

Reaching for Justice

The Right to Reparation in the African Human Rights System

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I. Introduction and Context

The right of victims of human rights violations to reparation is a ‘well-established and basic human right that today is enshrined in universal and regional human rights treaties and instruments.’¹ Yet, its application in practice is far from satisfactory, and the majority of States fail to provide victims with an effective remedy, and only rarely do victims obtain full and adequate reparation.² When States fail to afford reparation, regional and international human rights complaints mechanisms (‘human rights mechanisms’) can help to strengthen the application of the right to reparation at national level by awarding adequate reparation where they find a State responsible for human rights violations.

This also holds true for cases filed with regional and sub-regional mechanisms in Africa. The African Commission on Human and Peoples’ Rights is the main regional forum for victims of violations of the African Charter to seek justice where domestic justice systems are not available, effective or sufficient. The African Charter provides the African Commission on Human and Peoples’ Rights (‘African Commission’ or ‘Commission’) with a broad mandate to ‘promote human and peoples’ rights and ensure their protection in Africa.’³ However, as the African Charter does not include an express provision on the right to reparation for victims of violations of the rights set out in the Charter, the Commission’s early jurisprudence was sparse in this area, and the jurisprudence continues to be variable, largely contingent on whether claimants specifically request reparation, and the nature and detail of such requests. It is not currently standard practice at the Commission to request or encourage petitioners to specifically request that the Commission recommends reparation as part of its dispositive of the case, nor to submit arguments or evidence specifically related to the measures of reparation sought. Consequently, victims and/ or their representatives often do not include specific claims of reparation in their submissions, which in turn can result in inadequate, limited and inconsistent rulings on reparation.

Currently, reparation does not feature as a prominent issue on the agenda of the Commission. Gaps remain between its jurisprudence and international standards such as those reflected in the *UN 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 of 2005* (‘UN Basic Principles and

¹ International Criminal Court (ICC), *The Prosecutor v Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, No. ICC-01/04-01/06, 7 August 2012, para.185. See generally, UN Human Rights Committee, General Comment 31, Nature of the Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

² See for instance, Institute for Human Rights and Development in Africa, Independent Medico-Legal Unit, Victims’ Rights Working Group and REDRESS, ‘Access to Justice for Victims of Systemic Crimes in Africa: Challenges and Opportunities, Summary of Conference Proceedings’ (‘Systemic Crimes in Africa Report’), 5 April 2013, at http://www.redress.org/downloads/publications/Summary%20Report%20of%20Banjul%20Meeting_April2012.pdf.

³ *African [Banjul] Charter on Human and Peoples’ Rights*, adopted 27 June 1981, entered into force 21 October 1986, Article 30.

Guidelines'),⁴ the *Nairobi Principles on Women's and Girls' Right to a Remedy and Reparation* ('Nairobi Principles') of 2007,⁵ and the Committee against Torture's *General Comment No.3: Implementation of Article 14 by State Parties* ('General Comment No.3') adopted in December 2012.⁶

In one of its first rulings on the merits of a case in April 1994, which concerned the abduction, arrest, ill-treatment and trial in Malawi of several opposition activists, the Commission found that the State was in breach of Articles 4, 5 and 7 of the African Charter on Human and Peoples' Rights. The Commission's ruling did emphasise that the State was 'responsible for the reparation of these abuses'⁷ yet it did not identify any measures the State should take to provide victims with redress. In a later case, at its 10th Extra-Ordinary Session in December 2011, the Commission held in a case filed against Egypt on behalf of four victims of, *inter alia*, sexual assault by members of the riot police, that the State party had violated a range of Articles of the Charter.⁸ The Commission then requested Egypt to compensate each of the four victims 'in the amount of Egyptian Pounds 57,000 for the physical and emotional damages and trauma they suffered.'⁹ It was the first time that the Commission requested a government to pay a specified amount of compensation as requested by the applicants for a violation of Article 5 of the African Charter. In addition, the Commission ordered a range of other measures Egypt should adopt, including law reform and the investigation and prosecution of those responsible for the violations. The Commission's ruling partially acknowledged the victims' right to various forms of reparation and recognised that its rulings may need to go beyond the facts of the individual case to prevent future violations. Thus, it can be seen that when claimants specifically request reparation, the Commission has included reparation in its recommendations to States if and as appropriate, and there is an evolving, though limited practice in this regard.

Furthermore, the African Court on Human and Peoples' Rights ('African Court' or ACtHR), which at the time of writing had received 27 cases,¹⁰ has an explicit mandate to award reparation where it finds a State party in violation of the Charter. The Court will therefore

⁴ UN 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 ('UN Basic Principles and Guidelines'), Adopted by General Assembly resolution 60/147, 16 December 2005, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

⁵ Nairobi Principles on Women and Girls' Right to a Remedy and Reparation ('Nairobi Principles'), Nairobi, March 2007, at <http://www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf>.

⁶ UN Committee against Torture, 'General Comment No.3 (2012)- Implementation of article 14 by States parties' ('General Comment No.3'), CAT/C/GC/3, 13 December 2012, at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f3&Lang=en.

⁷ African Commission, *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, Communications 64/92, 68/92, 78/92, para. 12.

⁸ African Commission, *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 323/2006; the Commission held that Egypt violated Articles 1,2,3,5,9 (2), 16 (1), 18 (3) and 26.

⁹ *Ibid*, para. 275(iv). At the time of the judgment, 57,000 Egyptian Pounds amounted to roughly 9,317.00 US Dollars.

¹⁰ At the time of writing, the Court had received 27 cases, and rendered decisions in 19 cases, see <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1>.

play a particularly important role in cases brought before it by the Commission, as well as cases filed by or on behalf of individuals.¹¹ In light of its explicit reparation mandate, the Court's success and effectiveness will also be judged in terms of its capacity to award adequate reparation to victims of violations of the African Charter.¹²

Despite significant progress in upholding victims' rights and holding States responsible for violations under the African Charter, more can be done to strengthen victims' rights on the continent.

I.1 Purpose of the Report

The effectiveness of the Commission, as well as the African Court, is measured not only against their ability to determine whether States parties to the African Charter comply with their obligations under the Charter. Effectiveness should also be measured by the practical outcome of the cases: what steps are outlined to address those violations, what States should do to provide justice to the victims, what measures States should take to prevent recurrence, and most importantly, the extent to which States comply with the rulings.

At an expert meeting convened by REDRESS together with the Centre for the Study of Violence and Reconciliation (CSVr) in Banjul, the Gambia, on 5-6 April 2013,¹³ practitioners working in and with the mechanisms have underlined that further guidance on the right to reparation for victims of gross human rights violations – including extrajudicial killings, torture, enforced disappearances, rape and other forms of sexual violence – is necessary. Participants, who included representatives of the African Commission, the ECOWAS Community Court of Justice, the SADC Tribunal as well as civil society and litigants before those mechanisms, recommended that the African Commission develop a handbook or a manual on the right to reparation to ensure greater awareness of the concept of reparation, to make certain that prospective litigants understood the possibility to request reparation and how to do so, to encourage adequacy and consistency of reparation rulings and compliance with international standards.

¹¹ According to Article 5 (3) of the African Court's Protocol, the Court may only receive cases from NGOs and individuals if the State has ratified the Protocol and made a declaration accepting the competence of the Court to receive such cases under Article 34 (6). At the time of writing, only seven States had made such a declaration: Burkina Faso, Malawi, Mali, Rwanda, Ghana, Tanzania, Ivory Coast.

¹² Other mechanisms where victims can claim a violation of their rights enshrined in the African Charter include the ECOWAS Community Court of Justice and the East African Court of Justice. The SADC Tribunal remained suspended at the time of writing.

¹³ The Expert Seminar was organised in collaboration with Prisoners Rehabilitation and Welfare Action (PRAWA), Egyptian Initiative for Personal Rights (EIPR), Independent Medico-Legal Unit (IMLU) and the Actions pour la Protection des Droits de l'Homme (APDH), see 'Concept Note', at http://www.redress.org/downloads/Concept-Note_Expert-meeting-on-Reparation_Eng.pdf; for an overview of the discussions and recommendations of the meeting see Jurgen Schurr, 'Reparation for Torture Survivors: the role of African Human Rights mechanisms, Banjul, April 2013', in Pan-African Reparation Perspectives', published by EIPR, PRAWA, CSVr, APDH and REDRESS, at <http://www.redress.org/downloads/publications/130626-ENGLISH-FINAL.pdf>.

This Report has been prepared on the basis of the recommendations and discussions of the expert meeting. It is also written against the background of litigants' on-going discussions before the Commission on the strengthening of the Commission's protection mandate. The Report includes research on the practice of the African Commission and other regional mechanisms, particularly the Inter-American human rights system, in awarding reparation.

This Report seeks to examine the procedures as well as the jurisprudence of the African Commission on the right to reparation for victims of gross human rights violations, in light of the evolving international standards and taking into account the practice of other international and regional human rights mechanisms.¹⁴ The Report aims to provide a reference for practitioners working in and with the regional and sub-regional mechanisms in Africa, and primarily the African Commission. It also aims to provide a series of recommendations to the African Commission on areas in which its own procedures and findings could be strengthened, taking into account the practice of other comparable mechanisms. The Report highlights emerging practices and interpretations of the different components of the right to reparation and identifies some of the challenges with regard to the implementation of the right to reparation. The UN Basic Principles and Guidelines and the UN Committee against Torture's General Comment No. 3 arguably provide the most elaborate and holistic approach to the right to reparation. Both will be used throughout the Report as reference points to identify standards and different components of the right to reparation under international law. The jurisprudence of key human rights treaty bodies and courts, in particular the Inter-American Commission and Court of Human Rights, will be used to identify in more detail how the different components of the State obligation to afford reparation to victims of human rights violations have been applied in practice. International standards, as well as jurisprudence of (other) international and regional human rights mechanisms is particularly relevant for the African Commission in light of Articles 60 and 61 of the African Charter. These Articles specifically provide that the Commission shall 'draw inspiration from international law on human and peoples' rights' and 'take into consideration ... other general or special international conventions', including 'customs generally accepted as law.'

¹⁴ This report will focus on the jurisprudence of the African Commission, as at the time of writing, the African Court had not yet rendered a decision awarding reparation. The African Court has rendered one judgment finding the State of Tanzania responsible for violating Articles 2,3,10 and 13 (1) of the Charter, yet it has not taking a decision on reparation for the victims in the case. Instead it granted leave to one of the applicants to make a separate submission on reparation in accordance with Rule 63 of the Court's Rules of Procedure. See African Court, *In the consolidated matter of Tanganyika Law Society, the Legal and Human Rights Centre (first applicant) and Reverend Christopher R. Mtikila (second applicant) v The United Republic of Tanzania*, Application No. 009/2011 and 011/2011, para.126, at <http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Judgment%20Application%20009-011-2011%20Rev%20Christopher%20Mtikila%20v.%20Tanzania.pdf>.

I.2 Structure of the Report

The Report is structured as follows:

- **Section I** introduces the Report.
- **Section II** clarifies the terminology commonly used in the discourse on the right to reparation, and examines its evolution under international law. It also outlines how different human rights treaty bodies have a mandate to afford reparation and can thus contribute to strengthening the right to reparation. The purpose of this section is to set out the normative framework for reparation under international law and to explain States' obligations as well as rights of victims.
- **Section III** highlights the important role of regional mechanisms in Africa in ensuring State compliance with their obligations under the African Charter and international law generally. It also examines the process of claiming reparation before the African Commission from a complainant's perspective so as to highlight key procedural strengths and shortcomings.
- **Section IV** examines and analyses the characteristics and different components of awarding reparation to victims, particularly with reference to the jurisprudence of regional mechanisms in Africa, the Americas and Europe. It includes a detailed examination of the scope and the different forms of reparation, as well as specific considerations when awarding reparation in the context of serious and massive violations. This is aimed to assist litigants to formulate requests for reparation in submissions to the mechanisms. It also provides guidance to the institutions themselves, and may serve as a starting point for the institutions to develop a handbook or manual on the right to reparation at regional level.
- **Section V** examines some of the pertinent challenges in the enforcement of reparation rulings and proposes a range of recommendations to strengthen victims' right to reparation across the region.

II. Victims' Right to Reparation under International Law

This section outlines the evolution of the right to reparation for victims of human rights violations under international law. It considers the origins of the international legal framework of reparations involving inter-State claims, from the landmark judgment of the Permanent Court of International Justice (PCIJ) in 1928. Further it considers how the framework has evolved, including the steps leading to the adoption of the UN Basic Principles and Guidelines in 2005 as well as the General Comment No. 3 in 2012. The right to a remedy and reparation are key components of most human rights treaties, including the African Charter on Human and Peoples' Rights ('African Charter'). Complaints mechanisms which consider alleged violations of human rights established by human rights treaties - including the African Commission on Human and Peoples' Rights - have a mandate to make certain that States provide a remedy and reparation to victims when their rights have been violated. The jurisprudence of many of such complaints mechanisms has progressively developed and now provides content to what reparation means practically, establishing a 'reparation framework'.

II.1 Terminology: Remedy – Reparation - Redress

In human rights law, the right to reparation has been understood to entail two aspects: the right to a domestic **remedy** and the right to adequate and effective forms of **reparation**. The connection between the procedure by which reparation is sought and the ultimate award is understood as indivisible, and together the concepts of 'effective remedy' and 'reparation' have been described as **redress**.¹⁵

An **effective remedy** is a crucial component of a right, as it provides victims with the procedure by which they can assert their rights and seek reparation for the violation. All human rights treaties and instruments require, either explicitly or implicitly, States parties to provide remedies under national law.¹⁶ The UN Basic Principles and Guidelines explain the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as giving rise to a duty, *inter alia*, to provide remedies that include the right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.¹⁷ The procedural remedy has been understood to require States to afford effective access to fair processes in which arguable claims can be determined. The remedy should be prompt, accessible and capable of offering a reasonable

¹⁵ Committee against Torture, General Comment No. 3, para.2.

¹⁶ M. Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Hum R LR 203.

¹⁷ UN Basic Principles and Guidelines, above n. 4.

prospect of success.¹⁸ Jurisprudence and standard-setting texts also recognise the need to consider the quality of victims' access to and experience of justice processes. They specify the need to ensure that victims receive adequate information¹⁹ and are assisted to access justice. Victims, including those with particular vulnerabilities, must be treated with humanity and dignity,²⁰ and their privacy and safety, both physical and psychological, must be safeguarded.²¹ Allegations of human rights violations that constitute crimes also give rise to an obligation to carry out prompt, impartial and thorough investigations capable of leading to the identification, and if appropriate, prosecution of the authors.²² The type of procedure necessary to give effect to the right is contingent on the nature of the violation. Most bodies consider that the most severe human rights violations require judicial remedies; however, the powers provided by a remedial mechanism and the guarantees it affords will determine whether it is effective.²³ Remedies must be available to all persons within the State's jurisdiction, which has been understood to include instances when a State exercises effective control over an area outside its national territory.²⁴

A remedy is only effective if it results in adequate measures of **reparation** granted to victims.²⁵ A holistic approach to reparation puts the victim's needs and interests at the centre of the process and aims at restoring the dignity of the victim. The UN Basic Principles and Guidelines provide that reparation includes a variety of forms, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²⁶

¹⁸ African Commission, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96, October 2001; European Court of Human Rights (ECtHR), *Silver v. United Kingdom*, Application Nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75 and 7136/75, 25 March 1983, para. 113(b); Inter-American Court of Human Rights (IACtHR), *Mayagna (Sumo) Awaj Tigni Community v Nicaragua*, Judgment, 31 August 2001, para 112.

¹⁹ ECtHR, *Anguelova v Bulgaria*, ECtHR, Application No 38361/97, 13 June 2002; See also, Council of Europe, *Convention on Action against Trafficking in Human Beings* (ECAT, adopted 16 May 2005, entered into force 1 February 2008) CETS No 197, Art 15; ECtHR, *Zontul v. Greece*, App No 12294/07, 17 January 2012, para.115; *Recommended Principles and Guidelines on Human Rights and Trafficking*, UN Doc E/2002/68/Add.1, 20 May 2002, 9.2.

²⁰ Committee on the Elimination of Discrimination against Women, *AT v. Hungary*, UN Doc. CEDAW/C/32/D/2/2003, 26 January 2005, para. 9.6(II)(vi); HRC, General Comment No. 31 (above n. 1) para 15; Committee on the Rights of the Child (CRC), General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5, 3 October 2003, para. 24; *Basic Principles and Guidelines* (n 1), 12(c); ECtHR, *Aksoy v Turkey*, Application No 21987/93, 18 December 1996, para. 98.

²¹ *Basic Principles and Guidelines*, 10, 12(b).

²² IACtHR, *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, paras. 42, 43; ECtHR, *Kaya v. Turkey*, Application No 158/1996/777/978, 19 February 1998; ECtHR, *Assenov v. Bulgaria*, App No 90/1997/874/1086, 28 October 1998; ECtHR, *Aksoy v Turkey* (n 78); IACtHR, *Cantoral Benavides v. Peru*, Judgment (Merits), 18 August 2000; ECtHR, *Güleç v. Turkey*, Application No 54/1997/838/1044, 27 July 1998, paras. 80-82.

²³ IACtHR, *Velásquez Rodríguez v. Honduras* Judgment (Merits), 29 July 1988, paras. 62-68; African Commission, *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Communication 334/06, paras. 96-98; UN Human Rights Committee, *Bautista de Arellana v. Colombia*, UN Doc CCPR/C/55/D/563/1993, 13 November 1995, para. 8.2; ECtHR, *De Souza Ribeiro v. France*, Application No 22689/07, Judgment (Grand Chamber), 13 December 2012, para 79.

²⁴ ECtHR, *Ilaşcu v. Moldova and Russia*, Judgment (Grand Chamber), Application No 48787/99, 8 July 2004; ECtHR, *Al-Saadoon v. United Kingdom*, Application No 61498/08, 2 March 2010.

²⁵ UN Human Rights Committee, *Blazek et al v Czech Republic*, Communication No. 847/1999, CCPR/C/72/D/857/1999, July 2001, para.7.

²⁶ See further below, Section VII, 'Forms of Reparation'.

Example: If an individual has been tortured, the State is obliged to provide the victim with **redress** (see for instance Article 14 of UN CAT). That obligation can be broken down into (1) an obligation to provide the victim with an effective route to obtain reparation and (2) an obligation to provide adequate, effective and prompt reparation. The African Commission has emphasised that the route to obtain reparation, i.e. the **remedy**, must be 'available' (accessible without impediment), 'effective' (it must offer a prospect of success) and 'sufficient' (it must be capable of redressing the complaint). If there is sufficient evidence against individuals responsible for a human rights violation that also constitutes a crime under international human rights law, the obligation to provide a remedy includes an obligation to prosecute and punish such individuals. As the remedy is only effective if it is also sufficient, it must afford the victim with **reparation** that is capable of restoring the dignity of the victim, including through providing different forms of reparation as necessary in the specific case. In addition, the State is obliged to take measures to prevent the act from recurring in future.

II.2 Why is Reparation for Human Rights Violations Important?

Aside from the legal requirement to afford reparation which in and itself makes reparation an important component of the underlying need to respect victims' rights to justice and to underscore the role of law in society, reparation serves a number of additional purposes. Reparation can play a vital part in victims' recovery from past violations. By helping to restore the rupture between themselves and society which typically underpins human rights violations – the essential component being that a State causes harm to the individuals it is mandated to protect – reparation can help victims to regain their dignity and a sense of control. The public acknowledgement of wrong-doing by the State through the investigation of the circumstances of the violation(s), the identification, prosecution and punishment of those responsible, affording victims with compensation for the losses they suffered as a result of the violation, assisting in their rehabilitation and taking measures to prevent recurrence can all help to overcome stigmatisation and restore confidence in and the legitimacy of the justice system and the affirmation of the rule of law.

Where it is understood that a particular violation stems from structural shortcomings of a State's legal system or underlying injustices that make particular individuals or groups vulnerable to abuses, it has also been recognised that reparation should go beyond the individual case and address such shortcomings, for instance through institutional and law reform or broader measures aimed at overcoming structural discrimination.

This need for reparation to address more than the harms suffered by individual litigants is quite common. The need is present in the aftermath of a violent conflict or a dictatorship

involving systemic human rights violations and a large number of victims, and/or when particular groups such as women, ethnic or religious minorities are targeted because of their membership in the group and where harm is suffered by the community as a whole. In addition to addressing such harms, reparation can be a key component for societies in transition to reconcile and come to terms with a violent past.

II.3 Right to Reparation under International Law

Reparation has a fundamental place in law; it is synonymous with law itself.²⁷ It derives from tort law, public law and the law of State responsibility. Domestically, injured individuals can usually pursue public law or tort actions against persons or entities who have wronged them, including State officials and the State itself. Crime victims may also pursue civil actions against perpetrators, either alongside criminal trials or as separate tort claims. Some countries have established administrative programmes to indemnify crime victims as an extension of social welfare policies, or to respond to mass victimisation as part of political transitions.

In international law, the obligation to afford reparation arises as a consequence of the breach of a primary obligation causing injury.²⁸ The Permanent Court of International Justice (PCIJ) held in the landmark *Chorzów Factory* case that it is ‘a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.’²⁹ Reparation is applicable to any breached international obligation causing injury.³⁰

Consistent with the classical understanding of international law as a set of rules applicable to States in their relations to each other,³¹ the international law of reparation for human rights and international humanitarian law abuses first developed through inter-State claims, pursuant to the law on injury to aliens and diplomatic protection. Under this framework, the State of nationality may seek reparation from the offending State for the violation of its rights; the injured alien is not understood to possess individual rights separate from the State of nationality.³²

Victims’ right to a remedy and reparation under international law has evolved considerably since the 1928 landmark judgment of the PCIJ in the *Chorzow Factory* case. The focus of the

²⁷ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 389.

²⁸ ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts (ARS)*, Yearbook of the International Law Commission, 2001, vol. II (Part Two), UN Doc A/56/10, Art 31, reflecting the *Chorzów Factory (Ger. v. Pol.)* (Jurisdiction) [1927] PCIJ Rep Series A No 9, 21.

²⁹ *Chorzów Factory* (Merits) [1928] PCIJ Rep Series A No. 17, 29.

³⁰ ARS, above note 29, Art 31 and commentaries.

³¹ Lassa Oppenheim, *International Law: A Treatise* (Ronald Roxburgh ed, 3rd edn, Longmans Green & Co 1920) vol I, 18-19.

³² PCIJ, *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* [1924] PCIJ Rep Series A No 2, 12; *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ Rep 24.

PCIJ – and of international law at the time - was on the rights and obligations owed by one State to another State, rather than on the obligations of States vis-à-vis an individual. Following World War II, however, individuals were increasingly recognised as subjects of international law, and right-holders, as reflected in the Universal Declaration of Human Rights (UDHR), adopted in 1948 as a response to the horrific crimes committed in World War II. The right to an effective remedy and to reparation for those whose rights have been violated has been an integral part of these progressive developments and efforts to make the system of human rights protection effective. As emphasised by the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, ‘the question of reparation should be viewed in the overall context of the promotion and protection of human rights and fundamental freedoms and of preventing and correcting human rights abuses.’³³

The right to a remedy and reparation today is firmly embodied in human rights treaties and declarative instruments. Article 2(3) of the International Covenant on Civil and Political Rights 1966 (ICCPR), requires State parties to ‘ensure that any person who suffers a violation of the Covenant shall have an effective remedy’ and that ‘any person claiming the right to an effective remedy has the right to have their claim assessed by a competent judicial, administrative or legislative authority.’³⁴ Article 14 of the Convention Against Torture of 1984 stipulates the right of victims of torture to redress: ‘Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.’³⁵ The latest international human rights treaty to explicitly provide for a right to reparation is the International Convention for the Protection against Enforced Disappearances (CPED), stipulating in Article 24 (4) that “[E]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.”³⁶

³³ Commission on Human Rights, ‘Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms- Final report submitted by Mr Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993, Recommendation No.2 at http://www1.umn.edu/humanrts/demo/van%20Boven_1993.pdf.

³⁴ International Covenant on Civil and Political Rights, General Assembly (GA) resolution 2200 (XXI) of 16 December 1966, entry into force 23 March 1976; see also Articles 9 (5) and 14 (6) of the ICCPR, providing for a right to compensation in cases of unlawful arrest or detention or wrongful conviction.

³⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), General Assembly resolution 39/46 of 10 December 1984, article 14.

³⁶ International Convention for the Protection of All Persons from Enforced Disappearance 2006 (ICPPED), 20 December 2006, Doc.A/61/488.C.N.737.2008, Article 24; the right to a remedy is also enshrined in all other major international human rights treaties, including the International Convention on the Elimination of all forms of Racial Discrimination 1965 (ICERD) under article 6; the Convention on the Elimination of all forms of Discrimination Against Women 1979 (CEDAW) under article 2(b)(c)(e); the Convention on the Rights of the Child 1989 (CRC) under article 39; the Rome Statute for an International Criminal Court, Article 75.

The right to reparation under international law obliges States to ensure that victims are able to obtain such reparation in law and in practice. The UN Human Rights Committee and the UN Committee against Torture, as well as various regional mechanisms have spelled out the procedural and substantive elements of States' obligations to afford reparation.³⁷ The UN Basic Principles and Guidelines provide important further content to the State obligations in the context of the right to reparation. As emphasised in the preamble of this text, the UN Basic Principles and Guidelines do not 'entail new international or domestic legal obligations, but identify mechanisms... for the implementation of existing legal obligations under international human rights law and international humanitarian law.'³⁸

Accordingly, the key State obligations in relation to the obligation to provide a remedy and reparation include:

- ensuring that victims have "accessible and effective remedies" through appropriate judicial and administrative mechanisms;
- investigating allegations of violations promptly, thoroughly and effectively through independent and impartial bodies; and to cease on-going violations;
- prosecuting those responsible for violations which constitute crimes;
- providing reparation to victims, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

General Comment No. 3 underlines that the State responsibility to provide reparation also extends to acts of torture or ill-treatment committed by private actors in cases where States have failed to 'exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.'³⁹

The African Commission has emphasised in several cases that the State's obligation to provide reparation is inherited by successor governments:

[P]rinciples of international law stipulate, however, that a new government inherits the previous government's obligations, including the responsibility for the previous

³⁷ Human Rights Committee, General Comment No.31 (above n. 1) paras. 6-43.

³⁸ Other instruments adopted by the UN human rights Charter based and treaty bodies include the 'UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', UN GA Resolution 40/34 of 29 November 1985 and the 'Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity,' E/CN.4/2004/88, 24 February 2004.

³⁹ Above n. 6, para.7; see also Committee against Torture, General Comment No.2, 'Implementation of Article 2 by States parties', CAT/C/GC/2, 24 January 2008, para.15, at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en.

government's mismanagement. The change of government in Malawi does not extinguish the present claim before the Commission. Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses.⁴⁰

II.4 The right to reparation in the 'African Human Rights Framework'

The African Charter on Human and Peoples' Rights 1981 ('African Charter' or 'ACHPR') does not contain a specific article on the obligation of States to afford reparation in the event of a breach of the rights enshrined in the Charter.⁴¹ However, this does not mean that victims' right to reparation is not recognised in the Charter. Article 1 of the Charter obliges State parties to 'recognise the rights, duties and freedoms enshrined in the Charter and... to adopt legislative or other measures to give effect to them.' Article 7 (1) (a) provides that every individual shall have the right to have his cause heard, including 'a right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by convictions, laws, regulations and customs in force.' The African Commission has interpreted Article 7 (1) to include victims' right to a remedy, noting:

[T]he protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the rights of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief.⁴²

Accordingly, even in the absence of an article within the Charter providing specifically for victims' right to reparation, such a right has been implied by the African Commission and other sub-regional mechanisms in their interpretation of the Charter.⁴³

⁴⁰ See African Commission, *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, Communications 64/92-68/92-78/92_8AR, para.12.

⁴¹ Only article 21 (2) stipulates expressly that, in cases of spoliation of property, 'the disposed people shall have the right to the lawful recovery of its property as well as to adequate compensation.' This is in contrast to for instance the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ('European Convention' or 'ECHR') and the American Convention on Human Rights 1969 ('American Convention' or 'ACHR') which have both recognised explicitly the rights of victims to remedy and redress for violations of their rights. See European Convention Arts. 5(5), 13 and 41; American Convention, Arts. 25, 63(1) and 68.

⁴² African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/02, para.213. The Commission held further that 'where the competent authorities put obstacles on the way which prevent victims from accessing the competent tribunals, they would be held liable'. See African Commission, *Sudan human rights organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communications 279/03 and 296/05, para. 181.

⁴³ G. Musila, 'The right to an effective remedy under the African Charter on Human and Peoples' Rights', in African Human Rights Law Journal, (2006), p. 442. See also M. Cherif Bassiouni, "International Recognition of Victims' Rights," *Human Rights Law Review*, Vol. 6, No. 2 (2006), pp. 203-279, at p. 207.

The right to reparation as reflected in international treaties, and developed further in a series of instruments as outlined above, is also prominently present – and developed further- in a range of instruments within the African human rights framework.

Gender specific reparation: The ‘Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (‘Women’s Protocol’) of 2003 sets out a number of rights that victims can rely upon in communications before the Commission provided the relevant State has ratified the Women’s Protocol. Article 4(f) obliges State parties to the Protocol to ‘establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women.’⁴⁴ In November 2007, the African Commission adopted a *Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence*.⁴⁵ The resolution provides important guidance for States- as well as the Commission itself- to ensure that reparation afforded to victims of sexual violence is adequate and comprehensive, in particular in light of ‘the extent of physical and psychological trauma that women and girls face as a result of sexual violence.’ The Resolution calls on State parties to the African Charter to ensure accountability of perpetrators of sexual violence and to ‘[P]ut in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for victims of sexual violence.’ In complementing Article 4(f) of the Women’s Protocol, the Resolution further provides that in setting up such reparation programmes and mechanisms, States must ensure that women participate in the elaboration, adoption and implementation of such programmes.

