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Torres, Felix E.

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The State, the assailant? Guaranteeing economic and social rights after widespread violence through the Inter-American Court of Human Rights

Felix E. Torres *
Law School, University of Birmingham

Abstract

The Inter-American Court of Human Rights has traditionally addressed the socio-economic wrongs that result from episodes of widespread violence indirectly, under the lens of civil and political rights abuses. This article provides a historical explanation of this approach and expands on the limitations that follow from it in the Court's jurisprudence. Using empirical data on victims and perpetrators in countries affected by armed conflict and organised crime, the article measures the magnitude of these limitations. To overcome them, it suggests that the right to a 'dignified life' and recent developments concerning the enforceability of economic and social rights be applied after widespread violence, following the lead of the Colombian Constitutional Court regarding the protection of internally displaced people by violence.

Keywords

Economic and Social Rights, Reparations, Inter-American Court of Human Rights, Armed Conflict, Post-Conflict, Internally Displaced People

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Corresponding author:
Felix E. Torres, Law School, University of Birmingham.
Email: f.torres@bham.ac.uk

1. INTRODUCTION

The Inter-American Court of Human Rights (IACtHR or Court) began to operate through its advisory function in the early 1980s, with its first contentious judgment issued in 1988. Embedded in the growing momentum for the protection and promotion of civil and political rights driven by the Inter-American Commission (IACmHR or Commission) in the late 1980s and early 1990s,[1] the newly established Court largely framed violence in the region as a matter of 'State terrorism'.[2] That is to say, primarily as 'systematic practices' affecting civil and political rights 'tolerated or perpetrated by the State in a situation of general impunity'.[3] Hence, from its inception, the Court followed the Commission's classic approach to human rights law, according to which its main function is to address those situations in which the State, 'whose function is to protect the individual, becomes his assailant'.[4] In framing violence in this way, the Court neglected for a significant time the socio-economic wrongs arising from armed conflict and other instances of *widespread violence* affecting certain States in the region.[5] By widespread violence, this article understands the forms of violence that cannot be reduced to State-led action (either through its own security forces or proxy militias), but are also perpetrated by other armed actors (for example, rebel forces, groups of organised crime) and result from the dynamics of conflict as such (for example, armed combat).

With the turn of the century and with States beginning to move away from the shadows of dictatorships, the Court has progressively taken into account certain socio-economic issues in two directions. On the one hand, in conflict-related scenarios, it has stretched traditional duties to respect and protect civil and political rights to include the socio-economic distress of those affected by violence, especially the plight of internally displaced persons (IDPs).[6] It has also ordered far-reaching remedies that involve the provision of socio-economic goods after widespread violence, including the adoption of comprehensive development plans.[7] On the other hand, in peacetime, the Court developed the notion of the right to a 'dignified life' and more recently directly enforced economic and social rights (ESR).[8] The 2017 case *Lagos del Campo*,[9] deemed to be the 'major triumph' in terms of ESR adjudication given that the Court decided for the first time to directly enforce Article 26 of the American Convention on Human Rights (ACHR), opened previously unknown avenues for the protection of ESR in the region.[10]

1. Robert Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856, 874–5.
2. Victor Abramovich, 'From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System' (2009) 6 Sur-International Journal of Human Rights 7, 8–9; Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, '"War" in the Jurisprudence of the Inter-American Court of Human Rights' (2011) 33 Human Rights Quarterly 148, 156–160.
3. Burgorgue-Larsen and Úbeda de Torres (n 2) 160; Abramovich (n 2) 9, 11.
4. *Annual Report of the Inter-American Commission on Human Rights 1990–1991* (IACmHR, 22 February 1991) ch V, s II 2.
5. See Section 2.
6. See Section 3.
7. See Section 4.
8. See Section 6.
9. *Case of Lagos del Campo v Peru* IACtHR Series C 340 (31 August 2017) paras 141–154, 166.
10. Isaac de Paz González, *The Social Rights Jurisprudence in the Inter-American Court of Human Rights: Shadow and Light in International Human Rights* (Elgar 2018) 2.

However, the two tracks have evolved separately to a large extent, both in scholarly literature and in the Court's work, giving rise to a protection framework that fails to comprehensively address the plight of those engulfed by widespread violence.[11] As will be explained in this article, victims of certain non-State actors, as well as those affected by the general circumstances of armed conflict, often run the risk of being placed on the periphery of State responsibility, without access to the socio-economic goods the Court has ordered in cases that do involve State-led violence.[12] To close this gap, this article argues that the conceptuality that has been developed to address socio-economic concerns in peacetime should be driven to govern episodes of widespread violence. The traditional rationale that portrays the State as an *assailant*, therefore, needs to be complemented by an understanding of the State as an 'active guarantor of rights', responsible for ensuring ESR in 'contexts of inequality'.[13]

To support this claim, the rest of the article is organised as follows. The second section provides the historical background that explains the neglect of ESR by the Commission and how it ended up affecting the Court's own approach to socio-economic wrongs in the context of widespread violence. The third section explains how the traditional framework of duties to respect and protect civil and political rights has been stretched by the Court to partially address socio-economic wrongs after serious abuses. The fourth section examines the extent to which the Court's remedial practice, which generally includes ordering the award of socio-economic goods, counteracts its traditional emphasis on civil and political rights abuses. The fifth section addresses some of the limitations of the Court's traditional approach by highlighting the situation of certain victims who can easily be excluded from the existing protection framework. To address these shortcomings, the sixth section explains how the right to a 'dignified life' and recent attempts by the IACtHR to directly enforce ESR can be applied in the aftermath of widespread violence. The experience of the Colombian Constitutional Court in protecting IDPs due to armed conflict is analysed to illustrate how duties to ensure ESR can be tailored in contexts of inequality and exclusion.

11. Research on the socio-economic jurisprudence of the IACtHR tends to ignore the protection of ESR in the wake of widespread violence. The little attention given to this issue tends to be found in the broader context of the protection of the rights of certain groups, such as indigenous people. See, for instance, González (n 10); Mary Beloff and Laura Clérico, 'Derecho a Condiciones de Existencia Digna y Situación de Vulnerabilidad en la Jurisprudencia de la Corte Interamericana' (2016) 14 Estudios Constitucionales 139; Mónica Feria Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 Human Rights Quarterly 431. On the other side, academic writings that address the work of the Court in contexts of widespread violence, including its remedial practice, do not establish connections with the socio-economic jurisprudence developed in peacetime. This is so despite the fact that remedies often include substantive socio-economic goods. This can be exemplified with the 2018 special issue on The Inter-American Human Rights System in the International Journal of Human Rights (22:9). In a similar trend, see Juan Carlos Ochoa-Sánchez 'Review by the Inter-American Court of Human Rights and domestic reparation programmes: towards a more nuanced approach' (2021) 25 The International Journal of Human Rights 895.
12. See Section 5.
13. Abramovich (n 2) 29. For an examination of this proposal in the African human rights system and the connections that can be established with the case-law of the IACtHR, see Felix E. Torres, 'Economic and Social Rights, Reparations and the Aftermath of Widespread Violence: The African Human Rights System and Beyond' (2021) 21 Human Rights Law Review 935. For an analysis of these issues in the European context, see Felix E. Torres, 'Reparations: To What End? Developing the State's Positive Duties to Address Socio-economic Harms in Post-conflict Settings through the European Court of Human Rights' (2021) 32 European Journal of International Law 807.

2. THE HISTORICAL NEGLECT OF ESR BY THE COMMISSION AND ITS INFLUENCE ON THE COURT'S APPROACH

It took until the 1969 Buenos Aires Protocol for the Commission to begin addressing ESR in a rudimentary way, transcribing legislative measures adopted by States in some annual reports.[14] The Commission's work largely emphasised the protection of civil and political rights through *in situ* visits and country reports in the emerging context of dictatorships affecting the region. By 1990, out of 35 country reports, only 11 mentioned ESR — in many cases, this mention consisted of a squeezed chapter that added to longer considerations about civil and political rights affected by authoritarian rule.[15] In a few cases, State reports addressed to greater and lesser extent questions relating to economic growth, levels of unemployment and literacy, the existence of disadvantaged groups, access to social services,[16] and the situation of people living in poverty and wealth distribution.[17] Only once did the Commission expand on the ESR enshrined in the American Declaration.[18]

In the late 1980s and early 1990s, the Inter-American system underwent important changes which forged a new balance in the mechanisms used to promote and protect rights in the region. These included the first contentious decisions issued by the IACtHR in 1988; the progressive decline of authoritarian rule; and the avenue of more open societies in which individuals had more facilities to resort to international justice.[19] Medina explains that prior to 1990 the examination of individual cases by the Commission was a secondary practice, handling them because it 'had the duty to do so' or to document the existence of gross and systematic abuses in country reports.[20] With the turn of the century, however, things changed significantly. Along with the issuing of precautionary measures and the achievement of friendly settlements, individual petitions became the most important and time-consuming activity, consolidating a ground-breaking jurisprudence in terms of accountability for civil and political rights violations under authoritarian regimes.[21]

State reports and individual complaints subject States to different types of scrutiny, which helps explain why ESR were relegated to the background in the Inter-American system. The main

14. *Informe Anual de la Comisión Interamericana de Derechos Humanos 1974* (IACmHR, 30 December 1974) s 2 pt I; *Informe Anual de la Comisión Interamericana de Derechos Humanos 1973* (IACmHR, 14 February 1974) s 1 pt I; *Informe Anual de la Comisión Interamericana de Derechos Humanos 1971*, (IACmHR, 6 March 1972) pt I. Until 1977, annual reports are only available in Spanish. Thereafter, reference will be made to the English version.
15. *Report on the Situation of Human Rights in Paraguay* (IACmHR, 28 September 1987) ch VI (on trade union rights); *Report on the Situation of Human Rights in Bolivia* (IACmHR, 1 July 1985) ch VII; *Report on the Situation of Human Rights in Chile* (IACmHR, 9 September 1985) ch X (on trade union rights); *Report on the Situation of Human Rights in Argentina* (IACmHR, 11 April 1980) ch VIII (on trade union rights).
16. *Second Report on the Situation of Human Rights in Suriname* (IACmHR, 2 October 1985) ch VIII; *Report on the Situation of Human Rights in Guatemala* (IACmHR, 13 October 1981) ch X; *Report on the Situation of Human Rights in Colombia* (IACmHR, 30 June 1981) ch VII.
17. *Report Guatemala* (n 16) ch X; *Report on the Situation of Human Rights in Haiti* (IACmHR, 13 December 1979) chs VIII-IX; *Report on the Situation of Human Rights in El Salvador* (IACmHR, 17 November 1978) chs X–XI; *Report on the Situation of Human Rights in Nicaragua* (IACmHR, 30 June 1981) ch IX.
18. *Seventh Report on the Situation of Human Rights in Cuba* (IACmHR, 4 October 1983) chs X–XIV.
19. Goldman (n 1) 875.
20. Cecilia Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture' (1990) 12 Human Rights Quarterly 439, 442.
21. Goldman (n 1) 874–5, 880–2.

objective behind the State reporting mechanism is to exert diplomatic and political pressure on authorities by disclosing the findings in the forum of the Organization of American States (OAS).[22] These reports do not necessarily address *specific conducts* attributed to authorities, but rather are 'collective-oriented' and 'result-based' in that they address 'the factual enjoyment of rights in [a] jurisdiction'.[23] In contrast, the resolution of individual claims, both by the Commission and the Court, is a contentious process which involves the evaluation of specific conduct according to the regional obligations assumed. It implies an 'individual-oriented' and 'conduct-based' evaluation that lays the foundation for determining State responsibility. According to Melish, 'State responsibility is determined on the basis of whether or not concrete individualised harm may reasonably be imputed to the State through the unreasonable *acts* or *failures to act* of its agents'.[24] Any infringement entails, according to the Commission itself, international censorship of a different nature than the diplomatic and political recommendations that inspire State reports.[25]

Embedded in the momentum achieved in terms of bringing about accountability for civil and political rights abuses after dictatorships, ESR were relegated from the realm of State responsibility.[26] Misunderstood as a matter of policy and diplomacy, ESR obligations were considered by the Commission in the 1990s as mere aspirational goals.[27] An analysis of State conduct to determine its international legal responsibility according to the ESR enshrined in the American Convention took until the turn of the century.[28]

As a result, the Commission could only address cosmetically the socio-economic wrongs that resulted from armed conflict faced by certain States in the region (for instance, Peru and Colombia). In its country reports on Colombia,[29] for example, it found that: '[t]he phenomenon of widespread violence, together with the situation of [those] who have been displaced from their homes, has negative repercussions on the effective observance of ESCRs'.[30] However, this finding was a matter of policy assessment. It led to aspirational recommendations instead of providing the basis for establishing State responsibility.[31] In an unfortunate and highly descriptive manner, the Commission referred to widespread violence and its negative repercussion on the observance of ESR as a matter of *context* - a question different from 'real violations' that trigger State responsibility.[32]

The newly established Court began to function against this background of dictatorships and neglect of ESR, as discussed at the outset of this article. Then as now, the Court's considerations

22. Medina (n 20) 442.
23. Tara Melish, 'The Inter-American Commission on Human Rights' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 348.
24. ibid. Emphasis added.
25. *Third Report on the Situation of Human Rights in Colombia* (IACmHR, 26 February 1999) ch IV s B1.
26. Goldman (n 1) 885.
27. See for example *Report Guatemala* (n 16) Recommendations para 5; *Report Salvador* (n 17) Recommendations para 8; *Report Haiti* (n 17) Recommendations para 7.
28. Melish (n 23) 349.
29. *Report Colombia* (n 16) ch VII; *Second Report on the Situation of Human Rights in Colombia* (IACmHR, 14 October 1993) chs II, X; *Third Report Colombia* (n 25) chs III, IV, VI.
30. *Third Report Colombia* (n 25) ch III B 17.
31. ibid chs III, IV and VI.
32. *Second Report Colombia* (n 29) ch X sections A-B.

on ESR remain largely imprisoned within the State terrorism paradigm, no matter how much it tries to stretch it. The following section examines in detail the Court's growing concern over ESR and the way it has indirectly - and insufficiently - addressed them in two main scenarios: State responsibility for violations directly attributed to official authorities and for abuses perpetrated by non-State actors.

3. TACKLING SOCIO-ECONOMIC WRONGS AFTER WIDESPREAD VIOLENCE THROUGH A CIVIL AND POLITICAL RIGHTS FRAMEWORK

3.1. State Responsibility for Violations Directly Attributed to Official Authorities

3.1.1. Abuse of power, impunity, and socio-economic wrongs

From its foundational and more renowned cases, the IACtHR has dealt with systematic violations of human rights resulting from illegal use of force by State authorities. A solid body of jurisprudence has been consolidated defining the situations in which such practices directly engage State responsibility, be it because of the conduct of the State's own security forces[33] and/or agents acting under their direction and control.[34] While State responsibility is triggered in these scenarios 'immediately with the wrong attributed to [the State]',[35] the lack of effective investigation into violations has consistently been considered, in addition to an autonomous breach of the Convention, a factor that points out the existence of practices of abuse of power.[36]

Certainly, the traditional offending State-victimised individual framework that is at stake here is not the most fertile ground for developing a robust approach to ESR after episodes of widespread violence. Focus on State duties to refrain from arbitrarily interfering in the individual's life often obscures positive obligations to address existing socio-economic shortcomings.[37] That said, the Court's understanding of the scope of these 'negative' obligations has brought to the surface relevant consequences for authorities in terms of guaranteeing ESR. The Court has developed these views when dealing with a particular group of people affected by widespread violence, namely IDPs. In the 2005 judgment *Moiwana Community v Surinam*, for instance, an expansive analysis of the duty to carry out criminal investigations was conducted to determine the authorities' responsibility for the socio-economic wrongs that followed impunity.[38] In these and other cases, the Court established that the lack of investigation and prosecution of perpetrators entails a *de facto* restriction

33. See for example *Case of the Gómez-Paquiyauri Brothers v Peru* IACtHR Series C 110 (8 June 2004) para 88; *Case of the Members of the Village of Chichupac and Neighbouring Communities of the Municipality of Rabinal v Guatemala* IACtHR Series C 328 (30 November 2016) para 154; *Case of Bámaca-Velásquez v Guatemala* IACtHR Series C 70 (25 November 2000) paras 121–4, 143.
34. See for example *Case of Blake v Guatemala* IACtHR Series C 36 (24 January 1998) paras 75–7, 83; *Velásquez-Rodríguez v Honduras* IACtHR Series 4 (29 July 1988) para 147, 182.
35. *Gómez-Paquiyauri Brothers* (n 33) para 75.
36. ibid paras 80–8; *Case of Godínez Cruz v Honduras* IACtHR Series C 5 (20 January 1989) para 167.
37. See Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 164, 166 – referring to the neglect of ESR under the traditional offending State-victimised individual paradigm.
38. *Case of the Moiwana Community v Surinam* IACtHR Series C 124 (15 June 2005) para 39.

