1 Tracing the developing reparations jurisprudence of African Court on Human and Peoples' Rights as reflected in its first cases of *Mtikila*, *Zongo* and *Konate*

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Abstract:

This Chapter traces the development of the reparations jurisprudence of the African Court with a view to understanding the scope of reparations, their alignment with the human rights jurisprudence of other regional human rights tribunals, as well any peculiarities the Court has horned that shed light on the reparations philosophy of this Court. Anchored in the metaphor that the first cut is the deepest, the trace is limited to the first three reparations judgments of the African Court in *Mtikila*, *Konate* and *Zongo*. Through these foundational cases, the Court laid down its reparations approach such that a few conclusions were drawn. First, that the Court's reparations competence is unlimited in scope. Second, the Court has been increasingly developing the reparations approach, building on the cases as they came. Third, the Court has laid the foundation of its reparations approach in sync with the practice of other regional courts, such as the Inter-American Court of Human Rights, but also followed the practice of other African Union human rights bodies, such as the African Commission on Human and Peoples' Rights. Fourth, the Court has adopted a five-fold framework, which reparations should reflect, namely, compensation, restitution, rehabilitation, just satisfaction and guarantee of non-recurrence. Fifth, the Court has abandoned its initial innovative approach in interpreting its competence in favour of a lukewarm approach, such as restricting itself to granting only remedies that the party has requested. Nevertheless, by and large, the Court's approach is generally pointing in a

good direction having established the foundation upon which its reparations stand today and in the future.

1 Introduction

This chapter aims to contribute to the development of jurisprudence around the question of the impact of the African Court on Human and Peoples' Rights' (African Court) reparations approach to changing the circumstances of persons who fell victim to violations of fundamental rights and freedoms. It aims to set out the remedial approach the African Court has charted, as demonstrated in its first reparations cases. It will be for subsequent scholarship to examine how this Court's remedial approach enhances or undermines, albeit unintentionally, the positive impact of the African Court's decisions at the national level as it is generally the understanding that the success of an international tribunal such as the African Court should be measured by the extent to which it has influenced change within the national legal systems of member states.

The chapter is part of the growing and intensification of African scholarship on implementing human rights obligations, especially decisions of human rights courts and tribunals (HRCTs) in Africa.[1] It is premised on the basis that a remedy reflects the remedial approach a tribunal takes in its adjudication role, and because it is the remedy that stands to be executed or implemented, it has a bearing on the impact it will make on victims of human rights violation as well as national legal and policy frameworks in general. Thus, it is necessary to commit time to learning the remedial approach the African Court has preferred with a view to establishing the remedial philosophy of the Court in the long run.

The chapter also partly contributes to the work of the 'general assembly of African writers,' otherwise known as the 'implementation of commitments scholars,' who have generated so much momentum that gave credence to the proposition that the human rights discourse continues to plod along the implementation of obligations, as opposed to the erstwhile standard-setting phase that saw the adoption of general and thematic human rights obligation at national, regional and international levels.[2] A wave of studies, surveys, and analyses continues to generate answers to intriguing questions on the implementation of HRCT decisions. However, the author believes that much as the scholarship is getting traction on implementation, it would appear that more attention should also be

1 For the most recent publication on implementation, see A Adeola (ed) *Compliance with international human rights law in Africa: Essays in honour of Frans Viljoen* (2022).

2 See generally Adeola (n 1).

devoted to analysing the scope of reparation measures ordered by HRCTs that stand to be implemented.

To achieve the above, this chapter retreats a few paces backwards from the implementation discourse to expose the remedial approach as reflected in the remedies rendered by the African Court. Some of the questions that exercise one's mind when assessing the remedial approach of any tribunal, such as the African Court, include the following: *What is the philosophy behind the Court's remedies? How does the Court's remedial approach align with other international HRCTs? To what extent does the remedial approach consider the context? What is the level of clarity of the reparations so far given by the Court?*

In answering the above questions, scholarship has identified remedies given by a human rights court or tribunal as a key piece of the puzzle in understanding the impact that tribunal will have on the lives of victims of human rights violations as well the general changes in the national legal order of member states against whom such decisions were rendered.[3] For this reason, there is a need to analyse the tribunal's remedial approach closely, as reflected in the reparations so far rendered, for more insight.

In its role as an adjudicator, a court or tribunal needs to be inclined to issue clear orders when rendering decisions post-adjudication. Such a tribunal or court sets the tone for the provision of remedies to victims of the decision based on the language used and the particularity with which the remedial aspects of the orders awarded to the victim(s) are articulated. Thus, the specificity of the order is critical to its execution by the state concerned and impacts the circumstances of the victim and the national systems in general. In that sense, remedial aspects of a court order offer guidance to the state party concerned in terms of the adoption of appropriate measures to ensure the entire order is executed to the expectation of the court as contained in its decision, more so in achieving the objective of the court's remedial order.

Despite the clear facilitation role an HRCT plays when rendering a decision, the process raises further questions concerning the extent to which an international court would prescribe specific measures the respondent state should adopt to implement a court order against it in the light of the state's exercise of sovereignty when choosing the manner

3 For a discussion on the role of impact of a decision on implementation, see generally T Mutangi, 'Enforcing compliance with judgments of the African Court on Human and Peoples' Rights: prospects and challenges' in Adeola (n 1) 183 & 189.

of execution.[4] The argument justifies this approach by insisting that it is the sovereign prerogative of a state to choose the means by which it complies with or fulfils its international obligations. In that sense, the state obligation is one of result instead of process.

This fundamental question is illuminated even more considering the invariable mix of the civil and common law legal traditions often represented in supra-national adjudicatory institutions worldwide. The African Court is no exception. It is usually the case that the former is less prescriptive while the latter literally enumerates the measures a state should take to remedy the international wrongful act. While little space will be committed to this question in this chapter, it nevertheless needs to be addressed to inform conclusions and suggestions made at the end of the chapter.