Procedural obligations to guarantee access to justice, in particular for women and communities: The Commission also adopted the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (‘Fair Trial and Legal Assistance Principles and Guidelines’) which comprehensively set out the obligations of States relating to provisions on fair trial in the Charter.⁴⁶ These include significant procedural obligations such as guaranteeing victims of crime access to justice and prompt redress through ‘formal or informal procedures that are expeditious, fair, inexpensive and accessible.’ States furthermore should ‘inform victims of their rights in seeking redress through such mechanisms.’ These fair trial guidelines emphasise that States need to pay specific attention to the needs of rural communities and women:

⁴⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, at http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf; see further REDRESS, ‘Litigation strategies for sexual violence in Africa’, September 2012, pp.32-33 at <http://www.redress.org/downloads/publications/REDRESS%20Note%20on%20Reparation%20for%20PSVI%20Meeting.pdf>.

⁴⁵ African Commission, *Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence*, November 2011, at <http://www.achpr.org/sessions/42nd/resolutions/111/>.

⁴⁶ African Commission, ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa’, at <http://www.achpr.org/instruments/fair-trial/>.

- States must take special measures to ensure that rural communities and women have access to judicial services. States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women.
- In countries where there exist groups, communities or regions whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, States shall take special measures to ensure that adequate judicial services are accessible to them.
- States shall ensure that access to judicial services is not impeded including by the distance to the location of judicial institutions, the lack of information about the judicial system, the imposition of unaffordable or excessive court fees and the lack of assistance to understand the procedures and to complete formalities.⁴⁷

Furthermore, fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and 'to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence.'⁴⁸

Substantively, these fair trial principles do not provide for specific forms of reparation for women or communities. However, they do stipulate that, amongst other things, victims of crime and abuse of power, including victims of violations of international law committed by public officials, should 'receive restitution from the State whose officials or agents were responsible for the harm suffered.' States should provide financial compensation in cases where the perpetrator is indigent, including compensation to the victims who have suffered harm as a result of the crime, as well as the family, 'in particular dependants.' States are 'encouraged to establish, strengthen and expand national funds for compensation to victims.'⁴⁹

Reparation for torture: In 2002, the African Commission adopted the *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (Robben Island Guidelines'). The Robben Island Guidelines outline under three main headings the State obligations to prohibit and prevent torture, and, in part III, to provide reparation to victims of torture and ill-treatment. The obligation to provide reparation exists regardless of whether a successful criminal prosecution has been brought. The Robben Island Guidelines also urge States to ensure that

⁴⁷ African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at <http://www.achpr.org/instruments/fair-trial/>, Section G.

⁴⁸ Ibid, Section N.

⁴⁹ Ibid.

all victims of torture and their dependents are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support. These Guidelines specify that direct victims, as well as their family members and communities may also be considered victims for the purposes of reparation.⁵⁰

The above listed instruments provide helpful guidance to the interpretation of the obligation of State parties to the African Charter to provide, and the rights of victims to obtain, reparation for human rights violations. This is particularly true for the Women's Protocol, the Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, and the Fair Trial Principles and Guidelines, which fill gaps of other (international) instruments in setting out the procedural obligations of States to provide a remedy to women and communities in particular. The Robben Island Guidelines have equally helped to foster awareness of the State obligation to provide reparation to victims of torture. However, these Guidelines do not explain in any detail how in practice States are to implement the obligations spelled out in part III of the text. The Committee for the Prevention of Torture in Africa (CPTA) – mandated to promote the Robben Island Guidelines - is therefore considering developing a General Comment on part III, akin to General Comment No. 3 adopted by the UN Committee against Torture. This would set out in detail the obligations of States to afford reparation to victims of torture and ill-treatment in Africa.⁵¹

III. Role of International and Regional Human Rights Mechanisms in Strengthening Victims' Access to Reparation

The obligation to enable victims of human rights violations to access justice requires States to provide victims with an effective remedy within their own legal system. In turn, victims are therefore usually required to 'exhaust remedies' domestically, before turning to a regional or international human rights mechanism.⁵² According to the African Commission,

⁵⁰ African Commission, 'Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, October 2002, at http://www.achpr.org/files/sessions/32nd/resolutions/61/achpr32_robben_island_guidelines_eng.pdf.

⁵¹ See Jean-Baptiste Niyizurugero, Vice President of the CPTA, 'The Committee for the Prevention of Torture in Africa: facilitating justice and redress for victims of torture', 26 June 2013, in 'Pan-African Reparation Perspectives', published by EIPR, PRAWA, CSV, APDH and REDRESS, at <http://www.redress.org/downloads/publications/130626-ENGLISH-FINAL.pdf>.

⁵² Including the UN Human Rights Committee, the Committee against Torture as well as the African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, as

[T]he exhaustion of local remedies rule is a principle under international law of permitting States to solve their internal problems in accordance with their own constitutional procedures before accepted international mechanisms can be invoked. The particular State is thus enabled to have an opportunity to redress the wrong that has occurred there within its own legal order.⁵³

A victim may turn to the relevant regional or international mechanism in cases where a State fails to redress the wrong that has occurred within its own legal order. Human rights mechanisms therefore often represent the last resort for victims to find justice and they have an important role to play in upholding victims' rights.

Cases before human rights mechanisms such as the African Commission provide a key opportunity for the Commission to guide States on how best to apply the law in conformity with international obligations. This is a way to make human rights protection practical and effective. The more specific the guidance, arguably, the easier it is for the State to comply with the Commission's decisions and to ensure that its domestic law and practice is compatible with its obligations under the African Charter.

III.1 Reparation mandates of regional human rights mechanisms in Africa⁵⁴

African Court

The African Court has advisory and contentious jurisdiction and can make provisional orders and issue binding judgments. As mentioned above, the African Court has an express mandate to award reparation:

If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.⁵⁵

well as sub-regional mechanisms such as the East African Court of Justice, SADC Tribunal and ECOWAS Community Court of Justice.

⁵³ African Commission, *Article 19 v Eritrea*, Communication 275/03, para. 45; the African Commission has recognised that there are exceptions to the 'exhaustion requirement', see , Litigants' Group, 'Filing a Communication before the African Commission on Human and Peoples' Rights- a complainant's manual', August 2013, pp.12-15, at <http://www.redress.org/downloads/publications/1307%20Manual%20to%20the%20African%20Commission.pdf>.

⁵⁴ This section does not include the sub-regional Community courts; for further information on the role of these courts in the adjudication of human rights cases, see Lucyline Nkatha Murungi and Jacqui Gallinetti, 'The role of sub-regional courts in the African human rights system' in *International Journal of Human Rights*, vol.7, n.13, December 2010.

⁵⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, at <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf>. Similarly, the European Convention for the Protection of Human and Fundamental Freedoms (1950) provides the European Court of Human Rights with a mandate to award reparation in Article 41: '[I]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'; the American Convention on Human Rights provides in Article 63 (1): 'If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the

African Commission

The African Commission is tasked with the promotion and protection of the rights enshrined in the African Charter. As part of its protective mandate, it has a quasi-judicial function to examine 'Communications' (i.e. complaints) from victims and/or their representative(s) alleging violations of the African Charter by a State party to the Charter. Its protective mandate allows the Commission 'to make findings on violations or otherwise, with a view to safeguarding the enjoyment of human and peoples' rights and fundamental freedoms and providing redress for breaches thereof.'⁵⁶

Anyone alleging a violation of the African Charter by one of the State parties to the Charter can file a complaint with the Commission. Over the past 26 years, the Commission has rendered important decisions that uphold the rights of thousands of victims of human rights violations committed on the continent. While its Rules of Procedure do not expressly provide the African Commission with a mandate to award reparation, the African Commission for instance has made clear that:

[I]ts role consists precisely in pronouncing on allegations of violations of the human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries.....cannot shield that country from fulfilling its international obligations under the Charter.⁵⁷

In addition to the adjudication of human rights cases between individuals and States, the Commission can play an important role in standard setting through the adoption of resolutions, statements, declarations and recommendations. Through its function as 'guardian' over the African Charter, the Commission furthermore promotes and monitors State compliance with their obligations under the Charter, for instance through concluding observations on periodic State reports.⁵⁸

enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party'.

⁵⁶ African Commission, Resolution 97: Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, 29 November 2006, at <http://www.achpr.org/sessions/40th/resolutions/97/?prn=1>.

⁵⁷ African Commission, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*, Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98, para.83.

⁵⁸ While the Commission does not regularly monitor State compliance with the right to a remedy and reparation, - nor, for that matter, compliance with its recommendations- it has expressed concern about a lack of e.g. compensation paid to the next of kin of victims of enforced disappearance and recommended to 'find an appropriate solution to the situation of missing persons and ensure that a fair and equitable compensation is paid to the rightful heirs.' See African Commission, 'Concluding Observations on the 3rd and 4th Combined Periodic Reports of the Peoples' Democratic Republic of Algeria,

III.2 Relationship between the African Court and the African Commission

The African Commission can refer cases to the African Court where it considers it necessary to do so, for instance in cases involving serious or massive human rights violations, or where the Commission considers that a State failed to comply with its decision.⁵⁹ This is similar to relevant arrangements in the Inter-American human rights system, where the Inter-American Commission on Human Rights also has a mandate to refer cases to the Inter-American Court on Human Rights. There is, however a significant difference pertaining to the role of the initial complainants in referral cases: the Inter-American Commission's Rules of Procedure specifically provide that the Commission request the 'petitioner' to present, *inter alia*, 'the claims concerning reparations and costs' prior to referral.⁶⁰ Following the referral to the Inter-American Court, Article 24 of that Court's Rules of Procedure provide that 'the alleged victims or their duly accredited representatives may submit their pleadings, motions and evidence autonomously throughout the proceedings.'⁶¹

The African Commission's Rules of Procedure do not provide complainants in the referral case with the possibility to make separate submissions on reparation prior to referral. Furthermore, the Court's Rules of Procedure provide that initial complaints will only be heard in referral cases if the Court deems it necessary.⁶² Without further clarification of the role of initial complainants before the African Court in referral cases, the current provisions in the Commission's and Court's Rules of Procedures therefore risk that reparation requests and needs of victims are not adequately considered by the Court. A revision of the Rules providing initial complainants with an opportunity to make a separate submission on reparation prior would go some way to address this concern. A change in the Court's Rules of Procedure which provides the initial complainants with an active role alongside the Commission in referral cases would furthermore ensure that the Court can receive relevant submissions from and hear complainants on issues related to reparation. Barring this recommended revision to the Rules, the Commission should seek further inputs from the petitioners on reparation requests prior to referring the case.

May 2008, at http://www.achpr.org/files/sessions/42nd/conc-obs/3rd-4th-2001-2006/achpr42_conc_staterep34_2007_algeria_eng.pdf.

⁵⁹ See Rule 118 (1) of the Commission's Rules of Procedure.

⁶⁰ See Rule 44 (3) of the Inter-American Commission's Rules of Procedure, at http://www.oas.org/xxivga/english/reference_docs/Reglamento_CIDH.pdf.

⁶¹ See Article 24 of the Inter-American Court's Rules of Procedure, at http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf.

⁶² ACtHPR, Rules of Procedure, Rule 29 (3) (c); Rule 34 (5) providing for submissions by applicants to the Court on reparation does not refer to the role of complainants in referral cases, see http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf.

IV. A Complainant's Perspective of Claiming Reparation before the African Commission: Challenges and Opportunities

As a detailed examination of the communication process before the African Commission is beyond the scope of this report, this section is limited to a brief description of the process from the complainant's perspective.⁶³ While the Commission's communication process has been strengthened in the past decades, it arguably still has some way to go before becoming a 'victim friendly' human rights mechanism that puts the interests, needs and rights of the victims at its centre. The main concerns from a complainant's perspective, as elaborated below, are the Commission's lack of emphasis on aspects of reparation throughout the proceedings, and, in some cases, the Commission's deference to States as far as compliance with their obligations under the Charter are concerned.⁶⁴

IV.1 Access, Information and Outreach

The Commission takes a wide approach as to who can file a complaint before it. It does not impose strict conditions on who may file a complaint and is guided by the allegation of the violation itself, rather than the status of the person making the allegation.⁶⁵ The Commission has emphasised that complainants do not themselves need to be victims or members of a victim's family to raise an allegation of a human rights violation. In particular, the Commission allows persons other than victims to file communications, including non-governmental organisations. The Commission has explained that in cases where victims themselves are unable to file a complaint:

[I]t has adopted an *actio popularis* approach where the author of a communication need not know or have any relationship with the victim. This is to enable poor victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality.⁶⁶

⁶³ See for instance, Litigants' Group, 'Filing a Communication before the African Commission on Human and Peoples' Rights- a complainant's manual', August 2013, at <http://www.redress.org/downloads/publications/1307%20Manual%20to%20the%20African%20Commission.pdf>.

⁶⁴ See also, Gina Bekker, 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations', in *Human Rights Law Review* (2013, 13 (3): 499-528, 1 September 2013; Michelo Hansungule, 'African courts and the African Commission on Human and Peoples' Rights, pp. 233-271, at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf.

⁶⁵ Article 47 (for complaints brought by one State against another State) and Articles 55, 56 for individual complaints against State parties to the Charter.

⁶⁶ African Commission, *Article 19 v Eritrea*, para.65; *The Social and Economic Rights Action Center and the Centre for Economic and Social Rights v Nigeria*, Communication 155, para.49.

The Commission therefore can be a very accessible mechanism for a broad range of victims to obtain justice. However, litigants before the Commission and civil society working with victims in Africa have expressed concern about the lack of awareness of the Commission's existence, its mandate and communications process to date. This may explain the relatively low number of cases the Commission has considered to date, particularly in comparison to similar regional mechanisms elsewhere.⁶⁷ The absence of an outreach strategy to provide victims with information about available remedies at the Commission currently prevents it from playing a more meaningful role for a greater number of victims.⁶⁸ Other measures that could help increase the visibility of the Commission and its mandate could include publication of its documentation in French, English and Portuguese. The promotional missions the Commission carries out to State parties (subject to funding available, as well as an invitation from the State in question) can also help promote the work of the Commission, including its protective mandate.⁶⁹ Participation of Commissioners in conferences organised by civil society working with victims of human rights violations can have a similar awareness raising effect.⁷⁰ The new website of the Commission, including in particular the updates on its jurisprudence, can further contribute to raise awareness and understanding of the Commission's processes and the kinds of decisions the Commission can take.⁷¹

IV.2 Submitting a Claim for Reparation regarding a Violation of the African Charter

The Commission examines communications filed before it in a three stage process: (1) seizure, (2) admissibility, (3) merits. Its Rules of Procedure do not expressly provide for a separate stage for considering claims for reparation and these are currently decided in the

⁶⁷ In over 26 years, the Commission has heard less than 500 cases. This is in stark contrast to the Inter-American Commission, which in 2012 alone, has received 1,936 individual petitions, 448 requests for precautionary measures and referred 12 cases to the Inter-American Court of Human Rights, see 'Inter-American Commission on Human Rights, 'Annual Report of 2012', at http://www.oas.org/en/iachr/media_center/PReleases/2013/024.asp.

⁶⁸ See for instance in comparison the leaflet published by the Inter-American Commission on the communication procedure before the IACHR, at <http://www.oas.org/en/iachr/docs/pdf/HowTo.pdf>; the 'Litigants' Group'- a group of lawyers, civil society organisations and others working as litigants before the African Commission- therefore decided to publish a manual on how to file a complaint before the African Commission, targeting civil society organisations and lawyers less familiar with the Commission's mandate and communication procedure. See also OMCT, 'The Prohibition of Torture and Ill-treatment in the African Human Rights System- A handbook for victims and their advocates', OMCT Handbook Series Vol.3, October 2006.

⁶⁹ The Commission's mission to Uganda in July 2013 has also included a meeting with civil society groups in Uganda, affording the Commission an important opportunity to promote its work, and civil society to voice their concerns regarding human rights protection in Uganda, 'Press Statement on the Promotion Mission of the African Commission on Human and Peoples' Rights in the Republic of Uganda', 5 September 2013, see <http://www.achpr.org/press/2013/09/d173/>.

⁷⁰ Commissioner Med.S.K. Kaggwa for instance participated in a conference organised by the Independent Medico Legal Unit and REDRESS on the law and practice of torture in Africa. See REDRESS, 'Torture in Africa: the law and practice- Summary report of the proceedings of a meeting of African experts held in Naivasha, Kenya, from 10 to 12 May 2012', at <http://www.redress.org/downloads/1206%20Africa%20regional%20meeting%20Summary%20Report.pdf>.

⁷¹ See www.achpr.org, as well as the 'CaseLaw Analyser' by the Institute for Democracy and Development in Africa, providing a detailed overview over decisions taken by a variety of African mechanisms, including the African Commission: <http://caselaw.ihrda.org/>.

merits stage of the case.⁷² Complainants can set out a claim for reparation in the initial complaint sent to the Commission before seizure, and expand on and substantiate such a claim once a communication has been declared admissible and complainants are asked to submit arguments on the merits of the case.

The Commission does not request the complainant to make a specific submission on reparation (see below). However, from a complainant's perspective it is important that relevant claims are included as the Commission may not request the State to afford victims with specific forms of reparation unless these are specifically requested by the complainant. Complainants should therefore specify clearly in their submission what forms of reparation are required to remedy the alleged violation and present evidence in support of these requests. The complainant's submission on the merits is usually the last opportunity in the Commission's communication procedure to raise such requests.

Consideration of reparation requests

The Commission's communication process does not currently include a separate stage on the consideration of claims for reparation by victims, nor does the Commission's decision provide reasoning or an analysis of the reparation it affords to victims in response to the violations found. The award of reparation to victims is only considered in the actual ruling or the 'dispositif' of the Commission's decision, when the Commission 'recommends', 'urges' or 'requests' States found in violation of the Charter to afford victims specific forms of reparation. For instance, in the case of *Article 19 v Eritrea*, concerning the continued incommunicado detention of at least 18 journalists in Eritrea, the Commission found that Eritrea had violated its obligations under Articles 1, 5, 6, 7 (1), 9 and 18 of the African Charter. The Commission

[U]rges the government of Eritrea to release or to bring to a speedy and fair trial the 18 journalists detained since September 2001, and to lift the ban on the press;

Recommends that the detainees be granted immediate access to their families and legal representatives; and

Recommends that the government of Eritrea takes appropriate measures to ensure payment of compensation to the detainees.⁷³

⁷² The Commission has also made important findings at the admissibility stage, for instance on the availability of 'effective remedies' in the State concerned. The Commission's often detailed jurisprudence on the effectiveness of domestic remedies is, however, not reflected in its recommendations on reparation.

⁷³ African Commission, *Article 19 v Eritrea*, Communication 275/03, dispositif.

In the case of *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, where the Commission found Guinea responsible for violating Articles 2, 4, 5, 12 (5) and 14 of the African Charter, it recommended

[t]hat a Joint Commission of the Sierra Leonean and the Guinea Governments be established to assess the losses by various victims with a view to compensate the victims.

In neither of these cases, did the Commission expressly examine the requests of the complainants for specific forms of reparation or the State's response to the requests.

Evidence of harm

The Commission's current procedure of examining communications and reparation requests thus does not allow for an analysis of the type of evidence required to prove harm incurred in support of specific claims of reparation. The practice of the Commission to date suggests that as long as complainants can provide evidence to substantiate an alleged violation,⁷⁴ and the Commission considers that evidence to provide sufficient proof of a violation of the Charter, it can afford certain forms of reparation it deems appropriate to redress the violation.

Where victims or their legal representatives can adduce additional evidence specifically in support of their claims of reparation, the Commission should consider such evidence. This is particularly true as a violation of one right can result in multiple forms of harm that may require specific forms of reparation. For example, it would allow the Commission to develop a gender-sensitive approach to reparation, taking into account that victims of sexual violence, for instance, will require additional measures of reparation specifically addressing the gendered aspects of the harm suffered.⁷⁵

Transparency and efficiency

From a complainant's perspective, the Commission's communication process can be somewhat cumbersome and frustrating due to challenges in following up on the state of affairs of a pending case, as well as delays.⁷⁶ As the communication process is based almost exclusively on written submissions, litigants/victims should not be required to attend the Commission's sessions except for oral hearings, which increase victim engagement in the

⁷⁴ See also, Litigants' Group, 'Filing a Communication before the African Commission on Human and Peoples' Rights- a complainant's manual', August 2013, p.18.

⁷⁵ See further below, Section IX.

⁷⁶ See 'Joint Letter of Litigants to the Working Group on Communications of the African Commission on Human and Peoples' Rights, 2 December 2011, at <http://www.cihrs.org/?p=353&lang=en>.

process. However, litigants have indicated that in many cases, attendance of the Commission's sessions, or visits to the Secretariat in Banjul, the Gambia, are necessary to receive information about and, arguably, to ensure progress of pending communications. This seriously limits access to the Commission, as only complainants with the necessary means can afford to travel to Banjul.

Long delays in the process, with cases lasting up to 12 years from the date of seizure to a decision being taken on the merits, have further undermined the effectiveness of the Commission's communication procedure and resulted in frustration among complainants. The delays can only partly be explained by the (admittedly) serious lack of funding available to the Commission. Another reason for the delays appears to be the latitude the Commission shows towards compliance with time frames for submissions of arguments as stipulated by the Commission's Rules of Procedure. This applies to submission of arguments at the admissibility as well as the merits stage, and has led to recurrent postponements in the consideration of communications.⁷⁷

Recognising these shortcomings in the communication process led the Commission to establish a 'Working Group on Communications' in November 2011.⁷⁸ The Working Group's mandate, *inter alia*, is to prepare communications for the consideration by the Commission and advise the Commission on specific steps to take in communications, for instance on 'the need to grant oral hearings.' It also has a mandate to follow up on decisions of the Commissions and to 'present a consolidated Report on the status of implementation of the Commission's decisions on Communications at each Ordinary Session.'⁷⁹ A welcome step from the perspective of litigants before the Commission, it remains to be seen whether the Working Group will indeed address the current concerns in regard to the communication process before the Commission.

IV.3 Oral Hearings

The communication procedure before the Commission is primarily based on written submissions by the parties at all three stages of the proceedings. However, Rule 99(3) of the Commission's Rules of Procedure specifically provides both parties with the possibility to request the Commission to hold an oral hearing on 'new or additional facts or arguments or in answer to any questions that it may have concerning all issues relating to the Communication.'

⁷⁷ See also Michelo Hansungule, 'African courts and the African Commission on Human and Peoples' Rights, pp. 260-261, at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf.

⁷⁸ African Commission, 'Resolution Establishing a Working Group on Communications and Appointment of Members', November 2011, at <http://www.achpr.org/sessions/50th/resolutions/194/>; the Working Group is composed of three Commissioners, the Executive Secretary to the Commission, and four legal officers.

⁷⁹ See also further below, 'State failure to implement Commission's decisions.'

These oral hearings can provide an opportunity for complainants to directly address the Commission, and possibly also set out the claims for reparation.⁸⁰ This can be particularly important as it is not current practice of the Commission to request complainants or their representatives to submit their observations specifically on reparation at any stage throughout the proceedings.⁸¹ As mentioned, this can be attributed to the fact that there is no separate stage in the proceedings on the question of reparation. A hearing specifically on reparation could address this limitation, and also provide victims with the opportunity to speak out. However, such hearings are only granted at the discretion of the Commission, and there is no rule providing complainants expressly with the opportunity to address the Commission specifically on the issue of reparation. There is no practice to suggest that the Commission is currently applying Rule 99 (3) to request further information on aspects of reparation. Complainants, whose needs may have changed significantly during the period it took the Commission to decide on a communication, cannot update the Commission on the question of reparation.

The marginal role reparation for victims currently plays throughout the communication process arguably prevents the Commission from taking into account the ‘specific circumstances’ of the victim. It is also frequently reflected in the brevity of some of the Commission’s recommendations on reparation, and the rather vague and at times inconsistent reparation measures awarded.

IV.4 State Failure to Implement the Commission’s Recommendations

The lack of State implementation of the Commission’s rulings is a major obstacle in providing justice to victims. Full State compliance has been reported in only 14% of cases, partial compliance in 20% and non-compliance in 66% of cases.⁸²

Arguably, the usual lack of precision in the Commission’s rulings leaves States considerable room to avoid implementation. It also makes it more difficult to monitor implementation. As possible follow-up measures to the implementation of its rulings, the Commission, under its

⁸⁰ Rule 99 (3) of the Commission’s Rules of Procedure provides that a hearing may consider a) the verification of the facts; b) initiation of a friendly settlement; c) consideration on the merits; or d) any other matter pertinent to the Communication.

⁸¹ Once a communication is declared admissible, the Commission requests the complainant to submit ‘evidence and arguments’ on their case in accordance with Rule 108 of the Commission’s Rules of Procedure; see, in contrast for instance the rules of procedure of the Inter-American Commission on Human Rights which specifically provide that a petitioner before the Commission should make a submission on, *inter alia*, ‘the claims concerning reparation and costs’ prior to a referral to the Court, <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

⁸² Lirette Louw, ‘An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights’, University of Pretoria Press, 2005; Frans Viljoen and Lirette Louw, ‘State Compliance with the recommendations of the African Commission on Human and Peoples’ Rights, 1994-2004’, *American Journal of International Law*, Vol.101, No.1, 2007, pp. 1-34.

current rules of procedure, could hold hearings so as to verify compliance, and regularly report on progress in complying with recommendations as appropriate. At present, discussions among litigants indicate that neither measure appears to be standard practice at the Commission. The Commission's Working Group on Communications, mandated since 2012 to '[C]oordinate follow-up on decisions of the Commission on Communications, by concerned Rapporteurs,⁸³ can play an important role in assessing State compliance with its decisions. At present, however, the initiative to ensure implementation of the Commission's decision rests mostly with the complainant.

Absence of an effective enforcement mechanism

Aside from the Working Group, no mechanism exists at present that specifically follows up on the Commission's decisions and ensures State's compliance with the recommendations on reparation. This can be particularly problematic if recommendations on reparation measures are vaguely formulated and do not provide much guidance to States as how best to follow up. Vaguely formulated recommendations leave States with a significant margin of discretion on how to implement. In the absence of a meaningful control mechanism that victims can turn to in case of non-compliance or only partial compliance, this risks leaving victims' right to the reparation measures awarded by the Commission unrealised.

A comparison with the practice of the European Court of Human Rights is warranted. The European Court, somewhat similar to the African Commission, follows a rather narrow approach to reparation and leaves the determination of much of the content of reparation measures (other than compensation) to the discretion of the State. However, an enforcement mechanism exists - the Committee of Ministers of the Council of Europe - which is specifically mandated to supervise the execution of the Court's judgments.⁸⁴ The procedure of supervision also provides that the Committee may receive reports from the State and the complainant (as well as from NGOs), on the progress of the implementation of the Court's judgment. Victims thereby have an opportunity to ensure that their perspectives and views are taken into account regarding the manner in which the State needs to implement the Court's judgment. Such a role can help to afford a measure of oversight of the margin of discretion of the State. Furthermore, the Committee of Ministers itself can assist in the execution of judgments, for instance through detailed recommendations on the steps that States must take to implement the judgments.⁸⁵

⁸³ African Commission, 'Resolution 255 on the expansion of the mandate of the working group on communications and modifying its composition,' October 2012, at <http://www.achpr.org/sessions/52nd/resolutions/255/>.

⁸⁴ See Council of Europe, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights', at http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp.

⁸⁵ Ibid. See for instance the Committee of Minister's memorandum entitled 'Violations of the ECHR in the Chechen Republic: Russia's compliance with the European Court's judgments'. This memorandum is designed to assist in the supervision of the execution of the Court's judgment, CM/Inf/DH (2006) 32, revised 2 12 June 2007. The memorandum sets out in great detail what measures the State has taken, makes an assessment of these steps, raises concerns about non-

In the absence of a similar supervisory mechanism in regard to the African Commission's decisions that could monitor State's implementation and guide their exercise of discretion throughout the implementation process, it is arguably incumbent on the African Commission to a) ensure that its recommendations take into account victims' needs and b) provide guidance on concrete steps States should take to implement its decisions so as to ensure that the margin of discretion entailed in vague or general decisions is not abused. More detailed recommendations can furthermore help the Commission's Working Group on Communications and the complainants to monitor progress and identify steps that still need to be taken if progress is not forthcoming.

Conclusion

The Commission presents an important, and in many cases, the only, forum for victims of human rights violations in Africa to uphold their right to reparation. The current procedure before the Commission does not fully reflect that important role. It is also not apparent from the Commission's jurisprudence what importance it attaches to the right to reparation: many of its decisions are fairly comprehensive and detailed, while others are completely void of any recommendation to the State to adopt measures of reparation. In short, the Commission's approach to the right to reparation, and its definitions of the different components of that right, are unclear. The following sections will therefore examine some of the key components of the right to reparation, and consider how human rights mechanisms have interpreted the right to reparation under international law.

implementation and recommends further action or asks for further information, such as for instance information on measures taken to provide an effective remedy to victims in accordance with the jurisprudence of the Court.

V. Scope of the Right to Reparation: Who is Entitled to Reparation?

In human rights law, the qualification of ‘victim’ gives rise to certain rights, namely the right to a remedy and reparation. This includes the right to bring a claim and to exercise procedural rights.⁸⁶

According to principle 8 of the UN Basic Principles and Guidelines,

victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.⁸⁷

Article 24 of the ‘International Convention for the Protection of All Persons from Enforced Disappearance’ provides for a broader definition of victims of enforced disappearance, placing an emphasis on the harm suffered: ‘[F]or the purposes of this Convention, “victim” means the disappeared person and **any individual who has suffered harm** as the direct result of an enforced disappearance’ (emphasis added).⁸⁸

CAT General Comment No. 3 further elaborates that a person’s status as a victim is not reliant on ‘whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familiar or other relationship between the perpetrator and the victim.’⁸⁹

⁸⁶ See Ilias Bantekas and Lutz Oette, ‘International Human Rights- Law and Practice’ (Cambridge University Press, 2013), pp. 275-279, 536. However, see the broad provisions for standing in the African Charter as discussed above.

⁸⁷ See also ‘Fair Trial and Legal Assistance Guidelines’, Section S (n); see also Part III of the ‘Robben Island Guidelines’.

⁸⁸ International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, available at <http://www.refworld.org/docid/47fdfaeb0.html>.

