AFRICAN COURT ON HUMAN
AND PEOPLES' RIGHTS

Comparative Study on the Law and Practice of Reparations for Human Rights Violations

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FOREWORD

The African Court on Human and Peoples' Rights is a continental court established by African Union (AU) Member States to ensure the protection of human and peoples' rights in Africa. It complements and reinforces the protective mandate of the African Commission on Human and Peoples' Rights. The Court was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol) which was adopted by Member States of the then Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004.

As of this writing, nine (9) of the thirty (30) States Parties to the Protocol have made the Declaration recognising the competence of the Court to receive cases from Non-Governmental Organisations (NGOs) and individuals. These nine (9) States are; Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Mali, Malawi, Tanzania, Tunisia. The thirty (30) States that have ratified the Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

The Court has a mandate to make orders to remedy a human rights violation, including the payment of fair compensation or reparation, if it finds that there has been a violation of human or peoples' rights, as provided in Article 27 of the Protocol. Moreover, the Court is the only AU human rights organ with an explicit mandate to order such reparations. This provision is the cornerstone of the AU human rights protection system, which is built on the principle that, 'where there is a right, there is a remedy'. Implementing this obligation to provide a remedy is imperative to the effective enjoyment of rights under the African Charter on Human and Peoples' Rights and to reinforcing a robust African human rights protection system.

While the judgments of the Court on reparations establish important precedents for the future, the law and practice of reparations is vast and complex; with constantly evolving approaches particularly over the past decade and these can serve as important references for this Court.

With this background, I am pleased to present this **Comparative Study on the Law and Practice of Reparations for Human Rights Violations**, commissioned by the

Court to inform the development of its jurisprudence on reparations towards redress for human rights violations and enhance the protection of human rights in Africa.

Justice Sylvain Oré - **President of the Court**

Within the framework of the Court's Strategic Plan for 2016-2020, which includes the Goal of Enhancing the Court's judicial procedures, in 2017 the Court commenced the development of Internal Guidelines on Reparations to inform the elaboration of its reparations orders, taking account of the relevant law, principles and practice in this regard. Central to this process has been the development of this **Comparative Study on the Law and Practice of Reparations for Human Rights Violations** to inform the internal guidelines of the African Court on Human and Peoples' Rights on the delivery of reparations judgments**.**

The study was commissioned by the Court in September 2017 to the War Crimes Research Office of the American University (WCRO), a specialised research body with expertise in human rights and humanitarian law, and in particular, reparations law and practice at the international level. The preparation of the study is a result of collaboration between the Registry of the Court and the WCRO, who worked over the period of one year to conduct in-depth research and analysis of the issues contained herein. Ms Grace Wakio Kakai, Head of Legal Division, Dr. Mwiza Nkhata, Principal Legal Officer, Mr. Victor Lowilla, Legal Officer and Ms. Ismene Nicole Zarifis, PANAF expert to the Court as well as Ms Salma Gabr, Ms Rotondwa Mashige and Ms Harriet Vince, Legal Interns at the Court worked closely with WCRO to compile and finalise the study.

This is a comprehensive study detailing the prevailing law and practice on reparations and drawing from the jurisprudence of eighteen (18) international human rights courts and bodies. The analysis addresses virtually every substantive and practical aspect pertinent to inform the development of court-ordered reparations. It is therefore an immensely rich resource that will serve not only the Court, but other human rights courts or bodies grappling with the same considerations, researchers, legal professionals and the public at large.

Dr. Robert Eno - Registrar of the Court

EXECUTIVE SUMMARY

The aim of this study is to provide a comparative analysis on the law and practice of reparations for human rights violations to underpin the elaboration of guidelines on reparations for the African Court on Human and Peoples' Rights.

By providing detailed information about how different human rights courts and bodies have approached reparations issues, it is envisaged that this study will be an ongoing reference for the Court when determining requests for reparations.

The study elaborates on a number of key issues and challenges that may arise in determining reparations awards. It highlights predominant, as well as divergent principles and practices on various considerations for developing a comprehensive reparations order. In so doing, the practice and case law of 18 institutions as listed below was reviewed to contribute to this study, revealing significant similarities in their jurisprudence.

African Courts and Human Rights Bodies

1. African Court on Human and Peoples' Rights
2. ECOWAS Community Court of Justice
3. East African Court of Justice
4. Extraordinary African Chambers in the Courts of Senegal
5. African Commission on Human and People's Rights
6. African Committee of Experts on the Rights and Welfare of the Child

Other regional courts and human rights bodies

7. European Court of Human Rights,
8. Inter-American Court of Human Rights
9. Inter-American Commission on Human Rights

International human rights bodies

10. Human Rights Committee
11. Committee Against Torture
12. Committee on Enforced Disappearances
13. Committee on the Rights of the Child
14. Committee on the Elimination of Racial Discrimination
15. Committee on the Elimination of Discrimination Against Women

International criminal tribunals

16. International Criminal Court
17. Extraordinary Chambers in the Courts of Cambodia
18. Special Tribunal for Lebanon

The study covers a wide range of substantive and procedural issues for the Court's consideration with a view to identifying emerging practices and approaches to remedying different types of violations. The study has several sections starting with an introduction

on the right to remedy and reparation in international law, followed by an overview of the current practice of ordering reparations in the African human rights system, and thereafter, there is an analysis of the substantive issues, including: the definition of a victim, forms of reparations, the quantum of monetary reparations, standards relating to causation, standards on the burden of proof and evidentiary standards.

These topics are followed by a discussion on procedural matters covering the mechanisms for implementing reparations orders as well as the issue of whether to have separate or combined judgments on the merits and reparations. The guidelines document will draw from the study's identified emerging approaches and practices, to provide the Court with guidance on the various components and considerations for comprehensive reparations orders. A final section is dedicated to reparations contained in amicable settlements.

The study first sets out the **law and principles on the right to remedy and reparation**, stating that the right to a remedy and reparation for the breach of human rights is a fundamental principle of international law recognised in numerous treaty texts and affirmed by a range of international courts. Reparations are designed to render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. In practice, these obligations translate to specific actions to: take appropriate measures to prevent violations; investigate violations effectively, promptly, thoroughly and impartially and take action against the perpetrators; provide victims of human rights violations with effective access to justice; and to provide effective remedies and reparation to victims.

The main reference document on the right to remedy and reparation is the United Nations (UN) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations. The instrument sets out the nature and scope of the right as well as the definition of a victim, providing critical guidance on the internationally recognised standards on the scope of the right and State obligations. One of the most important conditions for awarding remedies is the requirement that the reparation must be 'adequate, effective and prompt" to promote justice. International law requires that the reparation be proportional to the harm suffered, and can take a variety of forms so as to restore the victim to the original situation before the harm and/or compensate him for damage suffered. It shall include measures of *restitution, compensation, rehabilitation, and satisfaction* for injuries to the victim, and finally, it shall include *guarantees of non-repetition* which aim to prevent the recurrence of the violations in the future.

In addition to the UN Basic Principles, the right to remedy and reparation is protected in the core regional instruments of the African human rights system. Key instruments include the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Court's Protocol), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and the African Charter on the Rights and Welfare of the Child. In addition, the African Commission on Human and Peoples' Rights recently adopted General Comment No.4 on the *African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and other Cruel, Inhuman or Degrading Punishment or Treatment*. The General Comment No.4 is the most specialised soft law instrument on the right to redress in Africa. It contains many of the same principles and provisions as the UN Basic Principles only that the UN document speaks to reparations for mass violations, while the AU document was developed to address the right to redress for acts of torture and ill-treatment more specifically. Nevertheless, the instrument elaborately sets out principles on the right to redress in the African context and details issues such as the definition of a victim, the nature and scope of the right, the five forms of reparations, collective reparations, as well as the principles applicable in the context of armed conflict and transitional justice.

The Court's Protocol explicitly grants the Court the authority to award reparations where it finds that there has been a violation of human or peoples' rights. The authority in this regard is drawn from Article 27 of the Protocol, and it is not limited to any particular form of reparations. This is confirmed in the Court's various judgments on reparations which have encompassed all of the forms of reparations recognised in international law, namely restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

The Court has issued fifteen (15) reparations judgments to date, and it therefore has not had to grapple with all of the issues and challenges inherent in reparations awards. For its part, it has elaborated on the nature and scope of the right to remedy and reparation based on international principles and jurisprudence. This is to say that the Court's jurisprudence thus far, is consistent with international practice in the area of the right to a remedy and reparation.

At the same time, given the evolution in the law and practice in this area, the Court can stand to benefit from further developing its jurisprudence by applying more comprehensively the principles set out in the ACHPR's General Comment No.4 and the UN Basic Principles. It can do this best by drawing from the reparations jurisprudence of

other regional and international tribunals, summarised here, and which together illustrate how the courts have practically handled the issue of reparations for complex violations.

The study subsequently launches into eight substantive sections. The first of which addresses the definition of a victim. In particular, the study found that all human rights bodies and international courts require a victim who is seeking reparations orders should have been *personally* affected by a human rights violation or international crime within the jurisdiction of the body or court – a requirement that is variously stated as requiring that the victim must have "suffered harm" or have been "directly," "personally" or "actually affected." This may include not only the direct victim, but individuals who are harmed while attempting to prevent a violation or assist a victim, and immediate family members. Human rights courts have recognised the next of kin of those killed or disappeared, including spouses, children and parents, as victims. Otherwise, some courts have observed that the concept of "family" and the determination of whether particular types of family members are close should be evaluated in light of relevant family and social structures, particularly when indigenous communities are involved. Finally, it is well established that some harms may be collective and not simply individual. Based on this principle, some courts including the African Court, African Commission on Human and Peoples' Rights and the ECOWAS Court of Justice have recognised entire communities or peoples as victims, particularly in cases concerning indigenous groups where large numbers of individuals were affected by the violations.

The appropriate form(s) of reparations depend on the specific harms suffered by the victim(s). Nonetheless, courts have increasingly recognised that multiple forms of reparations may be necessary to undo the harms of a particular violation or crime. Most courts therefore recommend or order remedies from several categories to adequately redress the harm suffered. As to the five *forms*, *restitution* is always the preferred one as it aims to fully restore the victim to his original state prior to the violation. This may include measures such as: restoration of liberty, restoration of property, restoration of employment and benefits, restoration of parental rights, and expunging criminal records. Where restitution is not possible due to the nature of the violation, compensation is the second most common form of reparation ordered. *Compensation,* the most requested form of reparations and the most complied with by States, takes the form of monetary awards for any economically assessable harm, including for material damage or loss of earnings, lost opportunities (employment, education), physical or mental harm, moral damage, and costs for expert or medical assistance. In addition to an award of compensation, an order to provide rehabilitation may be necessary depending on the nature of the harm suffered.

Rehabilitation is understood as the restoration of the victim's well-being through the provision of medical and psychological care to the victim, as well as legal and social services and this can be fulfilled through the provision of free health care, the provision of medical equipment and the setting up of special educational or vocational funds to assist victims. Courts have ordered collective rehabilitation measures such as medical and psychosocial support, in cases of systemic and/or collective violations. In addition to an order for compensation and rehabilitation, it is often necessary to accompany these awards with measures of satisfaction which aim to restore the dignity of the victim and can be of an individual nature but is often awarded to respond to a collective of victims or even entire communities affected by the violation(s), particularly relevant to cases of massive and widespread violations.

Measures of satisfaction vary depending on the nature of the violation, but may include: public apology, the construction of memorials and monuments, investigation and prosecution of those responsible, publication of court documents, the search for the disappeared, exhumation and reburial. Finally, *guarantees of non-repetition* are measures adopted to prevent the recurrence of violations in the future. These are complementary to the other forms but equally necessary and take the form of legal, judicial, policy and institutional reforms, the provision of human rights education and capacity building for State agents. In human rights jurisprudence, these measures are ordered in particular to respond to violations of a widespread nature highlighting structural causes that would need to be addressed to curb the violations. Overall, due to the multiple forms of harm suffered by victims of any one or multiple violations, it has become increasingly common for courts to order a wide variety of measures, including restitution but also measures of satisfaction, compensation, and non-repetition, in order to ensure that the full panoply of harms experienced by the victim are redressed.

Besides individual reparations, collective compensation awards are an important way to remedy violations committed against specific groups, particularly in the context of large-scale violations. As with reparations more generally, collective reparations may take a variety of forms, including symbolic measures, victim assistance programmes, community development grants, and institutional reform, among others, depending on the needs of the victims. Where entire groups have suffered harm, collective reparations may be preferable to individual awards.

As to the quantum of monetary reparations (the most frequently ordered form of reparations), the valuation of monetary damages is often a difficult and imperfect exercise. Some losses may be inadequately documented, some wrongs may not be fully accounted for or quantifiable, and some losses have competing measures by which they

could be assessed. Certain kinds of damages, particularly those dealing with future losses, may be inherently uncertain due to the impossibility of knowing what might have happened without the violation and fluctuation in socio-economic indicators applicable. Even those wrongs that initially appear to call for straightforward evaluation, such as the loss of property, may have myriad consequences on the victim, entailing not only the immediate financial loss of the property itself, but also the loss of rights related to the property and consequential emotional harms. In practice, the African Court along with other regional and international human rights courts typically specify a sum of monetary compensation to be paid to the victims when they determine that monetary reparations are appropriate. The sum will typically include an amount assessed for pecuniary (material) and non-pecuniary (moral) damages. Non-pecuniary damage includes psychological harm, distress, fear, frustration, anxiety, inconvenience, humiliation, and reputational harm caused by the violation and is normally assessed based on the gravity of the violation and the intent of the State involved.

In assessing pecuniary and non-pecuniary damages, there is a considerable consensus that domestic conditions can, and should, be considered in assessing material damages, but should not be a dominant factor in determining moral damages. Pecuniary damages compensate a victim for actual financial losses – losses which depend in turn on the cost of living in the concerned state. In contrast, when assessing moral damages, the psychological and emotional harm that human rights violations cause to victims does not vary based on the victim's financial situation. Based on the premise in human rights that "every human being has an equal and inherent moral value or status," the International Criminal Court has held that local economic conditions are "immaterial" to the determination of non-pecuniary damages. This is a divergent view to the European Court of Human Rights however, which holds that economic circumstances do play a role. In short, the jurisprudence in regional and human rights bodies suggests that pecuniary damages are "inseverable" from domestic socio-economic conditions, but that these conditions should play, at most, a limited role in the assessment of non-pecuniary damages.

Another challenge for the assessment of damages is the context of mass violations. One of the primary challenges in assessing the quantum of damages in such cases is the impracticability of collecting and evaluating detailed evidence of damages for each victim. Taking testimony, or collecting documentary evidence, about various forms of damages from hundreds of victims and credible witnesses would not only result in intolerable delays in providing assistance to those who desperately need it, but would also create an unmanageable administrative burden on the court. In such complex cases, there have been two approaches adopted by the Inter-American Court on one hand, and

the International Criminal Court on the other, by which the African Court can be guided. In some cases, the Inter-American Court has assessed the extent of damages of several victims whose damages are representative of those of the victims as a whole. The Court then awards the same amount of damages to each individual victim. The ICC, in contrast, has required each victim to provide proof of at least one form of damages. Once those damages are established, the court has used a series of presumptions based on the characteristics of the community to establish additional losses. The ICC then used *per capita* averages and submissions by the parties to determine the quantum of those damages for all victims. The use of representative victims and reasonable presumptions are both strategies that the African Court could employ in appropriate cases to more quickly evaluate claims of damages in cases with large numbers of victims.

The burden of proof, causation and evidentiary standards for issuing reparations to individual victims are also covered in the study. In order to issue an award of reparations there must be proof that the victim suffered harm and that the harm suffered was caused by the violation by the State, showing the type and extent of harm. This is regulated by the burden of proof and the standard of proof. According to the jurisprudence of the international criminal courts and regional human rights courts, there is general consensus that the burden of proof lies on the person seeking the remedy. This is appropriate in that it is typically the victim who has the most information about the violation and harm suffered. One exception to this arises in the jurisprudence of the Inter-American Court on Human Rights, when the victim is killed or forcibly disappeared for example, then it is assumed that the victim's family members experienced anguish and suffering and are relieved from the burden of proof in such cases. On the issue of standard of proof, international criminal courts and human rights courts have established the standard as one of 'preponderance of the evidence' requiring the victim to show that it is more probable than not that s/he is entitled to the requested reparation. This strict requirement deviates from the Inter-American Court's practice however, where a more flexible, case-by-case approach is adopted in line with its more progressive reparations jurisprudence and which typically considers a broader range of evidence and orders a wide variety of reparations.

On the issue of causation, the entitlement to reparations accrues only where there is a 'causal link between the established wrongful act and the alleged prejudice' and courts generally agree that reparations should not be limited to direct harm or immediate effects of the violation, but rather, there is recognition that human rights violations or international crimes often result in a chain of foreseeable and consequential harms. As such, consequential damages flow from the original violation and are caused by it; such harms may be redressed by a reparations award. At the same time, courts have

recognised the limits in holding the State responsible for every consequence of the wrongful act. The Inter-American Court recognised that every human act produces diverse consequences, some proximate and some remote. As such, it has been the practice of the courts to rely on the proximate cause doctrine to 'draw the line' and exclude consideration of more remote consequences, those which are more speculative to warrant a finding of responsibility of the wrongdoer.

Making an award for reparations is fundamentally dependent not only on whether the State committed a wrongful act, but on whether the evidence proves the damages and prejudice suffered. This is typically measured by the 'preponderance' of the evidence standard. That said, the section on evidentiary standards finds that international human rights bodies and courts, unlike domestic courts, are generally not bound to strict evidentiary standards and may rely on all forms of evidence, including circumstantial evidence. A strict requirement on supporting documentation is also generally not applied. This flexibility is due in part to the recognition by the international criminal and human rights courts of the difficulties surrounding victims' ability to obtaining evidence in support of their claim, due to the destruction or unavailability of the evidence. Moreover, in many cases these challenges are linked to the nature and context in which the human rights violations themselves took place, or due to the extended passage of time (loss of records), or due to the practice of local communities not keeping certain records, all of which the courts have recognised. Other challenges around the collection of supporting documentation is the trauma caused by the collection of evidence and the building of expectations in victims where an award for damages is not guaranteed. Due to these challenges, human rights courts routinely turn to expert assistance in the reparations phase. Experts can provide a range of information on the effects of the harm and are particularly helpful to the courts in determining pecuniary damages, as well as in claims for individual reparations for multiple victims of mass violations/atrocities. Some courts (ICC) have specific rules to guide the use of experts.

Another avenue by which reparations are delivered is through the friendly settlement procedure that is an available option in several of the international and regional human rights courts, including the African Court. In particular, the European Court and the Inter-American Commission have taken much more proactive approaches to amicable settlements, intervening more frequently and directly with the parties to try to facilitate such settlements. While the procedures differ slightly, there is a common objective to have the parties willingly agree to a series of measures, including reparations in their five forms, rather than having the matter adjudicated by the court, which can be time and resource intensive. The procedure tends to result in higher compensation awards, and

where successful, more swift implementation due to the willingness and commitment of the parties.

Thereafter, the study addresses several practical matters, such as the currency of monetary awards, the appropriate exchange rate to be used, how to structure awards to minors and the considerations and implications of issuing separate or merged merits-reparations judgments. The study also includes a case study on whether release from prison of victims of human rights violations occasioned in the course of criminal proceedings is an appropriate remedy.

In sum, the comparative study serves as a rich resource for the African Court on a wide range of substantive and practical matters that it will need to consider when drafting its future reparations judgments. On some issues, there is a clear and well-established practice, while in others, there are multiple approaches by different courts on which the African Court will have to further deliberate and decide on the best suited approach, or a modified one, for its context.

I. Introduction

The right to reparations for those harmed by human rights violations is now widely recognised as a fundamental part of international law.[1] These reparations are a crucial feature of the human rights system, repairing the damage caused by such violations and dissuading the perpetrators or States responsible from committing future violations. As the African Commission on Human and Peoples' Rights has observed, the "rights guaranteed by the African Charter would be an empty proclamation if it was not backed by the guarantee of a right to restitution or compensation in the event of violation."[2]

Reparations also play an increasingly important role in preventing future harms by requiring changes in the laws, policies, institutions, or systems that made a violation

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[1] African Commission on Human and Peoples' Rights, General Comment No.4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), par. 1 (2017) [hereinafter "African Commission General Comment No. 4"], https://www.achpr.org/public/Document/file/English/achpr_general_comment_no._4_english.pdf; 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, par. 2(c), 3(d), 11 (Dec. 16, 2005) [hereinafter "U.N. Basic Principles"], http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx; *see also Konate v. Burkina Faso*, App. No. 004/2013, African Court on Human and Peoples' Rights, Judgment on Reparations, par. 15 (June 3, 2016) ("A state found liable of an internationally wrongful act is required to make full reparation for the damage caused."), http://www.african-court.org/en/images/Cases/Ruling%20on%20Reparation/Konate%20Judgement%20on%20Reparation%20(English).pdf; *Zongo v. Burkina Faso*, App. No. 013/2011, African Court on Human and Peoples' Rights, Judgment on Reparations, par. 20 (June 5, 2015), http://www.african-court.org/en/images/Cases/Ruling%20on%20Reparation/Application%20No%20013-2011%20-%20Beneficiaries%20of%20late%20Norbert%20%20Zongo-Ruling%20on%20Reparation.PDF; *Mtikila v. Tanzania*, App. No. 011/2011, African Court on Human and Peoples' Rights, Ruling on Reparations, par. 27 (June 13, 2014), http://www.african-court.org/en/images/Cases/Ruling%20on%20Reparation/Ruling_on_Reparation_Appl.011-2011.pdf; *Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 25 (July 21, 1989) ("every violation of an international obligation which results in harm creates a duty to make adequate reparation"), http://www.corteidh.or.cr/docs/casos/articulos/seriec_07_ing.pdf; *Loayza-Tamayo v. Peru*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 84 (Nov. 27, 1998) ("When an unlawful act imputable to a State occurs, that State becomes responsible in law for violation of an international norm, with the consequent duty to make reparations"), http://www.corteidh.or.cr/docs/casos/articulos/seriec_42_ing.pdf; *Prosecutor v. Kaing*, Case No. 001/18-07-2007-ECCC/SC, Extraordinary Chambers in the Courts of Cambodia, Appeal Judgment, par.. 645-48 (Feb. 3, 2012), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf . In addition, the inclusion of provisions on reparations in the statutes of some of the most recent international tribunals suggests that a right to reparations is increasingly recognised in international criminal law. *See, e.g.*, Rome Statute of the International Criminal Court, art. 75 (July 17, 1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf; Statute of the Special Tribunal for Lebanon, art. 25 (May 30, 2007), https://www.stl-tsl.org/fr/documents/statute-of-the-tribunal/223-statute-of-the-special-tribunal-for-lebanon.

[2] *Mamboleo Itundamilamba v. Democratic Republic of Congo*, Comm. No. 302/05, African Commission on Human and Peoples' Rights, Decision, par. 133 (Oct. 18, 2013), https://www.achpr.org/sessions/descions?id=243

possible in the first place. By taking account of the root causes that led to the case or communication before it, human rights courts and bodies can craft reparations that reduce the potential for similar violations. In this sense, reparations can have a transformative effect on society,[3] positively affecting the broader human rights environment in particular countries.

The Content of Reparations

The term reparations is an overarching term that covers all types of measures a court or human rights body may order, or a State may take, to remedy the harm caused by a violation.[4] Such remedies should attempt to restore the victim to the original situation before the harm and/or compensate him for damage suffered.[5] The specific forms, discussed in detail in the practice section below,[6] and quantum of reparations necessary to do that in each case will vary according to the type of violation committed and the harm caused.[7] In all cases, however, reparations should be adequate, effective and comprehensive; be proportional to the gravity of the violations and the harm suffered; and address all of the kinds of harm suffered by the victim.[8]

Reparations at the African Court on Human and Peoples' Rights

The Protocol establishing the African Court on Human and Peoples' Rights explicitly grants the African Court the authority to award reparations where it finds that there has been a violation of human or peoples' rights.[9] The authority vested by this provision is broad, as it is not limited to any particular form of reparations,[10] and the

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[3] *See* African Commission General Comment No. 4, *supra* note 1, at par. 8 ("The ultimate goal of redress is transformation. Redress must occasion changes in social, economic and political structures and relationships in a manner that deals effectively with the factors which allow for" human rights violations).

[4] See *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 85; DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 33 (2015) (reparations encompasses "various methods available to a state to discharge or release itself from state responsibility for a breach of international law.").

[5] U.N. Basic Principles, *supra* note 1, at par.. 15, 19; *Zongo v. Burkina Faso*, *supra* note 1, at par. 60 (reparations should "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed").

[6] Forms of reparation include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition which aim to prevent the recurrence of the violations in the future. U.N. Basic Principles, *supra* note 1, at par.. 18-23.

[7] *Garrido and Baigorria v. Argentina*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 41 (Aug. 27, 1998), http://www.corteidh.or.cr/docs/casos/articulos/seriec_39_ing.pdf; *La Cantuta v. Peru*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 202 (Nov. 29, 2006), http://www.corteidh.or.cr/docs/casos/articulos /seriec_162_ing.pdf.

[8] African Commission General Comment No. 4, *supra* note 1, at par. 8; U.N. Basic Principles, *supra* note 1, at par.. 14, 15, 18; *Konate v. Burkina Faso*, *supra* note 1, at par. 15(b); *Mbiankeu v. Cameroon*, Comm. No. 389/10, African Commission on Human and Peoples' Rights, Views par. 131 (May 6, 2015), https://www.achpr.org/sessions/descions?id=253; *Mebara v. Cameroon*, Comm. No. 416/12, African Commission on Human and Peoples' Rights, Views, par. 135 (Aug. 8, 2015), https://www.achpr.org/sessions/descions?id=233 .

[9] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 27 (June 10, 1998), https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and.

[10] *Id.*

African Court already has held that it encompasses all of the forms of reparations recognised in international law, namely restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[11]

[11] *Konate v. Burkina Faso*, *supra* note 1, at par. 15(b); *Zongo v. Burkina Faso*, *supra* note 1, at par. 29; *Thomas v. Tanzania*, App. No. 005/2013, African Court on Human and Peoples' Rights, Judgment on Reparations (4 July, 2019), http://www.african-court.org/en/images/Cases/Judgment/Judgement%20on%20Reparations%20in%20Alex%20THOMAS%20Vs%20United%20Republic%20of%20Tanzania%20Delivered%20on%2004%20July%202019.pdf , *Nganyi v. Tanzania*, App. No. 006/2013, African Court on Human and Peoples' Rights, Judgment on Reparations (4 July, 2019),http://www.african-court.org/en/images/Cases/Judgment/Judgement%20on%20Reparations%20in%20NGANYI%20and%20Others%20Vs%20URT%20Delivered%20on%2004%20July%202019.pdf, *Abubakari v. Tanzania*, App. No. 007/2013, African Court on Human and Peoples' Rights, Judgment on Reparations (4 July, 2019) http://www.african-court.org/en/images/Cases/Judgment/Judgment%20on%20Reparations%20in%20the%20Matter%20of%20Mohamed%20ABUBAKARI%20Vs%20United%20Republic%20of%20Tanzania%20Delivered%20on%2004%20July%202019..pdf, *Umuhoza v. Rwanda*, App. No. 003/2014, African Court on Human and Peoples' Rights, Judgment on Reparations (7 December, 2018), http://www.african-court.org/en/images/Cases/Judgment/APPLICATION%20003-2014%20-%20INGABIRE%20VICTOIRE%20UMUHOZA%20V.%20REPUBLIC%20OF%20RWANDA,,....pdf, *Guehi v. Cote d'Ivoire*, App. No. 001/2015, African Court on Human and Peoples' Rights, Judgment on Merits and Reparations (7 December, 2018), http://www.african-court.org/en/images/Cases/Judgment/APPLICATION%20001-2015%20-%20ARMAND%20GUEHI%20V%20COTE%20D'IVOIRE%20INTERVENING%20-%20JUDGNM....pdf, *Rashidi v. Tanzania*, App. No. 009/2015, African Court on Human and Peoples' Rights, Judgment on Merits and Reparations (28 March, 2019), http://www.african-court.org/en/images/Cases/Judgment/222Judgement%20on%20Merits%20and%20Reparations%20in%20the%20Matter%20of%20Lucien%20IKILI.pdf, *Evarist v. Tanzania*, App. No. 027/2015, African Court on Human and Peoples' Rights, Judgment on Merits and Reparations (21 September, 2018), http://www.african-court.org/en/images/Cases/Judgment/Judgement%20MINANI%20Vs%20URT%20-%20Optimized.pdf, *Makungu v. Tanzania*, App. No. 006/2016, African Court on Human and Peoples' Rights, Judgment on Merits (7 December, 2018), http://www.african-court.org/en/images/Cases/Judgment/054%20-%20Judgement%20in%20the%20Matter%20of%20Mgosi%20Mwita%20MAKUNGU%20Versus%20United%20Republic%20of%20Tanzania%20Delivered%20on%2007%20December%202018%20-%20Optimized.pdf, *Williams v. Tanzania*, App. No. 016/2016, African Court on Human and Peoples' Rights, Judgment on Merits and Reparations (21 September, 2018), http://www.african-court.org/en/images/Cases/Judgment/016%20-%202016%20-%20Judgement%20in%20the%20Matter%20of%20Diocles%20WILLIAM%20Versus%20United%20Republic%20of%20Tanzania%20Delivered%20on%2021%20September%202018%20-%20Optimized.pdf, *Paulo v. Tanzania*, App. No. 020/2016, African Court on Human and Peoples' Rights, Judgment on Merits and Reparations (21 September, 2018), http://www.african-court.org/en/images/Cases/Judgment/020%20-%202016%20-%20Judgement%20in%20the%20Matter%20of%20Anaclet%20PAULO%20Versus%20United%20Republic%20of%20Tanzania%20Dated%2021%20September%202018%20-%20Optimized.pdf, *Ivan v. Tanzania*, App. No. 025/2016, African Court on Human and Peoples' Rights, Judgment on Merits and Reparations (28 March, 2019), http://www.african-court.org/en/images/Cases/Judgment/3333Judgement%20on%20Merits%20and%20Reparations%20in%20the%20Matter%20of%20Kenedy.pdf, *APDF and IHRDA v. Mali*, App. No. 046/2016, African Court on Human and Peoples' Rights, Judgment on Merits and Reparations (11 May, 2018), http://www.african-court.org/en/images/Cases/Judgment/046%20-%202016%20-%20Association%20Pour%20le%20Progr%C3%A8s%20et%20la%20Defense%20Des%20Droits%20Des%20Femmes%20Maliennes%20-%20APDF%20Vs.%20Mali%20-%20Judgement%20of%2011%20Mai%202018%20-%20Optimized.pdf, *see also* African Commission General Comment No. 4, *supra* note 1, at par. 10; U.N. Basic Principles, *supra* note 1, at par.. 18-23.

The African Court has issued fifteen judgments on reparations to date,[12] establishing a strong foundation for future reparations decisions. Three of these judgments: *Mtikila, Konate* and *Zongo* set out this foundation. In the *Mtikila* case, the first of the Court's reparations judgments issued in 2014, the Court recognised the right to reparations for harm caused by a violation of an international obligation as one of the fundamental principles of contemporary international law on State responsibility, and a customary norm of international law.[13] The Court ordered measures of satisfaction and guarantees of non-repetition, requiring the State to publish the decision and adopt legislative measures to remedy the violations at the national level.[14] Two years later in the *Konate* case, the Court set out clear principles on the right to a remedy and reparation, including the State obligation to make full reparation for damage where an international wrongful act has occurred; stipulated that reparations should cover all damages to the victim; established the requirement to show a causal link between the wrongful act and the alleged prejudice; and established that the applicant bears the burden of proof to justify any amounts claimed.[15] Applying these principles, the Court awarded measures of restitution; compensation for loss of income, expenses and moral damages; and satisfaction.[16] Finally, the *Zongo* reparations decision, issued in 2015, was notable for its recognition of a broad definition of a victim. In that case, the Court held, consistent with the U.N. Basic Principles and jurisprudence from the Inter-American Court,[17] that moral damages could be awarded not only to heirs but also to close relatives (including mothers, fathers, and children of the immediate victims).[18] On this basis, the Court awarded monetary compensation for moral damages to family members of the immediate victims, as well as measures of satisfaction (publication of the Court's judgment) and guarantees of non-repetition (reopening of the investigation to bring the perpetrators to justice).[19]

Nevertheless, as a relatively new court, the African Court will have to grapple with a number of issues and challenges inherent in reparations awards. As the cases that come before it are likely to become more complex over time, an analysis of reparations jurisprudence from regional and international tribunals which have had occasion to handle some of these issues – including those arising from complex situations involving mass or systematic violations, violations against collective groups or communities, and serious violations perpetrated in the context of conflict – could be useful to the Court as it continues to develop its approach to reparations.

Goals and Methodology of this Study

[12] *Supra* note 1.
[13] *Mtikila v. Tanzania*, *supra* note 1, at par. 27.
[14] *Id.* par.. 42-46.
[15] *See Konate v. Burkina Faso*, *supra* note 1, at par. 15.
[16] *Id.* par. 60.
[17] *Zongo v. Burkina Faso*, *supra* note 1, at par.. 47-48.
[18] *Id.* par. 50.
[19] *Id.* par. 111.

The aim of this study is, first, to provide a comparative analysis on the law and practice of reparations for human rights violations to underpin the elaboration of guidelines on reparations to be adopted by the African Court on Human and Peoples' Rights. Second, by providing detailed information about how different human rights bodies and courts have approached reparations-related issues, it is hoped that this study may be an ongoing resource for the Court as it considers requests for reparations by petitioners before it. Finally, the study highlights a number of key issues and challenges in the field of reparations that present difficulties in fashioning awards or that continue to divide courts and scholars.

In order to achieve these objectives, this study is based on a review of the conventions, rules, and jurisprudence of eighteen human rights bodies, human rights courts, and international criminal tribunals, namely:

African Courts and Human Rights Bodies

1. African Court on Human and Peoples' Rights,
2. ECOWAS Community Court of Justice,
3. East African Court of Justice,
4. Extraordinary African Chambers in the Courts of Senegal,
5. African Commission on Human and People's Rights,
6. African Committee of Experts on the Rights and Welfare of the Child,

Other regional courts and human rights bodies

7. European Court of Human Rights,
8. Inter-American Court of Human Rights,
9. Inter-American Commission on Human Rights,

International human rights bodies

10. Human Rights Committee,
11. Committee Against Torture,
12. Committee on Enforced Disappearances,
13. Committee on the Rights of the Child,
14. Committee on the Elimination of Racial Discrimination,

15. Committee on the Elimination of Discrimination Against Women,

International criminal tribunals[20]

16. International Criminal Court,

17. Extraordinary Chambers in the Courts of Cambodia, and

18. Special Tribunal for Lebanon.

In addition, at times, this study includes information about reparations issued by other international bodies. It does not, however, review reparations issuing out of domestic court decisions, administrative processes, or truth and reconciliation processes.[21]

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[20] Historically, questions of reparations fell outside the mandate of international criminal law and the *supra*-national tribunals created to adjudicate international crimes. CONOR MCCARTHY, REPARATIONS AND VICTIM SUPPORT IN THE INTERNATIONAL CRIMINAL COURT 1 (2012). While the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively) had the authority to order restitution of property that was unlawfully taken by a perpetrator in association with a crime for which the perpetrator was convicted, efforts to expand the mandate of these bodies to include the power to award financial compensation to victims were rejected by the judges of the Tribunals, and no formal consideration was given to empowering the Tribunals to award other forms of reparations, such as rehabilitation. WAR CRIMES RESEARCH OFFICE, THE CASE-BASED REPARATIONS SCHEME AT THE INTERNATIONAL COURT 1 n.1 (2010) [hereinafter "WCRO REPORT"], https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-12-the-case-based-reparations-scheme-at-the-international-criminal-court/. Thus, it is only recently that some international criminal tribunals have been vested with mandates to order reparations, and this study limits its consideration of international criminal tribunals to these institutions. Of the three international criminal tribunals included in this study, however, each has a different mandate. The ICC is the only one of the three with broad authority to issue reparations. *See* Rome Statute of the ICC, *supra* note 1, art. 75. By contrast, the ECCC may issue only collective or moral, not individual, reparations, and the Special Tribunal for Lebanon may only identify victims, who may then bring an action to obtain compensation in a national court or other competent body. Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 23 *quinquies* (Feb. 23, 2011), https://www.eccc.gov.kh/sites/default/files/legal-documents/IRv7-EN.pdf; Statute of the Special Tribunal for Lebanon, supra note 1, art. 25.

[21] Since the 1980s, more than 40 truth and reconciliation commissions (TRCs) have been established at the national level to address the legacy of past abuses perpetrated during periods of conflict or repression, many of which have issued reports recommending various forms of reparations. However, the number of reparations programmes that have been implemented through specific laws, policies and/or mechanisms remains far fewer. Among them are the reparations programmes implemented in Peru, Colombia, Peru, Sierra Leone, and, to some extent, in Kenya. For more information on the reparations program in Peru, see Cristián Correa, *Reparations in Peru: From Recommendations to Implementation* (International Center for Transitional Justice, 2013), https://www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf; Comisión de la Verdad y Reconciliación, *Informe Final* (2003), http://www.cverdad.org.pe/ifinal/; Marco Legal – Reparaciones, Ministerio de Justicia, Republica de Peru, http://www.ruv.gob.pe/normas.html. For more information on the reparations programme in Colombia, see Cristián Correa, *From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia* (International Center for Transitional Justice, 2015), https://www.ictj.org/sites/default/files/ICTJ_Report_ColombiaReparationsChallenges_2015.pdf; Ley

1448: por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del confl icto armado interno y se dictan otras disposiciones, Diario Oficial 48.096, 10 June 2011, https://www.ictj.org/sites/default/files/subsites/colombia-linea-tiempo/docs/Ley1448/ley1448.pdf. For more information on the reparations program in Sierra Leone, see Mohamad Suma and Cristián Correa, *Report and Proposals for the Implementation of Reparations in Sierra Leone* (International Center for Transitional Justice, 2009), https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf; *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission*, Vol. 2, Ch. 4: Reparations (2004), http://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. For more information on the reparations program in Kenya, see Christopher Gitari Ndungú, *Lessons to Be Learned: An Analysis of the Final Report of Kenya's Truth, Justice and Reconciliation Commission* (International Center for Transitional Justice, 2014), https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf; The Truth, Justice and Reconciliation Commission of Kenya, *The Final Report of the TJRC* (2013), https://digitalcommons.law.seattleu.edu/tjrc/; Victim Protection Act, Kenya Gazette Supplement No. 143 (Acts No. 17), 19 Sept. 2014, http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/VictimProtectionAct17of2014.pdf. As these processes are administrative in nature, standards of proof, causation and evidentiary requirements necessary to claim benefits are relaxed as compared to court-ordered reparations processes. However, most programmes identify the categories of eligible beneficiaries and the forms of available reparations. Thus, although these programmes are state-based rather than court-ordered, they may provide some guidance to human rights courts tasked with handling claims involving mass or widespread violations against specific groups of persons.

II. The Law on Remedies & Reparations in Theory

A. The Normative Framework of the Right to a Remedy in the International System

International human rights law sets out obligations which States are bound to respect and ensure.[22] Upon the ratification of international human rights treaties, States commit to the "negative" obligation to refrain from interfering with the enjoyment of human rights. Equally, States assume the "positive" obligation to facilitate the enjoyment of basic human rights, as well as to take measures to protect individuals and groups against human rights abuses.[23]

As stated earlier, the right to a remedy and reparations for the breach of human rights is a fundamental principle of international law recognised in numerous treaties[24] and affirmed by a range of international courts.[25] Reparations are intended to render justice to the victims by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. In practice, these obligations translate into specific actions: (1) taking appropriate measures to prevent violations; (2) investigating violations effectively, promptly, thoroughly and impartially and taking action against the perpetrators; (3) providing victims of human rights violations with effective access to justice; and (4) providing effective remedies to victims.[26] On this point, the Human Rights Committee held that "without reparation to individuals whose Covenant rights

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[22] *See, e.g.*, Universal Declaration of Human Rights (Dec. 10, 1948), http://undocs.org/A/RES/217(III); International Covenant on Civil and Political Rights (Dec. 16, 1966), http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx; Convention on the Elimination of all Forms of Discrimination against Women (Dec. 18, 1979), http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf; U.N. Basic Principles, supra note 1, par.. 1-3.

[23] United Nations Office of the High Commissioner for Human Rights, International Human Rights Law, http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx; *see also Social and Economic Rights Action Center et al. v. Nigeria*, Comm. No. 155/96, African Commission on Human and Peoples' Rights, Views, par. 44 (Oct. 27, 2001), https://www.achpr.org/sessions/descions?id=134.

[24] *E.g.*, International Covenant on Civil and Political Rights, *supra* note 22, arts. 2(3), 9(5), and 14(6); International Convention on the Elimination of All Forms of Racial Discrimination, art. 6 (Dec. 21, 1965), http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, art. 14 (Dec. 10, 1984) [hereinafter "Convention Against Torture"], http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx.

[25] *E.g.*, *Konate v. Burkina Faso*, *supra* note 1, at par. 15 ("[A] state found liable of an internationally wrongful act is required to make full reparation for the damage caused."); *Velásquez-Rodríguez v. Honduras*, *supra* note 1, at par. 25 ("every violation of an international obligation which results in harm creates a duty to make adequate reparation"); *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 84 ("When an unlawful act imputable to a State occurs, that State becomes responsible in law for violation of an international norm, with the consequent duty to make reparations"); Kaing Appeal Judgment, *supra* note 1, at par.. 645-48; Rome Statute of the ICC, *supra* note 1, art. 75; Statute of the Special Tribunal for Lebanon, *supra* note 1, art. 25.

[26] U.N. Basic Principles, *supra* note 1, at par. 3(d).

have been violated, the obligation to provide an effective remedy . . . is not discharged."[27]

One of the core reference documents on the right to remedy and reparation is the U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations. This instrument sets out the nature and scope of the right to a remedy, as well as the definition of a victim, providing critical guidance on the internationally recognised standards on the scope of the right and State obligations.[28]

In addition to setting out the multiple forms of reparations, the instrument sets out several underlying principles that run throughout the instrument, including the expectation that States should endeavour to inform victims of all the available services (legal, medical, psychological, social, administrative) to which they have a right to access and that victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimisation and on the causes pertaining to the violations suffered.[29] This is akin to the right to truth, as referred to in the ACHPR General Comment No.4.[30] Other applicable principles include non-discrimination, non-derogation, and the respect of others' protected rights. The provisions should be applied without discrimination; should not be construed to derogate from other rights or obligations recognised under international law; and should not conflict with the rights of others as protected under international law.[31]

In sum, the theory on reparations is grounded in placing the aggrieved party in the same position as he would have been had no injury occurred. Where this is not possible, other forms of reparations are necessary to erase the effects of the violation on the victim and restore him or her as fully as possible. This right has increasingly been affirmed by regional human rights courts, United Nations bodies and declarative instruments.

B. The Normative Framework of the Right to a Remedy in the African Human Rights System

The right to remedy and reparation is protected in the core regional instruments of the African human rights system, reflected in the decisions of the African

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[27] U.N. Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, par. 16 (Mar. 29, 2004), http://www.refworld.org/docid/478b26ae2.html.
[28] U.N. Basic Principles, *supra* note 1.
[29] *Id.* par. 24.
[30] African Commission General Comment No. 4, *supra* note 1, at par.. 10, 44.
[31] U.N. Basic Principles, *supra* note 1, at par.. 25-27.

Commission on Human and Peoples' Rights (hereinafter "African Commission") and African Committee of Experts on the Rights and Welfare of the Child (hereinafter "African Child Rights Committee"), and affirmed in the jurisprudence of the African Court on Human and Peoples' Rights (hereinafter "African Court"). Key normative instruments include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter "Maputo Protocol"),[32] which requires States Parties to provide for appropriate remedies where rights or freedoms have been violated, and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights,[33] which authorises the African Court to remedy violations of human and peoples' rights and order payment of fair compensation or reparation where the Court finds a violation.[34]

In addition, in March 2017, the African Commission adopted General Comment No. 4 on the *African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment*,[35] which is the most detailed and specialised instrument on the right to redress in the region. The comment, which reflects many of the principles and provisions of the U.N. Basic Principles, elaborately sets out the applicable principles on the right to redress in the African context and addresses issues such as the definition of a victim, the nature and scope of the right, the five forms of reparations, collective reparations, and principles applicable in the context of armed conflict and transitional justice. In particular, the instrument is founded on existing regional and international norms and standards regarding the right to redress for victims of torture and ill-treatment.[36] It sets forth State obligations to provide adequate, effective and comprehensive reparations to victims of torture and other ill-treatment and to provide reparation to victims for acts and omissions which can be attributed to the State.[37] It highlights that "[t]he ultimate goal of redress is transformation," which "envisages processes with long-term and sustainable perspectives that are responsive to the multiple justice needs of victims

[32] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 25 (July 11, 2003), https://au.int/sites/default/files/treaties/7783-treaty-0027_-_protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa_e.pdf.