When HRCTs, including the African Court, render decisions on reparations, this act perpetuates a principle respected in international dispute resolution for a long time. This is the principle of reparations. It reinforces the state's obligation to pay reparations following an international wrongful act, such as violating international human rights rules or norms. This responsibility of a state has remained one of the pillars of public international law, which eventually found residence in international human rights law as well. In fact, payment of reparations to remedy an international wrongful act is now a rule of customary international law.

This principle of 'full reparation', albeit as applicable only between states at that time, was affirmed by the then Permanent Court of International Justice in the famed *Chorzow Factory* case in 1928.[5] The finding of the Court affirmed that:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is 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 that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be

4 See the African Court's interpretation in *Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258 para 108.

5 *Factory at Chorzów, Germany v Poland, Judgment, Claim for Indemnity* (merits) (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928) 47.

> covered by restitution in kind or payment in place of it -such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[6]

It is generally accepted that the approach to reparations in terms of the quote above tended to take 'a retributive view', hence the emphasis on measures such as restitution and compensation as a form of providing redress. It is further acknowledged in the literature that the concept of reparations has been 'interpreted in different ways by international tribunals and other bodies' in the course of determining the 'forms and quantity of reparations' awarded in each particular case.[7] Due to the diversity of interpretations of the reparations standard, some scholarship continues to emerge seeking to revisit the application of the standard to reparations scenarios, especially in the context of compensation following nationalisation or expropriation. In this regard, Torres is one of those scholars who question 'the extent to which the standard of reparation depicted in Chorzów and reshaped in the ARSIWA reflects international practice'.[8] Be that as it may, as will be discussed below, the 'full reparation' standard from *Chorzow Factory* has been accepted in international human rights adjudication.

However, as will be demonstrated in relation to the African Court, legal instruments establishing and defining the boundaries of the mandate of the Court provide for this principle of full reparation, albeit partly, provide for this in its traditional formation of *restitutio in integrum* and compensation.[9] The inclusion of the principle in key African Union (AU) instruments represents its formal adoption and application in human rights adjudication in Africa.

Thus, this chapter has four parts, the first one being this introduction. The second part locates reparations within the African human rights legal framework, while the third part traces the evolution of reparations in Africa, albeit briefly to put into context the remedial competence or jurisdiction of the African Court, mainly focusing on the reparations

6 As above.

7 As above.

8 FE Torres 'Revisiting the *Chorzów Factory* standard of reparation – its relevance in contemporary international law and practice' (2021) 90 *Nordic Journal of International Law* at 190 & 192. See also J McIntyre 'The declaratory judgement in recent jurisprudence of the ICJ: conflicting approaches to state responsibility?' (2016) 29 *Leiden Journal of International Law* at 189.

9 See art 29 of the Protocol Establishing the African Court, which mentions 'reparations' and offers restitution and compensation as examples of redress in cases of violation of human rights.

regime the African Court has taken since it adopted its first decision on reparations in 2014. Again, it is stressed that the contribution seeks only to reveal the remedial approach the African Court has so far taken, benchmarking it against good practice within and outside Africa. The chapter avoids a systematic comparative approach with other human rights systems and courts. Rather, it makes *ad hoc* references by drawing inspiration from those systems where such is necessary to affirm the African Court's approach to reparations where it clearly follows good practice or to show where it may need to innovate and improve in future cases.

2 Reparations in the African human rights system

For as long as there are human rights violations, remedies will always be needed. The adoption of human rights standards at all levels and the establishment of human rights oversight institutions have not ended violations. To the extent that societal vices such as disease, corruption, bad governance, poverty, conflict, and harmful traditional and cultural practices are still part of African anthropology, violations of human rights will continue, and so will the need to redeem the victims of violations and discourage the recurrence of these violations.[10]

Yet due care should be exercised when dealing with the concepts of 'remedies' and 'reparations'. Literature and scholarship abound that refer to these interchangeably and, in some cases, separately. In its traditional meaning, a 'remedy' is often understood to refer to the procedural recourse a victim should have in order to seek substantive relief. It is the substantive relief that often insinuates 'reparations'. For the reason that it is difficult conceptually to drive a wage between these two concepts, the Human Rights Committee has interpreted the nature of state obligations in General Comment 31.[11] It held that 'without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, para 3, is not discharged'. It would appear the Human Rights Committee interpreted the right to an effective remedy as incorporating the right to reparations. When referring to reparations in this chapter, the idea is to mention the specific measures a court or tribunal requires of the state concerned to repair the violation of an international human rights obligation.

10 D Shelton *Remedies in international human rights law* 2 ed (2005) 113.

11 African Commission on Human and Peoples' Rights, General Comment 31 on the Nature of the general legal obligation imposed on states parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 16.

On their part, state parties to the African human rights system have the primary duty to provide redress to victims of human rights violations (wrongful conduct), with tribunals such as the African Court only intervening to affirm the same position where a state party has failed to do so. Such intervention does not create the obligation to repair but simply to confirm and enforce one that already exists. The obligation already exists under customary international law and specific treaty provisions. The insistence by a tribunal is meant to preserve the integrity of the human rights system, especially where non-compliance with human rights obligations is likely to create a state of impunity.

