

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

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Summary

International human rights law provides all victims of human rights violations with a right to a remedy. Without such recourse, justice is of little use. The right to remedy has five principle components – restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition – each of which entails various types of reparations and none of which are mutually exclusive. Thus, victims of human rights violations may ask for, and legal institutions may order human rights offenders to undertake, a variety of reparations based on the specific circumstances of each case. This report explains the right to remedy as it is understood in international law with a specific focus on the rights of indigenous peoples, and provides various examples of the types of reparations that have been ordered by tribunals in the Inter-American and African human rights systems. The report will serve as a guide to indigenous peoples, legal practitioners, and civil organizations alike on where the right to remedy is found and what types of remedies they may request.



Deforestation in Liberia for palm oil by GVL. Credit Justin Kenrick FPP

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. Such reparations are a fundamental feature of the international human rights system, 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 a bilateral agreement between the two States after World War I. Germany agreed to transfer the territory of Upper Silesia to Poland and in exchange, Poland agreed it would not seize any German property in the territory. Poland breached the agreement when it seized 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 incurred by 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 articulated in numerous multilateral treaties, both at the regional and international levels, as well as in commentaries, jurisprudence, and recommendations based on those treaties.

The international legal basis for the right to 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 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.

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* 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.” (Principle IX paragraph 19)

2. “*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.” (Principle IX paragraph 20)
3. “*Rehabilitation* should include medical and psychological care as well as legal and social services.” (Principle IX paragraph 21)



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

4. “*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.” (Principle IX paragraph 22)
5. 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.” (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 see 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. The commentary to Principle 25 defines remedy to include apologies, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions, and guarantees of non-repetition. In addition, under Principle 29, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted, in order to make it possible for grievances to be addressed early and remediated directly. These mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible and based on engagement and dialogue (Principle 31). Similarly, Principle 30 requires industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards to ensure that effective grievance mechanisms are available.⁹

The *UN Declaration on the Rights of Indigenous Peoples* (2007)¹⁰ 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 subsistence and development (Art. 20(2)).
3. Redress may include restitution, determined jointly 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 entities, as well as mitigate adverse consequences (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).



Marudi Mine gold mining in South Rupumuni, Guyana.
Credit Vicki Brown FPP

The right to restitution or compensation for lands taken was recognized ten years earlier in *General Recommendation XXXIII* on the Rights of Indigenous Peoples by the UN Committee on the Elimination of Racial Discrimination (1997).¹¹ The Committee recognized restitution as the best form of remedy, to be replaced by just, fair, and prompt compensation (principally in the form of land) when restitution is impossible (paragraph 5).

Regional human rights systems also provide for the right to remedy. In the African system, the *Pretoria Declaration on Economic, Social and Cultural Rights in Africa* (2004)¹² specifies that Art. 14 of the African Charter of Human and Peoples' Rights (which provides for the right to property) requires States to recognize and protect lands belonging to indigenous peoples, as well as adequate compensation for property taken in the course of nationalization or expropriation. Furthermore, Art. 21 of the Charter explicitly provides for restitution and adequate compensation in the case of spoliation. Some examples of how these obligations have been interpreted in the context of indigenous peoples' rights are set out below.

More generally, the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (1998)¹³ mandates the African Court of Human and Peoples' Rights ("African Court") to order remedies for human rights violations, including fair compensation and reparation (Art. 27(1)). *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The right to life (Article 4)* (2015) states that reparations must be proportional to the gravity of the violations and harm suffered. Furthermore, full and effective reparation includes guarantees of non-repetition (paragraph (C)(19)).

*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)*¹⁴ identifies five forms of remedy and explicitly provides that failure to provide prompt access to redress is de facto 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 stemmed from the victims' vulnerability or marginalization in society, then restitution must also include measures addressing the structural 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 incurred in bringing a claim for redress (e.g., legal fees) (paragraph 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 (paragraph 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 (paragraph 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 occur in tandem with reparations to individual victims – they do not replace the individual's right to redress (paragraph 50-56).

In the Inter-American human rights system, the *American Convention on Human Rights* (1978)¹⁵ 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)). Examples of how this has been interpreted in the context of indigenous peoples' rights are set out below.

In the southeast Asian context, unlike in Africa and the Americas, there is no explicit provision that recognizes an international right to remedy. The *ASEAN Human Rights Declaration*¹⁶ states that every person has the right to remedy as determined by a court or other authority for violations of rights granted by a constitution or other law (Art. 5). The language used in, and current interpretations of the provision, suggests that this is geared towards domestic remedies to be determined and enforced by domestic authorities.¹⁷

Specific Reparations Awards Relevant to Indigenous Peoples: Inter-American Court of Human Rights

The Inter-American Court has issued a number of judgments providing reparations to indigenous and tribal communities across Latin America. These rulings, enumerated below, share various characteristics, such as considerations of indigenous cultures and customs to determine appropriate remedies, pecuniary damages, public apologies, and structural remedies for communities on the basis of collective harm. Thus, the Inter-American Court generally awards reparations that cover some or all of the different categories of remedies – restitution, rehabilitation, compensation, satisfaction, and guarantees of non-repetition – in cases involving indigenous and tribal communities. The Inter-American Court orders reparations in a separate ruling following a judgment on the merits.

In 1993, the Inter-American Court issued a ruling on the reparations in *Aloeboetoe et al. v Suriname*, which involved the extrajudicial killings of multiple Saramaka tribal people.¹⁸ In rendering its judgment, the Inter-American Court accounted for the Saramaka culture and disregarded Surinamese family law to determine who counted as family members for the purpose of reparations. It ordered pecuniary redress in the form of two community funds – one for adults and one for children – with a Foundation acting as trustee (though the Saramaka were not involved). Forty-six individuals were determined to be the heirs of the seven deceased, and the money to be deposited in the community funds for their benefit amounted to USD 453,102.¹⁹ The Inter-American Court also mandated a USD 4,000 contribution to begin the Foundation's operations.²⁰ Additional community reparations included the reopening of a school and medical dispensary.

Ten years later, the Inter-American Court issued a judgment in *Comunidad Mayagna (Sumo) Awas Tingni v Nicaragua* (2001).²¹ The case concerned land disputes over the land of the Awas Tingni community. The community did not have legal title to the land and the State permitted logging operations to proceed in the disputed territory. Similar to *Aloeboetoe*, the Inter-American Court considered the concept of property from the indigenous community's perspective, thereby recognizing the right to collective property. The reparations ordered required Nicaragua to reform its domestic law to create an effective mechanism for the delimitation, demarcation, and titling of indigenous lands; to delimit, demarcate, and title the lands of the Awas Tingni; and to cease interference in the lands by State agents or third parties. As for compensation, the Inter-American Court ordered investment of USD 50,000 over the course of one year into the community, as well as USD 30,000 for expenses and costs incurred during both the domestic and international proceedings.²²

Shortly thereafter, in 2004, the Inter-American Court issued a judgment in *Masacre de Plan de Sánchez v Guatemala* ordering reparations for the massacre of indigenous people during the Guatemalan Civil War.²³ The reparations came in the form of compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The Inter-American Court ordered the State to provide pecuniary and non-pecuniary redress; hold a public ceremony for the State to accept responsibility and issue an apology; translate and disseminate the judgments to the community; provide free medical and psychological treatment (both individual and collective), as well as adequate housing for survivors; and establish programs to spread the indigenous culture, build and repair infrastructure, and improve the education and healthcare system in the communities. The monetary compensation included USD 55,000 for litigation expenses²⁴, USD 5,000 in pecuniary damages to the 317 surviving victims (a total of USD 1,585,000)²⁵, and USD 20,000 in non-pecuniary damages to the 317 surviving victims (a total of USD 6,340,000)²⁶.

The following year, the Inter-American Court decided the case of *Comunidad Moiwana v Suriname*, which also involved a massacre during an internal armed conflict.²⁷ Again, the Court took into consideration the communal nature of the community, including its customary laws and practices. Based on the community's customs, the Court ordered the following individual and collective reparations: monetary compensation; investigation of the massacre and recovery of remains; legislative reform to ensure the property rights of the Moiwana community – including delimitation, demarcation, and titling of traditional lands; creation of a developmental fund for health, housing, and educational programs; acceptance of international responsibility and an apology through a public ceremony; and construction of a public monument. The monetary compensation was divided as follows: USD 1,200,000 for a community fund²⁸, pecuniary damages of USD 3,000 for each of the 130 victims (totaling USD 390,000)²⁹, non-pecuniary damages of USD 10,000 for each of the 130 victims (totaling USD 1,300,000)³⁰, and litigation and other expenses (totaling USD 90,000)³¹.

Also in 2005, the Inter-American Court issued a judgment in *YATAMA v Nicaragua*, the first case concerning the right to participate in government.³² YATAMA is a political organization representing indigenous communities in Nicaragua organized under indigenous customs. Following a new Electoral Law, YATAMA no longer met the criteria to be considered a political entity and was thus excluded from elections by the Supreme Electoral Council. The Inter-American Court determined that customary forms of organizations are protected and thus indigenous peoples could not be forced to conform with State laws requiring certain organizational structures. To redress the situation, Nicaragua had to provide pecuniary and non-pecuniary damages, as well as litigation expenses to YATAMA amounting to USD 95,000³³, publish and broadcast readings of the judgment in various languages, establish a method for challenging decisions of the Supreme Electoral Council, and reform the Electoral Law to allow indigenous peoples to organize according to their customs.