⁸⁹ General Comment No.3, para. 3; see similarly the Robben Island Guidelines, providing that the ‘obligation upon the State to offer reparation to victims exists irrespective of whether a successful criminal prosecution can or has been brought,’ para.50.

As is evident from the definitions referred to above, the notion of victims is not limited to individuals; subject to certain conditions, groups and communities might be entitled to reparation to repair 'collective harm'.⁹⁰

V.1 Direct and Indirect Victims

The UN Human Rights Committee - as the authoritative interpreter of the ICCPR - has early on established that

a person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken.⁹¹

Similarly, the European Court of Human Rights has considered that

the word "victim" in the context of Article 25 (art. 25) denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice.⁹²

With the development of human rights law, the notion of the term "victim" was widened and today also includes, "where appropriate", **relatives** and **dependants** of the direct victim and persons who have suffered harm in intervening to assist victims. The rationale for including '*indirect victims*' as victims of a violation in their own right, is the recognition of their suffering, morally or materially, by reason of their relationship with a direct victim of a crime. The recognition that victims other than direct victims may have suffered harm is important in the identification of potential beneficiaries of reparation.

The relationship to the direct victim

Jurisprudence of international and regional human rights mechanisms confirms that family members with a close relationship to the direct victim can be indirect victims entitled to reparation. The **UN Human Rights Committee** for instance has established that where a victim has suffered ill-treatment and received compensation for the injury caused, compensation should also be paid to surviving family members in their own right for anguish suffered. It stated that:

⁹⁰ See further below. See also Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth session, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental reasons, Final report submitted by Mr Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993, para.14.

⁹¹ UN Human Rights Committee, *Shirin Aumeeruddy- Cziffra and 19 other Mauritian women v Mauritius*, Communication No. R.9/35, UN Doc Supp. No.40 (A/36/40) at 134 (1981), para.9 (2).

⁹² European Court of Human Rights, *Amuur v France*, Application no. 1977/92, Judgment, para.36.

The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has a right to know what has happened to her daughter. In these respects she too is a victim of the violations of the Covenant suffered by her daughter [...].⁹³

Such a right to reparation for indirect victims with a *close relationship* to the direct victim is also reflected in the jurisprudence of the African Commission, which has awarded compensation to widows of victims of extrajudicial executions,⁹⁴ as well as by the European Court of Human Rights.⁹⁵ The Inter-American Court has held that a close relationship exists in regard to immediate next of kin, namely mothers, fathers, children, siblings, spouses and permanent companions.⁹⁶

The Inter-American Court has gone beyond the category of indirect victims with a close relationship to the victim (i.e. immediate next of kin). According to the Court, other next of kin claiming reparation will have to prove the existence of a *special relationship* to the direct victim. According to the Court, such a special relationship could also exist between direct victims and grandparents as well as cousins:

[a]dequately identified immediate next of kin are the direct descendants and ascendants of the alleged victim, namely: mother, father, children and also siblings and spouse or permanent companion, or those determined by the Court based on the characteristics of the case and the existence of some special relationship between the next of kin and the victim of the facts of the case.⁹⁷

The Inter-American Court's jurisprudence suggests that the category of those who can constitute an indirect victim is therefore not limited to the existence of a close relationship

⁹³ UN Human Rights Committee in the case of *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990), para.40.

⁹⁴ African Commission, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*, Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98, dispositif.

⁹⁵ ECtHR, *Aslakhanova v. Russia*, (Appl. nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10), Judgment, 18 December 2012, para. 133; *Varnava and others v Turkey*, application nos. 16064/90, 1605/90, 1606/90, 1608/90, 16069/90, 16070/90, 1607/90, 16072/90 and 16073/90, para.200.

⁹⁶ The IACtHR considered a violation of several rights of next of kin of direct victims of arbitrary killings and enforced disappearances: (1) the right to humane treatment; (2) right to a fair trial and/ or (3) to judicial guarantees, see for instance *Street Children v Guatemala*, Judgment on the merits, 19 November 1999, paras. 99-101; see also IACtHR, *Blake v Guatemala*, Judgment on Merits, 24 January 1998, paras.93, 114-116; *Chitay Nech et al v. Guatemala*, Judgment, 25 May 2010, para. 220;

⁹⁷ IACtHR (Judgment), *Massacres de Ituango v Colombia*, para.264; according to the Court, others who can be considered as victims in their own right, depending on the circumstances of the case, include grandparents (*Street Children Case*, paras. 80-85) and cousins (*Myrna Mack v Guatemala*, para. 242-244); see also Rules of Procedure of the Inter-American Court of Human Rights, providing that 'next-of kin' « refers to the immediate family, that is, the direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable. », Article 2 (16).

of direct next of kin of the victim. Rather, the question of whether an individual could be considered an indirect victim entitled to reparation should be considered on a case by case basis, taking into account the characteristics of the case and the existence of a special relationship or link to the direct victim.

Proof of relationship between indirect victims with direct victims⁹⁸

The African Commission's jurisprudence to date has not provided criteria on how indirect victims – such as widows - can or should prove their relationship or link to the direct victim in order to benefit from the Commission's reparation awards. In a case brought by two human rights organisations against the State of Cameroon for post-election violence, the Commission, after having found the State responsible, recommended the State, *inter alia*, to:

[P]ursue its commitment to give fair and equitable compensation to the victims and without delay, to pay fair and equitable compensation for the prejudices suffered by the victims or their beneficiaries.⁹⁹

The Commission left it to the State to identify the victims or their beneficiaries, and did not set out what criteria the State should employ in the identification of the beneficiaries. This margin of discretion can be problematic where the State is unwilling or reluctant to comply with the decision.¹⁰⁰ It can present challenges for victims and beneficiaries, who are required to negotiate with the State about whether certain individuals can be considered as beneficiaries, thereby further delaying the award of reparation. Complainants filing cases on behalf of a large number of victims (direct and indirect) may further find it difficult to identify those entitled to reparation in the absence of criteria for the identification of beneficiaries, and without the State actively seeking to identify such beneficiaries. As a human rights mechanism the Commission is, arguably, best placed to provide guidance to the State on the status of individuals as victims under international law. It should use that expertise to prevent States from applying narrow definitions of victims and beneficiaries under national law in the Commission's decisions to the detriment of (indirect) victims.

The African Commission's practice regarding identification of beneficiaries is in contrast to the practice of other regional mechanisms which require that the existence of kinship to the direct victim has to be proven in order to benefit from reparation. Proof can include for instance identity papers, a birth, baptism, or death certificate and/ or statements to that

⁹⁸ See also further below, on the proof of identity regarding 'collective victims'.

⁹⁹ African Commission, *Association of Victims of Post Electoral Violence & Interights v Cameroon*, Communication 272/03, para.138 (2).

¹⁰⁰ See for instance on the challenges of implementation in this case, Interights, 'Implementation letter regarding Association of Victims of Post Electoral Violence & Interights v Cameroon, 2 September 2011, at <http://www.interights.org/document/174/index.html>.

effect before a notary public. Individuals who do not have the relevant documentation, and cannot, for instance, produce an identity card, could present other documents as proof of their identity, including for instance a declaration rendered before the competent authority by a leader of the indigenous community.¹⁰¹ The Inter-American Court has adopted a flexible approach on how victims can prove identity even after it has made an award, ruling that victims should be given compensation if they ‘present themselves before the competent State authorities within 8 months following the notification of this Judgment and they prove, through a sufficient means of identification, their relationship or kinship with the victim, and that they were alive at the time of the facts.’¹⁰²

It can be helpful guidance for States if the decision of the human rights mechanism either specifically identifies indirect victims or, in the alternative, provides a list of criteria to apply, in particular in cases where identification might be challenging. This can also benefit claimants, so as to ensure that their submission includes relevant information on the relationship between indirect and direct victims in support of the indirect victim’s claim. A degree of flexibility in proving identity and the link to the direct victim is warranted, taking into account potential challenges in obtaining relevant documentation. Such flexibility and the provision of alternative methods to proving identity can help ensure that a claim for reparation is not prevented, for instance, by missing identity papers.

Proof of harm of indirect victims¹⁰³

International and regional human rights mechanisms have awarded reparation to indirect victims particularly in the context of gross human rights violations such as torture and ill-treatment, extrajudicial killings and enforced disappearances, taking into account the profound impact such violations can have on the direct victim’s relatives.¹⁰⁴ The approach to the assessment of the impact or of the harm of such violations on indirect victims differs among human rights mechanisms.

¹⁰¹ IACtHR, *Plan de Sanchez Massacre v Guatemala*, Judgment (Reparations) of 19 November 2004, para.62; IACtHR, *Caracazo v. Venezuela*, Judgment of 29 August 2002 (Reparations and Costs), paras.63.b, 72.a-73; IACtHR, *Mapiripan Massacre v Colombia*, Judgment (Merits, Reparation and Costs), 15 September 2005, para. 257 (b); however, see below, ‘collective victims’ for exception to the need for individualisation in cases where there are large number of victims and violations committed were particularly widespread, causing collective harm.

¹⁰² IACtHR, *Castro Castro Prison v Peru*, Judgment of 25 November 2006, para.460; in another case, the Court has decided that victims who have not been identified at the time of the judgment could claim reparations subsequently if they applied within 24 months to the competent judicial mechanisms, following notification of the judgment and proved their kinship with the deceased victim, case of the *Mapiripan Massacre v Colombia*, Judgment (Merits, Reparation and Costs), 15 September 2005, para.257.

¹⁰³ See further below, Section VII.2 ‘Compensation.’

¹⁰⁴ UN Human Rights Committee, *Sharma v Nepal*, Communication No. 1469/2006, CCPR/C/94/D/1469/2006, para. 7.9; ECtHR, *Varnava and others v Turkey*, Application Nos. 16064/90, 1605/90, 1606/90, 1608/90, 16069/90, 16070/90, 1607/90, 16072/90 and 16073/90; IACtHR, *Street Children v Guatemala*, Judgment on the merits, 19 November 1999, paras.173-177.

Based on the notion of the close relationship, the Inter-American Court considers that the immediate next of kin of direct victims of gross human rights violations do not need to adduce evidence to show that they have suffered harm. In such cases, the Court presumes harm of the immediate next of kin in light of the 'grave impact on the mental and emotional well-being of the next of kin of the victims.'¹⁰⁵ According to the Court, the burden of proof (of mental and emotional harm) in such cases shifts to the State, and 'it is the State who shall invalidate said presumption'¹⁰⁶ that the violation of the direct victim also caused suffering to close relatives.

This approach is also reflected in the jurisprudence of the International Criminal Court (ICC) on victim participation, which considered that an indirect victim had to provide evidence in support of a close relationship with the direct victim, but that there was no need to submit evidence in relation to the harm once such a close relationship was established.¹⁰⁷

The European Court considers that in cases involving gross violations of human rights such as enforced disappearances, the essence of such a violation concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. Where State authorities fail to carry out a meaningful investigation into an alleged enforced disappearance, this can result in ill-treatment of the indirect victims on account of 'the distress and anguish which they suffered ... as a result of their inability to ascertain the fate of their family members and of the manner their complaints have been dealt with.'¹⁰⁸ While not expressly presuming harm, the European Court does focus expressly on the State's obligations to prevent harm to relatives through, for instance, a 'meaningful investigation.' Once the indirect victim can show that the authorities did not take any steps to remedy the violation, the burden is on the State to show that it complied with its obligations.

¹⁰⁵ IACtHR, *Mapiripán Massacre v Colombia*, Judgment (Merits, Reparations, and Costs), 15 September 2005, para. 146.

¹⁰⁶ IACtHR, *Aloeboetoe v Suriname*, Judgment (Reparations and Costs), 10 September 1993, para.76; IACtHR, *Loayza Tamayo v. Peru* (Reparations and Costs) 27 November 1998, para.140; IACtHR, *Gonzalez Medina and others v Dominican Republic*, para.270; see, in contrast, the past approach of the European Court of Human Rights, placing a higher burden of proof on relatives, as it considered that relatives of victims of enforced disappearances will need to demonstrate the intensity of suffering and anguish: 'whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant 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.' According to the Court, relevant elements will include: proximity of family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person; the way in which authorities responded to those enquiries. The Court considered that the 'essence of such a violation' concerns the 'authorities' reactions and attitudes to the situation when it is brought to their attention, in *Cakici v Turkey*, Judgment of 8 July 1999, para 98.

¹⁰⁷ International Criminal Court, *Prosecutor v Joseph Kony et al.*, Appeals Chamber, 'Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06, a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/120/06, a/021/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II', ICC-02/04-01/05-371, dated 23 February 2009.

¹⁰⁸ ECtHR, *Aslakhanova v. Russia*, (Appl. nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10), Judgment, 18 December 2012, para. 133.

A presumption of harm in cases of gross human rights violations appears justified in light of the impact of these violations on the victim as well as her or his loved ones. This is particularly true as many such violations are not only aimed directly at the victim, but also at punishing or intimidating family members and others closely related to the direct victim.

In cases where no presumption of harm applies due to the absence of a close relationship, other factors are taken into account in addition to the special relationship to the victim, including for instance whether the indirect victim had witnessed the fact, her or his level of involvement in the search for justice, and the State's reply to the formalities pursued.¹⁰⁹

V.2 Successors

It is established jurisprudence that a claim for reparation may also be transferred to the heir of the victim. This is based on the notion that a victim is entitled to reparation, and that 'a victim does not cease to be a victim because of his or her death.'¹¹⁰

According to the Inter-American Court, children, spouses and parents can be entitled to inherit the right to compensation in cases where the (direct) victim has died: 'the right to compensation for damages suffered by the victims up to the time of their death is transmitted to their heirs by succession.'¹¹¹ Children of deceased persons are considered as primary successors, while 'it is also generally accepted that the spouse has a share in the assets acquitted during a marriage.'¹¹² Importantly, the Inter-American Court has stated that this does not impact on the right to reparation of the victims' next of kin: '[O]n the other hand, the damages owed to the victims' next of kin or to injured third parties for causing the victims' death are an inherent right that belongs to the injured parties.'¹¹³

The immediate relative of a direct victim is therefore entitled to claim reparation as an heir of the direct victim, and as indirect victim for the personal damages suffered due to the close relationship with the direct victim and the violation committed against the direct victim.

¹⁰⁹ IACtHR, *Bámaca Velásquez Case*, Judgment of November 25, 2000, paras. 162, 163; see also ECtHR, *Cakici v Turkey*, Judgment of 8 July 1999 para.98.

¹¹⁰ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, single Judge Hans-Peter Kaul, Pre-Trial Chamber III, *Fourth Decision on Victims' Participation*, ICC-01/05-01/08-320, 12 December 2008, para.40; see also African Commission, *Monja Joana v Madagascar*, Communication 108/93, in which the case Commission undertook 'efforts to contact the deceased's legal successor' (to no avail) to continue the case before the Commission, para.11.

¹¹¹ IACtHR, *Bulcaio v Argentina*, Judgment (Merits, Reparations and Costs), 18 September 2003, para. 85; IACtHR, *Garrido Baigorria v Argentina*, Judgment (Reparations and Costs) 27 August 1998, para.50; IACtHR, *Aloeboetoe v Suriname*, Judgment (Reparations and Costs), 10 September 1993, para.62.

¹¹² IACtHR, *Aloeboetoe v Suriname*, Judgment (Reparations and Costs), 10 September 1993, para.62.

¹¹³ IACtHR, *Garrido Baigorria v Argentina*, para.50.

V.3 Dependants

General Comment No. 3 emphasises that persons entitled to reparation also includes dependants of the victim. The Robben Island Guidelines similarly provide that ‘all States should ensure that all victims of torture and their dependants’ receive reparation.¹¹⁴ The qualification of individuals as ‘dependants’ who may be entitled to reparation (i.e. who are not victims of a violation themselves) is based on the notion of ‘economic loss’ to the dependant as a direct consequence of the violation committed against the victim. The Inter-American Court has considered that ‘the obligation to make reparation for damages caused is sometimes, and within the limits imposed by the legal system, extended to cover persons who, though not successors of the victims, have suffered some consequence of the unlawful act.’¹¹⁵

According to the Inter-American Court, for ‘dependants’ to receive reparation in the form of compensation, the following criteria must be considered: (i) whether there have been effective and regular contributions made by the victim to the claimant; (ii) the nature of the relationship between the victim and the claimant, providing for the assumption that the payments would have continued had the victim not been disappeared or unlawfully killed; and (iii) the contributions from the victim to the claimant have been based on a financial need of the recipient.¹¹⁶

The recognition that ‘dependants’ are entitled to reparation subject to certain conditions is again based on the notion that the violation committed against the direct victim resulted in some form of harm to others. A holistic approach to reparation that seeks to ensure that those who suffered harm as a result of a violation therefore needs to take into account the reparation owed to dependants.

V.4 Groups of Victims¹¹⁷

In addition to the individual right to reparation, it is now an established principle that the right to reparation also extends to groups of victims. It is explicitly provided for in, *inter alia*, the UN Basic Principles and Guidelines, the Robben Island Guidelines and the Fair Trial and Legal Assistance Principles and Guidelines.¹¹⁸

¹¹⁴ Robben Island Guidelines, para.50.

¹¹⁵ IACTHR, *Aloeboetoe v Suriname*, Judgment (Reparations and Costs), 10 September 1993, paras. 67-68.

¹¹⁶ *Ibid.*

¹¹⁷ See also further below, Section IX: ‘Specific considerations in cases of mass human rights violations.’

¹¹⁸ UN Basic Principles and Guidelines, principle 8 referred to above, as well as principle 13: ‘In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate’; the Robben Island Guidelines provide that ‘[t]here should also be a recognition that families and communities which have also been affected by the torture and ill-treatment received by one of its members can also be considered as victims’; the Fair Trial and Legal Assistance Principles and Guidelines’; See also further below, ‘Collective Reparation in the context of massive violations’.

The right to reparation for a group of victims is based on the notion of collective or group harm, which is particularly relevant in cases of serious and massive violations which have an impact on a specific group of people or community. It also arises where a 'collective right' has been violated. In response to group or collective harm, international and regional human rights mechanisms have consistently awarded measures of collective reparation,¹¹⁹ either only or in addition to reparation afforded to individual members of the group, as appropriate.

Human rights mechanisms have applied a variety of criteria so as to identify the collective entitled to reparation.¹²⁰ The African Commission for instance has considered that for a collective of individuals to be recognised as peoples there must be 'linkages between peoples, their land and a culture that such a group expresses its desire to be identified as a people, or have the consciousness that they are a people.'¹²¹ This is similar to the jurisprudence of the Inter-American Court, which has considered that it is the bond of members of the community or the community as a whole with their ancestral land that determines their culture, way of life, beliefs and survival.¹²²

While the group identified as such might be entitled to collective reparation, it is important to emphasise that this does not exclude the individual victims' right to reparation for individual harm. In cases involving for instance large scale violations, next to awarding collective reparation to a specific group, it will therefore be important to establish a mechanism that enables individual victims to come forward and present their claim for reparation. The African Commission for instance in a case concerning mass violations against refugees from Sierra Leone in this respect recommended that a '[J]oint Commission of the Sierra Leonean and the Guinea Governments be established to assess the losses by various victims with a view to compensate the victims.'¹²³

As will be outlined in further detail below, the jurisprudence of the African Commission on violations committed to groups or communities is particularly extensive. This can be attributed to the human rights framework which attaches a particular emphasis upon group and/or collective rights. The African Charter for instance makes several references to

¹¹⁹ See further below, Section IX.

¹²⁰ African Commission, Endorois case, paras. 150-151.

¹²¹ Ibid.

¹²² Clara Sandoval-Villalba, 'The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations', pp.243-281, in Carla Ferstman, Mariana Goetz, Alan Stephens (editors) 'Reparations for Victims of Genocide, War Crimes and Crimes against Humanity- Systems in Place and Systems in the Making' (Martinus Nijhoff Publishers) (2009).

¹²³ See further below, Section IX; African Commission, *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea) v Guinea*, Communication 249/02, dispositif, adopted at 36th Ordinary Session, 2004.

‘serious and massive violations’,¹²⁴ as well as to the (collective) rights of peoples in Articles 19-24. The possibility of popular actions before the African Commission and the African Court, allowing for claims on behalf of large numbers of victims or specific groups, similarly underlines the importance of the collective dimension of the right to reparation. The right to reparation for groups of victims or collectives is therefore particularly important for the African Commission.

Summary

- The notion of ‘victim’ entitled to reparation as a result of a human rights violation has significantly developed over time, particularly through the adoption of declarative instruments such as the UN Basic Principles and Guidelines, the Guidelines and Principles on Fair Trial and Legal Assistance in Africa, General Comment No.3 and the Robben Island Guidelines, as well as the jurisprudence of regional mechanisms such as the Inter- American Court.
- Accordingly, international law recognises not only direct victims of human rights violations, but also next of kin of such victims by virtue of their own suffering due to their relationship with the victim. This includes, but is not limited to, close family members such as children, parents, siblings, spouses and permanent companions, and may also include cousins and grandparents.
- Successors and dependants are also entitled to be beneficiaries of reparation as are individuals who intervened to help victims or to prevent the commission of crimes.
- Collectives or groups can be considered a ‘victim’ entitled to reparation to repair collective harm. A flexible approach to the identification of victims – including collective victims - for the purposes of awarding reparation is necessary in particular in the context of serious and massive violations.
- The status of victim is not reliant on ‘whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familiar or other relationship between the perpetrator and the victim.’
- Harm and suffering should be presumed in cases of serious human rights violations, including unlawful killing, enforced disappearance, arbitrary detention, torture and inhuman treatment.

¹²⁴ See for instance Article 58 of the African Charter which requires the African Commission to ‘draw the attention of the Assembly of Heads of State and Government’ to special cases ‘which reveal the existence of a series of serious or massive violations of human and peoples’ rights.’

VI. Principles Governing an Award of Reparation

VI.1 The Quantity and Quality of Reparation

After establishing that a violation has been committed, reparation should be afforded which adequately and effectively redresses the breach of obligation and the particular harm suffered by the victims. In what has become a guiding statement of principle, the Permanent Court of International Justice has articulated that reparation must, as far as possible, wipe out all the consequences of the illegal act, and re-establish the situation which would, in all probability, have existed if the act had not been committed.¹²⁵

Human rights treaties and related texts tend to use descriptors such as fair, adequate or effective, used either singly or grouped together,¹²⁶ appropriate,¹²⁷ proportionate to the harm¹²⁸ and equitable.¹²⁹ These are not necessarily lesser standards; they help to clarify what is required, particularly when re-establishing the *status quo ante* is impossible and it is impractical to precisely quantify the harm.¹³⁰ There is therefore some consistency in what is understood to be required. This would align with the range of treaty references as well as the clarifying statements made by their interpretive bodies and UN independent experts. It would also be consistent with the findings of both domestic and international courts.

The UN Basic Principles and Guidelines stipulate that any award of reparation should be

[a]dequate, effective and prompt and intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.¹³¹

¹²⁵ Permanent Court of International Justice, Fourteenth (Ordinary) Session, The Factory at Chorzow (Claim for Indemnity) (The Merits), *Germany v Poland*, Judgment No.13, 13 September 1928, File E.c.XIII., Docket XIV: I., para. 73.

¹²⁶ *Protocol on the Statute of the African Court of Justice and Human Rights*, African Union (adopted 1 July 2008, not yet in force) Art 45; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Victims' Declaration, adopted 29 November 1985 by GA resolution 40/34); *American Convention on Human Rights* arts 63(1); *Godínez Cruz v. Honduras* (Interpretation of the Compensatory Damages) IACtHR, Ser C No 10, 17 August 1990, para. 27; the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD, adopted 21 December 1965, entered into force 4 January 1969) art 6; UNCAT Art 14; *Convention for the Protection of All Persons from Enforced Disappearance* (CPPED, adopted 20 December 2006, entered into force 23 December 2010) Art 24(4); Committee on Economic, Social and Cultural Rights, General Comment No 9, UN Doc E/C.12/1998/24, 3 December 1998 para. 9; *Basic Principles and Guidelines* (n 1) 15.

¹²⁷ Committee on the Rights of the Child (CRC), General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5, 3 October 2003, para. 24

¹²⁸ IACtHR, *Loayza Tamayo v. Peru*, Judgment (Reparations and Costs) 27 November 1998, para. 86; *AT v. Hungary*, UN Doc. CEDAW/C/32/D/2/2003, 26 January 2005, para. 9.6(II)(vi) *AT v. Hungary*, UN Doc. CEDAW/C/32/D/2/2003, 26 January 2005, para. 9.6(II)(vi); *Basic Principles and Guidelines* (n 1) 15, 18

¹²⁹ *Velásquez Rodríguez Case* (Compensatory Damages) IACtHR, Ser C No 7, 21 July 1989 para. 27, in which the IACtHR applied principles of equity. See also, *Djot Bayi v. Nigeria*, Community Court of Justice of the Economic Community of West African States (ECOWAS), Comm No ECW/CCJ/JUD/01/09, 28 January 2009, paras. 45-6.

¹³⁰ *Aloeboetoe v. Suriname*, IACtHR, Ser C No 15, 10 September 1993, para. 49.

¹³¹ UN Basic Principles and Guidelines, principle 10.

These Principles go on to state that ‘reparation should be proportional to the gravity of the violations and the harm suffered’.¹³² As reparation awards are aimed at redressing the effects of the violations committed, the awards should neither enrich nor impoverish the victim of a human rights violation.¹³³ Reparation awards for human rights violations should therefore also not be punitive, irrespective of the gravity of the breach.

The Inter-American Court considers that the obligation to provide adequate and effective reparation requires the existence of a ‘causal link with the facts of the case, the alleged violations, the proven damages, as well as with the measures requested to repair the resulting damages.’¹³⁴ In exceptional cases, this can result in the Court ordering reparation awards not requested by either party so as to ensure the adequacy of reparation in a given case.¹³⁵

To ensure comprehensive reparation will usually require the combination of different forms of reparation to redress the harm caused. The UN Committee against Torture, in the case of *Ali Ben Salem v. Tunisia* made clear that ‘[r]edress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations.’¹³⁶ In the case of *Kepa Urra Guridi v. Spain*, the same Committee indicated that monetary compensation was insufficient and found a violation of the State's obligation to provide adequate reparation as it did not include other measures, such as restitution and rehabilitation of the victim.¹³⁷

VI.2 Victim-orientated Reparation

The African Commission’s Fair Trial and Legal Assistance Guidelines provide several principles that ensure a ‘victim sensitive approach’ when affording reparation, including that victims should be treated with compassion and respect for their dignity and have access to prompt redress.¹³⁸ The Committee against Torture in its General Comment No. 3 has highlighted that ‘redress provided to victims should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them.’¹³⁹

¹³² UN Basic Principles and Guidelines, principle 15.

¹³³ IACTHR, “*Street Children*” (*Villagran- Morales et al*) *v Guatemala*, Judgment (Reparations and Costs) 26 May 2001, para.63.

¹³⁴ IACTHR, *Ticona Estrada and others v Bolivia*, Judgment (Merits, Reparations and Costs), 27 November 2008, para.110; IACTHR, *González et al. (“Cotton Field”) v Mexico*, Judgment (Preliminary Objection, Merits, Reparations, and Costs) of 16 November 2009, paras.450-451.

¹³⁵ In the case of *Rochela v Colombia*, the Court went beyond what was requested by the victims in the case, and ordered “four additional measures of satisfaction and guarantees of non-repetition...as it deems them necessary to adequately repair the consequences of the violations established in this judgment, in accordance with Article 63 (1) of the Convention,” Judgment (Merits, Reparations and Costs), 11 May 2007, para.286.

¹³⁶ UN Committee against Torture, *Ali Ben Salem v Tunisia*, 7 November 2007, *Communication no. 269/2005*, para.16.8.

¹³⁷ UN Committee against Torture, *Kepa Urra Guridi v Spain*, May 2005, *Communication No. 212/2002*, para.6.8.

¹³⁸ African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at <http://www.achpr.org/instruments/fair-trial/>, Section N (a).

¹³⁹ General Comment No.3, para.6.

For reparation to be adequate and effective, it is important to fully understand the particular perspective of the victim, and to include his or her gender, culture and background as these factors will influence the experience of harm.¹⁴⁰ Consulting victims and/or victim communities can help to identify these factors.

One way to obtain this input is through fact-finding missions to the location of the victims.¹⁴¹ The African Charter permits the African Commission to carry out 'on-site investigations' within the ambit of Article 46 of the Charter. It provides that '[T]he Commission may resort to any appropriate method of investigation.' In addition, Article 58 provides that the Commission, following a request from the Assembly of Heads of State and Government, may carry out an 'in-depth study' in cases involving serious or massive human rights violations and make a 'factual report accompanied by its findings and recommendations.' To date, the Commission has made relatively little use of these provisions. This may be due to budget restrictions, and/or the requirement that it can only carry out a fact finding mission with the consent of the government against whom the complaint is made.¹⁴²

In 2004 upon invitation from the Government of Sudan, the Commission carried out a fact-finding mission in the context of allegations concerning the serious and massive human rights violations committed in Darfur. The fact-finding mission was not carried out specifically in the context of a communication pending before the Commission. However, the Commission did refer to the findings of its mission in the case of *Sudan human rights organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* ('the Darfur case'), specifically to interviews it had conducted during the mission with women IDPs who alleged, *inter alia*, that they were raped and that their complaints were not investigated.¹⁴³ The Commission, based on a range of documents submitted by the complainants in support of such allegations, then found a violation of Article 5 as the State had not diligently protected

¹⁴⁰ See further, International Criminal Court (ICC), *The Prosecutor v Thomas Lubanga Dyilo*, 'Annex- Confidential ex parte only available to the Registry and the Trust Fund for Victims: Consultant's report on reparations in the Inter-American Human Rights System', 19 March 2012, ICC-01/04-01/06-2806-Anx, reclassified as public, available at <http://www.icc-cpi.int/iccdocs/doc/doc1224836.pdf>.

¹⁴¹ For instance, the Inter-American Commission and Court can complement the input received from victims through submissions and at hearings with fact finding missions. Such missions help gather complementary information about the context in which the violations took place and help to provide further clarity on the situation of victims.