The provision of reparations to repair violations of human and people's rights is well established in the legal texts of the African human rights system, though some scholars doubt its clarity.[12] This is documented in the key human rights instruments such as the African Charter on Human and Peoples' Rights (African Charter). However, Musila proffered two reasons for the African Charter's lack of clarity on the right to remedy. These are first, the right to a remedy is one of the many 'substantive rights that should have been included in the Charter but were not' when regard is had to the proposition that the Charter is a 'tentative, sparsely drafted instrument' often described as 'opaque' and 'difficult to interpret'.[13]

While article 30 of the African Charter establishes the African Commission, article 53 allows the Commission to prepare for the AU Assembly of Heads of State and Government (AU Assembly) recommendations it deems fit at the end of dealing with each case to provide a remedy to victims of human rights violations. Based on this and other provisions of the African Charter,[14] the African Commission has provided remedies to victims of violations since 1987, though 'provided with relatively weak powers of investigation and enforcement under the terms of the Charter'.[15]

12 GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) *2 African Human Rights Law Journal* at 441-464.

13 As above.

14 Musila (n 12) posits that the Commission relies on provisions 'scattered' throughout the African Charter such as art 1 on the universal obligation of states to implement rights and freedoms and art 7 on the right to fair trial and the fact that the Commission was established as the premier institution to oversee the promotion and protection of human rights on the continent. While the authors agree with reliance on treaty provisions on the 'implied' right to a remedy, the one on the Commission being the premier body has lost significance with the entry into operation of the African Court and African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

15 GJ Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* at 681-694 & 682.

Nonetheless, the African Commission, perhaps taking the Human Rights Committee approach to remedies and reparations, should be credited for setting off the jurisprudence on principles of effective remedies in *Jawara*,[16] where it postulated the now famed tripartite elements of a remedy, namely, 'availability', 'effectiveness' and 'sufficiency'. The Commission held that a 'remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint'.[17]

It would appear no controversy turns on this view by the Commission regarding the conceptualisation of an 'effective remedy'. The concern only concern is that the African Commission does not seem to elucidate any of the three elements in the post-decision context. Merely characterising a remedy as 'capable of redressing the complaint' is ambiguous as it is formalistic. That capacity is conditional on other factors. The Commission ought to treat the concept of an effective remedy as mutable. It could draw inspiration from the normative framework where the right to a remedy has become clear in article 25 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Article 25 of the Maputo Protocol imposes an obligation on state parties to provide 'appropriate remedies to any woman whose rights and freedoms, as herein recognised, have been violated'. The change in drafting parlance could have been prompted by scholarship that persisted in pointing out the deficiencies in the legal framework on remedies in the African human rights systems. A similar clear reference to remedies is present in article 27 of the African Court Protocol, supporting the view that the legislative tradition in the African system is moving towards the embodiment of the right to a remedy in clear terms.[18]

However, as if to address deficiencies in the remedial framework in the African legal instruments, the African Commission adopted General

16 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

17 *Jawara* (n 16) para 32.

18 Article 27(1) of the African Protocol provides: 'If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'. The view here is that the drafting of earlier human rights instruments, such as the African Charter, had not been specific in terms of articulating the remedial competencies of adjudicatory institutions they established. However, there now appears to be a shift to more express reference to the right of victims to remedies in order to address the violation and to guarantee non-recurrence of violation going forward.

Comment 4.[19] This Comment and its principles, though written with specific reference to victims of torture and other cruel, inhuman or degrading punishment or treatment, are applicable to all types of human rights violations just as freedom from torture, which is provided for under article 5 of the African Charter is a human right.

Much as the African Commission made the commentary on remedies specific to victims or survivors of torture in General Comment 4,[20] it is possible to extract specific elements therefrom that are universally applicable to several cases of violation of other human rights and freedoms. For instance, the Commission elucidated on the right to redress as encompassing 'the right to an effective remedy and to adequate, effective and comprehensive reparation', and the 'ultimate goal of redress' being

19 African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) adopted at the 21st extra-ordinary session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia (African Commission General Comment 4). In para 4, it provides that it is founded and guided by existing regional and international norms and standards regarding the right to redress for victims of torture and other ill-treatment. It reaffirms and elaborates the jurisprudence of the African Commission and relevant instruments adopted by AU member states, including the African Charter, the AU Constitutive Act, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child. It is also based on soft law developed in the African human rights system and elsewhere, such as the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines); the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; the Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa adopted at the 55th ordinary session of the African Commission on Human and Peoples' Rights, held from 28 April to 12 May 2014 in Luanda, Angola; African Commission General Comment 3 on the African Charter on Human and Peoples' Rights on the Right to Life (Article 4) adopted at the 57th ordinary session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia; and the Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism in Africa, among others. As for other systems, General Comment 4 builds on the United Nations Committee against Torture's General Comment 3 on the Implementation of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 13 December 2012, UN Doc CAT/C/GC/3 (UN CAT General Comment 3) and the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, UN Doc A/RES/60/147.

20 In African Commission General Comment 4 (n 19) para 7, the African Commission commented that the purpose of the General Comment is 'authoritative interpretation on the scope and content of the right to redress for victims of torture and other ill-treatment in specific contexts pertinent to the African continent'. It also highlighted national actors responsible for ensuring that redress is availed to victims at national level.

long-term and sustainable socio-political and economic 'transformation' of structures and relationships in a manner that promotes observance of human rights and restoration of human dignity.[21] In the final analysis, the state obligations remain to put in place 'legal, administrative and institutional frameworks to give effect to the right to redress'.[22]

The Commission also weighed in on the normative content of the concept of 'reparations', which it defined to include 'restitution, compensation, rehabilitation, satisfaction – including the right to the truth, and guarantees of non-repetition'.[23] This reparations regime appears to mirror the five-fold regime developed and being implemented in the Inter-American human rights system.[24] This is commendable to the extent that African states are held to a standard similar to the one applicable in other parts of the world, subject to the prevailing context that would make such reparations 'appropriate'. The deficiency in the Commission's approach is that it did not commit sufficient time to elucidate the principle of reparations in light of its contribution as a general comment guiding states on the implementation of article 5 of the African Charter.

The other element of universal application is the definition of a 'victim' of violation in article 5 and, by extension, other provisions of African human rights instruments. In this regard, the Commission defined 'victims' or 'survivors' as:

> persons who individually or collectively suffer harm, including physical or psychological harm, through acts or omissions that constitute violations of the African Charter.[25]

The Commission further expounded on the definitional aspects of a victim as one 'regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted'. It also underscored the point that one is a victim of violation 'regardless of any familial or other relationship between the perpetrator and the victim'.[26] Furthermore, it is the Commission's considered view that a victim should also include 'affected immediate family or dependants of the victim as well as persons

21 African Commission General Comment 4 (n 19) para 8.

22 As above.

23 African Commission General Comment 4 (n 19) para 10.

24 G Donoso 'Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach' (2009) 49 *Instituto Interamericano de Derechos Humanos* at 30.

25 African Commission General Comment 4 (n 19) para 16.

26 African Commission General Comment 4 (n 19) para 17.

who have suffered harm while intervening to assist victims or to prevent victimisation'.[27] The author notes here that the Commission adopted an approach preferred by other systems, such as the European[28] and Inter-American[29] human rights systems, that have benevolently interpreted the term 'victim' beginning with the actual recipient of injury due to violation and extended it to family members that include siblings and descendants, and further to non-relatives whose injury can be traced to the conduct of the perpetrator.

One should also note that the wider the definition of a victim is, the more imaginative a tribunal should be in couching relief appropriate to the violation or injury felt by victims in each case. This is more important considering the communal way of life prevalent on the continent, where one does not need to be a descendant or sibling of the victim to qualify for reparations. In matters of procedure, especially for the purpose of proving damages for injury suffered, evidential burdens of proof may vary between victims depending on their respective profiles.

In all this, the African Commission exhorted states to 'protect the dignity of victims' and to take a 'victim-centred' approach to redress, with participation laying at the core of this process.[30] This involves the state investigating the extent and nature of the violation that has taken place and the needs of the victims as lived realities that are consequences of a violation. By so doing, the remedial measures would respond to the needs of the victim, and in our view, they constitute 'appropriate' remedy in such circumstances.

Concerning the type of reparations constituting redress in each case, the Commission briefly commented on the five-pronged approach to reparations but aligned them to the 'particular context of victims on the African continent'.[31] This means that as the approach to reparations is gaining universal momentum based on its provision in several texts and practice in different human rights systems, the same criteria should be

27 As above.

28 The European system of human rights has long defined a victim to include 'any person' who would indirectly suffer prejudice or has an interest in seeking cessation of the violation. See eg *X v Federal Republic of Germany* ECHR Appl No 4185/69 (1970) 140, 142.

29 See eg, *Trujillo v Bolivia (Reparations)* IHRL 1475 (IACHR 2002) para 54, quoted by JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2003) 235-236.

30 African Commission General Comment 4 (n 19) para 18.

31 African Commission General Comment 4 (n 19) paras 36-49.

interrogated based on its application in a context such as the African human rights system.

First is restitution, which, according to the Commission, is meant to put the victim back to the situation they were in before the violation, which may include the restoration of citizenship, employment, land or property rights, accommodations, the release of persons arbitrarily detained or restoration of the ability for victims to exercise the right to return.[32]

Second is compensation, a specie of reparations, which, together with restitution presents the concept of reparations in its original and historical but deficient form. The African Commission stresses that this reparation should be 'fair, adequate and proportionate' to the harm suffered at the hands of violation of human rights.[33] A point is made that while compensation in the true sense may be for 'reimbursement of medical expenses', it may be awarded to take care of 'future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible' and 'cover damage caused to a victim's anticipated personal and professional development' as a result of the violation.[34]

Thirdly, through rehabilitation as another form of reparation, the Commission commented that it seeks to achieve 'restoration of function or the acquisition of new skills required by the changed circumstances of a victim in the aftermath of torture and other ill-treatment' to ensure 'maximum possible self-sufficiency'. Rehabilitation further seeks to restore, as far as possible, victims' independence and physical, mental, social, cultural, spiritual and vocational ability, aiming to achieve full inclusion and participation of victims in society.

Yet satisfaction as the fourth tentacle of the five-pronged reparations regime in Africa has a substantial component allocated to truth-telling, the state's acceptance of its responsibility over the violation, the effective recording of complaints, and the investigation and prosecution of perpetrators.[35] Satisfaction also entails efforts seeking 'cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure' is necessary and applicable to the violation in question. Public apologies, acceptance of responsibility and commemoration of victims become public declarations of facts.

32 African Commission General Comment 4 (n 19) para 36.

33 African Commission General Comment 4 (n 19) para 37.

34 As above.

35 African Commission General Comment 4 (n 19) para 44.

Finally, the African Commission offers a commentary on the guarantee of non-recurrence as the final leg of the reparation's regime.[36] States could adopt several measures to satisfy this requirement. However, it should entail 'institutional and social transformation that may be required to address the underlying causes of violence'. In its simplified form, non-recurrence means adopting measures to ensure that similar violations do not take place in the future. Non-recurrence is at the heart of human rights remedies, where general measures are adopted to deal with root causes of violations, such as legislative amendments to eliminate offending provisions. Taken conjunctively, the five tentacles of reparations outlined regarding torture can be argued to define the boundaries of the reparations regime applicable to the African human rights system.

Having outlined the Commission's regime, the chapter now traces the broader reparations approach taken by the African Court. Such a discussion provides a comprehensive understanding of how these two premier human rights bodies, the Commission and the Court, continue to develop jurisprudence on reparations and lessons and patterns that can be drawn from its practice. Moreover, the discussion will give an assessment of the extent to which the African human rights system interacts and cooperates judicially with other human rights systems that have adopted the same reparations regime.

3 The reparations practice in the African Court

In addition to the scattered provisions of the African Charter discussed above,[37] the African Court's remedial competence is provided for in article 27 of the African Court Protocol. This fulcrum provision on the remedial competence of this Court provides as follows:

36 African Commission General Comment 4 (n 19) paras 45-49.

37 KT Sánchez 'The right to reparations in the contentious process before the African Court on Human and Peoples' Rights: a comparative analysis on account of the revised rules of court' (2021) 21 *African Human Rights Law Journal* at 812-835, 814. The author believes that art 21(2), which reads: 'In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation' is a provision that can be cited as a basis of state parties to the African Charter to provide effective remedies for violation of their obligations thereunder. See, Maputo Protocol art 26.

(1) **If the Court finds that there has been violation of a human or peoples' rights**, it shall make **appropriate orders to remedy the violation**, **including the payment of fair compensation or reparation**.
(2) In cases of **extreme gravity and urgency**, and when necessary to avoid irreparable harm to persons, the **Court shall adopt such provisional measures** as it deems necessary.[38]

There is a conceptual debate from the outset. While it is now almost common cause that compensation is a form of reparation, the Protocol seems to treat the two as distinct resolutions. *Chorzow Factory* restated the original and historical conception of reparations as *restitutio in integrum* and compensation. As will be seen later, the African Court has clarified this issue in its reparation's jurisprudence. However, one key aspect of the provision is its total trust in the Court to be able to consider what amounts to 'appropriate' remedies. In so doing, the Court does not suffer from any limitation of power in this regard. The only rider or condition is that whatever remedy the Court gives must meet the 'appropriate' requirement.

It is important to note that the provision uses the term 'appropriate orders to remedy the violation'. This makes a case for the proposition that the remedy must be 'effective' in the sense that it is capable of changing the circumstances of the victim when the order is fully executed.[39] The author is of the view that the use of the term 'appropriate' in the African Court Protocol appears to have been deliberate from a drafting point of view. The drafters did not want to make reference to any remedy but 'appropriate remedy'. In terms of the English language, the synonyms of 'appropriate' which include 'suitable', 'apt' or 'fitting', go further to reinforce the author's interpretation that the remedy ought to be fit for purpose. As the African Court held in *Zongo* effective remedy refers to 'that which produces the expected result …' and thus measurable through its 'ability to solve the problem'.[40]

It is also noteworthy that the African Court adopted a *Comparative Study on the Law and Practice of Reparations for Human Rights Violations* in 2019 (African Court Reparations Study),[41] with the objective of providing

38 African Court Protocol art 27 (own emphasis).

39 On the effectiveness of remedies, see generally the jurisprudence of the African Commission in *Jawara* (n 16) para 46, where the Commission was addressing the 'effectiveness' of remedies for purposes of exhaustion of local remedies.

40 *Zongo* (n 4).

41 African Court on Human and Peoples' Rights *Comparative study on the law and practice of reparations for human rights violations* (2019) https://www.african-court.org/wpafc/wp-content/uploads/2020/11/Comparative-Study-on-the-Law-and-Practice-of-Reparations-for-Human-Rights-Violations.pdf (accessed 18 September 2023).

'a comparative analysis on the law and practice of reparations for human rights violations to underpin the elaboration of guidelines on reparations' for the African Court.[42] Consequently, the African Court Reparations Study covers various aspects of reparations, such as the legal and theoretical foundations, the definition of a 'victim', procedural requirements such as the burden of proof, causal link between conduct and injury, evidentiary standards, quantum of reparations; type of reparations; comparative practice in the European, Economic Community of West African States (ECOWAS), Inter-American and UN systems, among others things. The Study makes the overall point that the question of reparations is one that each tribunal should approach in its own way, although it may draw inspiration from the practice and procedure of others.[43]

4 The African Court's reparations framework

It is on record that the African Court has so far issued reparations decisions in more than 20 cases that have come before it.[44] Procedurally, the practice of the Court is guided by Rule 63 of its Rules of Procedure, which allows it to render a decision on the merits together with reparations, or if 'circumstances require', by convening a separate hearing for purposes of dealing with reparations and rendering a judgment to that effect in due course.[45] It is the content and philosophy driving or informing reparations judgments that are the focus of this chapter.

4.1 *Reverend Christopher Mtikila v Tanzania*

The African Court laid the foundational stone for its reparations jurisprudence in the joined cases of *Mtikila.*[46] The essence of the complaint was that the constitution of the respondent state required that a person should be a member of or sponsored by a political party for them to qualify for candidature in any presidential, parliamentary or local government elections. Having found violations of the African Charter, the African

42 As above, vi. See also the African Court *Fact sheet on filing reparation claims* (2019) https://www.african-court.org/en/images/Basic%20Documents/Reparations_Fact_Sheet-FINAL_25_Nov_2019.pdf (accessed 18 September 2023).

43 African Court Reparations Study (n 41) 12-13.

44 See African Court 'ACtHPR cases' https://www.african-court.org/cpmt/finalised (accessed on 11 June 2023).

45 See Rule 63 of the African Court Rules of Procedure (2020). Sánchez (n 37) discusses in detail the Rules of Procedure of the African Court and their implications on the right to reparations.

46 *Reverend Christopher Mtikila v Tanzania* (reparations) (2014) 1 AfCLR 72.

Court granted the applicant leave to apply for reparations in separate proceedings.[47]

The *Mtikila* decision makes several contributions to the reparations dialogue in Africa. First, it links and locates African approaches to reparations in *Chorzow Factory* jurisprudence, restating the rule of customary international law that 'any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation'.[48] The Court elaborated on the link between African and international principles on reparations (state responsibility) by positing that article 27(1) of the African Court Protocol reflects the international law position.[49] This shows that the Court does not only pursue judicial cooperation in normative or substantive jurisprudence but also in reparations, essentially ensuring African states are held to the same standards as other state parties across the globe.

Second, and from the onset, the Court harmonises its own jurisprudence and that of the African Commission in terms of adopting the five-fold approach to reparations elaborated in the African Commission General Comment 4. This harmony between the two AU human rights bodies is critical to a unified development of standards on reparations. In fact, as demonstrated earlier, the Court goes further to benchmark its approach with that of the African Commission.[50]

Third, and connected to the second point, the African Court structures its reparations decisions with headings recalling the five-fold typology of human rights reparations and reaffirming its acceptance, leaving no room for doubt as to which category a reparation belongs to. This is important in so far as it clarifies the relief granted and hints to the state party concerned on the manner of its implementation.

Fourth, under the reparation tentacle of 'compensation', the African Court introduced the 'causal nexus' principle when it held as follows:

> It is not enough to show that the Respondent State has violated a provision of the Charter; it is also necessary to prove the damages that the State is being required by the Applicant to indemnify. In principle, the existence

47 As above.

48 *Mtikila* (n 46) para 27.

49 As above.

50 The African Court relied on the African Commission's findings in Consolidated Communications 279/03 and 296/05 *Sudan Human Rights Organisation v Sudan* (2009) AHRLR 153 (ACHPR 2009).

> of a violation of the Charter is not sufficient, per se, to establish a material damage.[51]

In other words, the Court underscored the point that a violation does not always give rise to damages unless the same can be linked to the state's conduct, thus invoking state responsibility in that case. The other point embodied in the quote above is that the applicant bears the onus of proof or evidentiary burden to demonstrate to the satisfaction of the Court that the conduct violating rights caused pecuniary damages that have been particularised before the Court. The evidentiary burden is also applicable to non-pecuniary damages such as 'damages for the suffering and afflictions caused to the direct victim, the emotional distress of the family members and non-material changes in the living conditions of the victim, if alive, and the family', which are non-economic in nature.[52]

Although it acknowledged that legal costs and expenses incurred in litigation form part of reparation, the Court again declined to award the applicant costs and expenses on the basis that he 'failed to develop the arguments relating the evidence to the facts under consideration, the Court cannot grant his claims'.[53] In such cases the applicant must provide 'probative documents and to develop arguments relating the evidence to the facts under consideration'.[54] Where one is dealing with alleged financial disbursements, 'clearly describe the items and justification thereof'.[55]

Fifth, the Court demonstrated remedial acumen, competence and duty within the ambit of article 27(1) of the Court Protocol when it remarked that despite none of the parties in *Mtikila* making submissions on measures of satisfaction, based on the 'inherent powers of the Court', the Court is to consider reparation of satisfaction. This is a very important interpretation of its remedial competence in so far as the Court leaned on the practice of a human rights court giving a remedy the parties did not request, thus, giving full effect to the principle of 'appropriate' relief.[56]

Finally, the Court introduced the practice of requiring the state party involved in reparations proceedings to submit a report to the Court on the measures it has taken to implement the operative parts of its judgment. This is another demonstration of an interpretation of article 27 that gives

51 *Mtikila* (n 46) para 31.

52 *Mtikila* (n 46) para 39.

53 *Mtikila* (n 46) para 40.

54 As above.

55 As above.

56 *Mtikila* (n 46) para 44.

the Court a post-judgment responsibility to monitor the implementation of its decisions and not simply to exist as an entity of *functus officio*. The Court gave the respondent state nine months to make this report. While this aspect of reporting may not stand on its own as a sub-category of the reparation typology, it supports the implementation of all reparations ordered, or the Court may order by ensuring that they are implemented. We should add here that all remedial orders the Court gave, such as the order for publication of the judgment in a daily newspaper publication, were clearly articulated so much as to make them crystal clear to the state party for purposes of implementation.

However, the nature of *Mtikila* was that the scope of reparations was inevitably narrow as there were not many issues for determination by the Court. It would be interesting to analyse reparations in other cases where violations were more complex, thus triggering wide-ranging reparations and their implications on implementation.

4.2 *Norbert Zongo v Burkina Faso*

Having laid its foundation on reparations in *Mtikila*, it is interesting to trace the trajectory taken by the Court in its subsequent decisions. The one decision that followed on the heels of *Mtikila* was *Zongo*.[57] This case dealt with the extrajudicial killing of an investigative journalist and his companions in 1998, who were investigating various political, economic and social scandals in Burkina Faso during that period. Their burnt corpses were found in a car. The Court held that the state had failed to act with due diligence in arresting, detaining and prosecuting the perpetrators in violation of article 7 of the African Charter. Arguments on reparations were heard and determined in subsequent proceedings.

Notably, the Court commenced its ruling on reparations by referring to general legal principles of international law that affirm the basis for payment of reparation, namely, in the *Chorzow Factory* decision. However, this time, the Court added another layer of a legal basis for state responsibility to pay reparations, namely, the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts – principles on payment of full reparations.[58] The Court would again rely on the Draft Articles to underscore the causal link between a state's wrongful

57 *Zongo* (n 4) above.

58 International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10) chp. IV.E.1 (ILC Draft Articles).

conduct and harm or prejudice suffered[59] and to justify the consideration of material and moral damages in terms of article 31(2) of the ILC Draft Articles. The Court made a distinction between these two types of damages, making it clear that one is material and monetary in nature while moral damages 'affect the reputation, sentiments or affection of a natural person'.[60]

Finally, relying on article 34 of the ILC Draft Articles,[61] the Court motivated its interpretation of 'full reparations' to include 'restitution, compensation and satisfaction'. Reference to the ILC Draft Articles authenticates the Court's approach to reparation, again linking African human rights jurisprudence to the rest of the world. It plants the roots of the African reparation jurisprudence in the realm of universally acceptable principles to ensure that no violation of international law goes 'unpunished'.

The nature of violations in *Zongo* gave the Court an opportunity to reflect deeply on some aspects it glossed over in the *Mtikila* case. One of these aspects is the question of whether a victim is entitled to moral damages. As expected, the respondent state challenged the applicants' evidence as insufficient to 'justify their status as beneficiaries' and, therefore, entitled to reparations.[62] The Court had to answer this question in its journey of determining the question of reparations.

In defining a 'victim', the Court opened that discussion with a master stroke. It held that 'the notion of victim must not necessarily be limited to that of the first line heirs of a deceased person under national law' since it is possible that 'other close relatives of the deceased' might have suffered the impact of the violation.[63] Relying on 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*, the Court took the definition consistent with what would be the African Commission's position in General Comment 4. The Court indicated that there is a lack of harmony in the

59 As above.

60 *Zongo* (n 4) para 27.

61 ILC Draft Articles art 34 reads: 'Full reparation for the injury caused by the international wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter'.

62 *Zongo* (n 4) para 43.

63 *Zongo* (n 4) para 46.

approach of different HRCTs across the human rights systems on the level of affinity needed for a relative to qualify as a victim.[64]

In the final analysis, the Court adduced a criterion based on the fact that 'those who acted (directly or by representation) on the very front line in this respect and suffered the most from the situation are the spouses, children, fathers and mothers of the deceased' and accordingly, adjudged them as legible beneficiaries of reparations in that case.[65] As to proof of relations, the Court introduced the 'principle of free admissibility of evidence', which meant that the Court is the master of the evidentiary procedure with the final say in terms of which evidence to admit in proof of certain aspects of the dispute before it. Thus, the Court is not hamstrung by rules of national law or other strict approaches.

Still, on evidentiary requirements, especially on the causal link between violation and damage suffered, the Court seemed to step up its approach by declining to simply dismiss the lack of evidence as it did in *Mtikila*. In *Zongo*, the Court adopted the Inter-American Court approach, namely, that there is a presumption that prejudice may be an automatic consequence of a violation of a human right, in which case no proof of causal link will be required.[66] The Court accepted the presumption, thus finding that the violation itself (failure to investigate and prosecute perpetrators) was the cause of the victims' anguish.

The Court also had the chance to deal with the quantification of damages for the first time in *Zongo,* having dismissed all applications for damages in *Mtikila* for lack of evidence. In *Zongo*, the African Court alluded to the principle that when it comes to the quantum of damages, there must be 'full reparation, commensurate with the prejudice suffered' in an attempt to 'wipe out all the consequences of the illegal act and re-establish the situation', which would probably have existed but for the wrongful act.[67] Nonetheless, ascribing monetary value to moral injury is no mean task. Accordingly, it is dependent on the Court determining this value by the reasonable exercise of 'judicial discretion' and 'equity'.[68]

As for satisfaction and guarantees of non-repetition, the Court did not pursue any new line of reasoning except giving reparations consistent with the manner of violation. Regarding the latter, the Court ordered

64 *Zongo* (n 4) para 48.
65 *Zongo* (n 4) para 50.
66 *Zongo* (n 4) para 55.
67 *Zongo* (n 4) para 60.
68 *Zongo* (n 4) para 61.

that the state re-open investigations to bring to book those responsible for the heinous murders. However, as an issue incidental to this chapter, the Court made reference to an aspect that could undermine its control in monitoring the execution of its decisions when it held as follows:

> The Court would also like to emphasise that whereas it may indeed order the state to adopt certain measures, the Court does not, however, deem it necessary to indicate to the state how it should comply with the Court's decision, that being left to the discretion of the said state.[69]

The author has already expressed his reservations about such an approach to post-judgment competencies. This chapter applauded the Court in the *Mtikila* decision for inserting a part in the order that required the state to report on measures adopted to implement the order. Yet, in this case, the Court expresses its doubt as to whether it previously took the better approach. In *Zongo*, the Court defers to the state party the choice of complying with its remedial orders, probably leaving room for the state to either conduct superficial implementation or none at all. The Court should remain in firm control of the implementation process even as it seeks the cooperation of state parties in complying with its judgments. The irony, however, is that *Zongo* is regarded as one of the best implemented decisions of the Court to date, probably because the majority of the reparations, other than publishing the judgment and re-opening of investigations, sounded in money which has since been paid in full.

4.3 *Lohé Issa Konaté v Burkina Faso*

The one case that followed on the heels of *Zongo* was *Konaté*.[70] Here, the complaint was that the applicant had been charged and convicted of defamation, sentenced to a prison term, paid an excessive fine, and had his tabloid suspended from operating. The African Court found a violation of the African Charter, the International Covenant on Civil and Political Rights and the ECOWAS Treaty.[71]

The Court structured this reparations judgment in an interesting way. It first summed up the legal principles underpinning reparations, which it established in *Mtikila* and *Zongo* as follows:[72]

69 *Zongo* (n 4) para 108.

70 *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346 (*Konaté*).

71 As above.

72 *Konaté* (n 70) para 15.

(a) A state found liable of an internationally wrongful act is required to make full reparation for the damage caused.
(b) Such reparation shall include all the damages suffered by the victim and, in particular, includes restitution, compensation, and rehabilitation of the victim, as well as measures deemed appropriate to ensure the non-repetition of the violations, taking into account the circumstances of each case.
(c) For reparation to accrue, there must be a causal link between the established wrongful act and the alleged prejudice.
(d) The burden of proof lies with the applicant to show justification for the amounts claimed.

In *Konate,* the Court first confronted claims of *restitutio in integrum* as one of the prayers. In particular, the victim wanted his criminal record to be quashed and fines to be set aside as part of the restitution process. Rather than dealing with the principle of 'restitution' with a bit of commitment and in detail, the Court was quick to endorse the agreement between the parties concerning the quashing of records but declined the request to set aside exorbitant fines imposed on the victim by national courts. The Court reasoned that it is not an appellate court and hence has no competence to set aside decisions of national courts, but it nevertheless 'urged' Burkina Faso to revise its scale of fines.

The main criticism this chapter advances against the Court in *Konate* is that the Court abandoned the progressive and courageous interpretation of article 27(1) of the African Court Protocol when it previously ordered satisfaction to the application *proprio motu* without the applicant asking for this remedy. This chapter commented that this was the way to go for the Court as parties may miss some 'appropriate' reparations that have a far-reaching impact on the protection of human rights on the continent. Yet in *Konate*, the Court contradicted its previous approach when it held that it 'cannot rule *ultra petita*, it will limit itself to the amount claimed'. [73] The Court was simply declining to grant an amount that was more than what the applicant had indicated in court papers, yet the Court acknowledged that the receipts filed of record supported a higher amount.

The African Court should abandon the *ultra petita* approach in reparations. This is unnecessary adherence to proceduralism. The Court must accept and acquiesce with the nature of human rights litigation, which serves in some instances to protect the rights of people not before

73 This means *beyond that which is sought*. It is used to refer to a decision of a court that grants more than what is asked for. A judgment which is *ultra petita* may be successfully appealed as it is not good at law.

the Court. For instance, the reparation of guaranteeing non-reoccurrence is not meant to protect the victim only from future violations. It is a general measure meant to dismantle and uproot the cause of the current violation so that no one, the victim or anyone else, has to suffer from the same violation in the future. There is public interest in human rights litigation. Those who submit cases to the Court have the privilege to go before the Court. On a continent plagued with economic challenges, applicants with economic access to adjudication mechanisms such as the African Court should ensure that they seek reparations, the benefit of which extends to other similarly placed people. The Court should equally understand the context in which it conducts its judicial mandate and prefer a purposive interpretation of the law as opposed to committing itself to a narrow approach that limits the scope of beneficiaries of its decisions.

As for the rest of the reparations, the Court has remained on the same path. For it has maintained the same stance on the causal link and the evidentiary burden to prove material and moral damages as resting with the applicant. However, the Court lacks a commitment to engage in sustained analysis of issues and justification of decision making. For instance, in *Konate*, the Court simply concluded that 'the claim is exaggerated and on the basis of equity, decides to reduce the amount'.[74] It was necessary for the Court to demonstrate the exaggeration by making such factual findings as would lead to that conclusion. That approach would guide future applications grappling with the issue of proving costs before the African Court for purposes of reimbursement.

5 Conclusion

The purpose of this chapter was to trace the developing jurisprudence of the African Court on reparations as reflected in its earlier decisions. Having scanned through the Court jurisprudence, several conclusions could be made.

First, the legal framework of the African human rights system recognises reparations as an important tool to guarantee the protection of human and people's rights and has directly incorporated the concept of reparations in AU human rights instruments. Thus, article 21(2) of the African Charter and article 27(1) of the African Court Protocol, read together with article 25 of the Maputo Protocol, expressly provide for the right of victims of violation of rights to an effective remedy, which invariably includes payment of reparations to correct the harm.

74 *Konaté* (n 70) para 59.

Second, the reparation regime adopted by the Court is consistent with international practice in terms of its content; it being founded on established international legal frameworks such as the trailblazing jurisprudence on reparations, namely, *Chorzow Factory* as well as ILC Draft Articles. These legal bases concur in affirming the consequential obligation of a state to pay reparations following a wrongful act, which now includes the violation of fundamental rights and freedoms. In this regard, the Court has embraced the five-fold typology of reparations as practised by the Inter-American Court. This presents the Court with an opportunity to continue to draw inspiration from that human rights system where necessary as it plods along honing its own context-specific approach.

Third, the Court has correctly interpreted its remedial competence under article 27(1) of the Court Protocol as unlimited, provided that the remedies or orders it gives are appropriate in view of the violation established in particular legal proceedings. We will add that it could be necessary for the Court to be more aggressive to the extent of awarding certain remedies even where the applicant did not request them. This can be especially pertinent with general measures that seek to preserve the integrity of the African human rights system. This approach is recommended for remedies that, for instance, seek to guarantee non-recurrence of the same violation with respect to the victim or any other similarly placed person.

Fourth, the Court is commended for issuing clear remedial orders, thus presenting no difficulty in understanding them. However, the Court needs to commit more time and effort to explain legal principles as it applies them to the facts before reaching conclusions. The process of adjudication is as important as the outcome. So far, some findings appear to be abruptly arrived at even if they have a solid legal basis.

Finally, when it comes to the common reparation of compensation for expenses incurred by the applicant in prosecuting their case before the African Court, the Court initially took a pro-victim or applicant approach before it changed the approach to one where it sticks to the amounts claimed in the papers before it. This has happened even in cases where the victim or applicant has now tendered incontrovertible evidence showing that the expenses were, in fact, higher than the amount requested in papers. The hope is that the Court will overcome this formalistic approach and ensure that victims obtain actual reparations as proven throughout the hearing of reparations proceedings.

Nonetheless, the Court is proving through its developing jurisprudence that it is committed to ensuring that those entitled to reparations through its generous interpretation of the term 'victim' can receive them. Such a generous interpretation of 'victim' underscores the African philosophy of a family in its expanded definition.

Table of abbreviations

AU	African Union
ECOWAS	Economic Community of West African States
HRCT	Human rights courts and tribunals
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
PCIJ	Permanent Court of International Justice

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