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Economic and Social Rights, Reparations and the Aftermath of Widespread Violence: The African Human Rights System and Beyond

Felix E. Torres*

ABSTRACT

This article examines the dual responsibility of state authorities to repair past abuses and guarantee economic and social rights after episodes of widespread violence according to the jurisprudence of African human rights bodies. Two alternative frameworks underlying the practice of African bodies and human rights law more broadly are discussed. The first portrays the state as a threat to the individual, responsible for redressing the consequences of violations in breach of duties to respect and protect rights. The second understands the state as an active guarantor of rights in the aftermath of widespread abuses, responsible for improving the well-being of people affected and not affected by violence. In light of the possibilities and limitations that arise from both approaches in the African context, the article advocates the second.

KEYWORDS: economic and social rights, positive duties, reparations, post-conflict, African human rights system, armed conflict

1. INTRODUCTION

The African Commission on Human and Peoples' Rights (hereinafter the ACHPR or 'the Commission') has consistently recognised the importance of institutionalising a human rights-based approach to armed conflict and other scenarios of widespread violence, including conflict resolution and (post)conflict situations.¹ Considering the

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

'ongoing conflict situations affecting various parts of Africa, as well as the consistent reports of [widespread] violence being faced by civilian populations'² who continue to seek reparation,³ in 2013 and 2016, the Commission decided to entrust two of its members with the preparation of studies on these matters. The purpose of these reports, which were adopted in 2019 and made public only recently,⁴ is to begin developing a comprehensive framework to strengthen the 'role of the Commission in addressing human rights issues in conflict situations.'⁵ In addition, the ACHPR highlighted that people engulfed by widespread violence are 'disproportionately affected by a failure of the state to *respect, protect and fulfil* their economic and social rights (ESR) (emphasis added).⁶ The Commission took note that the guarantee of ESR continues to be marginalised despite their enshrinement in regional instruments, thereby 'excluding the majority of Africans from the full enjoyment of human rights.'⁷ Taken together, both concerns draw attention on the need to explore different avenues to ensure ESR after episodes of generalised violence, including the role of reparation measures in pursuing this goal. Or, as Magarrell suggested with reference to another context (i.e. Peru), what is required is 'an exploration of the intersection of legitimate claims upon the state to redress specific wrongs from the *past* and to honour social and economic rights more fully in the *present*' (emphasis added).⁸

This article seeks to contribute to the discussion by suggesting two frameworks that may be adopted in the aftermath of widespread violence taking into account the relevant developments by the African Commission, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC or 'the African Committee') and the African Court on Human and Peoples' Rights (ACtHPR or 'the African Court'). It contends that a response to the Commission's concerns about how to enforce ESR effectively in these contexts, including the role that reparations should play, is already there, latent in key judgments issued by African bodies. What is required is the elucidation of the rationale and moral frameworks underlying these judgements in order to outline an answer to the challenges posed by the Commission.

The discussion of this issue is placed in the broader context of international and regional human rights law, an inevitable exercise considering the generous reference of African human rights instruments⁹ and bodies¹⁰ to other sources and actors of

2 Resolution on Human Rights in Conflict Situations, ACHPR/Res. 332 (2016).

3 Resolution on the Fight against Impunity in Africa, ACHPR/Res. 344 (2016).

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

5 Resolution on Human Rights in Conflict Situations, *supra* n 1.

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

7 *Ibid.*

8 Magarrell, 'Reparations for Massive or Widespread Human Rights Violations: Sorting out Claims for Reparations and the Struggle for Social Justice' (2003) 22 *Windsor Yearbook of Access to Justice* 85 at 88.

9 Articles 60 and 61 of the African Charter on Human and Peoples' Rights; Article 46 of the African Charter on the Rights and Welfare of the Child; Article 7 of the Protocol on the Establishment of an African Court on Human and Peoples' Rights.

10 See, for instance, 155/96, *Social and Economic Rights Action Centre and Others (SERAC) v Nigeria*, 15th Annual Activity Report of the ACHPR (2001), at paras 63–7; 1/2012, *Frank David Omary and Others v Tanzania* (Admissibility), 28 March 2014, 1 AfCLR 358, at para 76; 13/2011, *Beneficiaries of Late Norbert*

international law. In this regard, the work of the European Court of Human Rights (ECtHR) has been used to adjudicate some of the cases in which the African Commission has dealt with the legacy of widespread violence.¹¹ It has also helped shape the Commission's overall approach to the use of force in these contexts.¹² Likewise, the jurisprudence of the Inter-American Court of Human Rights (IACtHR) on due diligence obligations and its remedial practice have played a key role in certain cases of the Commission,¹³ the Committee¹⁴ and in the consolidation of the African Court's case-law on reparations.¹⁵ Last but not least, the work of the Committee on Economic, Social and Cultural Rights (ESCR Committee) has had a cross-cutting impact on the entire African human rights system. For example, the African Commission has used the ESCR Committee's General Comments in the aftermath of widespread violence.¹⁶ Furthermore, the very understanding of the scope of state responsibility structured in terms of duties to *respect*, *protect* and *fulfil*, as interpreted by the ESCR Committee, informs the African Commission's jurisprudence¹⁷ and working documents and guidelines,¹⁸ as well as the practice of the African Committee.¹⁹

Hence, to a certain extent, what is at stake here is not just the responsibility of states to address previous wrongdoings and to honour ESR more fully in the present in the African context, but also the very possibility of articulating a satisfactory response from international law. To address this challenge, this article is organised as follows. The second section explores two moral and legal frameworks to deal with the aftermath of widespread violence. In a nutshell, the first understands the state as a potential threat to the individual. It focuses on evaluating the *conduct* of authorities regarding the occurrence of past violations in terms of their duties to *respect* and *protect* rights and privileges the duty to make reparation in order to wipe out the consequences of wrongdoing. The alternative portrays the state as an active guarantor of rights after

Zongo and Others v Burkina Faso (Merits), 28 March 2014, 1 AfCLR 219, at paras 114, 157, 161, 170–1, 180, 187–8.

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

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

13 *NGO Forum*, supra n 11 at paras 144–6; *COHRE*, supra n 11 at para 148.

14 3/2015, *Minority Rights Group International (MRGI) and others v Mauritania*, 30th Ordinary Session of the ACERWC, 15 December 2017, at para 52.

15 013/2011, *Beneficiaries of Late Norbert Zongo and others v Burkina Faso* (Reparations), 5 June 2015, 1 AfCLR, at paras 47, 55, 61.

16 *COHRE*, supra n 11 at paras 209–10.

17 368/09, *Abdel Hadi and Others v Republic of Sudan*, 54th Ordinary Session of the ACHPR, 22 October 2013, at paras 91–2; 272/03, *Association of Victims of Post Electoral Violence and Interights v Cameroon*, 46th Ordinary Session of the ACHPR, 11 November 2009, at paras 87–8.

18 *Guidelines for National Periodic Reports*, 2nd Annual Activity Report of the ACHPR (1988–9); *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Principles and Guidelines)*, 48th Ordinary Session of the ACHPR, November 2010.

19 1/2012, *The Centre for Human Rights (University of Pretoria) and others v Senegal*, 22th Ordinary Session of the ACERWC, 15 April 2014, at para 47; 2/2009, *Institute for Human Rights and Development in Africa (IHRDA) v Kenya*, ACERWC, 22 March 2011, at para 58; 2/2015, *The Institute for Human Rights and Development in Africa (IHRDA) v Cameroon*, 31st Ordinary Session of the ACERWC, May 2018, at para 44.

generalised violence, responsible for taking positive action against want and need. Duties to fulfil ESR are foregrounded to address existing socio-economic deficiencies regardless of the conduct that originated them. These frameworks will be explored with recourse to legal theory and moral thought, as embodied in the work of the ECtHR, the IACtHR and the ESCR Committee. The third section will analyse key cases of widespread violence decided by the African Commission and the African Committee in light of previously explored frameworks. This serves to point out the limitations that arise when adopting the framework that considers the state mainly as the aggressor from whom the individual requires protection. The fourth section delves into the question of reparations, exploring its basic doctrinal meaning as well as some of the features that emerge from its practice in the case-law of the ECtHR, the IACtHR and the ACtHPR. This is a first step to determine some of the consequences that may stem from the award of full reparation when it comes to guaranteeing ESR in the African context. In light of the limitations identified in the analysis, the fourth section examines different remedial alternatives in the practice of the African Commission and Committee, which have the more modest aim of improving the well-being of people affected by human rights violations. The fifth and final section explores some of the distributive tensions that arise when duties to fulfil ESR come to the fore to address existing deficiencies and highlights the importance of having a priority-setting framework to weigh the interests of different groups, affected and unaffected by violence. The final decision on whether to implement some reparation measures in the aftermath of generalised violence depends on this priority-setting exercise.

2. TWO FRAMEWORKS TO ADDRESS THE AFTERMATH OF WIDESPREAD VIOLENCE

A. The State as a Potential Threat to the Individual: Privileging Duties to *Respect* and *Protect* after Widespread Violence

It is well known that the traditional understanding of human rights law tends to view the state primarily as a potential threat to the individual. Rights are thus understood in negative terms, as people's non-interference claims mainly against authorities and, secondly, against other individuals.²⁰ Concomitant with this understanding of rights, there is a particular ordering of state duties. As if there were a 'one-to-one pairing between kinds of rights and duties', state duties are understood first in terms of *respecting* rights and then in terms of *protecting* rights from violations by third parties.²¹ While arbitrary violations resulting from official conduct are utterly unacceptable, third-party violations provide authorities with a more flexible range of manoeuvre. In these cases, duties boil down to taking reasonable steps to prevent abuses from happening and investigating them after their occurrence. The foregoing to avoid any suspicion that authorities authorised, required or were permissive with abuses.²² State duties to make

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

21 Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2020) at 52—criticising this scheme.