that makes it impossible for IDPs to return to their lands and provide their means of subsistence, leading to poverty and deprivation.[39]

The approach taken by the Court has the merit of partially addressing socio-economic wrongs by fighting impunity, as prosecution of perpetrators provides essential guarantees that allow IDPs to return safely to their lands. Nevertheless, the dire situation that IDPs usually face may require a response from a different angle, one that directly addresses existing socio-economic shortcomings after widespread violence. Surveys make it clear that insecurity is not the only and perhaps not the most important factor that prevents people from returning to their lands; the lack of guarantee of ESR at the place of return is an important deterrent that explains the decision of many to remain in the places where they settled after being uprooted.[40] In the *Moiwana* case, the Court could have resorted to the duty to fulfil ESR developed by the Committee on Economic, Social and Cultural Rights (ESCR Committee) to address the socio-economic wrongs affecting displaced communities.[41] Expecting this from the Court is not unreasonable since in 2005 it had already started to make connections with international ESR law in cases that also affected ethnic minorities without access to land.[42]

3.1.2. Legitimate security operations and the neglect of socio-economic wrongs

The scope of State obligations in conducting security operations and combating insurgent groups has not been developed in the same detail as in cases of abuse of power. The two leading cases in this regard are *Santo Domingo Massacre* and *Operation Genesis*.[43] Both judgments have in common the Court's focus on the planning and execution of military operations, which left the full scope of socio-economic wrongs resulting from the wider context of violence unattended. This was the case despite earlier judgments issued in peacetime that developed a robust ESR conceptuality.

In the *Santo Domingo Massacre* case, the IACtHR found the State responsible for deploying bombs and conducting strafing in populated areas in the middle of legitimate combat with guerrilla forces.[44] The conduct of the State security forces provoked killings, destruction of private property,

39. ibid paras 86, 102, 118–120. See also *Case of the Massacres of el Mozote and Nearby Places v El Salvador* IACtHR Series C 252 (25 October 2012) paras 193–4; *Mapiripán Massacre v Colombia* IACtHR Series C 134 (15 September 2005) paras 181, 186; *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* IACtHR Series C 270 (20 November 2013) paras 320–1; *Case of the Ituango Massacre v Colombia* IACtHR Series C 148 (1 July 2006) para 404 (bearing in mind that in the last three cases responsibility is not directly triggered by the conduct of State officials but the failure to prevent and investigate abuses by non-State actors).
40. Surveys carried out in Colombia show that 45% of IDPs would return only if they had access to housing, 40% if security conditions were guaranteed, 37% if they had access to employment, 23% if they had access to livelihoods, 20% if their children had access to education, 20% if their lands were returned, 10% if alternative lands were granted in the same municipality, 10% if they had access to health. Contraloría General de la República, *Primera Encuesta Nacional de Víctimas* (2015) 191.
41. The duty to fulfil includes the obligation of authorities to provide ESR 'when individuals or a group are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal'. CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (E/C.12/2000/4) 11 August 2000, para 37.
42. *Case of Yakye Axa Indigenous Community v Paraguay* IACtHR Series C 125 (17 June 2005) paras 166–8.
43. *Case of the Santo Domingo Massacre v Colombia* IACtHR Series C 259 (30 November 2012); *Operation Genesis* (n 39).
44. *Santo Domingo* (n 43) para 247.

and displacement of civilians. Besides the specific strafing and bombing, the IACtHR did not fully consider personal and property damage resulting from hostilities and widespread violence that affected the area. For example, no responsibility was established for acts of theft and looting of property perpetrated by guerrilla forces following hostilities, nor for the general destruction of property provoked by combat between the security forces and guerrilla units. Regarding a town that was almost entirely destroyed as a result of hostilities, the assessment concerning the protection of property rights led the Court to meticulously hold the State responsible for three houses and two grocery stores affected by 'the fragments of the AN-M1A2 bomb'.[45] Instead of fully analysing the State's positive obligations to address the socio-economic consequences derived from destruction of property, such as forced displacement, the Court narrowed the scope of State responsibility to the irregularities that occurred during the execution of the military operation.

The other leading case mentioned above, *Operation Genesis,* revolved around manoeuvres carried out by State security forces in tandem with paramilitary groups. These consisted of bombing military targets and land incursions to regain control over an area from the presence of guerrilla forces. Insofar as the bombing was not directed against the civilian population and did not represent a direct risk for their lives and personal integrity, the IACtHR considered that the State could not be held responsible for the resulting mass displacements.[46] Nor was the State responsible for the forced displacement of many other people in the area and nearby places, given the situation of generalised violence before, during, and after the incursion of paramilitary groups, including combat with guerrillas.[47] As if there were no other alternatives than the paradigm of State terrorism, the Court relied mainly upon the paramilitary incursion perpetrated with the cooperation of the security forces to hold the authorities to account, not for failing to respect but to protect civil and political rights from the conduct of non-State actors.[48] In this case, too, the Court did not analyse the socio-economic wrongs that stem from widespread violence in depth, but rather tied its evaluation to factors such as the way the State behaved whilst conducting security operations.

To be sure, in *Operation Genesis*, the IACtHR went a step further than in the *Moiwana* case by analysing certain ESR-related duties after the paramilitary incursion. In a few pages, the Court evaluated whether the authorities complied with the obligation to provide aid and socio-economic assistance to those displaced and quickly concluded that the response was insufficient. According to the Court, 'the physical and mental conditions that [IDPs] had to face for almost four years are not in accordance with the minimum standards required in this type of case'.[49] Unfortunately, no criteria were suggested to delineate the content of these minimum standards. The Court merely stated that the conditions of 'overcrowding, [access to] food, water supply and management, as well as the lack of adoption of health measures show a breach of the State's obligations to protect after the displacement'.[50] In the same vein, although the Court welcomed the measures taken by the State to address the displacement caused by the bombing in *Santo Domingo*, including access to housing and the provision of humanitarian aid, it found the State in breach of its international obligations without further elaborating on its duties to ensure ESR after widespread violence.[51]

45. *Santo Domingo* (n 43) paras 269–82.
46. *Operation Genesis* (n 39) paras 226, 239, 240, 285.
47. ibid paras 284, 429, 430.
48. ibid para 290.
49. ibid paras 320–4.
50. ibid para 323.
51. *Santo Domingo* (n 43) paras 262–8.

At this stage (2012–2013), the lack of sound criteria to evaluate the guarantee of ESR after generalised violence is frustrating, especially when it comes to displaced communities - with *Operation Genesis* involving ethnic minorities. Earlier in the three cases concerning certain indigenous communities against Paraguay (2005–2010), where people were also displaced and without access to land, the Court resorted to international ESR law in greater detail. While the full scope of this position will be addressed later, it suffices to mention here that the Court conducted a thorough analysis of the actions undertaken by the authorities in light of the standards defined by the ESCR Committee.[52]

3.2. State Responsibility for Non-State Actors: Acts of Collusion and Due Diligence Obligations

In *Velásquez-Rodríguez*, the Court foresaw that conduct violating human rights which initially is not directly imputable to the State can trigger its responsibility 'not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it'.[53] The evolution of this principle has not been free of complexities and tensions,[54] acquiring a more defined shape nowadays, close to the *Osman Test* developed by the European Court of Human Rights.[55] According to it, authorities not only have a general duty to establish a criminal system to prevent, suppress, and punish abuses, but also a duty to protect people from the acts of third parties in certain circumstances.[56] This last duty, however, is restricted to those cases in which authorities were aware of a risk situation and did not take reasonable measures to prevent it from materialising.[57] The key element of this analysis is whether non-State actors collude with authorities in perpetrating abuses: as the level of complicity increases, the rigour with which the *Osman Test* is applied decreases.

