THE VICTIMS OF OTHERS

The obligation of States to repair victims of violations of economic, social and cultural rights perpetrated by non-State actors

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SELBSTSTÄNDIGKEITSERKLÄRUNG

Hiermit erkläre ich, dass ich die vorliegende Dissertation selbstständig und ohne fremde Hilfe verfasst habe. Alle Hilfsmittel, die verwendet wurden, habe ich angegeben. Die Dissertation ist in keinem früheren Promotionsverfahren angenommen oder abgelehnt worden.

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[1] It will go well or it will pass.

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THE VICTIMS OF OTHERS: THESIS ABSTRACT

The present research was inspired by the chance encounter of an important dissonance between 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* and Uganda's nascent transitional justice policy. The latter foresaw reparations for all victims of Uganda's civil wars while the former stated that customary international law merely encouraged but did not oblige States to repair victims of non-State actors, the *victims of others*.[2] Was Uganda's policy gratuitous? Or has public international law evolved beyond the economy of the *Basic Principles and Guidelines*? It is the purpose of the present text to answer these questions. The thesis is divided into three substantive chapters that are preceded by an Introduction and tied together by a brief Conclusion.

The Introduction articulates the hypothesis and highlights that if correct, i.e., if there exists a rule of public international law obliging States to repair victims not their own, there exist two candidates for the content of that rule. The candidates are explored in Chapters 1 and 2. Before turning to them, the Introduction demonstrates that avenues typically proposed today are insufficient juxtaposed with the aim of making reparations a reality for victims of non-State actors. It thereby underlines that the hypothesis is not just thought-provoking but also of immense practical value.

Chapter 1 first investigates the nature of the States' obligation to protect economic, social and cultural rights, and concludes that the existing consensus as it is contained in the *Basic Principles and Guidelines* is that the obligation is a qualified obligation of result. It then examines the historical origins of the rule, demonstrates why it is inappropriate to apply it to the situation at hand and proposes that the obligation to protect be understood as an unqualified obligation of result instead, meaning that the State would find itself in a position of wrongfulness at the exact moment a non-State actor committed a violation. This would *ipso*

[2] The title of the thesis is inspired by the title of Florian Henckel von Donnersmarck's film *Das Leben der Anderen*, meaning 'The lives of others'.

facto create the State's secondary obligation to repair. Lacking a conventional articulation to that effect, such a rule would have to exist in the sphere of customary international law.

Chapter 2 takes under the magnifying glass the *International Covenant on Economic, Social and Cultural Rights* and explores the potential of the obligation of progressive realisation, the prohibition against discrimination and studies the work of the Committee on Economic, Social and Cultural Rights, substantiating the argument that the obligation to repair could be understood as a primary obligation.

What we do not yet know at this point in the thesis is whether either proposition corresponds to the States' understanding of the law. Chapter 3 therefore examines a dozen countries that have experienced a non-international armed conflict in their more or less recent past. It looks at their practice in regard to reparations, paying particular attention to whether States discriminate between victims of the State and those not of the State. As far as it can be discerned, it also analyses their understanding of public international law.

The Conclusion suggests an affirmation of the hypothesis.

Es gibt keine Ordnung der Dinge *a priori*.[3]

(Ludwig Wittgenstein)

There is a clinic in our village, but there are no doctors, no nurses and no supplies. Where is the Government?

(Ugandan victim)

[3] There is no *a priori* order of things.

INTRODUCTION

A non-international armed conflict is an armed conflict between a State and one or several non-State actors, or between non-State actors.[4] At present, it is the predominant form of armed conflict in the world.[5] This is not surprising. Ever since the end of the Second World War, an increasing number of larger and smaller, and sometimes seemingly perpetual non-international armed conflicts have been responsible for tens of thousands of civilian deaths every year.[6] Violations of other human rights number in the millions.[7] While it is not disputed that States who are parties to such conflicts have an obligation to "provide reparation to victims for acts or omissions which can be attributed to [them]",[8] victims of conduct that cannot be so attributed

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[4] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), United Nations Treaty Series (UNTS), vol. 75, p. 287, Article 3 (hereinafter: Common Article 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977), UNTS, vol. 1125, p. 609, Article 1 (1); Rome Statute of the International Criminal Court (1998), International Legal Materials (ILM), vol. 37, p. 999, Article 8 (2) (f); *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, pp. 170-171 and 177; and: *Marauhn, and Ntoubandi* (2016), Armed Conflict, in particular paras. 1-2 and 14. This thesis will use the terms 'non-international armed conflict' and 'civil war' interchangeably.

[5] For example, there have been about 100 non-international armed conflicts ongoing at any time between 2014 and 2019 (Armed Conflict by Region, 1946-2019, Uppsala Conflict Data Program, University of Uppsala, no date, ucdp.uu.se/downloads/charts/graphs/pdf_20/armedconf_by_region.pdf (unless explicitly stated otherwise, all internet sources have been last accessed on 6 June 2022; information in the thesis is up-to date as of 31 December 2021). See also: *Hofmann* (2007), Reparations for victims of war and non-state actors?, p. 293; United Nations General Assembly (UNGA), Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/68/297, 9 August 2013, para. 55; *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 231; *Bellal* (2016), Human Rights Obligations of Armed Non-State Actors, p. 3; *Herman* (2020), Beyond the state of play, p. 1034; International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (report), International Committee of the Red Cross (ICRC), shop.icrc.org/international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts-recommitting-to-protection-in-armed-conflict-on-the-70th-anniversary-of-the-geneva-conventions-pdf-en.html, p. 50, cited in: *Herman* (2020), Beyond the state of play, p. 1034; or: *Hutter* (2019), Starvation in Armed Conflicts, pp. 725-726.

[6] Fatalities by Type of Violence (Excluding Rwanda 1994), 1989-2019, Uppsala Conflict Data Program, University of Uppsala, no date, ucdp.uu.se/downloads/charts/graphs/pdf_20/fat_by_tov_excrw.pdf.

[7] This sentence should not be understood so as that this thesis submits that international human rights law directly binds non-State actors.

[8] UNGA, Resolution 60/147, including an Annex (Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law), UN Doc. A/RES/60/147, 21 March 2006 (hereinafter: Basic Principles and Guidelines), para. 15; see also: UNGA, Resolution 56/83, including an Annex (Annex: Responsibility of States for internationally wrongful acts), UN Doc. A/RES/56/83, 28 January 2002 (hereinafter: Articles on State Responsibility), Article 1

(hereinafter: victims not of the State or victims of non-State actors) do not currently benefit from the same legal certitude.[9] Certainly they too have the right to be repaired,[10] but if the responsible entity will not or cannot repair them, or is unknown, and the State is not liable to, against who can they raise their legal as opposed to merely moral claim?[11]

In 2005, the United Nations General Assembly adopted without a vote 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*

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in combination with Article 31 (1); *Herman* (2020), Beyond the state of play, pp. 1038-1039; and: *Evans* (2012), The Right to Reparation in International Law for Victims of Armed Conflict, p. 31 (on "general international law […] embrac[ing] individuals as direct beneficiaries of reparations"). For a singular authority on remedies in international human rights law, see: *Shelton* (2015), Remedies in International Human Rights Law.

[9] Based on Article 10 of the Articles on State Responsibility, this thesis submits that the right of victims of successful non-State actors to be repaired is already contained within the existing consensus as it is contained in the Basic Principles and Guidelines. For example, with the Taliban's ascent to power on 15 August 2021 (*Seir, Ahmad, et al*., Taliban sweep into Afghan capital after government collapses, Associated Press News, 16 August 2021, apnews.com/article/afghanistan-taliban-kabul-bagram-e1ed33fe0c665ee67ba132c51b8e32a5), all their actions can "be considered an act of [Afghanistan] under international law."

[10] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, hrlibrary.umn.edu/instree/Maastrichtguidelines_.html, para. 23; or: Basic Principles and Guidelines, para. 11 (b). See also: UNGA, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/69/518, 14 October 2014, para. 15; and: *Moffett* (2013), Beyond Attribution, p. 1. For a succinct introduction into why restraint of State agents is given more weight than their duty to prevent, see: *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, pp. 938-940. *Nota bene*, *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 2 ff, also argues that an individual right to reparation exists in international humanitarian law.

[11] The importance of having a *legal* claim is well-encompassed in the "famous dictum in reference to English law that "a right without a remedy is no right at all"" (*Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 23). For a suggestion that the State's obligation might be a moral one, see: *Herman* (2020), Beyond the state of play, p. 1048. The fact that "economic, social and cultural rights are broadly recognized, but the corresponding obligations are not", was observed already in 1987 and, unfortunately, still resonates today (*Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 3, citing: United Nations Commission on Human Rights, Report on the right to adequate food as a human rights submitted by Mr. Asbjørn Eide, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987, para. 47). For an explicit articulation by a Government of the victims' moral claim, see: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 53, citing a Sudanese State Governor saying "that full compensation was a "national, religious and ethical duty on the government"", footnote omitted. Finally, while there might be, in practice, overlaps, the right to be repaired should not be confused with the right to development or the right to humanitarian assistance (see: *Sengupta*, The human right to development; on the right to humanitarian assistance; and: *Stoffels*, Legal regulation of humanitarian assistance in armed conflict, respectively).

(hereinafter: Basic Principles and Guidelines).[12] It is a pivotal document and is for the purposes of this thesis considered to be the most accurate reflection of the state of (customary) international law in 2005.[13] The Basic Principles and Guidelines encourage but do not oblige States to also repair victims of non-State actors. The drafters believed that (customary) international law did not contain such an obligation at the time, calling it, instead, "an emerging norm",[14] and "a laudable aspiration".[15] However, meanwhile and since, numerous post-conflict States have begun to design and implement administrative reparation programmes the beneficiaries of which include victims not of the State. The programmes are often positioned within the framework of a larger transitional justice process and include, in accordance with many victims' immediate priorities,[16] tangible repair for violations of economic, social and

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[12] Basic Principles and Guidelines; and: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, pp. 19-20.

[13] The importance of the Basic Principles is Guidelines is noted by, among others: *Bassiouni* (2006), International Recognition of Victims' Rights, p. 203 ("an international bill of rights of victims)"; *Kamminga* (2007), Towards a Permanent International Claims Commission for Victims of Violations of International Humanitarian Law, p. 23 ("a codification of the rights of victims of gross violations of human dignity"); *Evans* (2012), The Right to Reparation in International Law for Victims of Armed Conflict, p. 5; *Shelton* (2015), Remedies in International Human Rights Law, p. 74; *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 20; or: *Herman* (2020), Beyond the state of play, p. 1040.

[14] *Bassiouni* (2006), International Recognition of Victims' Rights, p. 223.

[15] *Ibid.* Bassiouni's conclusions were echoed in: Rose (2010), *An Emerging Norm*. See also: *Shelton* (2015), Remedies in International Human Rights Law, p. 74, where she observed that "two paragraphs" in the Preamble "generate an impression that remedies are more matters of charity towards victims and survivors than moral and legal imperatives", or, in other words, that the "aspiration" thinking might encompass all victims, not just those of non-State actors. This thesis takes the view that it is only victims of non-State actors whose legal right remains unclear.

[16] Among others: *Magarrell* (2007), Reparations in Theory and Practice, p. 2; *Carranza, Ruben*, The Right to Reparations in Situations of Poverty (briefing), International Center for Transitional Justice (ICTJ), September 2009, www.ictj.org/sites/default/files/ICTJ-Global-Right-Reparation-2009-English.pdf; "To Walk Freely with a Wide Heart". A Study of the Needs and Aspirations for Reparative Justice of Victims of Conflict-Related Abuses in Nepal (study), ICTJ, September 2014, www.ictj.org/sites/default/files/ICTJ-Report-Nepal-Reparations-2014.pdf, p. 53; *Kunej, Špela, et al.*, The Long Wait. Victims' Voices on Transitional Justice (report), African Youth Initiative Network, 2014/2015, ayinet.org/wp-content/uploads/2019/04/AYINET-2014-Report.pdf (hereinafter: *Kunej, et al.* (2014/2015), The Long Wait); United Nations Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice and reparation and guarantees of non-recurrence, UN Doc. A/HRC/42/45, 11 July 2019, pp. 18-20; or: *El Gantri, Rim, and Arnaud Yaliki*, 'A Drop of Water on a Hot Stone'. Justice for Victims in the Central African Republic (report), ICTJ, March 2021, www.ictj.org/sites/default/files/ICTJ_Report_CAR_EN.pdf, pp. 32-33. The preference for the repair of violations of economic, social and cultural rights is not surprising if one considers the toll that non-international armed conflicts have on the realisation of these rights. *Mottershaw* (2008), Economic, Social and Cultural Rights in

cultural rights.[17] While some States do not explain their motivations for these programmes at all, others suggest links between them and international human rights law.[18] As there is no explicit conventional articulation of the State's obligation to repair victims of non-State actors, the obligation, if it is a legal obligation, must be either derivable from a treaty or contained within customary international law. The empirical evidence suggests that the Basic Principles and Guidelines, on the one hand, and States' reparation programmes, on the other, are either legally misaligned or the "emerging norm" has finally emerged.

α.1 Research question

The question that this thesis seeks to answer is whether a State that holds sovereignty over a certain territory (hereinafter: territorial State) has an obligation under public international law to repair victims whose economic, social and cultural rights have been violated by conduct that cannot be attributed to it.[19]

Armed Conflict, p. 449, for example, cites a "study estimat[ing] that 80-90 per cent of deaths resulting from the conflict in the Democratic Republic of Congo have been from easily preventable and treatable causes, such as infectious diseases and malnutrition." Meanwhile, *Guarin, et al.*, Reparations as Development?, provides empirical evidence from Colombia on the positive influence of reparations on the realisation of economic, social and cultural rights.

[17] See: *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, p. 953; and: Chapter 3. This practice corresponds to the increasing focus on economic, social and cultural rights in recent years more generally. See, for example: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 45 ff.

[18] See: Chapter 3.

[19] The thesis has in mind first and foremost the territorial State (see, generally: *Cohen, and Deng* (2015), Sovereignty as Responsibility), but does not exclude that States that are *de facto* in control might be encompassed by its conclusions (*Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, pp. 273-274). For a concise introduction into States' extraterritorial economic, social and cultural rights obligations, see: *Droege* (2008), Elective affinities, p. 510 ff; or: *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, pp. 127-163. Based on one's opinion on whether or not a State has extraterritorial obligations, and the scope of these obligations, one can use the conclusions of this thesis to argue, *mutatis mutandis*, for or against a State's extraterritorial obligation to repair. Meanwhile, an engagement with the vast and complex debate on States' extraterritorial human rights obligations exceeds the parameters of this thesis.

Relatively more pertinent to the question at hand is the effect of a territorial State's loss of control to a non-State actor. This question has received less attention (*Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 115). This thesis recognises the *prima facie* futility of insisting on obligations in the absence of possibility, however, it also believes that one should be vary of creating legal scenarios in which there suddenly is no bearer of human rights duties *vis-à-vis* an individual. In this regard, one's opinion on the existence of non-

The question demands a clarification and an emphasis. The clarification is that for the sake of argument, this thesis premises that the State could not have done anything more than it did to prevent the violation in question.[20] The emphasis concerns something that is entailed in the question articulated above but might easily be overlooked. This thesis, even though its theatre are non-international armed conflicts, only considers violations of international human rights law,[21] not violations of international humanitarian law. In the understanding of this thesis, these

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State actors as subjects of public international law beyond international humanitarian law will be decisive. This thesis, critical of the proposition that non-State actors are subjects of public international law outside the context of armed conflict, suggests that a non-refutable "presumption of competence and control" (*Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 163) of the territorial State is a *sine qua non* if victims' rights are to be worth more than the paper they are noted on.

In regard to non-State actors that are exercising effective territorial control, i.e., those non-State actors that are often referred to as "'unrecognised states', 'quasi- states', 'de facto states' or 'territorial non-state actors'" (*Cwicinskaja* (2018), International Human Rights Law and Territorial Non-State Actors, pp. 260-261, footnotes omitted), it is beyond the scope of this thesis to consider whether victims of a particular "territorial non-State actor" are, in fact, victims of an "unrecognised state[]", or victims not of the State, e.g., whether victims of Abkhazia's security forces are victims of the (unrecognised) State of Abkhazia and therefore already entitled to reparations under the existing consensus as it is contained in the Basic Principles and Guidelines or victims of a non-State actor, who, according to this thesis' hypothesis, should be repaired by Georgia. However, if one concludes that Abkhazia is or is not a State, one can then, as a consequence, conclude that victims of its security forces are, or are not, already encompassed by the existing consensus. (To read more on the rights of individuals under the de facto control of "territorial non-state actors", see: *Heintze* (2009), Are De Facto Regimes Bound by Human Rights?; *Ronen* (2013), Human Rights Obligations of Territorial Non-State Actors; *Cwicinskaja* (2018), International Human Rights Law and Territorial Non-State Actors; and: *Tan* (2019), Filling the Lacuna.)

[20] To prevent violations of economic, social and cultural rights is a multifaceted obligation. Beyond its *prima facie* content, i.e., the obligation to physically defend individuals, it might also include an obligation to negotiate with non-State actors (*Hutter* (2019), Starvation in Armed Conflicts, p. 730). One might even argue that the obligation to prevent applies from before the outbreak of the civil war if the State could have, with a different allocation of resources, prevented it altogether (*Ibid.*). The comprehensive content of the obligation to prevent in any given circumstance is a complex question that exceeds the framework of this thesis. Meanwhile, the relevance of the fact that the content, whatever it is, depends on the resources of a State is discussed in subchapter 1.1 *infra.*

[21] That international human rights law continues to apply in times of armed conflict has been repeatedly affirmed by international courts, both in regard to civil and political rights (International Court of Justice (ICJ), Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 25), as well as in regard to economic, social and cultural rights (ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136 (hereinafter: ICJ, Legal Consequences), paras. 106, 112-113 and 130-131; and: ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment (Merits), I.C.J. Reports 2005, p. 168, para. 216). The European Court of Human Rights and the Inter-American Court of Human Rights have also affirmed the applicability in times of armed conflict (*Landais, and Bass* (2015), Reconciling the rules of international humanitarian law with the rules of European human rights law; *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, pp. 83-90; *Tenenbaum, Julie*, Application of IHL by the ECtHR (seminar intervention), 23 September 2020, rm.coe.int/application-of-ihl-by-the-ecthr/1680a05735; Armed Conflicts

two legal fields, although often named together,[22] operate separately from each other, as they address different relationships.[23] As for the focus on economic, social and cultural rights, rather

(factsheet), European Court of Human Rights, April 2022, www.echr.coe.int/documents/fs_armed_conflicts_eng.pdf; *Cerna* (2011), The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict; and: *Frisso* (2018), The Duty to Investigate), as have the African Commission on Human Rights and the African Court on Human and Peoples' Rights (*Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence). The same is true for various human rights bodies established in the framework of the United Nations (Human Rights Committee, General Comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 (hereinafter: HRC, GC no. 31), para. 11 ("[T]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable."); Office of the High Commissioner for Human Rights (OHCHR), International Legal Protection of Human Rights in Armed Conflict, UN Doc. HR/PUB/11/01, 2011; and: International Law Commission (ILC), Draft articles on the effects of armed conflicts on treaties, reproduced in: ILC, Report of the International Law Commission on the work of its 63rd session (26 April – 3 June and 4 July – 12 August 2011), UN Doc. A/66/10, 2011, p. 175, Article 3 and Annex). For secondary sources, see: *Lubell* (2005), Challenges in applying human rights law to armed conflict, p. 737 ("This article takes the continuing applicability of human rights law as an accepted and welcome starting point"); *Droege* (2008), Elective affinities, pp. 501-502; *Mottershaw* (2008), Economic, Social and Cultural Rights in Armed Conflict; *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict; or: *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, p. 935. To recognise that international human rights law continues to apply in times of armed conflict is all the more important considering that this was far from settled when the Covenant was adopted (see, for example: UNGA, Resolution 2444 (XXIII): Respect for human rights in armed conflict, UN Doc. A/RES/2444(XXIII), 19 December 1968; or: *Droege* (2008), Elective affinities, p. 504).

[22] Such as in the Basic Principles and Guidelines, in regard to which, however, *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 21, makes the important observation that they are a particular amalgamation, "blend[ing] common law, civil law and Islamic legal principles, thus representing a consensus across different legal traditions and cultures". Meanwhile, *Mottershaw* (2008), Economic, Social and Cultural Rights in Armed Conflict, p. 455, notes that "[d]espite having different origins, different institutional associations and different conceptual frameworks, both sets of law share the same fundamental principles."

[23] There are different opinions on whether the existence of an armed conflict displaces international human rights law wholesale. While that proposition has few, if any proponents left (see: *Lubell* (2005), Challenges in applying human rights law to armed conflict, p. 738; and: *Müller* (2013), The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law, p. 26), there persists a spirited discussion on *how* international humanitarian law and international human rights law interact in situations in which their simultaneous application might yield opposing results (ILC, Fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006 (hereinafter: ILC, Fragmentation of international law), paras. 27-194 and 220-222; *Lubell* (2005), Challenges in applying human rights law to armed conflict, pp. 746-750; *Droege* (2007), The Interplay between International Humanitarian law and International Human Rights Law in Situation of Armed Conflict; *Droege* (2008), Elective affinities*; Mottershaw* (2008), Economic, Social and Cultural Rights in Armed Conflict, p. 455 ff; *Sassòli, and Olson* (2008), The relationship between international humanitarian and human rights law where it matters; *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 184 ("It is not the legal *regime* that should be the focus, but the specific *norm* and the unique situation in which the norm is to be applied", emphases added); *Hutter* (2019), Starvation in Armed Conflicts, p. 731-732; or: *Milanović* (2016), The Lost Origins of *Lex Specialis*). It goes without saying that sometimes their

simultaneous application will yield harmonious results (*Droege* (2008), Elective affinities, p. 521 ff (on complementarity)).

Despite the focus on overlaps, international humanitarian law and international human rights law also have vast separate fields of application (*Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 189, citing: ICJ, Legal Consequences, para. 106). In the words of the International Law Commission, they deal with different "subject-matter[s]" (ILC, Fragmentation of international law, para. 21). "International humanitarian law […] intends to solve humanitarian problems arising in the context of an armed conflict […] [I]ts rules limit the right of parties to a conflict to use methods and means of warfare and enjoin belligerents to protect persons or goods that may be affected by such conflict" (*Gasser* (2015), Humanitarian Law, para. 3). International humanitarian law applies *between belligerents*, not between civilians and the respective belligerent (Common Article 3; *Droege* (2008), Elective affinities, pp. 503 and 545, the latter page noting that "norms on reparation in the law of international armed conflict only recognise this right, or at least the right to claim it, to the state", footnote omitted; *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 173 ("rules embodied under IHL speak of duties of contracting parties rather than articulating rights of individuals"); and: *Marauhn, and Ntoubandi* (2016), Armed Conflict, para. 36). Most importantly, however, international humanitarian law contains within it an inherent acceptance of the fact that wars wreak havoc (*Lubell* (2005), Challenges in applying human rights law to armed conflict, pp. 744-746; or: *Hutter* (2019), Starvation in Armed Conflicts, p. 738). International human rights law, meanwhile, recognises the individual as a central subject of public international law and creates a direct relationship between her and the territorial State (*Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 22 ("the traditional view of international human rights law which was defined as a relationship between the State and the individual", footnote omitted); *Lubell* (2005), Challenges in applying human rights law to armed conflict, p. 750; *Droege* (2008), Elective affinities, p. 503; or: *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, pp. 243-244 ("Human rights treaties are characterized as setting norms meant to regulate the relationship between states and the individuals living under their jurisdiction")).

Rules of international humanitarian law are violated or not and once the conduct at question is completed they cease to apply. (For exceptions, see: *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, footnote 15; to read up on the novel proposition of a legal duty to repair "collateral damage", see: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 172 ff.) International human rights law, meanwhile, maintains a continuous focus on the welfare of the individual. For example, a practitioner of international humanitarian law might argue that an attack that was directed against a military objective satisfied the demands of proportionality at the time of the attack and therefore conclude that the destruction of the three surrounding houses and six hectares of land was lawful collateral damage. Meanwhile, a practitioner of international human rights law will observe that three families are now homeless and left without means to support themselves, a situation that is not tolerable under international human rights law. It is not that the practitioner of international humanitarian law is cruel or callous while the other is munificent. Rather, the two have different questions to answer. The relevant facts for the practitioner of international human rights law are that there are three families who had houses and fields with which they could support themselves before but are now homeless and destitute. On the other hand, the reach of international humanitarian law does not extend this far. The observation that an attack, the State's or the non-State actor's, was in compliance with international humanitarian law and the statement that the State might have to repair the individual because of its obligations under international human rights law are not logically mutually exclusive. In other words, whether or not a right was violated is (to be) determined by the international human rights law, not international humanitarian law (*Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, pp. 197-198). The thesis is aware that there is no uniform support for this position. *Hutter* (2019), Starvation in Armed Conflicts, p. 742, for example, writes that "[o]ne could even argue that if a conduct by a third party is justified by military necessity, it precludes a violation of a state's

than all human rights, it is justified not only due to these rights relative neglect in the past,[24] and their blanket violations in present-day civil wars, but also, as the thesis will show, particular economic, social and cultural rights-strengthening tools. It goes without saying that it is only positive if arguments developed here can be applied to other human rights as well.

The hypothesis of this thesis is that the answer to the research question is 'yes'. As this proposition stretches beyond the existing consensus as it is contained in the Basic Principles and Guidelines, the thesis can be understood as an overdue exchange between the consensus, on the one side, and empirical realities and the demands of victimhood, on the other.[25]

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obligation to protect *vis-à-vis* this behaviour." This thesis, however, finds such deterrence to international humanitarian law gratuitous.

At least as far as the topic of reparations for victims of non-State actors is concerned, the thesis does not see how the application of international humanitarian law could undermine international human rights law (UN Doc. A/68/297, para. 6; or: *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, pp. 177-181). It therefore considers that the two branches of public international law harmoniously coexist side by side, which means that the hypothesis can be explored within the framework of international human rights law only.

Last but not least, while the international humanitarian law of non-international armed conflicts only applies when certain thresholds concerning intensity of violence and organisation of belligerents are fulfilled (*Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, pp. 168 and 231; and: *Marauhn, and Ntoubandi* (2016), Armed Conflict, paras. 2-7, 14, 23 and 44), international human rights law does not have to prove these criteria to assert its application (*Droege* (2008), Elective affinities, p. 521). This allows the arguments presented here to be raised even when a government might choose to deny the existence of a non-international armed conflict (*Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 240).

[24] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1987, UN Doc. E/C.12/2000/13, 2 October 2000, para. 3; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights paras. 1-5; *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 433; *Karimova* (2014), The Nature and Meaning of 'International Assistance and Cooperation' under the International Covenant on Economic, Social and Cultural Rights, p. 182, or: *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, pp. 938-939.

[25] Beyond the legal sphere, reparations also feature prominently in the (nascent) discipline of transitional justice. While transitional justice is often accused of being too legalistic, this criticism appears to be essentially due to transitional justice's focus on criminal prosecutions, and on the legitimacy, or lack thereof, of post-conflict amnesties (see, for example: *Laplante, and Theidon* (2006), Transitional Justice in Times of Conflict, p. 51). However, as far as transitional justice discusses reparations for violations of economic, social and cultural rights, it is often descriptive of what States do, without focusing too much on the *legal* angle of their actions (see, for example: *Arbour* (2007), Economic and Social Justice for Societies in Transition, and: *Duthie* (2014), Transitional Justice, Development, and Economic Violence, p. 169, citing: *Carranza* (2008), Plunder and Pain; see also: *Robins* (2017), Failing Victims? ("A dominant legalism has seen mechanisms such as prosecution privileged over those that serve victims, such as reparation")).

In order to be able to claim that the State has an obligation as proposed by the hypothesis, at least one of the following needs to be true: either the obligation to protect economic, social and cultural rights is an unqualified obligation of result, creating the State's secondary obligation to repair the very moment a non-State actor violates an individual's right, or the obligation to repair violations of economic, social and cultural rights is a State's primary obligation. Both propositions challenge established orthodoxy. The first proposes that a State could find itself in a position of wrongfulness even though no accusation to the effect that it has failed to exercise due diligence can be raised against it. The second proposition, meanwhile, requires the term 'reparation' to include measures done by a State not in a position of wrongfulness at all. If such a broad understanding is not possible, the exploration of the second theory becomes moot. In other words, the second theory hinges on the possibilities of the term. Considering its importance, we shall look at its scope immediately.

α.2 Definition of the term 'reparation'

The origin of the law on reparations in public international law is found in inter-State relations.[26] In *The Factory at Chorzów*, the Permanent Court of International Justice famously wrote that "[i]t [was] a principle of international law that the breach of an engagement involves an obligation to make reparation".[27] Article 31 of the *Articles on the Responsibility of States for Internationally Wrongful Acts* (hereinafter: Articles on State Responsibility) confirms that

When transitional justice literature on reparations is future-oriented, it focuses on what could or should be done from a moral, historical- and social justice- based, political, or even psychological perspective, rather than a legal one (see: *Duthie* (2014), Transitional Justice, Development, and Economic Violence, citing: *Robins* (2012), Transitional Justice as an Elite Discourse; for a singular article on "types of justice", and how they could and should be mirrored in reparation programmes, see: *Laplante* (2015), Just Repair; for a similar approach, see: *McGill* (2017), Different Violence, Different justice?; for an example of how different motivations for reparations played out in one particular country, Liberia, see: *Schmid* (2009), Liberia's Truth Commission Report.) When transitional justice asserts that reparations are a victims' right under public international law, it is beyond any doubt right (see, for example: *Ibid*.), but it overlooks that this right, at least according to the Basic Principles and Guidelines, does not exist in the relationship with the only entity that can reasonably be expected to realise it, namely, the State. Even though transitional justice does not address the research question of this thesis, and it does not, its literature is raising the awareness of the victims' plight and is, for that purpose, indispensable.

[26] *Herman* (2020), Beyond the state of play, p. 1035.

[27] Permanent Court of International Justice, Factory at Chorzów (Germany v. Poland), Judgment (Jurisdiction), Publications of the Permanent Court of International Justice, Series A - No. 9, 26 July 1927, p. 29.

it is "[t]he responsible State [that] is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[28]

For as long as only States were subjects of public international law, reparations were given and received by them. With the burgeoning of international human rights law and the concurrent and related rise of the individual into a subject of public international law,[29] however, it was eventually accepted that the law on reparations could also be applied to the new dyad territorial State-individual.[30] The Basic Principles and Guidelines define the injured subjects, the victims, as *natural* "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights".[31] In paragraph 15, they state that "a State shall provide reparation to victims for acts or omissions which can be attributed to [it]". Important as this articulation is, it is not a conceptual revolution. Reparations have remained a relationship between the subject that has breached an obligation, in this case, the (territorial) State, and the subject that has suffered the breach, in this case, the individual.[32]

If reparations, by definition, have to be made by offender, then it is *ipso facto* impossible that reparations could be a *primary* obligation of States. For that, the term would need to include measures defined solely by that they are made in favour of the victim. In the Basic Principles and Guidelines, we find the term used in such a way twice. According to paragraph 15, liable entities "should […] compensate the State if the State has already provided *reparation* to the victim",[33] while paragraph 16 recommends that "States should endeavour to establish national programmes for *reparation* and other assistance to victims in the event that the parties liable

[28] Articles on State Responsibility.

[29] *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, pp. 30-31.

[30] *Gorski* (2013), Individuals in International Law, para. 1.

[31] Basic Principles and Guidelines, para. 8.

[32] *Bassiouni* (2006), International Recognition of Victims' Rights, p. 207 ("Provision of remedies to victims of crimes has historically been seen as a way to settle disputes between the offender and the victim, thus preventing individualised vindication and further disturbances of peace"); *Zegveld* (2010), Victims' Reparation Claims, p. 81; and: *Herman* (2020), Beyond the state of play, pp. 1034 ("Reparation for wrongs developed historically as a means of settling disputes between offenders and victims"). See also: *Moffett* (2013), Beyond Attribution, p. 1.

[33] Emphasis added.

for the harm suffered are unable or unwilling to meet their obligations."[34] While the drafters of the Basic Principles and Guidelines in 2005 concluded that States were not obliged to repair victims of non-State actors, the use of the term 'reparation' for measures done by the State in favour of victims not of the State was apparently not controversial. It can be therefore claimed that a measure that is done in favour of victims *qua* victims *can* be called a measure of reparation regardless of who provides it.[35] This is the understanding of the term 'reparations' that is adopted by this thesis. Definitional queries resolved,[36] the research question is finally ready to be examined.

α.3 Structure of the thesis

Chapter 1 first presents types of obligations in public international law, then analyses under which type the obligation to protect can be subsumed. Establishing that the existing consensus as it is contained in the Basic Principles and Guidelines is that the obligation to protect economic, social and cultural rights is a qualified obligation of result, Chapter 1 then sketches the genesis of that understanding by showing how a continuous thread runs all the way from the dawn of the law on State responsibility for injury to aliens to efforts to codify State

[34] Emphasis added.

[35] This understanding might appear novel but the use of the term 'reparations' to describe measures in favour of victims *qua* victims actually appears to be fairly uncontroversial across the board (see, for example: *Ottendörfer, Eva*, The Fortunate Ones and the Ones Still Waiting: Reparations for War Victims in Sierra Leone (report, Peace Research Institute Frankfurt, 2014, www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif129.pdf (hereinafter: *Ottendörfer* (2014), The Fortunate Ones), p. 5; or: *Laplante* (2015), Just Repair).

[36] The Introduction does not provide other definitions as other relevant terms are either considered elsewhere or do not need to be defined. Non-State actors fall into the latter category, the term itself being descriptive enough. The fact that the thesis considers armed non-State actors rather than international corporations is already clear from the thesis' first sentence. If one nevertheless insisted to know how this thesis sees non-State actors, the answer would be that 'you know one when you see one', an approach also adopted by other scholars writing about State responsibility for non-State actors (*Greenman* (2019), The history and legacy, pp. 17-18, where the writer "do[es] not try to define rebels […]. Instead, [she] take[s] at face value how the arbitral materials and scholarship invoked the term. These materials did not define rebels, seemingly assuming that we would know them when we saw them"). For those insisting on a more concrete image, the working definition developed by *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 232, is useful ("any armed group, distinct from and not operating under the control of the state, which has political, religious, and/or military objectives and lacks the legal capacity to become party to relevant international treaties. This conceptually encompasses entities ranging from armed groups, national liberation movements to de facto governing regimes, as well as partially internationally recognized states", footnote omitted"). Even Giacca, however, admitted that "[t]he number of ANSAs active in contemporary armed conflicts makes a clear and useful definition difficult" (p. 233).

responsibility before and after the Second World War, the Articles on State Responsibility and, ultimately, all the way to the Basic Principles and Guidelines. Chapter 1 demonstrates that the transposition of legal thought from the law on State responsibility (for injury to aliens) onto the human rights context has been detrimental to the objective of making reparations a reality for victims of non-State actors and notes that it does not correspond with what States are doing, namely, creating reparation programmes for these victims. It proposes seeing the obligation to protect as an unqualified obligation of result and demonstrates why this understanding is not only in the interest of victims of non-State actors but also a credible contender for the States' understanding of the law.

Chapter 2 accepts for the sake of argument that the obligation to protect is an obligation of result qualified by due diligence. It then proposes that the State that has to repair victims of non-State actors not because it failed to protect them but because the obligation to repair exists within the sphere of its primary obligations. Chapter 2 notes that this proposition is not explicitly articulated in any treaty but that the rule can, arguably, be extrapolated from the *International Covenant on Economic, Social and Cultural Rights* (hereinafter: Covenant),[37] and might, in parallel, also exist under customary international law. Chapter 2 zooms in on two economic, social and cultural rights-strengthening tools contained in the Covenant the potential of which for victims of non-State actors remains unexplored. It argues that the obligation of progressive realisation entails that civil war does not reset the threshold from which progressive realisation is measured, meaning that progressive realisation can only commence where reparations end. It also observes that victims of the State and victims of non-State actors are treated differently by the Basic Principles and Guidelines and concludes that this probably amounts to prohibited discrimination. Chapter 2 then observes how rights most commonly affected in non-international armed conflicts are dealt with in authoritative articulations of economic, social and cultural rights, and at how the Committee on Economic, Social and Cultural Rights (hereinafter: Committee), in particular, applies the law when engaging with individual countries. Chapter 2 finally considers whether understanding the obligation to protect as a primary obligation contributes to the objective of making reparations a reality for victims of

[37] UNGA, International Covenant on Economic, Social and Cultural Rights, UN Doc. A/RES/2200A(XXI), 16 December 1966 (hereinafter: Covenant).

non-State actors and whether it is a credible candidate for the States' understanding of the law. Chapter 2 concludes by noting the relative advantages of understanding the obligation to protect as an unqualified obligation of result rather than as a primary obligation, without, however, discounting the value of having a legal obligation of either content rather than having to rely on moral imperatives.

Chapter 3 attempts to answer two questions. The first, which logically precedes Chapters 1 and 2, is whether States think that their obligation to repair victims of non-State actors is a legal one at all. The second, which logically follows Chapters 1 and 2, is whether the States' understanding of the law corresponds to either of the propositions developed earlier on in the thesis. For this, it undertakes an empirical review of State practice and the States' understanding of the law. In line with the rest of the thesis, Chapter 3 does not scrutinise *how* States have chosen to repair victims of non-State actors or whether they should have offered more comprehensive repair but if they have decided to repair at all, whom they are repairing and why. The makeup of reparation programmes,[38] while interesting, falls outside the scope of this thesis.

The Conclusion unites the threads of the thesis and offers and affirmation the thesis' hypothesis.

α.4 The thesis' contribution to making reparations a reality for victims

The thesis addresses a practically important question that has received only scant attention so far. This is not to say that academic literature on war victims' rights, on the one hand, or economic, social and cultural rights, on the other, is not ample. There is considerable interest in whether international humanitarian law allows individuals to raise claims against responsible States,[39] and whether non-State actors could be held accountable for violations of international humanitarian legal rules.[40] Increasingly, the question is being asked whether States should be

[38] *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, p. 949 ff.

[39] Among others: *Hofmann* (2007), Reparations for victims of war and non-state actors?, providing an extensive list of prior works in footnote 9; or: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict.

[40] *Hofmann* (2007), Reparations for victims of war and non-state actors?, p. 308 ff.

obliged to repair not just violations of international humanitarian law but also collateral damage.[41] Within international human rights law, there is no longer any doubt that individuals have rights against States, however, this general certainty only allows for a more nuanced legal analysis of the concrete substantive and procedural rights of victims of violations.[42] There is also increasing interest in whether non-State actors have human rights obligations, which necessitates an analysis of their status as subjects of public international law beyond the confines of international humanitarian law in the first place. Economic, social and cultural rights, generally, are beginning to receive the attention they deserve,[43] and economic, social and cultural rights in armed conflict are following suit.[44] There is vast amounts of literature in the relatively new field of transitional justice discussing ethical, historical and peace-building aspects of reparations,[45] and country-specific literature.[46]

Insofar as the research question has been addressed directly, the authors were largely descriptive of the *status quo* rather than curious as to whether victims possibly had more rights than what appeared *prima facie*. So far it has been unanimously concluded that there does not yet exist an obligation as proposed by this thesis' hypothesis.[47]

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[41] *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 172 ff.

[42] *Shelton* (2015), Remedies in International Human Rights Law.

[43] *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, considering economic, social and cultural rights mostly in times of peace.

[44] *Lubell* (2005), Challenges in applying human rights law to armed conflict; *Mottershaw* (2008), Economic, Social and Cultural Rights in Armed Conflict, "examin[ing] the ways in which international law protects economic, social and cultural rights *in times of* armed conflict", emphasis added; or: *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, who observes "that human rights law not only applies in armed conflict but even constrains it".

[45] *Laplante* (2015), Just Repair.

[46] Among others: *Laplante* (2009), The Law of Remedies and the Clean Hands Doctrine; *Sarkin* (2014), Providing Reparations in Uganda; or: *Valenzuela* (2018), The legacy of Guatemala's Commission for Historical Clarification.

[47] *Bassiouni* (2006), International Recognition of Victims' Rights*;* or: *Rose* (2010), An Emerging Norm. In a recent article, Torres Penagos, implicitly stating that there does not exist such an obligation, proposed an altogether future-oriented approach, where

> "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.

This subchapter has as its objective to show that the *status quo* is insufficient in making reparations a reality for victims of non-State actors.[48] As a consequence, it demonstrates the need to approach the problem from a novel perspective, compose arguments not previously entertained, use existing tools for new purposes and give weight to realities on the ground. As such, it lays the ground for a thesis in an investigate rather than a descriptive format.

α.4.1 The thesis' relevance: the insufficiency of typically proposed avenues

So far, most attention appears to have been given to avenues that would allow a victim to receive reparations from the perpetrator her- or itself rather than from the State. The below paragraphs briefly look at domestic remedies, reparations in the context of international criminal law and the relatively recent attempt to establish international responsibility akin to that of States for non-State actors, and observe how all three approaches, while intuitive, are deficient if assessed against the aim of making reparations a reality for victims.

α.4.1.1 The shortfalls of domestic remedies

When a non-State actor violates an economic, social or cultural right, three subjects of repair are possible. One of them is the physical perpetrator. It is intuitive to think that the person who has committed the wrong should right that wrong.[49] However, as intuitive as that rule of substantial law might be, in order to establish whether a particular individual should repair another, there needs to exist a procedural mechanism to establish the existence or non-existence of the necessary requirements under the substantive law, such as, for example, whether the physical perpetrator has legal capacity. The Basic Principles and Guidelines, therefore,

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> 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"
>
> (*Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, p. 941, footnotes omitted).

The same author has recently written a doctoral thesis on the same topic (*Torres Penagos* (2021), Economic and social rights, state responsibility and reparations), however, I was unable to attain a copy. From the abstract, it follows that it contains some of the same ideas as the cited article from the same year.

[48] It is probably not controversial to consider that making reparations a reality for victims of non-State actors is an ideal that all authors addressing this topic share.

[49] See generally: *Álvarez* (2020), Towards a Regime of Responsibility of Armed Groups in International Law.

emphasise that victims "shall have equal access to an effective judicial remedy as provided for under international law" and that "[o]ther remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law."[50] Domestic remedies are obviously important, however, one should be cautious before pointing victims in their direction.

In order for domestic remedies to make reparations a reality for victims, there would need to exist a domestic judiciary that could provide "meaningful and effective remed[ies]",[51] something that is simply not the case in many post-conflict countries.[52] Problems range from inadequate legislative frameworks to the lack of courts and qualified judges who could operate effectively even in normal conditions, let alone after armed violence.[53] Beyond these legal and material challenges, judiciaries also often suffer from a profound lack of legitimacy, either because of their alignment with the former or current regime, or simply because of endemic common corruption.[54]

Another consideration is that in both civil and criminal domestic remedies, the defendant is protected by human rights guarantees, too.[55] In civil proceedings, victims are claimants and

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[50] Basic Principles and Guidelines, para. 12.

[51] Committee on Economic, Social and Cultural Rights (CESCR), General Comment no. 22 on the right to sexual and reproductive health, UN Doc. E/C.12/GC/22, 2 May 2016 (hereinafter: CESCR, GC no. 22), para. 64.

[52] Among others: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 71. It is of interest to note that this is hardly a new problem (*Borchard* (1930), "Responsibility of States", p. 534, "the courts […] were corrupt, biased, influenced by the executive, or in other ways were lacking in that impartiality implicit in the proper ad- ministration of justice"). In the past, in order to circumvent national judiciaries, States have created arbitration commissions.

[53] On legislative frameworks, see: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 82. On the question of the sheer volume of violations, see: *Magarrell* (2007), Reparations in Theory and Practice, p. 1; or: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 81.

[54] *Singh* (2019), Challenging corruption and clientelism in post-conflict and developing states. See also: Corruption Perception Index 2021 (report), Transparency International, January 2022, images.transparencycdn.org/images/CPI2021_Report_EN-web.pdf, pp. 2-3, where several post-conflict countries rank lowest in "[t]he perceived level of public sector corruption"; on the spectrum between 0 ("Highly Corrupt") and 100 ("Very Clean"); South Sudan, at the bottom of the list, has a score of 11, Syria and Somalia 13, Yemen and Afghanistan 16, Libya 17, the Democratic Republic of the Congo and Burundi 19, Sudan, Nicaragua and Chad 20, Iraq 23, the Central African Republic and Nigeria 24, Tajikistan and Guatemala 24, etc. To compare, Denmark, Finland and New Zealand, at the top of the list, have a score of 88.

[55] *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 40.

therefore, as a rule, carry the burden of proof while in criminal proceedings the State has to proof guilt beyond reasonable doubt. The practical consequence of not being able to prove a violation is that the law pretends as if no violation occurred which not only means that no reparations will be adjudicated but also that a victim might feel that insult has been added to injury, harming her further. Finally, even when a claimant or the prosecution wins a case and reparations are adjudicated, the perpetrator might be indigent,[56] meaning that no tangible repair will materialise. In short, the judicial road to reparations is winding, and its outcome uncertain at best and injurious at worst.

Beyond the practical concerns that can at least in theory be overcome, there is another problem that will persist regardless. The proposition that a victim should be enabled to bring a private suit against the perpetrator and that the provision of this avenue is a sufficient fulfilment of the State's obligations suggests that the relationship between the victim and the perpetrator is of an entirely private nature. Taking this proposition to the extreme opens to viewing violations of economic, social and cultural rights perpetrated in a non-international armed conflict in which the State is not involved as well as violations perpetrated not by the State in any non-international armed conflict as being of a purely private character, meaning that the State's role does not extend beyond mediating between the parties. From a purely technical perspective, this is an elegant solution. A war *can* be understood as nothing but a high density of bilateral relationships between injured and injuring parties but it probably should not be.[57]

To moderate the above argument one can highlight that in addition to providing private law remedies to victims, the State can and is in fact obliged to prosecute alleged perpetrators of crimes.[58] Criminal prosecutions are carried out in the name of the people, the State or the crown

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[56] By way of example: International Criminal Court (ICC), Ntaganda case: ICC Trial Chamber VI orders reparations for victims (press release), ICC, 8 March 2021, www.icc-cpi.int/news/ntaganda-case-icc-trial-chamber-vi-orders-reparations-victims (hereinafter: Ntaganda case (press release))) ("The Chamber also found Mr Ntaganda to be indigent for the purposes of reparations").

[57] To that effect, see: *Goebel* (1914), The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars, pp. 808-809 ("It is fundamental to our discussion that the character of responsibility in the problems at hand is primarily one at public law. […] The responsibility of a state for injuries sustained by aliens in civil commotions, never assumes a real character at private law, although at times it is difficult to distinguish the private from the public law aspects").

[58] Basic Principles and Guidelines, para. 3 (b).

and are obviously not of a private nature.[59] This is true but it only partly solves the problem. For one, there is no complete overlap between economic, social and cultural rights and the values protected by domestic criminal laws.[60] Even if the overlap was complete, it is considerably less difficult to verify that a right has been violated than to prove all the elements necessary to establish individual criminal responsibility, e.g., intent or negligence, criminal capacity, or the absence of circumstances precluding wrongfulness.[61]

This thesis does not purport to negate the importance of "meaningful and effective" domestic remedies that can brought against an alleged perpetrator and it welcomes continuous efforts to create such remedies wherever they are lacking. However, as a vehicle of post-conflict repair of victims of non-State actors, domestic remedies are both practically as well as conceptually insufficient. One might point out that some of those concerns have led to the development of international criminal law, however, the latter, while certainly contributing to post-conflict justice,[62] has its own limitations in making reparations a reality for victims. We look at those next.

α.4.1.2 The exaggerated promise of international criminal law

As observed above, domestic remedies are not the only focus of those who advocate for the accountability of the physical perpetrator. Their ambition can also be discerned from the funds poured into the International Criminal Court,[63] and its predecessors,[64] as well as from the

[59] [P]rosecutor (Encyclopaedia Britannica).

[60] The Committee on Economic, Social and Cultural Rights (hereinafter: Committee) affirms this but occasionality demands that States attach a criminal sanction to particular violations (CESCR, General Comment no. 23 on the right to just and favourable conditions of work, UN Doc. E/C.12/GC/23, 27 April 2016 (hereinafter: CESCR, GC no. 23), para. 65 (e).

[61] By way of example: German Criminal Code of 13 November 1998, Federal Law Gazette I, p. 3322, as amended on 19 June 2019, Federal Law Gazette I, p. 844, §§ 15, 19-20 and 32-35.

[62] *Stahn* (2018), A Critical Introduction to International Criminal Law, pp. 1-3.

[63] For 2022, "the Court [proposed] a total budget of €158,760.9 thousand, representing an increase for 2022 of approximately €14,087.0 thousand, or 9.7 per cent, over the approved budget for 2021" (Assembly of States Parties (ICC), Proposed Programme Budget for 2022 of the International Criminal Court, ICC Doc. ICC-ASP/20/10, 16 August 2021, p. 8).

[64] *Wippman* (2006), The Costs of International Justice, p. 861.

interest in international criminal law more generally.[65] It is important to acknowledge that international criminal law has in a short time span witnessed tremendous developments, including such that are of at least peripheral interest to this thesis. Different from the *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*,[66] as well as its contemporary established in the aftermath of the Rwandan genocide,[67] the *Rome Statute of the International Criminal Court* includes an explicit provision on reparations. Article 75 is entitled "Reparations to victims" and its 1st and 2nd paragraph read as follows:

> 1. The Court shall establish principles relating to reparations to, or in respect of, victims […].
> 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims […].
>
>   Where appropriate, the Court may order that the award for reparations be made through the Trust Fund […].

The provision is not a dead letter on paper and reparations have become part and parcel of the Court's work.[68] However, it cannot be ignored that the Court's main purpose is the identification and criminal prosecution of alleged perpetrators, *not* the reparations of the victims of their crimes. This is discernible from the name of the institution and not least from the sequence of its course of action. It prosecutes and convicts. And *then*, when it has convicted,

[65] There are several publications devoted to international criminal law and international criminal justice more generally, such as, for example, the Journal of International Criminal Justice (Oxford University Press).

[66] United Nations Security Council (UNSC), Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/RES/808, 22 February 1993; and: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 18.

[67] UNSC, Resolution 955, including an Annex (Annex: Statute of the International Tribunal for Rwanda), UN Doc. S/RES/955, 8 November 1994.

[68] By way of example: Ntaganda case (press release).

if it has convicted, it considers reparations.[69] That victims have to be victims of a convicted perpetrator considerably limits the number of victims that will be reached.[70] In fact, as victims eligible for reparations are defined not only by reference to the convict but also the crimes that the convict has been convicted of,[71] reparations for the benefit of a few might even end up to be perceived as unfair in the benefiting victims' communities, creating further harm.[72]

The International Criminal Court's focus on reparations is possibly a positive development. Victims are no longer just means to an end.[73] Because the interest in the International Criminal Court's work is substantial, its focus on reparations gives more prominence to victims and their plight overall.[74] Nevertheless, one should not try to overstate the Court's importance regarding reparations for victims. It is a criminal court, not a reparations fund.[75] Similar to domestic courts, it, too, is deficient if assessed against the aim of making reparations a reality for victims. The small number of cases is an obvious downside, too.[76] To make reparations a reality for victims, we are forced to look beyond the physical perpetrator. But if not her, who or what is the next possible subject of repair?

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[69] Not all indictments end in a conviction which is a *sine qua non* for adjudicating reparations (ICC Trial Chamber III, Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo: Final decision on the reparations proceedings, ICC Doc. ICC-01/05-01/08, 3 August 2018, para. 3).

[70] In addition, the earlier observation that not all violations of economic, social and cultural rights are covered by domestic criminal codes applies *a fortiori* when violations of economic, social and cultural rights are juxtaposed to international criminal law. Even if of considerable disadvantage to the victims, many violations do not reach the threshold of an international crime.

[71] *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, pp. 61-62.

[72] Trial Chamber I (ICC), Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo: Decision establishing the principles and procedures to be applied to reparations, ICC Doc. ICC-01/04-01/06, 7 August 2012, para. 57.

[73] *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, pp. 18-19 and 60 ff.

[74] *Herman* (2020), Beyond the state of play, p. 1036. For an example of reporting by mainstream media, see, for example: *Simons, Marlise*, Court Awards $1 Million for Victims of Congolese Warlord, New York Times (NYT), 24 March 2017, www.nytimes.com/2017/03/24/world/africa/international-criminal-court-congo-germaine-katanga.html.

[75] There do, however, exist proposals for an international reparations fund (*Kamminga* (2007), Towards a Permanent International Claims Commission for Victims of Violations of International Humanitarian Law).

[76] *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, pp. 65-66.

α.4.1.3 The impossibility of enforcing the potential international responsibility of non-State actors

Beyond the deficiencies of holding a known perpetrator accountable, in the context of a non-international armed conflict, finding that person will often be challenging, if not impossible. Unless the victim knows her personally, telling one fighter from another can be difficult,[77] and, in any case, the fighter is not there of her own accord but is part of a group that is typically referred to as an armed non-State actor or armed non-State group. As the physical perpetrator is not pursuing a purely private agenda, the question is if it should not be the group that should be held responsible.[78] Indeed, this appears to be such an intriguing proposition that the bulk of research on how to make reparations for victims of non-State actors a reality focuses on constructing international responsibility of non-State actors. One writer explains the focus as follows:

> "The recognition that non-State armed groups have become one of the main protagonists in present-day armed conflicts, and that they can cause significant harm in the societies in which they operate as a result of their violations of international humanitarian law, calls for holding these groups responsible *vis-à-vis* their victims."[79]

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[77] *Rose* (2010), An Emerging Norm, p. 309.

