**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

**CASE NO: 26902/2015**

In the matter between:

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| **THUPETJI ALEXANDER THUBAKGALE** | First Applicant |
| **EKURHULENI CONCERNED RESIDENTS' ASSOCIATION** | Second Applicant |
| **RESIDENTS OF THE WINNIE MANDELA INFORMAL SETTLEMENT** | Third Applicant |
| and | |
| **EKURHULENI METROPOLITAN MUNICIPALITY** | First Respondent |
| **THE EXECUTIVE MAYOR, EKURHULENI METROPOLITAN MUNICIPALITY** | Second Respondent |
| **THE CITY MANAGER, EKURHULENI METROPOLITAN MUNICIPALITY** | Third Respondent |
| **HEAD OF DEPARTMENT: HUMAN SETTLEMENTS** | Fourth Respondent |
| And | |
| **SECTION27** | *Amicus Curiae* Applicant |
| **ESCR-NET** | *Second Amicus Curiae* |

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# ESCR-NET'S SUPPLEMENTARY HEADS OF ARGUMENT

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## INTRODUCTION

1 These supplementary heads of argument are filed at the invitation of the Court during the hearing on 10 August 2022. They should be read with ESCR-Net's main heads of argument.

2 The fundamental question in this case is what an effective remedy is in the circumstances where it is beyond dispute that the respondents have not only infringed the applicants' right to have access to adequate housing, but are also in breach of two court orders intended to protect and promote the applicants' right to access to adequate housing.

3 The obligation to ensure an effective remedy rights violations derives from both domestic law and South Africa's obligations under international law. While states retain a wide latitude to determine measures to adopt to give effect to their international human rights obligations, the Vienna Convention on the Law of Treaties asserts that States "*may not invoke the provisions of its internal law as a justification for a failure to perform a treaty*" obligation.[1] The Constitutional Court has affirmed the "main provisions" of the Vienna Convention as customary international law.[2]

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[1] Vienna Convention on the Law of Treaties, May 23, 1969 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), Articles 26- 27.

[2] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) ("Law Society"), paras 34-9. Para 39: "But, it is now settled that its main provisions like articles 18 and 26 are part of the customary international law envisaged in section 232 of the Constitution." It seems indisputable that Article 27 is also such a "main provision" of VCLT as it resolves a fundamental conflict otherwise existing between the application of domestic and international human rights law.

4 At the broadest level, South Africa's obligations to ensure the provision of an effective remedy in terms of international human rights law are set out in 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 ("UN Basic Principles),[3] as follows:

> "*In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms:* ***restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition***."[4] (Emphasis Added)

5 Proceeding from the premise that "*victims should be treated with compassion and respect for their dignity*", the UN Basic Principles detail examples of these various forms of "*adequate, effective and prompt*" remedies in the following terms:

5.1 **Restitution:** Aimed at restoring a victim to their original situation prior to the rights violation, and including restoration of liberty, enjoyment of human rights, identity, family life and citizenship,

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[3] Resolution 60/147, 2005, available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

[4] Id, principle 18. See also See also: International Commission of Jurists "The Right to a Remedy and Reparation for Gross Human Rights Violations Practitioners Guide No. 2 (Revised Edition)" (2018) available https://www.icj.org/wpcontent/uploads/2018/11/Universal-Right-to-aRemedy-Publications-Reports-Practitioners-Guides-2018- ENG.pdf.

return to one's place of residence, restoration of employment and return of property.[5]

5.2 **Compensation:** for any economically assessable damages, in proportion to the gravity of the violation and all relevant circumstances. Damages claimed may result from, among others:

5.2.1 physical or mental harm;

5.2.2 lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damages; and

5.2.3 costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[6]

5.3 **Rehabilitation:** including the necessary medical and psychological care, as well as legal and social services.[7]

5.4 **Satisfaction:** including any or all of a range of remedies depending on the circumstances, including, as examples, measures aimed at:

[5] Id, Principle19.
[6] Id, Principle 20.
[7] Id, Principle 21.

5.4.1 the cessation of continuing violations;

5.4.2 the verification of facts and full public disclosure of the truth;

5.4.3 the publication of an official declaration or judicial decision aimed at restoring dignity, reputation and rights; and

5.4.4 the provision of sanctions, public apology, commemorations and tributes.[8]

5.5 **Guarantees of non-repetition:** including any or all of a range of remedies contributing to the prevention of future violations. These remedies include:

5.5.1 prioritizing the provision of human rights education for public officials;

5.5.2 promoting observance of codes of conduct, ethical norms and international law by public officials;

5.5.3 promoting mechanisms for preventing and monitoring social conflicts and their resolution; and

[8] Id, Principle 22.