3.2.1. The complicity of authorities with non-State actors: addressing the socio-economic wrongs faced by IDPs?

Scholars underline that the IACtHR tends to give paramount importance to contextual elements in defining the limits of State responsibility.[58] In Colombia, these elements have included enactment of laws that created non-State armed groups, such as paramilitary groups, to combat guerrillas; material assistance and logistical support to paramilitary groups for this purpose; and the lack of effective measures to dismantle paramilitary structures when their human rights abuses became manifest.[59] Given that in many of these cases the involvement of State authorities is evident,

52. *Yakye Axa* (n 42) paras 167–8.
53. *Velásquez-Rodríguez* (n 34) para 172. Emphasis added.
54. Victor Abramovich, 'Responsabilidad estatal por violencia de género: comentarios sobre el caso "Campo Algodonero" en la Corte Interamericana de Derechos Humanos' [2010] *Anuario de Derechos Humanos* 167, 173.
55. *Osman v United Kingdom* App no 87/1997/871/1083 (ECtHR, 28 October 1998) para 116.
56. *Pueblo Bello Massacre v Colombia* IACtHR Series C 140 (31 January 2006) para 112.
57. ibid para 123. See also *Gómez Virula v Guatemala* IACtHR Series C 393 (21 November 2019) para 56.
58. Burgorgue-Larsen and Úbeda de Torres (n 2) 155–6. See also Geneviève Lessard 'Preventive reparations at a crossroads: the InterAmerican Court of Human Rights and Colombia's search for peace' (2018) 22 The International Journal of Human Rights 1209, 1213.
59. *Case of 19 Merchants v Colombia* IACtHR Series C 109 (05 July 2004) paras 150–6; *Mapiripán* (n 39) para 114, 123; *Pueblo Bello* (n 56) paras 125–7.

State responsibility has been determined flexibly, without the authorities having specific knowledge of a prior risk situation that threatened victims.[60]

One of the paradigmatic cases of complicity between security forces and paramilitary groups, *Mapiripán Massacre*, allowed the Court to go further in shaping the scope of socio-economic wrongs in conflict-related situations. In this case, the Court determined that the Colombian authorities were responsible for the displacement caused by paramilitaries by facilitating access to the area, not taking protective measures during the massacre, and not conducting appropriate investigations after abuses.[61] The IACtHR carried out a detailed analysis of the plight of those forced to flee and concluded they were affected by a '*de facto* situation of lack of protection'.[62] IDPs not only found their right to freedom of movement restricted (Art. 22 ACHR), but they lacked the minimum socio-economic conditions compatible with the dignity of the human person, in breach of Arts. 1(1), 4(1), 5(1) and 19 ACHR. This was the case due to the shortcomings that followed uprooting, to the challenges that rural people generally face in providing their livelihoods in cities, compounded by patterns of marginalisation and discrimination.[63]

These advances in addressing socio-economic wrongs, however, were still modest. Given the gravitational pull exerted by the understanding of the State as the *assailant*, the content of positive duties to guarantee ESR after abuses was not developed. Reference made to a leading case on ESR issued in peacetime, the *Yakye Axa* judgment, had no real impact on the decision taken, since the 'positive steps' ordered were largely reduced to prosecuting perpetrators.[64] As in *Operation Genesis*, embryonic considerations on the obligation to ensure ESR were watered down in view of the duty to protect people's civil and political rights from non-State actors.

3.2.2. State responsibility for non-State actors not colluding with security forces: An embryonic obligation to ensure the right to housing?

The IACtHR has conducted a strict application of the *Osman Test* in the few cases in which it has ruled over abuses perpetrated by 'pure' non-State actors, that is to say, violations in which there is no indication of abuse of power or any other sort of complicity by security forces. Both in the *Cotton Field* and *Castillo* cases, the Court held that in the absence of a real and imminent risk that authorities knew or should have been aware of, State responsibility is not triggered.[65] Although it was widely recognised in *Cotton Field* that poor women were systematically victimised, State responsibility was compromised not because of the disappearance of the victim as such but because of the authorities' delay in carrying out inquiries after they were informed about the events.[66] In *Castillo*, the Court did not find the State responsible for the killing of a human rights activist by non-State actors since there was no complaint of any

60. *Pueblo Bello* (n 56) paras 138–140.
61. *Mapiripán* (n 39) paras 189, 241.
62. *Mapiripán* (n 39) paras 169–177; *Ituango* (n 39) paras 210–3.
63. *Mapiripán* (n 39) paras 175–189.
64. ibid paras 178–181.
65. *Case of González ("Cotton Field") v Mexico* IACtHR Series C 205 (16 November 2009) paras 282, 463; *Castillo González v Venezuela* IACtHR Series C 256 (27 November 2012) paras 128–9. See also *Gómez Virula* (n 57) para 56.
66. *Cotton Field* (n 65) para 282.

risk or request for protection measures.[67] This was the case despite the knowledge by the authorities of a situation of insecurity and violence against human rights activists in the region.[68]

Ebert and Sijniensky criticise the fact that in the IACtHR's case-law there seems to be no *general obligation* to protect people from pure non-State actors in contexts of generalised violence[69] — despite the fact that certain sectors of the population are visibly at risk (for example, women and human rights advocates) or that a situation of internal disturbance has been declared in the area.[70] Indeed, from the *Castillo* case it follows that people affected by an atmosphere of generalised violence find themselves on the peripheries of State responsibility,[71] as the Court seems to have recognised recently in *Yarce v Colombia*. In this case, the reasons provoking the victims' displacement included combat between insurgent and paramilitary groups, threats to human rights defenders, and rumours about possible attacks.[72] State responsibility was not triggered by any of these factors.[73] In interpreting its case-law retrospectively, the Court clarified that to establish State responsibility it is required to demonstrate 'the collaboration, assistance, help, or State tolerance' with non-State actors, which is to say that 'the wrongful act could not have been done without State acquiescence'.[74]

To some extent, these conclusions are nothing new in the Inter-American human rights system. As early as 1999, the Commission acknowledged that in situations of widespread violence 'the State cannot always prevent, much less be held responsible for, the harm to individuals and destruction of private property occasioned by the hostile acts of its armed opponents'.[75] What is rather striking is that after more than a decade has elapsed, including major advances in ESR enforcement in peacetime, the Court remains stuck to the traditional offending State–victimised individual framework after serious abuses.

It is important to acknowledge that in *Yarce* the Court did take a decisive step towards the protection of ESR. The Court evaluated the reaction of the authorities to the displacement they were aware of, including the provision of humanitarian aid, measures to facilitate the return of IDPs to their homes, or the provision of alternative housing if the return was impossible.[76] Importantly, it made the point that authorities had to 'adopt the necessary measures to protect the assets of the victims [that is, their houses] and provide them with mechanisms to obtain adequate housing' once they became aware of the situation.[77] However, what adequate housing entails, and the extent to which access to it depends on the authorities' failure to take protection measures, are crucial aspects which remained unresolved due to the Court's decision to address the situation with a civil and political rights approach.

67. *Castillo* (n 65) para 131.
68. ibid para 126.
69. Franz C Ebert and Romina I Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?' (2015) 15 Human Rights Law Review 343, 362–34.
70. *Yarce v Colombia* IACtHR Series C 325 (22 November 2016) para 271.
71. *Castillo* (n 65) paras 34–7.
72. *Yarce* (n 70) paras 107–9, 117, 120, 218–9, 222.
73. ibid paras 239, 245.
74. *Yarce* (n 70) para 180, fn 259.
75. *Third Report Colombia* (n 25) ch IV, para 4.
76. ibid paras 240–5.
77. ibid para 259.

The analysis carried out so far reflects a steady interest of the Court in addressing socio-economic wrongs in conflict-related scenarios. However, given that these wrongs are addressed through the framework that considers the State as a *threat* to the individual, the Court ends up addressing reactively and hesitantly what probably involves autonomous ESR violations from the perspective of the State as an active guarantor of rights.[78] The lack of an ESR-based framework after widespread violence is evident and the question arises as to why the understanding of positive duties to ensure ESR, significantly developed in peacetime by 2010, has not been fully implemented after serious abuses. One possible explanation for this is the Court's remedial practice, which at times counteracts its focus on obligations to respect and protect civil and political rights by ordering the adoption of remedies with a clear socio-economic content. The next sections address whether this practice can counteract the lack of an ESR framework to assess State responsibility after widespread violence.

4. REPARATIONS AFTER WIDESPREAD VIOLENCE

Pursuant to article 63(1) ACHR, the IACtHR has repeatedly held that reparation of harm caused by the breach of an international obligation requires the reestablishment of the situation that would have existed in the present had the wrongdoing not been committed.[79] If *restitutio in integrum* is impossible, the 'court must order that steps be taken to guarantee the rights infringed, redress the consequences of the infringements, and determine payment of indemnification as compensation for damage caused'.[80] Although initially more prone to grant monetary compensation, the Court's remedial practice rapidly evolved to emphasise the guarantee of infringed rights, and the redress, if possible, of the consequences of violations, developing a line of case-law deemed to be the most innovative and comprehensive in international law.[81]

The breadth and depth of remedies issued by the IACtHR makes it difficult to provide a single form of classification. Scholars propose the three headings enshrined in the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' as a possible taxonomy,[82] namely:

1. access to justice;
2. access to reparations, which encompasses restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition; and
3. access to information, which may include measures related to truth seeking.[83]

78. Tara Melish, 'The Inter-American Court of Human Rights' in M Langford (ed), (n 23) 400.
79. *Case of Velásquez-Rodríguez v Honduras* IACtHR Series C 7 (21 July 1989) paras 25–6.
80. *Case of Barrios Altos v Perú* IACtHR Series C 87 (30 November 2001) para 25.
81. Clara Sandoval, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes' (2017) 22 International Journal of Human Rights 1192, 1192; Thomas M Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 371; Douglas Cassel, 'The Expanding Scope and Impact of Reparations awarded by the Inter-American Court of Human Rights' in M. Bossuyt et al (eds), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (2006) 91, 92.
82. Cassel (n 81) 92–3; Lessard (n 58) 1209.
83. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (A/RES/60/147), 21 March 2006, paras 19–23.

The Court's practice endorses these taxonomies with more or less rigour depending on the case; on many occasions, it only mentions compensation for material and moral damages and includes many of the other sub-categories under the heading 'Other forms of reparation (*Satisfaction Measures and Guarantees of Non-Recurrence*)'.

The award of measures related to ESR has been part and parcel of the general remedial practice of the Court, in most cases, given the State's failure to respect and protect civil and political rights.[84] This trend has been followed to some extent in the aftermath of widespread violence, especially in the context of the armed conflicts that affected Guatemala, El Salvador, and Suriname throughout the 1980s. These were extreme cases of State terrorism, where the security forces deliberately and indiscriminately attacked the civilian population, killing many, razing entire towns, and forcing the displacement of whole communities. Although these cases were strictly framed through a civil and political rights lens, remedies issued by the Court appear to provide a satisfactory response in terms of ESR enjoyment. In the *El Mozote Massacres* case, for instance, the Court considered that the forced displacement that followed the massacres, together with the precarious living conditions facing IDPs, entailed a violation of their right to freedom of movement and residence (Art. 22(1) ACHR).[85] The Court delved into socio-economic wrongs by considering that the destruction of livestock, crops and houses by the security forces entailed a violation of the right to property and an abusive interference in private life (Arts. 11(2), 21(1)-(2) ACHR). Although this case, as well as other 'scorched earth operations' perpetrated by the State authorities in Guatemala and Suriname,[86] was framed primarily in terms of requiring the authorities to abide by their negative obligations to respect and protect civil and political rights,[87] positive socio-economic duties stemmed from these judgments. In the cases of *El Mozote* and *Chichupac Village*, the Court was clear that authorities were not only obliged to respect the victims' right not to be forcibly displaced and to protect them from forced uprooting, but also to provide the necessary conditions that allow a safe return to their lands in conditions of dignity.[88] In this connection, the Court in *El Mozote* ordered the adoption of a social development plan under the heading of *restitution*, which included the provision of public services of water and electricity; access to health centres, educational services and housing; and improvements to the public road system.[89] Similar development plans were ordered in the cases *Moiwana Community* and *Plan de Sánchez* under the heading of *Other forms of reparation (Satisfaction Measures and Guarantees of Non-Recurrence)*.[90] Along the same lines, when the applicants' property and homes have been affected, the Court has ordered the implementation of housing policies,[91] as well as the reopening of schools and the provision of medical services that were interrupted due to violence.[92]

84. González (n 10) 2.
85. *El Mozote* (n 39) para 195.
86. *Case of Plan de Sánchez Massacre v Guatemala* IACtHR Series C 105 (29 April 2004) paras 42(6); *Chichupac Village* (n 33) para 79.
87. *El Mozote* (n 39) para 195; *Plan de Sánchez* (n 86) paras 49.4, 49.5, 49.18, (52)3; *Chichupac Village* (n 33) para 341(10–13); *Moiwana Community* (n 38) paras 86, 102.
88. *El Mozote* (n 39) 186–8; *Chichupac Village* (n 33) paras 183–202.
89. *El Mozote* (n 39) paras 339, 350.
90. *Moiwana Community* (n 38) paras 213–5; *Case of Plan de Sánchez Massacre v Guatemala* IACtHR Series C 116 (19 November 2004) paras 105–110.
91. *Ituango* (n 39) para 407; *Plan de Sanchez* (n 90) para 105.
92. *Case of Aloeboetoe et al. v Suriname* IACtHR Series C 15 (10 September 1993) para 96.

In all these instances, the Court's expansive remedial practice can be considered to balance the emphatic assessment of the authorities' misconduct regarding the occurrence of abuses in terms of duties to respect and protect civil and political rights. This is the case because by issuing far-reaching measures, the IACtHR is fully eliminating the consequences of wrongdoing by ordering crucial socio-economic goods for those affected.[93] Perhaps because of this, scholars who appreciate the breadth of these decisions have not raised the issue of the autonomous application of ESR in the aftermath of serious abuses — despite the obvious socio-economic nature of the remedies at stake.[94]

That said, the Court's remedial practice may end up backfiring. For one thing, the Court is replacing an ESR-based framework to define State duties after widespread violence, which is the most natural avenue to order development plans and the provision of substantive socio-economic goods, with short-sighted considerations about the existence of abuse of power and compliance with due diligence obligations to protect and investigate abuses by non-State actors. As Tuffi and Ferolla recently stated in another context, the Court is not developing the specific legal framework in which these far-reaching orders are inserted, nor what this framework requires from the authorities in similar cases.[95] As a result, the Court is ordering such remedies with a certain level of discretion. For example, since in the *Maiwana* case the lack of criminal investigations influenced the Court's decision to require the authorities to implement a development plan, in similar 'impunity cases' comparable socio-economic measures should have been granted or at least discussed, which did not happen.[96]

Yet there are other compelling reasons as to why the Court's corrective practice fails to balance the narrow understanding of the State as a threat to the individual after widespread violence. In Guatemala, El Salvador, and Suriname, the main actor responsible for violations was the State. However, as will be discussed below, it is not uncommon to find that 'pure' non-State actors, such as rebel forces, are equally responsible for the harm inflicted on the civilian population. In addition, the very circumstances of armed conflict, such as legitimate combat, tend to leave a trail of socio-economic harm for which State authorities may not always be held to account. In these cases, then, the Court's expansive remedial practice may be addressing socio-economic wrongs only incompletely, running the risk of placing victims affected by forms of violence not sponsored by the State at the margins of State response. Equally important, the massacres in Guatemala, El Salvador and Suriname were cases of extraordinary violence perpetrated by the authorities themselves throughout the 1980s. Today, however, violence tends to take new forms. It is still widespread and very crude, with a huge bearing on the ESR of those affected. Yet, violence tends to result from the conduct of groups of organised crime that the State authorities are trying to combat, which casts doubt on the suitability of insisting on the offending State-victimised individual paradigm in these new contexts.

93. Feria Tinta (n 11) 457–9.
94. Lessard (n 58); Sandoval (n 81); Cassel (n 81); Antkowiak (n 81).
95. Aziz Tuffi and Mariana F Vallondro do Valle, 'The Inter-American Court of Human Rights and the Quest for Equality: The Fireworks Factory case' (*EJIL: Talk!*, 20 January 2021) <www.ejiltalk.org/the-inter-american-court-of-human-rights-and-the-quest-for-equality-the-fireworks-factory-case/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 29 January 2021.
96. See for example *Operation Genesis* (n 39); *Ituango* (n 39); *Mapiripán* (n 39).