[78] Herman notes that "[f]rom a reparative justice perspective, these initiatives [of "holding individuals criminally responsible for the crimes committed on the occasion of their membership to [non-State armed] groups"] remain unsatisfactory, since they do not provide an avenue for victims to claim reparations directly from responsible armed groups for the entire spectrum of violations and harms caused" (*Herman* (2020), Beyond the state of play, p. 1038, footnote omitted).

[79] *Herman* (2020), Beyond the state of play, p. 1036. In addition to stressing the sheer extent of harm that non-State actors cause, writers also defend their focus by opining that holding non-State actors accountable would be "significan[t] […] in countering impunity" (*Herman* (2020), Beyond the state of play, p. 1036). The latter reason will, obviously, only be true if the measure can be made effective, something that the proponents of the responsibility of non-State actors themselves doubt as will be discussed later on in this subchapter. To gain an insight into arguments favouring at least some degree of international human rights obligations of non-State actors, see, among others: *Clapham* (2006), Human rights obligations of non-state actors in conflict situations, p. 523 ("It is time to feel comfortable talking about the human rights obligations of non-state actors")*; Sassòli* (2010), Taking Armed Groups Seriously*; Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 242 ff ("holding ANSAs directly accountable under international human rights law is certainly the direction in which the international community is heading, and rightly so"); *Murray* (2016), Human Rights Obligations of Non-State Armed Groups; *Fortin* (2017), The Accountability of Armed Groups under Human Rights Law; or: *Hutter* (2019), Starvation in Armed Conflicts, pp. 747-751.

At the same time, it is acknowledged that "there is, at present, no treaty or legal instrument, nor any accompanying forum, that provides a normative and institutional framework to hold armed groups internationally responsible for their wrongful acts."[80] Writers cite authoritative sources that confirm, alas, that a responsibility of non-State actors, ""as an entity in itself"", cannot be concluded to exist,[81] even though the possibility at least has not been conclusively "rejected".[82] In addition, the Basic Principles and Guidelines' paragraph 15, which says that

> "[i]n cases where a person, a legal person, or *other entity* is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim",[83]

is interpreted to be a step in the right direction.[84] While this thesis agrees that the Basic Principles and Guidelines allow for the interpretation that non-State actors could be "found liable for reparation" and that it is not as such "controversial" to attempt to hold a perpetrating

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[80] *Herman* (2020), Beyond the state of play, p. 1037; see also: pp. 1042 and 1036, on the latter referencing: United Nations Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors: the protection of the right to life, UN Doc. A/HRC/38/44, 7 December 2020, para. 21, and: *Verhoeven* (2015), International Responsibility of Armed Opposition Groups, p. 287.

[81] *Herman* (2020), Beyond the state of play, p. 1037, citing: *Cameron, et al*. (2020), Article 3: Conflicts not of an international character, para. 931 ("International law is unclear as to the responsibility of a non-State armed group, as an entity in itself, for acts committed by members of the group.", footnote omitted); and: *Henckaerts, and Doswald-Beck* (2009), Customary International Humanitarian Law, pp. 536 and 550. See also: *Zegveld* (2002), The Accountability of Armed Opposition Groups in International Law, p. 230 ("There is little consensus on the question whether armed opposition groups can or should be bound by international human rights law. It is noteworthy that in cases in which international bodies have made an in-depth examination of the question whether human rights norms apply or should apply to armed opposition groups, they have come to the conclusion that they should not"); and: UN Doc. A/68/297, para. 58 ("there is currently a gap in the delineation of the human rights responsibilities of non-State armed groups and in mechanisms for holding them accountable, other than criminal prosecutions").

[82] *Herman* (2020), Beyond the state of play, p. 1037.

[83] Emphasis added.

[84] *Herman* (2020), Beyond the state of play, p. 1039. See also: *van Boven* (2010), The United Nations 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 (hereinafter: *van Boven* (2010), Basic Principles and Guidelines), pp. 1 and 3.

entity accountable,[85] it remains to be answered which national or international body could make an authoritative finding of non-State actors' international responsibility for reparations. Another challenge that is even more difficult is how to identify a non-State actor that has not transformed itself into a political party or otherwise taken on a (civilian) corporate form once a non-international armed conflict is over. Liesbeth Zegveld writes that "[t]he legal personality of armed opposition groups is based on their position as parties to an internal armed conflict,"[86] and Olivia Herman continues that "post-conflict reparations by an armed group constitute a complicated issue, since the group will no longer legally exist in international law".[87] If one is to champion the international responsibility of armed non-State actors one cannot consider it to be a negligible concern whether public international law even recognises as an international subject the entity on which international responsibility is to be pinned.[88]

Putting the problem of the non-State actor's existence as a subject of public international law aside, writers hoping to build the international responsibility of non-State actors also face other problems. They generally propose to take as a starting position the Articles on State Responsibility, however, they then immediately warn the reader to be mindful of the many important differences between States and non-State actors.[89] Perhaps the most important difference is that non-State actors are widely diverse. Many will have "loose organizational

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[85] *Herman* (2020), Beyond the state of play, p. 1047.

[86] *Zegveld* (2002), The Accountability of Armed Opposition Groups in International Law, p. 152, cited in: *Herman* (2020), Beyond the state of play, p. 1056.

[87] *Herman* (2020), Beyond the state of play, p. 1056. It is perhaps superfluous to articulate that if public international law does not recognise an entity as a subject of public international law that this entity then cannot be a bearer of obligations under public international law, including international human rights law. Indeed, whether or not non-State actors can be said to human rights obligations at all, remains highly controversial (*Droege* (2008), Elective affinities, p. 521; and: *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, pp. 230 and 242 ff). For a brilliant argument to the effect that non-State actors do not and should not have obligations under international human rights law, see: *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, pp. 9-46.

[88] This thesis, which merely has to identify *victims* of non-State actors, i.e., victims of conduct that cannot be attributed to the State, is not affected by this problem. Conduct that was not attributable when committed, will, except through the application of Article 11 of the Articles on State Responsibility, remain unattributable.

[89] That the Articles on State Responsibility cannot simply be transposed onto other subjects of public international law is not novel. See, by way of example: *Pellet* (2013), International Organizations Are Definitely Not States; or: *Ahlborn* (2012), The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations.

structures",[90] which may change over time, so far so that they might "fragmentize, be absorbed into another group or even dissolve."[91] Also, their "capacity […] to provide reparations may […] differ significantly",[92] and they are more likely that States to "be indigent or lack the monetary resources to […] contribute in a significant manner".[93] This leads authors to face "the *reality* within the majority of conflict and post-conflict situations, namely that reparations cannot be provided by perpetrators alone".[94]

This thesis finds it somewhat surprising that so much energy would be devoted to a solution so onerous and difficult to operationalise. Even at their most optimistic, authors argue "on the basis of examples from practice, that "at least in *some* cases, and in relation to at least *some* forms of reparations, it would indeed be feasible to *discuss* the question of reparations from armed groups"."[95] The attention is all the less understandable, *nachvollziehbar*, when one considers that there exists a subject from which operations would be theoretical much easier to obtain, namely, the territorial State. Luke Moffett articulates in a straightforward manner that the "state is in the most appropriate position to carry out reparations as it has the capacity, through its institutions, and the resources to provide effective remedies to victims".[96] That the option is more than theoretical will be demonstrated in Chapter 3.[97]

It is, of course, also part of the *status quo* that non-State actors are already being engaged and that they are at least nominally committing to respect international humanitarian law and even

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[90] *Herman* (2020), Beyond the state of play, p. 1043.

[91] *Id*., p. 1045, footnote omitted. To the same effect, see also: *Heffes, and Frenkel* (2017), The International Responsibility of Non-State Armed Groups, p. 66.

[92] *Herman* (2020), Beyond the state of play, p. 1045.

[93] *Id*., pp. 1044-1045. See also: p. 1047, where she noted that as of August 2021, no convict has had sufficient resources for reparations.

[94] *Herman* (2020), Beyond the state of play, p. 1049, emphasis added.

[95] *Id.*, p. 1046, citing: *Dudai* (2011), Closing the gap, p. 786, all emphases added.

[96] *Moffett* (2013), Beyond Attribution, p. 3.

[97] Authors who propose the State as an instance of last resort and opine that it "could carry out this role by, for instance, creating a special trust fund, an administrative reparations programme, or introducing a dedicated line in the annual budget" (*Herman* (2020), Beyond the state of play, p. 1048, footnote omitted), sometimes overlook that States are *already* doing all of these things.

accept responsibility.[98] An example of the latter can be found in the *Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace*,[99] where the Revolutionary Armed Forces of Colombia – People's Army "[…] "undertakes to contribute to the material reparation of the victims and in general to their comprehensive reparation"".[100] While this might be a positive development, it is an example of a non-State actor who is at least outwardly willing to be part of the restorative process.[101] The example, and others like it,[102] do not explain how an uncooperative non-State actor could be *made* to contribute to victims' reparations,[103]

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[98] Annual report 2021, Geneva Call, 31 December 2021, www.genevacall.org/wp-content/uploads/2022/05/Geneva-Call-Annual-Report-2021.pdf.

[99] Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace, signed on 24 November 2016, reproduced in: UNSC, Letter dated 29 March 2017 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2017/272, 21 April 2017 (hereinafter: Colombian Final Agreement).

[100] Colombian Final Agreement, referenced in: *Herman* (2020), Beyond the state of play, p. 1040. Herman also noted that "the FARC-EP has acknowledged collective responsibility and has offered public apologies on behalf of the group, among other measures", and cited a case from the country's Constitutional Court, where the latter wrote about ""solidarity civil responsibility" of armed groups" (referencing: Corte Constitucional de Colombia, Sentencia no. C-370/2006 (Gustavo Gallón Giraldo y otros v. Colombia), 18 May 2006 (hereinafter: Gustavo Gallón Giraldo y otros v. Colombia), para. 6.2.4.4, the translation from Spanish is Herman's).

[101] *Herman* (2020), Beyond the state of play, p. 1046. See also: *Dudai* (2011), Closing the gap, p. 807 ("at least in some contexts, victims of abuses direct their demands for symbolic reparations and truth at armed groups, not states; and […] in some circumstances, these non-state groups have the capacity and willingness to provide some measures of remedy to those victims"). Apart from dealing with *willing* non-State actors, the above is also an example of a *government* that is willing to allow the non-State actor to publicly make such a promise, thereby arguably increasing its legitimacy (see, for example: Farc former rebels choose new political party name and logo, British Broadcasting Corporation (BBC), 1 September 2017, www.bbc.com/news/world-latin-america-41119001). Overall, governments are not keen on helping to bestow legitimacy on non-State actors (*Marauhn, and Ntoubandi* (2016), Armed Conflict, paras. 8-10; and: Generally: *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, pp. 230-231 and 249, where he cites: *Clapham* (2006), Human rights obligations of non-state actors in conflict situations, p. 502 ("it is well-known that neither governments nor international organizations will readily admit that rebels are operating in ways which are akin to governments").

[102] For example: Agreement on Peace between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front, signed on 22 June 2001, reproduced by the United Nations Peacemaker, peacemaker.un.org/philippines-agreementonpeace2001, Section B, paras. 2-3, cited in: *Herman* (2020), Beyond the state of play, footnote 43; and: Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan on the Basis of the Doha Document for Peace in Darfur, signed on 6 April 2013, reproduced by the United Nations Peacemaker, peacemaker.un.org/sites/peacemaker.un.org/files/SD_130406_Sudan-JEMSOnDDPD.pdf, para. 43, cited in: *Herman* (2020), Beyond the state of play, footnote 44. Other developments include non-State actors updating their codes of conduct and various international mechanisms calling on non-State actors to provide reparations. See, generally: *Id.*, footnotes 45 and 50-52.

[103] *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 239.

and it is entirely arbitrary to make victims' reparations dependent on their perpetrators' munificence.[104]

Perhaps the strongest rationale for pushing for the accountability of non-State actors "is the intrinsic relation that exists between responsibility for internationally wrongful acts and the duty of the responsible actor to provide reparations".[105] This thesis is sympathetic to this urge and it certainly does not deny the "intrinsic" link. In fact, in subchapter α.2, the thesis explored whether only measures provided in the framework of this "intrinsic relationship" could be called reparations, thereby implicitly stating that such an understanding would be intuitive, primarily because of the "intrinsic relation". However, subchapter α.2 concluded that the term 'reparation' was not limited to the relationship between the perpetrator and the victim. That anything done in favour of victims *qua* victims is encompassed by the word is acknowledged even by those who point to the "intrinsic relationship" when they say that non-State actors "should bear this primary", as opposed to exclusive, "duty".[106] The relationship between the perpetrator and the victim is therefore, while intrinsic, also not exclusive.

Be that as it may, this thesis does not oppose the exploration of the responsibility of non-State actors, is in fact neutral to the possibility, not least because international responsibility of non-State actors and the rule proposed by this thesis' hypothesis could harmoniously coexist.[107] However, the thesis certainly considers that its own approach has a higher potential of making reparations a reality for victims of non-State actors, at least in the short term. There are two main reasons for this confidence. For one, both the Basic Principles and Guidelines as well as the recently adopted *Joint Statement by independent United Nations human rights experts on*

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[104] *Herman* (2020), Beyond the state of play, p. 1047 ("a future regime of responsibility should not make the provision of reparations to those who suffered injury solely dependent upon such actors").

[105] *Id*., p. 1046.

[106] *Id*., p. 1047.

[107] Addressing the argument that "conferring obligations on [non-State actors] would render the system of human rights protection ineffective", Giacca writes that "[t]aking the view that there is no mutual exclusion of different sets of responsibilities among states parties, there should not be compelling reasons to think that conferring obligations on ANSAs would diminish or even displace the concurrent responsibility of the territorial states" (*Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 245).

human rights responsibilities of armed non-State actors,[108] encourage States to provide reparations to victims of non-State actors. This thesis merely proposes to move the obligation from the moral to the legal side of the spectrum.[109] The second reason is that this thesis' hypothesis corresponds to the "final safety net" proposed even by those who the accountability of non-State actors. They realise that what non-State actors want and can contribute will typically be insufficient in making reparations a reality for victims and emphasise that even willing non-State actors will often be able to contribute only to some forms of reparation, e.g., "provide public apologies" or "shar[e] information" on "the whereabouts of the disappeared".[110] In turn, they will seldom be able to further economic and social rights.[111] When writers propose "a cascading regime of responsibility for reparation",[112] in which the

[108] Joint Statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors (press release), OHCHR, 25 February 2021, www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights.

[109] See also: International Human Rights Law Institute, Chicago Principles on Post-Conflict Justice, International Human Rights Law Institute, 2007, law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/projects/Documents/chicago_principles.pdf, principle 3.3., para. 2 ("Where non-state actors are responsible for violations, they should provide reparations to victims. Where these actors are unable or unwilling to meet their obligations, states should assume this responsibility, *especially* where a state was either partially complicit or failed to take adequate preventative action"), referenced in: *Herman* (2020), Beyond the state of play, p. 1048. While the word 'especially' specifies situations in which the State's obligations is the strongest, it also indicates that other situations are relevant, in this case, situations in which the State was *not* complicit and did *not* fail to exercise its obligation to protect with due diligence.

[110] *Herman* (2020), Beyond the state of play, pp. 1051-1053. While the word 'especially' specifies situations in which the State's obligations is the strongest, it also indicates that other situations are relevant, in this case, situations in which the State was *not* complicit and did *not* fail to exercise its obligation to protect with due diligence. See also: *Dudai* (2011), Closing the gap.

[111] That non-State actors would typically not be able to contribute to reparations for violations of economic, social and cultural rights is often left unaddressed. This is not very surprising. Even though the adage that all human rights are "indivisible and interdependent" is often repeated (OHCHR, What are human rights?, OHCHR, no date, www.ohchr.org/en/what-are-human-rights; International Conference on Human Rights, Final Act of the International Conference on Human Rights. Resolution XXI: Realization of economic, social and cultural rights, 12 May 1968, UN Doc. A/CONF.32/41, 22 April 1968 to 13 May 1968, Preamble; or: Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 3), violations that typically occur in non-international armed conflicts are more often examined through the lens of international criminal law or civil and political rights rather than through the lens of economic, social, and cultural rights. (See, generally: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 52 ff.)

[112] *Herman* (2020), Beyond the state of play, p. 1049.

State is to pick up the bill when non-State actors are "unable or unwilling" to do so,[113] they are, for all effects and purposes, proposing that the State does what this thesis hypothesis suggests it must do, even if they do not purport explain on what *legal* basis the State should have this obligation; this thesis does.

α.4.2 The thesis' novelty: an investigative approach

There are different ways to address a legal question. One can choose to provide an overview of the relevant *status quo*, zoom in on recent developments and identify outstanding problems.[114] If the objective of the present thesis had been to do those things, it would have been written differently; it would have been more descriptive of the Basic Principles and Guidelines, given an overview of general comments and concluding observations of the Committee and concluded that victims of non-State actors do not make many appearances there. It would have attempted a summary of the current academic discourse and looked look at countries that are habitually explored in the context of reparations for victims, such as Colombia. Relying on typical methods and sources, the thesis would have concluded, like them, that its hypothesis is not law.

Another way to address a legal question is to assume that a stated hypothesis is correct, then dig for arguments in its favour. Such an approach questions established truths, explores unfamiliar terrain and entertains innovative solutions. It looks at all of public international law, past and present, and is guided by a faith in the generosity of public international law to secure the individual's welfare.[115] Such research risks finding itself in blind alleys, it risks finding nothing at all. However, even if the quest should turn out to be successful, such an investigative approach will yield a very different thesis from one striving to be descriptive. It will be a thesis where arguments look less familiar, perhaps daring, and therefore relying on the reader's

[113] The third step in this regime involves the provision of assistance by the international community "in particularly weak and resource-scarce States" (*Id*., pp. 1048-1049).

[114] Superb examples of this approach are, among many others: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, where she provides an elegant and comprehensive analysis of the then "current normative content of the Covenant"; or: *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict.

[115] *Koskenniemi* (2004), The Gentle Civilizer of Nations, pp. 516-517.

curiosity and openness. Such a text will seldomly be the final answer to a question, however, as a well-argued brainstorm, it will offer several and thereby contribute to overcoming the orthodoxy's stalemate. Such a text is this thesis.

To the best of my knowledge, the arguments in Chapters 1 and 2 have not been previously employed to propose a right as envisaged by this thesis' hypothesis while Chapter 3 includes some countries that have been rarely examined elsewhere. The attempted inventiveness is of course not an aim in and of itself. It is the ultimate ambition of this thesis to unlock the stalemate and make a contribution to making reparations a reality for victims of non-State actors. They deserve our best efforts.

CHAPTER 1

THE OBLIGATION TO PROTECT AS AN UNQUALIFIED OBLIGATION OF RESULT

> ""Even if my parents were not killed by Government soldiers, the Government was responsible, because they were supposed to protect us.""
>
> (Victim from Kashumba, Uganda)[116]

If States are creating reparation programmes for victims of non-State actors because they think that they are obliged to do so by a rule of public international law, there are two candidates for what such a rule might be. Chapter 1 explores the first candidate, which is the proposition that the obligation to protect economic, social and cultural rights is an unqualified obligation of result. If the proposition is correct, then a violation by a non-State actor *ipso facto* creates the State's responsibility, which, in turn, activates its secondary obligation to repair.[117] The proposition is not explicitly articulated in nor can it be deduced from a treaty. This means that if the obligation to protect exists as an unqualified obligation of result, it does so under customary international law. Chapter 1 tests whether this proposition is reasonable and therefore a credible contender for the States' understanding of the law. The actual study of practice and the States' understanding of the law is presented in Chapter 3, where empirical data is juxtaposed with the propositions explored in Chapters 1 and 2, allowing us to conclude whether there exists a rule of public international law concordant with the thesis' hypothesis, and if so, whether the content corresponds to the proposition developed here in Chapter 1.

The investigation into the reasonableness of the proposition that States understand the obligation to protect economic, social and cultural rights as an unqualified obligation of result

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[116] *Kunej, et al*. (2014/2015), The Long Wait, p. 16.

[117] An obligation that follows from international responsibility is sometimes referred to as 'liability' (*Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, pp. 99-101). There are several obligations that follow from international responsibility and the obligation to repair is but one of them (Articles on State Responsibility, Articles 28-33, where the term 'legal consequence' rather than liability is used). As reparations are the only 'legal consequence' discussed in this chapter, the terms 'liability' and 'secondary obligation to repair' are used interchangeably.

is done in several steps. Subchapter 1.1 first looks at the types of obligations that exist in public international law, then juxtaposes these types with the content of the obligation to protect as it is contained in the Basic Principles and Guidelines. Establishing that the existing consensus is that the obligation to protect is a qualified obligation of result, subchapter 1.2 sketches the genesis of that understanding by showing how a continuous thread runs all the way from the dawn of the law on State responsibility for injury to aliens to efforts to codify State responsibility before and after the Second World War,[118] the Articles on State Responsibility and, ultimately, all the way to the Basic Principles and Guidelines. Subchapter 1.3 demonstrates that the transposition of the legal thinking from the law on State responsibility (for injury to aliens) onto the human rights context has been detrimental to the objective of making reparations a reality for victims of non-State actors and notes that it does not correspond with what States are doing, namely, creating reparation programmes for victims of non-State actors. Subchapter 1.4 proposes seeing the obligation to protect as an unqualified obligation of result and demonstrates why this understanding is not only in the interest of victims of non-State actors but also a credible contender for the States' understanding of the law. By way of conclusion, subchapter 1.5 provides an overview of Chapter 1, highlighting its most relevant outcomes.

1.1 Types of obligations and the existing consensus on the obligation to protect economic, social and cultural rights

The present subchapter looks at the types of obligations that exist in public international law, then juxtaposes these types with the content of the obligation to protect economic, social and cultural rights as far as it can be extracted from the Basic Principles and Guidelines, showing that the existing consensus is that the obligation to protect is a qualified obligation of result. It concludes by illustrating how this frustrates efforts to make reparations a reality for victims of non-State actors and asks whether the law was consciously designed to achieve that result.

[118] I would like to acknowledge that Tzvika A. Nissel's and Kathryn J. Greenman's recent doctoral theses on *A History of State Responsibility* and *The history and legacy of state responsibility for rebels 1839-1930*, respectively, have been invaluable for understanding the historical forces that have shaped the modern law on State responsibility.

1.1.1 Types of obligations in public international law

There is no treaty or other authoritative source that would simply list the types of obligations that exist in public international law. However, there are some classifications that are common in academic and other discourse.[119] One such was developed by the International Law Commission in the course of its work on State responsibility. In the 1997 version of the draft articles (hereinafter: 1997 Draft Articles),[120] the International Law Commission distinguished between three types of international obligations of States, namely, obligations of conduct, unqualified obligations of result and a third type that shall be in this thesis referred to as qualified obligations of result.[121]

The International Law Commission defined obligations of conduct as those "requiring the adoption of a particular course of conduct",[122] which may be "state[d] explicitly" or "implied".[123] It clarified that obligations of conduct, like obligations of result, had "a result" in mind but that what set them apart was "that their object or result [had to] be achieved through action, conduct or means "specifically determined" by the obligation itself, which [was] not true of obligations "of result"."[124] Contrary to obligations of conduct, unqualified obligations of result "merely require[d] the State to ensure a particular situation – a specified result – and le[ft] it free to do so by means of its own choice."[125] This freedom had a catch; even when the conduct preceding the failure had been exemplary, it would not shield the State from

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[119] Among others: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, pp. 12 ("The typologies are analytical tools that explain that the complete fulfilment of each right requires the performance of multiple kinds of duties"), 123-133 and 157 ff (Chapter V); and: *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, pp. 48-54.

[120] ILC, Draft articles on State responsibility with commentaries thereto adopted by the International Law Commission on first reading, UN Doc. 97-02583, January 1997 (hereinafter: 1997 Draft Articles).

[121] *Id*., draft article 23.

[122] *Id.*, draft article 20.

[123] *Id*., para. 17 of commentary to draft article 20. Even though the International Law Commission considered it sufficient for the required conduct to be implied, it added that "the determination [had to] […] be extremely precise, in other words, the obligation [had to] determine in a "particular" manner what [was] required of a given branch of the State machinery" (*Id*., para. 24 of commentary to draft article 20).

[124] *Id.*, para. 8 of commentary to draft article 20.

[125] *Id.*, para. 1 of commentary to draft article 21.

responsibility. That a failure to produce a result would automatically yield responsibility was not deemed legitimate for all obligations of result and so the International Law Commission proposed that in some cases the failure would not *ipso facto* lead to responsibility. Rather, once the desired result did not materialise,[126] prior conduct would determine whether a State was responsible for the failure. The International Law Commission applied this construction of obligations of result qualified by the quality of prior conduct to obligations where "the result required of a State […] [was] the prevention, by means of its own choice, of the occurrence of a given event".[127] The International Law Commission singled out obligations of prevention from other obligations of result because it considered it necessary to separately consider "cases where the result aimed at by the obligation is the prevention by the State of an event caused by factors in which it plays no part."[128] It justified this as follows:

> "In assuming obligations of this kind, States are not underwriting some kind of insurance to cover co-contracting States against the occurrence, whatever the conditions, of events of the kind contemplated, i.e. against the occurrence of the event even regardless of any material possibility of the State's preventing it from occurring in a given case. The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power. Only when the event has occurred because the State has failed to prevent it by its conduct, *and when the State is shown to have been capable of preventing it by different conduc*t, can the result required by the obligation be said not to have been achieved."[129]

Although the classification by the International Law Commission has some drawbacks, these are not directly relevant to the thesis at hand.[130] Its usefulness, meanwhile, is evident from the

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[126] This would be most obvious in instances where the opposite materialised.

[127] 1997 Draft Articles, draft article 23.

[128] *Id.*, para. 4 of commentary to draft article 23.

[129] *Id.*, para. 6 of commentary to draft article 23, emphasis added.

[130] For example, it is occasionally noted that the 1997 Draft Articles did not consider due diligence to be an element of obligations of conduct (*Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, pp. 102-103). It is possible that this was because due diligence would not, in the mind of the drafter, add value to an obligation that already was articulated in precise enough terms. This view did not survive and today the term 'obligation of conduct' is used almost interchangeably with the term 'due diligence obligation' (*Koivurova* (2010), Due Diligence, para. 8).

fact that it is actively referred to by practitioners. In the famous *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, for example, the International Court of Justice concluded that the obligation to prevent genocide was an obligation of prevention, even though it arrived at the conclusion from a different direction, stating that the obligation to prevent genocide was an obligation of conduct but that the conduct would only become relevant once the event to be prevented had occurred.[131] This sequence of reasoning garnered some criticism.[132] Rüdiger Wolfrum, for example, wrote that the International Court of Justice should have concluded that "obligations to prevent certain acts from happening are to be qualified as obligations of conduct as well as of result."[133] This would mean that while the occurrence of the event would automatically propel the State into a position of wrongfulness, its prior conduct would determine if the State was *in addition* also responsible for violating its obligation of conduct.[134] While in disagreement on what type of obligation the obligation to prevent genocide was, everyone's arguments invoked obligations of conduct, qualified obligations of result and unqualified obligations of result, confirming the International Law Commission's classification's enduring relevance.[135]

The key difference between qualified obligations of result and unqualified obligations of result is that in the case of the former, the failure to prevent merely triggers an inquiry into whether the State is responsible. In the case of the latter, the failure *ipso facto* means responsibility. We conclude subchapter 1.1.1 by establishing that there exist three types of obligations of States, which are obligations of conduct, unqualified obligations of result and qualified obligations of result.

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[131] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Merits), I.C.J. Reports 2007, p. 43, para. 430.

[132] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Merits), Separate Opinion of Judge *ad hoc* Kreća, I.C.J. Reports 2007, p. 457, para. 119.

[133] *Wolfrum* (2011), Obligation of Result Versus Obligation of Conduct, p. 381, and: *Wolfrum* (2010), General International Law, para. 80.

[134] *Wolfrum* (2011), Obligation of Result Versus Obligation of Conduct, p. 382.

[135] See also: CESCR, General Comment no. 3 on the nature of States Parties' obligations, UN Doc. E/1991/23, 14 December 1990 (hereinafter: CESCR, GC no. 3), para. 1, where the Committee referred to the classification before stating that it did not find it to be relevant for its work; or: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, pp. 174 and 184-196.

1.1.2 The existing consensus on the obligation to protect

Having established that there are three types of obligations, the next step is to find out what type of obligation the obligation to protect economic, social and cultural rights is according to the existing consensus as it is contained in the Basic Principles and Guidelines.[136] The latter do not answer the question explicitly but they provide sufficient clues.

Paragraph 3 of the Basic Principles and Guidelines announces the "[s]cope of the obligation", however, under the promising title it says no more than that "[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law […] includes, inter alia, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations". More relevant information can be found in paragraphs 8 and 9, where the term 'victims' is defined. The paragraphs state:

> "**V. Victims of gross violations of international human rights law and serious violations of international humanitarian law**
>
> 8. For purposes of the present document, victims are persons who individually or collectively suffered *harm*, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
>
> 9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim."[137]

What is key in this definition is that the materialisation of harm is a *sine qua non* for victimhood. Without harm, the Basic Principles and Guidelines do not recognise victimhood.

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[136] In the Preamble to the resolution adopting the Basic Principles and Guidelines, the General Assembly noted that it was guided by, *inter alia*, both "International Covenants on Human Rights", which means that the Basic Principles and Guidelines were always meant to cover economic, social and cultural rights, too.

[137] Emphasis added.

This means that the obligation to protect is not an obligation of conduct, but an obligation of result.

There are two types of obligations of result, so the next question is whether the obligation to protect is an unqualified or a qualified obligation of result. The Basic Principles and Guidelines state that all victims are entitled to reparations,[138] but immediately clarify that not all victims are entitled to reparations *from the State*. This is made most obvious in the wording of paragraph 16:

> "States should endeavour to establish national programmes for reparation and other assistance to victims *in the event that the parties liable for the harm suffered* are unable or unwilling to meet their obligations."[139]

Liability follows responsibility. Where there is responsibility, there is liability. And *vice versa*, where there is liability, there is, before it, responsibility. Paragraph 16 makes clear that the State is not always liable, which *ipso facto* means that it is not always responsible. In other words, the Basic Principles and Guidelines consider that victims of non-State actors are not automatically also victims of the State. There is no automatism between the failure to protect and responsibility. The obligation to protect is therefore not an unqualified obligation of result.

To summarise. Victims are defined through harm, which means that the obligation to protect is not an obligation of conduct. Victims of non-State actors are not entitled to reparations from the State, which means that the obligation to protect is not an unqualified obligation of result. The existing consensus is therefore that the obligation to protect economic, social and cultural rights is a qualified obligation of result, i.e., an obligation where responsibility is first entertained when harm materialises, even though the harm is not in itself sufficient to establish responsibility.

The conclusion is illuminating but it immediately generates a further question. If harm does not suffice to establish responsibility, what does? As qualified obligations of result are qualified

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[138] Basic Principles and Guidelines, paras. 11 and 15.

[139] *Id*., para. 16, emphasis added.

by the State's conduct prior to the materialisation of the harm, we must ask what conduct is required from the State in order for the State to be found not responsible. The Basic Principles and Guidelines do not answer this question, however, beyond their confines, the inquiry quickly concentres around the phrase 'due diligence'.[140]

1.1.3 Due diligence: little due to victims of non-State actors

What is due diligence? The phrase has many meanings. In one, it functions as a sort of umbrella term for various obligations that the State has prior to and after the materialisation of harm.[141] Meanwhile, it is also considered that all obligations have to be exercised *with* due diligence. In this latter meaning, "[d]ue diligence […] is no free-standing obligation but a modality attached to a duty of care for someone or something else".[142] Relevant for the quest at hand are the States' obligations prior to the materialisation of harm. What are they and is their content fixed or subjective, i.e., does it differ from State to State?

In General Comment no. 31, the Human Rights Committee wrote that measures aimed at preventing violations had to be "exercise[d] [with] due diligence".[143] The Committee, in turn, appears to avoid the phrase. It has used it in only three of its general comments and only in one of those in order to describe States' obligations.[144] Instead of 'due diligence', the Committee

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[140] Among others: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 18 ("The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors").

[141] Among others: OHCHR, Protection of economic, social and cultural rights in conflict, reproduced in: UNGA, Report of the United Nations High Commissioner for Human Rights, UN Doc. E/2015/59, 19 May 2015, para. 18; *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 168; *Hutter* (2019), Starvation in Armed Conflicts, p. 741; or: *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, pp. 55-76.

[142] *Peters, et al.* (2020), Due Diligence in the International Legal Order, p. 2.

[143] HRC, GC no. 31, para. 8.

[144] In General Comment no. 16 it stated that "States parties must […] act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors." (CESCR, General Comment no. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, UN Doc. E/C.12/2005/4, 11 August 2005 (hereinafter: CESCR, GC no. 16), para. 27.) The Committee also used the phrase in General Comments nos. 24 and 25, however, there it was used to describe what States should demand of business entities rather than what they themselves should be doing. (CESCR, General Comment no. 24 on State

typically writes that the obligation to protect requires that States take "measures", "all necessary measures", "steps", "appropriate steps" or "effective steps".[145] While these phrases are sometimes called "due diligence 'slang'",[146] the Committee's avoidance of the phrase 'due diligence' appears to be deliberate. In the corollary to the Human Rights Committee's General Comment no. 31, it wrote in its General Comment no. 3:

> "[O]bligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect."[147]

The articulation suggests that the Committee's priority is action rather than the determination of the exact content of the various obligations.[148] While this future-oriented approach has its

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obligations in the context of business activities, UN Doc. E/C.12/GC/24, 10 August 2017, paras. 15-17, 31-33 and 50; and: CESCR, General Comment no. 25 on science and economic, social and cultural rights, UN Doc. E/C.12/GC/25, 30 April 2020, paras. 75 and 84.)

[145] Among others: CESCR, General Comment no. 12 on the right to adequate food, UN Doc. E/C.12/1999/5, 12 May 1999 (hereinafter: CESCR, GC no. 12), paras. 15 ("measures) and 27 ("appropriate steps"); CESCR, General Comment no. 13 on the right to education, UN Doc. E/C.12/1999/10, 8 December 1999 (hereinafter: CESCR, GC no. 13), para. 47 ("measures"); CESCR, General Comment no. 14 on the right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, 11 August 2020 (hereinafter: CESCR, GC no. 14), paras. 33, 35 ("measures") and 51 ("all necessary measures"); CESCR, General Comment no. 15 on the right to water, UN Doc. E/C.12/2002/11, 20 January 2003 (hereinafter: CESCR, GC no. 15), para. 44 (b) ("all necessary measures"); CESCR, GC no. 16, para. 19 ("steps"); CESCR, General Comment no. 18 on the right to work, UN Doc. E/C.12/GC/18, 6 February 2006, paras. 22 ("measures") and 35 ("all necessary measures"); CESCR, GC no. 22, paras. 42 ("measures") and 59 ("effective steps"); and: CESCR, GC no. 23, para. 59 ("measures").

[146] *Peters, et al.* (2020), Due Diligence in the International Legal Order, p. 9, citing: *Bartolini* (2020), The Historical Roots of the Due Diligence Standard, p. 29.

[147] CESCR, GC no. 3, para. 1.

[148] *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 192.

benefits, its important drawback is that it is not very concrete.[149] Other bodies, in particular regional human rights courts, are relatively more occupied with the legal details, however, their case-law also shows that the phrase 'due diligence' has to be filled with concrete content every single time.[150] Due diligence was also discussed by the International Court of Justice. In the landmark *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the Court wrote:

> "[I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might

[149] The Committee's approach can, for example, make it difficult to find out *when* the State enters a position of wrongfulness.

[150] See, by way of example: Inter-American Court of Human Rights, Velásquez Rodríguez v. Honduras, Judgment (Merits), Doc. Series C No. 4, 29 July 1988, on the disappearance of student Angel Manfredo Velásquez Rodríguez; or: European Court of Human Rights (ECtHR), Opuz v. Turkey, Judgment, Application no. 33401/02, 9 June 2009. See also: *Violi* (2020), The Function of the Triad 'Territory', 'Jurisdiction', and 'Control' in Due Diligence Obligations.

> have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce."[151]

While the Court's construction of the obligation as one of conduct subject to the result occurring was, as noted above, criticised, its elaborations on the content of due diligence, in particular its considerations of both physical and legal capacity of the State, remain valid. They also mirror the Court's reasoning in the *Military and Paramilitary Activities in and against Nicaragua* case. There, the Court juxtaposed the capacities of two States and highlighted that different capacities created different obligations:

> "[I]f it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, *this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it*."[152]

Maria Monnheimer brilliantly observed that States are not actually given leeway to be less diligent and "are […] expected to make their best respective efforts."[153] However, as "[t]he same efforts employed with fewer resources automatically produce a lower outcome", the recognition of lesser capacity and its ascribing of legal relevance mean that there is an acceptance of "lower results in absolute terms".[154] Be that as it may, that demands placed on States would be so considerate of a State's circumstance appears considerate in the example above but unfortunate when juxtaposed to the objective of making reparations a reality for victims of non-State actors. Consider, for example, South Sudan, a country that has been

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[151] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Merits), para. 430.

[152] ICJ, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment (Merits), I.C.J. Reports 1986, p. 14 (hereinafter: ICJ, Military and Paramilitary Activities), para. 157, emphasis added.

[153] *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 158, footnote omitted.

[154] *Ibid.*

engulfed in civil war since December 2013.[155] In the conflict, both the Government of South Sudan as well as the main opposition group, the Sudan People's Liberation Movement/Army in opposition, and other non-State actors, have committed violations of economic, social and cultural rights.[156] South Sudan is also not well off. Its human assets and economic vulnerability indexes are among the lowest in the world as are its governance indicators.[157] While these characteristics are indicative only, in a judicial process in which South Sudan's conduct would be juxtaposed to its obligations qualified by due diligence, it would likely escape the imputation of responsibility for its failure to protect. This fear is added weight if we observe how the Committee, which speaks on economic, social and cultural rights with considerable authority, assesses civil war theatres. While South Sudan is yet to become a State Party to the Covenant and have its conduct reviewed by the Committee, other countries received sympathy for the situation they had found themselves in. In its 2021 *Concluding observations on the initial report of Mali*, for example, the Committee expressed "concern[] about the negative impact of the internal armed conflicts and confrontations in the northern and central areas of the country

[155] South Sudan: Government, Uppsala Conflict Data Program, University of Uppsala, no date, ucdp.uu.se/conflict/11345.

[156] Among others: Amnesty International Report 2021/22. The state of the world's human rights. Amnesty International, 2022, www.amnesty.org/en/wp-content/uploads/2022/03/WEBPOL1048702022ENGLISH.pdf, p. 338 ff.

[157] South Sudan was included in the United Nations' list of least developed countries in 2012 (, UNCTAD acknowledges admission of South Sudan as forty-ninth LDC, United Nations Conference on Trade and Development (UNCTAD), 21 December 2012, unctad.org/news/unctad-acknowledges-admission-south-sudan-forty-ninth-ldc). Two indexes are used to determine inclusion and "graduation" from the group. In 2021, South Sudan had a human rights index of 21.78 (or 33 where 66 is 100). A country is included into the least developed countries when its value is 60 or below and can graduate out of it when its value is 66 or above. South Sudan's economic vulnerability index in 2021 was 43.84 (or 137 where 32 is 100). A country is included into the least developed countries when its value is at 36 or above and can graduate out of it when its value is 32 or below. (UNCTAD, The least developed countries in the post-COVID world: Learning from 50 year of experience (report), UN Doc. UNCTAD/LDC/2021, 2021, p. 16.) The World Bank's "Worldwide Governance Indicators" for Juba are equally weak. In the percentile rank categorisation, whereby "Percentile Rank (0-100) indicates rank of country among all countries in the world", and "0 corresponds to lowest rank", South Sudan in 2019 scored 1.96 on "Voice and Accountability", 2.38 on "Political Stability and Absence of Violence/Terrorism", 0.00 on "Government Effectiveness", 2.40 on "Regulatory Quality", 1.44 on "Rule of Law", and 0.00 on "Control of Corruption". By comparison, in 2019 Germany's values were above 90 in all categories except for "Political Stability and Absence of Violence/Terrorism", where it scored 66.67 (Worldwide Governance Indicators (interactive data access), World Bank, no date, info.worldbank.org/governance/wgi/Home/Reports).

on the enjoyment of economic, social and cultural rights",[158] however, before proceeding to recommendations, it "recogniz[ed] the challenges faced by the State party".[159] Diplomatically deferential to a country's government,[160] this approach does not bode well for victims of non-State actors.

Due diligence or, rather, the subjective content of the conduct qualifying obligations of prevention, is an obstacle to making reparations a reality for victims of non-State actors. It is therefore intuitive to ask whether the law has been so designed on purpose or whether the origins of its form are more haphazard. It appears that both answers are correct. The law has been purposefully designed. But not for victims of non-State actors.

Moving forward, subchapter 1.2 sketches the two-odd centuries long genesis of the law, showing that while it is the result of intense negotiations between States, the negotiations did not consider a State's own victims of non-State actors. As a minimum, this means that history cannot be invoked to support the proposition that the understanding of the obligation to protect economic, social and cultural rights as a qualified obligation of result reflects States'

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[158] CESCR, Concluding observations on the initial report of Mali, UN Doc. E/C.12/MLI/CO/1, 6 November 2018 (hereinafter: UN Doc. E/C.12/MLI/CO/1), para. 4.

[159] *Id.*, para. 5.

[160] See also: CESCR, An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant (statement), UN Doc. E/C.12/2007/1, 21 September 2007 (hereinafter: CESCR, Statement on "maximum of available resources"), where the Committee explains which elements it would consider in the case of a State "us[ing] "resource constraints" as an explanation for any retrogressive steps taken". These include:

> "(a) The country's level of development;
>
> (b) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
>
> (c) The country's current economic situation, in particular whether the country was undergoing a period of economic recession;
>
> (d) The existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.
>
> (e) Whether the State party had sought to identify low-cost options; and
>
> (f) Whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason."

understanding of the law. However, the genesis provides other arguments against the qualified obligation of result as well. The latter are explored in subchapter 1.3.

1.2 From injury to aliens to human rights: tracing due diligence's spoor through time

International human rights law is a relatively new discipline of public international law. However, it is often associated with a much older discipline, namely, the law on State responsibility for injury to aliens.[161] In fact, the latter is often understood as the former's "precursor".[162] The association between the two fields is intuitive as both at least *prima facie* concern themselves with persons as opposed to States.[163] However, a closer look at the law on State responsibility for injury to aliens quickly reveals that the similarities with international human rights law are merely superficial. In fact, the differences between the two fields are so critical that the transposition of thinking from the law on State responsibility for injury to aliens to international human rights law must not be automatic.

This subchapter looks at the law on State responsibility for injury to aliens through a historical monocular. Subchapter 1.2.1 explores the historical circumstances in which State responsibility was transformed into a legal field and concludes with a look at the League of Nations Codification Conference (hereinafter: Codification Conference) at which State responsibility was, despite efforts, not codified. Subchapter 1.2.2 sketches some key debates before

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[161] Borchard illustrated the *raison d'être* of the law on State responsibility for injury to aliens as follows:

> "The individual abroad finds himself in legal relation to two countries, the country of which he is a citizen, and the country in which he resides or establishes his business. From the point of view of the one, he is a citizen abroad; from the point of view of the other, he is an alien. The common consent of nations has established a certain standard of conduct by which a state must be guided in its treatment of aliens. In the absence of any central authority capable of enforcing this standard, international law has authorized the state of which the individual is a citizen to vindicate his rights by diplomatic protection and other methods sanctioned by international law. This right of diplomatic protection constitutes, therefore, a limitation upon the territorial jurisdiction of the country in which the alien is settled or is conducting business."
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> (*Borchard* (1915), The Diplomatic Protection of Citizens Abroad, p. v.)

[162] *Shelton* (2015), Remedies in International Human Rights Law, p. 142.

[163] The use of the word 'persons' is deliberate and is intended to incorporate both natural persons and legal persons other than States and international organisations.

arbitration commissions addressing injury to aliens by non-State actors and extracts the rules that emerged, contentious and inchoate as they might have been. Subchapter 1.2.3 traces the development from the end of the Second World War to the adoption of the Articles on State Responsibility. It shows that while abstraction and subtraction were required in order for codification of at least secondary rules to finally succeed, rules of primary law remained uncodified, but were, nevertheless, allowed to inform the Basic Principles and Guidelines. Subchapter 1.2.4 highlights the most important findings, leading into subchapter 1.3, which substantiates the argument that the observed transposition is untenable. Letting go of cynicism, this untenability alone could be used to suggest that States cannot think that their obligation to protect economic, social and cultural rights against violations by non-State actors is a qualified obligation of result. For those more suspicious of States' motivations, subchapter 1.4 provides other arguments, too.

1.2.1 The mightiest's pen: the rise of the arbitration commission in the 19th and 20th century

This subchapter explores the historical circumstances in which State responsibility for injury to aliens was transformed into a legal field and concludes with a look at the Codification Conference. One might well ask why a thesis considering the rights of victims of non-State actors in the 21st century is looking at the *history* of the law on State responsibility for injury to aliens rather than, for example, State responsibility in its modern form. The simple answer is that this history remains relevant.[164] While the early form of State responsibility for injury to aliens was arguably not spectacularly different from its current shape, the Codification Conference was arguably the last time codification of primary law was attempted with such

[164] *Gaathi* (2002), War's Legacy in International Investment Law, p. 353 ("This article discusses the role war has played in shaping the rules of international investment law from the late nineteenth century"); *Greenman* (2019), The history and legacy, p. 233 ("Understanding the emergence of the nineteenth and early twentieth century rules of state responsibility for rebels helps us, I suggest, to put back together the pieces of state responsibility for rebels that fragmented after 1945. It thus enables a re-description of the state of international law today when it comes to responsibility for armed groups in a way which illuminates how international law continues to prioritise the protection of foreign investment against rebels, and non-state armed actors more generally, in the decolonised world"); and: *Burgstaller, and Risso* (2021), Due Diligence in International Investment Law, p. 697 ("The emergence of this concept [of due diligence] dates back to the seventeenth century, when it was used as a tool to mediate inter-State relations. Due diligence then developed throughout the nineteenth and twentieth centuries in the context of the protection of aliens").

optimism, at least by some, and the last time the wildly opposing views were articulated with a candour that was characteristic of the arbitration commissions preceding the Codification Conference but not the codification efforts following the Second World War.[165] The candour, in particular, reveals more clearly the motivations that shaped the rules, the clarity in turn making it easier to assess the legitimacy of their transposition onto international human rights law. In addition, the disputes before the arbitration commissions arose out of situations not unlike the ones considered by this thesis, i.e., non-international armed conflicts in which non-State actors violate economic rights. The superficial contextual similarities make obvious the wildly different natures of the relationships between 19th and 20th century aliens and territorial States, on the one hand, and between contemporary victims of non-State actors and their territorial States, on the other, thereby, again, providing a solid foundation from which the legitimacy of the transposition of rules developed for one relationship onto the other can be studied. In other words, the law on State responsibility for injury to aliens teaches us a lot about the rights of victims of non-State actors in the 21st century.

The law on State responsibility for injury to aliens is a child of its time, the time being the 19th and early 20th century. Prior to its development, European countries' international relations were mostly among themselves and it was common for injury to aliens claims to be settled without any (articulated) deference to the law,[166] on a diplomatic level.[167] If a motivation was expressed at all, it was more likely to be benevolence.[168] Where diplomacy proved futile, a

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[165] *Nissel* (2016), A History of State Responsibility, p. 342, where he noted that "[Special Rapporteur Francisco V. García-Amador] failed to grasp the difference between what his colleagues were saying officially and what they were seeking unofficially." Such a skill would not have been required at the Codification Conference.

[166] *Id*., p. 356 ("Prior to the late nineteenth century, international law was enforced dyadically and without regular recourse to adjudication").

[167] *Id*., p. 58.

[168] There are numerous examples of this. A selection was once passionately summarised as follows:

> "France, after the revolution of July 1830, the uprising of Lyons in 1834, the revolution of the month of February 1848; the insurrection of the Commune in Paris in 1871; and the events of Port Said in 1881; Belgium, on the occasion of the disturbances which took place there about the month of April 1834; the United States of America, in 1851, 1886, and 1891, with respect to the claims brought against them for damages caused to aliens during riots at New Orleans and Key West, Rock Springs and New Orleans again – ALL, have categorically rejected the principle of *obligatory indemnity by the state* in the circumstances cited. Whenever they have accorded pecuniary assistance to the victims of misfortunes of that nature, they have expressly declared that they did so through SPONTANEOUS LIBERALITY, not through *legal obligation*; in the sense of *compassion for personal misfortune and not as legal right or*

country could do everything from nothing to resort to war, an international dispute mechanism that is unlawful now but was not then.[169] The answer to who was right often followed the answer to who won.[170]

The more typical benevolent *modus operandi* was challenged when European countries and the United States established business relationships with Latin America. Newly decolonised and no longer subject to Spain's monopoly on trade with them,[171] "Latin American republics […] offered a vital market for Europe's surplus capital and manufactured goods and their natural resources were essential to the continued growth of European industry."[172] The trade was profitable but not without risk. Many Latin American countries were still regularly experiencing violence, including, in more modern language, non-international armed conflicts.[173] Once violence affected European and United States' persons, Europe and the United States would attempt to exercise diplomatic protection and demand reparations from

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> *for indemnity*; that acts of reparation in such cases are not founded on legal obligation; that such events come under the category of those inevitable acts to which all inhabitants of a country are exposed as they are to the effects of plague, and they can not compromise the responsibility of the state; and that aliens establishing themselves on national territory to engage in business, *ipso facto* submit themselves to local law and courts."
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> (United States and Venezuela Claims Commission, Venezuela Steam Transportation Company, Award, Dissenting Opinion of Commissioner Andrade, 1895, reproduced in: *Moore, John B.*, History and Digest of the International Arbitrations to which the United States has been a Party (vol. II). Government Printing Office (1898), p. 1724, p. 1728.)

For further examples, see, among others: *Goebel* (1914), The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars, p. 819 ff.)

[169] *Shaw* (2017), International Law, p. 371.

[170] *Nissel* (2016), A History of State Responsibility, p. 357.

[171] *Greenman* (2019), The history and legacy, p. 9.

[172] *Id.*, p. 10. See also: *Borchard* (1915), The Diplomatic Protection of Citizens Abroad, p. v, where he noted that "[w]ith the drawing together of the world by increased facilities for travel and communication, the number of persons going abroad for purposes of business or of pleasure has steadily increased", and that "an increasing amount of capital, American as well as European, has been seeking investment in foreign countries". He opined that these developments were "of economic advantage to the exploiting and to the exploited country", but admitted that "bonds of mutual dependency […] also create occasional friction."

[173] It has been convincingly argued that this violence was often reactional, and linked to the inequality and vulnerability of "the masses" for whom independence "had not brought any significant improvement in living conditions" (*Greenman* (2019), The history and legacy, pp. x and 72).

Latin American governments.[174] The latter, however, would take issue with the demand of paying reparations for harm caused by more or less legitimate non-State actors:

> "[Wars and revolutions] almost invariably occur because some blind force, against which the public authorities are powerless, has been set in motion. No State is immune from the evil. Revolution bursts upon a country with all the brutal force of some convulsion of nature. Foreigners as well as nationals have to partake of the consequences and share in the good or evil fortune which these undesired and unforeseen events may bring."[175]

Europe and the United States were not sympathetic to the Latin American woes and when the respective governments refused to heed Western powers' claims, the latter demonstrated willingness to buttress them with shows of force. However, instead of going all the way in and resorting to war, an intermediate stage was inserted onto the spectrum of means of international dispute resolution where on one end of it there is passivity and on the other war. Onto the spectrum was added the arbitration commission. The ostensible restraint on the use of force that manifested itself in the proliferation of arbitration commissions must therefore not be mistaken for the restraint on the *threat* of use of force. In fact, many arbitration commissions only materialised as territorial countries' last resort to prevent worse. For example, after Mexico became independent in 1821, the country was stage to "frequent revolutions", which, *inter alia*, injured US Americans, provoking claims by the latter's government.[176] Mexico's initial resistance to settle the claims was subdued by the threat of force and "[t]he first U.S.-Mexico Mixed Claims Commission was only established (in 1839) after Congress authorized President Andrew Jackson to initiate reprisals against Mexico, unless the latter agreed to settle claims."[177] European countries, too, relied on the power of the sword. The famous Venezuelan

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[174] Among others: *Nissel* (2016), A History of State Responsibility, p. 65 ff.

[175] League of Nations Committee of Experts for the Progressive Codification of International Law, Questionnaire No. 4 adopted by the Committee at its Second Session, held in January 1926: Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners, reproduced in: American Journal of International Law (AJIL), vol. 20, no. S5, 1926, p. 176 (hereinafter: Questionnaire No. 4), p. 196, cited in: *Greenman* (2019), The history and legacy, p. 195.

[176] *Greenman* (2019), The history and legacy, p. 40.

[177] *Nissel* (2016), A History of State Responsibility, p. 72, footnotes omitted.

commissions of 1902 and 1903, referred to as "the high point of the history of state responsibility for rebels",[178] were born in similar circumstances. Venezuela argued that the German, British and Italian claims should be settled by a domestic claims commission and in accordance with Venezuelan law, which "provided that foreigners must […] bring[] claims against the state and exhaust domestic remedies before seeking diplomatic protection", and, anyway, "that Venezuela would only be responsible for acts of 'the legitimate authorities acting in their public capacity' and thus not for the acts of rebels."[179] The Europeans were not impressed and "were stubborn in maintaining their right to diplomatic intervention",[180] without necessarily arguing the basis of that right. They presented Venezuela with an ultimatum.[181] When Venezuela refused to heed it, they proceeded to a professedly peaceful but in practice

[178] *Greenman* (2019), The history and legacy, p. 105.

