history,¹¹⁹ in contemporary distributive justice debates they are treated as competitors. The doctrine of sufficiency was relaunched in current discussions by Frankfurt,¹²⁰ in an attempt to explain the unease caused by poverty in a more effective way than egalitarianism does. Frankfurt considers that the moral importance of improving the living conditions of the poor is not based on the fact that they enjoy *less* economic benefits than the well-off members of society but that ‘they have too little’.¹²¹ What matters is not the ‘quantitative’ disparity between living standards but the ‘qualitative’ conditions faced by people who are substantially worse off.¹²² This position is reinforced by the claim, common amongst sufficiency advocates, that disparities between the rich and the super-rich lack normative salience.¹²³ Owing to this, state

¹¹⁷ Anderson (n 8) 300.

¹¹⁸ Wolff, ‘Fairness, Respect, and the Egalitarian Ethos’ (1998) 27 *Philosophy & Public Affairs* 97, 110.

¹¹⁹ See Moyn, *Not Enough: Human Rights in an Unequal World* (2018), Chapters 1 and 2.

¹²⁰ Frankfurt (n 4)

¹²¹ *ibid.* 32.

¹²² *ibid.*

¹²³ *ibid.* 32-3; Freiman (n 5) 29; Crisp, ‘Equality, Priority, and Compassion’ (2003) 113 *Ethics* 745, 755.

authorities must take care that as many people as possible have *enough* — not the *same*.¹²⁴ Once people have enough, state duties seriously diminish or even disappear.¹²⁵ As will be discussed later, an influential account of the notion of minimum core obligations, present to some extent in the Committee's work, flirts with this moral view.

Many questions arise with the doctrines of sufficiency. The first, which is perhaps the most obvious, is what exactly it means to *have enough*. Frankfurt links sufficiency to an amount of money that people are content with.¹²⁶ Freimen speaks of self-reported satisfaction.¹²⁷ Anderson builds the notion around a 'decent set of freedoms for functioning as an equal in society'.¹²⁸ Nussbaum,¹²⁹ Huseby¹³⁰ and Bilchitz¹³¹ use two thresholds. Roughly, the first deals with the base-line that makes human life functioning possible, while the second deals with the level at which life has value. For the sake of simplicity, the following will only discuss the *idea* of *one* threshold. This decision is not arbitrary since, as will be seen, criticism of the doctrines of sufficiency is not based on the number of thresholds or their content. It is the very existence of a threshold and the moral importance attached to it that is considered flawed.

The second crucial question is this. Once the moral imperative of assuring people a position above a good enough threshold is recognised, it remains to be addressed how this duty can be weighed against the claims of those who are not close to the threshold. Achieving sufficiency is considered by some to be a matter of lexical priority; that is, that benefits to people below the threshold unconditionally outweigh gains for people above it.¹³² Singer criticises this position by taking it to the extreme. He argues that if a society has only one utterly deprived member, it should spend all its resources raising her above the threshold 'before it spends anything at all on raising the welfare of anyone else, no matter how big a difference the

¹²⁴ Frankfurt (n 4) 31.

¹²⁵ Frankfurt (n 4) 21; Freiman (n 5) 27; Crisp (n 123) 758; Anderson (n 8) 326; Nussbaum, 'Human Functioning and Social Justice: In Defence of Aristotelian Essentialism' (1992) 20 *Political Theory* 202, 221. Elsewhere Nussbaum seems to take a step back from the sufficiency view. See her *Women and Human Development: The Capabilities Approach* (2000) 75, 86. However, as she acknowledges later, the question of 'what should be done when citizens are above the threshold' remained unresolved: 'Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan' (2000) 111 *Ethics* 102, 126.

¹²⁶ Frankfurt (n 4) 37.

¹²⁷ Freiman (n 5) 33.

¹²⁸ Anderson (n 8) 326.

¹²⁹ Nussbaum 'Human Functioning' (n 125), 222, 229.

¹³⁰ Huseby, 'Sufficiency: Restated and Defended' (2010) 18 *The Journal of Political Philosophy* 178, 180-2.

¹³¹ Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007), Chapter 1.

¹³² Crisp (n 123) 758; Huseby (n 130) 184 – referring to the maximal sufficiency threshold.

resources could make to everyone else in society'.¹³³ This position seems onerous to some advocates of the doctrine. Anderson, for instance, rejects the idea of 'giving absolute priority to the worst off' since it would require making 'considerable sacrifices in the lower middle ranks for trifling gains at the lowest levels'.¹³⁴ In these accounts, the weighing is done under the assumption that the utility of securing a profit for someone below the threshold decreases the further the person is away from it. Since someone who is very badly-off does not benefit substantially from receiving additional resources that simply bring him a little closer to the threshold, scarce resources must be used more efficiently.¹³⁵

Tough as it is, this reasoning is accepted in live-or-let-die cases dealing with ESR, such as that faced by the South African Constitutional Court in *Soobramoney*.¹³⁶ This iconic case revolved around a request for renal dialysis treatment by Mr Soobramoney, who was diagnosed with irreversible kidney failure. The treatment was denied by the health authorities due to the shortage of dialysis machines and nursing staff, which forced the authorities to reserve scarce resources for cases that could be treated and remedied, not for those patients, like the applicant, who suffered from chronic renal failure.¹³⁷ The Court denied the plaintiffs' request by embracing three distinctive elements of the moderate sufficiency doctrine discussed. First, substantive benefits for the many outweigh benefits for a few.¹³⁸ Second, it is more valuable to bring people above the threshold at which they are alive and can recover than to simply improve the situation of the hopeless.¹³⁹ Third, absolute priority should not be given to the worst off, namely those who are terminally ill or in need of expensive medical treatment, as this would require imposing onerous burdens on people above the threshold, this is, 'those suffering from illness or bodily infirmities which are not life threatening'.¹⁴⁰ This standard doctrine of sufficiency is well represented in the *sufficiency curve* below.¹⁴¹

¹³³ Singer, *A response to Martha Nussbaum*, 2002, in <https://www.utilitarian.net/singer/by/20021113.htm>. Accessed on October 20, 2020. For a similar view, see Freiman (n 5) 34.

¹³⁴ Anderson (n 8) 236.

¹³⁵ Frankfurt (n 4) 31-2.

¹³⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (27 November 1997), Constitutional Court (South Africa).

¹³⁷ *ibid.* paras 2-3.

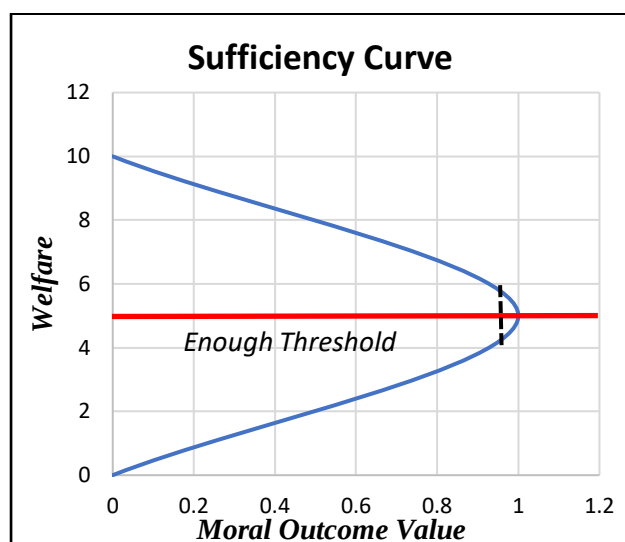
¹³⁸ According to the Court, the position of the health authorities is reasonable, since it allows 'more patients' to be 'benefited than would be the case if [resources] were used to keep alive persons with chronic renal failure', para. 25.

¹³⁹ Referring to the decision to restrict treatment to cases where people with chronic renal failure can survive, the Court considered that 'the outcome of the [medical] treatment is likely to be more beneficial because it is directed to curing patients, and not simply to maintaining them in a chronically ill condition', para. 25.

¹⁴⁰ *ibid.* paras 19, 28

¹⁴¹ The idea of resorting to graphical explanation like this is taken from Holtug (n 1) 227.

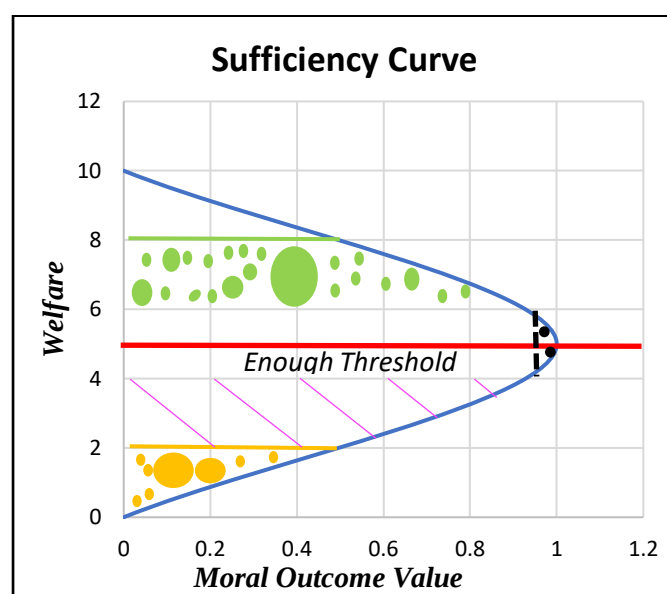
Welfare is measured in the left axis on a scale from 0 (destitute) to 10 (super-rich), with the Moral Value of assigning or removing a benefit established from 0 (minimum) to 1 (maximum), and the sufficiency threshold set at 5. The concave blue line expresses the moral salience of maximising the ‘incidence of sufficiency’, borrowing Frankfurt’s words, so the moral value of an outcome sharply increases the closer the wellbeing of an individual is to the threshold (see striped black line).



Giving a welfare unit to someone with four units, as well as not removing a unit from someone with six units, captures the result with the highest moral value, reaching 1. This is basically the case of securing access to medical services only for people between life and death who can be cured in *Soobramoney*. The blue line also makes it clear that the normative importance of providing benefits progressively diminishes the greater the welfare of recipients. Consequently, distributive justice would not require transfers to the well-to-do, with 9 welfare points, to close the gap with the super-rich, with 10 points, since the moral value of this result would be around 0.2. Likewise, distributive justice does not require dedicating large amounts of resources to people close to destitution. Given that the moral value of giving two welfare units to the destitute is very small (around 0.5), the same resources have a higher return if they are given to people closer to the threshold: the ‘lower-middle ranks’ according to Anderson, or people who are more likely to be cured with low-cost treatments, in *Soobramoney*. If each of the two units is awarded to people within the black hatched line, the moral outcome will be 2, four times higher.

As mentioned, the great importance attached to the idea of the threshold is what provokes the greatest criticism of the doctrines of sufficiency. To be clear, the key issue is not that the

threshold content is difficult to define — as it is.¹⁴² Assuming that it is possible to successfully spell the minimum baseline that makes human life possible and/or the level of a *good enough* life, the very idea of the threshold raises doubts. This is due to the difficulties in finding a good justification for the very different results that follow depending on the positioning of people with respect to the threshold. This can be illustrated in the graphic above with the following modifications.



The yellow area groups people with levels of welfare less than two units, this is, people without chances of reaching the threshold. The purple zone reflects people in ‘the limbo’, namely in more tolerable existence conditions but still below the threshold.¹⁴³ Finally, the green area represents people who albeit not rich, have secured a position in which they are not likely to fall below the threshold.

With this in mind, it seems arbitrary to downplay a policy that brings huge improvements in the wellbeing of several people by moving them from the yellow area to the purple area, just because the threshold is not reached. After all, even in life or death cases, the possibility of avoiding serious pain to five terminally ill people, for instance, does not seem so insignificant if the alternative is to keep one person alive in an indefinite coma or to fully cure someone with a very short life expectancy. As long as biological life is not an end in itself, it is easy to continue providing examples in which there are no clear distinctions in life or death cases.¹⁴⁴

¹⁴² Casal, ‘Why Sufficiency is Not Enough’ (2007) 117 *Ethics* 296, 313-4.

¹⁴³ Arneson, ‘Distributive Justice and Basic Capability Equality: “Good Enough” is not good enough’ in Kaufman (ed), *Capabilities Equality: Basic Issues and Problems* (2006), 28.

¹⁴⁴ Arneson, ‘Why Justice Requires Transfers to Offset Income and Wealth Inequalities’ (2002) 19 *Social Philosophy and Policy* 172, 186-7.