A third case from 2005, *Comunidad Indígena Yakye Axa v Paraguay*, involved land disputes and lack of an effective judicial remedy due to the length and inadequacy of the domestic proceedings for titling and restitution.³⁴ To determine adequate reparations, the Inter-American Court accounted for the special importance of the land to the indigenous community and determined that denial of territorial rights for these peoples risks specific and irreparable non-pecuniary damages. Thus, in addition to monetary compensation, the Inter-American Court ordered Paraguay to establish a community fund for education, health, housing, and agriculture projects with funds totaling USD 950,000³⁵; delimit and demarcate the traditional lands and issue titles of collective property – and more broadly create a mechanism these processes for all indigenous communities within the State; provide necessary resources and services while the people are forced to live off their lands; hold a public ceremony to accept international responsibility and issue an apology; and publish the judgment in the relevant languages. Paraguay was also ordered to pay USD 60,000 to the leaders of the Yakye Axa Community for expenses incurred.³⁶

In 2006, the Inter-American Court rendered another judgment against Paraguay involving similar issues of land disputes and lack of effective domestic remedy in *Comunidad Sawhoyamaya v Paraguay*.³⁷ In its decision, the Inter-American Court created a new separate category of reparations known as “devolution of traditional lands.” The Inter-American Court recognized the devolution of traditional lands as the closest form of restitution in integrum and that in cases such as these, the State must take all legislative, administrative, and other measures necessary to secure community member’s property rights over their traditional lands, including the use and enjoyment of these lands. If return of the ancestral land is impossible, the State, in agreement with the community,

may give other lands. The Inter-American Court also broadly ordered Paraguay to create a mechanism by which all indigenous communities could claim their traditional lands. Similarly to the previous case, the Inter-American Court accounted for the significance of the ancestral land to the indigenous community and ordered, in addition to monetary compensation, the following: creation of a community fund for various projects; provision of necessary resources and services while the community must live elsewhere; publication of the judgment; establishment of communication systems so that these communities can contact health providers; and creation of a registration program so that indigenous peoples can register and receive identification documents. Regarding the monetary compensation, the Inter-American Court ordered Paraguay to provide USD 1,000,000 for the community fund, USD 20,000 for each of the seventeen deceased community members (a total of 340,000), and USD 5,000 for the community leaders.³⁸

The most recent Inter-American Court judgment involving indigenous peoples is *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (2020).³⁹ This case also involves land disputes and lack of effective remedy, including improper intervention in the territories by the State via oil and gas concessions, deforestation activities, and public works projects⁴⁰. 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 own⁴¹. In conjunction with this, the State had to cease its operations in the territory unless given the free, prior, and informed consent of the indigenous communities⁴². Furthermore, the State had to facilitate the removal of the non-indigenous settlers of the territory, including their fences and livestock⁴³. 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 States and non-indigenous settlers⁴⁴. The Inter-American Court ordered a sum of USD 2,000,000 be allocated 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 communities⁴⁵. As measures of satisfaction, the Inter-American Court ordered Argentina to translate, publish, and broadcast the judgment⁴⁶ and ordered the State to adopt legislative and other measures to ensure the right to indigenous communal property such that it is realized across the country⁴⁷. Lastly, the Inter-American Court instructed Argentina to pay USD 50,000 for the costs and expenses⁴⁸.

Specific Reparations Awards Relevant to Indigenous Peoples: African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights ("African Commission") recognizes an effective remedy to "be prompt, accessible and capable of offering a reasonable prospect of success."⁴⁹ The African Commission has recommended various types of reparations falling under the different categories recognized by *General Comment No. 4*.

The most common forms of reparation include restitution and compensation, as explicitly provided for violations of the African Charter in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009).⁵⁰ In cases of unlawful detainment, the African Commission recommends restitution in the form of release from imprisonment⁵¹, as well as compensation to detainees⁵². The African Commission has recommended specific monetary damages for both physical and emotional trauma as determined by the African Commission, as well as legislative reforms (guarantee of non-repetition).⁵³ However, the African Commission has also left the calculation of damages up to the State as dictated by its domestic laws.⁵⁴ Much like the Inter-American Court, the African Commission has recognized public apology as a valid form of reparation because it provides psychological healing, promotes justice, and may change future conduct.⁵⁵ Another type of satisfaction previously ordered by the African Commission was for the State to investigate the human rights violations. In *Institute for Human Rights and Development in Africa v. Angola*, the human rights violations were of such a large scale – mass deportations and expulsions from the Republic of Angola – that the African Commission ordered the establishment of an investigative committee to verify the violations and pay compensation to the victims.⁵⁶ Other community reparations that the African Commission has recommended include proper burial of bodies in the case of extrajudicial killings, construction of a memorial, rebuilding of community infrastructure, and provision of health services for the affected.⁵⁷

In 2001, the African Commission ruled in favor of the Ogoni People in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*.⁵⁸ This case involved the exploitation of oil reserves in Ogoniland that resulted in serious environmental and health damages on lands belonging to the Ogoni people⁵⁹. The African Commission ordered the Nigerian government to stop the attacks carried out against the Ogoni by security forces, investigate the alleged human rights violations (satisfaction), provide adequate compensation to victims, carry out future oil development in a safe manner after accounting for environmental and social impact assessments (guarantee of non-repetition), disseminate information on future risks, and ensure communities have access to decision-making bodies when they are likely to be affected by oil operations.

The African Commission also issued a major ruling on one case involving an indigenous community - *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* (2009).⁶⁰ This case concerns the displacement of the Endorois from their ancestral lands without adequate compensation, which disrupted their cultural and religious practices, means of subsistence, and overall development⁶¹. The African Commission required the government of Kenya to recognize the property rights of the Endorois over their ancestral land (restitution), pay compensation for the losses suffered and royalties from existing economic activities on the land, and registration of the Endorois Welfare Committee to act as the official representative body of the community (guarantee of non-repetition).



Ogiek African Court Arusha

Specific Reparations Awards Relevant to Indigenous Peoples: African Court on Human and Peoples' Rights

The African Court analyzes and awards reparations in a manner similar to the African Commission and Inter-American Court. In 2019, the African Court conducted a study on how reparations are dealt with in its decisions.⁶² At the most basic level, the African Court believes reparation must be “fair, adequate, effective, sufficient, appropriate, satisfactory to the victim, and proportionate to the damage suffered.”⁶³

Reparations encompass restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition; the appropriate form(s) of reparations is determined based on the circumstances of each case.⁶⁴ Restitution is considered the ideal form of reparation (*restitutio in integrum*), but when that is impossible, adequate compensation is an appropriate substitute. The African Court’s study endorses the African Commission’s decision in *Mbiankeu v. Cameroon*, in which the victim’s land was expropriated and given to another, so restitution was impossible. However, the African Commission determined that she could be compensated with another plot of land of equal value – what the African Court deems the primary damage – as well as further compensation for related damages, such as loss of the rights to the land (e.g., use or enjoyment).⁶⁵ The African Court has also historically ordered measures of satisfaction, including investigations of alleged violations, and the subsequent arrest and prosecution of the perpetrators.⁶⁶ As is often ordered by the Inter-American African Court, the African Court has also instructed respondent States to publish the judgment and amend their legislation.⁶⁷

In 2017, the African Court issued a judgment in favor of the Ogiek who were being forcibly evicted by the Kenyan government from their ancestral lands in the Mau Forest.⁶⁸ The African Court definitively stated that the Mau Forest is the ancestral territory of the Ogiek and forest preservation does not justify restricting indigenous peoples’ access to their lands without evidence that the indigenous communities are the ones causing the destruction. The African Court has yet to issue a judgment on reparations.

Conclusion

Indigenous communities who have suffered human rights abuses at the hands of their Government are entitled to remedy and reparations. The form of these remedies can vary according to the specific circumstances of the case, but must be intended to 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. Indigenous peoples are therefore entitled to seek restitution of their land, compensation for the damage suffered, 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. None of these are mutually exclusive.

At the same time, companies and private sector operators who do not respect indigenous peoples' rights over their lands and natural resources bear the responsibility to provide remedy through the provision of effective grievance mechanisms, irrespective of whether the relevant State(s) have also provided remedy. Indigenous peoples are entitled to access these mechanisms where adversely impacted by private sector operations, in order to make it possible for grievances to be addressed early and remediated directly. These mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible and based on engagement and dialogue. Similarly, industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should also ensure that effective grievance mechanisms are available.

Melka Group oil palm plantations near Pucallpa, Ucayali, Peru. Credit Rainforest Rescue



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/remedyandrepairation.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/remedyandrepairation.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/guidingprinciplesbusinessshr_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/remedyandrepairation.aspx>
- 8 https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf
- 9 See also <https://www.forestpeoples.org/en/briefing-paper/2020/non-judicial-grievance-mechanisms-route-remedy-unfulfilled-opportunity>
- 10 https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
- 11 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7495&Lang=en
- 12 <https://www.achpr.org/legalinstruments/detail?id=35>
- 13 <http://hrlibrary.umn.edu/instree/protocol-africancourt.pdf>
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