[33] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 9, art. 27(1) ("If the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.").

[34] The right to a remedy is also implicitly recognised in the African Charter on Human People's Rights, which in Article 1 requires States to "recognise the rights, duties and freedoms enshrined in [the Charter] and . . . to adopt legislative or other measures to give effect to them," and in Article 7(1) specifically protects one's right to be heard and "to appeal to competent national organs" against violations of fundamental rights recognised in the Charter and other instruments in force. African Charter on Human and Peoples' Rights, arts. 1 and 7(1) (June 1, 1981), https://au.int/en/treaties/african-charter-human-and-peoples-rights.

[35] African Commission General Comment No. 4, *supra* note 1.

[36] While the General Comment discusses the right to remedy in the context of torture and ill-treatment, the principles set out in the instrument are universal and applicable to all human rights protected in the African Charter.

[37] *See* African Commission General Comment No. 4, *supra* note 1, at par. 33.

and therefore restores human dignity."[38] It goes on to explain the nature and scope of the right, which include the five internationally recognised forms of reparations and the right to truth.[39] These forms are intended to contribute to "healing" for victims, which is characterised by "making whole that which has been broken and wounded" and "seeks to restore the dignity, humanity and trust" damaged by the violation.[40]

In relation to the various forms of reparation, General Comment No. 4 goes on to recognise the collective harm[41] caused by violations affecting a group or a community, which is particularly relevant in situations of armed conflict, but also other cases involving environmental degradation or mass displacement of communities. Where collective harm is at issue, the Commission sets out guidelines for assessing the harm, and requires States to conduct full assessments of the nature of harm and the extent of its effects as well as the specific needs of the collective and to design redress measures accordingly. States must also be sensitive to the nature of the harm suffered and ensure the full and informed participation of the collective in the process, including hearing from the most at risk members of the group.[42]

In sum, General Comment No. 4 provides the most instructive guidance on the nature and scope of the right to a remedy and reparations in the context of the African human rights system. The task ahead will be on effective application of the instrument. As the African Court elaborates additional comprehensive reparations orders going forward, the General Comment may be helpful in providing underlying principles that the Court can apply to order tangible, realistic and relevant measures designed to comprehensively redress violations in the region.

[38] *Id.* par. 8.
[39] *Id.* par.. 33-49.
[40] *Id.* par. 10.
[41] *Id.* par.. 50-56.
[42] *Id.*

III. The Law on Remedies & Reparations in Practice

A. Approaches to Reparations

Before turning to the substantive issues addressed in reparations orders, it may be helpful to briefly consider how different types of institutions generally approach reparations questions. Different kinds of institutions have different mandates and different levels of authority which influence the types of reparations orders they are likely to issue. Understanding the reasons behind these different approaches can be useful as the African Court decides which strand of jurisprudence is most appropriate in particular cases. An overview of these different approaches is provided here, while particular differences related to specific issues are addressed in later sections.

As described in the introduction, this study is based on a comparative assessment of the reparations decisions of 18 different institutions. Broadly speaking, these institutions generally fall into one of three categories: (1) human rights courts, (2) international human rights bodies, and (3) international criminal tribunals. Although there is much that is similar in their reparations decisions, as detailed throughout this report, there are also several fundamental differences in their approaches to reparations.

An initial difference in approach relates to the type and level of authority granted to the various kinds of institutions. Human rights courts and international criminal tribunals are vested with the authority to issue binding judgments with respect to both wrongdoing and reparations.[43] By contrast, most regional and international human rights bodies, such as the Committee on the Rights of the Child and the Inter-American Commission on Human Rights, are authorised only to review complaints and provide their "views" or issue recommendations to the relevant State Party,[44] which retains the

[43] *E.g.*, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 9, arts. 27, 28, 30; ECOWAS, Protocol on the Community Court of Justice, arts. 19, 22(3) (July 6, 1991), http://www.courtecowas.org/site2012/pdf_files/protocol.pdf; European Convention on Human Rights, arts. 41, 46 (Nov. 4, 1950), https://www.echr.coe.int/Documents/Convention_ENG.pdf; American Convention on Human Rights, arts. 62, 63, 67, 68 (Nov. 22, 1969), https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm; Rome Statute of the ICC, *supra* note 1, arts. 74-76, 105; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, arts. 36, 38, 39 (Oct. 27, 2004), https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

[44] *E.g.*, American Convention on Human Rights, *supra* note 43, arts. 50(3), 51(2); International Convention for the Protection of All Persons from Enforced Disappearance, arts. 30(3), 31(5), 33(5) (Dec. 20, 2006), http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 7(3)-(5) (Oct. 6, 1999), http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 24, art. 14(7)(b); Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 10(5) (Dec. 19, 2011), http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx; Torkel Opsahl, *The Human Rights Committee*, *in* PHILIP ALSTON, THE UNITED NATIONS AND HUMAN RIGHTS: A

ultimate responsibility to decide how to remedy any violations that have been committed. As a result, human rights courts and international criminal tribunals tend to have more detailed and prescriptive reparations orders than do human rights bodies. The greater precision by human rights courts and international criminal tribunals facilitates the implementation of specific remedies, while the issuance of more general recommendations by human rights bodies provides States with greater flexibility in determining the appropriate remedy or remedies.

A second major difference in approach relates to who may be held responsible by various kinds of institutions. Human rights bodies and human rights courts assess the responsibility of States for human rights violations, while international criminal tribunals determine the criminal responsibility of specific persons.[45] These two types of potential violators have substantially different capacities to provide reparations.[46] A State, for example, can potentially amend laws, ratify treaties, investigate and prosecute alleged perpetrators, and provide a variety of other reparations using the resources and capabilities of the State. An individual, by contrast, cannot provide these types of reparations and is limited to a more restricted set of reparations, such as public apologies and compensation. As a result, the reparations orders of human rights bodies and human rights courts typically include a broader array, and more systemic forms, of reparations than do those of international criminal tribunals. One of the international criminal tribunals included in this study, the International Criminal Court (ICC), has set up a Trust Fund for Victims (TFV) which can provide various forms of assistance, including rehabilitation services and material support, to victims and their families separately from, and prior to, a reparations order issued against an individual convicted by the Court.[47] However, the TFV remains dependent on donors[48] and still cannot engage in the full range of reparations that States can, such as amending laws.

The foregoing differences influence reparations judgments in ways large and small. For instance, these differences help to explain why certain kinds of institutions rarely engage with particular issues, such as why human rights bodies almost never assess the appropriate quantum of monetary damages or why international criminal tribunals are unlikely to order certain forms of reparations. Such differences also help to explain why the jurisprudence of certain bodies is more developed in particular areas, such as why human rights courts and international criminal tribunals are more likely to emphasise causation than human rights bodies, such as UN treaty bodies and regional human rights commissions. As appropriate, specific differences related to the

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CRITICAL APPRAISAL 369, 421 (1992); Andrew Byrnes, *The Committee Against Torture*, *in* PHILIP ALSTON, THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 509, 535-36 (1992).

[45] *See* Kaing Appeal Judgment, *supra* note 1, at par.. 431-34 (discussing the different frameworks and policies animating human rights bodies and criminal courts).

[46] *See id.* par. 652.

[47] *E.g.*, Rome Statute of the ICC, *supra* note 1, art. 79.

[48] Assembly of States Parties, Regulations of the Trust Fund for Victims, par.. 22-24 (Dec. 3, 2005), https://trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf .

authority and mandates of these various types of institutions are addressed in the relevant sections below.

It is important, however, not to overstate these differences or their impact. With respect to certain issues, for instance, such as the definition of victims, these differences have little impact. Moreover, although these differences explain some of the variations in the practices of these institutions, other variations are due to the peculiarities of individual bodies and the way their jurisprudence has developed. The European Court of Human Rights, for example, is generally acknowledged to have "a more cautious and less substantial body of jurisprudence regarding reparations" than other similar regional human rights courts, such as the Inter-American Court of Human Rights.[49] This caution is a product, in part, of its history. For decades, the European Court of Human Rights held that its reparations mandate, which authorises the Court to order "just satisfaction,"[50] was limited to issuing judgments recognising that a State had violated a victim's rights. Only recently has the Court held that "just satisfaction" may include forms of reparation beyond issuing such a judgment. As a result, in some areas, its jurisprudence on reparations is less developed than one might otherwise expect of a human rights court and more closely resembles that of a human rights body.[51] By contrast, the reparations jurisprudence of the Inter-American Court on Human Rights, which has been faced with numerous claims of collective rights abuses involving massive violations,[52] as well as serious human rights violations perpetrated in the context of conflict or repressive regimes,[53] is quite extensive. These cases have forced the Inter-American Court to think expansively about issuing reparations orders

[49] MCCARTHY, *SUPRA* NOTE 20, at 15.
[50] European Convention on Human Rights, *supra* note 43, art. 41.
[51] Indeed, like a human rights body, the European Court of Human Rights has held that State Parties are "free to choose the means whereby they will comply with a judgment in which the Court has found a breach." Nagmetov v. Russia, App. No. 35589/09, European Court of Human Rights, Judgment, par. 65 (Mar. 30, 2017), http://hudoc.echr.coe.int/eng?i=001-172440.
[52] See generally *Case of the Plan de Sánchez Massacre v. Guatemala*, Inter-American Court of Human Rights, Judgment (Reparations) (Nov. 19, 2004), http://www.corteidh.or.cr/docs/casos/articulos/seriec_116_ing.pdf; *Case of the Mapiripán Massacre v. Colombia*, Inter-American Court of Human Rights, Judgment (Merits, Reparations, Costs) (Sept. 15, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf; *Case of the Ituango Massacres v. Colombia*, Inter-American Court on Human Rights, Judgment (Preliminary Objections, Merits, Reparations and Costs) (July 1, 2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf.
[53] *See generally Velásquez-Rodríguez v. Honduras*, *supra* note 1; *Case of Barrios Altos v. Peru*, Inter-American Court on Human Rights, Judgment (Reparations and Costs) (Nov. 30, 2001), https://www.corteidh.or.cr/docs/casos/articulos/seriec_87_ing.pdf; *Bámaca-Velásquez v. Guatemala*, Inter-American Court on Human Rights, Judgment (Reparations and Costs) (Feb. 22, 2002), http://www.corteidh.or.cr/docs/casos/articulos/Seriec_91_ing.pdf ; *Myrna Mack Chang v. Guatemala*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs) (Nov. 25, 2003), http://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf; *Chitay Nech and Others v. Guatemala*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations and Costs) (May 25, 2010), http://www.corteidh.or.cr/docs/casos/articulos/seriec_212_ing.pdf ; *González Medina and Family v. Dominican Republic*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations and Costs) (Feb. 27, 2012), http://www.corteidh.or.cr/docs/casos/articulos/seriec_240_ing1.pdf.

that include a combination of measures designed to fully restore the victim and prevent the recurrence of abuses. To take one last example, the reparations jurisprudence of the (Extraordinary Chambers in the Courts of Cambodia) ECCC is much more limited than that of the ICC, both because the ECCC is limited to issuing collective and moral reparations and because, in the absence of a trust fund like that at the ICC, it has held that awards should be limited to those that can realistically be implemented by the accused given their resources.[54] As these examples indicate, differences between institutions can often be as important as differences between types of bodies.

Ultimately, despite the differences in these three types of bodies, there also are significant similarities in their jurisprudence. The following sections explore these similarities and differences, providing examples, options, and strategies that the African Court may draw on as it further develops its own jurisprudence on reparations.

[54] Kaing Appeal Judgment, *supra* note 1, at par.. 666-68.

B. Definition of Victim

There is no single definition of "victim"[55] applicable across all human rights bodies and international courts. Nonetheless, although the exact definition of a "victim" varies from body to body, these definitions are all based on certain core principles. In particular, all human rights bodies and international courts require a victim to have been *personally* affected by a human rights violation or international crime within the jurisdiction of the body or court – a requirement that is variously stated as requiring that the victim must have "suffered harm" or have been "directly," "personally" or "actually affected."[56] This requirement is interpreted broadly, with all human rights bodies recognising that a person may suffer harm where he or she

[55] The terminology regarding who is entitled to reparations can be laden with emotion, and some individuals prefer other terms, such as "survivor." *See, e.g.*, African Commission General Comment No. 4, *supra* note 1, at par. 16; SHELTON, *supra* note 4, at 15-16. Without prejudice to other equally valid terms, this study generally uses the term victim both because it encompasses a wider group of individuals who have suffered harms, including those who have died, and because most of the literature and jurisprudence on who is entitled to reparations uses the term "victim." *See, e.g.*, U.N. Basic Principles, *supra* note 1, at par. 8.

[56] African Commission General Comment No. 4, *supra* note 1, at par. 16; U.N. Basic Principles, *supra* note 1, at par. 8; U.N. Committee Against Torture, General Comment No. 3: Implementation of article 14 by States parties, par. 3 (Nov. 19, 2012) [hereinafter "CAT General Comment No. 3"], http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf; International Criminal Court, Rules of Procedure and Evidence, Rule 85 (2002) [hereinafter "ICC Rules of Procedure"], https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf; Statute of the Special Tribunal for Lebanon, *supra* note 1, art. 25(1); *see also Zongo v. Burkina Faso*, *supra* note 1, at par. 47; Aumeeruddy-*Cziffra v. Mauritius*, U.N. Human Rights Committee, Comm. No. 35/1978, Views, par. 9.2 (Apr. 9, 1981), http://juris.ohchr.org/Search/Details/319; *Yrusta v. Argentina*, Comm. No. 1/2013, U.N. Committee on Enforced Disappearances, par. 10.8 (Mar. 11, 2016), http://juris.ohchr.org/Search/Details/2141; The Documentation and Advisory Centre on Racial Discrimination, Comm. No. 28/2003, U.N. Committee on the Elimination of Racial Discrimination, Decision, par.. 6.6-6.7 (Aug. 19, 2003), http://juris.ohchr.org/Search/Details/1743; *SOS Sexisme v. France*, Comm. No. 13/2007, U.N. Committee on the Elimination of Discrimination Against Women, Decision, par. 10.5 n.8 (Aug. 4, 2009), http://juris.ohchr.org/Search/Details/1712; *Brumărescu v. Romania*, App. No. 28342/95, European Court of Human Rights, Judgment, par. 50 (Oct. 28, 1999), http://hudoc.echr.coe.int/eng?i=001-58337; *Prager and Oberschlick v. Austria*, App. No. 15974/90, European Court of Human Rights, Judgment, par.. 26-27 (Apr. 26, 1995), http://hudoc.echr.coe.int/eng?i=001-57926; *Gorraiz Lizarraga and Others v. Spain*, App. No. 62543/00, European Court of Human Rights, Judgment, par. 35 (Apr. 27, 2004), http://hudoc.echr.coe.int/eng?i=001-61731; Biç and Others v. Turkey, App. No. 55955/00, European Court of Human Rights, Judgment, par. 19 (Feb. 2, 2006), http://hudoc.echr.coe.int/eng?i=001-72259; *Burden v. United Kingdom*, App. No. 13378/05, European Court of Human Rights, Judgment, par. 33 (Apr. 29, 2008), http://hudoc.echr.coe.int/eng?i=001-86146; *Tanase v. Moldova*, App. No. 7/08, European Court of Human Rights, Judgment, par. 104 (Apr. 27, 2010), http://hudoc.echr.coe.int/eng?i=001-98428; *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, International Criminal Court, Order for Reparations pursuant to Article 75 of the Statute, par. 39 (Mar. 24, 2017) [hereinafter "Katanga Reparations Order"], http://www.legal-tools.org/doc/63d36d/; *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, International Criminal Court, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, par. 28 (June 4, 2012), https://www.legal-tools.org/doc/0fdd1e/pdf/; Kaing Appeal Judgment, *supra* note 1, at par.. 415, 418; *Prosecutor v. Ayyash* et al., Case No. STL-11-01/PT/PTJ, Special Tribunal for Lebanon, Decision on Victims' Participation in the Proceedings, par. 59 (May 8, 2012), https://www.stl-tsl.org/crs/assets/Uploads/20120508_F0236_PUBLIC_PTJ_Decision_re_Victims_Participation_WEB_EN.pdf .

experiences physical or mental injury, emotional suffering, economic loss or the substantial impairment of a fundamental right.[57]

The following sections discuss how various human rights bodies and courts apply the foregoing criteria to different types of persons, the legal status of victims, the autonomous status of victims under international law and key issues and challenges in identifying victims.

1. The "personally affected" requirement

The requirement that a person should have been "directly," "personally" or "actually affected" by a human rights violation or international crime in order to qualify as a victim is plainly satisfied with respect to the person who was the immediate target of the violation or crime. It is beyond dispute that individuals who were illegally fired from their employment, raped, illegally detained, tortured, forcibly relocated, disappeared, killed, or were the subject of other human rights violations or international crimes are victims, and all human rights bodies and courts recognise such persons as victims provided that the specific violation or crime is within their jurisdiction.[58]

In addition to the immediate targets of a violation, human rights violations and international crimes often have harmful effects on other individuals that render them victims as well. For example, individuals who are harmed while attempting to prevent a violation or assist a victim are generally recognised as victims in their own right.[59]

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[57] U.N. Basic Principles, *supra* note 1, at par. 8; African Commission General Comment No. 4, *supra* note 1, at par. 16; CAT General Comment No. 3, *supra* note 56, at par. 3; Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 2(A) (Apr. 3, 2017) [hereinafter "STL Rules of Procedure"], https://www.stl-tsl.org/images/RPE/RPE_EN_April_2017.pdf; *see also Zongo v. Burkina Faso*, *supra* note 1, at par. 47; Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, International Criminal Court, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, par.. 115-17, 145-47 (Jan. 17, 2006), https://www.legal-tools.org/doc/2fe2fc/pdf/; *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, International Criminal Court, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Key Findings par. 1 (July 11, 2008) [hereinafter "Lubanga Victims' Participation Appeal"], https://www.icc-cpi.int/CourtRecords/CR2008_03972.PDF; Gbagbo Decision on Victims' Participation, *supra* note 56, at par. 28; Katanga Reparations Order, *supra* note 56, at par. 74.

[58] *See, e.g.*, *Konate v. Burkina Faso*, *supra* note 1, at par.. 6-8, *Umuhoza v. Rwanda*, *supra* note 11, at par. 19, *Thomas v. Tanzania supra* note 11, at par. 11, *Abubakari v Tanzania supra* note 11, at par. 19 ; *Saidykhan v. The Gambia*, Suit No. ECW/CCJ/APP/11/07, ECOWAS Community Court of Justice, Judgment, par. 46 (Dec. 16, 2010), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2010/MUSA_SAIDYKHAN_v_REPUBLIC_OF_THE_GAMBIA.pdf; *Shumba v. Zimbabwe*, App. No. 288/04, African Commission on Human and Peoples' Rights, Views, par. 167 (June 30, 2017), https://www.achpr.org/sessions/descions?id=238; *Goiburú v. Paraguay*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 145 (Sept. 22, 2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_ing.pdf; *Guridi v. Spain*, Comm. No. 212/2002, U.N. Committee Against Torture, Decision, par.. 1, 6.7, 6.8, 7 (May 24, 2005), http://juris.ohchr.org/Search/Details/133; Kaing Appeal Judgment, *supra* note 1, at par. 416.

[59] *E.g.*, African Commission General Comment No. 4, *supra* note 1, at par. 17; U.N. Basic Principles, *supra* note 1, at par. 8 (defining victim to include "persons who have suffered harm in intervening to assist victims in distress"); CAT General Comment No. 3, *supra* note 56_, at par. 3 (same); see also *Prosecutor v. Lubanga, Case* No. ICC-01/04-01/06, International Criminal Court, Redacted version of

Individuals forced to watch the torture of a friend or loved one also have been held to be victims of torture in their own right, due to the severe suffering caused by witnessing the crime.[60]

Many human rights bodies and courts also recognise that an immediate victim's family members may be victims as well.[61] As these bodies have acknowledged, the rights of the next of kin[62] are often directly violated by the targeting of their family member. For example, the next of kin of individuals who are disappeared or killed have a right to know the fate of their family members, and the failure to provide them with this information violates their rights as well.[63] This right of family members to

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"Decision on 'indirect victims,'" par. 51 (Apr. 8, 2009) [hereinafter "Lubanga Indirect Victims Decision"], https://www.legal-tools.org/doc/c1cf65/pdf/; Gbagbo Decision on Victims' Participation, *supra* note 56, at par. 30.

[60] *See, e.g.*, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia, Trial Judgment, par.. 267-68 (Dec. 10, 1998), http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, International Criminal Tribunal for the former Yugoslavia, Trial Judgment, par. 149 (Nov. 2, 2001), http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf; *Prosecutor v. Habré*, Extraordinary African Chambers, Trial Chamber, Judgment, Decision on Reparations, par.. 67 (May 30, 2016) [hereinafter Habré Reparations Decision]; *see also* MONICA FERIA TINTA, THE LANDMARK RULINGS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON THE RIGHTS OF THE CHILD: PROTECTING THE MOST VULNERABLE AT THE EDGE 124 (2008).

[61] *See, e.g.*, African Commission General Comment No. 4, *supra* note 1, at par. 17; CAT General Comment No. 3, *supra* note 56, at par. 3 (defining "victim" as including "affected immediate family or dependants of the victim"); U.N. Basic Principles, *supra* note 1, at par. 8 ("Where appropriate . . . the term 'victim' also includes the immediate family or dependants of the direct victim"); International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 44, art. 24(1) (defining victim to include both the disappeared person and "any individual who has suffered harm as the direct result of an enforced disappearance"); *Fernández Ortega et al. v. Mexico*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations, and Costs), par. 143 (Aug. 30, 2010), http://www.corteidh.or.cr/docs/casos/articulos/seriec_215_ing.pdf; *Case of the Miguel Castro-Castro Prison v. Peru*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 335 (Nov. 25, 2006) ("the next of kin of the victims of certain violations of human rights may be, at the same time, victims of violating acts"), http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf; Lubanga Victims' Participation Appeal, *supra* note 57, at par. 32 ("[h]arm suffered by one victim . . . can give rise to harm suffered by other victims," particularly "when there is a close personal relationship between the victims"); Kaing Appeal Judgment, *supra* note 1, at par. 417; *Sharma v. Nepal*, Comm. No. 1469/2006, U.N. Human Rights Committee, Views, par. 7.9 (Oct. 28, 2008) (finding that the author of the communication, who was the wife of a forcibly disappeared man, was also a victim because of the anguish and stress caused by her husband's disappearance), http://juris.ohchr.org/Search/Details/1461; *Yrusta v. Argentina*, *supra* note 56, at par.. 10.8, 12(a). *Umuhoza v. Rwanda supra* note 11, at par. 66 , *Abubakari v. Tanzania supra* note 11, at par. 59,

A handful of human rights bodies, including the African Committee of Experts, have to date recognised as victims only the immediate victims of a violation. This is likely due to the limited number of applications received so far and the lack of opportunity to acknowledge other types of victims. For example, the African Committee of Experts has decided only four cases on the merits as of March 7, 2018. *See* Table of Communications, African Committee of Experts on the Rights and Welfare of the Child, https://www.acerwc.africa/table-of-communications/

[62] This study uses the term "next of kin" interchangeably with "family members." The use of the term here is not meant to denote specific inheritance rights.

[63] *See, e.g.*, *Quinteros v. Uruguay*, Comm. No. 107/1981, U.N. Human Rights Committee, Views, par. 14 (July 21, 1983), http://juris.ohchr.org/Search/Details/339; *Guerrero Larez v. Venezuela*, Comm. No. 456/2011, U.N. Committee Against Torture, Decision, par.. 1, 6.10, 7, 8 (May 15, 2015), http://juris.ohchr.org/Search/Details/1999; *Yrusta v. Argentina*, *supra* note 56, at par.. 10.8, 12; *see also* International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 44,

information extends to other human rights violations. For example, in *Case of the Miguel Castro-Castro Prison v. Peru*, the Inter-American Court of Human Rights found the rights of the next of kin had been violated when they were unable to receive information about where their imprisoned family members had been transferred or the state of health of those family members.[64] In other cases, the refusal to adequately investigate the initial violations against a family member may give rise to additional violations against the next of kin, rendering them victims as well.[65] In addition, the next of kin of those who are targeted often suffer harm, particularly emotional and pecuniary harm such as the loss of a family member's financial contributions.[66] The Human Rights Committee, the Committee on Enforced Disappearances, and the Committee Against Torture, for example, have all underscored the "anguish and stress" caused by the disappearance or death of a close family member, which they have recognised as a violation of the rights of the person left behind.[67] Other courts likewise have found violations of the next of kin's right to humane treatment, personal integrity, or family life based on the mental suffering, fear, and altered family dynamics they experienced as a result of the violations committed against their loved ones.[68]

art. 24(2) (observing that "[e]ach victim has the right to know the . . . results of the investigation and the fate of the disappeared person"); *Çakici v. Turkey*, App. No. 23657/94, European Court of Human Rights, Judgment, par. 98 (July 8, 1999), http://hudoc.echr.coe.int/eng?i=001-58282; *Varnava and Others v. Turkey*, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90,16070/90, 16071/90, 16072/90 and 16073/90, European Court of Human Rights, Judgment, par.. 200, 202 (Sept. 18, 2009), http://hudoc.echr.coe.int/eng?i=001-94162; *Imakayeva v. Russia*, App. No. 7615/02, European Court of Human Rights, Judgment, par. 164 (Nov. 9, 2006), http://hudoc.echr.coe.int/eng?i=001-77932; *Kurt v. Turkey*, App. No. 24276/94, European Court of Human Rights, Judgment, par. 175 (May 25, 1998), http://hudoc.echr.coe.int/eng?i=001-58198.

[64] *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 337.

[65] *Goiburú v. Paraguay*, *supra* note 58, at par.. 133, 139, 146; *Zongo v. Burkina Faso*, *supra* note 1, at par.. 55-56.

[66] *See, e.g.*, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-3129-AnxA, International Criminal Court, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations," Annex A, par. 58(b) (Mar. 3, 2015) [hereinafter "Lubanga Reparations Principles Annex"], https://www.legal-tools.org/doc/df2804/pdf/; Kaing Appeal Judgment, *supra* note 1, at par. 417; *Zongo v. Burkina Faso*, *supra* note 1, at par.. 55-56; *Mtikila v. Tanzania*, *supra* note 1, at par. 34; *Guerrero Larez v. Venezuela*, *supra* note 63, at par.. 1, 6.10, 7, 8; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par.. 335-42, 418; *Fernández Ortega v. Mexico*, *supra* note 61, at par.. 143-49; Çakici v. Turkey, *supra* note 63, at par. 127; *Quinteros v. Uruguay*, *supra* note 63, at par. 14; *Sharma v. Nepal*, *supra* note 61, at par. 7.9; *Yrusta v. Argentina*, *supra* note 56, at par.. 10.8, 12.

[67] *See, e.g.*, *Quinteros v. Uruguay*, *supra* note 63, at par. 14; *Sharma v. Nepal*, *supra* note 61, at par. 7.9; *Guerrero Larez v. Venezuela*, *supra* note 63, at par.. 1, 6.10, 7, 8; *Yrusta v. Argentina*, *supra* note 56, at par.. 10.8, 12; *see also Mtikila v. Tanzania*, *supra* note 1, at par. 34; Kaing Appeal Judgment, *supra* note 1, at par. 417; Situation in the DRC Decision on the Applications for Participation in the Proceedings of VPRS 1 et al., *supra* note 57, at par.. 114-17, 132.

[68] *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par.. 335-42, 418; *Fernández Ortega v. Mexico*, *supra* note 61, at par.. 143-49; *Goiburú v. Paraguay*, *supra* note 58, at par. 158; *see also* Katanga Reparations Order, *supra* note 56, at par. 113; *Imakayeva v. Russia*, *supra* note 63, at par. 216. *Rashidi v. Tanzania supra* note 11, at par. 138, *Umuhoza v Rwanda supra* note 11, at par. 68.

Those human rights bodies and courts that recognise next of kin as victims generally include spouses,[69] children,[70] and parents[71] within the category of persons who may be victims. In addition, some bodies have also recognised as victims' siblings;[72] grandparents;[73] grandchildren;[74] aunt, uncles, nieces or nephews;[75] and cousins.[76] Some courts have observed, however, that the concept of "family" and the determination of whether particular types of family members are close should be evaluated in light of relevant family and social structures, particularly when indigenous or tribal communities are involved.[77]

Human rights bodies and courts have developed a variety of approaches to determine whether a particular individual within these aforementioned categories should be considered a victim. Some courts, such as the Inter-American Court of Human Rights, presume mental suffering, and thus a violation of the right to mental

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[69] *See, e.g.*, *Konate v. Burkina Faso*, *supra* note 1, at par.. 52, 54, 59, 60(v); *Malawi Africa Association et al. v. Mauritania*, Comm. Nos. 54/91-61/91-96/93-98/93-164/97_196/97-210/98, African Commission on Human and Peoples' Rights, p. 16, Recommendation par. 3 (May 11, 2000), https://www.achpr.org/sessions/descions?id=114 ; *Guerrero Larez v. Venezuela*, *supra* note 63, at par.. 1, 6.10, 7, 8; *Case of the Ituango Massacres v. Colombia*, *supra* note 52, at par. 264; Situation in the DRC Decision on the Applications for Participation in the Proceedings of VPRS 1 et al., *supra* note 57, at par.. 114-17, 183.

[70] *See, e.g.*, *Konate v. Burkina Faso*, *supra* note 1, at par.. 52, 55, 59, 60(v); *Case of the Ituango Massacres v. Colombia*, *supra* note 52, at par. 264; Situation in the DRC Decision on the Applications for Participation in the Proceedings of VPRS 1 et al., *supra* note 57, at par. 132; Katanga Reparations Order, *supra* note 56, at par. 121.

[71] *See, e.g.*, *Zongo v. Burkina Faso*, *supra* note 1, at par. 50; *Thomas v. Tanzania*, *supra* note 11, at par. 68, *Nganyi v. Tanzania supra* note 11, at par.. 71-74, *Wing Commander Danladi A Kwasu v. Nigeria*, Suit No. ECW/CCJ/APP/24/15, ECOWAS Community Court of Justice, Judgment, Decision section (Oct. 10, 2017) (deciding in favor of father for death of son), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2017/ECW_CCJ_JUD_04_17.pdf; *Interights & Ditshwanelo v. Botswana*, Comm. No. 319/06, African Commission on Human and Peoples' Rights, par.. 5, 58, 59, 96 (Nov. 4-18, 2015), https://www.achpr.org/sessions/descions?id=257 ; *Guerrero Larez v. Venezuela*, *supra* note 63, at par.. 1, 6.10, 7, 8; *Case of the Ituango Massacres v. Colombia*, *supra* note 52, at par. 264; *Cantoral-Benavides v. Peru*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 37 (Dec. 3, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_88_ing.pdf; Katanga Reparations Order, *supra* note 56, at par. 232; Habré Reparations Decision, *supra* note 60, at par. 67.

[72] *Kazingachire et al. v. Zimbabwe*, Comm. No. 295/04, African Commission on Human and Peoples' Rights, par. 127 (Oct. 12, 2013), https://www.achpr.org/sessions/descions?id=237 ; *Yrusta v. Argentina*, *supra* note 56, at par.. 10.8, 12; Situation in the DRC Decision on the Applications for Participation in the Proceedings of VPRS 1 et al., *supra* note 57, at par. 132; *Case of the Ituango Massacres v. Colombia*, *supra* note 52, at par. 264; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 37. *Thomas v. Tanzania*, *supra* note 11, at par. 68.

[73] *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par.. 80, 92-93, 123(1)(c), 123(2)(c) (May 26, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_77_ing.pdf; Katanga Reparations Order, *supra* note 56, at par. 232.

[74] Katanga Reparations Order, *supra* note 56, at par. 232.

[75] Situation in the DRC Decision on the Applications for Participation in the Proceedings of VPRS 1 et al., *supra* note 57, at par.. 114-17; Kaing Appeal Judgment, *supra* note 1, at par.. 560-63, 567-70, 577-80, 585-90; *Caracazo v. Venezuela*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 91(c) (Aug. 29, 2002), http://www.corteidh.or.cr/docs/casos/articulos/Seriec_95_ing.pdf.

[76] *Myrna Mack Chang v. Guatemala*, *supra* note 53, at par. 244.

[77] Katanga Reparations Order, *supra* note 56, at par. 121.

and moral integrity, on behalf of close family members – such as parents, children, spouses, and siblings – where the primary victim was killed or disappeared.[78] Family members also may provide written or oral evidence of their suffering,[79] their pecuniary and other damages,[80] or their victim status in cases concerning other violations.[81] For example, in cases of rape, there is no automatic presumption that the rights of family members also were violated, but family members may provide evidence of harms suffered.[82] Where an individual is not a close family member, however, the Inter-American Court of Human Rights uses the following factors to determine whether the person is an additional victim: "whether there is a particularly close relationship between them and the victims in a case that would enable the Court to establish an effect on their personal integrity and, therefore, a violation of Article 5 of the Convention" on the right to humane treatment; "whether the individuals have been involved in seeking justice in the specific case"; and "whether they have suffered as a result of the facts of the case or of subsequent acts or omissions on the part of the State authorities in relation to the facts."[83] The European Court of Human Rights, by contrast, has a more restrained approach to recognising family members as victims, holding that the suffering of the family member must take on "a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation."[84] To determine whether a family member's suffering rises to this level, and therefore whether the family member should be considered a victim, the European Court considers: the proximity of the family tie, the circumstances of the relationship, whether the family member witnessed the violation, and the involvement of the family member in attempts to obtain information or judicial redress.[85]

Although it is important to acknowledge the breadth of persons who can be harmed from a human rights violation or international crime, there is a limit as to how far the status of victim reasonably can be extended. The International Criminal Court, for example, excludes from the category of victim those individuals who suffer harm as a result of the *conduct* of immediate victims.[86] For example, a child who is recruited to participate in military action is a victim of the crime of unlawful recruitment of child soldiers, as may be his or her relatives and anyone who was harmed while attempting

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[78] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 151; *see also Cantoral-Benavides v. Peru*, *supra* note 71, at par.. 37-38; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 341; *Goiburú v. Paraguay*, *supra* note 58, at par. 159; *Zongo v. Burkina Faso*, *supra* note 1, at par.. 55-56.
[79] *Cantoral-Benavides v. Peru*, *supra* note 71, at par.. 54(b)-(h), 57-58, 61-61.
[80] *Id.* par.. 51(d)-(f). *Umuhoza v. Rwanda supra* note 11, at par. 68
[81] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 151.
[82] *Id.* at par.. 139-49.
[83] *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Inter-American Court of Human Rights, Judgment (Merits, Reparation, and Costs), par. 127 (Sept. 1, 2010), http://www.corteidh.or.cr/docs/casos/articulos/seriec_217_ing.pdf.
[84] *Çakici v. Turkey*, *supra* note 63, at par. 98; *see also Varnava v. Turkey*, *supra* note 63, at par.. 200, 202; *Imakayeva v. Russia*, *supra* note 63, at par. 164.
[85] *Çakici v. Turkey*, *supra* note 63, at par. 98; *Varnava v. Turkey*, *supra* note 63, at par.. 200, 202; *Imakayeva v. Russia*, *supra* note 63, at par. 164.
[86] Lubanga Indirect Victims Decision, *supra* note 59, at par.. 52-53.

to prevent the recruitment.[87] Those persons would all potentially be entitled to reparations from the defendant who committed the illegal recruitment. However, individuals harmed by the conduct of the child soldier, such as those maimed or killed by his or her actions, would not be victims of the original act of recruitment (although they are plainly victims of other crimes) and are therefore excluded from the definition of victim for the particular crime under consideration by the court.[88]

2. Legal status of victims

All international courts and human rights bodies recognise natural persons as victims,[89] and many conclude that legal persons may be victims too.[90] Of those courts and human rights bodies that do not recognise legal persons as victims, some have statutes or rules that explicitly limit the definition of victims to natural persons.[91] Others have mandates covering rights that, by definition, can only be held by natural and not legal persons. For example, the African Committee of Experts on the Rights and Welfare of the Child has never recognised a legal person as a victim, but that is

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[87] *Id.* par.. 42, 51.

[88] *Id.* par. 52, 54. As the ICC recognised, these individuals may, however, be victims of other crimes within the jurisdiction of the Court. *Id.* par. 53.

[89] *See, e.g.*, ICC Rules of Procedure, *supra* note 56, Rule 85(a) (defining "victims" to include natural persons); European Convention on Human Rights, *supra* note 43, art. 34 ("The Court may receive applications from any person . . . claiming to be the victim of a violation"); ECOWAS Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol, art. 4 (Jan. 19, 2005) (inserting into the Protocol on the ECOWAS Community Court of Justice a new art. 10 providing that individuals may bring claims for relief for violation of their human rights) [hereinafter "ECOWAS Community Court of Justice Supplementary Protocol"], http://prod.courtecowas.org/; Convention against Torture, *supra* note 24, art. 22(1) (regarding communications from "individuals . . . who claim to be victims"); *see also Konate v. Burkina Faso*, *supra* note 1, at par.. 6-8 (natural person was victim of human rights violations); *Shumba v. Zimbabwe*, *supra* note 58, at par. 167 (concluding that the applicant, a natural person, was a victim of torture and ill-treatment); Habré Reparations Decision, *supra* note 60, at par.. 59-68 (awarding reparations to natural persons who were victims of international crimes); *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 3 (natural person was victim).

[90] *See, e.g.*, *Zongo v. Burkina Faso*, *supra* note 1, at par. 65 (noting that legal entities may be victims); *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, App. No. 284/03, African Commission on Human and Peoples' Rights, Decision, par.. 1-7, 179, 181 (Apr. 3, 2009) (newspaper publishing company was the victim), https://www.achpr.org/sessions/descions?id=171; *Huri-Laws v. Nigeria*, App. No. 225/98, African Commission on Human and Peoples' Rights, Decision, par.. 1, 3, 42 (Nov. 6, 2000) (human rights NGO was the victim), https://www.achpr.org/sessions/descions?id=125; *TBB-Turkish Union in Berlin v. Germany*, Comm. No. 48/2010, U.N. Committee on the Elimination of Racial Discrimination, par.. 11.2-11.4 (Feb. 26, 2013), https://juris.ohchr.org/Search/Details/1728; *see also* European Convention on Human Rights, *supra* note 43, art. 34 (recognising that non-governmental organisations may be victims of a violation); ICC Rules of Procedure, *supra* note 56, Rule 85(b) (recognising certain legal entities may be victims); ECOWAS Community Court of Justice Supplementary Protocol, *supra* note 89, art. 4 (inserting into the Protocol on the ECOWAS Community Court of Justice a new art. 10 providing that corporate bodies may bring certain claims before the Court).

[91] *See, e.g.*, STL Rules of Procedure, *supra* note 57, Rule 2(A); Ayyash Decision on Victims' Participation in the Proceedings, *supra* note 56, at par. 30.

because it interprets the African Charter on the Rights and Welfare of the Child, which only covers rights held by children.[92]

Among those courts and human rights bodies that accept that legal persons may be victims, some limit the kinds of legal entities that may bring claims or the kinds of claims that legal entities may submit. For example, the European Court of Human Rights does not recognise governmental entities as victims.[93] The ICC takes an even narrower approach; under its rules, it may recognise legal persons as victims only if they have sustained harm to property "dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."[94] In its decisions, however, the ICC has found that a wide variety of legal entities can meet these criteria, including "non-governmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunications firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships."[95] The ECOWAS Community Court of Justice (ECOWAS CCJ/ECOWAS Court) will only accept a claim by a legal entity if it alleges that its rights were violated by a Community official.[96] Such limitations, however, are not based on general principles of law, but rather are grounded in the statutes, protocols, or rules of the court or human rights body.[97]

Finally, it is well established that some harms may be collective and not simply individual.[98] Based on this principle, some courts have recognised entire communities or peoples as victims, particularly in cases concerning indigenous or ethnic groups where large numbers of individuals were affected by the violations. The African Court

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[92] *See generally* African Charter on the Rights and Welfare of the Child (July 1, 1990), https://au.int/en/treaties/african-charter-rights-and-welfare-child. Similarly, the Committee Against Torture and the Committee on Enforced Disappearances have recognised only natural persons as victims, because only natural persons can be tortured or forcibly disappeared. *See* International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 44, art. 24(1) (defining "victim" to mean "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance").

[93] *See* European Convention on Human Rights, *supra* note 43, art. 34.

[94] ICC Rules of Procedure, *supra* note 56, Rule 85(b).

[95] Lubanga Reparations Principles Annex, *supra* note 66, at par. 8.

[96] ECOWAS Community Court of Justice Supplementary Protocol, *supra* note 89, art. 4 (limiting the claims of corporate bodies to those alleging that a Community official has violated its rights); *Ocean King Nigeria Ltd. v. Senegal*, Suit No. ECW/CCJ/APP/05/08, ECOWAS Community Court of Justice, Judgment, par.. 47, 49-50 (July 8, 2011) (corporate entities cannot bring claims for alleged violations of human rights not directed against a Community official), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2011/OCEAN_KING_NIG_LTD_v_REPUBLIC_OF_SENEGAL.pdf.

[97] *See, e.g.*, European Convention on Human Rights, *supra* note 43, art. 34; ECOWAS Community Court of Justice Supplementary Protocol, *supra* note 89, art. 4; ICC Rules of Procedure, *supra* note 56, Rule 85(b).

[98] *See, e.g.*, U.N. Basic Principles, *supra* note 1, at par. 8 (victims include those who have "collectively suffered harm"); CAT General Comment No. 3, *supra* note 56_, at par. 3.

of Human and Peoples' Rights, for example, recognised that the rights of entire communities can be violated in *African Commission on Human and Peoples' Rights v. Kenya*.[99] There, the African Court held that the State had violated the rights of an indigenous community by, *inter alia*, expelling the Ogiek community from their ancestral lands, denying them the opportunity to be consulted on their development, and discriminating against them.[100] Although the African Court did not technically use the term "victim," its decision implicitly recognised the Ogiek community as such. Similarly, in *Saramaka People v. Suriname*, the Inter-American Court of Human Rights found that the State had violated the rights of the Saramaka People to property, among other things, by failing to issue them collective title to their customary lands and by granting concessions on those lands to logging and mining companies.[101] Given the distinctive social structures, customs, and traditions of the Saramaka people, as well as the collective nature of the violations at issue, the Inter-American Court found the "Saramaka people" to be the victims.[102] Other human rights bodies and courts, including the African Commission on Human and Peoples' Rights and the ECOWAS

[99] *African Commission on Human and Peoples' Rights v. Kenya*, African Court on Human and Peoples' Rights, App. No. 006/2012, Judgment (May 26, 2017), http://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf.

[100] *Id.* par.. 131, 146, 169, 190, 201, 211, 217.

[101] *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations, and Costs), par.. 116, 154, 156, 158, 175, 185 (Nov. 28, 2007), http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

[102] *Id.* par.. 80-84, 188-89. Likewise, in the case of the *Yakye Axa Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights held that the "members of the indigenous community of Yakye Axa" were the victims, but in light of the small size of the community – just 319 people – it also individually named them. Yakye Axa Indigenous Community v. Paraguay, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 189 (June 17, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf. *See also* *Xákmok Kásek Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Judgment (Merits, Reparations, and Costs), par. 278 (Aug. 24, 2010) (concluding that the victims were "members of the Xákmok Kásek Community"), http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf.

Court, likewise have found entire communities or groups to be collective victims,[103] including communities identified by ethnicity and religion[104] or by geographic region.[105]

3. Autonomous status of victims under international law

A person's status as a victim is determined by reference to international, not domestic, law.[106] Disputes about whether an applicant qualifies as a victim most often arise in situations in which a person brings a claim based on the immediate violation of another's rights which allegedly resulted in harm to both. This occurs, for example, when an individual brings a claim based on the violation of a family's member's rights, such as the right not to be disappeared or extra judicially killed,[107] or when an individual with an interest in a company, such as an owner or shareholder, asserts a claim based on the violation of the company's rights.[108]

Courts and human rights bodies have resoundingly concluded that the concept of victim must be determined by reference to international, not domestic, law.[109] For instance, whether a family member is a victim is determined with reference to international standards regarding the harm to close family members, regardless of

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[103] *E.g.*, *Ominayak v. Canada*, Comm. No. 167/1984, U.N. Human Rights Committee, Views, par.. 2.2, 33 (July 22, 1987) (finding a violation with respect to the "life and culture of the Lubicon Lake Band," a Native American group), http://juris.ohchr.org/Search/Details/665; *see generally* *Centre for Minority Rights Development (Kenya) et al. v. Kenya*, Comm. No. 276/03, African Commission on Human and Peoples' Rights, Decision (Nov. 25, 2009) (finding violations against the Endorois, an indigenous group), https://www.achpr.org/sessions/descions?id=193 .

[104] *See The Nubian Community in Kenya v. Kenya*, Comm. No. 317/2006, African Commission on Human and Peoples' Rights, par.. 2, 71-73, 170 (Feb. 2015), http://www.achpr.org/files/sessions/17th-eo/comunications/317.06/communication_317.06_eng.pdf; *Open Society Justice Initiative v. Cote d'Ivoire*, Comm. No. 318/06, African Commission on Human and Peoples' Rights, Decision, par. 47, 161, 169, 179, 186 (Feb. 2015) (finding "the Dioulas," a group identifiable by ethnicity, religion, and language, to have been victims of various violations), https://www.achpr.org/sessions/descions?id=228; *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v. Kenya*, Comm. No. 002/09, African Committee of Experts on the on the Rights and Welfare of the Child, Decision, par.. 1, 69 (Mar. 22, 2011) (children of Nubian descent in Kenya), http://caselaw.ihrda.org/doc/002.09/pdf/en/.

[105] *SERAP v. Nigeria*, Suit No. ECW/CCJ/APP/08/09, ECOWAS Community Court of Justice, Judgment, par.. 4, 121 (Dec. 14, 2012) (people of the Niger Delta), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf.

[106] *Vallianatos v. Greece*, App. Nos. 29381/09 and 32684/09, European Court of Human Rights, Judgment, par. 47 (Nov. 7, 2013), http://hudoc.echr.coe.int/eng?i=001-128294; *see also Sanles Sanles v. Spain*, App. No. 48335/99, European Court of Human Rights, Decision, The Law (Oct. 26, 2000), http://hudoc.echr.coe.int/eng?i=001-22151; *Zongo v. Burkina Faso*, *supra* note 1, at par. 46; *Kazingachire v. Zimbabwe*, *supra* note 72, at par.. 128-131, 145 (determining that relatives were entitled to compensation under international law even though they did not qualify under domestic law).

[107] *See, e.g.*, *Zongo v. Burkina Faso*, *supra* note 1, at par.. 38-43.

[108] *See, e.g.*, *Begus v. Slovenia*, App. No. 25634, European Court of Human Rights, Judgment, par.. 23-25 (Dec. 15, 2011), http://hudoc.echr.coe.int/eng?i=001-108009; *Cingilli Holding A.S. v. Turkey*, App. Nos. 31833/06 and 37538/06, European Court of Human Rights, Judgment, par.. 22-23 (July 21, 2015), http://hudoc.echr.coe.int/eng?i=001-156254.

[109] *Vallianatos v. Greece*, *supra* note 106, at par. 47; *see also Zongo v. Burkina Faso*, *supra* note 1, at par. 46; *Kazingachire v. Zimbabwe*, *supra* note 72, at par.. 128-131, 145.

whether they qualify as heirs under domestic law.[110] Ultimately, the relevant question is whether the person seeking victim status was "directly affected" by the violation, not whether the domestic law would consider the person a victim.[111]

4. Key Issues and Challenges

As a general rule, many human rights bodies and courts require identification of the victims, meaning that cases must be brought by on behalf of specific victims rather than a generalised group of victims.[112] Likewise, only specified individuals are entitled to reparations.[113] These rules are important prerequisites for the application of other legal principles – for example, determining whether the harm claimed by a particular victim was caused by the violation[114] – as well as for ensuring that the total reparations obligations on the State or party remain reasonable.

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[110] *See, e.g.*, *Zongo v. Burkina Faso*, *supra* note 1, at par. 46; *Zamula v. Ukraine*, App. No. 10231/02, European Court of Human Rights, Judgment, par. 34 (Nov. 8, 2005) (noting that an heir *or relative* may bring a claim), http://hudoc.echr.coe.int/eng?i=001-70887.

[111] *See, e.g.*, *Koch v. Germany*, App. No. 497/09, European Court of Human Rights, Judgment, par.. 16, 50 (July 19, 2012), http://hudoc.echr.coe.int/eng?i=001-112282; *Monnat v. Switzerland*, App. No. 73604/01, European Court of Human Rights, Judgment, par.. 13, 33-34 (Sept. 21, 2006), http://hudoc.echr.coe.int/eng?i=001-76947.

[112] *See, e.g.*, Inter-American Court of Human Rights, Rules of Procedure, art. 35(1) (Nov. 16-28, 2009) (the report submitting the case to the court "must . . . identify the alleged victims") [hereinafter "Inter-American Court Rules of Procedure"], https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm; European Court of Human Rights, Questions & Answers, p. 6 (the European Court accepts complaints only from victims, or from official representatives provided that the victims are clearly identified), http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf; Optional Protocol to the International Covenant on Civil and Political Rights, art. 1 (Dec. 16, 1966) (the U.N. Human Rights Committee may accept communications under the protocol only from "individuals subject to its jurisdiction who claim to be victims of a violation"), http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx; Convention against Torture, *supra* note 24, art. 22(1) (same); PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 152 (2005) ("Every application to the European Court must identify the applicant."); *see also María Eugenia Morales de Sierra v. Guatemala*, Case No. 11.625, Inter-American Commission on Human Rights, Report No. 4/01, par. 4 (Jan. 19, 2001) (noting that the Commission required the petitioners "to identify concrete victims, as this was a requirement under its case system"), http://www.cidh.oas.org/annualrep/2000eng/chapterIII/merits/Guatemala11.625.htm; The Documentation and Advisory Centre on Racial Discrimination, *supra* note 56, at par. 6.7.

[113] *See, e,g.*, *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Inter-American Court of Human Rights, Judgment (Preliminary objections, merits, reparations and costs), par. 41 (Nov. 20, 2013) ("for a person to be considered a victim and to be awarded reparation, he or she must be reasonably identified"), http://www.corteidh.or.cr/docs/casos/articulos/seriec_270_ing.pdf .

Cases in international criminal courts operate somewhat differently, since they are brought by a prosecutor against a specific defendant, rather than by a victim against a state. Nonetheless, where such courts permit individual reparations, they too require identification of the victim. *See, e.g.*, ICC Rules of Procedure, *supra* note 56, Rule 94(1)(a). It is not, however, necessary for a victim to have participated in the trial proceedings in order to bring a claim for reparations. *See* INTERNATIONAL CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 38, https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf.

[114] *See, e.g.*, *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, *supra* note 113, at par. 430 (concluding that certain identified individuals were victims of other violations, not the violations alleged in the case before the Court, and therefore not entitled to reparations).

In practice, however, there are situations where identification of each and every victim is not possible, particularly in cases of mass violations, such as massacres.[115] Victims in these and other situations may have difficulty accessing the Court, identifying themselves, and requesting reparations. Indeed, "it can be assumed that the individuals or groups most severely victimized are often precisely those who are not in the physical, material or mental condition to apply for reparations."[116] Particularly in cases of mass violations, it cannot be taken for granted that all potential claimants will have participated in the proceedings on the merits in a case.

To address these difficulties, some courts, such as the Inter-American Court of Human Rights, permit the inclusion of, and award of reparations to, victims who have not yet been identified. For example, in the *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, the Inter-American Court of Human Rights observed that it was difficult to identify each victim because the massacre took place in seven different villages, many of the bodies were burned, there were no written records of the people who lived in the villages at the time, many of the next of kin had left the area, and the extended time that had passed since the massacre.[117] The Court therefore permitted consideration of non-identified victims.[118] The Court then ordered the state of El Salvador to undertake measures to identify all of the victims and their next of kin so that these persons could request the individualised reparations, such as compensation and rehabilitation measures, contained in the judgment.[119] In other cases, the Inter-American Court of Human Rights has required the state to make repeated public announcements in local and national media regarding the judgment in order to notify victims so that they can come forward, identify themselves, and obtain reparations.[120]

Some human rights bodies however, particularly those in Africa and the Americas, permit claims to be brought – and therefore reparations awarded to – entire

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[115] *Malawi Africa Association v. Mauritania*, *supra* note 69, at par. 79 ("in a situation of grave and massive violations, it may be impossible to give a complete list of names of all the victims").

[116] WCRO REPORT, *supra* note 20, at 26. *See also* Marieke Wierda & Pablo de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims* 6, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (2004) ("Even legal systems that do not have to deal with massive and systematic crime find it difficult to ensure that all victims have an equal chance of accessing the courts, and even if they do, that they have a fair chance of getting similar results. The more frequent case is that wealthier, better educated, urban victims have not only a first, but also a better chance of obtaining justice."), https://www.ictj.org/sites/default/files/ICTJ-Global-ICC-TrustFund-2004-English.pdf.

[117] Case of the Massacres of *El Mozote and Nearby Places v. El Salvador*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par.. 50-51 (Oct. 25, 2012), http://www.corteidh.or.cr/docs/casos/articulos/seriec_264_ing.pdf .

[118] *Id.*

[119] *Id.* par. 310, 352-53, 384; *see also Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 326.

[120] *See, e.g.*, *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, *supra* note 113, at par. 435; *see also Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 420 (providing for compensation to next of kin that had yet to be identified once they presented themselves to the competent State authorities); *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 326.

communities or groups of victims without the need to identify each victim.[121] As these bodies have observed, these collective claims are appropriate not only in cases of mass atrocities, but also in situations of widespread and systematic practices where identification of each individual victim would be "so impractical as to be virtually impossible."[122] For example, in *SERAP v. Nigeria*, an NGO brought suit before the ECOWAS Court on behalf of all persons living in the Niger Delta, claiming that Nigeria had violated their rights to, *inter alia*, an adequate standard of living, health, and economic and social development due to the government's failure to take effective measures to prevent pollution of the Niger Delta by private oil companies.[123] After finding that Nigeria had violated articles 1 and 24 of the African Charter on Human and Peoples' Rights, the Court ordered Nigeria to take effective measures of collective reparations, such as restoring the environment of the Niger Delta and holding the perpetrators accountable.[124] The Court did not, however, permit individualised reparations.[125] Similarly, cases before the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child have concerned thousands of unidentified victims, on whose behalf the Commission and the Committee have awarded collective reparations.[126] Case law

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[121] *See Mgwanga Gunme et al. v. Cameroon*, Comm. No. 266/03, African Commission on Human and Peoples' Rights, par. 67 (May 27, 2009) (observing that the African Charter does not require a communication to identify the victims of the violations), https://www.achpr.org/sessions/descions?id=189 ; *see also Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 278 (concluding that the victims were "members of the Xákmok Kásek Community" without identifying them individually); *Saramaka People v. Suriname*, *supra* note 101, at par.. 188-89 (concluding that the victims were members of the Saramaka Community, without individually identifying them); *see generally Centre for Minority Rights Development v. Kenya*, *supra* note 103, at (concluding that the Endorois indigenous community was the victim without identifying individual members).

[122] *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, App. No. 003/Com/001/2012, African Committee of Experts on the Rights and Welfare of the Child, Decision, par. 23 (Apr. 15, 2014), http://www.acdhrs.org/wp-content/uploads/2015/10/DECISION-CAEDBE_DSA-ACE-64-1047.15_English.pdf.

[123] *SERAP v. Nigeria*, *supra* note 105, at par.. 63-72.

[124] *Id.* par. 121.

[125] *Id.* par.. 113-117; A similar case was brought before the African Commission on Human and Peoples' Rights alleging violations by the government of Nigeria, *inter alia*, of the rights to health, to a satisfactory environment, and of a people to freely dispose of their wealth and natural resources - *Social and Economic Rights Action Center v. Nigeria*, *supra* note 23, at par.. 1-10; The reparations recommended by the Commission likewise focused on collective reparations, such as preparation of appropriate environmental and social impact assessments, cleanup of lands and rivers damaged by oil operations, and provision of information on health and environmental risks. *Id.* at p. 9 (Holding section); Some of the reparations – such as compensation to victims of human rights violations, including resettlement assistance – could have gone to individuals, although the Commission did not explicitly make any individual awards. *Id.*

[126] *See, e.g.*, *Malawi Africa Association v. Mauritania*, *supra* note 69, at p. 16 (ordering collective reparations to benefit black Mauritanians who had been victims of a variety of abuses, including disappearances and expulsions); *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, *supra* note 122, at par.. 2, 82; *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v. Kenya*, *supra* note 104, at par.. 1, 69 (permitting claims on behalf of and granting reparations to benefit children of Nubian descent in Kenya without identification of any specifically identified victims); *Centre for Minority Rights Development v. Kenya*, *supra* note 103, at p. 38. In some cases, where particular incidents of violations were described with discrete victims, reparations also have been ordered on

from the Inter-American Court on Human Rights, particularly with respect to indigenous and tribal communities, is in accord.[127]

behalf of those individual, though still un-identified, victims. *See, e.g.*, *Malawi Africa Association v. Mauritania*, *supra* note 69, at p. 16.

[127] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 278 (awarding reparations to "members of the Xákmok Kásek Community" without individually identifying them).

C. Burden and Standard of Proof

The establishment of a human rights violation or international crime is just the first step toward an award of reparations. In order to issue an award of reparations, there must also be proof, *inter alia*, that the victim suffered harm that the harm suffered was caused by the violation of the State or the crime committed by the individual perpetrator, and of the types and extent of harm. This proof is regulated by two important concepts: the burden of proof, which refers to ***who*** must present such proof, and the standard of proof, which refers to ***how much*** proof must be provided. Forms of proof are considered in the evidentiary standards section, *infra*.

1. Burden of Proof

The most thorough examination of the burden of proof appears in the jurisprudence of international criminal courts and some human rights courts, such as the African Court and the ECOWAS Court. As these courts explicitly have held, the burden of proof to provide evidence regarding the right to, type of, and amount of reparations generally lies with the person seeking a remedy.[128] Decisions of other human rights courts – particularly the European Court of Human Rights and the Inter-American Court of Human Rights – confirm that the burden rests with the petitioner, though their discussions of the burden of proof generally appear in the merits section of decisions and, while not specifically addressed in the reparations section, appear to apply by extension to questions of reparations.[129] Regional and international human rights bodies likewise appear to confirm that the burden of proof usually rests on the petitioner, although, consistent with the fact that such bodies can only provide non-binding views regarding appropriate reparations and that the final decision on

[128] *Konate v. Burkina Faso*, *supra* note 1, at par. 15(d); *Mtikila v. Tanzania*, *supra* note 1, at par. 40; *Umuhoza v. Rwanda supra* note 11, at par. 36, *Nganyi v. Tanzania supra* note 11, at par.. 16-17, *Incorporated Trustees of Fiscal and Civil Right Enlightenment Foundation v. Nigeria*, Suit No. ECW/CCJ/APP/02/14, ECOWAS Community Court of Justice, p.15 (June 7, 2016), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2016/ECW_CCJ_JUD_18_16.pdf; *Saidykhan v. The Gambia*, *supra* note 58, at par. 28; Katanga Reparations Order, *supra* note 56, at par.. 45, 50; Kaing Appeal Judgment, *supra* note 1, at par. 522; *see also* AVOCATS SANS FRONTIÈRES, PRINCIPLES ON COURT-ORDERED REPARATIONS: A GUIDE FOR THE INTERNATIONAL CRIMES DIVISION OF THE HIGH COURT OF UGANDA 26 (Oct. 2016) [hereinafter "ASF REPORT"], https://www.asf.be/wp-content/uploads/2017/01/ASF_UG_Court-OrderedReparations_201610_PP_Low.pdf; SHELTON, *supra* note 4, at 357.

[129] *E.g.*, *Hossam Ezzat & Rania Enayet v. Egypt*, Comm. No. 355/07, African Commission on Human and Peoples' Rights, par. 171 (Feb. 17, 2016), https://www.achpr.org/sessions/descions?id=260; *Oao Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, European Court of Human Rights, Judgment (Merits), par. 664 (Sept. 20, 2011), http://hudoc.echr.coe.int/eng?i=001-106308; *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 83, at par. 70; *Rosendo Cantú v. Mexico*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations and Costs), par. 102 (Aug. 31, 2010), http://corteidh.or.cr/docs/casos/articulos/seriec_225_ing.pdf ; *Kawas-Fernández v. Honduras*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 95 (Apr. 3, 2009), http://www.corteidh.or.cr/docs/casos/articulos/seriec_196_ing.pdf ; *see also* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 171; SHELTON, *supra* note 4, at 355, 357.

reparations rests with the State, these bodies generally do not apply the burden of proof to reparations questions.[130]

Placing the burden of proof on the victim or petitioner with respect to reparations is appropriate because the victim typically has the most information about, and therefore can best marshal evidence regarding, the consequences of the wrong.[131] Nonetheless, there are situations in which the victim or the victim's family members are relieved of the burden of proof, such as through application of a presumption. For example, where a victim has been killed, human rights and international criminal courts routinely presume that the victim's family members experienced suffering and anguish, thereby "reliev[ing] the class of immediate family from discharging the burden of proof of injury."[132] Such presumptions are explored in greater detail in the evidentiary section, *infra*. In addition, human rights bodies and courts sometimes share or shift the burden of proof,[133] particularly where the other party has more or exclusive information about the fact at issue.[134] While this is more common with respect to merits questions,[135] reversal of the burden of proof could be applied to reparations questions where information rests in the hands of the State or perpetrator.

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[130] *E.g.*, *Mebara v. Cameroon*, *supra* note 8, at par.. 116-17 (noting that the complaint failed to discharge the burden of proof); *Mamboleo Itundamilamba v. Democratic Republic of Congo*, *supra* note 2, at par. 129 (noting that usually the burden of proof rests with the alleging party, but choosing to shift it in the particular case); *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, African Commission on Human and Peoples' Rights, Communication No. 323/06, Views, par. 176 (Dec. 12-16, 2011), https://www.achpr.org/sessions/descions?id=203. Interestingly, the African Commission stated in *Haregewoin Gabre-Selassie and IHRDA v. Ethiopia* that "in cases of human rights violations, the burden of proof rests on the government." Haregewoin Gabre-Selassie and IHRDA v. Ethiopia, Comm. No. 301/05, African Commission on Human and Peoples' Rights, par. 178 (Oct. 24-Nov. 7, 2011), https://www.achpr.org/sessions/descions?id=242. In that case, however, the government failed to respond entirely, and the cases the Commission cited for the proposition do not discuss (or even mention the term) burden of proof.

[131] SHELTON, *supra* note 4, at 355, 357.

[132] Kaing Appeal Judgment, *supra* note 1, at par. 448. *See also Aloeboetoe et al. v. Suriname*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par.. 54, 71 (Sept. 10, 1993), http://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing.pdf.

[133] *Mamboleo Itundamilamba v. Democratic Republic of Congo*, *supra* note 2, at par. 129; *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 83, at par. 70; *Rosendo Cantú v. Mexico*, *supra* note 129, at par. 102; *Kawas-Fernández v. Honduras*, *supra* note 129, at par. 95; *Hassan v. United Kingdom*, App. No. 29750/09, European Court of Human Rights, Judgment, par. 49 (Sept. 16, 2014), http://hudoc.echr.coe.int/eng?i=001-146501; *Neupane v. Nepal*, Comm. No. 2170/2012, U.N. Human Rights Committee, Views, par. 10.4 (July 21, 2017), http://juris.ohchr.org/Search/Details/2309; SHELTON, *supra* note 4, at 355.

[134] PASQUALUCCI, *supra* note 129, at 171; *see also* U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights, par. 40 (July 2, 2009) (stating, in reference to national proceedings, that "where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or the other respondent, the burden of proof should be" shifted to them), http://www.refworld.org/docid/4a60961f2.html.

[135] Burden shifting is especially common in cases concerning enforced disappearances. *See, e.g.*, *Akhmadova and Sadulayeva v. Russia*, Application No. 40464/02, European Court of Human Rights, Judgment, par.. 86, 135-36 (May 10, 2007), https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%223026/03%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-89922%22]}.

2. Standard of proof

As with the burden of proof, the most detailed consideration of the appropriate standard of proof comes out of international criminal courts and some human rights courts, including the ECOWAS Court. As these courts explicitly have held, the standard of proof required during the reparations phase is one of preponderance of the evidence.[136] This standard, which is also known as the balance of the probabilities,[137] means that the victim must show that it is "more probable than not" that he or she is entitled to the reparations requested.[138] All aspects of reparations claims, including the victims' identities, the harm suffered, and causation, are subject to this standard.[139] Meanwhile, consistent with their authority to propose only "recommendations" with respect to reparations, regional and international human rights bodies generally move directly from finding a violation to recommending reparations without any discussion of the specific standard of proof, since they do not make a final determination as to the appropriate type or amount of reparations.[140]

By contrast, the Inter-American Court of Human Rights has not established a fixed standard of proof in cases before it, either with respect to merits or reparations.[141] Explaining that "[t]he standards of proof are less formal in an international legal proceeding tha[n] in a domestic one,"[142] the Inter-American Court has applied a flexible, case-by-case approach "without adopting a strict assessment of the quantum necessary to provide the grounds for a judgment."[143] This flexible approach provides the Inter-American Court with greater latitude to admit and "weigh the evidence

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[136] *E.g.*, *Incorporated Trustees of Fiscal and Civil Right Enlightenment Foundation v. Nigeria*, *supra* note 128, at p. 15; *Saidykhan v. The Gambia*, *supra* note 58, at par.. 28, 41; Katanga Reparations Order, *supra* note 56, at par.. 50, 59; Lubanga Reparations Principles Annex, *supra* note 66, at par. 65; *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, International Criminal Court, Decision establishing the principles and procedures to be applied to reparations, par. 253 (Aug. 7, 2012), https://www.legal-tools.org/doc/a05830/pdf/; Kaing Appeal Judgment, *supra* note 1, at par.. 523, 531; *see also Carabulea v. Romania*, App. No. 45661/99, European Court of Human Rights, par. 120 (July 13, 2010) (applying this standard to questions of causation), http://hudoc.echr.coe.int/eng?i=001-99911.

[137] Lubanga Reparations Principles Annex, *supra* note 66, at par. 65 n.37; Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par. 253 n.439; Kaing Appeal Judgment, *supra* note 1, at par. 523.

[138] Katanga Reparations Order, *supra* note 56, at par. 50; Kaing Appeal Judgment, *supra* note 1, at par. 523 ("more likely than not").

[139] *Konate v. Burkina Faso*, *supra* note 1, at par. 15(d); Katanga Reparations Order, *supra* note 56, at par.. 71-73, 84; *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, International Criminal Court, Reparations Order, par. 44 (Aug. 17, 2017), https://www.legal-tools.org/doc/02d1bb/pdf/; *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, International Criminal Court, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, par. 16 n.24 (Feb. 9, 2016), https://www.legal-tools.org/doc/8b7c4f/pdf/.

[140] *See, e.g.*, *TBB-Turkish Union in Berlin v. Germany*, *supra* note 90, at par.. 12.9-14; *Amarasinghe v. Sri Lanka*, Comm. No. 2209/2012, U.N. Human Rights Committee, Views, par.. 7-8 (July 13, 2017), http://juris.ohchr.org/Search/Details/2313.

[141] PASQUALUCCI, *supra* note 129, at 173; Kaing Appeal Judgment, *supra* note 1, at par. 517 (summarising the jurisprudence of the Inter-American Court).

[142] *Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment (Merits), par. 128 (July 29, 1988), http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

[143] *Kawas-Fernández v. Honduras*, *supra* note 129, at par. 82. See also *Zongo v Burkina Faso supra* note 11, at par. 61, *Rashidi v Tanzania supra* note 11, at par. 119.

freely."[144] Although this flexible approach has been primarily developed with respect to the merits of a case, it appears to apply equally to reparations.

In sum, institutions with the power to impose binding judgments on reparations generally adopt one of two approaches with respect to the standard of proof, applying either a preponderance of the evidence standard or a flexible case-by-case approach. The former method is more precise, and therefore seems to be preferred particularly by international criminal courts which, due to their context of imposing judgment and reparations directly on individuals, must adopt exact standards for guilt, sentencing, and reparations. It is also, however, used by some human rights courts, including the ECOWAS Community Court of Justice and the European Court of Human Rights. The Inter-American Court of Human Rights, however, has adopted a more flexible approach, consistent with its more progressive reparations judgments, which typically rely on a broader range of evidence and order a wider variety of reparations. More information about evidentiary standards and forms of reparations is provided in the sections on those issues, *infra*.

[144] *Id.*; *Velásquez-Rodríguez v. Honduras* Merits Judgment, *supra* note 142, at par. 127; *see also* PASQUALUCCI, *supra* note 129, at 173-74.

D. Causation

Entitlement to reparations accrues only where there is "a causal link between the established wrongful act and the alleged prejudice."[145] This means that the court or human rights body must not only find that a human rights violation or international crime was committed, but also that the pecuniary or non-pecuniary harm alleged by the victim resulted from that particular violation or crime.[146]

As with the issue of burden and standard of proof, the most explicit standard for causation can be found in the jurisprudence of international criminal tribunals. For example, the ICC has held that the wrongful act must be both the "but/for" cause and the "proximate cause" of the harm alleged.[147] "But/for" causation means that the harm would not have happened in the absence of the wrongful act, although the wrongful act need not be the sole cause.[148] If, however, the victim would have suffered the same loss even without the wrongdoer's conduct, then no reparations should be awarded.[149] Proximate causation examines "whether it was reasonably foreseeable

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[145] *Konate v. Burkina Faso*, *supra* note 1, at par. 15(c). *See also Zongo v. Burkina Faso*, *supra* note 1, at par. 24, *Thomas v. Tanzania supra* note 11, at par. 14, *Nganyi v. Tanzania supra* note 11, at par. 13; *Case of the "Las Dos Erres" Massacre v. Guatemala*, Inter-American Court of Human Rights, Judgment (Preliminary Objection, Merits, Reparations, and Costs), par. 227 (Nov. 24, 2009), http://www.corteidh.or.cr/docs/casos/articulos/seriec_211_ing.pdf; *Radilla-Pacheco v. Mexico*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations, and Costs), par. 362 (Nov. 23, 2009), http://www.corteidh.or.cr/docs/casos/articulos/seriec_209_ing.pdf; *Case of the Río Negro Massacres v. Guatemala*, Inter-American Court of Human Rights, Judgment (Preliminary objection, merits, reparations and costs), par. 247 (Sept. 4, 2012), http://www.corteidh.or.cr/docs/casos/articulos/seriec_250_ing.pdf; *Z. and Others v. United Kingdom*, App. No. 29392/95, European Court of Human Rights, Judgment, par. 119 (May 10, 2001), http://hudoc.echr.coe.int/eng?i=001-59455; *Shesti Mai Engineering OOD and Others v. Bulgaria*, App. No. 17854/04, European Court of Human Rights, Judgment, par. 101 (Sept. 20 2011), http://hudoc.echr.coe.int/eng?i=001-106250; *Axel Springer AG v. Germany*, App. No. 39954/08, European Court of Human Rights, Judgment, par. 115 (Feb. 7, 2012), http://hudoc.echr.coe.int/eng?i=001-109034; Katanga Reparations Order, *supra* note 56, at par. 36; *Maria de Lourdes da Silva Pimentel v. Brazil*, Comm. No. 17/2008, U.N. Committee on the Elimination of All Forms of Discrimination Against Women, Views, par. 7.3 (Sept. 27, 2001), http://juris.ohchr.org/Search/Details/1701; *Yekaterina Pavlovna Lantsova v. Russian Federation*, Comm. No. 763/1997, U.N. Human Rights Committee, Views, par. 9.2 (Mar. 26, 2002), http://juris.ohchr.org/Search/Details/740.

[146] *Konate v. Burkina Faso*, *supra* note 1, at par. 17; Al Mahdi Reparations Order, *supra* note 139, at par. 44; *see infra* pp. 41-42.

[147] Al Mahdi Reparations Order, *supra* note 139, at par. 44; Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par.. 249-50; Katanga Reparations Order, *supra* note 56, at par. 162.

[148] *Case of Oao Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, European Court of Human Rights, Judgment (Just Satisfaction), par. 29 (July 31, 2014), http://hudoc.echr.coe.int/eng?i=001-145730; Gbagbo Decision on Victims' Participation, *supra* note 56, at par. 31; *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, International Criminal Court, Fourth Decision on Victims' Participation, par. 77 (Dec. 12, 2008), https://www.legal-tools.org/doc/1652d9/pdf/; *Munaf v. Romania*, Comm. No. 1539/2006, U.N. Human Rights Committee, Views, par.. 14.2, 14.5 (July 30, 2009) (State responsibility is possible where the State's actions are "a link in the causal chain"), http://juris.ohchr.org/Search/Details/1517; Habré Reparations Decision, *supra* note 60, at par. 64 (concluding that the harms were the "direct consequence" of the criminal acts of the defendant).

[149] SHELTON, *supra* note 4, at 355.

that the acts and conduct underlying the conviction would cause the resulting harm."[150] Other international criminal courts and human rights courts similarly have required a "direct" or "clear" causal connection,[151] meaning that "the injury suffered must result directly from" the wrongdoing,[152] a standard that appears to be equivalent to "but/for" causation.[153] Several of these courts also have considered whether harms were foreseeable or too remote, suggesting that a standard similar to proximate cause also is applied.[154] Of these courts, the European Court of Human Rights appears to apply the causation standard most strictly, often denying claims, although unfortunately without discussion as to why the causal link is found lacking.[155]

Under any formulation of the standard, causation plainly encompasses the immediate impacts of a violation or crime. For example, dismissal of an employee

[150] Al Mahdi Reparations Order, *supra* note 139, at par. 44. *See also* WCRO REPORT, *supra* note 20, at 39 ("Proximate cause . . . is 'generally considered to be a relative term meaning 'near' or 'not remote,' and to include concepts of foreseeability and temporal proximity.'"); SHELTON, *supra* note 4, at 279 ("Proximate cause . . . makes use of foreseeability and the temporal relationship between harm and loss to distinguish compensable from non-compensable claims.").

[151] *Mohammed El Tayyib Bah v. Sierra Leone*, Suit No. ECW/CCJ/APP/20/13, ECOWAS Community Court of Justice, Judgment, p. 17 (May 4, 2015), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2015/ECW_CCJ_JUD_11_15.pdf; *Grebneva and Alisimchik v. Russia*, App. No. 8918/05, European Court of Human Rights, Judgment, par. 73 (Nov. 22, 2016), http://hudoc.echr.coe.int/eng?i=001-168761; *Akkoç v. Turkey*, App. Nos. 22947/93 and 22948/93, European Court of Human Rights, Judgment, par. 133 (Oct. 10, 2000), http://hudoc.echr.coe.int/eng?i=001-58905; *Co-Prosecutors v. Kaing*, Case No. 001/18-07-2007/ECCC/TC, Extraordinary Chambers in the Courts of Cambodia, Trial Judgment, par. 639 (July 26, 2010), https://www.legal-tools.org/doc/dbdb62/pdf/; Kaing Appeal Judgment, *supra* note 1, at par. 699; Co-*Prosecutors v. Leng et al*., Case No. 002/19-09-2007-ECCC/OCIJ, Extraordinary Chambers in the Courts of Cambodia, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, par. 71 (June 24, 2011), https://www.legal-tools.org/doc/9e9c46/pdf/; *Prosecutor v. Ayyash*, Case No. STL-11-01/PT/PTJ, Special Tribunal for Lebanon, Fourth Decision on Victim's Participation in the Proceedings, par.. 7-8 (May 2, 2013), https://www.legal-tools.org/doc/cfd3f4/pdf/; LEACH, *supra* note 112, at 401.

[152] Kaing Trial Judgment, *supra* note 151, at par.. 639, 642; *see also* Kaing Appeal Judgment, *supra* note 1, at par. 699; Ayyash Decision on Victim's Participation in the Proceedings, *supra* note 56, at par.. 39-40.

[153] International human rights bodies rarely discuss issues of causation, consistent with their limited authority to issue recommendations only. *See supra* pp. 12-15. Since the form and quantity of reparations are left to the State, it is ultimately the State's responsibility to determine whether particular harms were caused by the violation.

[154] *E.g.*, *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 17; *Aloeboetoe v. Suriname*, *supra* note 132, at par. 48; *Munaf v. Romania*, *supra* note 148, at par.. 14.2, 14.5; *Iglesias Gil and A.U.I. v Spain*, App. No. 56673/000, European Court of Human Rights, Judgment, par. 70 (Apr. 29, 2003), http://hudoc.echr.coe.int/eng?i=001-61069; *see also* SHELTON, *supra* note 4, at 279 (the "most common test" for causation is that of "proximate cause"); *id.* at 355; *infra* pp. 40.

[155] *E.g.*, *Batsanina v. Russia*, App. No. 3932/02, European Court of Human Rights, Judgment, par. 42 (May 26, 2009), http://hudoc.echr.coe.int/eng?i=001-92667; *Rózsa v. Hungary*, App. No. 30789/05, European Court of Human Rights, Judgment, par. 28 (Apr. 28, 2009), http://hudoc.echr.coe.int/eng?i=001-92508; *see also* SHELTON, *supra* note 4, at 279, 357.

causes loss of income,[156] torture causes physical injury,[157] and the death of a victim results in funeral expenses.[158]

Nonetheless, courts generally agree that "[r]eparations should not be limited to 'direct' harm or the 'immediate effects' of the crime[]" or violation."[159] A human rights violation or international crime often results in a chain of foreseeable and consequential harms.[160] For example, an illegal detention causes not only the immediate moral harm of deprivation of liberty, but also may result in expenses by the family to visit the detainee and may affect the detainee's income even after release.[161] Destruction of a victim's home may cause the victim to flee his or her village, resulting in costs for alternative lodging as well as a loss of income because the victim is no longer able to exploit his or her land.[162] Torture may cause not only the immediate harm of physical injury, but also loss of employment and therefore loss of earnings.[163] Detention of a child in inadequate conditions for years may cause psychological problems.[164] The death of a victim may cause the victim's family to lose necessary financial support.[165] These consequential damages flow from the original violation and therefore are caused by it. As a result, they are harms that may properly be redressed by a reparations award.

However, a State or individual perpetrator "may not reasonably be held responsible for every consequence of" the wrongful act, "and every legal system recognises that there is a point at which losses become too remote or speculative to warrant a finding of liability."[166] As the Inter-American Court of Human rights has explained:

> Every human act produces diverse consequences, some proximate and others remote. An old adage puts it as follows: *causa causae est causa causati*. Imagine the effect of a stone cast into a lake; it will cause

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[156] *E.g.*, *Ivanova v. Bulgaria*, App. No. 52435/99, European Court of Human Rights, Judgment, par. 97 (Apr. 12, 2007), http://hudoc.echr.coe.int/eng?i=001-80075.
[157] *E.g.*, *Saidykhan v. The Gambia*, *supra* note 58, at par. 45.
[158] *E.g.*, *Kawas-Fernández v. Honduras*, *supra* note 129, at par. 168.
[159] Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par. 249. *See also* Ayyash Decision on Victim's Participation in the Proceedings, *supra* note 56, at par.. 39-40; MCCARTHY, *SUPRA* NOTE 20, at 104-05.
[160] SHELTON, *supra* note 4, at 355.
[161] *Konate v. Burkina Faso*, *supra* note 1, at par.. 42, 49; *see also Mebara v. Cameroon*, *supra* note 8, at par. 142.
[162] *Akdivar and Others v. Turkey*, App. No. 21893/93, European Court of Human Rights, Judgment, par.. 24, 33 (Apr. 1, 1998), http://hudoc.echr.coe.int/eng?i=001-58152.
[163] *Saidykhan v. The Gambia*, *supra* note 58, at par. 45.
[164] *Güveç v. Turkey*, App. No. 70337/01, European Court of Human Rights, Judgment, par.. 91-92 (Jan. 20 2009), http://hudoc.echr.coe.int/eng?i=001-90700.
[165] *Beker v. Turkey*, App. No. 27866/03, European Court of Human Rights, Judgment, par. 62 (June 24, 2009), http://hudoc.echr.coe.int/eng?i=001-91841; *Akkoç v. Turkey*, *supra* note 151, at par. 133; Çakici v. Turkey, *supra* note 63, at par. 127; *Akhmadova and Sadulayeva v. Russia*, *supra* note 135, at par. 143; MCCARTHY, *SUPRA* NOTE 20, at 106-07.
[166] WCRO REPORT, *supra* note 20, at 5. *See, e.g.*, *Seceleanu and Others v. Romania*, App. No. 2915/02, European Court of Human Rights, Judgment, par. 58 (Jan. 12, 2010) (finding harm too "speculative"), http://hudoc.echr.coe.int/eng?i=001-96591.

> concentric circles to ripple over the water, moving further and further away and becoming ever more imperceptible. Thus it is that all human actions cause remote and distant effects.
>
> To compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured.[167]

In recognition of this fact, the proximate cause doctrine is sometimes applied to exclude "more remote consequences where there is an uncertain criminal link, or cumulative uncertainties about causation, making it impossible to say . . . that the wrong caused the harm."[168] Ultimately, however, the challenge is "how to draw the line so as to exclude claims based on harm that is too remote or speculative to warrant a finding of responsibility on the part of the wrongdoer."[169]

Although the burden of proof with respect to causation normally rests on the petitioner, human rights bodies and courts often will presume causation with respect to non-pecuniary damages, thereby relieving the petitioner of the need to prove causation.[170] For example, courts have held that dismissal from employment can be "expected" to "carr[y] with it some measure of infamy and stigma,"[171] that there can be "hardly any doubt" that the failure of the State to identify and prosecute those responsible for the death of a close family member causes moral damage,[172] that torture "no doubt" causes "pain and suffering,"[173] and that it is "reasonable to conclude" that the detention or death of a family member causes deep suffering.[174]

Finally, the requirement that the wrongful act be "established" is particularly important where a victim alleged more than one violation or crime, but the court or human rights body determines that the State or perpetrator is responsible for only some of the alleged violations or crimes. In such instances, some of the harms alleged by the victim may be attributable to conduct which was not proven or to conduct which was held not to constitute a violation or crime. Because those harms are not the result of an "established wrongful act," they cannot be the basis for an award of

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[167] *Aloeboetoe v. Suriname*, *supra* note 132, at par. 48.
[168] SHELTON, *supra* note 4, at 355.
[169] WCRO REPORT, *supra* note 20, at 38.
[170] *Konate v. Burkina Faso*, *supra* note 1, at par. 58, *Thomas v. Tanzania supra* note 11, at par. 14, *Abubakari v. Tanzania supra* note 11, at par. 22, *Rashidi v Tanzania supra* note 11, at par. 119 .
[171] *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 17.
[172] *Zongo v. Burkina Faso*, *supra* note 1, at par. 56.
[173] *Saidykhan v. The Gambia*, *supra* note 58, at par. 45.
[174] *Umuhoza v. Rwanda supra* note 11, at par. 60 and par. 67, *Bulacio v. Argentina*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 78, 98-99 (Sept. 18, 2003), http://www.corteidh.or.cr/docs/casos/articulos/seriec_100_ing.pdf; Suárez-Rosero v. Ecuador, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par.. 66-67 (Jan. 20, 1999), http://www.corteidh.or.cr/docs/casos/articulos/seriec_44_ing.pdf.

reparations.[175] The victim may still, however, be awarded reparations for harms linked to the violations or crimes for which the State or perpetrator is found responsible.[176]

[175] *E.g.*, Katanga Reparations Order, *supra* note 56, at par.. 146-52 (declining to award reparations for rape because the defendant was not convicted of being an accessory to that crime); *id.* at par.. 160-61 (declining to award reparations for harms to child soldiers because the defendant was not convicted of the crime of using child soldiers); Al Mahdi Reparations Order, *supra* note 139, at par.. 93-99 (because Al Mahdi was convicted only of directing an attack against protected buildings, and not of directing an attack against persons, he was not responsible for reparations for bodily harm or death in the absence of proof that these harms were foreseeable); *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, International Criminal Court, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations," par.. 196, 198 (Mar. 3, 2015) [hereinafter "Lubanga Reparations Order Appeal"] (concluding that an award of reparations to victims of sexual violence was inappropriate because the court determined that acts of sexual violence could not be attributed to the defendant), https://www.legal-tools.org/doc/c3fc9d/pdf/; Kaing Trial Judgment, *supra* note 151, at par. 647 (finding lack of a causal link because there was no evidence that the victims were detained at the detention facility at which the defendant worked); *Case of the Río Negro Massacres v. Guatemala*, *supra* note 145, at par. 295 (declining to award requested reparation because the Court did not have the competence to rule on that particular violation); *Cabrera García and Montiel Flores v. Mexico*, Inter-American Court of Human Rights, Judgment (Preliminary Objection, Merits, Reparations and Costs), par. 247 (Nov. 26, 2010) (declining to consider reparations for violations that were not presented to the Court), http://www.corteidh.or.cr/docs/casos/articulos/seriec_220_ing.pdf ; *see also* WCRO REPORT, *supra* note 20, at 4-5, 37.

[176] Katanga Reparations Order, *supra* note 56, at par.. 152-53 (although rape victims could not receive reparations for the harms attributable to rape, they could receive reparations for other harms related to the crimes of which the defendant was convicted).

E. Evidentiary Standards

In order to request an award of reparations, it is not sufficient to show that the State or individual perpetrator "committed a wrongful act . . .; it is equally necessary to produce evidence of the alleged damages and the prejudice suffered."[177] As described above, this evidence must show, by a preponderance of the evidence, that the State or perpetrator caused the harm alleged and the extent of the harm.[178]

1. Flexible standards

International human rights bodies and courts have wide latitude to admit and consider a broad array of evidence relevant to the question of reparations. These institutions generally are "not bound by strict rules of evidence and may rely on all forms of evidence." [179] For example, such bodies are not limited to the types of evidence required under domestic law,[180] nor are they limited to admissible evidence.[181] Uncontested or unchallenged evidence is frequently admitted and deemed true,[182] and circumstantial evidence may be considered.[183] Supporting documentation, though helpful, is often not required.[184]

In deciding whether supporting documentation is required with respect to particular damages claims, human rights bodies and courts must be especially sensitive to the "difficulty victims may face in obtaining evidence in support of their claim due to the destruction or the unavailability of evidence in the relevant circumstances."[185] In many cases, such difficulties arise due to the human rights violations or crimes themselves, such as where records are lost during displacement or burned during the destruction of a home.[186] In others instances, records may be unavailable due to the extended passage of time since the violations or crimes,[187] or because certain communities – particularly rural or indigenous communities – do not

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[177] *Konate v. Burkina Faso*, *supra* note 1, at par. 46, *Thomas v. Tanzania supra* note 11, at par. 14, *Abubakari v. Tanzania supra* note 11, at par. 22, *Rashidi v Tanzania supra* note 11, at par. 118.
[178] *See supra* pp. 35-42.
[179] LEACH, *supra* note 112, at 319; *see also id.* at 64 (observing that "[t]here are no strict rules as to what type of evidence may be put before the Court" and describing various kinds of evidence that have been submitted, including video, audio, and photographic evidence, as well as reports produced by inter-governmental institutions and human rights NGOs).
[180] *Zongo v. Burkina Faso*, *supra* note 1, at par.. 52, 54.
[181] *Id.* at par. 52; Al Mahdi Reparations Order, *supra* note 139, at par. 42.
[182] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 18; *Saramaka People v. Suriname*, *supra* note 101, at par.. 66, 73.
[183] *Abubakari v Tanzania supra* note 11, at par. 62, Katanga Reparations Order, *supra* note 56, at par. 61.
[184] Kaing Appeal Judgment, *supra* note 1, at par. 514; Gbagbo Decision on Victims' Participation, *supra* note 56, at par. 21 (observing that evidence may be "documentary or otherwise"); Katanga Reparations Order, *supra* note 56, at par. 60 (requiring supporting documentation only "to the extent possible").
[185] Katanga Reparations Order, *supra* note 56, at par. 47.
[186] *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 266; *Akdivar v. Turkey*, *supra* note 162, at par. 18; ASF REPORT, *supra* note 128, at 26; WCRO REPORT, *supra* note 20, at 41-42
[187] Katanga Reparations Order, *supra* note 56, at par.. 53, 60;

have a custom or practice of creating certain records.[188] Requiring that a victim meticulously itemise and document the extent of harm he or she suffered also may raise expectations that the victim will be made whole with respect to that harm, something that is not always possible. Finally, and most importantly, the process of documenting harm may itself be traumatising, especially in relation to crimes that are difficult to prove after many years, such as torture, rape, or other forms of sexual violence.[189] Where evidence is unavailable or limited for any of these reasons, courts frequently look to "the internal consistency, the level of detail, and the plausibility of the applications vis-à-vis the evidence as a whole."[190] It is also common to award some damages in equity, even where documentation of damages is incomplete or non-existent, particularly where it is logical that at least some damages would have been incurred.[191]

2. Experts

Because of the difficulties many petitioners face in gathering and presenting evidence, human rights bodies and courts routinely turn to expert assistance in the reparations phase of a case.[192] Such experts can present a wide range of information on reparations, from anthropological and sociological studies on the types of harms suffered by indigenous communities[193] to the trauma experienced by, and health needs of, survivors.[194] Such expert reports are particularly helpful with respect to the determination of pecuniary damages. Valuation and calculation of damages is complex even in straightforward cases, and judges are not necessarily experts in claims evaluation and processing, nor were they elected or appointed to perform such tasks. In light of the importance of expert assistance, some court rules provide specific guidance regarding the use of experts. For example, the ICC's Rules of Evidence and Procedure specify that experts may be consulted to assist a court in "determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations."[195] In cases concerning mass atrocities with large numbers of victims seeking individual reparations, expert assistance may also be useful to make findings of fact with regard to who qualifies as a victim and the levels of loss, damage, and injury suffered, which findings could then be submitted back to the court for approval.[196]

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[188] *Akdivar v. Turkey*, *supra* note 162, at par.. 18-19.
[189] WCRO REPORT, *supra* note 20, at 42.
[190] Katanga Reparations Order, *supra* note 56, at par. 67.
[191] *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par.. 267, 278; *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, *supra* note 117, at par. 383.
[192] In some courts, such as at the ICC, these experts are appointed by the Court itself. ICC Rules of Procedure, *supra* note 56, Rule 97(2). In other courts and human rights bodies, the parties hire the experts to provide reports supporting their claims regarding reparations. *E.g.*, *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 16-17, 20.
[193] *E.g.*, *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 16 (indigenous community offered testimony from an anthropologist and sociologist).
[194] *E.g.*, *Z. and Others v. United Kingdom*, *supra* note 145, at par. 114.
[195] ICC Rules of Procedure, *supra* note 56, Rule 97(2).
[196] WCRO REPORT, *supra* note 20, at 7.

3. Examples of forms of evidence

A few examples of the kinds of evidence human rights courts and international criminal courts have considered in evaluating reparations claims may help to underscore the flexibility with which such bodies approach the admission and evaluation of evidence. For example, courts accept a wide variety of official and unofficial documentation to prove the identity of, and/or familial relationship to, the victim, including passports, national identity cards, driver's licences, birth certificates, baptismal certificates, electoral cards, voter's cards, refugee cards, consular identity cards, certificates of loss of identification, marriage certificates, death certificates, attestation of paternity or maternity, decisions of a national court recognising a family relationship, documents pertaining to medical treatment, thumbprint comparisons, family registration booklets, and/or genetic evidence.[197] Where such documentation is unavailable, courts also have accepted declarations and witness statements attesting to the identity of the victim and family relationship.[198]

With respect to land and other fixed property, it may not always be possible to show official legal title to land or other property. This is particularly true with respect to indigenous communities, who may occupy their land in accordance with customary practices rather than state-sanctioned title,[199] but it is also relevant to other communities where there is no practice of registering title[200] or where circumstances made it impossible to register title. To account for these difficulties, courts frequently accept a wide range of evidence of possession or prior possession of the land rather than formal title,[201] including residence certificates, habitation certificates, photographs, satellite images, maps, victim testimony, expert testimony, and technical studies.[202] Such evidence may also be relevant to prove harms to property, such as

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[197] *Zongo v. Burkina Faso*, *supra* note 1, at par. 54; *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par.. 257, 309; *Moiwana Community v. Suriname*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations and Costs), par. 178 (June 15, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf; *Case of the Ituango Massacres v. Colombia*, Inter-American Court on Human Rights, *supra* note 52, at par. 356; Gbagbo Decision on Victims' Participation, *supra* note 56, at par. 25; Katanga Reparations Order, *supra* note 56, at par.. 71-73, 112, 119, 120; Kaing Appeal Judgment, *supra* note 1, at par.. 526, 540.

[198] Gbagbo Decision on Victims' Participation, *supra* note 56, at par. 25; Katanga Reparations Order, *supra* note 56, at par. 71; Kaing Appeal Judgment, *supra* note 1, at par.. 543-44.

[199] *E.g.*, *Moiwana Community v. Suriname*, *supra* note 197, at par. 130; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par.. 126-127 (Aug. 31, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

[200] *E.g.*, *Akdivar v. Turkey*, *supra* note 162, at par. 17.

[201] *Moiwana Community v. Suriname*, *supra* note 197, at par. 131 ("in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership"); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 199, at par.. 151-53; *Akdivar v. Turkey*, *supra* note 162, at par.. 21-26.

[202] *E.g.*, *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 16-17, 64 n.56. 94-99, 102; *Saramaka People v. Suriname*, *supra* note 101, at par.. 64-65, 149; Katanga Reparations Order, *supra* note 56, at par.. 80-83.

environmental degradation of the land.[203] As for other forms of property – such as livestock, household furniture, and personal effects – official documentation rarely exists. In such instances, courts have accepted signed and witnessed declarations of livestock ownership.[204] They also have often relied on presumptions that where a victim can prove loss of a house or other building that the victim owned or lived in, the victim must also have lost furniture or other personal effects.[205]

By contrast, legal costs and expenses are one of the damages most likely to be proven through documentation. Petitioners routinely submit, and courts consider, fee agreements; invoices; vouchers; receipts; detailed explanations as to the hours worked, the tasks conducted, and the hourly rates; and/or reference to attorney or expert pay scales in the relevant countries.[206] Yet even with respect to these costs and expenses, such documentation is often unavailable. Particularly where litigation has been prolonged, such invoices, vouchers, and receipts may have been lost or litigants may not have realised the importance of saving them throughout years of litigation. In the absence of proof, many courts nonetheless award in equity compensation for litigation costs and expenses, since it is beyond peradventure that litigation is costly and that some expenses must have been incurred.[207]

In contrast to pecuniary damages, such as lost property or legal costs, non-pecuniary damages are much more difficult to prove.[208] There is often little documentary evidence of non-pecuniary damages, with the exception of physical injuries, for which there may be medical records or visible scars. As a result, most of the evidence submitted by parties and considered by human rights bodies and courts

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[203] *Saramaka People v. Suriname*, *supra* note 101, at par.. 149-52.
[204] Katanga Reparations Order, *supra* note 56, at par.. 102-104.
[205] *Id.* at par.. 99-100.
[206] *Zongo v. Burkina Faso*, *supra* note 1, at par. 83, *Umuhoza v. Rwanda*, *supra* note 11, at par. 43; Case of the *Río Negro Massacres v. Guatemala*, *supra* note 145, at par. 316; *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 330; *Oneryildiz v. Turkey*, App. No. 48939, European Court of Human Rights, Judgment, par. 175 (Nov. 30, 2004) (observing that the application should have "substantiated his claims by . . . provid[ing] detailed explanations as to the work done by his representative"), http://hudoc.echr.coe.int/eng?i=001-67614; *see also* LEACH, *supra* note 112, at 408. Such expenses should be linked to the specific case before the court; it is not sufficient to submit general payroll or office expense information without specifying the portion that applies to the case at hand. *See, e.g.*, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, *supra* note 117, par. 391.
[207] *Case of the Río Negro Massacres v. Guatemala*, *supra* note 145, at par. 317; *González et al. ("Cotton Field") v. Mexico*, Inter-American Court of Human Rights, Judgment (Preliminary Objection, Merits, Reparations, and Costs), par. 596 (Nov. 16, 2009) [hereinafter "Cotton Field Case"], http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf; *Case of the Santo Domingo Massacre v. Colombia*, Inter-American Court of Human Rights, Judgment (Preliminary objections, merits and reparations), par. 344 (Nov. 30, 2012), http://www.corteidh.or.cr/docs/casos/articulos/seriec_259_ing.pdf; *Case of the Rochela Massacre v. Colombia*, Inter-American Court of Human Rights, Judgment (Merits, Reparations, and Costs), par. 305 (May 11, 2007), http://www.corteidh.or.cr/docs/casos/articulos/seriec_175_ing.pdf; *La Cantuta v. Peru*, *supra* note 7, at par. 245; *Oneryildiz v. Turkey*, *supra* note 206, at par. 175; *A. v. United Kingdom*, App. No. 25599/94, European Court of Human Rights, Judgment, par. 17 (Sept. 23, 1998), http://hudoc.echr.coe.int/eng?i=001-58232, *Umuhoza v. Rwanda*, *supra* note 11, at par. 44-46.
[208] MCCARTHY, *SUPRA* NOTE 20, at 117 (noting the "difficulty of objective verification" of non-pecuniary damages)

regarding non-pecuniary evidence consists of testimony or affidavits by the victims or their families, as well as expert reports and testimony.[209] Even in the absence of proof, however, it is widely recognised that human rights violations inflict mental suffering and that this is a proper category of damages.[210] Human rights bodies and courts therefore often turn to principles of equity, presuming the existence of non-pecuniary damages to victims and, in appropriate cases, their families, without requiring the submission of evidence.[211] In addition, as noted earlier, communities, particularly indigenous communities, that are victims of human rights violations or crimes also may experience non-pecuniary harms to the community as a whole, including the erosion of their way of life.[212] As with other forms of non-pecuniary harm, courts frequently consider victim statements and expert testimony to assess these harms.[213]

Finally, courts frequently presume damages where the damages requested are logical. For example, despite a lack of documentation, courts have accepted claims of costs for transportation to visit an illegally detained family member,[214] to attend a funeral of a victim,[215] and to search for information about and the bodily remains of disappeared victims.[216] Where the costs claimed are reasonable, courts have awarded the amounts requested or an amount in equity.[217]

4. Explanation and argumentation

Where supporting documentation is available, this evidence should be accompanied by arguments that "clearly describe the [evidence] and justification" for the expenses incurred.[218] Courts cannot be expected to wade through hundreds of pages of receipts, invoices, medical records without a clear indication of their

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[209] *Case of the Rochela Massacre v. Colombia*, *supra* note 207, at par.. 298-301; *Caracazo v. Venezuela*, *supra* note 75, par. 95(a); *Moiwana Community v. Suriname*, *supra* note 197, at par. 193; ASF REPORT, *supra* note 128, at 26; *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 286.

[210] *See supra* pp. 59-60.

[211] *Zongo v. Burkina Faso*, *supra* note 1, at par. 55; *Konate v. Burkina Faso*, *supra* note 1, at par. 58; *Maritza Urrutia v. Guatemala*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 169 (Nov. 27, 2003), http://www.corteidh.or.cr/docs/casos/articulos/seriec_103_ing.pdf; *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 283; *Oneryildiz v. Turkey*, *supra* note 206, at par.. 164, 171; Katanga Reparations Order, *supra* note 56, at par. 129; MCCARTHY, *SUPRA* NOTE 20, at 118; ASF REPORT, *supra* note 128, at 25 ("Human rights tribunals presume mental pain and anguish whenever an individual suffers *any* violation of protected rights."); *id.* at 26.

[212] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 172, 174-82 (indigenous community offered testimony from an anthropologist and sociologist).

[213] *Id.*

[214] *Konate v. Burkina Faso*, *supra* note 1, at par. 49.

[215] *Kawas-Fernández v. Honduras*, *supra* note 129, at par.. 166, 171, 172.

[216] *Gomes Lund et al. v. Brazil*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations, and Costs), par. 304 (Nov. 24, 2010), http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf.

[217] *Konate v. Burkina Faso*, *supra* note 1, at par. 49; *Gomes Lund v. Brazil*, *supra* note 216, at par. 304; *Kawas-Fernández v. Honduras*, *supra* note 129, at par.. 166, 171, 172.

[218] Case of the Santo Domingo Massacre, *supra* note 207, at par. 343; *Umuhoza v. Rwanda*, *supra* note 11, at par.. 48-49, *Thomas v. Tanzania*, *supra* note 11, at par. 26, *Mtikila v. Tanzania*, *supra* note 1, at par. 40.

relevance. This requirement of argumentation applies equally to the petitioner and the wrongdoer. In many cases, States claim to have addressed the underlying issues involved in a case – such as through the implementation of particular programmes. Human rights bodies and courts commonly reject such arguments where they are unaccompanied by an explanation of how these programmes relate to and have been used by the particular victim.[219]

5. Timing

There are two principal approaches as to when evidence regarding reparations should be taken. In the first approach, evidence relating to the merits and reparations phases is submitted together at the beginning of the case. This is the approach, for example, of the Inter-American Court of Human Rights, which requires victims to present their claims for reparations and costs, along with the evidence supporting these requests, in their pleadings. These claims for reparations may then be updated throughout the proceedings as additional information is obtained.[220] Requiring the early submission of reparations evidence can contribute to efficiency, since some evidence is relevant to both the merits and reparations phases. For example, medical certificates documenting injuries may help to establish the perpetration of torture, as well as entitlement to compensation and/or rehabilitation.[221]

By contrast, in the second approach, the reparations phase is a distinct phase in the proceedings, separate from and subsequent to that on the merits. This is the approach, for example, of the International Criminal Court.[222] Holding a separate reparations phase after the merits is logical because reparations may only be imposed if wrongdoing has been established,[223] and may be more efficient since evidence of reparations is collected and considered only in those cases. Holding a separate reparations phase also allows the victims to present evidence specific to reparations and provides the wrongdoer an opportunity to challenge that evidence,[224] both of which may get short-shrift if those proceedings are combined with the merits. In addition, at the ICC, victims who did not participate in the original merits proceedings may approach the court for reparations.[225] Finally, collecting evidence on reparations during the merits phase of proceedings may raise the expectations of victims, which cannot then be satisfied if the wrongdoing is not sufficiently established.[226]

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[219] *E.g.*, *S.V.P. v. Bulgaria*, Comm. No. 31/2011, U.N. Committee on the Elimination of Discrimination Against Women, Views, par. 9.8 (Oct. 12, 2012), http://juris.ohchr.org/Search/Details/1693.
[220] *Case of the Río Negro Massacres v. Guatemala*, *supra* note 145, at par. 316; *Case of the Santo Domingo Massacre v. Colombia*, *supra* note 207, at par. 343.
[221] *See, e.g.*, *Hadi v. Sudan*, Comm. No. 368/09, African Commission on Human and Peoples' Rights, par.. 72, 93(ii)(a) (Nov. 5, 2013), https://www.achpr.org/sessions/descions?id=249.
[222] Katanga Reparations Order, *supra* note 56, at par. 16.
[223] WCRO REPORT, *supra* note 20, at 4, 32.
[224] *See* Katanga Reparations Order, *supra* note 56, at par. 16.
[225] *See* Katanga Reparations Order, *supra* note 56, at par. 30.
[226] *Id.* With respect to criminal proceedings, allowing extensive evidence on reparations during the trial also may be prejudicial to the accused and interfere with the right to an expeditious trial. *Id.* at 32.

F. Forms of Reparations

There are five internationally recognised forms of reparations: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[227] The appropriate form or forms of reparations to be awarded in a specific case depends on the specific harms suffered by the victim. Nonetheless, courts have increasingly recognised that multiple forms of reparations may be necessary to undo the harms of a particular violation or crime. Most courts therefore recommend or order remedies from several categories to adequately redress the harm suffered.[228] The following sections define each form of reparations, describe the kinds of measures that constitute such reparations, and review some of the advantages and disadvantages of each form.

1. Restitution

Restitution is the act of ending any ongoing violations and restoring the victim, to the greatest extent possible, to his or her original situation before the commission of the human rights violation or international crime.[229] Because of its power to undo the effects of the violation, "[r]estitution is the preferred remedy for breaches of international law."[230]

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[227] African Commission General Comment No. 4, *supra* note 1, at par. 10; U.N. Basic Principles, *supra* note 1, at par.. 18-23; *Konate v. Burkina Faso*, *supra* note 1, at par. 15, *Umuhoza v. Rwanda*, *supra* note 11, at par. 20, *Thomas v. Tanzania*, *supra* note 11, at par. 13, Abubakari *supra* note 11 at par. 21.

[228] *See, e.g.*, *Konate v. Burkina Faso*, *supra* note 1, at par. 60; *Zongo v. Burkina Faso*, *supra* note 1, at par. 111, *Umuhoza v. Rwanda*, *supra* note 11, at par. 74, *Thomas v. Tanzania*, *supra* note 11, at par. 90, Abubakari *supra* note 11 at par. 94.; *Centre for Minority Rights Development v. Kenya*, *supra* note 103, at p.38; *Good v. Botswana*, Comm. No. 313/05, African Commission on Human and Peoples' Rights, par. 244 (May 26, 2010), https://www.achpr.org/sessions/descions?id=195 ; *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, *supra* note 122, at par. 82; *Aslakhanova and Others v. Russia*, Application Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, European Court of Human Rights, Judgment, par.. 223-38 (Dec. 18, 2012), http://hudoc.echr.coe.int/eng?i=001-115657; *Manneh v. The Gambia*, Suit No. ECW/CCJ/APP/04/07, ECOWAS Community Court of Justice, Judgment, par. 44 (June 5, 2008), http://www.chr.up.ac.za/index.php/browse-by-subject/306-the-gambia-manneh-v-the-gambia-2008-ahrlr-ecowas-2008.html; *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 18; Al Mahdi Reparations Order, *supra* note 139, at par.. 67, 71, 81-83, 90.

[229] *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 41; *Assanidze v. Georgia*, App. No. 71503/01, European Court of Human Rights, par. 198 (Apr. 8, 2004) (reparations measures should "put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach"), http://hudoc.echr.coe.int/eng?i=001-61875; *see also* U.N. Basic Principles, *supra* note 1, at par. 19; U.N. Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, par. 55 (Jan. 28, 2013) [hereinafter 2013 Report of the Working Group on Enforced or Involuntary Disappearances], http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.45_English.pdf; OXFORD PRO BONO PUBLICO, A REPORT ON REPARATIONS AND REMEDIES FOR VICTIMS OF SEXUAL AND GENDER BASED VIOLATION (A REPORT FOR REDRESS) 11 (2016), http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2016/01/REDRESS-Project-on-Reparations-and-Remedies-for-SGB-Victims-FINAL-28-January-20166.pdf.

[230] SHELTON, *supra* note 4, at 298; *see also Mbiankeu v. Cameroon*, *supra* note 8, at par. 131.

Restitution has numerous advantages over other forms of reparations. First and foremost, it "avoid[s] the possibility of the government paying compensation and continuing the violation (for example, deprivation of liberty or employment)."[231] In addition, "it allows tribunals to avoid the sometimes difficult and time-consuming assessment of damages, for example in property claims."[232] Finally, restitution most often corresponds to the needs and desires of victims.[233]

Restitution may consist of a wide variety of measures, including:

i. nullification of criminal judgments;[234]

ii. retrial on criminal charges;[235]

iii. restoration of liberty / release from prison or detention;[236]

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[231] SHELTON, *supra* note 4, at 298.

[232] *Id.*

[233] *Id.* In awarding measures of restitution, however, courts should pay particular attention to issues of gender and discrimination. Restitution usually means restoring the victim, to the greatest extent possible, to his or her original situation before the commission of the human rights violation or international crime. In some cases, however, this could risk returning minorities, women and girls, or other groups that have experienced discrimination to a "state of oppressive laws, policies and customs that discriminate and exclude." ASF REPORT, *supra* note 128, at 32. In such instances, other measures of reparations, particularly guarantees of non-repetition (such as structural changes to laws) may be equally necessary.

[234] *Cantoral-Benavides v. Peru*, *supra* note 71, at par.. 77-78; *Palamara-Iribarne v. Chile*, Inter-American Court of Human Rights, Judgment (Merits, Reparations, and Costs), par. 253 (Nov. 22, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf; *Herrera-Ulloa v. Costa Rica*, Inter-American Court of Human Rights, Judgment (Preliminary Objections, Merits, Reparations and Costs), par. 195 (July 2, 2004), http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf.

[235] In some cases, the domestic judicial proceedings may have had such a serious defect that the judgment cannot stand. *See, e.g.*, *Castillo Petruzzi et al. v. Peru*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par.. 219, 221 (May 30, 1999), http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf. In these instances, the judgment must be nullified and a new trial ordered. *Id.* A retrial must respect the requirements of the due process of law, including adequate defense for the accused. *Id.*; *Fermín Ramírez v. Guatemala*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 130(a) (June 20, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_126_ing.pdf.

[236] *Delia Saldias de Lopez v. Uruguay*, Comm. No. 52/1979, U.N. Human Rights Committee, par.. 10.2, 14 (July 29, 1981), http://juris.ohchr.org/Search/Details/298; *Loayza-Tamayo v. Peru*, *supra* note 1, at par.. 3, 109; *Manneh v. The Gambia*, *supra* note 228, at par. 44; *Mebara v. Cameroon*, *supra* note 8, at par. 136; *Centre for Free Speech v. Nigeria*, Comm. No. 206/97, African Commission on Human and Peoples' Rights, Views, p. 3 (Nov. 15, 1999), https://www.achpr.org/sessions/descions?id=112 ; *Del Río Prada v. Spain*, App. No. 42750/09, European Court of Human Rights, Judgment, par. 139 (Oct. 21, 2013), http://hudoc.echr.coe.int/eng?i=001-127697; *Williams v. Tanzania supra* note 11 at par. 105. The African Court has recognised that release may be appropriate in some cases. *See, e.g.*, *Makungu v. Tanzania*, *supra* note 11, at par. 86, *Thomas v. Tanzania*, App. No. 001/2007, African Court on Human and Peoples' Rights, Judgment, par. 45(iii) (Sept. 28, 2017), http://www.african-court.org/en/images/Cases/Judgment/001-2017-Interpretation%20of%20Judgment%20of%2020%20November%20%202015%20-%20Alex%20Thomas%20V.%20United%20Republic%20of%20Tanzania-Judgment-28%20September%202017.pdf; *Abubakari v. Tanzania*, App. No. 002/2017, African Court on Human and Peoples' Rights, Judgment, par. 42(iii) (Sept. 28, 2017), http://www.african-court.org/en/images/Cases/Judgment/002-2017-Interpretation%20of%20Judgment%20of%203%20June%202016%20-

iv. reduction of sentence;[237]

v. requiring detained persons to have access to family members;[238]

vi. expungement of criminal records;[239]

vii. cancellation of fines;[240]

viii. permitting a defendant to select the attorney of his or her choice;[241]

ix. restoration of employment and reinstatement of employees to their former positions,[242] including restoration of benefits, retirement rights and pensions;[243]

x. publication of a book that was previously censored;[244]

xi. return of property;[245]

%20Mohamed%20Abubakari%20V.%20United%20Republic%20of%20Tanzania-Judgment-28%20September%202017.pdf; U.N. Basic Principles, *supra* note 1, at par. 19.

[237] *Arutyunyan v. Uzbekistan*, Comm. No. 917/2000, U.N. Human Rights Committee, Views, par. 8 (Mar. 29, 2004), http://juris.ohchr.org/Search/Details/1099.

[238] *Article 19 v. Eritrea*, Comm. No. 275/2003, African Commission on Human and Peoples' Rights, Decision, par.. 101-03 (May 30, 2007), https://www.achpr.org/sessions/descions?id=182 .

[239] *Konate v. Burkina Faso*, *supra* note 1, at par. 60(i); *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 78; *Suárez-Rosero v. Ecuador* (Reparations and Costs), *supra* note 174, at par. 76; *Palamara-Iribarne v. Chile*, *supra* note 234, at par. 253.

[240] *Berenson-Mejía v. Peru*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 239 (Nov. 25, 2004), http://www.corteidh.or.cr/docs/casos/articulos/seriec_119_ing.pdf; *Suárez-Rosero v. Ecuador* (Reparations and Costs), *supra* note 174, at par. 76.

[241] *Bassolé v. Burkina Faso*, Suit No. ECW/CCJ/APP/03/16, ECOWAS Community Court of Justice, Judgment, p. 17 (Apr. 1, 2016), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2016/ECW_CCJ_JUD_19_16.pdf.

[242] *Baena-Ricardo et al. v. Panama*, Inter-American Court of Human Rights, Judgment (Merits, Reparations, and Costs), par. 203 (Feb. 2, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_72_ing.pdf; *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 113; *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 18; *Malawi Africa Association v. Mauritania*, *supra* note 69, at Recommendation par. 4; U.N. Basic Principles, *supra* note 1, at par. 19.

[243] *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 114; *Baena-Ricardo v. Panama*, *supra* note 242, at par. 203.

[244] *Palamara-Iribarne v. Chile*, *supra* note 234, at par. 250.

[245] A loss of property may be remedied through a variety of measures, including return of the original property, the provision of property of a similar nature, or compensation in the amount of the property's cash value. *Mbiankeu v. Cameroon*, *supra* note 8, at par. 132. Where possible, the preferred remedy is restitution, since property may have sentimental or other value beyond its actual pecuniary value. *Vasilescu v. Romania*, App. No. 27053/95, European Court of Human Rights, Judgment, par.. 59-61 (May 22, 1998) (ordering pecuniary damages because it was impossible to return the stolen property), http://hudoc.echr.coe.int/eng?i=001-58169; *Bueno-Alves v. Romania*, App. No. 28342/95, European Court of Human Rights, Judgment (Just Satisfaction), Holding par. 1 (Jan. 23, 2001) (ordering restitution of property and, in the alternative if the property was not returned, ordering compensation), http://hudoc.echr.coe.int/eng?i=001-59159; *Simunek et al. v. The Czech Republic*, Comm. No. 516/1992, U.N. Human Rights Committee, Views, par. 12.2 (July 19, 1995) (compensation may be awarded only if restitution of the property is not possible), http://juris.ohchr.org/Search/Details/536. For

xii. demarcating and granting title to land, including traditional lands claimed by indigenous communities;[246]

xiii. reviewing and modifying natural resource concessions within the traditional lands of indigenous communities;[247]

xiv. guaranteeing the safety and security of individuals so they can return to homes from which they were displaced;[248]

xv. ordering return of children to their parents or to a particular parent;[249]

xvi. recognition of citizenship;[250]

xvii. permitting persons to return to their country;[251]

xviii. replacement of national identity documents;[252] and

xix. restoration of the natural environment.[253]

Because of the variety of forms that restitution may take, it is difficult to generalise about levels of compliance. In general, states have complied with orders to release detainees,[254] as well as orders to expunge criminal records, waive fines, or cancel debts that resulted from an illegal conviction.[255] By contrast, orders to return property are less often complied with, often because that property has been transferred to third parties and returning the property in question would interfere with those persons' rights.[256] Another measure that often is not successful is allowing

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additional cases on restitution of property, *see also Papamichalopoulos v. Greece*, App. No. 14556/89, European Court of Human Rights, Judgment (Article 50), par. 38 (Oct. 31, 1995), http://hudoc.echr.coe.int/eng?i=001-57961; *Interights v. Democratic Republic of Congo*, Comm. Nos. 274/03 and 282/03, African Commission on Human and Peoples' Rights, p. 16 (Nov. 5, 2013), https://www.achpr.org/sessions/descions?id=246 ; *Palamara-Iribarne v. Chile*, *supra* note 234, at par. 250; *Malawi Africa Association v. Mauritania*, *supra* note 69, at Recommendation par. 2; U.N. Basic Principles, *supra* note 1, at par. 19.

[246] *E.g.*, *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 281, 283; *Saramaka People v. Suriname*, *supra* note 101, at par. 194; *Centre for Minority Rights Development v. Kenya*, *supra* note 103, at p. 38.

[247] *Saramaka People v. Suriname*, *supra* note 101, at par. 194.

[248] *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 313.

[249] *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal v. Senegal*, *supra* note 122, at par. 82(1).

[250] *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v. Kenya*, *supra* note 104, at par. 69(1)-(2).

[251] *Interights v. Democratic Republic of Congo*, *supra* note 245, at p. 16.

[252] *Id.*; *Malawi Africa Association v. Mauritania*, *supra* note 69, at Recommendation par. 2.

[253] *SERAP v. Nigeria*, *supra* note 105, at par. 121(i).

[254] *See, e.g.*, *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 4 (indicating that Peru had already complied with the merits judgment requiring release of the victim).

[255] PASQUALUCCI, *supra* note 129, at 312.

[256] *Id.* at 313.

victims to return to their homes, in large part because victims are afraid to return and States have been unable to reassure them that they will be protected.[257]

Unfortunately, restitution is sometimes impossible.[258] There is no form of restitution that can remedy a violation of the right to life, for example, or un-commit acts of torture or other physical or mental abuse.[259] Likewise, "an order of restitution would be futile . . . for harm that is time-sensitive, such as when a state has wrongly denied an individual the right to vote in an election that has passed."[260] Where restitution is impossible, courts impose alternative forms of reparations, such as monetary compensation to the victims and/or their relatives.[261]

In many other cases, restitution, although possible, cannot fully compensate the victim for the harms suffered.[262] For example, release from detention, though important, does not remedy the loss of income the detainee may have suffered during the period of detention. Similarly, return of real property may not account for the loss of income that could have been generated from that property during the years the victim was dispossessed. In these instances, courts and human rights bodies should "order a series of measures that will safeguard the violated rights, redress the consequences that the violations engendered, and order payment of compensation for the damages caused."[263] It is therefore increasingly common for courts to order a wide variety of measures, including restitution but also measures of satisfaction, compensation, and non-repetition, in order to ensure that the full panoply of harms experienced by the victim are redressed.[264] The following sections address these forms of reparation.

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[257] *Id.*

[258] *See* 2013 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 229, at par. 55; OXFORD REPORT, *supra* note 229, at 11.

[259] *Caballero-Delgado and Santana v. Colombia*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 17 (Jan. 29, 1997), http://www.corteidh.or.cr/docs/casos/articulos/seriec_31_ing.pdf; *Bulacio v. Argentina*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), Reasoned Opinion of Judge Trindade, par.. 25-26 (Sept. 18, 2003), http://www.corteidh.or.cr/docs/casos/articulos/seriec_100_ing.pdf; *see also* SHELTON, *supra* note 4, at 298; 2013 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 229, at par. 55.

[260] SHELTON, *supra* note 4, at 298.

[261] *Mbiankeu v. Cameroon*, *supra* note 8, at par. 131; *Caballero-Delgado and Santana v. Colombia*, *supra* note 259, at par. 17; *see also* 2013 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 229, at par. 55.

[262] *Fermín Ramírez v. Guatemala*, *supra* note 235, at par. 138.

[263] *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 41; *Mbiankeu v. Cameroon*, *supra* note 8, at par. 132 ("restoration does not necessarily exclude an additional compensation").

[264] *See, e.g.*, *Manneh v. The Gambia*, *supra* note 228, at par.. 39-40, 44.

2. Compensation

Compensation, i.e., the award of monetary funds, is the most-requested and subsequently most-awarded form of reparation in human rights bodies and regional courts.[265] It is, however, a "substitute remedy."[266] It cannot, for example, restore or replace rights that have been violated, undo harms such as torture, return family members who have been killed, or restore the physical capacities of those who have been injured.[267] Instead, monetary compensation is a means of providing some redress when there is no way to undo the effects of the violation through other measures, such as restitution or rehabilitation. For example, monetary compensation may permit an immediate victim who has been injured or disabled to afford measures that allow him or her to undertake activities he or she previously enjoyed or to find new activities.[268] And in cases where a family member was killed, monetary compensation is commonly ordered,[269] particularly to help the surviving next of kin to afford

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[265] MCCARTHY, *SUPRA* NOTE 20, at 162; SHELTON, *supra* note 4, at 31; *Velásquez-Rodríguez v. Honduras*, *supra* note 1, at par. 25; *see also Wing Commander Danladi Angulu Kwasu v. Nigeria*, *supra* note 71, at p. 29; *Chioma Njemanze et al. v. Nigeria*, Suit No. ECW/CCJ/APP/17/14, ECOWAS Community Court of Justice, Judgment, p. 42 (Oct. 12, 2017), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2017/ECW_CCJ_JUD_08_17.pdf; *Manneh v. The Gambia*, *supra* note 228, at par. 44; *Saidykhan v. The Gambia*, *supra* note 58, at par. 47; Hadi v. Sudan, *supra* note 221, at par. 93(ii)(a); *Interights v. Democratic Republic of Congo*, *supra* note 245, at par. 89(d); *Mebara v. Cameroon*, *supra* note 8, at par. 142; *Abrill Alosilla et al. v. Peru*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 132 (Mar. 4, 2011), http://www.corteidh.or.cr/docs/casos/articulos/seriec_223_ing.pdf; *Monika v. Cameroon*, Comm. No. 1965/2010, U.N. Human Rights Committee, Views, par. 14 (Oct. 21, 2014), http://ccprcentre.org/doc/2015/02/1965-2010-Monika-v.-Cameroon_ENG.pdf; *Teesdale v. Trinidad and Tobago*, Comm. No. 677/1996, U.N. Human Rights Committee, Views, par. 11 (Apr. 1, 2002), http://juris.ohchr.org/Search/Details/953; *González Carreño v. Spain*, Comm. No. 47/2012, U.N. Committee on the Elimination of Discrimination Against Women, Decision, par. 11 (July 16, 2014), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/58/D/47/2012&Lang=en; *Saada Mohamad Adan v. Denmark*, Comm. No. 43/2008, U.N. Committee on the Elimination of All Forms of Racial Discrimination, Decision, par. 9 (Aug. 13, 2010), http://juris.ohchr.org/Search/Details/1724.

By contrast, there is no consistent practice among international criminal tribunals. The ICC has issued orders for both compensation and other forms of reparations. *See, e.g.*, Katanga Reparations Order, *supra* note 56, at par. 306. The Extraordinary Chambers in the Courts of Cambodia, however, has the authority to order only collective, not individual reparations, and has not made awards for compensation. *See* Kaing Trial Judgment, *supra* note 151, at par. 670 (rejecting requests seeking individual monetary awards and the establishment of a trust fund for victims because they were "beyond the scope of available reparations before the ECCC"); Kaing Appeal Judgment, *supra* note 1, at par. 644 ("reparations before the ECCC are intended to be essentially symbolic rather than compensatory"). And, as noted previously, the Special Tribunal for Lebanon may only identify victims, who may then bring an action to obtain compensation in a national court or other competent body. *See supra* note 20.

[266] SHELTON, *supra* note 4, at 315, see *Umuhoza v. Rwanda*, *supra* note 11, at par. 74, *Thomas v. Tanzania*, *supra* note 11, at par. 90, Abubakari *supra* note 11 at par. 94.

[267] *See* SHELTON, *supra* note 4, at 315; *Institute for Human Rights and Development in Africa v. Democratic Republic of Congo*, Communication No. 393/10, African Commission on Human and Peoples' Rights, par. 150 (June 2016).

[268] *See* SHELTON, *supra* note 4, at 315.

[269] *See, e.g.*, *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(i)-(iii); *Wing Commander Danladi Angulu Kwasu v. Nigeria*, *supra* note 71, p. 29; *Institute for Human Rights and Development in Africa v. Democratic Republic of Congo*, *supra* note 267, at par.. 150, 154(iii); *Interights v. Democratic Republic*

necessities that the family member used to provide. In addition, such compensation acknowledges the very grave suffering experienced by the loss of a family member.[270]

Monetary compensation may be subdivided into two categories: pecuniary damages and non-pecuniary damages.[271] Pecuniary damages, also known as material damages, refer to the financial loss of the victim, including any expenses incurred and any special or consequential damages, as a result of the violation.[272] Non-pecuniary damages, also referred to as moral damages, compensate for the loss in dignity and reputation of the victim, as well as mental and emotional harm.[273] The following sections describe the kinds of pecuniary and non-pecuniary damages for which courts generally award compensation. An explanation of how these damages are calculated for each category is included in part G of this report, *infra*.

With respect to pecuniary damages, the courts award compensation for:

i. lost income and loss of future earnings,[274]

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of Congo, *supra* note 245, at p. 16; *Yrusta v. Argentina*, *supra* note 56, at par. 12(d); *Goiburú v. Paraguay*, *supra* note 58, at par.. 159-60.

[270] *Zongo v. Burkina Faso*, *supra* note 1, at par.. 55-56; *Garrido and Baigorria v. Argentina*, *supra* note 7, at par.. 62-64.

[271] *See, e.g.*, *Zongo v. Burkina Faso*, *supra* note 1, at par. 26; *Goiburú v. Paraguay*, *supra* note 58, at par. 143.

[272] *See, e.g.*, *Gomes Lund v. Brazil*, *supra* note 216, at par. 298; *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, App. Nos. 412/03 & 35677/04, European Court of Human Rights, Judgment (Just Satisfaction), par. 23 (Sept. 16, 2010), http://hudoc.echr.coe.int/eng?i=001-100433. *See also Zongo v. Burkina Faso*, *supra* note 1, at par. 27 ("material damage is 'one that affects economic or material interest, that is, interest which can immediately be assessed in monetary terms'"); SHELTON, *supra* note 4, at 330.

[273] *Zongo v. Burkina Faso*, *supra* note 1, par. 27; *Mtikila v. Tanzania*, *supra* note 1, at par. 34; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 53; *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, *supra* note 272, at par. 23; *see also* SHELTON, *supra* note 4, at 292-93.

[274] *Konate v. Burkina Faso*, *supra* note 1, par.. 37-44; *Saidykhan v. The Gambia*, *supra* note 58, at par. 45; *Sory Toure v. Guinée*, Suit No. ECW/CCJ/APP/22/13, ECOWAS Community Court of Justice, Judgment, par.. 122-27 (Feb. 16, 2016), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2016/ECW_CCJ_JUD_03_16.pdf; *Allenet de Ribemont v. France*, App. No. 15175/89, European Court of Human Rights, Judgment, par. 62 (Feb. 10, 1995) (pecuniary damages appropriate where violations "made it difficult for [the victim] to pursue his occupation"), http://hudoc.echr.coe.int/eng?i=001-57914; *Z. and Others v. United Kingdom*, *supra* note 145, at par.. 125-27; Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par. 230; *Constitutional Court v. Peru*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 120 (Jan. 31, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_71_ing.pdf; *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Judgment, par. 40 (June 19, 2012), https://www.legal-tools.org/doc/1d0733/pdf/; U.N. Basic Principles, *supra* note 1, at par. 20.

Human rights bodies also have urged states to provide compensation for lost income. *See, e.g.*, *Good v. Botswana*, *supra* note 228, at par. 244(1); *Mebara v. Cameroon*, *supra* note 8, at par. 142; *L.G. v. Korea*, Comm. No. 51/2012, U.N. Committee on the Elimination of Racial Discrimination, par. 9 (May 1, 2015), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/123/49/PDF/G1512349.pdf?OpenElement; *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 18; *Konate v. Burkina Faso*, *supra* note 1, at par. 60(iii).

ii. lost property,[275]

iii. lost opportunities, including employment, education, and social benefits,[276]

iv. medical expenses,[277] and

v. legal costs and expenses.[278]

Recognising that "it is a fact of human nature that every individual who suffers a human rights violation experiences suffering,"[279] courts also routinely award non-pecuniary (or moral) damages.[280] Non-pecuniary (or moral) damages seek to

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[275] As noted above, the preferred remedy for property losses is restitution when possible. *See, e.g.*, *Hentrich v. France*, App. No. 13616/88, European Court of Human Rights, Judgment, par. 71 (Sept. 22, 1994) (declining to consider whether to order monetary reparations for land because the "best form of redress would . . . be for the State to return the land" and reserving the question until the parties explored the possibility of an agreement), http://hudoc.echr.coe.int/eng?i=001-57903; *Mbiankeu v. Cameroon*, *supra* note 8, at par. 131; *see supra* note 245. Where restitution is not possible, monetary compensation is routinely ordered. *See, e.g.*, *Mbiankeu v. Cameroon*, *supra* note 8, at par. 153; Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par. 230; *Mahamadou v. Mali*, Suit No. ECW/CCJ/APP/39/15, ECOWAS Community Court of Justice, Judgment, par.. 71-73 (May 17, 2016), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2016/ECW_CCJ_JUD_11_16.pdf; *Institute for Human Rights and Development in Africa v. Democratic Republic of Congo*, *supra* note 267, at par. 154(iii); *Saramaka People v. Suriname*, *supra* note 101, at par.. 138-40, 199. The African Court has held that loss of property may be compensated, but has not yet awarded such compensation due to insufficient evidence. *Konate v. Burkina Faso*, *supra* note 1, at par.. 45-47.

[276] *E.g.*, Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par. 230; *Gawęda v. Poland*, App. No. 26229/95, European Court of Human Rights, Judgment, par. 54 (Mar. 14, 2002), http://hudoc.echr.coe.int/eng?i=001-60325; *Centro Europa 7 S.R.L. v. Italy*, App. No. 38433/09, European Court of Human Rights, Judgment par.. 218-20 (June 7, 2012) (awarding a lump sum where the company "did indeed suffer a loss" but the circumstances did "not lend themselves to a precise assessment of pecuniary damage" due to the uncertain profits the company might have earned), http://hudoc.echr.coe.int/eng?i=001-111399; *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 17 (considering fact that the victim became unemployable due to the violation, and therefore lost the opportunity to engage in other employment, in determining the amount of compensation); U.N. Basic Principles, *supra* note 1, at par. 20.

[277] *Konate v. Burkina Faso*, *supra* note 1, at par.. 50, 60(iv); *Aksoy v. Turkey*, App. No. 21987/93, European Court of Human Rights, Judgment, par. 111, 113 (Dec. 18, 1996), http://hudoc.echr.coe.int/eng?i=001-58003; *Saidykhan v. The Gambia*, *supra* note 58, at par. 45; Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par. 230; *Case of the Rochela Massacre v. Colombia*, *supra* note 207, at par. 252; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 51; U.N. Basic Principles, *supra* note 1, at par. 20.

[278] *Zongo v. Burkina Faso*, *supra* note 1, at par.. 79, 87, 91, 94, 111(vii); *Manneh v. The Gambia*, *supra* note 228, at par. 44(d); *Saidykhan v. The Gambia*, *supra* note 58, at par. 48; *Good v. Botswana*, *supra* note 228, at par. 244(1); *Abrill Alosilla v. Peru*, *supra* note 265, at par. 133; *Garrido and Baigorria v. Argentina*, *supra* note 7, at par. 79; *Goiburú v. Paraguay*, *supra* note 58, at par. 180; *Lingens v. Austria*, App. No. 9815/82, European Court of Human Rights, Judgment, par.. 52-54 (July 8, 1986), http://hudoc.echr.coe.int/eng?i=001-57523; U.N. Basic Principles, *supra* note 1, at par. 20.

[279] *Abrill Alosilla v. Peru*, *supra* note 265, at par. 131; *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 138; *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, *supra* note 117, at par. 383; *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 283. *See also Oneryildiz v. Turkey*, *supra* note 206, at par. 171 (acknowledging that "the applicant *undoubtedly* suffered as a result of the violations").

[280] *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(i)-(ii); *Chioma Njemanze v. Nigeria*, *supra* note 265, at p. 42; *Mbiankeu v. Cameroon*, *supra* note 8, at par. 149; *Okomba v. Benin*, ECOWAS

compensate victims for this suffering, including the psychological harm, anguish, grief, sadness, distress, fear, frustration, anxiety, inconvenience, humiliation, and reputational harm caused by the violation.[281] Where a violation results in an inability to pursue prior plans or dreams, such as having children or pursuing a particular career, courts also are increasingly awarding damages for this loss of enjoyment of life.[282] In addition to these emotional harms, non-pecuniary awards may also compensate a victim for the effect of the violation or crime on his or her family life and relationships.[283] Relatedly, family members of victims often feel deep pain and grief over the knowledge that their relative was subjected to severe human rights violations.[284] The next of kin therefore are frequently awarded non-pecuniary damages,[285] particularly, though not exclusively, when the family member is removed from the family, such as through prolonged detention, disappearance, or death.

Communities, particularly indigenous communities, who are victims of human rights violations or crimes also may experience non-pecuniary harms to the community as a whole, including the erosion of their way of life.[286] This is particularly the case

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Community Court of Justice, Suit No. ECW/CCJ/APP/27/14, Judgment, p. 25 (Oct. 10, 2017), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2017/ECW_CCJ_JUD_05_17.pdf; *Er v. Denmark*, Comm. No. 40/2007, U.N. Committee on the Elimination of Racial Discrimination, Opinion, par. 9 (Aug. 8 2007), http://juris.ohchr.org/Search/Details/1734.

[281] *Zongo v. Burkina Faso*, *supra* note 1, at par.. 27, 55-56; *Konate v. Burkina Faso*, *supra* note 1, at par.. 52-59; *Aydin v. Turkey*, App. No. 23178/94, European Court of Human Rights, Judgment, par. 131 (Sept. 25, 1997), http://hudoc.echr.coe.int/eng?i=001-58371; *Hokkanen v. Finland*, App. No. 19823/92, European Court of Human Rights, Judgment, par. 77 (Sept. 23, 1994), http://hudoc.echr.coe.int/eng?i=001-57911; *Van Der Leer v. The Netherlands*, App. No. 11509/85, European Court of Human Rights, Judgment, par. 42 (Feb. 21, 1990), http://hudoc.echr.coe.int/eng?i=001-57620; *Olsson v. Sweden* (No. 1), App. No. 10465/83, European Court of Human Rights, Judgment, par. 102 (Mar. 24, 1990), http://hudoc.echr.coe.int/eng?i=001-57548; *Okomba v. Benin*, *supra* note 280, at p. 25; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 289; U.N. Basic Principles, *supra* note 1, at par. 20; ASF REPORT, *supra* note 128, at 26 (providing a list of the ways in which psychological harm may manifest).