The same occurs with policies that seek to improve the living conditions of people who are in the green area. Addressing the differences between the unskilled and the skilled working-class, as well as between the lower middle class and the upper middle class, is of great moral concern, as the differences between them are substantial.¹⁴⁵

In all these cases, then, the key criticism is that the threshold itself introduces a sharp discontinuity, 'a jump in our moral response' where arguably it is about a 'smooth continuum that marks improvements in a person's wellbeing'.¹⁴⁶ For this discontinuity to make sense, says Arneson, we should live in a world in which 'no gains in the quality of people's lives that might occur either above or below the line of sufficiency have importance in comparison with the moral urgency of getting as many people as possible to the line of sufficiency'.¹⁴⁷ Crucially, wherever the line is drawn, it remains affected by this sharp discontinuity, introducing a significant level of arbitrariness. If the threshold is set too low, it is easy to criticise that obligations towards people slightly above it are no longer a cause for concern. As Salomon¹⁴⁸ and Moyn¹⁴⁹ comment, the reduction of global extreme poverty that took place during the last decade thanks to the boom of commodities is barely a Pyrrhic victory, for the hundreds of millions of people benefiting from it in China and India now live on just a little more than a dollar or so a day. But if the threshold is set too high, the number of people who are below it would increase, reducing the moral importance of serving the interests of people who are increasingly distanced from it.

To sum up this sub-section, two claims in particular encapsulate the spirit of sufficiency, positive and negative in Casal's account. The first, positive, is the moral urgency to eliminate insufficiency; the second, negative, is the little importance attached to having more than enough.¹⁵⁰ The articulation of both statements introduces a sharp discontinuity in terms of improvement in people's wellbeing, depending on where they are located relative to the threshold, instead of a smooth continuum. Amongst the two claims, the second gives the doctrine its distinctive character.¹⁵¹ Supporters of the doctrines of sufficiency consider that these two claims address the moral rejection posed by poverty better than egalitarianism. The following

¹⁴⁵ Nagel (n 7) 48.

¹⁴⁶ Arneson (n 144) 188, 194; Casal (n 142) 313.

¹⁴⁷ Arneson (n 144) 189.

¹⁴⁸ Salomon, 'Why Should it Matter that Others Have More? Poverty, Inequality, and the Potential of International Human Rights Law' (2011) 37 *Review of International Studies* 2137, 2138-9.

¹⁴⁹ Moyn (n 119) 208.

¹⁵⁰ Casal (n 142) 297-303, 314.

¹⁵¹ Casal (n 142) 299-300; Arneson (n 143) 27; Crisp (n 123) 758.

sub-section addresses the Committee's general work from a sufficiency perspective as a first step in assessing whether this family of moral views provides a robust explanation of the Committee's practice in (post)conflict situations.

3.2 The minimal threshold approach to ESR and minimum core obligations

The most natural place to consider in determining the influence of sufficientarian intuitions on the Committee's work is the familiar notion of minimum core obligations. In General Comment No. 3, the Committee acknowledged that the undertaking of the state parties to the ICESCR to achieving progressively the full realisation of ESR entails the recognition that ESR may not be effectively guaranteed for all in a short period of time.¹⁵² However, the Committee interpreted the Covenant as imposing on state authorities 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.¹⁵³ The scope of this obligation was exemplified by pointing out that a state in which 'any significant number of individuals is deprived of *essential* foodstuffs, of *essential* primary health care, of *basic* shelter and housing, or of the *most basic* forms of education is, *prima facie*, failing to discharge its obligations' (emphasis added).¹⁵⁴ General Comment No. 3 followed the work of special rapporteurs on extreme poverty,¹⁵⁵ non-governmental initiatives such as the *Limburg Principles*,¹⁵⁶ and influential scholarly writings,¹⁵⁷ all of which aimed to clarify the nature and scope of state obligations under the Covenant.

Certainly, the exact meaning and purpose of the notion of minimum core obligations is open and disputed. Sepúlveda interprets it in a *formalistic* way, meaning the obligation to ensure the 'essential elements without which a right loses its substantive significance as a human right.'¹⁵⁸ This is a formalistic interpretation, since it is limited to laying down that each right has certain basic elements that, if not guaranteed, loses its *raison d'être*. Alston clarifies this point by adding that 'each right must therefore give rise to an absolute minimum entitlement, in the

¹⁵² General Comment No. 3 (GC No. 3): The Nature of States Parties' Obligations (E/1991/23) 14 December 1990, para 9.

¹⁵³ *ibid.* para 10.

¹⁵⁴ *ibid.*

¹⁵⁵ Türk, The Realization of Economic, Social and Cultural Rights: Final Report (E/CN.4/Sub.2/1992/16) 3 July 1992; Bengoa Preliminary Report (n 64).

¹⁵⁶ 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 122.

¹⁵⁷ Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 332, 352-3.

¹⁵⁸ Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003), 366.

absence of which a State Party is to be considered to be in violation of its obligations.’¹⁵⁹ This formalistic interpretation of the notion is supported by the idea that domestic authorities are *prima facie* responsible for defining the exact content and scope of minimum core obligations.¹⁶⁰

That said, there are also *substantial* understandings of the concept, which attempt to define a baseline of ESR enjoyment under which authorities are considered to be in breach of their minimum core obligations. One of these alternatives, dubbed ‘the minimal threshold approach’,¹⁶¹ is substantial both because it seeks to achieve an internationally accepted definition of what the minimum essentials levels of ESR are and because, in so doing, it incorporates distributive justice insights, such as the sufficiency notion just discussed. The minimal threshold approach is inspired by certain provisions of the Limburg Principles and Shue’s *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*.¹⁶²

The Limburg Principles, in paragraphs 25 and 26, spell core obligations in terms of ensuring respect for ‘minimum subsistence rights’ for all disregarding the state development level.¹⁶³ The meaning of minimum *subsistence* rights is well understood by referring to Shue’s *Basic Rights*. In this book, he argues that subsistence, or minimal economic security, should be considered a basic right.¹⁶⁴ The right is made of the protection of ‘minimal cleanliness of air and water’ as well as the guarantee of ‘minimal food, clothing, shelter, and elementary health care’. These are very minimal commodities, literal ‘essentials of life’ in the sense that, in their absence, death or serious illness are likely to ensue.¹⁶⁵ Basic rights seek to draw ‘the line beneath which no one is to be allowed to sink’,¹⁶⁶ protecting people from actual collapse and also from the threat of it. Only if this basic right is guaranteed, along with security and liberty, can people enjoy their other rights without fear of coercion.¹⁶⁷ It is useful to emphasise that

¹⁵⁹ Alston (n 157) 352-3. See also Andreassen *et al*, ‘Compliance with Economic and Social Human Rights: Realistic Evaluations and Monitoring in the Light of Immediate Obligations’ in Eide and Hagvet (eds), *Human Rights in Perspective: A Global Assessment* (1992), 258.

¹⁶⁰ Alston (n 157) 353. This position was latter reaffirmed in Alston, The Implementation of the Right to Social Protection Through the Adoption of Social Protection Floors (A/69/297) 11 August 2014, para 38.

¹⁶¹ Andreasson *et al*, ‘Assessing Human Rights Performance in Developing Countries: The Case for a Minimal Threshold Approach’ in Andreassen and Eide (eds), *Human Rights in Developing Countries: Yearbook, 1987-8* (Akademisk Forlag 1988).

¹⁶² Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1980).

¹⁶³ ‘The Limburg Principles’ (n 156) 126.

¹⁶⁴ Shue (n 162) 23.

¹⁶⁵ *ibid.* 25.

¹⁶⁶ *ibid.* 18-9.

¹⁶⁷ *ibid.* 25-7.

with this proposal, Shue himself recognised that basic rights belong to the ‘morality of the depths (...) About aspirations *that enrich life*, nothing appears here’ (emphasis added).¹⁶⁸

In tune with these ideas, ESR scholars made proposals to define a core list of rights and the essential levels of each right that must be guaranteed as a priority for the further progressive realisation of all Covenant rights. In carrying out this task, Eide highlighted the importance of the right to food,¹⁶⁹ with colleagues from the Scandinavian countries spelling essential levels of the rights to education, health and employment. This proposal was dubbed ‘the minimal threshold approach’ to ESR.¹⁷⁰ By applying Shue’s ideas to the notion of minimum core obligations, they sought to identify a very minimal ESR threshold in the absence of which people may fall into a spiral of severe deprivation difficult to contain, eventually leading to death, or rendering themselves liable to acts of coercion and control by others.¹⁷¹ In guaranteeing everyone these minimums, the argument goes, a ‘platform’ is secured for individuals to further ‘make the contribution that they themselves are capable of making to their own economic/social human rights attainment’.¹⁷²

Understood in terms of the ‘minimal threshold approach’, the notion of minimum core obligations provides ESR law with a sufficiency threshold, basically meaning subsistence — a baseline without which aspirations that enrich life are empty rhetoric. Although the Committee has not fully incorporated this approach, as will be explored below, it does use language that is consistent with the idea of a subsistence threshold, as it has stressed more than once the obligation to prioritise safeguarding ‘basic needs’,¹⁷³ as well as keeping people above ‘extreme poverty lines’,¹⁷⁴ ‘subsistence levels’ and ‘minimum subsistence levels’.¹⁷⁵ According to this approach, by keeping as few people as possible below the subsistence baseline,¹⁷⁶ state authorities must be wary not to engage in discriminatory treatment that disproportionately

¹⁶⁸ *ibid.* xiii and 18.

¹⁶⁹ Eide, *The Right to Adequate Food and to be Free from Hunger: Updated Study on the Right to Food* (E/CN.4/Sub.2/1999/12) 28 June 1999.

¹⁷⁰ Andreasson *et al* (n 161) 333-55. This proposal was further refined by the authors in Andreasson *et al* (n 159) and by Eide in ‘Realization of Social and Economic Rights: The Minimum Threshold Approach’ (1989) 43 *The Review: International Commission of Jurists* 40.

¹⁷¹ Andreasson *et al* (n 159) 250.

¹⁷² Andreasson *et al* (n 159) 259.

¹⁷³ See *e.g.* CESCR Concluding observations Georgia, 2000, para 23; Georgia, 2002, para 12; Sudan, 2000, para 37.

¹⁷⁴ See *e.g.* CESCR Concluding observations DRC, 2009, paras 13, 29; Sudan, 2015, paras 21, 43.

¹⁷⁵ See *e.g.* CESCR Concluding observations Azerbaijan, 2004, para 48; Russia, 2003, paras 25, 50; Russia, 2011, para 18; Russia, 2017, para 30; Georgia, 2002, para 15.

¹⁷⁶ See Andreassen *et al* (n 159) explaining that ‘the target groups’ of state response are ‘people living below the minimal threshold of rights assurance’, 265.

pushes certain groups further away from the threshold. Eide exemplifies this position well by writing that

The scope of violation of socio-economic rights would refer to the percentage of the population not assured of this minimal threshold, in the first instance, and further involve the question of whether such failure of minimal threshold assurance is evenly or unevenly distributed by group, defined by ethnicity, race, occupation etc.¹⁷⁷

Because ‘the minimal threshold approach’ to ESR embodies important aspects of the doctrine of sufficiency, it is not entirely clear what the fate of people is once they have reached the minimum baseline.¹⁷⁸ To be clear, partisans of the minimal threshold approach do not rule out the existence of ‘other sorts of aid as necessary’ towards the full realisation of ESR.¹⁷⁹ Eide defends this approach on the basis that ‘it is a necessary stage of any consistent, progressive achievement of the aims expressed by the Covenant’.¹⁸⁰ Elsewhere he clarifies that the right to adequate food should not ‘be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients’.¹⁸¹ That being said, the normative grip of ESR obligations towards people above the line of subsistence remains in the twilight, at least for two reasons.

First of all, due to the very radical way the threshold is defined, in terms of providing the platform below which there is an uncontainable spiral of deprivation and above which the path for the autonomous realisation of rights is cleared, moral prominence of obligations towards people above the subsistence level immediately loses ground. According to Shue, basic rights — in ESR discussion, essential levels of rights — ‘need to be established securely *before* other rights can be secured’ (emphasis added), so that ‘if a choice must be made’ basic rights ‘ought to supersede’ the provision of non-basic.¹⁸² This argument paves the way for the sufficiency claim that the authorities’ efforts should focus on bringing people above the threshold rather than improving the situation for those slightly above it. It is not necessary to assign lexical priority to this claim, as advocates of minimalist approaches within ESR scholarship refrain

¹⁷⁷ Eide (n 170) 47.