[179] *Id.*, pp. 79-80, footnote omitted. An informative articulation of the Venezuelan argument that shows not just what it was arguing for but also against is the following:

> "No long meditation is necessary to realize the grave injury that would be done by such a dual legislation to the nations, like the greater part of those in America in whose development foreign immigration and the influx of foreign capital are important factors. In the course of a few lustres the inequality of conditions between natives and foreigners would create numberless difficulties which would go so far as to make national sovereignty a mere illusion of fancy."
>
> "If by exceptionally waiving the local laws, the matter of claims was allowed to be made one of mere diplomatic action, the simultaneous effect might be a constant injury to the internal sovereignty and a ceaseless threat to the national treasury."
>
> (Memorandum, Ministry of Foreign Relations of the United States of Venezuela, 19 March 1901, reproduced in: *Ralston, Jackson H.*, Venezuelan Arbitrations of 1903. Government Printing Office, 1904, p. 959, p. 959; and: Memorandum, Ministry of Foreign Relations of the United States of Venezuela, 12 August 1902, reproduced in: *Ralston, Jackson H.*, Venezuelan Arbitrations of 1903. Government Printing Office, 1904, p. 955, p. 956; both cited in: *Greenman* (2019), The history and legacy, p. 82.)

[180] *Greenman* (2019), The history and legacy, p. 80.

[181] While only Britain used the word ultimatum, the final communications from Germany and Britain were "in substance almost identical" (*Greenman* (2019), The history and legacy, p. 85). The Germans, for example, "ask[ed] that the Venezuelan Government […] forthwith make a statement in the sense that it recognizes, in principle, those claims as valid". The establishment of a commission was presented as the only alternative to "the Imperial Government [taking] the satisfaction of the same in its own hands" (Communication from Mr. von Pilgrim Baltazzi to Dr. Lopez Baralt, 7 December 1902, reproduced in: *Ralston, Jackson H.*, Venezuelan Arbitrations of 1903. Government Printing Office, 1904, p. 969, p. 971, cited in: *Greenman* (2019), The history and legacy, p. 85).

violent naval blockade.[182] Pushed into a (naval) corner, Venezuela at last "offered […] to refer the civil war claims to arbitration."[183]

In her seminal doctoral thesis on *The history and legacy of state responsibility*, Kathryn J. Greenman made the recurring observation that arbitral commissions were established as a mechanism alongside other mechanisms of foreign intervention, "in a spectrum with military invasion at its other end".[184] Another author described it even more illustratively, writing that "[v]irtually everywhere they looked, Latin Americans saw U.S. warships off their coasts".[185] Amid offhand remarks that "alien protection laws […] [are] genuinely concerned with the protection of individuals",[186] it is therefore really important to remember that arbitration commissions were about more than investing States' concerns with the rights of their citizens. Tzvika A. Nissel, writing primarily about the United States perspective, summarised the *raison d'être* of arbitration commissions as follows:

> "By employing legalism, U.S. diplomats launched a new legal field of "alien protection," which ultimately transformed the traditional practice of "diplomatic protection" in international law. *This was not a pacific gesture to the international community. By insisting on professional (white Anglo-Saxon Protestant) lawyers to act as arbitrators, the U.S. ensured that its assumptions about the relevance of minimum standards of legal protection were reflected in the international tribunals. The* telos *of this* techne *was not impartial judgment or equal protection under the law. It was the special protection of U.S. economic interests*."[187]

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[182] *Greenman* (2019), The history and legacy, p. 85. From a chronological point of view, the blockade was the last bit in a sequence of events which began with President Antonio Guzmán Blanco's retreat from power in 1889, Venezuela's vulnerability due to falling prices of coffee, which, since independence, had become its main export commodity, bullying by the United States which had "levied an additional duty on Venezuelan coffee and cacao to try and pressure Venezuela into signing a commercial treaty favouring US products", and an apparently uninterrupted line of smaller and larger uprisings, including the successful "*revolución legalista*" in 1892, and "*revolución restauradora*" in 1899, as well as the unsuccessful "*revolución libertadora*" in 1901. (*Id.*, pp. 72-74; and: Antonio Guzmán Blanco (Encyclopaedia Britannica).)

[183] *Greenman* (2019), The history and legacy, p. 85.

[184] *Id.*, p. 115.

[185] *Loveman* (2010), No Higher Law, p. 153, cited in: *Nissel* (2016), A History of State Responsibility, p. 73.

[186] *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 3.

[187] *Nissel* (2016), A History of State Responsibility, pp. 357-358, emphasis added.

Europeans had similar motivations. Writing about Venezuela, Kathryn J. Greenman reminds us that "[a]t stake in this battle over internationalisation was the protection of trade and investment in Venezuela and the project of liberal economic ordering after decolonisation."[188] Writing about other arbitration commissions, she reaches the same conclusion that "these commissions arose following periods of capitalist expansion which had been disrupted by revolution or civil war" and that "[t]he rules of state responsibility for rebels were a site of struggle over what political and economic relations between Latin America and the imperial powers, both new and old, would look like after decolonization".[189]

About a century after the first arbitration commissions in the framework of the Latin American integration into the global economy were established,[190] the law on State responsibility for injury to aliens was deemed ripe for codification,[191] and in 1930 countries came together to codify it at the Codification Conference. While the United States in particular were confident that codification was to be little more than a "technical" exercise,[192] countries who felt that arbitration commissions were established against rather than with them, highlighted the experience of duress and disputed the legitimacy of the legal material that the arbitration commissions had produced.[193] While provisional agreement was achieved on some questions,[194] and the Latin American countries notably softened their position of "soberanía

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[188] *Greenman* (2019), The history and legacy, p. 70; see also: pp. 76-78, where she illustrates how European commercial actors did not only passively stand by to see if arbitrations would be established or not, but were actively involved in their countries' politics.

[189] *Id.*, p. 208.

[190] *Id.*, p. 33 ff.

[191] *Nissel* (2016), A History of State Responsibility, pp. 297-304.

[192] *Greenman* (2019), The history and legacy, pp. 173-174.

[193] Questionnaire No. 4, p. 188, cited in: *Greenman* (2019), The history and legacy, p. 192:

> "It would be extremely dangerous to attribute any value to [the numerous precedents to be found in the past history of international claims]. Positive international law cannot derive its strength from sources which are so exiguous and so conflicting. A practice which is based on the use of force cannot be described as international practice in the sense admitted by international law. On the contrary, for the sake of the law's prestige, we should be careful to include in customary law only that which undeniably represents the definite will of all States composing the international community."

[194] In his Codification Conference's *post mortem*, Borchard, for example, observed that there was an agreement that responsibility implied liability and opined that, if they came that far, countries would have agreed that "the

absoluta",[195] it was clear on the eve of the Codification Conference that the law on State responsibility for injury to aliens was not yet ripe for codification.[196]

Against the backdrop of this contextual introduction, the subsequent paragraphs look at the law that emerged from the arbitration commissions.

1.2.2 From high stakes to the lowest common denominator: due diligence

As observed in subchapter 1.2.1, a key period of early arbitral practice spanned approximately one hundred years, from the first half of the 19th to the early 20th century. Even though this was a relatively long period in which State responsibility for injury to aliens could have developed and changed, the practice of the arbitration commissions was, in fact, oddly consistent. Consistency in this case does not mean uniformity or finality. Arbitration commissions often reached conclusions that are, in retrospect, nothing short of peculiar,[197] and even those awards that are still cited today as examples of the early years on the law on State responsibility for injury to aliens were often decided by umpires after the national commissioners were unable

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injured person must have been a national of the claiming state at the time the injury arose and at the time of presentation of the claim" (*Borchard* (1930), "Responsibility of States", pp. 522 and 539).

[195] *Nissel* (2016), A History of State Responsibility, pp. 349 and 365.

[196] *Borchard* (1930), "Responsibility of States", p. 540.

[197] Among others: United States and Venezuela Claims Commission, Venezuela Steam Transportation Company, Award, 1895, reproduced in: *Moore, John B.*, History and Digest of the International Arbitrations to which the United States has been a Party (vol. II). Government Printing Office (1898), p. 1693; or: United States and Colombia Commission, "Montijo", Award, 1875, reproduced in: *Moore, John B.*, History and Digest of the International Arbitrations to which the United States has been a Party (vol. II). Government Printing Office (1898), p. 1421. The latter case produced the famous dictum that "[i]t [was] clear, on every principle of the plainest justice, that 'some one' ought to pay for this act and its consequences", but another articulation from this case is even more interesting, arguing, in fact, an unqualified obligation of result even in inter-State cases. The award says:

> "But there is another and a stronger reason for such liability. This is […] that the general government of the Union through its officers in Panama, failed its duty to extend to citizens of the United States the protection which, both by the law of nations and by special treaty stipulation, it was bound to afford. It was, in the opinion of the [Umpire], the clear duty of the President of Panama, acting as the constitutional agent of the government of the Union, to recover the Montijo from the revolutionists and return her to her owner. It is true that he had not the means of doing so, there being at hand no naval or military force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation. The first duty of every government is to make itself respected at home and abroad. If it promises protection to those whom it consents to admit into its territory, it must find the means of making it effective. If it does not do so, even by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer."

to agree.[198] The consistency is rather in that it was the same questions that remained contentious all the way from the first arbitration commissions to the eve of the Codification Conference.

The lack of codification, the continuously incendiary disagreements and the inconsistent arbitral practice make it difficult to provide a succinct summary of the (early) law on State responsibility for injury to aliens. Nevertheless, some rules, contentious and inchoate as they might have been, and remain, can be said to have developed in those one hundred-odd years. The present subchapter looks at the broad strokes of some of the most interesting discussions in regard to injuries sustained by aliens at the hands of non-State actors and highlights the role of the belligerent context in which the arbitration commissions discussed State responsibility. The subchapter's purpose is to provide the reader with a rudimentary understanding of the agreements and, in particular, disagreements, as the latter led not only to the failure of the Codification Conference but also informed the codification process after the Second World War. Most importantly, however, understanding the contentions will make more tangible the practical effects of transposing the legal thinking of the arbitration commissions onto international human rights law. These effects are discussed in subchapter 1.3.

1.2.2.1 Three unanimous rejections: no responsibility, full responsibility and attribution of non-State conduct

As the introduction into subchapter 1.2.2 suggested, agreements were few, however, there were some. Three questions that were settled by the eve of the Codification Conference were whether the State should have any obligations for the conduct of non-State actors at all, whether the State should, due to the territorial link, assume full responsibility for the conduct of non-State actors and whether non-State conduct should, in fact, be *attributed* to the State.

The first question was answered with a categorical yes. While the exact content of the State's obligation to protect against non-State actors remained disputed, it was early on considered that

[198] Among others: Italy and Venezuela Commission, Sambiaggio, 1903, reproduced in: United Nations Reports of International Arbitral Awards, Vol. X (2006), p. 499.

the State had, perhaps as an attribute of its sovereignty,[199] an obligation, a privilege even,[200] to try to prevent harm. Even the initial proponents of the idea that States should not have any obligations at all, sometimes summarised as "soberanía absoluta",[201] had come around, and by the eve of the Codification Conference, when all countries were speaking on equal footing, no country argued that investing States could not expect anything at all from territorial States.[202]

The opposite idea that the State should assume full responsibility for the conduct of non-State actors was regularly raised by investing States,[203] however, more interestingly than that, in a few isolated instances, it even received arbitral recognition.[204] It is unclear whether the proponents of full responsibility thought that the territorial States' obligation to protect was an unqualified obligation of result or that reparations were part of a territorial State's primary obligations, however, either way, awards proposing full responsibility can be categorised among the more peculiar awards and the idea was not seriously discussed at the Codification Conference.

The third idea was to make the State responsible not for its own conduct, i.e., the omission to prevent, but instead to attribute to it, wholesale, all non-State conduct. While it is unclear if that idea was ever seriously entertained by a commissioner or an umpire, it was conclusively rejected in the award in the *Sambiaggio* case. In a general manner, Umpire Ralston wrote that

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[199] Among others: *Greenman* (2019), The history and legacy, p. 130, citing: Mexico and United States General Claims Commission, Home Insurance Company (USA) v. United Mexican States, 31 March 1926, reproduced in: United Nations Reports of International Arbitral Awards, Vol. IV (2006), p. 48, pp. 51-52.

[200] United States and Colombia Commission, "Montijo", Award, 1875, pp. 1442-1443, cited in: *Nissel* (2016), A History of State Responsibility, p. 192.

[201] *Grandin* (2012), The Liberal Traditions in the Americas, p. 71.

[202] *Nissel* (2016), A History of State Responsibility, p. 349; and: *Greenman* (2019), The history and legacy, p. 166.

[203] In the *Guastini* case, Italian commissioner "Agnoli argued that this was 'a case of damages committed by insubordinate subjects, whose very insubordination must be held as due to a lack of care and provision on the part of the Government'" (Italy and Venezuela Commission, Guastini, 1903, reproduced in: United Nations Reports of International Arbitral Awards, Vol. X (2006), p. 561, p. 571, cited in: *Greenman* (2019), The history and legacy, p. 94).

[204] United States and Colombia Commission, "Montijo", Award, 1875, p. 1444 ("'some one' ought to pay").

> "[t]he ordinary rule [was] that a government, like an individual, [was] only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it. To apply another doctrine, save under certain exceptional circumstances incident to the peculiar position occupied by a government toward those subject to its power, would be unnatural and illogical."[205]

The division between primary and secondary rules placed the question of attribution into the ambit of secondary rules and the rejection of attribution was explicitly articulated by the commentary to Article 9 of the Articles on State Responsibility, which mentioned "the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State", citing the *Sambiaggio* award.[206]

While the preceding paragraphs certainly sketch the cacophony of early arbitral awards, what is more interesting is to note that the mere proposition of these three ideas demonstrates that the obligation to protect has no intrinsic content. Rather, its content is a question of will, of choice.[207] Therefore, the suggestion that the State's obligation towards other States should have

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[205] Italy and Venezuela Commission, Sambiaggio, 1903, p. 512.

[206] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, reproduced in: ILC, Report of the International Law Commission on the work of its 53rd session (23 April – 1 June and 2 July – 10 August 2001), UN Doc. A/56/10, 2001, p. 31 (hereinafter: DARSIWA), p. 49 (para. 6 of commentary to draft article 9).

[207] 1997 Draft Articles, para. 5 of commentary to draft article 20:

> "To recognize the existence of two different types of international obligation according to their nature, and the importance of distinguishing between them in determining when and how the breach of each of these types of international obligation occurs, does not mean that it is necessary to specify, in the present drift articles, criteria for establishing the cases in which international law must impose on States obligations "of conduct" or "of means" and those in which it must confine itself to imposing obligations "of result". *It is at the stage of formation of the "primary" rules of international Saw that this legal system makes, as it were, an ideal choice between the cases in which it must confine itself to requiring a State to achieve a particular concrete result, while respecting its sovereign freedom to choose the means of doing so, and the cases in which the object in view leads it to require the State to adopt a particular course of conduct*" (emphasis added).

Consider also the quote by historian William LaPiana, who wrote:

> "Society creates law and law has to respond to society. Not slavishly and it can always guide society and you have to make choices and in the end someone's going to decide in our society, we hope in some sort of democratic, small "d" manner what's good. But you have to choose. You have to choose and of course the most horrible, difficult thing is to take responsibility and choose. And that's what law is all about."

the same content as the State's obligation under international human rights law can only be legitimate if the respective contexts lend themselves to analogous thinking.[208] Whether or not the contexts do so is the subject of subchapter 1.3, however, before reaching there, subchapter 1.2.2 still has to present the more contentious questions discussed by the arbitration commissions.

1.2.2.2 The baseline: a presumption of non-responsibility

Having established that the territorial State had *some* obligations in regard to conduct of non-State actors on its territory, the next question was whether the general rule was one of responsibility or one of non-responsibility. This, in essence, was a question of the content of the *praesumptio juris*. Was the presumption, i.e., the starting position, that the territorial State was responsible, meaning that the territorial State would have to proof the opposite to exonerate itself, or was the starting position that the territorial State was not responsible, meaning that the investing State would have to proof responsibility? This question, like the ones discussed above, was not overly contentious, as almost everyone could agree that a presumption of non-responsibility applied. However, some argued that this presumption could only be extended to

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> (Life of the Law, Logic and Experience, Life of the Law, 11 September 2012, www.lifeofthelaw.org/2012/09/logic-and-experience/.)

Examples that show that we can choose what kind of obligation an obligation should be, can be, among others, observed in the field of international humanitarian law. For example, the obligation that "[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for", articulated in 1864, was transformed to say that "[a]fter each engagement the occupant of the field of battle shall take measures to search for the wounded and dead, and to protect them against pillage and maltreatment" in 1929 and was, finally, given its current form in 1949, where the obligation is articulated as follows: "At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled." To "take all possible measures to search and collect" is, at least *prima facie*, a softer formulation than "shall be collected". (See: *Bartolini* (2020), The Historical Roots of the Due Diligence Standard, p. 30, where he considers the influence of due diligence on the articulation of obligations.)

[208] In the past, similar pleas were made in favour of understanding public international law as a framework in its own right. Koskenniemi recalls: "James Reddie (1773-1852) observed in 1842 […] it was time

> ["][t]o give up the idea of transferring the rules applicable to men viewed abstractly, apart from any condition, in which they have ever been found to exist, to nations or communities, formed by union of men in civil society;["]"

(*Koskenniemi* (2004), The Gentle Civilizer of Nations, p. 23, citing: *Reddie* (1842), Inquiries in International Law, p. 114. See also: *Koskenniemi* (2004), The Gentle Civilizer of Nations, pp. 56-58).

well-ordered States and not to "countr[ies] subject to frequent revolutions."[209] While the argument shows that arbitration commissions existed in an environment of routine and severe racism,[210] it was authoritatively rejected by Umpire Ralston in the *Sambiaggio* case. His thought process is instructive:

> "It is strongly insisted on behalf of the claimant that whatever may be the general rule of international law with respect to the nonliability of governments for the acts of revolutionists, this rule does not find a proper field of operation in Venezuela, the country being subject to frequent revolutions.
>
> […]
>
> To take the position, […] we […] must […] decide, that Venezuela does not occupy the same position among nations as is occupied by nations contracting with her. Is this justifiable?
>
> For about seventy years Venezuela has been a regular member of the family of nations. Treaties have been signed with her on a basis of absolute equality. Her envoys have been received by all the nations of the earth with the respect due their rank.
>
> The umpire entered upon the exercise of his functions with the equal consent of Italy and Venezuela and by virtue of protocols signed by them in the same sovereign capacity. To one as to the other he owes respect and consideration.
>
> Can he therefore find as a judicial fact […] that one is civilized, orderly, and subject only to the rules of international law, while the other is revolutionary, nerveless, and of ill report among nations, and moving on a lower international plane?

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[209] Among others: Italy and Venezuela Commission, Sambiaggio, 1903, p. 523. See also: *Greenman* (2019), The history and legacy, p. 163, where she cited: *Hall* (1884), A Treatise on International Law, pp. 230-231 ("All that can be asked is that the best provision for the fulfilment of international duties shall be made which is consistent with the character of the national institutions, *it being of course understood that those institutions are such that the state can be described as well ordered to an average extent*. A community has a right to choose between all forms of polity through which the ends of state existence can be attained, but it cannot avoid international responsibility on the plea of a deliberate preference for anarchy").

[210] *Greenman* (2019), The history and legacy, p. 71 ("This is a story in which Venezuelans are racialized; the German ambassador called [President Cipriano] Castro a 'cunning Indian', while Theodore Roosevelt referred to him as a 'villainous monkey'.", footnotes omitted). That some societies were more civilised than others was a common belief also in academic circles. See: *Koskenniemi* (2004), The Gentle Civilizer of Nations, p. 55 ff.

> It is his deliberate opinion that as between two nations through whose joint action he exercises his functions he can indulge in no presumption which could be regarded as lowering to either. He is bound to assume equality of position and equality of right."[211]

In an inter-State setting, a presumption of non-responsibility makes perfect sense. States are inherently protective of their sovereignty and a presumption of responsibility would have interfered with it more aggressively than a presumption of non-responsibility. Between the two, thus, non-responsibility was the obvious choice. Even though it was mostly Latin American countries that had to argue in favour of a presumption of non-responsibility in front of arbitration commissions, once generalised, this rule protects every defendant. In subchapter 1.3, the thesis explores whether for the purposes of transposing this rule an analogy can be drawn between the inter-State setting and the relationship between a territorial State and an individual.

Returning to the material emerging from the arbitration commissions, so far all of the questions raised appear to have been by and large settled. The same, however, is not true of the next and arguably most important of them all. What conduct suffices for a State to avoid responsibility?

1.2.2.3 "[S]ubject to the government exercising due diligence"

In order to avoid being found responsible for injury to aliens by non-State actors, Basis of Discussion No. 10 proposed that a State should "show such diligence in the protection of foreigners as, having regard to the circumstances […] could be expected from a civilised State."[212] A straightforward if outmoded articulation, the actual content of due diligence remains disputed up until the present day. Before and at the Codification Conference, the

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[211] Italy and Venezuela Commission, Sambiaggio, 1903, pp. 523-524.

[212] Basis of Discussion No. 10, reproduced in: ILC, Second Report by F. V. García Amador, Special Rapporteur, on the Responsibility of the State for injuries caused in its territory to the person or property of aliens. Part I: Acts and omissions, UN Doc. A/CN.4/106, 15 February 1957, para. 14 of commentary to draft article 12. For an alternative articulation, see: Institute of International Law, International Responsibility of States for Injuries on Their Territory to the Person or Property of Foreigners, 2 August - 2 September 1927, reproduced in: AJIL, vol. 22, no. S5, 1928, p. 330, p. 331 ("The State is not responsible for injuries caused in case of mob, riot, insurrection or civil war, unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to nationals. […]"), cited in: *Greenman* (2019), The history and legacy, p. 179.

territorial, mostly Latin American countries advanced arguments that would leave the judgment of their conduct to them. They argued that foreigners could not expect more protection than nationals, something referred to as the national standard,[213] and that a domestic authority should adjudicate aliens' claims.[214] Only a manifestly deficient legal process amounting to a denial of justice should allow the State of nationality to make a claim of diplomatic protection.[215] Unsurprisingly, no consensus could be formed around this position. It appears that while even investing countries were willing to concede that the national standard was the level of protection aliens could normally expect, it would have to be an international authority evaluating not only whether the standard was met, but, before that, whether the standard was good enough, thus, in fact, proposing an international minimal standard. Edwin M. Borchard articulated this position as follows:

> "[I]nternational law has probably established the rule that certain exceptional types of injury transgressing the requirements of civilized justice or administration would justify an international claim, even though nationals might for lack of a remedy have to tolerate them."[216]

Based on this, if the international minimal standard was higher than the national standard, the former would apply, even if that meant that aliens would sometimes find themselves in a privileged position *vis-à-vis* nationals.[217] The underlying implication was that the national standard in many Latin American countries was not good enough. What exactly a State would have to do to be found in fulfilment or non-fulfilment of its duties was nevertheless never authoritatively settled,[218] even though arbitral awards did overall show considerable deference

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[213] Among others: *Nissel* (2016), A History of State Responsibility, pp. 132 and 153 ff; or: *Greenman* (2019), The history and legacy, pp. 63, 82 or 199. The national standard was not favoured only by Latin Americans. See, for example: *Borchard* (1930), "Responsibility of States", p. 537, citing the Chinese delegate to the Codification Conference; and: *Greenman* (2019), The history and legacy, p. 201, citing the Danish delegate.

[214] For example: *Greenman* (2019), The history and legacy, pp. 79-83.

[215] *Id*., p. 48.

[216] *Borchard* (1930), "Responsibility of States", p. 537.

[217] *Ibid.*

[218] For example, in the *Sambiaggio* case, the "Italian commissioner Agnoli […] argued that, 'judging from the results it must be admitted that the means employed by [the Venezuelan Government to maintain political order]

to defendants.[219] Perhaps it is not possible to articulate abstract yet detailed enough rules to cover any eventuality that might occur in a non-international armed conflict, however, whatever the reason for it, the ambiguity is important to keep in mind.

But there is another important takeaway from 1.2.2.3, namely, the undercurrent underlying the Latin American defences, which is that it would not be *equitable* to expect countries to settle injury to aliens claims when they and their nationals were already ruined by the violence. In fact, Latin American countries presented their interests and the interests of their nationals as one. In *Sambiaggio*, the Venezuelan Commissioner made the following plea:

> "Is it equitable that, as between a Venezuelan and a foreigner, the former should say, 'My home is in mourning for cherished members of my family who have perished in defense of the state; I myself am ruined from the enforced neglect of my business: I have been the victim of the enemy,' while the foreigner may say, 'I have lost nothing by the war; I am as safe as in times of peace; not only does the government (which I do not defend) pay me for the losses which it has inflicted on me but for those occasioned by its enemies as well.' I believe that in equity such claims should be rejected."[220]

This his defence appears legitimate in the inter-State context. Whether that legitimacy can be transposed to the relationship between a territorial State and victims of non-State actors is the subject of subchapter 1.3.

1.2.2.4 Conclusion: much ado about nothing in particular

In one hundred years of arbitral practice and one international codification attempt, attribution of non-State conduct to the territorial State was rejected, as were no responsibility and full responsibility. Between a presumption of responsibility and non-responsibility, the latter was chosen, and the scope of due diligence requirement, to which the rule is subject, turned out to

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are, to say the least, inefficient, and from this its responsibility is deduced as a logical sequence'", while Umpire Ralston concluded "the opposite", writing that "the intensity of the uprising gives rise to a presumption that the government could not have done anything more." (*Greenman* (2019), The history and legacy, p. 94, citing, among other awards: Italy and Venezuela Commission, Sambiaggio, 1903, p. 504.)

[219] *Greenman* (2019), The history and legacy, p. 96.

[220] *Id.*, pp. 91-92.

correspond to the national standard unless the national standard was lower than an international minimum standard. An international authority would be the final arbiter of whether the latter was provided. That was, at least, the proposal by the investing States. In the end, an overall mistrust turned out to be too great an obstacle on the path to codification.

What *does* a State have to do to escape international responsibility? In 1930, the answer was 'it depends' and subchapter 1.2.3 will show that the answer has not changed since. Subchapter 1.3 will, *inter alia*, observe the challenge that this ambiguity presents to making reparations a reality for victims of non-State actors.

1.2.3 Seventy years of post-Second World War codification: divide the rules

Despite the unsuccess of the Codification Conference, following the Second World War, codification was attempted once again. The International Law Commission was "[r]equest[ed] […] to undertake the codification of the principles of international law governing State responsibility."[221] Although the mandate was broad, the Commission's initial efforts were still focused on State responsibility for injury to aliens.[222] In fact, despite the two-decade long intermission, the Commission in a way picked up where the Codification Conference left off.[223] Not much had changed in the twenty-odd years and it is perhaps no surprise that the Commission's early work was plagued by the same disagreements that had characterised the Codification Conference.[224] It became clear once again that that an agreement on the law on State responsibility (for injury to aliens) in the form that it was envisaged at the Codification Conference and now, under Special Rapporteur Francisco V. García-Amador, would not be forthcoming.[225]

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[221] UNGA, Resolution 799 (VIII): Request for the codification of the principles of international law governing State responsibility, UN Doc. A/RES/799(VIII), 7 December 1953.

[222] *Greenman* (2019), The history and legacy, pp. 222-223.

[223] ILC, International responsibility: report by F. V. García Amador, Special Rapporteur, UN Doc. A/CN.4/96, 20 January 1956, para. 15 ("Resolution 799 (VIII) of the General Assembly does not mark the commencement of a new work of codification. It constitutes rather the resumption of the many efforts made in the past to codify the "principles of international law governing State responsibility").

[224] *Nissel* (2016), A History of State Responsibility, pp. 323-328.

[225] *Id*., pp. 330-334.

The breakthrough came when the 2nd Special Rapporteur on State responsibility, Roberto Ago, proposed the now well-established distinction between primary and secondary rules. It was a "doctrinal "revolution.""[226] While the idea was not actually new as such as it "reflected Germanic preferences for distinguishing primary obligations and secondary responsibilities",[227] its practical application not only "symbolize[d] the end of U.S. domination",[228] but also, and perhaps more importantly, paved the way for the eventual adoption of the Articles on State Responsibility under the 3rd Special Rapporteur, James Crawford. As a result of the split, the final Articles on State Responsibility only deal with so-called secondary rules, i.e., "the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom."[229] Most of the contentious questions regarding the law on State responsibility (for injury to aliens) were dispassionately and elegantly moved into the confines of "primary rules, whose codification would involve restating most of substantive customary and conventional international law."[230] With rules of State responsibility both abstracted and subtracted, the final document reflects an "expansive but hollow doctrine of State responsibility".[231] Important problems remain unaddressed and those addressed were arguably less contentious to begin with.[232]

Albeit out of sight, the primary rules on State responsibility (for injury to aliens) are anything but out of lawyers' minds. In the field of international investment law, they remain as

[226] *Id*., p. 290, footnote omitted.

[227] *Ibid.*

[228] *Id*., p. 344.

[229] DARSIWA, p. 31. See also: ILC, Draft articles on diplomatic protection, with commentaries, 2006, reproduced in: ILC, Report of the International Law Commission on the work of its 58th session (1 May – 9 June and 3 July – 11 August 2006), UN Doc. A/61/10, 2006, para. 50, para. 50 (para. (2)) ("Diplomatic protection belongs to the subject of "Treatment of aliens". No attempt is made, however, to deal with the primary rules on this subject – that is, the rules governing the treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person").

[230] DARSIWA, p. 31.

[231] *Nissel* (2016), A History of State Responsibility, p. 380.

[232] An example is Article 10, which rejected the attribution of non-State actors' conduct to the State.

contentious as ever.[233] Meanwhile, international human rights law, in particular the Basic Principles and Guidelines, appear to be content to accept the extant primary rules, uncodified and inchoate as they might be. Theodoor C. van Boven, one of the drafters, wrote:

> "From the outset the Principles and Guidelines were based on the law of State Responsibility as elaborated over the years by the International Law Commission in a set of Articles on Responsibility of States for Internationally Wrongful Acts which were commended in 2001 to the attention of governments by the United Nations General Assembly".[234]

If he had wanted to say that the Basic Principles and Guidelines were based on the Articles on State Responsibility in their final form, taking as authoritative, say, the rules of attribution, he could have done so without referring to the document's genesis. His explicit mention of "the law of State Responsibility as elaborated over the years by the International Law Commission", therefore rather suggests that the drafters were well aware that the Articles on State Responsibility were the final and abridged summary of a discussion on both secondary *and* primary rules on State responsibility. The explicit mention of the process can be understood as a nod to it and some of the earlier drafts.

The 1997 Draft Articles, which reflected but had not yet perfected the distinction between primary and secondary rules, included draft article 23, which read:

> "When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result."

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[233] Among others: *Gaathi* (2002), War's Legacy in International Investment Law; *Rajput* (2020), Due Diligence in International Investment Law, pp. 274-279; or: *Burgstaller, and Risso* (2021), Due Diligence in International Investment Law.

[234] *Van Boven* (2010), Basic Principles and Guidelines, pp. 1-2.

The articulation can be considered a legitimate abstraction of the arbitral practice referred to above,[235] while it also coincides with the existing consensus on the obligation to protect. Draft article 23 can therefore be seen as an informative if unfortunate link between the arbitral practice and the Basic Principles and Guidelines.

1.2.4 Conclusion: the good old rules

In subchapter 1.2, the thesis demonstrated how State responsibility became a legal field. It painted the belligerent environment in which the arbitral commissions from whose work the law emanated operated and highlighted that "[t]he rules of state responsibility for rebels were a site of struggle over what political and economic relations between Latin America and the imperial powers, both new and old, would look like after decolonization".[236] It presented contentious and inchoate emerging rules and explained how these not authoritatively codified solutions ended up being integrated into the Basic Principles and Guidelines. In short, subchapter 1.2 proved what subchapter 1.1.3 had boldly stated, namely, that while the law defining the rights of victims of non-State actors was purposefully designed, it was not designed with a territorial State's own victims of non-State actors in mind, the consequence of which is that, as a minimum, history cannot be invoked to support the proposition that the States' understanding of the law is that the obligation to protect economic, social and cultural rights is a qualified obligation of result. In other words, there is no historical rationale for the law as it is according to the existing consensus as it is contained in the Basic Principles and Guidelines.

Moving on, subchapter 1.3 will show why the transposition of thinking from injury to aliens claims onto international human rights law is not just unfortunate for victims of non-State actors and historically haphazard but also legally unsound, while subchapter 1.4 shows how understanding the obligation to protect economic, social and cultural rights as an unqualified obligation of result not only favours victims' interests but is also a more credible candidate for the States' understanding of the law.

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[235] 1997 Draft Articles, para. 11 of commentary to draft article 23.

[236] *Greenman* (2019), The history and legacy, p. 208.

1.3 False friends: the law on State responsibility for injury to aliens and international human rights law

Subchapter 1.2 observed that the law on State responsibility for injury to aliens is sometimes referred to as a "precursor to international human rights law".[237] It then substantiated the proposition that there runs a continuous thread from the arbitral practice that began in the first half of the 19th century, to the discussions at the Codification Conference, the work of the International Law Commission, the Articles on State Responsibility, and, finally, all the way to the Basic Principles and Guidelines whose drafters relied not just on the Articles on State Responsibility but also on the process preceding their adoption. The fact that the Basic Principles and Guidelines as well as international human rights law more broadly are not just inspired by but rely on the law on State responsibility is not typically problematised.[238] This is perhaps because there exists an overall impression that the law on State responsibility for injury to aliens was "genuinely concerned with the protection of individuals",[239] which, if true, would possibly make it a *legitimate* precursor to international human rights law, or perhaps because there is a certain elegance in applying one abstract body of law to protect values as diverse as international investment, the environment, life.

Subchapter 1.2 further observed that the law on State responsibility for injury to aliens was developed in large part through the practice of arbitration commissions that worked in a tangibly belligerent environment. On the eve of the Codification Conference, States were able to agree on some rules, however, important themes remained so contentious that the Codification Conference did not succeed to codify State responsibility. Many primary rules of State responsibility remain uncodified up until today.

The present subchapter offers an examination of the law on State responsibility (for injury to aliens) from the viewpoint of the objective of making reparations a reality for victims of non-

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[237] *Shelton* (2015), Remedies in International Human Rights Law, p. 142.

[238] Among others: *Evans* (2012), The Right to Reparation in International Law for Victims of Armed Conflict, pp. 36-39; *Shelton* (2015), Remedies in International Human Rights Law, pp. 74-76; *Capone* (2017), Reparations for Child Victims of Armed Conflict, pp. 69-109; or: *Furuya* (2021), The Right to Reparation for Victims of Armed Conflict, pp. 31-33 and 62. For an authority preceding the Basic Principles and Guidelines, see: *Hessbruegge* (2005), Human Rights Violations Arising from Conduct of Non-State Actors, p. 83 ff.

[239] *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 3.

State actors. It observes that just as Indiana Jones could not replace the Golden Idol with a bag of weights without calamity unfolding, so we cannot put victims of non-State actors into shoes tailored for capital-exporting superpowers and expect that victims' interests be sufficiently safeguarded. For that, the elements that shaped the law on State responsibility do not sufficiently resemble the considerations that (should) sculpt the relationship between a State and its individuals.

1.3.1 State responsibility for injury to aliens: a relationship between States

A key characteristic of the law on State responsibility for injury to aliens is that it regulates the relationship that exists between States, i.e., entities that are at least juridical equals.[240] This was true even before the turn to legalism in the early 19th century,[241] and remains true to this day.[242] In other words, even though the shift to arbitration was significant, "generat[ing] an intermediary space between the allegation of breach and its remedial enforcement",[243] it did not in any way rattle State responsibility's inter-State core.[244] The law's objective was and remains to regulate a relationship between equals.[245] The inter-State nature of the law goes a

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[240] Charter of the United Nations, 1945, reproduced in: Charter of the United Nations and Statute of the International Court of Justice, UNTS, vol. 1, p. XVI; *Grote* (2006), Westphalian System; *Kokott* (2011), *States, Sovereign Equality*; *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 243 (writing on international humanitarian law, Giacca notes that "[t]he structure and alleged philosophy underlying international human rights law is based on a vertical relationship, *as opposed to IHL norms*", emphasis added).

[241] *Nissel* (2016), A History of State Responsibility, p. 58 ff.

[242] Articles on State Responsibility, Article 33.

[243] *Nissel* (2016), A History of State Responsibility, p. 357.

[244] *Id*., p. 356.

[245] There is no want of arguments to substantiate this proposition. For example, subchapter 1.2.1 observed that arbitration commissions were established between States after territorial States refused to give in to demands raised by investing States in the framework of the latter exercising diplomatic protection. To exercise diplomatic protection is a prerogative of the State, not its natural or legal persons (ILC, Draft articles on diplomatic protection, with commentaries, 2006, para. 49 (Article 1); or: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 30). It is of little legal significance that arbitration commissions then considered cases of direct interest to foreign natural or legal persons, especially because these were not, at that time, subjects of public international law.

(It is very doubtful whether corporations have become subjects of public international law in the meantime. While some allow for an "international legal position" (see: *Walter* (2007), Subjects of International Law, para. 20), others authoritatively reject that "businesses ha[ve] any legally binding obligations under existing international law" (see: *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 11, referring

long way in explaining why the law is as it is. When States are developing a body of law under which they might be a right holder in one setting but a duty bearer in another, they will consider this reciprocity when creating the law.[246] After all, what the United States can demand of Mexico today, the latter might demand of the former tomorrow.[247] This means that demands are framed carefully and with restraint, as are commitments. For when the State will find itself

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to the 2006 version of the Guiding Principles on Business and Human Rights, which suggests that businesses are not subjects). The 2011 version of the Guiding Principles on Business and Human Rights begins by stating that they "are grounded in recognition of: (a) *States'* existing obligations to respect, protect and fulfil human rights and fundamental freedoms;" and "(b) [t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights". Businesses can impact human rights, but they are not duty bearers under international law (OHCHR, Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. HR/PUB/11/04, 2011, p. 1).)

The question at any given time was what obligations the territorial State had towards the investing *State*, i.e., what the latter could expect before and claim after the materialisation of harm. This was perhaps made most obvious when the Committee of Experts for the Progressive Codification of International Law articulated the *Bases of Discussion*, Basis 29 of which included the statement that "[i]n principle, any indemnity to be accorded is to be put at the disposal of the injured *State*" (Responsibility of States for damage caused in their territory to the person or property of foreigners, League of Nations Doc. C. 75. M. 69. 1929. V., 1929, Basis of Discussion No. 29 (5), emphasis added). While this statement was struck out by the third sub-committee of the Commission on Responsibility of States at the Codification Conference, this was only because the principle was "deemed inherent in the very term "international responsibility"" (*Borchard* (1930), "Responsibility of States", pp. 522-523). It is because it is the State that is considered injured that reparations are to be given to the State (Articles on State Responsibility, Article 33).

Another telling example can be extracted from the discussions at the Codification Conference about whether a national or an international standard of protection applied. While some believed that the national standard was the maximum a foreigner could claim (see: subchapter 1.2.2.3, *supra*), others considered that "international law ha[d] probably established the rule that certain exceptional types of injury transgressing the requirements of civilized justice or administration would justify an international claim, *even though nationals might for lack of a remedy have to tolerate them.*" (*Borchard* (1930), "Responsibility of States", p. 537, emphasis added.) In other words, the alien's foreignness, i.e., her link to another *State* was decisive for the level of protection she could expect. This was not because the *alien* could claim more than a national but because what the territorial State owed to the investing State was an international minimum standard. (See also: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 5.)

[246] Among others: *Fard* (2013), Is Reciprocity a Foundation of International Law, p. 1 ("The absence of a powerful uniform legal authority, to enforce international law and international agreements, has placed reciprocity in a pivotal position in inter-State relations and the extent to which States rely on reciprocity"); or: *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 47 ("The law on state responsibility […] is among those areas that are most closely linked to this interstate reciprocal conception of international law"). See also: *Borchard* (1930), "Responsibility of States", p. 536, footnote 20, where he cites how the preliminary wording of a provision was the result of "reciprocal concessions between different points of view".

[247] *Nissel* (2016), A History of State Responsibility, p. 358.

in a situation of duty holder, the scope of the committment will function as a protective barrier. In fact, State responsibility, including State responsibility for injury to aliens, has been named "the "unspoken bargain" between States",[248] a bargain in which one State gives up some sovereignty and allows the other State to claim rights against it in exchange for the other State giving up a corresponding amount of sovereignty, also in exchange of being able to claim reparations from other States.[249] States weigh the risks of not finding an agreement against whatever risk they are mitigating with the agreement (e.g., havoc wreaked by armed non-State actors or a natural calamity).[250] State responsibility for injury to aliens is a textbook example of *quid pro quo,* which is, not least, why abstracting the law on State responsibility for injury to aliens into a more general law on State responsibility is unproblematic,[251] while the idea of transposing law on State responsibility for injury to aliens to international human rights law is anything but.

Quid pro quo does not reflect the logic underlying international human rights law at all. The relationship between the State and the individual is not a relationship between two entities that are, in principle, the same. Public international law now recognises the individual as a subject, however, as a subject it has different rights and obligations than a State. This is reflective of the fact that international human rights law is principally realised in a domestic setting which is characterised by a hierarchical relationship between a State and an individual on its territory.[252] The rise of international human rights law has corresponded with individuals

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[248] *Nissel* (2016), A History of State Responsibility, p. 368, citing: *Crawford, and Grant* (2007), Responsibility of States for Injuries to Foreigners, p. 84.

[249] For a discussion on how sovereignty was understood in the 19th century, see: *Nissel* (2016), A History of State Responsibility, pp. 144-160.

[250] *Peters, et al*. (2020), Due Diligence in the International Legal Order, p. 2:

> "Due diligence is needed when a risk has to be controlled or contained, in order to prevent harm and damage done to another actor or to a public interest. The rise of the concept is therefore tied to the rise of the 'risk society' and the idea of risk management. In the standard situation, a state is expected to tackle risks emanating from non-state actors in its territory. But risks can also arise from forces of nature, or be triggered by other types of actors, including third states" (footnote omitted).

[251] *Nissel* (2016), A History of State Responsibility, p. 381 ("The ILC solution was […] to abstract the law to such a sufficient degree that the remaining "general principles" would be relatively incontrovertible"), referencing: *Crawford* (2002), The International Law Commission's Articles, Articles 1-3.

[252] By way of example: CESCR, GC no. 3.

becoming subjects *and* holders of *human* rights. States, meanwhile, are human rights duty bearers and they do not themselves possess human rights.[253] This means that the reciprocity that permeates the very thinking of the law on State responsibility for injury to aliens is entirely absent from the relationship between a State and an individual on its territory.

Within the framework of international human rights law, States also do not have to bargain away their sovereignty in exchange for receiving guarantees by individuals. Individuals do not present the risk to sovereignty foreign States do and they do not ask its State to give up sovereignty to them. Yes, the State might be cautious in recognising an expansive scope of rights for fear of increased international supervision, however, the direct beneficiaries of any such recognition will be a State's own individuals. Meanwhile, individuals can make demands, or rather, demands can be made in the favour of individuals' rights, without a worry that this could backfire when the State would demand the same from individuals. Individuals do not possess sovereignty as this is an attribute of statehood,[254] and do not have to fear that their claims will have "unintended consequence[s]" in case the tables turn,[255] as this is a logical impossibility.

In short, there is no *quid pro quo.* This means that any rules that are expressive of reciprocal thinking must be scrutinised closely to see whether at all and, if so, why they have a place in relationships that are not reciprocal. The following paragraphs zoom in on some particulars and show that even closer scrutiny does not provide arguments in favour of transposing thinking from the law on State responsibility (for injury to aliens) onto international human rights law.

1.3.2 "[H]ere fortune is more readily achieved": the aliens' bargain, the individuals' fate

The next highlight of subchapter 1.3 cycles back to the observation made in subchapter 1.2.1 to the effect that "[t]he rules of state responsibility for rebels were a site of struggle over what political and economic relations between Latin America and the imperial powers, both new

[253] *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 39.

[254] *Besson* (2011), Sovereignty.

[255] *Nissel* (2016), A History of State Responsibility, p. 358.

and old, would look like after decolonization".[256] The thesis observed that the law on State responsibility is intimately linked with the political context of the 19th and early 20th century in which "capital-exporting states" were seeking "to internationalise the conditions – in terms of allocating the risk of harm caused by rebels – upon which foreign trade and investment entered Latin America".[257] The majority of cases that came before the arbitration commissions concerned "commercial interests" and "aliens were protected from rebels not as individuals but as commercial actors".[258] In other words, aliens came to Latin America in search of fortune, which is why Latin American lawyers argued that they should carry the risk that came with the potential benefit, as can be elegantly discerned from this passage:

> "The foreigner who comes to this part of America knows and implicitly accepts the fact that here at times society is politically perturbed, just as he knows that its soil is subject to upheavals which may engulf its inhabitants; just as he knows that fever lurks in every bush and pool of its exuberant nature. But if these are its drawbacks, there are also its compensations and advantages. Here life is easier than it is in the great European aggregations, and here fortune is more readily achieved."[259]

In addition to the alien's profit-seeking, there is another characteristic that is implicit in the aliens' actions, namely, her agency, voluntariness. Risks are weighed against benefits, *choices* are made. The alien chooses and is aware of the possible consequences of that choice. She can take them into account when making the decision. This is not true for the individual already present. She is a physical person, not a legal one, possibly destitute, not affluent so as to travel internationally, in her own country as a matter of fate, not choice. A victim of a non-State actor *will* "share in the good or evil fortune" and no opt-out option will be provided. One might argue that trade is beneficial to the territorial State and that the alien's choice therefore, in a way, benevolent, but that argument misses the point. Companies do not have a mandate to develop

[256] *Greenman* (2019), The history and legacy, p. 208.

[257] *Id.*, p. 211.

[258] *Id.*, p. 52.

[259] Italy and Venezuela Commission, Sambiaggio, 1903, p. 506, cited in: *Greenman* (2019), The history and legacy, p. 90.

societies. Their purpose is profit,[260] and even if trade can be mutually beneficial, companies do not enter relationships that are not, as a minimum, beneficial to them. Benefits for the territorial State are, if anything, collateral.

The wildly different positions of the (natural) persons discussed, and, just as importantly, the fact that it is the foreign State that is the subject of the relationship with the territorial State, not the alien, need to be treated as serious red flags against transposing the law on State responsibility for injury to aliens onto international human rights law. In the following paragraphs, we take a closer look at the institutions mandated to resolve disputes, the procedural tools and the substantive law that governed them, and the role the desired consequence plays in the creation of primary rules.

1.3.3 Institutional set-up

Arbitration commissions were the bodies that developed the law on State responsibility for injury to aliens through its awards. Their nature is important because the institutional set-up, the procedural rules and the substantive law of alien protection cannot be clinically separated from each other.[261] The form, the process and the substance are one integrated framework.

Arbitration commissions as well as other inter-State forums are established or at least acquiesced to by both parties to the case. The arbitration commissions described above were *ad hoc* bodies established by bilateral treaties.[262] Under the terms of the treaties, the parties would typically appoint one commissioner each and the national commissioners would then pick an umpire to rule in cases where the national commissioners disagreed. This group of three

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[260] *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 43; and: [C]orporation (Encyclopaedia Britannica).

[261] In the same vein, it is intuitive that a criminal procedure out to establish material truth will not be the same if carried out by a corrupt inquisition or an independent court, or if the presumption is one of guilt or innocence of the defendant. The same is true for the law on State responsibility for injury to aliens and international human rights law.

[262] By way of example: Treaty between Her Majesty and the United States of America (Washington Treaty), 8 May 1871, reproduced in: *Cushing, Caleb*, The Treaty of Washington: Its Negotiation, Execution, and the Discussions Relating Thereto. Harper & Brothers Publishers, 1873, p. 257, Article XII, "which set up one of the – if not the – most famous international arbitrations of all time, the Alabama Claims tribunal" (*Nissel* (2016), A History of State Responsibility, p. 44).

would become the arbitration commission. The system, while simple, provided a strong initiative for both parties to invest resources into the design and the subsequent operation of the commission, lest they suffered negative consequences. Both parties had at their disposal their respective State apparatus and could, ultimately, sanction the other's misconduct by the (threat of) use of force or economic sanctions, for example.

Victims, on the other hand, cannot co-design *their* forum and cannot ensure their representation in the same direct manner. They are also not in a position to make decisions regarding the forum's finances. A State's institutions and laws are given, lacking though they often are, as was observed in subchapter α.4.1.1. The victims are up against a much stronger party, the State, and the only State apparatus involved in the case is the one they are up against. Finally, victims have no real leverage. If their territorial State disregards all its obligations, there is little they can do.

The individuals' position in front of national courts does not only apply to victims of non-State actors, of course. But the argument that this thesis is making is not that national courts do not have a *raison d'être*. The argument is that what might be considered legitimate or fair in terms of procedural or substantive law is not independent of the institutional set-up. That the same procedural and substantive rules should apply in front of considerably different bodies is questionable.

1.3.4 Procedural tools: a presumption of non-responsibility

One such procedural rule is the presumption of non-responsibility. The presumption of non-responsibility is a clear reflection of States guarding their sovereignty against others and, *vice versa*, allowing others to do the same. States understood that whatever demand they would put on the other, others would put on them,[263] and while they eventually gave up bits of sovereignty in exchange for guarantees, they made this giving up conditional upon a presumption of non-responsibility. In the preceding subchapter, we discussed that individuals do not present a threat to the sovereignty of their State and that they do not have to guard their own since they are not

[263] *Nissel* (2016), A History of State Responsibility, p. 358.

sovereign, meaning that they do not have an interest to offer a presumption of non-responsibility as it actively hurts their interests and never benefits them in return.

That the presumption of non-responsibility is not only misplaced but clearly less legitimate in the State-individual relationship than it is in the inter-State context becomes obvious when we consider its consequences. The presumption of non-responsibility allocates the burden of proof onto the claimant. If Italy wants reparations from Venezuela, Italy has to prove Venezuela's responsibility. In our setting, if the victim of a non-State actor wants reparations from its territorial State, she has to prove the State's responsibility. The onus on the victim is the same as the onus on a State in the framework of the law on State responsibility for injury to aliens, however, while the former setting is one of Goliath *versus* David, or, in theory, at least a dispute between equals, the latter setting is David *versus* Goliath, where David is still the weaker party but has inherited all the obligations of the stronger Goliath and where Goliath is now protected by presumptions earlier developed for the typically weaker territorial State.

Seeing this argument in unison with the preceding one on institutional set-up, we also cannot overlook that Goliath of the past had a commissioner it itself had selected listening to its arguments and defending them against the other commissioner and, when necessary, pitching them to the umpire. A victim is not so represented. In addition, we remembered that a victim will only theoretically be provided with a judiciary corresponding to international standards. That given these circumstances a party would agree to extend the other a presumption of non-responsibility without gaining anything in return is unlikely and the law therefore at least *prima facie* unjust.

1.3.5 Substantive law: "subject to the government exercising due diligence"

It addition to scepticism against transposing procedural rules, the transposition of substantive law, too, has to be approached with caution. In subchapter 1.1.3, the thesis observed that due diligence had no definitively defined content. While this ambiguity can have benefits, for example "[i]n international law-making processes," where "it can be employed in a spirit of a constructive ambiguity in order to overcome a deadlock in negotiations",[264] it also has

[264] *Peters, et al*. (2020), Due Diligence in the International Legal Order, p. 3.

disadvantages, such as that its "vagueness […] is thought to complicate monitoring,"[265] or that it is difficult to know when and if at all an individual has actually become a victim.[266] One can understand that States might well desire this ambiguity, gambling on being able to exploit it to their advantage at a later point, either by arguing that the other side had more obligations or that they themselves had fewer before ever reaching the dispute on facts.

Victims, on the other hand, have little to gain from such vagueness. They, too, would have to argue the content of the State's obligations before then proceeding to the facts, however, they would typically do this with fewer resources, which might make it considerably more difficult to exploit the ambiguity to their benefit.[267] In turn, as the weaker party, they'd never benefit from the ambiguity themselves. This argument shows yet again that the law on State responsibility (for injury to aliens) is considerably less if at all legitimate when transposed to the international human rights law context.

1.3.6 Consequence: responsibility is about liability

One might claim that procedural and substantive rules are what they are and that we have to accept the results that necessarily flow from them. But neither the entry values nor the conclusion of the preceding sentence are true. In his doctoral thesis, Tzvika A. Nissel offers the following paragraph:

> "While the meaning of State responsibility has not been constant, certain attributes underlie all three narratives of this study. Most intuitively, responsibility means "answerability." As Joseph Weiler recently expressed it, "At the heart of state responsibility is a regime of consequence." As its etymology suggests, the core of State responsibility is *the possibility of liability*."[268]

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[265] *Baade* (2020), Due Diligence and the Duty to Protect Human Rights, p. 107 (footnote omitted).

[266] For an illustration of how complicated the question on when the violation was committed can become, see: 1997 Draft Articles, commentary to draft article 24, discussing the "[m]oment and duration of the breach of an international obligation by an act of the State not extending in time".

[267] Respondent States were often able to do that as can be observed, among others, from the considerable deference shown to them by some arbitration commissions (*Greenman* (2019), The history and legacy, p. 96).

[268] *Nissel* (2016), A History of State Responsibility, p. 360, citing: *Weiler* (2013), Crime and Punishment, p. 993; and: *Crawford, and Watkins* (2010), International Responsibility, p. 283.