5. THE NEGLECT OF VICTIMS OUTSIDE THE STATE TERRORISM PARADIGM

5.1. Rebel Groups and Legitimate Military Operations

The paradigmatic case of dictatorship which affected the south of the American region involved a model of vertical and targeted violence, sponsored by State authorities against specific sectors of the population. On the contrary, in armed conflict, violence often assumes a horizontal nature and includes different armed actors and the dynamics of conflict itself.[97] 'Pure' non-State actors, for instance, may bear greater responsibility than authorities for abuses, as exemplified by the Peruvian experience. According to the Peruvian Truth and Reconciliation Commission, State agents were responsible for 30 percent of fatalities, while the insurgent group *Sendero Luminoso* was responsible for approximately 46 percent of them. Other unidentified agents, along with armed clashes and other conflict-related situations, explained the remaining 24 percent of deaths.[98] In Colombia, at least 40 percent of IDPs were forced to flee due to rebel groups.[99] On many occasions, displacement took place 'drop by drop', meaning discrete individual displacements or the displacement of no more than one household;[100] it occurred in regions where the State has little or no presence;[101] and it resulted from daily acts of coercion against specific members of the community that are often invisible, such as threats.[102] This being the case, IDPs often face the risk of finding themselves on the margins of State responsibility given the limitations that follow from due diligence obligations. As discussed above, authorities cannot be held responsible for violations perpetrated by 'pure' non-State actors unless they are aware of a risk situation/complaint and do not adopt reasonable measures to respond to it, a requirement that is difficult to fulfil in armed conflict. By the same token, it was also seen that the extent of State responsibility for socio-economic wrongs which generally follow combat between security forces and non-State actors ends up depending on a short-sighted analysis of whether there was an irregularity in the planning and execution of military operations. For this reason, many of those who are affected by combat and surrounding situations of violence also run the risk of being placed on the margins of State responsibility,[103] including their socio-economic demands, especially when security operations were carried out lawfully (for example, the aerial bombardment in *Operation Genesis*).

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

97. Rachel Kerr, 'Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges' in R Duthie and P Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 125–9.
98. Comisión de la Verdad y Reconciliación, *Informe Final* (CVR 2003) Annex 2, 13.
99. Contraloría General de la República (n 40) 66.
100. ibid 63.
101. Centro Nacional de Memoria Histórica, *Una Nación Desplazada: Informe Nacional del Desplazamiento Forzado en Colombia* [2015] 93.
102. Contraloría (n 40) 61.
103. In Peru these people could represent 24 percent of those affected, see n 95. In Colombia, it could be around 8 percent: Contraloría (n 40) 61.

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

The Court's reasoning ends up neglecting that the impact of widespread violence on victims, as embodied by IDPs, generally jeopardises their ESR regardless of who the perpetrator is and what the causes of wrongdoing are.[104] Thus, rather than addressing socio-economic wrongs in their own right, the Court insists on tracing them to civil and political rights violations perpetrated or tolerated by authorities. In *El Mozote*, the Court illustrates this point by differentiating general displacement due to armed conflict from displacement purposefully perpetrated by authorities in light of the State terrorism paradigm. The socio-economic wrongs that accompanied uprooting were not the source of State responsibility by themselves, but were considered 'direct consequences' of the massacres perpetrated by State agents.[105] Therefore, to a certain extent, the Court reaffirms the Commission's opinion, expressed in the 1993 report on Colombia, that generalised violence and its negative impact on the observance of ESR are mere *contextual* elements in which 'real' civil and political rights violations are inserted.

Although armed conflicts do not have the impact they used to have in the region a couple of decades ago, they have not completely disappeared from the horizon, as shown by the recent rearmament of the FARC guerrilla in Colombia and the continued existence of the ELN guerrilla.[106] However, this is not the only reason why the offending State–victimised individual paradigm requires urgent rethinking as the main vehicle for addressing ESR after serious abuses. The new forms of violence in the region also require it.

5.2. Organised Crime in Central America

Perhaps one of the main concerns in the region at present is organised crime (OC), together with the socio-economic impact it produces on the population, as manifested, again, in IDPs. Cantor argues that States like Mexico and those of the Northern Triangle of Central America (El Salvador, Guatemala, and Honduras) face 'a new wave' of internal forced migration. Although it is not the result of traditional State repression and armed conflict over the 1980s,[107] it is possibly as deadly as armed conflict.[108] Be it street gangs (for example, 'maras'), drug carriers, or drug cartels,[109] these faces of OC have forced people and families to flee in large numbers.[110] Even

104. Maria Stavropoulou, 'The Right Not to be Displaced' (1994) 9 American University Law Review 689, 738.
105. *El Mozote* (n 39) para 193.
106. UN Verification Mission in Colombia, *Report of the Secretary-General* (S/2019/780) para 2.
107. David Cantor, 'The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico' (2014) 33 Refugee Survey Quarterly 34, 35. See also Cecilia Jiménez, *Report of the Special Rapporteur on the human rights of internally displaced persons on her visit to El Salvador* (A/HRC/38/39/Add.1) para 7.
108. David Cantor, 'As deadly as armed conflict? Gang violence and forced displacement in the Northern Triangle of Central America' (2016) 23 Agenda Internacional 77, 79.
109. Nicolas Rodríguez, 'Fleeing Cartels and Maras: International Protection Considerations and Profiles from the Northern Triangle' (2016) 28 International Journal of Refugee Law 25, 27–9.
110. In Mexico, approximately 1.65 million people were forced to flee due to the threat or risk of violence (2006–2011). Around 130,000 people were displaced within El Salvador during 2012, with approximately 174,000 IDPs in Honduras in 2014. See Cantor (n 107) paras 36–7; Cantor (n 108) 80–1, 88.

in States still affected by armed conflict, such as Colombia, the displacement caused by OC is very high, reaching the hundreds of thousands.[111]

A crucial feature of these new scenarios is that authorities are decidedly fighting OC[112] when resources permit so.[113] Since internal displacement is not necessarily the result of State-sponsored violence, the existing protection framework, first developed to address practices of abuse of power in the context of dictatorship, largely applied to armed conflict, will hardly offer any protection in terms of ESR. As discussed above, the scope of State responsibility regarding non-State actors is significantly reduced to those cases in which authorities are aware of a risk situation/complaint and fail to take reasonable measures to address it. This prior knowledge, however, cannot be taken for granted regarding OC either. Displacement due to OC is often an 'every day' pattern that takes place silently in marginalised areas where organised groups exercise control given 'the State's inability to control its territory and enforce its laws'.[114] In addition, 'displaced people try to solve their situations on their own', according to an interviewee in El Salvador, recalling that the number of cases reported to authorities is extremely low due to the decision of many 'to keep a deliberately low profile'.[115] The serious encroachment on the ESR of highly vulnerable segments of IDPs, especially poor people without family networks,[116] demands that existing socio-economic shortcomings in the aftermath of widespread violence be addressed autonomously. In this new landscape as well, 'the criminal character of the agents of displacement should not distract attention from the humanitarian nature of the needs of their victims'.[117]

6. MOVING FORWARD: THE RIGHT TO A DIGNIFIED LIFE AND THE DIRECT ENFORCEABILITY OF ESR AFTER WIDESPREAD VIOLENCE

6.1. The Right to a Dignified Life

Addressing the situation of people affected by armed conflict and widespread violence, not in the light of the State terrorism paradigm, but through the protection offered by the right to a dignified life, is an alternative worth exploring. The point here is not to obscure State duties to respect and protect rights during conflict-related scenarios, but rather to complement these non-interference duties with positive obligations to provide people affected by widespread violence with socio-economic goods that allow them to 'seek out a meaning for their own existence'.[118]

According to Beloff and Clérico, the notion of the right to a dignified life is part of the first attempts by the Court to underpin the judicial enforceability of ESR.[119] Since the *Street Children* case, the IACtHR has understood that the right to life binds authorities not only to

111. Unidad para la Atención y la Reparación Integral a las Víctimas, 'Registro Único de Víctimas' (*Unidad de Víctimas,* 2019) <https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394> accessed 18 November 2020.
112. Cantor (n 107) 84, 87–8.
113. In El Salvador, the number of gang members amounts to more than 60,000, compared to 25,000 police officers and 13,000 armed forces personal. Jiménez (n 107) para 5.
114. Rodríguez (n 109) at 29–30.
115. Jiménez (n 107) para 15; Cantor (n 107) 62–5.
116. Cantor (n 107) 54–5, 59.
117. ibid 65.
118. *Case of the "Street Children" (Villagrán Morales) v Guatemala* IACtHR Series C 63 (19 November 1999) para 191.
119. Beloff and Clérico (n 11) 140.