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

‘positive provision against want and need’ fall down the ladder of legal significance and are often not seen as belonging to the realm of fundamental human rights.²³ According to Fredman, under this approach, ‘rights are characterised as *restraints* and social provision or welfare as *policy*’ (emphasis added).²⁴

This understanding of human rights law explains important features of the practice of the ECtHR and IACtHR, on which African bodies have increasingly relied. These include a particular concern when abuses have been officially perpetrated, sponsored or tolerated, with the ECtHR and IACtHR decrying that these events undermine the rule of law and are incompatible with a democratic society.²⁵ Moving down the ladder of legal significance, both courts are more flexible when it comes to abuses perpetrated by third parties. Whether through the *Osman Test*²⁶ or the concept of *due diligence obligations*,²⁷ the establishment of state responsibility is reserved for cases in which authorities did not take reasonable measures to prevent foreseeable risks, without being considered *prima facie* responsible for violations. In episodes of widespread violence, the two courts have considered contextual elements when applying this reasoning (for example with respect to Turkey and to Colombia), seeking to tackle practices of official involvement or tolerance of abuses.²⁸ This is why investigations after violations are crucial, as they contribute to the maintenance of ‘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.’²⁹

Deontological ethics explain well this understanding of human rights law. The main characteristic of deontological morality is that it highlights the inherent rightfulness or wrongfulness of conduct, rather than the goodness or badness of states of affairs.³⁰ The moral appeal and ultimate strength of these views is that they protect fundamental interests that cannot be sacrificed simply as a means to an end, even if the sacrifice produces a greater good. This is typically exemplified by the absolute commandment not to deliberately kill or harm an innocent person, even though doing so will prevent further death and harm. Crucially for this moral view, the reasons that require an agent to abstain from certain conduct do not equally oblige her to prevent another person from being affected by the same conduct at the hands of another.³¹ If the agent has to incur certain charges to protect another person, she may be exempt from doing so—just like due diligence obligations to protect. As Nagel explains, deontological ethics ‘require

23 Fredman, ‘Providing Equality: Substantive Equality and the Positive Duty to Provide’ (2005) 21 *South African Journal on Human Rights* 164 at 166.

24 *Ibid.*

25 *Kılıç v Turkey* Application No 22492/93, Merits and Just Satisfaction, 28 March 2000, at paras 71–5; *Kurt v Turkey* Application No 24276/94, Merits and Just Satisfaction, 25 May 1998, at para 129; *Case of Velásquez Rodríguez v Honduras* IACtHR Series C 4 (1988) at para 158; *Case of the Gómez-Paquiayauri Brothers v Peru* IACtHR Series C 110 (2004) at paras 88–9.

26 *Osman v the United Kingdom* Application No 23452/94, Merits, 28 October 1998, at para 116.

27 *Velásquez-Rodríguez*, supra n 25 at para 172.

28 *Kılıç*, supra n 25; *Case of the Pueblo Bello Massacre v Colombia* IACtHR Series 140 (2006) at paras 125–31.

29 *Mehmet Senturk and Bekir Senturk v Turkey* Application No 13423/09, Merits and Just Satisfaction, 9 April 2013, at para 101.

30 Williams, ‘Consequentialism and Integrity’ in Scheffler (ed), *Consequentialism and its Critics* (1998) 20 at 20–1.

31 Nagel, *The View from Nowhere* (1986) at 176–7.

that we avoid murder at all costs, not that we prevent it at all costs.’³² Because of this, a harm that an agent intends and does has a greater moral weight than an equivalent harm that an agent does but simply anticipated or should have anticipated. By the same logic, any harm that an agent does carries far more moral weight than an equivalent harm an agent merely allows to happen.³³ The corollary of this reasoning is, again, that positive duties to provide against want and need are placed at the bottom rung of the ladder of moral importance.³⁴ Dire socio-economic states of affairs have little traction unless they can be attributed to intentional wrongdoing or reckless attitude, typically on the part of state agents or other actors for whom authorities are held to account.³⁵ Perhaps because of this, Sen considers that ‘it is obvious that the constraint-based deontological approach can hardly do justice to those rights associated with positive freedom.’³⁶

Not only does deontological thinking provide strong agent-based restrictions and weak reasons to help someone in need, but it also shapes the claims that agents are entitled to make once restrictions have been violated. The claim of someone who is in need because she was unjustly harmed carries greater moral weight than the claim of someone who is equally in need but has not been wronged.³⁷ Pablo de Greiff explains this with the difference between people affected by natural disasters and people affected by widespread violence. Although the two groups may experience similar difficulties, the harm that affects the first only represents a setback for their *interests*; it is not, as in the case of victims, the product of wrongdoing.³⁸ In light of this, it emerges that this approach is concerned about the people who were *wronged*, not simply the ones who are *badly off*—with wrongdoing understood in restrictive terms as the ‘unwelcome and disruptive’ interference in people’s autonomy.³⁹

This understanding of the individual-state relationship is very common after episodes of generalised violence. It informs the jurisprudence originally developed by the ECtHR in south-east Turkey,⁴⁰ as well as the work of the Inter-American Commission during the period of dictatorships in the region and, subsequently, the position of the IACtHR concerning countries affected by armed conflict (Colombia, Suriname, Guatemala).⁴¹ Ssenyonjo explains that the African Commission has

32 Nagel, *Mortal Questions* (1979) at 62.

33 Pogge, *Realizing Rawls* (1989) at 44.

34 Scheffler, *The Rejection of Consequentialism* (1982) at 24; Nozick, *Anarchy, State and Utopia* (1974) at 30.

35 Pogge, *supra* n 22 at 47–8.

36 Sen, ‘Rights and Agency’ in Scheffler (ed) n 30 187 at 190.

37 Pogge, *supra* n 22 at 47–8.

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

39 Kalmanotivz, ‘Compensation and Land Restitution in Transitions from War to Peace’ in López-Guerra and Maskivker (eds), *Rationality, Democracy, and Justice: The Legacy of Jon Elster* (2014) 191 at 194.

40 See generally Buckley, ‘The European Convention on Human Rights and the Right to Life in Turkey’ (2001) 1 *Human Rights Law Review* 35; Reidy et al., ‘Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey’ (1997) 15 *Netherlands Quarterly of Human Rights* 161; Torres, ‘Reparations: What for? Developing State Positive Duties to Address Socio-Economic Harms in (Post) Conflict Settings Through the European Court of Human Rights’ *European Journal of International Law* (forthcoming).

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

traditionally embraced the view of the state as a threat to the individual, in part 'because most African states were for a long time under a dictatorship where violations of civil and political rights were more widely reported'.⁴² As will be discussed in the third section, this understanding of the state-individual relationship has had a major influence on the neglect of ESR after widespread violence by the Commission.

B. The State as an Active Guarantor of Rights after Widespread Violence: Privileging Duties to *fulfil* Economic and Social Rights

There is a second approach to the relationship between the state and the individual after generalised violence. According to it, the state is portrayed as an active guarantor of rights after serious abuses, with the duty to take positive action against want and need becoming central. The legacy of generalised violence is addressed not so much in terms of redressing the consequences of specific violations attributed to the state, but in terms of positive obligations to ensure the conditions that allow affected persons to continue with their lives.⁴³ This implies weighing the burdens that violence and other social ills, such as poverty and discrimination, impose on people, seeking to achieve a balance that shows equal concern for all and makes 'economic sense for the common good'.⁴⁴ This framework, which has been suggested in Sudan, requires that the current level of rights enjoyment of those affected by violence be addressed in the context of the claims of other disadvantaged people, establishing priorities in terms of ESR satisfaction given the availability of resources.⁴⁵

An alternative ethical theory is at stake here, one that allows a direct grasp of urgent socio-economic states of affairs that need to be improved after abuses, regardless of how they occurred. Social scientists and philosophers have seen *consequentialism* as a way to address the legacy of deep and systematic human rights violations,⁴⁶ in some cases, in societies in transition from communism to capitalism in Eastern Europe.⁴⁷ Scholars working on social justice issues, such as Sen,⁴⁸ and more specifically, ESR law, such as Bilchitz,⁴⁹ have also turned to consequentialism to support their approaches. In contrast to deontological ethics, which emphasises the intrinsic rightfulness or wrongfulness of conducts, consequentialism focuses on the goodness or badness of states of affairs. It privileges the decision that achieves the best overall outcome, judged from an impersonal point of view which attaches equal importance to the interests of all.⁵⁰ When deciding what is the best overall result, the distribution of people's

42 Ssenyonjo, 'The Development of Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights' (2015) 4 *International Human Rights Law Review* 147 at 154.

43 Correa, *Integrating Development and Reparations for Victims of Massive Crimes* (2014) at 6.

44 *Ibid.* at 8.

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

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

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

48 Sen, *supra* n 36 at 190–1.

49 Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) at 66.

50 Scheffler, 'Introduction' in Scheffler (ed) n 30 1, at 1.

benefits and burdens is considered under different arrangements.⁵¹ This assessment takes into account efficiency in decision-making since, as Elster states when referring to (post)conflict societies, the bigger the ‘pie’, the easier it is to distribute it among beneficiaries.⁵² Consequentialism also gives value to the situation of disadvantaged people, whose interests should outweigh those of the better-off when adding and balancing the interests of all. The reason for this is to avoid sacrificing the fundamental interests of the disadvantaged to achieve non-essential gains for the majority.⁵³

Consequentialism underlies to some extent the interpretation of the ICESCR by the ESCR Committee, whose work, as mentioned, has taken root in the jurisprudence of African bodies. In concluding observations issued after episodes of generalised violence, the ESCR Committee has made it clear that authorities must improve ‘the efficiency of economic and social programmes’,⁵⁴ creating the conditions ‘leading to a higher number of people’ enjoying ESR (emphasis added).⁵⁵ These recommendations go hand in hand with the caveat, incorporated in General Comment No. 20, that efficiency calculation must be socially just and avoid the reproduction of patterns of marginalisation.⁵⁶ The ESCR Committee is of the view that burdens and benefits must be carefully distributed after widespread violence to level the playing field in favour of traditionally disadvantaged people. This is way it recommends, for instance, removing the ‘disproportionate burden of unpaid domestic and care work’ (emphasis added) that displaced women often endure after widespread violence.⁵⁷ In balancing the interests of different groups, the ESCR Committee certainly considers the situation of people who saw their lives negatively affected by violence, but this is always done in conjunction with the situation of other disadvantaged people with whom they share their plight.⁵⁸ This means that the Committee does not attach particular importance to how social shortcomings occurred. It rather stresses the imperative of improving people’s well-being, thus blurring the deontologically oriented distinction between people who have been *wronged* and people who are simply *badly off*.

To sum up this section, it is clear that after episodes of widespread violence authorities find themselves at the junction of legitimate claims to redress specific wrongs from the past and to honour ESR more fully in the present. Deontologically oriented human rights law privileges the understanding of the state as the *aggressor* responsible for previous abuses, highlights the fact that the individual has been *wronged* and underscores the retrospective assessment of *misconduct*, especially that of authorities in terms of duties

51 Sen, *supra* n 36 at 190.

52 Elster, ‘Land, Justice and Peace’ in Bergsmo et al. (eds) *Distributive Justice in Transitions* (2010) 15 at 20

53 Scheffler, *supra* n 34 at 72–4.

54 Committee on ESCR, Concluding observation (CO) on Colombia, 28 December 1995, E/C.12/1995/12, at para 21.

55 Committee on ESCR, CO on the Central African Republic, 4 May 2018, E/C.12/CAF/CO/1, at para 38(b); CO on Azerbaijan, 22 December 1997, E/C.12/1/Add.20, at para 34.

56 Committee on ESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para 2 of the ICESCR), 2 July 2009, at paras 1 and 38.

57 Committee on ESCR, CO on Ukraine, 6 March 2020, E/C.12/UKR/CO/7, at para 16.

58 Committee on ESCR, Colombia, *supra* n 54 at 22; Azerbaijan, *supra* n 55 at 24, 37; CO on the Democratic Republic of the Congo, 16 December 2009, E/C.12/COD/CO/4, at paras 27–8; CO on Kenya, 1 December 2008, E/C.12/KEN/CO/1, at para 34; CO on Angola, 15 July 2016, E/C.12/AGO/CO/4–5, at para 44.

to *respect* and *protect*. Consequentialist oriented human rights law portrays the state as an *active guarantor* of rights after generalised violence, highlights duties to *fulfil* ESR and focuses on *how badly-off* people *currently are* more than in previous misconduct. It is between these two extremes that African human rights bodies have begun to address the legacy of widespread violence. While the African Commission has taken a strong grip on the first framework, the African Committee has opted for the latter.

3. THE TWO FRAMEWORKS APPLIED IN THE AFRICAN CONTEXT

A. The African Commission: The State as a Threat to the Individual - The Neglect of Economic and Social Rights after Widespread Violence

Human Rights NGO Forum v Zimbabwe dealt with the situation of civil strife that followed the 2000 Constitutional Referendum, where abuses perpetrated by the state security forces and proxy militias were reported, as well as generalised violence that affected different sectors of the population. Plaintiffs alleged violations of civil and political rights and ESR, including farm invasions by war veterans and landless peasants, burning and looting of homes and businesses in rural and urban areas, the disruption of education and health services, and forced displacement.⁵⁹

In addressing these claims, the Commission adopted the 'state terrorism' framework,⁶⁰ which is to say, the authorities' supposed involvement in rights violations directly or, given their non-compliance with due diligence obligations to prevent and investigate the conduct of non-state actors, indirectly. After a lengthy discussion on state duties with regards to non-state actors inspired by the IACtHR and ECtHR's case-law, the African Commission concluded that the authorities' complicity with proxy militias was not demonstrated,⁶¹ dismissing most claims against the state.

By dedicating most of its analysis to assessing compliance with these obligations, the Commission's deontological insights were laid bare. The evaluation of the intrinsic rightfulness or wrongfulness of the authorities' conduct in terms of respecting and protecting the individual from illegitimate interference left in the background the assessment of positive duties in the field of ESR. The finding that people were not *wronged* in circumstances that triggered state responsibility was the end of the story and the very fact that many people were *badly off* socio-economically after widespread violence did not raise any concern on the part of the Commission. This is difficult to understand given that the plaintiffs alleged ESR violations, including the disruption of education and health services, as well as the plight of internally displaced persons. While the neglect of duties to make positive provision against want and need makes sense from a deontological point of view, it is regrettable that the Commission stuck to it in this case. Although the tripartite structure of duties was expressly incorporated,⁶² previous

59 *NGO Forum*, supra n 11 at paras 3–11.

60 *Ibid.* at paras 73–8, 137.

61 *Ibid.* at para 210.

62 *Ibid.* at paras 151–3.

case-law⁶³ and internal guidelines and working documents⁶⁴ concerning duties to provide basic ESR and facilitate them progressively were conspicuous by their absence.

The argument is not to put unfeasible and naive expectations on the Commission to resolve the colonial legacy of disputes related to unequal access to land, education and other social services that still affect large segments of the population.⁶⁵ Assuming that dealing with ESR is tantamount to seeking structural change can be misleading and loses sight of their pragmatic nature and flexibility, including 'the acceptance that states' ability to fully realise ESR will be limited by resource availability.'⁶⁶ Specific situations such as the interruption of education and health services due to the forced displacement of approximately 10,000 rural inhabitants⁶⁷ could have been addressed by referring, for instance, to the African Charter on the Rights and Welfare of the Child (Article 11(3)) to interpret the right to education enshrined in the African Charter (Article 17). As the African Committee stressed in a later judgment, even in contexts affected by the greatest violence and the most pressing social demands, authorities are called upon to fulfil ESR: if 'a State closes a school, it has to make other options available, however makeshift or problematic these alternative arrangements might be.'⁶⁸

Furthermore, there is already enough jurisprudence by the African Committee defining the scope of ESR-related duties in peacetime that exemplifies how obligations to fulfil can be tailored to address the challenges that arise as a result of widespread violence. Reflecting on the aggravated risks to the health of children living in the streets, slums and overcrowded and underserved camps, the Committee affirmed that the full implementation of the right to health (Article 12 (2) (g)) requires prioritising the provision of health services in the communities where children live.⁶⁹ There is nothing in this argument that excludes its application to displaced children affected by post-electoral violence in Zimbabwe. Despite the existence of limitations that prevent the full realisation of rights, either in times of peace or after generalised violence, duties to fulfil ESR remain in force. This requires that authorities act as quickly and diligently as possible, setting priorities in light of the different level of urgency of the interests at stake. This is the rationale behind the concluding observations of the ESCR Committee discussed above, where duties towards internally displaced persons and demobilised children were framed in the same terms as obligations towards homeless people and children living in the streets when it came to meeting basic needs.⁷⁰ However, none of this was explored in *NGO Forum* due to the Commission's emphasis on portraying the state as the aggressor from whom the individual requires protection. Taking ESR

63 25/89, 47/90, 56/91 and 100/93, *Free Legal Assistance Group and Others (FLAG) v Zaire*, 9th Annual Activity Report of the ACHPR (1995–1996), at para 47; 241/2001, *Purohit and Moore v The Gambia*, 16th Annual Activity Report of the ACHPR (2002–2003), at para 84.

64 *Guidelines Periodic Reports*, supra n 18.

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

66 Schmid and Nolan, "'Do no harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 *International Journal of Transitional Justice* 362 at 379.

67 *NGO Forum*, supra n 11 at para 6.

68 1/2005, *Hunsungule and Others v. Uganda*, 21st Ordinary Session of the ACERWC, 15 April 2013, at para 66.

69 *IHRDA v Kenya*, supra n 19 at para 61.