The paragraph highlights that the content of State responsibility is not an inherent truth that arbitration commissions or codification bodies have striven to find. Rather, State responsibility is about liability, i.e., about creating an obligation of reparation.[269] This is evident from the treaties that established arbitration commissions in order for the latter to determine responsibility and set the amount of reparations to be paid,[270] and even more so from treaties that established arbitration commissions that would only have to set the amount of reparations to be paid, responsibility already having been agreed upon in the treaty itself.[271]

Therefore, while a forum (or a treaty) will establish State responsibility in order to bring about the desired consequence, i.e., liability, the making of the rule actually begins at the opposite end. Investing countries wanted territorial countries to pay reparations whenever there was *any* harm. Territorial countries, on the other hand, also knew when they wanted to pay reparations, which was, ideally, never. With these objectives in mind, the content of State responsibility was to be shaped, a task that ultimately proved to be too difficult.

If we forget that State responsibility is, ultimately, "a regime of consequence", we strive to find its content as if it existed out there as an axiom waiting to be discovered, as if State responsibility had a purpose in and of itself. But we design criminal laws so that we may send criminals to prison and tax laws so as to ensure sufficient funds for the functioning of the State. We criticise laws that do little to nothing to fulfil their stated objective and those that promote objectives we find appalling. Therefore, when we discuss State responsibility in the context of international human rights law, the correct question to ask is not what *is* the content of the

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[269] ILC, International responsibility: report by F. V. García Amador, Special Rapporteur, para. 37 ff.

[270] Among others: *Greenman* (2019), The history and legacy, p. 41 ff.

[271] Protocol between the Government of Venezuela and the Imperial German Government, 13 February 1903, reproduced in: Monthly Bulletin of the International Bureau of the American Republics, vol. XIV, no. 4, 1903, p. 1102, p. 1103 (Article 1 ("The Venezuelan Government recognizes in principle the justice of the claims of German subjects presented by the Imperial German Government.")); *Nissel* (2016), A History of State Responsibility, pp. 57-58, citing, among others: Convencion entre la Francia y el Gobierno de la Provincia de Buenos Aires, Encargado de las Relaciones Exteriores de la Confederacion Argentina, 29 October 1840, available at: tratados.cancilleria.gob.ar/tratado_archivo.php?tratados_id=kqSkmZM=&tipo=kg==&id=laOimg==&caso=pdf; or: *Greenman* (2019), The history and legacy, p. 85 ff.

State's obligation to protect is but what it needs to be in order to promote the desired consequence, e.g., making reparations a reality for victims of non-State actors.

It is, of course, possible to argue that States might not be eager to pay reparations to anyone, including individuals on their territories. This argument has merit, not least because there exist today numerous governments that could not be described as democratic or accountable, or interested in the welfare of their people.[272] However, if we imagine a representative and accountable government, we can fathom that such a government would be less happy to pay reparations to foreign States than to its own citizens, the reason being that money paid to a foreign State leaves the country, meaning that fewer funds remain to use domestically. The foreign State's gain is the territorial State's loss.

This zero-sum situation does not correspond to international human rights law and reparations paid to own individuals. A State's relationship with its individuals is not *ipso facto* antagonistic and one's loss is not the other's benefit, and *vice versa*. In fact, the opposite is true. Individuals and governments can elevate each other.[273] A democratic and representative government will want to foster its individuals and repair them if they were harmed by non-State actors.[274] This, in turn, can have ripple effects and promote the wellbeing of the entire country.[275] Therefore, a democratic government might not insist on the same limits to its responsibility *vis-à-vis* its own individuals as it might legitimately invoke against foreign States. The consequence it does not care to offer to one subject is the consequence it might want to freely give to another. As a very minimum, when it comes to reparations to own individuals, a government cannot argue

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[272] A new low for global democracy. More pandemic restrictions damaged democratic freedoms in 2021, The Economist, 9 February 2022, www.economist.com/graphic-detail/2022/02/09/a-new-low-for-global-democracy; and: Corruption Perceptions Index 2021, no date, www.transparency.org/en/cpi/2021.

[273] *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, pp. 9 ("The lump sums payable sometimes did include a reckoning of the costs of damage (however flawed or inflated) for the injuries and losses of *nationals*", emphasis added) or 35 ("noting the imperative for such [*ex gratia*] redress comes from cultural expectations of the local population, the expectations of the international community, and a recognition by the State itself that it is in their national interest to do so (such as to win the 'hearts and minds' of the population)").

[274] See, for example: About the Victim Compensation Fund, September 11 Victim Compensation Fund (United States Government), no date, www.vcf.gov/about.

[275] Among others: Truth and Reconciliation Commission for Sierra Leone, Witness to Truth. Report of the Sierra Leone Truth and Reconciliation Commission. Volume 2, 5 October 2004, www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents/volume-two/item/witness-to-the-truth-volume-two-chapters-1-5?category_id=12 (hereinafter: Witness to Truth (vol. 2)), p. 240 ff.

against them by stating that it requires funds to rebuild the country as reparations are not taking from that. They are, in fact, part of the restorative objective.[276] Reparations to individuals do not drain the country as individuals *are* the country. We see, again, that State responsibility for injury to aliens addressed a relationship that is fundamentally different from the one entertained by the human rights context and that defences States (want to) raise against foreign States are not legitimate when held up against their own individuals.

One final remark remains to be made at this point. States that claim reparations surely profit from receiving them but can go on without them. Exactly because States do not depend on reparations, they can balance what they claim against what they promise. States are able to shoulder losses. Meanwhile, individuals cannot. Without reparations, life itself might be threatened, key economic and social rights will be.[277] A rich State can bargain because it has a safety net. A victim of a non-State actor often does not.

1.3.7 Conclusion: not good enough and out of touch

Subchapter 1.3 demonstrated that transposing the logic underpinning the law on State responsibility for injury to aliens onto international human rights law creates a law that is ineffective if juxtaposed with the objective of making reparations a reality for victims of non-State actors. The transposition is untenable and, as noted above, this untenability alone can be used to support the argument that the States' understanding of the law cannot be that the obligation to protect is a qualified obligation of result.

In addition, the proposition that the obligation to protect is a qualified obligation of result does not in fact correspond to what the States are doing as Chapter 3 shows. However, before we reach there, subchapter 1.4 considers if and how the proposition that the obligation to protect is an unqualified obligation of result solves the predicaments identified in subchapter 1.3, as well as whether and why it might be a more credible contender for the States' understanding of the law.

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[276] Reparations, ICTJ, no date, www.ictj.org/reparations.

[277] Among others: Witness to Truth (vol. 2), pp. 235 (para. 30) and 237 ff.

1.4 The obligation to protect economic, social and cultural rights: an obligation in its own right

Subchapter 1.1.1 observed that obligations can be divided into three types and concluded that the obligation to protect economic, social and cultural rights was a qualified obligation of result according the existing consensus as contained in the Basic Principles and Guidelines. Subchapter 1.3 then demonstrated that to consider the obligation to protect to be a qualified obligation of result is not good enough if assessed against the objective of making reparations a reality for victims of non-State actors. It also does not explain why States are designing reparation programmes for victims of non-State actors while rejecting wrongdoing. If the obligation to protect is not a qualified obligation of result, two possibilities remain. It can be an obligation of conduct or an unqualified obligation of result.

The proposition that the obligation to protect is an obligation of conduct does not appear to correspond to the current state of affairs in any way. Obligations of conduct as those "requiring the adoption of a *particular* course of conduct".[278] One can argue whether the obligation to protect is defined in a sufficiently detailed manner, what is unambiguous, however, is that both the Basic Principles and Guidelines and States agree that victims are (to be) defined through harm, i.e., the result, and not just the risk of harm created by a State's lack of preventive conduct. To the best of my knowledge, there does not exist a reparation programme that was designed to repair the mere risk of harm.[279]

With the qualified obligation of result rejected in subchapter 1.3 and the obligation of conduct also summarily discarded, the remaining type is the unqualified obligation of result. If the obligation to protect is an unqualified obligation of result, this means that in the same moment in which a non-State actor harms an individual, thereby making her a victim, the State has also *ipso facto* failed in its obligation to protect that individual. It is therefore immediately

[278] 1997 Draft Articles, draft article 20, emphasis added.

[279] This is not to say that it would not be desirable to hold States responsible and therefore liable to pay reparations before harm materialises, however, a further elaboration of is beyond the confines of Chapter 1 which is testing a candidate for the States' understanding of the law today. Whatever the latter is, it is not, at present, that the obligation to protect is an obligation of conduct.

responsible for its failure and has to provide reparations for *its* violation.[280] The purpose of subchapter 1.4 is to examine whether the understanding of the obligation to protect as an unqualified obligation of result facilitates the objective of making reparations a reality for victims and, in a preliminary manner, whether it corresponds to what States are doing.

Subchapter 1.4 goes about fulfilling the aims identified above by picking up the challenges identified in subchapter 1.3 and showing how understanding the obligation to protect as an unqualified obligation of result addresses each of them. Reaching the same conclusion over and over again, the arguments can well be considered variations on a theme, however, each of them highlights from its own respective angle just how fundamentally different the questions are that are today, apparently, regulated by the same set of rules. Subchapter 1.4 concludes by noting that the content of the unqualified obligation of result fits with what the States are doing and also that States would desire that the obligation to protect was understood as an unqualified obligation of result. Whether there is causation and not just correlation with State practice is explored in Chapter 3.

1.4.1 The State and the victim: a different kind of relationship

Subchapter 1.3 demonstrated that State responsibility is permeated with *quid pro quo* logic. Its rules, therefore, reflect a bargain between if not always belligerent then at least adversarial interests and are well-adjusted to the inter-State context. Subchapter 1.3 also noted that the forces shaping the law on State responsibility (for injury to aliens) are absent in the human rights context. There is no reciprocity as the State is only a duty bearer and not a holder of corresponding *human* rights. States also do not have to fear that individuals would want to pierce their sovereignty in favour of another State. In a direct negotiation between a State and individuals, the latter would have no incentive to limit their demands against their State as they

[280] One might argue that even unqualified obligations of result do not automatically lead to international wrongfulness, citing *force majeure* as a circumstance precluding wrongfulness. *Force majeure* will generally preclude wrongfulness but *not* when the State has "assumed the risk of that situation occurring". When obligations are designed specifically to apply in situations of armed conflict, their *raison d'être* would be defeated if armed conflict could qualify as *force majeure* (Articles on State Responsibility, Article 23 (2) (b); and: DARSIWA, para. 10 of commentary to draft article 23).

would have nothing to gain from such restraint. The State, meanwhile, would not need to put up defences of its sovereignty. From such a negotiation, a different law would emerge.

It is, of course, not by happenstance that unqualified obligations of result are rare in public international law. The burden placed on the bearer of the obligation is significant, yet, the latter is not given any avenues to avoid responsibility. That a State would ever agree to such a rule to its detriment and the benefit of another State, regardless of the context considered, does not appear realistic. Not just common sense, also historical experience negates that States would be so motivated. In many instances, in particular when applied against the weaker State, even a sense of basic fairness might be insulted by such a rule. Meanwhile, the proposition that a State should be considered responsible for its failure to protect economic, social and cultural rights, i.e., human rights, from the moment of the materialisation of the harm is not so at odds with common sense, history or fairness. In the relationship between a State and a victim of a non-State actor, motivations that (should) shape the law, are different. If we understand the obligation to protect as an unqualified obligation of result, we face none of the incongruity described above as the understanding is harmonious both with the fact that States and individuals have different rights and obligations as well as with the nature of the relationship in which interests, rather than being the same, i.e., most sovereignty for me, least sovereignty for the other, thereby infringing on one another and having to be mediated, are complementary and thus symbiotic. The reason for a State to be responsible without any examination of its behaviour prior to the harm would not be to devastate the State for the benefit of another or let it off the hook for possible wrongdoings. Rather, this immediate responsibility and liability would facilitate the objective of making reparations a reality for victims of non-State actors, an objective that can and also should be in the interest of the State.

1.4.2 "Troubled times have come to my hometown": the individuals' fate

In subchapter 1.3.2, the thesis noted the quest for profits that motivated aliens to travel and invest abroad, and underlined the inherent voluntariness of their presence in the (territorial) State plagued by non-State actors. The law on State responsibility for injury to aliens makes this transparent as it contemplates who should carry the risk of the alien's venture. Not unlike 'no pain, no gain', it allocates the risk on the alien, while, admittedly, demanding that the territorial State nevertheless offers *some* protection. If the State fulfils its duties, the alien's loss is her or its own. If no harm materialises, however, the alien's gain is her or its own, too. In the

inter-State context, the content of the law on State responsibility for injury to aliens makes sense.

In a way, the law on State responsibility for injury to aliens are terms and conditions offered to the foreign State and, by extension, its nationals who must accede to them before traveling and investing. Depending on their content, these terms and conditions can be perceived as an invitation or a deterrent, the alien can take them or leave them. On the other hand, there is no reason to subject individuals that are in the territorial State regardless to these same terms and conditions. In fact, if one were to ask what risk voluntarily assumed by the individual is to be divided between the territorial State and the individual, the respondent would have to admit that there is no such analogous risk assumed by the individual. Understanding the obligation to protect as a qualified obligation of result allocates the risk between the individual and the territorial State without even considering that there is no analogous risk to be allocated to begin with. The individual who happens to be in the territorial State, either by birth, prior international displacement or another reason has not come there and has not remained there primarily in search of profits. The territorial State is not a business opportunity, it is home. When a non-international armed conflict breaks out, the violence is therefore also more than a business risk to be navigated, it is violence that has literally hit home.[281] Without violence there is no gain and in the midst of it only loss.

Understanding the obligation to protect economic, social and cultural rights as an unqualified obligation of result is harmonious with the acknowledgement that the individual was neither encouraged nor discouraged to be in the territorial State but that this is simply where she is. It is further in harmony with the fact that the individual does not expect future profits and that there is therefore no business risk to be divided between the territorial State and the individual, no wager that the individual has taken and, in a way, deserves to be reproached for. In short, understanding the obligation to protect as an unqualified obligation of result is in sync with being sensitive to the victim's personal history and situation, and is therefore more successful in making reparations a reality for her.

[281] The title of the subchapter is taken from the song *My Hometown* by Bruce Springsteen.

1.4.3 Schrödinger's State, both friend and foe?

Subchapter 1.3.3 looked at the nature of the bodies that adjudicated claims between States and, perhaps more importantly, noted that the forums that are at least in theory accessible to the victims, i.e., national courts, differ significantly from the former. Differences include that victims' are not in a position to co-design the forum and that they are not represented on the bench in an equal manner, either. Subchapter 1.3.3 reminded the reader that domestic remedies often fall short of international standards and cautioned that even when they do not, victims nevertheless face a much stronger party, not a (juridical) equal. The purpose of that argumentation was not to show that domestic remedies were pointless but to create an awareness that substantive law, procedural law and the set-up of the institution that is to apply these laws are not elements that are independent of one another but in fact form an integrated framework. What has happened, however, when the law on State responsibility for injury to aliens was transposed onto the law on State responsibility and ended up in the Basic Principles and Guidelines is that the substantive and procedural rules, in particular the presumption of non-responsibility, have remained mostly intact, while the forum that is to apply this law has become a different one. In front of this forum, the application of the unaltered substantive and procedural laws is therefore *prima facie* as a minimum inopportune.

The reader might pick up on a certain tension between the above description and emphases made elsewhere in subchapters 1.3 and 1.4, highlighting that the relationship between the State and its individuals is not *ipso facto* adversarial. Which is it, the reader might ask, is the State hostile, meaning that its institutions, including courts, cannot be trusted, or is the State benevolent and the victims' ally, making the switch between arbitration commissions and courts unproblematic? There is, of course, no one answer to this question. Certainly, in practice, some governments will be careless while others will champion their people. On a theoretical level, however, there is an idiosyncrasy if we keep the current substantive and procedural laws to be applied by national courts. If the State is a foe, then only the proper calibration of substantive law, procedural law and institutional set-up will ensure the proper protection of victims' interests. If one element of the set of three is exchanged, the other two cannot remain unaltered without it being to the disadvantage of one party. If the State is a foe, domestic remedies subject to existing substantive and procedural laws, in particular the presumption of non-responsibility, put the victims into a highly disadvantageous position and do not contribute to making reparations a reality for them. This is true even if domestic remedies satisfy international standards and becomes exponentially more so the worse domestic remedies are.

In other words, if the State is a foe and national courts shall be the ultimate guarantors of victims' rights, both substantive and procedural rules need to be adjusted accordingly. If the State is a friend, however, then, as is observed in 1.4.4 and 1.4.5, it makes little sense for States to insist on the offerings, e.g., the presumption of non-responsibility, that are now voluntold by the victims to the State.

There are perhaps many solutions to this problem. One of them, however, is, as Chapter 1 suggests, an alteration of the primary rule. Understanding the obligation to protect to be an unqualified obligation of result dispenses, at least as far as reparations for violations of economic, social and cultural rights are concerned, of the need to have an adversarial process at all. It thereby *ipso facto* solves the problem of the institutional set-up. This, evidently, expedites making reparations a reality for victims.

1.4.4 A presumption of non-responsibility: a voluntold courtesy

Subchapter 1.3.4 observed that the presumption of non-responsibility is an inherent part of the bargain in which (territorial) States give up their position of "soberanía absoluta" in exchange for (investing) States extending them the benefit of doubt. The preceding subchapter observed how this procedural tool is inherently interlinked with the composition of arbitration commissions while subchapter 1.3.4 noted that it is also inherently intertwined with the inter-State context, leading to it being, unsurprisingly, out of place in the relationship between victims and their territorial States.

As noted above, understanding the obligation to protect as an unqualified obligation of result dispenses, at least as far as reparations for violations of economic, social and cultural rights are concerned, of the need to have an adversarial process and thereby *ipso facto* solves the problem of inopportune procedural tools. One might argue that other, less drastic mechanisms could also address this problem, such as the presumption of responsibility. The proposition has merit, however, to reverse the burden of proof does not solve other problems, such as the imbalance in the parties' strengths. One could point out that the reversed burden of proof is used in other unbalanced relationships, such as in criminal law, where the State has the burden of proof, pointing to that it might be sufficient also here. However, while the situations might appear analogous, they are actually not, not only because it is a requirement for criminal law to be *(lex) scripta* and, perhaps more importantly in this context, *(lex) certa*, while the content of due diligence is as vague as ever, but also because the State, in the case of criminal law, is the stronger party trying to prove something that happened within the domain of the weaker, while

here the State would be able to use its advantage to prove its "innocence" regarding something that lies in its own domain. Reversing the burden of proof is obviously more favourable than not reversing it but it is hardly sufficient.

1.4.5 Due diligence's lack of due clarity

Subchapter 1.3.5 noted that in inter-State relationships, ambiguity has an important, even a desired place and that States are willing to gamble on that they will be able to exploit the vagueness to their benefit in the future. This, however, means that when there is an actual case, the parties first have to argue and convince the commissioners or judges on what the law is before they can proceed to argue whether one or the other side violated it. The arguments might not always be made in such chronological order and might be well intertwined with allegations of fact but decision-makers will have to agree upon what the law is before they can apply it to the facts.[282]

This ambiguity does not work in the victims' favour. Even a reversed burden of proof would not dispense with the problem unless the reversal also applied to the preliminary question itself, i.e., that *in dubio*, the victims' interpretation of the law should prevail.[283] This might appear elegant but to say that law, not just facts, should be subject to procedural presumptions entirely undermines legal certainty. Subjecting law itself to procedural presumptions is therefore not a practice of any international court. Even in most contentious cases, courts eventually establish what the law *is*.[284]

Meanwhile, understanding the obligation to protect to be an unqualified obligation of result dispenses, at least as far as reparations for violations of economic, social and cultural rights are

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[282] For example, State A will claim that the fact that State B had no military presence in remote region X clearly demonstrates the latter's lack of due diligence. For this claim to be relevant, State A will first have to argue what can be expected of any State in terms of military presence, perhaps particularly with reference to ongoing civil wars and limited resources. Only once it is established that State B should have had troops in region X, can the parties proceed to compare notes on whether State B did or did not have a military presence in region X.

[283] In contractual law, the maxim *contra proferentem* provides that "[i]f contract terms supplied by one party are unclear, an interpretation against that party is preferred" (International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts, 2016, UNIDROIT, www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf, Article 4.6.).

[284] *Shelton* (2013), *Jura Novit Curia* in International Human Rights Tribunals.

concerned, of the need for victims to prove wrongdoing. It thereby *ipso facto* solves the problem of the ambiguity of the content of the due diligence requirement.

1.4.6 Consequence: no abstract law

At this point in the argument, a reader might be left with the impression that an attempt is being made not to find the most correct law but to find the substantive law, i.e., the primary rules that would make it easiest for victims of non-State actors to obtain reparations. This is not true insofar as the thesis is attempting to discover the most credible candidate for States' understanding of the law. But even insofar as there might exist an activist cause, it still does not discredit the argument.

Pablo Picasso is credited with saying:

> "There is no abstract art. You must always start with something. Afterward you can remove all traces of reality."[285]

In the same way, history shows that the law on State responsibility for injury to aliens is not abstract, either. As Tzvika A. Nissel noted, "the core of State responsibility is the *possibility of liability*."[286] The starting point is therefore the articulation of the desirability of reparations. Once we know what we want a rule to achieve, we can design it so that it will champion its own *raison d'être* in the most effective way. We must not pretend that law is an exercise in and of itself. All legal rules have a purpose, as is clearly demonstrated, among others, by Article 31 (1) of the *Vienna Convention on the Law of Treaties*:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*."

[285] Pablo Picasso > Quotes. Goodreads, no date, www.goodreads.com/author/quotes/3253.Pablo_Picasso.

[286] *Nissel* (2016), A History of State Responsibility, p. 360.

It is disingenuous not to consider the object and purpose, not just when interpreting rules but also when designing them.[287] The object and purpose of the law on State responsibility (for injury to aliens) are different that the object and purpose of international human rights law. The latter are to make reparations a reality for victims of non-State actors. Understanding the obligation to protect as an unqualified obligation of result achieves this in the most effective way.

1.4.7 Conclusion: more favourable to victims and a credible candidate for States' understanding of the law

Subchapter 1.3 noted that understanding the obligation to protect economic, social and cultural rights as a qualified obligation of result does not facilitate the victims' right to reparation. It also noted the discord between this understanding and the fact that States are designing reparation programmes without concurrent admissions of wrongdoing. Building upon these findings, subchapter 1.4 then demonstrated that understanding the obligation to protect as an unqualified obligation of result facilitated the objective of making reparations a reality for victims of non-State actors and, also, that it corresponded to States' actual conduct.

Why would States repair victims not their own? Applying a trusting attitude towards States, they could be imputed the desire to demonstrate their benevolence towards victims of non-State actors. Their thinking could also be that in a conflict or post-conflict situation, it was more important to repair and rebuild as quickly as possible rather than drag around forever in public discourse the shadow of the non-international armed conflict. Finally, States might want to emphasise that as territorial sovereigns they have the *privilege* to provide reparations.[288]

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[287] *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 44, writing about the United Nations Compensation Commission, for example, noted that "[f]rom a victim's perspective, the claim process was easy and streamlined […]. The *a priori* finding of Iraqi liability in Article 16 eliminated any need for victims to establish Iraq had breached an IHL obligation that gave rise to a right to compensation, and also eliminated any need to establish that a crime involving an Iraqi soldier (whether or not acting according to orders) was the responsibility of Iraq rather than a mere "private crime". Victims only had to show their losses were a direct result of Iraq's invasion of Kuwait – a much easier task." It is an excellent example of how law is the result of conscious choices.

[288] United States and Colombia Commission, "Montijo", Award, 1875, pp. 1442-1443, cited in: *Nissel* (2016), A History of State Responsibility, p. 192 ("Holding a State responsible reflects no disgrace to the nation; on the contrary, the conduct of Colombia, is calculated to advance her reputation in the eyes of the world, as it shows

Viewing the States as more opportunistic creatures, they could be imputed the motivation of wanting to emphasise the opposing belligerent's vileness or to escape the condemnation that comes with the establishment of State responsibility following the failure of realising a qualified obligation of result. One might use these arguments in favour of understanding the obligation to protect as a qualified obligation of result, urging that reparations must be contextualised to have reparative value,[289] and cannot, should not be given as hush money.[290] This is an important rebuke but it is not as damaging as it *prima facie* appears. Understanding the obligation to protect as an unqualified obligation of result does not negate the victims' victimhood. It recognises both the violation of their rights and the State's objective failure. In addition, reparations oriented towards the repair of economic, social and cultural interests are the reparations victims often desire most strongly.[291] Understanding the obligation to protect as an unqualified obligation of result thus recognises both the quality of victimhood and the immediacy of the resulting need. In addition, understanding the obligation to protect as an unqualified obligation of result does not preclude the argument that the obligation to protect is, in fact, a composite obligation. It can be argued that in addition to it being an unqualified obligation of result, it is also a qualified obligation of result, meaning that it can be investigated if the State, in addition to having failed to protect individuals as such, also failed to act with due diligence. These options are complementary, not mutually exclusive.[292] Alternatively, in

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her willingness to adopt, for the solution of difficulties, the enlightened course which has found favor, especially of late years, with powerful countries which could have trusted with confidence to the arbitrament of the sword").

[289] *Magarrell* (2007), Reparations in Theory and Practice, p. 2.

[290] *Ibid.*; and: *Moffett* (2017), Reparations in Transitional Justice.

[291] Among others: Witness to Truth (vol. 2), p. 235 (para. 30); for anecdotal evidence, see: *Kunej, et al.* (2014/2015), The Long Wait, p. 2:

> ""For me, Transitional Justice means that my family will get back 20 cows. The rebels took them from us and we were left without anything. I would like to send all my children to school, but I can only afford tuition for two. I can't write, but I want to give all of my children a future."
>
> "There is a clinic in our village, but there are no doctors, no nurses and no supplies. Where is the Government? We want to see the Government's presence."
>
> "I was abducted when I was in Primary 7. I would like to return to school. I want the Government and the community to support me. I also want the community to accept my son even though his father is a rebel. It's not his fault, it's not my fault.""

[292] *Wolfrum* (2011), Obligation of Result Versus Obligation of Conduct, p. 368.

addition to being an unqualified obligation of result, the obligation to protect could also be argued to be an obligation of conduct, creating the possibility of responsibility *before* harm, as well as after. These options, too, are complementary, not mutually exclusive. However, in all the alternatives, individuals, once victimised, are immediately recognised as victims and are therefore immediately entitled to reparations.

To conclude, even though understanding the obligation to protect as an unqualified obligation of result might have appeared too strict *prima facie*, it not only facilitates the objective of making reparations a reality for victims of non-State actors, but is, in fact, a more credible contender for the States' understanding of the law.

1.5 Conclusion: a better law

The hypothesis of this thesis is that States have an obligation to repair victims whose economic, social and cultural rights were violated by non-State actors. The hypothesis was inspired by the observation that States are designing reparation programmes for victims of non-State actors even though the currently only codification of victims' rights that claims to reflect customary international law merely encourages rather than obliges States to do so. States can have diverse motivations for their conduct, however, if there exists a *legal* rule that corresponds to this thesis' hypothesis, there are two candidates for what the content of such a rule might be. The first is that the obligation to protect is an unqualified obligation of result and this candidate was explored in Chapter 1.

In order to show that the existing consensus on the obligation to protect economic, social and cultural rights as it is contained in the Basic Principles and Guidelines is problematic, Chapter 1 zoomed in on the consensus, finding that the Basic Principles and Guidelines defined victims through the materialisation of harm and that victims of non-state actors were not *ipso facto* also victims of the State. Combined, these two observations yielded the conclusion that the existing consensus is that the obligation to protect is a qualified obligation of result. Chapter 1 then continued to show that the obligation of result is qualified by due diligence, i.e., various

obligations that the State must perform prior to and after the materialisation of harm.[293] Due diligence is subject to a State's capacity, which effectively hollows it out, at least in some cases.

As this appears a rather surprising rule and understanding of the law for States to hold, Chapter 1 continued to explore where the rule comes from, observing that understanding the obligation to protect as a qualified obligation of result is the result of a conscious if decentralised law-making process which, however, concerned not the relationship between a State and individuals on its territory but injury to aliens claims. Chapter 1 therefore zoomed in on the thinking informing the law on State responsibility for injury to aliens and exposed why this thinking, while perfectly logical in the inter-State context, is detrimental to the human rights of victims of non-State actors. It argued that the transposition ignored that rules are designed not for their own sake but so that they may bring about a desired consequence, e.g., reparations. Finally, Chapter 1 observed that the understanding of the obligation to protect as a qualified obligation of result is a weak contender for the States' understanding of the law.

Chapter 1 then considered an alternative, namely, understanding the obligation to protect as an unqualified obligation of result. It showed that this understanding not only fixed the problem for victims but was also a more credible contender for the States' understanding of the law as State practice is at least not in contradiction with it. Whether the content of the States' understanding of the law is, in fact, the same as the proposition explored in Chapter 1 or whether it rather equals the proposition explored in Chapter 2, or neither of them, is answered by Chapter 3.

One final note is required before we conclude Chapter 1. The proposition that the obligation to protect economic, social and cultural rights is an unqualified obligation is result is not a wish-fulfilling genie. It can repair in a legal sense but not undo harm and it cannot wish upon resources that a State simply does not have.[294] It also does not fix the fact that victims have little to no leverage if States choose to ignore them completely. However, establishing that a

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[293] *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, pp. 54-77.

[294] *Carranza, Ruben, et al*., Forms of Justice. A Guide to Designing Reparations Application Forms and Registration Processes for Victims of Human Rights Violations, ICTJ, 2017, www.ictj.org/sites/default/files/ICTJ_Guide_ReparationsForms_2017_Full.pdf, p. 2. See also: *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, p. 958 ff, discussing "the disassociation between the *right* and the *good* thing to do in the aftermath of widespread violence".

right exists at all strengthens the victims', non-governmental organisations' and other monitoring bodies' plea. The understanding that the obligation to protect economic, social and cultural rights is an unqualified obligation of result mirrors the humanitarian plea that "'some one' *ought* to pay".[295]

[295] United States and Colombia Commission, "Montijo", Award, 1875, p. 1444, emphasis added.

CHAPTER 2

THE OBLIGATION TO REPAIR AS A PRIMARY OBLIGATION

> ""I was abducted when I was in Primary 7. I would like to return to school. I want the Government and the community to support me. I also want the community to accept my son even though his father is a rebel. It's not his fault, it's not my fault.""[296]

If States are designing reparation programmes for victims of non-State actors because they think that they are obliged to do so by a rule of public international law, there are two candidates for what such a rule might be. Chapter 1 explored the first candidate, the proposition that the obligation to protect economic, social and cultural rights is an unqualified obligation of result. If the proposition is correct, then a violation by a non-State actor *ipso facto* creates the State's responsibility, which, in turn, makes it liable to provide reparations. Chapter 2 accepts for the sake of argument that the obligation to protect is a qualified obligation of result, meaning that a violation by a non-State actor does not *ipso facto* create the State's responsibility and liability.[297] If victims are unable to show that the State did not act with due diligence in the lead-up to the violation, the State will not be responsible and therefore not liable to provide reparations for its failure to protect. However, even in this set-up, victims of non-State actors still have a right to be repaired and it might still be the State that has to repair them, not because it failed to protect them but because the obligation to repair arguably exists within the sphere of a State's primary obligations. If the obligation to repair victims of non-State actors is a primary obligation,[298] then the State would find itself in a position of wrongfulness not when

[296] *Kunej, et al.* (2014/2015), The Long Wait, p. 1.

[297] Among others: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 222 ff; or: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 18.

[298] "The typology [of obligations] that the Committee has chosen is made up of three levels of obligations: 'respect', 'protect' and 'fulfil'" (*Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, pp. 12 and 174). Using this typology, the obligation to repair would fall under the obligation to fulfil. See also: *Id*., p. 162.

the non-State actor violated a right but when it itself failed to realise its primary obligation to repair.[299]

This proposition, which is the second candidate for the rule of public international law that might guide States in their design of reparation programmes, is not explicitly articulated in any treaty but can arguably be extrapolated from the Covenant.[300] 171 States are Parties to the treaty, so establishing the obligation as a conventional one would be sufficient in regard to the majority of victims. However, also countries that are not Parties are theatres of civil war, such as, for example, South Sudan. Victims of non-State actors in these countries are therefore only encompassed by the States' tentative primary obligation to repair victims of non-State actors if this obligation has duplicated itself into the sphere of customary international law.[301] To what degree treaties create customary international law and to what degree the latter can be extrapolated from the former is highly contested. The recent *Draft conclusions on identification of customary international law* (hereinafter: Draft Conclusions) "caution that, in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content".[302] This opinion is in accordance with explicit pronouncement of the International Court of Justice, even though it is, arguably, not entirely in line with its practice. More progressive writers also explicitly disagree with the inability and argue that treaty provisions can and do become customary international law.[303] It is beyond the confines

[299] By focusing on States' obligations, this thesis can be said to embrace the "obligations approach", championed, among others, by Sepúlveda Carmona. This approach stands in contrast to the "'violations approach'", where one "analyse[s] compliance with the Covenant by enumerating acts and omissions which constitute violations". "[A] 'violations approach' directly identifies 'violations' of the rights enumerated in the Covenant. […] it identifies the action or omission by which a State fails to comply with the Covenant's obligations, but without first identifying those obligations." In other words, one "'[…] identif[ies] violations of enumerated rights without first conceptualising their full scope or the States Parties' concomitant obligations with respect to them.'" (*Id.*, pp. 20-21, citing: *Chapman* (1996), A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, p. 39.

[300] *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, pp. 3-4, noting that there is still room to develop the "normative content of the Covenant".

[301] *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 82.

[302] ILC, Draft conclusions on identification of customary international law, with commentaries, reproduced in: ILC, Report of the International Law Commission on the work of its 70th session (30 April – 1 June and 2 July – 10 August 2018), UN Doc. A/73/10, 2018, p. 122, para. 2 of commentary to Conclusion 11.

[303] *Prima facie,* the International Court of Justice rejects this option. In 1985, the Court wrote:

of this thesis to resolve this debate, however, as the theory that treaty provisions can and do become customary international law is of immense benefit to victims of non-State actors in States that are not Parties to the Covenant, it is important to acknowledge its existence, content and, not least, potential. In Chapter 3, where the thesis analyses the practice and understanding of the law of States, the articulations of States that are not Parties to the Covenant will be

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> "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."
>
> (ICJ, Continental Shelf (Libyan Arab Jarnahiriya v. Malta), Judgment, I. C.J. Reports 1985, p. 13, para. 27.)

Once the Court had reiterated this general approach in *Military and Paramilitary Activities in and Against Nicaragua*, however, it relied almost exclusively on treaties and other documents (ICJ, Military and Paramilitary Activities, paras. 183, 187-193, 195-198 and 200). Can one therefore suggest that multilateral treaties such as the Covenant reflect customary international law? Some scholars think so. D'Amato, for example, observed that most rules that we have come to accept as customary have their source in treaties (*D'Amato* (1982), The Concept of Human Rights, in particular p. 1147). In stating this, he did not (yet) consider multilateral treaties but referred to a time when ""positivist" writers", and, even earlier, ""naturalist" writers" had drawn "almost everything they claimed to be a rule of international law" from "provision[s] of […] treat[ies]", chiefly bilateral ones (*Id.*, p. 1131). D'Amato claimed that with the exception of treaty provisions that are by their nature not generalisable, all substantive treaty provisions can become part of customary international law. He said that critiques of this theory had "uniformly failed to adduce a single instance of a generalizable treaty provision that has not been transmuted into customary law" (*Ibid.*). His claim, while sweeping, does find some support in more orthodox circles, too. In one instance, the International Court of Justice stated that the transformation of treaty rules into customary rules "constitute[d] indeed one of the recognized methods by which new rules of customary international law may be formed." While it pleaded caution, it allowed for the possibility as such (ICJ, North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3, para. 71; also cited in: *D'Amato* (1982), The Concept of Human Rights, p. 1141). D'Amato went further, however, insisting that not only *can* generalisable treaty provisions generate customary international law but that they actually *do*. He emphasised that many multilateral provisions aspired to "universal inclusivity" (*D'Amato* (1982), The Concept of Human Rights, p. 1135) and opined that States that opposed a (new) treaty could within a "reasonable time" simply conclude an opposite treaty. D'Amato also did not think that it was necessary to look for practice that was "subsequent to, or apart from, the conventions" but believed that "the conventions *themselves* constitute[d] or generate[d] customary rules of law" (*Id.*, p. 1129, emphasis added). A different theory would push countries into a "theoretical corner" (*Id.*, p. 1133), where a treaty provision could only attain customary status after it had been violated and after that violation had been opposed by a sufficient number of States (*Id.*, p. 1129). In particular within the field of international human rights law it might be cruel to demand this sequence of events. For purposes of comprehensiveness, it must be acknowledged that D'Amato used examples of treaties containing prohibitions, such as genocide, however, nothing prevents the application of his theory to economic, social and cultural rights as well. It is therefore *possible* that the Covenant reflects customary international law of the same content. (For D'Amato's other key works on this topic, see: *D'Amato* (1969), The Concept of Special Custom in International Law; *D'Amato* (1971), The Concept of Custom in International Law; and: *D'Amato* (1995/1996), Human Rights as Part of Customary International Law.)

examined with a view to see if the primary obligation can also be said to exist under customary international law.

For now, however, we remain with the Covenant. Its Article 2 contains two economic, social and cultural rights-strengthening tools the potential of which for victims of non-State actors remains unexplored, namely, the obligation to progressively realise economic, social and cultural rights, and the prohibition of discrimination.[304] The obligation and the prohibition have no existence of their own,[305] however, they are integral parts of all the substantive rights protected by the Covenant, such as the right to housing, food or social security. Subchapter 2.1 looks at the obligation to progressively realise economic, social and cultural rights, arguing, in essence, that civil war does not reset the threshold from which progressive realisation is measured, meaning that progressive realisation can only commence where reparations end. If progressive realisation is an obligation, then so are reparations. Subchapter 2.2 zooms in on the prohibition of discrimination. It observes that victims of the State and victims not of the State are treated differently and asks whether this differential treatment is prohibited by the Covenant. It concludes that it would be difficult to argue that the differential treatment could be "reasonably and objectively justified", meaning that it, instead, amounts to prohibited discrimination. The promise of these two tools is great, but no proposition can be accepted without being articulated first. What was true of Ludwig Wittgenstein's world is also true of human rights: the limits of their language are the limits of their reach.[306]

Subchapter 2.3 observes how rights most commonly affected in non-international armed conflicts are dealt with in authoritative articulations of economic, social and cultural rights, first and foremost in the Covenant and in the Committee's general comments.[307] It also looks

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[304] *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, pp. 18-20, noted, in a general fashion, that Part II of the Covenant, which includes the obligation of progressive realisation and the prohibition of discrimination, was, at the time of writing, less analysed than Part III and added that "there [was] a lack of substantive work on the present meaning and scope of the obligations imposed by article 1 to 5".

[305] *Id.*, pp. 15-17 and 20.

[306] "Die Grenzen meiner Sprache bedeuten die Grenzen meiner Welt." (*Wittgenstein* (1922), Tractatus Logico-Philosophicus, para. 5.6.)

[307] In addition to the Covenant, "many other international human rights instruments have been adopted which […] include the promotion and protection of economic, social and cultural rights", most notably the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child

at how the Committee, in particular, applies the law when engaging with individual countries. The articulations go a long way in substantiating the proposition that all victims deserve to be repaired by the State.[308]

Subchapter 2.4 asks whether understanding the obligation to protect as a primary obligation of result contributes to the objective of making reparations a reality for victims of non-State actors. It ponders whether the obligation to repair is an obligation of conduct or one of result

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(*Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 46, footnote omitted). There also exist regional treaties. Even though the Covenant remains the most comprehensive treaty, to the extent that other instruments are relevant, they will also be referred to.

As for the Committee, the main reason for its importance is, as its name suggests, its particular focus on economic, social and cultural rights, and its particular sensitivity to how violations of non-State actors affect these rights. Another reason for its importance, in particular when juxtaposed to judicial bodies, is its regular examination of the state of economic, social and cultural rights in the States Parties, including those that are theatres of non-international armed conflicts. This review is not dependant on an individual case reaching a judicial body, which is, in itself, important, as caselaw on non-State armed group-conduct is scarce. In particular before the Inter-American Court of Human Rights, cases concerning non-State actors stand out chiefly through their absence, the latter manifest of that the judicial path is not one that victims of non-State actors typically embark upon in order to demand the realisation of their rights. The caselaw of the other longer-established international human rights court, the European Court of Human Rights, is relatively less important, even though this is by mere fortune. In the period after the Second World War, Europe has not observed many non-international armed conflicts with non-State armed groups that, like in, for example, African or Latin American conflicts, remain perhaps associated, but are clearly not attributable to a State. The most infamous war in the 1990s, taking place in Bosnia and Herzegovina, concluded with an international agreement between Bosnia and Herzegovina, Croatia, and the then Federal Republic of Yugoslavia. The most notable exception to this general observation is perhaps the conflict between the Kurds and Turkey. There, the cases that have reached the European Court of Human Rights chiefly concern rights of Kurdish figures, rather than victims of Kurdish violence (see, for example: ECtHR, Öcalan v. Turkey, Grand Chamber Judgment, Application no. 46221/99, 12 May 2005). It is possible that one reason for this is that Turkey has in place some policies for victims of Kurdish violence, in particular for public servants (Committee of Experts on Terrorism (Council of Europe), Turkey, Council of Europe, May 2013, rm.coe.int/168064102d, p. 4, discussing *Law No. 5233 on Compensation of Damages Arising from Terrorism and Combating Terrorism*). For a succinct history of the Committee as well as the mode of its work, see: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 29 ff. On the authority of the Committee, see: *Id.*, p. 87 ff; *Mottershaw* (2008), Economic, Social and Cultural Rights in Armed Conflict, p. 452; or: *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, p. 937, noting, *inter alia*, the Committee's "cross-cutting impact on the entire African human rights system". See also: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 3.

[308] It is habitually stated that States have to redress or repair victims of war. However, this if often done in a by-the-way manner without any reference to a legal basis. (Among others: OHCHR, Protection of economic, social and cultural rights in conflict, para. 70 ("Retrogressive measures in the enjoyment of the core content of economic and social rights cannot be justified exclusively on the basis of the existence of a conflict").)

and the impact of either conclusion. Subchapter 2.4 also considers whether not just victims but also States would have an interest in the understanding that the obligation to repair victims of non-State actors was a primary obligation rather than a qualified obligation of result.

Looking beyond international human rights law, subchapter 2.5 offers a brief insight into another field of public international law, namely, international environmental law. Even though the differences between the legal fields are considerable, developments in international environmental law have one important message to contribute to this thesis. The message is that in the end all roads lead to the State.

By way of conclusion, subchapter 2.6 highlights the most important findings of Chapter 2. It notes the preliminary confirmation of the thesis' hypothesis but also admits that States might have a different or additional motivation for their reparation programmes. While a conventional obligation exists regardless of States championing it, the fact that the proposition developed in Chapter 1 is relatively more favourable to victims and a hitherto still reasonable candidate for the States' understanding of the law, there remains a need to explore what States are doing and why. This is the purpose of Chapter 3.

2.1 The obligation to repair as an integral part of the obligation of progressive realisation

The obligation to progressively realise economic, social and cultural rights is embedded in Article 2 (1) of the Covenant, which reads:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

One of the most authoritative interpretations of Article 2 (1) can be found in paragraph 9 of General Comment no. 3, where the Committee wrote:

> "[…] The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. […] Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under

> the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."

A *prima facie* straightforward articulation, neither the obligation of progressive realisation nor its flipside, the prohibition of deliberate retrogression, have been subjected to thorough scrutiny by the Committee. What can be deduced from the above-cited paragraph and a few other instances in which the Committee referred to progressive realisation and retrogression is that the concepts were developed with an image of an essentially peaceful State where retrogression would as a rule be authored by the State. Whether or not, and how, the concepts (could or do) apply in civil war remains uncertain.[309] The overall tone of the Committee, used both in its general comments as well as in its concluding observations addressed to States, is cooperative rather than authoritative.[310] Articulations of States' violations, including retrogressions, are rare. As the Committee is beyond doubt the most important international body in the field of

[309] See, for example: CESCR, Statement on "maximum of available resources", where armed conflict is mentioned once, in para. 10 (d), as an example of "other serious claims on the State party's limited resources".

[310] *Id.*, paras. 11 and 12, where the Committee emphasises the States' margin of appreciation "to take steps and adopt measures most suited to their specific circumstances", and "to determine the optimum use of its resources and to adopt national policies and prioritize certain resource demands over others." On the language used by the Committee, see: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, pp. 38-39. See also: Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 12 ("The supervision of compliance with the Covenant should be approached in a spirit of co-operation and dialogue. To this end, in considering the reports of States parties, the [Committee] should analyze the causes and factors impeding the realization of the rights covered under the Covenant and, where possible, indicate solutions"); or: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 8.

economic, social and cultural rights,[311] its muteness on the matter does not stimulate a spirited academic discussion, either.

To comprehensively explore the obligation to progressively realise economic, social and cultural rights exceeds the framework of this thesis.[312] However, given its potential relevance for the hypothesis, subchapter 2.1 explores what the application of the obligation of progressive realisation and the prohibition of deliberate retrogression could achieve if applied to the context of civil war. More specifically, the subchapter explores whether the obligation and the prohibition entail an obligation for States to repair "empirical retrogression",[313] authored by non-State actors.[314]

What is progressive realisation? Article 31 (1) of the *Vienna Convention on the Law of Treaties* prescribes that

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[311] *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 87 ff.

[312] OHCHR, Frequently Asked Questions on Economic, Social and Cultural Rights (factsheet), OHCHR, 2008, www.ohchr.org/sites/default/files/documents/publications/factsheet33en.pdf; *Ssenyonjo* (2009), Economic, Social and Cultural Rights in International Law, p. 58 ff; *Chenwi* (2013), Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance; *Müller* (2013), The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law, p. 67; or: *Ali* (2020) Economic, Social and Cultural Rights, p. 30 ff.

[313] *Warwick* (2019), Unwinding Retrogression, p. 471.

[314] This is a different question from what kind of obligations the State "as an *active guarantor* of rights" has "after" but not *because of* "generalised violence", but rather because of "*how badly-off* people *currently are*". The proposition of the State as "an active guarantor of rights" is based on the philosophy of consequentialism that "[i]n contrast to deontological ethics, which emphasises the intrinsic rightfulness or wrongfulness of conducts, […] focuses on the goodness or badness of states of affairs" and "privileges the decision that achieves the best overall outcome, judged from an impersonal point of view which attaches equal important to the interests of all". It proposes that "[i]n 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" (*Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, pp. 941-943 and 961). While the thesis recognises a certain elegant simplicity in consequentialism, it considers it unfortunate that the latter also appears to decontextualise measures entirely, thus denying that they are given to victims *qua* victims, i.e., denying the victims' victimhood. As noted *supra*, the withdrawal of context can reduce the reparative value of measures that are reparative in nature (*Magarrell* (2007), Reparations in Theory and Practice, p. 2). In addition, consequentialism might be at odds with the 'do no harm' principle (United Nations Secretary-General (UNSG), Guidance Note of the Secretary-General. Reparations for Conflict-Related Sexual Violence, United Nations, 11 June 2014, digitallibrary.un.org/record/814902?ln=en, p. 5).

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[315]

The ordinary meaning of the word 'progress' is "[d]evelopment towards an improved or more advanced condition",[316] while the ordinary meaning of the word 'realisation' is "[t]he achievement of something desired or anticipated",[317] and, more specifically, "[a]n actual form given to a concept or work".[318] Combined, the phrase 'progressive realisation' translates into an advancement of the level of fulfilment of a right over time.

In a non-international armed conflict, non-State actors violate economic, social and cultural right, the realisation of which consequently declines. The key question is whether a non-State actor's violation resets the State's obligation in the sense that it lowers the threshold from which the State's obligation of progressive realisation is measured. If the level is reset, the State does not owe victims of non-State actors anything in addition to what it already owes others on its territory and can label anything done to further the realisation of the rights of victims of non-State actors as progressive realisation.[319] If the level is not reset, however, the State first has to achieve for victims the *status quo ante* before it can claim progressive realisation. Conduct oriented towards achieving the pre-existing level would be reparatory in nature. In other words, if a civil war does not reset the level from which realisation is measured, the State cannot claim progressive realisation without repairing first. As progressive realisation is a primary obligation of the State, the precondition for its commencement, i.e., the obligation to repair, logically, must be a primary obligation, too.

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[315] United Nations, Vienna Convention on the Law of Treaties, 1969, UNTS, vol. 1155, p. 331. See also: Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 4.

[316] [P]rogress, Dictionary.com and Oxford University Press, no date, www.lexico.com/definition/progress.

[317] [R]ealization, Dictionary.com and Oxford University Press, no date, www.lexico.com/definition/realization.

[318] *Ibid.*

[319] For a succinct defence of consequentialism, see: *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence.

The language of the international human rights law of economic, social and cultural rights is not conflict-specific and does not generally use the term 'victims of non-State actors'.[320] In a much more abstract manner, the law typically considers people's current circumstances and the State's obligations towards people in such circumstances. Nevertheless, and only to a limited degree, dropping levels of the realisation of rights are discussed within the framework of the prohibition of retrogression. Literature on retrogression typically imagines a deliberate normative measure that risks lowering the level of realisation of a right. For example, a planned introduction of school fees for tertiary education, "normative retrogression", is viewed with suspicion as it could hamper economically weaker individuals from pursuing university degrees and thus lead to "empirical retrogression".[321] However, it is just as intuitive to imagine the latter preceding the former.[322] A State's decision not to repair a violation perpetrated by a non-State actor, i.e., a (normative) decision following "empirical retrogression", might in some or all circumstances be a prohibited deliberately retrogressive (omissive) measure.

In its first articulation on this topic, the Committee wrote that "any deliberately retrogressive measures […] require[d] the most careful consideration and […] need[ed] to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[323] A decision by the State not to repair would

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[320] In the Committee's general comments up until 2015, victims of non-State actors are not mentioned, while people living in conflict-affected areas are mentioned once (CESCR, General Comment no. 19 on the right to social security, UN Doc. E/C.12/GC/19, 4 February 2008 (hereinafter: CESCR, GC no. 19)). When war is mentioned, it is presented as if it were a weather phenomenon rather than something that States could control (CESCR, General Comment no. 7 on the right to adequate housing (forced evictions), UN Doc. E/1998/22, 20 May 1997 (hereinafter: CESCR, GC no. 7), para. 5). See also: CESCR, Statement on "maximum of available resources", where armed conflict is mentioned only once, in para. 10 (d), as an example of "other serious claims on the State party's limited resources"; and: Food and Agriculture Organization (FAO), Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security, FAO, November 2004, ISBN 978-92-5-105336-2, Guideline 16, where, instead of war, the Food and Agriculture Organization speaks of "human-made disasters".

[321] See generally: *Warwick* (2019), Unwinding Retrogression.

[322] Imagine the following example. A plant introduces new machinery that exceeds permissible noise pollution levels, thereby lowering the realisation of the right to an adequate standard of living. Pre-empting legal action by the community, the plant owners persuade the authorities to adjust upward permissible noise pollution levels. The authorities thereby retroactively approve the lowering of the community's standard of living and allow the lower level to persist into the future. It would not be difficult to make a case in favour arguing that such an adjustment amounts to prohibited retrogression.

[323] CESCR, GC no. 3, para. 9.

inherently signal acceptance of a lower level of realisation of a particular right and would therefore be *ex post facto* deliberately retrogressive. In order for it to be permissible, it would have to be "fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[324] This demand appears strict, however, even though States might struggle to defend inattention to victims of non-State actors as "fully justified", some might very well attempt to show that they simply do not have the financial resources to carry out large resettlement programmes or offer comprehensive treatment options to victims of gender-based violence. If successful, the deference to lacking resources is a way out.[325] *A contrario*, the availability of resources would appear to dictate a State's primary obligation to repair.[326] As such, the obligation to progressive realise economic, social and cultural rights affirms the thesis' hypothesis.

2.2 The obligation to repair and the obligation to not discriminate against victims of non-State actors

The other element whose potential for victims of non-State actors remains unexplored is the prohibition of discrimination. Article 2 (2) of the Covenant prohibits discrimination in regard to the realisation of all substantive rights:

> "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

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[324] One might suggest that Article 4 of the Covenant could also provide a justification. However, it is generally "understood" that with the obligation of progressive realisation regulated in Article 2, Article 4 "foreclose[s] justifications of non-fulfilment on the basis of scarce resources" (*Hutter* (2019), Starvation in Armed Conflicts, p. 731, citing among others: *Müller* (2013), The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law, pp. 115-116).

[325] It is of relevance that the State's passivity, i.e., the absence of an attempt to prove unavailability of resources while also not doing anything to alleviate the suffering of victims of non-State actors would "'indicate unwillingness'", which would "constitute[] a violation of the ICESCR" (*Hutter* (2019), Starvation in Armed Conflicts, p. 729, citing: UNGA, Interim report of the Special Rapporteur on the right to food, UN Doc. A/72/188, 21 July 2017, para. 56). On the State's burden of proof, see: *Mottershaw* (2008), Economic, Social and Cultural Rights in Armed Conflict, p. 459.

[326] If resources "existing within a State" are not sufficient, States are obliged to attempt to secure them "from the international community through international cooperation and assistance" (CESCR, GC no. 3, para. 9).

The postscript "or other status" gives the provision an inherently dynamic character, however, it is clearly not all other statutes that fall under this prohibition. Given the need for this thesis, one status ostensibly not falling under the prohibition is the identity of the perpetrator of a violation of an economic, social or cultural right. As noted earlier, the Basic Principles and Guidelines state that States are obliged to repair their own victims but not victims of non-State actors. It is evident that this is differential treatment, however, what is less obvious is whether it is allowed under the Covenant and, if not, whether it is the Covenant or the Basic Principles and Guidelines that prevail(s). Subchapters 2.2.1 and 2.2.2 attempt to answer these questions.