duties to respect life and protect it from non-State actors, but also to ensure that people, especially vulnerable groups, have 'access to the conditions that guarantee a dignified existence'.[120] The right to a dignified life has a qualitative and quantitative element: the qualitative dimension is linked to the notion of a *dignified existence*, which encompasses the 'right to harbour a project of life',[121] to pursue and achieve one's personal and professional goals;[122] the quantitative dimension has to do with *the minimum conditions* that allow people to harbour a life project, meaning in the *Street Children* case that authorities should prevent people from living in misery.[123] According to the Court, the enjoyment of specific socio-economic goods is indispensable for carrying out one's life project, as exemplified by the three cases involving certain indigenous communities in Paraguay, where the Court resorted to the ESCR Committee's work. While in *Yakye Axa*[124] and *Sawhoyamaxa*[125] there is already some loose mention of General Comments No. 12, 14, and 15, in *Xákmok Kásek* there is a separate analysis of the rights to food, water, education, and health.[126] The Court's reasoning is remarkable. It breaks down the notion of the right to a dignified life in a right-by-right analysis by considering positive measures undertaken by the authorities in view of the international standards that govern each of those rights. After considering that measures implemented to fulfil each right were insufficient, it found a violation of the right to a dignified life[127] and ordered encompassing development plans.[128]

There is no reason why this line of reasoning, which has been upheld during peacetime, should not be applied in conflict-related scenarios. To the extent that people affected by widespread violence find themselves under the material circumstances highlighted by the Court, as already recognised in certain cases,[129] there is no difficulty in making such an analogy. In all these cases, then, their right to a dignified life must be protected autonomously. This implies giving due consideration to existing socio-economic shortcomings rather than focusing solely on the failure of State authorities to comply with their negative obligation to respect rights and carry out appropriate investigations after violations. There are certainly many things that require further clarification, including the full scope of the right to a dignified life itself. Since it is based on a mix of quantitative and qualitative elements, this is a notion without definite content, and the basic material elements necessary to carry out a flourishing life remain open. This flexibility is a virtue after widespread abuses, however. Since one of the deepest effects of violence is the destruction of people's life projects,[130] the scope of corrective measures can be broad and should be consulted with them.[131] In any case, whatever the need to further develop this notion, its emphasis on existing shortcomings provides a strong grip to order development plans or other socio-economic goods. Being anchored in the State's positive duties in the field of ESR rather than in a background assessment of the authorities'

120. *Street Children* (n 118) para 144.
121. ibid para 191.
122. *Case of Loayza Tamayo v Peru* IACtHR Series C 42 (27 November 1998) para 147.
123. *Street Children* (n 118) para 191.
124. *Yakye Axa* (n 42) para 166.
125. *Case of the Sawhoyamaxa Indigenous Community v Paraguay* IACtHR Series C 146 (29 March 2006) para 164.
126. *Case of the Xákmok Kásek Indigenous Community v Paraguay* IACtHR Series C 214 (24 August 2010) paras 194–213.
127. ibid para 217.
128. *Yakye Axa* (n 42) para 205; *Sawhoyamaxa* (n 125) para 224.
129. *Mapiripán* (n 39) paras 162, 186; *Operation Genesis* (n 39) para 352; *Ituango* (n 39) paras 181, 210–3, 234.
130. *Loayza* (n 122) paras 148–9, 152.
131. *Moiwana* (n 38) para 215; *El Mozote* (n 39) paras 188, 339.

conduct during widespread violence, the right to a dignified life also closes the discussed protection gaps that arise when State-led violence is not evident.

6.2. Directly Enforcing ESR

As with the right to a dignified life, recent attempts to directly enforce ESR in peacetime should be applied to conflict-related scenarios. The Court is competent to apply under its individual complaints procedure two regional treaties that incorporate ESR, namely the American Convention, read in conjunction with the OAS Charter, and the Additional Protocol in the Area of Economic, Social and Cultural Rights (San Salvador Protocol). The San Salvador Protocol offers well-detailed provisions on a wide range of ESR that are relevant from the perspective of the State reporting mechanism and the Court's advisory function.[132] However, Article 19(6) of the San Salvador Protocol only grants jurisdiction over individual petitions for violations of the rights to unionise (Article 8.1) and to education (Article 13) enshrined therein. Melish explains that instead of adjudicating directly on these provisions, the Court tends to use them to interpret the American Convention, making the latter the main instrument for ESR enforcement,[133] as exemplified by the *Girls Yean and Bosico* case.[134]

As the position stands today, the Court differentiates the *immediate* and *progressive* nature of obligations regarding ESR, having the competence to rule over non-compliance with both sorts of obligations. Violations of immediate obligations concerning the rights to health,[135] work,[136] and water[137] have been declared due to the authorities' failure to protect rights and, more broadly, secure them without discrimination. The duty of progressivity concerning the right to health has been also violated.[138] In deciding which rights can be the object of judicial review under Article 26 ACHR, the Court resorts to the OAS Charter and the American Declaration of the Rights and Duties of Man,[139] with references to other human rights provisions and pronouncements of monitoring bodies as interpretative guidelines to define the content of the right.[140] The particular situation of plaintiffs is generally addressed by the Court through the lens of State duties to immediately guarantee ESR.[141] General policies, regulations, and laws are addressed under the duty of progressivity.[142]

As Schmid and Nolan have made clear, there is nothing intrinsic to ESR that prevents their autonomous application in the wake of widespread violence. Enforcing ESR is not equivalent to imposing unfeasible obligations on States, nor is it tantamount to trying naively to resolve historical

132. Advisory Opinion IACtHR OC-23/17 (15 November 2017) paras 56–70.
133. Melish (n 23) 376–377.
134. *Case of the Girls Yean and Bosico v Dominican Republic* IACtHR Series C 130 (8 September 2005) para 185.
135. *Poblete Vilches v Chile* IACtHR Series C 349 (8 March 2018) paras 134–143.
136. *Lagos del Campo* (n 9) paras 141–154, 166; *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v Brazil* IACtHR Series C 407 (15 July 2020) paras 154, 173–6.
137. *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina* IACtHR Series C 400 (6 February 2020) para 272.
138. *Cuscul Piraval v Guatemala* IACtHR Series C 359 (23 August 2018) para 147.
139. ibid paras 98–102.
140. ibid paras 103–107.
141. ibid paras 119–139.
142. ibid paras 144–154.

patterns of marginalisation and exclusion.[143] As with civil and political rights, violations of obligations to *respect* and *protect* ESR are too common in conflict-related scenarios, such as when the authorities themselves arbitrarily evict people from their residences or fail to protect the right to housing from non-State actors.[144] Addressing socio-economic wrongs after widespread violence, for instance, by providing people with basic access to water, food, and health, can be even easier than dismantling criminal structures and bringing perpetrators to justice.[145] Likewise, both sets of rights require complex policies to be implemented after generalised violence: strengthening a housing policy does not seem to require more resources, nor is it more challenging than strengthening the judicial system.[146]

By directly enforcing ESR, the Court is now in a position to explore the full scope of positive duties related to the obligation to fulfil ESR after widespread abuses, regardless of the perpetrator and the nature of violations. This is crucial since, as has been insisted throughout this article, the scope of obligations to respect and protect is very limited in these contexts. However, the emphasis on positive duties brings with it significant challenges, especially when it comes to the duty of *progressive* realisation of ESR. Two main difficulties come to mind. First, how to craft remedies that impose workable obligations on authorities? Although this question can also be raised in peacetime, it may be more acute after widespread violence, as resources are arguably scarcer and needs are more pressing. The second difficulty is very characteristic of post-conflict settings. It touches on an issue that has attracted much attention in transitional justice and post-conflict scholarship, namely, how to weigh competing ESR demands between people affected and unaffected by widespread violence in contexts of inequality and exclusion?[147] In this connection, it has been discussed whether victims should have priority access to public services over non-victims,[148] as well as in the progressive realisation of ESR[149] as a means of redress.