70 *Supra* notes 54 and 55.

seriously in Zimbabwe would have required to 'move beyond the categorical offending state-victimised individual paradigm and present a more nuanced approach that takes cognisance of other factors that impinge on social and economic rights.'⁷¹

Similar neglect of ESR occurred in *COHRE*, where the Commission dealt with the widespread and systematic violations of human rights that stemmed from the 2003 Darfur War.⁷² Claimants alleged that Sudan was responsible for extrajudicial executions, trials without due process guarantees and large-scale killings. Charges of forced eviction and displacement were also raised, along with indiscriminate bombings of populated areas that destroyed public facilities, property, markets and water wells, especially targeting some black African tribes.⁷³ Sudan's responsibility was alleged due to the activities of its security forces, proxy militias (i.e. *Janjaweed*) and the lack of adequate criminal investigations.⁷⁴

As in *NGO Forum*, the Commission devoted most of its reasoning to assessing the existence of wrongdoing regarding duties to *respect* and *protect* civil and political rights, resorting to the framework that regulates the use of force in the conduct of security operations developed by the ECtHR and recently gathered in the Commission's General Comment No. 3.⁷⁵ Given the emphasis of this framework on tackling practices of arbitrary use of force and preventing illegitimate inferences in people's lives, violations of ESR were analysed in a few paragraphs, again from the perspective of state duties to *respect* and *protect*. After mentioning the tripartite structure of obligations and referring to the ESCR Committee's General Comment No. 14, Sudan was held responsible for 'the destruction of homes, livestock, and farms as well as the poisoning of water sources', exposing victims to serious health risks.⁷⁶ The right of black African tribes to their economic, social and cultural development was violated as a consequence of military attacks, as well as children's right to education due to forced displacement.⁷⁷

At first glance, *COHRE* seems to be a strong case demonstrating that the paradigm of state terrorism is well suited to determine state duties in the wake of widespread violence when it also acknowledges socio-economic wrongs caused by abuse of power. As in this case, most of the abuses were attributed to the state's *deliberate conduct* against the communities from which the two main rebel groups originated,⁷⁸ the emphasis on duties to *respect* and *protect* seems appropriate. However, it can be misleading to reduce the situation of widespread violence in the region to state-led action. Violence between different armed actors, as well as the activities of rebel groups and foreign actors, must also be considered,⁷⁹ especially when it undermines the population's ability to provide their means of subsistence.⁸⁰ For instance, in Greater Equatoria, incursions by the Ugandan Lord's Resistance Army (LRA) displaced persons, destroyed

71 Muvingi, *supra* n 65 at 178.

72 *Supra* n 11.

73 *Ibid.* at para 3.

74 *Ibid.* at paras 8, 15, 11 and 112.

75 *Supra* n 12.

76 *COHRE*, *supra* n 11 at para 212.

77 *Ibid.* at para 224.

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

79 *Ibid.* at paras 534–7.

80 Samar, *supra* note 45 at para 64.

livelihoods and hampered humanitarian operations.⁸¹ This happened in a context of protracted clashes between different ethnic groups who have been armed for decades and threatened to destabilise parts of the south.⁸² This full picture explains that the incipient basic socio-economic infrastructure of rural areas was devastated, as well as hospitals, schools and police stations in several villages, many of them abandoned and destroyed.⁸³ It also accounts for the scope of widespread violence and the magnitude of forced displacement in the region. In the most affected sub-region, West Darfur, half of the population was affected by violence, with the vast majority becoming internally displaced—a pattern that reproduces in the whole Darfur.⁸⁴ In sum, the ESR of the population were encroached or severely jeopardised by a trail of violence that cannot be reduced to the state's duties to respect rights and protect them from the action of non-state actors.

In a context of mass destruction such as this, it may be more appropriate to foreground positive duties against want and need, instead of relegating them to the last rung of the scale of legal and moral importance that governs deontologically oriented human rights law. By privileging state duties in terms of ensuring non-interference in individual affairs, violations of ESR were not only explored in much less detail than civil and political rights abuses but were interpreted in terms of failure to respect and protect rights. In so doing, the Commission ended up lacking a solid basis to address urgent states of affairs that needed to be improved, even though they could not be clearly attributed to prior misconduct by the state. This is the case of socio-economic harms resulting from the conduct of rebel groups, foreign actors, the civilian population and the very dynamics of war, which were vaguely recognised by the Commission without a clear account of the responsibility of the authorities in the subject.⁸⁵

This short-sighted approach is also problematic because certain socio-economic wrongs are only visible through the lens of the state as an active guarantor of rights, such as the *Availability, Accessibility, Acceptability* and *Quality* of health services.⁸⁶ In a context of widespread sexual violence taking place in plain sight, recognised by the Commission itself,⁸⁷ it is disappointing that the emphasis on duties to respect and protect is made at the expense of evaluating the authorities' effectiveness in the provision of treatment and health services to victims of sexual violence. The first Independent Expert on the situation of human rights in Sudan found that burdensome administrative procedures prevented many victims to access health services⁸⁸—a situation that passed well under the Commission's radar, despite its awareness of reports on the subject.⁸⁹

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

82 *Ibid.* at para 9.

83 Cassese, *supra* n 78 at para 236.

84 *Ibid.* at para 229.

85 COHRE, *supra* n 11 at paras 180, 182, 185 and 194.

86 Committee on ESCR, General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, at para 12.

87 COHRE, *supra* n 11 at para 178.

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

89 COHRE, *supra* n 11 at paras 81–85.

B. The African Committee: The State as an Active Guarantor of Rights - Addressing Economic and Social Rights in the Aftermath of Abuses

Hunsungule v. Uganda is a landmark case concerning the protection of ESR in the aftermath of widespread abuses. It is the first ruling by a regional human rights body to directly address ESR in these contexts, allowing to shape duties to fulfil and consider issues related to resource allocation and priority-setting. As a matter of context, it is crucial to highlight that the state was not the perpetrator responsible for most of the abuses. In Uganda, rebel groups that challenged the central government⁹⁰ and tribal groups⁹¹ were largely responsible for the damage caused to the population. Although the African Committee carried out a brief evaluation to determine whether the state violated IHL by indiscriminately attacking school facilities or using them for military purposes,⁹² the analysis did not revolve around compliance with duties to respect rights and protect them from militias with connections to state security forces. On the contrary, assessment of state responsibility focused on duties to protect against rebels that attacked civilians,⁹³ along with the duty to fulfil ESR in a situation in which the state itself did not plunge the population into socio-economic deprivation.⁹⁴ To put it simply, the state looked like an *active guarantor* that sought to secure ESR in the face of restrictions posed by rebels.⁹⁵

This approach allowed the Committee to assess how the authorities met their positive obligations to fulfil autonomously, this is, independently of any findings regarding compliance with duties to respect and protect over the occurrence of abuses. Thus, in stark contrast with *NGO Forum* and *COHRE*, the range of duties owed to survivors of violence was not exhausted by the possibility that they were *wronged*, in terms of undue interference for which the state is held to account. State duties were understood in terms of the positive provision against want and need, taking into account how *badly off* those affected were and the burdens they had to bear to guarantee their ESR.

To underpin this approach, the Committee first considered that both in peacetime and the aftermath of widespread abuses authorities are bound to the same general obligation to take immediate steps to ensure ESR consistently with the use of maximum available resources.⁹⁶ Regarding the special weight that must be attached to the interests of traditionally disadvantaged groups in conflict-related scenarios, the Committee acknowledged that children are entitled to ‘special measures’.⁹⁷ Under these two premises, the Committee analysed state duties regarding the rights to education and health.

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

91 *Ibid.* at para 23 and Appendix I.

92 *Hunsungule*, supra n 68 at paras 67–8.

93 Deng, supra n 90 at para 31.

94 *Ibid.* at para 25.

95 *Ibid.* at para 29.

96 The Committee interpreted Article 14 on the right to enjoy the highest attainable standard of health similarly in *Hunsungule*, supra n 68 at para 72, and *IHRDA v Kenya*, supra n 19 at para 59—the first case related to a region devastated by war and the second in peacetime.

97 *Hunsungule*, supra n 68 at para 63.

Concerning the right to education, the Committee referred to the 'reasonableness' standard so familiar in discussions about ESR and enshrined in the Optional Protocol to the ICESCR (Art. 8). According to it, 'the state has a duty to be continually taking measures to build, maintain, improve and when attacked, repair its education system.'⁹⁸ The conduct of Uganda, consisting of setting up schools/learning centres in IDP camps; bursary schemes in areas affected by violence; budgetary increases benefiting children in conflict-affected areas; and other activities aiming to maintain children in schools and providing training, were considered 'reasonable steps' to fulfil its obligations under the African Charter on the Rights and Welfare of the Child (ACRWC).⁹⁹

As to the right to the highest attainable standard of health, the Committee considered that its guarantee is incompatible with the lack of 'a minimal access to health facilities, a lower level of contact with health-promoting measures and medical assistance, and a lack of provision of primary and therapeutic health resources and programmes'.¹⁰⁰ In applying the notion of progressivity to this case, the Committee considered that Uganda met its obligations under the ACRWC, notwithstanding several obstacles to the effective enjoyment of the right. Amongst them, the Committee took note that food insecurity was extremely high; the local population was dependent on humanitarian assistance provided to children; access to potable water was difficult; health and sanitation services were strained and access to livelihoods outside the camps was seriously reduced.¹⁰¹ In the Committee's view, these limitations were explained by the situation of generalised violence affecting the region, such as widespread insecurity attributed to raids and destruction of property by the main rebel group (LRA).¹⁰² Since authorities did not mismanage public funds, did not withhold available medicines and medical treatment, did not discriminate in fulfilling their duties and did not truncate the efforts of humanitarian actors, Uganda was diligent 'in its efforts to comply with Article 14 of the Charter'.¹⁰³

With this reasoning, the Committee is incorporating criteria initially developed in the African human rights system to govern peacetime situations under the understanding of the state as an active guarantor of rights, to cases dealing with the aftermath of widespread violence. As early as 1995, the African Commission held that mismanagement of public finances manifested in the shortage of medicines, as well as the lack of provision of social services, may constitute a violation of the African Charter.¹⁰⁴

Certainly, some aspects of *Hunsungule* might well be open to criticism. Even though the Committee has decided to adjudicate ESR in these contexts directly and correctly emphasised the role of the state as an active guarantor of rights, it does not follow that its analysis is appropriate in every aspect. Firstly, well-documented complaints of abuse by soldiers against IDPs in camps call into question the swift dismissal of claims alleging the involvement of security forces in related cases.¹⁰⁵ Secondly, the different approaches to