¹⁷⁸ Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights’ (1994) 16 *Human Rights Quarterly* 693, 701-2.

¹⁷⁹ Andreasson *et al* (n 159) 260; Shue (n 162) *xiii* and 23.

¹⁸⁰ Eide (n 170) 48.

¹⁸¹ Eide (n 169) para 6.

¹⁸² Shue (n 162) 19-20.

from doing,¹⁸³ to understand the implicit imbalance at stake. For reaching the threshold requires the consumption of most of the available resources before spending substantially on anything else.

There is a second reason why ESR-related duties towards people above the threshold lack substance within the ‘minimum threshold approach’. This is that implicit assumptions of luck-egalitarianism are filtered through this approach. The fulfilment of minimum core obligations is justified as it provides an *equal opportunity* platform where the individual can meet its basic needs on its own, free from undue interference and other threats of falling under the control of others.¹⁸⁴ This emphasis on equality of opportunities can be captured, in addition to Eide’s flirting with luck-egalitarian philosophy discussed above, from his understanding of state duties to fulfil. According to him, states are obliged to ‘take the measures necessary to ensure for each person *opportunities* to obtain satisfaction of basic needs which cannot be secured by personal efforts’.¹⁸⁵ Once basic needs are ensured, securing the *full enjoyment* of ESR appears to be largely dependent on the individual concerned making the right choices, as explained previously.

These reflections anticipate the direction of a great deal of criticism that has been devoted to this approach within ESR scholarship. Understanding minimum core obligations as incorporating a minimum threshold has been challenged because it overemphasises the direst situations and ‘draws attention away from the longer-term striving towards full implementation of the rights concerned’.¹⁸⁶ Provided that the state has fulfilled its minimum core obligations, ‘the “outer” core will be subject to lower standard of scrutiny’,¹⁸⁷ turning ‘the floor’ into ‘the ceiling’.¹⁸⁸ In a variation of this critique, Craven considers that the minimalist approach, while useful for countries in the global south, largely loses its edge in societies where people have the minimum already guaranteed.¹⁸⁹ Young argues that singling out the most basic

¹⁸³ Stewart, ‘Basic Needs Strategies, Human Rights, and The Right to Development’ (1989) 11 *Human Rights Quarterly* 347, 348; Chapman and Russell, ‘Introduction’ in Chapman and Russell (eds), *Core Obligations: Building a Framework for Economic, Social, and Cultural Rights* (2002), 14.

¹⁸⁴ Andreasson *et al* (n 159) 259.

¹⁸⁵ Eide (n 170) 46-7.

¹⁸⁶ Stokke, ‘What Is Left of State Responsibility - Turing State Obligations in to State Responsibility in the Field of Economic, Social and Cultural Rights’ in Scheinin and Suksi (eds), *Human Rights in Development Yearbook 2002. Empowerment, Participation, Accountability and Non-Discrimination: Operationalising a Human Rights-Based Approach to Development* (2002), 66.

¹⁸⁷ Lehmann, ‘In Defence of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core’ (2006) 22 *American University International Law Review* 163, 185 fn. 100.

¹⁸⁸ Chapman and Russell (n 183) 9.

¹⁸⁹ Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective of its Development* (1995), 143-4, 150.

requirements for subsistence is not as straightforward as any list of essential level of rights may suggest,¹⁹⁰ therefore questioning the existence of a fixed platform below which lives fall into the depths and slightly above which the path for the enrichment of life is cleared. She mentions, amongst other sources, Sen's findings that

People have been known to survive with incredibly little nutrition, and there seems to be a cumulative improvement of life expectation as the dietary limits are raised
There is difficulty in drawing a line somewhere, and the so-called 'minimum nutritional requirements' have *an inherent arbitrariness* that goes well beyond variations between groups and regions (emphasis added).¹⁹¹

Most importantly, Young recalls something that is crucial to human rights law, namely that protecting *bare* life is not a goal in and of itself. On the contrary, human dignity and similar moral principles are inseparably embedded into any understanding of life based on human rights.¹⁹² Once this qualitative element is introduced, it makes little sense to present a list of essential levels of rights that must be satisfied, as a matter of highest priority, just to keep people alive. All these positions share with the general criticism of the sufficiency doctrine explained above that the mere recourse to a threshold, in this case embedded in the notion of minimum core obligations, is arbitrary. The problem here, too, is the introduction of a sharp discontinuity in terms of improvement in people's wellbeing, depending on where they are located relative to the threshold, instead of a smooth continuum.

Perhaps due to difficulties in scope, content and purpose, minimum core obligations never really took off in the Committee's overall practice. The patchy use of the notion also departs importantly from the theoretical baggage of the doctrine of sufficiency. To start with, only a few General Comments spell out minimum core obligations. In General Comment No. 12 on the right to adequate food, the 'core content' or essential levels of the right are distilled but at an abstract level difficult to put in practice.¹⁹³ In General Comment No. 13 on the right to education, the Committee limits itself to selecting between the different obligations enshrined in Article 13 the indispensable ones.¹⁹⁴ Finally, in General Comment No. 14 on the right to

¹⁹⁰ Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113, 131-2.

¹⁹¹ Sen, *Poverty and Famines. An Essay on entitlements and deprivation* (1982), 12.

¹⁹² Young (n 190) 126-133.

¹⁹³ CESCR General Comment No. 12 (GC No. 12): The Right to Adequate Food (E/C.12/1999/5) 12 May 1999, para 8. For a discussion, see Sepúlveda (n 158) 367.

¹⁹⁴ CESCR General Comment No. 13 (GC No. 13): The Right to Education (E/C.12/1999/10) 8 December 1999, para 57. For a discussion, see Sepúlveda (n 158) 368.

health, the Committee specifies certain essential levels of the right, while at the same time expanding on other obligations of ‘comparable priority’.¹⁹⁵ Crucially, in these cases and other General Comments,¹⁹⁶ the Committee stresses other ‘essential elements’¹⁹⁷ or ‘essential features’¹⁹⁸ of rights, such as their Availability, Accessibility, Acceptability and Quality (AAAQ). As a result, a more balanced and interrelated framework of state duties is portrayed, one in which the jump in legal and moral response brought about by the sufficiency threshold is cushioned. After all, if the obligations of state authorities are understood in terms of securing rights’ AAAQ, the strong division between essential and non-essential levels of each right is watered down to some extent, as well as the categorisation of people below and above the threshold. For example, when the Committee considers that ‘health facilities, goods and services must be scientifically and medically appropriate and of good quality’¹⁹⁹ it is difficult to draw a dividing line between essential and non-essential levels of the right to the highest attainable standard of health. In other documents, its *Statement on Poverty* for example, the Committee has been emphatic that the guarantee of the minimum threshold must be understood as part of a continuum whose final end is the progressive realisation of rights.²⁰⁰

Elsewhere in its analysis of state reports, the notion of minimum core obligations stands out by its absence.²⁰¹ Despite repeated calls on the Committee to define, either directly²⁰² or after giving states the chance²⁰³ the essential levels of each right, and despite the growing number of scholarly attempts to carry out the task,²⁰⁴ COs make very loose and irregular use of the notion. However, as will be seen below, this does not mean that the Committee has downplayed the imperative to address with priority the situation of those that have *not enough* in (post)conflict settings.

¹⁹⁵ CESCR General Comment No 14 (GC No. 14): The Right to the Highest Attainable Standard of Health (E/C.12/2000/4) 11 August 2000, paras 43-4.

¹⁹⁶ CESCR General Comment No. 4 (GC No. 4): The Right to Adequate Housing (E/1992/23) 13 December 1991, para 8.

¹⁹⁷ CESCR General Comment No. 14 (n 195) para 12.

¹⁹⁸ CESCR General Comment No. 13 (n 194) para 6.

¹⁹⁹ CESCR General Comment No. 14 (n 195) para 12(d).

²⁰⁰ CESCR, Substantive Issues Arising in the Implementation of the ICESCR: Poverty and the ICESCR (E/C.12/2001/10) 4 May 2001, paras 17-8.

²⁰¹ See e.g. Sepúlveda’s analysis of how different categorisations of obligations are used when the Committee examines state report (n 158), 173-183, 196-208, 209-247.

²⁰² Türk, The Realization of Economic, Social and Cultural Rights: Preliminary Report (E/CN.4/Sub. 2/1989/19) 28 June 1989, para 31; Türk, Final Report (n 155) para 31; Bengoa, Preliminary Report (n 64) para 24.

²⁰³ Alston (n 157) 353.

²⁰⁴ Chapman and Russell (n 183); Forman *et al*, ‘Conceptualizing Minimum Core Obligations Under the Right to Health: How Should we Define and Implement the “Morality of the Depths”’ (2016) 20 *The International Journal of Human Rights* 1; Brand and Russell (eds), *Exploring the Core Content of Socio-Economic Rights: South Africa and International Perspectives* (2002).

3.3 The Committee and (post)conflict settings: The case for a mild version of sufficiency?

Sufficiency intuitions are not uncommon amongst actors and scholars dealing with (post)conflict settings. In some cases, they are introduced to explain better than equality the unease caused by the plight of those affected by violence. In the Colombian context, for example, the Constitutional Court resorted to a very low welfare threshold, namely the extreme poverty line, to emphasise a different range of urgency in the care of IDPs. The Court considered that it is plainly unacceptable that a small percentage of IDPs remain below the extreme poverty line. However, provided that this minimum threshold is exceeded, the Court was satisfied that the authorities address the situation of IDPs at the normal pace with which they deal with common poverty.²⁰⁵

Among academics, sufficiency arguments have been mobilised to establish an order of priorities among the different disadvantaged groups in (post)conflict societies. Kalmanovitz believes that people below a minimum threshold of basic goods, affected and unaffected by generalised violence, should have lexical priority in accessing public resources at the war's ending. Measures such as reparations for victims could be implemented '*only if no one is below that threshold*.'²⁰⁶ In what can be interpreted as a moderate understanding of the same principle, Pérez-Murcia recognises that if a minimum of socio-economic goods is not provided for most of the population, his proposal to prioritise victims over the ordinary poor on the social agenda is liable to criticism.²⁰⁷ Unlike Kalmanovitz, he does not make the strong claim that before spending something on the welfare of people above the minimum threshold, it is required to bring even the last person below the threshold, above it.

In all these cases, intuitions related to sufficiency and not equality explain why the situation of disadvantaged people in (post)conflict situations *matters*. The problem is not that those people have unequal access to goods or opportunities, but that they are doing very badly, facing extreme poverty or lack of access to basic goods. The Colombian Court exemplifies this well when considering inadmissible the claim that the situation of IDPs is less serious because they are equally badly off than other people below the extreme poverty line. 'Such a levelling down strikes human dignity', the Court concluded.²⁰⁸ Therefore, against the veil of severe deprivation, special treatment does not *end* when equality of something is reached, but rather

²⁰⁵ Colombian Constitutional Court, *Auto 373* (23 August 2016), 26.

²⁰⁶ Kalmanovitz, 'Corrective Justice versus Social Justice in the Aftermath of War' in Bergsmo *et al* (eds), *Distributive Justice in Transitions* (2010) 85.

²⁰⁷ Pérez-Murcia (n 116) 199, 203.

²⁰⁸ Colombian Constitutional Court (n 205) 26.

it seems to depend on securing an absolute, non-comparative minimum level of wellbeing, addressing situations in which people do not have enough as a priority. ‘After war’, Kalmanovitz categorically concludes, ‘those in *dire need* must be given top consideration’.²⁰⁹

As mentioned before, on several occasion the Committee has underlined the urgency for state authorities to provide ‘basic social services and infrastructure’²¹⁰ after widespread violence, including the guarantee of the ‘fundamental’,²¹¹ ‘main aspects’,²¹² or ‘essential levels’²¹³ of ESR. State authorities are expected under the Covenant to prioritise the safeguard of ‘basic needs’,²¹⁴ as well as keeping people above ‘extreme poverty lines’,²¹⁵ ‘subsistence levels’ and ‘minimum subsistence levels’.²¹⁶ This is so regardless of whether people in distress are directly affected by armed conflict, and whether the rights and policies in question specifically target any disadvantaged group.²¹⁷ As discussed before, when deprivation is widespread enough to affect several portions of the population, the Committee finds no relief whatsoever in the fact that people are equally badly off.²¹⁸

Strikingly, because of the way many COs are worded, the Committee leaves itself exposed to criticism that by resorting to minimalist conceptuality the floor ends up becoming the ceiling. Just to mention a few examples, the Committee recommended to the Central African Republic authorities that IDPs ‘enjoy at least the main aspects of their ESR’.²¹⁹ Concerning Burundi, it gently invited ‘the State party to ensure a minimum income for older persons’.²²⁰ On Suriname, it called upon authorities to provide to the best of their ability ‘basic facilities in the interior’.²²¹ Without further clarification, all these recommendations can be fulfilled by authorities guaranteeing the minimum. Clarifying, as in the *Statement on Poverty*, that ‘after a State party has ensured the core obligations it continues to have an obligation to move as expeditiously and effectively as possible towards the full realisation’ of ESR certainly prevents

²⁰⁹ Kalmanovitz (n 206) 85.