To date there are no precedents in the IACtHR's case-law in this regard. However, some guidance can be found in the work carried out by the Colombian Constitutional Court (CCC) since 2004 concerning the protection of millions of IDPs. The process initiated by the CCC is a complex one, with different phases and varying levels of success, impossible to summarise in just a few pages.[150] It is sufficient to consider here how the CCC has handled the duty of progressivity when it comes to IDPs' access to livelihoods. In Judgment T-025 of 2004, the Court elaborated on the minimum and immediate duties expected from authorities in dealing with the plight of IDPs, as well as medium and long-term obligations that must be fulfilled in light of the notion of progressivity, following

143. Evelyne Schmid and Aoife Nolan, '"Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 International Journal of Transitional Justice 362, 371–4.
144. CESCR, General Comment No. 7: The right to adequate housing: forced evictions (E/C.12/GC/20) 20 May 1997, para 4.
145. Schmid and Nolan (n 143) at 373.
146. ibid 375–6.
147. Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International and Comparative Law Review 157, 186–192; Luis E. Pérez-Murcia, 'Social Policy or Reparative Justice? Challenges for Reparations in Contexts of Massive Displacement and Related Serious Human Rights Violations' (2013) 27 Journal of Refugee Studies 191, 197–199.
148. Roth-Arriaza (n 147) 198–200.
149. Pérez-Murcia (n 147) 199–203.
150. See generally César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socio-Economic Rights in the Global South* (CUP 2015).

closely General Comments No. 3 and 14 by the ESCR Committee.[151] The CCC made it clear that it was unreasonable to expect the State to immediately guarantee access to the labour market for all IDPs. Nor was it reasonable to expect the State to provide everyone with full material support to undertake a productive project given 'the material restrictions and the real dimensions of the evolution of the phenomenon of displacement'.[152] Authorities were rather immediately obliged to characterise the situation of displaced individuals and families, including their particular skills. This served the purpose of identifying available alternatives in the short and medium-term 'to launch a reasonable individual economic stabilisation project, to participate productively in a collective project, or to link to the labour market'.[153]

The CCC revisited this topic in 2016. In referring to the *UN Framework on Durable Solutions for Internally Displaced Persons*,[154] it underlined that ensuring access to livelihoods is an obligation of means and not of result. This implies that authorities are not obliged to guarantee all IDPs effective access to employment or the recovery of previous livelihoods.[155] However, it stressed that the principle of *progressivity* implies that authorities cannot comply with their obligations in this matter by only fulfilling the minimum and immediate duties defined back in 2004. As more than a decade had elapsed, 'the State response cannot be the same'.[156] Consequently, the Court defined a more robust set of *progressive* duties that authorities have to comply with, including negative and positive obligations related to the accessibility of livelihoods, the sufficiency of resources granted, as well as transparency and participation in decision-making.[157]

Regarding the challenge of how to balance competing ESR claims between victims and non-victims, the Court's position evolved over time. Given the severe humanitarian crisis faced by IDPs during the first years of the 2000s, and in the face of a rather disarticulated and underfunded response from authorities, the CCC initially considered that IDPs should advance at a faster pace than other disadvantaged groups regarding access to livelihoods.[158] This position was qualified in 2016, in terms of requiring the authorities to level the playing field between IDPs and other people living in comparable socio-economic conditions, so that the former have access to livelihoods without discrimination.[159]

Crucially, these considerations presuppose an aspect that speaks directly to the IACtHR. Throughout the process that dates back to Judgment T-025 of 2004, the Colombian Court has been emphatic that the mere enactment of laws and the ordinary appropriation of resources are an insufficient response by the authorities if these measures do not contribute to the effective enjoyment of rights of the affected people.[160] Therefore, the CCC has a more robust understanding of the obligation of *progressivity* than that of the IACtHR in *Cuscul Pivaral*. Here, the mere enactment of laws, the implementation of public policies, and the increase in public spending to face an

151. *T-025*, Colombian Constitutional Court (22 January 2004) sub-s 8.3.2.
152. ibid sub-s 9.
153. ibid sub-s 9 para 8.
154. Walter Kälin, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Framework on Durable Solutions for Internally Displaced Persons* (A/HRC/13/21/Add.4) 09 February 2010.
155. *Auto 373*, Colombian Constitutional Court (23 August 2016) 149.
156. ibid.
157. ibid 152–4.
158. *Auto 008*, Colombian Constitutional Court (26 January 2009) para 90.
159. *Auto 373* (n 155) 154–6.
160. *T-025* (n 151), sub-s 6.1.6.3.; *Auto 373* (n 155) 6–11.

HIV-related crisis, were considered sufficient measures for the progressive fulfilment of the right to health – without any evaluation of the impact of these measures on the enjoyment of the right.[161]

Before concluding, it may be useful to say a few words about the viability of the approach advocated here in light of the excessive time it takes for the IACtHR to resolve a case, which can take years or decades after the occurrence of violations.[162] It could be argued that in this period, victims of violence have already recovered some degree of their socio-economic standing, and therefore short-term measures ordered by the Court, such as immediate access to water, housing and food,[163] are not appropriate. Certainly, if the case reaches the final stage of the merits before any other decision is made, there is little point in claiming these measures. However, provisional measures are available in the Inter-American system, both before the Commission[164] and before the Court,[165] and have already been used to urgently address serious socio-economic shortcomings. Furthermore, ESR are crucial for people affected by armed conflict far beyond the immediate urgencies that follow violent episodes. The CCC found in 2016 that IDPs continue to be affected by severe shortages of housing[166] and livelihoods[167] a decade or more after uprooting. Perhaps because of this, the mere passage of time did not prevent the IACtHR from ordering development plans, some of them including measures such as access to water and other public services urgently needed, in favour of communities forcibly displaced several years ago.[168]

Finally, it should not be forgotten that the scope of protection provided by regional human rights law must be framed in the broad context of 'the construction of a general order where rights can be fully guaranteed' by the State involved.[169] The Inter-American system was not conceived and clearly does not fit the purpose of ensuring timely justice for all persons affected by a violation of regional instruments. It is essential to highlight here the role of the Court in determining the content of assumed obligations and configuring the scope of State responsibility in such a way that all States in the region 'organise the entire national system, including institutions and practices, in such a way that rights can be materially guaranteed'.[170] In this regard, this article argued that it is crucial to outline the scope of positive duties in the field of ESR that State authorities owe to people affected by widespread violence, regardless of the perpetrator and the modality of violations.

7. CONCLUSION

Being applied for a long time to episodes of widespread violence, the State terrorism paradigm already seems to be exhausted and overwhelmed by socio-economic wrongs that result from a multiplicity of actors and the dynamics of armed conflict and organised crime. The protection of

161. *Cuscul Piraval* (n 138) para 145.
162. With thanks to one of the anonymous reviewers for pointing out this issue.
163. *Yakye Axa* (n 42) para 221; *Sawhoyamaxa* (n 125) para 230; *Xákmok* (n 126) para 30.1.
164. *Jorge Odir Miranda Cortez v El Salvador* IACHR Report 27 (20 March 2009) paras 15–7.
165. *Matter of the Penitentiary Complex of Curado regarding Brazil* IACtHR (28 November 2018) paras 14–35 and Resolutive part, para 1.
166. Only 10 percent or, in the best estimate, 20 percent of IDPs have access to housing in conditions of dignity. *Auto 373* (n 155) 120–2.
167. The percentages of IDPs that are below extreme poverty and poverty lines are higher than those of the entire population of the country (36 v 6; 81 v 26 respectively). ibid 155.
168. *El Mozote* supra (n 39) para 339; *Plan de Sánchez Massacre* (n 90) para 110.
169. Lessard (n 58) 1211.
170. ibid 1212.

the right to a dignified life and the direct enforceability of ESR make it possible to emphasise the special vulnerability of those undergoing socio-economic hardship due to armed conflict and widespread violence. Released from narrow considerations on the existence of abuse of power, misuse of force, and compliance with due diligence obligations to prevent and investigate, the IACtHR can coherently grant development plans and substantive socio-economic goods paying due attention to existing shortcomings in the aftermath of widespread violence.

Addressing ESR in their own right, however, requires going beyond the narrow understanding of the State as a threat to the individual, primarily responsible for respecting civil and political rights and protecting them from proxy militias. It requires highlighting the active role that authorities have to play in contexts of inequality and exclusion. It also requires anchoring the provision of substantive socio-economic goods in positive duties to ensure ESR — instead of considering that people are entitled to these goods only in cases of undue interference attributed to State authorities.

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ORCID iD


Felix E. Torres https://orcid.org/0000-0003-2550-5921