[282] *E.g.*, *Mikheyev v. Russia*, App. No. 77617/01, European Court of Human Rights, Judgment par. 163 (Jan. 5, 2006) (awarding damages for loss of mobility and sexual function, and his inability to have children), http://hudoc.echr.coe.int/eng?i=001-72166; *Caracazo v. Venezuela*, *supra* note 75, at par. 103 (awarding damages for ongoing severe physical limitation); MCCARTHY, *SUPRA* NOTE 20, at 112; SHELTON, *supra* note 4, at 76.

[283] *Olsson v. Sweden* (No. 1), *supra* note 281, at par. 102; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 53; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 289; *Goiburú v. Paraguay*, *supra* note 58, at par.. 159-60; *Molina-Theissen v. Guatemala*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par.. 69-70 (July 3, 2004), http://www.corteidh.or.cr/docs/casos/articulos/seriec_108_ing.pdf. The Inter-American Court has explicitly increased the amount of non-pecuniary damages awarded to minors for the disappearance of death of a parent or other loved one, holding that being a minor increases the level of suffering and subjects them to a lack of protection. *Goiburú v. Paraguay*, *supra* note 58, at par. 160(b)(iii); *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 288(iii).

[284] *See Umuhoza v. Rwanda*, *supra* note 11, at par.. 69-70, *Thomas v. Tanzania*, *supra* note 11, at par.. 59-60, Rashidi supra note 11 at par. 138. *Myrna Mack Chang v. Guatemala*, *supra* note 53, at par. 264.

[285] *See Acosta-Calderón v. Ecuador*, Inter-American Court of Human Rights, Judgment, (Merits, Reparations and Costs), par. 158 (June 24, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_129_ing.pdf.

[286] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 172, 174-82, 321; *Saramaka People v. Suriname*, *supra* note 101, at par. 200; *Centre for Minority Rights Development v. Kenya*, *supra* note 103, at par.. 166, 170, 173.

with indigenous communities that have been displaced from their traditional lands or whose lands have been damaged – lands which inform their cultural patterns, traditions, religions, and rituals, and therefore their identity.[287] To address such harms, the Inter-American Court, for example, has frequently ordered the creation of community development funds to implement projects for the benefit of the entire community.[288] In order to fully address such collective non-pecuniary harms, however, other forms of reparations – such as restitution of the land and guarantees of non-repetition – are likely to comprise a major part of any reparations order.[289]

In addition to being the most-requested form of reparation, compensation is often preferred because it is the form of reparation with which States most often comply. In the Inter-American system, for example, States have paid Court-ordered compensation in about 80% of cases.[290] Nonetheless, some scholars contend that non-monetary remedies should be preferred because compensation cannot undo the harms to the victim and damages awards may not be sufficient to prompt the State to take measures to stop the violation.[291] In addition, some non-monetary remedies, particularly guarantees of non-repetition, have the potential to provide broader benefits to society.[292]

3. Rehabilitation

Human rights violations often result in significant physical, mental, and social trauma on the part of immediate victims, and frequently on the part of their family members and communities as well.[293] Rehabilitation attempts to restore their health and well-being through the provision of "medical and psychological care as well as legal and social services."[294] Such services may be required over extended periods of time as victims confront and process the harm done to them and deal with their feelings of grief, anger, humiliation, fear and depression.[295] It is crucial, however, that victims be provided with opportunities for rehabilitation, both to restore as far as

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[287] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 172, 174-82, 321; *Centre for Minority Rights Development v. Kenya*, *supra* note 103, at par.. 166, 170, 173, 184, 241, 251.
[288] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 323; *Saramaka People v. Suriname*, *supra* note 101, at par.. 201-02.
[289] *See, e.g.*, *Centre for Minority Rights Development v. Kenya*, *supra* note 103, p. 38; *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 337(11)-(28); *Saramaka People v. Suriname*, *supra* note 101, at par.. 214(4)-(14).
[290] PASQUALUCCI, *supra* note 129, at 7, 309; *see also* Fernando Basch et al., *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions*, 7 SUR INTERNATIONAL JOURNAL ON HUMAN RIGHTS 9, 18 (2010) (finding nearly 60% compliance with monetary reparations ordered by the Inter-American Commission and the Inter-American Court), http://sur.conectas.org/wp-content/uploads/2017/11/sur12-eng-fernando-basch.pdf.
[291] *See* SHELTON, *supra* note 4, at 377, 378.
[292] *Id.* at 378.
[293] SHELTON, *supra* note 4, at 394; *see also Fernández Ortega v. Mexico*, *supra* note 61, at par.. 139-49.
[294] U.N. Basic Principles, *supra* note 1, at par. 21.
[295] *See* SHELTON, *supra* note 4, at 394.

possible the situation prior to the violation and to reduce the anger and frustration that might otherwise lead victims, their families or their communities to engage in vigilante justice and further cycles of violence and abuse.[296]

Although individualised rehabilitation measures are typically ordered in cases with discrete numbers of victims, courts have ordered collective rehabilitation where the case at hand concerned a failure to provide adequate systemic medical or psychological support,[297] or where entire communities were affected.[298] Examples of such collective measures are included in the lists below.

Measures of rehabilitation include:

i. Provision of medical or psychological care;[299]

Where a violation results in physical or psychological ailments, courts routinely order the State to provide medical or psychological treatment through the State's health institutions.[300] If those institutions are unable to provide the type of specialised treatment needed, the State must provide recourse to specialised private or civil society institutions.[301]

Rehabilitation orders need not be limited to the immediate victim of the violation.[302] Courts have ordered states to provide medical and psychiatric treatment for family members of victims, including in, but not limited to, cases of disappearances and deaths.[303]

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[296] *Id.*

[297] *Purohit and Moore v. The Gambia*, Comm. No. 241/01, African Commission on Human and Peoples' Rights, Views, p. 9 (May 29, 2003) (urging the provision of adequate medical care for persons suffering from mental health problems in the territory of The Gambia), https://www.achpr.org/sessions/descions?id=144 .

[298] *Institute for Human Rights and Development in Africa v. Democratic Republic of Congo*, *supra* note 267, at par. 154(v); *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, par.. 300-06.

[299] *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, *supra* note 122, at par. 82(3); *Berenson-Mejía v. Peru*, *supra* note 240, at par. 238; *Sharmila Tripathi v. Nepa*l, Comm. No. 2111/2011, U.N. Human Rights Committee, par. 9 (Oct. 29, 2014), http://juris.ohchr.org/Search/Details/1918.

[300] *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 449; *R.P.B. v. Philippines*, Comm. No. 34/2011, U.N. Committee on the Elimination of Discrimination Against Women, Views, par. 9(a)(ii) (Feb. 21, 2014), http://juris.ohchr.org/Search/Details/1875.

[301] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 252; *Gomes Lund v. Brazil*, *supra* note 216, at par. 268.

[302] 2013 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 229, at par. 59 ("Rehabilitation measures and programmes should be established and be easily accesible for victims and their families.").

[303] *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 51(d), (f) (ordering medical and psychiatric treatment for the mother of the victim, who suffered mental ailments due to her son's incarceration, and future medical and psychiatric expenses to the victim's brother); *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 449 (ordering the state to provide medical and psychological treatment to the victims and their next of kin); *Goiburú v. Paraguay*, *supra* note 58, at par. 176; *Gomes Lund v. Brazil*, *supra* note 216, at par. 269; *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 312; R.P.B. v. Philippines, *supra* note 300, at par. 9(a)(ii).

In addition, where an entire community's right to health has been violated, courts have ordered the provision of medical and psychological treatment for all members of the community, periodic vaccination and deparasitisation campaigns, specialised medical care for pregnant women, and the establishment of health clinics.[304]

ii. Provision of education[305]

Where a human rights violation has the effect of interrupting an individual's education, courts and human rights bodies frequently order the State to provide the victim with education. Such education may be at any level appropriate, including advanced or university studies, and should be at an institution selected by mutual agreement of the victim and the State.[306] In addition, to ensure that the victim can effectively pursue those educational opportunities, some courts have ordered the State to cover living expenses for the duration of the victim's studies.[307]

In some cases, human rights violations may affect the education of other individuals, such as the victim's family members. Courts have not hesitated to order the provision of educational services or the award of scholarships to those individuals in such circumstances.[308]

With respect to violations affecting an entire community, courts have ordered the provision of necessary materials and human resources for local schools.[309] Moreover, where indigenous communities are involved, courts have required the State to "ensur[e] that the education provided respects their cultural traditions and guarantees the protection of their own language."[310]

iii. Provision of goods and basic services

The Inter-American Court has found that some human rights violations affected a community's right to a decent existence.[311] In these cases, the Inter-American Court has ordered the provision of

[304] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 301, 306.
[305] *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, *supra* note 122, at par. 82(5).
[306] *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 80.
[307] *Id.*
[308] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 264 (ordering the award of scholarships to the victim's children).
[309] *See, e.g.*, *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 301.
[310] *See, e.g.*, *id.*
[311] *See, e.g.*, *id.* par.. 194-217.

sufficient potable water, delivery of food, and installation of latrines or other sanitation systems.[312] The Court also has ordered the State to undertake a study to ensure that such supplies and services are adequate.[313]

4. Satisfaction

Satisfaction refers to measures that acknowledge the violation, aim to end any continuing violations, and restore the dignity and reputation of the victim.[314] As the Inter-American Court of Human Rights stated in *Villagran Morales v. Guatemala*, such measures help to "recover[] the memory of the victims, re-establish[] their reputation, consol[e] their next of kin or transmit[] a message of official condemnation of the human rights violations in question and commitment to the efforts to ensure that they do not happen again."[315]

At the most basic level, a judgment in favor of a victim is in itself a form of satisfaction, as many courts have noted.[316] Indeed, the early practice of several human rights bodies and international courts, including the African Commission on Human and Peoples' Rights, the European Court of Human Rights, and many of the U.N. treaty bodies provided reparations principally, if not exclusively, in the form of satisfaction through the issuance of a favourable judgment.[317] It is now well recognised, however, that a favourable judgment alone is almost always an incomplete measure of reparation that does not effectively redress the harm to a victim.[318] Accordingly, nearly all human rights bodies and courts now order other reparations measures.[319] Even the U.N. and African human rights bodies, which have

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[312] *Id.* at par. 301.
[313] *Id.* par.. 303-04.
[314] African Commission General Comment No. 4, *supra* note 1, at par. 44; U.N. Basic Principles, *supra* note 1, at par. 22.
[315] *Case of the Street Children v. Guatemala*, *supra* note 73, at par. 84.
[316] *Mtikila v. Tanzania*, *supra* note 1, at par.. 45-46; *Zongo v Burkina Faso supra* note 1, at par. 100, *Abubakari v Tanzania supra* note 11, at par. 45 *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 79 ("As for the measures of satisfaction and the guarantees of non-recurrence that the victim's representatives and the Commission are seeking, the Court believes that the judgment itself is a form of reparation."); *Abrill Alosilla v. Peru*, *supra* note 265, at par. 132; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 431.
[317] *See, e.g.*, *Chahal v. The United Kingdom*, App. No. 22414/93, European Court of Human Rights, par.. 157-58 (Nov. 15, 1996), http://hudoc.echr.coe.int/eng?i=001-58004; *Hentrich v. France*, *supra* note 275, at par. 71; *Commission nationale des droits de l'Homme et des libertés v. Chad*, Comm. No. 74/92, African Commission on Human and Peoples' Rights (Oct. 11, 1995) (providing no reparations beyond the judgment), https://www.achpr.org/sessions/descions?id=78 ; *Union interafricane des droits de l'Homme et al. v. Angola*, Comm. No. 159/96, African Commission on Human and Peoples' Rights, Holding (Nov. 11, 1997) (urging the government to "draw all of the legal consequences arising from the present decision," but not recommending any particular reparations), https://www.achpr.org/sessions/descions?id=98 .
[318] *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 57; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 292; *Case of El Amparo v. Venezuela*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 35 (Sept. 14, 1996), http://www.corteidh.or.cr/docs/casos/articulos/seriec_28_ing.pdf.
[319] *Konate v. Burkina Faso*, *supra* note 1, at par. 60; *Zongo v. Burkina Faso*, *supra* note 1, at par. 111; *Centre for Minority Rights Development v. Kenya*, *supra* note 103, at p. 38; *Good v. Botswana*, *supra*

authority only to recommend reparations measures rather than to order them, now frequently include suggested measures of reparations in their recommendations.[320]

Besides issuance of a favourable judgment, other measures of satisfaction include:

i. Public apologies

One of the most commonly ordered forms of satisfaction is the issuance of a public apology, which should include an "acknowledgement of the facts and acceptance of responsibility" for the harms committed.[321] Such apologies aid in the psychological healing of victims and their families, help to promote social justice, and may foster changed behaviours or conduct.[322] In addition, human rights abuses are often accompanied by statements or actions that denigrate the public reputation of the victim, and public apologies can play an important role in restoring the victim's good name or honor.[323] The Inter-American Court of Human Rights, in particular, has developed a detailed and explicit jurisprudence regarding public apologies. The Inter-American Court now frequently requires these public apologies to take place in public ceremonies, in

note 228, at par. 244; *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, *supra* note 122, at par. 82; *Aslakhanova v. Russia*, *supra* note 228, at par.. 223-38*; Ahmad v. Denmark*, Comm. No. 16/1999, U.N. Committee on the Elimination of Racial Discrimination, Opinion, par. 9 (Mar. 13, 2000), http://juris.ohchr.org/Search/Details/1751; *Manneh v. The Gambia*, *supra* note 228, at par. 44; *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 18; Al Mahdi Reparations Order, *supra* note 139, at par.. 67, 71, 81-83, 90.

[320] *E.g.*, *Groupe de Travail sur les Dossiers Judiciaires Strategiques v. Democratic Republic of Congo*, Comm. No. 259/2002, African Commission on Human and Peoples' Rights, par. 92 (July 24, 2011), https://www.achpr.org/sessions/descions?id=218 ; *Hadi v. Sudan*, *supra* note 221, at par. 93; *Institute for Human Rights and Development in Africa v. Democratic Republic of Congo*, *supra* note 267, at par. 154; *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v. Kenya*, *supra* note 104, at par. 69; *Hansungule v. Uganda*, Comm. No. 1/2005, African Committee of Experts on the Rights and Welfare of the Child, Decision, par. 81 (Apr. 15-19, 2013), http://www.acerwc.org/download/decision-on-the-communication-against-the-republic-of-uganda/?wpdmdl=9749; *Sassene v. Algeria*, Comm. No. 2026/2011, U.N. Human Rights Committee, Views, par. 9 (Oct. 29, 2014), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C112/D/2026/2011&Lang=en; *Sharmila Tripathi v. Nepal*, *supra* note 299, at par. 9; *Monika v. Cameroon*, *supra* note 265, at par. 14; *González Carreño v. Spain*, *supra* note 265, at par. 11; *Simunek v. The Czech Republic*, *supra* note 245, at par. 12.2; *Niyonzima v. Burundi*, Comm. No. 514/2012, U.N. Committee against Torture, par. 10 (Nov. 21, 2014), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F53%2FD%2F514%2F2012&Lang=en; *Ahmad v. Denmark*, *supra* note 319, at par. 9; *Yrusta v. Argentina*, *supra* note 56, at par. 12.

[321] U.N. Basic Principles, *supra* note 1, art. 22(e); *see also Cantoral-Benavides v. Peru*, *supra* note 71, at par. 81. In some cases, courts have ordered a "public act of acknowledgment of international responsibility" instead. *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 296-97.

[322] *Institute for Human Rights and Development in Africa v. Democratic Republic of Congo*, *supra* note 267, at par. 151.

[323] *Id.*

the presence of high State authorities and the victims and/or their next of kin.[324] The terms and organisation of the ceremony must be agreed upon between the State and victim or their next of kin.[325] In addition, the Inter-American Court has required that these ceremonies be disseminated through the media, including through radio and television broadcasts.[326]

Although international criminal tribunals cannot force an individual defendant to issue an apology, the Extraordinary Chambers in the Courts of Cambodia ordered the compilation and publication of all "statements of apology" made by one of the defendants, recognising that those expressions of remorse might provide some satisfaction to victims.[327]

ii. Attempts to locate and identify remains of deceased victims and deliver them to their next of kin[328]

Returning a victim's body to his or her family is often "of utmost importance for the next of kin" because it "permits them to provide for a burial pursuant to their beliefs, as well as to close the grieving process."[329] Searching for the bodies may also be important to any investigation or prosecution, since the location of the body and evidence collected there may provide information that helps to identify the perpetrators.[330]

To aid in the process of identifying victims' remains and their next of kin, the Inter-American Court of Human Rights has sometimes ordered the creation of a genetic information system or database.[331]

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[324] *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 445; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 244; *Goiburú v. Paraguay*, *supra* note 58, at par. 173.
[325] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 244; *Gomes Lund v. Brazil*, *supra* note 216, at par. 277.
[326] *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 445; *Gomes Lund v. Brazil*, *supra* note 216, at par. 277.
[327] *See also* Kaing Trial Judgment, *supra* note 151, at par. 668; Kaing Appeal Judgment, *supra* note 1, at par.. 672, 675-77. Extraordinary Chambers in the Courts of Cambodia, Compilation of statements of apology made by Kaing Guek Eav alias Duch during the proceedings, Case No. 001, https://www.eccc.gov.kh/sites/default/files/publications/Case001Apology_En_low_res.pdf.
[328] *Caballero-Delgado and Santana v. Colombia*, *supra* note 259, at p. 15; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par.. 443-44; *Goiburú v. Paraguay*, *supra* note 58, at par.. 171-72; *Case of the Street Children v. Guatemala*, *supra* note 73, at par. 102; *Neira-Alegría v. Peru*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 69 (Sept. 19, 1996), http://www.corteidh.or.cr/docs/casos/articulos/seriec_29_ing.pdf; *Sassene v. Algeria*, *supra* note 320, at par. 9; *Sharmila Tripathi v. Nepal*, *supra* note 299, at par. 9; U.N. Basic Principles, *supra* note 1, at par. 22.
[329] *Gomes Lund v. Brazil*, *supra* note 216, at par. 261.
[330] *Id.* par. 261.
[331] *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 308; *Molina-Theissen v. Guatemala*, *supra* note 283, at par. 91; Cotton Field Case, *supra* note 207, at par.. 511-512.

If a victim's remains are found, they must be returned to the family and the State must cover any burial expenses.[332]

iii. Investigation of the facts regarding the violation and holding the perpetrators accountable, including through prosecutions as appropriate[333]

Human rights bodies and courts have increasingly recognised that victims, their families, and the public have a right to know the truth, including the fate of the victims and the identity of those responsible for the violations.[334] This right entails a corresponding obligation on the State to investigate the facts surrounding a violation and to punish those responsible.[335] Such investigations are also an important measure in fighting impunity and ensuring the effectiveness of domestic laws.[336]

This investigation must be "complied with seriously and not as a mere formality."[337] In this regard, it must be "effective and impartial"[338] and completed within a reasonable period of time.[339] All of those responsible, including the direct perpetrators as well as masterminds

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[332] *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 443; *Goiburú v. Paraguay*, *supra* note 58, at par. 172; *Gomes Lund v. Brazil*, *supra* note 216, at par. 262; *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 310.

[333] *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(x); *Wing Commander Danladi Angulu Kwasu v. Nigeria*, *supra* note 71, at p. 29; *SERAP v. Nigeria*, *supra* note 105, at par. 121(iii*); Hadi v. Sudan*, *supra* note 221 , at par. 93(ii)(b); *Institute for Human Rights and Development in Africa v. Democratic Republic of Congo*, *supra* note 267, at par. 154(i); *Mebara v. Cameroon*, *supra* note 8, at par. 136; *Yrusta v. Argentina*, *supra* note 56, at par. 12 (b)-(c); *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 68; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par.. 439-41; *Case of the Street Children v. Guatemala*, *supra* note 73, at par. 101; *Sassene v. Algeria*, *supra* note 320, at par. 9; *Sharmila Tripathi v. Nepal*, *supra* note 299, at par. 9; *González Carreño v. Spain*, *supra* note 265, at par. 11; *Niyonzima v. Burundi*, *supra* note 320, at par. 10; *see also* U.N. Basic Principles, *supra* note 1, at par.. 3(b), 4, 22(f).

[334] *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 69; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 441; *Goiburú v. Paraguay*, *supra* note 58, at par.. 164-65; *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par.. 297-98; *Myrna Mack Chang v. Guatemala*, *supra* note 53, at par. 274.

[335] *Cantoral-Benavides v. Peru*, *supra* note 71, at par.. 69-70.

[336] *Goiburú v. Paraguay*, *supra* note 58, at par. 164. An order to investigate constitutes a measure of satisfaction when it concerns the investigation of the facts, and prosecution of the perpetrators, in the specific case before the court or human rights body. By contrast, a general order to investigate cases similar to those before the court or human rights body would constitute a measure of non-repetition.

[337] *Molina-Theissen v. Guatemala*, *supra* note 283, at par. 80.

[338] *Hadi v. Sudan*, *supra* note 221, at par. 93(ii)(b); *see also Cantoral-Benavides v. Peru*, *supra* note 71, at par. 68; *Constitutional Court v. Peru*, *supra* note 274, at par. 124; U.N. Basic Principles, *supra* note 1, at par. 3(b).

[339] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 228; *Goiburú v. Paraguay*, *supra* note 58, at par. 165; U.N. Basic Principles, *supra* note 1, at par. 3(b).

and accomplices, must be identified.[340] In addition, the Inter-American Court has held that the victim and/or next of kin must have full access to the proceedings and that the State must put in place mechanisms to enable their participation in the proceedings, as desired.[341]

In some cases, such as where large-scale violations have occurred, the establishment of a Commission of Inquiry to conduct the investigation may be appropriate.[342] Such commissions should have broad authority to investigate the circumstances of the violation.[343]

Investigation and prosecution of certain crimes, particularly sexual crimes, may risk re-traumatising the victim. One measure courts have imposed to reduce this risk is to require the State to obtain the consent of the victim before the results of any investigation or prosecution are disseminated to the public.[344]

iv. Publication of the judgment or a summary thereof[345]

Reparations orders frequently specify that the decision shall be published, and further specify publication in an Official Gazette,[346] in a newspaper with nationwide circulation,[347] on a website,[348] and/or through a radio or television broadcast.[349] Where the victim speaks a language other than the language in which the judgment was written, the judgment should also be translated into, and published

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[340] *Goiburú v. Paraguay*, *supra* note 58, at par. 165; *Gomes Lund v. Brazil*, *supra* note 216, at par. 256(b); *Myrna Mack Chang v. Guatemala*, *supra* note 53, at par. 275.
[341] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 230; *Gomes Lund v. Brazil*, *supra* note 216, at par. 257.
[342] *Institute for Human Rights and Development in Africa v. Angola*, Comm. No. 292/04, African Commission on Human and Peoples' Rights, par. 87 (May 22, 2008), https://www.achpr.org/sessions/descions?id=185.
[343] *Id.*
[344] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 230.
[345] *Mtikila v. Tanzania*, *supra* note 1, at par. 45; *Konate v. Burkina Faso*, *supra* note 1, at par. 60(viii); *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(ix) *Thomas v Tanzania supra* note 11, at par. 74, *Abubakari v Tanzania supra* note 11, at par. 45; *Yrusta v. Argentina*, *supra* note 56, at par. 13; *Abrill Alosilla v. Peru*, *supra* note 265, at par. 92; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 79; Kaing Appeal Judgment, *supra* note 1, at par.. 708-09. Some bodies refer more simply to giving the decision "wide publicity." *TBB-Turkish Union in Berlin v. Germany*, *supra* note 90, at par. 14.
[346] *Abrill Alosilla v. Peru*, *supra* note 265, at par. 92; *Mtikila v. Tanzania*, *supra* note 1, at par. 45; *Konate v. Burkina Faso*, *supra* note 1, at par. 60(viii); *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 79.
[347] *Mtikila v. Tanzania*, *supra* note 1, at par. 45; *Konate v. Burkina Faso*, *supra* note 1, at par. 60(viii); *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(ix); *Thomas v Tanzania supra* note 11, at par. 74, *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 79; *Goiburú v. Paraguay*, *supra* note 58, at par. 175.
[348] *Mtikila v. Tanzania*, *supra* note 1, at par. 45; *Konate v. Burkina Faso*, *supra* note 1, at par. 60(viii); *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(ix); *Thomas v Tanzania supra* note 11, at par. 74, *Abubakari v Tanzania supra* note 11, at par. 45, *Fernández Ortega v. Mexico*, *supra* note 61, at par. 247; *Gomes Lund v. Brazil*, *supra* note 216, at par. 273.
[349] *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 447; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 247; *Saramaka People v. Suriname*, *supra* note 101, at par. 196.

in, that language.[350] Such publication not only helps to restore the dignity of the victim, but, particularly in cases of mass atrocities or collective harms, may "contribute to . . . reconciliation by promoting a public and genuine discussion on the past."[351]

v. Erection of monuments, establishment of memorials, and other forms of commemoration or tribute to the victims[352]

Monuments and memorials serve as a means of remembrance, consecrating the memories of the victims, contributing to national reconciliation, and serving as a measure to prevent such events in the future.[353] Memorials may take many forms, including naming public buildings or squares after victims,[354] or creating scholarships in their name.[355] Such monuments, and, as appropriate, memorials, should include a plaque with the names of the victims and mention the context of the human rights violations.[356] Decisions regarding the design, content, and location of a monument or memorial should be made in consultation with the victims or their families.[357]

As with other forms of reparations, compliance with measures of satisfaction varies dramatically depending on the particular measure ordered. Orders for public apologies, to rename public areas or erect plaques commemorating the victims, and to publish the judgment, for example, tend to have relatively high rates of compliance,[358] while orders to investigate and prosecute those responsible are among

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[350] *Mtikila v. Tanzania*, *supra* note 1, at par. 45; *Thomas v Tanzania supra* note 11, at par. 74, *Abubakari v Tanzania supra* note 11, at par. 45, *Fernández Ortega v. Mexico*, *supra* note 61, at par. 247.
[351] Kaing Appeal Judgment, *supra* note 1, at par. 708.
[352] *Institute for Human Rights and Development in Africa v. Democratic Republic of Congo*, *supra* note 267, at par. 154(v); *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 454; *Goiburú v. Paraguay*, *supra* note 58, at par. 177; *Moiwana Community v. Suriname*, *supra* note 197, at par. 218; *Case of the 19 Merchants v. Colombia*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 273 (July 5, 2004), http://www.corteidh.or.cr/docs/casos/articulos/seriec_109_ing.pdf; *see also* U.N. Basic Principles, *supra* note 1, at par. 22(g).
[353] *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 315; *Molina-Theissen v. Guatemala*, *supra* note 283, at par. 88; *Myrna Mack Chang v. Guatemala*, *supra* note 53, at par. 285; Kaing Appeal Judgment, *supra* note 1, at par.. 683, 691.
[354] *Molina-Theissen v. Guatemala*, *supra* note 283, at par. 88; *Myrna Mack Chang v. Guatemala*, *supra* note 53, at par. 286; *Case of the Street Children v. Guatemala*, *supra* note 73, at par. 103.
[355] *Myrna Mack Chang v. Guatemala*, *supra* note 53, at par. 285.
[356] *Goiburú v. Paraguay*, *supra* note 58, at par. 177; *Myrna Mack Chang v. Guatemala*, *supra* note 53, at par. 286.
[357] *Case of the Ituango Massacres v. Colombia*, *supra* note 52, at par. 408; *Moiwana Community v. Suriname*, *supra* note 197, at par. 218; *Case of the 19 Merchants v. Colombia*, *supra* note 352, at par. 273.
[358] PASQUALUCCI, *supra* note 129, at 316-17.

the measures with the lowest levels of compliance, perhaps due to political factors or to the difficulty of identifying perpetrators years later.[359]

5. Guarantees of non-repetition

Guarantees of non-repetition seek to avoid the commission of similar human rights violations or international crimes, whether against the same or additional victims. These measures are rooted in the recognition that human rights violations and international crimes frequently arise from a larger context of abuse that must be systemically changed in order to prevent future harms.[360] As the African Commission has stated, the "overall aim of guarantees of non-repetition is to break the structural causes of societal violence, which are often conducive to an environment in which [human rights violations] take place and are not publicly condemned or adequately punished."[361]

Guarantees of non-repetition often overlap with other forms of reparations, as all reparations may have some effect in deterring future violations.[362] This is especially true, however, of measures of satisfaction, which often include an acknowledgment and condemnation of the violations committed. For example, the Inter-American Court of Human Rights has observed that the erection of monuments and memorials not only consoles family members by keeping the memory of the victims alive, but also may "contribute to raising awareness in order to avoid the repetition of harmful acts."[363] Similarly, sanction of the perpetrators of a violation or crime – particularly where imprisonment removes the person from society for a time – reduces the likelihood both that the particular perpetrator will commit future violations, and may serve as a deterrent to other potential perpetrators as well.[364]

Guarantees of non-repetition include:

i. Ratification of relevant treaties related to the subject matter of the violation;[365]

ii. Amendment of laws or constitutional provisions;[366]

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[359] SHELTON, *supra* note 4, at 440; Basch, *supra* note 290, at 18; PASQUALUCCI, *supra* note 129, at 8.
[360] *See, e.g.*, SHELTON, *supra* note 4, at 384 ("ongoing violations may involve social conditions, behavioural patterns and organisational dynamics").
[361] African Commission General Comment No. 4, *supra* note 1, at par. 45, *Rashidi v Tanzania supra* note 11 at par. 149.
[362] SHELTON, *supra* note 4, at 397.
[363] *Case of the Street Children v. Guatemala*, *supra* note 73, at par. 103; *Myrna Mack Chang v. Guatemala*, *supra* note 53, at par. 286; *Moiwana Community v. Suriname*, *supra* note 197, at par. 218; *Case of the 19 Merchants v. Colombia*, *supra* note 352, at par. 273.
[364] SHELTON, *supra* note 4, at 397.
[365] *Gomes Lund v. Brazil*, *supra* note 216, at par. 287.
[366] *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(vii); *Konate v. Burkina Faso*, *supra* note 1, at par. 8; *Mtikila v. Tanzania*, *supra* note 1, at par.. 42-43; *Actions pour la Protection des Droits de l'Homme (APDH) v. Côte d'Ivoire*, App. No. 001/2014, African Court on Human and Peoples' Rights, Judgment, par. 153(7) (Nov. 18, 2016), https://en.african-

iii. Nullification or repeal of laws that violate human rights norms;[367]

iv. Establishment of administrative procedures or practices to ensure that violations are not repeated;[368]

v. Ensuring that complaints are properly investigated and that perpetrators are brought to justice and held accountable;[369]

vi. Review of state policies and procedures with respect to prosecution;[370]

vii. Creation of standard protocols for investigations and forensic analyses;[371]

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court.org/images/Cases/Judgment/JUDGMENT_APPLICATION%20001%202014%20_%20APDH%20V.%20THE%20REPUBLIC%20OF%20COTE%20DIVOIRE.pdf ; *Hadi v. Sudan*, *supra* note 221, at par. 93(ii)(c); *Interights v. Democratic Republic of Congo*, *supra* note 245, at par. 89(a); *Congrès pour la Démocratie et le Progrès v. Burkina Faso*, Suit No. ECW/CCJ/APP/19/15, ECOWAS Community Court of Justice, Judgment, p. 14 (July 13, 2015), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2015/Aff_CDP_c_l_Etat_du_Burkina.pdf; *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v. Kenya*, *supra* note 104, at par. 69(1); *Hansungule v. Uganda*, *supra* note 320, at par. 81(1); *Good v. Botswana*, *supra* note 228, at par. 244(2); *Groupe de Travail sur les Dossiers Judiciaires Strategiques v. Democratic Republic of Congo*, *supra* note 320, at par. 92(i); *Institute for Human Rights and Development in Africa v. Angola*, *supra* note 342, at par. 87; *Goiburú v. Paraguay*, *supra* note 58, at par. 179; *Castillo Petruzzi v. Peru*, *supra* note 235, at par. 222; *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par.. 97-98 (Feb. 5, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf; *Gomes Lund v. Brazil*, *supra* note 216, at par. 287; *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 309; *Hilaire et al. v. Trinidad and Tobago*, Inter-American Court of Human Rights, Judgment, par. 212 (June 21, 2002), http://www.corteidh.or.cr/docs/casos/articulos/seriec_94_ing.pdf; *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, *supra* note 272, at par. 50; *Aumeeruddy-Cziffra v. Mauritius*, *supra* note 56, at par. 11; *Palamara-Iribarne v. Chile*, *supra* note 234, at par.. 254, 256; *Simunek v. The Czech Republic*, *supra* note 245, at par. 12.2; *R.P.B. v. Philippines*, *supra* note 300, at par. 9(b)(i); *Jallow v. Bulgaria*, Comm. No. 32/2011, U.N. Committee on the Elimination of Discrimination Against Women, Views, par. 8.8(2)(a)-(c) (July 23, 2012), http://juris.ohchr.org/Search/Details/1692; U.N. Basic Principles, *supra* note 1, at par. 23(h); *S.V.P. v. Bulgaria*, *supra* note 219, at par. 10(2)(a).

[367] *Cantoral-Benavides v. Peru*, *supra* note 71, at par.. 77-78; *S.V.P. v. Bulgaria*, *supra* note 219, at par. 10(2)(a).

[368] *Hansungule v. Uganda*, *supra* note 320, at par. 81(4).

[369] *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, *supra* note 122, at par. 82(7); *Ahmad v. Denmark*, *supra* note 319, at par. 9; *Durmic v. Serbia and Montenegro*, Comm. No. 29/2003, U.N. Committee on the Elimination of Racial Discrimination, Decision, par. 11 (Mar. 6, 2006), http://juris.ohchr.org/Search/Details/1736; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 256. The notion of accountability includes the requirement that perpetrators be prosecuted for offences that reflect the gravity of their crimes. *S.V.P. v. Bulgaria*, *supra* note 219, at par. 10(2)(a). It is insufficient, for example, for a perpetrator of rape to be charged with the lesser offense of molestation. *Id.* at par.. 9(5), 10(2)(a). Similarly, if convicted, perpetrators should receive sentences commensurate with the seriousness of the crimes. *Id.* at par. 10(2)(a).

[370] *Dawas and Shava v. Denmark*, Comm. No. 46/2009, U.N. Committee on the Elimination of Racial Discrimination, par. 10 (Mar. 6, 2012), http://juris.ohchr.org/Search/Details/1727; *TBB-Turkish Union in Berlin v. Germany*, *supra* note 90, at par. 14.

[371] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 256.

viii. Taking measures to ensure that domestic courts apply the law in ways that are consistent with international law;[372]

ix. Requiring that certain kinds of cases be heard before ordinary, rather than military, courts;[373]

x. Providing adequate mechanisms for reparations;[374]

xi. Bringing conditions of public facilities, such as prisons, into compliance with international norms;[375]

xii. Establishment of minimum norms and standards for public or private services;[376]

xiii. Supervision, monitoring and/or inspections of facilities, such as prisons, by public authorities or appropriate non-governmental organisations to ensure compliance with laws and standards;[377]

xiv. Permitting international organisations, such as the International Committee of the Red Cross, concerned consulates, and representatives of human rights bodies access to detainees;[378]

xv. Establishment of complaint procedures and mechanisms to report abuses in public facilities, such as prisons;[379]

xvi. Ensuring access to competent authorities, such as administrative tribunals and courts, to review complaints of abuses in public facilities, such as prisons;[380]

xvii. Ensuring that victims have access to necessary services;[381]

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[372] *Jallow v. Bulgaria*, *supra* note 366, at par. 8.8(2)(a).
[373] *Fernández Ortega v. Mexico*, *supra* note 61, at par. 237.
[374] *S.V.P. v. Bulgaria*, *supra* note 219, at par. 10(2)(c).
[375] *Hilaire v. Trinidad and Tobago*, *supra* note 366, at par. 217; *Berenson-Mejía v. Peru*, *supra* note 240, at par. 241.
[376] *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, *supra* note 122, at par. 82(4).
[377] *Id.* par. 82(6); *Institute for Human Rights and Development in Africa v. Angola*, *supra* note 342, at par. 87.
[378] *Institute for Human Rights and Development in Africa v. Angola*, *supra* note 342, at par. 87.
[379] *Id.*
[380] *Id.*
[381] *Jallow v. Bulgaria*, *supra* note 366, at par. 8.8(2)(a). Ensuring access to necessary services entails more than simply making those services available. Victims may need specialised assistance in order to effectively access such services. For example, victims who do not speak the language used by service providers or the courts may need interpretation and translation services. *Id.* Victims may also need legal aid to effectively pursue civil claims, including the execution of judgments awarding compensation. *S.V.P. v. Bulgaria*, *supra* note 219, at par. 10(2)(b).

xviii. Requiring State consultation with victim communities, particularly indigenous communities, before undertaking actions that may affect their rights;[382]

xix. Granting indigenous communities legal recognition of their collective juridical capacity;[383]

xx. Requiring environmental and social impact assessments prior to awarding certain kinds of projects;[384]

xxi. Training of law enforcement personnel, judicial personnel, military and security forces, civil servants, health sector personnel, social workers, and/or community members, as appropriate, on human rights and laws related to human rights;[385]

xxii. Creation of an official State mechanism to monitor compliance with the reparations ordered.[386]

It is difficult to generalise about State compliance with orders for measures of non-repetition since these measures can take so many forms. A study of the Inter-American system, for example, found that close to half of orders to raise social awareness or conduct trainings were complied with by the States involved, but only 14% of orders requiring legal reforms were implemented.[387] Even where States comply, compliance with orders for certain measures of non-repetition may take more time than other forms of reparations because implementing systemic or widespread change often implicates multiple government actors and may require the mobilisation of significant resources. For example, amendment of a State's laws or Constitution typically requires passage of a new law by the legislature or a popular referendum, both of which take time.[388]

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[382] *Saramaka People v. Suriname*, *supra* note 101, at par.. 133-37, 194.
[383] *Id.* par. 194.
[384] *Id.*
[385] *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, *supra* note 122, at par. 82(9); *Institute for Human Rights and Development in Africa v. Angola*, *supra* note 342, at par. 87; *Hadi v. Sudan*, *supra* note 221, at par. 93(ii)(d); *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par. 452; *Fernández Ortega v. Mexico*, *supra* note 61, at par.. 260, 262; *Goiburú v. Paraguay*, *supra* note 58, at par. 178; *Gomes Lund v. Brazil*, *supra* note 216, at par. 283; *R.P.B. v. Philippines*, *supra* note 300, at par. 9(b)(iv); *Jallow v. Bulgaria*, *supra* note 366, at par. 8.8(2)(c); U.N. Basic Principles, *supra* note 1, at par. 23(e).
[386] The Inter-American Court has sometimes ordered the establishment of an official State mechanism to monitor compliance with the reparations ordered. *E.g.*, *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 311. Such mechanisms must include the participation of the victims or their family members. *Id.*
[387] Basch, *supra* note 290, at 18, 21.
[388] SHELTON, *supra* note 4, at 437 (citing the Court's annual report).

6. Key Issues and Challenges

i. Victim Consultation

It is imperative that courts and other human rights bodies consult with the victims in determining the appropriate form or forms of reparations to award, as the "participation of victims and victim groups in the design, implementation, and oversight of reparations programmes can be critical to ensuring that the reparations are meaningful, timely, and have an impact."[389] Moreover, the very process of consultation with victims regarding their needs and desires in respect of reparations can contribute to victims' healing.[390] By contrast, "insufficient outreach to and consultation with targeted beneficiaries about reparations measures may reduce the impact of such measures with local communities, and lessen the likelihood that the special needs of particularly vulnerable or marginalised sectors of society (including women, children and minority groups) are adequately considered."[391] Ultimately, how the reparations process is conducted play an important role in determining whether the process will be well received and accepted, and whether it "empowers [victims] as survivors, eventually reinstating dignity, respect and their rightful place in society."[392] To the greatest extent possible, therefore, the process should be victim-centered and victim-led.[393]

Consultation ensures that courts are aware of victims' strong preferences for or against certain types of reparations based on their needs, perceptions of cultural appropriateness, or potential impact on both victims and the wider community. For example, in *Katanga*, victims explicitly rejected as reparations the ideas of holding commemorative events, erecting monuments, broadcasting the trial, or tracing missing persons, explaining that such measures were either pointless, could cause fresh trauma, or might exacerbate social unrest.[394]

Nonetheless, "[e]nsuring victim participation is not necessarily an easy thing to accomplish, given the usual heterogeneity of victim groups, their frequent lack of resources and organisation, and, in many cases, the security risks and repression they may face as they seek redress."[395] Such difficulties can be mitigated through the use

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[389] Lisa Magarrell, *Reparations in Theory and Practice* 9 (2007), https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf.
[390] Linda Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 THOMAS JEFFERSON LAW REVIEW 189, 212 (2007) ("The process of developing community priorities based on victims" needs can be part of the healing process.").
[391] CARLA FERSTMAN, MARIANA GOETZ AND ALAN STEPHENS, REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 9 (2009).
[392] FERSTMAN, GOETZ AND STEPHENS, *supra* note 391, at 341.
[393] *Id.*
[394] Katanga Reparations Order, *supra* note 56, at par. 301.
[395] Magarrell, *supra* note 389, at 9.

of experts experienced in "victims and trauma issues" generally, as well as experts with knowledge of the victim community.[396]

ii. Collective reparations

Collective reparations awards are an important way to remedy violations committed against specific groups, particularly in the context of large-scale violations and massacres.[397] Such reparations also may better remedy harms to collective rights – such as loss of communal lands – and can contribute to collective healing. Nonetheless, collective reparations awards are not appropriate in every case and pose their own unique challenges. This section explores some of the key questions and challenges inherent in assessing whether a collective remedy should be awarded, either along with individual reparations or as a sole remedy.[398]

Definition of the group

There is no singular, pre-existing definition of what constitutes a group for purposes of collective remedies under international law. Instead, it is widely recognised that the definition is flexible, and should respond to the identity and needs of those harmed by particular violations or crimes. In many cases, collective harms are "perpetrated on structurally disadvantaged, persecuted, marginalized or otherwise discriminated groups."[399] In such cases, the victims are part of a pre-existing group, such as an ethnic, racial, social, political or religious group.[400] In other situations, it may be the shared experience of harm that forms and defines the group.[401] Yet other groups may be defined by shared geography.[402] Regardless of how the group comes to be defined, the victims should perceive themselves as part of a group if an award of collective reparations is to be feasible.[403]

The definition of an overarching group for purposes of a reparations award does not preclude the identification of particular classes within that group based on the harms they suffered and their particular needs with respect to reparations.[404] For example, in situations of conflict, some victims may have been personally injured,

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[396] *See, e.g.*, *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 16 (indigenous community offered testimony from an anthropologist and sociologist).
[397] PASQUALUCCI, *supra* note 129, at 209; WCRO REPORT, *supra* note 20, at 46; Kaing Appeal Judgment, *supra* note 1, at par. 659.
[398] As with reparations more generally, collective reparations may take a variety of forms. Specific examples of types of collective remedies, such as restitution of communal property, were included within the description of each form of reparations, *infra*.
[399] African Commission General Comment No. 4, *supra* note 1, at par. 51.
[400] *Id.*; Katanga Reparations Order, *supra* note 56, at par. 274; *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 278.
[401] African Commission General Comment No. 4, *supra* note 1, at par. 51; Katanga Reparations Order, *supra* note 56, at par. 274; *see also Hansungule v. Uganda*, *supra* note 320 (case on behalf of children in Northern Uganda whose well-being was threatened by the LRA); *Centre for Minority Rights Development v. Kenya*, *supra* note 103 (case on behalf of the Endorois indigenous community).
[402] African Commission General Comment No. 4, *supra* note 1, at par. 51.
[403] Katanga Reparations Order, *supra* note 56, at par. 275.
[404] *See, e.g.*, Habré Reparations Decision, *supra* note 60, at par. 64.

tortured, or raped, while others may have been forcibly displaced. These different classes of victims may benefit from different forms of reparations geared toward the particular harms they suffered. For example, victims who have been injured, tortured and raped may require long-term medical assistance and psychological support, while victims of forced displacement may benefit more from a one-time housing benefit or farm tools.[405]

Individual and collective rights

Collective reparations do "not necessarily pre-suppose the violation of a collective right."[406] Rather collective reparations may also be appropriate to remedy "the violation of the individual rights of a large number of members of the group."[407] Consistent with this understanding, collective remedies may aim to benefit the community as a whole, such as the building of a school or a memorial, or collective remedies may be focused on individuals within the group, such as healthcare provided to each of the group's members.[408]

Deciding between individual and collective reparations

"[I]ndividual and collective remedies are not mutually exclusive and may be awarded concurrently."[409] Indeed, many courts have awarded both individual and collective remedies in the same reparations award in order to remedy both individual and collective harms.[410] In determining whether to award individual reparations, collective reparations, or both, courts have considered the requests of victims in their applications and in consultation exercises.[411]

Individual reparations are frequently the default in international proceedings, not least because many cases are brought by just one or a handful of individuals whose rights have been violated. Even in cases of multiple victims, however, individual reparations may be appropriate. "Reparation to individuals . . . underscore the value of each human being and their place as rights-holders," thereby avoiding the risk of minimising the particular harm done to each person.[412] In particular, individual reparations may be more appropriate where there are a limited and identifiable number of victims, where there is a need to acknowledge the specific suffering of each victim, or where victims of group-based harm no longer live in the community.[413]

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[405] Magarrell, *supra* note 389, at 7.
[406] Katanga Reparations Order, *supra* note 56, at par. 276.
[407] *Id.* *See also* African Commission General Comment No. 4, *supra* note 1, at par. 51 (observing that people may "have suffered individually").
[408] Katanga Reparations Order, *supra* note 56, at par.. 278-80.
[409] *Id.* par. 265. *See also* Lubanga Reparations Order Appeal, *supra* note 175, at par. 130; ASF REPORT, *supra* note 128, at 29; African Commission General Comment No. 4, *supra* note 1, at par. 56.
[410] Katanga Reparations Order, *supra* note 56, at par.. 281, 283, 293.
[411] *Id.* par. 266. For a discussion of victim consultation in the collective reparations context, *see infra* pp. 81-82.
[412] Magarrell, *supra* note 389, at 5.
[413] Katanga Reparations Order, *supra* note 56, at par. 286.