98 Ibid. at para 69.

99 Ibid. at paras 66–9.

100 Ibid. at para 72.

101 Ibid. at para 74.

102 Ibid. at para 74.

103 Ibid. at para 75.

104 FLAG, supra n 63 at paras 4, 48.

105 Deng, supra n 90 at para 25.

due diligence obligations in the Committee's developing case-law warrant further reflection, as they portray stricter obligations in peacetime than in conflict-related settings without a clear justification.¹⁰⁶ Thirdly, the 'inhuman conditions' suffered by people living in camps, whose minimum needs were barely met mainly through the assistance provided by international actors and NGOs, cast doubt on Uganda's compliance with its obligations to fulfil ESR.¹⁰⁷ In a state with acute wealth inequalities between urban-south and rural-north, the fact that humanitarian actors had to pay authorities to be escorted to deliver assistance has prompted concerns that the government did not use the maximum of available resources to ensure the basic ESR of those affected by violence.¹⁰⁸ As Bilchitz explains, not granting a benefit to someone who lacks basic shelter has a greater impact than withdrawing the same benefit from someone who has a comfortable or luxurious home, which is why transfers from the latter to the former are fully justified in the distribution of burdens that generalised violence imposes on people.¹⁰⁹

To sum-up this section, the Commission and the Committee developed two different approaches to address the aftermath of widespread violence. By emphasising states duties to respect and protect during violent episodes, the Commission left socio-economic wrongs that authorities can reasonably deal with unaddressed. The assessment of the intrinsic rightfulness or wrongfulness of the authorities' conduct overshadowed an evaluation of the goodness or badness of the states of affairs that laid before the Commission. The discussed cases on lack of access to education and health services by displaced children (*NGO Forum*) and adequate health services by victims of sexual violence (*COHRE*) illustrate this point. Even a case like *COHRE* that largely involved state-led violence shows that the socio-economic legacy of armed conflict is such that it can escape the findings of state misconduct over the occurrence of abuses. The conduct of non-state actors such as rebels and foreign actors, violence perpetrated between different segments of the civilian population and the general circumstances of war entail considerable socio-economic harm for which the state is not clearly responsible in terms of its duties to respect and protect. The lack of clear responsibility for the occurrence of abuses does not relieve the authorities of their duties to make positive provision against want and need. This implies portraying the state less as the aggressor from whom the individual requires protection during violent episodes and rather as an active guarantor of rights in their aftermath. In light of these conclusions, what remains to be explored is what role remedies, especially reparations, can and should play in these circumstances.

4. REPARATIONS IN THE AFTERMATH OF WIDESPREAD VIOLENCE

A. Reparations in the Traditional Human Rights Law Paradigm: *Restitutio in Integrum* as an End in and of Itself?

The obligation to make reparation for damages resulting from the breach of duties to respect and protect is understood as a matter of corrective or compensatory justice,

106 *University of Pretoria*, supra n 19 at paras 33–9 and *MRGI*, supra n 14 at paras 45–58.

107 Deng, supra n 90 at para 53.

108 *Ibid.* at paras 10–29.

109 Bilchitz, supra n 49 at 86.

this is, the enforcement of ‘the obligation of restoration’¹¹⁰ or, in a familiar wording in international law, *restitutio in integrum*. Since traditional human rights law focuses on the evaluation of the intrinsic rightfulness or wrongfulness of conduct, regardless of the states of affairs it produces, consequentialist reasons have no bearing upon reparation claims. For this reason, victims demand what they have the *right* to demand, that their *due* be fully restored without further considerations of what is necessary ‘for some greater good’ or to achieve justice in a different sense (i.e. distributive).¹¹¹ As this paradigm focuses on the fact that people were *wronged* rather than they simply are *badly off*, reparations are aimed at undoing the consequences of wrongdoing rather than improving the living conditions of affected people and others in similar circumstances.¹¹²

Although the remedial practice of the ECtHR and IACtHR varies drastically, they are guided by this basic understanding of reparation. Both in its case law¹¹³ and its internal rules of procedures,¹¹⁴ the ECtHR has made it clear that just satisfaction must seek to achieve *restitutio in integrum*. In analysing the remedial practice of the ECtHR, scholars have stressed that awards ‘serve the interests of the aggrieved individuals. They are not intended to serve collective interest[s].’¹¹⁵ Likewise, since its first judgment, the IACtHR has construed the American Convention’s provision on reparation (Art. 63 (1)) in terms of ensuring *restitutio in integrum*,¹¹⁶ clarifying in future judgments that reparations seek ‘to make disappear the effects of the violations committed (. . .) they cannot imply neither enrichment nor impoverishment for the victim.’¹¹⁷ Both regional courts, therefore, largely support the well-known public international law formula of full reparation, first outlined by the Permanent Court of International Justice in *Chorzów Factory* and later relaunched by the International Law Commission’s 2001 Articles on State Responsibility.¹¹⁸ According to it, ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’¹¹⁹ As Paparinskis explains, it has been a tradition in public international law that the duty to make reparation

110 Perry, ‘The Moral Foundations of Tort Law’ (1992) 77 *Iowa Law Review* 449 at 456.

111 May, ‘Jus Post Bellum, Grotius, and Meionexia’ in Stahn et al. (eds) *Jus Post Bellum: Mapping the Normative Foundations* (2014) 16 at 20.

112 Kalmanotivz, ‘Corrective Justice versus Social Justice in the Aftermath of War’, in Bergsmo et al. (eds) *supra* n 52 71, at 75.

113 *Papamichalopoulos and others v. Greece* Application 14556/89, Just Satisfaction, 31 October 1995, at para 34.

114 ECtHR, Rules of Court, 1 January 2020, Strasbourg, https://www.echr.coe.int/documents/rules_court_eng.pdf, at 66

115 Altwicker-Hámori, Altwicker, Peters, ‘An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights’ (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1 at 10

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

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

118 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (A/56/10), 2001, at 91–4.

119 *Factory at Chorzów (Germany v Poland)* Merits, Judgment, PCIJ Reports 1928, Series A 17, at 125.

binds the wrongdoer regardless of any ‘consideration of the situation of, or the effect of compensation on the wrongdoing actor.’¹²⁰

In all these cases, then, the notion of *restitutio in integrum* is construed as an end in and of itself. The duty to make reparation does not depend on any consideration about the achievement of good states of affairs, nor is it affected by concerns about what the situation of plaintiffs and defendants should be all things considered. That said, full reparation is often more of a guiding principle than an actual outcome, with a myriad of obstacles standing in the way of the full materialisation of reparation. These include differences between courts about the role that reparations should play in international law, the interests of the parties, as well as the difficulty of successfully proving the causal link between the offence and the damage, among other evidentiary issues.¹²¹ Therefore, as important as the *restitutio in integrum* formula is, it is critical not to lose sight of the effective remedial practice of these bodies and to wonder about its consequences concerning their final beneficiaries. A human rights body that has been quite absent in the discussion carried out so far, the African Court on Human and Peoples’ Rights (ACtHPR), allows a first approach to these issues since it is the only body in the region that has thoroughly applied the standard of full reparation in the above terms.

In the emblematic *Zongo v. Burkina Faso* judgment, the state was found responsible for not investigating and punishing the murder of a journalist critical of the government and his colleagues by non-state actors, without the complicity of the state authorities. The ACtHPR, explicitly empowered to order reparations under Article 27 (1) of the African Court’s Protocol, adopted the well-known standard of reparation discussed, delving into the central elements of this obligation as defined in public international law.¹²² The ACtHPR also resorted to the jurisprudence of the IACtHR to determine issues such as the notion of victim and proof of the condition of victim, the calculation of non-pecuniary damage, among other subjects.¹²³ Despite its repeated reference to the IACtHR, the ACtHPR adopted a narrow understanding of the duty of reparation in cases that involve due diligence obligations, which is more common in public international law than in the jurisprudence of the IACtHR.¹²⁴ The precise contours of the ACtHPR position can be well understood against the foil of the IACtHR case-law.

In cases that involve breaches of due diligence obligations to prevent and investigate, the IACtHR holds the state responsible for the obligation to repair all damages caused by the violation, even though the violation is perpetrated by non-state actors and without the authorities’ participation or complicity. In the *Cotton Field* case, for instance, although authorities themselves did not kill the victims nor were they complicit in abuses, the IACtHR determined that they were responsible for making good all damages resulting from the victims’ death, which included pecuniary damage (consequential damage and earnings no longer produced by the dead) and non-pecuniary

120 Paparinskis, ‘A Case Against Crippling Compensation in International Law of State Responsibility’ (2020) 83 *The Modern Law Review* 1246 at 1247–8.

121 Torres, ‘Revisiting the *Chorzów Factory* Standard of Reparation—Its Relevance in Contemporary International Law and Practice’ (2021) 90 *Nordic Journal of International Law* 190 at 203–4, 215–7, 225–6.

122 *Zongo v Burkina Faso*, supra n 15 at paras 20–31, 53.

123 *Ibid.* at paras 47, 55, 61.