²¹⁰ See e.g. CESCR Concluding Observations DRC, 2009, para 13; Georgia, 2014, para 12; Colombia, 2017, para 52; Sudan, 2015, para 51.

²¹¹ CESCR Concluding Observations Azerbaijan, 2004, para 52.

²¹² CESCR Concluding Observations CAR, 2018, para 12 (a).

²¹³ CESCR Concluding Observations Sudan, 2015, para 49.

²¹⁴ See e.g. CESCR Concluding Observations Georgia, 2000, para 23; Georgia, 2002, para 12; Sudan, 2000, para 37.

²¹⁵ See e.g. CESCR Concluding Observations DRC, 2009, paras 13, 29; Sudan, 2015, paras 21, 43.

²¹⁶ See e.g. CESCR Concluding Observations Azerbaijan, 2004, para 48; Russia, 2003, paras 25, 50; Russia, 2011, para 18; Russia, 2017, para 30; Georgia, 2002, para 15.

²¹⁷ See e.g. CESCR Concluding Observations Azerbaijan, 1997, para 37; Azerbaijan, 2004, para 48.

²¹⁸ See e.g. CESCR Concluding Observations Salvador, 2007, para 21; Azerbaijan, 1997, para 9.

²¹⁹ CESCR Concluding Observations CAR, 2018, para 12 (a).

²²⁰ CESCR Concluding Observations Burundi, 2015, para 34.

²²¹ CESCR Concluding Observations Suriname, 1995, para 21.

misunderstandings.²²² The fact that COs often rely on General Comments that stress continuity rather than the strong below/above the threshold divide points in the same direction.²²³ Finally, it is possible to appreciate a change in language when the Committee deals with certain rights, such as social security and other work-related entitlements. In these cases, recommendations move away from the minimalist requirement that ‘assistance does not fall below the subsistence level’²²⁴ or ‘getting a level closer to the subsistence minimum’,²²⁵ towards the guarantee of an adequate standard of living²²⁶ or a ‘decent living’.²²⁷ In some COs, the Committee explicitly clarifies that after reaching the lowest level, the authorities must continue to advance to the next one.²²⁸

That said, introducing a ‘sufficient is not enough’ clause only resolves misunderstandings at the superficial level. Granting in advance that once the minimum is secured, progressive obligations are maintained, the difficulty that arises is whether those affected by violence or people in similar circumstances continue to have the right to have their interests especially weighed once the minimum has been achieved. At this junction, special concern for them may well end and state efforts must focus on ensuring that everybody advances at the same pace in the progressive realisation of ESR without discrimination. This position appears to gain additional support in the Committee’s work bearing in mind that, as concluded previously, achieving equality has no intrinsic value in (post)conflict settings, so equality is a point of non-arrival.

If this is true, then some form of *mild* sufficientarianism appears to be the answer to the question of where the special concern for the least advantaged people in (post)conflict settings *ends*. It is mild because once the threshold is reached, the full enjoyment of ESR still entails progressive realisation, so state duties go beyond people having minimal commodities. Furthermore, the Committee understands that in fulfilling the duty of progressive realisation, state authorities have to impose a greater burden on people who have greater wealth, as it follows from calls to implement progressive taxation in unequal (post)conflict contexts.²²⁹ As

²²² CESCR Substantive Issues (n 200) para 18.

²²³ See e.g. CESCR Concluding Observations Sudan, 2015, paras 49-50; Angola, 2008, para 29; Kenya, 2008, para 28.

²²⁴ CESCR Concluding Observations Azerbaijan, 2004, para 48.

²²⁵ CESCR Concluding Observations Georgia, 2002, para 35.

²²⁶ See e.g. CESCR Concluding Observations Colombia, 2001, para 16; Salvador, 2007, para 30.

²²⁷ CESCR Concluding Observations Colombia, 2017, paras 37, 42.

²²⁸ See e.g. CESCR Concluding Observations Russia, 2003, para 50; Russia, 2011, para 18; Russia, 2017, para 30.

²²⁹ See e.g. CESCR Concluding Observations Colombia, 2017, paras 19-20; Cameroon, 2019, para 14; Burundi, 2005, para 14.

Frankfurt claims, these social arrangements are not the essence of the doctrine of sufficiency.²³⁰ Perhaps more than that, progressive taxation may end up introducing a subtle but profound criticism at the heart of the doctrine. As Casal suggests, having people who own more contribute in proportion to their wealth may well explain a certain social concern about the differences between the super-rich and the well-to-do, a difference that advocates of sufficiency find meaningless.²³¹ This mild version, however, still contains central features of the doctrine. After all, the special weight initially given to the interests of the less favoured people disappears once the minimum threshold is reached, imposing a significant brake on the urgency of addressing the situation of those slightly above the line of sufficiency. This means that large social sacrifices are accepted to lift people affected by violence and in similar circumstances out of the depths, dedicating important amounts that could otherwise impact a greater number of people. However, once the initially deprived reach the surface, considerations of indistinctively maximising everyone's ESR enjoyment must prevail. It is not to forget that the Committee also emphasises that ESR must be guaranteed for the entire population, reaching as many as possible.²³²

Before reaching a final conclusion on whether a mild version of sufficiency explains the Committee's approach in (post)conflict situations, it is important to address the last distributive justice theory to be discussed in this study, namely the priority view. Fortunately for the weary reader, most of what needs to be said has already been said, and the following discussion only needs to interpret the insights achieved thus far in light of the priority view. It is already clear that all these moral views attempt to explain very basic and similar moral intuitions. The priority view only offers a slightly different explanation, perhaps better than that provided by equality and sufficiency, as to why the situation of people in distress matters and to what extent they should be entitled to special concern after widespread violence.

4 THE PRIORITY VIEW, ESR AND (POST)CONFLICT SETTINGS

4.1 Life beyond the threshold: A dead-end?

Having recognised that a mild version of sufficiency can explain the Committee's understanding of state duties in the field of ESR in (post)conflict situations, certain COs appear to reflect a slightly different approach. This approach does not accord special concern for

²³⁰ Frankfurt (n 4) 35-6, fn. 19.

²³¹ Casal (n 142) 311.

²³² See e.g. CESCR Concluding Observations CAR, 2018, para 38(b); Azerbaijan, 1997, para 34; Colombia, 1995, para 21.

disadvantaged groups only *until* they have secured the minimum threshold. It also avoids introducing sharp discontinuities in state response depending on whether people are below or above the threshold. In some recommendations, the imperative to address the direst conditions of people affected by violence is explicitly stated as part of ‘short and medium term’ strategies to achieve durable solutions.²³³ The Committee has also considered that minimum measures are ‘interim’²³⁴ and should be apply ‘irrespective’ of any long-term strategy.²³⁵ The centrality in many COs of the obligation to ensure as a priority an adequate standard of living for these groups,²³⁶ as well as the full enjoyment of other ESR,²³⁷ also broadens the scope of special concern beyond the minimum threshold. Although at first it seems like a mere semantic argument, the call to ‘improve’ living conditions until rights are fully guaranteed entails an open-ended formulation that resonates with a fluid continuum, not with leaps in state response.²³⁸ This is illustrated in the following COs on Georgia, in which:

The Committee strongly recommends that the State party take effective measures to *improve* the situation of internally displaced persons, including the adoption of a *comprehensive program* of action aiming at ensuring more effectively their rights to adequate housing, food and water, health services and sanitation, employment and education (emphasis added).²³⁹

There is little in this formulation that suggests that special concern towards those affected by violence ends once basic commodities are guaranteed and that authorities can slow down their response from that moment on. Fundamentally, what justifies prolonged priority treatment is not exclusively, or perhaps *not exactly* that the least advantaged are below the minimum threshold; otherwise, this special concern would disappear immediately after the threshold is reached, contrary to what these examples illustrate. A *pairwise* comparison usually justifies such a treatment, rather than an absolute level of deprivation. This can be exemplified with the Committee’s constant emphasis on the situation of certain groups ‘in particular’— among a broader range of legitimate beneficiaries. These groups stand out because, by virtue of a

²³³ CESCR Concluding Observations Sudan, 2000, para 37.

²³⁴ CESCR Concluding Observations Sudan, 2000, para 37.

²³⁵ CESCR Concluding Observations Colombia, 1995, para 22.

²³⁶ See e.g. CESCR Concluding Observations Colombia, 2017, para 52; Russia, 2011, para 27.

²³⁷ See e.g. CESCR Concluding Observations Azerbaijan, 2004, para 43; DRC, 2009, para 31; Bosnia, 2013, para 29; Colombia, 2017, paras 28-9.

²³⁸ See e.g. CESCR Concluding Observations Azerbaijan, 2004, para 55; Azerbaijan, 2013, para 9; Georgia, 2002, para 40; Colombia, 2001, para 43; Colombia, 2017, para 24; Guatemala, 2003, para 40.

²³⁹ CESCR Concluding Observations Georgia, 2002, para 31.

pairwise comparison, either they face ‘disproportionately’ ESR deprivation,²⁴⁰ or they are the ‘most’ disadvantaged and marginalised.²⁴¹ This can be exemplified by the neglect and marginalisation of rural areas in many countries, which results in peasants, many of them severely affected by violence, living in worse conditions compared to those of urban dwellers.²⁴²

Being clear that the priority setting process by the Committee has a comparative element that is not restricted to the narrow confines of meeting the minimum threshold, the question is how to interpret it. Regarding El Salvador, the Committee expressed concern about inequalities in rural and urban areas, affecting the provision of medical services, education, wages, and access to food, by requiring authorities to ensure that Covenant rights ‘are enjoyed to the *same* extent in both rural and urban areas’ (emphasis added).²⁴³ This call to equality is as striking as disappointing at this stage of the discussion, making the argument elaborated so far look circular, a dead-end.

Indeed, after all the conceptual work done so far, the Committee seems to be reverting to the blessings of egalitarianism. But this is impossible, since the first section on equality concluded that a situation in which different people have the same goods or opportunities is not a goal in itself for the Committee. Most importantly, such a state of affairs would be affected by the levelling down objection, this is, that there is little to celebrate in achieving equality by making someone worse and no one better. In this sense, recommendations for the ‘improvement’ of the living conditions of rural inhabitants, for instance, are not well explained by the fact that they have *fewer* assets or opportunities *than urban dwellers*, since closing the gap can be done by making the latter equally badly off.

The doctrines of sufficiency may be correct in the sense that the qualitative circumstances of people who have very little should take centre stage and should not be obscured by considerations of the gap that separates them from others. By emphasising absolute levels of deprivation, these doctrines also have the virtue of avoiding the levelling down objection. As discussed previously, these doctrines have support in the Committee’s work and scholarly writings that have attempted to underpin the notion of minimum core obligations. In this regard,

²⁴⁰ See e.g. CESCR Concluding Observations Sudan, 2015, para 43; Angola, 2016, para 8; Cameroon, 2019, para 48; Colombia, 2017, para 47

²⁴¹ See e.g. CESCR Concluding Observations Angola, 2008, para 29; Angola, 2016, para 8; Turkey, 2011, para 13; Colombia, 2001, para 11.

²⁴² CESCR Concluding Observations Colombia, 2017, para 63 (a).

²⁴³ CESCR Concluding Observations Salvador, 2007, paras 17, 35.

the ‘minimal threshold approach’ to ESR expresses well the Committee’s undeniable concern that people’s most minimal guarantees be secured with priority and, since this position is non-comparative, it is beyond the scope of the levelling down objection. Furthermore, a mild version of sufficiency removes some of the sharp discontinuity that characterises standard versions of the notion. There is also enough practice on the part of the Committee to affirm without shame that particular concern is owed to certain groups until they reach the minimum, at which point they will advance like any other person in the progressive realisation of ESR.