5.5.4 providing for the reviewing and reform of laws contributing to violations.[9]

6 These complementary principles have been applied repeatedly in determining multipronged remedies in matters before the United Nations Committee on Economic, Social and Cultural Rights,[10] the African Commission on Human and People's Rights,[11] and various domestic and regional courts. ESCR-Net submits that it is these generally applicable principles of international law that should inform this Court's determination of an effective remedy in terms of the South African Constitution.

7 In this regard, it is submitted that remedies such as, *inter alia*, findings of contempt of court and awards of constitutional and/or other damages should be considered as specific expressions of this Court's provision of remedies to ensure "*restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition*".

8 While the permissibility of the provision of constitutional damages by this Court, in light of the Constitutional Court's judgments in this matter, remains contested, even a determination by this Court that such

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[9] Id, Principle 23.

[10] *Lopéz-Albán v. Spain*, UN Committee on ESCR (2019), para. 14; *Mohamed Ben Djazia and Naouel Bellili v. Spain,* UN Committee on ESCR (2015), para. 20; *Lopéz-Albán v. Spain*, UN Committee on ESCR (2019), para. 16; *El Goumari and Tidli v. Spain*, UN Committee on ESCR (2021); *Walters v. Belgium*, UN Committee on ESCR (2021), para. 15.

[11] African Commission on Human and People's Rights "Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights" (2010) https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf, paras 21-26. See also, *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Republic of Congo*, ACHPR, Communication 259/2002, 24 July 2013, para 78; Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, African Commission on Human and Peoples' Rights (2009), Decision, 276/03, 238, 251, 268, 286, 288, 298.

constitutional damages cannot be awarded does not relinquish the Court's responsibility to consider and determine whether other forms of "compensation" and measures securing "guarantees of non-repetition" ought to be awarded.

9 Critically, this Court's responsibility in terms of international law does not end with ensuring reparations, irrespective of the form in which it is provided, to parties to a particular matter, but extends also to ensuring "guarantees of non-repetition" both to the parties and in society at large.

10 We submit that, in the specific circumstances of this matter, a finding of contempt alone, would fall short of meeting the requirements for an appropriate and effective remedy in international law. This Court should, we submit, therefore consider awarding **both** a contempt finding **and** the supervisory **and/or** compensatory relief sought by the residents.

11 The below jurisprudence of international treaty bodies, as well as domestic and regional courts, provides ample support for these assertions. This jurisprudence illustrates the approaches of various courts and treaty bodies to ensuring the provision of an effective remedy, which have included:

11.1 Finding a state entity to be in contempt of court to ensure cessation of a right violation and guarantee non-repetition; and/or

11.2 Issuing a supervisory order to guarantee non-repetition; and/or

11.3 Issuing a fine/awarding compensation including in the form of damages:

11.3.1 applying the same standard as in other instances of damages (for example in delict or contract) namely to place the victim in the position they would have been had they not suffered the harm and to ensure compensation, satisfaction and guarantees of non-repetition; and/or

11.3.2 at the discretion of the court, considering justice and equity, in order to ensure compensation, satisfaction and guarantees of non-repetition.

**EFFECTIVE REMEDY FROM A COMPARATIVE PERSPECTIVE**

12 The following summarised judgments and views from the decisions cited in ESCR-Net's main heads of argument is provided for the convenience of the Court and tailored directly for this matter.

United Nations Committee on Economic, Social and Cultural Rights

13 The United Nations Committee on Economic, Social and Cultural Rights ("The Committee") has affirmed the application of the right to an effective remedy to socio-economic rights, including the right to adequate housing.[12] In her final report to the UN Human Rights Council in 2019, the

[12] CESCR General Comment No. 4, para. 17; CESCR General Comment No. 7, para. 15.

UN Special Rapporteur on the right to adequate housing Leilani Farha emphasized that:

> *"[t]he provision of legal remedies for the violation of the right to housing is a core component of States' obligation to ensure the realization of this right"; as such, "**States have an immediate obligation to ensure access to justice for those whose right to housing has been violated, including through failures to adopt reasonable measures for its progressive realization**."*[13] (Emphasis Added).

14 Importantly, therefore, in terms of international law, the provision of the full range of remedies, ranging between **restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition,** must be made available for violations of the right to adequate housing. Contrary to the position advanced by Jafta J in the Constitutional Court judgment in this matter, a full range of remedies should be available precisely for violations of the right to housing caused by the failure to adopt "reasonable measures".

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[13] CESCR General Comment No. 4, para. 17. As elaborated by the same Rapporteur in the Guidelines for the Implementation of the Right to Adequate Housing, States must immediately recognise and give effect to the following "*implementation measures*":

1. Access to justice for the right to housing should be ensured by all appropriate means, through courts, administrative tribunals, human rights institutions and informal or customary community-based justice systems. Hearings and other procedures should be timely, accessible, and procedurally fair, enable full participation of affected individuals and groups and ensure effective remedies within a reasonable time frame. Where effective remedies rely on administrative or quasi-judicial procedures, recourse to courts should also be available.
2. Access to justice should be ensured for all components and dimensions of the right to housing that is guaranteed under international human rights law, covering not just the right to a physical shelter, but to a home in which to live in security, peace and dignity; not just protection from eviction or other State action, but also from State neglect and inaction and failure to take reasonable measures to progressively realise the right to housing. States should revoke legal provisions suggesting that the right to adequate housing is not justiciable under domestic law and should desist from making this argument before courts.
3. Remedies should address both individual and systemic violations of the right to housing (A/HRC/43/43 (Dec. 29, 2019), Guidelines for the Implementation of the Right to Adequate Housing, para. 83.)

15 The Committee has adopted the same approach in its communications procedure, providing a range of remedies for violation of socio-economic rights, including those relating to compensation and guarantees of non-repetition.[14] This includes "*financial compensation for the violations suffered*", in the direct context of communications relating to the right to housing.[15]

Inter-American Court of Human Rights

16 The jurisprudence of the Inter-American Court of Human Rights ("IACtHR") clearly established a right to an effective remedy, which, like the Constitutional Court of South Africa, it acknowledges as one of the "*basic principles of contemporary international law*" and a "*customary norm*".[16]

17 In *Cantoral-Benavides v. Peru*, the court expanded upon this in the following terms:

> "*Reparation for damages caused by a violation of an international obligation requires, whenever possible, full restitution (restitutio in integrum), which is to reinstate the situation that existed prior to the commission of the violation.* ***If, as in the instant case, full restitution is not possible, an international court must order a series of measures that will safeguard the violated rights, redress the consequences that the violations engendered, and order payment of compensation for the damages caused****. This obligation to make reparation is governed by international law in all its aspects (scope,*

[14] *Lopéz-Albán v. Spain*, UN Committee on ESCR (2019), para. 14; *Mohamed Ben Djazia and Naouel Bellili v. Spain,* UN Committee on ESCR (2015), para. 20; *Lopéz-Albán v. Spain*, UN Committee on ESCR (2019), para. 16; *El Goumari and Tidli v. Spain*, UN Committee on ESCR (2021); *Walters v. Belgium*, UN Committee on ESCR (2021), para. 15.

[15] Id.

[16] Cantoral-Benavides v. Peru (2001, Judgment, Reparations and Costs), para 40; *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, Inter-American Court of Human Rights (2019), para 208.

> *nature, modalities, and determination of beneficiaries), none of which the respondent State may alter or decline to perform by relying on the provisions of its own domestic laws."*[17] (Emphasis Added).

18 For the present purposes this importantly highlights three important aspects of the right to an effective remedy.

18.1 First, States cannot evade the obligation to provide reparation in terms of international law by appealing to their domestic law.

18.2 Second, particularly in situations where full restitution is not possible, as is the case at hand, courts will order "*a series of measures*", including but not limited to compensation.[18] The Court has also indicated that depending on the circumstances of a case there may be a need to "grant diverse measures of reparation" including *"pecuniary measures, and measures of restitution, rehabilitation and satisfaction as well as guarantees of non-repetition*".[19]

18.3 Third, legal systems may, and often do, provide for the compensation in the form of damages even in cases in which such damages assessments are not capable of being calculated in a straightforward manner typical of restitution-based calculations in the private law.

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[17] Id, para 41.
[18] Id.
[19] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (2020 Merits, Reparations and Costs), para 307.

19 Reparations understood in this manner, are, generally, "*intended to erase the effects of the violations committed*" and must therefore be "*proportionate to the violations that were established*".[20] In terms of the Court's jurisprudence such damages can be pecuniary and non-pecuniary based on "*the principle of equity*".[21]

20 In *ANCEJUB-SUNA v. Peru*, the Court ordered the State to execute and implement orders of Peruvian Courts that had gone unimplemented for a period of 27 years.[22] In addition to awarding pecuniary damages, the Court highlighted that its jurisprudence on non-pecuniary damages establishes that:

> "*non-pecuniary damage may include both the suffering and affliction caused by the violation and the impairment of values that have great significance for the individual,* ***and also any alteration of a non-pecuniary nature in the living conditions of the victims****. Also, since it is not possible to allocate a precise monetary equivalent to non-pecuniary damage,* ***this can only be compensated, in order to make full reparation to the victims, by the payment of a sum of money or the delivery of goods and services with a monetary value that the Court determines in application of sound judicial discretion and in accordance with equity.***"[23] (Emphasis Added).

21 In the circumstances of this particular case, the IACtHR provided an innovative remedy to the victim whose studies had been interrupted by his detention. It concluded that the "*best way to restore [the petitioners] life plan*" was to order the state to:

> "*provide him with a fellowship for advanced or university studies, to cover the costs of a degree preparing him for the profession of his*

[20] Id para 42.
[21] Id para 57.
[22] *ANCEJUB-SUNAT v. Peru*, Inter-American Court of Human Rights (2019), para 217.
[23] Id, para 235.

> *choosing and his living expenses for the duration of those studies, at a learning institution of recognized academic excellence, which the victim and the State select by mutual agreement*."

22 Another example of such an innovative remedy provided by the IACtHR was in *Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil*,[24] in which, in addition to awarding pecuniary damages to the victims of an explosion and their families, the Court ordered a public apology on public radio and television and a public commemorative ceremony.[25] Additionally the Court, given the socio-economic causes resulting in employment under dangerous circumstances, ordered the state to "*design and execute a socio-economic development program especially for the population of Santo Antônio de Jesus, in coordination with the victims and their representatives*" and "*provide the Court with a yearly progress report on its implementation*".[26]

23 What is clear from these decisions of the IACtHR is that the packages of remedies provided in these cases go far beyond the provision of pecuniary damages aimed at restitution. They seek to provide forms of "compensation" (for instance of the form of the fellowship in *ANCEJUB-SUNA*, "satisfaction" (such as apologies in *Workers of the Fireworks Factory*) and guarantees of non-repetition (such as the design and execution of a socio-economic development program) that go well beyond

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[24] Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil (2020), Judgment, para. 181, 295, 303.
[25] Id, paras 278, 281.
[26] Id, para 289.

the direct causes of the harm to the specific victims. They also entail supervisory aspects.

United States of America

24 In *Spallone v. United States*, the U.S. Supreme Court upheld a contempt order of a district court against the City of Yonkers, New York, that included fines approaching USD $1,000,000 a day for the city's failure to comply with a consent decree order that required adoption of a legislative package known as the Affordable Housing Ordinance.[27] In coming to this decision, the Court noted that "*defiance [of the court order] results, in essence, in a perpetuation of the very constitutional violation at which the remedy is aimed*"[28] and that when a court order "*is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers*".[29]

25 In *McCleary v. State*, the Washington Supreme Court issued an order of contempt holding the Legislature in contempt for failing to make "*real and measurable progress*" toward meeting the court's 2012 mandate to fully fund the state's basic education program by 2018.[30] It did so having retained jurisdiction over the case to monitor the legislature's implementation of funding reforms through the 2018 deadline. When the legislature did not comply with the orders the court noted that:

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[27] *Spallone v. United States*, 493 U.S. 265 (1990).
[28] Id, 302.
[29] Id, 276.
[30] *McCleary v. State*, No. 84362-7 (Wash. Sept. 11, 2014) (order of contempt).

> "*The Court has no doubt it has the legislature's "attention". But that is not the purpose of a contempt order. Rather, contempt is the means by which a court enforces compliance with its lawful orders which are not followed… **These orders are not advisory or designed only to get the legislature's 'attention**'; the court expects them to be obeyed even though they are directed to a coordinate branch of government. When the orders are not followed, contempt is the lawful and proper means of enforcement…."* (Emphasis Added)

26 Consequently, while issuing an order of contempt, if the legislature did not act to purge its contempt, *"the court will reconvene to impose sanctions and other remedial measures as necessary*".[31] It later did so, imposing contempt sanctions of US $100,000 per day on the legislature for its repeated failure to devise a remedial school finance plan as ordered.[32]

27 The provision for both contempt orders and simultaneous financial sanctions for the authorities for their failure to comply with court orders provides an example, relevant to the present purposes, of the inadequacy of contempt findings alone in matters in which the contempt relates to governmental failure to realise socio-economic rights. Alone, a mere contempt order, may, in the appropriate circumstances fall short of the standard required in terms of the right to an effective remedy. This is because a contempt order alone may neither effectively secure "satisfaction" nor a "guarantee of non-repetition". This is particularly likely to be the case where the contempt manifested as a result of active and repeated state defiance.[33]

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[31] Id.