2.2.1 "[D]ifferential treatment that cannot be reasonably and objectively justified"

The Committee defined discrimination as "differential treatment that cannot be reasonably and objectively justified",[327] or as "[d]ifferential treatment based on prohibited grounds".[328] Some of these prohibited grounds are articulated in Article 2 (2) of the Covenant itself. They include "race, colour, sex, language, religion, political or other opinion, national or social origin, property[] [and] birth".[329] The enumeration concludes with the phrase "or other status", which means that the list is not exhaustive.[330] Under Article 2 (2), an endless number of other grounds is possible. Some of them were already named by the Committee.[331] In addition, the Committee

[327] CESCR, General Comment no. 20 on non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2 July 2009 (hereinafter: CESCR, GC no. 20), para. 27.

[328] *Id*., para. 13.

[329] In some cases, perhaps even in most, these grounds will suffice. For example, if the non-State actor used rape of women as a weapon of war while the State did not, not repairing victims of the non-State actor would mean not repairing women. It can be argued that such a decision is already covered by the prohibition of discrimination on the basis of sex. In conflicts that are characterised by ethnical or religious differences, too, not repairing victims of a non-State actor might *ipso facto* mean not repairing a particular ethnic or religious group. It can be argued that such decisions, too, are already covered by the prohibition of discrimination on the basis of the explicitly articulated grounds. See, for example: UN Doc. A/68/297, paras. 37-50.

[330] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 36; and: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 20. The open list stands in contrast to, for example, the four grounds based on which a perpetrator can be convicted for the international crime of genocide (Rome Statute of the International Criminal Court, Article 6).

[331] These include:

wrote that "[a] flexible approach to the ground of "other status" [wa]s [] needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2."[332] With this articulation, it encouraged whoever it may concern to remain vigilant to an endless number of other grounds that can be imagined to be dormant and become activated once someone uses them as the basis for differential treatment.[333]

- disability (CESCR, General Comment no. 5 on persons with disabilities, UN Doc. E/1995/22, 9 December 1994 (hereinafter: CESCR, GC no. 5));

- age (CESCR, General Comment no. 6 on the economic, social and cultural rights of older persons, UN Doc. E/1996/22, 8 December 1995 (hereinafter: CESCR, GC no. 6));

- nationality (CESCR, GC no. 19, para. 36);

- being (a member of) an indigenous people (CESCR, GC no. 14, para. 27; CESCR, GC no. 19, para. 35; or: CESCR, GC no. 20, para. 18);

- being (a member of) a nomadic people (CESCR, GC no. 15, para. 16 (e));

- minority status (CESCR, GC no. 20, para. 18 ff);

- marital and family status (CESCR, GC no. 16, para. 5; or: CESCR, GC no. 20, para. 31);

- sexual orientation and gender identity (CESCR, GC no. 14, para. 18; or: CESCR, GC no. 20, para. 32);

- health status (CESCR, GC no. 14, para. 18; or: CESCR, GC no. 20, para. 33);

- place of residence (CESCR, GC no. 20, para. 34);

- economic and social situation (CESCR, GC no. 20, para. 35);

- being in prison or in a psychiatric institution (CESCR, GC no. 20, para. 27);

- being internally displaced (CESCR, GC no. 19, para. 39);

- being a victim of natural disasters or living in disaster-prone or other tough areas (CESCR, General Comment no. 4 on the right to adequate housing, UN Doc. E/1992/23, 13 December 1991 (hereinafter: CESCR, GC no. 4), para. 8 (e); CESCR, GC no. 15, para. 16 (h); or: CESCR, GC no. 19, para. 50); and

- the experience of armed conflict (e.g.: CESCR, GC no. 7), paras. 5-6; or: CESCR, GC no. 19, para. 27).

Other treaty bodies have added their own grounds when interpreting similarly general equality provisions in their own treaties. The Committee on the Rights of the Child, for example, has "interpret[ed] "other status" under article 2 of the Convention [on the Rights of the Child] to include HIV/AIDS status of the child or his/her parent(s)" (Committee on the Rights of the Child, General Comment no. 3 on HIV/AIDS and the rights of the child, UN Doc. CRC/GC/2003/3, 17 March 2003, para. 9).

[332] CESCR, GC no. 20, para. 27.

[333] There would be no need to articulate the prohibition of discrimination based on race or sexual orientation if such discrimination had never occurred. But once it occurred, was articulated and disapproved of, we demanded that it be prohibited. A similar process can be imagined here. We have observed that the Principles and Guidelines treat victims differently based on the identity of the perpetrator. We can, therefore, take issue with this, argue why

Some grounds, such as disability or age, the Committee considered so important that it devoted to them a separate general comment.[334] Victims of war, however, have not yet been accorded their own general comment. In fact, only in General Comment no. 19 on the right to social security does the Committee explicitly mention armed conflict at all, writing that States have to concentrate on making social security services physically accessible to "persons living in […] areas experiencing armed conflict".[335] The Committee apparently thinks that persons affected by armed conflict are disadvantaged in relation to others not so affected. Just as interesting to note is that the phrase "persons living in […] areas experiencing armed conflict" is a broad formulation encompassing non-victims and victims, and, among the latter, both victims of the State and victims of non-State actors. While the mention of "persons living in […] areas experiencing armed conflict" is far from a general comment, the wording offers a glimpse into how abstractly and universally the Committee thinks about "persons living in […] areas experiencing armed conflict".

If the Committee did write a general comment on victims of war, it would most likely walk through all the substantive economic, social and cultural rights and specify the States' obligations in regard to each of them. It would probably give examples, highlighting, perhaps, the desperation of families whose houses and fertile fields had been burned or the injuries of women and men who had been sexually enslaved. Based on its wordings in other general comments,[336] the Committee would probably not consider the origin of the situation that the

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it should not be so and demand that such differential treatment be (is) prohibited. See also: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, pp. 9 ("As is generally recognised, human right law has a dynamic character. Human rights are not static but, rather, they evolve over time in order to adapt to new circumstances and strengthen the protection of individuals") or 38 ("The prohibition of discrimination under article 2(2) ICESCR is also clearer after the Committee 'urge[d] the State Party to extend the subsidised health-care system to asylum-seekers without discrimination,' because it makes it apparent that the scope of article 2(2) also prohibits discrimination against asylum seekers"). Note also the observation that the Covenant has content that is "implicit" (among others: CESCR, GC no. 13, para. 5; or: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 46).

[334] CESCR, GC no. 5; or: CESCR, GC no. 6.

[335] CESCR, GC no. 19, para. 27.

[336] For example, in General Comment no. 5 on persons with disabilities, the Committee never considered the origin of the disability to be of relevance for the States' disability-based obligations (CESCR, GC no. 5).

victims have found themselves in,[337] and thereby, logically, not make the States' obligations subject to whether or not they were victims of the State.

While it is unlikely that the Committee would write itself into the same corner as the Basic Principles and Guidelines,[338] the expected manner of the Committee's articulation does not *ipso facto* mean that the international human rights law of economic, social and cultural rights prohibits the unfortunate differentiation between victims of the State and victims of non-State actors. Rather, the Committee's expected manner of articulation serves as a clue. The key question remains unanswered and we must again return to the guidance entailed in the phrase "reasonably and objectively justified".

What does "reasonably and objectively justified" mean? We have noted above that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[339] The word 'reasonably' means "[i]n a sensible way", or "[b]y sensible standards of judgement; justifiably".[340] Sharp minds might disagree on whether something is sensible or not, including differential treatment based on the identity of the perpetrator, which means that we will have to return to this word again later. The word 'objectively' means "[i]n a way that is not influenced by personal feelings or opinions", or "[i]n a way that is not dependent on the mind for existence; actually."[341] We observe at once that the word 'objectively' gives more concrete guidance. By looking at two burned down houses, one cannot tell that only one of them had been burned down by the State. To say that only one of the two homeless families has a right for their house to be repaired by the State, one would have to conjure a distinguishing factor

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[337] *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, p. 942.

[338] It is unlikely that the Committee would conclude, albeit in more abstract terms, that a rape victim does not have the right to receive a fistula surgery because the conduct of the rapist cannot be attributed to the State or that a woman does not have a right to receive restitution for her cattle simply because it had been killed during the rebels' raid on Monday and not, like her neighbour's, the government's counter-offensive on Tuesday. This argument becomes even more obvious if one, for example, considers which side poisoned wells that provide water to surrounding villages. (*Mottershaw* (2008), Economic, Social and Cultural Rights in Armed Conflict, p. 461.)

[339] United Nations, Vienna Convention on the Law of Treaties, 1969, Article 31 (1).

[340] [R]easonably, Dictionary.com and Oxford University Press, no date, www.lexico.com/definition/reasonably.

[341] [O]bjectively, Dictionary.com and Oxford University Press, no date, www.lexico.com/definition/objectively.

that is not visible to the eye. The distinguish factor, the identity of the perpetrator, is "dependent on the mind for existence" since the physical needs of the two families are certainly the same. One could reply that States and non-State actors are real enough and that those who defend the existing consensus as it is contained in the Basic Principles and Guidelines therefore do not need to "depend[] on the mind". Accepting that States and non-State actors are real enough, however, does not necessarily change the argument. Men and women can be considered objectively different in some regards, as can be older and younger people, and those with and without disabilities. However, those differences are not to be relied upon when making decisions regarding which the biological sex, age or ability are irrelevant. Victims of the State and victims of non-State actors have the same needs and the same right to be repaired. The latter statement can only remain credible if both groups are recognised as having a claim against the State.

In the beginning of the paragraph above, we put aside the definition of the word 'reasonably' observing that it was not clear-cut. The *Vienna Convention on the Law of Treaties* anticipated that a literal interpretation would often be insufficient and provided further guidance stating pointing to "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[342] The object and purpose of the Covenant or of the international human rights law of economic, social and cultural rights overall is, *inter alia*, to "recogni[se] […] [that] the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," and "that [the equal and inalienable] rights derive from the inherent dignity of the human person".[343] The most blunt definition of the word 'dignity' is "[t]he state or quality of being worthy of honour or respect."[344] The term 'respect' must necessarily include respect for one's rights. If there is only one avenue by which victims of non-State actors can tangibly experience respect for their right to be repaired and if that avenue is receiving reparations from the State, then the prohibition of discrimination must be interpreted so that the international human rights law of economic, social and cultural rights includes the prohibition of differential treatment of

[342] United Nations, Vienna Convention on the Law of Treaties, 1969, Article 31 (1).

[343] Covenant, Preamble.

[344] [D]ignity, Dictionary.com and Oxford University Press, no date, www.lexico.com/definition/dignity.

victims of war based on the identity of their perpetrator. Everything else, every other proposal that is only theoretically possible but not practically feasible, offends the dignity of victims of non-State actors, which means that the prohibition of discrimination cannot be interpreted to mean that States do not owe victims of non-State actors what they do not also owe victims of the State, or, if there are no victims of the State, what they would have owed victims of the State if there were any.[345] One cannot reconcile the claim that economic, social and cultural rights "derive from the inherent dignity of the human person" with prioritising, for example, fistula surgeries based on the identity of the perpetrator, rather than, if resources are limited, medical urgency.[346]

One last point remains to be made before we consider whether it is the Covenant's prohibition of discrimination or the Basic Principles and Guidelines' permission to differentiate that prevails. The type of victimisation by non-State actors might be such that the pursuit of reparations through judicial means, even if successful, could never be sufficient. An example would be a non-international armed conflict in which a non-State actor systematically attacked the cultural foundations of a particular group, perhaps to the extent that one could use the term cultural genocide.[347] If the State decided not to repair a value that the victims of non-State actors hold collectively rather than individually, this, too, could violate the prohibition of discrimination.[348] Imagine the following example: non-State actor N attacks primary schools attended by the ethnic group E. Ethnic group E is relatively small and its language, language E, is fluently spoken only by a couple of dozens of persons. Before the war, language E had been integrated into school curriculums in the hope that formal education would contribute to its revival. However, in the course of the conflict a large number of language E teachers were killed or displaced and for a decade almost no member of ethnic group E was given the

[345] The Committee included in its definition of direct discrimination "detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation" (CESCR, GC no. 20, para. 10 (a)).

[346] See, for example: UN Doc. A/68/297, paras. 11, 18 ("Refusal to treat persons wounded in conflict or providing preferential treatment to people of the same allegiance constitutes a direct violation of the right to health"), 70 (b), and 71 (a) and (c).

[347] For a truly excellent exploration of cultural genocide, see: *Novic* (2016), The Concept of Cultural Genocide.

[348] The Committee wrote that "[g]uarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights" (CESCR, General Comment no. 9 on the domestic application of the Covenant, UN Doc. E/C.12/1998/24, 3 December 1998).

opportunity to learn the language at the age at which language is most easily acquired. While individual members of N could be ordered to repair the children whose education they sabotaged by, for example, paying them a certain amount of money so that the young adults might complete primary education, albeit with a delay, the damage done to language E, and thereby to the heritage of ethnic group E, cannot be so repaired. The State has an indispensable role to play here.

We thus conclude this argument by observing that the prohibition of discrimination as contained in the Covenant cannot be interpreted to allow differential treatment of victims of war based on the identity of the perpetrator.

2.2.2 The Basic Principles and Guidelines' permission of differential treatment vs. the Covenant's prohibition of discrimination

The answer to a question in public international law should not depend on who you ask. This is not to say that there exists a satisfactory answer to every question but there is a difference between acknowledging a dilemma and accepting the fragmentation of public international law. This thesis is not attempting to contribute to the latter and understands the necessary choice between the Basic Principles and Guidelines' permission of differential treatment and the Covenant's prohibition of discrimination based on the identity of the perpetrator as an instance of the former.

The Basic Principles and Guidelines' permission has its origin in the law on State responsibility. In regard to obligations of prevention, the law on State responsibility says that the State's obligation is one of result subject to a due diligence requirement. Obligations of prevention do not apply in regard to conduct that can be attributed to the State, which explains why violations by the State and violations by non-State actor are treated differently. The international human rights law of economic, social and cultural rights, meanwhile, does not permit differential treatment based on the identity of the perpetrator. This body of law sources its authority from "the inherent dignity and of the equal and inalienable rights of all members of the human family" and emphasises that the prohibition of discrimination must be understood in a holistic manner and that it must not be hollowed out by technicalities.

States have no comparable quality to dignity. Unlike "members of the human family", they do not exist without a collective acceptance of the legal fiction that they do.[349] How these entities decide to organise their community is on them. However, "members of the human family" physically exist and their dignity is inherent, "[e]xisting in something as a permanent, essential, or characteristic attribute."[350] When discussing individuals, rules built from the foundation of their inherent dignity can be considered as a *lex specialis*,[351] and must necessarily take precedence over those imported from the law on State responsibility. This conclusion is not revolutionary and it does not fragment public international law. The recognition of existence of a rule governing the relationship between a States and individuals on its territory does in no way upset a legal system in place between States. Also, the recognition of victims of non-State actors as a separate group which cannot be discriminated against does not contradict the Basic Principles and Guidelines. Their permission includes within it a permission for the conclusion derived from international human rights law, i.e., a permission for a more protective rule. The reverse is not true, i.e., the prohibition of discrimination does not allow for a less protective rule. Therefore, in order to fully implement Article 2 (2), victims of non-State actors must be recognised as a separate group which, within the larger group of victims of war, cannot be lawfully discriminated against.

2.3 Examples of economic, social and cultural rights in practice: the rights to housing, health, and education

In Part III, the Covenant protects ten substantive rights. All of them are paramount for a life "in larger freedom",[352] but not all are equally realised in all countries. Social security, for example, might exist, if at all, as an informal system. Union rights, too, might be less developed in countries the formal labour market only makes up a fraction of the labour market. At present, many armed conflicts take place in developing countries,[353] where they destroy the very

[349] *Harari* (2011), Sapiens, pp. 35-36.

[350] [I]nherent, Dictionary.com and Oxford University Press, no date, www.lexico.com/definition/inherent.

[351] *Banaszewska* (2015), Lex specialis.

[352] Charter of the United Nations, Preamble.

[353] Fragility, Conflict and Violence (topic), World Bank, no date, www.worldbank.org/en/topic/fragilityconflictviolence. There is also an argument that there is not only

essence of life: housing, health. For children, education. Because of this, this chapter looks at how these rights in particular are discussed in relation to victims of war.

Rights are explored one by one. The exploration of every right begins with imagining how a non-State actor can violate the respective right and how the State can, in turn, repair it. Painting this image makes the quest more tangible and provides a useful context for the rest of the exploration. The next step is to look at how every respective right is articulated in the Covenant, paying particular attention to whether the Covenant mentions armed conflict, victims or reparations. Moving on from the (typically very succinct) formulations in the treaty, we look at the Committee's general comments on the individual rights,[354] again focusing on whether the Committee mentions armed conflict, victims or reparations, and we repeat the same exercise by looking at the Committee's concluding observations on the state of economic, social and cultural rights in States under the Committee's review. The exploration of every right is rounded up by a partial conclusion on the relevance of the right for the thesis' hypothesis.

2.3.1 The right to housing

A non-State actor can violate the right to housing in numerous ways. It can destroy an apartment's access to clean water, set a family's house on fire or chase a person away from her home altogether.[355] Following the violation, the State can repair the water systems or offer money to the family so that it itself might organise the repair. It can also rebuild the burned down house or offer another in exchange. Finally, it can secure the area from which a person was displaced and assist her homecoming. These measures are examples of restitution and compensation, which are types of reparation.

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correlation, but also causation between poverty and armed conflict. See, among others: *Pinstrup-Andersen, and Shimokawa* (2008), Do poverty and poor health and nutrition increase the risk of armed conflict onset?

[354] On general comments generally, see: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, pp. 41-42.

[355] For example: African Union, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009, Article 7, enumerates what "[m]embers of armed groups shall be prohibited from" doing, showing, thereby, that this is what they are doing.

Turning to the Covenant, one immediately notes that the Covenant does not include a separate provision dedicated to the right to housing. Instead, housing is mentioned as an integral part of "the right of everyone to an adequate standard of living", as defined by Article 11 (1).[356] Article 11 does not mention armed conflict, victims or reparations. An activist reader might nevertheless see the latter as being implied in the wording of "the continuous improvement of living conditions". As argued in subchapter 2.1, progressive realisation can only begin where reparation ends. The highlight that the right to an adequate standard of living applies to "everyone" is also of importance. The word 'everyone' encompasses victims of war, both those whose rights have been violated by the State and those whose rights have been violated by non-State actors. If a person's right has been violated, she nevertheless continues to possess it and State measures necessary to realise that (now prejudiced) right might in relation to some individuals, be reparative at least in consequence, if not in intent. This much can be extracted from the Covenant itself.

In 1991, the Committee dedicated its first general comment on a substantive right, General Comment no. 4, to the right to housing, writing that without "the right to live somewhere in security, peace and dignity", the implementation of other economic, social, cultural, civil and political rights was also impossible.[357] Six years later, it adopted a second general comment on the same right, zooming in on forced evictions.[358] As both comments are complementary,[359] they will be considered in unison.

General Comment no. 7 explicitly mentions that (unlawful) forced eviction habitually "takes place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements", and that "[m]any instances of forced eviction are associated with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence." Since the applicability of economic, social and cultural rights in times of armed conflict was hardly a

[356] Covenant, Article 11 (1). See also: UNGA, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS, vol. 1249, p. 13, Article 14 (2) (h).

[357] CESCR, GC no. 4, para. 7.

[358] CESCR, GC no. 7.

[359] *Id*., para.1.

settled matter in the 1990s,[360] the explicit references to armed conflict are notable. That being said, it is clear that both general comments were written primarily for countries enjoying (at least negative) peace.[361]

Even though neither of the general comments names victims or reparations, this does not harm the thesis' hypothesis. Both documents belong to an earlier, simpler and more concise generation of general comments. The nonappearance of reparations in all these earlier comments was rectified in later ones. For example, General Comment no. 12 on the right to food, another element of the right to an adequate standard of living, is the first general comment to mention reparations.[362] It began a trend that can be observed in almost all subsequent general comments dealing with substantive rights.

Not finding victims or reparations explicitly named in the general comments, we can resort to a more creative approach. Instead of reading and summarising, we might instead ask whether the State has a duty to repair violations of the right to housing perpetrated by non-State actors and scan the general comments for answers. The latters' answer appears to be in the affirmative.

General Comment no. 4 explores in some detail the element of adequacy in the context of housing. It notes that the concept is broad and includes "[a]vailability of services, materials, facilities and infrastructure", affordability, habitability, accessibility, location and cultural adequacy.[363] However, before all those is, in terms of chronology as well as importance, the necessity of "[l]egal security of tenure", a protoelement in a way. The latter is defined in paragraph 8 (a). Following a diverse list of forms of tenure, the paragraph notes that "[n]otwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats." To realise the right, "States parties should […] take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection".

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[360] Some might say that this was true even much later. See, e.g.: *Giacca* (2014), The Relationship between Economic, Social, and Cultural Rights and International Humanitarian Law, pp. 308-310. See also: ICJ, Legal Consequences, paras. 106, 112 and 130.

[361] For the concept of negative peace, see, for example: *Tehindrazanarivelo, and Kolb* (2006), Peace.

[362] CESCR, GC no. 12, para. 32.

[363] CESCR, GC no. 4, para. 8.

How would this guideline apply in a concrete example? Imagine that a non-State actor attacks a village and forces all of its inhabitants, including family F, to leave their houses. The family's security of tenure is thereby cancelled and family F consequently without it. These circumstances activate the State's obligation to "confer[] legal security of tenure upon" family F. The State can discharge its obligation by helping family F regain security of tenure in its former home, offering it a new home or pay it cash so that the family could itself decide how to proceed. Since family F had legal security of tenure before, their regaining it in whatever form would constitute restitution or compensation and, therefore, reparation.[364]

The State's obligation towards family F could be said to be further underlined by paragraph 11 of General Comment no. 4 where the Committee writes that "States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration." This wording could be interpreted to mean that, in practice, conflict or post-conflict States not only have to repair victims of war, but have an obligation to prioritise reparations over progressive realisation as those harmed by armed conflict will often find themselves in the relatively worst conditions.

Such an understanding of General Comment no. 4 is strengthened by some of the Committee's more recent concluding observations. For example, addressing Mali,

> "the Committee recommends that it [] [e]nsure […] that internally displaced persons are able to return to their home region safely and with dignity or offer them appropriate alternatives."[365]

Addressing the Central African Republic,

> "[t]he Committee […] recommends that the State party ensure [] [t]hat displaced persons exercising their right to return have access to adequate accommodation and land, and to

[364] See, by way of comparison: *Hutter* (2019), Starvation in Armed Conflicts, p. 746, where she writes that "[i]n addition, the right to food entails also the obligation to rebuild these facilities, goods and services when the war is over", citing: *Müller* (2013), The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law, p. 235.

[365] UN Doc. E/C.12/MLI/CO/1, para. 5 (d).

> adequate mechanisms of restitution, including judicial, with a view to safeguarding their durable return and resettlement within their communities".[366]

Writing to Colombia,

> "[t]he Committee recommends that the State party strengthen its efforts to ensure reintegration and the possibility of an adequate standard of living for returned refugees and internally displaced persons, so that they have access to adequate housing, productive projects and basic services such as water, sanitation, health, education and social assistance, including access to credit. The Committee also recommends that the State party take measures conducive to their safe and dignified return to their place of origin whenever possible or offer them appropriate alternatives."[367]

What these paragraphs clearly demonstrate is that States do not only have an obligation to realise the right to housing *in abstracto* but, facing a concrete situation, are also obliged to develop targeted solutions in favour of victims of war.[368] Such measures correspond to this thesis' definition of reparations.

Finally, it has to be noted that all of the paragraphs cited above are preceded with the Committee's acknowledgements of ongoing or recently concluded non-international armed conflicts. The Committee's observations are characterised by restraint from attributing any violations committed in those conflicts to the respective State Parties addressed. In fact, the Committee rarely mentions the belligerent parties at all, writing of war rather as if it was a separate victims-producing entity.[369]

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[366] CESCR, Concluding observations concerning the initial report of the Central African Republic, UN Doc. E/C.12/CAF/CO/1, 4 May 2018 (hereinafter: UN Doc. E/C.12/CAF/CO/1), para. 12 (b).

[367] CESCR, Concluding observations on the sixth periodic report of Colombia, UN Doc. E/C.12/COL/CO/6, 19 October 2017 (hereinafter: UN Doc. E/C.12/COL/CO/6), para. 52.

[368] See also: OHCHR, Protection of economic, social and cultural rights in conflict, para. 57.

[369] About Mali, the Committee wrote that it "[was] concerned about the negative impact of the internal armed conflicts and confrontations in the northern and central areas of the country on the enjoyment of economic, social and cultural rights", and that "[it] [was] also concerned about the large number of persons who have been displaced by these conflicts" (UN Doc. E/C.12/MLI/CO/1, para. 4). Turning to the Central African Republic, the Committee noted that "the country ha[d] been in a situation of conflict since 2012" and that "the central Government [wa]s

Combining the articulations on the obligations of conflict and post-conflict States and noting the refusal to attribute any prior violations to any of the belligerent parties,[370] including the State itself, we can conclude that it is the Committee's understanding that conflict and post-conflict States are obliged to repair victims of war, including victims of non-State actors, in their capacity as victims.

In review, we observe that the Covenant leaves room to argue that States have to repair violations of the right to housing perpetrated by non-State actors, that its general comments not only allow but support the hypothesis and, finally, that given a conflict or post-conflict context, the Committee, it its concluding observations, almost restates it. Furthermore, nothing in relation to the right to housing contradicts the theories present in the subchapters 2.1 and 2.2. This allows the conclusion that the Covenant obliges States to repair victims whose right to housing has been violated by non-State actors.

2.3.2 The right to health

The right to physical and mental health can be violated through any act that limits a person's "right to control one's health and body".[371] While a non-international armed conflict will typically produce circumstances such as poor hygiene and food insecurity,[372] which will affect the right to health in a negative way,[373] a non-State actor can violate the right to health by

able to exercise effective control over not more than about a third of the national territory" (UN Doc. E/C.12/CAF/CO/1, para. 7). As for Colombia, the Committee "welcome[d] the fact that a number of key points of the Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace represent[ed] an opportunity for the realization of economic, social and cultural rights, particularly those of victims and of the groups that ha[d] been most affected by the conflict" (UN Doc. E/C.12/COL/CO/6, para. 7).

[370] While all paragraphs testify to that, the paragraph in relation to the Central African Republic, whose Government was recognised as having being out of control of most of the national territory, is perhaps the most telling.

[371] CESCR, GC no. 14, para. 8.

[372] OHCHR, Protection of economic, social and cultural rights in conflict, para. 41; and: UN Doc. A/68/297, para. 8.

[373] UN Doc. A/68/297, paras. 1 ("Conflicts pose immense challenges to the realization of the right to health. […] Conflict affects health not only through direct violence, but also through the breakdown of social structures and health systems, and lack of availability of underlying determinants of health. This leads to a high incidence of preventable and treatable conditions including malaria, diarrhoea, pneumonia and malnutrition. These health

injuring a man's foot, raping a woman or forcing a child to "kill, cook and eat" a relative.[374] The State, in turn, can do much to undo these violations.[375] To the man with the injured foot, it can offer surgery and rehabilitative treatment. The woman can be provided with a counsellor and, depending on her particular situation, offered surgery and rehabilitation. If the rape resulted in social consequences such as her rejection from her community,[376] the State can sensitise the respective community so as to enable the woman's renewed inclusion in her social network. The example of the violation inflicted on the child is admittedly particularly gruesome and to claim that the child could be repaired might stretch the boundaries of imagination. It is, however, precisely therefore a fitting example to remember that legal reparation will not always amount to full restitution and that the obligation to give a person the best chance possible exists regardless of what situation a child or any person has found herself in. The child, in our case, can be offered counselling and/or other necessary rehabilitative measures.

In the Covenant, the right to health is fixed in Article 12 (1), which "recognize[s] the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The provision does not mention armed conflict, victims or reparations, however, both arguments developed in relation to the right to housing, i.e., the 'activist reader argument' and the 'meaning of the word 'everyone' argument', also apply here.

The Committee adopted its first general comment on the right to health in 2000.[377] It wrote that "the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health,

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effects often persist well after the end of active hostilities, and negatively impact health indicators for years thereafter.", footnotes omitted) or 26 ff.

[374] Uganda LRA rebel leader accused of ordering cannibalism, BBC, 21 January 2016, www.bbc.com/news/world-africa-35372921.

[375] UN Doc. A/68/297, paras. 33 ("States should therefore formulate detailed and time-bound plans for the reconstruction of systems, including for delivery of underlying determinants of health, and restoring community and social structures") or 34 ("States should address imminent public health concerns, including injuries and disabilities caused during conflict, and less visible effects on health such as mental health").

[376] *Kerali, Raphael*, Welcome home from the "bush"? A roadmap towards the collective healing of child soldiers and "rebel wives" in the Acholi sub-region, Northern Uganda, LSE Firoz Lalji Centre for Africa, no date, www.lse.ac.uk/africa/Assets/Documents/Policy-documents/Trajectories-of-Displacement/Policy-9-A-roadmap-towards-the-collective-healing-of-child-soldiers-and-rebel-wives.pdf.

[377] CESCR, GC no. 14.

such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."[378] As with the right to housing, it recognised that the right to health, too, was "intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality."[379]

Understood this broadly,[380] the importance of the right to health cannot be overstated and the Committee adopted two general comments to elaborate upon it. The first, General Comment no. 14, is arguably the most comprehensive authoritative interpretation on the right to health, much as "[t]he [Covenant] provides the most comprehensive article on the right to health in international human rights law." The second, General Comment no. 22, does not revise General Comment no. 14 but zooms in on an aspect of the right to health, namely the right to sexual and reproductive health. While this later general comment is important in its own right, it has to be emphasised that the Committee considered that it was adding more *weight* rather than more law to General Comment no. 14. Both general comments will be considered in unison.

Both general comments include numerous references to armed conflict. The articulation that shows most clearly that the right to health continues to apply during armed conflict is paragraph 30 of General Comment no. 22 that says that "women and girls living in conflict situations are disproportionately exposed to a high risk of violation of their *rights*, including through systematic rape, sexual slavery, forced pregnancy and forced sterilization".[381] While the Committee recognises that "formidable structural and other obstacles resulting from international and other factors beyond the control of the State […] [can] impede the full realization of article 12 in many States", the existence of such a context has no influence on the continuous existence of the right to health as such.

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[378] *Id.*, para. 4.

[379] CESCR, GC no. 22, para. 10.

[380] In this connection, see also: CESCR, GC no. 14, paras. 43, 44 and 47 on "core obligations […] which are non-derogable."

[381] CESCR, GC no. 22, para. 30, emphasis added, footnote omitted.

General Comments no. 14 and no. 22 were adopted in 2000 and 2016, respectively. They are therefore relatively more modern than the general comments on the right to housing and they explicitly mention reparation. General Comment no. 14 has a very typical articulation in paragraph 59, which says that

> "[a]ny person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition."[382]

This articulation allows and possibly encourages the understanding that the right to "adequate reparation" is independent from and therefore not subject to the right to an effective remedy. This would mean, simultaneously, that reparation does not have to come from the perpetrator. Paragraphs 29 and 64 of General Comment no. 22 unequivocally affirm this understanding. First, within the context of gender equality, paragraph 29 says that "States parties must put in place laws, policies and programmes to prevent, address and remediate violations of the right of all individuals to autonomous decision-making on matters regarding their sexual and reproductive health", while paragraph 64, the last paragraph in General Comment no. 22 and thus, in a way, the last word on the right to health, too, reads:

> "States must ensure that all individuals have access to justice and to meaningful and effective remedy in instances in which the right to sexual and reproductive health is violated. Remedies include, but are not limited to, adequate, effective and prompt reparation in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, as appropriate. The effective exercise of the right to remedy requires funding access to justice and information about the existence of these remedies. It is also important that the right to sexual and reproductive health be enshrined in laws and policies and be fully justiciable at the national level, and that judges, prosecutors and lawyers be made aware of that such a right can be enforced. When third parties contravene the right to sexual and reproductive health, States must ensure that such violations are investigated and prosecuted, and that the perpetrators are held accountable, while the victims of such violations are provided with remedies."

[382] Footnote omitted.

We can conclude that the general comments on the right to health answer the question on whether the State is obliged to repair victims whose right to health has been violated by non-State actors with a confident yes. The fact that General Comment no. 14 also determines "non-derogable" core obligations in relation to the right to health further strengthens this conclusion.[383]

In the framework of discussing the right to housing, we observed that even though reparations were not explicitly mentioned in the two relevant general comments, the latter nevertheless supported the hypothesis that States are obliged to repair victims of non-State actors. In regard to the right to health, looking at general comments' paragraphs pertaining to reparations already answered the question. Nevertheless, it remains worthwhile to consider General Comments no. 14 and 22 in their entirety, and show that the provisions on reparations are not taken out of context but fit logically into a reparations-approving mindset. To sketch this mindset, three examples are provided. The first example is paragraph 8 of General Comment no. 14. There, the Committee zoomed in on entitlements a person has towards the State and wrote that "the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."[384] This "equality of opportunity" can be considered through different lenses. Equality of opportunity between victims of the State and victims of non-State actors entails that whatever the State gives to its own victims, it also has to give to victims of non-State actors. Even more, it entails that whatever the State is obliged to give to its own victims, it is also obliged to give to victims of non-State actors. We already know that the State is obliged to repair victims of violations of the right to health which can be attributed to it. Paragraph 8 adds that there can be no difference in opportunity. This allows only one logical conclusion which is that the State also has to repair violations of the right to health perpetrated by non-State actors.

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[383] CESCR, GC no. 14, paras. 43, 44 and 47. See also: UNGA, Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/69/297, 11 August 2014, paras. 11, 16 and 70 (a); and: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, paras. 6 and 9.

[384] See also: CESCR, GC no. 22, para. 5 ("The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant").

Another lens through which equality of opportunity can be considered is the juxtaposition of opportunities of victims of war with the population at large. Let us say that in country C, all people have perfect equality of opportunity, everyone's rating is 100. Then, a war hits the country's South and suddenly the Southerners' rating is between one and 50 only. As the equality-of-opportunity obligation continues to exist, the Government of C will have to adopt measures to again lift the opportunity of the Southerners to 100, a level that the rest of the country has continued to enjoy throughout. These measures will fix, i.e., repair the compromised opportunity gap and, consequently, the right itself.

A practical application of this argument is, for example, the following paragraph in the Committee's concluding observation on Sri Lanka:

> "The Committee notes with concern the persistence of significant disparities in levels of economic development between the Western region and the rest of the country that affect the equal enjoyment by all of economic, social and cultural rights such as employment, welfare benefits, health and social services. […]
>
> The Committee recommends that the State party take all necessary remedial measures to address the regional disparities that affect the equal enjoyment of economic, social and cultural rights and to ensure that its poverty reduction strategies specifically address, through targeted measures, the needs of the most disadvantaged and marginalized individuals and groups".[385]

Whatever lens one chooses to look through in examining the equality of opportunity, if the quest is begun with the question on whether States have to repair violations of the right to health perpetrated by non-State actors, the general comments answer in the affirmative.

The second example is the "normative content" of the right to health, which includes the elements of availability, accessibility, acceptability and quality.[386] The State has a continuous obligation "to take steps" toward the realisation of these elements. This is regardless of the pressure the right to health might find itself under due to a situation of violence. Even more, if

[385] CESCR, Concluding observations on the second to fourth periodic report of Sri Lanka, UN Doc. E/C.12/LKA/CO/2-4, 9 December 2010 (hereinafter: UN Doc. E/C.12/LKA/CO/2-4), para. 30.

[386] CESCR, GC no. 14, para.12 ff.

the right to health of some groups is particularly compromised, the State has to give "tailored" attention to such a group.[387]

Looking again at the concluding observations on Sri Lanka cited above, we find the following observation:

> "The Committee is concerned that mental health services remain insufficient to cope with widespread post-conflict mental disorders. […]
>
> The Committee recommends that the State party […] formulate strategies to strengthen available psycho-social assistance, especially for children and recruit more mental health workers and other specialized professionals to address post-conflict mental disorders."[388]

Over 6 years later, it continued to echo the same concerns:

> "The Committee is concerned that, despite measures taken, the mental health-care system is inadequate and insufficiently available and accessible, while the need for mental health and psychosocial services is acute for many, in particular those in conflict-affected areas who suffer from conflict-related post-traumatic disorders (art.12).
>
> The Committee recommends that the State party intensify its measures to ensure that mental health care is available, accessible, timely and adequate, including through increasing funding, ensuring that there is a sufficient number of trained mental health professionals, decentralizing care provision, addressing regional disparities in service provision, improving referral systems and ensuring social protection for families and patients."[389]

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[387] It is important to note that as in relation to the right to housing, where we discovered that "States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration", here, too, those most vulnerable or marginalised are recognised the right to special attention. In addition, the obligation to take measures towards the realisation of the right to health in favour of those most vulnerable is listed among the States' core obligations.

[388] UN Doc. E/C.12/LKA/CO/2-4, para. 35.

[389] CESCR, Concluding observations on the fifth periodic report of Sri Lanka, UN Doc. E/C.12/LKA/CO/5, 4 August 2017.

We can conclude that regardless of who it was that compromised any of the elements listed, either for an especially vulnerable or other group, the State has to re-establish availability, accessibility, acceptability and quality using "the maximum of its available resources". This reestablishment, undertaken through whatever measures chosen, falls under the definition of reparation. If the elements listed were compromised by a non-State actor, then the State *ipso facto* has to make reparations to victims of non-State actors.

The third example looks at paragraphs addressing violations of the right to health. The Committee wrote that "the [State's] failure to take appropriate steps towards the full realization of everyone's right to the enjoyment of the highest attainable standard of physical and mental health",[390] as well as "the failure to take measures to reduce the inequitable distribution of health facilities, goods and services,"[391] a situation that can be the result of an armed conflict and non-State conduct, amounted to violations. This, in turn, turns steps and measures, also those in favour of victims *qua* victims, into obligations.

In review, we observe that General Comments no. 14 and no. 22 confirm this thesis' hypothesis not only in their paragraphs dedicated to reparations but in their entirety; in addition, nothing in the articulations on the right to health opposes conclusions in the subchapters 2.1 and 2.2. We also observed that the Committee's concluding observations further strengthen the hypothesis by showing that the Committee is not blind to context and that measures are often demanded to specifically address war-time victimisation. On this basis, we conclude that the Covenant obliges States to repair victims of non-State actors.

2.3.3 The right to education

A fighter belonging to a non-State actor can violate the right to education in numerous ways. She can kill a teacher, burn down a school or abduct a child.[392] In turn, the State can send new teachers or rebuild the school.[393] If applicable, it can try to free the child from the non-State actor and provide her with psychosocial and other support so that she is able to continue on her

[390] CESCR, GC no. 14, para. 49.

[391] *Id*., para. 52.

[392] OHCHR, Protection of economic, social and cultural rights in conflict, para. 62.

[393] *Giacca* (2014), Economic, Social, and Cultural Rights in Armed Conflict, p. 214.

educational path. If the child has meanwhile become an adult, the State can offer educational opportunities specifically designed for adults that have not completed their education earlier due to war-related reasons. The measures above correspond to restitution and rehabilitation and are, as such, forms of reparation.

In the Covenant, the right to education has two provisions.[394] Article 13 is of a comprehensive and general nature, while Article 14 zooms in on "the principle of compulsory education free of charge for all". Neither of the two provisions makes a reference to a conflict or post-conflict situation and there is no explicit mention of victims and reparations, however, both arguments developed in relation to the right to housing and applied in relation to the right to health, i.e., the 'activist reader argument' and the 'meaning of the word 'everyone' argument', can, again, also be applied here.

> "[A] well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence",

the Committee poetically wrote in 1999.[395] More practically, it noted that education was "an economic right, a social right and a cultural right", but also "a civil right and a political right, since it [wa]s central to the full and effective realization of those rights as well."[396] The importance of education cannot be overstated. For these reasons, the Committee devoted two general comments to it, both adopted in 1999. General Comment no. 11 is devoted to Covenant's Article 14, General Comment no. 13 to Covenant's more general Article 13. As the latter is "the longest provision in the Covenant [and] the most wide-ranging and

[394] The right to education is also enshrined in the *Universal Declaration of Human Rights* and the *Convention on the Rights of the Child*, among others (UNGA, Universal Declaration of Human Rights, UN Doc. A/RES/217(III), 10 December 1048, Article 26; and: United Nations Commission on Human Rights, Convention on the Rights of the Child, UN Doc. E/CN.4/RES/1990/74, 7 March 1990, Articles 28 and 29).

[395] CESCR, GC no. 13, para. 1.

[396] CESCR, General Comment no. 11 on plans of action for primary education, UN Doc. E/C.12/1999/4, 10 May 1999 (hereinafter: CESCR, GC no. 11), para. 2; OHCHR, Protection of economic, social and cultural rights in conflict, para. 52.

comprehensive article on the right to education in international human rights law",[397] General Comment no. 13 can be considered the most authoritative interpretation of the content of the right to education, too.

Neither General Comment no. 11 nor General Comment no. 13 use the words 'war', 'conflict' or even 'violence'. However, both documents clearly have these situations in mind. In General Comment no. 13, the Committee admits that it is "aware that for millions of people throughout the world, the enjoyment of the right to education remains a distant", even an "increasingly remote [goal]", and that it is "conscious of the formidable structural and other obstacles impeding the full implementation of article 13 in many States parties."[398] A similar wording can be found in General Comment no. 11 with the important addition that "[t]hese difficulties […] cannot relieve States parties of their obligation to adopt and submit a plan of action to the Committee, as provided for in article 14 of the Covenant."[399] The same conclusion can also be inferred for obligations arising out of Article 13. Nothing in the Committee's articulations suggests that any severity or duration of any challenge, including a non-international armed conflict, lessens or negates the right to education. The absence of a derogation clause in the Covenant,[400] as well as the articulation of core obligations in relation to Article 13,[401] strengthen this understanding.

Neither general comment includes explicit paragraphs providing for reparations. Therefore, the same strategy as in relation to the right to housing can be applied. We ask whether the State has to repair violations of the right to education perpetrated by non-State actors and scrutinise the two documents, in particular General Comment no. 13, for answers.

General Comment no. 13 begins with the aims of education. Building on the aims articulated in the *Universal Declaration of Human Rights*, including that "[e]ducation shall be directed to the full development of the human personality and to the strengthening of respect for human

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[397] CESCR, GC no. 13, para. 2.

[398] *Ibid.*

[399] CESCR, GC no. 11, para. 3.

[400] *Ibid.*

[401] CESCR, GC no. 13, para. 57; and: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 9.

rights and fundamental freedoms",[402] the Committee highlights that the Covenant added "that education shall be directed to the full development of the human […] sense of its dignity" and that it "shall enable all persons to participate effectively in a free society".[403] In order to give weight and nuance to the aims of education, the Committee further cited key documents in the field of education, including, among others, Article I of the *World Declaration on Education for All*.[404] The latter document made an important emphasis that might get lost when we only think of education's most common beneficiaries, children. The emphasis is in that "[e]very person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs." In a context in which an individual – whether she is still a child, a youth or already an adult – was deprived of her access to education because of war, the emphasis on "every person" as well as the necessity of education to further something so basic as human's dignity, cannot be interpreted to mean anything short of that the person in question continues to have the right to education and, correspondingly, the State an obligation to provide it to her. To give back something that was previously taken or lost is restitution, which is a form of reparation.

Exploring the "normative content" of the right to education, the Committee goes through the right's basic features and writes that education has to be available, accessible, acceptable and adaptable.[405] While all four elements are important also to the thesis at hand and supportive of its hypothesis, it is the last one that is most directly applicable. "[E]ducation has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings."[406] A conflict or post-conflict scenario is a social setting and in order to respect, protect and fulfil its obligations under paragraph 6 (d), a State Party has to adapt education to such a setting. That can be done by adopting curricula to also be suitable for older students, adjusting classrooms and bathrooms so that they are suitable for taller persons or by making education available in the afternoons so that victims

[402] UNGA, Universal Declaration of Human Rights, Article 26 (2).

[403] Covenant, Article 13 (1), referenced by: CESCR, GC no. 13, para. 4.

[404] CESCR, GC no. 13, para. 5.

[405] *Id*., para. 6.

[406] *Id*., para. 6 (d).

do not have to choose between school and work.[407] Either way, if a particular social setting is so extreme that it demands creative solutions in order for the right education to be realised, a State has to implement these creative solutions. In short, the Committee makes clear that a particular social setting, such as a post-conflict setting, does not absolve States of their obligations. If, by way of illustration, we assume that someone's right to education was intact when she was six years old but was then violated by a rebel group at her age of seven, the State anew offering what the then child once lost, satisfies the definition of reparation.[408] This argument is underlined by articulations in the framework of the right to technical and vocational education,[409] and fundamental education. About the latter, the Committee writes that "[t]he right to fundamental education extends to all those who have not yet satisfied their "basic learning needs"."[410] The right "is not limited by age or gender; [and] it extends to children, youth and adults, including older persons."[411] If individuals had their prior existing opportunities taken away, the States' anew creation of them does as much as possible to "restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred".[412] That is, yet again, the definition of restitution and, as such, clearly falls under the definition of the term 'reparation'. That the State has the obligation that corresponds to the right is made clear by, *inter alia*, the following phrase given in the framework of the Committee's examination of the respect-protect-fulfil troika: "As a general rule, States Parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal."[413]

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[407] In the same spirit, see: *Id.*, para. 50 ("In relation to article 13 (2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must […] fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries").

[408] See also: *Id.*, para. 53.

[409] *Id.*, para. 16 (e).

[410] *Id.*, para. 23.

[411] *Id.*, para. 24.

[412] Basic Principles and Guidelines, para. 19.

[413] CESCR, GC no. 13, para. 47.

Finally, a look at the State's (passive) violations of the right to education is illustrative. "[T]he failure to take measures which address de facto education discrimination" amounts to a violation.[414] I have already in relation to other rights explored how a war will almost certainly put the inhabitants of the war-torn region behind the rest of the country and/or how it will harm previously existing rights. This will necessitate a State's measures to bring the war-torn region and its inhabitants up to speed again, and these measures will often, if not always, satisfy the definition of reparation. I have also explored how equality must be ensured among victims and the population at large, but also among all victims; whatever the State owes to its own victims, particularly as articulated by the Basic Principles and Guidelines, it owes to victims of non-State actors as well.

The right to education is in part different from other rights insofar as that "reparations" will not so much re-establish what was lost (a house, the perfect State of health) but re-create the opportunity to continue where one left off. With this in mind, all the arguments made in previous chapters also apply, *mutatis mutandis*, to the right to education.

Before concluding, it is instructional to look at how the Committee has responded to violations of the right to education in the context of armed conflict. In its concluding observations, it typically addresses violations of the right to education in a comprehensive manner, and proposes equally comprehensive solutions. The following examples are representative:

> "While noting that the conflict has seriously affected the education system in the [Central Africa Republic], the Committee is concerned at the following:
>
> (a) the very high illiteracy rate in the State party, particularly among women and girls, indigenous populations and in rural areas, as well as the requirement to pay for certain aspects of education, which may have the effect of lowering the rate of school attendance;
>
> (b) the State party's inability to ensure inclusive education despite the provisions of article 28 of Act No. 00.007 of 20 May 2000, and the shortage of qualified teachers to supervise pupils with disabilities;
>
> I the low rate of enrolment in schools and the high dropout rate, particularly among girls;

[414] *Id*., para. 59.

(d) the obstacles faced by demobilized child soldiers in accessing education or professional or vocational training;

I the insufficient number of qualified teachers and the still considerable proportion of parent-teachers; and

(f) the looting, attacks and occupation of several schools and the murders of teachers by armed groups, which have led to the closure of schools for security reasons (art. 13).

[…] The Committee recommends that the State party give priority to education and the rehabilitation of the educational system in its peace and reconciliation initiatives. It recommends in particular that the State party take the necessary measures to:

(a) Combat illiteracy and increase the rate of literacy among the population, and ensure universal, free educational coverage, especially among the most marginalized and deprived populations;

(b) Guarantee inclusive education for pupils with disabilities, and train and recruit a sufficient number of qualified teachers to work with these pupils;

I Guarantee universal access to primary education and increase the enrolment of girls and children from indigenous or rural communities, and firmly address the causes of dropout;

(d) Step up the training and recruitment of qualified teachers and ensure the regular payment of their salaries;

I Ensure that demobilized child soldiers are able to have access to education and to acquire professional qualifications, thus facilitating their reintegration;

(f) Protect schools against looting and occupation by armed groups, rehabilitate them, and investigate, prosecute and, where necessary, convict those responsible.";[415]

"The Committee recommends that [Iraq] effectively implement the national education and higher education strategy for the period 2011 – 2020. It also recommends that the State party take all measures necessary to reintegrate children affected by the armed conflict into the educational system, including through non-formal educational programmes and by prioritizing the restoration of school buildings and facilities. The Committee further recommends that the State party take specific measures to ensure that internally displaced children and children with disabilities enjoy equal access to education.";[416]

[415] UN Doc. E/C.12/CAF/CO/1, paras. 39-40.

[416] CESCR, Concluding observations on the fourth periodic report of Iraq, UN Doc. E/C.12/IRQ/CO/4, 28 October 2015, paragraphs on the right to education.

or:

> "The Committee, while noticing the efforts made by [Afghanistan] to improve and promote access to education and reduce gender disparities, notes with concern and in particular that the right to education is not guaranteed in the State party without discrimination, and is also concerned at the poor situation of education in Afghanistan. In particular, the Committee is deeply concerned about the increase in the number of child victims of attacks against schools by insurgents and the throwing of acid to prevent girls and female teachers from going to school (arts. 13 and 14).
>
> The Committee recommends that the State party, in implementing its National Education Strategy Plan, take into account the Committee's general comments No. 11 (1999) on plans of action for primary education and No. 13 (1999) on the right to education and establish an effective monitoring mechanism for the plan. In particular, the Committee recommends that the State party take adequate steps to encourage the school enrolment of girls, including by providing facilities in schools (for example separate toilets for girls), and by training and recruiting female teachers, in particular in rural areas. The State party should improve security for children in school as well as on their way to and from school, and increase awareness of the value of girls' education."[417]

The above examples demonstrate that the Committee is aware of that the right to education can be hampered by non-State conduct and that it considers, regardless of the source of the "empirical retrogression",[418] that it is the State that has to repair it.[419]

We can conclude that the right to education includes an obligation to repair victims of violations of the right to education perpetrated by non-State actors. Even if a reader might be more conservative in her assessment, the articulations of General Comment no. 11 and General Comment no. 13 definitely do not allow for the opposite conclusion, i.e., that the right to education does *not* include such an obligation to repair. At this point, this conclusion is no longer surprising, as the analyses of the right to housing and the right to health have equally concluded that the Covenant includes the States' obligation to repair.

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[417] CESCR, Concluding observations on the second to fifth periodic report of Afghanistan, UN Doc. E/C.12/AFG/CO/2-4, 7 June 2010.

[418] *Warwick* (2019), Unwinding Retrogression, p. 471.

[419] See also: OHCHR, Protection of economic, social and cultural rights in conflict, para. 55.

2.4 Beneficial to victims and acceptable to States?

Subchapter 1.1.2 showed that the obligation to protect economic, social and cultural rights is, according to the existing consensus as it is contained in the Basic Principles and Guidelines, a qualified obligation of result. Subchapter 1.3 demonstrated why such an understanding does not further the objective of making reparations a reality for victims of non-State actors and subchapter 1.4 then proposed an alternative, which is to understand the obligation to protect as an unqualified obligation of result.

Chapter 2 accepts, for the sake of argument, that the obligation to protect is a qualified obligation of result but still proposes that the State might be obliged to provide reparations, not because it finds itself in a position of wrongfulness but because the obligation exists as a primary obligation of the State. Subchapters 2.1, 2.2 and 2.3 substantiated this proposition. It is the role of subchapter 2.4 to consider whether this understanding furthers the objective of making reparations a reality for victims of non-State actors and, not less relevant, whether it is a credible candidate for the States understanding of the law, i.e., whether it could be the reason for the States' reparation programmes.

One benefit of understanding the obligation to repair as a primary obligation is that it is, in fact, considered to be a legal obligation, rather than a moral nudge. This strengthens the victims', non-governmental organisations' and other monitoring bodies' plea in favour of victims. However, if the obligation to repair is a primary obligation, we must ask what kind of obligation it is. Is it an unqualified obligation of result, a qualified obligation of result or an obligation of conduct?

In subchapter 2.2, we extrapolated the obligation to repair victims of non-State actors from the prohibition of discrimination. The latter is an unqualified obligation of result,[420] and if the State carries out a reparation programme at all, it cannot exclude victims of non-State actors from it as a matter of law. This is significant. However, if there is no reparation programme to begin with, the prohibition of discrimination might have nothing to attach itself to, either.

Subchapter 2.1 extrapolated the obligation to repair victims of non-State actors from the State's obligation to progressively realise economic, social and cultural rights. *Prima facie*, this

[420] Among others: *Hutter* (2019), Starvation in Armed Conflicts, p. 728.

argument appears more relevant, in particular because the obligation "to take steps" is, in fact, an (unqualified) obligation of result. However, the obligation of progressive realisation as such is not an unqualified obligation of result. Due to the fact that it is subject to the State's available resources, it is often understood as a "goal-oriented" obligation.[421] If a State would decide to argue that it simply does not have the resources to repair, the obligation to repair would continue to exist, however, it would be unclear when and if the State violated its obligation and entered into a position of wrongfulness. If the obligation to repair is a secondary obligation, as was proposed by Chapter 1, it would not be subject to a State's resources and therefore, arguably, more likely, although in no way certain, to be realised.

To understand the obligation to repair as a primary obligation has tangible benefits, in particular if there is a reparation programme at all and if the State has resources available to progressively realise economic, social and cultural rights. However, as a primary obligation, in particular as a building block of the obligation of progressive realisation, it is subject to the same considerations, e.g., the relevance of resource constraints,[422] or the *force majeure* defence.[423] In practice, the theoretical difference between a secondary obligation and a primary obligation might not always be relevant, however, secondary obligations deduct from the "available resources" while the primary obligation of progressive realisation is subject to them. The former might therefore be implemented first. Either way, understanding the obligation to protect as a qualified obligation of result *and* understanding the obligation to repair as primary obligation is, from the objective of making reparations a reality for victims of non-State actors, preferable to understanding the obligation to protect as a qualified obligation of result and *not* understanding the obligation to repair as a primary obligation.

For the same reasons as explored in subchapter 1.4.7, this understanding might also be acceptable to States, who might be more willing to provide reparations without admitting wrongdoing. In addition, the reason that this understanding might be less beneficial to victims of non-State actors than the understanding of the obligation to protect as an unqualified

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[421] *Wolfrum* (2011), Obligation of Result Versus Obligation of Conduct, p. 366.

[422] *Torres Penagos* (2021), Economic and Social Rights, Reparations and the Aftermath of Widespread Violence, pp. 947-949, providing an example of finding a State (Uganda) not in violation of its obligation to fulfil despite clearly unsatisfactory conditions of victims of non-State actors.

[423] *Hutter* (2019), Starvation in Armed Conflicts, pp. 727-734.

obligation of result is also the reason why it might be preferred by States: the obligation being subject to available resources, they could, in many cases, postpone its implementation indefinitely. Either way, understanding the obligation to repair as a primary obligation is a credible candidate for the States' understanding of the law, i.e., the Covenant is a possible and likely reason for the States' reparation programmes.

2.5 Primary obligations to repair beyond international human rights law: all roads lead to the State

Beyond the field of international human rights law, primary obligations of the State to provide reparations for private conduct are almost non-existent. One exception is perhaps international environmental law where a handful of treaties foresee "liability for the injurious consequences of lawful activities". Some soft law codifications also reflect the ostensible need for something like liability without wrongfulness.[424] The creation of liability "aris[ing] following the causation of material damage, where the causal conduct was not specifically prohibited" is considered conceptually ""fundamentally misconceived"",[425] however, the idea behind it is understandable. Subchapter 2.5 sketches the broad outlines of some of the thinking belonging to international environmental law and shows that even though the legal field is arguably less

[424] See, for example: ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006, reproduced in: ILC, Report of the International Law Commission on the work of its 58th session (1 May – 9 June and 3 July – 11 August 2006), UN Doc. A/61/10, 2006, p. 106 (hereinafter: ILC, Draft principles on the allocation of loss), Principle 4 (5) ("In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available"). The document is highlighted in: *Shelton, and Kiss* (2007), Strict Liability in International Environmental Law, p. 1138.

This thesis has stated above that it understands the word 'liability' as a legal consequence flowing from responsibility. The use of the phrase "liability without wrongfulness" should therefore be understood as exceptional, its purpose being to sketch the discussion rather than suggest that the word should be so used. To see why the distinction between liability as a consequence of responsibility and liability for "damage caused by hazardous activities not prohibited by international law" is ""fundamentally misconceived"", see: *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 100.

[425] *Monnheimer* (2021), Due Diligence Obligations in International Human Rights Law, p. 100.

relevant for international human rights law as sometimes suggested,[426] it entails one impulse that is the same, i.e., the humanitarian plea that "'some one' ought to pay".[427]

In treaties that foresee "liability for the injurious consequences of lawful activities" for the conduct of corporate non-State actors, that liability is placed on the corporate non-State actors, rather than on the State.[428] Meanwhile, the (international) obligation of the State is to ensure that corporate non-State actors have in place insurance policies that satisfy the internationally prescribed standards.[429] One might want to note that in the context of this thesis, too, there exists a non-State actor and that if analogous reasoning is to be applied, liability without the need to investigate violations of law, or strict liability, should be imposed on the armed non-State actor. Bypassing the need for an adversarial judicial process might, of course, help, however, there is an obvious problem with the analogy. Corporations are legally incorporated within one or more jurisdictions and at least in theory therefore choose to operate within the law. States can reach them through legal avenues and can impose on them various obligations, including the acquisition of insurance policies for their hazardous (lawful) activities. In contrast, armed non-State actors choose to operate outside the law. As far as there exists legislation relating to non-State actors, the latter are typically violating it by their very existence. At the danger of stating the obvious, States cannot be obliged to demand of illegal armed non-State actors that they take out insurance policies to protect against their hazardous and illegal conduct. All in all, this means that while States can certainly choose to impose strict liability on armed non-State actors, they do not have the means available to ensure that the armed non-State actors will have at their disposal the necessary resources to provide reparations.

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[426] *Id*., pp. 144-166.

[427] United States and Colombia Commission, "Montijo", Award, 1875, p. 1444.

[428] Unless, of course, the State is itself the "operator" (*Shelton, and Kiss* (2007), Strict Liability in International Environmental Law, pp. 1139-1150).

[429] See, by way of example: International Maritime Organization, International Convention on Civil Liability for Bunker Oil Pollution Damage, 2 March 2001, Article 7. The Convention is referenced in: *Shelton, and Kiss* (2007), Strict Liability in International Environmental Law, pp. 1143-1144.

More encouraging than strict liability of corporate non-State actors is the idea of a State's residual or subsidiary liability. Principle 4 (5) of the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, for example, states:

> "In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available."[430]

We observed above that imposing liability on non-State actors is a remote possibility in regard to *armed* non-State actors. Hopping over it, we immediately land at the State's residual or subsidiary liability. Principle 4 (5) is not binding law. As was noted in subchapter 1.3.1, inter-State relations are permeated by *quid pro quo* thinking,[431] and Principle 4 (5) could, if it were an enforceable legal provision, create substantial legal burdens for transboundary harm's "State[s] of origin". It is therefore perhaps unlikely that it will ever become binding public international law. What it nevertheless demonstrates is that if victims' rights are to be taken seriously, several levels of insurance must exist and that the State is, by its very nature, the last resort. In the context of this thesis, it is arguably the first one, too.

In conclusion, what is the bounty of this brief peek at international environmental law? Articulations that foresee strict liability (of non-State actors) or State liability without wrongfulness are few. As far as treaties are concerned, only a handful have an encouraging number of States Parties.[432] However, the message that the documents considered above send is unequivocal nevertheless. They recognise the shortcomings of making reparations subject to a due diligence requirement. If victims' rights are to be more than window dressing, several

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[430] ILC, Draft principles on the allocation of loss, Principle 4 (5). Principle 4 (5) is referenced in: *Shelton, and Kiss* (2007), Strict Liability in International Environmental Law, pp. 1139-1140. See also: p. 1145, discussing the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*.

[431] *Shelton, and Kiss* (2007), Strict Liability in International Environmental Law, p. 1151.

[432] *Id.*, p. 1135.

layers of insurance must exist. And when all other avenues are exhausted, the only possible subject of repair that remains is the State.[433]

2.6 Conclusion: a conventional confirmation of the hypothesis

The hypothesis of this thesis is that States have an obligation to repair victims whose economic, social and cultural rights were violated by non-State actors. The hypothesis was inspired by the observation that States are designing reparation programmes for victims of non-State actors even though the currently only codification of victims' rights that claims to reflect public international law merely encourages rather than obliges States to do so. States can have diverse motivations for their conduct, however, if there exists a *legal* rule that corresponds to this thesis' hypothesis, there are two candidates for what the content of such a rule might be. The second candidate is that the obligation to repair is a primary obligation and this candidate was explored in Chapter 2.

Chapter 2 accepted, for the sake of argument, that the obligation to protect economic, social and cultural rights was an obligation of result qualified by a due diligence requirement and that the State could not have done more than it did to protect individuals on their territory.[434] To test the reasonableness of the proposition that the obligation to repair is a primary obligation, Chapter 2 explored two rights-strengthening tools the potential of which for victims of non-State actors remained unexplored. The analysis of the first of these tools, the obligation of progressive realisation, allowed the conclusion that a non-international armed conflict does not reset the level from which realisation of a right is measured, which means that a State has to repair before it can claim to progressive realise. As progressive realisation is an obligation, the obligation to repair *ipso facto* becomes one, too. The second rights-strengthening tool explored by Chapter 2 was the prohibition of discrimination. Subchapter 2.2 observed that the Covenant does not allow States to treat victims of non-State actors differently from victims of the State

[433] See also: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 2 ("It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights").

[434] The latter premise, i.e., that the State could not have done more than it did to protect victims of non-State actors is the premise of both Chapters 1 and 2 (see: subchapter α.1, *supra*).

and reasoned why the prohibition in the Covenant overrides the permission of differential treatment entailed in the Basic Principles and Guidelines. Moving from the abstract to the tangible, Chapter 2 looked at three rights most commonly affected in non-international armed conflict and made the case that the Covenant demands that the State repairs violations of these rights perpetrated by non-State actors. It also pondered whether, given that the obligation to protect is a qualified obligation of result, it is beneficial for victims that the obligation to repair was a primary obligation and opined why understanding the obligation to repair to be a primary obligation would be in the interest of States. At this point, Chapter 2 pointed out an important weakness of the proposition, which is that the obligation to repair as a primary obligation would be subject to the same considerations as the obligation of progressive realisation, e.g., the availability of resources. A State arguing that it does not have sufficient resources to repair could put off the obligation to repair indefinitely. In contrast, the proposition explored in Chapter 1 would not suffer from this weakness.

In total, Chapter 2 built the case that the Covenant obliges States to repair victims of violations of economic, social and cultural rights perpetrated by non-State actors. With 171 States Parties to the Covenant, establishing the obligation as a conventional one is significant. Already at this point, we can therefore state that the hypothesis is correct.

However, what we do not know at this point is whether States are, in fact, moved by the Covenant when they design reparation programmes or whether their motivations are different. In other words, we do now know if they also understand the obligation to repair as following from the Covenant or whether their understanding of the Covenant is different. It is still possible that States understand the obligation to protect as an unqualified obligation of result, which was the proposition explored in Chapter 1. As this latter proposition has some benefits for victims, it remains worthwhile to look at State practice and observe whether the States' understanding of the law is that they are implementing conventional obligations or, rather, that customary international law dictates that the obligation to protect is an unqualified obligation of result, propelling States into wrongfulness at the same moment at which a non-State actor harms an economic, social or cultural right. To find the answer to this question, we turn to Chapter 3.

CHAPTER 3

UNDERSTANDING WHAT STATES DO

> ""The Government hasn't done much for us, but it has done something.""[435]

If States are repairing victims of non-State actors because they think that they are obliged to do so by a rule of public international law, there are two candidates for what such a rule might be. The two candidates were explored in Chapters 1 and 2. The purpose of Chapter 3, meanwhile, is to answer a question that precedes and one that follows the investigation of Chapters 1 and 2. The foregoing question is *whether* States think that they have to repair victims of non-State actors as a matter of *law*. It is possible that the answer is 'no' and that States do not consider themselves bound by a legal obligation at all but are, instead, guided by a "sense of compassion for personal misfortune". If the answer to the foregoing question is 'yes', however, then Chapters 1 and 2 only represent candidates for the States' understanding of the law. Chapter 3, meanwhile, attempts to answer the subsequent question as to which of the candidates actually corresponds to it.

To answer the foregoing and subsequent questions, Chapter 3 takes under the microscope States that have experienced a non-international armed conflict in their recent past. It observes if States have chosen to repair victims of war, if they, while doing so, have distinguished between victims based on the identity of the perpetrator and what their understanding of the law, if any, might have been.[436] Chapter 3 examines the practice and understanding of the law

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[435] *Kunej, et al*. (2014/2015), The Long Wait, p. 2.

[436] Chapter 3 is sensitive to the fact that the proposition from Chapter 1 can only exist in the sphere of customary international law. Those who propose a "postmodern doctrine […] of [customary international law] on the basis of deliberative reasoning rather than mere coordination of states", might allow for an argument in favour of the proposition developed in Chapter 1 based on, for example, its undisputable benefit for victims of non-State actors (*Chimni* (2018), Customary International Law, p. 7). However, as the most authoritative way to claim the existence or recent emergence of a new rule of customary international law is, at least as of today, to conduct "an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by *opinio juris*)" (ILC, Draft conclusions on identification of customary international law, with commentaries), para. 1 of commentary to Conclusion 2), Chapter 3 is indispensable.

of States as if it was researching State practice and *opinio juris.* This is done, on the one hand, because the proposition developed in Chapter 1 actually demands a consideration of the constitutive elements of customary international law and, on the other, because guidelines on the identification of State practice and *opinio juris* also serve as a good guide on the identification of the understanding of the law of States more broadly.[437] While treaty obligations do not rely on the States' view in the way customary obligations do, when an obligation is argued to be entailed rather than explicitly articulated in a treaty, the States' understanding gives added weight to the argument that the treaty, in fact, entails that obligation. The conservative approach of Chapter 3 will give added weight to any conclusion it might reach, be it that the proposition from Chapter 1 is correct, that the proposition from Chapter 2 is correct, that the proposition from Chapter 2 is correct *and* that a corresponding obligation exists in customary international law, that both propositions are correct or that neither of them correspond to the States' understanding of the law.

The most authoritative guidance on the identification of customary international law is offered by the recent Draft Conclusions.[438] As the methodology of Chapter 3 is informed by them, the conclusions of greatest practical importance for the study at hand deserve a quick glance before our attention turns to the States. By way of introduction, the Draft Conclusions state that while "the same material may be used to ascertain practice and acceptance as law (*opinio juris*)", i.e., the constituent elements of a rule of customary international law,[439] "the existence of one

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[437] Even though *opinio juris* translates to understanding or opinion of the law, the Latin term is only used when referring to *opinio juris* as a constitutive element of customary international law. The term 'understanding of the law', meanwhile, will in some cases correspond to *opinio juris* while in other cases it will be that the State is bound by a treaty or that it is not bound by international law at all.

[438] ILC, Draft conclusions on identification of customary international law, reproduced in: ILC, Report of the International Law Commission on the work of its 70th session (30 April – 1 June and 2 July – 10 August 2018), UN Doc. A/73/10, 2018, p. 119 (hereinafter: ILC, Draft conclusions on identification of customary international law); and: ILC, Draft conclusions on identification of customary international law, with commentaries.

[439] Statute of the International Court of Justice, reproduced in: Charter of the United Nations and Statute of the International Court of Justice, UNTS, vol. 1, p. XVI, Article 38 (1) (b). It is perhaps superfluous to restate that the constituent elements of customary international law are State practice and *opinio juris*, what deserves mention, however, is that this method of identifying customary international law no longer enjoys unanimous support. Trends ranging from anti-colonialism to pragmatism challenge the orthodoxy (see: *Chimni* (2018), Customary International Law*;* and: *Worster* (2014), The Inductive and Deductive Methods in Customary International Law Analysis, p. 455, respectively).

element may not be deduced merely from the existence of the other".[440] In other words, it is necessary that "[e]ach of the two constituent elements […] be separately ascertained."[441] About "a general practice", the Draft Conclusions highlight that the element "refers primarily to the practice of States".[442] Conclusion 5 observes that State practice "consists of conduct of the

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[440] ILC, Draft conclusions on identification of customary international law, with commentaries, para. 8 of commentary to Conclusion 3.

[441] ILC, Draft conclusions on identification of customary international law, Conclusion 3 (2).

[442] *Id.*, Conclusion 4 (1). Conclusion 4 (2) notes that "[i]n certain cases, the practice of international organizations" can also be of relevance. In recent years, reparations have received some attention from the International Criminal Court. It is therefore useful to examine, if briefly, whether that practice is of relevance for this thesis. As a starting point, "the practice of international organizations" is to be approached with caution as it is relevant only in regard to "those rules (*a*) whose subject matter falls within the mandate of the organizations, and/or (*b*) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties)" (ILC, Draft conclusions on identification of customary international law, with commentaries, para. 5 of commentary to Conclusion 4). Further, the Draft Conclusions note that "the practice falling under paragraph 2 arises most clearly where member States have transferred exclusive competences to the international organization" such as "is the case […] for certain competences of the European Union" (*Id.*, para. 6 of commentary to Conclusion 4), and "where member States have not transferred exclusive competences, but have conferred competences upon the international organization that are *functionally equivalent* to powers exercised by States" (*Id.*, para. 6 of commentary to Conclusion 4). In the subsequent paragraph, the *Conclusions* also offer the wording: "the more directly a practice of an international organization is carried out *on behalf of* its member States and endorsed by them" (*Id.*, para. 7 of commentary to Conclusion 4, emphasis added).

Within the framework of the International Criminal Court, its "[Trust Fund for Victims] is […] implementing Court-ordered reparation awards […] upon the TFV Board of Directors (sic) decision to either fully or partially complement the relevant reparation awards" (Reparation implementation, Trust Fund for Victims, no date, www.trustfundforvictims.org/index.php/en/what-we-do/reparation-orders). The funds that the Trust Fund for Victims has as its disposal are, insofar as they exist, "funds collected from the convicted person and deposited with the Trust Fund" (*Ibid.*). The money that can be used to "fully or partially complement the relevant reparations awards" comes from "voluntary contributions of States Parties or other donors" (*Ibid.*), and at the end of 2020, the Fund's so called "reparations reserve" included EUR 5.473 million (Assembly of States Parties (ICC), Financial statements of the Trust Fund for Victims for the year ended 31 December 2020, ICC Doc. ICC/ASP/19/13, 26 July 2021, p. 18). While an increasingly pronounced generosity towards victims of International Criminal Court-convicted perpetrators is laudable, decisions by treaty bodies to use entirely *voluntary* contributions from (predominantly Western) States, and others, in order to repair victims have no direct bearing on the question of whether the intimate relationship between an individual and her *territorial* State includes an obligation of the latter to repair the former. To show the extraordinary nature of reparations in the International Criminal Court-context, Moffett writes that "reparations at the ICC […] notably move away from the international-law state-centric modes of liability for reparations to more private-law individual liability and even developmental or subsidiary responsibility when provided by the Trust Fund for Victims" (*Moffett* (2018), Reparations for victims at the International Criminal Court, p. 1204). The practice of the International Criminal Court can therefore be said to be relevant only to the extent that it confirms that reparations do not need to be made by the perpetrator in order to constitute reparations. Beyond that, the International Criminal Court's practice cannot be said to fall under the practice of international organisations envisaged by Conclusion 4 of the Draft Conclusions and is therefore without relevance to the thesis. (For an introduction into the literature on reparations

State […] in the exercise of its executive, legislative, judicial or other functions",[443] while the authoritative commentary highlights some well-established customary international law maxims which are of relevance for the correct understanding of Conclusion 5. One of those is "the principle of the unity of the State".[444] The principle is important not only in scenarios where State organs might have divergent practices, leading an observer to conclude that there perhaps is no practice of relevance to the identification of customary international law, but also, and more pertinent here, where different State organs might exhibit different levels of *enthusiasm* for the tangible realisation of already articulated reparation programmes. As long as there is explicit State practice coming from one organ and entirely or largely unexplained passivity from the other, the State practice of the respective country is, while perhaps factually frustrating, nevertheless uniform and as such of relevance to this thesis. Another important maxim is that "[t]he conduct of any State organ is to be considered conduct of that State".[445] The commentaries to the Draft Conclusions defer to Article 4 of the Articles on State Responsibility, the commentary to which is dedicated to underlining the deliberately inclusive scope of the term "organ" in public international law.[446] A particularly important State organ in the context of transitional justice are truth and reconciliation commissions, which are, in the understanding of leading transitional justice scholars and practitioners, "temporary bod[ies]" that are "officially authorized or empowered by the state under review."[447] Their actions, in

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before the International Criminal Court, see: *De Brouwer* (2007), Reparation to Victims of Sexual Violence; *Keller* (2007), Seeking Justice at the International Criminal Court; and: *Moffett* (2018), Reparations for victims at the International Criminal Court. For a critical perspective, see: *Aptel* (2012), Prosecutorial Discretion at the ICC and Victims' Right to Remedy; and: *Wiersing* (2012), Lubanga and its Implications for Victims Seeking Reparations under the International Criminal Court. For a critical perspective focusing on reparations for victims of gender-based violence, or the lack thereof, see: *Chappell* (2017), The gender injustice cascade; and: *Durbach, and Chappell* (2014), Leaving Behind the Age of Impunity.)

[443] ILC, Draft conclusions on identification of customary international law, Conclusion 5.

[444] ILC, Draft conclusions on identification of customary international law, with commentaries, para. 1 of commentary to Conclusion 5.

[445] *Id.*, para. 2 of commentary to Conclusion 5.

[446] DARSIWA, para. 1 of commentary to Article 4.

[447] *Hayner* (2011), Unspeakable Truths, p. 12. In addition to truth commissions that are "authoriz[ed] by the state, […] there are many examples of significant non-governmental projects that have documented the patterns of abuse of a prior regime." While such projects and the bodies that organise them might have a considerable impact, they are not bodies whose conduct can contribute to the development of customary international law (see: *Hayner* (2011), Unspeakable Truths, pp. 16-17). For an argument in favour of expanding the number of actors whose

particular their final reports, are therefore important parts of State practice.[448] The Draft Conclusions also highlight that "[t]he relevant practice of States is not limited to conduct *vis-à-vis* other States", but that "conduct within the State, *such a State's treatment of its own nationals*, may also relate to matters of international law",[449] and, finally, that the "practice must be known to other States".[450]

Conclusion 6 liberally states that "[p]ractice may take a wide range of forms", and that "[i]t includes both physical and verbal acts" and "may, under certain circumstances, include inaction."[451] It then goes on to provide an extensive, but not comprehensive list of possible forms exercised in the international as well as in the domestic sphere,[452] and notes that "[t]here is no predetermined hierarchy among [them]".[453] In the paragraphs below, we will observe that States articulate gracious programmes nearly as often as they fail to tangibly implement them. The International Law Commission's explicit articulation to the effect that "it is now generally accepted that verbal conduct (whether written or oral) may also count as practice",[454] is therefore of tremendous importance. A reparation programme will obviously have little value for victims if it is not tangibly implemented,[455] however, for the limited purpose of identifying

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conduct can contribute to the formation of customary international law, see: *Chimni* (2018), Customary International Law, p. 36 ff, in particular p. 42 ff.

[448] I was unable to find sources that state explicitly that truth commissions are organs of the State in the sense of the Articles on State Responsibility. However, "[t]he structure of the State and the functions of its organs are not, in general, governed by international law." "In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance" (DARSIWA, para. 6 of commentary to Chapter II). Thus, considering that truth commissions are established either by the legislative or the executive branch of government, that it is the responsibility of the State to finance them, that they are often endowed with powers analogous to that of the judiciary (e.g.: subpoena powers) and that the commissioners enjoy privileges analogous to that of some other functionaries (e.g.: immunities), the proposition that truth commissions are organs of the State relevant to the development of customary international law appears to be well-founded.

[449] ILC, Draft conclusions on identification of customary international law, with commentaries, para. 3 of commentary to Conclusion 5, emphasis added.

[450] *Id*., para. 5 of commentary to Conclusion 5.

[451] *Id*., para. 1 of commentary to Conclusion 6.

[452] *Id*., para. 2 of commentary to Conclusion 6.

[453] *Id*., paras. 3 and 8 of commentary to Conclusion 6.

[454] *Id*., para. 2. of commentary to Conclusion 6.

[455] *Correa* (2020), Operationalising the Right of Victims of War to Reparation.

customary international law, the articulation of the policy as such counts as State practice.[456] Whether or not this State practice should be ascribed much weight is a separate and logically subsequent question. In that sense, Conclusion 7 states that when "[a]ssessing a State's practice", "[a]ccount is to be taken of all available practice of a particular State, which is to be assessed as a whole." If a State, for example, expresses, that there is general support for the reparations policy, however, that it lacks funds to implement it, its reparation programme can be given considerable weight, while the weight might be reduced if the State does not explain its lack of implementation.[457] A different understanding of State practice would effectively prevent any expensive obligation to ever enter the sphere of customary international law.[458]

Turning to the "requirement […] that the general practice be accepted as law", commonly referred to as *opinio juris*, the commentary to Conclusion 9 specifies that this means that the practice "must be accompanied by a conviction that [the State] is permitted, required or prohibited by customary international law" to engage in the conduct in question.[459] Considering the subject matter of this thesis, the relevant question to ask is whether States that have relevant practice consider themselves *required* to provide reparations to victims of non-State actors.

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[456] The thesis recognises that this approach might appear somewhat impractical; no questions are asked regarding practical matters such as whether reparation programmes are designed well, if the State exhibits much enthusiasm for them or to what extent they are physically realised, if at all. It goes without saying that a thesis posing such questions would be markedly more frustrating to write. Nevertheless, the thesis hopes that a confirmation of the hypothesis would, over time, contribute to making reparations a reality for victims of non-State actors. Its *prima facie* aloof approach is therefore practically oriented, too.

[457] ILC, Draft conclusions on identification of customary international law, with commentaries, para. 4 of commentary to Conclusion 7.

[458] The same reasoning, i.e., that economic, social and cultural rights are resource-heavy and that they therefore cannot be considered to be proper rights but rather guidelines was for decades raised by those who argued that there existed a fundamental distinction between civil and political rights on the one hand and economic, social and cultural rights on the other. As it became increasingly clear that civil and political rights also can demand considerable resources while some economic, social and cultural rights simply required the State's inaction, the arguments were silenced and the thinking is now considered outdated (OHCHR, Frequently Asked Questions on Economic, Social and Cultural Rights (factsheet), OHCHR, 2008). Those who'd attempt to argue that insufficiently implemented reparation programmes did not contribute to State practice as a constitutive element of customary international law could be answered along the same lines.

[459] ILC, Draft conclusions on identification of customary international law, with commentaries, para. 2 of commentary to Conclusion 9.

Mirroring Conclusion 6, Conclusion 10 states that "[e]vidence of acceptance as law (*opinio juris*) may take a wide range of forms".[460] At the danger of stating the obvious, in the commentary to Conclusion 10, the International Law Commission writes that "an express public statement on behalf of a State that a given practice is […] mandated under customary international law provides the clearest indication that the State has […] undertaken such practice […] out of a sense of legal […] obligation. Similarly, the effect of practice in line with the supposed rule may be nullified by contemporaneous statements that no such rule exists."[461] The corresponding footnote clarifies that a typical statement that will have the same effect as saying that no rule exists will be to say that the practice was carried out "*ex gratia*". It is perhaps expected that "express public statement[s]" are almost non-existent when it comes to reparations for victims not of the State. When statements that go into that direction are made, e.g., when a truth and reconciliation commission states that public international law obliges the State to repair every victim, their probative value for this thesis will often be compromised by the same truth and reconciliation commission at a different point stating that the State in some way failed to exercise its obligation to protect. In our quest to find the respective country's understanding of the law it is therefore important to keep in mind that those making statements on behalf of the State are not necessarily international lawyers and that the question of reparations for victims of non-State actors is often approached from a political or a humanitarian rather than from a legal perspective.[462] This reminder should encourage us to

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[460] ILC, Draft conclusions on identification of customary international law, Conclusion 10 (1).

[461] ILC, Draft conclusions on identification of customary international law, with commentaries, para. 4 of commentary to Conclusion 10.

[462] It is perhaps also apt to point out at this point that many countries that are theatres of non-international armed conflicts belong to what Chimni calls "third world nations". About them, he writes:

> "[T]here is the general lack of availability of state practice of third world nations. […] The problem is that the practice of third world states is, in many cases, not systematically assembled and published, making it difficult for it to be furnished or taken into account. The reason for this state of affairs can be traced to, among other things, the lack of human and financial resources to gather and disseminate legally relevant practice. It is also perhaps the case that the practice of active documentation and preparation of digests is part of some cultures more than others, revealing once again that the idea of "formal source" is far from being neutral".
>
> (*Chimni* (2018), Customary International Law, p. 21, footnotes omitted.)

This, however, should not necessarily give their practice less weight and should certainly not be used against victims on their territories.

examine the articulations of any truth and reconciliation commission, as well as other organs making relevant pronouncements, in their entirety, in order to see if it is possible to extract one opinion as the most likely understanding of the law.[463] At the same time we must be careful that when translating less clear or diffuse articulations into the language of public international law, we do not assert *opinio juris* where there is truly none contained in the original text. It is after all possible that a State, practice notwithstanding, does not have an *opinio juris* on the subject matter of reparations. In that sense, the search for an *opinio juris* is less like Edmond Dantès' search for the treasure of Monte Cristo and more like NASA's quest for extra-terrestrial life. It only might exist.

Finally, the evaluation of evidence of State practice and *opinio juris* is qualitative, not quantitative. Conclusion 3 states that "[i]n assessing evidence for the purpose of ascertaining whether there is general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found."[464] Considering the topic of this thesis, it must be kept in mind that the provision of reparations to victims of war for violations of their economic, social and cultural rights will always depend heavily on a State's resources and that the proposed rule might therefore be particularly difficult to implement for conflict-ridden or post-conflict developing countries. Echoing Martti Koskenniemi's faith in that "[i]nternational law's energy and hope lies in its ability to articulate existing transformative commitment in the language of rights and duties and thereby to give voice to those who are otherwise routinely excluded",[465] we can cautiously suggest that these circumstances warrant that envisaged rather than just physically realised practice be taken into account. In relation to *opinio juris*, rather than demanding that States restate the thesis' hypothesis *verbatim*, it might be sufficient to analyse if a concurrence between the hypothesis and the respective State's *opinio juris* is, given what evidence of it does exist, likely. With these methodological considerations in mind, we can proceed to the empirical review.

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[463] See also: United Nations, Vienna Convention on the Law of Treaties, 1969, Article 31, which contains similar guidelines.

[464] ILC, Draft conclusions on identification of customary international law, Conclusion 3 (1).

[465] *Koskenniemi* (2004), The Gentle Civilizer of Nations, pp. 516-517.

3.1 Empirical review

Reparations, including reparations for victims of non-State actors, have received most attention since the advent of transitional justice.[466] However, even beyond that field's influence on and contribution to victims' repair, it is worthwhile to examine whether there exists a sort of organic impulse towards repairing victims not of the State that is independent of the transitional justice context. Chapter 3 therefore looks both at countries that have developed their reparation programmes outside that context, here referred to as the *pre-transitional justice group*, as well as States that have developed their reparation programmes within that context, here referred to as the *transitional justice group*. While focus is given to countries that have already articulated and either fully or partially implemented reparation programmes, countries that have just begun their journey towards a reparation programme are also briefly considered. They are referred to as the *pending group*.

A key consideration in the design of Chapter 3 was that the countries examined should be reasonably diverse. Therefore, Chapter 3 does not only look at the usual suspects but is also interested in countries that remain outside the limelight. The countries examined range the span of the globe. The reader will note that some continents are relatively more represented, however, this is not necessarily because they witness more armed conflict overall but because they witness more non-international armed conflict, including more harmful conduct that cannot be attributed to the State.[467]

The pre-transitional justice group includes countries with government-started programmes implemented largely without the international attention reparation programmes receive today. The State practice of this group is typically defined by both realistic programme design and actual realisation. Sources from which the States' understanding of the law can be extracted are, however, rare. The pre-transitional justice group includes Algeria and Tajikistan. Countries that have embraced the concept of transitional justice are included in the transitional justice

[466] See generally: *Teitel* (2003), Transitional Justice Genealogy; and: *García-Godos* (2008), Victim Reparations in Transitional Justice.

[467] The reader might note that some countries that have recently experienced or are experiencing a non-international armed conflict are not included in the empirical review. The thesis has sought to find a representative number of countries, however, the tragic ubiquity of non-international armed conflict around the world would mean that examining all possible countries would vastly exceed the scope of one thesis.

group and are characterised by ambitious reparation programmes, typically designed by a truth and reconciliation commission and, in stark contrast to the first group, a true plethora of articulations that could reflect the States' understanding of the law. The transitional justice group includes Colombia, Liberia, Peru and Sierra Leone. The last group includes countries that have not yet designed operational reparation programmes but have nevertheless undertaken some steps on the long path towards reparations for victims. While any analysis of this group can only be preliminary, the consistency of the (so far) limited State practice and understanding of the law nevertheless contributes to the understanding of the *status quo* and allows a prediction for the future. This last group includes Afghanistan, the Central African Republic, South Sudan and Uganda. We shall look at the groups one by one, examining, in turn, their practice and their understanding of the law.

3.1.1 The pre-transitional justice group: an organic impulse to repair

The pre-transitional justice group includes countries that have designed their reparation programmes outside the limelight of transitional justice. The reasons for this are, on the one hand, that the reparation programmes in question largely preceded the advent of transitional justice and, on the other and perhaps more speculative hand, that the respective countries were intently careful not to make references to public international law generally or international human rights law in particular. An example of the former is Tajikistan. The conflict in Tajikistan erupted almost immediately after the country's independence on 9 September 1991,[468] and while some "painted the conflict in ideological terms, depicting a clash of secular conservatism with Islamic fundamentalism",[469] it is today generally agreed that it was "a struggle for power between the old guard and political reformers, with loyalty to either side being closely related to regional background and/or elite patronage networks".[470] The violence

[468] Country Profile: Tajikistan, January 2007, Library of Congress – Federal Research Division, 2007, https://www.justice.gov/file/205641/download.

[469] *Lynch* (2001), The Tajik civil war and peace process, p. 50.

[470] *Kevlihan* (2016), Insurgency in Central Asia, p. 421; *Mitchell* (2015), Civilian victimization during the Tajik civil war, p. 358, emphasis added, references omitted; and: *Lynch* (2001), The Tajik civil war and peace process, p. 51. To read more about the origins of the civil war, reaching back to the 1920s, see: *Lynch* (2001), The Tajik civil war and peace process, pp. 52-56; and: *Foroughi* (2002), Tajikistan. For a comprehensive introduction into Tajik history, society and culture, see: *Matveeva, Anna*, The Perils of Emerging Statehood: Civil War and State Reconstruction in Tajikistan, Crisis States Research Centre, 2009, www.files.ethz.ch/isn/98292/wp46.2.pdf

peaked in the second half of 1992,[471] however, the conflict continued until 1997 and arguably even beyond.[472] It claimed a total of between 50,000 and 60,000 lives,[473] produced up to 1 million internally displaced persons and refugees,[474] and devastated the economy.[475] These high numbers are possibly due to the fact that the conflict was carried out by "pursuing asymmetric strategies of warfare, heavily dependent on victimization,"[476] which one author compared to "Serb-style ethnic cleansing".[477] The parties to the conflict were the Government's

(hereinafter: *Matveeva* (2009), The Perils of Emerging Statehood), pp. 1-13*;* *Matveeva* (2009), Tajikistan. Stability First*;* and: *Matveeva* (2015), Tajikistan: Peace Secured.

[471] *Mitchell* (2015), Civilian victimization during the Tajik civil war, p. 359; *Horsman* (1999), Uzbekistan's involvement in the Tajik Civil War 1992-97, p. 38; *Heathershaw* (2007), Peacebuilding as Practice, p. 220; and: *Kevlihan* (2016), Insurgency in Central Asia, p. 421.

[472] There is, in academic literature, some discussion on the groups that were or felt excluded from the peace process, and which continued to pursue their goals in a more or less violent manner even after 1997. To read more about them, see, for example: *Smith* (1999), Tajikistan: The rocky road to peace, pp. 248-250; and: *Lynch* (2001), The Tajik civil war and peace process, pp. 64-65. For an insightful contemporary political document, see: UNSC, Letter dated 24 February from the Charge d'affaires A.I. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General. Annex III: Joint communiqué, issued at Mashhad, Islamic Republic of Iran, on 21 February 1997, UN Doc. S/1997/169, 27 February 1997, in which the two sides wrote:

> "[W]e came to realize that the enemies of peace and stability in Tajikistan are striving to impede [the] implementation [of the Agreement between the President of the Republic of Tajikistan, E. S. Rahkmonov, and the leader of the United Tajik Opposition, S. A. Nuri, on the results of the meeting held in Moscow on 23 December 1996]. For, regrettably, there still exist individuals whose interests are served more in war than in peace. Taking the representatives of international organizations, government employees, members of the opposition and correspondents hostage as well as acts of terrorism carried out by the Rezvan Sodirov Group are instances of such reprehensible acts which have damaged the credibility of our State, nation and Government. In the light of the fact that no individual or group should violate the inalienable rights of human beings, we condemn such acts."

[473] *Mitchell* (2015), Civilian victimization during the Tajik civil war, p. 359, references omitted.

[474] Different sources give different numbers. See: *Id.*, pp. 357 and 365; *Lynch* (2001), The Tajik civil war and peace process, p. 49; or: *Foroughi* (2002), Tajikistan, p. 39. For considerably higher numbers, see: *Matveeva* (2009), The Perils of Emerging Statehood, p. 2 ("The conflict in Tajikistan is unique in the post-Communist world. Reported casualties amount to 157,000 dead, but unofficial estimates put the death toll up to 300,000 out of the pre-war population of 5.1 million, making the Tajik civil war the bloodiest conflict to result from the end of the Communist era", footnote omitted).

[475] *Mitchell* (2015), Civilian victimization during the Tajik civil war, p. 357. See also: *Lynch* (2001), The Tajik civil war and peace process, pp. 66-67 ("In 1998, the Open Society Institute estimated the reconstruction needs of Tajikistan at $7 billion").

[476] *Mitchell* (2015), Civilian victimization during the Tajik civil war, p. 360.

[477] *Roy* (2007), The New Central Asia, p. 140, cited in: *Mitchell* (2015), Civilian victimization during the Tajik civil war, p. 363. It can be noted that although the reference to "Serb style ethnic cleansing" reference was made

Popular Front of Tajikistan,[478] and an array of opposition militias and parties, some of which had united under the United Tajikistan Opposition. On 27 June 1997, President Emomali Rahmon and the Opposition's leader Sayid Abdulloh Nuri signed in Moscow the *General Agreement on the Establishment of Peace and National Accord in Tajikistan* (hereinafter: Tajik General Agreement),[479] following which the opposition was integrated into Government structures.[480] The Tajik General Agreement was "[s]upplemented by a series of protocols",[481] that were adopted prior to the *Agreement* itself. It was these protocols that already contained the country's reparation programme. Even though transitional justice had, at that point, already entered world stage, the pioneer practitioners were focusing the bulk of their attention on Latin American dictatorships,[482] and violations of civil and political rights that characterised life in the Union of Soviet Social Republics.[483] It is true that Tajikistan used to be a Soviet Socialist

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particular in relation to the Popular Front of Tajikistan, Mitchell also wrote that the largely non-State character of the conflict "facilitated a process we may call the socialization of barbarism, or the tendency of conflict actors to mirror each other's behaviour. Operating as they were within the same strategic environment and with similar constraints, it is not surprising that both the [Popular Front of Tajikistan], and the opposition militias engaged in civilian victimization" (*Id.*, p. 360). Beyond displacement, both internal and international, the conflict also included "revenge killings [and] kidnappings", forcible recruitment, sexual violence including rape, "hostage taking, torture, […] looting and wanton destruction of civilian and state property", and forced payments (*Id.*, pp. 361-364, references omitted; and: *Foroughi* (2002), Tajikistan, p. 46 ff).

[478] The pro-Government or governmental Popular Front of Tajikistan was itself a militia that "emerged from the National Guard" and "was formally dissolved in the spring of 1993" (*Mitchell* (2015), Civilian victimization during the Tajik civil war, pp. 359-360). To read up on the Popular Front of Tajikistan's foreign support, see, for example: *Horsman* (1999), Uzbekistan's involvement in the Tajik Civil War 1992-97; or: *Matveeva* (2009), The Perils of Emerging Statehood, pp. 32-35.

[479] UNSC, Letter dated 1 July 1997 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General. Annex I: General Agreement on the Establishment of Peace and National Accord in Tajikistan, signed in Moscow on 27 June 1997, UN Doc. S/1997/510, 2 July 1997.

[480] See, for example: *Lynch* (2001), The Tajik civil war and peace process. It should be noted that despite this development, United Tajikistan Opposition's conduct remains unattributable to Tajikistan. In its commentary to Article 10, the International Law Commission explicitly articulated that "the rule in paragraph 1 should not be pressed too far in the case of governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement", and that "[t]he State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government" (DARSIWA, para. 7 of commentary to Article 10).

[481] *Lynch* (2001), The Tajik civil war and peace process, p. 61.

[482] *Teitel* (2003), Transitional Justice Genealogy, p. 71 ff.

[483] *Ibid.*

Republic, too,[484] however, the civil war was subsequent to the country's independence and therefore (still) outside the new field's area of focus.[485]

An example of a country ostensibly careful not to reference public international law was Algeria. Algeria's civil war began in 1991 when the Army staged a coup and prevented a second round of parliamentary elections that would have propelled the Islamic Salvation Front into power. "Following the military coup, authoritarian rule was re-instated, while the Islamic Salvation Front was banned and its members imprisoned", however, "[r]ather that simply fading away, a significant number of Islamist militants took up arms against the regime".[486] One of these groups was the Armed Islamic Movement, a group that first emerged in the 1980s,[487] and then again in 1992, following the Army's coup. The Islamic Salvation Front, "realiz[ing] that they had lost the initiative" to come to power democratically, "endorsed [the Armed Islamic Movement]'s armed struggle in 1993 and subsequently went on to set up its armed wing, […] the Islamic Salvation Army".[488] In parallel to that, the Armed Islamic Group, a more extremist group, also formed in 1992. "It portrayed its struggle as Muslims fighting an apostate state and viewed their declared jihad as not only a means of reaching their goals but also as an end in itself."[489] Unsurprisingly, therefore, it "rejected democracy" and was not interested in negotiating an end to the conflict with the Government.[490] This new understanding

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[484] Country Profile: Tajikistan, January 2007, Library of Congress – Federal Research Division, 2007.

[485] A June 2022 search of the phrase 'transitional justice' on Google Scholar, filtered to show texts published between 1980 and 1992, yielded, without citations, only 71 results. The results relating to transitional justice as understood today, that is, in its broadest sense, "mechanisms" that "uncover and deal with crimes of the past" (see: About the Journal, International Journal of Transitional Justice, no date, academic.oup.com/ijtj/pages/About), focus on "punish[ing] state criminals" (*Malamud-Goti* (1990), Transitional Governments in Breach; and: *Orentlicher* (1991), Settling Accounts) and the difficulty of doing so (see: *Zalaquett* (1990), Confronting Human Rights Violations Committed by Former Governments; and: *Zalaquett* (1992), Balancing Ethical Imperatives and Political Constraints). The overall focus of those early ages was on "State terror and resistance in Latin America" (*Corradi, et al. (eds.)* (1992), Fear at the Edge; and: *Correa* (1992), Dealing with Past Human Rights Violence).

[486] *Cavatorta* (2008), Alternative Lessons from the 'Algerian Scenario', p. 7.

[487] The group emerged at "demonstrations held for the introduction of sharia law" (Government of Algeria – AIS, Uppsala Conflict Data Program, University of Uppsala, no date, ucdp.uu.se/statebased/828).

[488] Algeria: Government, Uppsala Conflict Data Program, University of Uppsala, no date, ucdp.uu.se/conflict/386.

[489] *Ibid.*

[490] *Ibid.*

of conflict came to influence victimisation patterns, too. While the initial violence was limited to belligerents, the Islamists in 1993 "expanded their targets to include government officials, representatives of the opposition, foreigners, and journalists"; the situation deteriorated further when the Armed Islamic Group "issu[ed] a fatwa that charged the whole Algerian society with apostasy" and "launched a new strategy, specifically targeting the civilian population."[491] "[I]n 1996-1999, violence reached a new level of cruelty, as at least 67 large-scale massacres took place", some described the conflict as "carnage".[492] "[T]he Algerian regime was able to deal with the challenge of the insurgency and effectively put an end to the threat of its stability by 1997",[493] even though the war is typically considered to have effectively ended a few years later, in 2002.[494]

The reparation programme for violations of economic, social and cultural rights was first articulated already in a legislative decree dated 19 January 1993 (hereinafter: *Décret législatif n° 93-01*),[495] subsequent to another legislative decree dated 30 September 1992 on the fight against subversion and terrorism (hereinafter: *Décret législatif n° 92-03*).[496] Rather than designing an all-encompassing reparation programme at the end of the conflict, the reparation programme in Algeria began without fanfare as only one provision, Article 145, in the just mentioned *Décret législatif n° 93-01*,[497] and zoomed in, first and foremost, on killed or injured public servants. From the first operationalisation in the executive decree dated 27 July 1993 (hereinafter: *Décret exécutif n° 93-181*),[498] it was revised and updated three times (on 10 April

[491] *Ibid.*

[492] *Ibid.*

[493] *Cavatorta* (2008), Alternative Lessons from the 'Algerian Scenario', p. 10.

[494] Algeria: Government, Uppsala Conflict Data Program, University of Uppsala, no date.

[495] Décret législatif n° 93-01 du 19 janvier 1993 portant loi de finances pour 1993, Hauté Comité d'Etat, 19 janvier 1993. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 32ème année, n° 04, 20 janvier 1993, p. 3 (hereinafter: Décret législatif n° 93-01).

[496] Décret législatif n° 92-03 du 30 septembre 1992 relatif à la lute contre la subversion et le terrorisme, Hauté Comité d'Etat, 30 septembre 1992. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 31' année, n° 70, 1 octobre 1992, p. 1490.

[497] Décret législatif n° 93-01.

[498] Décret exécutif n° 93-181 du 27 juillet 1993 fixant les modalités d'application des dispositions de l'article 145 du décret législatif n° 93-01 du 19 janvier 1993 portant loi de finances pour l'année 1993, Le Chef du

1994,[499] on 12 February 1997,[500] and one last time on 13 February 1999),[501] developing in parallel with the nature of the conflict. The two most recent executive decrees cite, in their respective Preambles, social security legislation but make no reference to public international law. In hindsight this is perhaps not surprising as not even *Décret législatif n° 92-03* did so and, notably, neither the subsequent reparation programmes for victims of the State,[502] as well as measures in favour of families who were affected by the involvement of a family member in terrorism,[503] all developed in 2006, following the adoption, through referendum, of the *Charte pour la paix et la réconciliation nationale*.[504] Algeria's various reparation programmes were, in summary, not articulated as an international affair.

Gouvernement, 27 julliet 1993. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 32ème année, n° 50, 28 julliet 1993, p. 5 (hereinafter: Décret exécutif n° 93-181).

[499] Décret exécutif n° 94-86 du 10 avril 1994 relatif à la pension de service et à l'indemnisation des dommages corporels résultant d'actes de terrorisme, Le Chef du Gouvernement, 10 avril 1994. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 33ème année, n° 22, 18 avril 1994, p. 3 (hereinafter: Décret exécutif n° 94-86).

[500] Décret exécutif n° 97-49 du 12 février 1997 relatif à l'attribution de l'indemnisation et à l'application des mesures consenties au profit des personnes physiques victimes de dommages corporels ou matériels subis par suite d'actes de terrorisme ou d'accidents survenus dans le cadre de la lutte anti-terroriste, ainsi qu'à leurs ayants droit, Le Chef du Gouvernement, 12 février 1997. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 36ème année, n° 10, 19 février 1997, p. 4 (hereinafter: Décret exécutif n° 97-49).

[501] Décret exécutif n° 99-47 du 13 février 1999 relatif à l'indemnisation des personnes physiques victimes de dommages corporels ou matériels subis par suite d'actes de terrorisme d'accidents survenus dans le cadre de la lutte anti-terroriste, ainsi qu'à leurs ayants-droit, Le Chef du Gouvernement, 13 février 1999. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 38ème année, n° 09, 17 février 1999, p. 4 (hereinafter: Décret exécutif n° 99-47); and: Décret exécutif n° 99-48 du 13 février 1999 portant création, organisation et fonctionnement des foyers d'accueil pour orphelins victimes du terrorisme, Le Chef du Gouvernement, 13 février 1999. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 38ème année, n° 09, 17 février 1999, p. 15 (hereinafter: Décret exécutif n° 99-48).

[502] Décret présidentiel n° 06-93 du 28 février 2006 relatif à l'indemnisation des victimes de la tragédie nationale, Le Président de la République, 28 février 2006. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 45ème année, n° 11, 28 février 2006, p. 7.

[503] Décret présidentiel n° 06-94 du 28 février 2006 relatif à l'aide de l'Etat aux familles démunies éprouvées par l'implication d'un de leurs proches dans le terrorisme. Le Président de la République, 28 février 2006. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 45ème année, n° 11, 28 février 2006, p. 11 (hereinafter: Décret présidentiel n° 06-94).

[504] Ordonnance n° 06-01 du 27 février 2006 portant mise en œuvre de la Charte pour la paix et la réconciliation nationale. Le Président de la République, 27 février 2006. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 45ème année, n° 11, 28 février 2006, p. 3.

3.1.1.1 Reparation by any other name

One key observation is that reparation programmes developed outside the framework of transitional justice were not called reparations. In Tajikistan, the parties to the Tajik General Agreement used the following vocabulary: "voluntary, safe and dignified repatriation and reintegration of refugees, including legal, economic and social guarantees for their protection",[505] "programmes to reintegrate refugees, displaced persons",[506] "assistance in restoring the national economy",[507] "safe and appropriate return of the refugees, their active involvement in the social, political and economic life of the country and the provision of assistance in reconstruction of the housing and industrial and agricultural facilities destroyed by the war",[508] "the voluntary return, in safety and dignity, of all refugees and displaced persons to their homes",[509] and "reintegrate returning refugees and displaced persons into the social and economic life of the country, which includes the provision to them of humanitarian and financial aid, assistance in finding employment and housing and the restoration of all their rights as citizens of the Republic of Tajikistan (including the return to them of dwellings and property and guaranteed uninterrupted service)".[510] While the word 'reparation' was not used by the Tajik belligerents, the content of the undertakings envisaged squarely fits the definition of the term 'reparation' provided in the Introduction.

In Algeria, the word 'reparation' was also not generally used when discussing what victims had the right to. In fact, in the relevant legislation, the word itself only appeared once, in the executive decree dated 10 April 1994 on service pensions and the compensation of bodily

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[505] UNSC, Letter dated 21 August 1995 from the Permanent Representative of Tajikistan to the United Nations addressed to the Secretary-General. Annex: Protocol on the fundamental principles for establishing peace and national accord in Tajikistan, 17 August 1995, UN Doc. S/1995/720, 23 August 1995.

[506] *Ibid.*

[507] *Ibid.*

[508] UNSC, Letter dated 24 December 1996 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, Annex II: Protocol of the main functions and powers of the Commission on National Reconciliation, UN Doc. S/1996/1070, 27 December 1996.

[509] UNSC, Progress report of the Secretary-General on the situation in Tajikistan. Annex III: Protocol on refugees, signed in Tehran on 13 January 1997, UN Doc. S/1997/56, 21 January 1997 (hereinafter: Tajik Protocol on Refugees).

[510] *Ibid.*

injuries resulting from terrorist acts (hereinafter: *Décret exécutif n° 94-86*). In this decree, which can be viewed as the first revised and updated edition of the reparation programme for victims of non-State actors first set up in *Décret exécutif n° 93-181*, Article 10 (2) said that the "réparation" mentioned in Article 10 (1) was to be carried out by the employer. Subsequent decrees no longer mentioned the word 'reparation' but rather opted for 'compensation' ("indemnisation"), which also appeared in the titles of subsequent executive decrees.[511]

The use of vocabulary other than reparation is not as such problematic as reparation is an abstract word and a sort of umbrella term for an endlessly diverse list of practical measures, including, among others, resettlement or monthly pensions. This was true even here as Article 9 of both later executive decrees stated that the "indemnisation" provided for in the preceding articles excluded any other "réparation".[512] The key is to inquire who the measures were for and why the Government was doing those measures for the designated beneficiaries. In other words, one must ask whether the measures were being done for everyone or were implemented for victims *qua* victims. In content, both the measures envisaged by the Tajik protocols as well as the Algerian decrees squarely fit the definition of reparations.

3.1.1.2 The one-stop shop

We see that in the pre-transitional justice group, reparation programmes were typically (co-) designed by the executive and then also implemented by it, either as a direct result of political compromise or in response to political necessity. In Tajikistan, the reparation programme was laid out in protocols that later became an inherent part of the Tajik General Agreement, concluded between the warring belligerents. In Algeria, the term 'décret législatif' might suggest that the reparation programme was at least, at least at its inception, a legislative undertaking, however, *Décret législatif n° 93-01* was actually adopted by the "military-backed High Council of State"[513] ("Le Haut Comité d'État"), a body that succeeded President Chadli

[511] Décret exécutif n° 97-49; and: Décret exécutif n° 99-47.

[512] Décret exécutif n° 97-49; and: Décret exécutif n° 99-47.

[513] Algeria. Elections in the Shadow of Violence and Repression (report), Human Rights Watch, 1997, www.refworld.org/docid/3ae6a7d1c.html.

Benjadid after he resigned in January 1992, having just dissolved the parliament.[514] Following the "legislative" decree, it was the executive, i.e., the Prime Minister ("Le Chef du Gouvernement"), that designed and, crucially, developed and expended the reparation programme with executive decrees adopted in 1993, 1994, 1997 and 1999.[515] A direct consequence of this executive-led nature of the reparations endeavour was that the programmes were limited in scope. This was especially true for Algeria's programme which focused almost exclusively on various modalities of monetary compensation.[516] However, at the same time, the reparation programmes, limited though they might have been, addressed what they had to. In Tajikistan, the key challenge was the large-scale displacement, both within and beyond the country's borders. In Algeria, displacement was not identified as a central problem. Instead, the programme focused on making up for the death and injuries of families' breadwinners, and was tied into the general social security framework already existing in the country. The programme from 1997 onward also addressed damages to housing, clothing and vehicles, and made provisions for the compensation of those.[517] Thus, while the programmes were, from today's perspective, lacking a comprehensive approach to reparations and did not identify all measures that would and could have had reparatory value, they did address violations of economic, social and cultural tights with tangible, down-to-earth measures. There are, of course, conceivable downsides to reparation programmes being developed in such a technocratic and top-down manner. Victim ownership comes to mind.[518] However, it was this manner that allowed a timely response to victimisation and, as is particularly visible from the updates in the Algerian programme, a constant adaptation to changing conflict dynamics. For

[514] Country Profile: Algeria, May 2008, Library of Congress – Federal research Division, 2008, www.refworld.org/pdfid/4950afcd0.pdf.

[515] Décret exécutif n° 93-181; Décret exécutif n° 94-86; Décret exécutif n° 94-91 du 10 avril 1994 fixant les modalités et les conditions d'indemnisation des victimes d'actes de terrorisme et le fonctionnement du fonds d'indemnisation, Le Chef du Gouvernement, 10 avril 1994. In: Journal Officiel de la République Algérienne Démocratique et Populaire (traduction française), 33ème année, n° 22, 18 avril 1994, p. 9; Décret exécutif n° 97-49; and: Décret exécutif n° 99-47.

[516] An important exception is *Décret exécutif n° 99-48*, which established and organised shelters for orphans due to terrorism.

[517] This development can be glimpsed from the titles of the respective decrees. While *Décret exécutif n° 94-86* only concerns "dommages corporels", *Décret exécutif n° 97-49* addresses "dommages corporels ou matériels".

[518] UNSG, Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice, United Nations, 2010, www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf, p. 2.

example, while *Décret exécutif n° 94-86* largely discussed the death and injury of public servants, later decrees addressed the deaths and injuries of those working both in the public and the private sector, and those not working at all, including retired persons and children. We have seen above that the conflict in Algeria took consecutive turns for the worse in the sense that the conflict became increasingly characterised by the victimisation of the civilian population. Through the decree-route, the reparation programme was able to keep up with that dynamic.

3.1.1.3 The reparation programmes' beneficiaries

Reparation programmes in this group treated victims in one of two ways. The first was that victims were treated as one homogenous group. This is the example of Tajikistan where the protocols referenced the displaced population as such without distinguishing *whose* victims the displaced people, or subgroups of them, might have been. One could, of course, argue that given the key violation in the Tajik conflict, which was a violation of the right to housing, differentiation would not make sense or even be possible, however, it must be remembered that the conflict did end up adopting a regional and ethnical character, which would have allowed the Government to guesstimate which victims were its own and which persons were, if victimised directly rather than having left their homes because of the generalised violence, victimised by the other side. That differentiation would definitely have been possible can be glimpsed from the following wording from the *Protocol on refugees*, which stated that "the Government of the Republic of Tajikistan assume[d] the obligation […] not to institute criminal proceedings against returning refugees or displaced persons for their participation in the political confrontation and the civil war".[519] While the United Tajikistan Opposition arguably insisted on that last part, it might not necessarily have objected if the Government had only been willing to repair *its* victims as that set would have largely coincided with the Opposition's base. We know, however, that this is not how the protocols were written, and that the Government agreed to repair all victims and treat them as one large group. This was a deliberate *choice*.

[519] Tajik Protocol on Refugees, para. 2.

The other way to treat the universe of victims of war is to treat them separately based on the perpetrator. This is the example of Algeria. The Algerian High Council of State adopted *Décret législatif n° 92-03* on 30 September 1992. On its basis, reparations for victims of terrorism were considered in the budget for 1993 and laid out in *Décret exécutif n° 93-181*, which was then updated multiple times, the last time with *Décret exécutif n° 99-47*. Throughout that time, there was no reparation programme for victims of the State, most likely because the Government did not consider or did not want to admit that there were any, apart from those who were terrorists anyway. When a reparation programme for victims of the "tragédie nationale", mostly a synonym for people disappeared by the Government,[520] as well as a programme to aid families who were affected by the involvement of a family member in terrorism,[521] was eventually designed following the referendum's result's endorsement of *Charte pour la paix et la réconciliation nationale*, it continued to uphold the differentiation of different categories of groups, even though it ended up designing similar, monetary payments-based programmes for all groups.

What we are faced with at this point in the analysis is two very different countries, far apart, whose State practice includes the provision by the State of reparations to victims of violations of economic, social and cultural rights perpetrated by non-State actors. Treating them as part of a homogenous group of victims or separately, but not differently, and definitely not worse, the practice of these two States in the pre-transitional justice group strongly supports the hypothesis of this thesis.

3.1.1.4 An intangible understanding of the law: a group of few words

Moving on to Tajikistan's and Algeria's understanding of the law, the introductory paragraph to subchapter 3.1 noted that the reparation programmes of the pre-transitional justice group were not accompanied with a plethora of articulations that could be considered to reflect their *opinio juris* or, more generally, their understanding of the law. There are, nevertheless, a few elements that are relevant for the analysis of the understanding of the law of these two

[520] *Osman, Ines*, There must be truth and justice for Algeria's disappeared. The 2006 Charter on National Peace and Reconciliation continues to undermine justice in Algeria, Al Jazeera, 3 March 2021, www.aljazeera.com/opinions/2021/3/3/there-must-be-truth-and-justice-for-algerias-disappeared.

[521] Décret présidentiel n° 06-94.

countries. What stands out most in regard to Tajikistan is the Government's appeal for international support for its programme. This is not enough to show that the Government's stance on the matter coincided with this thesis' hypothesis, i.e., that the Government thought the reparation programme was required of it under public international law, but it shows that the Government, as a minimum, thought that it was desired, so much so that other countries would be willing support it financially.

In regard to Algeria, what stands out is Article 9 of *Décret exécutif n° 97-49* and *Décret exécutif n° 99-47*, already briefly mentioned above, which, in full, said:

> "L'indemnisation prévue aux articles 7 et 8 du présent décret exclut toute autre réparation du fait de la responsabilite civil de l'Etat",

or, in other words, that the compensation given in accordance with the respective decree excluded the provision of any other "réparation" that would be due because of the State's civil responsibility. This can be interpreted as that it was the Government's understanding that the reparations given in the form of compensation were the Government's obligation and, therefore, correspondingly, a right of the victims. The same wording on the exclusion of "tout autre réparation" was used in regard to victims of the "tragédie nationale" but, and this is highly significant, not in relation to families who were affected by a family member's involvement in terrorism. On the contrary, *Décret exécutif n° 06-94* explicitly stated that "l'aide" was given "au titre de la solidarité nationale", not responsibility. The conclusion is therefore warranted that it was the Government's understanding that it owed reparations to victims of terrorism. However, none of the documents made a reference to public *international* law, which means that we cannot conclude that the Government thought that public international law or international human rights law obliged it to repair victims of non-State actors. It must be nevertheless regarded as significant that it thought it was *obliged*.

What are we to make of those bits and pieces? They are hardly enough to conclude that the understanding of the law of either country was something or other. If asked directly, would Tajikistan and Algeria explain that they thought victims had rights in accordance with the thesis' hypothesis, or would they rather have stated that reparations as they were designed were a political necessity or perhaps an obligation based on domestic law only? We cannot know. Based on Tajikistan's appeal for international assistance and Algeria's reference to the State's

"responsabilité civile", however, we can conclude that the two countries either did not have a tangible understanding of the law or, if they did, that it did not oppose the thesis' hypothesis. either way, what they clearly did have was an organic impulse to repair.

3.1.2 The transitional justice group: "the centrality of victims"

Distinct from the countries in the pre-transitional justice group are those whose reparation programmes reflect the golden era of transitional justice. A distinguishing feature of this group was that reparation programmes deferred to the new discipline's guiding principles, including the principle to "[e]nsure the centrality of victims in the design and implementation of […] processes and mechanisms".[522] The burgeoning of the victims' prominence led post-conflict countries to refrain from designing reparation programmes either in peace agreements or at the executive level, i.e., in a top-down manner. Instead, governments, often in agreement with the other belligerent(s), envisaged a new body that, unburdened by the past, would have legitimacy in addressing the plight of the victims and, in addition, also represent a reparatory measure through its very existence.[523] Subsequent to peace agreements, these bodies, typically referred to as truth and reconciliation commissions, would be created by legislative acts and a few years down the line propose reparation programmes in their respective final reports.

3.1.2.1 The middleman

One early example of this sequence of events – peace agreement, legislative act, truth commission with the mandate to address the victims' plight – can be found in one of transitional justice's earliest children, Guatemala, where the *Agreement on a Firm and Lasting Peace*, signed on 29 December 1996 between the Government of Guatemala and the Guatemalan National Revolutionary Unity,[524] ended a conflict that had lasted for over 30 years during which it yielded hundreds of thousands of killed or disappeared, hundreds of thousands of refugees

[522] UNSG, Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice, United Nations, 2010, p. 2.

[523] Basic Principles and Guidelines, para. 22.

[524] UNSC, Identical letters dated 5 February 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council. Annex II: Agreement on a firm and lasting peace, UN Doc. S/1997/114, 7 February 1997.

and a million internally displaced.[525] Similarly as in Tajikistan, "[t]he agreement also br[ought] into effect all the previous agreements encompassing military, political, social, economic and environmental issues and b[ound] them into a comprehensive nationwide agenda for peace."[526] Among these "previous agreements" were the *Comprehensive Agreement on Human Rights* of 29 March 1994,[527] and, most importantly, the *Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer*, which was signed on 23 June 1994.[528] The latter document defined as one of the purposes of the future body to

> "[f]ormulate specific recommendations to encourage peace and national harmony in Guatemala. The Commission shall recommend, in particular, measures to preserve the memory of the victims, to foster a culture of mutual respect and observance of human rights and to strengthen the democratic process."[529]

Another classroom example of the above-mentioned sequence comes from a transitional justice golden era-country, Sierra Leone. Sierra Leone's non-international armed conflict(s) took place between 1991 and 2002.[530] While a number of non-State actors were active during the conflict,

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[525] Among the many atrocities that characterised the conflict was the destruction of 600 entire villages.

[526] UNSC, Identical letters dated 5 February 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, UN Doc. S/1997/114, 7 February 1997.

[527] UNSC, Letter dated 8 April 1994 from the Secretary-General to the President of the General Assembly and to the President of the Security Council. Annex I: Comprehensive Agreement Human Rights, UN Doc. S/1994/448, 19 April 1994.

[528] UNSC, Letter dated 28 June 1994 from the Secretary-General to the President of the General Assembly and to the President of the Security Council. Annex II: Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, UN Doc. S/1994/751, 1 July 1994.

[529] *Id*., Purposes, III.

[530] The starting date is pinned "[o]n 23 March 1991 […] when forces crossed the border from Liberia […] to overthrow the corrupt and tyrannical government of Joseph Saidu Momoh and the All People's Congress […] which had ruled Sierra Leone since 1968" (Witness to Truth (vol. 2), p. 3 (para. 1)). The war ended on 18 January 2002 (Sierra Leone News. January 2002, The Sierra Leone Web, no date, www.sierra-leone.org/Archives/slnews0102.html). The same dates were also identified by the Truth and Reconciliation Commission (hereinafter: TRC (Sierra Leone)) as the timeframe within which a violation must have had occurred for a victim to be eligible for reparations. The Commission wrote that "[f]or a person to be eligible for reparations, the event or injury sustained had to have occurred between 23 March 1991 and 1 March 2002" (Witness to Truth

the primary belligerents were the Government in the form of the Sierra Leone Army, on the one hand, and the Revolutionary United Front that declared that it wanted "to overthrow the corrupt and tyrannical government of Joseph Saidu Momoh and the" ruling "All People's Congress",[531] on the other.[532] The *Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* (hereinafter: Lomé Agreement) was signed on 7 July 1999,[533] and even though fighting did not cease for another three years, the Lomé Agreement is considered to be the beginning of the end of the conflict.[534] Among other comprehensive post-conflict arrangements, the document also prescribed the establishment of

(vol. 2), p. 248 (para. 87), footnote omitted). For an overview of the conflict, as well as its precursors, see: *Id.*, pp. 3-17 (paras. 1-66).

[531] *Id.*, p. 3 (para. 1).

[532] *Id.*, p. 13 (para 46). In addition to the Sierra Leone Army and the Revolutionary United Front, many other groups took part in the Sierra Leonean civil war(s). The separate character of these groups must be considered with caution as the civil war was characterised by "factional fluidity". Fighters changed groups and the groups themselves oscillated between support for and opposition to the Government (see: *Id.*, p. 12 (para. 36)). Nevertheless, the National Patriotic Front of Liberia, the Civil Defence Forces and the so-called West Side Boys deserve mention as the most infamous fractions. The National Patriotic Front of Liberia fought on the side of the Revolutionary United Front and TRC (Sierra Leone) found it to be directly responsible for "the original armed incursion" into Sierra Leone as well as "for the initial peak in brutality against civilians and, especially, against traditional and state authorities" (*Id.*, pp. 85 and 86 (paras. 379 and 382)). "[B]eyond [the] direct responsibility for systematic violations and abuses[,] [t]he [National Patriotic Front of Liberia] continued to provide support to the [Revolutionary United Front] in diverse ways for the rest of the conflict period" (*Id.*, p. 86 (para. 384)). The conduct of the National Patriotic Front of Liberia could reasonably be attributed to Liberia after the reconstituted National Patriotic Front of Liberia, now called the National Patriotic Party, won the 1997 general election (NPFL, Uppsala Conflict Data Program, University of Uppsala, no date, ucdp.uu.se/actor/507). Contrary to the National Patriotic Front of Liberia, the other two groups, i.e., the Civil Defence Forces and the West Side Boys, at some point, and particular towards the end, fought on the side of the Government and were to various degrees considered to represent State's security forces. Some of their conduct can conceivably be attributed to the Sierra Leone. (In relation to the Civil Defence Forces, see: Witness to Truth (vol. 2), pp. 28, 74, 77 and 80 (paras. 33, 320, 337 and 361); in relation to the West Side Boys, see: *Id.*, pp. 72, 73 and 74 (paras. 305, 318 and 320).) As far as international organisations and foreign States are concerned, their conduct remains attributable to them. (In relation to ECOMOG/ECOWAS, se: *Id.*, p. 84 (paras. 367-368); and: in relation to the United Kingdom, see: *Id.*, p. 84 (paras. 369).)

[533] UNSC, Letter dated 12 July 1999 from the Chargé d'affaires ad interim of the Permanent Mission of Togo to the United Nations addressed to the President of the Security Council. Annex: Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, UN Doc. S/1999/777, 12 July 1999 (hereinafter: Lomé Agreement).

[534] Witness to Truth (vol. 2), p. 3 (para. 3).

a truth and reconciliation commission,[535] which was to "recommend measures to be taken for the rehabilitation of victims of human rights violations".[536] The enabling legislation in the form of the *Truth and Reconciliation Commission Act* was adopted less than a year later,[537] and tasked the new body "to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered."[538] At the same time, it also gave it the broad authority "to do all such things as may contribute to the fulfilment of [its] object."[539] The Truth and Reconciliation Commission (hereinafter: TRC (Sierra Leone)) was eventually established on 5 July 2002.[540]

Four years after the Lomé Agreement, Article XIII of the *Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia and the political parties*, signed on 18 August 2003, by the Government of Liberia, the Movement for Democracy in Liberia, Liberians United for Reconciliation and Democracy, as well as 18 other political parties, closely mirrored the Lomé Agreement as it envisaged the establishment of a Truth and Reconciliation Commission (hereinafter: TRC (Liberia)) that was to "recommend measures to be taken for the rehabilitation of victims of human rights violations."[541] Subsequent legislation tasked TRC (Liberia) to

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[535] Lomé Agreement, Articles VI (2) (ix) and XXVI; see also: Truth and Reconciliation Commission for Sierra Leone, Witness to Truth. Report of the Sierra Leone Truth and Reconciliation Commission. Volume 1, 5 October 2004, www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents/volume-one/item/witness-to-the-truth-volume-one-chapters-1-5?category_id=11 (hereinafter: Witness to Truth (vol. 1)), p. 23 (para. 1).

[536] Lomé Agreement, Article XXVI (2).

[537] Truth and Reconciliation Commission Act, Parliament of Sierra Leone, 1 January 2000, www.refworld.org/pdfid/3fbcee4d4.pdf.

[538] *Id*., section 6 (1).

[539] *Id.*, section 6 (2) (c); see also: section 15 (2).

[540] Witness to Truth (vol. 1), p. 24 (para. 4).

[541] Letter dated 27 August 2003 from the Permanent Representative of Ghana to the United Nations addressed to the President of the Security Council. Annex: Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia and the political parties, UN Doc. S/2003/850, 29 August 2003, Article XIII (3).

> "[a]dopt[] specific mechanisms and procedures to address the experiences of women, children and vulnerable groups, paying particular attention to gender based violations, as well as to the issue of child soldiers, providing opportunities for them to relate their experiences, addressing concerns and recommending measures to be taken for the rehabilitation of victims of human rights violations in the spirit of national reconciliation and healing."[542]

Considering each country's uniqueness, it is perhaps not surprising that not *all* followed the above-mentioned sequence to the letter. In Peru, for example, where the *Partido Comunista del Perú – Sendero Luminoso* (hereinafter: Shining Path) was defeated militarily, the Truth Commission, later renamed Truth and Reconciliation Commission (hereinafter: TRC (Peru)),[543] was established not by legislation following a peace agreement but rather by Valentín Paniagua,[544] who took over as interim President after Alberto Fujimori had "fled to Japan" following a corruption scandal.[545] TRC (Peru) was established on 2 June 2001 and one its objectives was to "prepare proposals to repair and dignify victims and their next of kin".[546] Another exceptional scenario and perhaps the most well-known example of a country that was influenced by the transitional justice framework but did not follow the peace agreement, legislative act, truth commission-sequence is Colombia where several reparative measures were designed and implemented *before* the conclusion of the *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, signed by the Government of Colombia

[542] Act to Establish the Truth and Reconciliation Commission, National Transitional Legislative Assembly (Liberia), 10 June 2005, www.refworld.org/docid/473c6b3d2.html, section 4 (e). The *Act to Establish the Truth and Reconciliation Commission* was adopted on 10 June 2005 and the Truth and Reconciliation Commission began its work on 22 June 2006.

[543] Decreto Supremo N° 065-2001-PCM, El Presidente de la República del Perú, 4 June 2001, www.cverdad.org.pe/lacomision/cnormas/normas01.php (hereinafter: Decreto Supremo N° 065-2001-PCM); and: Decreto Supremo N° 101-2001-PCM, El Presidente de la República del Perú, 31 August 2001, www.usip.org/sites/default/files/file/resources/collections/commissions/Peru01-Charter/Peru01-Charter_decree101.pdf.

[544] Decreto Supremo N° 065-2001-PCM.

[545] *Root* (2013), Peru, p. 373.

[546] Decreto Supremo N° 065-2001-PCM, Article 2 (c) ("Elaborar propuestas de reparación y dignificación de las víctimas y de sus familiares"). See also, on Peru: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, pp. 148-151.

and the Revolutionary Armed Forces of Colombia – People's Army on 24 November 2016.[547] Colombia's flagship transitional justice measure was, and no doubt remains,[548] *Ley 1448*, better known as the *Victims and Land Restitution Law* (hereinafter: *Ley 1448*). *Ley 1448* was signed into law on 10 June 2011,[549] thereby preceding the *Final Agreement* by over 5 years.[550]

In the countries above, with the exception of Colombia, the establishment of a truth and reconciliation commission preceded the development of a reparation programme. While there are some differences between the countries in how the respective truth and reconciliation commissions came about, the key commonality is that all of them eventually proposed and designed a reparation programme for victims of war. While this result could obviously be envisaged in Peru, where the term 'reparation' was specifically mentioned in the decree establishing TRC (Peru),[551] other truth and reconciliation commissions received less tangible guidance. Guatemala's, in particular, could not be said to have been directed towards designing a reparation programme at all. That all truth and reconciliation commissions ultimately arrived at a reparation programme and that each of those programmes, as we shall see later on, included reparations for violations of economic, social and cultural rights, has to be considered as significant in and of itself.

3.1.2.2 The middleman's ambition

In contrast to Tajikistan and Algeria, where the political leadership reacted to the circumstances of the day in real time, the reparation programmes developed in countries inspired by transitional justice came with a relatively great delay, however, also with the ambition to be not only responsive to the victims' plight but to put it at the very centre of their

[547] Colombian Final Agreement.

[548] Colombia extends Victims' Law until 2031, Justice for Colombia, 19 November 2020, justiceforcolombia.org/news/colombia-extends-victims-law-until-2031/.

[549] Ley 1448, El Congreso de la República de Colombia, 10 June 2011 (hereinafter: Ley 1448). For an accessible introduction into Ley 1448, see: Colombia: The Victims and Land Restitution Law (analysis), Amnesty International, 2012. www.refworld.org/pdfid/4f99029f2.pdf.

[550] See also, on Colombia: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, pp. 145-148.

[551] Decreto Supremo N° 065-2001-PCM, Article 2 (c).

considerations.[552] It appears that whereas countries in the pre-transitional justice group understood victims to be no more than recipients, countries in the transitional justice group, in line with the new field's guiding principle of "[e]nsur[ing] the centrality of victims", actively reached out for the latter's opinions,[553] and integrated them into their programmes. Unsurprisingly, perhaps, the reparation programmes designed were therefore incredibly ambitious. Even though the importance of financial prudence was emphasised, this was done subsequent to illustrations of horrendous victimisation, which explains why the commissions, despite stressing that they wanted to be practical, they seldomly were.

In Guatemala, the Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer (hereinafter: Commission for Historical Clarification), observed that "state forces and related paramilitary groups were responsible for 93% of the violations documented" and that their victims, "in ethnic terms, the vast majority were Mayans".[554] This led the Commission to "conclude[] that agents of the State of Guatemala, within the framework of counterinsurgency operations carried out between 1981 and 1983, committed acts of genocide against groups of Mayan people".[555] As for the conduct of the opposition, the Commission did not accuse the guerrillas, to whom it attributed "3% of the violations registered",[556] of genocide, it did, however, note that "[t]he guerrilla

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[552] See, for example: Ley 1448, Article 1.

[553] See, for example: UNSG, Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice, United Nations, 2010, p. 6 ("National consultations, conducted with the explicit inclusion of victims and other traditionally excluded groups, are particularly effective in allowing them to share their priorities for achieving sustainable peace and accountability through appropriate transitional justice mechanisms").

[554] Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer, Memory of Silence. Report of the Commission for Historical Clarification. Conclusions and Recommendations, 25 February 1999, hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf (hereinafter: Memory of Silence), p. 20.

[555] *Id*., pp. 23, 27, 30 and 41. See also: *Ross* (2013), Guatemala, pp. 216 ("The army's counterinsurgency program militarily dominated the highlands by employing the strategy of "draining the pond in order to kill the fish" (the pond being the population and the fish the insurgents)") and 218 ("On February 25, 1999, the Commission presented its report, *Memory of Silence*. In addition to 3,500 pages of information on atrocities including more than 600 massacres, the Commission found the state responsible for 93 percent of the violations and called it genocide").

[556] Memory of Silence, p. 42. In a more detailed breakdown, the Commission for Historical Clarification stated that "insurgent actions produced 3% of the human rights violations and acts of violence perpetrated against men, women and children, including 5% of the arbitrary executions and 2% of forced disappearances" (see: *Id*., p. 21).

organisations committed violent and extremely cruel acts that, which terrorised people and had significant consequences.[557] Arbitrary executions, especially those committed before relatives and neighbours, accentuated the already prevalent climate of fear, arbitrariness and defencelessness."[558] Given the nature of the violations described, anything but an ambitious reparation programme could have been perceived as a mockery. In its report, *Memory of Silence*, the Commission therefore sketched a reparation programme that included "moral and reparatory measures" for "the victims (or their relatives) of the human rights violations and of the acts of violence connected with the internal armed confrontation."[559] It wrote that the reparations could be "individual or collective",[560] and

> "[t]hat the National Reparation Programme [should] include a series of measures inspired by the principles of equality, social participation and respect for cultural identity, among which at least the following should figure:
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> a) Measures for the restoration of material possessions so that, as far as is possible, the situation existing before the violation be re-established, particularly in the case of land ownership.

[557] *Id*., p. 42.

[558] *Id*., p. 26. In greater detail, the Commission also wrote that "[t]he guerrilla groups committed acts of violence which violated the right to life, through the arbitrary execution of civilians or individuals, some of whom were defenceless, who were connected to the confrontation as military commissioners or members of the Civil Patrols, as well as through the arbitrary execution of members of their own organisations and even massacres" (*Id*., p. 42). "Executions were […] carried out in the presence of the community, to generate terror and thus force individuals to join the guerrillas" (*Ibid.*). In addition, "[m]embers of the so-called dominant social class were also victims of arbitrary execution. These were primarily large landowners and businesspeople who the guerrillas included in their broad definition of the enemy" (*Ibid.*). It further held that the guerrillas carried out some massacres and that "[t]here were also some cases of forced disappearance of people kidnapped by the guerrillas, whose whereabouts have never been discovered" (*Id*., p. 43). It particularly highlighted that "[t]he presence of the guerrillas also led to the displacement of traditional authorities" (*Id*., p. 30). The Commission also noted that it received testimonies of torture, "[a]lthough [torture] was not generally practised among insurgent groups" and noted "that the guerrillas forcibly recruited civilians, even minors" (*Id*., p. 43).

[559] *Id*., p. 51.

[560] *Id*., p. 50. See also: Acuerdo Gubernativo 258-2003 (Programa Nacional de Resarcimiento), El Presidente de la República (Guatemala), 7 May 2003, www.refworld.org/docid/5b6d98414.html, as amended by: Acuerdo Gubernativo 539-2013, El Presidente de la República (Guatemala), 27 December 2013, reparations.qub.ac.uk/assets/uploads/Guatemala-Acuerdo-gubernativo-539-2013.pdf (hereinafter: Programa Nacional de Resarcimiento), Article 1.

b) Measures for the indemnification or economic compensation of the most serious injuries and losses resulting as a direct consequence of the violations of human rights and of humanitarian law.

c) Measures for psychosocial rehabilitation and reparation, which should include, among others, medical attention and community mental health care, and likewise the provision of legal and social services.

d) Measures for the satisfaction and restoration of the dignity of the individual, which should include acts of moral and symbolic reparation."[561]

While these measures already envisaged the repair of a number of economic, social and cultural rights, including of the right to housing and other property, health, culture, and others, they were, according to the Commission for Historical Clarification, the bare minimum. Despite this, the Commission was aware that financing for even the minimum was not available in the then present circumstances. In order to finance the proposed measures, it pointed to the "universally progressive tax reform established by the Peace Accords" and also noted that a "redistribution of social spending and a decrease in military spending would be appropriate."[562] In addition, the Commission opined that "the State [should] solicit international co-operation from those countries which, during the internal armed confrontation, lent military and financial aid to the parties."[563] In other words, the reparation programme was to be financed by funds that were yet to become available.

This sequence of events was replicated in both Sierra Leone and Liberia. In Sierra Leone, "civilians bore the brunt of the violations and abuses that marked the conflict",[564] and TRC

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[561] Memory of Silence, p. 50. See also: Programa Nacional de Resarcimiento, Articles 2 and 2 bis; *Burt, Jo-Marie*, Transitional Justice in the Aftermath of Civil Conflict. Lessons from Peru, Guatemala and El Salvador, Due Process of Law Foundation, 2018, www.dplf.org/sites/default/files/pictures/transitional_justice_final.pdf, p. 29; *Valenzuela* (2018), The legacy of Guatemala's Commission for Historical Clarification, p. 67; and: Reparations for Gross Human Rights Violations in Guatemala (policy brief), Impunity Watch, 2018, docs.wixstatic.com/ugd/f3f989_f3c1b110b4044e2d873faf968670be95.pdf, p. 4.

[562] Memory of Silence, p. 52.

[563] *Ibid.*

[564] Truth and Reconciliation Commission for Sierra Leone, Witness to Truth. Report of the Sierra Leone Truth and Reconciliation Commission. Volume 3A, 5 October 2004, www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents/volume-three-a/item/witness-to-the-truth-volume-three-a-chapters-1-4?category_id=13 (hereinafter: Witness to Truth (vol. 3A)), p. 465 (para. 3). This conclusion of TRC (Sierra Leone) is hardly surprising given the *modus operandi* of most groups. (See, e.g.: *Ibid.* ("There were very few accounts of direct confrontation between the combatant factions"); or: Witness to Truth (vol. 2), p. 34 (para. 84)

(Sierra Leone) in its report, *Witness to Truth*, went into truly gruesome detail when describing wartime victimisation,[565] which, in addition to violations infamously implicit in non-international armed conflicts, such as assault and beating, killing, forced displacement, destruction of property, looting and extortion, also included rape, sexual abuse and sexual slavery, torture, amputation, drugging and forced cannibalism, as well as forced recruitment and forced labour.[566] The reparation programme consequently proposed, even though "[t]the Commission took the decision to make the programme feasible and practical",[567] was extensive and included "Physical Health Care for Amputees",[568] "Physical Health Care for "Other War Wounded",[569] "Physical Health Care for Victims of Sexual Violence",[570] "Physical Health Care

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("[C]ivilians, as individuals and in groups, were often the direct targets of participant militias and armed groups rather than merely the unfortunate victims of "collateral damage". Combatant groups executed brutal campaigns of terror against civilians in order to enforce their military and political agendas. Civilians became the "objects" of political or factional allegiance. They were victimised indiscriminately to send a message to "the enemy"").

[565] "Forced cannibalism was a means of inflicting psychological torture on the victims, who were often relatives or neighbours of the person they were forced to eat. Cecilia Caulker's son was murdered by the [Revolutionary United Front] in 1992 in Bonthe:

> "They cut my son in pieces alive. I was under gun point and all actors were in uniform and caps [which] were very low over their eyes, I did not detect anybody. They cut him in pieces with a knife and when they opened his chest, they took out his heart and cut a piece of it and pushed it into my mouth, saying you first eat of it, but then when they have cut his head, they laid it in my hand saying go and breast feed your son and they started dancing.""
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> (Witness to Truth (vol. 3A), p. 477 (para. 43), footnote omitted.)

[566] *Id.*, p. 470 (para. 19).

[567] Witness to Truth (vol. 2), pp. 241 (para. 52) and 245-247 (paras. 71-81).

[568] Having identified "the inability to pay for medical services and drugs" as the primary reason for "why people in rural communities do not visit hospitals", TRC (Sierra Leone) recommended that amputees, as well as their wives and minor children "be eligible to receive free physical health care." Further, it "recommend[ed] the provision of free prosthetic and orthotic devices" as well as related "free rehabilitation services […] including on the use, repair, and maintenance of the prosthetic" (*Id.*, pp. 251 (para. 106) and 252-253 (paras. 109-113 and 119)).

[569] TRC (Sierra Leone) recommended "the provision of free […] health care […] to the degree the[] injury or disability demand[ed]." Wives and minor children were also benefit from free health care if the direct "victim experienced a 50% or more reduction in earning capacity". TRC (Sierra Leone) also "recommend[ed] the provision of physiotherapy and occupational therapy" (*Id.*, pp. 254-255 (paras. 126-128 and 133)).

[570] "[T]he Commission recommend[ed] the provision of free […] health care for adult and child victims of sexual violence, on an as needed basis, depending on the degree of their injury." It recommended the same for minor children of victims of sexual violence and "wives of eligible male victim of sexual violence". TRC (Sierra Leone) highlighted that the free health care should include required fistula surgeries. Finally, it also noted that the decade-long conflict led to an increase in HIV/AIDS as well as other sexually transmitted infections. To address the problem, it recommended "free testing at primary health units across the country", which would go hand in hand

for Children",[571] "Mental Health Care (Counselling and Psycho-social Support)",[572] "Pensions for Individual Beneficiaries",[573] "Education for Individual Beneficiaries",[574] "Skills Training, Micro-credit and Micro-projects for Individual or Collective Groups of Beneficiaries",[575] "Symbolic Reparations" and "Community Reparations".[576] Even though the programme proposed was by no means comprehensive, it was very ambitious, still, and relied on several sources of funding. This was to come from "revenue generated from mineral resourced according to Article VII of the Lomé Peace Agreement", "[a] reparations or peace tax" and "[t]he prioritisation of reparations within the government's budget", i.e., a redistribution of spending. TRC (Sierra Leone) also relied greatly on international financing envisaging both "[d]onor support" as well as a "[d]ebt-relief-for-reparations-scheme". In addition to these

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with necessary counselling, and be followed by "free medical treatment for those victims of sexual violence who test positive for the HIV/AIDS virus or any other STI" (*Id.*, pp. 255-257 (paras. 134-135, 140, 147-148 and 150)).

[571] Under this heading, TRC (Sierra Leone) zoomed in on the practice of branding children with letters indicating an armed group and "recommend[ed] that the government assist the organisations and bodies that provide scar removal surgery" (*Id.*, p. 258 (para.156)).

[572] The introductory wording is very broad and states that "[t]he Commission recommend[ed] the provision of free counselling and psychosocial support for all victims mentioned above as beneficiaries of this programme, as well as for their dependants if needed." In subsequent paragraphs, the Commission again focused on particular groups, which, it can be deduced, it considers need to be treated with priority in this regard. These groups included "amputees and other war wounded" and "victims of sexual violence", and also women and children (*Id.*, pp. 258-259 (paras. 159 and 162-165)).

[573] The monthly pension was envisaged for "adult amputees, the adult 'other war wounded […], and adult victims of sexual violence" who were "disabled to the point where they cannot sustain themselves or their families" (*Id.*, p. 259 (para. 168)).

[574] TRC (Sierra Leone) was aware that its recommendations regarding education fit into the larger context of destroyed school infrastructure and lack of qualified personnel. In addition to recommending, in a general manner, that "education at the basic level" should be free, it added, specifically, "that free education be provided until senior secondary school level to […] [c]hildren who are amputees, 'other war-wounded' or victims of sexual violence; [] [c]hildren who suffered abduction or forced conscription", "[o]rphans", and "[c]hildren of amputees, other war wounded if their parents experienced a 50% or more reduction in earning capacity as a result of the violation committed against them, and victims of victims of sexual violence" (*Id.*, pp. 260-261 (paras. 173 – 178)).

[575] Under this humble heading, TRC (Sierra Leone) addressed the fact that "[t]he financial sector in Sierra Leone was destroyed as a result of the protracted war." A lot of its recommendations were general, but addressed, by and large, as other, the three groups, i.e., "amputees, 'other war wounded', [and] victims of sexual violence" (*Id.*, p. 262 (paras. 184 and 186)).

[576] Recognising, no doubt, the scale of the recommendation, the Commission, in general terms, "recommend[ed] that the government work out a programme for the reconstruction and rehabilitation of" "regions [which] were destroyed more than the others" (*Id.*, p. 265 (para. 206)).

sources, TRC (Sierra Leone) also mentioned "seized assets from convicted persons" and ""in kind contributions" from ex-combatants". While the sources envisaged were reasonable, TRC (Sierra Leone), by listing them, indirectly conceded, much like the Commission for Historical Clarification, that the funds for the programme were not actually available. In relation to the sequence outlined, the *Consolidated Final Report* written by TRC (Liberia) can also be considered a variation on a theme. Listing the same violations as TRC (Sierra Leone) and recommending an ambitious 30-year or more reparation programme, it envisaged the funding to come from the future nationalisation and monetisation of the E.J. Roye building,[577] as well as from the Liberian Diaspora.[578]

The ambition of TRC (Peru), too, is a reflection of the Andean country's historic, post-war challenge. In the Peruvian civil war, the majority of the victims were populations already most marginalised, i.e. the "Andean and indigenous communities".[579] Even though TRC (Peru) did not, unlike the Commission for Historical Clarification, level an accusation of genocide against either belligerent, it emphasised that the historical grievance of the "Andean and indigenous communities", unaddressed and thus perpetuated by the Government, created a climate that could give birth to a non-State actor like Shining Path. According to the *Informe Final*, the majority of all deaths and violations could be attributed to the Shining Path, while 44.5 % "were attributed to the agents of the state", "most notably the administration of Alberto Fujimori",[580] and a relatively small percentage, 1.5 %, could be attributed to *Movimiento Revolucionario Túpac Amaru*, a smaller non-State actor that joined the armed conflict in 1984.[581] While some

[577] Truth and Reconciliation Commission (Liberia), Final Report. Volume II: Consolidated Final Report, 30 June 2009, web.archive.org/web/20170415010956/http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf (hereinafter: TRC Report (Liberia)), p. 378 (para. 17.2.).

[578] TRC Report (Liberia), p. 396 (para. 19.4.).

[579] Comisión de la Verdad y Reconciliación del Perú, Informe Final, 28 August 2003, www.usip.org/publications/2001/07/truth-commission-peru-01 (hereinafter: Informe Final), Volume IX, p. 193.

[580] Truth Commissions: Peru 01, United States Institute of Peace, 13 July 2001, www.usip.org/publications/2001/07/truth-commission-peru-01.

[581] *Correa, Cristián*, Reparations in Peru. From Recommendations to Implementation (report), ICTJ, 2013, www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf (hereinafter: *Correa* (2013), Reparations), p. 3.

actors were more infamous for certain violations than others,[582] the non-international armed conflict as a whole was characterised by the full spectrum of abuses unfortunately typical in such contexts and included "torture, illegal detention, sexual violence, forced recruitment of children, massive displacement, and a climate of terror and fear".[583] To demonstrate the disproportionate effect on the "Andean and indigenous communities", TRC (Peru) gave the comparison that if the conflict had been as intense nation-wide as it had been in the town of Huanta in the Ayacucho area, the total death toll would have been closer to half a million, rather than 69,280.[584]

The subsequent reparation programme was unsurprisingly broad. TRC (Peru) first delineated different groups of beneficiaries and then sketched reparations measures envisaged, always noting which of the groups should benefit from it.[585] In the field of economic, social and cultural rights, the reparation programme for individual beneficiaries prominently included reparations in regard to health,[586] education,[587] and economic reparations.[588] The beneficiaries of reparations in regard to health education were the "universe of individual beneficiaries" who suffered from a physical or mental problem, or who had had their education interrupted,

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[582] For example, State forces accounted for a greater percentage of sexual violations (*Correa* (2013), Reparations, p. 3 (footnote 9)).

[583] *Id*., p. 3.

[584] Informe Final, Volume IX, pp. 193-194. For the number of dead, see: *Correa* (2013), Reparations, p. 3.

[585] Beneficiaries could be individuals or collective entities. The "universe of individual beneficiaries" included relatives of the murdered, relatives of the disappeared, the kidnapped, the displaced, the recruited, the tortured, the raped, as well as innocent persons who had been imprisoned, and members of the Armed Forced and other armed units defending the State "wounded or injured in attacks violating IHL or in acts of service" (Informe Final, Volume IX, p. 152). Outside this "universe", other individual beneficiaries included, depending on the reparation measure proposed, children product of rape, minors who made up a so-called self-defence committee, people wrongly arrested for terrorism and treason, and individuals who, as a result of conflict, became undocumented (*Ibid.*). Collective beneficiaries were in essence of two types: communities affected by the conflict, and organised groups of non-returnees (*Id.,* Volume IX, p. 153). Noting that beneficiaries were not a homogenous group, the Truth and Reconciliation Commission proposed for the reparation programme to give priority to those most vulnerable, which it considers to be widows and orphans, elderly people, and disabled people (Informe Final, Volume IX, p. 156).

[586] *Id*., Volume IX, pp. 168-178.

[587] *Id.*, Volume IX, pp. 178-181.

[588] *Id.*, Volume IX, pp. 188-193.

respectively.[589] In addition, beneficiaries of reparations in regard to health included collective entities,[590] and beneficiaries of reparations in regard to education also included children product of rape and minors who had made up so-called self-defence committees.[591] The beneficiaries of economic reparations provided in the form of services included the entire "universe of individual beneficiaries" while only some groups were also entitled to monetary compensation.[592] The reparation programme for collective beneficiaries emphasised the key role of the beneficiaries in contributing to the development of the programme to benefit their respective community. Without imposing any project on any particular community, it highlighted the types and scope of damage inflicted by the armed conflict and imagined the types of projects that communities might choose.[593]

An important particularity of the Peruvian *Informe Final* was the expectation of almost exclusive Government funding as the only way to ensure the reparation programme's viability over the long term.[594] To presuppose such a commitment from the State could be seen as optimistic, however, victims' struggles to see the implementation of promised reparation programmes in other countries show that TRC (Peru) was also the most realistic of them all.

One might be led to think that the brief summary is evidence of a general lack of the middleman's judiciousness, however, in Colombia, where there was no middleman, the legislative came up with an equally ambitious blueprint. Building on *Ley 975* on the reincorporation of members of actors into society,[595] the Congress of Colombia adopted *Ley 1448*, providing for the relatively most comprehensive reparation programme, addressing restitution, as the preferred reparation modality, of land (Title IV, Chapter III), restitution, as the preferred reparation modality, of the right to housing (Chapter IV), reparation of the right to education and work (Chapter VI), legal, medical, psychological and social rehabilitation

[589] *Id.*, Volume IX, pp. 170, and 180.

[590] *Id.*, Volume IX, p. 170.

[591] *Id.*, Volume IX, p. 180.

[592] *Id.*, Volume IX, p. 190.

[593] *Id.*, Volume IX, pp. 193-202.

[594] In addition, State funding is also considered as symbolic of the State and society showing its commitment to the victims of the armed conflict (*Id.*, Volume IX, p. 204).

[595] Ley 975, El Congreso de la República de Colombia, 25 July 2005.

(Chapter VIII), satisfaction (Chapter IX), guarantees of non-repetition (Chapter X), and collective reparation measures (Chapter XI). In addition to the substantive measures themselves, *Ley 1448* included institutional and procedural provisions regulating the factual realisation of the reparation measures envisaged (Title IV and V). Among the institutional set-ups was also *Fondo de Reparación,* already established by *Ley 975*. While the latter already listed the State's budget as a source of funding, a document that is at least of equal importance is the Constitutional Court case *Gustavo Gallón Giraldo y Otros v. Colombia*, where the Court explained that even though the civil responsibility remained with the perpetrator and "a form of vicarious liability, or "solidarity," extended to the whole demobilized group", the State nevertheless "enter[ed] "in this sequence […] in a residual role to cover the rights of victims, especially those who do not have a final judicial decision to fix the amount of indemnification."" With this, the Constitutional Court removed "the law's limits on the state's financial contribution based on budget constraints, arguing that "the state cannot excuse itself from paying compensation" by arguing it had no available funds."[596] *Ley 1448* put the instructions of the Constitutional Court and more into writing, and in no uncertain terms obliged the Government to create a sustainable financing plan for its own implementation.[597]

3.1.2.3 Reality check

It is clear that it is not only the middleman who can be ambitious. The challenge is, rather, if it is *only* the middleman who is ambitious. The clearest sign that a coordinated implementation of a reparation programme designed by a truth and reconciliation commission will falter and eventually fail is the lack of implementing legislation, as the examples of Sierra Leone and Liberia clearly demonstrate.

As for Sierra Leone, the Government's efforts to see the implementation of the reparation programme have been, critically, summarised as a "demonstration of [its] persistent disinterest in people's needs".[598] After *Witness to Truth* had been handed over to the Government, it took the latter eight months to issue a so-called white paper with which "[it] accepted the report's

[596] *Laplante, and Theidon* (2006), Transitional Justice in Times of Conflict, p. 95, further citing: Gustavo Gallón Giraldo y otros v. Colombia.

[597] Ley 1448.

[598] *Ottendörfer* (2014), The Fortunate Ones, p. 2.

findings and recommendations in principle […]. It also accepted the recommendation for a reparation programme and agreed to "use its best endeavors to ensure the timely implementation" of such a programme […] However, the white paper also made clear that the government expected international donor organizations to create a corresponding reparations program".[599] For four years after the handover of *Witness to Truth*, "Sierra Leone's government […] failed to take any action" at all.[600] Most importantly, and widely criticised, the reparation programme was, as noted above, never translated into law, which made the reparation measured proposed by TRC (Sierra Leone) not legally enforceable.[601] Only concerted "pressure from Sierra Leone's biggest survivor organization, the Amputee and War-Wounded Association (AWWA) and a 3.5 million USD grant from the UN Peacebuilding Fund (PBF) [] kickstart[ed] reparation efforts in 2008",[602] however, no momentum was created and so even after that, recommendations were not implemented as envisaged. To help with the wait, "each registered survivor received an interim-relief payment of 100 USD to bridge the gap until more comprehensive reparation could be delivered."[603] The cash payments then became a somewhat infamous *modus operandi* with "Sierra Leone quickly decid[ing] to focus exclusively on individual compensation."[604] It deserves noting that lump-sum cash payments were not recommended by TRC (Sierra Leone), which had based its recommendations on the opinions of victims rather than being guided by regulations of international organisations,[605] or expediency. It was not until 2013 that "[t]he first genuine compensation package was delivered" after another United Nations grant of USD 2.5 million.[606] The implementation again

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[599] *Id.*, p. 13.

[600] *Langmack, Fin-Jasper*, Reparations in Sierra Leone: news from the periphery of transitional justice, Justice Info, 2020, www.justiceinfo.net/en/43710-reparations-in-sierra-leone-news-from-the-periphery-of-transitional-justice.html (hereinafter: *Langmack* (2020), Reparations).

[601] *Ottendörfer* (2014), The Fortunate Ones, p. 19.

[602] *Langmack* (2020), Reparations. See also: *Ottendörfer* (2014), The Fortunate Ones, p. 14.

[603] *Langmack* (2020), Reparations. See also: *Ottendörfer* (2014), The Fortunate Ones, p. 1, where the author quoted a woman who had stated that USD 100 was a mockery and that the Government did "not even provid[e] the structures necessary for victims to collect their benefits", meager as they already were.

[604] *Langmack* (2020), Reparations.

[605] *Ottendörfer* (2014), The Fortunate Ones, p. 14. For an overview of "funding of the reparations program" up until 2014, see page 16.

[606] *Langmack* (2020), Reparations.

stalled when the country was marked by Ebola and then, again, due to lack of (international) funding.[607] Sierra Leone did begin "to compensate survivors of sexualized violence and war-widows" and implemented or contributed to programmes run by international non-governmental organisations, but the assessment is arguably correct that all that was done was, and remains, *ad hoc*,[608] and relies heavily on funding from the international community, whose attention is no longer focused on what was once "the center of the transitional justice world."[609]

Sierra Leone is one of the poorest countries,[610] with too many priorities and the lack of "enthusiasm", as one researcher wrote, was, "[i]n hindsight, […] foreseeable."[611] More soberly, another researcher concluded that "Sierra Leone constitute[d] a case that is representative for post-conflict societies in general: Within the non-ideal setting of post-conflict societies in which state structures are lacking and demand for support on behalf of victims is high, the task of implementing a 'right to reparations' in a meaningful way proves especially challenging."[612] Gloomy as this might sound, it has to be emphasised that the Government never renounced on the programme, and is continuing its implementation even two decades after the end of the non-international armed conflict that devastated the country.[613]

In Liberia, TRC (Liberia) recommended a reparation programme that was to run for at least 30 years.[614] For its effective implementation, TRC (Liberia) recommended the establishment of a Reparation Trust Fund to be funded by the State.[615] As some of the measures proposed by TRC (Liberia) could be considered to be (also) measures of development, TRC (Liberia) explicitly

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[607] *Ibid.*

[608] *Ibid.*

[609] *Ibid.*

[610] Ever since 1982, it has been on the UN's list of least developed countries (List of Least Developed Countries (as of 24 November 2021), United Nations Committee for Development Policy, no date, www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf).

[611] *Langmack* (2020), Reparations.

[612] *Ottendörfer* (2014), The Fortunate Ones, p. 2.

[613] *Langmack* (2020), Reparations.

[614] TRC Report (Liberia), p. 378 (para. 17.0.).

[615] To see particulars of how the State is to acquire additional funds to use for the Fund, see: *Id.*, pp. 378-379. See also: p. 460 ff (Annex 3: A Resolution Establishing the TRC Reparation Trust Fund), in particular Section 8.

wrote that the Government's USD 300 million contribution should be allocated to reparations as "distinct from [Government of Liberia]'s development program agenda."[616] It also wrote that the Government should implement all its recommendations, including those pertaining to reparations for economic, social and cultural rights, as a matter of law.[617] Once the *Consolidated Final Report* was presented to the Government, the latter said that it agreed with TRC's (Liberia) view that the proposed reparations were the way forward.[618] Unfortunately, however, the implementation of the reparations proposed in the *Consolidated Final Report* never really kicked off. Ellen Johnson Sirleaf's Government prioritised a traditional reconciliation mechanism, the funding for which also dried up in the meantime,[619] acting as a case in point to the observation that the reparation programme's implementation was "improbable".[620] So improbable, in fact, that it even appears that many victims have heard about TRC's (Liberia) proposed reparation programme only recently, i.e., from late 2020 onward.[621] Frustrating as the tangible implementation has been, it has to be noted, also in reference to Liberia, that the Government never renounced the programme.

To observe the effect of legislation, we can juxtapose Sierra Leone and Liberia with Peru. Following the presentation of the *Informe Final* to the Government, the Peruvian Congress adopted *Ley que crea el Plan Integral de Reparaciones – PIR (Ley Nº 28592)* (hereinafter: *Ley*

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[616] TRC Report (Liberia), p. 468.

[617] See *infra.*

[618] *Martin-Ortega, and Herman* (2013), Truth and Reconciliation Commission (Liberia), p. 422.

[619] *Rouse, Lucinda*, Liberia and Sierra Leone: Different lessons in how not to deliver post-war justice, The New Humanitarian, 24 June 2019, www.thenewhumanitarian.org/analysis/2019/06/24/liberia-sierra-leone-post-war-justice. On Liberia's economic situation, see also: See also: *Hayner, Priscilla*, Negotiating peace in Liberia: Preserving the possibility for Justice, Centre for Humanitarian Dialogue, 2007, www.files.ethz.ch/isn/45616/LiberiaReport_1107.pdf, p. 20; *James-Allen, Paul, et al.*, Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia, ICTJ, 2010, ictj.org/sites/default/files/ICTJ-Liberia-Beyond-TRC-2010-English.pdf, pp. 23-24; and: *Pajibo* (2007), Civil Society, pp. 291-292.

[620] *Jaye, Thomas*, Transitional Justice and DDR: The Case of Liberia, ICTJ, June 2009, ictj.org/sites/default/files/ICTJ-DDR-Liberia-CaseStudy-2009-English.pdf, p. 32.

[621] Rocky Road to Reparations in Liberia, Liberian Observer, 2020 (initially available at www.liberianobserver.com/news/rocky-road-to-reparations-in-liberia/, then at theworldnews.net/lr-news/rocky-road-to-reparations-in-liberia; by 15 June 2022 the article was no longer available on either location); and: War Victims Disappointed in Govt's Failure to Implement TRC Report, Liberian Observer, 2021 (initially available at www.liberianobserver.com/news/war-victims-disappointed-in-govts-failure-to-implement-the-trc-report, then at announce.today/home/announce/dHFZLcKhG2WtJ2Ns8XdE9.

Nº 28592), on 28 July 2005.[622] A short document of only 11 provisions, as well as complementary and transitional provisions, it was operationalised by *Decreto Supremo Nº 015-2006-JUS* of 6 July 2006[623] (hereinafter: PIR Regulation). *Ley Nº 28592* in principle adopted the *Informe Final* and only slightly amended the reparation programmes proposed. Even so, the provision listing the programmes was open-ended and allowed for "other programmes". Economic reparations, included in the *Informe Final*, but omitted in *Ley Nº 28592*, could therefore be reinstated by the PIR Regulation.[624] In line with the *Informe Final*'s proposal on financing, the [multisectoral commission], "[t]he governing body of the entire reparations policy", was given the task "to coordinate 'actions with the ministries, regional, local governments and with the state entities that will include in their budgets strategies leading to the pertinent funding for the execution of the Comprehensive Reparations Plan'."[625] A study conducted in 2018 (hereinafter: Peru Study) shows that although progress in the implementation of the programme has not been consistent and has faced various obstacles of different origin, important headway has been and is being done, as the Integral Reparations Plan continues to be implemented and financed by the State. The Peru Study noted, for example, that, in regard to collective reparations, as of 26 April 2018, the Reparations Council had included "5,715 communities and populated centers in the [*Registro Unico de Víctimas*]", as well as "127 organized groups of non-returnees. Of this total, CMAN has repaired 1,852 (32.5%) populated centers and communities in 15 departments, pending to repair 3,845 (67.5%) of them."[626] Other components of the Integral Reparations Plan also continue to be implemented.[627]

Legislation is no panacea, and the implementation of the reparation programme in Peru has had its rocky episodes. However, it does show that the legally binding nature of legislation has the

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[622] Ley que crea el Plan Integral de Reparaciones – PIR (Ley N° 28592), El Congreso de la República del Perú, 28 July 2005 (hereinafter: Ley N° 28592).

[623] Decreto Supremo N° 015-2006-JUS, El Presidente de la República del Perú, 5 July 2006, as amended.

[624] Article 37 ff.

[625] *Guillerot, Julie,* Reparations in Peru: 15 Years of Delivering Redress (report), Queen's University Belfast, 2019, reparations.qub.ac.uk/assets/uploads/Peru-Report-ENG-LR-2.pdf, p. 21, further citing: Ley N° 28592, Article 11.

[626] *Id.*, p. 33, footnote omitted.

[627] *Id.*

potential to keep the momentum going even when progress is slow.[628] That being said, it remains to be emphasised that while countries can show different successes in the implementation of their reparation programmes, none of the countries considered here has ever denounced a programme.

3.1.2.4 The reparation programmes' beneficiaries

This leaves us with the last and most important question of this chapter, namely, who the reparation programmes were for. The answer to this question is simple and straightforward. The reparation programmes were made for victims of war. The typical design of each of these programmes was that victims were treated as one group, even though emphasis was given to particular subgroups based on the particular victimisation(s) that the person(s) had suffered, or the resulting need. TRC (Sierra Leone), for example, explicitly limited its reparation programme to particular groups. Under the heading "Guiding Principles Regarding Victim Eligibility", it wrote:

> "53. Many, if not all of the people of Sierra Leone suffered during the war. Some suffered directly from various kinds of violations mentioned in this report. Others witnessed these violations or indirectly suffered from them. In this way, all Sierra Leoneans are survivors. The Commission hereby explicitly acknowledges the suffering of all these people, Sierra Leonean and others, during the war.
>
> […]
>
> 56. Nonetheless, not all victims can be beneficiaries of the reparations programme or aspects of it. While all victims of the conflict will be beneficiaries of the symbolic measures outlined in the programme, the Commission sought to prioritise certain categories of victims who will be eligible to benefit in the form of service packages. Whereas many people in Sierra Leone wish to see all of their needs met, it is unrealistic to think that this can be done by the reparations programme recommended by the Commission. In making the decision to limit access to certain measures of the reparations programme, the Commission was guided by practical considerations, mainly the inability of the state to provide for the needs of all the

[628] See also: Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 18; CESCR, GC no. 3, para. 3 ("The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable"); and: *Sepúlveda Carmona* (2003), The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights, p. 347.

> victims given the limited resources available. The decision to accord benefits to certain victims does not reflect a judgment on the intensity or significance of the suffering of different victims, but is based on pragmatic grounds.
>
> 57. *The Commission determined the categories of beneficiaries who should benefit from the reparations programme by considering those victims who were particularly vulnerable to suffering human rights violations*. Most Sierra Leoneans agree that amputees, war wounded, women who suffered sexual abuse, children and war widows would constitute special categories of victims who are in dire need of urgent care. The Commission also considered those victims who are in urgent need of a particular type of assistance to address their current needs, even if this only serves to put them on an equal footing with a larger category of victims. The reparations programme aims at contributing to the rehabilitation of those victims, even if complete rehabilitation is not possible.
>
> 58. Based on the rationale described above, the Commission recommends the following groups of victims as beneficiaries of the specific measures of the reparations programme: (1) amputees; (2) other war wounded (defined under the section describing the various categories of beneficiaries); (3) children; and (4) victims of sexual violence. […]"[629]

We thus see that while TRC (Sierra Leone) was both generous in its recognition of victimhood but also restrictive in delineating beneficiaries, it used vulnerability as a criterion to guide it in its selection as to who the post-conflict Government should repair. TRC (Liberia), by comparison, did not limit its reparation programme to certain groups but even in its comprehensive approach, it urged the Government to implement measures in favour of "victims of sexual violence without delay irrespective of whether or not the reparation trust fund is fully established or operational", opining that these measures could not wait.[630] Regardless of whether we zoom in on Sierra Leone or Liberia, it is important to remember that different differentiations or prioritisation would have been possible, and were not chosen.

One controversial issue regarding the designation of the universe of victims is denying the status of victim to former combatants. Two observations can be made. For one, former combatants would typically (but not exclusively) be victims of the State, meaning that their exclusion, controversial though it might be, does not have a direct bearing on this thesis. The second observation is that, in Peru, for example, the exclusion was softened in the sense that

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[629] Witness to Truth (vol. 2), p. 242 (paras. 53 and 56-58), emphasis added.

[630] TRC Report (Liberia), p. 386.

even though the person was excluded from the ambit of victims under the administrative reparation programme, the person could still take the State to court.

Thus, in conclusion, we can observe State practice that is overwhelmingly supportive of the thesis' hypothesis. Even though not all countries have implemented their programmes in a satisfactory way, there does not appear to be contrary practice, i.e., no Government has, following a commission proposal, denounced the right of victims of non-State actors to be repaired.

3.1.2.5 A diffuse understanding of the law: a group of many words

Moving on to the States' understanding of the law, we are faced with the opposite problem than the one we had when looking at the *opinio juris* of countries in the pre-transitional justice group. Countries in the transitional justice group and their truth and reconciliation commissions in particular were quick to provide a long list of everything the respective governments had done wrong. The items on the list could easily be presented as legal bases for the respective government's obligation to provide reparations. However, such causal reasoning is, with the notable exception of Peru, which we shall look at below, markedly absent. At best, a truth commission will have, in a wholesale manner, cited legal, political and moral reasons for a proposed reparation programme. In the narrow-minded quest to find these countries' understanding of the law, such wholesale articulations are as valuable as no articulation at all.

The extensive lists of governments' own wrongdoing, whether legally relevant or not, leave us with numerous candidates for any State's understanding of the law. The candidates include those that support the thesis' hypothesis and those that do not. We shall look at those that do not support the hypothesis first. For one, if a State grounded its reparation programme in the circumstance that victims of non-State actors did not have access to courts, either because the court system was largely non-existent or compromised, or because perpetrators had been given amnesties that also protected them from civil suits, the most legitimate interpretation of the mental element behind such a programme would be that the government in question was repairing its own omission, i.e., the failure to provide a functioning court system, or its own

action, i.e., amnesties,[631] rather than violations of non-State actors.[632] As the obligation of governments to repair its own human rights violations, i.e., its own victims, is established law, such an understanding of the law would not support the hypothesis, which looks at obligations of States towards victims *not* their own. Looking at post-conflict countries, we can observe that while truth and reconciliation commissions did zoom in on access to courts and obstacles to that access, more often than not finding that access to courts was either compromised or wholly impossible, be it due to practical or legal limitations, such as amnesties, they failed to articulate a causality between the compromised access and the State's obligation to repair.

By way of example, and looking first at the absence of a functioning court system, TRC (Sierra Leone) provided a good summary of the state that the country's post-conflict judiciary was in:

> "In Sierra Leone, effective redress is simply not available through the courts. The justice system currently does not have the capacity to deal with the massive violations committed during the conflict. Large parts of the country do not have functioning courts and access to formal justice is difficult to obtain. Moreover, the judiciary suffers from a perceived lack of credibility and lacks public confidence. Therefore, the possibility for victims to seek redress through the civil courts for the violations committed against them is not a reality in Sierra Leone."[633]

One might be tempted to conclude that there was a clear if implied causal link between the diagnosed state of Sierra Leone's post-conflict judiciary and the State's obligation to implement an administrative reparation programme;[634] we need look no further. The pitfall

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[631] On the legal repercussions of amnesties, see: *Fowler* (2018), State-Based Compensation for Victims of Armed Conflict, p. 88.

[632] See, for example: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 27 on 'Impunity'.

[633] See: Witness to Truth (vol. 2), p. 229 (paras. 10 and 11).

[634] One would be strengthened in her argument as TRC (Sierra Leone) concluded that "to seek redress through the civil courts […] [was] not a reality in Sierra Leone" and noted that "several international human rights instruments [which Sierra Leone ratified] impose on States the duty to provide the individual with "an effective remedy", "effective protection and remedies", "redress and an enforceable right to fair and adequate compensation"", and closed with pointing out that "*[i]n the last decade, reparations programmes established through truth seeking mechanisms have become the only measure of redress for victims of violations arising out of civil conflicts*" (*Id.*, pp. 229 (para. 11), 230 (para. 17) and 230 (para. 11), respectively, emphasis added).

with this conclusion is, as we shall see further on, that this is not the only articulation of TRC (Sierra Leone) that could lead to such a conclusion, i.e., that the State has to provide reparations to victims of war, including victims of non-State actors. While nothing prevents us from, in theory, determining that Sierra Leone's understanding of the law was that *both* the dismal state of its judiciary, as well as, for the sake of argument, the prohibition of discrimination between victims based on the identity of the perpetrator would yield the State liable to implement a reparation programme in favour of all victims, we are unable to make that conclusion in the case as hand, as no causal links were articulated. To put it differently, if the state of Sierra Leone's judiciary was fine, would TRC (Sierra Leone) still have reached the conclusion that the State was liable to implement a reparation programme? Perhaps, in which case the failure to provide access to courts would according to Sierra Leone not be the only circumstance that obliged a country to implement a reparation programme. If not, we would be able to conclude that the only causality that existed was the one between dismal access to courts and a reparation programme. Alas, we have no control Sierra Leone and thus do not know if TRC (Sierra Leone) only highlighted the problem for the sake of historical documentation, because it thought that it is one of the several reasons that obliged the country to implement an administrative reparation programme or because it thought that it was, in the crowd of the State's many other failures, the *only* one that obliged the country to provide reparations. The final outcome of this is, logically, that as we cannot confirm that this causality is the only one legally relevant, we cannot, at this point, exclude any other possible understanding of the law, either.

In addition to the overall failure to provide "functioning courts", the Government of Sierra Leone with the Lomé Agreement also agreed to grant an amnesty to "all combatants and collaborations in respect of anything done by them in pursuit of their objectives".[635] Even though the amnesty was arguably, from a practical viewpoint, unnecessary, considering that the country did not have a functioning court system that could process the many perpetrators to begin with, in a parallel world where obtaining justice through courts would have been a real possibility, granting amnesties to perpetrators of human rights violations would obviously have been a practically significant violation of victims' civil rights, a violation that would have, in turn, activated the duty to repair *that* conduct by the State, not a non-State actor's conduct. As

[635] Lomé Agreement, Article IX. See also: Witness to Truth (vol. 1), p. 30 (para. 17).

before, TRC (Sierra Leone), albeit critical of the amnesties, did not articulate whether it thought that there was a causal connection between the State offering amnesties and the State therefore becoming obliged to provide reparations, and that *this* was the circumstance it based its proposal for reparations on.

Another understanding of reparations that does not support the thesis' hypothesis is the understanding that a government is liable to implement a reparation programme because it failed to exercise due diligence in the protection of the people on its territory. The reason that this reasoning does not support the hypothesis is that culpable omission renders the victims to be also victims of the State. That the State has to repair these is undisputed. If a country is of the opinion that all victims are victims of the State, we are left without any material from which to extract its understanding of the law in regard to victims not of the State. A textbook example of such a country is Peru. TRC (Peru) articulated the causality between the Government's failures and its duty to repair in no uncertain terms:

> "Con respecto del deber de garantía, mencionado anteriormente como un principio derivado de la obligación de respetar y hacer respetar los derechos humanos, es fuente de la responsabilidad del Estado por no prevenir y responder adecuadamente a las acciones de actores privados que perjudican gravemente el pleno goce de los derechos humanos. […] Por lo tanto, y en cuanto garante del orden social y público, el deber de reparar de los Estados se extiende a las violaciones de los derechos humanos. A manos de actores privados, incluyendo grupos subversivos y terroristas. Consecuentemente, la Comisión de la Verdad y Reconciliación y su Plan Integral de Reparaciones (PIR) recomiendan establecer un trato igual para todas las víctimas, ya sean víctimas por hechos cometidos por agentes del Estado o por grupos subversivos terroristas."[636]

Here, TRC (Peru) wrote that the duty to guarantee, i.e., to protect, yielded the State responsible for not preventing and adequately addressing the conduct of subversive and terrorist organisations that had harmed the enjoyment of human rights. Therefore, TRC (Peru) said, the State's obligation to repair "extend[ed] to violations of human rights perpetrated by private actors, including subversive and terrorist groups." It then offered the perhaps clearest

[636] Informe Final, Volume IX, p. 143.

articulation of causality in all primary transitional justice literature, writing that it *consequently* recommended the Comprehensive Reparations Programme for victims of both the State and victims of non-State actors. Peru's articulation was straightforward and likely reflected the true mindset of TRC (Peru), however, a critical observation must nevertheless be offered. While TRC (Peru) clearly stated that the (legal) justification for the reparation programme was that the Government had either directly victimised or failed to protect people on its territory, it can be noted that the programme that TRC (Peru) envisaged would have been impossible were not the Government to implement it in its entirety. The question that therefore forces itself upon us is if the determination of the State's responsibility really preceded the design of the programme or if the ideal programme was envisaged and responsibility was then tailored accordingly. I have no evidence for such a proposition and question neither the *bona fide* effort of TRC (Peru) to fulfil its mandate nor the veracity of its conclusions regarding the grave failures of the Peruvian Government, however, one might ask if TRC (Peru) would have articulated the causality between responsibility and the reparation programme differently had it been of the opinion that governments also *had to* repair victims not their own.

The candidates that support the thesis' hypothesis are any articulations that sound like the proposals developed in Chapters 1 and 2. The first is the idea developed in Chapter 1, that is that the obligation to protect is an unqualified obligation of result. There does not seem to be much to support this. Articulations to that effect are made, if at all, in passing, such as, for example, seen in the paragraph from the *Informe Final* cited above, where TRC (Peru) wrote that the State's duty to repair followed from its role as a guarantor of social and political order. Considering that this phrase was made by the way, while the opinion that the State had failed to exercise its due diligence to protect victims was given more focus and specificity, the weight that can be attached to the more fleeting articulation is minimal. That being said, it is not to be completely discarded. As noted above, one can wonder whether the Comprehensive Reparations Programme really followed from the understanding that the State did not exercise its obligation to protect or whether it was the other way around. Perhaps TRC (Peru) did think that the mere existence of a violation rendered the Government, as a guarantor of social and political order, responsible, but was not convinced that this would have been accepted as persuasive by the Government.

The second idea, developed in subchapter 2.2, is that the obligation to repair is a primary obligation that follows from the prohibition of discrimination. This thought is not articulated explicitly, however, its seeds appear to be included in many other ideas. The strongest argument

in favour of the understanding of the law of States being that victims should not be treated differently based on the identity of the perpetrator is, beyond doubt, the designs of the reparation programmes themselves, where beneficiaries were delineated based on types of violation or vulnerability but not the identity of the perpetrator. While no truth and reconciliation commission explicitly articulated that its reason for choosing vulnerability over the perpetrator's identity as a selection criterion was the human rights-based prohibition of discrimination, the casualness, perhaps better expressed with the German word 'Selbstverständlichkeit', with which all the truth and reconciliation commissions did so, allows the proposition that they possibly considered the prohibition of discriminating based on the identity of the perpetrator too obvious to even mention, perhaps even entertain as a thought.

It also does not go unnoticed that the prohibition of discrimination ties in neatly with important objectives of not just reparation programmes but the entire transitional justice undertaking of a country. Transitional justice programmes are, *inter alia*, oriented towards national reconciliation. The latter has value in and of itself but it also contributes to the aim of non-repetition. If one argued that non-discrimination of victims of a past or current conflict contributed to preventing a future conflict and thus further victimisation of a country's individuals, then the prohibition of discrimination also takes on a forward-looking aspect as an inherent element of the country's obligation to respect and protect. While this, too, is not articulated explicitly, it might be too obvious to write that in order to foster peace, we should not exacerbate the divides of the present. TRC (Peru), for example, made this point explicit when taking about symbolic reparations measures,[637] but there is no logical bar from applying this same understanding in regard to other types of reparations.

The third idea, developed in subchapter 2.1, is that the obligation to repair follows from the obligation of progressive realisation. While there is, yet again, no explicit articulation, there are many instances of truth and reconciliation commissions noting that wars have disproportionately affected either the already most marginalised communities or particular

[637] "Consciente de esta realidad, la CVR propone que como parte del PIR se desarrollen ciertas acciones de contenido simbólico conformando un conjunto de rituales cívicos, que de un lado apunten a la refundación del pacto social, y del otro busquen establecer hitos representativos de la voluntad del Estado y de la sociedad de que no se repitan hechos de violencia y violación de derechos humanos como los ocurridos entre 1980 y 2000" (*Id.*, Volume IX, pp. 160-161).

sections of the population, such as women, and that therefore the State had to go above and beyond in repairing them. The former observation is particularly accentuated in Peru, where the ethnic composition and geographical distribution of the victim population did not at all reflect the ethnic composition or geographical distribution of the Peruvian society.[638] The latter observation, that war disproportionately affected certain segments of the society, such as women, is, unfortunately, obvious everywhere. TRC (Peru) wrote that in addition to exclusions based on cultural and economic diversity, women, too, have been traditionally excluded from public spaces.[639] All truth commissions also zoomed in on sexual violence and highlighted the need not only to address the violations as such but also the reasons as to why sexual violence against women was so prevalent. A most chilling manifestation of that dynamic is to be found in the *Consolidated Final Report*. There, TRC (Liberia) first noted what percentages of violations contributed rape, sexual abuse, gang rape, sexual slavery and multiple rape (total 3.9 %),[640] clarified that "children (girls) between the ages of 15-19 were the main targets of sexual violence",[641] and finally noted that while all crimes counted (163,615)[642] were only a fraction of those committed, sexual violence was thought to be particularly underrepresented, "for reasons of insecurity[] [and] stigma".[643] The history of exclusion of women from public life had contributed to that,[644] and particular, and urgent focus had to be paid to remedying that exclusion and consequent victimisation.

The fourth idea developed in Chapter 2 is that the obligation to repair is straight and simple part of the obligation to fulfil. There appears to have been generally done little legal reasoning and truth commissions have, in a way, operated with implicit assumptions when saying that victims had rights and that States would repair the violations of those rights. However, for the State to have an obligation, there must be a legal causality between victimhood and a State's

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[638] *Id.*, Volume IX, pp. 193-194.

[639] *Id.*, Volume IX, p. 94, footnote omitted.

[640] TRC Report (Liberia), p. 262.

[641] *Id.*, p. 274, see also: p. 276.

[642] *Id.*, p. 262.

[643] *Id.*, p. 19.

[644] For a brief history of women in Liberia, see: *Id.*, pp. 312-315.

obligation. Perhaps the reason the causality was not articulated is because it was so obvious. If not the State, then who?

What supports this argument is that reparation programmes were typically developed in a separate chapter that began with emphases of the rights of victims under public international law rather than failures of the State. If the articulated reparation programmes that were to be implemented by the respective States followed from that general restatement of rights of victims, that the subject holding the corresponding obligation had to be the State.

The Commission for Historical Clarification wrote that it

> "considers that truth, justice, reparation and forgiveness are the bases of the process of consolidation of peace and national reconciliation. Therefore, it is the responsibility of the Guatemalan State to design and promote a policy of reparation for the victims and their relatives. The primary objectives should be to dignify the victims, to guarantee that the human rights violations and acts of violence connected with the armed confrontation will not be repeated and to ensure respect for national and international standards of human rights."[645]

TRC (Sierra Leone) expressed itself as follows:

> "The purpose of a reparations programme is to provide redress and accord a measure of social justice to victims of human rights violations. Under international law, victims can obtain redress either through political means such as reparations programmes or pursue legal recourse through the civil courts. However, as in many post-conflict societies, it is not possible to prosecute perpetrators or seek civil damages through the courts."[646]

TRC (Liberia) articulated this idea in the following terms:

[645] Memory of Silence, p. 50.

[646] Witness to Truth (vol. 2), p. 229 (para. 9).

> "The TRC hereby recommends that the Government of Liberia assumes its full responsibility under international law principles and regimes and pursuant to its moral, legal, social, political, cultural, economic, and security obligations to its citizens to provide reparations for all those individuals and communities victimized by the years of instability and war."[647]

All these articulations were arguably a bit busy, throwing together multiple considerations not all of which are necessarily legally relevant, for example, by mentioning "justice, reparation and forgiveness" in the same phrase. While such an assembly is frustrating for the discernment of the countries' understanding of the law, it is key to remember that those making statements out of which an understanding of the law can be extrapolated were often not international lawyers and their focus, therefore, different.

An important example supporting this theory is also Colombia. *Ley 1448*, which developed a rather comprehensive reparation programme, kicked off by listing general principles that were to guide the implementation of the law. Victims were to receive reparations regardless of who was responsible for the violation and regardless of whether the responsible belligerent or person had been identified at all. In addition, *Ley 1448* stipulated:

> "El fundamento axiológico de los derechos a la verdad, la justicia y la reparación, es el respeto a la integridad y a la honra de las víctimas. Las víctimas serán tratadas con consideración y respeto, participarán en las decisiones que las afecten, para lo cual contarán con información, asesoría y acompañamiento necesario y obtendrán la tutela efectiva de sus derechos en virtud del mandato constitucional, deber positivo y principio de la dignidad.
>
> El Estado se compromete a adelantar prioritariamente acciones encaminadas al fortalecimiento de la autonomía de las víctimas para que las medidas de atención, asistencia y reparación establecidas en la presente ley, contribuyan a recuperarlas como ciudadanos en ejercicio pleno de sus derechos y deberes."

Ley 1448 thereby established "el respeto a la integridad y a la honra de las víctimas" as the foundation of the victims' rights to truth, justice and reparations, and obliged the State to effect "la tutela efectiva de sus derechos". The second paragraph cited said that the State would

[647] TRC Report (Liberia), p. 378.

prioritise actions aimed at strengthening the autonomy of the victims and ultimately contributing to recover their identity as citizens who fully exercise their rights and duties.

A separate, but related emphasis is to be made concerning the victims' dignity. Dignity is mentioned in the Preambles to both the *International Covenant on Civil and Political Rights* and the Covenant, and it also features prominently in reports of truth and reconciliation commissions, as well as in legislation, where legislation exists.

In Guatemala, the Commission for Historical Clarification considered it to be the primary objective of the reparation programme "to dignify the victims".[648]

The *Truth and Reconciliation Commission Act* mandated TRC (Sierra Leone) to "work to help restore the human dignity of victims". In its chapter on reparations, TRC (Sierra Leone) devoted an entire short chapter to "The Potential of Reparations to Restore the Dignity of Victims", and wrote:

> "42. The conflict caused many innocent people to fall victim to the cruellest violations of fundamental human rights. As a consequence, *victims often find themselves in a condition which is not conducive to living with dignity*. Most have been reduced to living in poverty, some having to endure the loss of limbs and others shunned because of their personal experiences such as rape and sexual slavery. Their dependency and social exclusion are constant reminders of the suffering they went through.
>
> 43. Some are faced almost continuously with those who have harmed them in their own communities, their presence serving as a constant reminder of the violation suffered. Moving on beyond this state is impossible given the economic and social conditions that victims find themselves in and their dependence on handouts. The humiliation of being dependent on the charity of others and often having to beg in order to live re-victimizes victims, leaving lasting scars and wounds that may fester thoughts of bitterness and anger. This may constitute the seeds of future violence. *A reparations programme has the potential to restore the dignity of victims whose lives have been most devastated to move beyond the position they are currently in as a consequence of the war. The restoration of the dignity of victims can help to create the conditions necessary for reconciliation*."[649]

[648] Memory of Silence, p. 50.

[649] Emphases added.

The *Act to Establish the Truth and Reconciliation Commission* also mandated TRC (Liberia) to "[h]elp[] restore the human dignity of victims",[650] while TRC (Liberia), in turn, wrote that "[r]eparation [was] a responsibility of the state and development partners as a long term peace investment to redress the gross violations of human rights committed against victim communities and individuals, especially women and children, to help restore their human *dignity*, foster healing and closure, as well as justice, and genuine reconciliation."[651]

A very technical interpretation of these passages could be that the continued absence of restored dignity is a State violation and that the State therefore must repair its violation offending individuals' dignity. However, dignity cannot be separated from human rights. One cannot restore dignity without addressing questions of housing, health or education, rights that had previously been violated by private actors. In fact, as one author put it, "[t]here is no such thing as a right to dignity", but rather, "that human dignity is the central value underpinning the *entirety* of international human rights law."[652] Therefore, a more sensible interpretation is that the State has (to continue) to respect the dignity of victims, which is done by redressing the violations that they suffered at the hands of the State or non-State actors.

Looking back at the examination above, it is not possible to offer a simple, one-dimensional conclusion. What appears undisputed is that countries opine that victims of violations of economic, social and cultural rights perpetrated by non-State actors have a right to be repaired by their respective government, however, on what legal basis that right is based, i.e., to which theory developed in Chapter 1 or Chapter 2 the legal thinking of the States corresponds to, is less clear. The easiest conclusion to reach would be to say that States do have *a* reason, regardless of what that reason might be, and, a bit like it is sufficient to convict a person based on circumstantial evidence alone, we should suffice ourselves to say that there is enough evidence to support that there is *a* understanding of the law that includes a legal obligation, even if its classification into the legal framework of public international law is not possible. This, although a viable course of action, does not appear entirely satisfactory and at least some further analysis is warranted.

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[650] TRC Report (Liberia), p. 61.

[651] *Id.*, p. 19, emphasis added.

[652] *O'Mahony* (2012), There is no such thing as a right to dignity, pp. 551 and 552, emphasis added.

Towards the end of the presentation provided above, we observed that countries would emphasise the victims' right to dignity. Perhaps, as the Committee stated, e.g., in regard to food, that "the right to adequate food is indivisibly linked to the inherent dignity of the human person", so, too, perhaps, is the right to be repaired *also* "indivisibly linked to the inherent dignity of the human person". A reparation programme as an affirmation of human dignity elegantly incorporates all the elements discussed above, as it would be offensive to the dignity of a woman, to use a hypothetical example from earlier in the thesis, not to receive restitution or compensation for her cattle just because it had been, unlike that of her neighbour, killed during the rebels' raid on Monday and not the government's counter-offensive on Tuesday, as it would be offensive for a government to assert development when devastation is still visible and as it would be offensive to claim that the right to fulfil economic, social and cultural rights exists in equal measure for all, regardless of prior victimisation. I therefore submit that the countries in the transitional justice group developed their reparation programmes in order to affirm the victims' inherent dignity. As such, their understanding is that the victims right to repair is an integral part of the prohibition of discrimination, of the progressive realisation obligation and, overall, the obligation to fulfil economic, social and cultural rights. I conclude that States in the transitional justice group opine that the obligation to repair victims not of the State is a primary obligation, which corresponds to the proposition made in Chapter 2 of this thesis.

3.1.3 The pending group

We can finally look at countries that have recently or not so recently embarked on the path towards a reparation programme but are still far from adopting one. It appears that what followed the golden era of transitional justice is an era of transitional justice fatigue in which concepts have crystalised and language has been fine-tuned but implementation is largely lacking.[653] The material that comes from these countries is, as far as it is of relevance for this

[653] See, for example: *Macdonald* (2019), 'Somehow This Whole Process Became so Artificial'; while the author zoomed in on Uganda, she wrote that her "[f]indings [we]re relevant to the wide range of nontransitioning contexts where [transitional justice] [wa]s promoted by international donors and ha[d] important implications for its claimed potential to catalyze or restore civic trust in political systems in the aftermath of massive human rights violations" (p. 225).

thesis, encouraging nevertheless. The countries in the pending group can be roughly divided into two sections. In the first section, we find countries where transitional justice has been or is being discussed during a still ongoing conflict or a relatively recent and still precarious post-conflict peace. In this group we find, by way of example, South Sudan and the Central African Republic in Africa, and Afghanistan in Asia.[654]

In South Sudan, civil war broke out almost immediately after the country declared its independence from Sudan on 9 July 2011. In addition to an inter-State conflict with Sudan,[655] in "December 2013[,] high-intensity fighting between different factions of the presidential guard, started in Juba. The faction loyal to […] Riek Machar formed the rebel group [Sudan People's Liberation Movement/Army – in opposition] SPLM/A-IO",[656] which has fought the Government ever since and remains active as of the cut-off date for this thesis' research.[657] Parallel to it, fighting between different groups, such as cattle raiders,[658] contributes to the overall tragedy of the world's youngest country.

The main belligerents of the civil war, the Government, on the one hand, and the Sudan People's Liberation Movement/Army – in opposition, on the other, have signed several ceasefire and peace agreements. The most recent is the *Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan* (hereinafter: Revitalised Agreement), concluded on 12 September 2018 under the auspices of Intergovernmental Authority on Development. Like its predecessor,[659] it includes an extensive chapter on transitional justice. Chapter V obliges the Revitalised Transitional Government of National Unity to establish three transitional justice mechanisms, including the Commission for Truth, Reconciliation and

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[654] In the course of research for this thesis, the Taliban again seized power in Afghanistan. Developments in Afghanistan are therefore only considered up until the coup of 15 August 2021 (*Seir, Ahmad, et al*., Taliban sweep into Afghan capital after government collapses, Associated Press News, 16 August 2021).

[655] South Sudan, Uppsala Conflict Data Program, University of Uppsala, no date, ucdp.uu.se/country/626.

[656] South Sudan: Government, Uppsala Conflict Data Program, University of Uppsala, no date.

[657] 31 December 2021.

[658] The Uppsala Conflict Data Program lists over 30 non-State conflict dyads. Even though some dyads mirror the ethnic division of the main conflict, others are independent of it (South Sudan, Uppsala Conflict Data Program, University of Uppsala, no date).

[659] Agreement on the Resolution of the Conflict in the Republic of South Sudan, signed on 17 August 2015, reproduced by the United Nations Peacemaker, peacemaker.un.org/node/2676, Chapter V.

Healing, and the Compensation and Reparation Authority. The latter, yet to be established,[660] shall manage the also yet to be established Compensation and Reparation Fund, "the utilization of which should be guided by a law enacted by the [Transitional National Legislative Assembly]",[661] and "shall provide material and financial support to citizens whose *property* was destroyed by the conflict and help them rebuild their livelihoods".[662] Meanwhile, the future Commission for Truth, Reconciliation and Healing is endowed with the task of "recommend[ing] processes and mechanisms for the full enjoyment by victims of the right to remedy, including by suggesting measures for reparations and compensation."[663] Victims are not defined in the *Revitalised Agreement*, however, whenever referenced, they are referred to as one homogenous group, allowing the conclusion that measures in favour of victims are meant, in equal measure, for victims of the Government and for victims of non-State actors. As for the origin of the "right to remedy", which, under the *Revitalised Agreement*, appears to be an umbrella term including the right to reparations, it is not clear what the Parties to the *Revitalised Agreement* consider to be its source. In the *Transitional Constitution of the Republic of South Sudan*,[664] there is foreseen "adequate compensation", however, that only applies to victims whose rights are considered in the context of a civil or criminal case and whose compensation is to be provided by the perpetrator, not the State. Considering the very strong involvement of the international community in South Sudan,[665] it is more likely that the

[660] Government of South Sudan launches public consultations on formation of Truth, Reconciliation and Healing Commission, United Nations Development Programme, 8 April 2022, www.undp.org/south-sudan/news/government-south-sudan-launches-public-consultations-formation-truth-reconciliation-and-healing-commission.

[661] Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan, signed on 12 September 2018, ucdpged.uu.se/peaceagreements/fulltext/SSD%2020180912.pdf (hereinafter: Revitalised Agreement), Article 5.4.2.5.

[662] *Id*., Article 5.4.2.4., emphasis added.

[663] *Id*., Article 5.2.1.5. See also: Articles 5.2.2.3.2. and 5.2.2.3.4.

[664] Transitional Constitution of South Sudan, Southern Sudan Legislative Assembly, 2011, www.refworld.org/pdfid/5d3034b97.pdf.

[665] Both the *Agreement on the Resolution of the Conflict in the Republic of South Sudan* as well as the *Revitalised Agreement* were co-signed by the African Union, Algeria, Chad, China, Djibouti, Ethiopia, the European Union, the Intergovernmental Authority on Development's Partners Forum Kenya, Nigeria, Norway, Rwanda, Somalia, South Africa, Sudan, Uganda, the United Kingdom, the United Nations, the United States of America and, as the Agreement was concluded under its auspices, the Intergovernmental Authority on Development.

Government thought that the right to reparation was/is a right that (all) victims of war enjoy under public international law. While the Government did not say so explicitly and did not specifically reference the victims' dignity in relation to reparations either, the Preamble to the *Agreement on the Resolution of the Conflict in the Republic of South Sudan* offers some valuable insight into the Government's thinking. First, the Government acknowledges the "disastrous economic, political and social consequences" that the conflict had had "for the people of South Sudan". Further, it "[p]rofoundly regret[ed] the suffering and distressed caused […][,] apologising unconditionally to the people of South Sudan for all the suffering and distress caused by the devastation, loss of life and instability", and, importantly, acknowledges, the "mass violations of *human rights*",[666] rather than, for example, constitutional rights.

The Central African Republic is a step ahead of South Sudan as the *Political Agreement for Peace and Reconciliation in the Central African Republic* (hereinafter: Political Agreement (CAR))[667] has already been followed up by the adoption of *Loi n° 20.009 portant création, organisation et fonctionnement de la Commission Vérité, Justice, Réparation et Réconciliation* (hereinafter: *Loi n° 20.009*),[668] which establishes the Commission on Truth, Justice, Reparation, and Reconciliation,[669] mandating it with "le rétablissement de la dignité des victimes".[670] It also proposes a *Fonds Spécial de Réparations des Victimes* and a national reparation programme that is to include material, and moral and symbolic measures of reparation.[671] The Commission on Truth, Justice, Reparation, and Reconciliation is to be funded by the State budget as well as donations,[672] while the financing of the reparations fund is yet to be determined by law and implementing decree(s).[673] *Loi n° 20.009* does not define

[666] Emphasis added.

[667] UNSC, Letter dated 14 February 2019 from the Secretary-General addressed to the President of the Security Council. Annex: Political Agreement for Peace and Reconciliation in the Central African Republic, February 2019, UN Doc. S/2019/145, 15 February 2019 (hereinafter: Political Agreement (CAR)).

[668] Loi n° 20.009 portant création, organisation et fonctionnement de la Commission Vérité, Justice, Réparation et Réconciliation, L'Assemblée Nationale, 7 April 2020.

[669] *Id*., Article 1.

[670] *Id*., Article 5.

[671] *Id*., Article 6.

[672] *Id*., Article 40 (1).

[673] *Id*., Article 40 (2).

victims, however, it is clear that the entire universe of victims is embraced by this word and that the identity of victimhood is independent of who the perpetrator of a certain violation was.[674] As for the understanding of the law, it is clear that the Government thinks that victims are entitled to reparation.[675] Whether the origin of that obligation is international or domestic in nature is, just as in the example of South Sudan, difficult to pinpoint, however, it can be emphasised that, similar to Tajikistan, the Government expects "to work with international partners and relevant associations for the establishment of a victim support and redress programme",[676] meaning that even if it does not think it is obliged to repair victims not of the State, it definitely considers this to be a measure so highly desired as to attract international support. *Loi n° 20.009* and, before it, the Political Agreement (CAR) come from a context of a plethora of non-State actors,[677] further allowing the conclusion that the Government does not consider all victims to be *its* victims and, consequently, sees its obligation to repair all victims as part of an obligation to fulfil that is independent of the Government's responsibility.

While we have seen that reparation features prominently in both South Sudan and the Central African Republic, one imagining a separate Compensation and Reparation Authority and a programme to be developed by the Commission for Truth, Reconciliation and Healing, the other putting the word 'reparation' into the name of the truth and reconciliation commission itself, the example of Afghanistan is comparatively less encouraging. Since 1978,[678] the people of Afghanistan have lived through three or four consecutive conflicts, which they often consider as one uninterrupted experience of violence.[679] While the author of the violence against the civilian population has often been the State, considerable amounts of conduct violating economic, social and cultural rights could also be attributed to the Taliban *after* they

[674] Political Agreement (CAR), Annex II, para. 2 of 'Justice, national reconciliation and humanitarian issues'.

[675] Political Agreement (CAR), Article 12 ("The Parties agree to take appropriate measures, including the establishment of a trust fund, to guarantee the rehabilitation and reparation due to victims").

[676] *Id*., Article 4 (s).

[677] Central African Republic, Uppsala Conflict Data Program, University of Uppsala, no date, ucdp.uu.se/country/482.

[678] Afghanistan profile – Timeline, BBC, 9 September 2019, www.bbc.com/news/world-south-asia-12024253.

[679] A Call for Justice. A National Consultation on Past Human Rights Violations in Afghanistan, Afghan Independent Human Rights Commission, 25 January 2005, www.refworld.org/docid/47fdfad50.html, p. 11.

were displaced from power in 2001.[680] Even though the *Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America* (hereinafter: Agreement for Bringing Peace to Afghanistan), signed on 29 February 2020,[681] opened the way for the Taliban's inclusion into State politics, their conduct up until 15 August 2021, even if the *Agreement for Bringing Peace to Afghanistan* was to be followed by an agreement between the Taliban and the Afghan Government, remained unattributable to Afghanistan.[682] Despite the decades of violence, Afghanistan's pre-August 2021 flirtations with transitional justice were short-lived. Reparations hardly made an appearance, being mentioned only briefly in *A Call for Justice*, a report produced by the Afghan Independent Human Rights Commission in 2005,[683] and similarly only in passing in the *Peace, Reconciliation and Justice in Afghanistan Action Plan*.[684] Measures that appear to be reparatory in nature appeared in the *National Development Strategy* for the period between 2008 and 2013, where the Afghanistan National Development Strategy Oversight Committee addressed measures in favour of (returning) refugees and internally displaced persons.[685] Even though there was no distinction made between refugees and internally displaced persons based on when they became internationally or internally displaced, or whose responsibility it was, the placement of the measure among development measures makes the extraction of an understanding of the law, *any* understanding of the law, difficult. The same is true for "[t]the civilian victims of the ongoing conflict",[686]

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[680] Taleban, Uppsala Conflict Data Program, University of Uppsala, no date, ucdp.uu.se/actor/303.

[681] Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America, 29 February 2020, www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf.

[682] When the Taliban seized power on 15 August 2021, their conduct arguably became attributable to Afghanistan (Articles on State Responsibility, Article 10).

[683] A Call for Justice. A National Consultation on Past Human Rights Violations in Afghanistan, Afghan Independent Human Rights Commission, 25 January 2005, pp. 32-34.

[684] Peace, Reconciliation and Justice in Afghanistan (action plan), Government of the Islamic Republic of Afghanistan, 7 June 2005, www.legal-tools.org/doc/17033d/pdf/, Introduction.

[685] Afghanistan National Development Strategy (2008-2013), Afghanistan National Development Strategy Oversight Committee, no date, www.wto.org/english/thewto_e/acc_e/afg_e/wtaccafg18_cd_1.pdf, pp. 2 and 13.

[686] *Id*., p. 126.

even though the use of the word 'victim' could be considered of importance. While the determination of beneficiaries does hint at that the State wanted to repair violations of economic, social and cultural rights perpetrated by either group, the placement of those "support" measures within the development chapter makes the extraction of an understanding of the law little more than guesswork. One possible understanding is that the Government understood measures of reparation to be an integral part of the fight against terrorism and that victims of violations of economic, social and cultural rights had to be repaired not because they were due repair as a matter of (public international) law but for entirely practical purposes, namely, to be provided with a disincentive from turning to support terrorists.[687] While such an understanding of the law would not support the thesis' hypothesis, it would also be wrong, as public international law demands that a government, as a minimum, repairs its own victims. If the Afghan Government did not think so, then the weight of its understanding of the law regarding victims of non-State actors should be given less weight, too. Either way, the most recent *National Peace and Development Framework* no longer discussed victims at all.[688]

In the second section within the pending group are countries where the relevant conflict is either detached from the centre of power or is slowly but surely scooching into the past, garnering little attention from the respective government. A textbook example of such a country is Uganda. Officially, Uganda saw the conclusion of its latest civil war in 2007 after the Government and the infamous Lord's Resistance Army signed the *Agreement on Cessation of Hostilities between the Government of the Republic of Uganda and Lord's Resistance Army/Movement*,[689] followed on 29 June 2007 by the *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and Lord's Resistance*

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[687] *Id*., p. 54 ("To defeat terrorism, new strategies attuned with political objectives of the Government are being adopted, such as strengthening the effectiveness of ISAF and Coalition Forces assistance. This includes special attention to building the professional capabilities of Afghan security forces designed to defeat terrorism and to render assistance to victims of war and avoid civilian casualties").

[688] Afghanistan National Peace and Development Framework (2017-2021), Government of the Islamic Republic of Afghanistan, and partners, no date, www.refworld.org/pdfid/5b28f4294.pdf.

[689] UNSC, Letter dated 3 November 2006 from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council. Annex: Agreement on Cessation of Hostilities between the Government of the Republic of Uganda and Lord's Resistance Army/Movement, UN Doc. S/2006/861, 3 November 2006.

Army/Movement (hereinafter: Agreement on Accountability and Reconciliation).[690] The Lord's Resistance Army has since thinned out and spread into neighbouring countries.[691] The Cabinet, meanwhile, despite adopting occasional *ad hoc* measures in favour of victims of the civil war in Northern Uganda, took almost 12 years to follow up the *Agreement on Accountability and Reconciliation*'s reparations provisions,[692] and adopt the blueprint for the ongoing and upcoming transitional justice process, the *National Transitional Justice Policy*.[693]. While the delay is discouraging,[694] in particular considering the international attention the conflict has received both from foreign countries, the International Criminal Court and international civil society,[695] what the *National Transitional Justice Policy* has to say about reparations for

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[690] UNSC, Letter dated 16 July 2007 from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council. Annex: Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, UN Doc. S/2007/435, 17 July 2007 (hereinafter: Agreement on Accountability and Reconciliation).

[691] *Cascais, Antonio*, The last throes of Uganda's Lord's Resistance Army, Deutsche Welle, 24 January 2022, www.dw.com/en/uganda-lord-resistance-army-final-days/a-60535944.

[692] Agreement on Accountability and Reconciliation, Clause 9. See also: Annexure to the Agreement on Accountability and Reconciliation, signed between the Government of Uganda and the Lord's Resistance Army/Movement on 19 February 2008, available at: ucdpged.uu.se/peaceagreements/fulltext/UGA%2020080219.pdf, paras. 16-18.

[693] National Transitional Justice Policy, Cabinet of the Republic of Uganda, 17 June 2019, drive.google.com/file/d/1zbqYZgRVpUpDrQUTM5c_GeMsuItrB9O2/view (hereinafter: National Transitional Justice Policy).

[694] See: *Macdonald* (2019), 'Somehow This Whole Process Became so Artificial'. Even though the National Transitional Justice Policy has now been adopted, the author's worry remains valid. She wrote, *inter alia*:

> "In its treatment of the Ugandan case, this article argues that the TJ implementation gap is best understood as the space in which this tension plays out. Rather than a temporary bump in the road, the implementation gap is a dynamic, enduring political space generated, constituted and sustained by the interaction of technocratic donor approaches and the power imperative of domestic elites in nontransitioning places. In Uganda, this (un)productive encounter has produced two mutually enabling forms of political artifice that keep TJ on the agenda, but thwart the realization of substantive progress. The first is 'isomorphic mimicry,' in which donors and recipients have a shared interest in prioritizing institutional form (what an institution looks like) over institutional function (what it achieves and the extent to which it is institutionalized). […] The second is 'calculated stasis,' in which domestic political elites skillfully leverage the space provided by donor 'partnership' approaches to sociolegal and political reform by stalling policy progress on TJ and gradually reframing its political narratives, without having to explicitly reject it."
>
> (*Macdonald* (2019), 'Somehow This Whole Process Became so Artificial', p. 227, footnotes omitted.)

[695] See, for example: *Gettleman, Jeffrey*, In Vast Jungle, U.S. Troops Aid in Search for Kony, NYT, 29 April 2012, www.nytimes.com/2012/04/30/world/africa/kony-tracked-by-us-forces-in-central-africa.html; Uganda.

victims of war is encouraging, both in regard to Uganda's State practice as well as its understanding of the law. The National Transitional Justice Policy foresees the development of a reparation programme for all victims, whom it defines as

> "person(s) who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or impairment of their fundamental rights, through acts or omissions that constitute gross violations/abuses of human rights and may include a member of the immediate family or dependant of the victim or other person(s)."[696]

By establishing and financing a reparation programme, the Government will, according to the National Transitional Justice Policy, continue to realise its "national and *international*"[697] obligations towards victims of war. While the theory that Uganda's understanding is that the Government's obligation towards all victims is based on its "recognition that persons affected by conflict should be supported to enjoy in full equality the same social, economic and political rights as the rest of the country",[698] i.e., its continuous obligation to fulfil, *inter alia*, economic, social and cultural rights, is credible and supportive of the hypothesis, it can also be emphasised that the policy is, among others, governed by the principles of equality and inclusiveness, the latter being explained as the "equal treatment to all actors irrespective of differences",[699] allowing also for the understanding that Uganda's understanding of the law goes hand in hand with the theory developed in Chapter 2 that the prohibition of discrimination in the realisation of economic, social and cultural rights includes the demand that all victims of violations be treated equally.[700]

Situation in Uganda (ICC-02/04), ICC, no date, www.icc-cpi.int/uganda; or: Uganda, ICTJ, no date, www.ictj.org/location/uganda.

[696] National Transitional Justice Policy, p. ix.

[697] *Id.*, p. 3.

[698] *Id.*, p. 3.

[699] *Id.*, p. 17.

[700] It has to be noted that Uganda, prior to the agreements with the Lord's Resistance Army/Movement, adopted, in 2000, the Amnesty Act. Its Supreme Court recently clarified "that the Amnesty Act does not provide for blanket

Looking at South Sudan, the Central African Republic and Uganda, a clear pattern emerges. The State practice so far falls squarely in line with the thesis' hypothesis. The understanding of the law is, just as in the transitional justice group, not simple to discern, however, it appears that all countries agree that the State should repair victims not their own. The word 'dignity' comes to mind again. Even though less often explicitly named, articulations of the Government of South Sudan to the effect that it is "apologising unconditionally to the people of South Sudan for all the suffering",[701] or the articulation of Uganda to the effect that it will design its transitional justice project based on the principle of "[v]ictim [c]enteredness",[702] are manifest of the recognition of the victims' needs, rights and dignity. As the Central African Republic and Uganda are States Parties to the Covenant, their understanding of the law can be said to fall in line with the idea proposed in Chapter 2. South Sudan, on the other hand, is not a State Party. If it is the country's understanding of public international law that the latter demands the reparation of victims of non-State actors, South Sudan must think that its primary obligation to repair exists in the sphere of customary international law.

3.1.4 Key findings from the empirical review

Chapter 3 looked at countries that have had a more or less recent experience with a non-international armed conflict. The empirical review was divided into three groups, loosely determined by the context and time of birth of the respective country's reparation programme. The pre-transitional justice group developed its policies in the late 1990s and at the turn of the millennium. The transitional justice group is not so much separate in time as it is in the absorption of the transitional justice framework into its fibre, putting victims at the centre of its designs. The pending group is perhaps best understood as a subgroup of the transitional justice group, employing similar language and imagining the paramount role that a truth and reconciliation commission should play, however, with international focus to some degree

amnesties, but is limited to the participation in the rebellion and does not extend to war crimes" (Supreme Court of Uganda, Thomas Kwoyelo alias Latoni v. Uganda (Constitutional Appeal No. 01 of 2012), 8 April 2015).

[701] Agreement on the Resolution of the Conflict in the Republic of South Sudan, signed on 17 August 2015, Preamble.

[702] National Transitional Justice Policy, p. 16.

already shifting away from transitional justice, it is to be seen whether we will witness further reparation programmes and, if so, of what kind.

From the perspective of this thesis' hypothesis, the results of the empirical review have been encouraging. State practice in all countries is overwhelmingly supportive of the thesis' hypothesis. With the exception of Algeria, no country has developed distinct reparation programmes for victims of the State and victims not of the State and even in Algeria, victims of non-State actors were, chronologically speaking, considered first and never treated worse than victims of the State. All other countries treated victims as homogenous groups. As far as some of them were prioritised in or excluded from the proposed reparation programmes, the criteria applied were independent of the identity of the perpetrator. Rather, prioritisation was guided by considerations of vulnerability and fiscal prudence.

To what degree the countries' understanding of the law corresponds to the thesis' hypothesis is less clear. In the pre-transitional justice group, the most important observation was that countries appeared to possess an instinctive reflex, an organic impulse to give reparations to victims not of the State, and at least the Algerian government considered that victims were *due* reparations even though it was not possible to discern on what legal basis. Countries in the transitional justice and pending groups appear to think that all victims deserve reparations, thereby confirming the thesis' hypothesis. However, here as well, it is unclear where countries think the obligation comes from. Despite many articulations on the various actors' responsibilities, the lack of causal reasoning prevents a final answer to the question. The understanding that most elegantly subsumes a majority of the statements made by the respective countries as well as the subhypotheses presented in Chapter 2, stating, in essence, that the obligation to repair is an inherent part of the State's obligation to fulfil economic, social and cultural rights, is that reparation programmes are legally necessary to affirm victims' inherent dignity.

CONCLUSION

Public international law is a dynamic legal field. In 1933 in an article about the static and dynamic forces shaping it, the author wrote that "dynamic development will be brought about in many instances by the violation of the static law".[703] This observation fit well to prohibitive norms, however, opposed to 1933, today's public international law does not include only or predominantly prohibitions. Not only omissions, also acts are required of the State, often in favour of a corresponding *human* rights holder.

The relevant rules here do not prohibit but set a minimum standard. If a State exceeds that minimum, it is not violating its obligations and does not have to justify or defend its conduct. A territorial State's generosity towards its own population is, of course, welcomed, however, the nature of the obligation which it is not only realising but exceeding makes it difficult to determine when a new obligation including a higher minimum has emerged and when, contrary to that, a State's generosity is merely that, gratuitous largesse. Considering this thesis' hypothesis in particular, the problem is arguably exacerbated by the fact that many non-international armed conflicts take place in States that do not diligently compile overviews of their practice and understanding of public international law.[704]

According to the Basic Principles and Guidelines, the authoritative articulation of the current consensus on the States' obligations to protect, on the one hand, and repair, on the other, States must exercise due diligence in protecting individuals on their territory and are obliged to repair victims of conduct that is attributable to them. They are also encouraged to repair victims of conduct not attributable to them. This latter appeal is a moral, not a legal one. And yet, in the over 15 years since the Basic Principles and Guidelines' adoption, States have shown a remarkable consistency in developing reparation programmes whose beneficiaries include victims of non-State actors. If the appeal for generosity is consistently heeded, sometimes accompanied with a statement more or less corresponding to this thesis' hypothesis, sometimes not, but never contradicting it, can we consider that the required minimum has moved upward? Has time closed the dissonance, has public international law evolved so as to be in consonance

[703] *Kunz* (1933), The Law of Nations, Static and Dynamic.

[704] *Chimni* (2018), Customary International Law, p. 21.

with State practice? Perhaps a twist of the articulation from a positive obligation into a negative can accentuate the point. We know that the Basic Principles and Guidelines prohibit States from not providing reparations to victims of conduct that is attributable to them. Are States on the eve of 2021 also prohibited from not providing reparations to victims not of the State or do they remain free to disregard violations of economic, social and cultural rights as if they were, beyond the general obligation to provide procedural remedies to victims, none of their concern? This is the question that this thesis set out to answer.

Starting from an observation that States do in fact repair victims not of the State, Chapters 1 and 2 were devoted to finding legal rules that might guide States in doing so. Chapter 1 set out to show that the current consensus was that the obligation to protect was a qualified obligation of result. It then showcased the weakness of such an understanding juxtaposed to the cause of making reparations a reality for victims of non-State actors and demonstrated that the current framework has developed from the law on State responsibility, a law that was developed for relationships profoundly different than the one between the individual and her territorial State. In conclusion, it proposed understanding the obligation to protect as an unqualified obligation of result, showing not only that it was more beneficial for victims of non-State actors but also a credible candidate for the States' understanding of the law.

Chapter 2 accepted to view the obligation to protect as a qualified obligation of result and then explored whether the obligation to repair could be seen as a primary obligation. It demonstrated that the Covenant included two important tools that could be interpreted so as to include the obligation to repair victims of non-State actors, namely, the obligation of progressive realisation and the prohibition against discrimination. A look at how the Committee addressed certain economic and social rights further confirmed that nothing contradicted the arguments developed in Chapter 2.

In their totality, Chapters 1 and 2 demonstrated that public international law already contains mechanisms that (would) make it possible to oblige the State to repair victims not of the State, making it unnecessary to resort to less effective propositions, such as the attempt to construct an unstable international subjectivity of non-State actors in order for holding them accountable, directly under public international law, for violations of human rights, a proposition that is at best ineffective and at worst counterproductive, or holding reparations hostage to outcomes of (international) criminal trials and the wealth, or lack thereof, of physical perpetrators.

What Chapters 1 and 2 did not answer, however, was whether States considered their obligation to be a legal one at all and, if so, what the exact content of it might be. Chapter 3 thus summarised an empirical review of a dozen conflict and post-conflict countries. It showed that State practice was virtually uniform and that States with reparation programmes did not distinguish between victims based on the identity of the perpetrator. Vulnerability or financial prudence were the designers' guiding principles instead.

As far as it was possible to extract the respective State's understanding of the law, that understanding was in harmony with the thesis' hypothesis. There is little to suggest that States think along the line of the idea developed in Chapter 1. However, solid evidence points to that States consider the obligation to repair victims not of the State to be a primary obligation as was proposed by Chapter 2. It appears that the underlying motivation to repair victims not of the State is respect for their inherent dignity, a motivation that elegantly encompasses also the obligation of progressive realisation and the prohibition of discrimination, two important, yet little explored mechanisms contained in the Covenant. It is even possible to suggest that the primary obligation exists not only as a conventional but also as a customary one. While the proposition of Chapter 2 has notable shortcomings compared to the proposition in Chapter 1, it does establish that the obligation to repair victims of non-State actors is a legal, not merely a moral one.

The question regarding whether a State that holds sovereignty over a certain territory has an obligation under public international law to repair victims whose economic, social and cultural rights have been violated by conduct that cannot be attributed that State is answered in the affirmative. Victims of non-State actors can claim reparations from the State as a matter of law.

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