

# Article 25

## Remedies

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- The States Parties undertake to:
- (a) Provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised have been violated;
  - (b) Ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

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|                                                                                                              |     |
|--------------------------------------------------------------------------------------------------------------|-----|
| 1 Introduction .....                                                                                         | 506 |
| 2 Drafting history .....                                                                                     | 508 |
| 3 Concepts and definitions .....                                                                             | 509 |
| 3.1 Right to remedies as an ancillary right.....                                                             | 509 |
| 3.2 Judicial, legislative, administrative, or other authorities .....                                        | 511 |
| 3.3 Competent authorities .....                                                                              | 511 |
| 3.4 Appropriate remedies for violations .....                                                                | 512 |
| 4 Nature and scope of state obligations .....                                                                | 512 |
| 4.1 Redress for violation of rights in terms of article 25(a) .....                                          | 513 |
| 4.2 Access to competent national authorities to determine and award remedies in terms of article 25(b) ..... | 521 |
| 5 State practice .....                                                                                       | 526 |
| 5.1 Access to a remedy to vindicate rights .....                                                             | 526 |
| 5.2 Access to appropriate gender transformative remedies .....                                               | 529 |
| 6 Conclusion .....                                                                                           | 530 |

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## 1 Introduction

Where a violation of the rights and freedoms enshrined in the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) occurs, a right to a remedy for that violation arises.<sup>1</sup> This implies a state obligation to ensure that access to remedies is made available to victims of violations in form, as an enforceable right, and in substance by ensuring that there are processes and procedures to enable equal access to the mechanisms before which rights violated can be vindicated.<sup>2</sup> This aspect of state conduct, in addition to the domestication of international treaties, demonstrates

1 AA Agbor 'Pursuing the right to an effective remedy for human rights violation in Cameroon: the need for legislative reform' (2017) *Potchefstroom Electronic Law Journal* 1.

2 The African Charter on Human and Peoples' Rights (African Charter) has no free-standing justiciable right to a remedy. However, it contains several clauses that speak to this. Article 7(1) of the African Charter provides every individual the right to have his cause heard. Musila argues that this clause establishes the right to a remedy and a reciprocal obligation to provide viable avenues of redress, see GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 447-448. Similar guarantees are found in other international treaties: art 8 of the Universal Declaration on Human Rights; art 2(3)(a) of the International Convention on Civil and Political Rights (ICCPR); art 6 of the Convention on the Elimination of Racial Discrimination (CERD); art 14(1) of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT); arts 6 & 39 of the UN Convention on the Rights of the Child (CRC); of international humanitarian law as found in art 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV) 8 art 91

states' willingness to make good on its ratification of the treaty.<sup>3</sup> It speaks to state accountability where citizens' rights are violated.<sup>4</sup>

This chapter considers the measures and processes that member states must put in place to ensure that women have recourse to appropriate national institutions to vindicate a violation of their rights as contained in the Maputo Protocol. It further considers what the appropriate remedies are to enable reparation of harm suffered at an individual level and to effect change in the social, cultural, or political system that created or sustained conditions that aided the violation.

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has directed that meeting the obligation to provide remedies requires state measures that clarify the operational aspects needed to ensure that the equality guarantees of the Convention on the Elimination of Discrimination Against Women (CEDAW) are realised. Thus, it involves clarifying how cases of discrimination against women are to be resolved, damages awarded or other effective remedies given for violations of its provisions.<sup>5</sup> In the same vein, article 25 of the Maputo Protocol provides for a right to remedies (redress) while conversely creating a right to a process by which victims can claim redress before competent authorities (remedy).<sup>6</sup> In this way, article 25 of the Maputo Protocol provides both a procedural right to a remedy, not limited to judicial in nature and a substantive right to redress for rights violations.<sup>7</sup>

Articulating the required remedies (individual and systematic gendered redress) and the availability of and access to judicial, extra-judicial and quasi-judicial avenues and procedures for claiming, assessing and ordering the redress (remedy) by states under article 25 is central to the realisation of all substantive rights in the Maputo Protocol. However, where rights and remedies are available, women still need to be empowered to claim their entitlements. The reality for many African women is that their access to remedies is hindered by social, cultural and economic factors that undermine their access to institutions and mechanisms established in law.<sup>8</sup> Therefore, measures must be taken to dismantle the root causes of gender inequality, such as gender stereotypes and gender roles, also present in the processes by which women seek justice as well as in the remedies that are awarded following the violation of a substantial right.

This chapter is organised into six sections. Section 2 considers the drafting history of article 25. Section 3 proceeds to unpack the meaning and content of the provision as a right ancillary to other substantive provisions in the Maputo Protocol. Section 4 examines the nature and scope of the

of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 9 and arts 68 & 75 of the Rome Statute of the International Criminal Court; arts 12 & 13 of the European Convention on Human Rights (ECHR) and arts 11 & 25 of the American Convention on Human Rights (ACHR).

3 A Rudman 'Women's access to regional justice as a fundamental element of the rule of law: the effect of the absence of a women's rights committee on the enforcement of the of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* at 322.

4 Agbor (n 1) 2.

5 Concluding Observations on the Combined initial, 2nd and 3rd Periodic Report of Tajikistan, Committee on the Elimination of Discrimination Against Women (2 February 2007) UN Doc CEDAW/C/TJK/CO/3 (2007) para 11.

6 E Desmet 'The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation: a landmark or window-dressing? An analysis with special attention to the situation of indigenous peoples' (2008) 24 *South African Journal on Human Rights* 90. Desmet clarifies the relationship between the procedural element and the substantive elements of the right to remedies and reparations as follows: "The term "remedy" (singular) refers to the procedural side of access to justice whereas "reparation" is the umbrella term for the various forms of substantive relief, such as restitution and compensation ie forms of remedies'.

7 D Shelton *Remedies in international human rights law* (2016) 1. See also Agbor (n 1).

8 See the detailed discussion on the transformational aim of the Maputo Protocol with respect to enabling women's access to justice, equality before the law and equal treatment before the law in CN Musembi 'Article 7' in this volume.

obligations imposed on states under article 25. Section 5 then considers state practice in complying with this provision. In conclusion, the discussion assesses the challenges to the implementation of article 25 and provides some recommendations to state and non-state actors.

## 2 Drafting history

The Nouakchott Draft did not include a provision on remedies.<sup>9</sup> Neither did the Kigali Draft<sup>10</sup> nor the Final Draft, of 13 September 2000.<sup>11</sup> A proposal to include a provision dealing with remedies was only considered at the first Meeting of Experts held in November 2001. In the deliberations, the insertion of a new clause was proposed. This new clause, article 23, included two sub-sections. The first subsection related to the state obligation to ensure implementation of the Maputo Protocol by submitting state reports on the realisation of the rights. The second subsection stipulated remedies for non-compliance.<sup>12</sup> The wording of this draft provided for the right to an 'effective' remedy for a violation determined by 'a competent authority provided for by the legal system of the State'.<sup>13</sup> The first Meeting of Experts could not agree on the inclusion of this clause but opted to keep it for further consideration.<sup>14</sup>

In the continuing drafting process, the combined clause titled 'Monitoring and Compliance' retained both sub-sections suggested at the first Meeting of Experts. A coalition of non-governmental organisation (NGOs) involved in the drafting process made submissions on the draft 'Monitoring and Compliance' clause. In the submissions, they suggested the addition of the following to the monitoring clause, '[a]ny procedures or remedies that arise under or pertaining to the provisions of the African Charter shall be equally applicable to the provisions of the Protocol'.<sup>15</sup>

Article 26 of the African Charter on Human and Peoples' Rights (African Charter) creates an obligation on state parties to establish independent courts and other appropriate national institutions 'entrusted with the promotion and protection of the rights and freedoms guaranteed by the *present* Charter'. Article 26 is inextricably linked to article 7 of the African Charter and, read together, they are the remedies provisions of the African Charter.<sup>16</sup> A narrow interpretation of article 26 of the African Charter is that the application of courts and other institutions established by state parties to enable the protection of rights in line with this clause are applicable to rights guaranteed only in the African Charter. The narrow interpretation of article 26 would mean that already existing mechanisms in national states established and improved over the years in compliance with article 26 of the African

9 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

10 Document on file with the author.

11 Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

12 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 24.

13 As above.

14 Final Draft (n 11) para 25.

15 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003. A note to elaborate on this suggested amendment indicated the NGOs intention was to ensure that in clear terms women receive no less protection for their rights in the Maputo Protocol than are contained in the African Charter.

16 R Murray 'Article 26: independence of the courts and establishment of national institutions' in *The African Charter on Human and Peoples' Rights: a commentary* (2019) 566.

Charter are not applicable to the rights of women guaranteed in the Maputo Protocol.<sup>17</sup> With the proposed amendment, the NGOs appear to have been looking to ensure that if any member state adopts this narrow interpretation of article 26, the amended provision in the Maputo Protocol will cure the consequences of the exclusion.

The second Meeting of Experts was held in March 2003 to finalise the draft for submission to the Meeting of Ministers.<sup>18</sup> The Meeting of Ministers did not accept this suggested change. However, deliberations on this clause resulted in the decision to separate the monitoring and remedies provisions. In the Addis Ababa Draft (2003), the monitoring and implementation aspects are covered under article 26; while the remedies in the event of non-compliance are guaranteed under article 25. The wording approved at this meeting changed from requiring that states make available 'effective' remedies to requiring 'appropriate' remedies to any woman whose rights or freedoms has been violated.<sup>19</sup>

### 3 Concepts and definitions

Once member states ratify the Maputo Protocol, they incur a legal obligation to comply with the provisions thereof. Where a breach occurs, a new obligation arises to cease the breach and conform to the obligations and concurrently to remedy any harm caused.<sup>20</sup> The remedies provision in treaties is the countervailing requirement that individuals have the opportunity to obtain redress in the domestic system for the violation.<sup>21</sup> In the context of women's rights it seeks to provide some legal or other material consequence for those who violate the rights of women.<sup>22</sup>

#### 3.1 Right to remedies as an ancillary right

The ECHR contains a comparable provision in article 13. It provides that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before national authority notwithstanding that the violation has been committed by persons acting in official capacity'. Similar to the Maputo Protocol it can be argued that the right to a remedy would only arise once it is proven that a violation of a right contained in the Maputo Protocol has occurred. In other words, that the right to a remedy under article 25 will only attach when a claim has been successfully proven. Avoiding this circular argument, the European Court of Human Rights (European Court) has held that this is not the meaning to be ascribed to article 13. Given that the literal meaning requires that the claim is first lodged for a violation to be found, the European Court has ruled that the right to an effective remedy is for anyone who claims that their rights or freedoms have been violated.<sup>23</sup> This interpretation would logically, similarly, apply to article 25.

17 See the discussion in sec 5.1 of this chapter relating to the state practice in reporting on measures taken in compliance with art 25(b) of the Maputo Protocol. Some member states fail to recognise the applicability of state institutions available to the protection and promotion of rights in both the African Charter and the Maputo Protocol. Information provided to the African Commission in state reports is in these instances limited to complaints specific to the African Charter with no indication of the mandate of these bodies with respect to complaints filed by women relating to women's rights.