That said, there is also an undeniable edge of comparative analysis in the Committee’s work that sufficiency fails to grasp, such as the importance of addressing income differences above the threshold with redistributive taxes in unequal (post)conflict societies. But most importantly, as the examples that open this section suggest, the Committee often compares people’s different situations to justify priority treatment in favour of those who have not secured essential levels of ESR, extending such treatment beyond minimum commodities. This comparative element, however, seems to bring the analysis back to the beginning, as if the Committee seeks states of affairs in which everyone has the same share of socio-economic goods or opportunities, by virtue of the COs issued on El Salvador.

To overcome the impasse, it may be useful to gather the main conclusions that emerge from the Committee’s practice discussed so far, which must be accommodated by any conception of distributive justice that attempts to articulate and justify them successfully. These are four normative claims. First, and perhaps most important, it is required a non-egalitarian approach to pairwise comparison. Such an approach should make it possible to affirm that it is bad for one person to be worse-off than another, avoiding the levelling down objection. If an explanation is provided for this, the dead-end that seems to have been reached thanks to the COs on El Salvador can be overcome. Second, the work of the Committee requires a non-sufficientarian explanation as to why the situation of people in dire need matters most. That is, a basis to establish a ranking of urgency in favour of these people that is not grounded on ensuring an absolute, non-comparative level of minimum goods. Third, this urgency ranking must reflect a continuum in improving the wellbeing of people in the worst situation, prioritising their interests beyond the satisfaction of basic needs. Lastly, this account must also take care not to entail the expenditure of disproportionate resources on behalf of a few given the Committee’s imperative to efficiently ensure ESR for as many people as possible. It will be argued that the priority view successfully accounts for these normative edges of the Committee’s work on (post)conflict settings, therefore providing the strongest account of why

the situation of disadvantaged people *matters* and when special concern that is due to them *ends* in these contexts.

4.2 Squaring the circle: Making explicit the priority view in the Committee's practice

4.2.1 A non-egalitarian approach to pairwise comparison

In Chapter 4 it was argued that the Committee supports the view that someone has the right to have her interests given priority over those of another person where the failure to do so will result in the first person faring worse than the second. Since failing to secure basic shelter has more serious implications than not providing comfortable housing, priority must be attached to the homeless rather than the person who is already protected from the elements.²⁴⁴ As explained, this reasoning led to what Nagel calls 'a ranking of urgency' — meaning that the claim of someone who is socio-economically badly off has some priority over the claims of each individual who is better off.²⁴⁵ Since the concern is greater the worse off people are, benefits to the worse off matter more.²⁴⁶

An adequate understanding of this position makes it possible to differentiate the priority view from egalitarianism. As explained, an egalitarian considers that it is *in itself* bad that some people are worse off than others, so that an outcome in which people have similar shares is in one respect better than an outcome in which they have different shares. A prioritarian also considers bad that some people are worse off — but what is bad, as Parfit explains, 'is that they are worse off than *they* might have been', not that they are worse off than *others*.²⁴⁷ So the chief difference is that while egalitarians are concerned with 'relativities, with how each person's level compares with the level of others', prioritarians are concerned about people being badly off, wanting them to be better off.²⁴⁸ The relevance of the inequality between the person in the worst situation and the person in the better situation is thus merely *indicative*, as it only points out to the fact that the former has greater shortcomings than the latter. Under this approach, then, the *intrinsic* moral value of equality is removed and inequalities should be contested insofar as they are '*bad for people*'.²⁴⁹

²⁴⁴ Bilchitz (n 131) 86.

²⁴⁵ Nagel (n 7) 47.

²⁴⁶ Parfit (n 33) 19.

²⁴⁷ *ibid.* 22.

²⁴⁸ *ibid.* 23. See also Arneson, 'Cracked Foundations of Liberal Equality' in Burley (ed), *Dworkin and His Critics* (2004) 90.

²⁴⁹ Parfit (n 33) 23, 28.

It is Raz who best explains this

What makes us care about various inequalities is not the inequality but the concern identified by the underlying principle. It is the hunger of the hungry, the need of the needy, the suffering of the ill... The fact that they are worse off in the relevant respect than their neighbours is relevant. But it is relevant not as an independent evil of inequality. Its relevance is in *showing* that their hunger is greater, their need more pressing, their suffering more hurtful, and therefore our concern for the hungry, the needy, the suffering, and not our concern for equality makes us give them priority (emphasis added).²⁵⁰

Under this account, when the Committee urges state authorities to address ‘disparities’ between urban and rural areas, by adopting measures necessary to *improve* conditions in the most disadvantaged regions, it is hitting the nail on the head.²⁵¹ The disparity between urban and rural dwellers matters insofar as it is indicative of the latter’s comparatively flawed ESR enjoyment, so that the provision of socio-economic goods for them matters more. In addressing regional disparities, the situation of rural dwellers needs ‘improvement’ in order for education to be of better quality;²⁵² health services to be more widely covered;²⁵³ food, access to water, and sanitation services to reach more people;²⁵⁴ low-cost housing to benefit more people;²⁵⁵ employment opportunities to be higher;²⁵⁶ poverty to be reduced,²⁵⁷ and so on — regardless of whether city inhabitants decide to leave the country for good and there is no one in a better position to compare. On the contrary, when the Committee calls on the authorities to ensure that IDPs with disabilities enjoy protection and humanitarian assistance on ‘equal terms’ with other IDPs,²⁵⁸ then the levelling down objection easily applies.

²⁵⁰ Raz, *The Morality of Freedom* (1986) 240.

²⁵¹ See e.g. CESCRC Concluding Observations Turkey, 2011, para 13; Colombia, 1995, para 26 (c).

²⁵² See e.g. CESCRC Concluding Observations Guatemala, 2003, para 27; Peru, 2012, para 26.

²⁵³ See e.g. CESCRC Concluding Observations Colombia, 2001, paras 24-6; Peru, 2012, para 20; Burundi, 2015, paras 51-2.

²⁵⁴ See e.g. CESCRC Concluding Observations Colombia, 2010, para 21; Colombia, 2017, paras 61-2; Salvador, 2014, para 20; Burundi, 2015, paras 48, 50.

²⁵⁵ See e.g. CESCRC Concluding Observations Peru, 2012, para 19; Rwanda, 2013, para 34.

²⁵⁶ See e.g. CESCRC Concluding Observations Colombia, 2010, para 11; Rwanda, 2013, para 12.

²⁵⁷ See e.g. CESCRC Concluding Observations Colombia, 2010, para 20; Rwanda, 2013, para 22; Uganda, 2015, para 28; Sudan, 2015, para 43.

²⁵⁸ CESCRC Concluding Observations CAR, 2018, paras 11-2.

4.2.2 A non-sufficientarian explanation of why the situation of people in dire need matters the most

In the last chapter it was argued that preventing people from falling below an unacceptable level of deprivation justifies addressing their claims with priority, without the need to compare. The doctrines of sufficiency help to shape this position by explaining that it is a matter of greater urgency to bring people above a *good enough* threshold and that distributive justice obligations are fulfilled or seriously reduced thereafter. In the field of ESR, the ‘minimal threshold approach’ allows for the establishment of a very low baseline below which people fall in an uncontrollable spiral of deprivation and above which the path for autonomous rights enjoyment is cleared. Given the way in which this threshold is constructed, it was argued, the satisfaction of essential levels of rights is considered a top priority. Bringing as many people as possible to the threshold thus requires consuming most of the available resources before spending substantially on anything else. Crucially for the purpose of the current discussion, people’s likelihood of successfully crossing the threshold, rather than doing very badly, serves as the criterion for prioritising among those in need. The *sufficiency curve* explored above showed that the worse off people are, the further away from the threshold they stand, so the urgency to satisfy their interests increasingly decreases. Live-or-let-die cases like *Soobramoney*’s recalled the existence of *lost causes* in which people are that badly off that giving them benefits seems wasteful in the face of the possibility of bringing more people to the threshold.

The priority view has a different account of why the situation of people in dire need matters most. Since the degree of preference to people increases the worse off these people are, alleviation of urgent needs and serious deprivation bears especially strong importance.²⁵⁹ Owing to this, the Committee’s constant references to the duty to provide basic social services and infrastructure, meeting basic needs, and keeping people above poverty lines, do not contradict the priority view. Differences arise not so much with the imperative to secure minimum guarantees, but rather with the way in which this obligation is fulfilled, with priority and sufficiency reaching different outcomes when establishing priorities.

For instance, the priority view accords greater weight to the interests of those situated on the lowest rung of the socio-economic ladder, rather than taking it away due to the greater distance that may separate those people from the minimal threshold (which the doctrine of sufficiency

²⁵⁹ Nagel (n 7) 11.

would suggest). The Committee took the priority view when considering that certain practices, such as the informal collection of fees for accessing basic health services, which push the fulfilment of basic needs ‘*even further beyond the reach* of the poorest and most disadvantaged groups of society’ (emphasis added) do not diminish concern towards them, but increases it.²⁶⁰

In addition, by placing a greater value on the benefits of the worst off, the priority view endorsed by the Committee shifts the emphasis from Anderson’s ‘lower middle ranks’ in favour of gains at the lowest levels. When the guarantee of minimum subsistence levels for all is not immediately possible, the Committee recommends that benefits go to the people ‘most in need’²⁶¹ — not to those who have the best chances of securing the minimum, as it would follow from the doctrines of sufficiency.

Finally, emphasis placed on the situation of those who are worse off introduces a caveat to the sufficiency imperative of indiscriminately maximising the number of people who need to cross a particular threshold. When authorities seek to bring people above the poverty line, for example, the Committee considers that efforts should be made not exclusively in terms of tackling the plight of as many people as possible. On the contrary, the Committee is of the view that authorities should address people who may have the greatest difficulty in securing livelihoods or are even unable to do so themselves under the circumstances, such as persons with disabilities, IDPs, refugees, asylum seekers, or stateless persons.²⁶²

These decisions that attach a higher value to protecting the interests of the worst off are possible thanks to the absence of a black and white threshold that compartmentalises priority setting in terms of either falling into the depths or having a clear path for life enrichment. Rather than consuming all available energy to get as many people as possible above the threshold, the priority view encompasses many grey areas in which people in need are worse off than others and require their interests to be especially considered. While efficiency calculations may restrict the use of a large amount of resources to favour only a few, resources that could otherwise be used to benefit more people, this is not the case because there are *lost causes* in which bestowing benefits is a waste, as it follows from a sufficiency perspective.

²⁶⁰ CESCR Concluding Observations Georgia, 2002, para 24.

²⁶¹ See e.g. CESCR Concluding Observations Russia, 2003, para 50; Georgia, 2002, para 35.

²⁶² CESCR Concluding Observations Azerbaijan, 2013, para 23.

4.2.3 Prioritising the interests of the worst-off beyond the satisfaction of basic needs

As mentioned, the core of the priority view is the position that the claim of someone who is socio-economically badly off has some priority over the claim of each individual who is better off. In the absence of a sufficiency threshold, the fact that minimum commodities are guaranteed does not place a cap on priority treatment. Nagel is clear that ‘the method of pairwise comparison with priority going to the lower member of the pair simply does not cease to apply above the level of basic needs’.²⁶³ As explained above, the disparities between the unskilled and the skilled working class, or between the lower middle class and the upper middle class, ‘present the same ranking of relative importance’.²⁶⁴

Hence, the priority view explains well the COs that open this sub-section, in which the Committee calls on the authorities to improve the situation of those affected by violence with priority beyond the satisfaction of basic needs.²⁶⁵ Priority treatment towards those affected by violence and people facing similar socio-economic shortcomings continues to the extent that they are worse off in terms of ESR enjoyment than other members of society. This is evident, for example, when the Committee recommends the implementation of rural reform where disparities in access to land affect peasants, ethnic minorities, and IDPs of rural origin in (post)conflict contexts.²⁶⁶ The justification for this does not lie solely in ensuring the basic needs of these groups. It is true that, in the absence of land redistribution, these people will have greater difficulties than a landlord who concentrates property to ensure livelihoods. However, provided that basic commodities are secured, the interests of these disadvantaged groups still need to be treated with priority. This is the case because rural communities have deep cultural and socio-economic ties to their lands,²⁶⁷ so the lack of a land-related benefit affects them more intensely than a person for whom land is just an asset to invest. Owing to this, the moral value of land restitution or the allocating of a new plot for violently uprooted peasants outweighs the claim of the landlord that seeks to exploit his or her estates. Special consideration, although not absolute, must be given to the former even if the landlord is more efficient in exploiting land.

²⁶³ Nagel (n 7) 48.

²⁶⁴ *ibid.* 48.

²⁶⁵ See Sub-section 4.1.

²⁶⁶ See *e.g.* CESCR Concluding Observations Colombia, 2017, paras 49-50; Guatemala, 2003, paras 24, 29, 42; Burundi, 2015, para 45.

²⁶⁷ See *e.g.* CESCR Concluding Observations Uganda, 2015, para 13; Cameron, 2019, para 12; Russia, para 7.

If the priority view is approached in terms of imposing burdens rather than accumulating benefits, it follows that people must contribute proportionally to their wealth to fund social programmes. Since the moral value of imposing a burden on a person is higher, the lower the wellbeing's loss of the person who gets it,²⁶⁸ then the super-rich and not the rich, the upper middle class and not the lower middle class, have greater responsibility towards people who have a low standard of living. The priority view, then, also fits perfectly with the Committee's calls for progressive taxation to combat poverty or maximise resources to ensure ESR in (post)conflict settings.²⁶⁹ This is in contrast to the *mild* version of sufficiency that allows this conclusion only at the cost of going against its most characteristic elements.

4.2.4 Efficiency concerns and the priority view

From the fact that the moral value in the distribution of a benefit increases the worse off the individual to whom it accrues is, it does not follow that the priority view gives absolute priority to the interests of the worst off. Nor does it mean that benefits for a few disadvantaged people always outweigh the gains for more people in better conditions. Attaching such a priority would be similar to the lexical priority that radical supporters of sufficiency defend when they consider that bringing the last person up to the threshold is required before spending on anything else. In the priority view, a similar version of lexical priority would look like the following

First maximise the income, wealth, etc. of the worst-off representative person, then seek to minimise the number of people in his position (by moving them upwards); then proceed to do the same for the next worst-off social position, then the next and so on, finally seeking to maximise the benefits of those in the best-off position (as long as this does not affect the others).²⁷⁰

Like moderate versions of sufficiency, moderate versions of priority consider that it is too demanding to keep the fate of the rest of people who are not on the lowest rung of the socio-economic ladder in suspense until the situation of each worst-off group is improved. Instead of this, they consider that priority setting must take into account 'the amount of benefit that can be secured for both the better off and the worse off',²⁷¹ so that 'preference for the worse off can be outweighed by sufficiently large benefit to sufficiently large numbers of those better

²⁶⁸ Arneson, 'Luck Egalitarianism and Prioritarianism' (2010) 110 *Ethics* 339, 343.

²⁶⁹ See e.g. CESCR Concluding Observations Colombia, 2017, para 20; Guatemala, 2014, para 8; Russia, 2017, paras 16-17; Cameroon, 2019, para 14; Sudan, 2015, para 15; RDC, 2009, para 13; Salvador, 1996, para 12

²⁷⁰ Scanlon, 'Rawls' Theory of Justice' (1973) 121 *University of Pennsylvania Law Review* 1021, 1061.

²⁷¹ Arneson (n 144) 197.

off'.²⁷² This was the situation illustrated in the last chapter when analysing the dilemma posed to authorities by the COs issued on Suriname, in terms of constructing a highway that would bring greater general benefits to the interior region or guaranteeing comfortable housing to those affected by violence.²⁷³ It was concluded that the size of the overall benefit at stake and the seriousness of the implications for disadvantaged groups of not receiving special treatment should determine whether efficiency calculations take precedence over the special concern we owe each other.

Here it suffices to add that the priority view, instead of proceeding in a staggered way from the most disadvantaged group upwards, rather starts from the efficiency imperative of improving the lot of as many people as possible and places a greater moral value on the benefits bestowed upon people, the worse-off they are. Holtug offers the following formula: 'an outcome is intrinsically better, the larger the sum of weighted individual benefits it contains, where benefits are weighted such that they gain a greater value, the worse off the individual to whom they accrue'.²⁷⁴

Although abstract at first, these formulations accurately encapsulate the Committee's current position on how states must deal with the fate of disadvantaged people, including those affected by violence, hand in hand with their duties towards the majority of the population. With regard to Georgia, the Committee urged

the State party to continue its efforts to improve the living conditions of its population, in particular by ensuring that the infrastructure for water, energy provision and heating is improved, and by paying priority attention to the needs of the most disadvantaged and marginalised groups of society, such as older persons, persons with disabilities, internally displaced persons, and persons living in poverty.²⁷⁵

In light of the priority view, this recommendation can be understood in the sense that the Committee requires the state authorities, first of all, to guarantee ESR for as many people as possible; but crucially, in seeking this overall result, the needs of the most disadvantaged groups have greater weight than those of the better-off and should therefore be addressed with priority. Since this is not an absolute position, the interests of the most disadvantaged may be outweighed by a large enough benefit for a sufficiently large number of other people in need.

²⁷² Nagel (n 7) 50

²⁷³ CESCR Concluding Observations Suriname, 1995, para 21.

²⁷⁴ Holtug, 'Prioritarianism' in Holtug and Lippert-Rasmussen (eds), *Egalitarianism: New Essays on the Nature and Value of Equality* (2007), 133.

²⁷⁵ CESCR Concluding Observations Georgia, 2002, para 40.

In the end, all citizens are entitled to ESR. Treating everyone with equal concern also implies taking into account the interests of people who, because they are not in the direst circumstances are no less important.

While not entirely new, this type of recommendation has been issued increasingly in COs issued since the mid-2000s. Its general form is as follows: state authorities are requested to ensure that ‘all persons’ enjoy *x* right, with a *y* caveat that attaches greater weight to the interests of certain people. Initially making references to rights that require universal coverage (i.e. primary health care,²⁷⁶ basic education,²⁷⁷ social security²⁷⁸) *x* has grown to include rights that range from sanitation, water²⁷⁹ and food,²⁸⁰ through to employment,²⁸¹ adequate housing²⁸² and an adequate standard of living,²⁸³ to all ‘the economic, social and cultural rights enshrined in the Covenant’.²⁸⁴ The *y* caveat usually takes the form ‘without discrimination’, ‘paying special attention’ to specific areas (i.e. rural), or ‘giving priority’ to *z* groups (i.e. disadvantaged, discriminated).

This last type of recommendation puts in perspective the scope of the non-discrimination principle and its relationship with the priority view, including the question of when special concern for people affected by status-based discrimination *ends*. As explained in the previous chapter, an important avenue to address discrimination is to ensure access to and distribution of socio-economic goods and services without restrictions based on prohibited grounds. As Sepúlveda argues, universal coverage measures have the advantage of avoiding stereotypes and other forms of prejudice that affect people’s equal standing in participation in society.²⁸⁵ In all these cases, the non-discrimination principle easily fits the reasoning carried out so far. It basically boils down to the warning made by the Committee that, in ensuring ESR for all,

²⁷⁶ See e.g. CESCR Concluding Observations Azerbaijan, 2013, para 16; Russia, 2017, para 55; Serbia and Montenegro, 2005, para 60; Colombia, 2010, para 25; Guatemala, 2014, para 22; Salvador, 2014, para 21; Macedonia, 2016, para 48.

²⁷⁷ See e.g. CESCR Concluding Observations Russia, 2017, para 57; CAR, 2018, para 40(c); Chad, 2009, para 32.

²⁷⁸ See e.g. CESCR Concluding Observations Russia, 2017, para 37; Serbia, 2014, para 24; Colombia, 2017, para 42; Chad, 2009, para 9; Mali, 2018, paras 30-1.

²⁷⁹ See e.g. CESCR Concluding Observations Serbia, 2014, para 32; Salvador, 1996, para 33.

²⁸⁰ See e.g. CESCR Concluding Observations Angola, 2008, para 29; Uganda, 2015, para 31; Kenya, 2008, para 28.

²⁸¹ CESCR Concluding Observations Kosovo, 2008, para 17.

²⁸² See e.g. CESCR Concluding Observations Azerbaijan, 2004, para 54; Rwanda, 2013, paras 23-4; Cyprus, 2016, paras 37-8; Ethiopia, 2012, para 20.

²⁸³ See e.g. CESCR Concluding Observations Russia, 2003, para 53; Russia, 2011, para 26; Serbia, 2014, para 24; Colombia, 2017, para 42; Uganda, 2015, para 28.

²⁸⁴ See e.g. CESCR Concluding Observations Azerbaijan, 2004, para 41; Macedonia, 2016, paras 13-4.

²⁸⁵ Sepúlveda, Report of The Independent Expert on the Question of Human Rights and Extreme Poverty (A/64/279) 11 August 2009, paras 65-8.

state authorities should not restrict access to ESR-related goods and services for prohibited reasons. That said, it was also seen that non-discrimination may also require the adoption of exceptional measures in favour of historically marginalised people. In these cases, the Committee has made it clear that greater resources may be needed to address entrenched patterns of status-based discrimination.²⁸⁶ The question that remains to be explored, then, is when this special consideration ends.

The answer to this question is straightforward. The special consideration due to traditionally discriminated people extends until the disadvantages affecting them due to their status are eliminated. If displaced women find it more onerous than displaced men to secure livelihoods because of care duties and because wages are lower, special consideration in this regard ends when those burdens are effectively removed. This can be achieved, for example, with the provision of adequate childcare services and the implementation of legislation that ensures the principle of equal pay for work of equal value. If displaced women come from rural areas, special consideration ends when they receive training that allows them to have the same opportunities to earn a living as women from urban areas where they settle, in light of the specific mention to equality of opportunities in Articles 6 and 7 of the ICESCR. If these displaced women belong to ethnic minorities without a good command of the predominant language, special treatment, such as interpretation services, can be extended indefinitely.²⁸⁷ Certainly, taken by themselves, each of these measures is insufficient to counteract existing disadvantages, as patterns of discrimination are deeply ingrained in society. They must be properly articulated so that they have a significant impact on the lives of affected individuals and groups. However, by addressing discriminatory practices on the basis of the specific disadvantages that arise due to people's status, the way is opened to determine 'the duration of temporary special treatment by reference to its functional result in response to a concrete problem'.²⁸⁸ Fundamentally, the scope of priority treatment for discriminated people is more oriented towards eliminating the burdens that place them at a disadvantage in terms of rights enjoyment than pursuing material or socio-economic equality as an end in and of itself. Because if this were the case, there would be something good in decreasing the enjoyment of ESR for certain disadvantaged people, at a disadvantage for reasons other than status-based

²⁸⁶ CESCR CG No. 20 (n 14) para 39.

²⁸⁷ *ibid.* 9.

²⁸⁸ Chinkin, *The Protection of Economic, Social and Cultural Rights Post-Conflict* (2008), 26.

discrimination, without improving the ESR enjoyment for anyone. But the Committee does not appear to consider this to be good *in any respect*.

5 CONCLUSION

This chapter addressed the final research question of this study, namely the question of why exactly the situation of people in distress matters in the aftermath of widespread violence and when special concern towards them ends. This question is an important one, as simultaneous ESR claims by disadvantaged people on the basis of victimisation, material deprivation, status-based discrimination, and socio-economic inequalities must be balanced and decided by expressing equal concern for all. This chapter presented a workable interpretation of the Committee's 'jurisprudence' in light of contemporary distributive justice theories, with the aim of articulating the Committee's views in order to have a stable basis for discussing how to better address ESR-related dilemmas after episodes of widespread violence.

Certainly, the emphasis placed on consequentialism throughout this chapter and the previous one makes visible some problematic aspects that derive from focusing so much on existing socio-economic shortcomings from a distributive perspective. This was manifested not only with the neglect of the victims' experience of having been wronged and their very legitimate claim to find the impoverishment they went through redressed according to their own narrative. It also includes interpreting discriminatory practices primarily in terms of the gains and losses they produce on people's wellbeing. Deontological thinking may be better suited to address some of these issues given its emphasis on conduct and attitudes that express prejudice. There is further ground for articulating this way of thinking with the Committee's emphasis that non-discrimination also requires people to be in a *relationship of equals*, a principle that, as mentioned before, is not distributive — in the sense of how access to socio-economic goods and their distribution should be carried out.²⁸⁹ As Salomon comments, 'the move towards equality is not limited to the distribution of goods', but includes other factors such as the establishment of fair institutional procedural principles.²⁹⁰ One of these factors that plays a central role in (post)conflict settings, according to Rees and Chinkin, is meaningful participation of traditionally marginalised groups, such as women, in 'peace processes and the political, institutional, and social structures for reconstruction'.²⁹¹

²⁸⁹ See Chapter 4, Section 4.1.2.

²⁹⁰ Salomon (n 148) 2154.