124 The IACtHR has explained the extent to which its understanding of the attribution of responsibility differs from the rules that govern public international law on the matter in *Pueblo Bello*, supra note 28, at 116–7.

damage.¹²⁵ In *Zongo*, the ACtHPR did not hold the state responsible for repairing the consequences of the killing. On the contrary, authorities were only obliged to repair the damage resulting from the shortcomings in the investigation that affected the next of kin, such as the stress and anguish that followed an ‘unduly prolonged procedure which in the end turned out to be fruitless.’¹²⁶ In so doing, the African Court adopts a long-standing public international law position, which can be traced at least to the USA-Mexico Claims Commission,¹²⁷ which has been reaffirmed by the International Court of Justice¹²⁸ and scholars working in the field.¹²⁹ According to it, the obligation to repair breaches of due diligence obligations does not require that authorities ‘make good all of the damage caused by the crime itself.’¹³⁰ Since responsibility arising from the lack of due diligence is never as serious as if authorities commit wrongdoing ‘with their own hands’,¹³¹ the fixation of the quantum of compensation for which they are liable ‘cannot be computed by merely stating the damages caused by the private delinquency.’¹³²

This understanding of reparations brings to the surface a crucial feature of the traditional offending state–victimised individual framework. When applying this standard as the ACtHPR did, which is a position also suggested by the African Commission in *NGO Forum*,¹³³ it emerges that the award of reparation ends up oriented towards the objective of sanctioning or straightening the authorities’ previous misconduct, not to make victims whole again. Fundamentally, this position is not victim-centred as it overlooks the fact that for victims, it does not matter who the perpetrator of abuse is. They want the consequences of wrongdoing to be eliminated as completely as possible, not just the uneasiness that arises from the state’s recklessness in preventing or investigating abuses by third parties. To some extent, the ACtHPR is following suit of the remedial practice of the ECtHR regarding the setting of compensation for non-pecuniary damage. In a recent empirical study on the subject, Fikfak found that the amount of compensation increases when the case involves deliberate and arbitrary violations of Articles 3 (i.e. acts of torture) and 5 (i.e. arbitrary detention).¹³⁴ She also found that in Article 2 cases (the right to life), substantive violations give rise to more compensation than procedural ones.¹³⁵ Given that the ECtHR is seemingly adjusting

125 *Case of González et al. (‘Cotton Field’) v Mexico* IACtHR Series C 205 (2009), at paras 285–6, 388–9, 561–578

126 *Zongo v Burkina Faso*, supra n 15 at para 56.

127 Torres, supra n 121 at 204–5.

128 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, ICJ Reports 2007, 43 at paras 415, 424, 461–3.

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

130 *Laura M. B. Janes et al. (U.S.A) v United Mexican States*, 16 November 1925, Mexico-USA General Claims Commission, Report of International Arbitral Awards (R.I.A.A.), Vol. iv, United Nations, 2006, at para 22.

131 *Ibid.* at para 20.

132 *Ibid.* at para 25.

133 The Commission made it clear that ‘the fact that all the allegations could not be investigated does not make the State liable for the human rights violations alleged to have been committed by non-state actors.’ Supra n 11 at para 201.

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

135 *Ibid.* at 356–7.

the amounts based on how the authorities' conduct is qualified rather than on the consequences faced by those affected, Fikfak holds that the ECtHR ends up forgetting about the victim by overemphasising the straightening of the state's conduct.

It should not be surprising, then, that the link between reparations and ESR is only indirect under the approach taken by the ACtHR and the ECtHR. It is clear that reparations are not expected to make victims better off, but rather to redress the consequences of wrongdoing and rebuke certain conducts that are considered especially problematic, without further consideration of what is required to achieve a greater good. However, reparations have an indirect effect on the victims' welfare, since disadvantaged victims tend to make use of reparation-related resources to secure ESR, which generally occurs after widespread violence.¹³⁶

The position of the IACtHR on these issues departs to some extent from the conclusions reached so far. As explained, the IACtHR imposes on the state the obligation to fully repair the consequences of wrongdoing for which it is not directly responsible, unlike the ACtHR and the African Commission. The IACtHR also refrains from adjusting the amount of damages according to how the conduct is qualified, in opposition to the ECtHR.¹³⁷ But the most important thing is that the IACtHR is more sensitive to the specific situation of victims when it comes to shaping remedies, including their socio-economic impoverishment, developing jurisprudence on reparations with a breadth and depth that has earned it international recognition. Although findings on state responsibility in conflict-related settings tend to revolve around civil and political rights violations, generally in terms of illegitimate interference in people's lives, the way remedies are devised ends up trying to ensure socio-economic effects 'of more structural and enduring scope'.¹³⁸ This trend is particularly evident when the Court orders to implement development programs for people affected by widespread violence, including access to water, free medicines, education and housing, as well as the construction of health centres and maintenance and improvement of roads.¹³⁹

Therefore, while the remedial practice of the ACtHR and the ECtHR only has an *indirect* impact on the well-being of victims, the practice of the IACtHR has a *direct* bearing, raising the question of the role that reparations should play when guaranteeing ESR after episodes of generalised violence. In making this assessment, it may be required to stop considering *restitutio in integrum* as an end in and of itself and rather approach it as a means to pursue other goals.

136 Torres, 'El Desplazamiento Forzado en los Intersticios de la Justicia Transicional: Oportunidades y Riesgos' (2019) 69 *Revista de Estudios Sociales* 28 at 35; Roht-Arriaza, 'Reparations and Economic, Social and Cultural Rights' in Sharp (ed), *Justice and Economic Violence in Transition* (2014) 109 at 116.

137 Leach, Murray and Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Buckley, Donald and Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (2006) 33 at 58–9.

138 Melish, 'The Inter-American Court of Human Rights' in Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 339, 400.

139 *Case of the Plan de Sánchez Massacre v Guatemala* IACtHR Series C 105 (2004) at paras 109–111, 125–9 and subsequent; *Case of the Massacres of El Mozote and surrounding areas v El Salvador* IACtHR Series C 252 (2012) at paras 336–40.

A. Applying the Principle of Full Reparation in the African Context

The main difficulty that arises when bringing the principle of full reparation to the aftermath of widespread violence is that it depends on the authorities' success in complying with duties to respect and protect during conflict-related episodes. This is compounded by the fact that deontological ethics, the conceptual framework that supports the primacy of these duties, privileges correcting flagrant violations of duties to respect (i.e. those involving episodes of state terrorism) while diminishing the moral importance of addressing wrongdoing that results as a more remote result of state conduct. In light of the *indirect* and *direct* effects that reparations have on people's well-being, insisting on this ladder of legal and moral importance may not be appropriate for the following reasons.

It is now clear that attaching greater weight to violations perpetrated by the authorities themselves than to those that they let happen (the ACtHR's approach), as well as greater importance to deliberate and arbitrary violations over unintentional ones (as per the ECtHR), is actually an attempt to sanction or correct the state's misconduct instead of taking seriously the situation of affected people. The results of this approach are problematic from a victim perspective, as they run the risk of receiving varying amounts of monetary resources for debatable reasons, instead of, for instance, the effects of the violation on their standard of living or their vulnerability.¹⁴⁰ Increasing these amounts in cases of official violations could be justified if, as Pogge suggests, deliberate breaches of the duty to respect always make people worse off than involuntary or private wrongs.¹⁴¹ However, this is a matter of evaluating existing *states of affairs*, not a matter of principle. As the plight of IDPs illustrates, their ESR are similarly jeopardised regardless of whether they fled from this or that armed actor, or whether uprooting was the result of intentional conduct or the general circumstances of the war.¹⁴² Certainly, accountability measures are sorely required to address practices that, for one reason or another, are considered more blameworthy, such as intentional killing or the authorities' complicity with wrongdoing. That said, the distribution of resources with a direct and indirect bearing on the victims' well-being should be left out of these discussions.¹⁴³

By the same token, emphasis on state-led violence tends to obscure the situation of people indirectly affected by armed conflict and the conduct of rebels and other actors not acting under the authorities' control. As discussed in the third section, excessive focus on state-led violence raises serious concerns as certain rebel groups (the LRA, for example) are largely responsible for the harm caused to the population. Not forgetting cases in which different factions of the civilian population end up pitted against each other in contexts of historical enmity and access to weapons. These people will hardly access reparation-related resources which are instrumental to cope with daily socio-economic shortcomings. This is so since in order to trigger state responsibility it is required that authorities were, or should have been aware of a specific risk and refrained from taking reasonable measures to prevent it, according to the standards developed by the ECtHR and IACtHR, which were recently reaffirmed by the African

140 Fikfak, *supra* n 134 at 357.

141 Pogge, *supra* n 22 at 65.

142 Stavropoulou, 'The Right not to be Displaced' (1994) 9 *American University Law Review* 689 at 738. See also Torres, *supra* n 136 at 34.

143 For a defence of this argument in the European context, see Torres, *supra* n 40.

Commission.¹⁴⁴ Nonetheless, the scope of this obligation is very narrow in contexts in which there are structural risks on the population,¹⁴⁵ for example where entire regions lack the presence of authorities, which endangers access to reparations for many.

In this sense, the breadth and depth of reparations issued by the IACtHR should not obscure the very limited scope of due diligence obligations in conflict-related scenarios. Victims of rebel groups¹⁴⁶ and people affected by the general consequences of armed conflict¹⁴⁷ tend to be excluded from the scope of state responsibility, thereby lacking access to substantive socio-economic goods issued as reparations. As early as 1999, the Inter-American Commission conceded that in situations of widespread violence 'the state cannot always prevent, much less be held responsible for, the harm to individuals and destruction of private property occasioned by the hostile acts of its armed opponents'.¹⁴⁸ It is therefore not entirely clear what the advantage is of ordering substantive socio-economic goods as a means of reparation for illegitimate interference in people's lives, in violation of duties to respect and protect. The latter, considering that African bodies have the possibility, already put into practice by the Committee in *Hunsungule v Uganda*, to adjudicate ESR directly in the light of the authorities' positive obligations in this regard.

