# The Right to Remedy for Indigenous Peoples in Principle and in Practice

Forest Peoples Programme

***Briefing*** November 2021 | Anni Bangiev and Lucy Claridge

## *Key Points*

***1.* The right to remedy**
Under international law, violation of a human right gives rise to a right to remedy which must, as far as possible, wipe out all the consequences of the illegal act, and re-establish the situation which would have existed if the act had not been committed.

***2.* Reparations should be specific**
The form of the reparations will vary according to the specific circumstances of the case, and can include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, none of which are mutually exclusive.

***3.* Governments must provide remedies**
Indigenous peoples are entitled to seek restitution of their land, compensation for the damage, rehabilitation in the form of medical and psychological care as well as legal and social services, satisfaction including the right to truth, and guarantees of non-repetition for human rights abuses suffered.

***4.* Companies, industry & multi-stakeholder initiatives also bear responsibilities**
Companies and private sector operators who do not respect indigenous peoples' rights over their lands and natural resources also bear the responsibility to provide remedy through the provision of effective grievance mechanisms, as do industry and other multistakeholder collaborative initiatives.

## Introduction

The right to remedy is a basic legal principle. Under international human rights law, it is essential in providing effective recourse where there has been an allegation of a human rights violation. It encompasses the obligation to make reparations for those violations.

*Community member in Cambodia appealing to regional human rights commissions for redress for lands taken into a sugar plantation without their consent.* **Credit:** *Marcus Colchester, FPP*

Such reparations are a fundamental feature of the international human rights system, both for repairing the damage caused by human rights violations and preventing future harm from occurring, by requiring changes in laws, policies or systems that dissuade the perpetrators or States responsible from committing future violations.

The duty to make reparations was first articulated as a general principle of international law by the Permanent Court of International Justice in *Factory at Chorzów* (1928).[1] This case concerned a property dispute between Germany and Poland that arose out of an agreement between the two States after World War I. Germany agreed to transfer the territory of Upper Silesia to Poland and in exchange, Poland would not take any German property in the territory. Poland breached the agreement when it took two German properties, including the factory at Chorzów. In its judgment, the Court specifically provided that "reparations 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..."[2]

Since that landmark ruling, international human rights treaties and bodies have further adopted and developed the right to remedy, clarifying how States should remedy human rights violations. Generally, the duties of a State are (1) to take appropriate measures to prevent violations, (2) to effectively investigate violations, (3) to provide victims with effective access to justice, and (4) to provide victims effective remedies.[3] While use of the word victims implies individual legal persons, the right to remedy is also available to groups and whole communities on the basis of harms to the collective.[4] In addition, companies and those operating in the private sector also bear a responsibility to provide remedy, independently of whether States provide such access.[5]

*Mambele, Cameroon.* ***Credit:*** *Viola Belohrad, FPP*

## The Right to Remedy in International Law

The right to remedy is written in numerous treaties, both at the regional and international levels, as well as in commentaries, jurisprudence, and recommendations based on those treaties.

The main international legal basis for the right to a remedy and reparation was firmly enshrined in the many international human rights instruments that are now widely accepted by States.[6] The main international legal reference codifying the right to remedy and reparations right to remedy and reparations is the *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005)[7]. This explains that victims of violations of human rights or humanitarian law are entitled to three forms of remedy: access to justice, reparations, and access to information on violations and reparation mechanisms (Principle VII). They then go on to explain exactly what it is that those forms of remedy entail.


*Ogiek African Court Arusha*

Regarding access to justice, victims are entitled to fair and impartial proceedings and an effective judicial remedy in both domestic and international jurisdictions. To that end, States must ensure the privacy and safety of victims and others during proceedings, as well as minimize the inconvenience of carrying out these proceedings (Principle VIII).

On reparations, the guidelines require that reparations be proportional to the violations and harm suffered (Principle IX). There are five types of reparations listed: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, as follows:

1. Restitution aims to restore the victim(s) to their original situation before the violations, and includes actions such as return of property and restoration of liberty (e.g., release from imprisonment). (Principle IX paragraph 19)

2. Compensation refers to monetary remedies, including payment for physical and mental harm, lost opportunities and earnings, material and moral damages, and the costs of legal and medical services. (Principle IX paragraph 20)

3. Rehabilitation consists of medical and psychological care, and legal and social services. (Principle IX paragraph 21)

4. Satisfaction includes a number of potential actions on the part of the State, including stopping ongoing violations, publicly disclosing violations, searching for disappeared people and bodies of the deceased, issuing public apologies and erecting monuments, punishing private individuals responsible for violations, and educating and training people about the violations. (Principle IX paragraph 22)

5. Guarantees of non-repetition involve acts to ensure future violations do not happen, such as: strengthening the independence of the judiciary, changing laws that contributed to the violations, and promoting mechanisms for preventing and monitoring social conflicts. (Principle IX paragraph 23).

Lastly, the requirement to provide access to information on violations and human rights mechanisms obligates States to inform the victims and general public on their rights, the services they may access (e.g., medical, legal), and the causes or conditions that resulted in the violations (Principle X).

*The UN Guiding Principles on Business and Human Rights* (2011)[8] sees the access to remedy for victims of business-related human rights abuses as a foundational principle. Under Principle 25, States are required to provide access to effective remedy for such abuses via judicial, legislative, administrative, or other means. As noted, companies have a responsibility to provide remedies even where States fail to act. The commentary to Principle 25 defines remedy to include apologies, restitution, rehabilitation, financial or non-financial compensation, punishments for the perpetrators, and guarantees of non-repetition.