18 Summary of the proceedings of the second Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa, Expt/Prot.Women/Rpt(II), Addis Ababa, Ethiopia, March 2003, para 1.

19 A coalition of NGOs offering commentary during the drafting process suggested the use of 'appropriate' in the clause introduced ambiguity to the provision because determining whether a remedy would be appropriate would be a subjective determination creating room for ambiguity in application of the provision. Comments by the NGO Forum (n 15).

20 Shelton (n 7) 13. See also A Byrnes 'Article 2' in MA Freeman et al (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a Commentary* (2013) 83.

21 K Reid *A practitioner's guide to the European Convention on Human Rights* (2004) 477.

22 Byrnes (n 20) 83.

23 *Silver v United Kingdom* (1983) Series A no 61 para 113; European Court on Human Rights *Guide to article 13 of the Convention on Human Rights* (2021) 8 [https://www.echr.coe.int/Documents/Guide\\_Art\\_13\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf) (accessed 20 May 2023).

Moreover, article 13 of the ECHR has been determined, by the European Court, to have no independent existence separate from the substantive clauses of the Convention and its Protocols when a claim arises.<sup>24</sup> This is also the case with respect to article 25 in that substantive redress under sub-section 25(a) can only be claimed in combination with, or in the light of, an alleged violation of one or more substantive rights in the Maputo Protocol before a mechanism as established under sub-section 25(b). In other words, as the right to remedy is a secondary right dependent on the breach of a primary substantive right, to rely on article 25 of the Maputo Protocol an applicant must have an actionable claim under a substantive provision of the Maputo Protocol.<sup>25</sup> This interpretation requires that the national authorities established by state parties for the vindication of violations under the Maputo Protocol should also have the competence to determine an appropriate remedy for the violation.<sup>26</sup>

Remedies and access to remedy are provided for in the ICCPR under article 2(3)(a) and (b).<sup>27</sup> In addition to this, article 2(3)(c) of the ICCPR creates an obligation on state parties to enforce the remedies granted by the relevant authorities.<sup>28</sup> Unlike the approach of the European Court, the Human Rights Committee (HRC) has determined that article 2(3) cannot be found to have been violated in the absence of a corresponding finding that there was a violation of another right under the Convention.<sup>29</sup> In terms of the HRC's ruling, an allegation of the violation of any substantive rights is not sufficient for the right to remedies to accrue under the ICCPR. However, three members of the HRC noted a dissenting opinion. The dissenting view endorsed the approach of the European Court that a claim of a violation is sufficient to trigger the application of the right to a remedy. The dissenting view noted that the majority view, requiring a finding of a violation before a right to remedies occurs, would render article 2(3) useless.<sup>30</sup> They suggested the following:

What Article 2 intends is to set forth that whenever a human right recognized by the Covenant is affected by the action of a State agent there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation. This interpretation is in accordance with the whole rationale underlying the Covenant, namely that it is for the state parties thereto to implement the Covenant and to provide suitable ways to remedy possible violations committed by state organs.

Nonetheless, the HRC clarified that the right to remedies in article 2(3) is an obligation that attaches to all the other treaty provisions.<sup>31</sup>

24 Reid (n 21) 478. See also *Zavoloka v Latvia* European Court on Human Rights Judgment 7.7.2009 [Section III] July 2009, para 35(a).

25 L Zegveld 'Remedies for victims of violations of international humanitarian law' (2003) 85 *International Review of the Red Cross* 503.

26 E Evatt 'Reflecting on the role of international communications in implementing human rights' (1999) 5(2) *Australian Journal of Human Rights* 20-43.

27 UN Human Rights Committee (HRC) General Comment 31 (80) the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para 8; see also N Lerner *The UN Convention on the Elimination of All Forms of Racial Discrimination* (2015) 65. Lerner explains that art 6 of CERD also provides for redress and remedy. The first section of the article provides for the guarantee of access to remedies through competent tribunals and other national state institutions. The second section guarantees reparation or satisfaction when the victim of the act of racial discrimination has already suffered damage as a result of it.

28 A Conte & R Burchill *Defining civil and political rights: the jurisprudence of the United Nations Human Rights Committee* (2009) 36.

29 *Kall v Poland* Communication 552/1993 UNHR Committee (14 July 1997) UN Doc CCPR/C/60/D/552/1993 (1993) (Dissenting Opinion) para 3.

30 As above.

31 UN Human Rights Committee (HRC) General Comment 29 States of emergency art 4, 24 July 2001, CCPR/C/21/Rev.1/Add.11, para 14.

On the sub-regional level, the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court) has determined claims for the enforcement of a violation of article 25 of the Maputo Protocol in conjunction with violations of other substantive rights.<sup>32</sup> This approach is similar to that taken in the European Court in that an allegation of a violation of a substantive right is sufficient to trigger the applicability of the rights under article 25.

### 3.2 Judicial, legislative, administrative, or other authorities

An independently enforceable right to access judicial remedies is captured in article 8 of the Maputo Protocol.<sup>33</sup> In comparison, article 25 presents a guarantee for the realisation of the substantive rights in the Maputo Protocol through competent authorities established by the state that can rule on the violation and award remedies.<sup>34</sup> There is a procedural element to article 8 of the Maputo Protocol that relates to access to judicial avenues of domestic remedies.<sup>35</sup> However, article 25(b) creates the obligation on state parties to put in place a procedure that allows women whose rights have been affected to make a claim that the violation has occurred and have this claim determined. This obligation requires state parties to put in place any appropriate avenue to redress for claims in respect of rights in the Maputo Protocol, including but not limited to judicial bodies.<sup>36</sup> In this regard, the ECOWAS Court has determined that the right to remedy under article 25 enables claimants to appeal to a competent authority, judicial or administrative, and obtain a decision materialised on facts.<sup>37</sup>

The Southern Africa Development Community (SADC) adopted a treaty that addresses the protection of women's rights. The SADC Protocol on Gender and Development (SADC Protocol) mirrors the provisions on the Maputo Protocol creating a right to a remedy.<sup>38</sup> The SADC Protocol obliges state parties to provide for appropriate remedies to any woman whose rights or freedoms have been violated on the basis of gender, and to ensure that a competent, judicial, legislative, administrative or other competent authority determines remedies.<sup>39</sup>

### 3.3 Competent authorities

Article 25(b) requires that authorities put in place by state parties are competent authorities. This calls into question the definition of 'competent' as used in the treaties requiring that competent authorities provide remedies for violation of the treaty provisions. Competence means the legal power to make decisions.<sup>40</sup> The competence of an authority as a remedy is determined by considering its institutional

32 In *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017) (*Dorothy Njemanze*) the petitioner was successful in claiming a violation of *inter alia* arts 8 & 25 of the Maputo Protocol.

33 Article 8 of the Maputo Protocol provides for access to justice and equal protection before the law and benefit of the law. See A Rudman 'Article 8' in this volume.

34 *Adama Vandi v Sierra Leone* Judgment No ECW/CCJ/JUD/32/22 (18 July 2022) para 35.

35 See A Rudman 'Article 8' sec 4.2 in this volume.

36 See EC Cuenca 'Right to effective remedy' in JG Roca & P Santolaya (eds) *Europe of rights: a compendium of the European Convention of Human Rights* (2012) 454 for an analysis of the interaction between art 13 & art 6 of the ECHR reflective of arts 8 & 25 of the Maputo Protocol.

37 *Adama Vandi* (n 34) para 74.

38 M Forere & L Stone 'The SADC Protocol on Gender and Development: duplication or complementarity of the African Union Protocol on Women's Rights?' (2009) 9 *African Human Rights Law Journal* 446.

39 Article 32 of the SADC Protocol on Gender and Development provides:  
'States Parties shall:  
provide appropriate remedies in their legislation to any person whose rights or freedoms have been violated on the basis of gender; and  
ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided by law.'

40 V Engström *Constructing the powers of international institutions* (2012) 6.

effectiveness, being its independence from the respondent authority and remedial effectiveness, being the enforceability of its decisions.<sup>41</sup>

The African Commission, with reference to the term as used in article 7(1) of the African Charter, has held that the word competent ‘encompasses facets such as the expertise of the judges and the inherent justice of the laws under which they operate’.<sup>42</sup> However, as mentioned above, remedy under article 25(b) extends beyond those that are judicial.<sup>43</sup> Various arms of government, and judicial, legislative, administrative or other bodies constituted under them, respectively, can have the legal power to determine questions relating to the implementation of human rights and the appropriate remedy for violations.<sup>44</sup> Competence of these bodies is not only the power of the authority to reach and enforce decisions on claims before it but also providing a framework within which the petitioner and the state can negotiate to settle the dispute informally and cost-effectively.<sup>45</sup>

### 3.4 Appropriate remedies for violations

The HRC has clarified that remedies are appropriate when they are ‘adapted so as to take account of the special vulnerability of certain categories of person’.<sup>46</sup> The peculiar vulnerabilities of African women to discrimination in the social and cultural context require that these factors are accounted for when crafting appropriate consequences for rights violations. Addressing structural and systematic discrimination calls for the creative consideration of remedial options. As stated by the United Nations Special Rapporteur on violence against women:

Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation ... reparations should aspire, to the extent possible, to subvert, instead of reinforce, pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience.<sup>47</sup>

## 4 Nature and scope of state obligations

A claim for a remedy creates an obligation on states to ensure that it takes measures to ensure that victims are able to remedy harm caused by a violation of the Maputo Protocol. This means that processes are in place by which a claim can be considered, the harm arising from the violation can be determined and an award of appropriate redress for the harm suffered can be granted by a competent authority.<sup>48</sup> This section considers the obligations imposed by article 25 of the Maputo Protocol.

41 K Wellens et al *Remedies against international organisations: basic issues* (2002) 28.

42 *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 62.

43 See sec 3.2.

44 R Masterman *The separation of powers in the contemporary constitution: judicial competence and independence in the United Kingdom* (2011) 124.

45 K Wellens et al (n 41) 209. See also R Cavanagh & A Sarat ‘Thinking about courts: toward and beyond jurisprudence of judicial competence’ (1980) 14 *Law & Society Review* 373.

46 HRC General Comment 31 (n 27) para 15.

47 G Brodsky et al ‘The authority of human rights tribunals to grant systemic remedies’ (2017) 6 *Canadian Journal of Human Rights* 36.

48 Reid (n 21) 483 in discussing art 13 of the ECHR details that there are two separate elements of this provision i) a procedure whereby the substance of complaint under the substantive article may be determined and ii) the provision of adequate redress.