¹⁴² The Commission has for instance requested a fact finding mission in the case of *Free Legal Assistance Group and Others v Zaire*, Communications 25/89, 47/90, 56/91 and 100/93, which was never granted. The Commission still found that the Government was responsible for serious and massive violations of the Charter, namely Articles 4,5,6,7,8, 16 and 17. In the case of *Malawi African Association and others v Mauritania*, the African Commission carried out a mission to Mauritania to 'obtain an amicable settlement.' The Commission emphasised that even though the mission was carried out in relation to Communications pending before it, it was not an 'enquiry mission', and 'while it permitted the Commission to get a better grasp of the prevailing situation in Mauritania, the mission did not gather any additional specific information on the alleged violations, except on the issue of slavery.' The Commission therefore proceeded to examine the communications before it on the basis of the written and oral declarations made before the Commission, see para. 87.

¹⁴³ African Commission, *Sudan human rights organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communications 279/03 and 296/05 ('the Darfur case'), para.151.

its civilian population in Darfur and as it failed to provide remedies to the victims. The Commission may have come to the same conclusion without having carried out the fact-finding mission. However, by being in Darfur and speaking to authorities, NGOs and victims involved, the Commission was able to form its own impression of the situation, and, importantly, of the situation and needs of some of the victims. This may have contributed to the Commission's relatively far-reaching recommendations on reparation.¹⁴⁴

The Commission would also benefit further from the perspective of victims by affording victims with the opportunity to provide information on their particular situation and needs, either orally or in writing and ideally both. This could include providing victims with the opportunity to make specific submissions on reparation and to consider such requests in a separate stage of the proceedings.¹⁴⁵ Such methods can help to ensure that the forms of reparation awarded are appropriate to achieve the actual harm suffered, based on the assumption that 'reparation complies with its function when it is determined by its own victims.'¹⁴⁶ Consultation of victims about reparations is further warranted as victims are well-placed to explain and, provide evidence of the harm they suffered, and to explain how best to address that harm.¹⁴⁷

VI.3 Non-discriminatory Reparation Awards

The UN Basic Principles and Guidelines make clear that awards of reparation must be made without any discrimination:

The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

The International Criminal Court, in its first ever reparations decision, in the Lubanga case, has indicated that the needs of all victims must be taken into account, and particularly children, the elderly, those with disabilities and victims of sexual or gender violence. This, in

¹⁴⁴ See further below, section VIII.2.

¹⁴⁵ See further Maria Suchova, 'The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation', edited by Dr Clara Sandoval, Essex University, Reparations Unit, Briefing Paper No.5, August 2011, at http://www.essex.ac.uk/tjn/documents/Paper_5_Participation_Large.pdf.

¹⁴⁶ Gina Donoso, 'Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach', in *Revista IIDH*, 2009, Vol.49, p.49; see also IACtHR judgment in *Plan de Sanchez Massacre v Guatemala*, Judgment (Reparations) of 19 November 2004, para. 77.

¹⁴⁷ However, the Inter-American Court has started to move away from oral proceedings at the reparations stage, introducing revised rules of procedure aimed at expediting the procedures, see International Criminal Court, 'Consultant's report on reparations in the Inter-American Human Rights System', published 19 March 2012, para.15, at <http://www.icc-cpi.int/iccdocs/doc/doc1224836.pdf>, para.18.

turn, requires that reparation should be granted and implemented without any discrimination, such as regards age, ethnicity, political belief or gender.¹⁴⁸

When awarding reparation to victims of violations of the Charter, the African Commission therefore should take into account that the victims are to be treated equally and award reparation specifically geared towards the individual victim's circumstances. As the Commission does not always identify individual victims, it can examine whether an alleged violation was committed in a discriminatory fashion in violation of Article 2 or 18(3) of the Charter. The finding of such a violation would then need to be reflected in the Commission's decision on reparation so as to ensure to redress the discriminating character of the violation.¹⁴⁹

The Commission's *Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence* as well as the 'Nairobi Principles' set out a number of factors that need to be considered to ensure for instance that reparation awards in cases of sexual violence are gender sensitive and non-discriminatory. These include for instance tailor made reparation recommendations 'specifically adapted to their needs, interests and priorities, as defined by them; and that measures of access to equality (positive discrimination) are required in order to take into account the reasons and consequences of the crimes and violations committed, and in order to ensure that they are not repeated.'¹⁵⁰ Such measures can include recommending individual reparation measures such as rehabilitation capable of addressing gender specific harm as well as wider general measures such as legislative and institutional reform.

Reparation awards by regional / international human rights mechanisms should be comprehensive, adequate and effective.

They should be non-discriminatory and informed by a victim-orientated approach that reflects the gravity of the violations committed.

¹⁴⁸ ICC, *The Prosecutor v Thomas Lubanga*, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06.

¹⁴⁹ See further below, Section 10, in regard to the Commission's decision in the case of *Egyptian Initiative for Personal Rights and Interights v. Egypt*.

¹⁵⁰ Nairobi Principles, para.7.

VII. Forms of Reparation

The UN Basic Principles and Guidelines identify five forms of reparation, recognising that these are not exhaustive. These are (i) restitution; (ii) compensation; (iii) rehabilitation; (iv) satisfaction and (v) guarantees of non-repetition. An award of reparation can include one or several of these forms of reparation, subject to the violation the award needs to redress and the particular harm caused to the victim(s). This section will outline what these forms of reparation consist of.

The Inter-American Court applies a set of presumptions in the consideration of reparations on the basis that these assumptions are ‘firmly rooted in what has been learned from experience’.¹⁵¹ These presumptions can include:

- the presumption according to which all persons who disappeared in a context of violent events and who have been missing for many years are considered dead;
- the presumption according to which all adults who receive income and have a family spend most of that income providing for the needs of its members;
- the presumption according to which the next of kin of a deceased person cover the costs of his or her funeral;
- the presumption according to which every person, from the time he or she attains majority, carries out productive activities and perceives, at least, an income equivalent to minimum legal wage in the country involved [...]; and
- the presumption according to which violations of human rights and a situation of impunity regarding those violations cause grief, anguish and sadness, both to the victims and to their next of kin.¹⁵²

These presumptions impact on the Court’s award of reparation, and reflect the cases that the Court has considered over time. As such, these presumptions help in rendering reparation awards that take into account a ‘regional experience.’ A similar approach by the African Commission, on the basis of its existing jurisprudence and caseload, could similar inform the Commission’s approach to reparation, thereby providing for a specific ‘African reparation perspective.’

VII.1 Restitution

According to the UN Basic Principles and Guidelines, **restitution** as a form of reparation is aimed at restoring the victim to the original situation he or she would have been in before the violation occurred, and can include ‘restoration of liberty, enjoyment of human rights,

¹⁵¹ IACtHR, *Caracazo v. Venezuela*, Judgment of 29 August 2002 (Reparations and Costs), para.50.

¹⁵² *Ibid.*

identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.¹⁵³

The Permanent Court of International Justice has emphasised that the primary objective of reparation is restitution, a position re-iterated by the European Court of Human Rights in the 'Greek Case'. In that case, the European Court considered that 'a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.'¹⁵⁴ The African Commission has recognised the importance of restitution, and has held that a State in violation of rights enshrined in the African Charter should 'take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation.'¹⁵⁵

An award of restitution should specify precisely what rights of the victim should be restored so as to provide guidance to the State how best to redress the violation and put the victim in the situation before the breach occurred, to the extent possible. As indicated in the UN Basic Principles and Guidelines, and affirmed by the jurisprudence of international and regional human rights mechanisms, a variety of violations will require specific forms of restitution, including:¹⁵⁶

(1) Restoration of right to a fair trial

International and regional human rights mechanisms have consistently held that in cases where a person's right to a fair trial has been violated, the victim may have a right to a re-trial.¹⁵⁷ The UN Human Rights Committee considered in the case of *Akwanga v Cameroon*, in which the applicant (a civilian) had been convicted by a military court in violation of Article 14 of the Covenant, that the State party is under an obligation to provide the author with an effective remedy, which should include a review of his conviction with the guarantees enshrined in the Covenant.¹⁵⁸ The African Commission and a range of other regional

¹⁵³ UN Basic Principles, Principle 19.

¹⁵⁴ ECtHR, *Papamichalopoulos and Others v. Greece*, application no.14556/89, Judgment, 31 October 1995, para.34.

¹⁵⁵ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, dispositif (para.229 (d)).

¹⁵⁶ Other violations, such as dismissal from employment in violation of human rights, can also require restitution, see for instance, African Commission, *Malawi African Association and others v Mauritania* where the Commission recommended the government of Mauritania to 'reinstate the rights due to the unduly dismissed and./ or forcibly retired workers, with all the legal consequences appertaining thereto.'

¹⁵⁷ See also, International Court of Justice, *Germany v United States* (La Grand Case), Judgment of 27 June 2001, I.C.J. Reports 2001, para.125.

¹⁵⁸ UN Human Rights Committee, *Ebenezer Derek Mbongo Akwanga v Cameroon*, Communication No. 1813/2008, CCPR/C/101/D/1813/2008, 19 May 2011, para. 9, at <http://www.redress.org/downloads/documents/110322-mbongoakwangavcameroon.pdf>.

mechanisms similarly held in cases of violations of fair trial rights, that the victims should be afforded the possibility of a re-trial.¹⁵⁹

The Inter-American Court has furthermore underlined that where a victim has been convicted as a result of an unfair trial, her right to reparation includes an obligation of the State to declare all records of the trial and of the conviction “null and void.”¹⁶⁰

(2) Restoration of liberty

Similarly, it is standard jurisprudence of human rights mechanisms in cases of arbitrary detention to request the State to release the victim from detention.¹⁶¹ In the case of *Loayza Tamayo v Peru*, the Inter-American Commission referred the case to the Inter-American Court after finding that Peru had failed to comply with its recommendations and requested the Court to, *inter alia*, ‘instruct the Peruvian State to order her [the victim] immediate release and make her appropriate reparation.’ The Court then decided to, *inter alia*, ‘order the State of Peru to release Maria Elene Loayza-Tamayo within a reasonable time.’¹⁶² The UN Human Rights Committee held that if conditions of detention violate international human rights law, the detainee had to be released if the conditions of detention do not improve.¹⁶³

The African Commission’s jurisprudence has similarly developed towards requesting States to release detainees who were still in detention at the time the Commission found a violation of Article 6 (right to liberty). In *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon*, a case decided by the Commission in 1997 and where the victim was imprisoned beyond the expiry of his sentence in the absence of a judgment to extend his sentence, the Commission held that such ‘detention is arbitrary ... and constitutes a violation of Article 6.’ Instead of expressly requesting the government of Cameroon to ensure the victim’s release, however, the Commission recommended in rather general terms ‘that the Government of Cameroon draw all the necessary legal conclusions to reinstate the victim in his rights.’¹⁶⁴

In 2011, the African Commission, in a case brought on behalf of three victims who had been tried and sentenced to death after being accused of acts of terrorism in Egypt, found that

¹⁵⁹ African Commission, *Civil Liberties Organisation v Nigeria*, Communication 151/96, dispositif; Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi, Communication 231/99, dispositif; IACtHR, Castillo Petruzzi and others v Peru, Judgment, 30 May 1999, paras.217-221; IACmHR, Joseph Thomas (Jamaica), Report No.127/01, Case 12.183, 3 December 2001, para.153 (1).

¹⁶⁰ IACtHR, *Loayza Tamayo v Peru*, Judgment (Reparations), 27 November 1998, para.122.

¹⁶¹ See for instance, ECtHR, *Assanidze v Georgia*, 39 EHRR 653, paras.202-203.

¹⁶² IACtHR, *Loayza Tamayo v Peru*, Judgment, 17 September 1997, paras. 1, 84; see also on the role of the Inter-American Commission in requesting the release of victims, Maria-Claudia Pulido, ‘Reparation for torture: recent jurisprudence of the Inter-American System on Human Rights’, in ‘Pan-African Reparation Perspectives’, *supra*, n. 14.

¹⁶³ UN Human Rights Committee, *Reece v Jamaica*, 21 July 2003, CCPR/C/78/D/796/11998, para.9.

¹⁶⁴ African Commission, *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon*, Communication 39/90, dispositif.

the victims were imprisoned following an unfair trial in violation of Article 7 of the Charter and expressly called on the Government of Egypt to, *inter alia*, release all three victims.¹⁶⁵

Restoration of liberty in cases involving arbitrary arrest and detention is an important measure of reparation that can also help to prevent further violations. It should always be included in the measures of reparation awarded in cases where the Commission has found a violation of Article 6 and the victim is still in detention at the time of the Commission's decision. In addition, cases involving arbitrary detention should give rise to other forms of reparation, including for instance compensation, and, where applicable, rehabilitation.

(3) Restoration of citizenship and safe return to one's place of residence

The UN Basic Principles and Guidelines provide that restitution includes, *inter alia*, the restoration of citizenship and return to one's place of residence. The African Commission recognised in *John K. Modise v Botswana*, who was born in South Africa to a Botswanan father and a South African mother, and following his mother's death shortly after his birth, had returned to and grown up in Botswana, that the applicant had been denied nationality of Botswana in breach of the African Charter. The Commission urged the government of Botswana to 'take appropriate measures to recognise Mr John Modise as a citizen of Botswana by descent...[.]'¹⁶⁶ In the case of *Malawi African Association and others v Mauritania*, the Commission considered a variety of joined communications related to the human rights situation in Mauritania between 1986 and 1992.¹⁶⁷ The communications concerned, *inter alia*, the arbitrary arrest and detention of hundreds of black Mauritians, and the death of more than 300 in detention. In addition, around 50,000 people were expelled from Mauritania to neighbouring Senegal, including Mauritanian citizens whose identity cards were destroyed by Mauritanian authorities and who were subsequently denied the right to return as they could not prove their Mauritanian citizenship. The Commission, recognising a wide variety of violations, called on Mauritania to, *inter alia*, 'take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania...[.]'¹⁶⁸ Similarly, in the Darfur case, the Commission, after finding the government of Sudan responsible for the forced displacement of 'thousands upon thousands of persons', has recommended the government to 'take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution...[.]'¹⁶⁹

¹⁶⁵ African Commission, *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Communication 334/06, dispositif.

¹⁶⁶ African Commission, *John K. Modise v Botswana*, Communication 7/93_14AR, dispositif.

¹⁶⁷ African Commission, *Malawi African Association and others v Mauritania*, dispositif.

¹⁶⁸ Ibid.

¹⁶⁹ African Commission, *Darfur Case*, dispositif.

In the case of *John D. Ouko v Kenya*, the complainant alleged, *inter alia*, that he was forced to flee the country due to his political opinions. The Commission, in finding the State responsible for a violation of Article 12 of the African Charter, 'urge[s] the Government of the Republic of Kenya to facilitate the safe return of the Complainant to the Republic of Kenya, if he so wishes.'¹⁷⁰

The cases referred to above indicate that the African Commission has developed a practice of recommending restoration of citizenship and safe return to one's place of residence in cases where it found the State responsible for, *inter alia*, a violation of Articles 3 (2),¹⁷¹ 12 (1), (2)¹⁷² and/ or 13¹⁷³ of the Charter. The main challenge remains the Commission's follow up on the enforcement of its decisions in these cases, in particular in cases involving mass human rights violations such as those in the 'Mauritania' and 'Darfur' cases. The Commission did not provide much guidance as to the steps to take to ensure restitution in light of the massive scale of the violations, and the States in question have either ignored the recommendations (Sudan) or grappled with implementation (Mauritania).¹⁷⁴ Botswana had also not implemented the Commission's recommendation to 'take appropriate measures to recognise Mr John Modise as a citizen of Botswana by descent.'¹⁷⁵

(4) Restoration of property

The restoration of property unlawfully expropriated is a common form of reparation also in the jurisprudence of the African Commission. In the '*Endorois case*', concerning the expulsion of the Endorois people from their land in Kenya, the Commission in a landmark decision urged Kenya to 'recognise the rights of ownership to the Endorois and restitute Endorois ancestral land.'¹⁷⁶ The obligation to restore unlawfully obtained and expropriated property as well as restitution of 'belongings looted' from the victims was also upheld in several other cases where the Commission found a violation of Article 14 of the African Charter.¹⁷⁷

¹⁷⁰ African Commission, *John D. Ouko v Kenya*, Communication 232/99, dispositif.

¹⁷¹ Article 3 (2) provides that [E]very individual shall be entitled to equal protection of the law."

¹⁷² Article 12 (1) and (2) provide, in relevant parts that "[E]very individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law; "[E]very individual shall have the right to leave any country including his own, and to return to his country."

¹⁷³ Article 13 provides for a citizen's right to participate in the government of his country, to equal access to the public service of the country and to public property and services in "strict equality of all persons before the law."

¹⁷⁴ See Institute for Human Rights and Development in Africa, 'Implementation Report - October 2011, highlighting that in Mauritania, 'successive governments have made progress toward achieving both the letter and spirit of the Commission's recommendations....[but] that not one of the six recommendations has been adequately implemented,' at <http://mauritania.ihrda.org/acmhpr-mauritania-decision-implementation/>.

¹⁷⁵ See The Botswana Gazette, 'Botswana urged to implement decision on John Modise', 6 January 2010, at <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=4b4c219b5>.

¹⁷⁶ African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, Communication 276/03, dispositif, point (a);

¹⁷⁷ African Commission, *Bah Ould Rabah v Mauritania*, Communication 197/97, dispositif; *Malawi African Association and others v Mauritania*, dispositif point (1); '*Darfur Case*', dispositif.

The right to restitution of stolen or looted property in violation of Article 14 of the Charter therefore is part of the Commission's recommended measures of reparation. As with the restitution measures recommended in the context of other violations, however, the main challenge is the implementation of the Commission's decisions in these cases. In the 'Endorois Case', Kenya has yet to implement the decision. However, in this case, the Commission has shown an unprecedented level of engagement with the complainants in the case in the follow up to the decision. In light of the government's failure to fully comply with the decision, the Commission held an implementation hearing with the Kenyan government in April 2013.¹⁷⁸ It remains to be seen whether Kenya will take concrete steps to implement the decision as a result the hearing. However, such hearings demonstrate the Commission's commitment to implementation and help ensure that the State cannot simply ignore the Commission's decision. It also provides complainants with the opportunity to raise concerns regarding the implementation, thereby ensuring that the manner in which the decision is eventually implemented reflects perspectives and needs of victims.

In light of the Commission's constant struggle to find sufficient resources, such implementation hearings might not be possible in every single case in which the State fails to implement a decision. However, the Commission should consider convening implementation hearings in cases raising complex issues of implementation, in particular in regard to serious and massive violations involving a large number of victims.

Restitution and transformative measures of reparation to address 'structural violations'

In cases involving gross human rights violations,¹⁷⁹ due to the nature of the crimes and their impact on victims, it is impossible to fully restore the victim to the situation existing before the breach. As will be outlined below, the African Commission has recommended a range of other forms of reparation, including for instance compensation, satisfaction and guarantees of non-repetition in addition to the measures of restitution outlined above.

Furthermore, General Comment No. 3 specifies that restitution should not, under any circumstances, place the victim in a situation where he or she may be at risk of a repetition of the violation. To this end, reparation awards by regional mechanisms should include the different steps States should take to address 'any structural causes of the violation, including any kind of discrimination...[.]' The further clarification and elaboration on the scope, meaning and content of restitution as a form of reparation provided by General Comment No. 3 is highly important as it emphasises that restitution is not simply about restoring the victim to the situation they were in before the violation occurred, but also

¹⁷⁸ ESCR-Net, 'The Endorois community clarifies priorities for land restitution and reparations, advancing implementation of the precedent-setting recommendations of the African Commission on Human and Peoples' Rights to Kenya', at <http://www.escri-net.org/node/365247>.

¹⁷⁹ Including extrajudicial killings, torture, enforced disappearances, rape and other forms of sexual violence.

requires taking steps to address aspects of that situation which may have led to the violation in the first place.

This applies in particular to cases where mechanisms have found a State responsible for violence against women, and may require awards of reparation to address underlying structural problems giving rise to the violation. The Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, has noted that '[s]ince violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalisation, measures of redress need to link individual reparation and structural transformation.'¹⁸⁰

The *Nairobi Principles on Women and Girl's Right to a Remedy and Reparation* of 2007 for instance emphasise that 'reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girl's human rights predate the conflict situation.'¹⁸¹

As will be outlined further below, the African Commission's jurisprudence regarding measures addressing structural causes for violations is rather mixed. While it can be commended for recommending States to take a range of relatively far reaching measures to address such causes, it has not always done so in a consistent manner. Recommendations such as to bring domestic laws in conformity with the Charter or to request 'an amendment of laws ... to bring them in line with the African Charter'¹⁸² do not identify the structural shortcomings in a State's legal system. They also leave too much discretion to the State found in violation, making it difficult for the Commission and complainants to monitor follow up, particularly in the absence of a practice of implementation hearings.

¹⁸⁰ Human Rights Council (2010), 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo', UN Doc. A/HRC/14/22 19 April 2010, Reparations for Women Subjected to Violence: First Thematic Report.

¹⁸¹ Nairobi Principles on Women and Girls' Right to a Remedy and Reparation, November 2007, para.3, at <http://www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf>.

¹⁸² African Commission, *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 323/06, dispositif.

VII.2 Compensation

According to the UN Basic Principles and Guidelines, compensation should be awarded for ‘any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case... such as: (i) physical or mental harm; (ii) lost opportunities such as employment, education or social benefits; (iii) material damages including loss of earning potential; (iv) moral damage; and (v) any costs incurred for legal assistance, medical services, and psychological and social services.’ General Comment No. 3 reiterates that compensation should be awarded for pecuniary and non-pecuniary damages, and the Robben Island Guidelines provide that victims of torture should be provided with ‘appropriate levels of compensation and support.’¹⁸³

A range of international and regional human rights treaties and declarative instruments contain an explicit right to compensation for human rights violations. Article 9(5) of the ICCPR, Article 5(5) ECHR and Article 10 ACHR provide expressly for compensation for unlawful arrest, detention or conviction.¹⁸⁴ Article 14 of the Convention against Torture obliges State parties to the Convention to ensure that victims of torture ‘have an enforceable right to fair and adequate compensation.’¹⁸⁵ The African Charter provides expressly for the State obligation to adequately compensate ‘dispossessed people’ in the case of spoliation.¹⁸⁶ The jurisprudence of the relevant international and regional human rights bodies has furthermore confirmed that a right to compensation – implied in the right to reparation - exists regarding the other Articles enshrined in the relevant treaty.

Compensation is the most common form of reparation awarded. It is also the most complex and challenging to determine. The following sections will therefore explain in detail the different components involved in awarding compensation to victims.

VII.2.1 Standard of Compensation

As mentioned above, human rights treaties provide for an obligation to afford ‘fair and adequate’ compensation to victims. While the amount of compensation may differ from country to country, the UN Human Rights Committee has stated in several cases that States are under an obligation to provide appropriate compensation, which excludes purely ‘symbolic’ amounts of compensation.¹⁸⁷

¹⁸³ Robben Island Guidelines, para.50 (c); see also Fair Trial and Legal Assistance Guidelines, which provide that victims of unlawful arrest or detention (M, (1) (h), victims of torture or ill-treatment (7 (j), and ‘victims of abuse of power’ (N (5) (e), are entitled to compensation.

¹⁸⁴ See also on the right to compensation for unlawful detention and arrest: Article 16 of the Arab Charter on Human Rights and Article 85 of the Rome Statute of the ICC.

¹⁸⁵ Similar, Article 24 of the ICPPED.

¹⁸⁶ Article 21 (2).

¹⁸⁷ See for instance Human Rights Committee, *Bozize v Central African Republic*, Communication No. 449/1990; *Mjica v Dominican Republic*, Communication No.449/1991); *Griffin v Spain*, Communication No. 493/1992.

The African Commission similarly has emphasised in several cases involving violations of Article 5 of the Charter, that the State is obliged to pay ‘adequate compensation to the Victim for the torture and trauma suffered’,¹⁸⁸ to ‘adequately compensate the victims in line with international standards’,¹⁸⁹ to take appropriate measures to ensure compensation of the victims¹⁹⁰ or to ensure payment of a compensatory benefit.¹⁹¹ What is adequate or appropriate depends on the circumstances of the case, the type of violation and the harm suffered by the victim.¹⁹²

While the African Commission therefore recognises a victim’s right to compensation, it has not, for instance, set out what could be ‘appropriate steps’ for compensation. It has not yet identified which factors States should take into account in their assessment of the compensation owed, which could be due to the fact that the Commission itself does not assess the harm suffered by the victims.¹⁹³

Similar to the practice of the Inter-American Commission and the Human Rights Committee, the African Commission does not usually specify loss in monetary terms.¹⁹⁴ In the case of *Antoine Bissangou v Republic of Congo*, the complainant filed a complaint against the Republic of Congo in regard to the State’s failure to enforce an award of compensation the complainant had been granted by the State’s court. The complainant requested the Commission to recommend the State to comply with the ruling of its own court.

The Commission, finding a violation of Articles 3, 7 and 14 of the African Charter, considered that:

[A]lthough admitting that the Complainant suffered some loss due to the delay in the payment of the sum granted by Congolese courts, [the Commission] does not consider itself in a position to put a figure to the loss. This is the reason why, relying on its jurisprudence, especially its decision on *Communication 59/91*, the [African] Commission recommends that the amount of the compensation be determined according to Congolese legislation.¹⁹⁵

¹⁸⁸ African Commission, *Gabriel Shumba v Zimbabwe*, Communication 288/04, dispositif.

¹⁸⁹ African Commission, *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 334/06, dispositif.

¹⁹⁰ African Commission, *Curtis Francis Doebbler v Sudan*, Communication 236/00, dispositif.

¹⁹¹ African Commission, *Malawi African Association, and others v Mauritania*, dispositif.

¹⁹² See above, principles governing an award of reparation.

¹⁹³ While the Commission does not assess harm in the context of e.g. awarding compensation, it takes into account the violation to determine what the compensation should address, see for instance *Gabriel Shumba v Zimbabwe*, where the Commission ordered the government of Zimbabwe to compensate Mr Shumba for the torture and trauma suffered.

¹⁹⁴ In awarding compensation, however, the Inter-American Commission, does specifically set out what losses the compensation should cover (see further below).

¹⁹⁵ African Commission, *Antoine Bissangou v Republic of Congo*, Communication 253/2002, para.80.

The Commission therefore recommended the State to, *inter alia*, compensate the complainant as required by its own Court as well as for the loss suffered by the complainant, the 'amount of which shall be determined in accordance with Congolese legislation.'¹⁹⁶

The only case to date where the Commission departed from its approach to unspecified amounts of compensation is the case of *Egyptian Initiative for Personal Rights and Interights v Egypt*. In this case, the complainants (representing four women) alleged a series of human rights violations by Egyptian authorities committed in the context of a demonstration, including in particular sexual assault amounting to discrimination and a violation of their dignity and ill-treatment in violation of Article 5. Here, the complainants requested a specified amount of compensation, which the Commission awarded without providing any reasons for doing so.¹⁹⁷ It is therefore not clear what motivated the Commission to change its approach. In the Shumba case, which was decided shortly after the Commission's decision in the case against Egypt, and which involved a violation of Article 5 amounting to torture, the Commission reverted to its common practice, of awarding compensation for the torture and the trauma suffered (without specifying the amount).

There are good reasons to specify the quantum of compensation a State should pay following the finding of a violation of the Charter. In particular:

(1) A specified sum can be directly enforced, is not subject to further negotiations and provides a clear benchmark for both parties of what to pay and what to expect. This is particularly important in the absence of a strong follow-up mechanism that provides guidance to the State and monitors implementation;

(2) An award of a specified sum can prevent further delays through negotiating an amount of compensation agreeable to both parties;

(3) It can therefore be more victim friendly, as it can facilitate more prompt compensation that does not require the victim to negotiate with those potentially responsible for the violation(s);

(4) A decision by the Commission regarding the amount of compensation owed can balance any potential disparities during a negotiation between the victim and the State;

(5) An amount of compensation specified by the Commission, as the continental human rights body, could be more likely to comply with international standards than awards determined by States themselves. Furthermore, if the Commission decides on the amount

¹⁹⁶ Ibid, dispositif (5).

¹⁹⁷ African Commission, *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 323/06.

to be paid, victims of human rights violations will be treated equally rather than on the basis of the law existing in a given State party to the African Charter.

VII.2.2 Only Compensation?

It is a common misconception that reparation is synonymous with compensation. The Committee against Torture has, however, emphasised that provision of only monetary compensation is inadequate and States doing so would not be in compliance with their obligations under article 14 of the CAT.¹⁹⁸ As human rights mechanisms request or recommend States to take certain steps to redress the violations found, it is therefore important that their reparation awards go beyond compensation awards, and include other forms of reparation, including, as appropriate, restitution, rehabilitation, satisfaction and guarantees of non-repetition. This is standard practice of all human rights mechanisms, to different degrees.¹⁹⁹

VII.2.3 Assessment of Harm

Only few human rights mechanisms have specified the amount of compensation, particularly the Inter-American Court and the European Court. The International Court of Justice and the ECOWAS Community Court of Justice (CCJ), though not human rights courts, have also made specific monetary awards for material and moral damages.²⁰⁰

The determination of compensation is important for all human rights mechanisms, irrespective of whether it is the practice to fix a precise figure. At the enforcement stage, mechanisms might be required to examine submissions from both parties regarding the (amount of) compensation owed. The following sections will therefore examine the practice of the Inter-American Court, the European Court as well as the International Court of Justice and ECOWAS CCJ in assessing the amount of compensation for victims of gross human rights violations.

A. Material harm

What is it/ what can it include

Compensation is granted for 'economically assessable harm' arising from the human rights violation, including material damages (also referred to as 'pecuniary damages'). Such

¹⁹⁸ UN CAT, General Comment No.3, para.9.

¹⁹⁹ As mentioned above, the ECtHR has an arguably narrower approach to reparation than for instance the African Commission, placing a particular emphasis on compensation, and indicating other measures in more general terms, leaving it to the State (in cooperation with the Court's supervisory mechanism, the Committee of Ministers) to determine the steps to take to redress the violation(s).