On the other hand, collective reparations may be preferable to individual awards in certain circumstances. For instance, collective awards may be preferable where victims were targeted because they are members of a group.[414] This is particularly true where group members suffered certain types of collective harms, such as identity-based violations or the loss of trust within a community.[415] For example, where rape was used as a means of repression, collective remedies may help avoid stigmatisation of individual victims, restore a sense of dignity, and improve women's position in the community. In other instances, such as where an entire village was attacked, "collective reparations may offer an effective response to damage to community infrastructure, identity and trust."[416] As the ICC has observed, such community-wide reparations measures may be appropriate, even where not every community member was a victim, in order to address "the root and underlying causes of the conflict" and guarantee the non-repetition of the wrongdoing.[417]

Collective remedies also may be most appropriate in addressing harms to indigenous communities. In many instances, the harms alleged in cases by indigenous and tribal communities involve collective rights, such as communal ownership of traditional lands, the right to self-determination (including the right to dispose freely of their natural wealth and resources), the right to adequate social services (such as education and health care), and a right to the collective cultural identity as expressed through language, traditional rituals, and way of life.[418] Such harms cannot be addressed individually – they require, *inter alia*, State recognition of communal property rights and restitution of traditional lands, State recognition of the right of communities to freely dispose of the natural wealth and resources on those lands that they have traditionally used, and/or the provision of social services to the entire community.[419] For example, in *Xákmok Kásek Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights ordered the State to return the community's traditional lands; provide the community with sufficient food, water, and latrines; establish a health clinic; and ensure the availability of medical and psychological services to all members of the community.[420] The Court has also awarded compensation for both the pecuniary and non-pecuniary harms suffered by indigenous communities, but has typically provided that such compensation should be placed in a community development fund earmarked for educational, housing, health,

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[414] *See* WCRO REPORT, *supra* note 20, at 6; Magarrell, *supra* note 389, at 5.
[415] Magarrell, *supra* note 389, at 5; Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW 157, 169 (2004) ("harms to community life and trust cannot easily be redressed through individual awards").
[416] Magarrell, *supra* note 389, at 5.
[417] Lubanga Reparations Order Appeal, *supra* note 175, at par. 215.
[418] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 51-182, 197-217; *Saramaka People v. Suriname*, *supra* note 101, at par.. 88-96; *Centre for Minority Rights Development v. Kenya*, *supra* note 103, at par.. 173, 238, 251.
[419] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 281-83; *Saramaka People v. Suriname*, *supra* note 101, at par.. 115-16, 120-23.
[420] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 281-83.

sanitation, and other projects for the benefit of the community.[421] In addition, the Court has specified detailed procedures for determining how the funds shall be spent.[422] Finally, where individual pecuniary and non-pecuniary harm have been established – such as the deaths of family members within the community – the Court has awarded compensation to be distributed by the community leaders in accordance with the community's customs and decision-making procedures.[423]

Collective awards may also be preferable where a large number of people were harmed, but only some of them participated in court proceedings and applied for reparations.[424] Particularly in settings of conflict or mass atrocities, or where the harm is targeted at indigenous communities, many victims may not have access to, or the resources to hire counsel or approach a court.[425] In these situations, awarding only individual reparations to those victims who brought the case without providing anything for similarly-situated victims would not only be unjust, but could risk exacerbating tensions in the community.[426] For example, the ECCC – in the context of mass crimes concerning more than 12,000 direct victims and many more indirect victims – observed that collective reparations, and particularly those aimed at a large number of beneficiaries, were more appropriate than individual reparations because individual reparations would necessarily exclude other individuals who were equally deserving, who were not aware of the possibility of engaging in the case as a civil party, or who were not in a financial or logistical position to become a civil party.[427] According to the court, collective reparations also had the potential to serve a reconciliatory function.[428]

Finally, collective awards may be preferable in order to maximise limited resources.[429] Where there are insufficient resources to provide individual reparations to each person harmed, reparations that take the form of an assistance or rehabilitation program may be better suited to address victims' harm than cash payments, particularly where the amount of payment to a given individual may be nominal.[430] Studies have shown that victims often value forward-looking reparations and reparations that will benefit their children, which may weigh against a one-time distribution of nominal monetary compensation.[431] In addition, individual cash payments risk increasing tensions within a community, a negative externality that

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[421] *See, e.g.*, *id.* par. 323; *Saramaka People v. Suriname*, *supra* note 101, at par. 202.
[422] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 323-24.
[423] *Id.* par. 325.
[424] Lubanga Reparations Order Appeal, *supra* note 175, at par. 153.
[425] Magarrell, *supra* note 389, at 3; Kaing Appeal Judgment, *supra* note 1, at par. 659.
[426] Magarrell, *supra* note 389, at 5.
[427] Kaing Appeal Judgment, *supra* note 1, at par. 659.
[428] *Id.* par. 660.
[429] Katanga Reparations Order, *supra* note 56, at par. 292.
[430] WCRO REPORT, *supra* note 20, at 6; FERSTMAN, GOETZ AND STEPHENS, *supra* note 391, at 341 (where funds are limited, individual awards "could result in *de minimus* awards that can lose all practical meaning for beneficiaries").
[431] WCRO REPORT, *supra* note 20, at 6; Magarrell, *supra* note 389, at 6; Naomi Roht-Arriaza, *supra* note 415, at 180-81.

collective reparations may help to avoid.[432]

Nonetheless, collective reparations come with their own set of challenges. It can be difficult to define beneficiary communities, or to justify which beneficiary communities should benefit, particularly in cases of large-scale atrocities.[433] Victims may resist collective reparations, perceiving such reparations as inadequate to address the personal violations and suffering they experienced.[434] Even with respect to collective reparations programmes, there may be insufficient resources, forcing critical decisions about which victims to prioritise.[435] States may attempt to relabel development programmes – which already were underway and to which the victims already were entitled – as reparations programmes.[436] Where entire communities benefit from reparations, perpetrators who reside in those communities may also inadvertently benefit, stoking tensions.[437] And it can be difficult to gain consensus within a community as to the appropriate reparations, a challenge addressed in the next section.

Assessing the Content of Collective Reparations

In order to determine the appropriate forms and content of collective remedies, a "full assessment[] of the nature of harm and the extent of its effects as well as the specific needs of the collective" should be undertaken.[438] As with all reparations, courts should consult with the victims in conducting this assessment, as the participation of victims in designing and implementing reparations programmes is essential to ensuring that the reparations are effective and meaningful.[439] This is especially critical in the context of collective reparations, as victims "may have varying opinions and needs on the nature or form of" appropriate reparations, even where they have been subjected to the same violations or crimes.[440] To ensure that these different perspectives are heard, opportunities should be provided for "full and informed participation of the collective in the reparation process."[441] In addition, because collectives are not immune from internal discrimination and inequalities, special measures should be taken to ensure that the voices of all victims are heard and considered, including victims with special vulnerabilities due to age, sex, status, or other reasons.[442]

The Inter-American Court has a particularly robust jurisprudence on victim consultation procedures in the context of indigenous communities. Although the Court

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[432] WCRO REPORT, *supra* note 20, at 6; Magarrell, *supra* note 389, at 5.
[433] Magarrell, *supra* note 389, at 6.
[434] *Id.*
[435] *See id.* at 9.
[436] *Id.* at 6-7.
[437] *Id.* at 7.
[438] *See* African Commission General Comment No. 4, *supra* note 1, at par. 52.
[439] Magarrell, *supra* note 389, at 9.
[440] *Id.*
[441] *Id.*
[442] *Id.*

orders specific remedies in these cases, it often cannot set out all of the details of implementation of those remedies, such as the exact borders of traditional lands to be returned to a community. As a result, it frequently orders the State to undertake certain specific remedies within specific timeframes and in consultation with the leaders and representatives of the community involved.[443] The Inter-American Court also has specified that, in determining the consensus of the community, the community shall be permitted to use its traditional methods of decision-making.[444]

iii. Compliance

Compliance with reparations awards remains one of the most challenging issues facing human rights bodies and courts, and yet one over which they have the least control.[445] A study of reparations in the Inter-American system, for example, found that States failed to comply with 50% of the remedies ordered, partially complied with another 14% of awarded remedies, and fully complied with just 36% of ordered remedies.[446] A similar study of compliance with reparations decisions of the African Commission concluded that States did not comply with the Commission's recommendations in 30% percent of cases, partially complied in 32% percent of cases, and fully complied in just 14% percent of cases.[447]

As noted in the sections on each form of reparations, some kinds of reparations, such as compensation, typically have higher levels of compliance than others.[448] The likelihood of State compliance with specific reparations should not, however, factor into a court's decision on the type of reparations it issues. As one scholar has observed:

> The risk of non-compliance may make courts reluctant to issue an order, especially because the wrongdoer has already shown a disregard for the substantive law. When, however, a court bases its decision exclusively on the likelihood of obedience, it improperly places the victim's rights at the mercy of the state's obduracy.[449]

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[443] *E.g.*, Xákmok Kásek Indigenous Community v. Paraguay, *supra* note 102, par.. 283, 285, 297, 301.
[444] *Id.* par. 286.
[445] PASQUALUCCI, *supra* note 129, at 303 ("The effectiveness of . . . reparations orders is dependent on their execution and implementation by the State.").
[446] Basch, *supra* note 290, at 18. The Inter-American Commission on Human Rights similarly found that States failed to comply at all in 18% of cases, partially complied in 69.5% of cases, and fully complied in just 12.5% of cases. Courtney Hillebrecht, *The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System*, 34 HUMAN RIGHTS QUARTERLY 959, 961 (2012).
[447] Frans Viljoen & Lirette Louw, *State Compliance with the Recommendation of the African Commission on Human and Peoples' Rights 1994-2004*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 6 (2007). The amounts do not add up to one hundred percent because some cases had insufficient information to determine their level of compliance and some were not counted due to governmental changes. *Id.* at 6-7.
[448] *See infra* pp. 54-55, 61, 69, 73.
[449] SHELTON, *supra* note 4, at 401.

Instead, courts may employ – and have employed – a variety of strategies to increase compliance with all reparations measures, including:

i. providing that documents submitted in a case shall be made public, unless there are good reasons not to do so;[450]

ii. requiring the State to report back to the court or human rights body after a specified period of time on its progress implementing the measures of reparations ordered;[451]

iii. undertaking visits to the country to follow up on the status of compliance;[452]

iv. automatically placing a case on a supervising body's agenda for consideration and review after a certain period of time;[453]

v. designating a Special Rapporteur to follow up on measures taken by States;[454] and

vi. imposing additional costs on States that fail to implement the ordered reparations within a specified period of time.[455]

Although State compliance is likely to always be an issue, the available evidence suggests that compliance can be improved by greater monitoring and follow up of reparations decisions.[456]

[450] SHELTON, *supra* note 4, at 437; U.N. Human Rights Committee, Rules of Procedure of the Human Rights Committee, Rule 103 (Jan. 11, 2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f3%2fREV.10&Lang=en.
[451] *Dawas and Shava v. Denmark*, *supra* note 370, at par. 11 (90 days); *Gelle v. Denmark*, Comm. No. 34/2004, U.N. Committee on the Elimination of Racial Discrimination, Decision, par. 10 (Mar. 6, 2006) (six months), http://juris.ohchr.org/Search/Details/1737; *Jallow v. Bulgaria*, *supra* note 366, at par. 8.9; *Hadi v. Sudan*, *supra* note 221, at par. 93(iii) (180 days); *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 355(18) (one year); *Saramaka People v. Suriname*, *supra* note 101, at par. 214(15) (one year).
[452] Viljoen & Louw, *supra* note 447, at 17.
[453] SHELTON, *supra* note 4, at 436.
[454] U.N. Human Rights Committee Rules of Procedure, *supra* note 450, Rule 101.
[455] *E.g.*, *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 288 (requiring the State to pay $10,000 for every month of delay in implementing the reparations).
[456] Viljoen & Louw, *supra* note 447, at 17.

G. Quantum of Monetary Reparations

As noted above, monetary reparations are one of the most common forms of reparation requested by victims and awarded by regional and international courts.[457] This next section will, therefore, focus on the question of how such courts assess the appropriate quantum of the reparations.

Valuation of monetary damages is often a difficult and imperfect exercise. Some losses may be inadequately documented, some wrongs may not be fully accounted for or quantifiable, and some losses have competing measures by which they could be assessed.[458] Certain kinds of damages, particularly those dealing with future losses, may be inherently uncertain due to the impossibility of knowing what might have happened without the violation.[459] Even those wrongs that initially appear to call for straightforward evaluation, such as the loss of property, may have myriad consequences on the victim, entailing not only the immediate financial loss of the property itself, but also the loss of rights related to the property and emotional harms.[460] The following sub-sections assess how human rights bodies and courts deal with these difficult questions, including the disparate approaches taken by these bodies, the types of monetary damages commonly awarded, the factors used to guide courts' discretion, and the key issues and challenges in this area.

1. Approaches to setting the quantum of monetary compensation

International and regional courts and human rights bodies have adopted two disparate approaches for determining the quantum of monetary reparations. The African Court of Human and Peoples' Rights,[461] as well other regional and special African courts,[462] typically specify an exact sum of monetary compensation to be paid to the victims when they determine that monetary reparations are appropriate. Other human rights and international criminal courts have a similar approach.[463] By contrast,

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[457] *See supra* p. 56.
[458] *See* SHELTON, *supra* note 4, at 315.
[459] *See, e.g.*, *Kurić v. Slovenia*, App. No. 26828/06, European Court of Human Rights, Judgment (Just satisfaction), par. 82 (Mar. 12, 2014), http://hudoc.echr.coe.int/eng?i=001-141899; *Magyarországi Evangéliumi Testvérközösség v. Hungary*, App. No. 54977/12, European Court of Human Rights, Judgment (Just satisfaction), par. 38 (Apr. 25, 2017), http://hudoc.echr.coe.int/eng?i=001-173104.
[460] *See Mbiankeu v. Cameroon*, *supra* note 8, at par.. 137-38, 147, 153(ii)-(iii).
[461] *See, e.g.*, *Konate v. Burkina Faso*, *supra* note 1, at par. 60(iii)-(v); *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(ii), (vi), (vii), *Umuhoza v. Rwanda*, *supra* note 11, at par. 74, *Thomas v. Tanzania*, *supra* note 11, at par. 90, *Abubakar v. Tanzania supra* note 11 at par. 94 .
[462] *See, e.g.*, *Manneh v. The Gambia*, *supra* note 228, at par. 44; *Prosecutor v. Habré*, Extraordinary African Chambers, Appeals Chamber, Judgment, par. 939 (Apr. 27, 2017) (specifying an exact amount of monetary reparations). As noted above, the East African Court of Justice typically does not award monetary reparations in human rights cases, and therefore does not set a specific quantum of reparations. It is therefore not addressed in the remainder of this section.
[463] *See, e.g.*, *Z. and Others v. United Kingdom*, *supra* note 145, at par.. 131, 135; *Velásquez-Rodríguez v. Honduras*, *supra* note 1, at par. 60; Katanga Reparations Order, *supra* note 56, at par. 306. As noted in the section on forms of reparations, the Extraordinary Chambers in the Courts of Cambodia only awards collective reparations and the Special Tribunal for Lebanon may only identify victims, who may

regional and international human rights commissions and committees, such as the Inter-American Commission on Human Rights, the Human Rights Committee, and Committee against Torture, generally do not propose an appropriate quantum of monetary compensation in their recommendations. Instead, after determining that monetary compensation should be provided, they refer the matter back to the state for determination of the proper amount of compensation.[464]

The difference in approach appears to be attributable to the different levels of authority conferred on these bodies. As described in the section on approaches to reparations, human rights bodies such as commissions and committees established to monitor compliance with a human rights treaty are generally authorised only to provide their "views" on an alleged violation.[465] While these bodies serve an important function in declaring what the law is, they do not have the authority to issue binding

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then bring an action to obtain compensation in a national court or other competent body. *See supra* note 20.

In a few exceptions, courts have referred the quantum of compensation back to the national authorities where the authorities had specialised knowledge related to damages, such as where damages depended on the salary and benefits legislation of the respondent State or where "the internal courts or the specialised national institutions have specific knowledge of the branch of activity to which the victim was dedicated." *Cesti-Hurtado v. Peru*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 46 (May 31, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_78_ing.pdf; *Constitutional Court v. Peru*, *supra* note 274, at par. 121.

[464] For instance, in *Wilson v. Philippines*, the Human Rights Committee found several violations of the ICCPR, including a violation of the prohibition on torture and inhuman and degrading treatment. *Wilson v. Philippines*, Comm. No. 868/1999, U.N. Human Rights Committee, par. 8 (Oct. 30, 2003), http://juris.ohchr.org/Search/Details/1088. The Committee declared that the state "should compensate the author" and that the "compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused," but did not specify an amount. *Id.* par. 9.

For similar cases in African human rights bodies, *see, e.g.*, *Good v. Botswana*, *supra* note 228, at par. 244 (recommending that the state "provides adequate compensation"); *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo*, *supra* note 320, at par. 88 ("it is clear that the assessment of the *quantum* of such compensation is at the discretion of the courts and national authorities of the Respondent State"); *Hadi v. Sudan*, *supra* note 221, at par. 93(ii)(a*); Interights v. Democratic Republic of Congo*, *supra* note 245, at par. 85 ("the Commission . . . cannot take the place of national authorities . . . when it comes to redress of injuries suffered"). On a few occasions, the African Commission has recommended a specific amount, always in cases in which the petitioner has specified a precise amount and usually in cases in which the particular individuals who would be responsible for determining the amount of compensation are the same individuals responsible for the violations. *See, e.g.*, *Mebara v. Cameroon*, *supra* note 8, at par.. 141-42, 145(iii); *see also Interights v. Democratic Republic of Congo*, *supra* note 245, at par. 85.

For similar cases in other regional and international human rights bodies, *see, e.g.*, *E.N. v. Burundi*, Comm. No. 578/2013, U.N. Committee Against Torture, par. 9 (Nov. 25, 2015) (urging the state to "grant the complaint appropriate redress, including compensation"), http://juris.ohchr.org/Search/Details/2081; *Dawas and Shava v. Denmark*, *supra* note 370, at par. 9 (recommending "that the State party grant the petitioners adequate compensation"); *Yrusta v. Argentina*, *supra* note 56, at par. 12(d) (urging the state to provide the authors with "fair and adequate compensation"); *González Carreño v. Spain*, *supra* note 265, at par. 11(a)(i) (recommending that the state "grant the author . . . comprehensive compensation"); *Suresh v. Canada*, Case No. 11.661, Inter-American Commission on Human Rights, Report No. 8/16, par. 120 (1) (Apr. 13, 2016) (recommending that the state grant the petitioner "integral reparations, including compensation"), http://www.oas.org/en/iachr/decisions/2016/CAPU11661EN.pdf.

[465] *See supra* p. 13.

orders.[466] Instead, the ultimate authority to accept those views and determine what would be an effective remedy rests with the state, and the state therefore maintains a wide latitude to choose among different reparations options.[467] Issuing general recommendations for compensation – rather than recommending specific amounts – is a rational approach to these bodies' limited authority. Regional and international *courts*, on the other hand, have authority not only to issue binding orders, but also to determine the appropriate reparations necessary to remedy specific violations.[468] In such circumstances, referring the question of quantum of monetary reparations back to the state would be an abdication of the courts' authority and would risk undermining perceptions of justice.

2. Types of monetary damages

As described earlier, monetary compensation may be subdivided into two categories: pecuniary damages (which refer to the financial loss of the victim, including any expenses incurred) and non-pecuniary damages (which compensate for the loss in dignity and reputation of the victim, as well as mental and emotional harm).[469] The following paragraphs describe how pecuniary damages are calculated.

i. lost income and loss of future earnings

Generally, lost income and loss of future earnings are based on the actual income of the victim.[470] In certain kinds of cases, however, information about actual income may not be available or easily documented, particularly in cases concerning victims who engaged in temporary, informal, subsistence or self-employment; who are or were children; and/or which consist of non-profit charities that engage in some income-producing work or relatively new companies. Some courts have been open to flexible approaches in such circumstances, including reference to the minimum wage in the respondent country,[471] use of the average wage for the victim's profession,[472] reference to educational records to determine the type of profession and salary a victim likely

[466] *See supra* pp. 12-13.
[467] *See supra* pp. 13.
[468] *See supra* pp. 12-13.
[469] *See supra* p. 57.
[470] *See, e.g.*, *Neira-Alegría v. Peru*, *supra* note 328, at par. 49; *Kawas-Fernández v. Honduras*, *supra* note 129, at par.. 176-77 (using annual income tax returns to determine income); *Sory Toure v. Guinée*, *supra* note 274, at par.. 122-27; *Ghimp and Others v. Moldova*, App. No. 32520/09, European Court of Human Rights, Judgment (Merits and Just Satisfaction), par.. 57, 64-65 (Oct. 30, 2012), http://hudoc.echr.coe.int/eng?i=001-114099.
[471] *See, e,g.*, *Neira-Alegría v. Peru*, *supra* note 328, at par.. 49-50; *Case of the Street Children v. Guatemala*, *supra* note 73, at par. 79; *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 277.
[472] *See, e.g.*, *Bueno-Alves v. Argentina*, Inter-American Court of Human Rights, Judgment (Merits, Reparations, and Costs), par. 172 (May 11, 2007), http://www.corteidh.or.cr/docs/casos/articulos/seriec_164_ing.pdf.

would have earned,[473] use of a subsistence level wage,[474] expert estimations of the annual amount of farming income per year per acre,[475] or presumption or estimation of a loss of income where there can be no doubt that some income was lost but the exact amount is unclear.[476] Even where a victim was unemployed at the time of his or her death, courts have held it equitable to assume that the individual would eventually have had some earnings and to award an amount for lost income.[477] In cases where the available information is insufficient to calculate lost income, but it is apparent that the violation must have resulted in such losses (for example, due to the death or disappearance of a family member), some courts have awarded an amount in equity.[478]

In calculating future wages, the amount should include any annual bonus to which the victim would have been entitled under domestic law or company policy.[479] In addition, where the primary victim has died, several courts reduce the total amount of wages by a percentage reflecting the portion of the victim's wages that he or she would likely have spent on personal expenses and therefore that would not have been available to the remaining family members for their support.[480]

Some courts, such as the Inter-American Court of Human Rights, typically deduct a standard 25% for this amount,[481] while other courts review the applicants' claims regarding the portion of the victims' salary they relied upon.[482] Interest from the time of the incident to the date of judgment is also added to the amount.[483] Once a final amount is

[473] *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 83, at par. 266.
[474] *Case of El Amparo v. Venezuela*, *supra* note 318, at par. 28; *see also Utsayeva and Others v. Russia*, App. No. 29133/03, European Court of Human Rights, par.. 208-219 (May 29, 2008), https://hudoc.echr.coe.int/eng#{"itemid":["001-86605"]}.
[475] *Akdivar v. Turkey*, *supra* note 162, at par. 25.
[476] *See, e.g.*, *Open Door and Dublin Well Woman v. Ireland*, App. Nos. 14234/88 & 14235/88, European Court of Human Rights, Judgment, par.. 85-87 (Oct. 29, 1992), http://hudoc.echr.coe.int/eng?i=001-57789; Centro Europa 7 *S.R.L. v. Italy*, *supra* note 276, at par.. 218-20 (awarding a lump sum where the company "did indeed suffer a loss" but the circumstances did "not lend themselves to a precise assessment of pecuniary damage" due to the uncertain profits the company might have earned); *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *supra* note 274, at par. 40.
[477] *Akhmadova and Sadulayeva v. Russia*, *supra* note 135, at par. 143; *Imakayeva v. Russia*, *supra* note 63, at par. 213.
[478] *E.g.*, *Case of the Río Negro Massacres v. Guatemala*, *supra* note 145, at par.. 308-09.
[479] *Case of the Street Children v. Guatemala*, *supra* note 73, at par. 81.
[480] *Id.*; *Neira-Alegría v. Peru*, *supra* note 328, at par.. 48, 50.
[481] *Neira-Alegría v. Peru*, *supra* note 328, at par.. 48, 50; *Case of the Street Children v. Guatemala*, *supra* note 73, at par. 81; *Case of El Amparo v. Venezuela*, *supra* note 318, at par. 28.
[482] *Utsayeva v. Russia*, *supra* note 474, at par.. 208-19.
[483] *Case of El Amparo v. Venezuela*, *supra* note 318, at par. 28.

calculated, this amount is then adjusted to its current value on the date of judgment.[484]

Many courts accept the submission of expert reports or actuarial calculations in order to assist in determining the proper wage or other income rates and calculate the appropriate amount of compensation that should be granted.[485]

ii. lost property[486]

Reparations for lost property may compensate an individual for the loss of a broad array of moveable and immoveable possessions, including land, houses, furniture, and livestock, among others.[487] In assessing the value of property, many courts use the property's current market value, meaning the value of the property if it were sold at the time of the judgment granting reparations.[488] However, where the violation itself had the result of *decreasing* the value of the property, courts have alternatively looked to the value of the property prior to the violation.[489] Other methods of valuation exist, however, including calculation of value per meter (for houses),[490] calculation of annual income per acre (for cultivated land), and per capita estimates (for cultivated land and

[484] *See Case of the Street Children v. Guatemala*, *supra* note 73, at par. 81.
[485] *Abrill Alosilla v. Peru*, *supra* note 265, at par.. 99-107; *Akdivar v. Turkey*, *supra* note 162, at par. 25; *Tanli v. Turkey*, App. No. 26129/95, European Court of Human Rights, Judgment, par. 183 (Aug. 28, 2001), http://hudoc.echr.coe.int/eng?i=001-59372.
[486] As noted in the section on forms of reparation, the preferred remedy for property losses is restitution when possible. *See, e.g.*, *Hentrich v. France*, *supra* note 275, at par. 71 (declining to consider whether to order monetary reparations for land because the "best form of redress would . . . be for the State to return the land" and reserving the question until the parties explored the possibility of an agreement); *Mbiankeu v. Cameroon*, *supra* note 8, at par. 131; *see also supra* note 245. Where restitution is not possible, monetary compensation is routinely ordered. *See, e.g.*, *Mbiankeu v. Cameroon*, *supra* note 8, at par. 153; Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par. 230; *Mahamadou v. Mali*, *supra* note 275, at par.. 71-73. The African Court has concurred that loss of property may be compensated, but has not yet awarded such compensation due to insufficient evidence. *Konate v. Burkina Faso*, *supra* note 1, at par.. 45-47.
[487] *See Case of the Ituango Massacres v. Colombia*, *supra* note 52, at par. 174; *Akdivar v. Turkey*, *supra* note 162, at par.. 15-34 (awarding compensation for the loss of houses, land, household property, livestock and feed, and alternative accommodation); Katanga Reparations Order, *supra* note 56, at par.. 76-101.
[488] *E.g.*, *Mbiankeu v. Cameroon*, *supra* note 8, at par. 136; *Hentrich v. France*, *supra* note 275, at par. 71; *Papamichalopoulos v. Greece*, *supra* note 245, at par. 37.
[489] *See, e.g.*, *Chiriboga v. Ecuador*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par.. 41, 82 (Mar. 3, 2011), http://www.corteidh.or.cr/docs/casos/articulos/seriec_222_ing.pdf.
[490] *Akdivar v. Turkey*, *supra* note 162, at par.. 17-19.

livestock).[491] Due to the complexity of determining the value of property, particularly land, expert opinions are often requested and consulted.[492]

iii. lost opportunities

Lost opportunities include, *inter alia*, lost education, social benefits, and business opportunities.[493] These damages are particularly challenging to assess because the financial benefits those opportunities might have conferred often depend on many other factors, such as existing job markets and business competition.[494] Despite these difficulties, courts frequently award in equity damages for lost opportunities, recognising that at least some losses were incurred and that it would be unfair not to award damages due to the uncertainty of the amount.[495] In some instances, however, courts simply order the provision of the lost opportunity, such as educational or social benefits.[496]

iv. medical expenses

In addition to past medical expenses, courts are increasingly awarding compensation for future medical needs.[497] Courts also have awarded damages for the medical expenses or future medical expenses of next of kin who suffered physical or psychological ailments caused by the

[491] *Id.* par.. 21, 25-26; Katanga Reparations Order, *supra* note 56, at par. 101.
[492] *See, e.g.*, *Mbiankeu v. Cameroon*, *supra* note 8, at par. 142 (noting that the complainant should have provided an expert assessment); *S.L. and J.L. v. Croatia*, App. No. 13712/11, European Court of Human Rights, Judgment (Just Satisfaction), par.. 18-20 (Oct. 6, 2016), http://hudoc.echr.coe.int/eng?i=001-178604; *Gawęda v. Poland*, *supra* note 276, at par. 54; *Akdivar v. Turkey*, *supra* note 162, at par.. 6, 15-34.
[493] *See, e.g.*, Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par. 230; *Centro Europa 7 S.R.L. v. Italy*, *supra* note 286, at par. 219; *Magyarországi Evangéliumi Testvérközösség v. Hungary*, *supra* note 459, at par.. 38-39; *Gawęda v. Poland*, *supra* note 276, at par. 54.
[494] *See Kurić v. Slovenia*, *supra* note 459, at par. 82; *Magyarországi Evangéliumi Testvérközösség v. Hungary*, *supra* note 459, at par. 38.
[495] *See, e.g.*, *Kurić v. Slovenia*, *supra* note 459, at par. 82; *Magyarországi Evangéliumi Testvérközösség v. Hungary*, *supra* note 459, at par. 38; *Gawęda v. Poland*, *supra* note 276, at par. 54; *Mohammed El Tayyib Bah v. Sierra Leone, supra* note 151, at p. 17 (considering fact that the victim became unemployable due to the violation, and therefore lost the opportunity to engage in other employment, in determining the amount of compensation).
[496] *See supra* pp. 61-64 (section on rehabilitation).
[497] *See, e.g.*, *Z. and Others v. United Kingdom*, *supra* note 145, at par.. 124-27; *Molina-Theissen v. Guatemala*, *supra* note 283, at par. 71; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 51(b); *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 129(d). Requests for such compensation are usually supported by expert medical testimony or reports. *See, e.g.*, *Z. and Others v. United Kingdom*, *supra* note 145, at par. 114; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 51(b).

harm to their family member, including, but not limited to, where the family member was disappeared or killed.[498]

v. other expenses

In some instances, human rights violations result in additional expenses for victims and their family members. For example, where an individual is wrongfully imprisoned, the individual's family may incur expenses to visit him or her.[499] Violations resulting in death generally incur funeral expenses, including the costs of travel to attend the funeral.[500] Family members may also incur expenses to investigate the violations, such as searching for loved ones who have been forcibly disappeared.[501] Courts routinely award damages for these expenses.[502]

vi. legal costs and expenses

To be reimbursable, legal costs and expenses must be "actually incurred, . . . necessarily incurred, . . . and reasonable."[503] It is well established that legal costs and expenses include those incurred at both the domestic and international levels,[504] since these costs are "a natural consequence of the effort made by the victim, his or her beneficiaries, or representative to obtain a court settlement recognising the violation committed and establishing its legal consequences."[505] Awards for legal costs and expenses should include, *inter alia*, attorneys' fees, expert fees, communication costs, court fees, and the expenses incurred for the

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[498] *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 51(d), (f) (awarding medical expenses to the victim's mother, who suffered from physical and mental ailments due to her son's incarceration, and future medical and psychiatric expenses to the victim's brother); *Gomes Lund v. Brazil*, *supra* note 216, at par. 269 (awarding money for medical and psychological treatment of the victim's mother); *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 129(d) (awarding money for future medical needs of victim's children); *Molina-Theissen v. Guatemala*, *supra* note 283, at par. 58(2).

[499] *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 51(c); *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 129(c); *Konate v. Burkina Faso*, *supra* note 1, at par. 49.

[500] *Kawas-Fernández v. Honduras*, *supra* note 129, at par. 171.

[501] *Id.* par. 169; *Gomes Lund v. Brazil*, *supra* note 216, at par. 304; *Molina-Theissen v. Guatemala*, *supra* note 283, at par. 58(1).

[502] *See Cantoral-Benavides v. Peru*, *supra* note 71, at par. 51(c); *Konate v. Burkina Faso*, *supra* note 1, par. 49; *Gomes Lund v. Brazil*, *supra* note 216, at par. 304; *Kawas-Fernández v. Honduras*, *supra* note 129, at par.. 171-73.

[503] *Oneryildiz v. Turkey*, *supra* note 206, par.. 175; *Akhmadova and Sadulayeva v. Russia*, *supra* note 135, at par. 151-52. *See also Case of the Santo Domingo Massacre v. Colombia*, *supra* note 207, at par. 342.

[504] *Mtikila v. Tanzania*, *supra* note 1, at par. 39, *Guehi v. Tanzania*, *supra* note 11, at par. 188, par. 200; *Garrido and Baigorria v. Argentina*, *supra* note 7, at par. 79; *La Cantuta v. Peru*, *supra* note 7, at par. 243; *Case of the Santo Domingo Massacre v. Colombia*, *supra* note 207, at par. 342; European Court of Human Rights, Rules of Court, Practice Directions, Just satisfaction claims, par. 16 (Sept. 19, 2016) [hereinafter "ECHR Rules of Court Practice Directions"], https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf.

[505] *Garrido and Baigorria v. Argentina*, *supra* note 7, at par. 79; *see also Abrill Alosilla v. Peru*, *supra* note 265, at par.. 133, 137; *Cantoral-Benavides v. Peru*, *supra* note 71, at par.. 85-87; *Constitutional Court v. Peru*, *supra* note 274, at par. 120.

victim to appear at hearings.[506] Where investigative costs were incurred, such as the exhumation and forensic analysis of victims, these expenses are also reimbursable.[507] In addition, such costs may cover the expenses incurred by the victim in trying to prevent the violation from occurring.[508] Finally, some courts have awarded amounts for future expenses which the victims are likely to incur to monitor compliance with the judgment.[509]

In determining the appropriate amount of costs and expenses, some courts have observed that these are not limited to the amounts usually available for domestic proceedings, since matters that ultimately come before supra-national courts are generally more complex, subject to greater qualitative requirements, and take more time.[510] In addition, some courts permit reasonable estimates of these expenses, since it is reasonable to infer that at least some expenses must have been incurred to obtain legal representation and participate in the public hearings of the case.[511] Where those legal costs and expenses were incurred by non-profit or legal aid organisations on behalf of the victim, some courts deduct those amounts and only award the expenses actually incurred by the victim.[512] The better practice, however, would be to order awards for those amounts, to be paid directly to the organisation,[513] as this recognises the critical work by the organisation in pursuing justice and ensures that the organisation can continue this work in the future. However, if the domestic authorities have already paid all or some of the legal fees and costs incurred by the victim or organisations working on the victim's behalf, those amounts should be deducted from the award of legal fees.[514]

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[506] *See, e.g.*, *Lingens v. Austria*, *supra* note 278, at par.. 52-54; *Saidykhan v. The Gambia*, *supra* note 58, at par. 48; *Zongo v. Burkina Faso*, *supra* note 1, at par.. 79, 87, 91, 94, 111(vii); *Umuhoza v. Rwanda*, *supra* note 11, at par. 74; *Goiburú v. Paraguay*, *supra* note 58, at par. 180; *Garrido and Baigorria v. Argentina*, *supra* note 7, at par.. 80-85; Cotton Field Case, *supra* note 207, at par. 596; Lubanga Decision establishing the principles and procedures to be applied to reparations, *supra* note 136, at par. 230; ECHR Rules of Court Practice Directions, *supra* note 504, at par. 16.
Although human rights bodies do not usually specify exact amounts of monetary reparations, they also have urged states to provide compensation for lost legal costs and expenses at both the domestic and international level. *See, e.g.*, *Good v. Botswana*, *supra* note 228, at par. 244(1).

[507] *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, *supra* note 117, at par.. 391, 393.

[508] ECHR Rules of Court Practice Directions, *supra* note 504, at par. 16.

[509] *Case of the "Las Dos Erres" Massacre v. Guatemala*, *supra* note 145, at par. 303; Cotton Field Case, *supra* note 207, at par. 596.

[510] *Zongo v. Burkina Faso*, *supra* note 1, at par.. 85-87.

[511] *See, e.g.*, *Abrill Alosilla v. Peru*, *supra* note 265, at par.. 137-39.

[512] ECHR Rules of Court Practice Directions, *supra* note 504, at par. 18; *Oneryildiz v. Turkey*, *supra* note 206, at par. 175; *A. v. United Kingdom*, *supra* note 207, at par. 37; LEACH, *supra* note 112, at 408.

[513] *Case of the Santo Domingo Massacre v. Colombia*, *supra* note 207, at par.. 340 n. 472, 344; *Case of the "Las Dos Erres" Massacre v. Guatemala*, *supra* note 145, at par. 303; *Case of the Rochela Massacre v. Colombia*, *supra* note 207, at par. 306.

[514] ECHR Rules of Court Practice Directions, *supra* note 504, at par. 18.

With respect to non-pecuniary damages, human rights and international criminal courts routinely award damages to victims for the psychological harm, distress, fear, frustration, anxiety, inconvenience, humiliation, and reputational harm caused by the violation.[515] In addition to these emotional harms, courts have also taken into consideration the effect of violations on the victim's family, family life and relationships.[516] Non-pecuniary damages are particularly difficult to quantify, since there are no market rates for or standard monetary values placed on emotional well-being. To fix values for such damages, human rights courts typically assess a wide variety of factors, from the gravity of the violation to the intentions of the state. These factors are addressed in greater detail in the section on discretionary factors, below.

Finally, in some cases, international and regional courts have awarded "nominal," or token, damages for violations. Such awards are infrequent, however, perhaps because a finding of a human rights violation – which is intrinsically serious – is a prerequisite for such damages. Nominal damages have been awarded, however, in cases in which relatively minor violations occurred and were already remedied, in large part, by the state. For example, in *Engel v. The Netherlands*, the European Court awarded nominal damages for an unlawful detention where the detention had lasted less than a day and a half and where the harm of that illegal detention was offset by an equivalent reduction in the victim's sentence.[517]

3. Discretionary factors

Human rights and international criminal courts have considerable discretion in setting the appropriate level of compensation.[518] To help guide this discretion, regional and international courts often consider several factors, of which the most important are the gravity of the violation and the deliberateness of the violation.

With respect to gravity, courts often award higher amounts for more severe violations.[519] For instance, in *Z and Others v. United Kingdom*, the victims, all of whom

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[515] *Aydin v. Turkey*, *supra* note 281, at par. 131; *Hokkanen v. Finland*, *supra* note 281, at par. 77; *Van Der Leer v. The Netherlands*, *supra* note 281, at par. 42; *Olsson v. Sweden* (No. 1), *supra* note 281, at par. 102; *Zongo v. Burkina Faso*, *supra* note 1, par. 27; *Okomba v. Benin*, *supra* note 280, at p. 25; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 289.

[516] *Olsson v. Sweden* (No. 1), *supra* note 281, at par. 102; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 53; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 289; *Goiburú v. Paraguay*, *supra* note 58, at par.. 159-60; *Molina-Theissen v. Guatemala*, *supra* note 283, at par.. 69-70. The Inter-American Court has explicitly increased the amount of non-pecuniary damages awarded to minors for the disappearance or death of a parent, holding that being a minor increases the level of suffering and subjects them to a lack of protection. *E.g.*, *Goiburú v. Paraguay*, *supra* note 58, at par. 160(b)(iii); *Umuhoza v. Rwanda*, *supra* note 11, at par. 62, par. 72, *Rashidi v. Tanzania supra* note 11 at par. 131.

[517] *Engel et al v. The Netherlands*, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, European Court of Human Rights, Judgment, par. 10 (Nov. 23, 1976), http://hudoc.echr.coe.int/eng?i=001-57478.

[518] *See, e.g.*, *Shesti Mai Engineering Ood v. Bulgaria*, *supra* note 145, at par. 101 (noting that the court "enjoys a certain discretion" in awarding reparations).

[519] *See, e.g.*, Katanga Reparations Order, *supra* note 56, at par. 263 (the scope of liability for reparations "must be proportionate to the harm caused"); Lubanga Reparations Order Appeal, *supra* note 175, at par. 118 (same); *Case of the Río Negro Massacres v. Guatemala*, *supra* note 145, at par. 272 (the

were children, suffered years of serious abuse and neglect that left several of them with ongoing physical injuries and psychiatric illnesses.[520] The European Court of Human Rights accordingly entered "a substantial award to reflect their pain and suffering."[521] Studies have also found that certain kinds of violations seen as the most grave, such as those violating the rights to life or physical and mental integrity, generally receive higher amounts of compensation compared to other violations, such as procedural justice breaches.[522] For example, the ECOWAS Community Court of Justice has imposed exceptionally high awards for torture[523] and prolonged *incommunicado* arbitrary detention without trial.[524] And in *Heliodoro Portugal v. Panama*, the Inter-American Court of Human Rights considered the "gravity" of the crime of forced disappearance in determining the amount of non-pecuniary damages to award family members.[525]

In contrast, courts sometimes provide lower awards where the violations by the State were not deliberate. In *Price v. United Kingdom*, for example, the European Court of Human Rights set the level of compensation based, in part, on the fact that the ill-treatment the victim suffered was not based on an "intention to humiliate or debase" but due to the inadequacy of detention facilities for disabled persons.[526] By contrast, the United Nations Compensation Commission, which was created to process claims and pay compensation for damages due to Iraq's invasion and occupation of Kuwait in 1990-91,[527] decided that victims of torture should receive the

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"gravity of the effects" of the violations should be considered in determining reparations); *Aksoy v. Turkey*, *supra* note 277, at par. 113 (awarding the full amount of compensation sought by the victim due to the "extremely serious violations"). Although human rights bodies, as opposed to courts, generally do not set a specific quantum of compensation, they also have agreed that the compensation provided to the victim "should take due account both of the seriousness of the violations and the damage to the author caused." *Wilson v. Philippines*, *supra* note 464, at par. 9; *see also* CAT General Comment No. 3, *supra* note 56_, at par. 6 (reparations should "be proportionate in relation to [the] gravity of the violations committed").

[520] *Z. and Others v. United Kingdom*, *supra* note 145, at par. 130.

[521] *Id.* par. 130.

[522] Szilvia Altwicker-Hàmori, Tilmann Altwicher, and Anne Peters, *Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights*, HEIDELBERG JOURNAL OF INTERNATIONAL LAW, 1, 41 (2016) (examining awards for different types of violations at the European Court of Human Rights), http://www.mpil.de/files/pdf4/Quant_Human.Rights1.pdf. There are not yet enough decisions from the African Court to conduct a comparative analysis, but the family members in the *Zongo* case, in which the primary victims died, were compensated significantly more overall than the victims in the *Konate* case, although the year-long detention suffered in that case was not a "procedural" breach. Compare *Zongo v. Burkina Faso*, *supra* note 1, at par. 111, *with Konate v. Burkina Faso*, *supra* note 1, at par.. 3, 60.

[523] *Saidykhan v. The Gambia*, *supra* note 58, at par.. 3, 5, 37-38, 41, 47 (awarding $200,000 USD).

[524] *Manneh v. The Gambia*, *supra* note 228, par.. 22, 27, 40, 41, 44(c) (awarding $100,000 USD).

[525] *Heliodoro Portugal v. Panama*, Inter-American Court of Human Rights, Judgment (Preliminary objections, Merits, Reparations and Costs), par. 239 (Aug. 12, 2008), http://www.corteidh.or.cr/docs/casos/articulos/seriec_186_ing.pdf.

[526] *Price v. United Kingdom*, Application No. 33394/96, European Court of Human Rights, Judgment (Merits and Just Satisfaction), par.. 24-30, 34 (July 10, 2001), http://hudoc.echr.coe.int/eng?i=001-59565.

[527] United Nations Compensation Commission, https://www.uncc.ch.

maximum amount of compensation permitted because, *inter alia*, "torture is deliberate."[528]

4. Key Issues and Challenges

In addition to the inherent difficulties in valuing damages, several key issues and challenges arise out of the jurisprudence on assessing the quantum of reparations. This section considers some of the most salient issues and challenges likely to arise before the African Court of Human and Peoples' Rights.

i. Whether and to what extent domestic conditions should be considered in setting the quantum of reparations

Domestic conditions, particularly the level of economic and social development, vary widely across countries. One of the key questions that regional and international courts have faced has been whether and to what extent domestic conditions should be considered in setting the quantum of monetary reparations. Issuing consistent decisions in cases with similarly situated victims – at both the merits and reparations stages – is crucial to maintaining the perception of fairness and justice by victims, advocates, court observers, and others. In the international context, however, the need for consistency points in two opposing directions, since increased *consistency* at the regional or international level may increase *inconsistency* between those victims and similarly situated victims who seek redress in domestic fora.[529]

There is a considerable consensus that domestic conditions can, and should, be considered in assessing pecuniary damages.[530] Pecuniary damages compensate a victim for actual financial losses – losses which depend in turn on the cost of living in the respondent State. Determining, for example, how much an individual lost when his or her house was destroyed depends on how much it cost the individual to build a house in the local market.[531] Likewise, determining how much income an individual lost when he or she was illegally terminated from employment depends on the actual salary for that position in the respondent State – or, where information about the victim's actual wages are not available, the wages of similarly situated individuals or

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[528] United Nations Compensation Commission, Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US$100,000, p. 261 (Dec. 21, 1994), https://www.uncc.ch/sites/default/files/attachments/documents/r1994-03.pdf. The recommendations were adopted by the UNCC's governing council. *See* United Nations Compensation Commission, Decision Concerning the First Instalment of Individual Claims for Damages up to US$100,000, par. 1 (Dec. 19, 1994), https://www.uncc.ch/sites/default/files/attachments/dec_25.pdf.

[529] *See* MCCARTHY, *supra* note 20, at 163.

[530] *Id.*; Katanga Reparations Order, *supra* note 56, at par.. 188-89.

[531] *See, e.g.*, Katanga Reparations Order, *supra* note 56, at par. 188 (observing that "the monetary assessment of pecuniary harm is inseverable from the economic context of the [victim's] region and . . . village" and that the valuation of destroyed property must be based on "prices on the local market").

the minimum wage in the respondent State.[532] Providing standard sums for various categories of pecuniary damages would undercompensate those who live in more expensive cities or countries, thereby failing to repair the harms of the violation. Meanwhile, standard sums would unjustly enrich those who live in areas where the cost of living is low, providing them with far more than they actually lost.

By contrast, the idea of incorporating considerations of domestic conditions into the assessment of non-pecuniary damages is controversial. The field of human rights is founded on the belief that "every human being has an equal and inherent moral value or status."[533] The psychological and emotional harm that human rights violations cause to victims does not vary based on the victim's financial situation.[534] Consistent with these principles, some courts, such as the International Criminal Court, have held that local economic conditions are "immaterial" to the determination of non-pecuniary damages.[535] Other courts, however, such as the European Court of Human Rights, while agreeing that domestic levels of compensation are "not decisive," have found them "relevant."[536] Studies on the European Court of Human Rights have confirmed that economic circumstances play a partial role in determining the amount of non-pecuniary damages awarded.[537] Some academics have justified this approach by noting that although the harm to the victims may not vary based on economic circumstances, the ability of a financial award to "provide solace to the victim" or his or her family does, in fact, "depend on the purchasing power of the sum of money" in the victim's country.[538]

As the African Court of Human and Peoples' Rights advances to the reparations stage in an increasing number of cases, it will have to decide whether and to what extent domestic conditions should influence the quantum of monetary reparations. Consistent jurisprudence in regional and human rights bodies suggests that pecuniary damages are "inseverable" from domestic socio-economic conditions, but that these conditions should play, at most, a limited role in the assessment of non-pecuniary damages.

ii. Valuation of damages in contexts of mass violations

Some of the cases that have come before international human rights and criminal courts concern situations of mass human rights violations that concern

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[532] *See, e.g.*, *Neira-Alegría v. Peru*, *supra* note 328, at par.. 49-50 (using the minimum wage in the respondent country); *Bueno-Alves v. Argentina*, *supra* note 472, at par. 172 (using the average wage for the victim's profession in the respondent country).
[533] SHELTON, *supra* note 4, at 346.
[534] *See* Katanga Reparations Order, *supra* note 56, at par. 189.
[535] *Id.*
[536] *Z. and Others v. United Kingdom*, *supra* note 145, at par. 131 (finding domestic levels of compensation relevant to its assessment of all damages, both pecuniary and non-pecuniary); *see also* ECHR Rules of Court Practice Directions, *supra* note 504, at par. 3.
[537] Altwicker-Hàmori et al., *supra* note 522, at 40, 42.
[538] *Id.* at 42.

hundreds, if not thousands, of victims.[539] Such cases raise unique concerns regarding quantification of monetary damages, including whether and how to conduct individualised assessments of damages and whether and how to prioritise damages among victims.

One of the primary challenges in assessing the quantum of damages in cases of mass violations is the impracticability of collecting and evaluating detailed evidence of damages for each victim. Taking testimony, or collecting documentary evidence, about various forms of damages from hundreds of victims and credible witnesses would not only result in intolerable delays in providing assistance to those who desperately need it, but would also create an unmanageable administrative burden on the court. International human rights and criminal courts have employed various strategies to address this issue. In some cases, the Inter-American Court of Human Rights has assessed the extent of damages of several victims whose damages are representative of those of the victims as a whole.[540] The Court then awards the same amount of damages to each individual victim.[541] The International Criminal Court (ICC), by contrast, has required each victim to provide proof of at least one form of damages, such as destruction of a house.[542] Once those damages are established, the court has used a series of presumptions based on the characteristics of the community to establish additional losses, such as presuming that those who lost a house also lost furniture, livestock, and harvests.[543] The ICC then used per capita averages and submissions by the parties to determine the quantum of those damages for all victims.[544] The use of representative victims and reasonable presumptions are both strategies that the African Court of Human and Peoples' Rights could employ in appropriate cases to more quickly evaluate claims of damages in cases with large numbers of victims.

The use of representative victims and per capita averages has an additional advantage – it results in the same quantum of damages for most or all of the victims,[545] lessening the likelihood that some victims will feel disadvantaged because they had a greater difficulty documenting their losses. Awarding identical or near-identical damages to victims, however, creates a risk that individuals with larger than average pecuniary losses will be inadequately compensated. This concern can be addressed by permitting, but not requiring, individuals to submit particularised evidence of losses when they believe their losses are unusual. For example, in *Katanga*, the ICC

[539] *See, e.g.*, *Case of the Plan de Sánchez Massacre v. Guatemala*, *supra* note 52, at par.. 66, 68 (recognising 317 victims); Katanga Reparations Order, *supra* note 56, at par. 32 (considering applications from 341 alleged victims); Al Mahdi Reparations Order, *supra* note 139, at par.. 51, 53 (recognising that the crimes affected "people throughout Mali and the international community").
[540] *See, e.g.*, *Case of the Plan de Sánchez Massacre v. Guatemala*, *supra* note 52, at par. 84.
[541] *Id.* par.. 88, 89.
[542] *See, e.g.*, Katanga Reparations Order, *supra* note 56, at par.. 76-86.
[543] *Id.* par.. 91, 99.
[544] *Id.* par.. 101, 190, 195.
[545] *See Case of the Plan de Sánchez Massacre v. Guatemala*, *supra* note 52, at par.. 88, 89; Katanga Reparations Order, *supra* note 56, at par.. 195, 202.

accepted declarations from individuals attesting that they owned larger-than-average numbers of livestock and determined their losses accordingly.[546]

Interestingly, one consequence of permitting individuals to submit individualised evidence is that they may prove that their losses were smaller than average. This occurred in *Katanga*, where some applicants submitted declarations regarding livestock ownership which indicated that they had owned less livestock than the per capita average.[547] This occurs because at least some victims must submit proof of their losses before the court decides on the relevant average to apply. Despite proof of lower than average losses, the ICC decided to award the per capita average to these victims, concluding that it would be unfair to penalise such individuals when other individuals who failed to proffer any evidence of livestock ownership (instead benefitting from a presumption) and who might likewise have had less than the per capita average were nonetheless awarded the per capita average.[548]

Another key challenge in cases of mass violation is whether and how to prioritise damages to victims. Although in principle "all victims are to be treated fairly and equally as regards reparations,"[549] resource limitations may prevent an award to all individuals harmed by a violation. This issue arises in particular in international criminal cases, where reparations orders are limited to issuing awards against the specific defendant or defendants in the case, who may be indigent.[550] For example, in *Al Mahdi*, the ICC found that the economic losses caused by the defendant "reverberated across the entire community in Timbuktu."[551] Although the ICC concluded that these losses generally required a collective reparations response, it ordered individual damages for a small category of individuals whose losses had been most acute.[552] Moreover, because these individuals were those who had been the most harmed by the violations, the ICC found it appropriate to prioritise the individual reparations when implementing the order.[553] In other instances, prioritisation of reparations may focus on those most urgently needing assistance, such as individuals needing immediate medical care, or on the most vulnerable, such as older persons, orphans, widows, persons with disabilities, or victims of sexual violence.[554] Although the issue of prioritisation is especially relevant to the international criminal context, it could arise in the human rights context as well, since particularly large awards against some of the least developed countries could have an impact on the state's ability to finance social and economic programmes.

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[546] Katanga Reparations Order, *supra* note 56, at par. 104.
[547] *Id.* par. 105.
[548] *Id.*
[549] Al Mahdi Reparations Order, *supra* note 139, at par. 29.
[550] *See id.* par. 113 (confirming that defendant was indigent); Lubanga Reparations Order Appeal, *supra* note 175, at par.. 59, 106; Katanga Reparations Order, *supra* note 56, at par.. 327-28; Kaing Appeal Judgment, *supra* note 1, at par.. 666-68.
[551] Al Mahdi Reparations Order, *supra* note 139, at par. 76.
[552] *Id.* par.. 76, 81, 82.
[553] *Id.* par. 140.
[554] ASF REPORT, *supra* note 128, at 29.

H. Mechanisms and procedures for implementing reparations orders

The consideration of reparations does not end once a court or human rights body decides upon the forms and quantum of reparations to award. At this point, several practical considerations arise, including the currency of monetary awards, the appropriate exchange rate to be used, and how to structure awards to minors. This next section reviews in detail these practical considerations.

1. Approaches to mechanisms and procedures for implementing reparations orders

Many of the practical considerations concerning reparations relate specifically to the implementation of monetary awards. Like the question of quantum, approaches to these considerations generally fall into two broad categories. Bodies that usually specify an exact sum of monetary compensation, such as human rights courts,[555] tend to explicitly address related questions such as the appropriate currency or interest rate.[556] By contrast, because regional and international human rights commissions and committees generally do not propose a specific quantum of monetary compensation in their recommendations,[557] they typically do not find it necessary to address the practical considerations below. As a result, the following sections draw only on case law from human rights courts.[558]

2. Currency of awards

In order to set a specific quantum of monetary reparations, it is evident that a court must specify the currency of the award, as well as the currency in which the award shall be paid. Increasingly, courts tend to specify the amount of monetary reparations in a standard currency, such as the United States dollar, the Euro, or the West African FCFA,[559] even where that currency is not the currency of the respondent

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[555] *See supra* pp. 85-87. As noted above, the East African Court of Justice does not typically award monetary reparations in human rights cases, *supra* note 462, and thus its jurisprudence does not deal with the questions below.

[556] *See infra* pp. 102-04.

[557] *See supra* pp. 86-87.

[558] With respect to international criminal courts, this section includes only a handful of cases from the ICC. To date, monetary reparations at the ICC have primarily been awarded against indigent defendants who have no money to pay the award. As a result, these reparations orders have not addressed many of the practical issues, such as timing, exchange rates, or taxes, covered in this section. *See, e.g.*, Al Mahdi Reparations Order, *supra* note 139, at par. 113; Katanga Reparations Order, *supra* note 56, at par.. 327-28. This section does not address how the ICC's Trust Fund for Victims deals with reparations awards since, at this time, there is no equivalent mechanism within the African Court of Human and Peoples' Rights. As for other international criminal tribunals, as noted earlier, *see supra* note 20, the Special Tribunal for Lebanon may only identify victims, who may then bring an action to obtain compensation in a national court or other competent body and the Extraordinary Chambers in the Courts of Cambodia does not award individual monetary reparations. As a result, they have not dealt with these issues.

[559] The West African FCFA is pegged to the Euro, and therefore does not fluctuate against that currency. *See A Brief History of the CFA Franc*, African Business (Feb. 19, 2012), http://africanbusinessmagazine.com/uncategorised/a-brief-history-of-the-cfa-franc/. Awards against countries that use the FCFA are thus typically in this currency. *See, e.g.*, *Konate v. Burkina Faso*, *supra*

state.[560] This practice arose in large part to avoid the unfair impact that fluctuating and/or depreciating currencies might have on the value of an award to a victim.[561] This has been a particularly severe problem in the Inter-American system, where many Latin American countries experienced periods of hyperinflation – in one five-year period averaging over 700%.[562] As a result, some of the Inter-American Court's early awards were significantly devalued before the respondent State complied with the judgment.[563] To counteract this problem, the Inter-American Court of Human Rights began awarding monetary reparations in dollars.[564] Other courts, including the European Court of Human Rights and ECOWAS Court, have taken the same approach of using a hard currency for most decisions.[565]

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note 1, at par.. 41, 43, 49, 51, 59; *Prosecutor v. Habré* Appeals Judgment, *supra* note 462, at par. 939; *Societe Anonyme Maseda v. Mali*, Suit No. ECW/CCJ/APP/10/16, ECOWAS Community Court of Justice, Judgment, p. 9 (Jan. 24, 2017), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2017/ECW_CCJ_JUD_02_17.pdf.

[560] *See, e.g.*, *Manneh v. The Gambia*, *supra* note 228, at par. 44 (awarding monetary reparations in dollars, even though The Gambia does not use that currency); *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 18 (awarding damages in dollars); *Abrill Alosilla v. Peru*, *supra* note 265, at par. 139 (awarding monetary reparations in dollars, even though Peru does not use the dollar); *Garrido and Baigorria v. Argentina*, *supra* note 7, at par.. 91(1)-(2) (same); *Fernández Ortega v. Mexico*, *supra* note 61, at par.. 285, 304; *Konstantin Moskalev v. Russia*, App. No. 14902/04, European Court of Human Rights, Judgment (Just satisfaction), Holding par. 2 (July 31, 2014) (specifying the amount of monetary reparations in Euros, even though Russia does not use the Euro), http://hudoc.echr.coe.int/eng?i=001-145730; *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, *supra* note 272, at Holding par. 1(a) (specifying the amount of monetary reparations in Euros, even though Bulgaria did not use Euros at the time); ECHR Rules of Court Practice Directions, *supra* note 504, at par. 24 (indicating that the court typically makes monetary awards in Euros "irrespective of the currency in which the applicant expresses his or her claims"); *Plaxeda Rugumba v. Attorney General of the Republic of Rwanda*, Taxation Cause No. 2 of 2012 (Originating from Appeal No. 1 of 2012), East African Court of Justice, p. 9 (May 3, 2013) (awarding costs in dollars), http://eacj.org/wp-content/uploads/2013/09/Plaxeda_Lugumba_Taxation_Ruling_AD.pdf; *Hon. Sitenda Sebalu v. The Secretary General of the East African Community*, Reference No. 8 of 2012 (arising out of Reference No. 1 of 2010 and Taxation Reference No. 1 of 2011), p. 39 (Nov. 22, 2013) (same), http://eacj.org/wp-content/uploads/2014/02/REFERENCE-NO-8-OF-2012.pdf; Al Mahdi Reparations Order, *supra* note 139, at par.. 118, 128, 133, 134; Katanga Reparations Order, *supra* note 56, at par. 326; *see also* ECHR Rules of Court Practice Directions, *supra* note 504, at par. 24 ("Any monetary award . . . will normally be in euros . . . irrespective of the currency in which the applicant expresses his or her claims").

[561] *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 127; *Akdivar v. Turkey*, *supra* note 162, at par. 34; Elisabeth Lambert Abdelgawad, *The execution of judgments of the European Court of Human Rights*, at 13 (2008), http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2008).pdf.

[562] *See Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment (Interpretation of the Judgment of Reparations and Costs), par. 18 (Aug. 17, 1990), http://www.corteidh.or.cr/docs/casos/articulos/seriec_09_ing.pdf; *Godínez-Cruz v. Honduras*, Inter-American Court of Human Rights, Judgment (Interpretation of the Judgment of Reparations and Costs), par. 18 (Aug. 17, 1990), http://www.corteidh.or.cr/docs/casos/articulos/seriec_10_ing.pdf.

[563] *See, e.g.*, *Velásquez-Rodríguez v. Honduras* (Interpretation of the Judgment of Reparations and Costs), *supra* note 562, at par.. 18, 41; *Godínez-Cruz v. Honduras*, *supra* note 562, at par.. 40-43.

[564] *See, e.g.*, *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 127.

[565] *See, e.g.*, *Manneh v. The Gambia*, *supra* note 228, at par. 44; *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 18 (awarding damages in dollars); *Konstantin Moskalev v. Russia*, *supra* note 560, at Holding par. 2; *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, *supra* note 272, at Holding par. 1(a); ECHR Rules of Court Practice Directions, *supra* note 504, at par. 24.

The principal exception to this practice appears to be with respect to Nigeria, for which ECOWAS sometimes making awards in U.S. dollars and sometimes in Nigerian Naira. Though the court has not been explicit as to the rationale for this difference, it appears to depend on the request of the petitioner.

3. Currency of payments and exchange rates

Although human rights courts typically use a hard currency, such as the dollar, Euro, or FCFA, in specifying the amount of monetary damages, some courts permit the actual payment to be made in local currency where the country does not use the currency specified in the award.[566] To preserve the real value of the award, courts generally specify an exchange rate and leave it up to the State whether to pay the award in hard or local currency.[567] As the Inter-American Court has observed, preserving "the real value of the sum received when it became due and payable," is important in "ensuring the fulfillment of the goal of *restutio in integrum* for the injuries suffered."[568] To that effect, the Inter-American Court has consistently ordered that the exchange rate to be applied shall be the one in effect in New York on the day before the payment.[569] The European Court similarly requires use of the exchange rate on the date of payment, rather than the date of the award.[570] By contrast, ECOWAS Court has typically not indicated whether the payment of monetary reparations may be made in a currency other than that specified in the award, and therefore has not indicated an exchange rate to be used for such a purpose.[571]

4. Taxes and other charges on awards

The real value of monetary reparations could also be reduced if the victim has to pay taxes or other fees on the award. To avoid this result, courts increasingly make explicit provisions for taxes in their reparations judgments, either by requiring that the State compensate the applicants for any tax charged on the award[572] or by holding

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Compare, e.g., *Wing Commander Danladi A Kwasu v. Nigeria*, *supra* note 71, at pp. 4, 29 (awarding reparations in dollars where that was the currency of the request), *with Chioma Njemanze v. Nigeria*, *supra* note 265, at pp. 12, 42 (awarding monetary reparations in Naira where the original request was in Naira).

[566] *See, e.g.*, *Oao Neftyanaya Kompaniya Yukos v. Russia* (Just satisfaction), *supra* note 148, at Holding par. 2 (specifying that the award, which was in Euros, should be converted into the currency of the respondent state); *Akkus v. Turkey*, App. No. 19263/92, European Court of Human Rights, Judgment, par. 36 (July 9, 1997), http://hudoc.echr.coe.int/eng?i=001-58034; *Aloeboetoe v. Suriname*, *supra* note 132, at par. 26; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 304.

[567] *Abrill Alosilla v. Peru*, *supra* note 265, at par. 142; *Garrido and Baigorria v. Argentina*, *supra* note 7, at par. 87; *Aloeboetoe v. Suriname*, *supra* note 132, at par. 99.

[568] *Godínez-Cruz v. Honduras*, *supra* note 562, at par. 41; *see also Velásquez-Rodríguez v. Honduras* (Interpretation of the Judgment of Reparations and Costs), *supra* note 562, at par. 29.

[569] *Abrill Alosilla v. Peru*, *supra* note 265, at par. 142; *Garrido and Baigorria v. Argentina*, *supra* note 7, at par. 87; *Aloeboetoe v. Suriname*, *supra* note 132, at par. 99.

[570] *See, e.g.*, *Akkus v. Turkey*, *supra* note 566, at par. 36; ECHR Rules of Court Practice Directions, *supra* note 504, at par. 24.

[571] Other courts, such as the Extraordinary African Chambers in the Courts of Senegal, have thus far only awarded monetary compensation in the currency of the respondent state (which currency is also a hard currency), and therefore there has been no need to address the issue of exchange rates to date. The African Court has, however, in some cases specified the U.S. dollar equivalent of its awards. *See, e.g.*, *Konate v. Burkina Faso*, *supra* note 1, at p. 16.

[572] *Konstantin Moskalev v. Russia*, *supra* note 560, at par.. 74, 77; *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, *supra* note 272, at Holding par. 1(a); *Koch v. Germany*, *supra* note 111, at Holding par. 4; *Kurić v. Slovenia*, *supra* note 459, at par. 127, Holding par. 1(a).

that no taxes should be imposed on the award.[573] Similarly, where raised by the applicant, courts often direct the State to cover the costs of other fees that may be imposed on an award, such as any fees imposed by financial institutions.[574]

5. Timing of payment and interest on late payments

Most courts set a specific timeline for payment. These periods typically range from three months to a year, depending on the court.[575] In order to prevent late payments or non-compliance, courts often specify that late payments will be subject to a penalty in the form of interest, usually set at the current bank rate in the country or of the applicable regional community bank.[576]

6. Payments to adult, minor, and indigenous victims

Awards to individual adult victims usually direct that the monetary compensation be paid directly to the victim(s)/applicant(s).[577] Where several

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[573] *Abrill Alosilla v. Peru*, *supra* note 265, at par. 144; *Caballero-Delgado and Santana v. Colombia*, *supra* note 259, at par. 64. See *Ivan v Tanzania supra* note 11, at par. 98 (vii),*Rashidi v Tanzania supra* note 11 at par. 160 (ix), *Thomas v. Tanzania*, *supra* note 11, at par. 90, *Abubakari v Tanzania supra* note 11 at par. 94 (vi), *Nganyi v Tanzania supra* note 11, at par. 94 (vi),.

[574] *E.g.*, *Suárez-Rosero v. Ecuador*, Inter-American Court of Human Rights, Judgment (Interpretation of the Judgment on Reparations and Costs), par. 28 (May 29, 1999), http://www.corteidh.or.cr/docs/casos/articulos/seriec_51_ing.pdf.

[575] *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(viii) (ordering payment within six months); Konate v. Burkina Faso, *supra* note 1, at par. 60(vii) (same); *Moreira de Azevedo v. Portugal*, App. No. 11296/84, Judgment (Article 50), Holding par. 1 (Aug. 28, 1991) (ordering payment within three months), http://hudoc.echr.coe.int/eng?i=001-57680; *Aksoy v. Turkey*, *supra* note 277, Holding par. 7 (same); *Z. and Others v. United Kingdom*, *supra* note 145, at Holding par. 5 (same); *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, *supra* note 272, at Holding par. 1(a) (same); *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 91 (requiring payment within six months); *Garrido and Baigorria v. Argentina*, *supra* note 7, at par. 86 (six months); *Abrill Alosilla v. Peru*, *supra* note 265, at par. 132 (requiring payment within one year); *Goiburú v. Paraguay*, *supra* note 58, at par. 184 (one year); *see also* Abdelgawad, *supra* note 561, at 13; ECHR Rules of Court Practice Directions, *supra* note 504, at par. 25. Of those courts that specify a quantum of monetary compensation for individual victims, the ECOWAS Community Court of Justice is the principal one that does not generally set a timeline for payment. *See, e.g.*, *Manneh v. The Gambia*, *supra* note 228, at par. 44; *Mohammed El Tayyib Bah v. Sierra Leone*, *supra* note 151, at p. 18. The Inter-American Court provides more time for payments where the victims have not been identified or where the State must determine the extent of damages. *See, e.g.*, *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 61, at par.. 433-34 (requiring payment within 18 months where the State had to determine, *inter alia*, whether each surviving victim had been partially permanently handicapped, completely permanently handicapped, or left with permanent consequences not rising to the level of a partial or complete handicap).

[576] *Garrido and Baigorria v. Argentina*, *supra* note 7, at par. 90; *Abrill Alosilla v. Peru*, *supra* note 265, at par. 145; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 97; *Konate v. Burkina Faso*, *supra* note 1, at par. 60(vii); *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(viii); *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, *supra* note 272, at p. 11; *Koch v. Germany*, *supra* note 111, at par. 95; *Konstantin Moskalev v. Russia*, *supra* note 560, at par. 78; ECHR Rules of Court Practice Directions, *supra* note 504, at par. 25.

[577] *E.g.*, *Abrill Alosilla v. Peru, supra* note 265, at par. 140; *Cantoral-Benavides v. Peru*, *supra* note 71, at par. 92; *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), par. 221 (May 25, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_76_ing.pdf; *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 186; *Akkus v. Turkey*, *supra* note 566, at p. 11; *Aksoy v. Turkey*, *supra* note 277, at p. 30;

individuals were harmed by the same violation, such as several family members, courts generally provide a separate award of monetary compensation to each victim (rather than providing a lump sum to one of the victims to distribute to the others).[578]

There is less jurisprudence with respect to awards to minors, primarily because by the time international court judgments are rendered, many child applicants have become adults.[579] The Inter-American Court of Human Rights, which has the most developed jurisprudence on this issue, usually orders the establishment of a trust[580] or deposit of the funds in a solvent financial institution until the minors become adults.[581] The Inter-American Court typically specifies that the trust or deposit be established under "the most favourable conditions permitted by [the state's] banking practice," which is intended to direct the trustee to take measures to ensure that the amount maintains its purchasing power and generates sufficient earnings or dividends to increase over time.[582] If, however, a minor is very close to the age of majority, the Court has occasionally directed that the payment be made directly to the minor.[583] The European Court of Human Rights, on the other hand, has typically directed awards to be paid to child applicants, without specifying particular procedures or guarantees to ensure that the awards are not spent by family members or wasted by the child before the child comes of age.[584]

Koch v. Germany, *supra* note 111, at p. 23; *Manneh v. The Gambia*, *supra* note 228, at par. 44; *Konate v. Burkina Faso*, *supra* note 1, at par. 60(v).

[578] *E.g.*, *Zongo v. Burkina Faso*, *supra* note 1, at par. 111(ii); *Case of the Mapiripán Massacre v. Colombia*, *supra* note 52, at par. 290; *Case of the Plan de Sánchez Massacre v. Guatemala*, *supra* note 52, at par. 75; *Chioma Njemanze v. Nigeria*, *supra* note 265, at p. 42; *M. and M. v. Croatia*, App. No. 10161/13, European Court of Human Rights, Judgment, pp. 2, 61, (Sept. 3, 2015) (awarding compensation directly to the "first applicant," who was born in 2001 and therefore would have been 14 at the time of the judgment), http://hudoc.echr.coe.int/eng?i=001-156522; *see also* ECOWAS Community Court of Justice, Government of Nigeria to Pay N30 Million for Compensation for Human Rights Violation (describing separate awards for the wives, son, and siblings of the deceased victim), http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=398:-government-of-nigeria-to-pay-n30-millions-for-compensation-for-human-rights-violation.

[579] For example, the Extraordinary African Chambers in the Courts of Senegal, which has jurisdiction over crimes committed between 1982 and 1990, rendered its initial merits decision in 2016. Any child victims entitled to reparations would have been adults by that time. *See* Statute of the Extraordinary African Chambers, art. 3(1) (unofficial translation by Human Rights Watch), https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers; *see generally* Habré Reparations Decision, *supra* note 60. *See,* Ikili Rashidi v. Tanzania, *supra* note 11 at par. 422

[580] *Godínez-Cruz v. Honduras*, *supra* note 562, at par. 32; *Velásquez-Rodríguez v. Honduras* (Interpretation of the Judgment of Reparations and Costs), *supra* note 562, at par.. 30-32; *Aloeboetoe v. Suriname*, *supra* note 132, at *par.* 101; *Case of the Ituango Massacres v. Colombia*, *supra* note 52, at par. 433.

[581] *E.g.*, *Fernández Ortega v. Mexico*, *supra* note 61, at par. 301.

[582] *Godínez-Cruz v. Honduras*, *supra* note 562, at par.. 30-32; *Velásquez-Rodríguez v. Honduras* (Interpretation of the Judgment of Reparations and Costs), *supra* note 562, at par.. 30-32; *Suárez-Rosero v. Ecuador* (Reparations Judgment), *supra* note 174, at par. 107; *Fernández Ortega v. Mexico*, *supra* note 61, at par. 301; *Case of the Ituango Massacres v. Colombia*, *supra* note 52, at par. 422.

[583] *E.g.*, *Loayza-Tamayo v. Peru*, *supra* note 1, at par. 184.

[584] *See, e.g.*, *A. v. The United Kingdom*, *supra* note 207, at pp. 3, 10 (directing payment to the applicant, who was born in 1984 and thus would have been 14 at the time of the judgment); *Z. and Others v. United Kingdom*, *supra* note 145, at pp. 3, 37-38 (awarding compensation to applicants C, B, and A, who were born in 1988, 1986, and 1984, respectively, and therefore would have been 13, 15, and 17 at the time of the judgment).

Finally, the issue of monetary compensation to indigenous communities has arisen primarily in the Inter-American system. In awarding monetary reparations to indigenous communities, the Inter-American Court of Human Rights has acknowledged that indigenous peoples may have different cultural traditions and norms, and has ordered that monetary awards be distributed according to the community's traditions and customs, as opposed to ordering direct payment to victims.[585] In many cases, as described in the greater detail in the section on forms of reparations,[586] the Court also has required the State to set up and finance a community development fund, which is then managed by an implementation committee composed, in part, of members of the community.[587]

[585] *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 318, 325, 332; *Yakye Axa Indigenous Community v. Paraguay*, *supra* note 102, at par.. 195, 232.
[586] *Supra* pp. 78-79.
[587] *See, e.g.*, *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par.. 323-24; *Yakye Axa Indigenous Community v. Paraguay*, *supra* note 102, at par. 218.

I. Amicable Settlement

An amicable settlement is a process facilitated by a court or human rights body to enable the State and the alleged victims and/or petitioners to reach an agreement that offers a solution to the alleged human rights violations without resorting to a contentious court proceeding. Such settlements offer parties a more rapid solution to their disputes,[588] while allowing States an opportunity to redress their wrongs before court intervention.[589] Amicable settlements also offer other advantages, including that they tend to have higher levels of compliance by States than do merits judgments.[590]

Several international human rights court and bodies, including the African Court of Human and Peoples' Rights,[591] have the competence to facilitate amicable settlements.[592] The process has been most extensively utilised, however, in the European Court of Human Rights and the Inter-American Commission on Human Rights, in part to try to reduce the extraordinarily heavy caseloads in these two

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[588] *See, e.g.*, Council of Europe, Committee of Ministers, Resolution Res(2002)59 concerning the practice of friendly settlements (Dec. 18, 2002) ("the conclusion of a friendly settlement . . . may constitute a means of alleviating the workload of the court, as well as a means of providing a rapid and satisfactory solution for the parties"), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804de98a; UNIVERSITY OF TEXAS, HUMAN RIGHTS CLINIC, MAXIMIZING JUSTICE, MINIMISING DELAY: STREAMLINING PROCEDURES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 60 (2011) (noting that the time to reach resolution through a friendly settlement was almost five months shorter than that to reach a merits decision by the Inter-American Commission and nearly two years shorter than a decision by the Inter-American Court), https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2012-HRC-IACHR-Maximizing-Justice-Report.pdf [hereinafter UT Report].

[589] HELEN KELLER, MAGDALENA FOROWICZ, AND LORENZ ENGI, FRIENDLY SETTLEMENTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS 5 (2010).

[590] Conference, *Advocacy Before Regional Human Rights Bodies: A Cross-Regional Agenda*, 59 AMERICAN UNIVERSITY LAW REVIEW 163, 196 (2009) (remarks of Elizabeth Abi-Mershed, describing the situation at the Inter-American Commission); UT Report, *supra* note 588, at 60 (noting that friendly settlements had almost twice the level of compliance as decisions of the Inter-American Court and nearly five times the level of compliance as reports by the Inter-American Commission).

[591] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 9, art. 9, African court on Human and Peoples' Rights, Rules of Court, Rules 56 and 57 (April, 2010) http://www.african-court.org/en/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonisation_-_Final__English_7_sept_1_.pdf.

[592] *See* African Charter on Human and Peoples' Rights, *supra* note 34, art. 56(7) (providing the African Commission on Human and Peoples' Rights with competence to settle cases); African Commission on Human and Peoples' Rights, Rules of Procedure, Rules 99(3)(b), 109 (2010), https://www.achpr.org/rulesofprocedure; ECOWAS, Rules of the Court of Justice of the Economic Community of West African States, art. 72 (2002), http://www.courtecowas.org/site2012/pdf_files/rules_of_procedure.pdf; African Committee of Experts on the Rights and Welfare of the Child, Revised Guidelines for the Consideration of Communications, section XIII, http://www.acerwc.org/download/revised_communications_guidelines-2/?wpdmdl=8763; Inter-American Court Rules of Procedure, *supra* note112, art. 57; American Convention on Human Rights, *supra* note 43, art. 48(f); European Convention on Human Rights, *supra* note 43, art. 39; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, *supra* note 44, art. 9; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 7 (Dec. 10, 2008), http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx; U.N. Human Rights Committee Rules of Procedure, *supra* note 450, Rule 79.

bodies.[593] The following sections therefore focus primarily on the practice of friendly settlements in these two bodies, with the incorporation of additional jurisprudence from other bodies as appropriate. The sections below do not include jurisprudence from any international *criminal* courts, which do not have procedures for friendly settlements[594] because neither the victim nor the state is a party to the proceeding.

1. Procedures for facilitating an amicable settlement

The amicable settlement process depends on the will of the parties and, therefore, both parties have to agree to the procedure and be willing to engage in negotiations.[595] In some human rights bodies, the process is left entirely up to the parties and the body waits for a communication from them if they intend to amicably settle the case;[596] in others, the human rights body is charged with "mak[ing] available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter," but there are no specific steps the body is required to take to encourage or promote amicable settlements.[597]

The European Court of Human Rights and the Inter-American Commission on Human Rights, however, have taken much more active approaches to amicable settlements, intervening more frequently and directly with the parties to try to facilitate such settlements. In the European Court, for example, if the Court determines that an application is not obviously inadmissible[598] and that it concerns an area with well-established case-law, the Registrar will communicate a proposal for a friendly settlement to the parties at the same time that the Registrar sends the initial communication to the parties.[599] In these cases, the Registry actually sends a

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[593] *See, e.g.*, Council of Europe Resolution concerning the practice of friendly settlements, *supra* note 588 ("the conclusion of a friendly settlement . . . may constitute a means of alleviating the workload of the court, as well as a means of providing a rapid and satisfactory solution for the parties"); KELLER, FOROWICZ, AND ENGI, *supra* note 589, at 3, 91.

[594] *See generally* Rome Statute of the ICC, *supra* note 1 (no mention of amicable settlements); Law on the Establishment of the ECCC, *supra* note 43 (same); Statute of the Special Tribunal for Lebanon, *supra* note 1 (same).

[595] *See, e.g.*, African Commission Rules of Procedure, *supra* note 592, Rule 109(2); African Committee of Experts Revised Guidelines for the Consideration of Communications, *supra* note 592, Section XIII(2)(ii); Inter-American Commission on Human Rights, Rules of Procedure, art. 40(2) (Mar. 8-22, 2013), http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp; *Case of the Río Negro Massacres v. Guatemala*, *supra* note 145, at par. 315; *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 102, at par. 31.

[596] *See, e.g.*, African Committee of Experts Revised Guidelines for the Consideration of Communications, *supra* note 592, section XIII (noting that the "*parties* to a communication may settle their dispute amicably" and describing no role for the committee) (emphasis added); ECOWAS Rules of the Court of Justice, *supra* note 592, art. 72 (similar); Inter-American Court Rules of Procedure, *supra* note 112, art. 57.

[597] *See, e.g.*, Optional Protocol to the Convention on the Rights of the Child on a communications procedure, *supra* note 44, art. 9(1); Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *supra* note 592, art. 7; U.N. Human Rights Committee Rules of Procedure, *supra* note 450, Rule 79.

[598] European Court of Human Rights, Rules of Court, Rule 62(1) (2016), http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf; KELLER, FOROWICZ, AND ENGI, *supra* note 589, at 33-34.

[599] KELLER, FOROWICZ, AND ENGI, *supra* note 589, at 34-35, 78, 82.

complete settlement draft with concrete proposals for reparations based on prior similar cases that have gone to judgment before the Court.[600] These reparations proposals frequently include slightly higher amounts of compensation (about 10% higher) than a victim would typically receive if he or she went to judgment before the Court, as an incentive for the applicant to settle.[601] Although the amount is higher than the State would otherwise have to pay, it may be willing to accept such an amount in order to avoid the costs associated with lengthy proceedings before the Court, including the costs of responding to the submissions and financing translations, as well as to avoid the greater media attention that a disputed case may receive.[602] In routine cases governed by established case law, the Registry generally does not permit negotiations, since the effort expended on negotiations may well exceed the effort required by the European Court to decide a fairly straightforward case under established law.[603] By contrast, in more novel or complicated cases without established case law, the Registrar will contact the parties after the application has been declared admissible and indicate that it is at the parties' disposal to help facilitate a friendly settlement.[604] Overall, victims who agree to amicable settlements often receive substantially higher levels of compensation than those who proceed to judgment, in some cases more than twice as much.[605]

The Inter-American Commission on Human Rights likewise has worked to increase the promotion of amicable settlements.[606] The Inter-American Commission has adopted a practice of offering to facilitate a friendly settlement in *all* cases,[607] and it now contacts the parties when the processing of a petition begins to place itself at the disposal of the parties for this purpose.[608] By rule, the Commission also sets aside a specific period of time for the parties to indicate whether they would like to pursue a friendly settlement, although the exact amount of time is left to the Commission's discretion.[609] These negotiations may take place at the Commission headquarters or

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[600] *Id.* at 34-35, 65, 78, 82.
[601] *Id.*
[602] *Id.* at 76.
[603] *Id.* at 76, 82.
[604] *Id.* at 34; ECHR Rules of Court, *supra* note 598, Rule 62(1).
[605] *See, e.g.*, Gregory S. Weber, *Who Killed the Friendly Settlement? The Decline of Negotiated Resolutions at the European Court of Human Rights*, 7 PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL 215, 250-51, 253 (2007).
[606] *See, e.g.*, Inter-American Commission on Human Rights, Impact of the Friendly Settlement Procedure, par. 55 (2013) (describing the increase in friendly settlements after the commission's rules were changed to encourage more settlements), http://www.oas.org/en/iachr/friendly_settlements/docs/Report-Friendly-Settlement.pdf.
[607] Inter-American Commission Impact of the Friendly Settlement Procedure, *supra* note 606, at par. 45. Part of the impetus for encouraging friendly settlements has come from the Inter-American Court of Human and Peoples' Rights, which has interpreted the American Convention on Human Rights as requiring the Commission to attempt to achieve an amicable settlement before it may publish a decision on the merits or refer the case to the Inter-American Court, except in "exceptional" cases. *Caballero-Delgado and Santana v. Colombia*, Inter-American Court of Human Rights, Judgment (Preliminary Objections), par. 27 (Jan. 21, 1994), http://www.corteidh.or.cr/docs/casos/articulos/seriec_17_ing.pdf.
[608] Inter-American Commission Impact of the Friendly Settlement Procedure, *supra* note 606, par. 59; American Convention on Human Rights, *supra* note 43, art. 48(1) (f).
[609] Inter-American Commission Rules of Procedure, *supra* note 595, art. 37(4).

in the state concerned, and may proceed with or without the Commission's participation.[610] Where the parties choose to use the Inter-American Commission as a mediator, the negotiations are typically conducted by the Commissioner who serves as the country rapporteur for the State concerned,[611] in contrast to the European Court, where the Registry is the principal organ involved in the process.[612] In addition, the Commission has at times imposed conditions on the State that the Commission considers indispensable to its function, particularly those designed to create a détente between the parties. For example, in the *Miskito case*, in which Nicaragua was alleged to have killed, disappeared, arbitrarily detained and forcibly dislocated thousands of indigenous individuals,[613] the Commission asked Nicaragua to provide a pardon or amnesty to all those arrested as a result of the incidents in the case and to hold a conference with representative leaders of the Miskito people.[614] When Nicaragua declared that it was unable to provide such an amnesty, the friendly settlement procedures were terminated and the Commission published a report on the human rights violations.[615] Recently, in an effort to improve its amicable settlement procedures, the Commission created a special unit on friendly settlements to analyse friendly settlement practices, train staff on alternative dispute resolution, create an internal protocol to facilitate friendly settlements, and provide support in processing friendly settlements.[616]

In both systems, and others, the process of settlement negotiations is confidential and information revealed in the negotiations may not be used before the court or human rights body in the event the case proceeds to the merits.[617]

2. Timing of amicable settlements

The rules of some human rights bodies appear to require amicable settlements to be reached prior to a determination on the merits.[618] Other bodies permit an

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[610] Inter-American Commission Impact of the Friendly Settlement Procedure, *supra* note 606, at par. 60.
[611] *Id.* at par. 60.
[612] Indeed, the European Court of Human Rights considers "negotiations . . . to be incompatible by their very nature with the impartiality of Judges." KELLER, FOROWICZ, AND ENGI, *supra* note 589, at 83.
[613] Inter-American Commission on Human Rights, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, Conclusions (Nov. 29, 1983), http://www.cidh.org/countryrep/miskitoeng/toc.htm.
[614] Inter-American Commission on Human Rights, Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin, par. 11 (May 16, 1984), https://www.cidh.oas.org/countryrep/Miskitoeng/annex.htm.
[615] *Id.* Resolves par.. 1, 6.
[616] *Id.* par. 10; UT Report, *supra* note 588, at 59-60.
[617] ECHR Rules of Court, *supra* note 598, Rule 62; *see also* African Court, Rules of Court, *supra* note 595, Rule 57(2); Committee on Economic, Social and Cultural Rights, Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-30 Nov. 2012), Rule 15(4) (Dec. 3, 2012), U.N. Doc. E/C.12/49/3, http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.49.3.pdf.
[618] *See, e.g.*, Inter-American Commission Rules of Procedure, *supra* note 595, art. 37(4); ECOWAS Rules of the Court of Justice, *supra* note 592, art. 72; African Committee of Experts Revised Guidelines

amicable settlement to be concluded at any time,[619] recognising that even after a determination on the merits is made, the parties may find it to their advantage to amicably reach a solution on other issues in the case, such as reparations. Perhaps because of these benefits, even bodies which formally require amicable settlements to be concluded before a merits decision have, on rare occasions, permitted a settlement to take place after the merits were decided. For example, in the *Villatina Massacre Case*, the Inter-American Commission on Human Rights, which normally requires amicable settlements to take place prior to a merits decision,[620] permitted the parties to restart friendly settlement negotiations despite the Commission's approval of a merits report in 2001, and the parties eventually came to an agreement.[621]

3. Forms of reparations in amicable settlements

Amicable settlements are not limited to compensation and may include a wide variety and number of reparations measures. For example, states have agreed in amicable settlements to provide:

Restitution, including

i. termination of criminal proceedings,[622]

ii. reversal of criminal convictions,[623]

iii. release of prisoners,[624]

iv. transfer of prisoners to different facilities,[625]

v. return of land,[626]

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for the Consideration of Communications, *supra* note 592, section XIII(1)(i); Committee on Economic, Social and Cultural Rights, Provisional Rules of Procedure, *supra* note 617, Rule 15(1).

[619] African Commission Rules of Procedure, *supra* note 592, Rule 109(1); Inter-American Court Rules of Procedure, *supra* note 112, art. 66(2) (permitting amicable settlements with respect to reparations after a judgment on the merits); European Convention on Human Rights, *supra* note 43, art. 39 (friendly settlements may be concluded "at any stage of the proceedings").

[620] Inter-American Commission Rules of Procedure, *supra* note 595, art. 37(4).

[621] *Villatina Massacre Case*, Petition 11.141, Inter-American Commission on Human Rights, Report No. 105/05, par.. 10-12 (Oct. 27, 2005), http://cidh.org/annualrep/2005eng/Colombia11141eng.htm.

[622] *Open Society Justice Initiative v. Cameroon*, Comm. No. 290/04, African Commission on Human and Peoples' Rights, par. 22(1) (May 25, 2006), https://www.achpr.org/sessions/descions?id=209 .

[623] *Verbitsky v. Argentina*, Case No. 11.012, Inter-American Commission on Human Rights, Report No. 22/94, par.. 17, 20(iii) (Sept. 20, 1994), https://www.cidh.oas.org/annualrep/94eng/argentina11012.htm; *Ananias Laparra Martinez v. Mexico*, Petition No. 1171-09, Inter-American Commission on Human Rights, Report No. 15/16, par. 13(VIII.1) (Apr. 14, 2016), http://www.oas.org/en/iachr/decisions/2016/MXSA1171-09EN.pdf.

[624] *Marcos Gilberto Chaves and Sandra Beatriz Chaves v. Argentina*, Case No. 12.710, Inter-American Commission on Human Rights, Report No. 102/14, par. 23(II)(a)(1) (Nov. 7, 2014), http://www.oas.org/en/iachr/decisions/2014/ARSA12710EN.pdf.

[625] *Miriam Beatriz Riquelme Ramírez v. Paraguay*, Petition No. 1097-06, Inter-American Commission on Human Rights, Report No. 25/13, par. 19 (Mar. 20, 2013).

[626] *Juan Jacobo Arbenz Guzmán v. Guatemala*, Case No. 12.546, Inter-American Commission on Human Rights, Report. No. 30/12, par. 17 (Mar. 20, 2012); *Enxet-Lamenxay Kayleyphapopyet*

vi. reinstatement to a position of employment,[627]

vii. granting of residence permits,[628] and

viii. granting government licences previously denied;[629]

Compensation, including

i. compensation for both pecuniary and non-pecuniary damages[630] and

ii. compensation for legal costs;[631]

Rehabilitation, including

i. medical insurance coverage,[632]

ii. medical and psychological treatment,[633]

ix. construction of health infrastructure and provision of medical equipment in underserved areas,[634]

(Riachito) Indigenous Communities v. Paraguay, Case No 11.713, Inter-American Commission on Human Rights, Report No. 90/99, par.. 11-14 (Sept. 29, 1999), http://www.cidh.org/annualrep/99eng/Friendly/Paraguay11.713.htm.

[627] *Pablo Ignacio Livia Robles v. Peru*, Case No. 12.035, Inter-American Commission on Human Rights, Report No. 75/02, par. 13 (Dec. 13, 2002), http://cidh.org/annualrep/2002eng/Peru.12035.htm; *Jesus Salvador Ferreyra Gonzalez v. Peru*, Petition No. 288-08, Inter-American Commission on Human Rights, Report No. 69/16, par. 11(2.2) (Nov. 30, 2016), http://www.oas.org/en/iachr/decisions/2016/PESA288-08EN.pdf.

[628] *Incedursun v. The Netherlands*, App. No. 33124/96, European Court of Human Rights, Judgment, par. 23 (June 22, 1999), http://hudoc.echr.coe.int/eng?i=001-58258.

[629] *Open Society Justice Initiative v. Cameroon*, *supra* note 622, at par. 22(2), (5).

[630] *Id.* par. 22(4); *Kagbara v. Togo*, Case No. ECW/CCJ/APP/01/14, ECOWAS Community Court of Justice, par. 9 (Feb. 16, 2016), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2016/ECW_CCJ_JUD_04_16.pdf; L.*N.P. v. Argentine Republic*, Comm. No. 1610/2007, U.N. Human Rights Committee, par.. 10.1-10.2 (Aug. 16, 2011), http://juris.ohchr.org/Search/Details/1617; *F.C. v. The United Kingdom*, App. No. 37344/97, European Court of Human Rights, Decision, The Law (Sept. 7, 1999), http://hudoc.echr.coe.int/eng?i=001-4754; *Ehf v. Iceland*, App. No. 34142/96, European Court of Human Rights, Judgment, par. 12 (May 30, 2000), http://hudoc.echr.coe.int/eng?i=001-58596; *Benavides-Cevallos v. Ecuador*, Inter-American Court of Human Rights, Judgment (Merits, Reparations and Costs), par. 48 (June 19, 1998), http://www.corteidh.or.cr/docs/casos/articulos/seriec_38_ing.pdf; *María Mamérita Mestansa Chaves v. Peru*, Case No. 12.191, Inter-American Commission on Human Rights, Report No. 71/03, par. 14 (Oct. 22, 2003), http://www.cidh.org/annualrep/2003eng/peru.12191.htm.

[631] *Incedursun v. The Netherlands*, *supra* note 628, at par. 23(b); *Benavides-Cevallos v. Ecuador*, *supra* note 630, at par. 48(1); *Ananias Laparra Martinez v. Mexico*, *supra* note 623, par. 13(VIII.3.3).

[632] *María Mamérita Mestansa Chaves v. Peru*, *supra* note 630, at par. 14; *Vicenta Sanchez Valdivieso v. Mexico*, Case No. 12.847, Inter-American Commission on Human Rights, Report No. 16/16, par. 11 (Apr. 14, 2016), http://www.oas.org/en/iachr/decisions/2016/MXSA12847EN.pdf.

[633] *MM v. Peru*, Case No. 12,041, Inter-American Commission on Human Rights, Report No. 69/14, par. 25(III)(5) (July 25, 2014); *María Mamérita Mestansa Chaves v. Peru*, *supra* note 630, at par. 14.

[634] *Yanomami Indigenous People of Haximu v. Venezuela*, Petition No. 11.706, Inter-American Commission on Human Rights, Report No. 32/12, par. 37 (Mar. 20, 2012); *Enxet-Lamenxay Kayleyphapopyet (Riachito) Indigenous Communities v. Paraguay*, *supra* note 626, at par. 16.

x. scholarships, awards, and stipends to undertake studies,[635]

xi. employment opportunities,[636] and

xii. provision of land and housing;[637]

Satisfaction, including

i. public apologies,[638]

ii. agreements to search for and/or hand over the remains of family members,[639]

iii. investigation and sanction of those responsible,[640]

iv. measures of remembrance, including the erection of monuments, creation of memorials, production of documentary films, exhibitions of photographs, publication of books, issuance of postage stamps, improvement of local parks, and revision of educational curriculum,[641] and

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[635] *L.N.P. v. Argentine Republic*, *supra* note 630, at par.. 10.1-10.2; *Mónica Carabantes Galleguillos v. Chile*, Case No. 12.046, Inter-American Commission on Human Rights, Report No. 33/02, par. 14(1), http://cidh.org/annualrep/2002eng/Chile12046.htm; *María Mamérita Mestansa Chaves v. Peru*, *supra* note 630, at par. 14.

[636] *MM v. Peru*, *supra* note 633, at par. 25(III)(6)-(7); *Vicenta Sanchez Valdivieso v. Mexico*, *supra* note 632, at par. 11.

[637] *MM v. Peru*, *supra* note 633, at par. 25(III)(2)-(4*); L.N.P. v. Argentine Republic*, *supra* note 630, at par.. 10.1-10.2.

[638] *L.N.P. v. Argentine Republic*, *supra* note 630, at par.. 10.1-10.2; *Oates v. Poland*, App. No. 35036/97, European Court of Human Rights, Decision, The Law (Sept. 7, 2000), http://hudoc.echr.coe.int/eng?i=001-5400; *Scott v. The United Kingdom*, App. No. 62688/00, European Court of Human Rights, Decision, The Law (Aug. 25, 2005), http://hudoc.echr.coe.int/eng?i=001-70234; *Herson Javier Caro v. Colombia*, Case No. 11.538, Inter-American Commission on Human Rights, Report No. 43/16, par. 14 (Oct. 7, 2016), http://www.oas.org/en/iachr/decisions/2016/COSA11538EN.pdf; *Omar Zuñiga Vasquez and Amira Isabel Vasquez de Zuñiga v. Colombia*, Case No. 12.541, Inter-American Commission on Human Rights, Report No. 67/16, par. 28 (Nov. 30, 2016), http://www.oas.org/en/iachr/decisions/2016/COSA12541EN.pdf.

[639] *Omar Zuñiga Vasquez and Amira Isabel Vasquez de Zuñiga v. Colombia*, *supra* note 638, at par. 28.

[640] *MM v. Peru*, *supra* note 633, at par. 25(III)(1); *Benavides-Cevallos v. Ecuador*, *supra* note 630, at par. 48(4); *Ricardo Manuel Semosa Di Carlo v. Peru*, Petition No. 12.078, Inter-American Commission on Human Rights, Report No. 31/04, par. 20 (Mar. 11, 2004), http://cidh.org/annualrep/2004eng/Peru.12.078eng.htm; *Ananias Laparra Martinez v. Mexico*, *supra* note 623, par. 13(IX.1).

[641] *Benavides-Cevallos v. Ecuador*, *supra* note 630, at par. 48(5); *María Mamérita Mestansa Chaves v. Peru*, *supra* note 630, at par. 14; Trujillo Massacre, Case No. 11.007, Inter-American Commission on Human Rights, Report. No. 68/16, par. 22 (Nov. 30, 2016), https://www.oas.org/en/iachr/decisions/2016/COSA11007EN.pdf; *Juan Jacobo Arbenz Guzmán v. Guatemala*, *supra* note 626, at par. 17.

v. exemption from compulsory military service for siblings of the decedent;[642]

Guarantees of non-repetition, including

i. amendment of laws or constitutional provisions,[643]

ii. ratification of international conventions,[644]

iii. issuance of codes of practice to guide public officials in their duties under the law,[645]

iv. creation of specialised units, such as a unit to support victims of sexual violence or a specialised forensic unit, within the appropriate government offices,[646]

v. seminars, trainings, or awareness raising campaigns for public officials,[647]

vi. modification of public buildings, such as detention areas in police stations, to conform with international standards,[648]

vii. provision of security to individuals who have been threatened,[649] and

[642] *Herson Javier Caro v. Colombia*, *supra* note 638, at par. 14.
[643] *IHRDA v. Malawi*, Comm. No. 004/Com/001/2014, African Committee of Experts on the Rights and Welfare of the Child (2016), http://www.ihrda.org/2015/12/ihrda-on-behalf-of-malawian-children-v-the-republic-of-malawi/. *Verbitsky v. Argentina*, *supra* note 623, at par.. 17, 20(ii), 22; *Tornes v. Andorra*, App. No. 35052/97, European Court of Human Rights, Judgment, par.. 19, 21 (July 6, 1999), http://hudoc.echr.coe.int/eng?i=001-58268; *F.C. v. The United Kingdom*, *supra* note 630, The Law; *Ehf v. Iceland*, *supra* note 630, at par. 12; *María Mamérita Mestansa Chaves v. Peru*, *supra* note 630, at par. 14; *Ricardo Javier Kaplun v. Argentina*, Case No. 12.854, Inter-American Commission on Human Rights, Report No. 36/17, par. 22 (Mar. 21, 2017), http://www.oas.org/en/iachr/decisions/2017/ARSA12854EN.pdf.
[644] *Yanomami Indigenous People of Haximu v. Venezuela*, *supra* note 634, at par. 37.
[645] *J.M. v. United Kingdom*, App. No. 47014/99, European Court of Human Rights, Decision, The Law (Jan. 15, 2002), http://hudoc.echr.coe.int/eng?i=001-22160.
[646] *M.Z. v. Bolivia*, Case No. 12.350, Inter-American Commission on Human Rights, Report No. 103/14, par. 26 (Nov. 7, 2014), http://www.oas.org/en/iachr/decisions/2014/BOSA12350EN.pdf.
[647] *L.N.P. v. Argentine Republic*, *supra* note 630, at par.. 10.1-10.2; *Ricardo Javier Kaplun v. Argentina*, *supra* note 643, at par. 22; *Ananias Laparra Martinez v. Mexico*, *supra* note 623, at par. 13(IX.2); M.Z. v. Bolivia, *supra* note 646, at par. 26.
[648] *Ricardo Javier Kaplun v. Argentina*, *supra* note 643, at par. 22; *M.Z. v. Bolivia*, *supra* note 646, at par. 26.
[649] *María Nicolasa García Reynoso v. Mexico*, Case No. 12.627, Inter-American Commission on Human Rights, Report. No. 92/17, par. 21 (July 7, 2017), http://www.oas.org/en/iachr/decisions/2017/MXSA12627EN.pdf.

viii. improvement of the legal institutions protecting the rights of indigenous peoples, including the right to participate in their own development, and measures to strengthen their cultural identity.[650]

Often, amicable settlements include several forms of reparations in order to repair the harm done to the victim.[651]

4. Approval and Enforcement

Before an amicable settlement is final, the relevant court or human rights body must verify that the terms of the settlement respect human rights and that both parties have voluntarily agreed to the settlement.[652] This may be done on the basis of the written agreements, or the Court or human rights body may request additional information or hold additional meetings or hearings to ensure that the agreement is adequate.[653]

For example, in *Joyce Nawila Chiti v. Zambia,* the Human Rights Committee refused to give effect to an amicable settlement because, among other things, it only included compensation and did not fulfill the state's obligation to investigate and prosecute allegation of human rights violations.[654] The Inter-American Commission has similarly verified that amicable settlements include provisions to investigate the facts and punish the perpetrators before approving such settlements.[655]

Although an amicable settlement generally closes a case,[656] both courts and human rights bodies have the capacity to monitor compliance of the terms of the

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[650] *Huenteao Beroiza v. Chile*, Petition No. 4617/02, Inter-American Commission on Human Rights, Report No. 30/04, par. 33 (Mar. 11, 2004), http://cidh.org/annualrep/2004eng/Chile.4617.02eng.htm.

[651] *See, e.g.*, *L.N.P. v. Argentine Republic*, *supra* note 630, at par.. 10.1-10.2; *María Mamérita Mestansa Chaves v. Peru*, *supra* note 630, at par. 14.

[652] African Commission Rules of Procedure, *supra* note 592, Rule 109(5)-(6); African Committee of Experts Revised Guidelines for the Consideration of Communications, *supra* note 592, Section XIII(1)(ii); ECHR Rules of Court, *supra* note 598, Rule 62; Inter-American Commission Rules of Procedure, *supra* note 595, art. 40(5). The African Court of Human Rights appears to have been granted this same authority under its Protocol and Rules of Procedure. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 9, art. 9 (amicable settlements must be in "accord[] with the provisions of the Charter"); African Court Rules of Court, *supra* note 617, Rule 57(1) (providing that Court-facilitated amicable settlements must be "based on respect for human and peoples' rights as recognised by the Charter").

[653] *See, e.g.*, *Mónica Carabantes Galleguillos v. Chile*, *supra* note 635, at par. 15; *Benavides-Cevallos v. Ecuador*, *supra* note 630, at par.. 29, 32, 33; *Paladi v. Moldova*, App. No. 39806/05, European Court of Human Rights, Judgment, par. 53 (July 10, 2007), http://hudoc.echr.coe.int/eng?i=001-81441; *Akdivar v. Turkey*, *supra* note 162, at par.. 10-14.

[654] *Nawila Chiti v. Zambia*, Comm. No. 1303/2004, U.N. Human Rights Committee, Views, par. 11.5 (Aug. 28, 2012), http://juris.ohchr.org/Search/Details/1424.

[655] *See, e.g.*, *Benavides-Cevallos v. Ecuador*, *supra* note 630, at par.. 47, 54, 55.

[656] *See, e.g.*, ECOWAS Rules of the Court of Justice, *supra* note 592, art. 72; African Committee of Experts Revised Guidelines for the Consideration of Communications, *supra* note 592, Section XIII(1)(iii); European Convention on Human Rights, *supra* note 43, art. 39(3); Inter-American Court Rules of Procedure, *supra* note 112, art. 57; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, *supra* note 44, art. 9(2); Optional Protocol to the International

friendly settlement.[657] The right to monitor compliance is generally ensured through the inclusion of compliance measures in the provisions of the friendly settlement itself, [658] as well as in the court's or human rights body's final decision on the case.[659] Compliance may be monitored through a variety of means, including requesting information from the parties, holding hearings or working meetings, or conducting site visits.[660] For instance, in *Enxet-Lamenxay and Kayleyphapopyet (Riachito) Indigenous Communities v. Paraguay*, the Inter-American Commission requested quarterly reports from all parties on compliance with sanitary, medical and educational measures, held several meetings, and also conducted an on-site visit to Paraguay, during which the government completed the transfer of title to the land that it had previously failed to transfer to the indigenous communities.[661] Ultimately, if all of the terms of the amicable settlement are not fully implemented, the court or human rights body may re-open the case.[662] Amicable settlements, however, tend to have higher rates of compliance than orders by courts or recommendations by human rights bodies.[663]

5. Key Issues and Challenges

Amicable settlements have sometimes been criticised for enabling a State to dispose of a case without addressing the underlying problems that led to the violation in the first place.[664] Thus, where a court or human rights body repeatedly receives complaints regarding similar violations by the same State, some have suggested that friendly settlements should be permitted only if they also include provisions aimed at resolving the underlying structural problems giving rise to the violations.[665]

Covenant on Economic, Social and Cultural Rights, *supra* note 592, art. 7(2); *Open Society Justice Initiative v. Cameroon*, *supra* note 622, at par. 24.

[657] *See, e.g.*, African Commission Rules of Procedure, *supra* note 592, Rule 109(6)(d); Committee on Economic, Social and Cultural Rights Provisional Rules of Procedure, *supra* note 617, Rule 18. In some systems, the monitoring of compliance is conducted by another governmental body, such as the Committee of Ministers. *See* European Convention on Human Rights, *supra* note 43, art. 39(4).

[658] *See, e.g.*, *María Nicolasa García Reynoso v. Mexico*, *supra* note 649, at par. 21; *Herson Javier Caro v. Colombia*, *supra* note 638, at par. 14.

[659] *See, e.g.*, African Commission Rules of Procedure, *supra* note 592, Rule 109(6)(d); *Benavides-Cevallos v. Ecuador*, *supra* note 630, Section VII, par. 5.

[660] Inter-American Commission Rules of Procedure, *supra* note 595, art. 48.

[661] *Enxet-Lamenxay Kayleyphapopyet (Riachito) Indigenous Communities v. Paraguay*, *supra* note 626, at par.. 20-22.

[662] *See, e.g.*, African Commission Rules of Procedure, *supra* note 592, Rule 109(7); European Convention on Human Rights, *supra* note 43, art. 37(2); *see* also *L.N.P. v. Argentine Republic*, *supra* note 630, at par.. 10.1-10.2, 13.3-13.9, 14; *Katić v. Serbia*, App. No. 13920/04, Decision, The Law (July 7, 2009), http://hudoc.echr.coe.int/eng?i=001-93815.

[663] Basch, *supra* note 290, at 20 (addressing compliance in the Inter-American system).

[664] *See, e.g.*, KELLER, FOROWICZ, AND ENGI, *supra* note 589, at 49; *see also* Susan H. Shin, *Comparison of the Dispute Settlement Procedures of the World Trade Organisation for Trade Disputes and the Inter-American System for Human Rights Violations*, 16 N.Y. INTERNATIONAL LAW REVIEW 43, 75 (2003) ("If a state party accused of gross human rights violations wants to minimize its accountability, its best recourse is to enter 'friendly settlements' and agree to a settlement, where the final report will only briefly lists the facts and solutions.").

[665] *See, e.g.*, KELLER, FOROWICZ, AND ENGI, *supra* note 589, at 49.

The European Court of Human Rights faced this problem in the late 1990s and early 2000s, when it received repeated complaints regarding severe human rights violations caused by systemic structural problems, particularly though not exclusively, in prisons.[666] To combat the flood of applications, the European Court created a new system, known as the pilot judgment procedure.[667] Under this procedure, when the Court receives several applications stemming from the same structural problem, it may, after consultation with the parties,[668] select one or more of the applications for priority treatment.[669] Those cases not selected for priority treatment are frequently, though not always,[670] adjourned pending consideration of the priority applications.[671] In the judgment portion of the procedure, the Court decides whether a violation has occurred, identifies the systemic issues that led to the violation(s), and provides the State with remedial measures it must take.[672] In some instances, after the judgment the parties may come to a friendly settlement, resolving not only the individual complaint, but also proposing systemic remedies to address the underlying causes of the violations.[673] In these cases, the Court carefully reviews the systemic remedies as well to ensure that they adequately address the violations identified in the Court's judgment.[674] If the Court approves the friendly settlement, the Court strikes out that application, and, once the terms of the judgment and/or settlement have been implemented, generally strikes out the similar applications as well.[675] The Court will, however, permit the reinstatement of those cases, or bringing of new cases, if there is evidence that the remedial measures adopted by the State are insufficient.[676]

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[666] *Id.* at 70-71.
[667] *See* ECHR Rules of Court, *supra* note 598, Rule 61.
[668] *Id.* Rule 61(2)(a).
[669] ECHR Rules of Court, *supra* note 598, Rule 61(c); European Court of Human Rights, Fact Sheet – Pilot Judgment (Nov. 2017), http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.
[670] The European Court has often decided not to adjourn similar cases where due to the nature of the right, such as the right not to be treated inhumanely, the victims would be subjected to continued suffering if their cases were delayed. *See, e.g.*, *Neshkov v. Bulgaria*, Application No. 36925/10, European Court of Human Rights, Judgment, par. 291 (Jan. 27, 2015), http://hudoc.echr.coe.int/eng?i=001-150771; *Ananyev v. Russia*, App. Nos. 42525/07 and 60800/08, European Court of Human Rights, Judgment, par.. 235-37 (Jan. 10, 2012), http://hudoc.echr.coe.int/eng?i=001-108465; *Varga v. Hungary*, App. Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, 64586/13, European Court of Human Rights, Judgment, par.. 114-15 (June 10, 2015), http://hudoc.echr.coe.int/eng?i=001-152784.
[671] ECHR Rules of Court, *supra* note 598, Rule 61(6).
[672] *Id.* Rule 61(3); ECHR Fact Sheet – Pilot Judgment, *supra* note 669.
[673] *See, e.g.*, *Hutten-Czapska v. Poland*, App. No. 35014/97, European Court of Human Rights, Judgment, par. 27 (Apr. 28, 2008), http://hudoc.echr.coe.int/eng?i=001-86137; *Broniowski v. Poland*, App. No. 31443/96, European Court of Human Rights, Judgment (Friendly Settlement), par. 31 (Sept. 28, 2005), http://hudoc.echr.coe.int/eng?i=001-70326.
[674] *Hutten-Czapska v. Poland*, *supra* note 673, at par.. 36-43; *Broniowski v. Poland*, *supra* note 673, at par.. 37-42.
[675] *See, e.g.*, *Wolkenberg v. Poland*, App. No. 500003/99, European Court of Human Rights, Decision, par.. 31, 36, 38, 67-78 (Dec. 4, 2007) (striking out similar application in wake of implementation of the *Broniowski v. Poland* pilot judgment), http://hudoc.echr.coe.int/eng?i=001-83935.
[676] *Id.* par. 77; *see also Kalinkin v. Russia*, App. Nos. 16967/10, 37115/08, 52141/09, 57394/09, 57400/09, 2437/10, 3201/10, 12850/10, 13683/10, 19012/10, 19401/10, 20789/10, 22933/10, 25167/10, 26583/10, 26820/10, 26884/10, 28970/10, 29857/10, 49975/10, and 56205/10, European Court of Human Rights, Judgment, par.. 9-12, 24-67 (Apr. 17, 2012) (despite passage of two laws in

The pilot judgment procedure has been hailed as a means of more quickly and efficiently addressing a large number of repetitive cases, thereby offering more rapid redress to victims while simultaneously easing the Court's caseload.[677] Nonetheless, the procedure has been subjected to multiple critiques, including that there are no criteria for determining that that the priority case adequately represents the violations in the larger set of cases, which cases are sufficiently similar to be part of the procedure and/or covered by the friendly settlement agreement, and when to adjourn similar cases.[678] Scholars have also recommended several reforms to the pilot judgment procedure, including the adoption of criteria to ensure representative case selection, creating subclasses of victims as necessary to ensure that all types of violations are covered, and integrating national human rights institutions and civil society organisations into the process to provide input into the nature of the violations and appropriate remedies.[679]

The adoption of a procedure similar to the pilot judgment procedure could help the African Court avoid some of the problems of individual amicable settlements in cases of systemic violations, as well as enable the Court to more quickly provide redress to multiple victims. Nonetheless, such a procedure should be considered with caution, and, if adopted, additional procedural safeguards should be implemented to ensure that the pilot judgment cases are adequately representative of the larger set of cases.[680]

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response to the Court's pilot judgment, the remedial measures remained insufficient, and the Court therefore received the claims and proceeded to judgment), http://hudoc.echr.coe.int/eng?i=001-110394.

[677] *Broniowski v. Poland*, *supra* note 673, at par. 35; *Neshkov v. Bulgaria*, *supra* note 670, at par. 267.

[678] *See* Tatiana Sainati, *Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights*, 56 HARVARD INTERNATIONAL LAW JOURNAL 147, 159-60, 165-71 (2015).

[679] *Id.* at 196-201.

[680] In addition to the pilot judgment and settlement procedure, the European Court also permits unilateral declarations in order to resolve cases. ECHR Rules of Court, *supra* note 598, Rule 62A(1). Such declarations are usually only implemented when the applicant has refused an amicable settlement. *Id.* The declaration must be accompanied by a public admission of the violation and must include adequate remedial measures. *Id.* If the Court is satisfied that the declaration respects human rights, then the Court may strike the application "even if the applicant wishes the examination of the application to be continued." *Id.* Rule 62A(3); *see also Kalanyos v. Romania*, App. No. 57884/00, European Court of Human Rights, Judgment, par.. 25-36 (Apr. 26, 2007), http://hudoc.echr.coe.int/eng?i=001-80274. In these instances, the applicant may appeal the decision and, if circumstances warrant, the case may be restored to the Court's docket. *See, e.g.*, *Toğcu v. Turkey*, App. No. 27601/95, European Court of Human Rights, Judgment, par.. 8-14 (May 31, 2005), http://hudoc.echr.coe.int/eng?i=001-69214. The Court has not hesitated to reject inadequate declarations, however, with one study finding that nearly 30% of proposed declarations were rejected. KELLER, FOROWICZ, AND ENGI, *supra* note 589, at 132. For example, the Court has rejected unilateral declarations as inadequate where they failed to guarantee a full investigation. *See, e.g.*, *Tahsin Acar v. Turkey*, App. No. 26307/95, European Court of Human Rights, Judgment (Preliminary issue), par.. 84-86 (May 6, 2003), http://hudoc.echr.coe.int/eng?i=001-61076. Even where the Court has accepted the declaration, the case may be restored to the list of cases if the State fails to adequately implement the remedial measures. *See, e.g.*, *Aleksentseva v. Russia*, App. Nos. 75025/01, 75026/01, 75028/01, 75029/01, 75031/01, 75033/01, 75034/01, 75036/01, 76386/01, 77049/01, 77051/01, 77052/01, 77053/01, 3999/02, 5314/02, 5384/02, 5388/02, 5419/02, 8192/02, European Court of Human Rights, Judgment, par.. 5-6, 12-17 (Jan. 17, 2008), http://hudoc.echr.coe.int/eng?i=001-84446. In these instances, the Court frequently awards

significantly more than the State offered in the unilateral declaration. *Compare id.* Holding (2)(a) (requiring payment of damages of 2,300 to 5,200 Euros per applicant), *with Aleksentseva v. Russia*, App. Nos. 75025/01, 75026/01, 75027/01, 75028/01, 75029/01, 75030/01, 75031/01, 75032/01, 75033/01, 75034/01, 75035/01, 75036/01, 75037/01, 75038/01, 75136/01, 76386/01, 76542/01, 76736/01, 77049/01, 77051/01, 77052/01, 77053/01, 3999/02, 5314/02, 5384/02, 5388/02, 5419/02, 8190/02, 8192/02, European Court of Human Rights, Decision, The Law par. 1 (Sept. 4, 2003) (offering to pay 1,500 to 3,000 Euros per applicant), http://hudoc.echr.coe.int/eng?i=001-141417. Because unilateral declarations do not have the consent of the applicant, they should be used cautiously, if at all, and only for repetitive cases with well-established caselaw. *See* KELLER, FOROWICZ, AND ENGI, *supra* note 589, at 105-06.

J. Case Study: Release Orders- A possible remedy at the African Court

The African Court has been seized by applicants in the past who have sought a release order as a form of relief for alleged violations of the right to be heard and the right to liberty and security of the person. In the first decision on this prayer, that is in the matter of *Thomas v. United Republic of Tanzania*, the majority of the judges decided the following: "regarding the Applicant's prayer to be set free, such a measure could be ordered by the Court itself only in *special and compelling circumstances*".[681] The Court then held that these special circumstances had not been met in that case, however, Justice Elsie Thompson and Justice Rafaâ Ben Achour dissented. While they agreed with the majority on the general rule that a release order can only be issued in "very specific/and or compelling circumstances" they departed from them in this particular case on the basis that the applicant had demonstrated "specific or compelling" circumstances to warrant an order for release.[682] Noting especially that the multiple violations of the Applicant's fair trial rights and the fact that he had already served more than half of his sentence meant that the most suitable relief in this case was a release order.[683]

Justice Elsie Thompson referred to the *Del Rio Prada v Spain* case of the European Court of Human Rights and the *Loayza-Tamayo v Peru* case of the Inter-American Court of Human Rights wherein release orders had been issued as the most suitable remedy to address the alleged violation.

In the matter of *Evarist v. Tanzania*[684], the Court indicated that "if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice" then it could order the release of such an applicant.

Article 27 of the African Court's Protocol is the basis for it to order release in cases where it deems appropriate. This has been done by the African Court once thus far, that is in the matter of *Makungu v United Republic of Tanzania*.[685] The African Court can also be inspired by the jurisprudence of the Inter-American Court of Human Rights, European Court of Human Rights, the ECOWAS Court, the United Nations Human Rights Committee and international criminal tribunals in identifying "specific or compelling circumstances" that could serve as a basis for an order for his release.

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[681] *Thomas v. Tanzania supra* note 238; *Abubakari v. Tanzania supra* note 238.
[682] *Thomas v. Tanzania* Ibid (see Separate Opinion).
[683] *Ibid*.
[684] *Evarist v. Tanzania*, *supra* note 11 at par. 82.
[685] *Makungu v. Tanzania*, *supra* note 11.

1. Inter-American Court and Commission of Human Rights

The Inter American Commission of Human Rights has provided three conditions when release of an applicant can be ordered; that is when:

i. There is criminalisation of freedom of speech;

ii. There is confession induced through torture;[686]

iii. There is grievous violations of procedural rights which leads to arbitrary detention.[687]

In the case of *Gallardo v Mexico*[688], the Inter American Commission of Human Rights recommended that the Applicant be set free as the respondent had failed "to discharge its obligation to respect and guarantee the rights to personal integrity, legal guarantees, honor and dignity, and legal protection of Brigadier General José Francisco Gallardo Rodríguez". In a similar case where procedural irregularities culminated in the arbitrary detention of the applicant; the Inter-American Commission of Human Rights recommended the State of Argentina to "set the [applicant] free so long as the sentence remains pending".[689]

In the Inter-American Court, the chance to set precedent in cases influenced by "Anti-Terrorism laws" came in the form of *Loayza-Tamayo* v *Peru* case.[690]Professor Tamayo was arrested without a warrant and without proper investigation under the suspicion of being a member of the alleged terrorist group especially in relation to evidence that would have linked her to '*sendero luminoso'*.

Following her arrest, Professor Tamayo was held *incommunicado*, denied access to legal counsel except one appointed and supervised by the State and finally tried by "faceless" judges for treason in a military tribunal. Even so, the Special Naval Court, the military tribunal which tried her, acquitted her of the treason charge. However, this verdict was reversed by the Special Naval Court Martial, on appeal. On further appeal, the Supreme Council of Military Justice acquitted Professor Tamayo but then ordered that she be tried in civilian courts.

In the Criminal Court of Lima, Professor Tamayo challenged her charge through a preliminary objection of *res judicata*, nevertheless, she was convicted and sentenced to twenty (20) years imprisonment. At this point, a complaint against the detention of

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[686] See*, Martin del Campo Dodd v. Mexico*, Case 12.228, Report No. 117/09, Inter-American Commission on Human Rights, 12 November 2009.
[687] See, *Gallardo Rodríguez v. Mexico*, Case 11.430, Report No. 43/96, Inter-American Commission on Human Rights, 15 October 1996.
[688] *Ibid*.
[689] *Mauricio Macri and others v. Argentina*, Case 11.205, Report No. 2/97, Inter-American Commission on Human Rights, 11 March 1997.
[690]*Loayza-Tamayo v. Peru*, Inter-American Court of Human Rights, Judgment (Reparations and Costs), 27 November 1998.

Professor Tamayo had been filed with the Inter-American Commission of Human Rights IACHR which consequently made recommendations of *inter alia*, 'immediate release' of Professor Tamayo. Nevertheless, the Government of Peru rejected that recommendation leading the Inter-American Commission to seize the Inter-American Court.

The Commission in its application to the Court submitted: "*[t]here is a dual sense of urgency about this case: firstly, Peru, through the measure adopted, has caused irreparable harm to a person who has been arbitrarily tried and sentenced, in violation of the Convention; secondly, the physical and mental suffering inflicted on Ms. María Elena Loayza-Tamayo as a consequence of her confinement in a tiny cell for twenty-three and a half hours a day, and her incommunicado detention for one year, as well as the severe restrictions on visits, also constitute cruel and inhuman treatment*"[691]

In the judgment on merits the Inter-American Court of Human Rights held that the State of Peru had violated *inter alia* Article 7 of the American Convention. In order to remedy the situation, the Court posited: *"[a]s a consequence of the violation of the rights enshrined in the Convention, particularly the prohibition of double jeopardy, to the detriment of Ms. María Elena Loayza-Tamayo, and pursuant to the aforementioned article, the Court considers that the State of Peru must, in accordance with its domestic legislation, order the release of Ms. María Elena Loayza-Tamayo within a reasonable time*".[692]

A scrutiny of the *Loayza-Tamayo* decision reveals a clear distinction between the reasoning of the Commission and the Court even though they ordered the same remedy. For the Commission, emphasis was placed on the heinous nature of the detention which resulted in irreparable harm that could not be mitigated with any remedy other than release of the detainee.

The Court on its part based its decision to order Prof. Loayza-Tamayo's release on the prohibition against double-jeopardy especially *autrefois acquit*. Both the reasons given by the Commission and the Court could be considered serious and compelling enough to allow the tribunals to order the release of the victim.

2. European Court of Human Rights

The European Court of Human Rights issues declaratory judgments. Where it finds a violation, the general rule is that, it directs the respondent State to take measures to remedy the violation but it does not usually indicate which specific measures a Respondent Stat should take. Nevertheless, the exception to this rule was

[691] *Ibid.*
[692] *Ibid* at par. 84.

established in the matter of *Assanidze v Georgia*.[693]

In *Assanidze v Georgia*[694]; the Applicant had been convicted of kidnapping and sentenced to twelve (12) years imprisonment by the Ajarian High Court. The Applicant appealed until the Supreme Court of Georgia; which found in his favour, quashed the conviction and acquitted him. The Ajarian prison authorities were also ordered to release him with immediate effect. However, despite various efforts of the Supreme Court of Georgia and various other authorities' attempts to secure the release of the applicant; the Ajarian prison authorities did not comply. Thus the Applicant filed the case at the European Court of Human Rights.

The Court found a violation of Article 5 § 1[695] of the European Convention of Human Rights. It held: "the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment".[696] "…however, by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it".[697]

The reasoning of the Court was simple; the applicant was being detained despite his conviction being quashed by the highest Court of Georgia on the basis that he had not committed any offence according to the law, and the continued illegal detention was despite various attempts by the Georgian authorities to secure his release. Thus the Court ordered: "There is in fact only one way in which the consequences of the violation can be repaired." "…"In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 5 § 1 and Article 6 § 1 of the Convention , the Court considers that the Respondent State must secure the applicant's release at the earliest possible

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[693] *Assanidze v. Georgia*, App. No. 71503/01, European Court of Human Rights, 8 April 2004, par. 198.
[694] *Ibid.*
[695] "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a. the lawful detention of a person after conviction by a competent court".
b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition".
[696] *Supra* note 696 at par. 202.
[697] *Ibid*.

date."[698] The Applicant was released five days after the judgment.[699]

In the recent cases of *Alpay v Turkey*[700] *and Altan v Turkey*, the European Court was faced with a similar situation. The applicants were among the three hundred (300)[701] journalists who had been detained under the suspicion of terrorism after the failed coup d'état in Turkey in 2016. The crux of their accusation was that they had written articles opposing government policies. They were arrested and placed in pre-trial detention following an order by a magistrate. The applicants filed an objection to their detention order at a magistrate's court but it was dismissed. The applicants then filed another objection to their detention but it was also dismissed. The applicants consequently filed an application at the Turkish Constitutional Court while their original case was pending at the Istanbul Assize Court.

The Turkish Constitutional Court made a finding that the applicants were being unlawfully detained as the detention order was not substantiated with "concrete evidence". The Turkish Constitutional Court also held that the pre-trial detention of the Applicants was unnecessary and not proportional as it did not serve any "pressing social need".[702]The Turkish Constitutional Court found a violation of the right to liberty and transmitted its decision to the Istanbul Assize court "to take action". This decision prompted the applicants to apply to the trial court for an order for release but the Istanbul Assize Court (the trial court and also lower in hierarchy to the Turkish Constitutional Court) rejected the request. The Applicants then seized the European Court and their cases were prioritised. The European Court of Human Rights found a violation of Article 5 § 1 in both cases and observed: "[*f*]*or another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications runs counter to the fundamental principles of the rule of law and legal certainty*".[703]

In the *Case of Alpay*, The European Court ordered: "having regard to the particular circumstances of the case, the reasons for its finding of a violation and the urgent need to put an end to the violation of Article 5 § 1 of the Convention, the Court considers that the Respondent State must ensure the termination of the applicant's pre-trial detention at the earliest possible date".[704] In the *Altan case* however, even after finding the same violation; it was attributed only to his pre-trial detention and did not affect his imprisonment after being sentenced following conviction by the Istanbul Assize Court.

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[698] *Ibid*.
[699] See Alexander Orakhelashvili, "*Assanidze v. Georgia*", 99 *American Journal of International Law* (2005) 222.
[700] *Alpay v Turkey*, App No. 10839/09,13 March 2018.
[701] See Senem Gurol "Resuscitating the Turkish Constitutional Court: The ECtHR's Alpay and Altan Judgments". Available at: https://strasbourgobservers.com/2018/04/03/resuscitating-the-turkish-constitutional-court-the-ecthrs-alpay-and-altan-judgments/#more-4160.
[702] *Ibid*.
[703] *Ibid*.
[704] *Alpay v Turkey*, App No. 10839/09, 13 March 2018, at par. 195.

In *Ilascu v Moldova and Russia*[705], the applicants were citizens of Moldova who had been tried and convicted by "Moldavian Republic of Transdniestrian Supreme Court". This was a region that had self-proclaimed its independence but its independence was not recognised. While making an order for their release, the European Court indicated that "none of the Applicants was convicted by a court" and further that the sentence meted out to the Applicants could not be construed as lawful detention.

In ordering the applicants' release in the *Ilascu* case[706]; the Court based its decision on the lack of a legal basis for the detention, which left the Court with no choice but to terminate the said detention. Therefore, the Court has issued orders of release in cases where there is no legal basis of holding an individual, either because the legality of such detention has ceased or it never existed \.

3. ECOWAS Court

The ECOWAS Court has ordered the release applicants from prison in cases where it determines that the applicants have suffered gross violations of their fair trial rights.

This happened in 2016 when former National Security adviser of the Federal Republic of Nigeria, *Dasuki v. Nigeria* seized the ECCJ after he was re-arrested when he was out on bail. The ECCJ reasoned that Dasuki had been arrested initially in violation of pre-trial guarantees and that the re-arrest was a "mockery of democracy and rule of law".[707]

In *Inyang and Another v. Nigeria*, the Court ordered the release of applicants who had been sentenced to death by a Military Court in the Federal Republic of Nigeria in 1995. The Court held, "…that having found the defendant in breach of Article 7(1) (a) and (b) of the African Charter, the defendant's continuous holding and detention of the Applicants is illegal and therefore the defendant is hereby ordered to immediately release or order release of the Applicants from all further detention and restriction".[708]

4. United Nations Human Rights Committee

The United Nations' Human Rights Committee has also had to deal with cases requiring it to determine whether to order the release of an applicant from prison or not. In *Casafranca v Peru*, the Applicant had been arrested twice in the span of ten (10) years for suspicion of terrorism[709] and detained *incommunicado* where he was

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[705] *Ilascu v Moldova and Russia*, App. No. 48787/99, 8 July 2004.
[706] *Ibid*.
[707] *Dasuki v.Federal Republic of Nigeria*, Suit No. ECW/CCJ/APP/01/16, Judgment No. ECW/CCJ/JUD/23/16, 4 October2016.
[708] *Gabriel Inyang and Another v. Federal Republic of Nigeria*, Suit No. ECW/CCJ/03/2018 Judgment No. ECW/CCJ/JUD/20/18, 29 June 2018 at par. 8(3).
[709] Suspicion of being part of *Sendero Luminiso*.

allegedly tortured. The Committee found that Peru had violated *inter alia* Articles 7[710] and 9[711]of the International Convention on Civil and Political Rights (ICCPR). The HRC ordered that the State of Peru release and compensate the applicant.

Similarly, in the matter of *Del Saldias de Lopez v. Uruguay*, [712] the applicant's husband had been "arrested and detained for four months" without charge in Uruguay then released. Following harassment by security forces; the victim moved to Argentina, where he was arrested and later deported illegally to Uruguay. He was again held *incommunicado* for about four (4) months. At the time of his detention he was subjected to "physical, mental torture and other cruel, inhuman and degrading treatment".[713]

The Committee noted that not only had the rights of the victim been violated because he was illegally detained and tortured, but also because the measures applied by the State did not warrant the derogation of rights. The Committee also noted that the victim had served the prison term following the conviction from the unfair trial s and therefore he should have been released. Considering all those factors and obligated by Article 2 (3)[714] of ICCPR, the Committee held that the State should release the victim. In analysing the case filed by Del Saldias; it is not clear which particular factor swayed the Committee to order the victim's release from prison, whether it was the torture the victim suffered or that he was being held without a legal basis. What is indisputable is that, the Committee considered that the order of release was the most appropriate remedy that case. Therefore the Committee, just like the European Court, despite the limitations to the remedial jurisdiction set out in the legal texts, has ordered release of applicants from prison when it has deemed it fit to remedy egregious human rights violations.

From an analysis of the foregoing jurisprudence, the African Court on Human and Peoples' Rights could order release of detainees or prisoners as an appropriate remedy for fair trial/ violations of the right to liberty where 'special and compelling" circumstances arise. These may include cases where:

i. It is the only effective remedy- for example in a situation where the applicant is detained based on a double jeopardy charge;

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[710] Article 7 – "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…".
[711] "Everyone has the right to liberty and security of a person...".
[712] *Delia Saldias de Lopez v Uruguay supra* note 236.
[713] *Ibid*.
[714] 3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

ii. There is/was no legal basis for the applicant to be/have been in detention. This applies to situations where the applicant has been illegally detained *ab initio* and also when the initial legal basis for detention ceases to exist. Further in pre-trial detention whereby on analysis, the detention is not proportional or necessary;

iii. The African Court finds egregious violation of Articles 5 and 6 of the African Charter and the Court deems it reasonable to release the Applicant.

iv. The African Court finds the violation of the procedural rights of the African Charter were so grave as to virtually nullify the outcome in the national courts as a result of which the Applicant was detained;

v. The detention makes it urgent to release the Applicant in cases the African Court will deem so;

vi. Detention causes irreparable harm;

vii. Humanitarian reasons apply, for example, the Applicant is terminally ill.[715]

viii. Detention is a result of criminalisation of the freedom of expression.

[715] See *Djukic* No. IT-96-20-T, T. Ch.I., 24 Apr. 1996, at 4; In the Djukic Case Trial Chamber I of the International Criminal Court, “finding that the accused was suffering from an incurable illness which was in its terminal phase, ordered provisional release "solely for humanitarian reasons”.

IV. CONCLUSION

The right to a remedy and reparations for those harmed by human rights violations and international crimes is a crucial feature of the international human rights system. Reparations awards not only repair the harms caused by such violations, but they also reaffirm the guarantees contained in international instruments; increase the costs to, and thereby dissuade, States and other potential perpetrators from committing such violations; and have the potential to reduce the potential for future harms by addressing the root causes of the violations through changes in the laws, policies, institutions, or systems that made the violation possible.

In order to achieve these aims, reparations decisions by international human rights bodies and courts have adopted a variety of flexible approaches to the issues reviewed in this study. Such flexibility flows through nearly all aspects of reparations awards, from the types of evidence a body considers to the forms of reparations granted to the methods used for calculating monetary compensation. This flexibility recognises that, due to the harms they have suffered, victims often confront unique challenges in approaching human rights institutions and courts and proving damages. By utilising a variety of approaches and remaining flexible regarding their application in specific cases, human rights institutions and courts can most effectively redress the harms experienced by victims. As the African Court on Human and Peoples' Rights continues to develop its approach to reparations, it is hoped that this study may help to inform the creation of guidelines on reparations, as well as serve as an ongoing resource to address case-specific issues.

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