Finally, despite the special stigma that state terrorism practices have in the imagination of regional human rights bodies, the reality is that they very sparingly hold the authorities accountable for them, for both operational and political reasons. Demonstrating the existence of a systematic plan behind deliberate abuses is a complex task¹⁴⁹ and faces considerable opposition from states.¹⁵⁰ Perhaps because of this, in the African system¹⁵¹—as well as in the European¹⁵² and inter-American systems¹⁵³—is not strange to find that states are not held responsible for committing gross violations themselves, but for failing to protect and investigate abuses by proxy militias and other non-state actors. However, although compliance with due diligence obligations has become an important avenue when establishing state responsibility in the

144 431/12 *Thomas Kwoyelo v Uganda*, 23rd Extra-Ordinary Session of the ACHPR, 12 February 2018, at paras 210–12.

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

146 Complaints of acts of theft and looting of property perpetrated by guerrillas after combat with authorities were dismissed as they were not attributed to the state in *Case of the Santo Domingo Massacre v Colombia* IACtHR Series C 259 (30 November 2012) at paras 269–82.

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

148 *Third Report on the Human Rights Situation in Colombia* IACmHR OEA/Ser.L/V/II.102 (1999) at ch IV, para 4

149 Buckley, supra n 40 at 36–44; Reidy, supra n 40 at 171–2.

150 Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16 *Human Rights Law Review* 731 at 749–50.

151 See, for instance, *NGO Forum* supra n 11.

152 Buckley, supra n 40 at 54–5; Reidy, supra n 40 at 167–8.

153 See, for instance, *Mapiripán*, supra n 117; *Pueblo Bello*, supra n 28; *Operation Genesis*, supra n 147.

African context,¹⁵⁴ the existing case-law of African bodies requires considerable legal refinement¹⁵⁵ or, in the worst case, reflects the political pressures that hinder human rights protection in the region.¹⁵⁶ It must also be recalled that judicial systems in certain conflict-torn states are structurally weak (i.e. Sudan),¹⁵⁷ making it difficult to evaluate whether the authorities have complied with their obligations to investigate and sanction abuses by non-state actors.¹⁵⁸ Given these *realpolitik* considerations and the institutional limitations faced by domestic judicial systems, it becomes difficult to link access to reparations to the authorities' fulfilment of obligations to respect and protect.

B. The Alternative Remedial Practice of the African Commission and Committee

Although the African Commission has adopted a quite proactive role in ordering remedies and developed a reparations jurisprudence,¹⁵⁹ it has yet to establish an articulated approach to reparations. Even though it explains in General Comment No. 3 that 'reparation should be proportional to the gravity of the violations and the harm suffered' and that 'full and effective reparation (. . .) should include the implementation of guarantees of non-repetition',¹⁶⁰ the basis and scope of reparations remain often unclear throughout its practice, as reflected when compensation is awarded. In delving into the underpinnings of compensation, the Commission limits itself to mentioning in a non-articulated way some principles that inform redress and vague criteria to define the amount of compensation when restitution is not possible (i.e. 'fairness', 'adequateness', 'effectiveness', 'sufficiency', 'appropriateness' or being 'victim-friendly').¹⁶¹ In well-known cases in which compensation is recommended, it is not clear whether it depends on a general obligation to repair the consequences of international wrongdoing, as conceived by the PCIJ in *Chorzów Factory*, or a right-by-right analysis.¹⁶² States are more likely to be free to choose how to meet their compensatory obligations, with the Commission noting that compensation must abide by *domestic standards*.¹⁶³ Only rarely has the Commission issued more detailed recommendations that define what

154 See, for instance, *Zongo*, supra n 15; *MRGI*, supra n 14; *IHRDA v Cameroon*, supra n 19.

155 Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9 *Human Rights Law Review* 222 at 239–40.

156 Bekker, 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations' (2013) 13 *Human Rights Law Review* 499 at 500.

157 Kálin, supra n 81 at para 58.

158 Reidy, supra n 40 at 167.

159 Naldi, 'Reparation in the Practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681 at 685; Bekker, supra n 156 at 503.

160 Supra n 12 at para 19.

161 318/06, *Open Society Justice Initiative v Côte d'Ivoire*, 17th Extraordinary Session of the ACHPR, 19 February 2015, at para 199; 292/04, *Institute for Human Rights and Development in Africa (IHRDA) v Angola*, 43rd Ordinary Session, 7 May 2008, at para 87; *Interights v Cameroon*, supra n 17 at para 138; *NGO Forum*, supra n 11 at para 215; *SERAC*, supra n 10 para 70.

162 *SERAC*, supra n 10 at para 55.

163 313/05 *Kenneth Good v Botswana*, 28th Annual Activity Report of the ACHPR (2009–2010), at para 244(i); 253/2002, *Bissangou v Dem. Rep. Congo*, 21st Annual Activity Report of the ACHPR (2006–2007), at para 84(5); 59/91, *Embga Mekongo v Cameroon*, 8th Annual Activity Report of the ACHPR (1994–1995), at para 2; *Interights v Cameroon*, supra n 17 at para 138.

compensation should include or requested a specific amount of damages.¹⁶⁴ In very few cases, the Commission considered explicitly that compensation should abide by international standards—without clarifying what these standards are.¹⁶⁵

These gaps extend to situations in which ‘serious and massive violations’ are involved, making it difficult to discern what the Commission’s remedial position is after armed conflict and related scenarios.¹⁶⁶ On the one hand, the Commission has called upon authorities to grant compensation in many cases. Authorities have been required to ‘take appropriate measures to ensure payment of a compensatory benefit’ (i.e. *COHRE*),¹⁶⁷ create a Commission of Inquiry to ‘ensure the payment of adequate compensation’ (i.e. *NGO Forum*)¹⁶⁸ and establish a Joint Commission ‘to assess the losses with a view to compensate the victims.’¹⁶⁹ On the other hand, the Commission has also limited itself to drawing the attention of the Heads of State and Government to the violations of rights in the corresponding state and issuing mere declaratory relief,¹⁷⁰ denying compensation on the grounds of the high number of affected people.¹⁷¹

The practice of the African Commission seems to suggest that the principle of full reparation should be tempered when widespread abuses are at stake. ‘When placed in the context of human rights’, the Commission contends, ‘this principle, which requires that the victim is reinstated in the situation prior to the violation, is mitigated.’¹⁷² Rather than the ‘impossible’ task of restoring the situation that would have existed had the wrongdoing not been committed, the Commission seems to favour the *cessation* of wrongdoing and the *mitigation* of its consequences. In its own words, in the aftermath of widespread violations, ‘the adoption of prompt and effective measures to finally put an end to the sufferings of the past may in themselves constitute an effective redress.’¹⁷³ Accordingly, measures for the rehabilitation of those affected, the construction of memorial sites and the prevention of the occurrence of ‘fresh violations’ were recommended.¹⁷⁴

Similarly to the African Commission, the Committee lacks an articulated understanding of the duty to repair. Typically, when it recommends compensation, it develops

164 *Bissangou*, supra n 163 at paras 64–68; 341/2007, *Equality Now v Ethiopia*, 57th Ordinary Session of the ACHPR, 4 November 2015, at para 158.

165 334/06, *Interights v Egypt*, 9th Extra-Ordinary Session, 23 February 2011, at para 233 (II).

166 About the lack of clarity of the expression ‘serious and massive violations’, see Murray, ‘Serious or massive violations under the African Charter on Human and Peoples’ Rights’ (1999) 17 *Netherlands Quarterly of Human Rights* 109 at 110–1. See also Bekker, supra n 156 at 523.

167 *COHRE*, supra n 11 at paras 201, 229(d); 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, *Malawi African Association and Others (MAA) v Mauritania*, 13th Annual Activity Report of the ACHPR (1999–2000), at para 142.

168 *IHRDA v Angola*, supra n 161 at para 87; *NGO Forum*, supra n 11 at para 215.

169 249/02, *Institute for Human Rights and Development in Africa (IHRDA) v Guinea*, 36th Ordinary Session of the ACHPR, 23 November 2004, at para 72.

170 47/90, *Lawyers Committee for Human Rights v Zaire* 7th Annual Activity Report of the ACHPR (1993–1994); 64/92, 68/92 and 78/92, *Achutan and Amnesty International v Malawi* 8th Annual Activity Report of the ACHPR (1994–1995); 74/92, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, 18th Ordinary Session of the ACHPR, 11 October 1995, at paras 15 and 26; *FLAG*, supra n 63 at paras 15, 48.

171 *Open Society*, supra n 161 at para 203.

172 *Ibid.* at para 199.

173 *Ibid.* at para 200.

174 *Ibid.* at para 200.

its views about reparation.¹⁷⁵ Curiously, the Committee does not usually approach reparation as an obligation derived from a breach of international law attributable to the state but largely as a duty related to abuses committed by non-state actors.¹⁷⁶ The Committee's emerging case-law also appears to be less oriented towards full reparation than ceasing the wrongdoing and mitigating children's suffering. Criteria such as promoting the 'full recovery'¹⁷⁷ of children, 'redress[ing] the exclusion'¹⁷⁸ they endure, or 'ensuring that children are [no longer] deprived of their basic [socio-economic] rights'¹⁷⁹ stem from its reasoning.

Criticising what appears to be an excessively deferential practice with states, Bekker argues that the Commission should abide by international standards of reparation, including the provision of more robust compensation—a position that could be extended to the Committee. In her opinion, this is particularly true when serious or massive violations occurred, namely when individuals' rights 'have been violated as a result of a systematic government programme'.¹⁸⁰ In light of the discussion in the previous section, material reparations should not depend on the imperative to punish this type of conduct. However, accountability measures should be enforced consistently in these cases to avoid impunity practices, as well as giving authorities wrong incentives, such as the belief that they can fulfil their obligations after generalised violence solely by ceasing violations. Therefore, measures ordered by the Commission and the Committee in terms of the requirement of criminal proceedings¹⁸¹ and the rejection of blank amnesties¹⁸² should be encouraged, as well as the consistent application of General Comment No. 3 on the right to life and the use of force in these contexts.

That said, the very emphasis by the Commission and the Committee on the authorities' duty to mitigate the consequences of wrongdoing and putting an end to ongoing suffering should be taken seriously. Seeking the recovery of those affected, addressing the exclusion they face and effectively ensuring their ESR require putting duties against want and need to the fore. In carrying out this task, medium- and long-term distributive questions arise, which require weighing claims and establishing priorities in terms of access to socio-economic goods and public spending.

5. THE IMPORTANCE OF A PRIORITY SETTING FRAMEWORK TO DIRECTLY ADDRESS ECONOMIC AND SOCIAL RIGHTS AFTER WIDESPRED VIOLENCE

The massive and sudden migration flux in Darfur¹⁸³ posited dilemmas regarding the satisfaction of competing demands between those affected by violence, 'common'

175 *MRGI*, supra n 14 at para 98(G); *IHRDA v Cameroon*, supra n 19 at para 84(b).

176 *MRGI*, *ibid.* at paras 41–57, 81–82, 84(b); *IHRDA v Cameroon*, *ibid.* at paras 45–58, 98(G).

177 *University of Pretoria*, supra n 19 at para 82(a)(c).

178 *MRGI*, supra n 14 at paras 74 and 98 (C-D).

179 1/2015, *African Centre of Justice and Peace Studies (ACJPS) and others v Sudan* 31st Ordinary Session of the ACERWC, May 2018, at para 105 (F).

180 Bekker, supra n 156 at 509 fn. 27 and 523 fn. 134.

181 *MRGI*, supra n 14 at para 98(A).

182 *NGO Forum*, supra n 11 at para 215

183 Kálin, supra n 81 at para 2.

poor urban residents¹⁸⁴ and other deprived rural communities.¹⁸⁵ This occurred in a region with 'lack of basic infrastructure and public services after decades of civil war, with millions living in extreme poverty'.¹⁸⁶ Despite the recognition of relevant human rights law standards by local authorities, Kálin found with a worrisome frequency that they simply could not cope with the situation.¹⁸⁷ In these contexts, then, all levels of government 'will have to make decisions about what resources to allocate where'. 'It is paramount', Samar continues, to ensure that authorities are 'not violating [their] immediate obligations under the ICESCR'.¹⁸⁸

The need for a framework that allows priority setting becomes increasingly urgent to the extent that the African states continue to ratify several regional protocols. For instance, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹⁸⁹ contains a strong mandate to prioritise resource allocation in favour of women over military spending (Article 10(3)). The African Charter on the Rights and Welfare of the Child¹⁹⁰ accords children's special needs 'the highest priority' under destabilised regimes such as armed conflict (Article 26). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of the Older Persons in Africa¹⁹¹ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa¹⁹² also contemplate that these groups are entitled to access authorities with priority (Article 14(1) Elderly's Protocol) and to 'special measures of protection in keeping with their physical or moral needs' (Preamble of the Persons with Disabilities' Protocol). Priority setting when dealing with these groups is a question that reaches the core of consequentialist ethics as it requires to strike an adequate balance between the interests of each group expressing equal concern for all.

In conducting this discussion, strengthening the domestic judicial system must also be balanced. This task is not independent of discussions about resource scarcity and progressive realisation of rights just because civil and political rights are involved.¹⁹³ Likewise, the final decision on the need for remedial measures, such as compensation, must also be filtered through a prioritisation exercise. In (post)conflict settings, efficiency concerns are inevitable. It is just reckless to invest significant amounts of resources in reparations without securing that they provide the highest possible economic return for victims and society in general.¹⁹⁴ For example, implementing a land restitution policy for internally displaced people can be the first step in a broader attempt to ensure better access to land in societies in which this good is highly concentrated, thereby simultaneously meeting the goals of corrective and

184 Cassese, *supra* n 78 at para 229.

185 Kálin, *supra* n 81 at para 35.

186 Samar, *supra* n 45 at para 67.

187 Kálin, *supra* n 81 at para 2.

188 Samar, *supra* n 45 at para 69.

189 Adopted by the 2nd Ordinary Session of the Assembly of the Union, 11 July 2003.

190 Adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU, 1 July 1990.

191 Adopted by the 26th Ordinary Session of the Assembly, 31 January 2016.

192 Adopted by the 30th Ordinary Session of the Assembly, 29 January 2018.

193 Schmid and Nolan, *supra* n 66 at 373–4.

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

distributive justice for the benefit of victims and society in general.¹⁹⁵ On the contrary, individual compensation that runs into the hundreds of thousands of dollars according to the IACtHR standards, recently adopted by the African Commission,¹⁹⁶ is more difficult to justify. The same occurs with the award of material reparations to well-off victims, especially when segments of the population have yet to meet basic needs.¹⁹⁷ This means that the ambivalence of the African Commission and Committee towards compensation explained above, which includes giving local authorities the capacity to define the scope of compensation, is not necessarily regrettable.¹⁹⁸ For it may be introducing valuable contextual elements that need to be considered when recommending reparation measures.

By framing the discussion on reparations in this way, which is not entirely unfamiliar to societies in transition,¹⁹⁹ the underpinnings of the traditional *restitutio in integrum* formula are shaken. This is the case because full reparation is no longer understood as an end in itself that must be guaranteed as a question of what is *right*, but rather is an additional element to weigh in the search for a greater *good*. But more importantly, the very liberal assumptions that explain the centrality of corrective justice and the obligation of restoration are questioned. As mentioned, the moral appeal of reparations is linked to the special rebuke of illegitimate and disruptive interference that affects people's plans and projects. Reparations do not seek to make people *better off* but fully restore their *due* in order to secure and sustain 'the plans and projects that were upset by the harm.'²⁰⁰ Nonetheless, it is clear that the very possibility of having a life project presupposes certain features that cannot be taken for granted in societies ravaged by armed conflict, including access to basic socio-economic goods. In these settings, it is not uncommon that large numbers of people struggle to meet basic needs,²⁰¹ while many others can only carry out activities that open up a horizon that does not go beyond daily urgencies.²⁰² When this happens, it seems reasonable that the more 'modest' duty to make those vulnerable and disadvantaged better off, regardless of how shortcomings took place, should prevail over the duty to restore people's life plans had the authorities not breached their obligations to respect and protect. This line of reasoning leads to the following paradox formulated by Kalmanovitz:

'The more widespread and extensive the destruction caused by war, the weaker the rights to receive reparations. In the limiting case of a war that affects directly a large majority of the population, rights and obligations of social justice should trump all rights of corrective justice.'²⁰³

195 Saffon and Uprimny, 'Distributive Justice and the Restitution of Dispossessed Land in Colombia', in Bergsmo et al. (eds) *supra* n 52 379, at 410–8.

196 341/2007, *Equality Now v Ethiopia* 57th Ordinary Session of the ACHPR, 4 November 2015, at para 158.

197 Kalmanovitz, *supra* n 112 at 85; Uprimny, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 *Netherlands Quarterly of Human Rights* 625 at 644.

198 See *supra* section 4C.

199 Offe, *supra* n 47 at 125.

200 Kalmanovitz, *supra* n 112 at 79.

201 Kálin, *supra* n 81 at para 51.

202 *Ibid.* at para 30.

203 Kalmanovitz, *supra* n 112 at 72.

This paradox entails the disassociation between the *right* and the *good* thing to do in the aftermath of widespread violence. Even if an individual has a right to reparation for a wrong attributable to the state, as can easily be deduced, for instance, in the Sudanese case, justice is not necessarily secured in (post)conflict by giving people their due, as May provocatively suggests.²⁰⁴ On the contrary, justice can also be delivered by adopting an approach that has an economic sense for the common good.²⁰⁵ Unfortunately, because of its constant recourse to the paradigm of state terrorism and its emphasis on state duties to respect and protect, the African Commission ends up adopting a 'western reformism' attitude according to which 'Africa merely needs a liberal democratic, rule-of-law state to be freed from despotism.'²⁰⁶

5. CONCLUSION

The devastating effects of armed conflict and related scenarios on the enjoyment of ESR exceed what can legitimately be expected of authorities during these episodes in terms of their duties to respect and protect. Excessive insistence on these duties has led to ignoring bad socio-economic states of affairs that could have been reasonably addressed by the state, understood not so much as the aggressor from whom the individual requires protection, but as an active guarantor of their rights. Adopting a consequentialist approach enables positive duties to fight want and need to have all the centrality they require in (post)conflict settings, casting light on the plight of affected people by considering how badly off they are rather than how wrongly they were treated in terms of finding their lives illegitimately disrupted. The African human rights system has already significantly advanced a general framework for the enjoyment of ESR, the application of which after widespread violence has been carried out by the African Committee. With the ratification of the regional protocols on the rights of disadvantaged groups and the consolidation of the African Court in the region, it can be expected that ESR will have a more developed framework and better avenues for enforceability in the aftermath of widespread violence. However, a consequentialist-oriented response to the aftermath of widespread violence entails acute challenges. These include having a more refined framework that allows priority-setting between those affected and unaffected by violence, as well as expressing special concern for certain disadvantaged groups. In the aftermath of widespread violence, the imperative to honour ESR more fully in the present must be the strainer through which demands for reparation must be filtered. This, to avoid the difficulties that arise when the distribution of important resources for people to cope with in daily life, depends on the authorities' compliance with duties to respect and protect.

204 May, *supra* n 111 at 20.

205 *Ibid*; Correa, *supra* n 43 at 8.

206 Wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', 35 *Virginia Journal of International Law* (1995) 339 at 341.