²⁰⁰ See for instance the ECOWAS Community Court of Justice, which considers compensation for 'three kinds of damages: special damages, general damages and punitive damages', in *Chief Ebrimah Manneh v Republic of The Gambia*, ECW/CCJ/JUD/03/08, Judgment of 5 June 2008, paras.29-32.

damages can include for instance loss of personal property; loss of earnings/income, as well as loss of future income; costs arising from legal assistance, as well as from medical and psychological assistance. The UN Basic Principles and Guidelines provide further that compensation should cover lost opportunities, including employment, education and social benefits.

Economically assessable harm has also been referred to as ‘pecuniary damages’ or ‘special damages’, which the ECOWAS CCJ describes as “enumerable or quantifiable monetary costs or losses suffered by the plaintiff...including medical costs, repair or repair or replacement of damages property, lost wages, lost earning potential, loss of business, loss of irreplaceable items, loss of support, etc.”²⁰¹

a) Loss of personal property

International and regional mechanisms have awarded compensation for loss of property as a result of human rights violations, including compensation for loss of a house and household property destroyed by security forces,²⁰² costs of alternative housing,²⁰³ loss of livestock²⁰⁴ as well as loss of land.²⁰⁵ The Inter-American Court has the most advanced practice of awarding compensation for loss of personal property, including for the loss of a company,²⁰⁶ compensation for expenses incurred to locate disappeared victims,²⁰⁷ expenses incurred to search for the mortal remains as well as burial and funerary services.²⁰⁸

While the burden of proof of the loss of property rests primarily on the complainant, international jurisprudence suggests that this rule is to be applied flexibly and on a case by case basis. The ICJ, in a case filed by Guinea on behalf of its national Ahmadou Sadio Diallo for ‘serious violations of international law upon the person of a Guinean national’,²⁰⁹ considered that the general rule imposing the burden of proof on the claimant is to be applied flexibly in cases where the other party/State is in a better position to establish certain facts.²¹⁰ The Inter-American Court has similarly established that

²⁰¹ Ibid, para.29.

²⁰² See for instance ECtHR, *Selçuk and Asker v Turkey*, application no.12/1997/796/998-999, Judgment, 24 April 1998, paras. 107-108.

²⁰³ Ibid, paras. 113-14.

²⁰⁴ ECtHR, *Ipek v Turkey*, Judgment of 17 February 2004, paras. 228-229.

²⁰⁵ African Commission, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96, dispositif.

²⁰⁶ IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment of 21 November 2007 (Preliminary Objections, Merits, Reparations, and Costs) paras.228-234.

²⁰⁷ IACtHR, *Caracazo v. Venezuela*, Judgment of 29 August 2002 (Reparations and Costs), paras.84-85.

²⁰⁸ Ibid.

²⁰⁹ ICJ, Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of The Congo*), Judgment of 30 November 2010, at <http://www.icj-cij.org/docket/files/103/16244.pdf>.

²¹⁰ ICJ, Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*), (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), Judgment, 19 June 2012, pp.4-5, at <http://www.icj-cij.org/docket/files/103/17044.pdf>, Introductory Observations.

in proceedings on human rights violations, the defense of the State cannot be based on the impossibility of the plaintiff to provide evidence that, in many cases, cannot be obtained without the cooperation of the State, this leads to the conclusion that the burden of proof on this point corresponds to the State (footnotes omitted).²¹¹

Where possible, loss of personal property should be documented for instance with an inventory of lost items - supported by, for instance, purchase receipts, detailed descriptions of the items, including estimates of the value of the (tangible and intangible (e.g. bank accounts)) items lost or documentation of the value of the items at the time of loss. The documentation should also include evidence showing that “loss” of the property was a result of the respondent’s conduct (for instance evidence to show that the State actually seized, sold otherwise prevented the applicant from taking possession of the property).²¹²

Where the complainant cannot substantiate claims as to the quantity and the value of his lost property with reference to any documentary evidence, or any independent evidence corroborating the claims as to the lost property, the European and Inter-American courts have confirmed that they will make their assessment of the loss on the basis of equity (see below).²¹³

The African Commission could refer to a flexible standard of proof as well as the principle of equity when awarding compensation and remind the State to apply these principles in the implementation of the award. Standards of evidence applied in a national context for the award of compensation should not prevent an enforcement of the Commission’s decision.

Quantification of loss

Where insufficient evidence exists as to the (value of the) lost property, the practice of human rights mechanisms, particularly the European and Inter-American courts, as well as inter-State courts such as the ICJ, suggests that awards are nevertheless made on the basis of equity, provided that there is a causal nexus between the damage and the violation.²¹⁴

The European Court for instance has held that, for determining damage,

[i]ts guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case,

²¹¹ IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment of November 21, 2007, (Preliminary Objections, Merits, Reparations, and Costs), para.76.

²¹² *Ibid*, para.14.

²¹³ ECtHR, *Ipek v Turkey*, Judgment of 17 February 2004, para. 227; IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment of November 21, 2007, (Preliminary Objections, Merits, Reparations, and Costs), para.232.

²¹⁴ See for instance, ECtHR, *Ipek v Turkey*, Judgment of 17 February 2004, para. 227; IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment of 21 November 2007, paras.232, 240, 242; ICJ, Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*), Judgment (Compensation), 19 June 2012, para.24.

including not only the position of the applicant but the overall context in which the breach occurred.²¹⁵

In the case of *Akdivar and Others v. Turkey*, the European Court held that the ‘applicants’ houses were burnt down by the security forces²¹⁶ in violation of the European Convention. When the Court considered claims for compensation for the loss of their houses, the government submitted that a group of experts it had nominated to assess the victims’ losses had found that only three out of the seven applicants had registered their houses with the municipality. The government thus opposed an award of compensation for the four unregistered houses. It submitted that the loss of the three registered houses should be calculated according to the size of the houses as per the municipality’s register and in line with the base rate per square metre as established by the group of experts.²¹⁷

Four of the victims could not present any independent evidence as to the loss of their houses. In their submission for claims for compensation, they argued that in ‘the rural area where they lived, there was no tradition of registering property, which passed from generation to generation, and was acquired by prescriptive use.’²¹⁸ They therefore claimed compensation for the loss of their houses, providing an estimated size of these houses. While all victims agreed with the base rate set by the group of experts per square meter, they did not agree with the expert’s estimated size of their houses.

The Court did not consider it ‘as conclusive that no record exists in respect of the houses of four of the applicants’²¹⁹ and held that an award should be made in respect of the houses of all seven victims. As the claims of four of the victims in regard to the size of their houses could not be substantiated for lack of registration, the Court proceeded to make an award for the loss of the applicants’ houses on the basis of equity, taking into account the claims of the applicants, as well as the size of the registered houses of the three other applicants. The Court then made an award of ‘fifty percent of the surface area claimed by the applicants at the base rate.’²²⁰ The Court also considered the high rate of inflation in Turkey, and requested that the total sum of compensation awarded was to be converted into pounds sterling.²²¹

In cases where the calculation of lost property would be too complex so as to allow for an accurate assessment of material loss, the Inter-American Court has determined that ‘an arbitration tribunal should determine the percentage of loss that Mr. Chaparro [the victim] suffered as a result of the State’s seizure and deposit of the Plumavit factor [the victim’s

²¹⁵ ECtHR, *Al-Jedda v the United Kingdom*, Judgment of 7 July 2011, Application No. 27021/08, para. 114.

²¹⁶ ECtHR, *Akdivar and others v Turkey* (Article 50), application no 99/1995/605/693, Judgment, 1 April 1998, para.18.

²¹⁷ *Ibid*, para.16.

²¹⁸ *Ibid*, para.17.

²¹⁹ *Ibid*, para.18.

²²⁰ *Ibid*, para.19.

²²¹ *Ibid*, introductory paragraph II.

company].²²² The Court then proceeded to establish an approximate amount of compensation for the victim's loss 'based on the equity principle.' According to the Court, if the arbitration procedure resulted in an amount greater than the award by the Court, the government could deduct from the victim the amount established by the Court. If it was less, the victim could keep the amount awarded by the Court. The Court ordered the government to deliver the amount of compensation ordered within one year 'at the latest of notification of this Judgment.'

The above examples of the European and Inter-American courts' rich jurisprudence on the award of specified amounts of compensation illustrate the advantages, and indeed the need, to examine claims for reparation, and in particular compensation, separately from the examination of the merits of the case. A separate, detailed consideration of claims submitted by the complainants, and arguments by the government is required to address the complexities in the assessment of loss. Where no separate consideration of the claims for compensation takes place, unspecified awards of compensation should include recommendations to States to apply a) a flexible burden of proof regarding the evidence of loss claimed by victims, and b) the application of the principle of equity to ensure that victims can obtain an award that is 'just, fair and reasonable' in light of the circumstances of their case.

b) Loss of (future) earnings

It is standard in the jurisprudence of human rights mechanisms to award compensation to victims of human rights violations for lost earnings, subject to the existence of a 'causal connection' between the lost earnings, and the violation of the relevant treaty.²²³ Even though the UN Human Rights Committee has not, to date, awarded specified amounts of compensation, it has considered that State authorities should include the lost earnings of the victim in the compensation owed on the basis of salaries the victim would have received.²²⁴ This is also true for the Inter-American Commission which, in several cases referred to the Court, has requested compensation for lost earnings.²²⁵

International and regional human rights mechanisms have awarded compensation for loss of earnings to direct and indirect victims. In the case of enforced disappearances and extrajudicial killings such awards were also made to dependants subject to the existence of certain criteria: (i) whether there have been effective and regular contributions made by the

²²² IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment of 21 November 2007, para.232.

²²³ ECtHR, *Çakici v Turkey*, Judgment of 8 July 1999, para.127; the ECtHR also refers to the 'loss of income' instead of loss of earnings, see for instance, *Ipek v Turkey*, Judgment of 17 February 2004; *Barberà, Messegué and Jabardo v. Spain*, Judgment of 13 June 1994, application no. 285-C, paras.16-20; see also IACtHR, *Suárez-Rosero v. Ecuador*, Judgment (Reparations and Costs), 20 January 1999, para.60.

²²⁴ UN Human Rights Committee, *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*, Communication No. 933/2000, U.N. Doc. CCPR/C/78/D/933/2000 (2003), para.6.2.

²²⁵ See for instance, IACtHR, *Caracazo v. Venezuela*, Judgment of 29 August 2002 (Reparations and Costs), para.82.

victim to the claimant; (ii) the nature of the relationship between the victim and the claimant, providing for the assumption that the payments would have continued had the victim not been disappeared or unlawfully killed; and (iii) where the contributions from the victim to the claimant have been based on a financial need of the recipient.²²⁶

The loss of earnings will be calculated against the background of the violation established by the human rights mechanism. For instance, in cases involving arbitrary detention, the European Court will take into account the length of time spent in detention so as to calculate the lost earnings. Cases where the mechanism established extrajudicial killings will involve calculation of loss of future earnings to the benefit of indirect victims and/or dependants. The basis for such calculation is the victim's salary, the contribution to the indirect victim/dependant, as well as the latter's life expectancy.

Burden of proof of loss of earnings

The claimant needs to establish a) that the victim had received a salary prior to the violation, and b) the amount of the salary, for instance through monthly/yearly salary receipts; bank account / tax records; or accounting records of the employer. The burden of proof is again applied flexibly, taking into account the victim's possibility to access relevant documentation. The Inter-American Court for instance called on the representatives of the victims and next of kin, as well as the Inter-American Commission and the State to provide specific information to facilitate the calculation of the claim for compensation for loss of earnings, including:

- birth certificates of victims or their next of kin;
- work certificates;
- medical reports;
- reports on the legal minimum wage in force;
- life expectancy in the country concerned.²²⁷

Calculation of loss of (future) earnings

The starting point for the calculation of lost earnings is the victim's salary before the violation.²²⁸ If the salary cannot be calculated precisely (for instance where no salary receipts exist that would allow the mechanism to calculate the amount of compensation in

²²⁶ Ibid.

²²⁷ Ibid, para.26.

²²⁸ See for instance IACtHR, *Loayza Tamayo v Peru*, Judgment (Reparations), 27 November 1998, para. 129.

relation to the period of time the victim was unable to work), the amount of compensation will be calculated on the basis of equity.²²⁹

In the case of *Elci and others v Turkey* for instance victims of arbitrary detention and ill-treatment could not support their claims for loss of earning with any evidence of their income during their time in detention. The European Court considered that it had found that the applicants in this case had been arbitrarily detained and ill-treated by the Turkish authorities. It considered the length of their arbitrary detention to calculate a daily rate of loss of earnings, for which it took into account the applicants' work experience as well as the standard of living in the area they lived in Turkey. The Court considered that even in the absence of any additional evidence, this could allow the Court to proceed to award compensation for loss of earnings, also taking into account that

it is clear that there was some loss of earnings during the applicants' detention which has been found to violate Article 5 of the Convention, and that a recuperation period was required after their stressful experience in order to restore their health and their clients' confidence.²³⁰

In another case concerning the loss of future earnings, the Court found that there was a causal link between the applicant's son's death in violation of Article 2 of the European Convention and the loss of the applicant of the financial support which he could have provided her. Accordingly, the Court considered the monthly income of the applicant's son, the life expectancy of the applicant against the average life expectancy in Russia to calculate how long she would have benefited from her son's support and awarded her a total of 18,710 Euro as pecuniary damage, 'plus any tax that may be chargeable on that amount.'²³¹

The Inter-American Court, too, awards compensation for lost future earnings to relatives and other dependants in cases where the victim has disappeared or died as a result of the human rights violation, subject to the criteria detailed above.²³² As with the European Court, the reference point for calculating the compensation in such cases is the average life expectancy in the country in question.²³³ Where no salary receipts exist, the Court will for instance consider the minimum wage in national law,²³⁴ or take into account taxes paid by the victim before the violation to calculate the average monthly salary.²³⁵ Overall, the Court

²²⁹ See for instance ECtHR, *Elci and others v Turkey*, applications nos. 23145/93 and 25091/94, Judgment 13 November 2003, paras.721-722; ICJ, Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*), Judgment, 19 June 2012, para.49.

²³⁰ ECtHR, *Elci and others v Turkey*, paras.721-722.

²³¹ ECtHR, *Isayeva v Russia*, application no. 57950/00, Judgment 6 July 2005, para.236.

²³² See above, Section V.3 'Dependants'.

²³³ See for instance IACtHR, *Bámaca Velásquez v Guatemala* (Reparations), Judgment of 22 February 2002, para.51 (b); *Caracazo v. Venezuela*, Judgment of 29 August 2002 (Reparations and Costs), para.29

²³⁴ IACtHR, *Neina Alegria et al v Peru*, Judgment (Reparations) of 19 September 1996, paras.49-52; "Street Children" (Villagrán-Morales et al.) v. Guatemala Judgment of 26 May 2001 (Reparations and Costs), para.79.

²³⁵ IACtHR, *Caracazo v. Venezuela*, Judgment of 29 August 2002 (Reparations and Costs), para.49.

determines the loss of future earnings ‘in fairness’, calculating loss of earnings on the basis of twelve monthly salaries, and the benefits granted under national legislation, less 25 % for personal expenses, to which it adds current interests.²³⁶

These examples of how other regional human rights mechanisms have approached compensation for loss of (future) earnings could be taken into account by the African Commission. This applies in particular in cases where the Commission has found that the State was responsible for arbitrary detention, torture or ill-treatment, enforced disappearance or extrajudicial killing. When it recommends States to provide compensation for such violations, the Commission could for instance specify that such compensation should also include compensation for loss of earnings, including past and future earnings, where applicable.

c) Other material damage

The UN Basic Principles and Guidelines provide that compensation must cover ‘lost opportunities, including employment, education and social benefits.’ Beyond the loss of personal property and the loss of (future) earnings, victims, their relatives or other persons may suffer other forms of material damage resulting from the violation, including for instance costs arising out of past and future medical and psychological assistance as well as legal costs.

In one of its first cases, the Inter-American Court has considered that the loss of educational opportunities must be addressed so as to ensure that victims receive compensation to be able to study.²³⁷ In another case, it has ordered compensation for domestic help for a physically disabled (indirect) victim while her husband was arbitrarily detained, as well as for physical and psychological treatment costs of the direct victim.²³⁸ The European Court, in a case where the victim was tortured and subsequently attempted to escape his torturers by jumping out of a window, resulting in a broken spine and permanent disability, found the authorities responsible for the torture as well as the ensuing consequences. In addition to providing compensation for loss of past and future earnings, the Court awarded compensation for ‘the considerable amount of money required to continue his treatment.’ The Court considered that a ‘large number of imponderables’ were involved in the assessment of future losses. However, it proceeded to make an award, taking into account that the victim ‘will undeniably suffer significant material losses as a result of his complete disability and the need for constant medical treatment.’²³⁹ In awarding pecuniary damages

²³⁶ IACtHR, *Street Children” (Villagrán-Morales et al.) v. Guatemala* Judgment of 26 May 2001 (Reparations and Costs), para.81.

²³⁷ IACtHR, *Aloeboetoe v Suriname*, Judgment (Reparations and Costs), 10 September 1993, para.96; the Court held further that victims not only require compensation, but that further a school should be made available for the children, and ordered that the state should re-open the local school and employ teachers and administrative personnel.

²³⁸ IACtHR, *Suárez-Rosero v. Ecuador*, Judgment of 20 January 1999 (Reparations and Costs), para.60 (b) –(c).

²³⁹ ECtHR, *Mikheyev v Russia*, application no. 77617/01, Judgment 26 January 2006, paras.157-162.

for future medical treatment, the Court paid particular attention to an expert forensic report.

d) *The Life-Plan*

In a landmark decision, the Inter-American Court developed the concept of the so-called life-plan. In the case in question, the Court found that the victim, Mrs Loayza Tamayo, had received an unfair trial, was subjected to unlawful detention and to torture by authorities in Peru. Following the violations, Mrs Tamayo moved to live in exile in Chile. The Court considered that, beyond the material losses as a result of the violations, she had also suffered damage to her plan of life. The Court saw the life plan as akin to

personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself...[.] Those options, in themselves have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.

The Court then held that

[I]t is reasonable to maintain, therefore, that acts that violate rights seriously obstruct and impair the accomplishment of an anticipated and expected result, and thereby substantially alter the individual's development..[.] the damage to the 'life plan'... implies the loss or severe diminution , in a manner that is irreparable or reparably only with great difficulty, of a person's prospects of self-development. Thus, a person's life is altered by factors that, although extraneous to him, are unfairly and arbitrarily thrust upon him, in violation of laws in effect and in a breach of the trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and to satisfy his legitimate interests.²⁴⁰

While the Court did not make an assessment of the economic damages to the life plan of the victim in this case, it decided in the case of *Cantoral Benavides* in 2001 to order compensation for the damage to the life plan of the victim. In this case, the victim's unlawful detention prevented him from pursuing his studies. The Court, in direct reference to the life plan, ordered the State to provide the victim with 'a fellowship for advanced or university studies, to cover the costs of a degree preparing him for the profession of his choosing, and his living expenses for the duration of those studies, at a learning institution

²⁴⁰IACtHR, *Loayza Tamayo Case*, Judgment (Reparations) of 27 November 1998, para.150.

of recognized academic excellence, which the victim and the State select by mutual agreement.’²⁴¹

B. Moral damages

The UN Basic Principles and Guidelines provide that compensation should also cover moral damages or non-material loss as a result of the human rights violation. Moral damages are meant to compensate for harm, pain and suffering, including mental anguish, humiliation and a sense of injustice. One of the main functions of compensation in cases of gross human rights violations is to provide redress for harm to the physical and well-being of a person, as in such cases, *restitutio in integrum* is not typically possible for such damage.²⁴²

Non-material injury may take various forms, for instance mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to the victim’s credit or to his or her reputation. Referring to the practice of the Inter-American Court, the International Commission of Jurists has observed that ‘non-pecuniary damage may include distress, suffering, tampering with the victim’s core values, and changes of a non-pecuniary nature in the person’s everyday life’.²⁴³

The right to compensation for moral damages is well established in the jurisprudence of human rights mechanisms, including mechanisms that do not specify the amount of compensation owed to the victims.²⁴⁴ The African Commission, too, has recommended States to award compensation for ‘trauma suffered’ following a finding of torture in violation of Article 5 of the Charter.²⁴⁵ As will be outlined further below, in light of a presumption of moral harm in cases such as torture, enforced disappearances or extra-judicial killings, recommendations to States for compensation of victims (direct and indirect, where applicable) should therefore consistently include a reference to compensation also for moral harm.

Burden of proof

The Inter-American Court, as well as the ICJ, apply a ‘presumption of immaterial damage’ in cases of gross human rights violations, as ‘non-material injury is an inevitable consequence’

²⁴¹ IACtHR, *Cantoral Benavides Case*, Judgment of 3 December 2001, para.80; see also *Barrios Altos v Peru*, Judgment of 30 November 2001, para.43.

²⁴² International Commission of Jurists, ‘The Right to a Remedy and to Reparation for Gross Human Rights Violations- a practitioners’ guide, (‘The Right to a Remedy’), p. 134.

²⁴³ *Ibid.*

²⁴⁴ See for instance UN Human Rights Committee in the case of ‘*María del Carmen Almeida de Quinteros et al. v. Uruguay*’, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990), para.40.

²⁴⁵ African Commission, *Gabriel Shumba v Zimbabwe*, *dispositif*.

of such violations.²⁴⁶ In awarding compensation for moral damages due to pain and suffering of victims' parents, the Inter-American Court has held that '[I]t is essentially human for all people to feel pain at the torment of their children.'²⁴⁷

The Court also relies on circumstantial evidence and presumptions where they 'lead to consistent conclusions as regards the facts of the case.'²⁴⁸ In relation to moral harm for instance, where the Court has found that an individual has suffered gross human rights violations such as torture or ill-treatment, it will rely on the same evidence to consider that a person has also suffered moral damage. No additional evidence is needed for the consideration of compensation for moral harm.²⁴⁹

Quantification of moral damage

The Inter-American Court determines the amount of compensation for non-pecuniary damages 'in the reasonable exercise of its judicial authority and on the basis of equity.'²⁵⁰ The Court has held that monetary compensation for emotional harm is particularly appropriate in cases of human rights violations, based upon the principles of equity - especially as it is not possible to measure pain.²⁵¹ In its ground breaking decision in *Velázquez Rodríguez v. Honduras*, the Court awarded moral damages because of 'the psychological impact suffered by the family'.²⁵²

The European Court considers the purpose of compensation for moral harm to be giving 'recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment.'²⁵³ In calculating the amount of moral damages, the Court will apply the principle of equity, and take into account the severity of the violation, including for instance the period of time or the circumstance in which a victim was detained.²⁵⁴

Other factors that are taken into account when assessing the quantum of moral damages can include the degree or severity of suffering, the gravity of the breaches in question, the overall damage to health of the victim, number of violations, characteristics of the victim

²⁴⁶ Ibid, para.21; see also IACtHR, *Mapiripán Massacre v Colombia*, Judgment (Merits, Reparations, and Costs), 15 September 2005, para. 146.

²⁴⁷ Ibid.

²⁴⁸ IACtHR, *Gangaram Panday v Suriname*, Judgment (Merits), 21 January 1994, para.49.

²⁴⁹ International Criminal Court, 'Consultant's report on reparations in the Inter-American Human Rights System', published 19 March 2012, para.15, at <http://www.icc-cpi.int/iccdocs/doc/doc1224836.pdf>.

²⁵⁰ IACtHR, *Cantoral Benavides v Peru*, Judgment Judgment, 3 December 2001, para.53.

²⁵¹ For a critique of the approach based solely on equity as risking to lead to 'widely various amounts of compensation for similar injuries', see Gina Donoso, 'Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach', in *Revista IIDH*, 2009, Vol.49 , pp.43-44.

²⁵² IACtHR, *Velázquez Rodríguez v. Honduras*, Judgment on Reparations and Costs, 21 July 1989, para. 50.

²⁵³ ECtHR, *Varnava and others v Turkey*, para.224.

²⁵⁴ ECtHR, *Al Jeddá v UK*, para. 114.

(e.g. women and children), conduct of the parties concerned or the period of time over which the violation was committed.²⁵⁵ Specifically in regard to compensation provided for the moral harm of relatives, the Inter-American Court's practice suggests that the closer the family link, the higher the award, so that spouses, parents and children are often awarded higher awards than siblings or other family members.²⁵⁶

VII.3 Rehabilitation²⁵⁷

The UN Basic Principles and Guidelines refer to rehabilitation as one of the five forms of reparation, yet in contrast to the relatively detailed elaboration provided for the other forms of reparation, the Principles describe rehabilitation only as including 'medical and psychological care, as well as legal and social services.' Rehabilitation is also explicitly referred to in article 14 of the Convention against Torture. Other instruments that include a right to rehabilitation for victims of human rights violations include the Convention on the Rights of the Child,²⁵⁸ the International Convention for the Protection of All Persons from Enforced Disappearances,²⁵⁹ as well as the Robben Island Guidelines which stipulate that the obligation to provide reparation includes an obligation on States to ensure that victims 'have access to appropriate social and medical rehabilitation.'²⁶⁰

General Comment No. 3 provides the first detailed articulation of the meaning of rehabilitation as a form of reparation. It refers to the

restoration of function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment.... Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability, and full inclusion and participation in society.

²⁵⁵ See for instance ECtHR, *Mikheyev v Russia*, para.163.

²⁵⁶ See International Commission of Jurists, 'The Right to a Remedy'; IACtHR, *Gangaram Panday v Suriname*, Judgment (Merits), 21 January 1994, para.49.

²⁵⁶ International Criminal Court, 'Consultant's report on reparations in the Inter-American Human Rights System', published 19 March 2012, para.15, at <http://www.icc-cpi.int/iccdocs/doc/doc1224836.pdf>.

²⁵⁶ ECtHR, *Al Jedda v UK*, para.114; see also ICJ, para.24.

²⁵⁶ IACtHR, *Cantoral Benavides v Peru*, Judgment Judgment, 3 December 2001, para.53.

²⁵⁶ For a critique of the approach based solely on equity as risking to lead to 'widely various amounts of compensation for similar injuries', see Gina Donoso, 'Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach', in *Revista to Reparation for Gross Human Rights Violations- a practitioners' guide*, p. 136.

²⁵⁷ See further, REDRESS, 'Rehabilitation as a form of reparation under international law' ('Rehabilitation as a form of reparation'), December 2009, at

<http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf>.

²⁵⁸ Convention on the Rights of the Child, General Assembly Resolution 44/25, 20 November 1989, entry into force 2 September 1990, Articles 23, 24, at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

²⁵⁹ Article 24 provides

²⁶⁰ Robben Island Guidelines, para.50 (b).

CAT identifies the following steps for States parties to take in order to fulfil the obligation to ensure the means for as full rehabilitation as possible under article 14 of the CAT, including the adoption of ‘a long-term, integrated approach and ensure that specialist services for victims of torture or ill-treatment are available, appropriate and readily accessible.’ This necessitates a procedure for evaluating and assessing victims’ therapeutic and other needs, which may include medical, physical, and psychological services; re-integrative and social services; community and family-oriented assistance and services; vocational training; education, etc. In this regard, the Committee has confirmed that rehabilitation measures must be holistic, and may require a multi-disciplinary approach. In addition, rehabilitative services must take into consideration the ‘strength and resilience of the victim’ and must take place in a context of trust and confidence. They must be accessible for *all* victims of torture and ill-treatment, without discrimination of any kind. Access to such services should not be dependent on a victim pursuing judicial remedies, and they can be provided by the State directly, or through NGOs. However, the obligation to ensure rehabilitative services are available for and accessible to victims of torture rests on the State.

While General Comment No. 3 is specifically directed towards the Convention Against Torture, its provisions on what constitutes a holistic approach to rehabilitation can equally be applied to other gross human rights violations.

VII.3.1 Jurisprudence of human rights mechanisms on the right to rehabilitation

The UN Human Rights Committee has limited its consideration of rehabilitation of victims to recommending States to afford the necessary medical assistance to victims.²⁶¹ The UN Committee against Torture, as the authoritative interpreter of CAT has reaffirmed in multiple concluding observations and views that torture victims have a right to reparation, including rehabilitation and other relevant measures. Indeed, the Committee when referring to Article 14 of CAT has stated that ‘redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations.’²⁶²

The African Commission has recommended States found in violation of the Charter to pay compensation to address ‘physical and psychological trauma’, yet it does not yet appear to have fully embraced the concept of holistic rehabilitation as reflect in the General Comment No.3. In the case of *Purohit and Moore v The Gambia*, the Commission, in finding a violation

²⁶¹ UN Human Rights Committee, *Raul Sendic Antonaccio v Uruguay*, Views of 28 October 1981, CCPR/C/14/D/63/1979, para.21; *Elena Beatriz Vasilevskis v Uruguay*, Views of 31 March 1983, CCPR/C/18/D/80/1980, para.12; *Gustavo Raul Larrosa Bequio v Uruguay*, Views of 29 March 1983, CCPR/C/18/D/88/1981, para.13; see also REDRESS, ‘Rehabilitation as a form of reparation’, pp.26-29.

²⁶² See for example, Committee Against Torture, *Saadia Ali v. Tunisia*, Communication No. 291/2006, 21 November 2008, para. 15.8; *Kepa Urra Guridi v. Spain*, Communication No. 212/2002, 17 May 2005, para. 6.8 and *Ali Ben Salem v. Tunisia*, Communication No. 269/2005, 2 May 2005, para. 16.8 and CAT/C/SR.422, paras. 35-46, 7 November 2007.

of, *inter alia*, Article 5 of the Charter in regard to the detention of mentally ill patients at a psychiatric unit, requested the government of The Gambia to

- a) Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in The Gambia compatible with the African Charter on Human and Peoples' Rights and International Standards and Norms for the protection of mentally ill or disabled persons as soon as possible;
- b) Pending (a), create an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release;
- c) Provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia.²⁶³

In the Darfur case, the Commission recommended that the government of Sudan

[R]ehabilitate economic and social infrastructure, such as education, health, water and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the internally displaced persons and refugees.²⁶⁴

In another case, filed against Angola for widespread human rights violations committed by authorities in particular in violation of Articles 5 and 6 of the Charter, the Commission recommended that Angola

Take measures to ensure that all persons in detention are provided with proper medical examination and medical treatment and care.²⁶⁵

The Inter-American Court has ordered a range of measures to address medical and psychological suffering of victims, primarily providing victims with the financial means to have access to medical and/ or psychological treatment. In the case of the *19 Tradesman v. Colombia*, where 19 persons were arbitrarily killed by paramilitary groups in Puerto Boyaca with the acquiescence of State authorities, the Court did not deal with elements of rehabilitation within the headings of pecuniary or non-pecuniary damages. Instead, the Court awarded 'medical care' to the next of kin of the arbitrarily killed men as an 'other form of reparation,' the third heading used by the Court when awarding reparations.²⁶⁶ This indicates that the Court considers rehabilitation as a separate measure of reparation, rather

²⁶³ African Commission, *Purohit and Moore v The Gambia*, Communication 241/2001, *dispositif*.