#### 4.1 Redress for violation of rights in terms of article 25(a)

Also termed as redress or reparation, article 25(a) provides for a right to claim appropriate redress depending on the violation of the claim alleged. The CEDAW Committee has found that the state obligation to provide redress is covered by article 2(b) of CEDAW, stating the following:

Subparagraph (b) contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.<sup>49</sup>

According to the UN Basic Principles, reparation needs to be adequate, effective, prompt, and proportional to the gravity of the violation and harm suffered.<sup>50</sup> The CEDAW Committee describes this requirement as, 'reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights'.<sup>51</sup> Similarly, the African Commission has set out that the overarching goal of reparation 'is to provide healing for victims'.<sup>52</sup> Importantly, awards of reparation must always be made and implemented without discrimination.<sup>53</sup>

The jurisprudence of the African Commission is arguably underdeveloped with regard to redress both under the African Charter and the Maputo Protocol. This is due to a focus on assessing domestic remedies for purposes of determining the admissibility of complaints while, when ruling on the merits of complaints before it, neglecting to elaborate on what forms of redress are appropriate to remedy the violations that arose in the complaints before it.<sup>54</sup> Following a review of the African Commission's jurisprudence, Ssenyonjo observes that after finding violations of the African Charter, the Commission

49 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para 32.

50 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law, Resolution adopted by the General Assembly on 16 December 2005, UN Doc A/RES/60/14 (UN Basic Principles) para 15; see also UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, 18 October 2013, CEDAW/C/GC/30, para 79; UN Committee on the Rights of the Child (CRC), General Comment 5 General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5; IACtHR, *Loayza Tamayo v Peru*, Judgment of 27 November 1998, Series C, No 42 para 87; IACtHR, *Velásquez Rodríguez v Honduras* (merit) Judgment of 21 July 1989, Series C No 7 para 27; ECOWAS Court, *Djot Bayi v Nigeria*, Communication ECW/CCJ/JUD/01/09, 28 January 2009 paras 45-6.

51 *AT v Hungary* Communication 2/2003, CEDAW Committee (26 January 2005) UN Doc CEDAW/C/32/D/2/2003 (2005) para 9.6(I)(b).

52 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 (art 5), adopted during the 21st extra-ordinary session of the African Commission, held in Banjul, The Gambia, from 22 October-5 November 2013 para 10.

53 UN Basic Principles (n 50) para 25.

54 GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 454. For a similar view on the inconsistent practice of offering remedies and awarding damages at the ECHR see T Barkhuysen & ML van Emmerik 'A comparative view on the execution of judgments of the European Court of Human Rights' in T Christou & JP Raymond (eds) *European Court of Human Rights: remedies and execution of judgments* (2005) 5.



seldom required any specific actions or measures to be taken by states to provide remedies.<sup>55</sup> More recently, the Commission has acknowledged the significance of compensation for violations that is just and adequate or fair and equitable as to be determined by the national laws.<sup>56</sup>

The African Court on Human and Peoples' Rights (African Court) is given the powers under article 27(1) of the Court Protocol to make appropriate orders to remedy a violation, including the payment of fair compensation or reparation where it finds that there is a violation of human rights. The African Court has held that with respect to the determination of reparations, the respondent state should first be internationally responsible for the wrongful act, causation should be established between the wrongful act and the alleged prejudice and where it is granted, reparation should cover the full damage suffered.<sup>57</sup>

The following sub-sections consider the measures states must take to meet its obligations under article 25(a). This discussion highlights the need for gendered restitutive measures, appropriate compensation awards, victim-centred rehabilitation and clear modalities of ordering and enforcing satisfaction.

#### 4.1.1 Gendered restitutive measures

Restitutive measures aim to put the victim back in the position they were in before the violation.<sup>58</sup> However, this approach may not result in repair of the harm or injury caused by the violation. This is

55 M Ssenyonjo 'Responding to human rights violations in Africa: assessing the role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7 *International Human Rights Law Review* 7. See also Shelton (n 7) 12, where she cites examples of such recommendations in the following cases: *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995); *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union interafricaine des droits de l'Homme, Les témoins de Jéhovah v Zaire*, Communications 25/89, 47/90, 56/91, 100/93 (Joined), African Commission on Human and Peoples' Rights, 10th Annual Activity Report (2000); *Commission Nationale des Droits de L'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995); *Civil Liberties Organization v Nigeria*, Communication 129/94, African Commission on Human and Peoples' Rights, 9th Annual Activity Report, (2000); *Amnesty International v Zambia*, Communication 212/98, African Commission on Human and Peoples' Rights, 12th Annual Activity Report, (2000); *Rights International v Nigeria*, Communication 215/98, African Commission on Human and Peoples' Rights, 13th Annual Activity Report, (2000); *Forum of Conscience v Sierra Leone*, Communication 223/98, African Commission on Human and Peoples' Rights, Fourteenth Annual Activity Report, (2000); and *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).

56 G Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681. See Ssenyonjo (n 55) 15 where he cites the following cases as examples: *Odjouriby Cossi Paul v Benin* Communication 199/97, African Commission on Human and Peoples' Rights, 17th Annual Activity Report; *Kenneth Good v Republic of Botswana* Communication 313/05, 28th Activity paras 243-244; *Association of Victims of Post Electoral Violence & interights v Cameroon* Communication 272/2003, African Commission on Human and Peoples' Rights 27th Activity Report, para 138. See also *Embga Mekongo Louis v Cameroon* Communication 59/91, African Commission on Human and Peoples' Rights, Eighth Annual Activity Report, para 2 where after a finding of violation of art 7, the Commission stated that it was 'unable to determine the amount of damages' and thus recommended 'the quantum should be determined under the law of Cameroon'. This can be compared with *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* Communication 323/06, African Commission on Human and Peoples' Rights, Combined 32nd and 33rd Annual Activity Report (2013), where the Commission determined a quantum for damages when it '[r]equest[ed] compensation to each of the victims in the amount of EP 57,000, as requested by the Complainant, for the physical and emotional damages/traumas they suffered'.

57 *Joseph John v United Republic of Tanzania* Application 005/2018 para 101.

58 General Comment 4 (n 52) para 36.

the case where the cause of the violation was systematic in nature.<sup>59</sup> Thus, a distinction must be made between individual reparations and reparations targeted at systematic failures.<sup>60</sup>

Reparations targeted at systematic failures aim to guarantee non-repetition of the violation.<sup>61</sup> The Maputo Protocol is transformative in nature.<sup>62</sup> Therefore a remedy arising as a consequence of a violation of the treaty should not aim to return victims to the status *quo ante*.<sup>63</sup> Often the facts that result in a complaint are manifestations of the root causes of discrimination against women and account for a specific and compounded form of harm that women experience.<sup>64</sup> Restitutive measures to address these root causes will not serve their purpose if they merely restore the circumstances that perpetuated the initial violation.<sup>65</sup> Meeting the requirements of article 25(a) therefore requires that restitutive measures are determined with a gendered lens. The measures should not perpetuate gender discrimination.<sup>66</sup>

An element of this form of transformative order is contained in the *APDF*.<sup>67</sup> Here the African Court ordered Mali, first to reform its laws in line with the state's human rights obligations; secondly to undertake educational drives with the population and; finally to report back to the African Court within two years on implementation of the orders.<sup>68</sup> In terms of the second remedy, it, importantly, aims to change the social norms that inform gender bias. Before the African Commission, an instance of this form of remedy targeted at addressing a systematic problem is evident in the order urging the state to ratify the Maputo Protocol.<sup>69</sup>

59 See *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v the Federal Government of Nigeria* Judgment No ECW/CCJ/JUD/08/17 (12 October 2017). Page 8 of the unofficial translation on file with the author. In these cases, the ECOWAS Court found that there were deficiencies in the Nigerian judicial system in responding to complaints by women victims of violence and providing them access to judicial remedies. However, in both cases the court proceeded to only make declarations regarding the human rights violations and award individual compensation to the petitioners. The ECOWAS Court missed opportunities to address systemic root causes of discrimination in the administration of justice in the state that resulted in the violation of the individual petitioners rights. This despite an attempt by the petitioner in the *Dorothy Njemanzi* case for instance to seek remedies targeted at systematic failures such as '[a]n order for the enactment of a law eliminating all forms of violence, including sexual violence against women and the training of the Police, Prosecutors, Judges and other responsible Government Agencies on laws on violence against Women and gender sensitivity and the creation of specialized police Units and Courts dealing with cases of violence against women'.

60 XA Ibanez 'The role of international and national courts: human rights litigation as a strategy to hold states accountable for maternal deaths' in P Hunt & T Gray (eds) *Maternal mortality, human rights and accountability* (2013) 54.

61 Ibanez (n 60) 54.

62 See A Rudman 'Article 8' sec 3.1.1 in this volume for a discussion on the transformative goal of the Maputo Protocol and attaining substantive equality for women in Africa.

63 R Rubio-Marfn & C Sandoval 'Engendering the reparations jurisprudence of the Inter-American Court of Human Rights: the promise of the *Cotton Field* judgment' (2011) 33 *Human Rights Quarterly* 1070.

64 Rubio-Marfn & Sandoval (n 63) 1070.

65 As above.

66 African Commission on Human and Peoples' Rights Guidelines on Combating Sexual Violence and its Consequences in Africa adopted during its 60th ordinary session held in Niamey, Niger from 8-22 May 2017 para 42.

67 *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali (APDF)* (merits) (2018) 2 AfCLR.

68 *APDF* (n 67). Orders: 'x the Respondent State to amend the impugned law, harmonise its laws with the international instruments, and take appropriate measures to bring an end to the violations established; ... xii. Requests the Respondent State to comply with its obligations under art 25 of the Charter with respect to information, teaching, education and sensitisation of the populations. xiii. Orders the Respondent State to submit to it a report on the measures taken in respect of paragraphs x and xii within a reasonable period which, in any case, should not be more than two (2) years from the date of this Judgment'.

69 *Egyptian Initiative for Personal Rights* (n 56) para 275.

#### 4.1.2 Compensation awards

Compensation is a monetary award for material costs and losses as well as moral damages for the harm suffered.<sup>70</sup> Compensation should be provided for any monetary loss or damage that is proved to have occurred as a result of gross violations of international human rights law and serious violations of international humanitarian law.<sup>71</sup> Where a concrete figure is awarded, compensation awards encompass pecuniary and non-pecuniary damages as well as costs and expenses.<sup>72</sup> According to the UN, Basic Principles compensation must be fair, adequate, and proportionate to the material, non-material and other harm suffered.<sup>73</sup> Damages can include compensation for physical or mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, moral damage and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>74</sup>

However, compensation awards in instances of human rights violations are often difficult to quantify.<sup>75</sup> Generally, the theoretical foundations of damages for human rights violations remains underdeveloped as courts have struggled to articulate a clear, consistent, rational, and thought-out reasoning for human rights damages.<sup>76</sup> The African Commission has developed jurisprudence that indicates its willingness to award compensation as redress for a violation but has in most instances, as mentioned above, stopped at directing that the quantum be determined in accordance with national law.<sup>77</sup> The CEDAW Committee has taken a similar approach ordering compensation that is ‘commensurate with the gravity of the violation’.<sup>78</sup>

The African Court applies the general principle that there must be a causal link between the violation and the alleged injury and places the burden of proof on the petitioner to provide evidence to justify the claim for reparation.<sup>79</sup> In determining compensation for material prejudice, the African Court has established that any material prejudice must be proven by supporting documents, and the causal link between the alleged prejudice and the violation found must be established.<sup>80</sup> On moral damages, the African Court applies a presumption of moral injury suffered by a petitioner as soon as the Court has found a violation of the petitioner’s rights, ‘so that it is no longer necessary to look for evidence to establish the link between the violation and harm’.<sup>81</sup> The Court has held that:

70 UN Basic Principles (n 50) para 20.

71 As above.

72 See eg, Inter-American Court on Human Rights case *González et al (Cotton Field) v Mexico*, Judgement of 16 November 2009, Series C No. 205.