*The UN Declaration on the Rights of Indigenous Peoples* (2007)[9] specifies States' obligations with respect to remedies for indigenous peoples as follows:

1. States must have effective mechanisms to prevent and provide redress for certain human rights violations specific to indigenous communities, such as forced assimilation and population transfers (Art. 8(2)).

2. States must also provide redress when indigenous peoples are deprived of their means of survival and development (Art. 20(2)).

3. Redress may include restitution, determined with indigenous peoples as it relates to the taking of their cultural, intellectual, religious, and spiritual property (Art. 11(2)).

4. States must provide effective mechanisms for redress for the taking of indigenous lands and resources by private actors, as well as mitigate the negative consequences that result from the taking (e.g., environmental, spiritual, etc.) (Art. 32(3)).

5. For lands and resources taken from indigenous peoples without their free, prior, and informed consent, an effective remedy may either take the form of restitution or, if not possible, compensation. The default definition of compensation is lands and resources equal in quality, size, and legal status; monetary compensation; or other (Art. 28).

Regional human rights systems also provide for the right to remedy. *The African Commission on Human and Peoples' Rights General Comment No. 4: The right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (Article 5)* (2017)[10] identifies five forms of remedy and explicitly provides that failure to provide prompt access to redress is on its own a denial of redress (paragraph 26). It recognizes reparation to include restitution, compensation, rehabilitation, satisfaction – including the right to the truth – and guarantees of non-repetition (paragraph 10).

1. Restitution aims to put victims back to the situation they were in before based on the specific circumstances of each case. If the human rights violation resulted from the victims' vulnerability or marginalization in society, then restitution must also include measures addressing the causes of the vulnerability or marginalization, including discrimination and socio-economic disadvantages (paragraph 36).

2. Compensation must be fair, adequate, and proportionate to the material and non-material harms suffered. Specifically, compensation may cover past and future medical expenses, loss of earnings and earning potential, lost opportunities (e.g., employment or education), and costs of bringing a claim for redress (e.g., legal fees) (paragraphs 37-39).

3. The purpose of rehabilitation is to maximize self-sufficiency and function for the victim by way of medical rehabilitative services, social integration, and vocational training (paragraphs 40-41).

4. Satisfaction includes the right to truth and public disclosure of the truth, State recognition of responsibility, and effective legal proceedings, such as police investigations and prosecution (paragraph 44).

5. Guarantees of non-repetition, to be successful, require States to reform their institutions and laws to ensure perpetrators are held accountable and government actors have the necessary training to avoid future human rights violations (paragraphs 45-47).

These forms of remedy are not limited to individual victims; rather, *General Comment No. 4* recognizes collective harm and requires States to undertake remedies that take into account the needs of the collective. Reparations for collective harm are awarded together with reparations to individual victims – they do not replace the individual's right to redress (paragraphs 50-56).

In the Inter-American human rights system, the *American Convention on Human Rights* (1978)[11] establishes the Inter-American Court of Human Rights ("Inter-American Court") and mandates the Inter-American Court to order remedies and fair compensation to those whose rights or freedoms, as enshrined in the Convention, were violated (Art. 63(1)). An examples of how this has been interpreted in the context of indigenous peoples' rights is set out below.

## A Recent Example of Remedies Awarded to an Indigenous Community

The most recent Inter-American Court judgment involving indigenous peoples is *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (2020).[12] This case concerns land disputes and lack of effective remedy, including improper intervention in the indigenous peoples' territories by the State via oil and gas concessions, deforestation activities, and public works projects (paragraph 1). The Inter-American Court ordered numerous reparations divided into the categories of restitution, satisfaction, and guarantees of non-repetition. First, the Inter-American Court ordered the delimitation, demarcation, and titling of the disputed territory to the 132 indigenous communities who claim the land as their own (paragraph 327). This would give the indigenous communities the legal right to occupy and use those lands. Additionally, the State had to stop its operations in the territory unless given the free, prior, and informed consent of the indigenous communities (paragraph 328). Furthermore, the State had to assist in the removal of the non-indigenous settlers of the territory, including their fences and livestock (paragraphs 329-330).

The State was required to ensure indigenous communities have access to basic resources and services, especially to drinking water and forest resources as those were depleted due to the activities of the State and non-indigenous settlers (paragraphs 332-336). The Inter-American Court ordered a sum of USD 2,000,000 be used to establish a community development fund to redress the harm done to the cultural identity of the indigenous communities and to implement various programs as decided by the communities (paragraphs 337-342). As measures of satisfaction, the Inter-American Court ordered Argentina to translate, publish, and broadcast the judgment (paragraphs 348-349). The Inter-American Court ordered the State to adopt legislative and other measures to ensure the right to indigenous communal property is realized across the country (paragraphs 353-357). Lastly, the Inter-American Court instructed Argentina to pay USD 50,000 for the costs and expenses (paragraph 365).

*Community of Santa Clara de Uchunya presenting a constitutional lawsuit to recover its ancestral territory grabbed by big-scale palm oil agribusiness.* ***Credit*** *FECONAU*

# Endnotes


1. *Factory at Chorzow*, PCIJ Series A No 9

2. *Factory at Chorzow* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) paragraph 125.

3. *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* Principle I, https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx

4. *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Principle* VIII, https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx; "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 cited in n. 90 of "Reaching for Justice: The Right to Reparation in the African Human Rights System," https://redress.org/wp-content/uploads/2017/12/1310reaching-for-justicefinal.pdf

5. *UN Guiding Principles on Business and Human Rights* (2011), Principles 29 and 30; https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

6. UN General Assembly Note by the Secretary General, Promotion of truth, justice, reparation and guarantees of non-recurrence, 19 July 2021, A/76/180, para 56

7. https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx

8. https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

9. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

10. https://www.achpr.org/legalinstruments/detail?id=60

11. http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

12. https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf