International Center for Transitional Justice

RESEARCH REPORT

Repairing from the Bench

From Finding Responsibility to Fashioning Judicial Redress

January 2024

ICTJ Justice Truth Dignity

Cover Image: A man rides his bikes past a mural in Cali, Colombia, that reads, "We embrace the memory of those who were taken, for justice and memory. From 1985 to 2012, 25,000 victims of forced disappearance." The photo was taken on April 8, 2016, the eve of the National Day of Remembrance and Solidarity with Victims of the Armed Conflict. (Luis Robayo/AFP via Getty Images)

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Adriana Garcia Garcia, Fatima Yasmin Bokhari, and Masha Lisitsyna

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About the Authors

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Repairing from the Bench draws on research conducted by Masha Lisitsyna, Adriana Garcia Garcia, and Ana-Elena Fierro Ferraez, professor at Instituto Tecnologico de Monterrey, Mexico, from 2016 to 2019 that resulted in the *Guide on Reparations,* published in 2019 in Spanish by Centro de Investigacion y Docencia Economicas (CIDE) and the Federal Administrative Tribunal in Mexico.[1] The 2019 guide was based on desk research and interviews with human rights advocates, academics, and domestic judges and covered the jurisprudence of the Inter-American Commission on Human Rights, Inter-American Court of Human Rights (IACtHR), and United Nations treaty bodies and domestic court decisions in Argentina, Brazil, Chile, and Colombia. *Repairing from the Bench* builds on information in the 2019 guide and broadens the discussion with analysis of decisions from select countries in South and North America, Africa, Asia, and Europe, mapping judges' creative crafting of measures of reparations to enhance access to justice for victims and deter serious human rights violations.

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About ICTJ

The International Center for Transitional Justice (ICTJ) works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit **www.ictj.org**

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Executive Summary

Violence perpetrated by the police and the military, including through torture, killing, and enforced disappearance, is dominating news around the world. Survivors, victims, activists, and lawyers on all continents have filed lawsuits against these violations in judicial processes, including criminal, civil, constitutional, and administrative proceedings. Among the key objectives for victims are to seek the truth and confirmation from authorities that a wrong was done to them and to obtain reparations. The premise that harm should be repaired is routine in domestic legal systems around the world. But what does the obligation to provide reparations mean, particularly when serious human rights violations are at issue? While reparations may be narrowly defined as the relief afforded to a successful claimant in a given proceeding, in practice they can take a range of forms.[1] The right to reparation has expanded in recent decades through interpretations of international norms, in particular, the right of victims of human rights violations to an effective remedy.[2]

This report draws on that evolving interpretation of international law and jurisprudence, much of it developed by regional human rights institutions in Africa, the Americas, and Europe; UN treaty bodies; and some innovative domestic courts. It identifies a series of judicial decisions interpreting international human rights law that have affirmed the content of the right to reparation for serious human rights violations that have upheld the rights of victims as much as possible. More than an analysis of the state of the field of the recognition of the right to reparation, the report provides guidance to human rights defenders and courts that are trying to respond to victims of such violations in ways that affirm their dignity and rights. This includes, in general, decisions that:

- *Offer effective access to remedies* that provide legal aid and are prompt and independent of the outcome of criminal cases against the alleged perpetrator of the human rights violation in question, including voiding statutes of limitations for reparations for serious human rights violations, guarantees of victims' rights, and monitoring of implementation;

- *Apply adequate measures,* reflecting the specificities of each individual case and characteristics of the victims to guarantee that the reparations granted respond to the harms suffered and are capable of addressing the consequences of the violations;

1 See Dinah Shelton, *Remedies in International Human Rights Law,* second ed. (Oxford: Oxford University Press, 2005), 16.
2 International tribunals have produced a significant body of work on reparations in human rights matters, in particular the Inter-American Court of Human Rights and Inter-American Commission on Human Rights. See Claudio Grossman, Agustina del Campo, and Mina A. Trudeau, *International Law and Reparations: The Inter-American System* (Atlanta, GA: Clarity Press, Inc., 2018).

- *Be preventive,* including, where necessary, transformative reparations bringing existing institutional practices into conformity with legal requirements;
- *Be comprehensive,* taking into account not only compensation but also measures of restitution, satisfaction, rehabilitation, and non-repetition; and
- *Be non-discriminatory,* including through adopting a gender perspective.

As these standards suggest, granting reparations, even if effective remedies exist, is not an easy task. Violations such as summary execution, enforced disappearance, torture, and sexual violence result in suffering and harms that are irreparable. The language of reparation seems inappropriate to address those harms, particularly because its legal origins derive from harm caused to property where restitution to the prior state or situation and compensation is generally possible. This problem becomes even more challenging when violations are widespread or massive, committed by state agents, or resulting from state policy. Indeed, it is hard to imagine a sole mechanism able to fully achieve all these characteristics. Thus, in the context of widespread violations, victims have used both political and legal avenues to achieve relief, and the urgency of their suffering has prompted the creation of remedies in both spheres. Governments have created reparations programs, and courts at both the international and domestic levels have increasingly included the provision of reparations in their rulings. And while these spheres are often described as being in tension with each other, the relationship between them can in fact be quite symbiotic.

Reparations programs refer to administrative proceedings in which victims are defined in standardized terms in a statute that provides a relatively fixed, tabulated amount of compensation for all who were harmed. These programs usually share the advantage of the relative accessibility of their benefits and the efficiency of their delivery to large numbers of victims. These programs, together with other transitional justice institutions, have proved effective in some countries.[3] They require decisive political will, which often depends on strong victims' movements and civil society groups that exercise pressure and contribute political capital. They require the creation of institutions and the investment of considerable resources. When these conditions exist, such programs can promote social reflection on the impact of the violations and the factors that contributed to them, which sometimes can lead to institutional or legal reforms and broad memorialization efforts, like national museums. The sustainability of the allocation of resources and overall implementation, though, depends on their degree of acceptance and their level of institutionalization.

Judicial reparations, however, often guarantee those victims who are able to exercise these judicial remedies access to justice in an adequate and comprehensive manner that may justify the additional barriers to entry and higher costs. Certain elements of the *comprehensiveness* standard of reparations are particularly important in this regard, specifically *satisfaction, compensation,* and *non-repetition. Measures of satisfaction,* for example, can include those aimed at verifying the facts and disclosing the truth as well as judicial and administrative sanctions against the persons responsible for the violations. *Measures of compensation* are often defined

3 There is a wealth of thoughtful literature and analysis on the various reparations programs implemented by different states as part of transitional justice efforts and other state policy initiatives. Some countries like Ghana created a truth-commission process to oversee reparations programs. In Nepal and Sierra Leone, the postcolonial state designated existing agencies to take charge of post-conflict humanitarian programs. In other countries institutions to implement reparations policy have been established with short (for instance, three years in the Philippines) or long (for instance, 10 years in Colombia, recently renewed for additional 10) periods to implement as well as permanent programs (like in Chile). For more information on reparations programs, see Pablo de Grieff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006).

based on individualized assessments of the economic impact that the violation had on the victim. They can also have a sanctioning effect if the individual or agency responsible is made to pay the compensation. *Measures of non-repetition* can take a range of different forms, including institutional, legal, and structural reforms addressing the factors that contributed to the onset of the violations, even if court-ordered structural reforms are sometimes ignored by governments and policymakers.

Judicial reparations are better suited than administrative programs to uncovering the facts and ordering sanctions, including penal sanctions if applicable, and non-repetition measures that respond to the direct factors that contributed to the specific violation. In this sense, judicial reparations may contribute more substantively through satisfaction, compensation, and non-repetition to broader objectives of transitional justice, such as *truth, accountability,* and *prevention* when there is not enough political will to implement these policies. In addition to their more immediate effects, judicial proceedings can bring enhanced attention to these objectives in appropriate cases, particularly if the judgments begin to establish norms and, by doing so, create a more conducive environment for political actors to take broader scale legislative or executive action.

This guide explores how domestic courts have provided judicial reparations at the national level. Two relevant questions are considered: Have they in fact complied with international decisions and relevant norms regarding reparations? Have they delivered by doing those things that we believe courts are better suited to do on behalf of victims? At the domestic level, very few analyses exist on how domestic judges grant reparations or the compliance of their decisions with international law, jurisprudence of international human rights courts, and decisions by international human rights bodies that govern reparations or that can be useful guidance to fully affirm the right of victims to adequate, effective, and prompt reparations. It is even harder to determine if truth, accountability, and prevention measures will be considered, given that judicial reparations at the domestic level can be obtained through different types of judicial remedies. Reparations can be obtained through a variety of avenues across different countries, ranging from constitutional, administrative, criminal, or human rights' claims to private law and civil lawsuits.

This guide seeks to fill this gap through the analysis of decisions of domestic courts around the world with different specialties. In an attempt to provide insights from different continents and legal systems, this guide discusses examples of judicial reparations for violations related to the right to life and personal integrity and the prohibition against torture in 24 countries: Argentina, Bangladesh, Brazil, Canada, Chile, Colombia, France, India, Indonesia, Kenya, Korea (Republic of), Kyrgyzstan, Malaysia, Mexico, Nepal, Pakistan, the Philippines, South Africa, Sri Lanka, Thailand, Uganda, the United Kingdom, the United States of America, and Zambia. Unlike previous studies, it takes a granular look at a range of national court rulings, drawn from a variety of situations, rather than the better documented cases of reparations ordered by the international tribunals or administrative programs.

While the research offered here is not comprehensive or representative, it is illustrative of visible trends that reveal how courts have addressed measures of reparations. Our findings suggest that: 1) some judges from the highest domestic courts around the world are acknowledging the characteristics of reparations established by international standards; 2) the diversification of judicial mechanisms and judicial independence at the domestic level have fostered innovation in crafting reparations; 3) as a result, some judges around the world are crafting creative reparations that contribute to the objectives of truth, accountability, and prevention. This report concludes by noting that implementation of decisions regarding judicial reparations at the domestic level

remains a key challenge. The guide provides a selection of promising decisions that, at the least, comply to some degree with the criteria of reparations that uphold victims' rights. The guide aims to be helpful to judges, litigators, activists, victims, and victims' representatives and provide them with useful examples and inspiration for what to request from the courts.

Findings

Domestic Courts' Incorporation of International Standards Regarding Reparation

International bodies' formal and informal interpretations of the right to a remedy have shaped and given content to the right to reparation. Several domestic courts, including those in Argentina, Chile, Colombia, and Mexico, often cite international jurisprudence to give content to the right to obtain reparation at the domestic level. Higher courts in several jurisdictions in Asia also invoke international treaties and jurisprudence in both assessing and granting relief to victims of human rights violations. We argue that regional judicial bodies, in particular, are influencing domestic courts. This influence is very clear in Latin America, which has a stronger tradition of monism. Several decisions by domestic courts in the region cite the Inter-American Court of Human Rights (IACtHR) jurisprudence. However, even in countries without a regional body, such as India, Pakistan, and Nepal, domestic judges have cited decisions from the European Court of Human Rights, IACtHR, and the UN treaty bodies in their decisions. This influence suggests that judges are incorporating international standards regarding reparation through decisions by international bodies.

Diversification of judicial mechanisms, judicial independence

The diversification of mechanisms to obtain reparations at the domestic level has triggered innovation in crafting reparations. The emergence of remedies in human rights law has resulted in the focus moving from finding responsibility to fashioning redress. Previously, criminal judges had the monopoly on deciding cases regarding serious human rights violations. As such, they focused on criminal accountability, with other measures of reparations accessory to their core function. However, victims' demands for other measures of reparation have increased in many countries, and victims and their lawyers have filed claims before different types of judges to obtain reparations. This has required constitutional, civil, and administrative judges to get involved. Due to their specialties, these judges do not focus on determining mere criminal responsibility but also on broader degrees of responsibility derived from human rights violations and on addressing their consequences and/or the factors that contributed to them in a more holistic fashion. Furthermore, judicial independence has also played a role in judges' activism in the world of reparations. In some countries in Asia, for instance, judges are not constrained by the submission of cases to their courts. They have powers to decide cases even in the absence of a specific lawsuit. These powers have prompted some judges to exercise their function in a more comprehensive manner, which may have influenced them to craft more effective reparations.

Contributing to Accountability

The incorporation of international standards into domestic court decisions, the diversification of judicial mechanisms at the domestic level, and the independence of domestic judges help to explain the increasingly innovative nature of judicial reparations. This innovation includes

contributions to accountability. Traditionally, the accountability component of reparations for serious human rights violations was directed to criminal punishment. While typically constitutional and administrative judges do not focus on punishment, leaving this issue for criminal proceedings, in several decisions domestic judges have included directions to pursue criminal investigations against individual perpetrators and to initiate departmental proceedings, including against those who may be indirectly responsible, through the notion of command responsibility. In Colombia, most of the Administrative Court decisions include measures of satisfaction requiring the Office of the General Attorney of the Nation to initiate or continue criminal investigations against perpetrators. One of the most interesting findings of this research, however, is that reparations for human rights violations increasingly incorporate financial accountability. Some judges are trying to not only provide relief to victims by granting compensation but also to achieve a measure of accountability by targeting perpetrators' assets and income, even in human rights cases filed against the state or a specific agency. In its 2020 report on financial accountability, REDRESS argues that seizing the assets of perpetrators and applying these assets to fund reparations serve as both a form of accountability and an effective form of satisfaction for victims.[4] Several domestic judicial decisions from Belgium, Kenya, India, Pakistan, Uganda, and the United States included in this guide highlight the accountability component of reparation, even when only granting compensation.

Contributing to Prevention

If they are carefully devised, reparations can help to limit illegal behavior of state—and sometimes non-state—actors. This research demonstrates that some judges are currently paying more attention to the preventive effect of reparations. Although most of the time judges are more concerned with granting relief to survivors or victims' families, this guide includes multiple domestic decisions where the judge explicitly established that one reason for granting reparations in cases of human rights violations is to prevent similar violations in the future. In doing so, they examine the context; identify structural causes, patterns, or policies that violate human rights; and call for future preventive measures.

The preventive potential of reparation is usually framed within the non-repetition component of the comprehensiveness standard. We observed that non-repetition measures have been crafted in a much more specific manner, requiring more from governments than compliance with legal rules.

Contributing to Truth

Some judges at the domestic level have crafted measures of reparation with a special focus on truth. Usually, these measures are considered measures of satisfaction and can be individualized as public apologies, but some courts are also ordering the creation of truth commissions, and many others are ordering the government to publish the truth through different mechanisms, such as memorials or public registers.

On a final note, this report shows that even though some judges are taking seriously their power to grant reparations by thinking thoroughly about reparation measures that can contribute to truth, accountability, and prevention, implementation is still an area in need of judges' attention. States have an obligation to take steps to ensure that judicial and administrative decisions

4 REDRESS, *Financial Accountability for Torture and Other Human Rights Abuses Framework, 2020,* https://redress.org/financialaccountability/

on reparations are enforced and implemented. The effectiveness of the remedies to obtain reparations depends on the actual implementation of the measures obtained for reparation. While implementation of the decisions is typically the obligation of the executive, the courts could pay more attention to the need for implementation of their decisions. Judgments do not specify monitoring mechanisms or often provide specific time frames for implementation. In practice, despite progressive jurisprudence from the courts in several countries, judicial decisions often have not led to actual changes of situation for victims and survivors who brought cases due to challenges of non-implementation. Further research is needed to identify existing gaps in implementation and suggest specific actions to ensure effective implementation of reparations.

Introduction

Reparation for harm caused is an indispensable element of international and national norms. At the international level, since the establishment of the Permanent Court of Justice after World War I, it has been clear that states have an obligation to provide reparations to other states.[1] With the development of international human rights law, this obligation among states has derived as a right that victims of human rights violations can claim against states, through mechanisms that those states need to establish.[2] Individual victims of human rights violations have been recognized as entitled to reparation by the responsible state in international fora.[3] In the context of criminal responsibility, the Rome Statute of the International Criminal Court also recognizes victims' right to demand reparations from those found guilty, with the court invariably paying compensation so far through its Trust Fund for Victims, because perpetrators have claimed to have no assets. Finally, there is broad acceptance at the domestic level about the obligation to grant reparations. At least 60 federal constitutions in the world spell out the right of victims of human rights abuses to obtain reparation.[4] Although currently there is more clarity on the existence of a right to obtain reparations and the characteristics of such reparations, the

1 As the Permanent Court of Arbitration in Chorzów Factory (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17 at 29 establishes: "The breach of an engagement involves an obligation to make reparations in an adequate form." This case is one of an unlawful expropriation and in such cases expropriating sates must in addition to paying the compensation due in respect of lawful expropriation, pay also damages for any loss continued by the injured party. Moreover, the International Law Commission Articles on State Responsibility provides a refined codification of precedents and doctrines of international law relative to reparations,"
http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.

2 Some important human rights instruments have included relief for individuals, such as Article 10 of the Universal Declaration of Human Rights; Article 10 of the American Convention on Human Rights; Article 14 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment; Article 9 of the Inter-American Convention to Prevent and Punish Torture; and Article 50 of the European Convention for the Protection of human Rights and Fundamental Freedoms.

3 The first inclusion of individuals appears in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J., ¶¶ 152–153 (July 9), making it concrete rights previously established by certain conventions, like victims' right to effective remedies.

4 Bolivia Const. art. 113; Central African Republic Const. art. 18; Colombia Const. trans. art. 66; Democratic Republic of the Congo Const. art. 155; Costa Rica Const. art. 41; Ecuador Const. arts. 53 and 57; Fiji Const. art. 173; Iran Const. art. 171; Italy Const. art. 24; Madagascar Const. art. 9; Malawi Const. arts. 137 and 144; Maldives Const. art. 144; Malta Const. arts. 34 and 37; Mauritius Const. art.5; Mexico Const. art. 1; Moldova Const. art. 20; Montenegro Constitution Art. 38; Morocco Const. art. 122; Mozambique Const. arts. 58 and 92; Namibia Const. art. 25; Nepal Const. arts. 21–24; New Zealand Const. art. 83; Nigeria Const. art. 35; Panama Const. art. 49; Papua New Guinea Const. art. 137; Philippines Const. arts. III and XIII; Poland Const. arts. 77; Portugal Const. arts. 29, 59 and 60; Romania Const. arts. 44 and 52; Articles 42; Russian Federation Const. arts. 52 and 53; Saint Kitts Const. art. 5; Saint Lucia Const. art. 3; Saint Vincent and the Grenadines Const. art. 3; Serbia Const. art. 35; Seychelles Const. art. 18; Sierra Leona Const. art. 17; Slovenia Const. art. 26; Solomon Islands Const. art. 17; Somalia Const. art. 111; Swaziland Const. arts. 35, 106 and 121; Syrian Arab Republic Const. art. 53; Tajikistan Const. art. 21; Timor-Leste Const. arts. 31 and 53; Trinidad and Tobago Const. art. 14; Turkey Const. arts. 19 and 129; Turkmenistan Const. art. 44; Uganda Const. arts. 4 and 23; Ukraine Const. arts. 32, 50 and 56; United States Const. Part I, Field 9, Matter 9.1; Tanzania Const. art. 30; Uruguay Const. art. 312; Vanuatu Const. arts. 6 and 53; Venezuela Const. art. 30; Yemen Const. art. 48; Zambia Const. art. 28; and Zimbabwe Const. art. 50.

field at the domestic level is still evolving, with incipient steps in state practice complementing existing international jurisprudence.

Reparation may be narrowly defined as the relief afforded to a successful claimant in a given proceeding, but more broadly speaking it can in practice take a wide range of forms.[5] Characteristics of how reparations should be granted has evolved and different human-rights bodies have issued different interpretations. Although not systematized, there are specific characteristics that international instruments and bodies and domestic courts with decisions that were reviewed for this report have usually recognized as governing the obligation of states to provide reparation for serious human rights violations. First, reparations must be *effective*. Based on our review of international and domestic standards and jurisprudence, the characteristics of remedies to obtain reparations that directly affect their effectiveness should include: 1) existence of provisional measures, when pertinent, 2) independence of mechanisms to obtain reparation from criminal proceedings' outcomes, 3) non-application of the statute of limitations, 4) non-restrictive interpretations and flexibility of the process to access reparation, 5) respect for victims' rights, and 6) monitoring mechanisms for implementation. Second, reparations must be *appropriate;* that is, they must reflect the specificities of each individual case and the characteristics of the victim(s). Third, reparation must comply with the purpose of preventing future violations. Fourth, reparation must be *comprehensive.* This supposes that reparation must incorporate measures for the different types of harm and loss suffered by victims of human rights violations, including not only compensation but also restitution, satisfaction, rehabilitation, and non-repetition. Finally, *nondiscrimination* is necessary when granting reparation; therefore, the perspective of gender and other relevant characteristics must be incorporated.

Reparation can be obtained at both the international and national levels. At the international level, regional human rights conventions establish mechanisms for countries that have accepted their jurisdiction. Also, complaint mechanisms exist in the UN system for countries that have accepted them. Following the subsidiary principle governing them, they usually require the exhaustion of domestic remedies. At the domestic level the avenues of obtaining reparation are various. Nowadays, mainly two mechanisms to obtain reparation coexist,[6] judicial reparations and (administrative) reparations programs. It is generally accepted that judicial reparation is granted by a judge, in the context of a specific case before a court that awards reparation based on the particular harm experienced by each victim. Reparations programs, on the other hand, refer to administrative proceedings in which victims are defined in standardized terms in a statute that provides, in addition to other measures, a relatively fixed, tabulated amount of compensation for all.[7] Several countries offer victims the option of pursuing reparation through one mechanism or another. Victims can choose between mechanisms because administrative reparations programs cannot preclude judicial reparations and, when appropriate, judicial reparations should consider reparations programs.[8]

Additionally, the IACtHR has stated that "Administrative programs for reparation, and other means of normative actions or of another nature which coexist with the same, must not cause an obstruction to the possibility of the victims, in accordance with their rights to guarantees and

5 See Shelton, *Remedies,* 16.
6 IACHR, "Report on Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights," OEA/Ser.L/V/II.129.Doc. 4, September 7, 2007, ¶ 104.
7 Jaime E. Malamud'Goti and Lucas Sebastian Grossman, "Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies," in *The Handbook of Reparations,* ed. Pablo de Greiff (Oxford: Oxford University Press, 2006).
8 Clara Sandoval, "Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes," *The International Journal of Human Rights,* 22:9: 1192–1208, DOI: 10.1080/13642987.2016.1268439.

judicial protection, commencing a lawsuit to claim reparations."[9] For that reason, administrative programs must not prevent the possibility of victims' accessing an effective judicial remedy that guarantees them reparation. In recent cases, the IACtHR took into account if the victim had already obtained some reparation through administrative programs.[10] It has also ordered that the implementation of measures such as rehabilitation, compensation, restitution, or non-repetition should continue to be dealt with by administrative programs for reparation.[11] Finally, although the IACtHR in the beginning did not analyze or make a statement on other means to obtain reparation at the national level, recently it has indicated that, because there are national mechanisms to determine forms of reparation, "these procedures and their results must be taken into consideration if the same satisfy the criteria of objectivity, reasonability and effectiveness."[12]

As such, the IACtHR set out rules to enable the coexistence of administrative programs and judicial reparations to enhance victims' rights. Giving victims the choice between them enhances their right to obtain reparation because each mechanism offers different advantages, depending on the specific circumstances and contexts of the case. It also enables the system to deliver different measures of reparation that can improve the system as a whole. As explained before, reparations should be accessible; promptly granted; adequate; comprehensive, including measures of restitution, compensation, satisfaction, rehabilitation and non-repetition; and gender-neutral, and they should prevent future violations and transform unjust circumstances. The coexistence of administrative programs and judicial reparations may help to achieve all of these characteristics of reparation.

While judicial reparations are often associated with individual claims, reparations programs are traditionally associated with mass serious human rights violations in the context of political and post-conflict transitions in some states and for historical injustices. They derive from political decisions, even if sometimes those decisions respond to pressure exercised through litigation or even judicial settlements. Examples of post-authoritarian or post-conflict programs include the diverse policies implemented by Argentina through different waves of policymaking, including in 1986 in immediate response to the recommendations made by the National Commission for the Disappeared and in the mid 1990s resulting from political pressure derived from decisions by the Inter-American Commission of Human Rights and a growing victims' movement that could find few other avenues for acknowledgment and accountability. In Chile, different policies coincided or followed the creation of the National Commission for Truth and Reconciliation ("Rettig Commission") in the early 1990s and other waves of policies responding to increased pressure from victims' groups in the decades that followed, including the creation of the National Commission on Political Imprisonment and Torture Report ("Valech Commission"), which expanded reparations to survivors of political imprisonment and torture. Currently, similar policies are being discussed or have been already enacted in response to the repressive violence exercised by state agents during the massive 2019 protests. Reparations have also been implemented as interim measures or in response to recommendations of truth commissions, as in Ghana, Guatemala, Morocco, Peru, Sierra Leone, South Africa, Timor Leste, and more recently Tunisia. A partial program is also being implemented in Côte d'Ivoire, following

9 García Lucero et al. v. Chile, Preliminary objection, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 267, ¶ 190 (August 28, 2013).
10 Río Negro Massacres v. Guatemala, Preliminary objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 300 (September 4, 2012); García Lucero et al. v. Chile; Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270, ¶ 474 (November 20, 2013).
11 Sandoval, "Two Steps Forward."
12 Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213 ¶¶ 139 and 140 (May 26, 2010); and Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, ¶ 37 (November 30, 2012).

recommendations by a national truth commission. Some remarkable post-conflict and even mid-conflict reparations policies are being implemented in Colombia and more partially in the Balkans and Iraq. Other reparations policies are the product of political processes and negotiations, some of them deriving from litigation or judicial settlements. Often there is not just one policy that is capable of addressing the different harms caused, as in the case of the different programs implemented by Germany for crimes committed by the Nazi regime, which followed initial interstate reparations in the 1950s, followed by massive processes negotiated with survivors' organizations in the following two decades and expanded through a program derived from a combination of judicial settlements and negotiations in subsequent decades. More recently, the city of Chicago approved the first municipal reparations package in the United States for survivors of torture under former Police Commander Jon Burge.[13] Negotiations between Germany and the government of Namibia on a "reconciliation agreement" that would include an apology and aid payments towards infrastructure, healthcare, and job-training programs related to serious abuses of rights during colonial occupation, while controversial and criticized for lack of participation and other flaws, is an example of an attempt to address historic grievances.[14]

Such programs reflect a political judgment about how to offer redress and foster reconciliation and closure. Some of them are rooted in, and often in response to, judicial affirmations of the state's legal obligation to provide reparation, but others constitute humanitarian assistance, provision of development cooperation, or voluntary gestures, recognizing political and moral responsibility but not a legal obligation to repair. While causal links are not always easy to establish, many of the administrative reparations programs are preceded by litigation, and whether survivors win, lose or have their suits dismissed in the court, these lawsuits often serve as one of the catalysts for governments to offer a settlement, a deal, or a reparations package.[15] Before the city of Chicago started its reparations program, Burge, the architect of its torture program, was convicted of lying about police torture in a federal court.[16] In cases of mass violations, there are generally a number of lawsuits before progress is achieved toward reparation. For example, Canada has tackled abuses against Indigenous children and their families in Indian Residential Schools through settlement of several lawsuits resulting in reparations programs offered by the government, which also included the creation of an official truth commission.

The result of such judicial settlements is often policies that provide standard forms of reparation for different categories of victims, some of them limited to compensation but others adopting a comprehensive set of policies implemented by different government agencies with some coordination for oversight. They require consulting victims and civil society to define those services and how to provide them, low-standard registration processes that are accessible and trusted by victims, and large investment of institutional and financial resources, often over several decades, particularly when measures such as pensions or health care and psychosocial support are implemented over the full life of victims or over several years as for scholarships or memorialization policies.

13 See Natalie Y. Moore, "Payback," The Marshall Project, October 30, 2018, www.themarshallproject.org/2018/10/30/payback

14 See Sarah Imani, Karina Theurer, and Wolfgang Kaleck, "The 'Reconciliation Agreement' – A Lost Opportunity," European Center for Constitutional and Human Rights, June 2021, www.ecchr.eu/fileadmin/Hintergrundberichte/ECCHR_GER_NAM_Statement.pdf

15 Survivors of colonial abuses from Herrero and Nama tribes in Namibia attempted in 2019 to sue the government of Germany to pay damages over genocide and property seizures by colonists. The lawsuit was dismissed on the ground of sovereign immunity. See Jonathan Stempel, "Lawsuit against Germany over Namibian Genocide Is Dismissed in New York," *Reuters*, March 6, 2019, www.reuters.com/article/us-namibia-genocide-germany/lawsuit-against-germany-over-namibian-genocide-is-dismissed-in-new-york-idUSKCN1QN2SQ

16 See US Department of Justice, "Former Chicago Police Officer Jon Burge Sentenced for Lying About Police Torture," January 21, 2011, www.justice.gov/opa/pr/former-chicago-police-officer-jon-burge-sentenced-lying-about-police-torture

These policies are often part of broader transitional justice policies, where prosecutions, comprehensive examination of the facts, acknowledgement of violations committed and of political responsibility, and reforms and policies to reduce the likelihood of repetition or continuation of cycles of violence are often implemented. On many occasions, reparations have followed truth commissions, but others have followed litigation. As political decisions, they often are not implemented alone but as part of broader policies for dealing with the past, including accountability and acknowledgement. On some occasions, they have contributed to strengthening the resolve for peace and accountability. For example, in Colombia, initial assistance policies for those who were displaced due to the war were strengthened by Constitutional Court decisions, later led to the enactment of judicial and demobilization policies and then became more comprehensive reparation policies and contributed to the 2016 Peace Accords. Sometimes large-scale registration of victims helps to reduce the deniability of the violations that were committed, forcing additional steps. Regarding prevention and recurrence, it is often claimed that by addressing the grievances of victims and acknowledging the wrongs done to them, it becomes less likely that members of affected communities will resort to armed violence.

In many countries around the world, decisions by domestic judges awarding reparation in individual or collective cases that do not necessarily relate to a specific well-known incident of mass abuse are equally important but receive insufficient attention. Serious human rights violations—such as torture, death in custody, extrajudicial execution, and enforced disappearance—are among the worst harms a person can experience, and they need to be redressed whether they are an isolated incident or part of systemic violations.

The courts play a key role in upholding this right. An individual victim cannot apply to a reparations program if such a program does not exist. These programs, when they exist, while critically important, often are limited in temporal or geographic scope and often follow the logic of simplified access to some benefits. A victim's right to seek comprehensive reparation, as provided by international law, should not depend on the willingness of the government to establish such programs. Victims should also have a choice on how they seek reparations if different options exist; they should not be constrained to one avenue. Individual victims of violations that do not constitute a systemic practice should also be able to access reparations; the courts sometimes are the only viable option in these cases. Moreover, the ability of each mechanism to achieve the goals set out by international standards varies. While judicial reparations may deliver comprehensive, adequate, and persuasive reparations, their financial costs are often much larger and the time they demand longer compared to administrative reparations. They also require that victims participate in or be exposed to judicial proceedings and examinations that are often not friendly, especially for victims fearing stigma or trauma or who are not used to interacting with courts and bureaucracies.

On the other hand, litigation is costly and not always available for all victims. Specifically, the availability and promptness characteristics have proven to be unachievable through most judicial mechanisms. Moreover, when faced with cases of massive violations, there is an inherent tension between the criteria of reparative justice, which highlights the restitution of each victim to their pre-injured state, and the goal of cases with collective dimensions seeking justice for a community or identifiable group of persons who have suffered aninjury. This tension may result in difficulties ensuring that all victims have an equal chance to access the court and a fair chance to receive similar measures.[17] For these reasons, in recent years, various governments have had recourse to administrative reparations programs to provide reparation.

17 Shelton, *Remedies,* 121.

Administrative programs provide victims with practical, accessible, and prompt tools to obtain reparation. However, other characteristics may be harder to achieve through reparations programs; "Programs of reparations do not take truth-telling, criminal justice, or institutional reform, for example, as parts of reparations."[18] Reparations programs usually require other transitional justice mechanisms to enact truth-seeking commissions, institutional reform, accountability mechanisms, and commemoration.[19] On the other hand, judicial reparations may not deliver prompt or accessible reparation. The characteristic of expediency is more frequently found in administrative procedures;[20] however, judicial reparations may be better equipped to deliver truth, accountability and deterrence or prevention.

In sum, efficiency, accessibility, and wide coverage are more readily achieved through reparations programs while judicial reparations are better suited to uncovering the facts and ordering accountability, including penal sanctions if applicable, and preventive measures. If judicial proceedings result in enhanced attention to these measures in appropriate cases, the expansion of judicial reparations may justify the additional barriers to entry and higher costs, particularly if such judgments begin to establish norms and, in doing so, create a more conducive environment for political actors to take broader scale legislative or executive action.

For these reasons, both judicial reparations and reparations programs should coexist at the domestic level. Both mechanisms attempt to grant reparation. However, administrative programs are more specialized for mass violations and focus on access and promptness. On the other hand, judicial reparations attempt to cover all of the characteristics set out in the international standards. However, their ability to grant promptness and access has been unusually questioned. This suggests that reparations programs and judicial reparations are more like complements than substitutes. In the big picture, reparations programs are better suited to satisfy the demand for prompt, accessible reparations, while judicial reparations are better suited to fulfill the demand for comprehensive, adequate, and deterrent reparation.

Literature on reparations programs at the domestic level is very comprehensive; however, analyses of domestic judicial reparations are scarce. With this guide, we attempt to fill this gap. Our aim is to show some innovative domestic decisions regarding reparations. While this research is not comprehensive or representative, some trends are visible in how courts have addressed each measure of reparation. The guide provides a selection of promising decisions that, at the least and to a degree, comply with the criteria of effective reparation. The guide aims to be helpful to judges, litigators, activists, victims, and victims' representatives and provide them with some useful examples and inspiration for what to request from courts to achieve the maximum benefit for victims.

The current guide is based on the 2019 publication *Guide on Reparations for Human Rights Violations: International and Domestic Judicial Decisions.*[21] The authors conducted most of the desk research and conducted 54 interviews in person or via video-conference with judges, lawyers, scholars and nongovernmental group activists from 2018–2021. Some interviews were conducted by e-mail.

While all international standards governing reparations obligations and characteristics apply to all human rights violations, the domestic decisions analyzed in this guide only cover violations of human rights related to the right to life and personal integrity (torture, death in custody,

18 Pablo De Grieff, "Justice and Reparations" in *The Handbook of Reparations,* ed., Pablo De Grieff (Oxford: Oxford University Press, 2008), Loc. 6924.
19 Lisa Magarrell, "Reparations in Theory and Practice," ICTJ, 2007, www.ictj.org/publication/reparations-theory-and-practice
20 Malamud'Goti and Grossman, "Reparations and Civil Litigation," Loc 8470.
21 García García et al., *Guía en materia de Reparaciones.*

enforced disappearance, excessive use of force, and arbitrary execution). In selecting the countries for this guide, the following main feature was considered as applicable: countries that have dealt with a large number of victims of human rights violations due to their special historical circumstances. Similarly, the authors sought to include countries on which literature and accepted experiences on the subject existed and aimed to find examples from different regions and legal systems. The guide includes examples from Argentina, Bangladesh, Brazil, Canada, Chile, Colombia, France, India, Indonesia, Kenya, Korea (Republic of), Kyrgyzstan, Malaysia, Mexico, Nepal, Pakistan, the Philippines, South Africa, Sri Lanka, Thailand, Uganda, the United Kingdom, the United States of America, and Zambia.

The authors asked interviewees about cases in their jurisdictions that at least partially met the criteria of effective reparation described in this guide. In some countries our interlocutors were able to provide a long list of decisions, while in others only a few such decisions were available. The guide does not provide an overview of the practice of reparation in specific countries; rather, it illustrates through national decisions examples of court compliance with international rules and standards related to reparation for human rights violations pertaining to the rights to life and personal integrity. Moreover, it highlights specific examples of domestic decisions focusing on key features of judicial reparations.

As to the types of decisions reviewed in this guide, it is pertinent to highlight that most were issued by constitutional or administrative courts. As has repeatedly been stated internationally and nationally, it is the criminal justice system that plays the main role in pursuing, investigating, penalizing, and granting reparation for human rights violations. Nevertheless, other mechanisms, procedures, and modalities of domestic law in each country have proven useful or effective as complements to establishing the truth, determining the scope and dimensions of state responsibility, and providing comprehensive reparation for violations.[22] Hence, in the vast majority of legal systems, there are other paths than the criminal justice system that enable reparation for human rights violations to be obtained. In consequence, another distinct feature of the decisions reviewed in this guide is that not all decisions condemned a specific individual perpetrator, as is typical of criminal law, but rather censured the state as a whole or an agency of the state.

Finally, it should be stated that although the primary objective of this guide is not to describe cases of violations of human rights in general, many of the reasons and principles explained below are applicable to other violations of human rights. Hence, the reasons explained here could also be useful for subjects other than judges who attempt to tailor reparation to the individual in cases of human rights violations.

The first section identifies the conceptual framework for the obligation of states to grant reparation at the domestic level and the characteristics of reparation as established by international standards. This section is partly based on the jurisprudence of international human rights bodies that helped to define the framework that should guide states in providing reparation for victims of human rights violations. It also provides examples of domestic judicial decisions that help to clarify the characteristics of reparation. The second section focuses on the ability of judicial reparations to grant measures of reparation that administrative reparations programs usually cannot, namely, truth, accountability, and deterrence. The third section shows domestic decisions relevant to each of these three components of reparation. The fourth section sets out some hypotheses about judges who may be crafting innovative reparation measures. Finally, the last section provides some conclusions.

22 Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, ¶ 130 (May 26, 2010).

Reparations for Serious Human Rights Violations

International Standards That Require Domestic Courts to Provide Reparation in Cases of Human Rights Violations

The Obligation to Grant Reparation at the Domestic Level

It is a principle of international law that any state that violates an international obligation should provide reparation.[23] Although the right to obtain reparation has not been explicitly established in international law instruments, it has usually been considered part of an effective remedy. The UN Human Rights Committee has signaled that the right to reparation is part of the right to effective remedy stipulated in Article 2.3 of the International Covenant on Civil and Political Rights (ICCPR).[24] Non-compliance violates victims' right to effective remedy.[25] The right that victims have is correlative of the obligation that states have to establish in their legal systems a judicial or non-judicial mechanism that could provide that remedy and grant adequate reparation. One way to understand this obligation is to consider the rights recognized by the respective convention as primary rights; if a state does not comply with such obligations and causes harm, then the victim has a *secondary right to claim reparation.* However, that would not

23 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, December 16, 2005, A/RES/60/147 [hereinafter *Basic Principles and Guidelines on the Right to a Remedy*], principle 11, www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx: "Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms."

24 UN General Assembly, International Covenant on Civil and Political Rights, December 16, 1966, United Nations, Treaty Series, vol. 999, 171, art. 2.3: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

25 UN Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 31 (80), "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant," May 26, 2004, CCPR/C/21/Rev.1/Add.13., ¶ 16. See also Communications: Human Rights Committee, William Torres Ramírez v. Uruguay, Communication No. 4/1977 U.N. Doc. CCPR/C/10/D/4/1977; Miguel A. Millán Sequeira v. Uruguay, Communication No. 6/1977, U.N. Doc. CCPR/C/OP/1 at 52 (1984); Alberto Grille Motta v. Uruguay, Communication No. 11/1977, U.N. Doc. CCPR/C/OP/1 at 54 (1984); Monja Jaona v. Madagascar, Communication No. 132/1982 U.N. Doc. Supp. No. 40 (A/40/40) at 179 (1985); Nqalula Mpandanjula et al. v. Zaire, Communication No. 138/1983 U.N. Doc. Supp. No. 40 (A/41/40) at 121 (1986); Lucía Arzuaga Gilboa v. Uruguay, Communication No. 147/1983; Herrera Rubio v. Colombia, Communication No. 161/1983 U.N. Doc. Supp. No. 40 (A/43/4) at 190 (1988); Ramon B. Martinez Pontorrea v. Dominican Republic, Communication No. 188/1984 U.N. Doc. Supp. No. 40 (A/43/40) at 207 (1988); Miango v. Zaire, Communication No. 194/1985 U.N. Doc. Supp. No. 40 (A/43/40) at 218 (1988).

be enough to guarantee reparation unless victims are recognized as *holding a tertiary procedural right to claim reparation.*

Following the same reasoning as the ICCPR, the American Convention on Human Rights does not explicitly establish an independent right to reparation. Nevertheless, the IACtHR has stipulated that the right to reparation is a customary rule that constitutes one of the fundamental principles of contemporary international law.[26] That is why the IACtHR has derived the internal obligation of states to provide reparation to victims of human rights violations, from the obligation to guarantee the full and free exercise of the rights recognized in the American Convention on Human Rights, to any person subject to their jurisdiction,[27] established in Article 1.1 of the convention,[28] from the obligation to guarantee the right to an effective legal remedy,[29] established in Article 25.[30]

Other specialized conventions explicitly mention the right to reparation. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, explicitly mentions that state parties must ensure in their legal systems that a victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible (Article 14.1). Other examples are Article 9 of the Inter-American Convention to Prevent and Punish Torture;[31] Article 24.4 of the International Convention for the Protection of All Persons from Enforced Disappearance;[32] article 7, subparagraph g of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Pará Convention) also obligates states to ensure that women subjected to violence have effective access to restitution, reparation, or other just and effective remedies.[33]

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26 Galindo Cárdenas et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 301 ¶ 281 (October 2, 2015); Velásquez Rodríguez v. Honduras, Reparations and Costs. Judgment, Inter-Am. Ct. H.R., (ser. C) No. 7, ¶ 2 (July 21, 1989); Espinoza Gonzáles v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 289, ¶ 300 (November 20, 2014); Garífuna Punta Piedra Community and its members v. Honduras, Preliminary Objections, Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 304, ¶ 313 (October 8, 2015).

27 See Velásquez Rodríguez v. Honduras, ¶¶ 166 and 178; Garibaldi v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 203, ¶ 112 (September 23, 2009); Gómez Lund et al. ("Guerrilha do Araguiaia") v. Brazil, Preliminary objections, Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 140 (November 24, 2010).

28 OAS General Assembly, American Convention on Human Rights, OAS Treaty Series, No. 36, 22 November 1969, entry into force on 18 July 1978 [*hereinafter* American Convention on Human Rights], art. 1.1: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

29 Durand and Ugarte v. Peru, Merits. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68, ¶ 130 (August 16, 2000); Reverón Trujillo v. Venezuela, Preliminary objection, Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H.R., (ser. C) No. 197, ¶ 127 (June 30, 2009); Ituango Massacres v. Colombia, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 293 (July 1, 2006).

30 American Convention on Human Rights, art. 25: "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted."

31 "The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture."

32 "Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation."

33 Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), 9 June 1994, Article 7.g: "The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies."

Although not binding, the most comprehensive instrument of the United Nations on the right to reparation is the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).[34] These principles are based on the Articles on Responsibility of States for Internationally Wrongful Acts (2001).[35] Although the Basic Principles by design refer only to gross violations, principle 26 has established that "it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights and international humanitarian law."[36]

The Committee against Torture (CAT) also issued important guidance in its General Comment No. 3 (2012). There, CAT highlights the obligation of all states to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[37] The general comment broadly describes the state's obligation to grant reparation and distinguishes and explains the different measures of redress: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[38] Another example of similar norms is article 5 of General Comment No. 4 of the African Commission on Human and People's Rights, on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment.[39] The African Commission reiterates that:

> The overarching goal of these forms of reparation is to provide healing for victims of torture and other ill-treatment. Healing entails making whole that which has been broken and wounded. It seeks to restore the dignity, humanity and trust violated by torture and other ill-treatment. It recognizes and facilitates the journey of coming to terms with the torture and other ill-treatment and dealing with the consequences of trauma and other injuries. It has physical, psychological, social, cultural and spiritual dimensions and helps break the cycle of violence at individual, family, collective, institutional and societal levels.[40]

Characteristics of Reparations

States are not only obligated to grant reparation but also to do so in a certain manner. National and international legal norms and jurisprudence help to discern some minimum characteristics of reparation proceedings and measures. Reparation must be effective, appropriate, and comprehensive.[41] It should not be discriminatory; it should include a gender perspective, be transformative in cases in which previous contexts violated human rights, and serve to prevent future

34 Basic Principles and Guidelines on the Right to a Remedy.
35 See UN General Assembly, "Responsibility of States for Internationally Wrongful Acts," Resolution adopted by the General Assembly, A/RES/56/83 (28 January 2002).
36 Basic Principles and Guidelines on the Right to a Remedy, principle 26.
37 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 14.
38 Committee against Torture, General Comment No. 3, 2012: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Implementation of Article 14 by States Parties,* December 13, 2012 [hereinafter General No. Comment 3].
39 African Commission on the Human and Peoples' Rights, *General Comment No. 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,* February–March 2017 [hereinafter General Comment 4], art. 5.
www.achpr.org/public/Document/file/English/achpr_general_comment_no._4_english.pdf
40 African Commission on Human and People's Rights, *General Comment 4,* ¶ 10.
41 Convention against Torture, ¶¶ 2 and 6; and Juvenile Reeducation Institute v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 257 (September 2, 2004); Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H.R., ¶ 192 (September 31, 2004); and Gómez-Paquiyauri Brothers v. Peru, Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H.R., ¶ 187 (July 8, 2004).

violations. The defectiveness of reparation is inherently linked to the remedies and procedures for how they may be obtained. The following section discusses these characteristics.

Access to Effective Remedies to Obtain Reparation

The obligation to provide reparation requires the existence of effective remedies to obtain reparation that are accessible to victims. This involves institutions (courts) that have the independence and capacity to examine the claim and make an impartial decision with promptness, and if the court finds that a violation was committed, to grant reparation in sufficiency to be *remedial* of the harms caused to the victim, and for those orders to be fully implemented by the respective entities to the satisfaction of the claimant. For remedies to be effective, victims should have the ability to access judicial protection, which should be capable of providing a decision that is not only satisfactory, but also can translate into tangible results. In this sense, reparation is an important measure of whether remedies (on paper and in law) are effective, which international law has set as a fundamental requirement of a legal system that purports to protect human rights.

The IACtHR has played a leading role in establishing criteria for crafting reparations for human rights violations and has interpreted that states are obligated to "provide effective . . . judicial remedies to the victims of human rights violations that must be substantiated in accordance with the rules of due process of law."[42] According to the court, effectiveness requires that, in addition to their formal existence, remedies lead to the results or responses to the violations of rights and that its implementation by the competent authority should be effective.[43] This demands that the measures ordered and implemented be appropriate to end the violation and address its consequences, including the restitution or re-establishment of the violated right.[44] In this regard, the court indicated that "the effectiveness of the domestic remedies must be assessed comprehensively taking into account . . . whether, in the specific case, domestic mechanisms existed that ensured real access to justice to claim the reparation of the violation."[45] The court declared that any state without an effective remedy violates the American Convention on Human Rights.[46]

The African Commission on Human and People's Rights has also adopted a comprehensive general comment on the right to redress, based on existing legal standards and jurisprudence. It confirmed that states "are required to ensure that victims of torture and other ill-treatment are able in law and in practice to claim redress by providing victims with access to effective remedies. This includes the adoption of relevant legislation and the establishment of judicial, quasi-judicial, administrative, traditional and other processes."[47] It further established that for a remedy to be effective, it must be available without impediment, offer victims the possibility of success, and be sufficient to repair the harm suffered.[48]

The European Court of Human Rights also established that the remedy required by article 13 of the European Convention of Human Rights—guaranteeing the availability at the national level of a remedy to enforce the substance of rights outlined in the convention—must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by acts or omissions by state authorities.[49]

42 Velásquez Rodríguez v Honduras, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 91 (June 26, 1987).
43 Ibid.
44 Ibid.
45 Ibid.
46 Ibid.
47 African Commission on Human and People's Rights, *General Comment 4*, ¶ 9.
48 African Commission on Human and People's Rights, *General Comment 4*, ¶ 23.
49 Aydin v. Turkey, 57/1996/676/866, Eur. Ct. H.R. (September 25, 1997); and Isayeva v. Russia, 57950/00, Eur. Ct. H.R., ¶ 226 (February 24, 2005).

The UN Human Rights Committee emphasized in its jurisprudence the obligation of states to remove common obstacles to reparation and ensure that the right to a remedy is effective.

At the domestic level, judges have also established that reparation requires effective remedies to obtain them. In Mexico, the Supreme Court of Justice established that reparation should be timely, broad, comprehensive, and effective.[50] The Colombian Constitutional Court also expressly established that victims of human rights violations have the right to an effective remedy to request the state to satisfy their right to reparation.[51]

As shown, effective remedies should be capable of delivering reparation that can address the consequences of the violations. However, there is not a single instrument in which an effective remedy is defined or described. Based on all of the definitions issued by these international bodies and their jurisprudence, we developed the following list of characteristics that must exist for a remedy to be considered effective.

Access to Legal Aid

The use of judicial remedies often implies the need for legal aid. Therefore, access to remedies must include access to legal aid and mechanisms that are simple enough to be exercised without the need of a lawyer. The African Commission on Human and People's Rights refers to the obligation of granting effective remedies, including the adoption of relevant legislation and the establishment of judicial, quasi-judicial, administrative, traditional, and other processes.[52] It further established that civil society organizations, community-based organizations, and others may complement services offered by state institutions in order to ensure full realization of the right to redress.[53] Special measures should be taken to provide access for victims in places of detention and to discriminated against, marginalized, or disadvantaged persons or groups, who are often unable to access full and effective redress or may even be exposed to revictimization and stigmatization.[54]

The Committee against Torture's General Comment 3 also establishes that "[j]udicial remedies must always be available to victims, irrespective of what other remedies may be available, and should enable victim participation, legal advice, legal education and information, mechanisms for alternative dispute resolution, and restorative justice processes."[55]

At the domestic level the importance of legal aid has also been raised. In a case of torture in detention, a court in Uganda raised the issue of the importance of the court's rulings to fixing structural problems. It established that few cases involving prisoners' rights reach the High Court, primarily due to lack of access to legal services.[56]

50 Reparación del daño derivada de un delito. Parámetros que deben observarse para cumplir con este derecho humano, SCJN (Mex.), decision number: 1a. CCLXXII/2015 (10a.), September 2015 (Mex.), http://sjf2.scjn.gob.mx/detalle/tesis/2009929

51 Corte Constitucional, 18 mayo 2006, Sentencia C-370, Manuel José Cepeda Espinosa y otros (Colom.), www.corteconstitucional.gov.co/relatoria/2006/C-370-06.htm

52 African Commission on Human and People's Rights, *General Comment 4,* ¶ 9.

53 African Commission on Human and People's Rights, *General Comment 4,* ¶ 21.

54 These measures may include: the establishment of clinics with staff trained in providing trauma counselling, the use of legal advice centers or mobile law clinics, the development of outreach programs to ensure all victims can access redress, and support of relevant civil society initiatives and community-based organizations assisting vicims. State parties should also provide reasonable accommodation measures on a case-by-case basis to persons with disabilities and others who may require such support. African Commission on Human and People's Rights, *General Comment 4,* ¶22.

55 Committee against Torture, General *Comment No. 3.* Paragraph 30.

56 See Yahaya Lukwago & 4 Ors v Aiso & 3 Ors (Civil Suit-2015/226), UGHCCD 232 (20 December 2019) (Ugan.), https://ulii.org/ug/judgment/hc-civil-division-uganda/2019/232

The availability of legal aid is more important in countries where reparation is sought through civil litigation. Several countries provide legal aid to victims of serious human rights violations. In Argentina, and in some states in Brazil, public defender's offices provide legal advice and accompany victims of state violence during investigations and trials. Their services are part of the legal aid provided by the state. The Public Defender's Office in Rio de Janeiro has a Human Rights Unit focused on such cases, including representing victims in criminal cases and filing civil and collective actions on their behalf. In Argentina, a law passed in 2017 established an innovative type of Public Defender Office for Victims, part of the Federal Public Defender's Office.[57]

Prompt Remedies

According to principle I. 2.c of the Basic Principles and Guidelines on the Right to a Remedy, states must, as required under international law, ensure that their domestic law is consistent with their international legal obligations by making available prompt remedies to obtain reparation.

Promptness requires expedient processes to grant reparation, expedient compliance by entities ordered to provide reparation, preventive measures, and interim relief measures or assistance when needed while a final decision is being adopted and/or implemented. The European Court of Human Rights has established the need to pay particular attention to "the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration."[58] UN treaty bodies and experts have also made extensive reference to the need for timely, prompt, and expeditious remedial proceedings.[59]

As explained above, promptness not only requires speedy processes, it also requires the existence of preventive injunctions aimed at obtaining provisional reparation. Whenever providing and obtaining reparation requires time, resources, coordination, experience, and commitment, victims must be able to rely on the possibility of obtaining provisional reparation that reflects the most urgent and immediate harm or loss.[60] With the aim of preventing harm from being committed in an irreparable manner, once a remedy for a human rights violation has been initiated, it is essential for a judge to have the authority to order provisional (often called *interim*) measures. Preventive injunctions are also used to prevent the future commission of a wrong.[61]

In any system or jurisdiction, provisional measures depend on the victim's need for protection, whenever the typical and basic prerequisites of extreme seriousness and urgency exist, and in order to avoid irreparable harm or in order to secure assets and ensure the substance of the judgment is not illusory.[62]

International judicial and quasi-judicial bodies of human rights protection with competence to consider communications of individuals or groups against states typically allow petitioners to

57 Open Society Justice Initiative, Who Polices the Police? *The Role of Independent Agencies in Criminal Investigations of State Agents,* May 7, 2021, 51, www.justiceinitiative.org/publications/who-polices-the-police-the-role-of-independent-agencies-in-criminal-investigations
58 Doran v Ireland, Application no. 50389/99, Eur. Ct. H.R., ¶ 57 (May 18, 2006).
59 UN, Committee on Economic, Social and Cultural Rights, General Comment No. 9, ¶ 9 (1998); CMW/C/GTM/CO/1 (2011), ¶ 21; UN Committee on the Rights of the Child [CRC], General Comment No. 16, ¶ 30 (2013); UN General Assembly, Human Rights Council, *Report of the Independent Expert on the Issue of human Rights Obligations Related to Access to Safe Drinking Water and Sanitation,* ¶ 54, A/HRC/15/31/Add. 1, (July 1, 2010).
60 U.N. Secretary General, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence* (June 2014), 12, www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf
61 Shelton, *Remedies,* 384.
62 Bernal Arias Ramírez, "Las medidas provisionales y cautelares en los sistemas universal y regionales de protección de los derechos humanos," *IIHR Journal* (2006), vol. 43, 57, www.corteidh.or.cr/tablas/R08060-3.pdf

request provisional measures to avoid irreparable harm. The IACtHR has ordered various types of provisional measures aimed at the protection of the right to life, integrity of the person,[63] personal freedom, freedom of expression and thought, freedom of movement and residence, legal guarantees, legal protection, political rights, private property,[64] the right to work and freedom of association,[65] and the rights of the child. There are also examples of specific measures, like a caesarean section, to save the life of the mother.[66] Similarly, the UN Human Rights Committee has decreed various provisional measures, such as the suspension of executions,[67] the suspension of deportation orders,[68] or the abstention from actions intended to cause irreparable damage to the environment.[69] The European Court of Human Rights also issues provisional (interim) measures; the most typical cases are ones in which there are fears of a threat to life or ill-treatment. The court issued interim measures that included the release of a detained political activist due to the risk to his life in detention.[70] The African Commission on Human and People's Rights, African Court of Human and People's Rights, Economic Community of West African States Community Court of Justice, and the UN treaty bodies, including the Committee against Torture, all use the mechanism of provisional measures.

In domestic proceedings, often a separate legal action is needed to obtain an injunction as a protective measure. In a class action case brought by New York City residents alleging that the New York Police Department had a widespread practice of making unlawful stops on suspicion of trespass in buildings in the Bronx that are enrolled in the "Trespass Affidavit Program," a court in the United States granted a preliminary injunction on the basis that the plaintiffs showed a clear likelihood of success on the merits and that they were "likely to suffer irreparable harm in the absence of preliminary relief."[71]

Independence of the Results of Criminal Actions and the Mechanisms to Access Reparations

The important third element of a remedy to be effective is to guarantee the independence of mechanisms to obtain reparation from the outcomes of criminal proceedings. Victims of human rights violations must be able to rely on the possibility of initiating parallel criminal proceedings and reparation proceedings.

The IACtHR recognized that although the criminal justice system plays a leading role in cases of human rights violations, other mechanisms of national law can be useful or effective as complementary means to offer comprehensive reparation for violations.[72]

63 Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 248 (June 27, 2012).
64 Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 248 (June 27, 2012).
65 Arias Ramírez, *Las medidas,* 32.
66 Order, Provisional Measures with regard to El Salvador, Matter of B, Inter-Am. Ct. H.R. (May 29, 2013), www.corteidh.or.cr/docs/medidas/B_se_01_ing.pdf
67 Gilbert Samuth Kandu-Bo et al. v. Sierra Leone, U.N. Human Rights Committee, Communication No. 841/1998, U.N. Doc. CCPR/C/64/D/839, 840 and 841/1998 (November 4, 1998).
68 Mr. C v. Australia, Communication No. 900/1999, U.N. Human Rights Committee, U.N. Doc. CCPR/C/76/D/900/1999 (2002).
69 Jouni E. Länsman et al. v. Finland, U.N. Human Rights Committee, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996).
70 European Court of Human Rights, "The Court Grants an Interim Measure in Favour of Aleksey Navalnyy and Asks to the Government of Russia to Release Him," ECHR 063 (2021), February 17, 2021, www.courthousenews.com/wp-content/uploads/2021/02/navalny-echr.pdf
71 Ligon v. City of New York, 12 Civ. 2274 (SAS) S.D.N.Y. (Feb. 11, 2013).
72 Manuel Cepeda Vargas v. Colombia ¶ 130.

Both the UN Human Rights Committee and Committee against Torture held that while criminal investigation is necessary for fulfilling the obligation to investigate and provide redress, compensation and other forms of reparation cannot depend on the criminal conviction of the perpetrator: restricting compensation in civil suits to *after* the conclusion of criminal proceedings violates the right to compensation and redress under article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[73] and article 2(3) of the ICCPR, in conjunction with articles 6 and/or 7.[74] The Committee against Torture also summarized this approach in its General Comment 3:

> Notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. The Committee considers that compensation should not be unduly delayed until criminal liability has been established. Civil liability should be available independently of criminal proceedings and the necessary legislation and institutions for such purpose should be in place. If criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence of or undue delay in those criminal proceedings constitutes a failure on the part of the State party to fulfil its obligations under the Convention. Disciplinary action alone shall not be regarded as an effective remedy within the meaning of article 14.[75]

At the national level, there are decisions that also establish the obligation to guarantee mechanisms independent of the criminal justice system to obtain reparation. For example, Supreme Federal Court of Brazil has stated that civil, criminal, and administrative actions must be independent and that this does not violate in any way the presumption of innocence of the implicated party.[76]

Similarly, the Second Chamber of the Supreme Court of Chile has indicated that not allowing access to a compensation lawsuit until criminal proceedings are completed discriminates against the victims.[77]

The judiciary of Colombia, through the Council of State of Colombia, established that criminal proceedings and civil proceedings against the state are independent, to the extent that even if a perpetrator is not found guilty in criminal proceedings, in terms of asset liability the responsibility of the state can be established.[78] Further, the council established that the absence of results in criminal proceedings is not an obstacle to declaring the state's financial liability.[79] The Constitutional Court of Colombia, in judgment C-228 of 2002, also established that the rules that prevent victims from accessing certain procedural stages and require them to declare that they did not initiate a parallel civil case before initiating a criminal investigation are unconstitutional. This judgment allows victims to initiate criminal proceedings that include non-monetary

73 See Committee against Torture, Decision, Communication No. 433/2010, 48th session, 7 May–1 June 2012, regarding Gerasimov v. Kazakhstan, ¶ 12.8. See also Committee against Torture, decision, Communication No. 497/2012, 52nd session, 28 April–23 May 2014, regarding Bayramov v. Kazakhstan.
74 See UN Human Rights Committee, Communication No. 2052/2011, regarding Akmatov v Kyrgyzstan, ¶ 10: "The State party is also under an obligation to prevent similar violations in the future, including by removing obstacles for obtaining civil reparation independently of any related criminal proceedings."
75 Committee against Torture, *General Comment No. 3*.
76 Federal Supreme Court, AG. REG. Em Mandado de Seguranca 34.420, Federal District (Braz.), www.jusbrasil.com.br/topicos/12720893/processo-n-34420-do-stf
77 Supreme Court, Ruling 10.665-2011 (January 21, 2013) (Chile).
78 Consejo de Estado, Tercera Sección, 10 abril 1997, Sentencia 10138, Orejanera Parra; and 11 marzo 1999, Sentencia 11342, Aguilar Piratoba et al. (Colom.).
79 Consejo de Estado, 11 febrero 2009, Sentencia 16337; 14 abril 2011, Sentencia 20145, Bertel Navaja et al.; and 8 febrero 2012, Sentencia 21521.

compensation measures and submit requests via civil proceedings for financial compensation. Victims should not be forced to choose between compensation and the pursuit of justice.[80]

In Mexico, the Federal Judiciary in a final decision clearly stated that reparation proceedings cannot be suspended due to an ongoing criminal investigation.[81] The court established that domestic legislation cannot suspend reparation proceedings even if pending criminal investigations involve the same acts that are challenged through the reparations remedy. It also establishes in detail the differences between criminal investigations and reparation proceedings and specifies that both proceedings should be considered independently.

In Kyrgyzstan, in court decisions related to compensation based on decisions by the UN Human Rights Committee for families of those killed in state custody, the government argued that a criminal conviction of policemen was necessary for considering a request for compensation, but the courts supported the applicants, confirming that "it is necessary to follow the views of the Human Rights Committee that indicate that persons, those rights were violated, have the right to recover moral damages regardless of any related criminal proceedings."[82]

In Canada, in addition to the independence of civil lawsuits from the results of criminal proceedings, the Supreme Court ruled that an acquittal in a disciplinary action will not generally invoke the concept of issue estoppel in a parallel civil action arising from the same act. The court ruled that it needs to be analyzed on a case-by-case basis. The court reiterated that "the standards and the proof required, and the purposes of two proceedings, are significantly different; and, unlike a civil action, the disciplinary process provide no remedy or costs to the complainant."[83]

In Pakistan and India the higher courts have wide powers to grant relief for violations of fundamental rights as part of their constitutional jurisdiction, including powers to grant monetary compensation and other forms of reparation, independent of other remedies available to victims in civil or criminal proceedings.[84] Similarly, in Sri Lanka the Supreme Court has the power to grant reparations for violations of the fundamental right to freedom from torture and cruel, inhuman, and degrading treatment, independent of any criminal or civil action.[85]

Higher courts in India and Pakistan have also distinguished between an award of compensation as a public-law remedy pursuant to their constitutional jurisdiction and an award of compensation in a private tort law action or under ordinary civil and criminal proceedings. The courts have broadly established that an award for compensation for enforcement of fundamental rights is a public-law remedy and does not limit the victim/complainant's right to compensation under other civil and criminal proceedings.[86]

80 Consejo de Estado, 3 abril 2002, Sentencia C-228 (Colom.).
81 Tribunal Colegiado, Amparo en Revisión 379/2017-7135, Décimo Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito (Mex.).
82 Pervomaiski District Court of Bishkek (Kyrgyzstan), Decision, Case No. GD-839/18.BZ (October 16, 2018), 12 www.justiceinitiative.org/uploads/8f72c722-515e-47f5-abf9-5f1285f8ce06/akmatov-district-court-decision-eng-20181018.pdf
83 Penner v. Niagara (Regional Police Services Board), 2013 SCC 19, [2013] 2 S.C.R. 125 in Ian Scott, *Issues in Civilian Oversight of Policing in Canada* (Carswell, 2014), 160.
84 Mazharuddin v. The State, PCr.LJ (Pak.) 1035 (1998); Syed Hassan Ali Shah v. Station House Officer, Police Station Dadu and others, Writ under Section 491 of the Code of Criminal Procedure, P L D 2006 Karachi 425; Rudul Sah v. Sate of Bihar and Another, Writ Petition (Criminal) No. 1387 (1982), Judgement (August 1, 1983); Nilabati Behera (SMT) Alias Lalita Behera (through the Supreme Court Legal Aid Committee) v. State of Orissa and Others, Writ Petition (Civil) No. 488 (1988), Judgment (March 24, 1993).
85 Supreme Court (Sri Lanka), FR. No. 56/2012; SC/FR No. 578/2011; SC FR Application No. 244/2010; Gerard Perara Case (2002), Application No. 328/2002; etc.
86 Rudul Sah v. Sate of Bihar and Another, Writ Petition (Criminal) No. 1387 (1982), Judgment (August 1, 1983); Nilabati Behera (SMT) Alias Lalita Behera (through the Supreme Court Legal Aid Committee) vs. State of Orissa and Others, Writ Petition (Civil) No. 488 (1988), Judgment (March 24, 1993); Mahera Mahera Sajid v Station House Officer, Police Station Shalimar & 6 others, Writ Petition No.2974/2016, Judgment (July 11, 2018); Zainab Zaeem Khan vs. SHO P.S. Industrial

Non-application of the Statute of Limitations

Human rights tribunals agree that states may impose reasonable restrictions to exclude abusive filings. However, limitations must not restrict the exercise of the right in such a way or to such an extent that the very essence of the right is impaired.[87]

At the national level, one of the obstacles generally invoked by authorities to deny access to reparation is the statute of limitations. In this regard, the Basic Principles and Guidelines on the Right to a Remedy and Reparation explicitly state that "[w]here so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law."[88] These principles also state that domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including time limitations applicable to civil claims and other procedures, should not be unduly restrictive.[89]

At the national level, there are examples of judicial decisions that echo these standards related to the matter of the statute of limitations. They provide relevant support and useful reasoning for affirming the persistence of the right to reparation, at least in the case of the most serious human rights violations. Some courts have established that the right to obtain reparation is included in the right to an effective remedy; therefore, there is no reason for distinguishing between criminal and civil responsibility. In Argentina the characteristic of the statute of limitations for crimes against humanity has been extended to civil proceedings for reparation resulting from these cases, because claims for reparation are related to acts that were challenged through criminal proceedings.[90] Brazil also has judicial precedents that explicitly establish the prohibition against establishing a statute of limitations for actions to obtain reparation in cases of torture, for example.[91] Similarly, the Council of State of Colombia established that in cases of serious violations of human rights the right to obtain reparation must not be subject to the statute of limitations.[92]

In France, the State Council ruled in a decision related to the claim of damages for arrests and deportations of Jewish people under the Vichy regime that:

> The imprescriptible nature of crimes against humanity laid down by article 213-5 of the penal code that relates to penal action and civil action brought before the criminal court, according to the judgment of the Court of Cassation of June 1, 1995, Touvier, can it be extended, in the absence of express legislative provisions to this effect, to actions aimed at engaging the responsibility of the state for facts having contributed to the commission of such crimes.[93]

Area, Writ Petition No. 2767/H/2015, Islamabad High Court, Judgment, (November 2, 2018); Mazharuddin v. The State, 1998 PCr.LJ 1035 (application under Section 491 of the Code of Criminal Procedure); etc.

87 Shelton, *Remedies,* 59.

88 Basic Principles and Guidelines on the Right to a Remedy, Principle 4, ¶ 6.

89 Ibid., at Principle 4, ¶ 7.

90 Supreme Court of Argentina, Brarda, Fernando Patricio v. State of Argentina, Judgment S.C.B.616, L.XLI (March 10, 2009),

91 High Court of Justice, Special Remedy No. 1.315.297- PR (2012/0057946-3) (Braz.), https://stj.jusbrasil.com.br/jurisprudencia/15516862/ag-1315297?ref=juris-tabs

92 Consejo de estado, Tercera Sección, Subsección C, 17 septiembre 2013, Sentencia 45092, Echeverry Correa (Colom.): "Based on an analysis of the conventionality and the principles of international law and human rights, in cases which constitute crimes against humanity, it is not appropriate to consider and apply the statute of limitations to proceedings for direct reparation. In accordance with the criteria of conventionality, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was applicable as a standard of *jus cogens,* including the scope of the responsibility of the State. The request must be admitted since the elements of the case considered proved what happened in the Palace of Justice of Bogotá could constitute a crime against humanity."

93 The Council of State added that this responsibility can be sought through ordinary courts (*le juge judiciaire*) in the event that the crime against humanity would constitute an infringement of individual freedom within the meaning of Article 136

In Croatia the law provides that if damage results from a criminal offence, the regular statutory time limits for compensation claims must match the time limits prescribed for the prosecution of criminal offences, and prosecution cannot be time-barred for war crimes.[94]

In Nepal a public interest litigation has been pending before the Supreme Court that challenges the constitutionality of the six-month statute of limitation for crimes of torture, arguing that this violates victims' right to justice and reparation.[95] In an earlier judgment, the Supreme Court of Nepal in the transitional justice context also stated that:

> Since such a short period of statutory limitation in serious violation of human rights may lead to impunity, the said provisions are inconsistent with the provisions relating to fundamental rights and justice in the Constitution and contrary to the accepted principles of justice recognized by the Constitution, and, therefore, they need to be reviewed and amended accordingly in tune with the Constitution and justice.[96]

Non-restrictive Interpretations and Procedural Flexibility for Access to Reparations

Effective remedies also require non-restrictive interpretations and procedural flexibility for access to reparation. Human rights violations cases, unlike other types of cases, are often difficult to prove, because the state is involved. Victims often lack evidence to prove the facts and identify perpetrators. For these reasons, the context of human rights cases is often used as a tool to justify the facts reported by victims, and strict procedural rules are often flexible. The IACtHR has established that states should consider the context of the case when investigating human rights abuses.[97] The IACtHR has also established that circumstantial evidence and presumptions in human rights violations cases may be used to support the facts of the case.[98]

In this regard, although some national authorities have opted to use restrictive interpretations to prevent victims from accessing reparation for human rights violations, there are promising examples of judicial decisions applying non-restrictive interpretations of access to reparation.

The Federal Division for Administrative Disputes of the Judiciary of Argentina recognized that special reparation laws make international obligations effective in granting reparation for human rights violations and they should be interpreted "in favor of a person (*pro-persona*)" principle.[99] The court ruled that, even when certain types of cases are not included explic-

of the Code of Criminal Procedure, or before the administrative jurisdiction. France, Conseil d'État, *case N° 315499*, Section du Contentieux, ECLI:FR:CEASS:2009:315499.20090216.

94 See Lize R. Glas, "Trivkanović V. Croatia: About Rigidity, Reopening and Proof of Forced Disappearances," Strasbourg Observers, February 15, 2021, https://strasbourgobservers.com/2021/02/15/trivkanovic-v-croatia-about-rigidity-reopening-and-proof-of-forced-disappearances/#more-5143

95 The Supreme Court has recognized the writ, but the statute of limitations has not yet been revised. Currently, the statute of limitation for torture cases is six months. Previous decisions of the UN Human Rights Committee have held Nepal's statute of limitation in violation of international obligations under the ICCPR, including in Fulmati Nayya v Nepal, 2019. See more at Trial International, "Public Interest Litigation in Nepal Could End Statute of Limitation on Torture, November 11, 2020," https://trialinternational.org/latest-post/public-interest-litigation-in-nepal-could-end-statute-of-limitation-on-torture/

96 Suman Adhikari vs Nepal Government, Order 069-WS-0057, Judgment (February 26, 2015).

97 Olivares Muñoz and others v. Venezuela, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 415, ¶ 151 (November 10, 2020).

98 Díaz Loreto and others v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 392, ¶ 68 (November 19, 2019).

99 Tribunal Superior de Justicia, Neuquen, Neuquen, Sala Civil, Luis Alberto c/ Mapfre Cía. de Seguros S.A. s/ Cobro de seguro por incapacidad, Judgement FA15070068, Noviembre 9, 2015.

itly in the law, if the state is involved (including abroad), the right to reparation prevails.[100] The Supreme Court of Justice of Argentina established that a person can claim the right to receive compensation as the successor of a victim, even after the victim may have died.[101] Finally, in Argentina courts adjusted their evaluation of the testimonies of victims; some now value the victim's account of abuse in detention as sufficient without requiring additional documentary evidence.[102]

Similarly, in Kyrgyzstan a court specifically cited a UN Human Rights Committee decision to award compensation to a brother of man who died after being tortured by police, despite the fact that the government argued that only their late father, who was recognized as a victim in a criminal investigation (and also the only author of the complaint to the committee) had the right to claim compensation. The court stated that "the plaintiff, being the sibling brother of the deceased, has also experienced moral suffering."[103]

The Council of State of Colombia set the criteria related to the flexibility of standards of evidence in order to access reparation. It indicated that when the evidence required to prove harm or loss caused by serious violations of human rights prevents victims from accessing reparation, the standards of evidence should be relaxed along with the authority of the judge used to require *ex officio* the provision of the same.[104] Similarly, in a case of extrajudicial killing, the Council of State of Colombia established that:

> In events, cases or facts in which the violation of human rights and international humanitarian law is discussed, the so-called rational test or "sound reasoning" is used as a basic principle, which is based on the rules of logic and experience, because the freedom of the judge is not based exclusively on the intimate conviction, as occurs with the verdict of the popular jury.[105]

100 Federal Division for Administrative Disputes of the Judiciary, Case 63169/2016, June 22, 2017, considering IV (Argen.). (The Supreme Court of Justice of the Nation underlined the generous spirit which guided the National Congress when enacting the law and that it tried to make the international commitment adopted by the Republic effective and provide reparations, without restrictions alien to its intention, gross violations to the dignity of the human being committed during those years in our history as well as the political will of the Nation which emerged clearly from the debates in Parliament and from which it was deduced that the legislative, beyond clarifying terminology, focused all efforts on achieving all-inclusive compensation for those who suffered from this horrific situation (Rulings: 327:4241, already cited). It had already been pointed out that "detention, not only in this law but also in terms of common sense, means different forms of reducing freedom of movement" and that "there is no doubt that inherent in the concept of detention of the law on analysis is confinement of a whole family... on the grounds of a foreign embassy and their subsequent exile..."). *Likewise, in Cagni, Carlos Alberto v. Ministry of Justice and Human Rights*, December 16, 2008, the Supreme Court of Justice of Argentina, reiterating the inclusive criterion and submitting to the opinion of the Attorney General, determined that the benefit granted by Law 24.043 should not be denied and which was requested by the claimant without determining specific motives for the exile of a whole family in order to avoid death cannot be understood as a derivation of the concept of "detention" to which the law refers.

101 Supreme Court of Argentina, Sánchez, Elvira Berta v. Ministry of Justice and Human Rights, Article 6 Law 24.411, Resolution 409/01, Judgment 1091, XLI, May 22, 2007, http://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=6280681

102 Centro de Estudios Legales y Sociales et al, *Fiscalías especializadas en violencia institucional. Diseño, implementación y estrategias jurídicas,* November 9, 2020, 39, www.cels.org.ar/web/publicaciones/fiscalias-especializadas-en-violencia-institucional-diseno-implementacion-y-estrategias-juridicas/

103 Pervomaiski District Court of Bishkek (Kyrgyzstan), Case No. GD-839/18.BZ, Chyngyz Suyumbaev v the Kyrgyz Republic Ministry of Finance, 12. Unofficial translation into English at www.justiceinitiative.org/uploads/8f72c722-515e-47f5-abf9-5f1285f8ce06/akmatov-district-court-decision-eng-20181018.pdf: "[T]he court considers it is necessary to be guided by the UN Committee's Views, which states that persons whose rights have been violated independently of any related criminal proceedings have the right to compensation for moral damage. Thus, the arguments of the defendant that the decision of investigator A. Mamazhakyp uulu dated May 27, 2005 recognized Suyumbai Akmatov [the father of the victim] as a victim, and only he can be the plaintiff, is considered unfounded by the court. The court believes that the plaintiff, being the sibling brother of the deceased, has also experienced moral suffering. However, this circumstance should affect the amount of compensation."

104 Consejo de Estado, Tercera Sección, 22 marzo 2012, Sentencia 22206, Domicó Domicó.

105 Consejo de Estado, 25 febrero 2016, Sentencia 49798, Damaris Valencia and others (Colom.).

In Mexico the Federal Judiciary also interpreted in a flexible way the right to reparation by establishing that even though the right was limited to compensation, the state's liability caused by irregular administrative activities must be interpreted in light of the American Convention on Human Rights; therefore, it should comply with states' obligation to grant comprehensive reparations, including restitution, compensation, satisfaction, rehabilitation, and non-recurrence measures.[106]

The Supreme Court of the Philippines, using the doctrine of command responsibility applied to the Writ of Amparo and Habeas Corpus, established that, "although international tribunals apply a strict standard of knowledge, i.e., actual knowledge . . . a more liberal view [may be] adopted in the Philippines, and superiors may be charged with constructive knowledge."[107]

The Supreme Court of Appeal in South Africa in a case ruled against police, highlighting that in the evaluation of evidence, the judge must guard against a tendency to focus too intently on separate and individual parts of what is ultimately a mosaic of proof.[108] It also confirmed that when a suspect is fatally assaulted while in police custody, there is a duty on those policemen who witnessed the attack but did not participate in it to put a stop to it. Each could be convicted on one of three bases: 1) as an actual participant in the assault, 2) on the basis of common purpose, and 3) by failing to prevent the assault when there was a duty to do so.

Victims' Rights

Victim engagement in both processes of contestation and demand for reparation and the design, implementation, and monitoring of reparation is an essential component of the fulfillment of victims' right to reparation.[109] Because one of the ultimate objectives of reparation is the restoration of the dignity of the victim, measures of reparation should always include victims' participation in the redress process. Experience demonstrates that judgments for reparations could be better implemented through consultations with victims than by unilateral action by states.[110] A process that is inclusive will allow a state to fulfill its legal obligations in a way that takes into account its capacity and resources, the right to reparation of similarly situated victims, and the needs of the intended beneficiaries.

A victim-centered approach to redress requires an analysis and full understanding of the harm that victims suffered and victims' wishes. It needs to reflect their experiences and realities, so that the redress that is provided is responsive to their needs. States should ensure that victims help lead the redress process and relevant actors providing redress are expected to work with the victims, not on the victims. Victims should be enabled to play active and participatory roles in the process of obtaining redress without fear of stigma or reprisal.[111]

106 Tribunales Colegiados de Distrito, Tesis: III.5o.A.12 A (10a.) (Mex.): "Responsabilidad patrimonial del Estado de Jalisco y sus municipios. El artículo 11, fracción ii, de la ley relativa, que establece un monto máximo como límite al que deberá sujetarse la indemnización por el daño moral que ocasione la actividad administrativa irregular, es inconstitucional e inconvencional, al restringir arbitrariamente el derecho del particular a recibir una indemnización justa."
107 Rodriguez v. Arroyo, G.R. No. 191805, (November 15, 2011) (Phil.).
108 S v Govender and Others 2004 (254/03) ZASCA 34 (S. Afr.). The court confirmed this position later in Mkhize v S 2019 (390/18) ZASCA 56 (S. Afr.).
109 UN Women, *Report on Reparation Development and Gender* (October 2012), 5–6.
110 For example, discussions between states and victims as litigants before the IACHR have led to the implementation of measures that include symbolic and material forms of reparation, aside from compensation, and in such countries as Peru and Argentina, to the establishment of reparations programs that offer reparation to victims who were not part of the original litigation.
111 African Commission on Human and People's Rights, *General Comment 4,* at para 18.

The inclusion of victims in these processes can be found in national practice. For example, the Supreme Court of Chile has indicated that:

> Currently the responsibility deriving from an unlawful act generates a restorative obligation, in the widest sense; this implies a process and not a mere action, in which both victims and offenders participate, paying full attention to the effects or consequences, whether direct or indirect, and including mediate repercussions.[112]

The Supreme Court of Nepal, in a case regarding amnesty provisions in a law under question, stated that:

> since this has made the involvement and consent of victim in the amnesty proceedings not mandatory but only a secondary requirement and as this seems to be against the victims' fundamental right to justice including right to life and liberty, right to information, right against torture, and against the recognized principles of justice, this provision has to be reviewed, reformed and amended accordingly.[113]

Monitoring Mechanisms for Implementing Reparation Measures

States have an obligation to take steps to ensure that judicial and administrative decisions on reparation are enforced and implemented. The effectiveness of the remedies to obtain reparation depends on the actual implementation of the measures obtained for reparation. The IACtHR has indicated repeatedly that national courts must "establish in a clear and precise manner (in accordance with the scope of their authority) the scope of reparations and the means to execute them."[114] In this regard, the UN Human Rights Committee has established the need to "indicate the specific domestic authorities that are in charge of implementing each measure of reparation."[115] Among the examples used by the IACtHR to monitor its own decisions, there are specific bodies created for a specific duration of time to implement the court's decisions. It has indicated that these bodies must allow for the participation of victims and track the necessary internal processes to obtain reparation.[116]

In a recent case at the national level, the Supreme Court of Spain indicated that the lack of a specific enforcement procedure constitutes non-compliance with a legal and constitutional mandate that orders the protection of human rights.[117]

In a public interest litigation case in Bangladesh, the court issued detailed guidelines related to the protocols for guaranteeing the rights of persons held in custody and highlighted the importance of these guidelines and the consequences of not following them: "[F]ailure to comply with the requirements mentioned shall apart from rendering the concerned official liable for departmental action, liable to be punished for contempt of court may be instituted in any high court of the country, having territorial jurisdiction over the matter."[118]

112 Corte Suprema de Justicia, "Episodio Colegio Médico – Eduardo González Galeno," 21 Enero 2013, No. 10.665-2011 (Chile).
113 Supreme Court of Nepal, Suman Adhikari vs Nepal Government, Order 069-WS-0057, decision, February 26, 2015.
114 Mejía Idrovo v. Ecuador, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 228, at ¶ 96 (July 5, 2011).
115 Human Rights Committee, Bholi Pharaka v. Nepal, Communication No. 2773/2016, at ¶ 9
116 Mapiripán Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 310 (September 15, 2005).
117 S.T.S., July 17, 2018, No. 1263/2018, Section IV, 28, (María de los Ángeles González Carreño v. Ministry of Justice), www.cambridge.org/core/journals/american-journal-of-international-law/article/maria-de-los-angeles-gonzalez-carreno-v-ministry-of-justice/F2E94FB33587DCF993147FF16B1C49D7
118 AIR, DK Basu V. State of West Bengal, 1997, SC 610.

Adequate Reparation

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to adequate reparation for harm suffered.[119] According to the IACtHR, the adequacy of measures varies, depending on the concrete circumstances surrounding each case and the precise nature and scope of the injury.[120]

At the domestic level judges have also interpreted the right to grant reparation as including the obligation to grant appropriate reparation. The Supreme Court of Mexico established that victims of human rights violations have the right to appropriate reparation, which must include individual measures aimed at restoring, compensating, and rehabilitating the victim as well as measures of satisfaction and guarantees of non-repetition.[121]

Reparation to Prevent Future Violations

The right to obtain reparation is related to the question of preventing impunity.[122] Beyond their restorative function, if reparation is carefully devised, it can deter illegal behavior by states in the future. In this regard, the analysis of reparations functions concerns not only the individual case but also how the reparation affects the future behavior of other actors.[123]

Literature on deterrence in domestic legal systems has analyzed the degree to which sanctions and enforcement influence compliance with laws.[124] In this literature, *deterrence* is defined as "the inhibiting effect of sanctions on the criminal activity of people other than the sanctioned offender,[125] and "many scholars and practitioners argue that human rights trials are both legally and ethically desirable and practically useful in deterring future violations."[126] A review of the deterrence literature from domestic legal systems now concludes that there is much firmer evidence for a substantial deterrent effect than there was two decades ago.[127]

This deterrent element is not alien to the international law context. On the contrary, it is present in the cessation and non-repetition effects of reparation. As established in Commentary 5 to Article 30 of the Responsibility of States for Internationally Wrongful Acts:

> The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary

119 Basic Principles and Guidelines on the Right to a Remedy, Principle I. 2.c.
120 Avena and other Mexican Nationals (Mexico v United States of America), Judgment, 2004 I.C.J. 12, ¶ 119 (March 31).
121 Supreme Court of Justice, P. LXVII/2010 (Mex.).
122 Theo Van Boven, *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* United Nations Audiovisual Library of International Law, n.p., (2010).
123 See Adriana García and Dirk Zavala Rubach, "El Poder Judicial y la reforma sobre derechos humanos: un análisis a partir de la teoría de juegos," *in Reforma constitucional sobre los derechos humanos: los costos de su implementación,* Carlos Pérez Vázquez (coord.), Supreme Court of Justice of Mexico, Mexico, 2014, 23–48.
124 See Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor, MI: University of Michigan Press, 1974); Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, D.C.: National Academy of Sciences, 1978); Ross L. Matsueda, Derek A. Kreager, and David Huizinga, "Deterring Delinquents: A Rational Choice Model of Theft and Violence," *American Sociological Review* (2006) 71:95–122; Bill McCarthy, "New Economics of Sociological Criminology," *Annual Review of Sociology* (2002) 28:417–42; and Daniel S. Nagin, "Criminal Deterrence Research at the Outset of the Twenty-First Century," in *Crime and Justice: A Review of Research,* ed. M. Tonry (Chicago: University of Chicago Press, 1998), 1–42.
125 See Blumstein et al, *Deterrence and Incapacitation.*
126 See Juan E Méndez, "In Defense of Transitional Justice," in *Transitional Justice and the Rule of Law in New Democracies,* ed. A. James McAdams (Notre Dame: Notre Dame Press, 1997), 1–26; Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 2005); and David Mendeloff, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?" *International Studies Review* (2004) 6:355–80.
127 See Daniel S. Nagin, "Criminal Deterrence Research at the Outset of the Twenty-First Century," in *Crime and Justice: A Review of Research,* ed. M. Tonry, (Chicago: University of Chicago Press, 1998), 1–42.

> rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

Moreover, the IACtHR, when evaluating the effectiveness of the internal remedies available in each country to obtain reparation, analyzes whether the decisions made have contributed effectively to ending impunity, ensuring the non-repetition of harmful acts, and guaranteeing the free and full exercise of the rights protected by the American Convention on Human Rights.[128]

Judges at the domestic level have increasingly incorporated the deterrent component into their decisions, as we will show later.

In this regard, the Council of State of Colombia has played an active role in granting measures of non-repetition. In its jurisprudence, it reiterated that:

> In order to specify the preventive role which jurisprudence must have on administrative disputes… in cases of gross violations of human rights . . . it is of great importance for the Council of State to highlight, in cases such as the present one, the inappropriate behavior committed by state agents, with the aim of setting a precedent which obliges the public administration to pull out by the root this type of behavior and for the case to receive due reparation which would make the recurrent recourse of citizens to international organizations unnecessary.[129]

The Constitutional Court of Colombia also established that:

> The guarantee of non-repetition is composed of all the actions aimed at preventing behavior from re-occurring which impacted on the rights of the victims and which must be appropriate to the nature and magnitude of the offence. The guarantee of non-repetition is directly related to the obligation of the State to prevent gross violations of human rights; this includes the adoption of measures of a legal, political, administrative, and cultural nature that promote safeguarding rights. In particular, the following contents of this obligation have been identified: (i) recognize the rights at an international level and offer guarantees of equality; (ii) draw up and implement strategies and policies of comprehensive prevention; (iii) implement programs of education and dissemination aimed at eliminating patterns of violence and infringement of rights and inform people of rights, mechanisms of protection and the consequences of their infringement; (iv) introduce programs and promote practices that allow an effective response to complaints of human rights violations as well as strengthen institutions with functions in that field; (v) assign sufficient resources to support prevention efforts; (vi) adopt measures to eradicate risk factors; this includes devising and implementing instruments to facilitate the identification and notification of factors and events that pose the risk of violation; (vii) take specific prevention measures in cases where a group of people is found to be at the risk of their rights being violated.[130]

In Mexico, the Federal Judiciary established that it is unconstitutional and unconventional to arbitrarily restrict an individual's right to comprehensive reparation if caused by the state's irregular administrative activities. Without it, the state would lack a proper incentive to take

128 Manuel Cepeda Vargas v. Colombia., ¶ 139.
129 Consejo de Estado, Tercera Sección, Subsección B, 30 Abril 2014, Sentencia 28075, Sapuyes Argote et al (Colom.).
130 Corte Constitucional, 3 julio 2015, Sentencia T-418/15 (Colom.).

the necessary actions and precautions to elevate the quality of public services.[131] The Mexican judiciary also established that the state's obligation to investigate, punish, and remedy human rights violations entails the application of all measures necessary to achieve the restoration of rights. Compliance with human rights guarantees can occur through comprehensive reparation or could result in progressive actions. Solutions adopted by the state should restructure the political and social environment that respects human rights.Reparation awarded in a particular case can also include guidelines for future governmental activities.[132]

Comprehensive Reparations

The Inter-American system of human rights has crafted the "most comprehensive and holistic approach to reparations" under international human rights law.[133] It has indicated repeatedly that, in accordance with its standards and those of international human rights law, that "the scope of these measures must be of a comprehensive nature, and wherever possible, with the aim of returning the person to the moment before the violation occurred (*restitutio in integrum*)."[134] In accordance with IACtHR jurisprudence, comprehensive reparation "means the re-establishment of the previous situation and the removal of the results which the violation produced;"[135] and considers, in addition to monetary compensation, the granting of other types of reparation, such as restitution, rehabilitation, satisfaction, and guarantees of non-repetition.[136] Each one of these measures addresses the needs of the victims in different ways. The following section comprises an analysis of each measure and gives examples of how they can be applied on the basis of each measure. One or more measures can provide reparation for a specific harm or loss without being considered double reparation.[137]

At the national level, the Supreme Court of Chile in a case of enforced disappearance, indicated that the focal point when granting reparations is to do so in a comprehensive manner so that, seen as a process, it examines multiple aims that constitute restoration as reparation results.[138] They include, to the greatest possible extent, restitution, compensation, reparation, reconciliation, and acceptance, including accepting responsibility for the act with all of the related consequences. The process should include all involved: the victim, the perpetrator, the victim's family, other affected individuals, the community, and ultimately, the state itself. In other decisions, the Supreme Court of Chile drew on international experience to establish a national obligation to provide comprehensive reparations in cases of serious violations of human rights.[139]

131 Responsabilidad Patrimonial del Estado de Jalisco Y Sus Municipios. El Artículo 11, Fracción Ii, De La Ley Relativa, Que Establece Un Monto Máximo Como Límite Al Que Deberá Sujetarse la Indemnización por el Daño Moral Que Ocasione La Actividad Administrativa Irregular, Es Inconstitucional E Inconvencional, Al Restringir Arbitrariamente El Derecho Del Particular A Recibir Una Indemnización Justa, Tribunales Colegiados de Distrito [TCC], Tesis: III.5o.A.12 A (10a.) (Mex.).
132 Ibid.
133 Shelton, *Remedies,* 299.
134 Mejía Idrovo v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 228, at ¶ 96 (July 5, 2011).
135 González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. ¶ 450 (November 16, 2009).
136 Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R., (ser. C). No. 105 (April 29, 2004); Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287, ¶ 543 (November 14, 2014); Herrera Espinoza et al. v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 316, ¶ 214 (September 1, 2016).
137 González et al. ("Cotton Field"), ¶ 450.
138 Corte Suprema de Justicia, 21 enero 2013, Sentencia No. 10.665-2011 (Chile).
139 Corte Suprema de Justicia, 14 diciembre 2016, Sentencia No. 62032-16, p.19 (Chile): "[T]he civil case deduced against the Treasury aimed at obtaining comprehensive reparation of the damage and loss caused, has its basis in the general principles of the International Human Rights Law and is regulated by the international treaties ratified by Chile which oblige the State of Chile to recognize and protect this right to comprehensive reparation, in accordance with the provisions of the second paragraph of Article 5 and Article 6 of the Political Constitution. Articles 1.1 and 63.1 of the American Convention on Human Rights establish that the responsibility of the State for this class of crimes is subject

The Council of State of Colombia has stated that comprehensive reparation measures must be adopted when relevant and necessary because measures of restitution, rehabilitation, satisfaction, and guarantees of non-repetition have far-reaching and universal effects.[140] In accordance with established jurisprudence of the Council of State of Colombia, there are cases where the judge can order measures aimed at comprehensive reparation of harm(s) or loss(es), including when the plaintiff has not requested it.[141]

The Council of State of Colombia has also established that comprehensive reparation covers both individual and collective aspects. In one case, the Council of State of Colombia established that the killing of Jose Giraldo Cardona involved the loss of a son, a father, a husband, and a brother as individual victims.[142] In addition, it also involved the collective harm imposed on human rights defenders, because they had lost trust in the equal protection of the state, and a political party as an exterminated political community. The council stated that:

> the notion of the principle/right to comprehensive reparation encompasses a combination of measures which, since they cover various fields of life, attempt to re-establish, in the most immediate manner, the situation to the state prior to the harmful deed, or to improve it by transforming it . . . the State institutions must commit to recovering the confidence lost, in creating spaces that facilitate the application of measures aimed at creating forms of reparation that are individual, symbolic, and collective, that are comprehensive and which, moreover, can be effective as guarantees of the non-repetition of the deeds.[143]

There are also examples of decisions by the Constitutional Court of Colombia that provide comprehensive reparation for serious violations of human rights.[144] According to the Constitutional Court of Colombia, reparation measures must be subject to two principles, comprehensiveness and proportionality: "The principle of comprehensiveness supposes that the victims are to be given reparations of different types that reflect the different ways in which they have suffered."[145]

The Mexican Federal Judiciary established that comprehensive reparation resulting from a human rights violation entails full restitution of the victim (*restitutio in integrum*), to restore the victim's situation before the violation occurred.[146] However, given the limited possibility that all human rights violations may be fully repaired by their very nature, legal doctrine has developed a wide range of reparations that try to compensate victims of human rights violations with both pecuniary and non-pecuniary reparations.[147] Victims of human rights violations, or their relatives, are entitled to comprehensive reparation achieved through restitution, compensation and rehabilitation, satisfaction measures, non-repetition guarantees, and other procedures legally

to the rules of International Law which cannot be ignored under the pretext of prioritizing other precepts of national law because if an unlawful act is identified that is attributable to a State. The latter immediately becomes responsible internationally because it has violated an international rule, with the consequent obligation to provide reparation and ensure the consequences of the violation cease."

140 Consejo de Estado, Tercera Sección, Subsección A, 27 abril 2016, Sentencia 50231, De La Cruz Mora (Colom.).

141 Consejo de Estado, Tercera Sección, 20 febrero 2008, Sentencia 16996, Carmona Castañera Brothers; 28 enero 2009, Sentencia 30340, presiding judge Enrique Gil Botero; Tercera Sección, 21 febrero 2011, Sentencia 20046, Galvis Quimbay et al. (Colom.).

142 Consejo de Estado, Tercera Sección, Subsección B, 26 junio 2014, Sentencia 26029, Giraldo Cardona (Colom.)

143 Ibid.

144 Corte Constitucional, 7 abril 2016, Sentencia CC 161/2016, Víctor Hugo Matamoros Rodríguez; 3 diciembre 2013, Sentencia C912/ 2013, Luis Jorge Garay Salamanca et al.; 24 abril 2013, Sentencia SU 254/2013, Carlos Alberto González Garizabalo et al. v. the Presidential Agency for Social Action and International Cooperation (Colom.).

145 Corte Constitucional, 3 julio 2015, Sentencia T-418/15 (Colom.).

146 This definition differs from the criminal law definition of *reparation,* which is not related to restitution.

147 Acceso a la justicia. ElEl deber de reparar a las víctimas de violaciones de derechos humanos es una de las fases imprescindibles de dicho derecho, Primera Sala de la Suprema Corte de Justicia, 1a. cccxlii/2015 (Mex.).

provided for this purpose. Comprehensive reparation should not be conceptualized as a gracious concession but as the fulfillment of a legal obligation.[148]

It is important to notice that there is not a straightforward distinction between different reparation measures. Several legal instruments include one or more general categories. For the purposes of these guidelines, we adopt the most common definition of reparation measure, relying on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The guidelines establish that the comprehensive reparative concept of reparation "entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."[149]

Before delving into each measure, it is important to point out that not all cases require all five forms of reparations. As required by the obligation to provide appropriate reparation, the reparation measures appropriate in each case depend on the type and extent of the harm caused to the victim and, most importantly, on the needs of the victim.

Restitution

As defined by the *Basic Principles and Guidelines on the Right to a Remedy and Reparation,* restitution "seeks to restore the victim to the situation that would have existed had the crime not happened. This may include restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property."[150]

In accordance with international law, reparation must, as far as possible, remove the consequences of illegal acts and restore the situation that probably would have existed if the act had not been committed.[151] Restitution, which is understood to be the re-establishment of the situation that existed before the violation, must always be given whenever materially possible and does not constitute a disproportionate burden.[152]

For restitution to be effective, efforts should be made to address any structural causes of the violation, including, for example, any kind of discrimination related to gender, sexual orientation, disability, political or other opinion, ethnicity, age, or religion, and all other grounds of discrimination.[153]

It is important to note that restitution can also be juridical:

> The term "juridical restitution" is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.[154]

148 Derechos Humanos. Su violación genera un deber de reparación adecuada en favor de la víctima o de sus familiares, a cargo de los poderes públicos competentes, Pleno de la Suprema Corte de Justicia [SCJN], P. Lxvii/2010 (Mex.).
149 Committee against Torture, General comment No. 3, ¶ 2.
150 UNGA, *Basic Principles and Guidelines on the Right to a Remedy.*
151 Factory at Chorzów (Germany v. Poland), Judgment, 1928 P.C.I.J. (ser. A), No. 17 at 47 (September 13).
152 UNGA, *Basic Principles and Guidelines on the Right to a Remedy.*
153 Committee against Torture, General Comment No. 3, ¶ 8.
154 International Law Commission, "Draft Articles on Responsibility of States," Comment 5 on art. 35.

Similarly, restitution has limits and is granted solely if it is not materially impossible or wholly disproportionate to the damage caused by the violation:

> The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.[155]

Thus:

> This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness.[156]

The IACtHR has stated that restitution measures must always be chosen first. If restitution is not possible, then other comprehensive means of reparation should be selected.[157]

Reparation for harm or loss caused by the breach of an international obligation requires full restitution (*restitutio in integrum*) whenever possible, which consists in re-establishing the situation prior to the violation. If this is not possible, as happens in the majority of cases of human rights violations, the court should determine measures to guarantee the rights that were violated and provide reparation for the consequences caused by the violations.[158]

The IACtHR has ordered various means of restitution, of which the most prominent are annulment of sentences (including death sentences); annulment of previous sentences;[159] release of imprisoned victims;[160] annulment of fines;[161] re-instatement of jobs;[162] creation of development programs;[163] provision of appropriate conditions for displaced victims (provided that the victims

155 Ibid. at Comment 7 on art. 35.
156 Ibid. at Commentary 11 on art. 35.
157 Garífuna Punta Piedra Community and its members v. Honduras, Preliminary Objections, Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H.R., ¶ 255 (October 8, 2015); Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 26 (July 21, 1989); López Lone et al. v. Honduras, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ¶¶ 222 and 287 (October 5, 2015); Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287, ¶ 543 (November 14, 2014).
158 Granier et al. (Radio Caracas Televisión) v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 293, ¶ 361 (June 22, 2015).
159 Fermín Ramírez v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) no. 126, ¶ 138 (June 20, 2005); Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 94, ¶ 223 (June 21, 2002); Castillo Petruzzi et al. v. Peru., Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 52.¶ 221 (May 30, 1999); Cantoral Benavides v. Peru., Merits. Judgment, (ser. C) No. 69 ¶ 42 (August 18, 2000); Herrera Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107 ¶ 195 (July 2, 2004); Loayza Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 121 (September 17, 1997); Acosta Calderón v. Ecuador, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 129 ¶ 175 (June 24, 2005).
160 Loayza Tamayo v. Peru, ¶ 113; Baena Ricardo et al. v. Panama, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 72 ¶¶ 1, 84 (February 2, 2001); on the role of the Inter-American Commission requesting the liberation of victims; see María-Claudia Pulido, "Reparation for Torture: Recent Jurisprudence of the Inter-American System on Human Rights," in *Pan-African Reparation Perspectives* 1 (June 2013): 6–7.
161 Lori Berenson v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 119 ¶ 248 (November 25, 2004); Suárez Rosero v. Ecuador, Merits, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 35 ¶ 113 (November 12, 1997).
162 Loayza Tamayo v. Peru., ¶ 113; Baena Ricardo et al. v. Panama, ¶ 214.
163 Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 252 ¶ 339 (October 25, 2012).

wish to return);[164] creation of housing programs;[165] review of criminal proceedings;[166] restitution of land; information about victims; and the location, and exhumation (as appropriate) of victims.[167] Similarly, the IACtHR has classified the return of seized monies or assets as restitution.[168]

The UN treaty bodies have frequently referred to restitution in their jurisprudence, although itcan take various forms in individual cases.

In accordance with paragraph 6 of the *Guidelines on Measures of Reparation under the Optional Protocol to the International Covenant on Civil and Political Rights,* States parties should provide for measures of restitution with a view to restoring rights that have been violated. "Such measures may include, for example, the victim's reinstatement in employment that was lost as a result of the violation committed."[169] Similarly, in accordance with the guidelines, the Human Rights Committee can order: release of detained persons, asking national authorities to revise the reasons that caused the deprivation of liberty, or giving the state party the option to retry the case.[170]

Further, the UN Working Group on Arbitrary Detention has stated that "the remedy for arbitrary detention will regularly be immediate release."[171] It has done so in the great majority of cases analyzed in relation to arbitrary detention.[172]

At the domestic level, the Colombian judiciary has identified restitution as the preferred means of reparation. For example, in Judgment C-715 of 2012, the Constitutional Court of Colombia stated that: "(i) Restitution must be understood as the preferred and main means of reparation for victims as being an essential element in restorative justice."[173] Other cases establishing this principle are: *Estrada Montes Brothers,*[174] *Neusa Cortés et al.,*[175] *Oquendo Flórez et al.,*[176] and *Pérez García.*[177]

164 Ibid. at ¶ 345.
165 Ibid.
166 Omar Humberto Maldonado Vargas et al. v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 300 (September 15, 2015).
167 Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140 (January 31, 2006).
168 Cantoral Huamaní and García Santa Cruz v. Peru, Judgment, Inter-Am. Ct. H.R., ¶ 187 (July 10, 2007).
169 UN Human Rights Committee, "Guidelines on Measures of Reparation," ¶ 6.
170 Ibid, at ¶ 7.
171 UNGA, *Report of the Working Group on Arbitrary Detention,* U.N. Doc. A/HRC/30/36, July 10, 2015, http://undocs.org/en/A/HRC/30/36
172 See various documents of the UN Working Group on Arbitrary Detention, http://ap.ohchr.org/documents/dpage_e.aspx?m=117
173 The court further established that "(ii) Restitution is a right in itself, and is independent of whether dispossessed or usurped victims or those forced to abandon their lands effectively return or not. (iii) The State must guarantee access to compensation or an adequate payment for cases where restitution would be materially impossible or when the victim consciously and voluntarily opts for such. (iv) The means of restitution must respect the rights of third parties occupying property in good faith and who, if necessary, must have access to means of compensation. (v) Restitution must aim at fully reinstating the victim and returning them to their situation prior to the violation in terms of guarantee of rights, but also the guarantee of non-repetition, when the structural causes of dispossession, usurpation or abandonment of property have changed. (vi) In cases where full restitution is not possible, means of compensation must be adopted, which take into consideration not only moveable property that cannot be restored, but also all other possessions as well in terms of compensation, such as compensation for damage or loss caused. (vi) The right to restitution of possessions requires the State to take a comprehensive view within the framework of respect for and guarantee of human rights that constitutes a fundamental element of retributive justice since it is clearly a mechanism of reparation and a right in itself, autonomous and independent." See Corte Constitucional, 13 septiembre 2012, Sentencia C-715/12 (Colom.), www.corteconstitucional.gov.co/relatoria/2012/C-715-12.htm
174 Consejo de Estado, Sección Tercera, Sentencia No. 5594, 23 octobre 1990, Estrada Montes Brothers.
175 Consejo de Estado, Sección Tercera, Sentencia No. 24724, 26 junio 2014, Neusa Cortés et al.
176 Consejo de Estado, Sección Tercera, Subsección B, Sentencia No. 21806, 29 October 2012, Oquendo Flórez et al.
177 Consejo de Estado, Sección Tercera, Subsección A, Perea Fonseca, Sentencia No. 36.566, 17 abril 2013.

Compensation

Of the various forms of reparation, compensation is perhaps the most sought in practice. When the victim cannot be restored to their pre-injury situation, financial compensation may be awarded.[178] According to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation,* compensation must be provided where damage is "economically assessable," and in keeping with all other forms of reparation, it must be "proportional to the gravity of the violation and the circumstances of each case."[179] Compensation may be claimed for the following losses: physical or mental harm; lost opportunities, including of 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.[180]

Compensation is not a new subject at the domestic level. Various decisions defining criteria for compensation have become a standard. In case 1.006.017, No. 12786506, the Federal Supreme Court of Brazil confirmed a decision establishing criteria for the quantification and adjustment over time of the amount for compensation for the death of a victim.[181] In a case involving the misuse of force by police, the Federal Supreme Tribunal of Brazil established general criteria for judges to individualize compensation in cases of death in custody.[182]

The Council of State of Colombia, through a jurisprudential unification decision, established the clear criterion that the damage or loss caused by wrongful deprivation of liberty must be taken into consideration when quantifying reparations. It repeatedly stated that, in cases of wrongful deprivation of liberty and based on experiences, there is room to infer that this situation creates mental suffering, fear, and anxiety for persons whose liberty has been unfairly affected or limited.[183] The council also emphasized that it must turn to lessons from experience in order to quantify the suffering of the victim's family members, "the judge must apply judicial discretion as the basis and must evaluate, according to his or her wise counsel, the circumstances of the specific case for the purpose of determining the intensity of distress, with the aim of calculating the sums to be assigned according to this view."[184]

The Mexican Federal Judiciary established that the obligation to compensate victims for human rights violations is one of the essential milestones in achieving justice. The justice system must be able to repair the damage done by state authorities and, depending on the severity of the violation, promote a culture change.[185] It also established that there are two dimensions to financial and moral damages: present and future. While present damages take into account actual losses at the time of the judicial decision, future damages must include an expected extension or aggravation of an existing injury.[186]

178 Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26).
179 UNGA, *Basic Principles and Guidelines on the Right to a Remedy.*
180 Ibid.
181 Supremo Tribunal Federal (S.T.F.), Ag.Reg. No Recurso Extraordinário Com Agravo 1.006.017, Estado do Goiás, Relator: Min. Dias Toffoli, 31.03.2017 (Braz.), http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12798721
182 Supremo Tribunal Federal (S.T.F.), Andamento do Processo n. 1.006.017, Ag.reg, Recurso Extraordinário, Agravo – 26.04.2017 (Braz.), www.jusbrasil.com.br/diarios/documentos/452001717/andamento-do-processo-n-1006017-agreg-recurso-extraordinario-agravo-26-04-2017-do-stf?ref=topic_feed
183 Consejo de Estado, "Document Ordered by Record No. 23 of 25/Sept/2013 with the Aim of Compiling the Line of Jurisprudence and Establishing Standardized Criteria for Reparation of Immaterial Damages," 24.
184 Ibid.
185 Derechos Humanos. Todas lLas Autoridades Están Obligadas aA Cumplir Con Las Obligaciones De Respeto Y Garantía,. Suprema Corte de Justicia de la Nación [S.C.J.N.], Tesis: 1a. CCCXL/2015.
186 Reparación del Daño en Materia Penal. Para Su Cuantificación, El Juez Debe Valorar Los Daños Presentes, Así Como; as Consecuencias Futuras, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.], Tesis: 1a. CXXXII/2016 (Mex.).

Similarly, in a case of torture, a court in Kenya granted compensation, noting the difficulty of calculating subjective damages:

> It is self-evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.[187]

Finally, compensation has been granted in many countries in Asia. In India, Pakistan, and Sri Lanka, the supreme courts, as part of their constitutional jurisdiction, have awarded monetary compensation for acts of torture, death in custody, and other violations of the right to life and liberty. In a number of cases, the Supreme Court of Sri Lanka has held that the petitioner was entitled to the declaration that their fundamental right to freedom from torture and cruel, inhuman and degrading treatment was violated and compensation by the state and respondents.[188] In another case of illegal detention and torture, the Supreme Court of Sri Lanka awarded compensation, recognizing the lasting impact of mental pain suffered as a result of torture.[189] Courts in the Philippines, Thailand, and Indonesia have also awarded compensation in similar cases.

Satisfaction

According to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation:*

> satisfaction should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the

187 Wilson Olal & 5 others v Attorney General & 2 Others (2017), eKLR, High Court of Kenya, http://kenyalaw.org/caselaw/cases/view/137643/
188 Applications under Article 126 read with Article 17 of the Constitution of the Democratic Republic of Sri Lanka; Suppiah Sivakumar v. Sergeant 6934 Jayaratne and others, SC. FR. No. 56/2012, Judgment, July 26, 2018; S. G. P. Dilshan Tilekeratne v. Sergeant Douglas Ellepola and others, SC. FR No. 578/2011, Judgment, January 14, 2016 (SC held that it would be just and equitable to pay for compensation for humiliation and suffering).
189 Chaminda Sampath Kumara v. Sub Inspector Salwatura, and Others, SC FR Application No. 244/2010, Judgment, May 30, 2017 (Sri Lanka).

> victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.[190]

Typically, there is significant overlap between measures of satisfaction and measures of non-repetition. Both serve important preventive objectives. However, their scope differs in that measures of satisfaction focus on the victim, while measures of non-repetition focus on the entire society, not just the victim. However, this distinction is not always clear, and judges often lump them together, sometimes classifying them all as one form of reparation or—in many decisions outside of Latin America—not referring to the different types of reparation in ordering them.

Regardless of the classification, in domestic decisions studied in this guide, judges tended to award satisfaction measures in two broad categories: measures related to the right to truth and those aimed at holding perpetrators accountable. The following section explores such measures.

Rehabilitation

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation* extend the possible application of rehabilitation as a form of reparation beyond torture and enforced disappearance to include any gross human rights violation and serious violations of humanitarian law. Article 21 establishes that: "Rehabilitation should include medical and psychological care as well as legal and social services."

The IACtHR has given special attention to rehabilitation measures and, since 2001, has ordered states to provide educational, medical, or similar services or scholarships to survivors and family members affected by human rights violations.[191]

Rehabilitation measures ordered by the IACtHR include medical, psychological or psychiatric, and psychosocial care of victims.[192] Psychosocial measures have been ordered in cases where "it has been found that the harm suffered by the victims does not refer only to parts of their individual identity but to the loss of their roots and community ties."[193]

The IACtHR has not limited itself to ordering the provision of rehabilitation but has also determined the characteristics it must have. Rehabilitation must be of a permanent nature, and programs must have a "multidisciplinary focus carried out by experts in the subject, sensitized and trained in the care of victims of human rights violations, as well as a focus of collective attention."[194] Rehabilitation must be free and offered in an appropriate and effective manner through the respective specialized public institutions closest to the victims. It is important to note that "the provision of social services which the State offers individuals must not be confused with the reparations to which the victims of human rights violations have a right to due to the specific damage or loss caused by the violation."[195] If no specialized public institutions exist, use

190 UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation, IX:22 a-h.
191 Caracazo v. Venezuela, Merits. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 58, (November 11, 1999).
192 Ibid., ¶¶ 352 and 353.
193 Ibid, ¶ 352.
194 Ibid.
195 Ibid, ¶ 350.

should be made of private institutions or specialized civil society institutions. The informed consent of victims is also necessary, along with the free provision of necessary medicines and medical examinations. Procedures to obtain treatment must be simple and differentiated from ordinary medical procedures during registration and updated through the standard healthcare system.[196]

The IACtHR has also made a statement regarding rehabilitation in individual cases.[197] It has indicated that states are obliged to provide medical and psychological treatment required by victims in a free and immediate manner, for the time necessary, and with their informed consent, including the provision of medicines. It has repeated in these cases that psychological treatment must be provided by state personnel and institutions specialized in the care of victims of violent acts. If the state does not have such institutions, private institutions or specialized civil society institutions should be used, with preference given to sites closest to the victims. In that regard, it is important to emphasize that the circumstances and particular needs of each victim must be taken into consideration, along with the manner in which they can receive treatment individually and as a family through an individualized examination.[198]

Similarly, the IACtHR has indicated that if the victim is residing outside of the country and refuses to return for legitimate reasons, the state must provide the necessary funds for medical, psychological, and psychiatric treatment abroad.[199] The IACtHR has also stipulated that when a rehabilitation order is made, the gender aspect must be taken into consideration,[200] and when there are collective victims of human rights violations, the state can be ordered to create a committee to evaluate the physical and mental condition of the victims.[201]

Despite its importance, rehabilitation is one of the least developed measures of reparation in judicial decisions. While there are examples of courts ordering specific medical treatment,[202] we did not find domestic judicial decisions that would provide good examples of rehabilitation. This may be because the provision of rehabilitation services, particularly psychosocial support, requires a degree of trust that victims often do not have in state services, so it is less likely that they demand them as such. They Judges could add the cost of rehabilitation to estimates for compensation amounts. It is a complex process involving multiple actors, many of them nongovernmental and generally different from those responsible for the violations. As noted by the nongovernment group Freedom from Torture, which specializes in rehabilitation of torture survivors, the goal of holistic rehabilitation is to assist a survivor in rebuilding their life and to feel healthy, safe, and whole again. Holistic rehabilitation strives to ensure that a survivor is not only self-sufficient but is also empowered to engage with and proactively contribute to their

196 Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 252 ¶ 353 (October 25, 2012).
197 Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and. Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 213 ¶ 235 (May 26, 2010); Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 75, note 325, ¶¶ 42–45 (March 14, 2001); "Dos Erres" Massacre v. Guatemala, Inter-Am. Ct. H.R., note 57; Barrios Altos v. Peru, Judgment, March 14, 2001, ¶ 270; Anzualdo Castro v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 202, note 36, ¶ 203 (September 22, 2009).
198 19 Traders v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 278 (July 5, 2004).
199 Contreras et al. v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 201 (August 31, 2011).
200 González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 205, ¶ 549 (November 16, 2009).
201 Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 105, ¶ 108.
202 Supreme Court of Bangladesh, Ain o Salish Kendra (ASK) and Others v Bangladesh, Writ Petition No. 5464 of 2004. In this case, the police were made responsible for the medical treatment of the detainee, which provides useful indication of some of the corrective measures that may be applied in order to provide some relief to a victim of police abuse. In another case, DK Basu V. State of West Bengal, the courts referred to access to medical treatment more broadly as one of the guidelines to be followed in all cases of arrest and detention: "the arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a panel for all Tehsils and Districts as well."

community. Holistic rehabilitation services are interdisciplinary and can include doctors, psychiatrists, psychologists, psychotherapists, physiotherapists, casework-counselors, lawyers, social welfare workers, teachers, and community outreach workers. A rehabilitation approach can be described as holistic when it looks at the survivor of torture as a whole person and supports all of their needs.[203]

Non-repetition

Article 30 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states that "The State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require." According to the commentaries on the Draft Articles:

> Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.[204]

Guarantees of non-repetition "constitute specific preventive measures which the States parties consider essential to prevent torture and ill-treatment."[205] At the international level, guarantees of non-repetition tend to involve legislative measures.[206]

According to the Committee Against Torture's General Comment No. 3, guarantees of non-repetition can include:[207]

- civilian oversight of military and security forces;
- ensuring that all judicial proceedings abide by international standards of due process, fairness and impartiality;
- strengthening the independence of the judiciary;
- protecting human rights defenders and legal, health and other professionals who assist torture victims;
- establishing systems for regular and independent monitoring of all places of detention;

203 Freedom from Torture and Penal Reform International, *Holistic Rehabilitation for Survivors of Torture, Content Manual*, 2011, 9–10, https://cdn.penalreform.org/wp-content/uploads/2013/05/Content_Manua_Engl-1.pdf
204 UNGA, "Draft Articles on Responsibility of States," Commentary 1 to art. 30.
205 Committee against Torture, Convention against Torture, General Comment No. 3, ¶ 18.
206 See International Commission of Jurists, *Right to a Remedy,* 99; Suárez de Guerrero v. Colombia, hearings of March 30, 1982, CCPR/C/15/D/45/1979, ¶ 15; Young v. Australia, Ruling, August 29, 2003, CCPR/C/78/D/941/2000, ¶ 12; Cesario Gómez Vázquez imprisonment v. Spain, hearings of August 11, 2000, CCPR/C/69/D/701/1996, ¶ 13; Loayza Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 164 (September 17, 1997); Suárez Rosero v. Ecuador, Merits, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 35 ¶¶ 97–99 (November 12, 1997); "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 88 (February 5, 2001); Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 212 (June 21, 2002,); Trujillo Oroza v. Bolivia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 122 (February 27, 2002); Castillo-Petruzzi et al. v. Peru, Merits, Reparations and Costs, Jjudgment, Inter-Am. Ct. H.R. (ser. C) No. 52, resolution 14 (May 30, 1999); Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 18 (September 3, 2001).
207 Committee against Torture, General Comment No. 3, ¶ 18.

- providing, on a priority and continued basis, training for law enforcement officials as well as military and security forces on human rights law that includes the specific needs of marginalized and vulnerable populations and specific training on the Istanbul Protocol for health and legal professionals and law enforcement officials;
- promoting the observance of international standards and codes of conduct by public servants, including law enforcement, correctional, medical, psychological, social service and military personnel;
- reviewing and reforming laws contributing to or allowing torture and ill-treatment;
- ensuring compliance with article 3 of the Convention prohibiting refoulement; and
- ensuring the availability of temporary services for CAT/C/GC/3 5 individuals or groups of individuals, such as shelters for victims of gender-related or other torture or ill-treatment.

The IACtHR has ordered various types of non-repetition measures. Legislative measures, training[208] and the strengthening of national institutions stand out.[209] The IACtHR has also ordered the investigation and punishment of human rights violations as part of measures of non-repetition to combat impunity.[210]

In accordance with *the Guidelines on Measures of Reparation under the Optional Protocol to the International Covenant on Civil and Political Rights,* guarantees of non-repetition have general scope and are essential to preventing human rights violations from being committed again.[211] This must be specific when determining and recommending such measures in judicial opinions, in order to optimize the reparation provided in each case.

Under the category of non-repetition measures there are structural injunctions that attempt to remodel an existing social and political institution to bring it into conformity with legal requirements. UN treaty bodies, IACtHR, the African Commission of Human and People's Rights, and other international bodies have established the necessity of granting transformative reparations in cases in which the violation is serious and repetitive due to existing social, legal, or political circumstances.

The IACtHR explicitly established the concept of transformative reparations in the case of *Campo Algodonero ("Cotton Field") v. Mexico.*[212] The Court redefined the concept of reparations, emphasizing that when violations occur in a structural context of discrimination, reparations cannot be limited to restoring the situation in which the victims originally found themselves. In such cases, reparations should try to transform the pre-existing circumstances that caused the violation.[213] Examples of this type of analysis can be found in situations where the IACtHR estimated that women saw themselves affected by acts of violence differently to men,[214] or when pregnancy was taken as a decisive aspect when evaluating the additional harm caused by the same violation for a pregnant woman.[215]

208 Massacres of El Mozote and Nearby Places v. El Salvador, ¶ 369.
209 Shelton, *Remedies,* 396–397.
210 González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 205 ¶ 454 (November 16, 2009).
211 UN Human Rights Committee, "Guidelines on Measures of Reparation," ¶ 12.
212 Ruth Rubio Marín and Clara Sandoval, "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment," in *Human Rights Quarterly* 33 (2011) 1062–1091, 1063 and 1064.
213 González et al., ¶ 450.
214 Miguel Castro Castro Prison v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 160, ¶ 223 (November 25, 2006).
215 Ibid. at ¶ page 56.

The *Guidance Note of the United Nations Secretary-General: Reparations for Conflict-Related Sexual Violence* urges that any initiative designed to fulfil the right to reparations should be informed by the "potential to be transformative," with a view to "unsettling patriarchal and sexual hierarchies and customs."[216]

The African Commission stated that:

> [T]he ultimate goal of redress is transformation. Redress must occasion changes in social, economic and political structures and relationships in a manner that deals effectively with the factors, which allow for torture and other ill-treatment. This transformation envisages processes with long-term and sustainable perspectives that are responsive to the multiple justice needs of victims and therefore restore human dignity.[217]

Non-discriminatory Reparations, Including the Gender Perspective

Reparations are guided by principles of non-discrimination and gender-equality;[218] they should not discriminate by gender, ethnicity, race, or another prohibited category. UN Women stated that reparations must be guided by principles of non-discrimination, gender equality and participation, and empowerment of victims as well as the inclusion of redress and the non repetition restoration of the causes and consequences of serious violations and crimes.[219]

According to the Committee against Torture's General Comment 3:

> Judicial and non-judicial proceedings shall apply gender-sensitive procedures which avoid re-victimization and stigmatization of victims of torture or ill-treatment. With respect to sexual or gender-based violence, access to due process, and an impartial judiciary, the Committee emphasizes that in any proceedings, civil or criminal, to determine the victim's right to redress, including compensation, rules of evidence and procedure in relation to gender-based violence, must afford equal weight to the testimony of women and girls, as should be the case for all other victims, and prevent the introduction of discriminatory evidence and harassment of victims and witnesses.[220]

The IACtHR has also recognized the combined discriminatory effect of gender and ethnicity or race, which it considers as equated to "circumstances of special vulnerability."[221] In such cases, there is a state obligation to initiate investigations led by officials trained in gender violence and to provide gender-sensitive support to victims.[222] In cases where women were affected dispro-

216 UN Secretary General, "Guidance note of the Secretary-General: reparations for conflict-related sexual violence," June 2014, page 6, https://www.ohchr.org/sites/default/files/Documents/Press/GuidanceNoteReparationsJune-2014.pdf
217 African Commission on Human and People's Rights, General Comment 4, ¶ 8.
218 UN Women, UN Development Programme, "Reparation, Development and Gender," October 2012, 15, www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2012/10/WPSsourcebook-06A-ReparationsDevelopmentGender-en.pdf
219 Ibid.
220 The committee also considers that complaint mechanisms and investigations require specific positive measures that take into account gender aspects in order to ensure that victims of abuses such as sexual violence and abuse, rape, marital rape, domestic violence, female genital mutilation, and trafficking are able to come forward and seek and obtain redress. See UN Committee Against Torture, General Comment No. 3, ¶ 33.
221 Fernández Ortega et al. v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 230 (August 30, 2010); Rosendo Cantú v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 213 (August 31, 2010); Veliz Franco v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 277, ¶ 251 (May 19, 2014); Espinoza Gonzáles v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 289, ¶ 309 (November 20, 2014); Velásquez Paiz v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 307, ¶ 229 (November 19, 2015); Favela Nova Brasilia v. Brazil, Preliminary Objections, Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 333, ¶ 293 (February 16, 2017).
222 Fernández Ortega et al. v. Mexico, ¶ 230; Rosendo Cantú v. Mexico, ¶ 213.

portionately, the IACtHR has ordered the state to implement measures with a collective impact, such as the reform of procedural mechanisms related to the investigation of enforced disappearance, sexual violence, and domestic violence,[223] and a mechanism of free access for victims to specialized medical care programs.[224] In exceptional cases of widespread discrimination and violence against women, the IACtHR has ordered permanent educational programs on gender stereotypes and violence against women to be introduced at all levels of the national education system.[225] In cases of sexual violence perpetrated by state agents, the IACtHR has ordered the state to provide permanent, obligatory courses for the police and medical care providers on assistance for rape victims.[226]

Similarly, the IACtHR has recognized the importance of certain aspects of the customs of Indigenous peoples when granting reparations.[227] As such, "measures of reparation granted should provide effective mechanisms, in keeping with their specific ethnic perspective, that permit them to define their priorities as regards to their development and evolution as a people."[228] Some examples of reparations with a cultural aspect granted by the IACtHR include ensuring access to justice in accordance with the habits and customs of the community, and the provision of services in a culturally appropriate manner.[229] A good example of how the court applied these standards is *Women Victims of Sexual Torture in Atenco v. Mexico.*[230]

At the national level, states are also granting reparations with a gender perspective. The Council of State of Colombia ordered measures to protect female minors' right to family privacy and presumption of innocence. Additionally, it called on the Office of the Public Prosecutor to designate an expert to develop measures to eradicate gender stereotypes from investigations of sexual violence. It called on the Superior Council of the Judiciary to analyze interventions of officials who knew the case with the aim of adopting correction, dissemination, and training measures. Similarly, it ordered copies of the decision sent to the High Presidential Council for Women's Equity and the Administrative Chamber of the Superior Council of the Judiciary-National Gender Commission of the Judicial Branch, with the aim of promoting public policies for the prevention, investigation, and penalization of violence against women.[231]

223 González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 205 ¶ 502 (November 16, 2009).
224 Espinoza Gonzáles v. Peru, ¶ 331.
225 Velásquez Paiz v. Guatemala, ¶ 248.
226 Favela Nova Brasilia v. Brazil, ¶ 324.
227 The Court declared explicitly that some reparations in cases involving indigenous communities must recognize and strengthen their cultural identity, guaranteeing control over their institutions, cultures, traditions, and lands in order to contribute to their development and maintain their life projects, as well as current and future needs. Bámaca-Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 81 (February 22, 2002).
228 Kaliña and Lokono People v. Suriname, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 272 (November 25, 2015); Garífuna Punta Piedra Community and its Members v. Honduras, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 304, ¶ 316 (October 8, 2015); Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 203 (June 17, 2005); and Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 212 (March 29, 2006).
229 Yakye Axa Indigenous Community v. Paraguay, ¶ 218.
230 The Inter-American Court of Human Rights granted important measures of reparation considering the gender perspective. Regarding the duty to investigate, the court obliged the state, within a reasonable time and through officials trained in attending to victims of discrimination and gender-based violence, to continue and initiate broad, systematic, and meticulous investigations necessary to identify, judge, and, where appropriate, punish those responsible for the violence and sexual torture suffered by the eleven women victims. The court also granted rehabilitation measures obliging the state to consider the gender specificities in providing them. Finally, regarding non-repetition measures, the court obliged the state to strengthen the mechanism for follow-up of cases of sexual torture committed against Women in Mexico, which includes the allocation of resources for the performance of its powers and to establish annual deadlines for reporting. It also required the state to create reports of the phenomenon of sexual torture of women in the country and periodically develop public policy proposals. Women Victims of Sexual Torture in Atenco v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 371 (November 28, 2018), www.corteidh.or.cr/docs/casos/articulos/seriec_371_ing.pdf
231 Consejo de Estado, 11 diciembre 2015, Sentencia No. 41208, Luis José-Jazmín.

In a recent decision by the Mexican Supreme Court of Justice regarding the obligation of judges to consider a gender perspective when deciding a case, the court established that judges should: 1) identify possible situations of imbalance of power between the parties as a consequence of their gender, 2) question the neutrality of the evidence and the applicable regulatory framework;3) collect necessary evidence to visualize the context of violence or discrimination; and 4) decide cases without using stereotypes against women or men.[232]

Finally, in a 2021 judgment, the Supreme Court of Pakistan held that the use of virginity testing and reporting of the sexual history of a survivor of rape as evidence to discredit her independence and character were in violation of the constitutional right to dignity. The Supreme Court directed courts to"also discontinue the use of painfully intrusive and inappropriate expressions, like 'habituated to sex', 'woman of easy virtue', 'woman of loose moral character', and 'non-virgin', for the alleged rape victims even if they find that the charge of rape is not proved against the accused. Such expressions are unconstitutional and illegal."[233] Earlier in 2018, the High Court Division of the Supreme Court of Bangladesh banned the "two-finger test" on rape survivors and also directed the specific tribunals "to ensure that no lawyer shall ask any degrading question to [a] rape victim which is not necessary to ascertain any information of rape."[234]

Findings

Certain visible trends reveal how courts have addressed reparation measures. Our findings suggest that: 1) some judges from the highest courts around the world are acknowledging the characteristics of reparation established by international standards; 2) the diversification of judicial mechanisms and judidical independence at the domestic level has fostered innovation in crafting reparations; 3) and, as a result, some judges around the world are crafting creative reparations that contribute to the objectives of a) accountability, b) prevention, and c) truth. These findings are explored below.

Influence of International Bodies

There are numerous examples of the influence of regional human rights tribunal jurisprudence on the judgments of domestic courts. This influence is very clear in Latin America. Several decisions in Latin American courts cite IACtHR jurisprudence. However, even in countries in which there is no regional body, as in India, Pakistan, and Nepal, domestic judges have cited decisions from regional bodies such as the European Court of Human Rights, IACtHR, and the UN treaty bodies in granting reparations. Moreover, higher courts in several Asian jurisdictions have also invoked international treaties, including those not ratified by the state, in both assessing and granting relief to victims of human rights violations. This confirms the importance of international precedents regarding reparations and suggests that the capacitation of domestic judges in international jurisprudence regarding reparation may be an important strategy to improve domestic reparations.

232 Perspectiva de Género. Forma En La Que El Juzgador Debe Aplicar Esta Doctrina Al Dictar Las Medidas De Reparación. Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.], Tesis: 1a. CXCII/2018 (10a.). 2018752, dieciembre 2018, 370. Amparo Directo 50/2015, 80 (Mex.).
233 Atif Zareef v The State (2020), Supreme Court of Pakistan, Criminal Appeal No.251/2020 & Criminal Petition No.667/2020, Judgment, January 4, 2021.
234 BLAST and Others vs. Bangladesh and Others [Prohibition of the "Two-Finger Test"] (2018), W.P. No. 10663/2013, Judgment, April 12, 2018, www.blast.org.bd/content/pressrelease/18-04-2018-Press-Release-tft-eng.pdf

In Pakistan, in a few cases where courts have granted out-of-the-ordinary relief and compensation, judges and litigators have relied in part on international and regional norms. In Pakistan, in the *Yaseen Shah* case, the Supreme Court relied on the International Convention for the Protection of All Persons from Enforced Disappearance (2006) and went so far as to say that, despite Pakistan not having ratified the treaty, the Supreme Court could apply the convention to achieve justice, noting that enforced disappearance was a crime against humanity.[235] Similarly, the Islamabad High Court, in *Zainab Zaeem Khan* vs *SHO P.S. Industrial Area,* recognizing gaps in domestic law in the definition of enforced disappearance, relied on the definition provided in the International Convention for the Protection of All Persons from Enforced Disappearance (2006),[236] not ratified by Pakistan, and in the case of *Mahera Sajjad* vs *SHO, Police Station Shalimar & 6 others,* referred to the International Convention for the Protection of All Persons from Enforced Disappearance (2006) and the Inter-American Convention on Forced Disappearance of Persons (1994). Moreover, the court in the latter case additionally relied on the jurisprudence of the European Court of Human Rights and the IACtHR in establishing the right of the victim's family, the wife of the disappeared, to seek appropriate relief.[237] In contrast to earlier practice, the above two cases crafted reparations more creatively and resulted in higher financial compensation awards.

In *Nilabati Behera* vs. *The State of Orissa,* the Supreme Court of India referred to Article 9(5) of the International Covenant on Civil and Political Rights (1966) stating, "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[238]

Diversification of Jurisdiction, Judicial Independence

The diversification of mechanisms to obtain reparation at the domestic level and judicial independence have triggered innovation in crafting reparations.

The emergence of remedies in human rights law has resulted in a shift from finding responsibility to fashioning redress. Criminal judges traditionally held a monopoly on deciding cases involving serious human rights violations. As such, their focus was on determining criminal accountability, and other reparation measures were largely accessory to their core function. However, victims' needs for other measures of reparation have increased in many countries, and victims and their lawyers have targeted different types of judges to obtain reparations. This has perhaps not only required, but also broadened the scope in some contexts for, constitutional and administrative judges to get involved in the broader picture of reparation. Due to their specialty, these constitutional and other judges are not narrowly focused on criminal responsibility; they have the competence to adopt a more holistic approach to human rights violations. For example, courts exercising a constitutional jurisdiction to protect against fundamental rights violations have a different manner of approaching cases, greater discretionary powers to grant relief, and, therefore, greater experience in crafting remedies, including, for example, granting compensation measures. Their expertise in other areas of the law might have had an influence on the innovation of the deterrence and accountability components of reparation described above. This was clearly exemplified by most of the cases reviewed in this guide, because almost all of them were issued by constitutional or administrative courts.

235 Human Rights Case No.29388-K of 2013, PLD 2014 SC 305 (Pak.)., This case was an application by a Mohabbat Shah stating that his brother Yaseen Shah has been missing since 2010. The Supreme Court took up the case in its original jurisdiction under Article 184(3) of the Constitution of Pakistan.
236 Zainab Zaeem Khan vs. SHO P.S. Industrial Area, Writ Petition No. 2767/H/2015, Judgment, November 2, 2018 (Pak.).
237 Mahera Sajid v Station House Officer, Police Station Shalimar & 6 others, 2018 CLC 1858, Writ Petition No.2974/2016, decisionJudgment, Islamabad High Court, dated 11, 07, July 11, 2018 (Pak.).
238 *Nilabati Behera vs. The State of Orissa* (1993) AIR 1960.

The powers available to the courts and judicial independence in several countries have played a key role in judicial activism in the world of reparations. Different jurisdictions have different processes that impact local practice. Higher courts in some Asian countries, for example, have much wider powers to grant remedies in exercise of their constitutional jurisdiction for violations of fundamental rights. In India, Pakistan, and Bangladesh, the supreme courts are not constrained by the submission of cases or petitions to their courts. They have powers to take up and decide cases on their own, even in the absence of a specific lawsuit or petition. *Suo Motu* proceedings may be initiated by the supreme court on its own motion in matters pertaining to public interest and enforcement of constitutional fundamental rights. Because a formal petition is not required in such cases, courts have taken up matters mentioned in newspaper articles,[239] and the courts have transformed letters to the court into public-interest petitions.

The extensive powers of the courts in these jurisdictions arguably both shape the way some judges perceive their role and provide some insights into landmark judgments that have been delivered by judges in these countries. These powers have prompted some judges to exercise their function in a more comprehensive manner, which may have influenced their interest in crafting more effective reparations. It is pertinent to mention here that courts in these jurisdictions have long had and used these powers to deliberate and adjudicate on several public-interest matters, including human rights issues. It merits a deeper inquiry into how existing institutional structures operate within their national social and political contexts to assess what factors prompt changes in judicial attitudes and variation in judicial practice within these countries.

Accountability

Punishing the perpetrator is one of the most important ways of restoring a victim's dignity. Judicial reparation is usually better suited to achieving accountability, whether criminal or financial. Judges are the authorities with the required powers to impose criminal or financial sanctions on those responsible for a violation or harms, including by requesting prosecutors to open a criminal investigation. Public officers managing administrative programs do not have judicial powers to order criminal investigations or to impose fines or financial sanctions. Unlike administrative reparations programs, in which it is never the perpetrator who pays for the compensation, not even as the result of a subsequent action by the state, and, therefore, there is no punishment of the perpetrator,[240] judicial reparations often focus on the perpetrator or at the least the agency to which the perpetrator pertains. Reparation measures that focus on accountability may include measures of satisfaction, such as requesting the opening or reopening of criminal investigations against alleged perpetrators or measures of compensation paid by perpetrators. The following decisions are examples of constitutional or administrative courts seeking to grant reparation measures to establish the criminal responsibility of direct and indirect perpetrators.

Measures to Seek Criminal Responsibility of Perpetrators

The analysis of domestic decisions in this guide indicates that non-criminal judges, including higher court judges in exercise of their constitutional jurisdiction, are also concerned with the criminal responsibility of perpetrators when granting reparations. In several decisions, judges have included directions to pursue criminal investigations against individual perpetrators, in addition to initiating departmental proceedings.

239 In *State v. Deputy Commissioner, Satkhira* (1993) 45 D.L.R. (H.C.D) 643, the Supreme Court of Bangladesh took up the matter after learning from a newspaper article about a prisoner who had been in jail for 12 years. After the court reviewed the case records of the trial court, it quashed the conviction.
240 Malamud'Goti and Grossman, "Reparations and Civil Litigation," Loc 8488.

In Colombia, almost every case involving reparation included the judge's order to start or continue criminal investigations against the perpetrator(s). In a case of death in the army's custody, the Council of State of Colombia granted measures of satisfaction, including requesting the prosecutor's office to continue criminal investigations against the perpetrators and publish the decision.[241] In a similar case, the Council of State of Colombia granted measures of satisfaction that included sending the decision to criminal authorities of the National Army and to the People's Defense Office to investigate the human rights violation. It also ordered the National Army to inform the court regarding the decision's implementation.[242] In a case of a massacre, the Council of State of Colombia granted measures of satisfaction, including the submission of evidence generated through the trial to the Office of the Attorney General of Colombia to continue and start criminal investigations against the perpetrators.[243] In a case of excessive use of force by the National Army and the police, the Council of State of Colombia required the army to start a human-rights training for its members on the right to protest. It also mandated the National Army and the police to establish a link to its webpage with an appropriate heading in which the content of the ruling could be accessed. Finally, the court asked the Office of the Attorney General to consider the possibility of reopening investigations aimed at clarifying criminal responsibility and identifying the alleged perpetrators.[244] In a case of a massacre, the Council of State of Colombia, asked the National Army to consider reopening disciplinary proceedings related to operations carried out by illegal armed groups with the consent of the police and the army. The Attorney General's Office was urged to reopen the criminal investigation.[245] The council has ordered similar measures in other cases.[246]

In Bangladesh, the High Court Division, in *Alhaj Md. Yusuf Ali* vs. *The State* (2002),[247] held that a police officer arresting a person unjustifiably or other than on reasonable grounds and *bona fide* belief renders themselves liable for prosecution.[248] This was recognition of a form of deterrence that can be used against police officers who will not be immune to repercussions.

In South Korea, in *Park Jong Chul,* the court ordered individuals involved in the torture and death of the victim to be charged and held accountable.[249]

In the Philippines, in *Secretary of National Defense, et al. v. Raymund Manalo and Reynaldo Manalo,*[250] the Court of Appeals granted the privilege of the Writ of Amparo. The court ordered the secretary of the National Defense and the chief of staff of the Armed Forces of the Philippines to furnish the Manalos family and the court with all official and unofficial investigation reports as to the custody of the Manalo brothers, confirm the present places of official assignment of two military officials involved in the case, and produce all medical reports and records of the Manalo brothers while in military custody.[251]

241 Consejo de Estado, Sala Plena de la Sección tercera, Sentencia No. 20601, 11 septiembre 2013, Cubides Chacón.
242 Consejo de Estado, Sección Tercera, Subsección C, Sentencia No. 28666, 26 febrero 2015, Valerio Soriano et al (Colom.).
243 Consejo de Estado, Sentencia No. 34448, 24 octobre 2016, Leivy Milena Sancjez Martinez and others (Colom.).
244 Ibid.
245 Consejo de Estado, Sentencia No. 48407, 18 mayo 2017, María Nidia Giraldo Martínez and others (Colom.).
246 Consejo de Estado, Sentencia No. 49358, 24 mayo 2017, Flor Edilma Correa Taborda and others (Colom.).
247 Alhaj Md. Yusuf Ali vs. The State, 22 BLD (2002), 231 (Bangladesh).
248 National Human Rights Commission, "Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh," January 2013 (Bangladesh), http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/348ec5eb_22f8_4754_bb62_6a0d15ba1513/Analysis%20of%20Decisions%20of%20the%20Higher%20Judiciary%20on%20%20Arrest%20and%20Detention%20in%20Bangladesh.pdf
249 While some were charged, high-ranking officials involved had not been held accountable. In 2020, a South Korean chief prosecutor issued an apology to Park Jong-Chul's father, who had been seeking accountability and justice for the death of his son in 1987. See Yonhap News Agency, "Top Prosecutor Offers Apology to Father Over Son's Torture Death in 1987," March 20, 2018, https://en.yna.co.kr/view/AEN20180320009300315; and *Korea Joongang Daily,* "30 Years on, son's Murder Still Haunts Family," January 12, 2017, https://koreajoongangdaily.joins.com/2017/01/12/socialAffairs/30-years-on-sons-murder-still-haunts-family/3028599.html
250 Secretary of Defense v. Manalo, G.R. No. 180906 (October 7, 2008) (Phil.).
251 Ibid.

Command Responsibility

Within measures of seeking criminal accountability, an interesting finding usually limited to criminal cases is that non-criminal judges are also now holding not only direct perpetrators but also indirect perpetrators accountable, applying the doctrine of command responsibility. In cases of torture, extrajudicial killing, and enforced disappearance, individual perpetrators are often unknown. Even if known, while responsible, they often can use violence because those in charge of their units, the institutions, condone or encourage it. The state and its agents in superior positions have a duty to ensure the respect of rights. The ability to seek through all types of available remedies the responsibility of superiors and commanders is critical in these cases.

In a case of torture and abduction, the Supreme Court of the Philippines held that the doctrine of command responsibility applied also to the Writ of Amparo and Habeas Corpus because it constitutes an international law principle. The court stated, "[T]he president, being the commander-in-chief of all armed forces, necessarily possesses control over the military that qualifies him as a superior within the purview of the command responsibility doctrine."[252] This case is considered one of the most definitive expositions on the applicability of the principle of command responsibility with regard to writ petitions. The court also extended the scope of the principle, holding that although it was "originally used for ascertaining criminal complicity, the command responsibility doctrine has also found application in civil cases for human rights abuses."[253]

In Indonesia, in an unusual decision for a case regarding police violence, judges held the chief of the police equally responsible for causing damage to the victim on *respondeat superior* ("command responsibility") as the remaining police officers.[254] This reasoning aligns with international human rights standards; the Committee against Torture states:

> those exercising superior authority – including public officials – cannot avoid accountability . . . for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was, or was likely, to occur, and they took no reasonable and necessary preventive measures.[255]

Financial Punishment: Targeting Perpetrators' Assets to Fund Reparations

While criminal punishment was the focus of courts, now that other types of courts are playing a role in the world of reparation, domestic decisions reveal a greater use of financial punishment. Interestingly, judges are crafting compensation measures in a detailed manner and explicitly establishing that perpetrators should pay at least part of the compensation with their assets. In this way, judges are also imposing financial costs to illegal actions of the state.

Compensation usually serves two objectives: the first and most important is to provide relief to the victim, and the second is to make the perpetrator accountable by making them pay in part for the harm they caused. This may also help to deter future violations. However, these two

252 In the Matter of the Petition for the Writ of Amparo and Habeas Data in Favor of Noriel H. Rodriguez, Noriel H. Rodriguez v. Gloria Macapagal-Arroyo et al., G.R. No. 191805 (November 15, 2011).
253 Writ of Amparo and Habeas Data in Favor of Noriel H. Rodriguez, Noriel H. Rodriguez v. Gloria Macapagal-Arroyo et al., G.R. No. 191805 (November 15, 2011).
254 Alamsyahfudin v. Chief of Bukittinggi Sub-District Police, Judgment, No. 07/PDT.G/2013.PN.BT, Bukittinggi District Court (November 7, 2013), https://humanrightsinasean.info/article/indonesia-bukittinggi-court%E2%80%99s-ruling-torture-compensation-claim-exceptional.html
255 UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties,* 24 January 2008, CAT/C/GC/2.

objectives sometimes come into tension. To provide relief to the victim, compensation should be paid promptly, without excessive requirements. To hold the perpetrator financially accountable, it is important that compensation is paid with their assets. In some countries, a criminal conviction is required to order the perpetrator to pay with their assets. Often, perpetrators claim to have insufficient assets for adequate compensation. There are complicated legal questions beyond the scope of this guide about what types of assets may be appropriate to consider for compensation and what should be excluded. There will be cases where harm is caused, but individual perpetrators are difficult to identify, as in some cases related to conditions of detention. Some cases require assessing the individual responsibility of those in superior positions, when the nexus to harm inflicted becomes even harder to prove.

Therefore, it is important to mention that for the victim to have prompt access to reparation, the state or a specific agency should pay the compensation through a proceeding different from criminal liability and requiring a lower burden of proof, such as through civil and administrative lawsuits or administrative reparations programs. Because reparation is a right, the state must uphold it. It is especially important when harm is caused by the action or negligence of state actors. However, in some cases, the accountability objective of compensation would require targeting perpetrators' individual assets. The nongovernmental group REDRESS recently analyzed each of the existing avenues to obtain reparation and noted that, even when perpetrators face criminal justice proceedings, they are rarely deprived of their assets.[256] REDRESS's findings point to the importance of focusing on using perpetrators' assets to fund reparations for victims of violations.[257] The practice of the state first paying compensation to the victim and then recovering, at least in part, funds from the perpetrators mayt be an important avenue, among others.

In *Mahera Sajid v Station House Officer, Police Station Shalimar & 6 others* concerning the enforced disappearance of the husband of the petitioner, the Supreme Court of Pakistan held that it was "an obligation of the State to financially put the petitioner in the same position by way of compensation as existed on the day of [the violation's] occurrence."[258] In addition to payment of arrears, calculated from the date of the enforced disappearance, the court also ordered the petitioner to be paid a continuous monthly sum until the state, through its functionaries, traced the whereabouts or fate of the missing person. In another case of enforced disappearance in Pakistan, the Islamabad High Court asked relevant officials in office at the time to pay compensation jointly, and their superior was directed to retain half of their salaries until the recovery of the forcibly disappeared person.[259] The amount recovered from these officials was to be marked separately and then paid to the petitioner, the wife of the missing person, as compensation.[260]

In Sri Lanka, in a recent case involving torture and death in custody, the Supreme Court awarded a sum of one million rupees (approximately USD $12,000) as compensation, with Rs. 500,000 (approximately USD $6,000) directed to be invested in a state bank in the names of the two children of the deceased, in equal shares.[261] Of the total sum, Rs. 750,000 (approximately USD $9,000) was ordered to be paid by the state and Rs. 50,000 (approximately USD

256 REDRESS and Knowledge Platform for Security & Rule of Law, *Financial Accountability for Torture and Other Human Rights Abuses: A Framework for Developing Case Strategies,* 2020. www.kpsrl.org/publication/financial-accountability-for-torture-and-other-human-rights-abuses
257 Ibid. at 11.
258 Mahera Sajid v Station House Officer, Police Station Shalimar & 6 others, 2018 CLC 1858, Writ Petition No.2974/2016, Judgment, Islamabad High Court, July 11, 2018 (Pak.).
259 Zainab Zaeem Khan vs. SHO P.S. Industrial Area, Writ Petition No. 2767/H/2015, Judgment, November 2, 2018 (Pak.).
260 Ibid.
261 SC FR Application No. 244/2010 (Petitioner: Chaminda Sampath Kumara), Judgment, May 30, 2017 (Sri Lanka).

$600) by each of the five police officers held responsible for the fundamental rights violation. Similarly, in another case of torture by police, the court awarded monetary compensation to be divided equally and paid to the victim personally by four police officers.[262] The state was directed to pay an additional amount to the petitioner/victim on behalf of the Officer in Charge of the Police Station, who was also held responsible for failing to keep control over the police officers who committed acts of torture at the police station.[263]

In Thailand, in a case involving two university students who were tortured and held incommunicado in military detention, the court found that officials must be responsible for the acts that they commit along with the acts committed by persons under their command.[264] For emotional distress and physical injuries suffered by the victims, the court ordered compensation plus a 7.5 percent interest per annum incurred since the day the case was filed (January 14, 2009) until all the debts were serviced.[265]

In a case of prolonged illegal detention, the Supreme Court of India stated that where it is established:

> That the petitioner's detention was wholly unjustified and illegal, there can be no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for the damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favor.[266]

The court further added that:

> In these circumstances, the refusal of the Supreme Court to pass an order of compensation in favor of the petitioner will be doing a mere lip-service to his fundamental right to liberty, which the State Government has so grossly violated. Article 21 (Protection of Life and Personal Liberty) will be denuded of its significant content if the power of the Supreme Court were limited to passing orders of release from illegal detention.[267]

A decision of the New York district court mandated the transfer of proceeds from the sale of former Filipino President Ferdinand Marcos' assets and recovered properties of the Marcos family to provide compensation to victims of human rights violations committed during his dictatorship in the Philippines.[268]

In a case involving torture, a court in Kenya highlighted the deterrent function of reparations when granting compensation.[269] The court established that:

> Where overzealous public servants commit wanton violation of the constitution and the law, any awards arising from such violations should not be vested on the

262 SC FR Application No. 244/2010 (Petitioner: Chaminda Sampath Kumara), Judgment, May 30, 2017 (Sri Lanka).
263 Ibid.
264 Ismael Tae and Amizi Manak, Black Case no. O55-56/2555 and Red Case no. O1309-1310/2559 (Thailand). This case is the first of its kind in which victims of torture, who were detained under martial law, have exercised their right through the courts to hold concerned state agencies (in this case, Royal Thai Army and Ministry of Defence) accountable for abuse by officials under their charge per the Tortious Liability of Officials Act B.E. 2539 (1996). As such, the case recognized the possibility of compensation being awarded to victims following Tortious Liability.
265 Ibid.
266 Rudul Sah v. State of Bihar and Another, Writ Petition (Criminal) No. 1387 of 1982, Judgment, August 1, 1983 (India).
267 Ibid.
268 Nathalie Robles, "US Judge Okays Reparation For Martial Law Victims," *Asian Journal,* April 11, 2019, https://www.asianjournal.com/usa/dateline-usa/us-judge-okays-reparation-for-martial-law-victims/
269 Miguna Miguna v. Fred Okengo Matiang'i and others (2018) eKLR, High Court of Kenya, http://kenyalaw.org/caselaw/cases/view/163893/

> public. They should be borne by the responsible public officers themselves so that the public is shielded from such unnecessary costs . . . damages and costs in this petition be borne by the Respondents jointly and severally to dissuade any motivation for continued assault on our constitution, democracy human rights and the rule of law in line with Article 259(1) (b) and (c) to advance the rule of law, human rights and fundamental freedoms in the Bill of Rights and development of the law.[270]

In another case involving enforcement of rights and freedoms, a court in Kenya held that the purpose of awarding damages in constitutional matters should not be limited to simply compensation. It established that in proper cases, such an award ought to be made with a view to deterring the repetition of the violation or punishing those responsible or even securing effective policing of constitutionally enshrined rights by rewarding those who expose breaches of rights with substantial damages.[271]

In a case of torture in prison, a court in Uganda granted compensation and established that the responsibility for payment of damages should be shared by perpetrators and their supervisor.[272]

Punitive Damages

Punitive damages are not part of international standards or jurisprudence on reparations; international tribunals are not allowed to formally issue punitive damages. However, some domestic courts have resorted to this tool, notably in the United States and Uganda. In a case of torture committed by police, a court in Uganda granted compensation including punitive damages, stating that:

> Redress includes punitive damages which are meant to punish the violator for violation of the Constitution. Article 23 (7) provides that any person unlawfully arrested, restricted or detained by any other person or authority shall be entitled to compensation from that other person or authority whether it is the State or an agency of the State or other person or authority. In case of general damages, these are damages which are presumed to natural or probable consequence of the wrong complained of, with the results that the plaintiff is required only to assert that such damage has been suffered.[273]

In a landmark decision under the Alien Tort Claims Act against a former Paraguayan official brought by two Paraguayan citizens for the wrongful death of a relative, a US District Court ordered punitive damages, stating that:

> Punitive damages are designed not merely to teach a defendant not to repeat his conduct but to deter others from following his example . . . To accomplish that purpose this court must make clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense. Thereby the judgment may perhaps have some deterrent effect.[274]

270 Ibid.
271 Jennifer Muthoni & 10 Others vs. Attorney General of Kenya (2012) eKLR, High Court at Nairobi.
272 Yahaya Lukwago & 4 Others v Aiso & 3 Others (Civil Suit-2015/226) [2019] UGHCCD 232 (December 20, 2019) (Uganda), https://ulii.org/ug/judgment/hc-civil-division-uganda/2019/232
273 Nakaziba v Attorney General (Miscellaneous Cause-2018/295) [2020] UGHCCD 31 (February 7, 2020) (Uganda), https://ulii.org/ug/judgment/hc-civil-division-uganda/2020/31
274 Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984), https://law.justia.com/cases/federal/district-courts/FSupp/577/860/1496989/

The High Court in Pakistan stated that:

> The petitioner/victim may also be entitled to payment of actual, compensatory or deterrent cost apart from actual costs of litigation calculated according to the applicable Rules. Compensatory costs may be awarded and the official responsible for illegal action may be personally burdened with the liability to pay exemplary or punitive costs.[275]

The court further noted that:

> An order merely directing the release of a person from custody upon finding his detention illegal and condoning the violation of his most cherished fundamental rights of liberty and dignity in defiance of the requirements of law and the Constitution may not be the appropriate relief to which such person may be entitled. Under the wide powers available to the Court, it would be proper to award monetary compensation to a victim of violation of fundamental rights.[276]

In this case, the court established that:

> The liability to pay such compensation would devolve jointly and severely upon the state as well as the public officials responsible for illegally depriving a citizen of his or her liberty. The State Government however, would be entitled to recover the amount paid/payable to the detenu from such officials for having caused wrongful loss to the Government through misuse of powers.[277]

Prevention

Non-repetition is not only an essential element of the comprehensiveness characteristic of reparations, it is also the main connection between reparation and the broader objective of prevention. In this regard, judges can consider not only the specific circumstances of the individual case, but also the preventive effects of the decision for future violations. There are various examples of practices that satisfy, at least in theory, the function of seeking to prevent future violations. The clearest ones are specific measures of non-repetition.

The jurisprudence of domestic courts around the world develops these standards even further. Not surprisingly, among all forms of reparation, those aimed at obtaining guarantees of non-repetition include lawsuits brought in the public interest by activists, government officials, and agencies, not just by victims themselves. This guide includes examples of decisions adopted in reparations claims by victims and public-interest lawsuits. We also touch on the matter—usually not part of reparations discussions—of settlements seeking structural changes in police conduct.

Our analysis of domestic decisions suggests that domestic judges have been very creative and specific in granting non-repetition measures. We also observed that some courts have issued more general decisions, not as a result of granting reparations but as a result of analysis of structural problems, covering a wide range of cases involving widespread human rights violations that courts have observed to be repeated or prevalent. For example, when the Constitutional Court of Colombia finds that cases show systematic and continual violations of human rights, it issues a decision called the "Unconstitutional State of Affairs," in which it underlines

275 Mazharuddin v. The State (1998) PCrLJ 1035, ¶ 54 (viii) (Pak.)
276 Ibid. at ¶ 54 (iv).
277 Ibid. at ¶ 54 (vii).

the structural causes of such violations and requires the government to take effective measures to remove the causes.[278] The court has issued this type of decision in cases of forcibly displaced women and overcrowding in prisons.[279] The Federal Supreme Court of Brazil also issued a similar "Unconstitutional State of Affairs" decision addressing inhumane conditions in the country's penitentiary system.[280]

In a case of a killing by police in Argentina, the judiciary in the state of Mendoza explicitly ordered measures of satisfaction and non-repetition, citing the IACtHR's Molina Theissen v. Guatemala case and granting the enactment of protocols for police conduct, training of police, and immediate publication of the court's decision.[281]

In Brazil, in Appeal 580.252 *Mato Grosso do Sul de Brasil,* a judge closely analyzed the practical effect that reparations could have in cases of human rights violations for persons held in inhumane prison conditions.[282] The court discussed the potential practical effect of compensation orders, direct instructions to the government to build new prisons, and reduction of sentences of affected persons. The judge concluded that reduction of sentences would create incentives for improvement for the state and would be the best form of reparation for victims. However, the majority of judges did not approve this opinion.