73 UN Basic Principles (n 50) para 37.

74 UN General Principles (n 50) para 20.

75 Ibanez (n 60) 55. See a consideration of compensation in cases of maternal mortality which by their nature are irreparable and any remedy would fail to be proportionate to the gravity of the injury or harm caused.

76 JN Varuhas *Damages and human rights* (2016) 2.

77 See cases cited under n 56 above. For examples of the African Commission deviating from this general approach see *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples’ Rights 57th Annual Activity Report (2016) para 158 where the court quantified damages awarded. See also *Egyptian Initiative for Personal Rights* (n 56).

78 See as examples *X and Y v Russia* CEDAW Communication 100/2016; *LC v Peru* CEDAW Communication 22/2009 para 12(a); *ST v Russia* CEDAW Communication 65 of 2014 para 11(a); *Angela González Carreño v Spain* Communication 47/2012 para 11(a)(i); *VK v Bulgaria* Communication 20/2008 para 9.16(a); *SFM v Spain* CEDAW Communication 138/2018. See also *Ciobanu v Moldova* Communication 104/2016 where the CEDAW Committee gave a more detailed order for compensation yet did not determine the quantum to be awarded.

79 *Kouamé Patrice Kouassi and Baba Sylla v Republic of Côte d’Ivoire* Appl 15/2021 para 149.

80 *Kouamé and Sylla* (n 79) para 154.

81 *Kouamé and Sylla* (n 79) para 158. See also *Oumar Mariko v Republic of Mali* Appl 29/2018 para 184; *Sébastien Germain Marie Aïkoue Ajavon v Benin* (merits and reparations) (2020) 4 AfCLR 133, para 168; *Guehi v Tanzania* (merits and reparations) (2018) 2 AfCLR 477 para 55; and *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346 para 41.

[M]oral prejudice is presumed in cases of human rights violations, and the quantum of damages in this respect is assessed based on equity, considering the circumstances of the case. The Court has thus adopted the practice of granting a lump sum in such instances.<sup>82</sup>

The African Court has yet to determine a claim for compensation concerning the violation of women's rights in the African Charter or the Maputo Protocol. The African Commission has in two seminal women's rights cases awarded compensation. In a decision adopted in 2011, in awarding compensation in the amount of about USD 1850 to each complainant for violations of the African Charter, the African Commission gave no reason for this determination. In its order, the African Commission merely indicates that the award was 'as requested by the Complainant'.<sup>83</sup> In a decision adopted in 2015, the African Commission gave an award of compensation of USD150 000 dollars to the complainant as 'equitable and fair compensation'.<sup>84</sup> In detailing the factors considered in awarding non-material damages the African Commission noted that it is determined taking into account relevant circumstances including physical, psychological and emotional trauma suffered as a result of both the violation by a third-party and the state's failure to adequately respond to the violation.<sup>85</sup>

The ECOWAS Court has made several orders specifying the quantum of the compensation to be awarded in instances of women's rights violations. However, an assessment of the reasons provided for the determination of the quantum in each case and the reasons provided for the appropriateness of compensation as the suitable redress reveals the challenges experienced in the application of the court's discretion to award compensation. A consistent method that can be cited as authority in this regard has not been developed and the quantification of the compensation appears to be a matter of judicial discretion. The following case discussions, referring to women's rights under the African Charter and the Maputo Protocol, are nonetheless important in considering the application of the obligation to provide redress because they provide an indication of where compensation was found appropriate and what evidence the ECOWAS Court required to quantify the compensation.

In 2008, in *Hadijatou Mani Koraou v Niger*,<sup>86</sup> the ECOWAS Court awarded individual monetary compensation of approximately USD18 415 to the petitioner, who was sold to a man at the age of 14 and kept as an enslaved person in his household for nine years.<sup>87</sup> The court held that it did not have enough submission on the calculation of reparations to assist in determining the quantum of compensation.<sup>88</sup> It nonetheless awarded compensation but made little effort to clarify how it arrived at the quantum awarded. It clarified that the compensation was to remedy the physical, psychological and moral harm suffered over the period of the victim's enslavement.<sup>89</sup> In *Mani Koraou* a consideration of the facts was sufficient to justify an entitlement to the compensation awarded to the petitioner. In explaining the amount awarded, the Court stated:

To support her reparation request, the applicant did not provide the Court with any calculation hint that would allow it to decide on a specific sum of money in reparation for the alleged harm. The Court concludes that an all-inclusive sum of money can be granted to her...[t]he analysis of the facts clearly shows that the

82 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (reparations) (2015) 1 AfCLR 258 para 55; and *Ingabire Victoire Umuhoza v Rwanda* 2016 (2016) 1 AfCLR 540 para 59; and *Christopher Jonas v Tanzania* (reparations) Appl 11/2015 para 23.

83 *Egyptian Initiative for Personal Rights* (n 56) para 275 (iv).

84 *Equality Now and Ethiopian Women Lawyers Association* (n 77) para 158.

85 As above.

86 *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/C CJ/JUD/06/08 (27 October 2008) (*Mani Koraou*).

87 *Mani Koraou* (n 86) para 14.

88 *Mani Koraou* (n 86) para 95.

89 *Mani Koraou* (n 86) para 96.

applicant was subject to physical, psychological and moral harm due to the nine (9) years during which she was held in slavery. This justifies the allocation of compensation as reparation for the harm suffered.<sup>90</sup>

In 2017, in *Dorothy Njemanze* the ECOWAS Court similarly awarded an amount of approximately 6 million Naira or USD13 780 as damages against the state for violations of the petitioners' rights.<sup>91</sup> The petitioners had been abducted and assaulted sexually, physically, verbally and unlawfully detained in different incidents over a period. The arrests were all carried out as part of routine sweeps by the Abuja Environmental Protection Board and the Society Against Prostitution and Child Labour. The petitioners were arrested and accused of being prostitutes simply because they were found on the streets at night. The first petitioner attempted to lodge a complaint about the unlawful detention with the police, but she was turned away because 'they all looked like prostitutes'.<sup>92</sup> In this case, the petitioners had made a claim for *inter alia* monetary compensation for 100 million Naira.<sup>93</sup> After determining that the state had violated the petitioners' rights, the Court ordered a reduced amount of 6 million Naira. Unfortunately, the judgment does not offer any insight into the reason for the reduced order on damages or why the remedy was appropriate in the circumstances.

In *Mary Sunday*, the ECOWAS Court had another opportunity to clarify the principles applicable in determining compensation claims before it. In this case, the petitioner was successful in claiming a violation of her right to access justice as the state had failed to conduct an adequate investigation into a case of domestic violence. As a result of the physical assault, she sustained extensive injuries that resulted in visible permanent scarring. The Court awarded compensation in the amount of approximately USD30 400 as reparation for the injuries she had sustained. The petitioner had claimed an amount of USD45 900. The Court's reasoning for awarding the compensation was arguably not informed by any evidence put before it. In fact, the Court noted that there was no evidence before it to assess the damage suffered by the petitioner.<sup>94</sup> The Court further noted that the submission of such evidence would have greatly helped in the quantification of the damage. From the statement made by the Court, it appears to have been swayed by the appearance of the petitioner's injuries in awarding the compensation where it noted:

that no evidence permitting the assessment of the damage suffered by the applicant has been entered in the file. The production of such a piece would have greatly helped her to quantify the damage, even though, during her various hearings, the Court was able to get an idea of the severity of Ms. Sunday's injuries, it [the physical manifestation of the injuries Ms Sunday sustained] has often been present. That being so, the absence of such evidence of damages does not preclude it from ruling on the question of pecuniary compensation, since it has a discretion in that regard.<sup>95</sup>

In *Aircraftwoman Beauty Igbobie Uzezi v Nigeria*,<sup>96</sup> the ECOWAS Court determined a claim of compensation and awarded approximately USD200 000 in damages. A former aircraftwoman filed the case with the Nigerian Air Force who, after being raped by a superior officer at the base, had suffered various forms of physical and mental torture and ill-treatment at the hands of officers in the Air Force

90 *Mani Koraou* (n 86) paras 95-96.

91 *Dorothy Njemanze* (n 32).

92 *Dorothy Njemanze* (n 32) 5.

93 About USD 232 000.

94 *Mary Sunday* (n 59). Paras 8-9 of unofficial translation on file with the author.

95 As above. See also *Aminata Diantou Diane v Mali* Judgment No ECW/CCJ/JUD/14/18 (21 May 2018). The ECOWAS Court again cited its inherent discretion as the basis for determining the amount of compensation in the absence of evidence to enable the exact computation of damages suffered by the applicant. The Court awarded approximately 22,500 USD in compensation for the damage suffered by the applicant.

96 *Aircraftwoman Beauty Igbobie Uzezi v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/21 (30 April 2021) (*Aircraftwoman*).

intent on punishing her for reporting the rape incident and identifying her rapist.<sup>97</sup> This persecution culminated in her unlawful dismissal. Again, like in *Mary Sunday* and *Dorothy Njemanze*, the Court did not refer to any evidence before it in quantifying the damages. It determined an all-inclusive amount for all the heads of damages included in the petitioner's claim.<sup>98</sup> This award represented a departure from the average quantum awarded by the court in the cases discussed above relating to the violation of women's rights. The range of awards in previous cases discussed was between USD18 000 and USD30 000. In the *Aircraftwoman Beauty* case, the USD200 000 awarded far exceeded the average awarded in cases raising women's rights violations. An indication of what may have informed this determination is the observance by that Court that restitution for rape as torture is impracticable, leaving monetary compensation as the only viable option. In determining the quantum of damages, the Court considered 'what amount of money is sufficient to repair or compensate for the trauma of a young teenager just entering adulthood, a trauma that will remain with her for life'.<sup>99</sup> The Court then cited the psychological effects of rape as a basis for the award.<sup>100</sup>

In *EI v Nigeria*, the ECOWAS Court rejected a claim for compensation arising from a violation of the right to a remedy by having a rape case prosecuted over an extensive period of time.<sup>101</sup> The petitioner alleged the violation of her right to *inter alia*, remedies. The state, in this case, had failed to conduct a speedy and effective trial after the petitioner had reported a case of rape. The ECOWAS Court found a violation of the right to a remedy and ordered that the state conduct a trial and punish the perpetrator if he is found guilty. The Court dismissed the petitioner's claim for damages. In this regard, the petitioner had claimed a sum of 25 000 000 Naira<sup>102</sup> to compensate for the physical and psychological pain, emotional distress, and post-traumatic stress she had suffered as a result of the violation of her rights.<sup>103</sup> The Court reasoned that the claim for 'physical and psychological pain, emotional distress and post-traumatic stress' related to the harm arising out of the rape, rather than as a consequence of the failure of the state to effect a speedy trial.<sup>104</sup> In making this determination, the Court relied on the absence of submissions on the damages suffered as a result of the delay in the prosecution and the fact that the petitioner, throughout the case, did not show any special damages suffered as result of the delay in the state conducting a fair trial. Its inference was therefore that the claim for damages was for the rape itself. It determined that until a determination on the rape case was made by the national court, it was not able to award damages for any harm arising from the alleged rape.<sup>105</sup>

In this case, the ECOWAS Court arguably failed to apply the principle that a violation of a right results in a claim for reparations, including compensation.<sup>106</sup> That notwithstanding, the point made by the Court, in this case, is that where damages are claimed, the petitioner has the onus to comprehensively clarify the basis of the claim for damages and present evidence of the harm suffered as a result of the violation. This ruling indicates a departure from the approach taken in the cases discussed above. As noted above, in *Mary Sunday* and *Dorothy Njemanzi*, despite the absence of evidence on the harm

97 *Aircraftwoman* (n 96) paras 11-19.

98 *Aircraftwoman* (n 96) para 154.

99 *Aircraftwoman* (n 96) para 152.

100 *Aircraftwoman* (n 96) para 153.

101 *EI v Nigeria* Judgment No ECW/CCJ/JUD/09/22 (25 April 2022).

102 Approximately USD58 000.

103 *EI* (n 101) para 95.

104 *EI* (n 101) para 98.

105 *EI* (n 101) para 96.

106 The ECOWAS Court had at this juncture itself endorsed this principle in 2021 in the case of *Aircraftwomen* (n 96) para 150 where it cited its decisions in other cases endorsing this principle.

suffered or on computation of the quantum of damages, the Court proceeded to invoke its discretion in awarding compensation for violations without giving any further justification for the decision.

#### **4.1.3 *Victim-centred rehabilitation***

Rehabilitation is considered a non-monetary remedy targeted at victims of human rights violations and their family members or communities.<sup>107</sup> Rehabilitation is aimed at providing a means to heal the physical, mental and emotional trauma or harm that has been caused by the violation to the victims and other affected persons, such as family members or the community.<sup>108</sup> Rehabilitation should include medical and psychological care as well as legal and social services.<sup>109</sup> Rehabilitation of victims should aim to restore, as far as possible, their independence, and physical, mental, social, cultural, spiritual, and vocational ability and full inclusion and participation in society.<sup>110</sup> Providing this as a form of reparations therefore requires that state institutions tasked with determining claims for damages elaborate on the modalities of how rehabilitation awards are determined by the relevant bodies and under what circumstances rehabilitation will be available as a remedy.

Victim-centred rehabilitation requires that decisions made about the life of the victim must be made with their interests as the primary focus. Their autonomy must at all times be paramount.<sup>111</sup> Victim-centred rehabilitation where properly applied, ensures that programmes are tailored to each woman's needs and individual circumstances and provide for a possibility for active participation of the victims in their own recovery process.<sup>112</sup> Having said that, addressing collective trauma is also a key objective of rehabilitation for human rights violations.<sup>113</sup> Failing to address the collective trauma creates the risk of repetition of the violation.<sup>114</sup> Rehabilitation awards should therefore seek to promote individual, family and social healing, recovery and reintegration.<sup>115</sup>

The African Commission has called for a holistic, integrated and long-term approach to state responsibility for providing rehabilitation for victims of human rights violations. In General Comment 4, the African Commission has indicated examples of services that may be implemented as including medical, physical and psychological rehabilitative services; re-integrative and social services; community reconciliation and community therapy; socio-therapy and social integration; family-oriented assistance and services; and vocational training and education.<sup>116</sup>

#### **4.1.4 *Modalities of ordering and enforcing satisfaction***

Where restitutive measures and compensation are not appropriate remedies to address an injury or harm arising from the violation of a human right, satisfaction may be considered. Unlike restitution,

107 Shelton (n 7) 1, 394.

108 Shelton (n 7) 349.

109 UN General Principles (n 50) para 21.

110 UN General Principles (n 50) para 40. See also African Commission General Comment 4 (n 52) para 40.

111 International Federation for Human Rights, Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, International Meeting on Women's and Girls' Right to a Remedy and Reparation (2007), Basic Principle D.

112 REDRESS and Transitional Justice Network 'Rehabilitation as a form of reparation: opportunities and challenges' (2010) <https://redress.org/wp-content/uploads/2018/01/Sep-10-Rehabilitation-as-a-Form-of-Reparation.pdf> (accessed 10 October 2022).

113 See *The African Commission on Human and Peoples' Rights v Republic of Kenya* Appl 06/2012 para 44 where the African Court held that 'the Court remains alive to the fact that the notion of "victim" is not limited to individuals and that, subject to certain conditions, groups and communities may be entitled to reparations meant to address collective harm'.

114 REDRESS (n 112) 4.

115 REDRESS (n 112) 4.

116 General Comment 4 (n 52) para 41.

compensation and rehabilitation, satisfaction can more readily result in the systematic changes needed to address violations resulting in individual harm.<sup>117</sup> Satisfaction refers to a variety of measures.<sup>118</sup> The UN General Principles indicate what some of these measures should include. Effective measures aimed at the cessation of continuing violation are an example of satisfaction.<sup>119</sup> Investigations are in themselves a form of satisfaction in that they enable the facts relevant to a violation to be verified and, where appropriate, these facts can be made public. The UN General Principles also identify the location of missing persons abducted or disappeared and identification and reburial of those killed in line with express wishes or cultural rites of the deceased's family or community as another instance of satisfaction.<sup>120</sup> Moreover, a judicial order that has the effect of restoring the dignity, the reputation and the rights of the victim and of persons closely connected with them has in several cases proven an effective form of satisfaction.<sup>121</sup> Public apologies to the victims are also listed in the UN General Principles as a form of satisfaction and have been claimed in cases of human rights violations by petitioners.<sup>122</sup> Other forms of satisfaction included in the UN General Principles are the state acknowledging the facts and taking responsibility for violations, bringing those liable for the violations to justice and symbolic tributes such as commemoration sites.<sup>123</sup> Giving content to what appropriate redress is, the African Court ruled in *APDF* that declarations of rights can in themselves be appropriate remedies as they are a form of satisfaction for moral injury.<sup>124</sup>

Determination of satisfaction as a form of redress continues to be a challenging aspect of enforcing human rights obligations against states.<sup>125</sup> When courts order individual remedies for particular claimants such as compensation, modalities for ensuring implementation of that order are theoretically more straightforward than where the court calls for more structural change such as a change in policy, or a reform process.<sup>126</sup> This notwithstanding, states are required to ensure that reparations awarded in line with article 25 are realised in practice.<sup>127</sup>

#### **4.2 Access to competent national authorities to determine and award remedies in terms of article 25(b)**

As mentioned in the introduction article 25(b) calls on member states to have in place institutions with clear processes through which victims can claim and access redress.

117 H Potts 'Accountability and the right to the highest attainable standard of health right' in P Hunt & T Fray (eds) *Maternal mortality, human rights and accountability* (2013) 127.

118 International Commission of Jurists 'The right to a remedy and reparation for gross human rights violations: a practitioners' guide' (2018) xiv.

119 See *Brahim Ben Mohamed Ben Brahim Belgeith v Republic of Tunisia* Appl 017/2021 para 35, where the African Court ordered Tunisia to repeal presidential decrees, as a measure of restitution and put in place a Constitutional Court as a means to ensure non-repetition of the violations complained of at para 139.

120 UN Basic Principles (n 50) para 22.

121 See *African Commission v Kenya* (n 113) where land restitution was awarded to the petitioners. See also *Mgosi Mwita Makungu v United Republic of Tanzania* Appl 6/2016 para 68, where the African Court has held that 'the publication of judgments of international human rights courts as a measure of satisfaction was common practice.' See also *Norbert Zongo* (n 82) para 98; *Reverend Christopher R. Mtikila v Tanzania* (reparations) Appls 9 and 11/2019 para 45; and *Anudo Ochieng Anudo v United Republic of Tanzania* Appl 012/2015 para 95.

122 *African Commission v Kenya* (n 113) para 129 the African Court held that under the circumstances a claim for an apology was not necessary as the judgment was sufficient satisfaction.

123 UN Basic Principles (n 50) para 22.

124 See Shelton (n 7) 396.

125 Ibanez (n 60) 54.

126 S Gloppen 'Studying courts in context: the role of non-judicial institutional and socio-political realities' in L Haglund & R Stryker (eds) *Closing the rights gap from human rights to social transformation* (2005) 297.

127 See R Nekura 'Article 4' in this volume for a discussion relating to the specific obligation to ensure reparations are realised in practice with respect to women victims of violence.



Thus, the primary responsibility for providing avenues for procedural access to justice is that of the state.<sup>128</sup> Where a treaty provides for a monitoring mechanism, the role of such a regional or international body is subsidiary and becomes relevant where the state has failed in its responsibility.<sup>129</sup> The African Commission has accepted this rationale, stating that states must be permitted to resolve internal problems ‘in accordance with their own constitutional procedures before accepted international mechanisms can be invoked’.<sup>130</sup> The African Court has similarly followed this principle in matters before it.<sup>131</sup> Like most regional and international mechanisms the African Commission and African Court require exhaustion of local remedies before a claim is admissible before them.<sup>132</sup>

Contrary to this approach, the ECOWAS Court does not require the exhaustion of domestic remedies.<sup>133</sup> The Supplementary Protocol detailing the jurisdictional competence of the ECOWAS Court does not require this and the Court in its practice and operation, has not either.<sup>134</sup> This is the case with respect to the East African Court of Justice (EACJ).<sup>135</sup> As such, but for the EACJ and the ECOWAS Court, in the African regional human rights system, national authorities tasked with the vindication of rights must first be guaranteed and realised at a national level, failing which the citizens of a state that has ratified the treaties that they will be seeking to vindicate can access the sub-regional and regional mechanisms to defend their rights.

This section investigates the types of measures needed to provide access to remedies at the national level. Article 25(b) requires that states provide competent judicial, administrative, or legislative authorities or other competent authorities provided by law to determine a claim for breach of a right. The CEDAW Committee, has pointed out that CEDAW does not expressly provide for a right to a remedy; however, it considers that the procedural part of the right to remedy is implied particularly in article 2(c), by which states parties are required ‘to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination’.<sup>136</sup>

128 AF Bayefsky ‘General approaches to domestic application of international law’ in RJ Cook (ed) *Human rights of women: national and international perspectives* (1994) 354.

129 Ssenyonjo (n 55) 7. See also Shelton (n 7) 59.

130 *Article 19 v Eritrea* (2017) AHLR 73 (ACHPR 2007) para 44.

131 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314 paras 78-79.

132 Article 56(5) of the African Charter requires that as procedural requirements to access the claims procedure that a complaint is to be sent after local remedies, if any, have been exhausted, unless said procedure has been unduly prolonged. See also, eg, ECHR art 35; ACHR art 46(1)(a). For a comprehensive analysis of the jurisprudence of the African Court on this rule between December 2009 and December 2018 see L Chenwi ‘Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples’ Rights’ (2019) 41 *Human Rights Quarterly* 374-398; H Onoria ‘The African Commission on Human and Peoples’ Rights and the exhaustion of local remedies under the African Charter’ (2003) 3 *African Human Rights Law Journal* 1-24. See CF Amerasinghe *Local remedies in international law* (2004) for a discussion of the local remedies requirement in international law.

133 ST Ebobrah ‘A rights-protection goldmine or a waiting volcanic eruption: competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice’ (2007) 7 *African Human Rights Law Journal* 326.

134 The Supplementary Protocol A/SP1 /01/05 that details the jurisdictional competence of the ECOWAS Court did not include a requirement for the exhaustion of domestic remedies. See also ST Ebobrah ‘Taking children’s rights litigation beyond national boundaries: the potential role of the ECOWAS Community Court of Justice’ in M Killander (ed) *Human rights litigation and the domestication of human rights standards in sub-Saharan Africa* (2007) 167.

135 See *Prof Peter Anyang’ Nyong’o v Attorney General of Kenya* Ref 1 of 2006 EACJ para 21. In determining that the provision in the treaty detailing the jurisdiction of the court did not have this requirement, the court held that ‘article 30 on the other hand, confers on a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein... [w]e therefore, do not agree with the notion that before bringing a reference under article 30, a litigant has to “exhaust the local remedy”’.

136 *KT Vertido v the Philippines* Communication 18/2008 CEDAW Committee (1 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010) para 8.3; *LC v Peru* Communication 22/2009 (17 October 2011) UN Doc CEDAW/C/50/D/22/2009 (2011) para 8.16.

Article 25(b) requires that member states establish institutions and that procedures for access to these institutions as determined by law. However, it does not pre-determine what those measures should be.<sup>137</sup> The authorities may be constitutional, legislative, administrative and judicial institutions.<sup>138</sup> The Inter-American Court of Human Rights (Inter-American Court) has held that national institutions that states are required to establish so as to enable citizens to lodge claims where their rights have been violated must be suitable to address the infringement of a legal right complained of. The African Commission has defined an effective remedy as one which is available without impediments, offers a prospect of success to the woman claimant and can sufficiently repair the harm suffered.<sup>139</sup>

Recognising that a number of institutions may exist in every country, judicial, quasi-judicial and non-judicial, not all are applicable in every circumstance. It is upon the petitioner to determine a mechanism that is adequate to vindicate their violation.<sup>140</sup> In the context of article 25, this means that at the national level, where there are civil and criminal judicial avenues to vindicate rights, women can opt for either of these. In addition, where there are administrative institutions with the power to determine a claim relating to the same violation, the petitioner can opt to utilise the administrative institution rather than any of the judicial mechanisms available. When engaging the local authorities, a victim of violations is not required to engage all available institutions at their disposal.<sup>141</sup> In order for victims to make an informed choice between various available institutions, these options must be available in law and in practice.<sup>142</sup> More importantly, there must be clear and known procedures on how to access the various available authorities.<sup>143</sup>

#### 4.2.1 Judicial measures

The availability of courts as an avenue for the judicial vindication of rights violations under the Maputo Protocol is required by member states under article 25(b).<sup>144</sup> To meet the state obligations member states may for instance have in place courts tasked with adjudication of entitlements of rights contained in the Maputo Protocol such as normal courts with jurisdiction to hear matters relating to the violation of human rights, Constitutional Courts, Sexual Offences Special Courts or Domestic Violence Courts.<sup>145</sup>

Litigation is a popular avenue to obtain redress for rights violations, although, as already mentioned, not the only avenue.<sup>146</sup> As the nature of litigation and the processes by which cases vindicate human rights violations contained in the Maputo Protocol are evolving on the continent, no two countries have the same procedures for enabling access to judicial institutions to enforce human rights.<sup>147</sup> In addition to that, the more civil society organisations engaging in public interest litigation and victims

137 Cuenca (n 36) 450.

138 D Galligan & D Sander 'Implementing human rights' in S Halliday & P Schmidt (eds) *Human rights brought home: socio-legal perspectives on human rights in the national context* (2004) 30.

139 General Comment 4 (n 52) para 23.

140 *Velázquez Rodríguez v Honduras* IACHR (29 July 1988) Ser C No 4, para 64.

141 *Escher et al v Brazil*, IACHR (6 July 2009) Series C No 200 para 28. See also European Court on Human Rights 'Practical Guide on Admissibility Criteria' Council of Europe (2014) para 66. See also Case of *Jasinskis v Latvia* (Application 45744/08 ECtHR 2018) paras 50-53.

142 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 32.

143 As above, The African Commission has held that such an authority for access to redress cannot be said to be available if it cannot be accessed or used by a victim. This principle was reiterated in *De Jong, Baljet & Van den Brink v The Netherlands* (1984) 8 EHRR 20 para 39. The European Court held that the authority must be available in theory and in practice. See also *Sejdovic v Italy* (Application no 56581/00) [2006] ECHR 86 para 45.

144 Chenwi (n 132) 380.

145 Cuenca (n 36) 451.

146 E Durojaye 'Litigating the right to health in Nigeria: challenges and prospects' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 154.

147 H Duffy *Strategic Human rights litigation: understanding and maximising impact* (2018) 9.

of violations are engaging in human rights litigation before national courts, the more the rules of procedure regulating access to these institutions are developing.<sup>148</sup>

From the jurisprudence emanating under the African Charter, a judicial authority that can be shown to be subject to the discretionary intervention of the executive arm of government will not qualify as a 'competent' authority set up in line with article 25(b) in that it does not have the legal power to make the determination.<sup>149</sup> In addition, where the jurisdiction of a body is ousted by constitutional or other legislative provisions, the courts are stripped of the competence to determine the remedies due for violations.<sup>150</sup> The nature of state obligations to enable access to judicial avenues of justice in law and in practice under the Maputo Protocol is comprehensively covered in chapter 9, dealing with article 8 of the Maputo Protocol. However, where the overarching state obligation under the Maputo Protocol is to effect a positive change in the real-life experiences of African women, it warrants emphasis here that such judicial mechanisms must be aimed at addressing the practical hindrances to women's access to justice.

#### 4.2.2 Legislative measures

The first step to implementing article 25(b) is a constitutional clause setting out the ratification and domestication of international treaties. Depending on the states' approach to international treaties, states may elect to enact specific legislation that detail the modalities of enforcing the rights guaranteed under the Maputo Protocol.<sup>151</sup> Other states may have separate provisions on enforcing the rights before competent bodies or legislate on the options for redress available to victims for rights violations.<sup>152</sup>

Enforcement of the rights guaranteed in the Maputo Protocol requires that domestic laws are in place. It further requires that rules of procedure or guidelines that enable women to practically file and prosecute a complaint before national institutions set up for this purpose exist.<sup>153</sup> Once domestic application of the rights in the Maputo Protocol is promulgated into national law, the procedure for accessing remedies for violation of rights contained in the Maputo Protocol, and the remedies that can be accessed through those procedures, must be clarified.<sup>154</sup> Laws and directives that clarify who has

148 Duffy (n 147) 10.

149 Onoria (n 132) 4-6; *Amnesty International v Sudan* (n 42) para 31. See sec 3.3.

150 Onoria (n 132) 10.

151 Tanzania for instance has a Basic Rights and Duties Enforcement Act 33 of 1994 (BRDE Act) in place. While the Constitution empowers the High Court to determine matters relating to human rights, the BRDE Act determines that all cases on the Bill of Rights will have to be heard and determined by the High Court, through the procedure set out by the BRDE Act. For an explanation of the challenges in the BRDE Act see MKB Wambali 'The enforcement of basic rights and freedoms and the state of judicial activism in Tanzania' (2009) 53 *Journal of African Law* 53.

152 Traditionally contained in an 'Enforcement Clause' of the Bill of Rights. For instance sec 38 of the Constitution of the Republic of South Africa, 1996, indicates the remedies available for violation of rights as 'anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights'. On what constitutes relief under sec 38 the court has held in *Fose v Minister of Safety and Security* 1997 (3) SA 786 CC para 69 that, 'I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the rights entrenched in the constitution cannot properly be upheld or enhanced'.

153 Bayefsky (128) 359.

154 DK Agaba 'Implementing legal accountability to reduce maternal mortality and morbidity in Uganda' (2018) 18 *African Human Rights Law Journal* 136 where the specific measure for realisation of remedies in the context of Uganda are discussed. See *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) where the African Commission considered the effectiveness of the judicial remedial avenues available under the Immigration and Deportation Act as remedies under the domestic legal order.

the right to claim the violation and approach an appropriate body to institute proceedings to vindicate these rights are necessary legislative measures that provide access to remedies.<sup>155</sup>

#### 4.2.3 Administrative measures

Administrative mechanisms determining claims for violation of rights under the Maputo Protocol are included in the ambit of remedies that fall under the definition of article 25(b). In earlier jurisprudence from the African Commission this was not a clearly established principle. In *Alfred Cudjoe v Ghana*, the Commission, in determining what type of remedy was provided at the domestic level, determined that the rules of procedure on the admissibility of complaints required remedies sought from courts of a judicial nature, thereby excluding proceedings before the Ghanaian Human Rights Commission.<sup>156</sup> This was subsequently clarified when the Commission held that the decisions of administrative authorities would qualify, provided that they have the potential to address the violation complained of based on the application of legal principles and not subject to the discretion of executive power.<sup>157</sup> The Court has determined that administrative measures need to be determined based on the facts of the case bearing in mind the nature of the administrative remedy.<sup>158</sup>

National Human Rights Institutions (NHRIs), as administrative bodies, are in many African states a representation of an authority that is tasked with promoting, protecting and offering an avenue for vindication of rights where violations occur.<sup>159</sup> Recognising this critical role, the United Nations has developed criteria by which the independence of NHRIs can be measured in determining the extent to which an NHRI suffices as a measure for procedural access to remedies under the Maputo Protocol in a country.<sup>160</sup>

Measures by member states that can speak to administrative measures to realise article 25(b) include empowering laws and directives that clarify the power of NHRIs and their mandate to provide sufficient and effective remedies.<sup>161</sup> Such laws and directives should detail the jurisdiction of such bodies, the status of their decisions *vis a vis* other judicial, administrative or legislative authorities such as courts, in remedying a violation, that the complaints before them are determined on legal principles

155 See the African Court decision of *Beneficiaries of the Late Norbert Zongo v Burkina Faso* Application 013/2011 (Judgment on Merits) where the domestic laws excluded NGOs standing to bring claims for damages on behalf of victims of human rights violations in cases before criminal courts as an NGO was not a direct victim.

156 Communication 221/98, African Commission on Human and Peoples' Rights, 12th Annual Activity Report (1998-1999) para 14.

157 *Article 19 v Eritrea* (n 130) para 48, see also *Constitutional Rights Project v Nigeria* (I) (2000) AHRLR 241 (ACHPR 1999) para 10.

158 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (2016) 1 AfCLR 668.

159 S Livingston & R Murray 'The effectiveness of national human rights institutions' in S Halliday & P Schmidt (eds) *Human rights brought home: socio-legal perspectives on human rights in the national context* (2004) 137.

160 Principles relating to the Status of National Institutions (Paris Principles), 20 December 1993 UN General Assembly Resolution 48/134.

161 Specific to the role of NHRIs in determining remedies for human rights violations the Paris Principles provide the following:

'A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality; informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them; hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law; making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

rather than discretionary and clarifying the remedies that the bodies have the power to provide to victims of rights violations.<sup>162</sup> A concern with endowing NHRIs with the function of providing access to remedies for violations is the potential for duplication of the role of judicial bodies.<sup>163</sup> This can be avoided with clear laws and directives. Such laws and directives should also reflect the overall intention to offer a less complicated avenue for access to remedies than the formal court processes.<sup>164</sup>

Other bodies created with the purpose of meeting the state obligations under article 25 may include Constitutionally mandated human rights bodies such as Gender Commissions and Commissions on Administration of Justice, provided that they make the determination of the complaint that is lodged before them based on the application of law and are not discretionary.<sup>165</sup> The African Court has held that a commission of inquiry is a remedy that need not be exhausted to file a complaint before it. The reasoning provided by the court was that the commission of inquiry was a quasi-judicial body and as such was not a remedy that needed to be exhausted before approaching the African Court.<sup>166</sup> This reasoning is relevant for the interrogation of exhaustion of remedies as a procedural requirement of the court.<sup>167</sup> However, a commission of inquiry can be a quasi-judicial remedy that makes recommendations to the state that are aimed at providing victims remedies for violations.<sup>168</sup> They can provide a way to ensure accountability for human rights violations.<sup>169</sup>

## 5 State practice

Given that the right to a remedy under article 25 is subject to the attachment to an alleged violation of another substantive right in the Maputo Protocol, it is possible to consider state practice on the enforcement of the right to a remedy as it attaches to each of those substantive rights. However, this assessment is beyond the scope of this chapter as it is captured in discussions on state practice in enforcing any of these rights in various chapters of this Commentary. This section considers the application of the right to remedies as independently recognised under the Maputo Protocol.

### 5.1 Access to a remedy to vindicate rights

States reporting on measures undertaken within their jurisdictions that represent steps towards the realisation of the rights enshrined in article 25 are scattered in different parts of states' reports to the African Commission. The differential approach taken by member states indicates that while many states recognise the obligation to provide remedies for violations within their territories, they do not always recognise measures taken in this regard as advancing the right to a remedy under article 25.

162 Agaba (n 154) 139. Also See W Lichuma 'The role of national human rights institutions in monitoring human rights: a case study of the Kenya National Commission on Human Rights' in P Hunt & T Gray (eds) *Maternal mortality, human rights and accountability* (2013) 59 detailing the powers of the Kenya National Human Rights Commission to determine and order compensation where there is a human rights violation. See the discussion on Uganda's NHRI's similar empowering provisions in KC Esom 'The role of national human rights institutions in promoting international law in domestic legal systems: case study of the Uganda Human Rights Commission' in M Killander (ed) *International law and domestic human rights litigation* (2010).

163 GD Beco & R Murray *A commentary on the Paris Principles on National Human Rights Institutions* (2015) 109.

164 R Langer *Defining rights and wrongs: bureaucracy, human rights, and public accountability* (2007) 155.

165 Rwanda's Ombudsman was for instance found to be an inadequate remedy at the domestic level for vindication of rights as it exercised exclusive and discretionary powers in *Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165 para 72.

166 *Woyome v Ghana* (merits and reparations) (2019) 3 AfCLR 235 para 84.

167 FIDH, Admissibility of complaints before the African Court: Practical Guide, [https://www.fidh.org/IMG/pdf/admissibility\\_of\\_complaints\\_before\\_the\\_african\\_court\\_june\\_2016\\_eng\\_web-2.pdf](https://www.fidh.org/IMG/pdf/admissibility_of_complaints_before_the_african_court_june_2016_eng_web-2.pdf) (accessed 5 May 2023).

168 T Probert & C Heyns 'Commissions of inquiry: valuable first steps towards accountability or smokescreens for inaction?' in T Probert & C Heyns (eds) *National Commissions of Inquiry in Africa: vehicles to pursue accountability for violations of the right to life?* (2020) 331.

169 As above.

Some state reports provide insight into measures undertaken to meet the obligations under article 25, but many reports do not record such measures.<sup>170</sup> For instance, Kenya reported having put in place judicial, legislative and administrative measures that advance the right to remedies without categorising these measures as such.<sup>171</sup> Like many other African states with similar institutions for access to remedies, it reported on the creation of the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administration of Justice that hold constitutional and legal responsibilities to investigate complaints on human rights violations and afford victims remedies.<sup>172</sup> These measures were listed in Part A of the State Report dealing with the African Charter in response to Concluding Observations and Recommendations received but does not link these to article 25 in Part B dealing with the Maputo Protocol. The National Gender and Equality Commission, for instance, is entrenched in Kenya's 2010 Constitution with the mandate to receive, process and investigate complaints from any person who alleges that their fundamental rights against discrimination and gender equality have been violated and to offer redress for such violations.<sup>173</sup>

This is not peculiar to Kenya. A consideration of the state reports recently filed with the African Commission indicates that states generally do not report on article 25 as a substantive entitlement of the women in their territory, with many reports on the Maputo Protocol ending at measures undertaken to implement article 24.<sup>174</sup>

Of the states that have included measures undertaken to implement article 25, there sometimes appears to be a merger of measures undertaken under article 25 and those required under article 8 of the Maputo Protocol. As an example, in 2020 Namibia reported on several measures under article 25. The most relevant to illustrate the conflation between articles 8 and 25 is a collaboration to enable training for a victim-centred approach to investigating and prosecuting gender-based violence cases.<sup>175</sup> While it may appear to be a measure relating to judicial measures for access to a remedy for the violation of article 4 of the Maputo Protocol, it is a measure that should naturally fit into measures to ensure equal access to justice under article 8 of the Maputo Protocol in relation to gender-based

170 Republic of Kenya Combined 12th and 13th Periodic Reports 2015-2020 on the African Charter on human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, April 2020. The report lists measures required under art 25. However, Part B of the State Report ends at measures under art 24.

171 Combined Report of Kenya (2015-2020) (n 170) p 14, para 1 reads, '[t]he Constitution not only recognizes the notion of effective remedies for violations of constitutional rights, but also empowers the judiciary with wide powers to provide redress or relief for violation of rights. Article 22 reads "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened". Article 23 provides the High Court with the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Right. The appropriate remedies which can be ordered by the Court include: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights; an order for compensation; and an order for judicial review. To effectively advance the realization of rights for persons seeking judicial redress and relief, the Chief Justice developed the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The use of the Rules enhance access to justice for all persons seeking to enforce their rights against the State or any other person, whether natural or corporate'.

172 Combined Report of Kenya (2015-2020) (n 170) p 14 para 3.

173 NGEC Investigations, redress and monitoring <https://www.ngeckkenya.org/ThematicAreas/LegalInvestigationsand.Redress> (accessed 23 June 2023).

174 See state reports filed where states end reporting on measures at art 24 of the Maputo Protocol by Republic of Togo 6th, 7th & 8th Periodic Report (2011-2016), Republic of Angola 6th Periodic Report (2011-2016), Republic of Rwanda 11th, 12th & 13th Periodic Report (2009-2016), Democratic Republic of Congo 11th, 12th & 13th Periodic Report (2005-2015), Gambia 2nd Periodic Report (1994-2018), The Kingdom of Lesotho 2nd to 8th Combined Periodic Report (2001-2017), Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Periodic Report (2007-2019) and Cameroon 4th-6th Periodic Report (2015-2019)

175 The Republic of Namibia 7th Periodic Report (2015-2019) on the African Charter on Human and Peoples' Rights and the Second Report Under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) 133.

violence cases. Relevant to the implementation of article 25 would rather be the establishment of an independent administrative institution to redress instances where the trained police officers fail to employ the victim-centred approach to investigating and prosecuting offences resulting in the violation of the victim's rights.

Seychelles reported in its initial report to the African Commission on the Maputo Protocol on the different levels of courts under its Constitution as measures under article 25. It further highlighted the Family Court and the Commission established to investigate and remedy complaints of violations during the 1977 coup experienced in the country.<sup>176</sup> This report was arguably more accurate in capturing the implementation of the obligations under this provision.

Moreover, many states record measures put in place to fulfil the obligations under article 25 as part of their general obligation to promote and protect the rights in the African Charter and the Maputo Protocol. As an example, Rwanda reported on measures under article 25 in the introductory background section of its report. These included the establishment of the National Human Rights Commission, the Office of the Ombudsman and a Gender Monitoring Office.<sup>177</sup> As another example, Zimbabwe reported on the establishment of the Zimbabwe Gender Commission whose functions include the monitoring and investigation of possible violations of rights relating to gender and the securing of redress where rights have been violated and other complementing institutions such as the Zimbabwe Human Rights Commission, the National Peace and Reconciliation Commission, the Zimbabwe Media Commission and the Zimbabwe Electoral Commission as administrative and institutional measures implementing article 2 of the Maputo Protocol.<sup>178</sup> Furthermore, in its introduction section, Angola reported on the establishment and role of the Ombudsman Office.<sup>179</sup>

In addition, as mentioned above, measures that are reported on under Part A, dealing with measures implementing the African Charter, may merit an assessment with respect to their applicability and use for the vindication of women's rights but are often not considered in state practice. Gambia, for instance, reported on establishing the Gambia Police Force Human Rights and Complaints Unit, tasked with receiving complaints of human rights abuses by its officials.<sup>180</sup> Similarly, there was a consideration of the complaints mechanism available in the Labour Tribunal and the Office of the Ombudsman with respect to Part A of the report.<sup>181</sup> As administrative bodies that provide avenues for access to remedies where there is a violation, a consideration of their mandate with respect to complaints by women under the Maputo Protocol would also be suitably located under Part B, which details the implementation measures for the Maputo Protocol, of the report specific to article 25.

176 Seychelles 3rd Periodic Report (2006-2019) 50.

177 Republic of Rwanda the 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples' Rights & the Initial Report on the Implementation Status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa (Maputo Protocol) (2009-2016).

178 Zimbabwe Combined Periodic Report (2007-2019) paras 2.7-2.8.

179 Republic of Angola 6th Periodic Report (2011-2016) paras 14-15.

180 Gambia Periodic Report (1994-2018) 32. See also para 67.1 of Namibia's 7th Periodic Report on the African Charter on Human and Peoples' Rights (ACHPR) and the second report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Report (2020) with respect to the mechanism of the Office of the Ombudsman for access to remedies but not noted under art 25 of the Maputo Protocol.