²⁹¹ Rees and Chinkin, 'Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and Social Rights' (2016) 48 *International Law and Politics* 1211, 1219.

That said, an analysis that allows addressing, weighing and establishing priorities in regard to how the gains and losses in people's welfare should be distributed post-conflict is essential, and the strong emphasis placed on consequentialism when interpreting the Committee's practice allows this to be done. The previous account of the different distributive justice theories that to different degrees appear to underlie the Committee's practice leads to greater clarity on the meaning and scope of priority treatment in (post)conflict settings.

In these contexts, many people are often plunged into severe socio-economic hardship, because they suffered direct abuse or were more remotely affected by widespread violence. These people are not the only ones facing deprivation, but they are part of a broader range of people waiting for their ESR to be fulfilled. The Committee understands that whatever the underlying reason, the situation of people who are badly off must be urgently addressed in these contexts. Their situation *matters* very much not because they lack the same socio-economic goods available to the people who do better; nor because armed conflict upsets the level playing field in which everyone can secure the full enjoyment of ESR for themselves. While many people in distress may find it difficult to meet basic needs, it is not falling into the depths that justifies placing great weight on their interests. As shallow as it may seem, their situation matters because their ESR need to be better fulfilled than they currently are, both immediately and progressively, and regardless of their responsibility in bringing about their own misfortune. It is the fact that disadvantaged people need to be better than *they* currently are, not as well as *everybody else*, that justifies treating them with priority. Special consideration for people who are worse off, therefore, does not *end* when they are as well off as everyone else or have equal chances to pursue a meaningful life, should they choose to do so. Nor does it end when subsistence, basic needs, or the essential level of ESR are secured, so that everyone can lead a dignified life, if they wish. Special consideration for disadvantaged people continues to the extent that their ESR claims are more pressing, meaning that the gap in their wellbeing is greater if the claims of those who are better off are considered instead. Since every citizen, regardless of the exact position on the socio-economic ladder, is entitled to the rights enshrined in the Covenant, the preference for the fulfilment of the ESR of the most disadvantaged can be offset by a sufficiently large benefit to sufficiently large numbers of other people in need.

CONCLUSION

This research examined two understandings of the state-individual relationship in (post)conflict settings and their possibilities and limitations to guarantee the ESR of people affected by widespread violence. As the study developed, this initial concern raised questions that pointed to the challenges faced by state authorities in ensuring ESR expressing equal concern for all in these contexts. The study first considered the plight of those affected by widespread violence in circumstances in which state authorities may not be held responsible for abuses. It then addressed the situation of victims in the broader context of other disadvantaged people not affected by violence in societies facing pervasive patterns of material deprivation, status-based discrimination and social inequalities. The simultaneity of the ESR claims of disadvantaged people and the impossibility to satisfy them immediately due to resource scarcity raised the issue of priority setting, including the question of why exactly their plight matters in (post)conflict settings and when the special treatment accorded to their interests should end.

The first part of the thesis explored the traditional offending state–victimised individual paradigm, as it manifests in the predominant practice of regional human rights bodies in conflict-related scenarios. It focused on answering the first research question that inspired this study, this is, whether access to goods and services that are important for people affected by widespread violence to ensure ESR should depend on the findings of the state’s past misconduct regarding the occurrence of abuses, in terms of duties to respect and protect. After examining the work of the IACtHR and the African Commission, this question was answered in the negative.

It is true that the IACtHR has attempted to address socio-economic wrongs in (post)conflict settings by stretching traditional duties to respect and protect civil and political rights. However, the strong grip it has over the offending state-victimised individual paradigm has prevented it from developing a solid framework that allows it to tackle ESR in depth in these contexts. The absence of such a framework is not offset by the IACtHR’s expansive remedial practice. This is so because people affected by the general circumstances of armed conflict and the conduct of certain non-state actors, such as rebel groups, run the risk of being placed on the margins of state responsibility, without access to socio-economic goods that are granted through the lens of reparations. These protection gaps persist in the Court’s jurisprudence regarding conflict-related scenarios despite the fact that it has developed a fairly comprehensive ESR framework in the peacetime context that allows for addressing the plight

of people affected by widespread violence. However, the IACtHR has refrained from resorting to the right to a dignified life and the direct enforceability of ESR in these contexts because it remains imprisoned in an understanding of the state that portrays it mainly as an *assailant*, responsible for respecting the individual's autonomy and protecting them from undue interferences, typically by proxy militias.

The African context also made it explicit that the offending state-victimised individual paradigm opens up important protection gaps when violence is not attributable to the state. This is the case of violence perpetrated by different factions of the civilian population that are pitted against each other and the presence of foreign armed actors. Like the IACtHR, the African Commission portrays the state as a threat to the individual and consequently tends to ignore socio-economic wrongs that, although they may not be attributed to state authorities, can nevertheless be addressed by them if they are understood as active guarantors of rights. The *NGO Forum* and *COHRE* cases, related to the lack of access of displaced children to educational services and the lack of access of victims of sexual violence to health services, exemplified this. And like its Inter-American counterpart, the African commission is not taking ESR seriously in (post)conflict settings, even though it has already developed a fairly comprehensive ESR framework in peacetime.

Addressing the legacy of widespread violence through the offending state-victimised individual paradigm also has undesirable consequences from the perspective of disadvantaged people not-affected by violence. Emphasising victimisation and duties to respect and protect leads to approach the situation of people affected by violence in terms of how *wrongly* they were treated, in contrast to people who are 'merely' *badly off*. By drawing a line in the sand between victims and non-victims in this way, the very fact of being badly off loses important traction in the aftermath of abuses, undermining the claims of the non-victimised poor. From a distributive justice perspective, it was argued that the opposition of the victim/ordinary poor categories may depend on unacceptable positions, such as that poor people are poor because they deserve it — in stark contrast to the innocent victims. It may also depend on social attitudes and deep beliefs about individual responsibility that seek to reward the deserving at the expenses of the undeserving. Supporters of deontologically oriented human rights law may not actually believe in any of this. However, this does not eliminate the fact that such reasoning allows the victim/non-victim dichotomy to be firmly seized and places the interests of the 'deserving' poor in the background. In this regard, in the Introductory Chapter it was explained that by interpreting the situation of people affected by violence *qua* victims, domestic

arrangements tend to give them automatic preferential access to socio-economic goods over non-victims, placing the latter in the queue even though they may share the victims' plight. The IACtHR seems to be inclined towards this position, although it has not yet explicitly adopted it.

While half of this study was devoted to exploring the theoretical underpinnings of the offending state-victimised individual paradigm, as well as the undesirable practical consequences that follow from its application after widespread violence, the remainder explored and argued for a paradigm shift. The thesis explored a consequentialist framework that gives little relevance to a retrospective assessment of the authorities' conduct with regard to the occurrence of abuses in light of duties to respect and protect. This alternative rather seeks to address existing socio-economic shortcomings regardless of how they occurred, thus bringing duties to fulfil ESR to the fore. This reasoning was applied to some extent by the African Committee in *Hunsungule*. Essentially, in this decision, the Committee attached its own stamp of importance to existing socio-economic shortcomings, adjudicating on them regardless that there was no previous finding on wrongdoing in relation to the occurrence of serious abuses. Although the final result of the Commission's analysis in *Hunsungule* can be disputed and criticised, it made clear that immediate and progressive duties to fulfil ESR are very much in force after episodes of widespread violence. These duties are better understood if the state is conceived as an active guarantor of rights rather than as a threat to the individual. These duties include: taking immediate steps to fulfil ESR, such as the implementation of makeshift arrangements not to interrupt children's access to education; facilitate the operations of humanitarian actors; diligently procuring available medicines and medical treatment; the prohibition of discriminatory practices and proper management of public funds.

The argument made in Chapters 2 and 3 to expand the scope of protection in favour of victims who find themselves at the margins of the offending state-victimised individual paradigm, logically requires blurring the victim/non-victim distinction in the field of ESR. For if it is argued that state authorities must guarantee ESR disregarding the reasons that lead to socio-economic shortcomings, this is, if they were the product of state led-violence, 'pure' non-state actors, or the general circumstances of conflict, it follows that authorities must also disregard whether shortcomings result from conflict-related episodes in the first place. Owing to this, it was argued that people affected by armed conflict stand *prima facie* on an equal footing with the rest of the society's disadvantaged population when it comes to the guarantee of ESR.

Disadvantaged citizens, not victims of widespread violence; being badly off, not having been wronged — these became the leading analytical categories for the remainder of the study.

Certainly, this approach misses a key aspect of victimisation that is well captured by deontological thinking. This is the experience of those affected by violence of having been wronged, as well as their claim to tackle the pauperisation inflicted on them by violence according to their own expectations. Inevitable as this is, consequentialism also allows them to oppose the selective distribution of reparation-related resources that have a direct and indirect impact on their wellbeing.

As with the notion of ‘victim’, a consequentialist approach to (post)conflict settings casts an entirely different light on traditional understandings of reparations. As discussed with respect to the ACtHPR and ECtHR, it is usually understood that reparations pursue *restitutio in integrum* and seek to rebuke certain conducts that are considered especially problematic. As a result, reparations do not seek to make people better off. When addressing the ECtHR’s practice, the possibility was discussed that African human bodies also modify the amount of compensation depending on how state conduct is qualified, instead of considering the effects of violence on affected people. This alternative was ruled out since victims run the risk of receiving varying amounts of monetary resources for debatable reasons, rather than, for example, the effects of the violation on their standard of living. In contrast, a consequentialist understanding of reparations makes them dependent on securing positive states of affairs, including their contribution to securing ESR. This means that reparations are not premised on a recognition that victims have been wronged by conduct attributable to state authorities in terms of duties to respect and protect. Rather, they are conceptualised as ‘mere’ benefits that have an impact on people’s wellbeing. Therefore, the final decision on the appropriateness of implementing reparation measures post-conflict depends on their ability to improve the plight of people affected by violence without losing sight of the authorities’ obligations towards other people in distress.

In light of this reasoning, the IACtHR’s practice of ordering substantive socio-economic goods and development programmes is appropriate as long as it does not depend on the authorities’ failure to respect and protect rights during violent events. If these remedies are based on state duties to fulfil ESR after widespread violence, the situation of those affected by violence must be understood against the background of ESR claims of other disadvantaged people. By anchoring access to ESR in duties to fulfil, it becomes more feasible to ensure the rights of

those affected by violence without losing sight of others in distress. Thus understood, the remedial practice of the African Commission and Committee, consisting of recommending that state authorities address the continuing suffering of people affected by human rights violations, tackling the exclusion they face and ensuring basic access to ESR, is well justified.

To some extent, the ESCR Committee supports a consequentialist approach to remedies and reparations such as the one advocated here. In addressing cases of sexual violence and forced eviction, Chapter 4 found that remedies are linked to improving the living conditions of people affected by violence, without losing sight of the situation of others at a disadvantage. Equally important, duties to fulfil rights, such as the right to housing, were not considered secondary or of less importance than duties to respect and protect people's existing housing conditions by enforcing the prohibition of forced eviction. As explained, forced eviction is another phenomenon that leads people, affected or not affected by armed conflict, to suffer inadequate housing conditions. Because of this, it is critical for the Committee that state authorities pay special attention to those who are unable to support themselves and suffer disproportionately from homeless-related situations, regardless of how deficiencies occurred.

The Committee's work proved to be indispensable to answer the remaining research questions that inspired this study. The second question was that of how should state authorities weigh and prioritise simultaneous ESR claims from individuals and groups that bear the brunt of violence, material deprivation and status-based discrimination. In this regard, the Committee's 'jurisprudence' provided insight into how material deprivation and status-based discrimination are mutually reinforcing patterns that place people affected by widespread violence at the bottom rung of the social ladder. It offered guidance on how to address those people's plight, as exemplified by a docket of general and targeted recommendations that reflect more than two decades of experience dealing with these contexts. More importantly, and with a little help from distributive justice theories, the Committee's work also provided a workable priority-setting framework for weighing ESR claims of different disadvantaged groups, affected and unaffected by violence, in (post)conflict settings. The importance of this weighting exercise proved to be more important when states authorities are called upon to implement targeted measures in favour of particularly disadvantaged people. This was the case because of the difficulties in striking a fair balance in terms of the amount of resources that are justifiably invested in upholding the interests of particularly disadvantaged groups when other people in need are also waiting for their ESR to be met.

Chapter 4 proposed two main principles and a tie breaker clause to guide priority setting. These two principles are essentially a formalisation of the Committee's understanding of non-discrimination. The first principle reads that authorities have a duty to ensure ESR for as many people as possible without discrimination. The second principle establishes that, in striking this overall result, the interests of the most disadvantaged people must be accorded a greater weight than those of the better-off and should therefore be addressed with priority. These two principles may be affected by the following tension: maximising overall ESR enjoyment may not accord disadvantaged groups the special treatment they deserve, and fully addressing the interests of the latter may involve spending a disproportionate amount of resources at the expense of the interests of other disadvantaged people. If this tension arises, the tie breaker clause comes into play. It basically implies to consider the size of the overall benefit at stake (x) and the severity of the implications for the most disadvantaged people of not receiving special treatment (y). Depending on the values of x and y , the interests of the most disadvantaged may or may not be outweighed by a large enough benefit for a sufficiently large number of other people in need.

Finally, and also with a little help from distributive justice theories, the Committee's work allowed to reach an answer to the final question of this study, this is, the question of *why* exactly the plight of disadvantaged people, affected and not-affected by violence, matters in the aftermath of widespread violence. Thereby, it made it possible to provide criteria to establish *when* the special treatment accorded to them *ends*. Their plight does not matter because it is intrinsically important that people have the same access to socio-economic goods and services or the same opportunities to ensure the overall enjoyment of ESR, if they so choose. Because of this, the special treatment owed to them does not end when material equality or equality of opportunities are assured. Their plight does not matter because they have fallen into an irreversible spiral of deprivation either. Thereby, giving greater value to their interests does not end when they have secured subsistence, basic needs, or essential levels of ESR. Crucially, considerations related to the situation of others and the urgency to address the most serious forms of deprivation *do* matter in explaining why the plight of disadvantaged people must be addressed as a priority. However, the explanation for this is not well captured by distributive egalitarianism and the doctrines of sufficiency, but rather by the priority view. The situation of disadvantaged people matters because they are worse off *than they could be* — not worse off *than others*. According to this reasoning, the worse-off people are, including the specific disadvantages that arise due to discriminatory practices, the greater the weight attributed to

their interests. Because of this, special consideration for them continues to the extent that their ESR claims are more pressing, in the sense that the toll of not receiving a benefit is greater for them than that of someone who is better off and denied the same benefit. As shallow as it may seem, the plight of disadvantaged people, affected and unaffected by violence, matters because their ESR must be fulfilled in better ways than they currently are. This reasoning holds true regardless of people's responsibility in bringing about their own misfortune, dispelling any appearance that there are more or less deserving people in society.

Annex

The following table illustrates the COs analysed here, with basic background information on the situation of violence affecting the respective state when the COs was issued. In general, states facing armed conflict were selected. Other contexts of generalised violence were also chosen, such as civil wars, revolutions and contra-revolutions, coups d'état, post-electoral violence and other insurgencies and internal tensions. The reason for selecting these cases is the high number of people affected by violence they have in common, over the hundreds of thousands, even if there was no triggering episode that left a significant death-toll.¹ It is important to note that not all COs on the selected states were addressed here, as some of them were issued before² or well after³ episodes of widespread violence, making them irrelevant for the purpose of this analysis. Although the time elapsed between the cessation of violence and the issuance of COs is relevant, in certain cases the Committee has failed to address the consequences of widespread violence on ESR enjoyment without providing clear reasoning for it.⁴ States are organised chronologically according to the date of first report presented before the Committee, either during conflict or/and (post)conflict – see right columns **Co/PCo**.

Country	Conflict-related situation	Year/ Periodic Report	Co	PCo
Nicaragua	-Sandinista revolution and contra-revolution (1979-1990) -Elections (1984)/state of exception -Democracy (1990-)	1994: First report (E/C.12/1993/14); 2008: Second to fourth report (E/C.12/NIC/CO/4).		X
Suriname	-Civil War (1986-1991)	1995: First report (E/C.12/1995/6).		X
Colombia	-Internal armed conflict (1960-) • 1997-2004: Peak of violence	1995: Third report (E/C.12/1995/12); 2001: Fourth report, (E/C.12/1/Add.74); 2010:	X	X

¹ For instance, the coup d' état and immediate Turkish invasion in Cyprus did not leave a high number of dead people. Still, the events that unfolded provoked a migration crisis affecting more than 230.000 people according to the Internal Displacement Monitoring Center: <https://www.internal-displacement.org/countries/cyprus>.

² The first COs on Rwanda was issued immediately before the genocide started. The first COs on Gambia was issued in 2015, with the crisis starting the year after. Two COs were issued on Libya, in 1997 and 2006, but the internal civil war started in 2011. The first COs on Nigeria was issued in 1998, but the Boko Haram insurgency started to take place until 2009. The initial COs on Ukraine were issued before the Dombas war started.

³ The end of the conflict in Djibouti dates to 1994, with the first COs issued in 2013. In Mauritania the end of the conflict goes back to 1991 and the first COs was issued in 2012.

⁴ In the 2010 COs on Turkey, violence in the south-eastern region was barely mentioned. Certainly, the peak of violence had already passed a decade ago, but by 2010 IDPs reached non-negligible figures of more than 1.000.000 people: <https://www.internal-displacement.org/countries/turkey>. It is not clear why the migration crisis in Cyprus, which took place more than a decade before Turkey's, was treated while the Turkish crisis was not addressed. The (post)conflict situation in Ethiopia was not mentioned despite the war with Eritrea. The Committee also ignored the situation of widespread violence in Ukraine until the 2020 COs, despite that by 2014 forced migration already affected around 1.500.000. people: <https://www.internal-displacement.org/countries/ukraine>. The (post)conflict situation in Armenia was only addressed in the first COs issued on that country, while the situation in Azerbaijan has been addressed much more extensively.

	• 2005: Demobilisation of paramilitaries • 2016: Peace agreements with FARC	Fifth report (E/C.12/COL/CO/5); 2017: Sixth report (E/C.12/COL/CO/6).		
Guatemala	-Civil War (1960-1996) • 1994: Agreements on resettlement of IDPs and Truth-seeking measures • 1996: Agreements on rural and socio-economic issues and to achieve peace	1996: First report (E/C.12/1/Add.3); 2003: Second report, (E/C.12/1/Add.93); 2014: Third report (E/C.12/GTM/CO/3).		X
El Salvador	-Civil War (1979 -1992) • 1992: Peace agreement to achieve peace	1996: First report (E/C.12/1/Add.4); 2007: Second report, (E/C.12/SLV/CO/2); 2014: Third to fifth report (E/C.12/SLV/CO/3-5).		X
Peru	-Internal armed conflict (1980-2000)	1997: First report (E/C.12/1/Add.14); 2012: Second to fourth report, (E/C.12/PER/CO/2-4).		X
Azerbaijan	-Nagorno-Karabakh conflict (1988-) • 1988-1994: Peak of violence • 1994: Ceasefire agreement • 1994 -: Low-intensity conflict	1997: First report (E/C.12/1/Add.20); 2004: Second Report (E/C.12/1/Add.104); 2013: Third report (E/C.12/AZE/CO/3).	X	X
Russia	-1st Chechen War: 1994-1996 -2nd Chechen War: 1999-2009 -Russia/Ukraine conflict: 2014-2018	1997: Third report (E/C.12/1/Add.13); 2003: Fourth report (E/C.12/1/Add.94); 2011: Fifth report (E/C.12/RUS/CO/5); 2017: Sixth report (E/C.12/RUS/CO/6).	X	X
Cyprus	-Coup d'état and Turkish invasion (1974-) • 1974/5: massive population transfer	1998: Third report, (E/C.12/1/Add.28); 2009: Fourth to fifth report (E/C.12/CYP/CO/5); 2016: Sixth report, (E/C.12/CYP/CO/6).		X
Armenia	-Nagorno-Karabakh conflict (1988-) • 1988-1994: Peak of violence • 1994: Ceasefire agreement 1994 -: Low intensity conflict	1999: First report (E/C.12/1/Add.39); 2014: Second to third report (E/C.12/ARM/CO/2-3).	X	X
Georgia	-Georgian-Ossetia conflict (1989-) • 1991-1992 (South Ossetia war): Peak of violence • 1992: Ceasefire agreement • 2004: Renewal of confrontations	2000: First report (E/C.12/1/Add.42); 2002: Second report (E/C.12/1/Add.83).		X
Croatia	-Croatia Independence War (1991-1995)	2001: First report (E/C.12/1/Add.73);		X
Serbia and Montenegro	-Yugoslav Wars (1991-2001)	2005: First report (E/C.12/1/Add.10823).		X

Bosnia and Herzegovina	-Bosnian war: 1992-1995 • 1995: Dayton peace agreement	2006: First report (E/C.12/BIH/CO/1); 2013: Second report (E/C.12/BIH/CO/2).		X
Macedonia	-Insurgency in Macedonia (2001) • 1999: Kumanovo Treaty	2008: First report, (E/C.12/MKD/CO/1); 2016: Second to fourth report (E/C.12/MKD/CO/2-4).		X
Kosovo	-Kosovo War (1998-1999) • 1999: Kumanovo Agreement -Insurgency in the Preševo Valley (1999-2001)	2008: First report (E/C.12/UNK/CO/1)		X
Turkey	-Kurdish Conflict (1978-) • 1984-1999: Peak of violence	2011: First report (E/C.12/TUR/CO/1).		X
Albania	-Kosovo War (1998-1999)	2013: Second to third report, (E/C.12/ALB/CO/2-3).		X
Serbia	-Yugoslav Wars (1991-2001)	2014: Second report (E/C.12/SRB/CO/2).		X
Montenegro	-Yugoslav Wars (1991-2001)	2014: First report (E/C.12/MNE/CO/1).		X
Ukraine	-War in Donbass (2014-)	2020: Seventh report (E/C.12/UKR/CO/7).	X	
Algeria	-Algerian Civil War (1992-2002) • 1994: Peak of Violence • 2006: Charter for Peace and National Reconciliation (amnesty law)	1995: First report (E/C.12/1995/17); 2001: Second report, (E/C.12/1/Add.71); 2010: Third and fourth report (E/C.12/DZA/CO/4).	X	X
Sudan	-Second Sudanese Civil War (1983-2005) • 1997: Khartoum peace agreement • 2005: Naivasha peace agreement (North-south) -Darfur War (2003-)	2000: First report (E/C.12/1/Add.48); 2015: Second report, (E/C.12/SDN/CO/2).	X	X
Morocco	Western Sahara conflict (1975-) • Western Sahara War (1975-1991) • First Sahrawi Intifada (1999-2004) • Independence Intifada (2005-)	2006: Third report, (E/C.12/MAR/CO/3); 2015: Fourth Report (E/C.12/MAR/CO/4).	X	X
Angola	-Angolan Civil War (1975-2002) • 1994: Lusaka Protocol • 2002: Memorandum of Understanding (Luena Agreement)	2008: First to third Report, (E/C.12/AGO/CO/3); 2016: Fourth and fifth report (E/C.12/AGO/CO/4-5).		X
Kenya	- Land-related issues and ethnic tensions (1990s) - Post-electoral violence (2007-2008)	2008: First report (E/C.12/KEN/CO/1)		X
Chad	-Chadian Civil War (2005-2010)	2009: First to third report (E/C.12/TCD/CO/3)	X	
DRC	-First Congo War (1996-1997) -Second Congo War (1998-2003) • 2002: Peace agreement	2009: Second to fourth report (E/C.12/COD/CO/4).	X	X

	-Continued violence (2003-)			
Ethiopia	-Ethiopian-Eritrean War (1998-2000) • 2018: Implementation of the 2000 peace treaty and final peace declaration	2012: First to third report (E/C.12/ETH/CO/1-3).		X
Rwanda	- Genocide (1994)	2013: Second to fourth report, (E/C.12/RWA/CO/2-4)		X
Burundi	- Civil War (1993-2005)	2015: First report (E/C.12/BDI/CO/1).		
Uganda		2015: First report (E/C.12/UGA/CO/1).		
Central African Republic (CAR)	- Civil War (2012-)	2018: First report (E/C.12/CAF/CO/1).	X	
Mali	Northern Mali Conflict (2012-) • Peace agreement (2015) • Low level fighting continues	2018: First report (E/C.12/MLI/CO/1).	X	X
Niger	Boko Haram insurgency (2009-) • First incursion within Niger (2015)	2018: First report (E/C.12/NER/CO/1).	X	
Cameroon	-Anglophone Crisis (2017-)	2019: Fourth report (E/C.12/CMR/CO/4).	X	

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