²⁶⁴ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communications 279/03-296/05, *dispositif*.

²⁶⁵ African Commission, *Institute for Human Rights and Development in Africa (on behalf of Emaila Connateh & 13 others) v Angola*, Communication 292/04.

²⁶⁶ IACtHR, *19 Merchants v. Colombia*, Judgment on the Merits, Reparations and Costs, 5 July 2004, para. 85.

than part of compensation. This is important as it recognises the different objectives of the right to rehabilitation.

The Inter-American Commission, in referring the case to the Court, had requested, among other forms of reparation, the provision of 'health services, including psycho-social and family support programs for the next of kin affected by the disappearance, according to their needs and to the opinion of professionals trained in treating the effects of violence and forced disappearance.'²⁶⁷ The Court granted the request on the basis of an expert report on the impact of the violations on the next of kin. The Court emphasised that

[T]o help repair physical and psychological damage, the Court rules that the State has the obligation to provide without charge, through its specialized health institutions, the medical and psychological treatment required by the next of kin of the victims, including the medication they require, taking into consideration that some of them have suffered from drug addiction and alcoholism. Bearing in mind the opinion of the expert, who has evaluated or treated many of the next of kin of the 19 tradesmen [...], psychological treatment must be provided that takes into account the particular circumstances and needs of each of the next of kin, so that they can be provided with collective, family or individual treatment, as agreed with each of them and following individual assessment.²⁶⁸

Similarly, in other cases, the Court ordered the re-opening of a medical dispensary in a village affected by gross human rights violations²⁶⁹ and the State to provide free medical aid and medicine to victims and to establish a programme of psychological and psychiatric treatment free of cost.²⁷⁰

While the African Commission has adopted a number of recommendations to States that could help rehabilitate victims, it could do more to specifically highlight what is need for rehabilitation to be effective, in line with General Comment No. 3.

VII.4 Satisfaction

The UN Basic Principles and Guidelines - as well as General Comment No. 3 - provide a list of (largely symbolic) measures that States should take so as to provide 'satisfaction' to victims of human rights violations. Measures of satisfaction include key components of justice for victims such as public acknowledgment of wrongdoing, truth and accountability. Satisfaction

²⁶⁷ Ibid, para.254 (i).

²⁶⁸ Ibid, para.278.

²⁶⁹ IACTHR, *Aloeboetoe v Suriname*, Judgment (Reparations and Costs), 10 September 1993, para.96.

²⁷⁰ IACTHR, *Case of the Plan de Sanchez Massacre v Guatemala*, Judgment (Reparations) of 19 November 2004, paras.106-108, 117.

is also recognised in the Articles on State responsibility²⁷¹ as well as the European Convention.²⁷²

Measures of satisfaction, and in particular those aimed at revealing the truth of the human rights violations and accountability thereof, are key components of the right to reparation. While aimed at providing satisfaction to the victims, these measures also have an important preventative effect through deterrence and the affirmation of the rule of law. As outlined below, the African Commission's jurisprudence includes a range of measures of satisfaction ordered following the finding of a violation of the African Charter.

(1) Acknowledgment, truth and accountability²⁷³

Acknowledgment of and acceptance of responsibility for human rights violations are important measures of satisfaction. The UN Basic Principles and Guidelines provide that this should include

- Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- Public apology, including acknowledgement of the facts and acceptance of responsibility;
- Judicial and administrative sanctions against persons liable for the violations;
- Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

Human rights mechanisms have requested States to take a range of measures of satisfaction so as to acknowledge human rights violations, accept responsibility and ensure accountability.

²⁷¹ Article 37 (2) provides: 'Satisfaction may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.'

²⁷² Article 41 ECHR.

²⁷³ See further, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff', 28 August 2013, A/HRC/24/42, at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A_HRC_24_42_ENG.doc.

The African Commission, following findings of a violation of, *inter alia*, Article 5 of the Charter, has recommended States to²⁷⁴

- Conduct effective official investigations into the abuses...and to take steps to prosecute those responsible for the human rights violations...;²⁷⁵
- Carry out an inquiry and investigation “to bring those who perpetrated the violations to justice;”²⁷⁶
- Put an end to these violations in order to abide by its obligations under the African Charter;
- Establish a Commission of Inquiry to investigate the circumstances under which the victims were expelled and to allow representatives of the African Commission, relevant international organisations, ICRC, NGOs, concerned consulates and others access to detainees and places of detention, including to those where non-nationals are held;²⁷⁷
- Establish a Commission of Inquiry to investigate the causes of the violence... and bring those responsible for the violations to justice, and identify victims of the violence in order to provide them with just and adequate compensation.²⁷⁸

Specifically in regards to measures of satisfaction, the Commission’s focus is on the need for investigations of the violations and sanctions through the prosecution of those responsible. It has not, however, provided much detail as to what steps States should take in this regard: for instance, to specifically address violations such as enforced disappearances or extra-judicial killings. Its recommendations do not provide guidance to the State as to what an investigation in line with international standards should look like, for instance by way of referring to standards enshrined in the Robben Island Guidelines and the Istanbul Protocol. Nor do the recommendations specify for instance the right of the victims to have full access to the investigation at all stages. In contrast, the Inter-American Court has ordered States to localise, exhume and identify the mortal remains of victims of enforced disappearance or extra-judicial executions and the restitution to their relatives, as well as the transfer of such mortal remains and the guarantees that they receive a burial in the place and the manner chosen by relatives. It has also ordered (i) the sanction of any public officials, as well as private individuals, who are found responsible for having obstructed criminal investigations; (ii) adequate safety guarantees for the victims and witnesses, and iii) the use of all technical and scientific means possible – taking into account relevant standards, such as those set out

²⁷⁴ In addition to the African Commission’s recommendations in its findings, it has rich jurisprudence on the effectiveness of domestic remedies, including on the failure to investigate and prosecute; however, rarely are these findings at the admissibility stage later translated into the findings at the merit stage.

²⁷⁵ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, dispositif.

²⁷⁶ African Commission, *Gabriel Shumba v Zimbabwe*, dispositif; *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 323/06, dispositif.

²⁷⁷ African Commission, *Malawi African Association and others v Mauritania*, dispositif.

²⁷⁸ African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/02, dispositif.

in the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions - to recover promptly the remains of the deceased victims.²⁷⁹ Such precise requests can help monitor efforts of States to investigate violations, and respond directly to the concerns of victims about the circumstances of the violations.

The public acknowledgment of human rights violations is not currently included as a prominent feature in the African Commission's jurisprudence (nor for that matter, the European Court). Public acknowledgment is important for victims as it can help to overcome stigmatisation and restore confidence and legitimacy of the justice system. Such acknowledgment can for instance include a public statement or a declaration by the State, as is common practice at the Inter-American Court, where an acknowledgment can be made before or during the merits stage of the case.²⁸⁰ It is also standard practice for the Court to request States to make its judgments public, for instance in an official newspaper of the country concerned, or through the public broadcasting of certain sections of the judgments and in a language of the victims most affected.²⁸¹

The African Commission has also not yet included recommendations regarding public apologies by States, as provided for in the UN Basic Principles and Guidelines. Apologies, combining acknowledgment with an expression of remorse can constitute 'important symbolic measures for victims and serve goals of restorative justice.'²⁸² Accordingly, the Inter-American Court has in several cases ordered the State to issue public apologies.²⁸³

²⁷⁹ See for instance IACtHR, *Moiwana Community v Suriname*, Judgment (Reparations) 15 June 2005, at paras.207-208; *Mack Chang v Guatemala*, Judgment (reparations) 25 November 2003, paras.275-277.

²⁸⁰ James Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court', in *The American Journal of International Law*, Vol.102, p.808; accordingly, almost 80% of the judgments published in 2007, involved some form of public acknowledgment; see pp. 809-816 on potential risks involved in placing too much of an emphasis on public acknowledgments.

²⁸¹ For instance, IACtHR, *Case of Plan de Sanchez Massacre*, Judgment (Reparations) Of 19 November 2004, para.102.

²⁸² See further, Ilias Bantekas and Lutz Oette, 'International Human Rights- Law and Practice', 2013, p.549.

²⁸³ See e.g. IACtHR, *Cantoral Benavides v Peru*, Judgment Judgment, 3 December 2001, para.81; IACtHR, *Moiwana Community v Suriname*, Judgment (Reparations) 15 June 2005, para.216.

The right to truth

“The acknowledgment and exercise of the right to truth in a specific situation constitutes a means of reparation.” (IACtHR, Castro-Castro Prison v Peru, para.440)

Truth, an integral part of acknowledgment, is a component of reparation in its own right. The right to truth is enshrined in several treaties and instruments and has been recognised by a range of international and regional human rights mechanisms, specifically in cases involving enforced disappearances and extra-judicial killings. The African Commission for instance urged the government of Mauritania ‘arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared...’ (*Malawi African Association and others v Mauritania*).

In such cases, immediate family members have a right ‘to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person’ (Article 24 (1) of the CPED).

The right to truth includes the right of the victim to ‘have full access and be able to act in all stages and levels of investigation.’ Furthermore, the right to truth is relevant for the public, who has a right to know what had happened. This is essential to maintain public confidence in a State’s adherence to the rule of law and ‘in preventing the appearance of collusion in or tolerance of unlawful acts.’

The right to truth is also reflected in the Fair Trial and Legal Assistance Principles and Guidelines, which stipulate that the right to an effective remedy includes, inter alia, an access to justice and to all factual information concerning the violations.

(2) Commemorations and tributes to the victims

As mentioned above, other important measures of satisfaction include ‘commemorations and tributes to the victims’, for instance in the form of museums, monuments or memorials,²⁸⁴ naming streets after victims,²⁸⁵ ceremonies or educational materials. These measures form an integral part of the jurisprudence of the Inter-American Court and play an important role in affirming the suffering and the humanity of the victims, empowering them to (re-) claim their place in society.²⁸⁶ They do not yet feature in the African Commission’s jurisprudence, yet such measures of satisfaction have been a prominent component for instance of the government of Rwanda in commemorating and paying tribute to the victims and survivors of the 1994 Genocide. The use of commemorative reparation measures is particularly relevant in the context of mass violations, involving a large number of victims, or in cases that occurred a long time in the past.

²⁸⁴ IACtHR, *Barrios Altos v Peru*, Judgment (Reparations), November 2001, para.44 (f) and operative para. 5 (f).

²⁸⁵ See e.g. IACtHR, *Villagrán Morales et al v Guatemala (Street Children Case)*, Judgment (Reparations), 26 May 2001, para.103.

²⁸⁶ See Ilias Bantekas and Lutz Oette, ‘International Human Rights- Law and Practice’, 2013, p.550.

VII.5 Guarantees of non-repetition

The right of victims to be guaranteed non-repetition of the acts they suffered is a fundamental part of redress. Central to the guarantee of non-repetition is combating impunity for gross human rights violations, as articulated in the UN Basic Principles and Guidelines and by the Committee Against Torture in General Comment No. 3. Under the UN Basic Principles and Guidelines, measures to guarantee non-repetition include:

- ensuring effective civilian control of military and security forces;
- ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- strengthening the independence of the judiciary;
- protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- promoting mechanisms for preventing and monitoring social conflicts and their resolution; and
- reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

General Comment No. 3 elaborates on the UN Basic Principles and Guidelines, detailing that measures to guarantee non-repetition of acts of torture or ill-treatment should include clear instructions and training to public officials regarding the provisions of the Convention Against Torture, as well as training on the specific needs of marginalised and vulnerable populations and in the Istanbul Protocol; independent monitoring of places of detention and the provision of temporary services for individuals or groups, such as shelters for victims of gender-related torture or ill-treatment. In addition, the Comment also provides that ‘guarantees of non-repetition offer important potential for the transformation of social relations that may be the underlying causes of violence, and may include... amending relevant laws, fighting impunity, and taking effective preventative and deterrent measures.’

The request to take measures to prevent future violations therefore requires States to adopt a range of ‘forward looking measures that typically go beyond the individual case at

hand and seek to prevent the recurrence of certain violations, particularly by bringing about systemic changes.²⁸⁷

International and regional human rights mechanisms have repeatedly called on States to adopt measures to guarantee non-repetition of the violations. The African Commission's jurisprudence, while arguably not very detailed, is particularly rich on such measures, which included the Commission requesting the relevant State to:

- Repeal legislation found to be incompatible with the African Charter;²⁸⁸
- Establish a National Reconciliation Forum to address the long-term sources of conflict, equitable allocation of national resources to the various provinces, including affirmative action for Darfur, resolve issues of land, grazing and water rights, including destocking of livestock;²⁸⁹
- Desist from adopting amnesty laws for perpetrators of human rights abuses;²⁹⁰
- Ratify the Women's Protocol;²⁹¹
- Reform the composition of the State Security Emergency Courts and ensure their independence;²⁹²
- Take measures to ensure that its law enforcement organs, particularly the police respect the rights of suspects detained in line with Article 5 of the Charter;²⁹³
- Carry out an assessment of the status of such practices [in regard to victims of slavery] with a view to identifying with precision the deep rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication;²⁹⁴
- Put in place mechanisms allowing all detained persons access to effective complaint procedures, regarding their treatment with a view to curb, in particular, cases of physical and/ or psychological abuse;²⁹⁵

²⁸⁷ Ibid, p.551.

²⁸⁸ African Commission, *Purohit and Moore v The Gambia*, in which the Commission urged the Government of The Gambia to repeal a specific piece of legislation, the 'Lunatics Detention Act'; in *Curtis Francis Doebller v Sudan*, the Commission requested the Government of Sudan to immediately amend the Criminal Law of 1991, in conformity with its obligations under the African Charter; these cases are in contrast to the Commission's approach in the majority of other cases where it recommended changes of legislation, and where the Commission preferred to be rather general, and did not identify specifically which (part of the) legislation it considered to be incompatible with the Charter, and therefore urged to change. See for instance *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, where the Commission urged the government of Sudan to "undertake major reforms of its legislative and judicial framework in order to handle cases of serious and massive human rights violations"; *Egyptian Initiative for Personal Rights & Interights v Egypt*, Communication 323/06;

²⁸⁹ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, *dispositif*.

²⁹⁰ Ibid.

²⁹¹ African Commission, *Egyptian Initiative for Personal Rights & Interights v Egypt*, Communication 323/06, *dispositif*.

²⁹² African Commission, *Egyptian Initiative for Personal Rights & Interights v Egypt*, Communication 334/06, *dispositif*.

²⁹³ Ibid.

²⁹⁴ African Commission, *Malawi African Association and others v Mauritania*, *dispositif*.

²⁹⁵ African Commission, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, Communication 292/04, *dispositif*.

- Ensure regular supervision or monitoring of places of detention by qualified and/ or experienced persons or organisations;²⁹⁶
- Put in place procedural safeguards or clear procedures/policies that guarantee for all persons deprived of their liberty (national and non-nationals alike) effective access to competent authorities such as administrative tribunals and courts responsible for prison/detention oversight and/or review.²⁹⁷

The important role of measures of non-repetition is enshrined in the African Commission’s reparation jurisprudence. Its practice is, for instance, in stark contrast to the European Court of Human Rights, which, as a general rule, does not order or recommend States to take specific measures to prevent re-occurrence. The African Commission’s jurisprudence is more akin to the jurisprudence of the Inter-American Commission and Court, which consistently call on States to adopt measures of non-repetition.²⁹⁸ However, the African Commission’s jurisprudence, while exemplary in some respects, suffers from a lack of consistency. It is not yet common practice of the Commission, for instance, to recommend ‘regular supervision or monitoring of places of detention by qualified and/or experienced persons or organisations’ in cases where it found several violations of Article 6 or to call on States to ‘take measures to ensure that its law enforcement organs respect the rights of suspects detained in line with Article 5 of the Charter’ where it found a violation of Article 5 by law enforcement agents.

The practice to date suggests that the Commission follows to some extent what is requested by the complainants.²⁹⁹ Where complainants do not include an extensive list of measures of reparation, the Commission may not make any recommendations or keep these very general. The failure of some complainants to submit specific observations on reparation, however, can only partially be attributed to a lack of understanding on the extent of the right to reparation. The fact that the Commission itself does not specifically request complainants to address reparation in their submission, can also lead to a lack of emphasis on that aspect in complainants’ submissions.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ See for a comparison of the practice of the Inter-American Court and the European Court, Gabriella Citroni, “Measures of reparation for victims of gross human rights violations: developments and challenges in the jurisprudence of two regional human rights courts,” in *Inter-American and European Human Rights Journal*, Vol.5, N.1-2, 2012, pp.49-71.

²⁹⁹ However, during seminars organised by litigants before the Commission, litigants have also expressed concern that the Commission often ignores specific aspects of reparation requested in their submissions.

VIII. Specific Considerations in the Context of Massive Human Rights Violations

Massive violations can be distinguished from other violations by their nature, scale and impact on a large number of victims, including groups of victims. As mentioned above, both the Court and the Commission have a unique and progressive mandate allowing for the submission of *actio popularis* communications on behalf of a large number of victims. This is complemented by the African Charter's specific provisions for peoples' rights, which are granted to 'peoples' in Articles 19-24.³⁰⁰ In addition, the African Charter recognises the special character of mass violations in Article 58 which requires the Commission to draw to the attention of the Assembly of Heads of State and Government cases which reveal the 'existence of a series of serious or massive violations of human and peoples' rights'. The Commission's Rules of Procedure provide that once aware of serious or massive violations of human rights, it may 'submit a communication before the Court against a State party.'³⁰¹

The need to award reparation for mass violations is thus particularly relevant in the context of the African human rights framework and pertinent for both the African Commission and African Court. The specific nature, scale and impact of systemic or mass violations also require specific responses from these mechanisms. Any effort to award reparation to victims in such cases would need to take into account the damage caused not only to the individuals directly affected, but the affected community as a whole. This is also reflected in the UN Basic Principles and Guidelines, which provide that 'reparation should be proportional to the gravity of the violations and the harm suffered.'

VIII.1 Individual v. Collective Forms of Reparation

While massive human rights violations are distinct in many respects from violations directed at a particular individual or small number of individuals, the right to reparation exists all the same. Cases of mass human rights violations pose significant challenges for mechanisms seeking to afford reparations: the sheer number of victims will make the assessment of individual harms complicated, will make difficult the identification of all persons particularly affected and pose challenges for the disbursement of awards. Furthermore, mass human rights violations will typically not simply comprise individual violations multiplied to a very large scale; they will also comprise violations against the community as a whole, thus both individual and collective forms of harm will be present.

³⁰⁰ See also above, the recognition of the right of communities to an access to justice, in the Fair Trial and Legal Assistance Principles and Guidelines.

³⁰¹ African Commission, Rules of Procedure, Rule 118 (3).

These challenges raise the stark question of how best to achieve meaningful reparation that responds to the various harms in an adequate and effective way. A simplified response would be to place emphasis on collective measures of reparation, yet such an approach might violate the individuals' right to reparation. Indeed, the difficulty in such cases is not necessarily the determination of collective reparation for group harm, but ensuring that the rights of the individual victims to reparation are also respected.

The ECOWAS CCI considered the issue of individual and collective forms of reparation in a case brought against Nigeria for massive violations committed in the Niger Delta. The complainant had requested the Court to award adequate monetary compensation of one billion USD to the victims of human rights violations in the Niger Delta. The Court found that Nigeria had violated Articles 1 and 24 (peoples' right to a general satisfactory environment favourable to their development) of the African Charter, and acknowledged that the 'continuous environmental degradation in the Niger Delta Region produced a devastating impact on the livelihood of the population.' However, it held that since the complainant had not identified a single victim to whom the requested pecuniary compensation would be awarded, that no compensation could be awarded. Furthermore, the Court considered that

[I]n any case, if the pecuniary compensation was to be granted to individual victims, a serious problem could arise in terms of justice, morality and equity: within a very large population what would be the criteria to identify the victims that deserve compensation? Why compensate someone and not compensate his neighbour? Based on which criteria should be determined the amount each victim would receive? Who would manage that one Billion Dollars?³⁰²

The Court then dismissed the request for compensation in light of the 'impracticability' of providing compensation in cases of human rights violations that 'affect an undetermined number of victims or a very large population.' It held that a collective benefit to repair, as completely as possible, was more suitable, and that any reparation awarded should address the collective harm caused.³⁰³

The ECOWAS CCI's approach is in contrast to other regional courts, including the African Commission, which has in several cases adopted a mixed approach between individual and collective forms of reparation.³⁰⁴ Indeed, in a similar case, also concerning multiple human rights violations of the Ogoni communities in Nigeria by oil companies with the

³⁰² ECOWAS CCI, *SERAP v Nigeria*, ECW/CCI/APP/08/09, Judgment No ECW/CC/JUD/18/12, 14 December 2012.

³⁰³ *Ibid*, para.116; the Court then ordered the government of Nigeria to ensure the restoration of the environment of the Niger Delta, to take all measures necessary to prevent the occurrence of damage to the environment and to ensure accountability of the perpetrators of the damage.

³⁰⁴ See also the International Criminal Court, in the case of *The Prosecutor v Thomas Lubanga Dyilo*, 'Decision establishing the principles and procedures to be applied to reparations', No. ICC-01/04-01/06, 7 August 2012; the Trial Chamber considered that a combination of individual and collective reparation would be the best response to address these challenges.

acquiescence of the government, the African Commission awarded individual and collective forms of reparation.³⁰⁵ The Commission appealed to the State of Nigeria to, *inter alia*, ensure 'adequate compensation to the victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive clean-up of lands and rivers damaged by oil operations.' The Commission also urged the government to 'provide information on health and environmental risks and meaningful access to regulatory and decision making bodies to communities likely to be affected by oil operations.'³⁰⁶ The Commission did not, however, indicate the steps the government of Nigeria should take to identify individual victims so as to facilitate their compensation and other forms of reparation.

The Commission has done so in other cases involving massive human rights violations in Angola, Sierra Leone/Guinea, Mauritania and Zimbabwe, where it recommended that the State in question 'establish a Commission of Inquiry to investigate the circumstances under which the victims were expelled and ensure the payment of adequate compensation of all those whose rights were violated in the process';³⁰⁷ 'joint commission of enquiry to assess the losses by the various victims';³⁰⁸ 'arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared';³⁰⁹ and to establish a Commission of Inquiry to ... identify the victims of the violence in order to provide them with justice and adequate compensation.³¹⁰

Similarly, the Inter-American Court in the case of *Mapiripán Massacre v Colombia*, involving torture and unlawful killings of at least 49 civilians, called on the State to 'immediately take such steps as may be necessary to individually identify, within a reasonable time, the victims who were executed and made to disappear, as well as their next of kin.'³¹¹ Importantly, the Court recognised that many victims of mass violations may find it difficult to prove their identity, simply because no system to register persons exists, or because identity papers once obtained were lost as a result of the mass violations. The Court therefore held that unidentified victims could claim reparations at a later stage after the judgment, and could

³⁰⁵ African Commission, *The Social and Economic Rights Action Center and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96.

³⁰⁶ *Ibid*, dispositif.

³⁰⁷ African Commission, *Institute for Human Rights and Development in Africa (on behalf of Emaila Connateh & 13 others) v Angola*, Communication 292/04.

³⁰⁸ African Commission, *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea) v Guinea*.

³⁰⁹ African Commission, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*

³¹⁰ African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/02.

³¹¹ IACtHR, *Mapiripán Massacre v Colombia*, Judgment (Merits, Reparations, and Costs), 15 September 2005, para. 335 (8); after finding a violation of various Articles of the American Convention on Human Rights, the IACtHR underlined that it 'deems it indispensable for the State, for the purposes of reparation, to individually identify the victims who were executed and made to disappear, as well as their next of kin...' (para.305). The Court held further that 'to make individual identification effective and feasible, the State must publish an announcement by means of a radio broadcaster, a television broadcaster and a newspaper, all of them with national coverage, stating that it is attempting to identify the victims executed or made to disappear during the Mapiripán Massacre, as well as their next of kin, with the aim of recovering the remains of the former and delivering them to the latter together with pertinent reparations' (para.306).

rely on alternative methods for proving their identity. According to the Court, unidentified victims can claim reparation if they '(i) appeared within 24 months of the date when the State notifies them that their next of kin has been individually identified before the reparation mechanism to be established; and (ii) prove their relationship to or kinship with the victim by means of adequate identification or two attesting witnesses.'³¹²

In the case of *Castro- Castro Prison v Peru*, where more than 500 prison inmates were either arbitrarily killed, tortured or subject to other ill-treatment, the Inter-American Court awarded lump sum payments to individual victims depending on the degree of their employment disability or the suffering they endured.³¹³

VIII.2 Collective Forms of Reparation

Regional human rights mechanisms have ordered States responsible for mass human rights violations to take a number of measures to redress collective harm. According to the Inter-American Court, collective measures of reparation should take into account the socio-cultural characteristics of the group affected by the violations.³¹⁴ In the *Plan de Sanchez* case, the Court awarded \$25,000.00 USD for maintenance and improvements to the infrastructure of the chapel in which the victims pay homage to those who were executed in the massacre. It further ordered the State to set up a development programme on health, education, production and infrastructure to benefit members of the communities 'affected by the facts of the case.' Specifically, the Court ordered that the State shall implement the following programmes:

- a) study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organisation;
- b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal;
- c) sewage system and potable water supply;
- d) supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities;
- e) the establishment of a health centre in the village of Plan de Sánchez with adequate personnel and conditions, as well as training for the personnel of the Rabinal Municipal Health Centre so that they can provide medical and psychological care to those who have been affected and who require this kind of treatment.³¹⁵

³¹² IACtHR, *Mapiripán Massacre v Colombia*, Judgment (Merits, Reparations, and Costs), 15 September 2005, para. 289; *Moiwana v Suriname*, Judgment (Merits and Reparations) 15 June 2005, para.178.

³¹³ IACtHR, *Castro Castro Prison v Peru*, Judgment of 25 November 2006, para.432 (c) (i)- (iv).

³¹⁴ IACtHR, *Case of the Plan de Sanchez Massacre v Guatemala*, Judgment (Reparations) of 19 November 2004, para. 90.

³¹⁵ *Ibid*

The African Commission has also considered a significant number of cases involving massive human rights violations.³¹⁶ However, the Commission's focus in awarding reparation in such cases has been on individual victims (who the Commission does not identify) and on measures of satisfaction and guarantees of non-repetition, rather than specifically the collective harm caused to a specific group or mass violation, which it awarded only in a small number of cases. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council v Kenya*, the Commission recommended that the Respondent State, in addition to individual measures of reparation,

- recognise rights of ownership to the Endorois and Restitute Endorois ancestral land;
- ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites for grazing their cattle.³¹⁷

In the Darfur case, the Commission held that Sudan had committed serious and massive violations, and in addition to individual measures of reparation, recommended the government to

- rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the IDPs and refugees;
- establish a National Reconciliation Forum to address the long-term sources of conflict, equitable allocation of national resources to the various provinces, including affirmative action for Darfur, resolve issues of land, grazing and water rights, including destocking of livestock.³¹⁸

While the Commission can be commended for awarding at times far reaching measures of satisfaction and guarantees of non-repetition in cases of mass human rights violations, there is room for improvement in regard to the Commission's approach to the identification of individual and collective harm for the purposes of reparation. Without a thorough assessment of the harm suffered, it is difficult for the Commission to develop a full understanding of what victims need. Reparation afforded to victims then risks not addressing victims' actual harm.

³¹⁶ See e.g. African Commission, *Institute for Human Rights and Development in Africa (on behalf of Emaila Connateh & 13 others) v Angola*, Communication 292/04; Amnesty International, *Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, 48/90-50/91-52/91-89/93; *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda*, 27/89-46/91-49/91-99/93; *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v DRC*, 25/89-47/90-56/91-100/93; *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*

³¹⁶ African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/02; 'Darfur case'.

³¹⁷ African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council v Kenya*, Communication 276/03, *dispositif*.

³¹⁸ African Commission, 'Darfur case' *dispositif*.

Summary

When considering reparation for mass human rights violations, human rights mechanisms should consider the harm suffered by the individual victims, as well as any potential collective harm suffered by the community as a whole.

Collective reparation for a group affected by human rights violations should take into consideration the socio-cultural characteristics of the group so as to ensure that collective reparation measures are adequate and proportionate to the harm suffered.

IX. Gender Specific Forms of Reparation

Victims of gender based violence and in particular sexual violence, can suffer from severe physical and mental pain and anguish that affects almost every aspect of their lives. In addition to recovery from a range of often horrific physical injuries, victims are affected in innumerable other ways, from stigmatisation and ostracisation by families and communities, to the loss of social status, to having bring up babies conceived through rape.³¹⁹

A holistic approach to reparation for harm done by such violence requires multi-faceted and multi-disciplinary responses, involving medical psychological, social as well as legal measures that are gender sensitive. Often, gender based violence is rooted in structural discrimination (particularly against women, but also lesbians, gays, bi-sexuals or transgender) and reparation measures therefore need to also include transformative measures so as to address the root causes for the violence.

The African Commission's (and African Court's) provisions on standing, providing for group or collective complaints, put the mechanisms in a well-placed position to cater for protection of rights of victims of gender based violence:

[t]he mechanism for group or collective complaints allow women who may hold shared experience, such as widespread rape or sexual violence during armed conflict, to benefit from collective representation. In addition, collective complaints by women may be better placed to address structural causes of violence and inequality.³²⁰

In addition, the African Commission has adopted progressive human rights instruments designed to contribute to the protection of women's rights, including gender specific forms of reparation.³²¹ However, despite being well placed, the Commission has been slow in incorporating these instruments and standards into its jurisprudence.³²² It was only in December 2011 that the Commission adopted a decision directly related to women's rights in the case of *Egyptian Initiative for Personal Rights and Interights v Egypt* (Communication 323/06). In this case, the complainants (representing four women) alleged a series of human rights violations by Egyptian authorities committed in the context of a demonstration, including in particular sexual assault amounting to discrimination and a violation of their

³¹⁹ See for instance African Commission Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, *supra*, stipulating that reparation needs to take into account "the extent of physical and psychological trauma that women and girls face as a result of sexual violence."

³²⁰ Christine Chinkin, 'Feminist Interventions into International Law', (1997) 19 *Adel.L.R.*13 20.

³²¹ Above, section II.4; in particular, protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, at http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.

³²² See further REDRESS, *Litigation Strategies for Sexual Violence in Africa*, September 2012, pp.27-31.

dignity and ill-treatment in violation of Article 5. The Commission held that the government of Egypt was responsible for discriminating against the four victims in violation of Articles 2 and 18 (3) [providing that the ‘State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women...’]. The Commission considered that

[t]he incidents alleged took place in a form of a systematic sexual violence targeted at the women participating or present at the scene of the demonstration.

Furthermore, perpetrators of the assaults seemed to be aware of the context of the Egyptian society; an Arab Muslim society where a woman’s virtue is measured by keeping herself physically and sexually unexposed except to her husband. The perpetrators were aware of the consequences of such acts on the victims, both to themselves and their families, but still perpetrated the acts as a means of punishing and silencing them from expressing their political opinions.³²³

The Commission also confirmed that it considers the violence committed against the women as gender based violence and as a form of discrimination.³²⁴ In considering whether the treatment of the victims amounted to a violation of Article 5, the Commission found that the acts committed (involving beatings, kicking, including kicks in the pubic area, slapping, forced undressing, ‘fondling of private parts’ and other forms of sexual assault, abuse by name calling such as ‘whore’ and ‘slut’) caused physical and emotional trauma, and was ‘debasing and humiliating’ in violation of Article 5.³²⁵

Part of the reparation awarded included the Commission requesting an amendment of the laws to bring them in conformity with the Charter (though the Commission did not specify which laws the State should amend and did not consider the applicants’ analysis of the domestic legislation’s shortcomings in this respect) and urging the State to ratify the Women’s Protocol. The Commission followed the applicants’ request in awarding the amount of compensation ‘requested for the physical and emotional damages/traumas they suffered.’

However, it is surprising that the Commission did not at any point in its decision refer to its *Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence*. Arguably, this prevented the Commission from awarding reparation measures specifically tailored to address the gender aspects of the violations for which it found the State responsible. The Commission did not award any measures of specifically tailored forms of rehabilitation - such as psychological or medical treatment for the victims, nor did

³²³ African Commission, *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 323/06, para.152.

³²⁴ Ibid, para. 165.

³²⁵ The Commission did not consider the specific gender aspects of the violence in its analysis of Article 5.

it order gender specific measures of non-repetition, such as training of police on the kind of measures required to avoid and prevent violence against women.³²⁶

The leading human rights case in regard to gender based violence is the case of *Cotton Field v Mexico* in which the Inter-American Court applied the concept of gender-sensitive and transformative reparation.³²⁷ The case concerned the abduction, sexual abuse, and killing of three women (aged 15, 17 and 20) by non-state actors, and the State's subsequent failure to act with due diligence in the investigation, prosecution and punishment of the perpetrators and to treat with due diligence the next of kin of the victims.³²⁸

The Inter-American Court's approach to gender sensitive and transformation reparation requires:

- (i) a precise determination of the relevant facts, in particular those facts that have gender aspects;
- (ii) the identification of the violation, including gender based violence, for instance with reference to relevant instruments providing for women's rights;
- (iii) the identification of the victim(s); and
- (iv) the identification of the harm suffered as a result of the violation(s).³²⁹

The identification of harm suffered (in addition to the violation committed) is a key aspect for the determination of adequate reparation. This applies particularly in the context of gender based violence, as only the identification of harm will allow for an understanding that 'different harms may ensue from the same violations and that one of the determining factors [for the identification of the harm] may be the gender of the victim.'³³⁰ Where harm is not properly identified, for instance a failure to recognise that threats of rape also constitute a form of sexual violence, or that rape by officials constitutes torture, reparation awarded cannot fully redress the harm suffered by the victim.

These requirements are considered pre-conditions for adequate reparation in cases of gender based violence, as it allows the award of reparation to specifically address the gender-specific harm suffered as a result of (gender-specific) violence.

³²⁶In their submissions, the complainants had not requested rehabilitation, yet provided medical and psychological reports on the impact of the violations on the victims. The Commission did refer to the medical reports and findings in its analysis yet did not extend measures of reparation to also address these findings. The Commission also did not enquire with the complainants whether the victims would be in need for rehabilitation.

³²⁷IACtHR, *González et al. ("Cotton Field") v Mexico*, Judgment (Preliminary Objection, Merits, Reparations, and Costs) of 16 November 2009.

³²⁸The case represented a pattern of violations in Mexico involving the abduction and killing of more than 300 women and girls by none state actors since 1993; see further, Ruth Rubio-Marín & Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment,' in *Human Rights Quarterly* 33 (2011), 1062-1091.

³²⁹Following the analysis by Ruth Rubio-Marín & Clara Sandoval in 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment,' in *Human Rights Quarterly* 33 (2011), 1062-1091.

³³⁰*Ibid*, p.1068.

An award of reparation in gender based violence cases should also include a transformative aspect, so as to ensure that the victim is not subjected to conditions of, for instance, discrimination, poverty and violence, which are often the root causes for the violence. The Inter-American Court in the 'Cotton Field' case stated that:

bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State ..., the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable.³³¹

Based on the principle that reparation should, *inter alia*, take into account a gender perspective, the Inter-American Court's awarded measures of gender specific reparation have included:

- Slightly higher award for moral damages than in comparable other cases not involving gender based violence;
- Physical and mental health rehabilitation measures for the victims, with each victim receiving the opportunity to have free access to medical and psychological services and to medication according to their own needs for as long as necessary. Such rehabilitation should be provided by personnel trained to deal with the consequences of gender violence;
- Specific requests to ensure investigation of the sexual violence in the case in light of the contextual situation;
- Request to regularly inform victims of the progress of the investigation and to involve personnel in the investigation with expertise in the treatment of violence and discrimination against women; to also investigate the public servants who failed to carry out their jobs with due diligence, and the threats and persecution of some of the next of kin of the deceased victims;
- Ordering the State to standardise its investigative protocols in relation to cases of sexual violence, in line with the Istanbul and Minnesota Protocols;
- Creation and updating of a database with information of all missing women and girls and their genetic information;
- Training to personnel involved in the prevention, investigation and prosecution of violence against women, with an emphasis on women's rights.³³²

³³¹ IACtHR, *González et al. ("Cotton Field") v Mexico*, Judgment (Preliminary Objection, Merits, Reparations, and Costs) of 16 November 2009, para.450.

³³² IACtHR, *Castro Castro Prison v Peru*, Judgment of 25 November 2006, paras.497-512.

Summary

A holistic approach to reparation for harm done by gender based violence requires multi-faceted and multi-disciplinary responses, involving medical, psychological, social as well as legal measures that are gender sensitive.

Important international and regional instruments exist that specifically cater for gender specific forms of reparation and these should be used by human rights mechanisms in the assessment of violations, identification of harm and measures of reparation to address such harm.

Measures of reparation awarded for gender based violence should include a transformative aspect of all forms of reparation, so as to ensure that the victim is not subjected to conditions of, for instance, discrimination, poverty and violence, which are often the root causes for the violation.

X. Enforcement of Reparation Rulings

Once the African Commission adopts a decision on the merits, it remains confidential and is not transmitted to the parties in the case until its publication is authorised by the Assembly of Heads of State and Government of the African Union ('Assembly').³³³ The Commission notifies the parties within thirty days after the Assembly has authorised distribution and publication of the decision. If a decision was taken against a State party, the State usually has 180 days to inform the Commission in writing about all measures, if any, it has taken to implement the decision.³³⁴ Rule 112 of the Commission's Rules of Procedure stipulates that the Rapporteur for the Communication, or any other member of the Commission designated for this purpose, shall monitor the measures taken by the State to comply with the Commission's decision.

The African Commission has emphasised in November 2006 that 'compliance of State Parties to its recommendations will contribute to the enhancement of the work of the Commission as well as to the improvement of the conditions of the population under their jurisdiction and also contribute to the promotion and enhancement of the rule of law in Africa.'³³⁵ Nearly seven years after this important statement, the lack of State compliance with the Commission's recommendations remains as one of the biggest challenges to the Commission's work.

Statistics on State compliance with the Commission's rulings are difficult to compile. The latest figure, from 2006, puts the average compliance rate with the Commission's rulings at 35%. There is not much reason for optimism to suggest that this figure has since significantly increased. Many of the challenges that have impeded effective compliance in the past mostly still exist today. These consist primarily of the lack of political will to implement decisions. Steps to address some of these challenges have been taken, and are continuously discussed among States, litigants and advocates before the Commission.

X.1 Challenges to Enforcement³³⁶

Challenges to enforcement include:

³³³ Rule 110 (2).

³³⁴ Rule 112.

³³⁵ African Commission, Resolution 97 on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, November 2006, at <http://www.achpr.org/sessions/40th/resolutions/97/?prn=1>.

³³⁶ The challenges and potential next steps presented below draw upon discussions among litigants taking place during the NGO Forum preceding Ordinary Sessions of the African Commission. They also reflect discussions and conclusions of a "Seminar on national implementation mechanisms" organised by the University of Bristol on 21 and 22 November 2011 in Addis Ababa as part of its Implementation on Human Rights Standards project, see <http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/events.htm>.

1. The Decision

Concerns have been voiced earlier in this Report as well as by others about the rather vague and general reparation rulings of the Commission (with some limited exceptions), making it difficult for the Commission (and victims and their representatives) to monitor compliance with the Commission's rulings. It is also arguably difficult for States to identify what steps they should take to comply with the ruling. The general nature of some of the rulings furthermore invites misunderstanding on both sides, thereby further delaying any potential compliance.

Furthermore, some of the rulings do not reflect the seriousness of the violations established. By requesting States to 'draw all legal consequences', draw 'necessary legal conclusions', or 'take necessary steps', the Commission is undermining its own authority and mandate in clearly identifying how violations should best be addressed.

2. Legal status of decisions taken by the African Commission

There appears to be a perception among States to consider rulings of the Commission as non-binding, in particular in light of Article 45 (1(a)) of the Charter, which provides for the Commission's competence to issue 'recommendations'.³³⁷ The Commission itself has elaborated upon the obligation of States to comply with its obligations and has for instance considered that 'State Parties in ratifying without any reservation the African Charter on Human and Peoples' Rights have thus agreed to accept the authority and the essential role of the Commission in the promotion and protection of Human Rights throughout Africa.' While the Commission's rulings are therefore potentially not binding *stricto sensu*, they cannot be seen as mere recommendations. Rather they are authoritative interpretations of the obligations and rights under the Charter, which is legally binding upon States.³³⁸

3. Absence of consequences for a failure to follow up

States found in violation of the Commission's decisions do not, as of now, have to fear any consequences for a failure to comply with the decisions of the Commission. In addition, the Commission itself has been rather timid in the follow up of its decisions. While Rule 112(8) provides that the Commission shall draw the attention of any situation of non-compliance to the attention of the 'Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the AU,' this has not yet resulted in any formal steps being taken against States for their failure to comply.

³³⁷ See for instance University of Bristol, 'Summary and recommendations from an expert seminar on identifying national mechanisms to follow up and implement decisions of the African Commission on Human and Peoples' Rights,' ('Implementation Expert Seminar Report') 20-21 November 2011, pp.2-3, at <http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/documents/seminarreportenglish.doc>.

³³⁸ See also REDRESS, 'Enforcement of Awards for Victims of Torture and Other International Crimes', May 2006, pp.17-24, at http://www.redress.org/downloads/publications/master_enforcement%2030%20May%202006.pdf.

4. Lack of (information on) follow up

Once the Commission has adopted a decision and the decision is disseminated to the parties, there is often little information on what happens next. It is particularly difficult for complainants to follow up, as past practice has not indicated that the Commission enquires with States about the follow up directly. Furthermore, the Commission rarely informs complainants at its own initiative, and the burden of enforcement in the majority of cases to date rests on the complainants.

5. Government challenges to enforcement

It is likewise difficult to trace which particular domestic agency does what when it comes to procedures before the Commission. Some states have confirmed that there is inadequate coordination between agencies responsible for the implementation.³³⁹

Several of the Commission's decisions call on the government found in violation of the Charter to make legislative and/ or institutional changes. The required changes are not always identified in detail, and guidance is lacking on what aspects of and how the legislation or institutional practice should be reformed.³⁴⁰

Budgetary constraints have been identified by some States as preventing implementation of decisions awarding compensation to victims.³⁴¹

6. Delays caused by the Rule 110 (3) of the Rules of Procedure

Rule 110(3) provides that the decision of the Commission shall remain confidential and shall not be transmitted to the parties until its publication is authorised by the Assembly. In practice, the authorisation of publication was recently transferred to the Executive Council, which rather than authorising decisions of the Commission in the context of approving its Activity Reports, has withheld authorisation of some Activity reports, resulting in significant delays with the dissemination of a decision to the parties concerned.³⁴²

X.2 Steps to Address (Some of) the Enforcement Challenges

1. The Decision:

³³⁹ Ibid, pp.4-5.

³⁴⁰ Ibid, p.5.

³⁴¹ Ibid.

³⁴² See decision of the African Union Executive Council, EX.CL/Dec.666(XIX); available at [http://www.au.int/en/sites/default/files/EX%20CL%20Dec%20644-667%20\(XIX\)%20_E.pdf](http://www.au.int/en/sites/default/files/EX%20CL%20Dec%20644-667%20(XIX)%20_E.pdf)

The Commission could consider including in its decision further detail specifically on what is required of States to implement the decision, and determine both, short and long term measures.

For the Commission's decisions to reflect the violations established, and to further encourage implementation of its findings, the Commission may want to use 'less optional terminology' such as 'recommending' States to adopt certain measures, but rather request or call on States to afford victims specific measures of reparation as awarded by the Commission.

2. Follow up:

Coordination of competencies: Some countries, such as Cameroon, have established particular units within the Ministry of Justice – the Department of Human Rights and International Development - responsible for the implementation of decisions of international and regional human rights mechanisms, including the African Commission. Ideally, these units include representatives from the national human rights institutions and civil society so as to provide a comprehensive response to decisions taken by human rights mechanisms.³⁴³ In addition, the relevant unit should include a focal point responsible for coordinating the implementation among the different national agencies as required by the decision and act as liaison official between the relevant human rights mechanism and the government.

National human rights institutions (NHRIs) could play a central role in the national and regional follow up and implementation of the decision. Such a role is particularly warranted given the human rights expertise - and mandate - of staff working within NHRIs.

Implementation hearings: once the State party's time to comply with the decision or time to indicate what steps it has taken, has expired, the Commission could, upon request of either of the parties, hold implementation hearings to address any shortcomings in the implementation process and identify potential solutions or provide further guidance to the State of what specific steps to take to comply with its obligations.

Implementation strategies: As the burden of ensuring implementation of the Commission's decision currently rests on the complainants, complainants should ensure that strategies for

³⁴³ See for instance, Open Society Justice Initiative, "From Rights to Remedies: Structure and Strategies for Implementing International Human Rights Decisions," 2013, pp.46-47, at <http://www.opensocietyfoundations.org/sites/default/files/from-rights-to-remedies-20130708.pdf>; 'Implementation Expert Seminar Report', p.4.

the implementation are put in place so as to increase the chance of a decision actually being implemented to the satisfaction of the victim.³⁴⁴

Commission follow up: The African Commission's Working Group on Communications has a mandate to '[C]oordinate follow-up on decisions of the Commission on Communications, by concerned Rapporteurs.'³⁴⁵ The Working Group can therefore be the contact point for implementation, informing complainants about relevant developments, receive information from complainants about the implementation process, and prompt States to ensure implementation.

Referral of cases of non-compliance to the African Court: Rule 118 (1) provides that the Commission may refer a case of non-compliance with its decisions to the African Court pursuant to Article 5 (1) (a) of the Protocol on the establishment of the Court. This could present the Commission with an additional instrument to encourage implementation of its decisions.³⁴⁶

³⁴⁴ See further, Litigants' Group, 'Filing a Communication before the African Commission on Human and Peoples' Rights- a complainant's manual', August 2013, pp.22-23 at <http://www.redress.org/downloads/publications/1307%20Manual%20to%20the%20African%20Commission.pdf>.

³⁴⁵ African Commission, 'Resolution 255 on the expansion of the mandate of the working group on communications and modifying its composition', October 2012, at <http://www.achpr.org/sessions/52nd/resolutions/255/>.

³⁴⁶ The Court's mandate on follow up has been questioned however, and in particular whether the Court is mandated to order execution of the Commission's decisions, or whether it should adjudicate the case anew. See, participant at University of Bristol expert seminar on identifying national mechanisms to follow up and implement decisions of the African Commission on Human and Peoples' Rights, 20-21 November 2011.

XI. Conclusions and Recommendations

The focus of the African Commission in the majority of the approximately 500 cases it has considered to date has been more on setting standards on the rights enshrined in the Charter, rather than on developing a holistic, victim-centred approach on reparation for victims of gross human rights violations in Africa. At the same time, the Commission today is undoubtedly a much stronger regional human rights mechanism to uphold victims' rights on the continent than even just a short number of years ago. Its jurisprudence on the right to reparation has consistently developed, and it has adopted important instruments providing guidance on the content of the right to reparation. However, as this Report has sought to explain, there are some areas for improvement.

The Commission's practice to date suggests that the Commission does not sufficiently take into account individual harm suffered by victims. This has the result of issuing awards of individual measures of reparation that are divergent and often not tailored to the harm suffered. In contrast, its awards on measures of guarantees of non-repetition are occasionally more far-reaching, and even innovative. The relative inconsistency of the Commission's reparation awards to date makes it difficult to ascertain a clear Commission approach to reparation. This lack risks creating double standards between litigants, and makes it much less clear as to what to expect, and thus less transparent.

The limitations of the Commission's reparations practice can be attributed to the relatively minor role victims play in the proceedings before the Commission, and the Commission's failure to specifically request complainants (or advise them of their right) to make a submission on claims for reparation. Furthermore, there is no separate consideration of reparation awards, which instead are considered together with the finding on the merits. This practice does not do justice to the right of victims to reparation, and furthermore risks that insufficient attention is being paid to the need for reparation.

The Commission could address these limitations without much difficulty. Its Rules of Procedure provide for the possibility of hearings, which the Commission could make greater use of, particularly in complex cases involving serious and massive human rights violations, to hear parties on claims for reparation. Jurisprudence from other mechanisms exists that could also further guide the practice of the Commission in this respect. The Commission may also seek to carry out more fact-finding missions, and may consider requesting parties to make submissions specifically on reparation, which could help to better identify the harm suffered, and improve the consistency of reparation awards, provided the Commission takes these submissions consistently into consideration. To overcome a 'knowledge gap' on what constitutes adequate reparation in a particular case, the Commission, relying on Article 45 (c) of the Charter, could develop a handbook or guidelines for practitioners working with the Commission to ensure that international and regional standards of reparation are

adequately taken into account in the submission of reparation claims, as well as reparation awards.

Recommendations to the African Commission on Human and Peoples' Rights

- Adopt a thematic resolution pursuant to Article 45(c) of the Charter on the right to reparation for victims of gross human rights violations in Africa that reflects current international and regional standards on the right to reparation.
- Develop a handbook or guidelines on the right to reparation in accordance with Article 45(c) in consultation with practitioners from other regional human rights mechanisms and relevant experts.
- Instruct the Committee for the Prevention of Torture in Africa to draft a General Comment on part III of the Robben Island Guidelines in consultation with State parties to the African Charter and civil society.
- Continue collaboration with representatives from other regional human rights mechanisms to exchange on recent developments regarding the right to reparation, in particular gender sensitive measures of reparation.
- Ensure that the Study on Transitional Justice in Africa (ACHPR/Res.235) includes the right to reparation in transitional justice processes.
- Consider revising the Rules of Procedure, so as to specifically provide for the separate consideration of reparation awards following a decision on the merits. In the alternative, ensure that the examination of a case on the merits includes a subsequent, separate consideration of reparation awards if the Commission found the State responsible for (a) violation(s) of the Charter.
- Revise the Rules of Procedure so as to ensure that prior to the referral of cases to the African Court, victims can make a submission on reparation claimed.
- Consider revising Rule 110(3) of the Rules of Procedure to avoid delay in communicating the decision in a case to the parties concerned.
- Ensure that any decision finding a State in violation of the Charter includes adequate and comprehensive reparation awards in line with international standards and practice. Reparation awards should further provide detailed guidance on the steps States should take to comply with the Commission's ruling.

- Encourage complainants to make specific submissions on reparation in line with international standards as spelled out for instance in the UN Basic Principles and Guidelines and other relevant instruments adopted by the African Commission.

Recommendations to the African Union

- Support the important work of the African Commission by providing adequate financial and human resources to the Commission and its Secretariat in accordance with Article 41 of the African Charter.
- Call on State parties to the African Charter to fully and promptly comply with decisions of the African Commission.
- Subject to a revision of Rule 110(3) of the Commission's Rules of Procedure, ensure that the African Commission's Activity Reports are promptly adopted by the Assembly.

Recommendations to States

- Comply fully and promptly with decisions of the African Commission, and implement without delay the reparation measures awarded by the Commission.
- Set up a national mechanism for the implementation of decisions of human rights mechanisms, including the African Commission.
- Appoint a national focal point to follow up on decisions and to liaise with human rights mechanisms as well as complainants in the implementation of the decision.

XIV. Annexes

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

Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005

The General Assembly,

Guided by the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights, other relevant human rights instruments and the Vienna Declaration and Programme of Action,

Affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field,

Recalling the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005 and by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, in which the Council recommended to the General Assembly that it adopt the Basic Principles and Guidelines,

1. *Adopts* the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law annexed to the present resolution;

2. *Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;

3. *Requests* the Secretary-General to take steps to ensure the widest possible dissemination of the Basic Principles and Guidelines in all the official languages of the United Nations, including by transmitting them to Governments and intergovernmental and non-governmental organizations and by including the Basic Principles and Guidelines in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*.

*64th plenary meeting
16 December 2005*

Annex

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

Preamble

The General Assembly,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and General Assembly resolution 40/34 of 29 November 1985 by which the Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Noting that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation", requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

Affirming that the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

Noting that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines,

Adopts the following Basic Principles and Guidelines:

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

(a) Treaties to which a State is a party;

(b) Customary international law;

(c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender of offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims’ right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

- (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
- (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
- (c) Provide proper assistance to victims seeking access to justice;
- (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

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

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(a) Physical or mental harm;

(b) Lost opportunities, including employment, education and social benefits;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. Non-discrimination

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

XII. Non-derogation

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. Rights of others

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

General Comment No. 3

Committee against Torture, General comment No. 3 (2012), Implementation of article 14 by States parties

1. This general comment explains and clarifies to States parties the content and scope of the obligations under article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Each State party is required to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” The Committee considers that article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment (hereafter “ill-treatment”) without discrimination of any kind, in line with the Committee’s general comment No. 2.

2. The Committee considers that the term “redress” in article 14 encompasses the concepts of “effective remedy” and “reparation”. The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention.

3. Victims are persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim. The term “victim” also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization. The term “survivors” may, in some cases, be preferred by persons who have suffered harm. The Committee uses the legal term “victims” without prejudice to other terms which may be preferable in specific contexts.

4. The Committee emphasizes the importance of victim participation in the redress process, and that the restoration of the dignity of the victim is the ultimate objective in the provision of redress.

5. The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.

Substantive obligations: the scope of the right to redress

6. As stated in paragraph 2 above, redress includes the following five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Committee recognizes the elements of full redress under international law and practice as outlined in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines).³⁴⁷ Reparation must be adequate, effective and comprehensive. States parties are reminded that in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them. The Committee emphasizes that the provision of reparation has an inherent preventive and deterrent effect in relation to future violations.

7. Where State authorities or others acting in their official capacity have committed, know or have reasonable grounds to believe that acts of torture or ill-treatment have been committed by non-State officials or private actors and failed to exercise due diligence to prevent, investigate, prosecute and punish such non-State

³⁴⁷ 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, General Assembly resolution 60/147.

officials or private actors in accordance with the Convention, the State bears responsibility for providing redress for the victims (general comment No. 2).

Restitution

8. Restitution is a form of redress designed to re-establish the victim's situation before the violation of the Convention was committed, taking into consideration the specificities of each case. The preventive obligations under the Convention require States parties to ensure that a victim receiving such restitution is not placed in a position where he or she is at risk of repetition of torture or ill-treatment. In certain cases, the victim may consider that restitution is not possible due to the nature of the violation; however the State shall provide the victim with full access to redress. For restitution to be effective, efforts should be made to address any structural causes of the violation, including any kind of discrimination related to, for example, gender, sexual orientation, disability, political or other opinion, ethnicity, age and religion, and all other grounds of discrimination.

Compensation

9. The Committee emphasizes that monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment. The Committee affirms that the provision of monetary compensation only is inadequate for a State party to comply with its obligations under article 14.

10. The right to prompt, fair and adequate compensation for torture or ill-treatment under article 14 is multi-layered and compensation awarded to a victim should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary. This may include: reimbursement of medical expenses paid and provision of funds to cover future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible; pecuniary and non-pecuniary damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or ill-treatment; and lost opportunities such as employment and education. In addition, adequate compensation awarded by States parties to a victim of torture or ill-treatment should provide for legal or specialist assistance, and other costs associated with bringing a claim for redress.

Rehabilitation

11. The Committee affirms that the provision of means for as full rehabilitation as possible for anyone who has suffered harm as a result of a violation of the Convention should be holistic and include medical and psychological care as well as legal and social services. Rehabilitation, for the purposes of this general comment, refers to the restoration of function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment. It seeks to enable the maximum possible self-sufficiency and function for the individual concerned, and may involve adjustments to the person's physical and social environment. Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society.

12. The Committee emphasizes that the obligation of States parties to provide the means for "as full rehabilitation as possible" refers to the need to restore and repair the harm suffered by a victim whose life situation, including dignity, health and self-sufficiency may never be fully recovered as a result of the pervasive effect of torture. The obligation does not relate to the available resources of States parties and may not be postponed.

13. In order to fulfil its obligations to provide a victim of torture or ill-treatment with the means for as full rehabilitation as possible, each State party should adopt a long-term, integrated approach and ensure that specialist services for victims of torture or ill-treatment are available, appropriate and readily accessible. These should include: a procedure for the assessment and evaluation of individuals' therapeutic and other needs, based on, inter alia, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol); and may include a wide range of inter-disciplinary measures, such as medical, physical and psychological rehabilitative services; re-integrative and social services; community and family-oriented assistance and services; vocational training; education etc. A holistic approach to rehabilitation which also takes into consideration the strength and resilience of the victim is of utmost importance. Furthermore, victims may be at risk of re-traumatization and have a valid fear

of acts which remind them of the torture or ill-treatment they have endured. Consequently, a high priority should be placed on the need to create a context of confidence and trust in which assistance can be provided. Confidential services should be provided as required.

14. The requirement in the Convention to provide these forms of rehabilitative services does not extinguish the need to provide medical and psychosocial services for victims in the direct aftermath of torture, nor does such initial care represent the fulfilment of the obligation to provide the means for as full rehabilitation as possible.

15. States parties shall ensure that effective rehabilitation services and programmes are established in the State, taking into account a victim's culture, personality, history and background and are accessible to all victims without discrimination and regardless of a victim's identity or status within a marginalized or vulnerable group, as illustrated in paragraph 32, including asylum seekers and refugees. States parties' legislation should establish concrete mechanisms and programmes for providing rehabilitation to victims of torture or ill-treatment. Torture victims should be provided access to rehabilitation programmes as soon as possible following an assessment by qualified independent medical professionals. Access to rehabilitation programmes should not depend on the victim pursuing judicial remedies. The obligation in article 14 to provide for the means for as full rehabilitation as possible can be fulfilled through the direct provision of rehabilitative services by the State, or through the funding of private medical, legal and other facilities, including those administered by non-governmental organizations (NGOs), in which case the State shall ensure that no reprisals or intimidation are directed at them. The victim's participation in the selection of the service provider is essential. Services should be available in relevant languages. States parties are encouraged to establish systems for assessing the effective implementation of rehabilitation programmes and services, including by using appropriate indicators and benchmarks.

Satisfaction and the right to truth

16. Satisfaction should include, by way of and in addition to the obligations of investigation and criminal prosecution under articles 12 and 13 of the Convention, any or all of the following remedies: effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification, and reburial of victims' bodies in accordance with the expressed or presumed wish of the victims or affected families; an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; judicial and administrative sanctions against persons liable for the violations; public apologies, including acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims.

17. A State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial of redress and thus constitute a violation of the State's obligations under article 14.

Guarantees of non-repetition

18. Articles 1 to 16 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment. To guarantee non-repetition of torture or ill-treatment, States parties should undertake measures to combat impunity for violations of the Convention. Such measures include issuing effective, clear instructions to public officials on the provisions of the Convention, especially the absolute prohibition of torture. Other measures should include any or all of the following: civilian oversight of military and security forces; ensuring that all judicial proceedings abide by international standards of due process, fairness and impartiality; strengthening the independence of the judiciary; protecting human rights defenders and legal, health and other professionals who assist torture victims; establishing systems for regular and independent monitoring of all places of detention; providing, on a priority and continued basis, training for law enforcement officials as well as military and security forces on human rights law that includes the specific needs of marginalized and vulnerable populations and specific training on the Istanbul Protocol for health and legal professionals and law enforcement officials; promoting the observance of international standards and codes of conduct by public servants, including law enforcement, correctional, medical,

psychological, social service and military personnel; reviewing and reforming laws contributing to or allowing torture and ill-treatment; ensuring compliance with article 3 of the Convention prohibiting refoulement; ensuring the availability of temporary services for individuals or groups of individuals, such as shelters for victims of gender-related or other torture or ill-treatment. The Committee notes that by taking measures such as those listed herein, States parties may also be fulfilling their obligations to prevent acts of torture under article 2 of the Convention. Additionally, guarantees of non-repetition offer important potential for the transformation of social relations that may be the underlying causes of violence and may include, but are not limited to, amending relevant laws, fighting impunity, and taking effective preventative and deterrent measures.

Procedural obligations: implementation of the right to redress

Legislation

19. Under article 2 of the Convention, States parties shall enact “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” As clarified by the Committee in its general comment No. 2, “States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4.” The failure of States parties to enact legislation that clearly incorporates their obligations under the Convention and criminalizes torture and ill-treatment, and the resulting absences of torture and ill-treatment as criminal offences, obstructs the victim’s capacity to access and enjoy his or her rights guaranteed under article 14.

20. To give effect to article 14, States parties shall enact legislation specifically providing a victim of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress, including compensation and as full rehabilitation as possible. Such legislation must allow for individuals to exercise this right and ensure their access to a judicial remedy. While collective reparation and administrative reparation programmes may be acceptable as a form of redress, such programmes may not render ineffective the individual right to a remedy and to obtain redress.

21. States parties should ensure that their domestic laws provide that a victim who has suffered violence or trauma should benefit from adequate care and protection to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

22. Under the Convention, States parties are required to prosecute or extradite alleged perpetrators of torture when they are found in any territory under its jurisdiction, and to adopt the necessary legislation to make this possible. The Committee considers that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has commended the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress.

Effective mechanisms for complaints and investigations

23. The Committee has, in its concluding observations, identified other State obligations that shall be met in order to ensure that the article 14 rights of a victim are fully respected. In this regard, the Committee underscores the important relationship between States parties’ fulfilment of their obligations under article 12 and 13, and their obligation under article 14. According to article 12, States parties shall undertake prompt, effective and impartial investigations, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction as the result of its actions or omissions and, as set out in article 13 and affirmed by the Committee in its general comment No. 2, ensure that impartial and effective complaints mechanisms are established. Full redress cannot be obtained if the obligations under articles 12 and 13 are not guaranteed. Complaints mechanisms shall be made known and accessible to the public, including to persons deprived of their liberty, whether in detention, psychiatric facilities, or elsewhere, via, for example, telephone hotlines or confidential complaints boxes in detention facilities, and to persons belonging to vulnerable or marginalized groups, including those who may have limited communication abilities.

24. At the procedural level, States parties shall ensure the existence of institutions competent to render enforceable final decisions through a procedure established by law to enable victims of torture or ill-treatment to secure redress, including adequate compensation and rehabilitation.

25. Securing the victim's right to redress requires that a State party's competent authorities promptly, effectively and impartially investigate and examine the case of any individual who alleges that she or he has been subjected to torture or ill-treatment. Such an investigation should include as a standard measure an independent physical and psychological forensic examination as provided for in the Istanbul Protocol. Undue delays in initiating or concluding legal investigations into complaints of torture or ill-treatment compromise victims' rights under article 14 to obtain redress, including fair and adequate compensation and the means for as full rehabilitation as possible.

26. Notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. The Committee considers that compensation should not be unduly delayed until criminal liability has been established. Civil liability should be available independently of criminal proceedings and the necessary legislation and institutions for such purpose should be in place. If criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence of or undue delay in those criminal proceedings constitutes a failure on the part of the State party to fulfil its obligations under the Convention. Disciplinary action alone shall not be regarded as an effective remedy within the meaning of article 14.

27. Under article 14, a State party shall ensure that victims of any act of torture or ill-treatment under its jurisdiction obtain redress. States parties have an obligation to take all necessary and effective measures to ensure that all victims of such acts obtain redress. This obligation includes an obligation for State parties to promptly initiate a process to ensure that victims obtain redress, even in the absence of a complaint, when there are reasonable grounds to believe that torture or ill-treatment has taken place.

28. The Committee strongly encourages States parties to recognize the Committee's competence to consider individual complaints under article 22 to allow victims to submit communications and seek the views of the Committee. The Committee furthermore encourages States parties to ratify or accede to the Optional Protocol to the Convention against Torture in order to strengthen preventive measures against torture and ill-treatment.

Access to mechanisms for obtaining redress

29. The Committee highlights the importance of the State party affirmatively ensuring that victims and their families are adequately informed of their right to pursue redress. In this regard, the procedures for seeking reparation should be transparent. The State party should moreover provide assistance and support to minimize the hardship to complainants and their representatives. Civil proceedings, or other proceedings, should not impose a financial burden upon victims that would prevent or discourage them from seeking redress. Where existing civil proceedings are unable to provide adequate redress to victims, the Committee recommends implementing mechanisms that are readily accessible to victims of torture and ill-treatment, including the establishment of a national fund to provide redress for victims of torture. Special measures should be adopted to ensure access by persons belonging to groups which have been marginalized or made vulnerable.

30. Judicial remedies must always be available to victims, irrespective of what other remedies may be available, and should enable victim participation. States parties should provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress. States parties shall also make readily available to the victims all evidence concerning acts of torture or ill-treatment upon the request of victims, their legal counsel, or a judge. A State party's failure to provide evidence and information, such as records of medical evaluations or treatment, can unduly impair victims' ability to lodge complaints and to seek redress, compensation and rehabilitation.

31. The State party should also take measures to prevent interference with victims' privacy and to protect victims, their families and witnesses and others who have intervened on their behalf against intimidation and retaliation at all times before, during and after judicial, administrative or other proceedings that affect the interests of victims. Failure to provide protection stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy.

32. The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. States parties shall ensure that access to justice and to mechanisms for seeking and obtaining redress are readily available and that positive measures ensure that redress is equally accessible to all persons regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, gender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction, and including those marginalized or made vulnerable on bases such as those above. Culturally sensitive collective reparation measures shall be available for groups with shared identity, such as minority groups, indigenous groups, and others. The Committee notes that collective measures do not exclude the individual right to redress.

33. Judicial and non-judicial proceedings shall apply gender-sensitive procedures which avoid re-victimization and stigmatization of victims of torture or ill-treatment. With respect to sexual or gender-based violence and access to due process and an impartial judiciary, the Committee emphasizes that in any proceedings, civil or criminal, to determine the victim's right to redress, including compensation, rules of evidence and procedure in relation to gender-based violence must afford equal weight to the testimony of women and girls, as should be the case for all other victims, and prevent the introduction of discriminatory evidence and harassment of victims and witnesses. The Committee considers that complaints mechanisms and investigations require specific positive measures which take into account gender aspects in order to ensure that victims of abuses such as sexual violence and abuse, rape, marital rape, domestic violence, female genital mutilation and trafficking are able to come forward and seek and obtain redress.

34. To avoid re-victimization and stigmatization of victims of torture or ill-treatment, the protections outlined in the preceding paragraph equally apply to any person marginalized or made vulnerable on the basis of identities and groups such as those examples listed under the principle of non-discrimination in paragraph 32. In judicial and non-judicial proceedings sensitivity must be exercised toward any such person. Accordingly, the Committee notes that judicial personnel must receive specific training on the various impacts of torture and ill-treatment, including those on victims from marginalized and vulnerable groups, and on how to exercise sensitivity towards victims of torture and ill-treatment, including in the form of sexual or gender-based discrimination, in order to prevent re-victimization and stigmatization.

35. The Committee considers the training of relevant police, prison staff, medical personnel, judicial personnel and immigration personnel, including training on the Istanbul Protocol, to be fundamental to ensuring effective investigations. Furthermore, officials and personnel involved in efforts to obtain redress should receive methodological training in order to prevent re-traumatization of victims of torture or ill-treatment. This training should include, for health and medical personnel, the need to inform victims of gender-based and sexual violence and all other forms of discrimination of the availability of emergency medical procedures, both physical and psychological. The Committee also urges States parties to establish human rights offices within police forces, and units of officers specifically trained to handle cases of gender-based and sexual violence, including sexual violence perpetrated against men and boys, and violence against children and ethnic, religious, national or other minorities and other marginalized or vulnerable groups.

36. The Committee furthermore underlines the importance of appropriate procedures being made available to address the needs of children, taking into account the best interests of the child and the child's right to express his or her views freely in all matters affecting him or her, including judicial and administrative proceedings, and of the views of the child being given due weight in accordance with the age and maturity of the child. States parties should ensure the availability of child-sensitive measures for reparation which foster the health and dignity of the child.

Obstacles to the right to redress

37. A crucial component of the right to redress is the clear acknowledgement by the State party concerned that the reparative measures provided or awarded to a victim are for violations of the Convention, by action or omission. The Committee is therefore of the view that a State party may not implement development measures or provide humanitarian assistance as a substitute for redress for victims of torture or ill-treatment. The failure of a State party to provide the individual victim of torture with redress may not be justified by invoking a State's level of development. The Committee recalls that subsequent governments as well as successor States still have the obligation to guarantee access to the right of redress.

38. States parties to the Convention have an obligation to ensure that the right to redress is effective. Specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include, but are not limited to: inadequate national legislation, discrimination with regard to accessing complaints and investigation mechanisms and procedures for remedy and redress; inadequate measures for securing the custody of alleged perpetrators, State secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities; the failure to provide sufficient legal aid and protection measures for victims and witnesses; as well as the associated stigma, and the physical, psychological and other related effects of torture and ill-treatment. In addition, the failure of a State party to execute judgements providing reparative measures for a victim of torture, handed down by national, international or regional courts, constitutes a significant impediment to the right to redress. States parties should develop coordinated mechanisms to enable victims to execute judgements across State lines, including recognizing the validity of court orders from other States parties and assisting in locating the assets of perpetrators.

39. With regard to the obligations in article 14, States parties shall ensure both de jure and de facto access to timely and effective redress mechanisms for members of groups marginalized and/or made vulnerable, avoid measures that impede the ability of members of such groups to seek and obtain redress, and address formal or informal obstacles that they may face in obtaining redress. These may include, for example, inadequate judicial or other procedures for quantifying damages which may have a negative disparate impact on such individuals in accessing or keeping money. As the Committee has emphasized in its general comment No. 2, “gender is a key factor. Being female intersects with other identifying characteristics or status of the person...to determine the ways that women and girls are subject to or at risk of torture or ill-treatment”. States parties shall ensure due attention to gender in providing all the elements cited above in the process of ensuring that everybody, in particular members of groups made vulnerable, including lesbian, gay, bisexual and transgender (LGBT) people, must be treated fairly and equally and obtain fair and adequate compensation, rehabilitation and other reparative measures which respond to their specific needs.

40. On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them. For many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress. States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress.

41. The Committee has consistently held that amnesties for the crime of torture are incompatible with the obligations of States parties under the Convention, including under article 14. As was pointed out in general comment No. 2, “amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.” The Committee considers that amnesties for torture and ill-treatment pose impermissible obstacles to a victim in his or her efforts to obtain redress and contribute to a climate of impunity. The Committee therefore calls on States parties to remove any amnesties for torture or ill-treatment.

42. Similarly, granting immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14. The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims.

43. The Committee considers reservations which seek to limit the application of article 14 to be incompatible with the object and purpose of the Convention. States parties are therefore encouraged to consider withdrawing any reservations to article 14 that limit its application so as to ensure that all victims of torture or ill-treatment have access to redress and remedy.

United Nations Voluntary Fund for Victims of Torture

44. Voluntary contributions to international funds for victims of torture play an important role in providing assistance to them. The Committee highlights the important work done by the United Nations Voluntary Fund for Victims of Torture, which provides humanitarian assistance to victims of torture. The Committee highlights

also the possibility for States parties to make voluntary contributions to this fund, irrespective of the national measures taken or contributions made.

Monitoring and reporting

45. States parties shall establish a system to oversee, monitor, evaluate, and report on their provision of redress measures and necessary rehabilitation services to victims of torture or ill-treatment. Accordingly, States parties should include in their reports to the Committee data disaggregated by age, gender, nationality, and other key factors regarding redress measures afforded to victims of torture or ill-treatment, in order to meet their obligation as recalled in general comment No. 2 to provide continual evaluation of their efforts to provide redress to victims.

46. On the implementation of article 14, the Committee has observed the need to provide adequate information on the implementation of article 14 in States parties' reports. Therefore, the Committee wishes to underscore that specific information should be provided on the following:

(a) The number of victims of torture or ill-treatment who have sought compensation through legal, administrative and other means and the nature of the violations alleged; the number of victims who have been awarded compensation; and in what amounts;

(b) The measures taken to assist victims in the direct aftermath of torture;

(c) The rehabilitation facilities available to victims of torture or ill-treatment and the accessibility thereof, as well as the budget allocation for rehabilitation programmes and the number of victims who have received rehabilitative services appropriate to their needs;

(d) The methods available for assessing the effectiveness of rehabilitation programmes and services, including the application of appropriate indicators and benchmarks, and the result of such assessment;

(e) The measures taken to ensure satisfaction and guarantees of non-repetition;

(f) The domestic legislation which provides victims of torture or ill-treatment with the right to remedy and redress, and relevant implementation measures taken by the State party. Where such legislation is lacking, reports should include information on the measures taken by the State party to adopt and implement such legislation.

(g) The measures taken to ensure that all victims of torture or ill-treatment are able to exercise and enjoy their rights under article 14.

(h) The complaints mechanisms available for victims of torture or ill-treatment, including how such mechanisms are made known and accessible to all victims. States parties should also include data disaggregated by age, gender, nationality, location and alleged violation, on the number of complaints received through such mechanisms.

(i) The measures taken by States parties to ensure that all allegations of torture and ill-treatment are effectively investigated.

(j) The legislation and policy measures designed to positively identify victims of torture in order to provide them with redress.

(k) The available avenues for a victim of torture or ill-treatment to obtain redress, including all criminal, civil, administrative and non-judicial procedures, such as administrative reparation programmes, as well as information on the number of victims who have accessed such mechanisms, how many obtained redress and reparative measures, and in what forms and/or amounts.

(l) The legal aid and witness protection available to victims of torture or ill-treatment as well as witnesses and others who have intervened on behalf of victims, including how such protection is made known and how it is made available in practice; the number of victims who have been granted legal aid; the number of persons who have been protected by State witness protection; and the State party's evaluation of the effectiveness of such protection.

(m) The steps taken to implement judgements by national, regional or international courts, including the amount of time lapsed from the date of the judgement and the actual provision of compensation or other forms of redress. States parties should also include disaggregated data on the number of victims designated to

receive reparative measures in court judgements and the number who actually received redress, and for what violations.

(n) The safeguards available for the special protection of members of marginalized or vulnerable groups, including women and children seeking to exercise their rights guaranteed under article 14 of the Convention.

(o) Any such other matters that the Committee may require.

Robben Island Guidelines

Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

Preamble

Recalling the universal condemnation and prohibition of torture, cruel, inhuman and degrading treatment and punishment;

Deeply concerned about the continued prevalence of such acts;

Convinced of the urgency of addressing the problem in all its dimensions;

Recognising the need to take positive steps to further the implementation of existing provisions on the prohibition of torture, cruel, inhuman and degrading treatment and punishment;

Recognising the importance of preventive measures in the furtherance of these aims;

Recognising the special needs of victims of such acts;

Recalling the provisions of:

- Art. 5 of the African Charter on Human and Peoples' Rights which prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment;
- Art. 45 (1) of the African Charter which mandates the African Commission to, inter alia, formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;
- Arts. 3 and 4 of the Constitutive Act of the African Union by which States Parties undertake to promote and respect the sanctity of human life, rule of law, good governance and democratic principles;

Recalling further the international obligations of States under:

- Art. 55 of the United Nations Charter, calling upon States to promote universal respect for and observance of human rights and fundamental freedoms;
- Art. 5 of the UDHR, Art. 7 of the ICCPR stipulating that no one shall be subjected to torture, inhuman or degrading treatment or punishment;
- Art. 2 (1) and 16 (1) of the UNCAT calling upon each State to take effective measures to prevent acts of torture and other acts of cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction;

Noting the commitment of African States as reaffirmed in the Grand Bay Declaration and Plan of Action adopted by the 1st Ministerial Conference on Human Rights in Africa to ensure better promotion and respect of human rights on the continent;

Desiring the implementation of principles and concrete measures in order to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment in Africa and to assist African States to meet their international obligations in this regard;

The "Robben Island Workshop on the Prevention of Torture" has adopted the following guidelines and measures for the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment and propose that they are adopted, promoted and implemented within Africa.

Part I: Prohibition of Torture

Ratification of Regional and International Instruments

1. States should ensure that they are a party to relevant international and regional human rights instruments and ensure that these instruments are fully implemented in domestic legislation and accord individuals the maximum scope for accessing the human rights machinery that they establish. This would include:

- a) Ratification of the Protocol to the African Charter of Human and Peoples' Rights establishing an African Court of Human and Peoples' Rights;
- b) Ratification of or accession to the UN Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment without reservations, to make declarations accepting the jurisdiction of the Committee against Torture under Articles 21 and 22 and recognising the competency of the Committee to conduct inquiries pursuant to Article 20;
- c) Ratification of or accession to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the First Optional Protocol thereto without reservations;
- d) Ratification of or accession to the Rome Statute establishing the International Criminal Court.

Promote and Support Co-operation with International Mechanisms

2. States should co-operate with the African Commission on Human and Peoples' Rights and promote and support the work of the Special Rapporteur on prisons and conditions of detention in Africa, the Special Rapporteur on arbitrary, summary and extra-judicial executions in Africa and the Special Rapporteur on the rights of women in Africa. States should co-operate with the United Nations Human Rights Treaty Bodies, with the UN Commission on Human Rights' thematic and country specific special procedures, in particular, the UN Special Rapporteur on Torture, including the issuance of standing invitations for these and other relevant mechanisms.

Criminalization of Torture

4. States should ensure that acts which fall within the definition of torture, based on Article 1 of the UN Convention against Torture, are offences within their national legal systems.

5. States should pay particular attention to the prohibition and prevention of gender-related forms of torture and ill-treatment and the torture and ill-treatment of young persons.

6. National courts should have jurisdictional competence to hear cases of allegations of torture in accordance with Article 5 (2) of the UN Convention against Torture.

7. Torture should be made an extraditable offence.

8. The trial or extradition of those suspected of torture should take place expeditiously in conformity with relevant international standards.

9. Circumstances such as state of war, threat of war, internal political instability or any other public emergency, shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.

10. Notions such as "necessity", "national emergency", "public order", and "ordre public" shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.

11. Superior orders shall never provide a justification or lawful excuse for acts of torture, cruel, inhuman or degrading treatment or punishment.

12. Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence, applied in accordance with relevant international standards.

13. No one shall be punished for disobeying an order that they commit acts amounting to torture, cruel, inhuman or degrading treatment or punishment.

14. States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.

Non-Refoulement

15. States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture.

Combatting Impunity

16. In order to combat impunity States should:

- a) Ensure that those responsible for acts of torture or ill-treatment are subject to legal process
- b) Ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.
- c) Ensure expeditious consideration of extradition requests to third states in accordance with international standards.
- d) Ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody.
- e) Ensure that where criminal charges cannot be sustained because of the high standard of proof required, other forms of civil, disciplinary or administrative action are taken if it is appropriate to do so.

Complaints and Investigation Procedures

17. Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.

18. Ensure that whenever persons who claimed to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated.

19. Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol).

Part II: Prevention of Torture

Basic Procedural Safeguards for those deprived of their liberty

20. All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:

- a) The right that a relative or other appropriate third person is notified of the detention;
- b) The right to an independent medical examination;

c) The right of access to a lawyer;

d) Notification of the above rights in a language which the person deprived of their liberty understands;

Safeguards during the Pre-trial process

21. States should establish regulations for the treatment of all persons deprived of their liberty guided by the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 2.

22. Ensure that criminal investigations are conducted by those subject to the relevant codes of criminal procedure.

23. Prohibit the use of unauthorised places of detention and ensure that it is a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.

24. Prohibit the use of incommunicado detention.

25. Ensure that all detained persons are informed immediately of the reasons for their detention.

26. Ensure that all persons arrested are promptly informed of any charges against them.

27. Ensure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.

28. Ensure that comprehensive written records of all interrogations are kept, including the identity of all persons present during the interrogation and consider the feasibility of the use of video and/or audio taped recordings of interrogations.

29. Ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made.

30. Ensure that comprehensive written records of those deprived of their liberty are kept at each place of detention, detailing, inter alia, the date, time, place and reason for the detention.

31. Ensure that all persons deprived of their liberty have access to legal and medical services and assistance and have the right to be visited by and correspond with family members.

32. Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention.

Conditions of Detention

33. Take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the UN Standard Minimum Rules for the Treatment of Prisoners.

34. Take steps to improve conditions in places of detention which do not conform to international standards.

35. Take steps to ensure that pre-trial detainees are held separately from convicted persons.

36. Take steps to ensure that juveniles, women, and other vulnerable groups are held in appropriate and separate detention facilities.

37. Take steps to reduce over-crowding in places of detention by inter alia, encouraging the use of non-custodial sentences for minor crimes.

Mechanisms of Oversight

38. States should ensure and support the independence and impartiality of the judiciary including by ensuring that there is no interference in the judiciary and judicial proceedings, guided by the UN Basic Principles on the Independence of the Judiciary.

39. Encourage professional legal and medical bodies, to concern themselves with issues of the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment.

40. Establish and support effective and accessible complaint mechanisms which are independent from detention and enforcement authorities and which are empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment.

41. Establish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights.

42. Encourage and facilitate visits by NGOs to places of detention.

43. Support the adoption of an Optional Protocol to the UNCAT to create an international visiting mechanism with the mandate to visit all places where people are deprived of their liberty by a State Party.

44. Examine the feasibility of developing regional mechanisms for the prevention of torture and ill-treatment.

Training and empowerment

45. Establish and support training and awareness-raising programmes which reflect human rights standards and emphasise the concerns of vulnerable groups.

46. Devise, promote and support codes of conduct and ethics and develop training tools for law enforcement and security personnel, and other relevant officials in contact with persons deprived of their liberty such as lawyers and medical personnel.

Civil Society Education and Empowerment

47. Public education initiatives, awareness-raising campaigns regarding the prohibition and prevention of torture and the rights of detained persons shall be encouraged and supported.

48. The work of NGOs and of the media in public education, the dissemination of information and awareness-raising concerning the prohibition and prevention of torture and other forms of ill-treatment shall be encouraged and supported.

Part III: Responding to the Needs of Victims

49. Ensure that alleged victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families are protected from violence, threats of violence or any other form of intimidation or reprisal that may arise pursuant to the report or investigation.

50. The obligation upon the State to offer reparation to victims exists irrespective of whether a successful criminal prosecution can or has been brought. Thus all States should ensure that all victims of torture and their dependents are:

- a) Offered appropriate medical care;
- b) Have access to appropriate social and medical rehabilitation;

c) Provided with appropriate levels of compensation and support;

In addition there should also be a recognition that families and communities which have also been affected by the torture and ill-treatment received by one of its members can also be considered as victims.

Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence

The African Commission on Human and Peoples' Rights (the African Commission or ACHPR), meeting at its 42nd Ordinary Session held in Brazzaville, Republic of Congo, from 15 - 28 November 2007:

Recalling its mandate to promote human and peoples' rights and ensure their protection in Africa under the African Charter on Human and Peoples' Rights (the African Charter);

Bearing in mind that the right to a remedy and reparation is notably affirmed by: Article 25 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; Article 8 of the Universal Declaration of Human Rights; Article 2 of the International Covenant on Civil and Political Rights; Article 39 of the Convention on the Rights of the Child; and Articles 68 and 75 of the Rome Statute of the International Criminal Court;

Deploring all forms of sexual violence against women and girls;

Considering that rape in times of conflicts has been categorised as a crime against humanity and as a war crime in the founding statutes of the International Criminal Tribunal for the former Yugoslavia (Art 5 (g)), of the International Criminal Court (Arts 7 and 8) and of the Special Court for Sierra Leone (Art 2(g)); and considering furthermore that the International Criminal Tribunal for Rwanda has qualified rape in conflict situations as an act of genocide case No. ICTR- 96-4-T (Sept 1998) and the International Criminal Tribunal for the former Yugoslavia classified rape as amongst the most serious crimes of war by defining it as a breach of the Geneva Conventions in case No.IT-94-1-T (May 1997);

Reaffirming its Resolution ACHPR/Res.103 (XXXX) 06 on the *Situation of Women in the Democratic Republic of Congo*, adopted during its 40th Ordinary Session held in Banjul, The Gambia, on 29 November 2006;

Recalling the United Nations' Security Council Resolution 1325 (2000) on *Women, Peace and Security*;

Recalling also the provisions of the *Fourth Geneva Convention on the protection of civilians in armed conflicts*;

Recalling furthermore the United Nations' General Assembly Resolution A/RES/60/147 adopting '*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*' in March 2006;

Noting with great concern the prevailing impunity for the perpetrators and accomplices of crimes of sexual violence and emphasising that a culture of impunity encourages the commission of such crimes;

Taking into consideration the legal and practical obstacles existing in many countries and preventing victims of sexual violence in particular in times of conflict, from accessing their rights to truth, justice and reparation, notably the lack of adequate training on sexual violence issues for actors of the judiciary and the lack of information on services and access to justice for victims;

Concerned by the extent of physical and psychological trauma that women and girls victims face as a result of sexual violence and by the necessity for them to receive adequate and accessible health care, including psychological support;

Acknowledging the civil society initiative creating the '*Nairobi Declaration of the Right to A Remedy and Reparation for Women and Girls Victims of Sexual Violence*', which provides guiding principles for the implementation of programmes intended to achieve reparation for crimes of sexual violence perpetrated in times of conflicts;

Convinced that participation of women at all stages of creation and implementation of reparation programmes is necessary to ensure efficient programmes and to achieve sustainable peace;

The African Commission on Human and Peoples' Rights:

1. **Condemns** all forms of sexual violence against women and girls;

2. **Urges** States Parties to the African Charter on Human and Peoples' Rights to:

- Criminalise all forms of sexual violence, ensure that the perpetrators and accomplices of such crimes are held accountable by the relevant justice system;
- Ensure that police and military forces, as well as all the members of the judiciary receive adequate training on the principles of international humanitarian law, women's rights and the children's rights;
- Identify the causes and consequences of sexual violence and to take all necessary measures to prevent and eradicate it;
- Develop campaigns to raise public awareness on existing remedies for cases of sexual violence;
- Put in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for victims of sexual violence;
- Ensure that victims of sexual violence have access to medical assistance and psychological support; - Ensure participation of women in the elaboration, adoption and implementation of reparation programmes;
- Ratify without reservations and ensure the effective implementation of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* and the *Convention on the Elimination of All Forms of Discrimination against Women* as well as its *Optional Protocol*;
- Ratify the *Protocol to the African Charter on Human and Peoples' Rights on Establishing an African Court on Human and Peoples' Rights* and make a declaration according to Article 34(6) of this Protocol, and ratify as well the Rome Statute of the International Criminal Court.

Done in Brazzaville, Republic of Congo, 28 November 2007.

Fair Trial and Legal Assistance Guidelines

PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA (select provisions)

A (2)

The essential elements of a fair hearing include:

- (b) equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;
- (c) equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;
- (d) respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;

C. RIGHT TO AN EFFECTIVE REMEDY:

(a) Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.

(b) The right to an effective remedy includes:

1. access to justice;
2. reparation for the harm suffered;
3. access to the factual information concerning the violations.

(c) Every State has an obligation to ensure that:

1. any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body;
2. any person claiming a right to remedy shall have such a right determined by competent judicial, administrative or legislative authorities;
3. any remedy granted shall be enforced by competent authorities;
4. any state body against which a judicial order or other remedy has been granted shall comply fully with such an order or remedy.

da) The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.

E. LOCUS STANDI:

States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination.

G. ACCESS TO JUDICIAL SERVICES:

(a) States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

(b) States must take special measures to ensure that rural communities and women have access to judicial services. States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women.

(c) In countries where there exist groups, communities or regions whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, States shall take special measures to ensure that adequate judicial services are accessible to them.

(d) States shall ensure that access to judicial services is not impeded including by the distance to the location of judicial institutions, the lack of information about the judicial system, the imposition of unaffordable or excessive court fees and the lack of assistance to understand the procedures and to complete formalities.

N. VICTIMS OF CRIME AND ABUSE OF POWER

a) Victims should be treated with compassion and respect for their dignity. They are entitled to have access to the mechanisms of justice and to prompt redress, as provided for by national legislation and international law, for the harm that they have suffered.

b) States must ensure that women who are victims of crime, especially of a sexual nature, are interviewed by women police or judicial officials.

c) States shall take steps to ensure that women who are complainants, victims or witnesses are not subjected to any cruel, inhumane or degrading treatment.

d) Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

e) States are required to investigate and punish all complaints of violence against women, including domestic violence, whether those acts are perpetrated by the state, its officials or agents or by private persons. Fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence.

f) Judicial officers, prosecutors and lawyers, as appropriate, should facilitate the needs of victims by:

1. Informing them of their role and the scope, timing and progress of the proceedings and the final outcome of their cases;
2. Allowing their views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
3. Providing them with proper assistance throughout the legal process;
4. Taking measures to minimize inconvenience to them, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
5. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

a) Informal mechanisms for the resolution of disputes, including mediation, arbitration and traditional or customary practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

b) Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses, the provision of services and the restoration of rights.

c) States should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

d) Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws or international law, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted.

e) When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

1. Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
2. The family, in particular dependants of persons who have died or become physically or mentally incapacitated.

a) States are encouraged to establish, strengthen and expand national funds for compensation to victims.

b) States must ensure that:

1. Victims receive the necessary material, medical, psychological and social assistance through state, voluntary, non-governmental and community-based means.

2. Victims are informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
3. Police, justice, health, social service and other personnel concerned receive training to sensitize them to the needs of victims, and guidelines are adopted to ensure proper and prompt aid.

S. USE OF TERMS

For the purpose of these Principles and Guidelines:

n) "Victim" means persons who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws or that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress.