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Reparations: To What End? Developing the State's Positive Duties to Address Socio-economic Harms in Post-conflict Settings through the European Court of Human Rights

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Abstract

Despite being conceived as a framework to protect civil and political rights in peacetime, the European Convention on Human Rights is currently being applied in states affected by armed conflicts with challenging socio-economic demands. This article outlines the European Court of Human Rights' current approach for the protection of human rights in conflict-related scenarios and critically examines its suitability to cope with the socio-economic challenges that arise in post-conflict settings. With recourse to legal theory and moral thought, it explores an alternative avenue to coherently frame the Court's practice to overcome certain problematic distributive outcomes that derive from the prevailing approach. The suggested alternative is a regime of positive duties intended to ensure an adequate standard of living after widespread violence.

1 Introduction

The European Convention on Human Rights (ECHR) came into effect in 1953, under the assumption that it would mainly apply in times of peace, given that most of the members of the Council of Europe enjoyed 'a comparatively high degree of internal stability and determined to keep friendly relations between themselves' by that time.[1]

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1 Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict', in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 201, at 202; Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222 (hereinafter 'ECHR').

Without explicitly obliging the state to guarantee core socio-economic rights, the ECHR has been traditionally understood as a typical example of a civil and political rights treaty, with the main purpose of protecting the individual from state interference.[2] Over the next four decades, recourse to the European Court of Human Rights (hereinafter 'ECtHR' or 'the Court') functioned as an 'exceptional procedure', like 'a constitutional court on fundamental rights' with regard to the democracies of Western Europe.[3]

Since the Council of Europe expanded to include a greater number of states in 1989, the ECHR has increasingly been applied to situations that were not entirely foreseen at its birth.[4] Ongoing events, such as the occupation of Northern Cyprus by Turkey (since 1974) and the conflict in Southeastern Turkey (since 1978), already indicated the new landscape in which human rights were to be applied. In the face of other conflicts arising from the break-up of the Soviet Union (i.e. Nagorno-Karabakh, Chechnya, Georgia) and the ratification of the ECHR by new states emerging from the dissolution of the former Yugoslavia, it is not surprising that the President of the ECtHR stressed that 'Europe is not a happy island, sheltered from wars and crises'.[5] Nor is it unexpected that the 'obvious correlation' between armed conflicts and the aggravation of risks for human rights was highlighted.[6]

A lot of ink has been devoted to reflecting on how the ECtHR has managed to apply human rights law to armed conflicts and other scenarios of generalized violence. On the one hand, scholars have examined how the standards originally conceived to govern during peacetime have been tailored by the Court to address conflict-related scenarios.[7] On the other hand, there is a great deal of research that analyses the extent to which the Court's remedial practice has been able to comply with the demands of justice of those affected by violence in contexts such as Southeastern Turkey, Cyprus or Chechnya.[8]

2 A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), at 3.

3 Reidy, Hampson and Boyle, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey', 15 *Netherlands Quarterly of Human Rights* (*NQHR*) (1997) 161, at 162.

4 Gioia, *supra* note 1, at 202.

5 European Court of Human Rights (ECtHR), Annual Report 2007, Registry of the European Court of Human Rights (2008), at 29.

6 *Ibid.*, at 12.

7 See, e.g., Gioia, *supra* note 1; Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *European Journal of International Law* (*EJIL*) (2005) 741.

8 For Turkey, see Reidy, Hampson and Boyle, *supra* note 3; Buckley, 'The European Convention on Human Rights and the Right to Life in Turkey', 1 *Human Rights Law Review* (*HRLR*) (2001) 35; Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations', 16 *HRLR* (2016) 731. For Cyprus, see Proukaki, 'The Right of Displaced Persons to Property and to Return Home after *Demopoulos*', 14 *HRLR* (2014) 701; Skoutaris, 'Building Transitional Justice Mechanisms without a Peace Settlement: A Critical Appraisal of Recent Case Law of the Strasbourg Court on the Cyprus Issue', 35 *European Law Review* (2010) 720. For Chechnya, see Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context', 1 *Journal of International Humanitarian Legal Studies* (2010) 275.

However, a systematic study that both outlines the prevailing framework that governs conflict-related scenarios and evaluates whether it is appropriate to face the challenges that arise in post-conflict settings, some of which are of a socio-economic nature, is still missing. There is a gap in the existing literature on how the victims' access to reparations is affected by the way in which state conduct is qualified in scenarios of abuse of power, legitimate use of force and in light of due diligence obligations to protect and investigate abuses by non-state actors. More precisely, how the qualification of state conduct affects the definition of the scope of the duty to make reparation and the calculation of damages in a context of widespread socio-economic deprivation.

Although the existing empirical studies on the awards made by the Court suggest that it may be more concerned with sanctioning state misconduct than with addressing the factual circumstances of victims,[9] the exact scope of this position has yet to be explored in post-conflict settings. If true, it is valid to criticize the Court's practice and explore alternatives that are somewhat more sensitive to the impact that widespread violence often has on the socio-economic wellbeing of those affected. This article carries out this task.

Section 2 emphasizes the importance of having clarity about the factors which influence the calculation of damages in post-conflict situations. As will be seen, people engulfed by widespread violence often experience severe socio-economic hardship and they use reparation-related resources to cope with daily adversity. Therefore, determining to what extent the Court considers these aspects is crucial. Section 3 analyses the setting of the amount of compensation for non-pecuniary damages, including its relationship with other remedies, in scenarios of abuse of power, legitimate use of force and with regard to due diligence obligations. Granting in advance that the Court's remedial practice may be overlooking the factual situation of victims, Section 4 weighs different arguments that may justify its emphasis on righting state misconduct. Since these arguments may not be compelling in post-conflict settings, Section 5 provides an alternative framework of state responsibility and reparations, one that does consider the heavy blow to people's standard of living caused by widespread violence.

It will be argued here that an excessive emphasis on the state's past conduct regarding the occurrence of serious violations when calculating damages and defining the scope of the duty to make reparation runs the risk of assigning victims varying levels of resources for questionable reasons. It also risks excluding groups of victims from access to much-needed reparation-related resources. To avoid this, emphasis should be placed on the state's positive duties to guarantee an *adequate standard of living* in post-conflict settings, with considerations of equity, scarcity of resources and reaching a fair balance between the interests of the applicant and those of the whole society informing the Court's reasoning.

[9] Fikfak, 'Non-pecuniary Damages Before the European Court of Human Rights: Forget the Victim; It's All About the State', 33 *Leiden Journal of International Law* (2020) 335, at 356–357.

A conceptual clarification is in order before proceeding. In what concerns the use of the term 'post-conflict', it is important not to make clear-cut distinctions between the obligations to protect rights *during* armed conflict and the duty to address abuses *after* it, since linearity is often lacking from one stage to another. There is no clear dividing line between conflict and post-conflict in states with ceasefire arrangements that lack a political solution to bring the conflict to an end (i.e. Nagorno-Karabakh, Cyprus). Nor is there a clear divide in situations where the state imposes itself militarily on the insurgent forces in a considerable, but not absolute way (i.e. Southeastern Turkey, Chechnya). Although the peak of abuses has been overcome to a certain extent, these cases remain affected by what Christine Bell calls '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'.[10] Although outbreaks of violence do not disappear completely, and other factors that can fuel new insurrections and clashes remain, the decision to implement massive reparation programmes to address the legacy of abuses puts the accent on the prefix of the '*post*-conflict' notion (i.e. Nagorno-Karabakh, Southeastern Turkey, Cyprus[11]).

2 Reparations in Context: The Calculation of Damages, the Impact of Armed Conflict on the Socio-economic Well-being of People and the Use of Reparation-related Resources

The remedial practice of the ECtHR 'is hardly known for being innovative or progressive'.[12] Despite certain changes with the turn of the century, some of them resulting from its increasing workload, declaratory judgments and compensation awards remain central in the Court's approach to just satisfaction.[13] Compensation for non-pecuniary damage is much more common than for pecuniary damage. This is so, since, in the latter case, the applicant bears the full burden of proof for any alleged damage,[14] a burden that has proved hard to fulfil, given the recurring difficulty in establishing a causal link between the breach of the obligation and the damage, as

[10] Bell, 'Post-conflict Accountability and the Reshaping of Human Rights and Humanitarian Law', in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 328, at 330.

[11] For Nagorno-Karabakh, see ECtHR, *Sargsyan v. Azerbaijan*, Appl. no. 40167/06, Judgment of 12 December 2017, para. 34 (hereinafter '*Sargsyan II*'). For Southeastern Turkey, see ECtHR, *Icver v. Turkey*, Appl. no. 18888/02, Judgment of 12 January 2006, para. 82 (hereinafter '*Icver*'); *Dogan and others v. Turkey*, Appl. nos. 8803–8811/02, 8813/02 and 8815–8819/02, Judgment of 13 July 2006, para. 6 (hereinafter '*Dogan II*'). For a discussion of Cyprus, see Proukaki, *supra* note 8.

[12] Nifosi-Sutton, 'The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective', 23 *Harvard Human Rights Journal* (2010) 51, at 52.

[13] Mowbray, 'The European Court of Human Rights' Approach to Just Satisfaction', 4 *Public Law* (1997) 648, at 658–659; Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures', 17 *HRLR* (2017) 450, at 452–457.

[14] Altwicker-Hámori, Altwicker and Peters, 'An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights', 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016) 1, at 6.

well as other procedural obstacles.[15] With the award of compensation for non-pecuniary damage the Court gives recognition 'to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage'.[16] For this reason, the suffering of the applicant must reach a certain level of intensity since otherwise a mere declaratory judgment may be enough to provide just satisfaction.[17] Although the quantification of compensation for non-pecuniary damage has been considered 'difficult to comprehend',[18] studies that systematically analyse the Court's practice find coherent patterns.

In the first empirical study on this topic, Altwicker-Hámori, Altwicker and Peters found that the seriousness of the violation plays a decisive role in calculating the amount of compensation for non-pecuniary damages. To unravel the concept of seriousness, they established an implicit 'hierarchy' of Convention rights, finding that the more important the rights affected, the more serious the violation and the greater the sums granted.[19] More recent empirical studies analyse how the amount of compensation varies in relation to violations of the same right.[20] These studies share the interest of determining the factors that influence the calculation of awards made in respect of non-pecuniary damage. They raise the important question of whether the ECtHR is more interested in sanctioning state misconduct, by adjusting the sums based on how conduct is qualified, or in addressing the consequences faced by those affected.[21]

This question is extremely important in post-conflict contexts, given the profound impact of violence on the population's standard of living and their use of reparation-related resources to cope with daily life – a situation that is not affected by the way the state's conduct is qualified. Irrespective of the perpetrator, those who directly suffer the effects of physical violence, such as permanent injuries that decrease their ability to access livelihoods, who lose key assets to provide their own means of subsistence or who suffer the death of breadwinners face socio-economic deprivation.[22] The effects of armed conflict, however, extend far beyond these instances to include people indirectly affected by it. These include people who find their areas of residency or work devastated socio-economically due to the dynamics of conflict itself, many of whom are forced to flee.[23] Moreover, in many cases, it

[15] D. Harris *et al.*, *Law of the European Convention on Human Rights* (2014), at 168–170; D. Shelton, *Remedies in International Human Rights Law* (2006), at 296–298.

[16] ECtHR, *Varnava and others v. Turkey*, Appl. nos 16064–16066/90, 16068–16073/9, Judgment of 18 September 2009, para. 224.

[17] ECtHR, *Silver v. UK*, Appl. nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, Judgment of 24 October 1983, para. 10.

[18] Shelton, *supra* note 15, at 345.

[19] Altwicker-Hámori, Altwicker and Peters, *supra* note 14, at 17–18.

[20] Fikfak, *supra* note 9.

[21] *Ibid.*, at 343, 355–357.

[22] C. Correa, 'Integrating Development and Reparations for Victims of Massive Crimes', Center for Human Rights, University of Notre Dame (2014), at 8, available at https://klau.nd.edu/assets/331778/correareparations2.pdf.

[23] Deng, 'Specific Groups and Individuals: Mass Exoduses and Displaced Persons. Addendum: Turkey', Report of the Representative of the Secretary-General on Internally Displaced Persons submitted pursuant to Commission on Human Rights Resolution 2002/56, E/CN.4/2003/86/Add.2, 27 November 2002, at 7, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2003/86/Add.2&Lang=E.

becomes impossible to distinguish whether people were displaced due to violence, to seek better opportunities or both.[24] People displaced from rural to urban settlements usually find themselves in dramatic conditions and extreme poverty,[25] sharing with impoverished local communities 'the bottom rung of the economic ladder'.[26]

These circumstances cast a different light on measures, such as reparations, that are usually intended as a means to correct past violations. Evidence shows that, in the aftermath of abuses, reparation-related resources are largely used to cover financial and socio-economic hardship stemming from armed conflict.[27] Naomi Roht-Arriaza explains that, when delivered as a single payment, reparations are likely to be spent, for instance, on medical expenses or school fees.[28] Because of this, it is reasonable to understand reparations instrumentally, as *benefits* that victims use to cope with ongoing socio-economic distress.[29]

In these contexts, then, it is crucial to determine what the factors are that influence the calculation by the Court of damages for non-pecuniary loss, if the amounts are affected by the way state misconduct is qualified, and whether the impact of violence on the living standards of those affected is considered. Despite the importance of existing quantitative studies to address this issue, their conclusions cannot simply be transplanted to thematic analyses that require the evaluation of multiple breaches,[30] let alone to post-conflict situations, where certain violations that were not considered in some of these studies are all too common.[31] This is especially important, for instance, when cases of abuse of power are at stake. In contexts like these, an analysis of multiple violations is not only necessary to adequately grasp the Court's holding,[32] but is crucial in addressing its remedial practice, including the calculation of damages.

[24] Connor, 'Humanitarian Situation of the Displaced Kurdish Population in Turkey', Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Demography, 22 March 2002, at 14, available at https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9670&lang=EN.

[25] Deng, *supra* note 23, at 23.

[26] *Ibid.*, at 16.

[27] See, respectively, Proukaki, *supra* note 8, at 726; Torres, 'Forced Displacement at the Juncture of Transitional Justice: Opportunities and Risks', 69 *Revista de Estudios Sociales* (2019) 28, at 35.

[28] Roht-Arriaza, 'Reparations and Economic, Social and Cultural Rights', in D.N. Sharp (ed.), *Justice and Economic Violence in Transition* (2014) 109, at 116.

[29] Van der Auweraert, 'The Potential for Redress: Reparations and Large-Scale Displacement', in R. Duthie (ed.), *Transitional Justice and Displacement* (2012) 139, at 140–147.

[30] See Altwicker-Hámori, Altwicker and Peters, *supra* note 14, at 26–27; Fikfak, *supra* note 9, at 345 (both excluding multiple breaches from their analysis).

[31] Altwicker-Hámori, Altwicker and Peters, *supra* note 14, at 22, 33, 41 (excluding certain cases of killings and forced disappearance from their analysis).

[32] Buckley, *supra* note 8, at 46–51, 55–64; Reidy, Hampson and Boyle, *supra* note 3, at 165–169.

3 Compensation for Damages and Other Remedies in Post-conflict Settings: Abuse of Power, Legitimate Use of Force and Due Diligence Obligations

A *Abuse of Power*

Abuse of power can be understood as the exercise of public authority by state agents, or proxy militia acting on their behalf, pursuing no legitimate goals and without giving any consideration to guarantees of due process.[33] Practices of abuse of power can be found in the serious human rights violations perpetrated by the state security forces against people considered members of the Kurdistan Workers' Party (PKK) in Southeastern Turkey since 1980 – a situation considered by the ECtHR as incompatible with the rule of law in a democratic society. The ECtHR consistently found in these cases that, despite criminal law provisions and enforcement machinery in place to protect life, their effectiveness and impartiality were undermined,[34] as it transpired from the repeated failure of the authorities to provide victims with an effective remedy (Article 13 ECHR).[35] Reidy, Hampson and Boyle highlighted that in these contexts, 'domestic remedies are unavailable or are ineffective when invoked . . . evidencing the element of official tolerance necessary to establish a practice of violation of both the right to a remedy and other rights and freedoms'.[36] This can be exemplified by extrajudicial killings in the region, understood as 'the taking of an individual's life by governmental authorities without the minimal guarantees provided by the due process of law'.[37]

In these scenarios, the calculation of compensation for non-pecuniary damages expresses the greatest concern of the Court about certain practices, namely those in which the deliberate and arbitrary nature of state conduct is more salient. The 'seriousness' of the violation is considered greater when there is a finding of arbitrary killing directly perpetrated by state authorities compared with *unintended* killing resulting from security operations, with the Court granting higher awards in the first case.[38] Likewise, while requests for non-pecuniary damages are consistently

[33] ECtHR, *Çakici v. Turkey*, Appl. no. 23657/94, Judgment of 8 July 1999, paras 85–87 (hereinafter '*Çakici*'); ECtHR, *Kılıç v. Turkey*, Appl. no. 22492/93, Judgment of 28 March 2000, paras 71–75 (hereinafter '*Kılıç*').

[34] *Kılıç*, Appl. no. 22492/93, Judgment of 28 March 2000, para. 75.

[35] *Çakici*, Appl. no. 23657/94, Judgment of 8 July 1999, paras 111–114.

[36] Reidy, Hampson and Boyle, *supra* note 3, at 165. A detailed explanation of the failures in the investigation process that led to questioning the impartiality of the law enforcement apparatus in Turkey can be found in Buckley, *supra* note 8, at 46–51.

[37] Buckley, *supra* note 8, at 36–44.

[38] 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 (i.e. *Çakici*) and GBP 20,000 (i.e. *Ertak*): *Çakici*, Appl. no. 23657/94, Judgment of 8 July 1999, paras 128–130; *Ertak v. Turkey*, Appl. no. 20764/92, Judgment of 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 crossfire: ECtHR, *Ergi v. Turkey*, Appl. no. 66/1997/850/1057, Judgment of 28 July 1998, para. 110 and operative part (3)(4) (hereinafter '*Ergi*').

recognized in cases of destruction of property and villages and forced evictions *arbitrarily* perpetrated by security forces, where the state's involvement is less transparent they are discarded[39] or compensation is awarded in smaller amounts.[40]

As for other remedies, in early cases of abuse of power, the ECtHR used to issue declaratory judgments abstaining from ordering the state to undertake specific action.[41] The lack of criminal investigations used to be considered a violation of the right to an effective remedy (Article 13 ECHR) and contributed to explaining the seriousness of the breach that justifies the award of compensation for non-pecuniary damages.[42] This line of reasoning has remained quite constant, with the exception of blatant aerial bombings that kill and injure the civilian population, followed by an egregious failure to investigate the incident.[43] In these cases, the Court has been clear that authorities cannot just pay victims compensation and move on.[44] Instead, they are required to identify and prosecute those responsible since, under Article 46 of the Convention, 'the very nature of the violation found, [is] such as to leave no real choice between measures capable of remedying it'.[45] When the Court itself requires or recommends investigations, it no longer considers Article 13 violations to contribute to explaining the seriousness of the breach that justifies an award for non-pecuniary damages.[46]

B *Legitimate Use of Force*

The ECtHR evaluates the legitimate use of force in conflict-related scenarios under the *proportionality test*. Its fundamental premise is that the use of force by state agents is expected to pursue legitimate goals and be carried out with strict proportionality to

[39] *Dogan II*, Appl. nos. 8803–8811/02, 8813/02 and 8815–8819/02, Judgment of 13 July 2006, para. 61.

[40] In *Sargsyan II*, Appl. no. 40167/06, Judgment of 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 recognized exclusively for non-pecuniary damages in *Akdivar* (GBP 8,000), *Selçuk* (GBP 10,000) and *Ayer* (EUR 14,500): *Akdivar and Others v. Turkey*, Appl. no. 99/1995/605/693, Judgment of 1 April 1998 (hereinafter '*Akdivar*') (Art. 50 ECHR); *Selçuk and Asker v. Turkey*, Appl. no. 12/1997/796/998–999, Judgment of 24 April 1998 (hereinafter '*Selçuk*'); *Ayer and Others v. Turkey*, Appl. no 23656/94, Judgment of 8 January 2004 (hereinafter '*Ayer*').

[41] Typical cases are *Akdivar*, Appl. no. 99/1995/605/693, Judgment of 1 April 1998, paras 45–47; *Selçuk*, Appl. no. 12/1997/796/998–999, Judgment of 24 April 1998, paras 104, 123–125; *Ayer*, Appl. no 23656/94, Judgment of 8 January 2004, paras 138–155; and *Ipek v. Turkey*, Appl. no. 25760/94, Judgment of 17 February, paras 221–239.

[42] *Selçuk*, Appl. no. 12/1997/796/998–999, Judgment of 24 April 1998, paras 93–98, 118; *Ayer*, Appl. no 23656/94, Judgment of 8 January 2004, paras 122–129, 159.

[43] ECtHR, *Benzer and Others v. Turkey*, Appl. no 23502/06, Judgment of 24 March 2014, paras 214–219 (hereinafter '*Benzer*').

[44] ECtHR, *Yasa v. Turkey*, Appl. no. 63/1997/847/1054, Judgment of 2 September 1998, paras 114–115.

[45] *Benzer*, Appl. no 23502/06, Judgment of 24 March 2014, paras 217–219.

[46] Compare *ibid.*, paras 219 and 223, where, after investigations were required or recommended, violations of Article 13 ECHR were not included in the compensation for non-pecuniary damages, with *Selçuk*, Appl. no. 12/1997/796/998–999, Judgment of 24 April 1998, para. 118 and *Ayer*, Appl. no 23656/94, Judgment of 8 January 2004, para. 159, where investigations were not required or recommended and Article 13 ECHR violations were included in the heading of non-pecuniary damages.

attain the permitted aims. State responsibility ranges from misdirected fire from its agents, killing civilians, to the failure to take all feasible 'precautions in the choice of means and methods with a view to avoiding and, in any event, minimising incidental loss of civilian life'.[47] Not only is the specific action of the agents using force being examined, but also the surrounding circumstances, such as planning, control and response to the operation.

The Court's emphasis on correcting wrongful practices with greater involvement and determination by state authorities also transpires from its evaluation of the authorities' compliance with the proportionality test. If authorities, in pursuit of legitimate objectives, fail *to secure* the right to life by not taking the required precautions, or if they openly violate their obligations *to respect* it, this is decisive to establish the quantum of compensation.[48] As a result, the Court awards greater sums in the second case.[49] In those exceptional circumstances in which authorities are using force in pursuit of legitimate aims but in blatant disregard of the principle of proportionality, they are held responsible largely as when abuse of power is involved. Hence, the ECtHR requires or recommends under Article 46 the investigation and sanction of those responsible[50] and grants victims large sums in respect of non-pecuniary damages.[51]

It is clear, then, that the Court attaches special importance to those cases in which authorities voluntarily commit abuses or their participation in them is somewhat more salient. Not only does it require authorities to undertake specific conduct to redress violations (i.e. criminal investigation), but it also grants greater compensation for non-pecuniary damages to express a greater condemnation. This coincides with Fikfak's empirical study, which found that the Court grants greater compensation when it finds deliberate and arbitrary violations of certain ECHR provisions.[52]

[47] *Ergi*, Appl. no. 66/1997/850/1057, Judgment of 28 July 1998, para. 79; *Esmukhambetov,* Appl. no 23445/03, Judgment of 29 March 2011, para. 146.

[48] ECtHR, *Finogenov and Others v. Russia*, Appl. nos. 18299/03 and 27311/03, Judgment of 4 June 2012, para. 289 (hereinafter '*Finogenov*').

[49] Compare in this sense *Benzer*, Appl. no 23502/06, Judgment of 24 March 2014, and *Finogenov*, Appl. nos. 18299/03 and 27311/03, Judgment of 4 June 2012. The first dealt with an indiscriminate bombing of villages that resulted in *substantive* violations of Article 2 ECHR. The second involved a counter-terrorist and rescue operation to solve a hostage crisis in which the authorities committed errors in the operation's execution, provoking the death of certain civilians, committing a *procedural* violation of Article 2 ECHR. 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.

[50] ECtHR, *Abuyeva and Others v. Russia*, Appl. no. 27065/05, Judgment of 11 April 2011, para. 37 (hereinafter '*Abuyeva*'); ECtHR, *Abakarova v. Russia*, Appl. no. 16664/07, Judgment of 14 March 2016, para. 112.

[51] Compare *Benzer*, Appl. no 23502/06, Judgment of 24 March 2014, para. 184, with *Abuyeva*, Appl. no. 27065/05, Judgment of 11 April 2011, paras 196–198. While in the former case, the Court was reluctant to consider that the authorities' conduct pursued legitimate objectives, it accepted it in the latter case. Still, the Court estimated the value of non-pecuniary damages for the victim's death in similar amounts, around EUR 80,000 and EUR 60,000, respectively – the difference arguably being explained by the fact that, in *Benzer*, authorities did not even try to justify their conduct in terms of the legitimate use of force.

[52] In Article 3 ECHR cases, the Court orders significantly greater amounts when it comes to torture rather than other *non-deliberate* ill-treatment, to the same extent that, under Article 5 ECHR, *arbitrary* detention pays more than other deprivations of liberty: Fikfak, *supra* note 9, at 356.

C *Due Diligence Obligations*

Due diligence obligations impose on authorities a twofold duty to protect rights by taking steps to prevent abuses by third parties and to investigate them after they occur. The Court has made it clear that the state cannot be held prima facie responsible for not preventing abuses perpetrated by non-state actors. Responsibility is only triggered if authorities are aware of a risk situation and do not take reasonable measures to prevent or mitigate it, as first outlined in *Osman v. the United Kingdom*.[53] In conflict-related scenarios, Ebert and Sijniensky stress that the ECtHR uses the *Osman* test with a degree of flexibility, and gives due consideration to contextual elements on a case-by-case basis. Commenting on Southeastern Turkey, they explain that 'the climate of repression, combined with widespread physical violence against the members of [certain] groups, sometimes with the State's suspected acquiescence', influenced how the test was applied.[54] Thus, the Court established that these contextual elements were sufficient to consider that the authorities were aware of the existence of a real and immediate risk that threatened the victims, even though the latter did not inform the authorities of the specific situation.[55] With regard to the duty to investigate, authorities are obliged to take all reasonable steps to ensure that an effective, independent investigation is conducted.[56] While the precise scope of this obligation is informed by the boundaries of due diligence,[57] it remains in force in circumstances of generalized violence, armed conflict or insurgency.[58]

The state's failure to comply with the twofold obligation to protect and investigate is perhaps the scenario in which the ECtHR's reasoning as to the calculation of damages is most unclear. In Southeastern Turkey, the same sum was awarded regardless of whether the state failed to prevent the killings, failed to investigate them or failed to both prevent and investigate them.[59] Nor is it entirely clear whether greater compensation is awarded when authorities commit the offence themselves than when they fail to prevent or investigate it. In discussing the amount of damages for breaches of duties to prevent and investigate, the ECtHR resorts to cases in which victims suffered

[53] ECtHR, *Osman v. the United Kingdom*, Appl. no. 87/1997/871/1083, Judgment of 28 October 1998, para. 116.

[54] 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?', 15 *HRLR* (2015) 343, at 349.

[55] *Ibid*.

[56] ECtHR, *Al-Skeini and others v. The United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011, para. 93 (hereinafter '*Al-Skeini*').

[57] Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?', 21 *EJIL* (2010) 701, at 706–707.

[58] *Al-Skeini*, Appl. no. 55721/07, Judgment of 7 July 2011, para. 93; *Tanrıkulu v. Turkey*, Appl. no 23763/94, Judgment of 8 July 1999, paras 114–119, 128 (hereinafter '*Tanrıkulu*'); *Ergi*, Appl. no. 66/1997/850/1057, Judgment of 28 July 1998, para. 82.

[59] Compare *Tanrıkulu*, Appl. no 23763/94, Judgment of 8 July 1999, para. 138, with *Akkoc v. Turkey*, Appl. nos. 22947/93 and 22948/93, Judgment of 10 October 2000, para. 136 (hereinafter '*Akkoc*'); *Mahmut Kaya v. Turkey*, Appl. no. 22535/93, Judgment of 28 March 2000, para. 138 (hereinafter '*Kaya*'); *Kılıç*, Appl. no. 22492/93, Judgment of 28 March 2000, para. 105.

violations perpetrated directly by authorities, granting similar sums.[60] Fikfak concludes that, in Article 2 cases, substantive violations lead to more compensation than procedural, while this is not the case with Article 3 breaches.[61]

D *A Preliminary Assessment of the Court's Remedial Practice in Post-conflict Settings*

The analysis carried out so far opens the Court's practice to two provisional criticisms. On the one hand, the examination of the state's misconduct often overlooks the impact of violence on the socio-economic wellbeing of the people affected. After all, the destruction of a village and the displacement of its population arguably cause similar damage regardless of whether the state intentionally attacks the village, whether the village is caught in a crossfire or whether it is destroyed by non-state actors. Since monetary resources received as reparations are likely to be used to cope with the socio-economic harms caused by violence, it seems inappropriate to grant some people more resources than others based on the evaluation of state conduct, rather than, for instance, the impact of violence on the victim's standard of living. This conclusion coincides with Fikfak's criticism that '[t]he Court appears to be focusing on state conduct and determines damages depending on how that conduct has been qualified . . .[; the victim's] vulnerability, individual circumstances and consequences she may have suffered are mostly ignored'.[62]

On the other hand, the Court may be establishing some limits regarding the victims' access to reparations, depending on the perpetrator and the success of authorities in discharging their due diligence obligations. Even in contexts of abuse of power, there appears to be no *general obligation* to protect individuals from non-state actors in all circumstances.[63] And although the Court has been flexible in the application of the *Osman* test in these contexts, the same does not go for victims of 'pure' non-state actors, that is, rebels or other actors that do not collude with authorities. It is important to bear in mind that the civilian population usually ends up trapped in a violent dynamic where supporting one armed group often implies becoming the enemy of another, with forced migration being the only course of action available to support neither.[64] Since any claim related to 'pure' non-state actors must comply with the rather strict requirements of the *Osman* test, the possibility that victims of these actors may access reparation measures before the ECtHR is more distant. For example, imperceptible daily violations that occur in isolated areas

[60] Compare *Kurt v. Turkey*, Appl. no. 15/1997/799/1002, Judgment of 25 May 1998, paras 174–175; *Çakici v. Turkey*, Appl. no. 23657/94, Judgment of 8 July 1999, para. 130, with *Kaya*, Appl. no. 22535/93, Judgment of 28 March 2000, para. 138; *Kılıç*, Appl. no. 22492/93, Judgment of 28 March 2000, para. 105; *Akkoc*, Appl. nos. 22947/93 and 22948/93, Judgment of 10 October 2000, para. 136; *Tanrıkulu*, Appl. no 23763/94, Judgment of 8 July 1999, para. 138.

[61] Fikfak, *supra* note 9, at 356–357.

[62] *Ibid.*, at 360.

[63] For a discussion, see Ebert and Sijniensky, *supra* note 54, at 363–365. See also Mowbray, *supra* note 2, at 20.

[64] Connor, *supra* note 24, at 14.

without the presence of authorities will hardly trigger state responsibility.[65] The reason for this is simple. Carrying out a serious and prompt investigation of abuses mainly seeks to maintain 'public confidence in the adherence of the authorities to the rule of law and preventing any appearance of collusion in or tolerance of unlawful acts'.[66]

Victims' access to reparations may also be affected by the degree of control that authorities exercise over their territory in other conflict-related circumstances. These include military occupation by foreign armed forces, presence of separatist movements and other acts of war or rebellion by virtue of which 'a state is prevented from exercising its authority in part of its territory'.[67] If state authorities lack de facto control over certain regions, they naturally cannot be held responsible for interference with the enjoyment of the rights and freedoms guaranteed in the Convention. Rather, the Court has stated that their duties boil down to taking any steps possible to regain control of the situation in such a way that the rights can be fully guaranteed.[68] In addition, the authorities also seem to be somewhat exempt from complying with the obligation to investigate in such settings, as the Court recognizes that any judicial investigation into people living in areas not controlled by the authorities or any investigation related to offences committed there 'would be ineffectual'.[69] The extent to which a state fully exerts its authority in a particular case will certainly be contested. Even so, once it is established that the state lacks jurisdiction or cannot be held responsible for abuses, its duty to make reparation diminishes. According to the Court, 'where a State elects to redress the consequences of certain acts for which it is not responsible, it has a wide margin of appreciation in the implementation of that policy'.[70]

Therefore, with its emphasis on righting state misconduct, the Court is not only modifying the compensation awarded for non-pecuniary damages for questionable reasons. It is also placing certain victims in the periphery of state responsibility and opening the door to differentiated treatment of victims, depending on the type of perpetrator and the circumstances in which the violations occurred. At this diffuse threshold, some victims may not only lack access to much-needed reparations to address socio-economic needs, but may also face difficulties in resorting to Strasbourg to challenge domestic reparation programmes, in contrast to victims of state-led action.[71]

These unsatisfactory conclusions seem hard to dispute. However, it is debatable whether these criticisms, as they stand, can be levelled against the ECtHR.[72] For one thing, it is not clear whether the undesirable distributive consequences resulting from

[65] Ebert and Sijnensky, *supra* note 54, at 366. For an exploration of this topic in the inter-American context, see Torres, 'The State, the Assailant? Guaranteeing Economic and Social Rights after Widespread Violence through the Inter-American Court of Human Rights', *NQHR* (forthcoming).

[66] ECtHR, *Senturk v. Turkey*, Appl. no. 13423/09, Judgment of 9 April 2013, para. 101.

[67] ECtHR, *Ilascu and Others v. Moldova and Russia*, Appl. no. 48787/99, Judgment of 8 July 2004, paras 311–313, 333 (hereinafter '*Ilascu*'); ECtHR, *Sargsyan v. Azerbaijan*, Appl. no. 40167/06, Judgment of 16 June 2015, paras 128–131 (hereinafter '*Sargsyan I*').

[68] *Ilascu*, Appl. no. 48787/99, Judgment of 8 July 2004, paras 310–313, 330.

[69] *Ibid.*, para. 347.

[70] ECtHR, *Von Maltzan and others v. Germany*, Appl. nos. 71916/01, 71917/01, and 10260/02, Judgment of 2 March 2005, paras 77, 111

[71] *Icver*, Appl. no. 18888/02, Judgment of 12 January 2006.

[72] The author wishes to thank one of the anonymous reviewers for highlighting the limited scope of the conclusions reached thus far and the steps required to strengthen them.

the award of damages should be considered a matter of concern in the first place. As with other regimes (i.e. tort law), the Court may be pursuing objectives that explain and justify the unequal access to reparation-related resources discussed thus far. Furthermore, the existence of any other ground for establishing state responsibility has not yet been addressed, especially with regard to the socio-economic impact of armed conflict on the population. For the criticism made here to be complete, it is necessary to address each of these objections.

4 State Responsibility and Reparations in Post-conflict Settings: In Search of Corrective Justice, Relational Justice and Deterrence

The Court may well be pursuing different goals through its remedial practice that justify its focus on state conduct when calculating damages and defining the scope of the duty to make reparation. This section first provides a defence of the Court's remedial practice in terms of the pursuit of *corrective justice*, *relational justice* and *deterrence*. Next, it will explore whether this justification is sound when it comes to post-conflict settings. If it is not, as this article will try to argue, the existence of any other ground for establishing state responsibility – one that pays due attention to the socio-economic impact of armed conflict on people – needs to be explored.

A *Justifying the Court's Remedial Practice*

1 Corrective Justice

The first thing to consider, from a general perspective, is whether reparations serve a purpose other than simply undoing the consequences of wrongdoing. The Court's remedial practice is informed by the classic aim of corrective justice, namely 'the enforcement of the obligation of restoration', or *restitutio in integrum*.[73] Accordingly, when a state breaches a Convention provision it is bound by 'a legal obligation to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach'.[74] If the nature of the violation allows *restitutio in integrum*, the ECtHR has established as a rule that 'it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself'.[75] If restitution *strictu sensu* is impossible, corrective justice requires the payment of compensation for the loss suffered by the applicant, the value of which is expected to restore as far as possible the situation prior to the wrongdoing.[76]

[73] Perry, 'The Moral Foundations of Tort Law', 77 *Iowa Law Review* (1992) 449, at 456.

[74] ECtHR, *Papamichalapoulos and others v. Greece*, Appl. 14556/89, Judgment of 31 October 1995, para. 34.

[75] *Ibid.*, para. 34.

[76] *Dogan II*, Appl. nos. 8803–8811/02, 8813/02, and 8815–8819/02, Judgment of 13 July 2006, paras 45 and 54; *Sargsyan II*, Appl. no. 40167/06, Judgment of 12 December 2017, para. 37.

Corrective justice primarily seeks to 'transform the victim's right to be free from wrongful suffering at the actor's hand into a remedy whereby the actor undoes the injurious consequences'.[77] In a zero-sum game, the victim's wrongful loss and the wrongdoer's duty to repair are correlative to each other.[78] For this reason, a court only 'aims to correct the injustice done by one party to the other', without taking into consideration their socio-economic circumstances.[79] In a tort claim, for example, the fact that the defendant is poor and the plaintiff rich does not affect the duty of reparation, regardless of the fact that undoing the effects of the offence would be very burdensome for the former and insignificant to the latter.[80]

According to this argument, to the extent that the remedial practice of the ECtHR is informed by corrective justice, it should only be concerned with wiping out the consequences of state wrongdoing. It should not examine the impact of armed conflict on the victims' standard of living and their use of reparation-related resources.

2 Relational Justice

The emphasis on state conduct could also be justified by considering the purpose underlying the award of compensation for non-pecuniary damages, that is, fostering 'relational justice'. Advocates of relational justice reflect on 'the intrinsic moral importance of the way social and political institutions *act*'.[81] For Schemmel, the way 'institutions *treat* people has relevance to justice that is not reducible to the distributive effects of such treatment'.[82] This position can be understood more broadly as standing on the side of deontological approaches to morality, which stress the intrinsic rightfulness and wrongfulness of conducts.[83] According to this, 'any harm an agent does is always more important than any harm that agent merely lets happen, and a harm an agent intends and does has more weight than equivalent harm the agent does but merely foresees (or should foresee)'.[84]

Deontological ethics stand in stark contrast with consequentialist morality, which gives an intrinsic value to *states of affairs*, ranking them from best to worst according to an impersonal standpoint.[85] From a consequentialist perspective, that the agent does harm by themselves, and does it intentionally, has no moral relevance in determining the goodness or badness of states of affairs[86] – in the present discussion, the level of socio-economic distress provoked by widespread violence. The emphasis on

77 Weinrib, 'Understanding Tort Law', 23 *Valparaiso University Law Review* (1989) 485, at 524.
78 Perry, *supra* note 73, at 479–483.
79 Weinrib, 'Corrective Justice in a Nutshell', 52 *University of Toronto Law Journal* (2002) 349, at 350, 351–352.
80 Coleman, 'The Mixed Conception of Corrective Justice', 77 *Iowa Law Review* (1992) 427, at 428–429.
81 Schemmel, 'Distributive and Relational Equality', 11 *Politics, Philosophy & Economics* (2012) 124, at 125.
82 *Ibid.*
83 Williams, 'Consequentialism and Integrity', in S. Scheffler (ed.), *Consequentialism and Its Critics* (1998) 20, at 21.
84 T. Pogge, *Realizing Rawls* (1989), at 44.
85 Scheffler, 'Introduction', in S. Scheffler (ed.), *Consequentialism and its Critics* (1998) 1, at 1.
86 Pogge, *supra* note 84, at 45.

conduct allows deontological ethics to address two things that escape consequentialism, namely the *intentionality* of action and the *mistreatment* perceived by the victim. 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 victimized'.[87] From the victim's point of view, 'the intention makes for the offence'.[88] In short, the intentionality of harm draws a line in the sand between being hurt by a natural event or human accident, and being the target of deliberate wrongdoing, even if the consequences are identical.

Under this framework, the Court's practice can be defended to the extent that it embodies strong deontological morality. In the context of forced evictions in Southeastern Turkey, the Court took note of *the way* in which the authorities *treated* victims when they burned their houses, expressing a greater moral and legal rejection than in other cases when houses where destroyed. Both the deliberate intention to cause harm and the victims' perception of abuse were considered by the Court as key elements to determine the presence of ill-treatment. Victims of intentional harm, therefore, were awarded higher compensation.[89] And among the different forms of ill-treatment, torture stands out for its deliberate nature.[90] Hence, what seems to be paramount to the ECtHR is the way in which the state *behaves towards* people, rather than the objective states of affairs produced by the state's misconduct. By awarding higher compensation for intentional harm and reducing the state's burden to make reparation for violations not directly attributable to it, the Court does nothing more than express that deep moral intuition that what one deliberately does to people carries a greater responsibility than what simply happens to them as a more remote result of our actions.[91]

Deontological thinking not only justifies the Court's emphasis on righting state behaviour, it can also provide a basis for downplaying the factual circumstances of victims when awarding damages. To understand this, it is important to remember that this moral view can also be characterized by imposing restrictions on actions.[92] Some philosophers consider that rights, understood negatively, are above all 'side constraints' on action, especially state action.[93] As such, rights are absolute in the sense that they do not belong to the realm in which states of affairs are evaluated, but rather

[87] S. Scheffler, *The Rejection of Consequentialism* (1982), at 106.

[88] C. Fried, *Right and Wrong* (1978), at 31.

[89] In *Akdivar* and *Selçuk*, the authorities were held responsible for deliberately burning the applicants' houses and belongings, causing them to abandon their village. In *Selçuk*, the plaintiffs' possessions were burned in their presence – a seemingly premeditated 'exercise carried out *contemptuously* and *without respect for the feelings of the applicants*'. The Court expressly stated that the 'way' in which the authorities burned the houses down provoked suffering grave enough to consider the acts of the security forces as ill-treatment. In *Akdivar*, there was no evidence of *how* the authorities burned the victims' houses, which is why ill-treatment was not recognized: *Akdivar*, Appl. no. 99/1995/605/693, Judgment of 1 April 1998, paras 81, 88, 91; *Selçuk*, Appl. no. 12/1997/796/998–999, Judgment of 24 April 1998, paras 77–79. Likewise, *Ayer*, Appl. no 23656/94, Judgment of 8 January 2004, paras 109–111, 157–159.

[90] ECtHR, *Ireland v. United Kingdom*, Judgment of 18 January 1978, Appl. no. 5310/7, at para. 167.

[91] T. Nagel, *Mortal Questions* (1979), at 60–61.

[92] T. Nagel, *The View from Nowhere* (1986), at 175–180.

[93] R. Nozick, *Anarchy, State and Utopia* (1974), at 29.

stand as constraints to achieve the best overall result.[94] To the same extent that rights protection is alien to consequentialist insights, reparation of abuses is independent of considerations of general welfare, including the victim's own wellbeing.

This perspective also informs the Court's remedial practice, particularly when it awards damages for non-pecuniary loss when plaintiffs did not request them or specify the required amount. These decisions are justified for the infringed right's 'own sake', that is, for the sake of its 'absolute character' or 'fundamental importance'.[95] For this reason, with the award of damages, the Court is not expected to consider the victim's welfare or what would be the best outcome, all things considered.[96] The Court therefore endorses a deontological understanding of rights that some theorists understand in other contexts as 'moral' or 'abstract'. What the misconduct of the state affects is the 'personality' of the individual as a rights holder, not her actual wellbeing.[97]

3 Ensuring Deterrence

There is a third reason to justify awarding higher compensation when there is evidence of intentionality and participation on the part of authorities, namely deterrence. Although the ECtHR has rejected the idea that damages should serve a punitive function, it has also recognized that they 'must be such as to create a serious and effective means of dissuasion with regard to the repetition of unlawful conduct of the same type'.[98] In *Cyprus v. Turkey*, for instance, the respondent was ordered to pay a high amount of damages due to a deliberate failure to comply with previous judgments and to cease the breach.[99] The same goes for repeated violations in the Chechen context.[100]

Therefore, taken together, these three arguments could justify the Court's emphasis on correcting state conduct through the award of damages, despite the unfortunate distributive consequences discussed in the previous section. After all, as has been discussed in the context of other corrective justice regimes, such as tort law, 'to the extent that deterrence, compensation and the punishment of wrongful conduct are the worthy goals pursued, undesirable distribution is simply something that must be tolerated'.[101]

This argument is certainly valid when it comes to states that enjoy a status quo that must be preserved. This includes the general monopoly of force, with human rights

[94] According to Nozick: 'Rights do not determine a social ordering but instead set the constraints within which a social choice is to be made, by excluding certain alternatives, fixing others, and so on'. *Ibid.*, at ix.

[95] *Chember v. Russia*, Appl. no. 7188/03, Judgment of 3 July 2008, para. 77; *Khudyakova v. Russia*, Appl. no. 13476/04, Judgment of 8 January 2009, para. 107.

[96] Weinrib, *supra* note 79, at 340.

[97] Perry, *supra* note 73, at 478.

[98] ECtHR, *Guiso-Gallisay v. Italy*, Appl. no. 58858/00, Judgment of 22 December 2009, para. 85.

[99] ECtHR, *Cyprus v. Turkey*, Appl. no. 25781/94, Judgment of 12 May 2014, Concurring Opinion of Judge Pinto, para. 19.

[100] *Abuyeva*, Appl. no. 27065/05, Judgment of 11 April 2011, paras 214–216.

[101] Posner and Vermeule, 'Transitional Justice as Ordinary Justice', 117 *Harvard Law Review* (2003) 762, at 810.

violations being an exception rather than the rule, and most of the population enjoying a certain level of socio-economic welfare.[102] In these contexts, the restoration of infringed rights serves the ultimate goal of 'maintaining' an established and well-functioning rights system.[103] Because of this, the argument just made is common in other fields, such as tort law, which presuppose a significant level of institutional stability. Although the position holds true for the 'club' of Western Europe democracies over the first decades of implementation of the ECHR, it requires further scrutiny as the Council of Europe expanded to include states affected by armed conflict and other situations of generalized violence.

B *Criticizing the Court's Remedial Practice in Post-conflict Settings*

1 The Flaws of Corrective Justice

Granting reparations in view of corrective justice, however sound it may be in peacetime, contributes little in contexts where the number of affected people reaches hundreds of thousands, even millions. In these contexts, cases in which victims can bring their plight before the Court, successfully proving pecuniary damages and making good their loss, are extremely low. This is a reality that also extends to other regional human rights bodies, such as the Inter-American Court of Human Rights. In this sense, Roht-Arriaza remarks on the 'perceived inequity' when a few victims, generally better educated and belonging to the middle class, 'receive large amounts of compensation while others similarly situated [i.e. poor peasants] receive nothing because they never filed claims'.[104]

This situation cannot be solved simply by seeking to guarantee universal access to reparations under the *restitutio in integrum* formula, given the financial burden this would place on the state.[105] The 'security operations' carried out in Southeastern Turkey since July 2015 over a period of 13 months, for instance, caused the forced displacement of between 355,000 and 500,000 people.[106] If all of them were granted the least amount of compensation for non-pecuniary damages awarded in

[102] Kalmanovitz, 'Corrective Justice versus Social Justice in the Aftermath of War', in M. Bergsmo *et al.* (eds), *Distributive Justice in Transitions* (2010) 71, at 82; Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law', in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights* (1999) 1, at 19–20; Roht-Arriaza, *supra* note 28, at 111; Van der Auweraert, *supra* note 29, at 141.

[103] Kalmanovitz, *supra* note 102, at 79–82; Lamont, 'Justice: Distributive and Corrective', 61 *Philosophy: The Journal of the British Institute of Philosophy* (1941) 3, at 13; Uprimny, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice', 27 *NQHR* (2009) 625, at 630.

[104] Roht-Arriaza, 'Reparations Decisions and Dilemmas', 27 *Hastings International and Comparative Law Review* (2004) 157, at 169.

[105] De Greiff, 'Justice and Reparations', in P. de Greiff (ed.), *The Handbook of Reparations* (2006) 451, at 457.

[106] Office of the High Commissioner for Human Rights (OHCHR), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016* (2017), paras 14, 47.

displacement-related cases (EUR 5,000), when authorities deny victims access to their possessions without compensation and adequate socio-economic relief, the figures would rise considerably. In this hypothetical scenario, which is not very difficult to imagine according to well-documented reports,[107] the total sum would amount to between EUR 1.78 billion and 2.5 billion. This corresponds to approximately between 5.7% and 8% of the budget invested in education in that period (approx. EUR 31.2 billion).[108] Moreover, widespread abuse of power was consistently reported, including disproportionate use of force and lack of proper investigation,[109] which would double or triple the total amount of compensation owed to Internally Displaced Persons (IDPs) according to the sums awarded during the 1990s.[110] If it is true that some 1,200 civilians were killed during that grim period,[111] compensation owed by Turkey would increase by GBP 30 million for non-pecuniary damage *alone*, taking as reference the prices described above (GBP 25,000). If we take the mean of pecuniary *and* non-pecuniary damages imposed on Turkey *per case* during the period 2015–2016 (EUR 99,607),[112] compensation would increase by EUR 119.5 million for the lives lost, without considering the damages inflicted upon the relatives of those killed. This figure alone exceeds the lump sum of EUR 90 million imposed on the defendant in *Cyprus v. Turkey* after several years of occupation.[113]

Therefore, as important as the idea of securing *restitutio in integrum* is, when violence is widespread enough to affect hundreds of thousands, even millions of people, it is impossible to simultaneously satisfy 'the claims of all victims and of other sectors of society that also require the attention of the state'.[114]

2 *The Flaws of Relational Justice*

While we might take for granted that relational justice matters, it does not follow that the only, or the best, way to secure it is by increasing compensation sums when intentional harm is involved. The measures discussed below to achieve accountability,

[107] *Id.*, paras 33, 36–39, 47–48.

[108] Turkey invested around TRY 95 billion on education in 2015 and TRY 111 billion in 2016, with a currency conversion of EUR 1 = TRY 3.3 by that time. See Clark, 'Total Education Expenditure Value of Public Institutions in Turkey from 2013 to 2017', *Statista* (21 April 2020), www.statista.com/statistics/983523/education-expenditures-of-public-institutions-turkey/.

[109] OHCHR, *supra* note 106, paras 9, 19–22, 25, 35, 49–51.

[110] See *supra* text accompanying note 40.

[111] OHCHR, *supra* note 106, paras 2, 9, 19, 23–31.

[112] Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2016: 10th Annual Report of the Committee of Ministers, 2017, at 56, 76, available at www.coe.int/en/web/execution/annual-reports. This figure is established following the 2010 Committee of Ministers' report, where the average award of just satisfaction *per case* is calculated by dividing the total amount of euros awarded against a state in a year by the number of decisions that became final the same year.

[113] ECtHR, *Cyprus v. Turkey*, Application no. 25781/94, Judgment of 12 May 2014, Concurring Opinion of Judge Pinto, para. 58.

[114] De Greiff, *supra* note 105, at 456.

such as criminal prosecutions or truth-seeking, may well be considered to incorporate relational justice requirements.

That said, the very emphasis on relational justice, and deontological ethics more broadly, can be misleading in post-conflict settings. This way of reasoning provides good reasons for *refraining* from doing certain things. The strength and absolute character of the commandment *thou shalt not kill* speaks for itself and provides a strong justification for the absolute prohibition of arbitrary killings by state authorities. However, that same commandment does not equally *compel* someone, not even the authorities, to prevent an innocent person from being hurt by a third party. If the agent has to bear certain burdens to protect another person, she may be exempt from doing so[115] – as established in the *Osman* test with respect to state authorities. Likewise, constraint-based deontological morality says little about positive duties to assist others in need,[116] and, in some cases, even makes a case against any state obligation to do so.[117]

Because of its more salient features, then, this moral framework can easily be overwhelmed in post-conflict settings. It is worth remembering that conflict-related scenarios, like other settings characterized by widespread abuses, leave a trail of damages of such magnitude that 'nobody can possibly be punished' for all of them[118] – let alone damage that can be traced to state misconduct. As explained in Section 2, the indirect effects of armed conflict by themselves represent a severe blow to the standard of living of those affected. Not to mention all the damage caused by legitimate combat and the conduct of non-state actors that, prima facie, cannot be attributed to state irregularities. In these contexts, then, an evaluation that focuses on the legitimacy of the reasons and the proportionality of the means by which authorities undertake their conduct is short-sighted. It easily runs the risk of overlooking bad *states of affairs* that in themselves should be the subject of great moral and legal concern. It also fails to provide a normative justification for the state's positive duties towards those in need after widespread violence.

The Court is not entirely alien to these considerations. For instance, in appalling socio-economic circumstances tantamount to ill-treatment, state responsibility has been activated from a pure *consequentialist* perspective, namely in the absence of 'intentional acts or omissions of public authorities'.[119] The same occurs with wrongdoings that only involve a certain carelessness and insensitivity on the part of authorities in carrying out their ordinary administrative procedures which, nevertheless, lead to

[115] Nagel, *supra* note 92, at 176–177.

[116] 'Traditional non-consequentialist analyses ordinarily maintain that the duty not to harm is stronger than the duty to help even if both requirements are equally burdensome for the agent': Scheffler, *supra* note 87, at 24.

[117] Nozick once famously wrote that: 'Your being *forced* to contribute to another's welfare violates your rights, whereas someone else's not providing you with things you need greatly, including things essential to the protection of your right, does not *itself* violate your rights, even though it avoids making it more difficult for someone else to violate them': Nozick, *supra* note 93, at 30.

[118] C. Offe, *Varieties of Transition: The East European and East German Experience* (1996), at 109.

[119] ECtHR, *N. v. United Kingdom*, Appl. no. 26565/05, Judgment of 27 May of 2008, paras 43–44.

serious socio-economic distress.[120] There is no reason why this consequentialist reasoning, which has been applied in peacetime, should not be given full consideration in cases of widespread violence.

Finally, it is not clear why intentionality, which can be attributed to individuals, is so important in a framework that seeks to hold the state accountable. The rules of state responsibility discussed in scenarios of abuse of power, misuse of force, and in light of due diligence obligations refer to the measures that state authorities must implement to prevent wrongdoing and respond appropriately when it does occur. These rules do not deal with establishing the *mens rea* requirement, or any other category legally relevant from an individual perspective. In this regard, Fikfak's conclusion, that in certain Article 3 cases substantive violations do not lead to greater compensation than procedural, is very illustrative, as it suggests that 'the Court is more concerned about *the process* and how authorities *respond* to a case of ill-treatment than the ill-treatment itself'.[121]

Yet it is unclear why this particular position is immune to the gravitational pull that deontological thinking so forcefully exerts on the Court elsewhere. In the absence of a justification for this, emphasis on relational justice lacks coherence. While the Court recognizes the moral weight of harm that results from the *intentional conduct* of state agents and makes the victim *feel mistreated*,[122] these considerations are set aside when dealing with ill-treatment perpetrated by non-state actors.[123]

3 The Flaws in Securing Deterrence

Lastly, the probability of changing the behaviour of states with a poor human rights record by slightly increasing the amount of compensation for non-pecuniary damages has been challenged. There are many reasons for this. They include the fact that repetitive and systematic abusers, some of them undergoing post-conflict situations, such as Turkey and Russia, internalize predictable violations in domestic budgets, perhaps thinking of compensation 'as a price to be paid' in exchange for not modifying the root causes of abuses.[124] This is not to say that states unequivocally comply in a timely manner with the awards ordered by the Court,[125] especially when the amount granted is considerably high. Turkey, for example, has failed to comply with the order to pay Cyprus approximately EUR 90 million, five years after the *Cyprus v. Turkey* case

[120] ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Judgment of 21 January 2011, at paras 258–264.

[121] Fikfak, *supra* note 9, at 356–357 (emphasis added).

[122] See *supra* text accompanying note 89.

[123] Compare *Kaya*, Appl. no. 22535/93, Judgment of 28 March 2000, paras 113, 114, 138, with *Kılıç*, Appl. no. 22492/93, Judgment of 28 March 2000, para. 105. In both cases, the Court found violations of Articles 2 and 13 ECHR, with an additional finding of ill-treatment in the first (ECHR, art. 3). Despite this, in both cases the amount was fixed at GBP 15,000.

[124] Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights', 29 *EJIL* (2018) 1092, at 1116; Koroteev, *supra* note 8, at 289.

[125] Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 13th Annual Report of the Committee of Ministers, 2019, Appendix 1, at 79–81.

on just satisfaction was issued.[126] This fact may suggest that authorities are regulating the financial burden of the ECtHR's decisions on their budgets,[127] arguably only planning to pay a small sum annually, while refusing to do so when amounts approach hundreds of millions, as with Turkey, or billions, as in *Yukos v. Russia*, a case concerning expropriation of property.[128]

While the possibility of tackling practices of abuse of power and blatant misuse of force is quite low, there is a high risk of providing people in similar circumstances of need with varying resources. Crucially, the Court has already taken some steps to correct the state's behaviour without adjusting the amount of compensation. When authorities fail to comply with their obligation to investigate abuses, the Court has required or recommended investigation pursuant to Article 46 – no longer considering the absence of investigation to be a factor justifying the award of compensation for non-pecuniary damage.[129] The adoption of other non-monetary measures that lead to the clarification of events (i.e. fact-finding mission, dissemination of certain information in judgments) and the pressure on recurring violators via the media and other public channels (i.e. holding public hearings) have also been encouraged to help correct behaviour.[130]

If the analysis made so far is correct, the criticism made in Section 3, concerning the incidence of the qualification of state conduct in the calculation of damages and the limited scope of the duty to make reparation when state responsibility is more remote, should be taken more seriously. Since both practices are not adequately justified by the Court's attempt to secure corrective justice, relational justice and deterrence, the victims' socio-economic circumstances, including unequal access to key resources,

[126] Council of Europe, Supervision of the Execution of the European Court's Judgments, 1362nd meeting, 3–5 December 2019, Ministers' Deputies, (DH): CM/Notes/1362/H46-30–31.

[127] The author wants to thank one of the anonymous reviewers for highlighting this point among many other topics.

[128] For instance, Russia has increased its annual budget 'reserved' for ECHR awards from USD 1,700,000 in 2010, to 7,600,000 in 2016: Fikfak, *supra* note 124, at 1115. During that period, awards against Russia reached an annual total of EUR 7,409,391 (2010); EUR 8,727,199 (2011); EUR 7,150,521 (2012); EUR 4,089,564 (2013); EUR 1,879,542,229 (2014); EUR 4,916,117 (2015); and EUR 7,380,062 (2016). See respectively: Council of Europe, Supervision of the Execution of Judgments of the European Court of Human Rights: 4th Annual Report of the Committee of Ministers, 2010, Appendix 2, at 54; Council of Europe, Supervision of the Execution of Judgments of the European Court of Human Rights: 6th Annual Report of the Committee of Ministers, 2012, Appendix 1, at 59; Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 8th Annual Report of the Committee of Ministers, 2014, Appendix 1, at 57; Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 10th Annual Report of the Committee of Ministers, 2016, Appendix 1, at 76. These data suggest that, leaving aside 2014, when *Yuko v. Russia* was issued, ordering the defendant to pay around EUR 1.9 billion, Russia foresaw an annual budget in 2016 that covered roughly the average amount paid in previous years (EUR 6,612,142). In contrast to the regular payment of these small sums, Russia has so far not paid the compensation established in *Yukos*. For a discussion of this case, see McCarthy, 'The ECtHR's Largest Ever Award for Just Satisfaction Rendered in the Yukos Case', *EJIL: Talk!* (15 August 2014), available at https://www.ejiltalk.org/the-ecthrs-largest-ever-award-for-just-satisfaction-rendered-in-the-yukos-case/.

[129] See *supra* note 46 and accompanying text.

[130] Koroteev, *supra* note 8, at 302.

cannot be ignored. It becomes crucial, then, to seek another basis for determining state responsibility, one that takes into account the socio-economic impact of armed conflict on people. Crucially, what is at stake in post-conflict settings is not to preserve the status quo by sanctioning the occasional misconduct of the state and enforcing the obligation of restoration. It is rather a matter of figuring out how to cope with the socio-economic legacy of widespread abuses and harms bequeathed to the present, perpetrated by a plurality of actors and resulting from armed conflict as such. In these circumstances, the scope of state responsibility needs to be extended beyond the bipolar structure of corrective justice, understanding the duty to make reparation as 'a general social responsibility involving more widespread reasons for action'.[131]

Discussing states where hundreds of thousands, even millions of people are affected by violence, Van der Auweraert stresses that 'it would be irresponsible to spend significant amounts of public funds on reparations without ensuring that they provide the highest possible economic return, for the victims as well as for the broader society'.[132] This is a lesson already learned from some states that experienced post-Communist transitions in Central and Eastern Europe. The German Democratic Republic, Hungary and the former Czechoslovakia relied both on deontological and consequentialist considerations in deciding how the legacy of widespread abuses was going to be solved. Restitution of property, for instance, was not pursued solely for the sake of securing *restitutio in integrum*. Rather, its implementation was an attempt to achieve positive states of affairs in the sense that the returned lands should be used to meet public interest objectives.[133]

5 Towards a Regime of Positive Duties in Post-conflict Settings

As explained in Section 3, the bulk of the Court's approach to state responsibility closely assesses the authorities' conduct over the occurrence of serious abuses in cases involving abuse of power, misuse of force and due diligence obligations. As a result, some victims run the risk of being placed at the periphery of state responsibility. However, as explained below, the Court has also stressed that even if violations can be attributed to 'pure' non-state actors and in other circumstances where the state may not be held responsible for serious violations, obligations to take positive steps to secure rights remain in force.[134] The Court has defined the scope of these positive steps according to the *fair balance principle*; for example, when security reasons legitimately prevent applicants from accessing their property. According to this principle, any

[131] Perry, *supra* note 73, at 450.

[132] Van der Auweraert, *supra* note 29, at 146.

[133] Offe, *supra* note 118, at 125. For a defence of this position in the African context, see Torres, 'Economic and Social Rights, Reparations and the Aftermath of Widespread Violence: The African Human Rights System and Beyond', *HRLR* (2021) 1.

[134] *Dogan and others v. Turkey*, Appl. nos. 8803–8811/02, 8813/02 and 8815–8819/02, Judgment of 29 June 2004, paras 142–143 (hereinafter '*Dogan I*'); *Sargsyan I*, Appl. no. 40167/06, Judgment of 16 June 2015, paras 215 and 234.

restriction on the enjoyment of the individual's rights must strike an equilibrium between their interests and those of society, without imposing a disproportionate burden on the former.[135] The fair balance principle helps to determine the extent to which the state is subject to an implicit positive obligation under the Convention when there is no finding of wrongful conduct upon the occurrence of serious abuses.

A *Defining the Content of Positive Duties in Post-conflict Settings: The Fair Balance Principle*

Two illustrative cases in this regard are *Dogan v. Turkey* and *Sargsyan v. Azerbaijan*. For procedural and factual reasons, in none of the cases were the authorities held responsible for the occurrence of serious abuses during episodes of widespread violence. In *Dogan*, the possibility that violations resulted from general disturbances in the region or could be attributed to the conduct of rebels (PKK) was left open.[136] In *Sargsyan*, the Court did not address charges of human rights violations related to forced displacement and other losses that arose from the armed conflict that took place before 2002, given the lack of jurisdiction *ratione temporis*.[137] In both cases, the Court did not establish that the state was responsible for breaching its duties to respect and secure rights *during* hostilities and generalized violence, but rather for denying the victims access to their possessions in the aftermath – a restriction which was not declared illegal, since it could be justified by the pursuit of general interests (i.e. security reasons).[138] In commenting retrospectively on *Dogan*, the ECtHR was crystal clear that 'the obligation to take alternative measures', including compensation for loss of property, 'does not depend on whether or not the State can be held responsible for the displacement itself'.[139]

Dogan and *Sargsyan* represent an authentic revolution within the Court's framework. Instead of delving into the immorality or illegality of the state's conduct with respect to previous serious violations, the analysis laid bare the pressing states of affairs endured by those affected by widespread violence. In *Dogan*, the Court considered that the applicants' inability to access their village for almost 10 years forced them to live

> in conditions of extreme poverty, with inadequate heating, sanitation and infrastructure. Their situation was compounded by a lack of financial assets, *having received no compensation for deprivation of their possessions*, and the need to seek employment and shelter in overcrowded cities and towns, where unemployment levels and housing facilities have been described as disastrous.[140]

[135] *Sargsyan I*, Appl. no. 40167/06, Judgment of 16 June 2015, para. 220.

[136] *Dogan I*, Appl. nos. 8803–8811/02, 8813/02 and 8815–8819/02, Judgment of 29 June 2004, paras 142–143.

[137] *Sargsyan I*, Appl. no. 40167/06, Judgment of 16 June 2015, para. 215; *Sargsyan II*, Appl. no. 40167/06, Judgment of 12 December 2017, para. 46.

[138] *Dogan I*, Appl. nos. 8803–8811/02, 8813/02 and 8815–8819/02, Judgment of 29 June 2004, paras 148–149; *Sargsyan I*, Appl. no. 40167/06, Judgment of 16 June 2015, paras. 225, 233.

[139] *Sargsyan I*, Appl. no. 40167/06, Judgment of 16 June 2015, para. 234.

[140] *Dogan I*, Appl. nos. 8803–8811/02, 8813/02 and 8815–8819/02, Judgment of 29 June 2004, para. 153 (emphasis added).

Since authorities did not provide applicants with socio-economic goods or 'any funding which would ensure an *adequate standard of living*' during uprooting, the ECtHR held that an 'excessive burden' was placed on them.[141] The authorities thus failed to strike a fair balance 'between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one's possessions'.[142] In other words, had the authorities ensured an adequate standard of living after the displacement of the population, including offering compensation for loss of property, they would not have been found in breach of their obligations under the ECHR.

The path opened by the Court is revolutionary for a second reason. In resorting to the fair balance principle, it undermined the strict correlation between the right to be repaired and the duty to repair. Instead of seeking a zero-sum result between the agent responsible for displacement and those forced to flee, the Court expected the authorities to adopt positive measures to help those affected. In *Sargsyan*, the Court considered that the applicant, like other Armenians who fled during the conflict, did not have access to the socio-economic support that Azerbaijan was providing to its own IDPs. This 'discriminatory practice' could have been avoided by providing them with compensation for loss of property or other measures.[143]

Remarkably, compensation measures for the deprivation of property rights, as italicized in the paragraph quoted above, were initially conceived as a means to address the socio-economic hardship after displacement – not to pursue *restitutio in integrum*. They represent an avenue that allows the state to fulfil positive socio-economic duties in post-conflict settings, paying more attention to the victims' situation than qualifying the authorities' conduct with respect to serious abuses. This departure from strong deontological morality is clear in the Court's decision to resort to the Pinheiro Principles. According to these principles, what matters is the fact that people do not have access to property instead of the level of state involvement in land dispossession.[144] As such, victims of state-led violence, misuse of force and violence perpetrated by 'pure' non-state actors, as well as those affected due to the general circumstances of armed conflict, all stand on the same footing to claim their property.

In these cases, then, the Court envisions a response to generalized violence that goes beyond a short-sighted evaluation of the authorities' misconduct with respect to the occurrence of serious abuses. Regardless of any finding on abuse of power, misuse of force or inobservance of due diligence obligations during violent episodes, if any, the state is obliged to ensure that affected people enjoy an adequate standard of living. Certainly, this is not to say that any socio-economic situation, no matter how undesirable, by itself triggers the responsibility of the state. State responsibility and the duty to make reparation are always linked to the breach of an obligation, be it negative or

[141] *Ibid.*, para. 154 (emphasis added).

[142] *Ibid.*, para. 155.

[143] *Sargsyan I*, Appl. no. 40167/06, Judgment of 16 June 2015, paras 234, 240.

[144] *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, Final Report of the Special Rapporteur, Paulo Sergio Pinheiro, E/CN.4/Sub.2/2005/17, art. 1.2 (hereinafter 'Pinheiro Principles').

positive.[145] The approach discussed here is rather revealing in that, when making this assessment in post-conflict contexts, there is no need to adopt all the assumptions of deontological morality that end up digging so deeply into factors such as the intention with which damage is done. The disproportionate socio-economic burden that armed conflict imposes on people is sufficient to establish state responsibility.

The sound conceptual basis that underlies the work done by the Court, however, contrasts with its 'cautious steps into the execution field'.[146] Neither in the operative part of the judgments, nor under the Article 46 injunction, are the authorities required to ensure an adequate standard of living for those affected. This raises the question of whether more specific reparation orders should be issued in these complex scenarios and, ultimately, what the real scope is of the positive duties defended here.

B *Embodying Positive Duties in the Execution Field*

To address this issue, it is useful to resort to Donald and Speck's distinction between the degrees of 'specificity' and 'prescriptiveness' applied by the Court in judgments that are not entirely declaratory. According to them, '[s]pecificity refers to the degree of detail contained in the indication of particular non-monetary measures' in the judgment.[147] Prescriptiveness is conceptualized as being on a spectrum that ranges from purely *declaratory* judgments, through to *recommendatory* judgments that provide different levels of remedial indication, to pure *prescriptive* judgments that contain directions in the operative part. Donald and Speck also explain that judgments that have a detailed diagnosis of the causes of violations can be considered specific even if they lack recommendations.[148] Under this framework, *Dogan* and *Sargsyan* can be considered *specific* and *recommendatory* judgments. This is the case since the Court provided a complete diagnosis of the root causes of violations and, in *Sargsyan*, also recommended specific measures without writing them down in the operative part or invoking Article 46 ECHR. To the extent that the Court's analysis is persuasive, distinctions as to the exact 'legal status' of its recommendations may become secondary in the implementation phase.[149] By framing things this way, the ECtHR may have achieved a good balance in providing a good diagnosis of the causes of violations, outlining the steps to be taken and waiting to see if the state follows through. 'In order to avoid ill-designed measures', Donald and Speck explain, 'Judges will seek to ascertain, before adopting an Article 46 or pilot judgment, how susceptible the respondent state is likely to be to a directive judgment'.[150]

This cautious approach is crucial when required measures are of an evident socio-economic nature, far beyond the rights expressly recognized in the ECHR. In

[145] The author wants to thank one of the reviewers again for emphasizing this point.

[146] Donald and Speck, 'The European Court of Human Rights' Remedial Practice and Its Impact on the Execution of Judgments', 19 *HRLR* (2019) 83, at 93.

[147] *Ibid.*, at 84.

[148] *Ibid.*, at 85, 103–104.

[149] *Ibid.*, at 104.

[150] *Ibid.*, at 102.

post-conflict settings, reparations only have a meaningful impact 'if they are coordinated with, or are an integral part of, a broader strategy for pro-poor economic growth and development'.[151] This is especially true when it comes to repairing property loss and guaranteeing durable solutions when dealing with uprooting. Williams explains that the restoration of victims' prior property rights is only a precondition for them to enjoy durable solutions.[152] This requires, in turn, development programmes which are holistic in nature, as envisioned in Southeastern Turkey and Nagorno-Karabakh.[153] Otherwise, delivered as one-time payments and isolated from any other measures, reparations are likely to be 'consumed without creating any real long-term change' in the recipients' standard of living.[154]

Therefore, the Court is carefully framing the boundaries within which the Committee of Ministers (CM) and the respondent state can work together to achieve the *result* sought in the judgment, without encroaching on the CM's role under Article 46.[155] If the state is unwilling to adopt the recommended measures, the judgment's ruling remains sound and clear for future cases. To the extent that an adequate standard of living is not guaranteed to those who lost access to their property, including compensation, the state is breaching its obligations under Article 1, Protocol No. 1 to the ECHR.

C *Limitations of the Court's Approach to Positive Duties*

Despite the solid conceptual basis that supports the Court's reasoning and the reasonable steps taken in the execution field, the outcome is somewhat disappointing in light of the arguments made so far. After all, in *Sargsyan* the Court was addressing claims related to an episode of forced displacement that took place almost three decades before, without any consideration of the ongoing socio-economic distress faced by the applicant, who died while the judgment was issued, or the heirs – if there were any shortcomings. While analysing the compensation policy that followed *Dogan*, the Court completely overlooked the obligation to secure an adequate standard of living.[156] Furthermore, if *Dogan* and *Sargsyan* are compared, it is clear that the key insight of approaching compensation as a *means* whose ultimate goal is to achieve an adequate standard of living seems to be lost in translation. These decisions can rather be understood as enforcing abstract entitlements only for their own sake, without any

[151] Van der Auweraert, *supra* note 29, at 146.

[152] R. Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice* (2007), at 50–51.

[153] Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 2000/53: *Armenia*, E/CN.4/2001/5/Add.3, 2000, at 58; Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, *Azerbaijan*, A/HRC/8/6/Add. 2, 2008, at 73.

[154] Roht-Arriaza, *supra* note 28, at 116.

[155] Donald and Speck, *supra* note 146, at 100, 104.

[156] *Icver*, Appl. no. 18888/02, Judgment of 12 January 2006, paras 77–82, 85.

practical consideration other than a half-hearted attempt to bring about *restitutio in integrum* for property-related losses.

Under this perspective, Judge Hajiyev's criticism, that the Court was placing a disproportionate burden on Azerbaijan by recommending massive compensation for loss of property in favour of all who crossed the border, may be well founded. After all, this recommendation may divert resources that are required to cope with the pressing socio-economic demands of Azerbaijan's own IDPs.[157] The consequentialist analysis explained above could have required the allocation of scarce resources to improve the standard of living of those in need within Azerbaijan rather than upholding the *abstract entitlements* of those that crossed the border. If the purpose of the ECtHR is only to recognize the applicant and people in similar circumstances as *rights holders*, without any expectation of alleviating their socio-economic suffering, then the availability of less impactful remedies could have been considered, such as treating the judgment itself as just satisfaction.[158] With this judgment, there is no trace that the Court is securing the highest possible economic return both for victims and the broader society.

The Court's understanding of the state's positive duties is problematic yet for another reason. In post-conflict settings, positive duties appear to be the last resort, relegated only to cases in which more 'serious' traces of state misconduct are missing. This is also manifested when authorities overlook the fair balance principle and the case reaches the stage of fixing the compensation. Given the strong gravitational pull of deontological thinking, these awards are considerably smaller than when more 'serious' wrongdoings are found. In this regard, damages values are two to three times higher when cases involving forced displacement are framed as a result of deliberate and arbitrary eviction by authorities, instead of the impossibility of communities to access their property for legitimate security reasons.[159] This is unfortunate since, as explained, these are cases where IDPs are likely to face similar socio-economic difficulties, using reparation-related resources to cope with daily concerns after uprooting. And it is not clear that invoking the agent's intention to disrespect those who ended up being displaced in order to qualify the conduct as ill-treatment justifies the difference in the compensation awarded.[160] For the reasons stated above, the pursuit of corrective justice and deterrence does not justify such a practice either.

[157] *Sargsyan I*, Appl. no. 40167/06, Judgment of 16 June 2015, paras 239–240; see also *id.* paras. 105–107 (Hajiyev, J, dissenting).

[158] See Kalmanovitz, 'Compensation and Land Restitution in Transitions from War to Peace', in C. López-Guerra and J. Maskivker (eds), *Rationality, Democracy, and Justice: The Legacy of Jon Elster* (2014) 191, at 215.

[159] For a critique of the Court's practice of framing situations of forced displacement as 'return to village cases', rather than as the result of 'the actions of the security forces in Turkey', thereby 'downplaying the nature of the violations', see Kurban, *supra* note 8, at 750.

[160] These findings coincide with those of the empirical study by Altwicker-Hámori, Altwicker and Peters, according to which violations of Article 1, Protocol 1 of the ECHR rank lower than Article 3 violations. Altwicker-Hámori, Altwicker and Peters, *supra* note 14, at 36–37, 40.

6 Conclusion

This article critically examined certain arguments that could justify the Court's emphasis on righting state conduct when it decides the quantum of compensation for non-pecuniary damages and defines the scope of the duty to make reparation in post-conflict settings. Questioning the attempt to secure corrective justice, relational justice and deterrence, the article criticized the adjustment of the amount of damages according to the 'seriousness' of the state's misconduct, as well as the restrictions that hinder victims' access to reparations when state responsibility is more remote.

In so doing, the path has been cleared for taking seriously the distributive consequences on the population that derive from the application of the ECtHR's framework in post-conflict settings. At the individual level, attention should be paid to the use of reparation-related resources by beneficiaries due to the economic deprivation that often accompanies armed conflict. Macro-considerations related to ensuring the highest economic return with the decisions made, both for the sake of victims and the whole of society, must also be taken into account. Instead of being an end in itself, to be sought only for the sake of corrective justice, reparations should be understood as a tool that should promote positive distributive outcomes post-conflict – meaning the enhancement of people's standard of living.

If the arguments are persuasive, considerations of equity, scarcity of resources and striking a fair balance between the interests of the applicant and those of the whole society should guide how to address the aftermath of widespread violence in the first place. This 'distributive mindset' can guide the Court's reasoning without relying on the lack of findings of more 'serious' violations.