Another example is case 0000705-74.2010.4.02.5005 resolved by the Federal Regional Court of the Second Region of Brazil, in which the state was found liable for the harm caused to persons in prison due to poor conditions. In addition to compensation, the court ordered an audit of public resources allocated to penitentiary institutions.[283]

In a case of unjust deprivation of liberty, the Council of State of Colombia granted non-repetition measures, including the obligation of the National Penitentiary and Prison Institute to design and disseminate in all the country's prisons a document to train public officers about medical and nutritional treatment for incarcerated persons, especially for those presenting with a medical condition, according to human dignity and respecting prisoners' rights to life and health. The court also mandated that the National Penitentiary and Prison Institute should disseminate directives and circulars in all the country's prisons to guarantee incarcerated persons' access to all services of the general health system, which includes comprehensive and timely medical care and prevention, conservation, and recovery of their health, early diagnosis, and adequate treatment of all physical or mental pathologies. Additionally, it ordered the National Penitentiary and Prison Institute to disseminate directives and circulars in all the country's prisons to guarantee the existence of a primary care and emergency care unit and to seek the provision of prescribed or authorized medical services and, for health reasons, changes in the diet of persons deprived of liberty, observing the hygiene, safety, and health conditions that must be met in each prison establishment. The court also urged the Office of the Attorney General of Colombia and the Judiciary of

278 Corte Constitucional, Sentencia T-025/2004, 22 enero 2004 (Colom.).
279 Corte Constitucional, Sentencia T-388/2013, 28 junio 2013 (Colom.).
280 Supremo Tribunal Federal, ADPF 347 - Official Gazette, Justice-Rapporteur Marco Aurélio, 19.2.2016 (Braz.), Injunction in Argument of Non-compliance with Fundamental Precept No.. 34. The Brazilian Supreme Court recognized the unconstitutional state of things in relation to Brazilian prisons, including on grounds of violating international treaties to which Brazil is a party.
281 Poder Judicial Mendoza [Mendoza Judiciary], 04/03/2016, "FISCAL CONTRA ONTIVEROS ARANCIBIA JOSÉ MIGUEL POR HOMICIDIO CALIFICADO" y su acumulada, Argentina Expediente P-98.930/14, Sentencia No. 7.530 de (Arg.).
282 Supremo Tribunal Federal, Procedência de Recurso Extraordinario, RE 580.252, Estado do Mato Grosso do Sul, Relator: Min. Alexandre De Moraes, 16/02/2017, Brasília: DJ. nº204, 11/09/2017, www.jusbrasil.com.br/diarios/documentos/191066375/andamento-do-processo-n-580252-do-dia-25-05-2015-do-stf?ref=topic_feed
283 Tribunal Regional Federal da 2ª Região (TRF-2), caso No. 0000705-74.2010.4.02.5005, Relator: Ricardo Perlingeiro, 28.06.2012, J.F.E.S. www.jusbrasil.com.br/diarios/38270166/trf-2-jud-jfes-28-06-2012-pg-172?ref=previous_button

Colombia to disseminate among all its officials information and training to fully resolve all release requests based on serious health issues. Finally, the court obliged the Institute of Legal Medicine and Forensic Sciences to disseminate information training among all of its officials so that medical examinations performed on inmates are carried out in a detailed, meticulous manner, and without undue delay.[284]

In Bangladesh, in *Bangladesh Legal Aid and Services Trust (BLAST)* v *Bangladesh,* the Supreme Court's Appellate Division provided a comprehensive list of guidelines that restrict the arbitrary use of police powers and placed greater scrutiny on police and magistrates. It also introduced legal safeguards for citizens against police abuses by issuing guidelines to improve the law and align legal provisions with constitutional principles. The court endorsed the need for preventive action alongside punitive measures. The division reiterated the binding nature of the guidelines and clarified that it had the authority to issue them, pending the enactment of law.[285]

In India, the Supreme Court, in *DK Basu* V. *State of West Bengal,* brought by the chair of the State of West Bengal Legal Aid Services for the first time initiated the development of "custody jurisprudence" and closely examined atrocities committed in India in this regard.[286] The court stressed the unconstitutionality of torture in custody and recognized both physical and mental forms of torture. Identifying the primary role that the police play in torture cases, the court authoritatively laid down requirements to be followed in all cases of arrest and detention as preventive measures against custodial torture and death and to ensure transparency and accountability for these crimes.[287] The judgment called for multiple checks and balances to be

284 Consejo de Estado, Sentencia No. 46495, 2 agosto 2018, Aracely Vargas and others.
285 The petitioners asked the courts in their constitutional jurisdiction to assess the powers given to the police under two sections of the Bangladesh criminal code as in violation of different fundamental rights under the Constitution: section 54, which allows police to arrest without a magistrate's order or a warrant in an expansive number of situations; and section 167, which deals with remand to the police. The petitioners shared examples of abusive exercise of power and violation of rights, including torture and death in custody. The courts scrutinized the two sections of the code and found these sections to be inconsistent to an extent with the provisions in the Constitution. The court made specific recommendations for changes in these two provisions of the law, some additional provisions of law by relation, and gave some immediate directions to be followed. See Bangladesh Legal Aid and Services Trust (BLAST) and others vs. Bangladesh and others (2003) 55 DLR (HCD) 363 (April 7), www.blast.org.bd/content/judgement/55-DLR-363.pdf
286 DK Basu, executive chairman of Legal Aid Services, West Bengal, a non-political organization, in 1986 addressed a letter to the Supreme Court of India calling attention to certain news published in the *Telegraph Newspaper* about deaths in police custody. He requested that the letter be treated as a Writ Petition under the state's Public Interest Litigation rules. Considering the importance of the issues raised in the letter, the court agreed. See Abhishek Kumar, "D.K Basu vs. State of West Bengal," *Law Times Journal*, June 7, 2020, https://lawtimesjournal.in/d-k-basu-vs-state-of-west-bengal/. The *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh* was also relied on in this case, because provisions of the criminal code in both countries have the same origin.
287 DK Basu V. State of West Bengal, AIR 1997 SC 610 (India). For the guidelines, see, for example, Government of Puducherry, "Guidelines Laid Down by The Hon'ble Supreme Court in D.K. Basu Case," accessed on June 3, 2023, https://police.py.gov.in/About%20us/ArrestGuidlines.htm: "1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designation the police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register. 2. The police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest. 3. A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the arresting witness of the memo of the arrest is himself such a friend or relative of the arrestee. 4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the District and the Police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest. 5. The person arrested must be made aware of his right to have one informed of his arrest or detention as soon as he is put under arrest or is detained. 6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of arrestee and the name and particulars of the police officials in whose custody the arrestee is. 7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any

introduced concerning detainees, such as proper documentation of their presence/movement, informing relevant persons of their custody, and periodic medical examinations to ensure no ill-treatment takes place.[288]

In India, the court in *State of Uttar Pradesh* v. *Ram Sagar Yadav and others* recommended that the law pertaining to evidence be amended in order to place the evidential burden of proof on the police in cases of custodial violence. The court observed, "The law as to the burden of proof may be re-examined by the legislature so that the handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection."[289]

In Malaysia, the High Court and Court of Appeal in the *A. Kugan* case recognized the gravity of the problem of abuse of police powers and the high incidence of custodial deaths in the country resulting from it.[290] It called for implementation of the Independent Police Complaints and Misconduct Commission to look into police discipline, due to the sharp rise in custodial violence, torture, and death in police custody.[291] It was noted that:

> The enforcement of an independent body to investigate accusation or disciplinary offences by police officers will eliminate accusations of 'horror stories' in some lockups and police stations, where detainees are subjected to various forms of torture and physical ill treatment by some officers under the pretext of intensive interrogation which is a continuous act, as in the present case, until death occurs.[292]

Similarly, the Supreme Court of Nepal ordered the government to develop impartial and effective mechanisms to investigate cases of human rights violations like extrajudicial execution and held that legislation and guidelines should ensure vetting of security officials before their appointment or promotion.[293]

In Pakistan, the Supreme Court in the *Yaseen Shah* case highlighted the absence of a domestic law on enforced disappearance and directed the state, through the Chief Executive, to enact domestic legislation to control arbitrary detention of persons and ensure that no enforced disappearances takes place in the future.[294]

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present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee. 8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a panel for all Tehsils and Districts as well. 9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record. 10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation. 11. A police control room should be provided to all district and State Headquarters, where information regarding the arrest and place off custody of the arrestee shall be communicated by the officer causing the arrest. Within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous board."

288 DK Basu V. State of West Bengal, AIR 1997 SC 610.

289 The Supreme Court upheld the conviction of a police official in this case involving death in custody. The court stated that the statement made by the deceased ("dying declaration") in front of the magistrate that he sustained injuries through the police was a crucial piece of evidence and can be acted on without corroboration. See State of Uttar Pradesh v. Ram Sagar Yadav and others, 1985 AIR 416, 1985 SCR (2) 621 (India), full judgment at https://indiankanoon.org/doc/596213/

290 Suara Rakyat Malaysia (SUARAM), "Malaysia Human Rights Report 2009: Civil & Political Rights," 46–47. The case involved the death in custody of Kugan Ananthan. His family sought compensation for false imprisonment, assault, negligence, misfeasance, and breach of statutory duties.

291 See M. Megaswari, "Kugan's Case: Justice V T Singham's Landmark Written Judgement," The Star [Malaysia], July 9, 2013, www.thestar.com.my/news/nation/2013/07/09/kugans-case-justice-v-t-singhams-landmark-written-judgement/#eKT32YohyOJEGhbL.99

292 Ibid. Despite better judgments from former courts, the federal court in this case held that no exemplary damages should be awarded to family members of individuals who die in custody. See Hafiz Yatim, "No Exemplary Damages in Kugan's Custodial Death Case, Court Rules," *Malaysiakini*, November 6, 2017, www.malaysiakini.com/news/400941

293 Sunil Ranjan Singh & Others v Government of Nepal & Others (Case No. 067/2067). See also *Himalayan News Service*, "Form 'New Body' to Probe Extra Judicial Killings: Supreme Court," December 12, 2020. https://thehimalayantimes.com/nepal/form-new-body-to-probe-extra-judicial-killings-supreme-court

294 Human Rights Case No.29388-K of 2013, PLD 2014 SC 305 (Pak.).

In Nepal, the Supreme Court in 2015 struck down amnesty provisions in the Truth and Reconciliation Commission Act (2014) for grave crimes committed during the state's civil war and directed the law to be amended.[295] The judgment, considered landmark, requires the government to revise existing law in compliance with international standards of transitional justice. In 2020, the Supreme Court rejected a petition by the government asking it to review the 2015 ruling.[296]

In a case assessing whether corporal punishment violated constitutional protection from torture, the Supreme Court of Nepal struck down a provision allowing "minor beating" of children by family and teachers, as per Section 7 of the Children Act 1992[297] The court held that the provision violated the constitutional prohibition against torture and cruel, inhuman, and degrading treatment and directed the state "to pursue appropriate and effective measures to prevent physical punishment as well as other cruel, inhuman or degrading treatment or punishment or abuse being imposed or inflicted on and likely to be imposed or inflicted on children."

In a case of corporal punishment, a court in Zambia condemned judicial corporal punishment and held that sections providing for the use of corporal punishment as a sentence were in direct conflict with article 15 of the Zambian Constitution and, therefore, unconstitutional; the court ordered these sections to be repealed from the Penal Code.[298] A number of penal laws have been repealed or amended to reflect the High Court judgment—including provisions authorizing "disciplinary" corporal punishment in the Prisons Act (1966), provisions authorizing judicial corporal punishment in the Penal Code (1931), the Criminal Procedure Code (1934), and Reformatory School Rules (1965).

Settlements Aimed at Non-repetition

Settlements in cases of human rights violations can be controversial and merit deep contextual analysis beyond the scope of this paper. Settlements announced publicly that award compensation and other forms of reparation, including satisfaction and non-repetition measures, in some contexts might be adequate in order to both provide relief for the harm inflicted on victims and seek a measure of accountability of perpetrators.

The Inter-American System of Human Rights includes the possibility of reaching agreements between petitioners and states. Through its "friendly settlement mechanism," petitioners and states are able to negotiate agreements that introduce reparation measures that benefit both the direct alleged victims of the violation and society at large. More than 120 such settlements have been approved by the IACHR. "In addition to securing reparation for the alleged victims in specific cases, these agreements have led to the adoption of measures with far-reaching structural

295 Suman Adhikari vs Nepal Government, Order 069-WS-0057, Judgment, January 2, 2014, www.derechos.org/intlaw/doc/npl3.html.
296 Amnesty International, "Nepal: Supreme Court's Decision Reaffirms the Need to Amend Transitional Justice Law," May 1, 2020, www.amnesty.org/en/latest/news/2020/05/nepal-supreme-court-decision-reaffirms-need-to-amend-transitional-justice-law/
297 Ale (CVICT) et al v Government, Writ number 57 of the year 2061 (2005) (Nep.). This case followed an application made by the Center for Victims of Torture regarding the constitutionality of section 7 of the Act relating to Children, 2048 (1992), which provided for "minor beating" of children by family members and teachers. See also Sonia Vohito, "Using the Courts to End Corporal Punishment: The international Score Card," *De Jure Law Journal* 52 (2019), 597–609, https://www.dejure.up.ac.za/images/files/vol52-2019/CLC%20Vohito%202019.pdf
298 Banda v The People (2002) AHRLR 260 (ZaHC 1999) (Zamb.), https://endcorporalpunishment.org/human-rights-law/national-high-level-court-judgments/zambia-1999-high-court-judgment/

effects across all sectors of government, including legislative reforms, implementation of public policies, and programs at the service of the community."[299] For example:

> on December 6, 1996, the Inter-American Commission on Human Rights received a petition against the Bolivarian Republic of Venezuela, for the murder of 16 Yanomami indigenous persons from the Haximu region, in June and July 1993; for not effectively preventing the presence of the garimpeiros (independent mining prospectors) on Yanomami territory; and for failure to investigate, prosecute and punish those responsible.[300]

The parties signed a friendly settlement agreement on October 1, 1999, by which the petitioners undertook to work with the Brazilian government to prevent further garimpeiro attacks due to illegal mining in the Yanomami area. Petitioners and the state agreed on implementation of health programs to serve Indigenous communities.

In enforcing federal law, the US Department of Justice sometimes brings lawsuits against state and local governmental entities. It uses the term "consent decree" for a negotiated agreement that is entered as a court order and enforceable through a motion for contempt.[301] State governments are sovereigns with special and protected roles under the US constitutional order.[302] Consent decrees are quite rare, subject to multiple limitations, and particularly related to the separation of powers in a federated state. While atypical, they are an important example of how the judiciary can step in to guarantee measures of non-repetition.

In a case involving stopping, detaining, and searching persons as part of racial-profiling practices, a court in the United States approved an agreement between the American Civil Liberties Union and the state of Maryland in which structural reparations, including the enactment of a consent decree, were agreed upon. The consent decree provided for a new police policy that included: the prohibition of racial profiling in traffic stops, retraining of officers, audio-visual taping of all traffic stops and searches, creation of a citizen complaint process, maintenance of statistics regarding traffic stops, development of a Police-Citizen Advisory Committee to promote mutual understanding between the police force and the community, and use of consent forms for vehicle searches.[303]

In a class-action suit against the New York Police Department, a permanent injunction was granted with an order for immediate reforms and a joint remedial process to identify a more thorough set of reforms. The police department was ordered to ensure that officers recorded stops in their activity logs with the required specificity. The court noted that performance evaluation was a potential area for reform, highlighting that a shrinking budget and targets for stops were causing officers to police aggressively, including in high-crime neighborhoods. In addition, a one-year pilot program of body cameras was ordered, with the judge stating that "[w]hile the logistical difficulties of using body-worn cameras will be greater in a larger police force, the potential for avoiding constitutional violations will be greater as well."[304]

299 Inter-American Commission on Human Rights, "Friendly Settlements," accessed on June 3, 2023, www.oas.org/en/IACHR/jsForm/?File=/en/iachr/friendly_settlements/default.asp
300 Inter-American Commission on Human Rights, "Examples of the Impact of Friendly Settlement Agreements," accessed on June 3, 2023, www.oas.org/en/IACHR/jsForm/?File=/en/iachr/friendly_settlements/examples-impact.asp
301 The US Department of Justice uses the term "settlement agreement" for an out-of-court resolution that requires performance by the defendant, including a memorandum of agreement or memorandum of understanding, enforcement of which requires filing a lawsuit for breach of contract.
302 US Dept. of Justice, *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities,* November 2018.
303 See Wilkins v. Maryland State Police, Civ. No. 93- 468 (D. Md. 1993) (settlement agreement approved Jan. 5, 1995), www.clearinghouse.net/detail.php?id=1044
304 Floyd et al v New York 08 Civ. 1034 (SAS), "Remedies Opinion."

Truth

Due to the rules of evidence, judicial fact-finding is usually more rigorous than administrative programs' fact-finding.[305] Even if only a tiny fraction of cases reaches the courts, this may be enough to perform this essential truth-finding function. Once the courts establish the facts in one case, those facts become the basis for understanding the truth. Establishing the truth in this way will benefit not only the plaintiffs in the individual case but also victims more generally.[306]

The Judiciary in Colombia has issued the highest number of elaborate decisions regarding this type of satisfaction measure. Often the courts classify them as non-repetition, but this guide follows its own classification based on international standards.

In a case of enforced disappearances by the National Army, the Council of State of Colombia granted measures of satisfaction that included a public apology and the building of a plaque in a visible place in the town where the violations were committed.[307]

In a case of extrajudicial killings, the Council of State granted measures of satisfaction that included the publication of the judgment on its webpage and a summary of the decision in a newspaper with wide national and regional circulation. The content of the press release had to be agreed on by the victims' next of kin. It also sent to the director of the National Center for Historical Memory and the General Archive of the Nation a copy of the judgment to make it part of its registry and contribute to the state's documentary construction to of the national memory of the violence generated by Colombia's internal armed conflict. Finally, the court required the army to create a link on its website where the public can access all of the court's jurisprudence regarding the Colombian armed conflict and where all the cases that have occurred in that context are included.[308] Colombian courts have issued multiple similar decisions.[309]

In another case of extrajudicial killing, the Council of State of Colombia granted reparation measures that included public apologies from the National Army with the consent of the victims.[310] The court also obliged the Army to plant a big native tree in the town's downtown. The judgment established that children from neighboring schools could participate in the ceremony by painting a mural alluding to the facts of the decision that would include a message of reconciliation and non-repetition of acts that violate human rights. Additionally, the court established the creation of a bronze plaque to be installed in the last place where the adolescent victim was last seen, with a written description of the facts of the case. The court also urged the Special Jurisdiction for Peace to study the possibility of invoking its jurisdiction in the matter. Public disclosure of the violations on the Army's web site was also granted. The court sent a copy of the sentence to the National Center for Historical Memory. Finally copies of the judgment were sent to the Office of the Attorney General of the Nation so it could monitor compliance with the decision.

305 Malamud'Goti and Grossman, "Reparations and Civil Litigation," Loc 8470.
306 Ibid. at Loc 8483.
307 Consejo de Estado, Sección Tercera, Subsección B, Sentencia No. 24984, 5 abril 2013, Uni Gironza.
308 Consejo de Estado, Sentencia No. 56447, 14 febrero 2018, Ricardo Alberto Triana Pulido and others. Additionally, the court forwarded copies of the judgment to the Attorney General's Office to carry out a serious, impartial, and effective investigation to identify, capture, and criminally sanction those responsible for the deaths. The Council of State classified these measures as non-repetition, but this guide mentions them as satisfaction. in line with international standards.
309 Consejo de Estado, Sentencia No. 20046, 21 febrero 2011, Galvis Quimbay et al. In this case of illegal detention, torture, and killing by the police, the Consejo de Estado granted measures of satisfaction that included the publication of the decision, public apologies to the family of the victim, and the drafting and publication of a letter to all government officers establishing the consequences of such illegal behavior.
310 Consejo de Estado, Sentencia No. 56750, 10 mayo 2018, Ismael Caro Caro and others.

In a similar decision in another extrajudicial execution case, the Council of State of Colombia ordered several reparation measures, including: a press release in a newspaper with wide national circulation with the National Army reporting that the victim's death was the result of an extrajudicial execution; a public apology on the National Army's website; and the production of a documentary (at least 5 minutes in length) recounting the events, with the warning that it was an extrajudicial execution performed by members of the National Army and that the victim was unfairly accused of belonging to a guerrilla group.[311] The film had to be presented at a public event arranged with the victim's family members. Additionally, the court granted rehabilitation to the victim's family. Finally, the court ordered a copy of the judgment sent to the National Center for Historical Memory, the Special Jurisdiction for Peace, and the Truth Commission, to make it part of its registry and contribute to the historical documentary construction of the country.

In Mexico, the Federal Administrative Court has notably ordered state institutions to publicly acknowledge their responsibility for human rights violations—as in the public apology delivered by the federal prosecutor in February 2017 to three Indigenous women who had spent three years in prison on fabricated charges.[312]

In Mexico a federal judge issued a decision in 2018 ordering the creation of a truth commission to investigate the enforced disappearance of 43 students in the 2014 *Ayotzinapa* case.[313] Although the decision was invalidated, the Mexican Executive Branch created the commission, and the decree mentioned the judicial decision.

Other measures ordered in Mexico have included, in 2018, requiring city authorities to list streets deemed unsafe for unaccompanied women and requiring the executive branch to publish Gender Violence Alerts.[314] While recognizing that such measures are insufficient, the state should make more effort to prevent such violence. This example shows an attempt by judges to offer realistic measures of protection given the general context of the state.

In the *Oquendo Flórez et al.* case regarding the enforced disappearances of two men, the Council of State in Colombia ordered the National Civil State Register to revert the decision of not registering such deaths and officially acknowledge their deaths.[315]

311 Consejo de Estado, Sentencia No. 43770, 7 septiembre 2018, Carmen Cecilia Sajonero Rico y otros.
312 Tribunal Federal de Justicia Administrativa, Expediente 6235/13-17-05-11/1289/13-PL-02-04, Jacinta Francisco Marcial (Mex.).
313 Primer Tribunal Colegiado del Décimo Noveno Circuito, con sede en Tamaulipas, amparos en revisión 203/2017 al 206/2017, caso Ayotzinapa.
314 Juzgado Segundo de Distrito en Materia Administrativa del Distrito Federal, Amparo Número 429/2015, 25 de noviembre de 2015.
315 Consejo de Estado, Sección Tercera, Subsección B, Sentencia No. 21806, 29 octobre 29, 2012, Oquendo Flórez et al. The court classified this measure of reparation as restitution.

Conclusion

This guide referred to dozens of examples of decisions by domestic courts around the world that awarded reparations that at least partly comply with criteria for effective reparations established in international law and jurisprudence. Domestic judges are fashioning innovative decisions for redress to obtain accountability, truth, and prevention on behalf of victims. Our findings demonstrate that judicial reparations have an important role to play in making domestic governments comply with international law governing reparation. The precise manner through which judges are designing reparations show their interest in preventing human rights abuses in the future. We noted that the majority of the domestic decisions are from Latin American jurisdictions, in particular Colombia, with some notable decisions from other regions. An explanation of why courts in some countries are more proactive in granting reparations than others is beyond the scope of this guide.

It is important to highlight that the implementation of domestic decisions ordering reparation remains a challenge. Our research shows that even though some judges take seriously their power to grant reparations through decisions rendering adequate reparation measures that can achieve truth, accountability, and prevention, implementation is still an area in need of judges' attention. States have an obligation to take steps to ensure that judicial and administrative decisions on reparations are enforced and implemented. The effectiveness of remedies to obtain reparations depends on their actual implementation. While implementation of the decisions is typically the obligation of the executive, the courts could pay more attention to this need as well. Judgments generally do not specify monitoring mechanisms or provide specific timeframes for implementation, while in many jurisdictions it is possible, even if atypical, for judges to include such measures. In practice, despite progressive jurisprudence from courts in different countries, judicial decisions often did not lead to actual changes of situation for the victims and survivors who brought cases due to challenges of non-implementation. However, more research is needed to identify existing gaps in implementation and suggest specific actions to ensure effective implementation of reparations.

Finally, it is worth noting that the specificity of the reparations granted by domestic courts should teach lawyers, advocates, and human rights organizations that, in requesting reparations, framing and specificity matter. Reparations are now more important than ever. Reparations are the real measure of the effectiveness of remedies, and if well designed, they can lead to accountability and prevention. We believe that the new generation of judgments should be much more specific, with a real focus on targeting accountability and prevention. They should be solidly grounded in the facts of the case, and the reparations measures should have a clear meaning and

reasoning to justify them, based on the factors that contributed to the violation(s) or the consequences that resulted from the violation(s). This will require much more analysis and thoroughness when requesting specific reparation measures.

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