181 Combined Report of Gambia (n 180) 64.

## 5.2 Access to appropriate gender transformative remedies

Some states have detailed the forms of redress available in their jurisdiction for human rights violations in their state report.<sup>182</sup> A consideration of cases where the provisions of the Maputo Protocol have been enforced within domestic judicial courts indicates the state practice on awarding redress for violations of rights in the treaty.<sup>183</sup> In *Coalition on Violence Against Women et al v Attorney General et al* the Constitutional Court in Kenya determined a petition alleging the violation of rights under *inter alia*, the Maputo Protocol.<sup>184</sup> The claim arose from sexual violence perpetrated against the petitioners by state and non-state actors during post-election violence. The court ordered compensation to four of the survivors amounting to Ksh4 million, approximately USD 40,000 for each petitioner, as a consequence of finding that the petitioners' rights had been violated.<sup>185</sup> The court also made a declaration that the successful petitioners' rights had been violated.<sup>186</sup> In this case, the petitioners made a claim for other forms of redress such as satisfaction and rehabilitation. The court did not order any structural transformative measures sought by the petitioners as forms of satisfaction.<sup>187</sup> The court also failed to determine a claim for rehabilitation made by the petitioners.<sup>188</sup>

In *Center for Health, Human Rights & Development v The Executive Director, Mulago Referral Hospital*, the High Court of Uganda made an order that was in many respects an illustration of the transformative potential of appropriate gendered redress.<sup>189</sup> The petitioners filed a claim seeking declaratory relief and compensation for the violation of their rights. The individual petitioners in the case were a couple. The woman gave birth to two babies at a state hospital. Upon discharge, she was only given one of the babies and informed that the other was born dead. The individual petitioners demanded the dead baby's body and were handed a body by the hospital staff that they disputed was that of their baby. A DNA test confirmed their suspicions. They filed a case with the police of a missing baby and proceeded with the claim before the Court.<sup>190</sup> The Court found a violation of various human rights, including the right to health in the Maputo Protocol.<sup>191</sup> The Court made the requested declaratory orders and awarded compensation.<sup>192</sup> However, the court did not stop at this. The Court was at pains to detail the systematic problems in the hospital that put the lives of pregnant women and delivering mothers and their babies lives at risk,<sup>193</sup> and a bigger problem in the country with respect to access to ante-natal and post-natal healthcare for poor and rural women.<sup>194</sup> It proceeded to order that an investigation

182 Namibia cited the Constitutional provisions entitling citizens to access to remedies including compensation for rights violations in its Initial Report to the African Commission on the Maputo Protocol (2015) para 54.

183 See Equality Now 'Breathing life into the Maputo Protocol: jurisprudence on the rights of women and girls in Africa' (2018).

184 Petition 122 of 2013.

185 Petition 122 of 2013 at para 172.

186 As above.

187 The petitioners for instance sought to 'compel the Attorney General to establish an independent body specifically responsible for monitoring the provision of reparations to victims of SGBV during PEV, analysing and reporting on systemic deficiencies on the provision of effective remedies for SGBV victims, including investigations and prosecutions of the crimes committed against said victims, and periodically reporting to this Honourable Court on the implementation of the Honourable Court's judgment in this case'.

188 The petitioner claimed for the 'creation of a database of all victims of SGBV committed during PEV and to ensure such victims are provided appropriate, ongoing medical and psychosocial care and legal and social services'.

189 *Center for Health, Human Rights & Development & 2 Ors v The Executive Director, Mulago Referral Hospital & Anor* (Civil Suit 212 of 2013) [2017] UGSC 10 (24 January 2017) (*Mulago*).

190 *Mulago* (n 189) paras 2-4.

191 *Mulago* (n 189) paras 63-66.

192 *Mulago* (n 189) para 67(viii).

193 *Mulago* (n 189) para 57.

194 *Mulago* (n 189) para 54.



be conducted by the police and a report provided within six months as a form of restitution.<sup>195</sup> It also ordered that the staff that handled the newborn be held accountable for the movement of the baby, representing satisfaction by holding the individual perpetrator accountable. Further, the hospital was ordered to take steps to address the inefficiencies in the movement of babies in the hospital and file periodic progress reports for two years with the court.<sup>196</sup> The court reserved the right to make further orders regarding the implementation of this last-mentioned order.<sup>197</sup> In addition to requiring reports from the hospital, the court ordered that the NGO that was the institutional petitioner in the claim, acting in public interest, was to periodically monitor the progress at the hospital in addressing the systemic challenges that existed and provide the court with a counter-report to that filed by the hospital.<sup>198</sup> This is a form of satisfaction that goes to ensure that the systematic challenges in the hospital are addressed and the violations are not repeated. More importantly, it demonstrated the possible ways in which authorities adjudicating rights claims can address the challenge of enforcing satisfaction. Rehabilitation was considered in the court order in that the individual petitioners were to be provided psychosocial care and counselling services to enable their healing.<sup>199</sup>

While not reported to the African Commission in the state reporting process, there are instances of good state practice in implementing measures to enable access to remedies. The enactment of the Victim Protection Act 2014 in Kenya is to provide clear provisions for avenues for and forms of redress that victims of abuse are entitled to. As a legislative measure, it defines and makes provision for restitution, compensation, rehabilitation and other forms of reparations. Another example is Kenya's Counter Trafficking in Persons Act 2012. It makes provision for the offence of human trafficking, a violation of the Maputo Protocol, and creates an obligation on the state to put rehabilitative measures for victims in place.<sup>200</sup> As a form of reparation, the Act specifies the types of measures that can be awarded.

## 6 Conclusion

The state obligations under article 25(a) and (b) have been elaborated here. It appears from the state reports under the Maputo Protocol and the African Charter that member states in reporting on the compliance with the substantive rights contained in article 1 to article 24 of the Maputo Protocol highlight the judicial measures in place for remedial action.<sup>201</sup> However, the state obligations created under article 25 of the Maputo Protocol call for access to remedies and access to a variety of institutions before which violations can be vindicated. Enabling access to both judicial and extra-judicial or quasi-judicial processes for access to remedies is key to meeting the obligations in this provision. Judicial

195 *Mulago* (n 189) para 67(i).

196 *Mulago* (n 189) para 67(iii).

197 *Mulago* (n 189) para 67(vii).

198 *Mulago* (n 189) para 67(v).

199 *Mulago* (n 189) para 67(vi).

200 Section 20(2)(j) of the Counter-Trafficking in Persons Act 2014. The Act provides for: 'measures necessary to rehabilitate victims of trafficking in persons and in particular the – (i) implementation of rehabilitative programmes including education and protective programmes for the victims of trafficking in persons; (ii) provision of counselling services and temporary shelter to victims of trafficking in persons; and (iii) establishment of centres and programmes for intervention at various levels of the community'.

201 This practice has developed despite clear guidance from the African Commission on what types of remedies it calls for in the Guidelines on State Reporting on the Maputo Protocol available at <https://www.achpr.org/statereportingproceduresandguidelines>. States are directed to list measures under the categories including remedies. On remedies, the Guidelines indicate that the measures should not be limited to judicial remedies. This guideline asks that state list: 'Remedies (judicial and administrative (extra-judicial)) (What are the available avenues for redress in the event of a breach of the particular rights provided in the Protocol? Have any cases been decided in respect to each of the rights; and if so, have these decisions been implemented?)'.

bodies are the focus of state attention with respect to meeting their obligations to ensure access to remedies.

Article 25 is, in practice, employed in vindicating the violation of any one of the substantive rights in the Maputo Protocol. As such the redress and the remedy to be claimed and obtained where a right is violated must aim to transform the social context that gave rise to the violation. Chapter 9 details the gender transformative aims of article 8 of the Maputo Protocol in ensuring access to justice for women. While that discussion is specific to judicial mechanisms, the transformative goal of the Maputo Protocol requires that all avenues for vindication of women's rights result in substantive equality for women. Measures that are detailed there with respect to judicial mechanisms can similarly be assessed when looking at the quasi-judicial and extra-judicial mechanisms implemented under article 25.

Similarly, the African Commission has articulated that the goal of redress is transformation.<sup>202</sup> Redress must occasion changes in social, economic and political structures and relationships in a manner that deals effectively with the factors which allow for gender inequality and the persistence of patriarchal norms. This transformation requires a broad interpretation of state obligations to provide redress, including putting in place legal, administrative and institutional frameworks to give effect to the right to redress.<sup>203</sup> A holistic interpretation of this state obligation requires a state that recognises that rights without remedies, whether judicial, quasi-judicial or extra-judicial, are hollow. In this sense, upon ratification, every attempt by a member state to domesticate or implement substantive rights in the Maputo Protocol must reflect an element of remedial avenues where there is non-compliance. Such a reflection must consider social, cultural, and economic barriers to women exercising their rights under article 25 and intentionally seek to address them when setting up the mechanisms for access to remedies.

Reparations are central to the realisation of the right contained in article 25. Engendering reparations calls for the identification of adequate and transformative remedies.<sup>204</sup> Reparations targeted at addressing the systematic failures that result in the violation of women's rights are just as important as those targeted at repairing the harm suffered by the individual. Those preparing claims on behalf of women before competent institutions have an important role to play in ensuring that redress sought from these processes is impactful and articulates the appropriate form of redress, of the options available to victims of rights violations, to ensure transformation of the society.<sup>205</sup> For instance, there is a dire need for submissions before the regional and sub-regional institutions discussed with details regarding the computation of claims for compensation or damages that assist the courts in determining these cases. This necessitates the preparation and submission of evidence to support these claims. As noted in the cases from the ECOWAS Court relating to compensation, the Court has decried insufficient evidence on the quantum of the amount claimed or the paucity of submissions before it to enable it to make a more informed determination on compensation and other appropriate remedies. While emphasis before the ECOWAS Court was on damages, many human rights courts or other remedial institutions available in member states are limited to awarding the redress that is articulated in the claim or petition filed before it.<sup>206</sup> The role of legal representatives or other actors supporting women in vindicating their rights to articulate transformative remedies cannot be overemphasised.

202 General Comment 4 (n 52) para 8.

203 As above.

204 Rubio-Marfn & Sandoval (n 63) 1070.

205 REDRESS (n 112) 5. Analysing the practice of awarding rehabilitation before the Human Rights Committee, Prof Sir Rodley stated that 'there is little practice on the issue partly because the applicants and NGOs rarely raise it before the HRC'.

206 *Joseph John* (n 57) para 102. See also *Kennedy Gihana and Others v Rwanda* (merits and reparations) (2019) 3 AfCLR 655 para 139; see also *Reverend Christopher Mtikila v Tanzania* (reparations) (2014) 1 AfCLR 72 para 40; *Lohé Issa Konaté* (n 81) para 15(d); and *Elisamehe v Tanzania* (merits and reparations) (2020) 4 AfCLR 265 para 97.

Such determination is central to the realisation of article 25 and, by implication, all other substantive rights of the Maputo Protocol.<sup>207</sup>

207 Rubio-Marín & Sandoval (n 63) 1076.