[32] Contempt Order at 9-10, *McCleary v. State* (*McCleary II*), 269 P.3d 227 (Wash. Aug. 13, 2015); continuing Contempt Order at 11, *McCleary v. State* (*McCleary III*), 269 P.3d 227 (Wash. Oct. 6, 2016 (No. 84362-7).

Republic of Kenya

28 The Kenyan Supreme Court has affirmed the remedies of compensation and the imposition of supervisory orders in housing rights cases. In *Mitu-Bell Welfare* the Supreme Court affirmed the decision of the High Court, which, citing comparative jurisprudence including that of South African courts, recognised:

> "*the general principle that 'a mandamus and the exercise of supervisory jurisdiction' may be necessary to ensure an effective remedy for a breach of any Constitutional right, including a socio-economic right*."[34]

29 In doing so it drew explicitly on international human rights law, including non-binding sources such as the applicable general comments of the UN Committee on Economic, Social and Cultural Rights, finding that:

> "*interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the Courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a Constitutional or statutory mandate to enforce the order*."[35]

30 The Court remitted the matter to the High Court for the determination of an appropriate remedy in light of this guidance and the full circumstances of the matter, providing further direction that:

> "*Having alleged a violation of their rights to dignity and housing, it is our considered opinion that the most effective relief open to the appellants was a claim for compensation*." [36]

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[34] *Mitu-Bell Welfare Society v. Kenya Airports Authority*, SC Petition 3 of 2018, Supreme Court of Kenya (2021), para 37, para 121.
[35] Id, para 122.
[36] *Mitu-Bell Welfare Society v. Kenya Airports Authority*, SC Petition 3 of 2018, Supreme Court of Kenya (2021), para. 2-5, 152, 155. See also *William Musembi & 13 others v Moi Education Centre Co. Ltd & 3 others*, Supreme Court of Kenya (2021), para 80, 81(vi) and 82.

*31* *Mitu-Bell* provides an example of a case in which an apex Court defers to a remedy awarded by a High Court providing for both mechanisms to ensure "satisfaction", such as a supervisory order, and "compensation" in a context where restitution is no longer possible as a result of the human rights violations alleged by petitioners.

Republic of Uganda

32 In *Centre for Health and Human Rights Development and others v Attorney General v Mulago National Referral Hospital*,[37] a matter on the enforcement of the right to health, the Constitutional Court relied on international law as justification for the award of both general and "exemplary" damages.[38]

33 In *Esoko & 3 Ors v Attorney General & 4 Ors*,[39] the court referred to *Jennifer Muthoni & 10 ors vs Ag of Kenya* [2012] eKLR, wherein the court held that:

> *"... **the purpose of awarding damages in constitutional matters should not be limited to simple compensation**. Such an award ought in proper cases to be made with a view to **deterring a repetition of breach** or punishing these responsible for it or even securing effective policing of the constitutionality enshrined rights by rewarding those who expose breach of them with substantial damages*." (own emphasis)

34 On this basis the Court held that:

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[37] Center for Health, Human Rights and Development (CEHURD) & 3 Ors v Attorney General (Constitutional Petition 16 of 2011) [2020] UGCC 12 (19 August 2020).

[38] The Court describes "exemplary damages" as those which "represent a sum of money of a penal nature in addition to compensatory damages".

[39] *Esoko & 3 Ors v Attorney General & 4 Ors* (Miscellaneous Cause 42 of 2019) [2020] UGHCCD 79 (30 April 2020).

> "*An award of compensation for established infringement of the indefeasible rights guaranteed under the Constitution is a remedy available in public law since* ***the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein rights and interests shall be protected and preserved***." (own emphasis)

35 In concluding to award damages, the court reasons that such damages were, in part, intended to "*deter*" the authorities "*from repeating this conduct against the citizenry*"[40] and in part to "*civilize public power*".

36 This highlights that the function of damages in circumstances of human rights violations, including violations of socio-economic rights, may be intended to both secure "***compensation"*** but also to deter the duty bearer from further violations consistent with securing an effective remedy which "*guarantees non-repetition*".

People's Republic of Bangladesh

37 In *CCB Foundation*, the High Court Division (Special Original Jurisdiction), the court awarded damages for a constitutional rights violation. The case involved state negligence due to "*pipes, wells, tube wells, sewerage pipes, holes and water tanks left uncared for or uncovered throughout the country.*" This negligence caused the death of a child, who fell down an uncovered shaft abandoned by the Bangladesh Railway and Water Supply and Sewage Authority.

38 In awarding damages , the Court indicated that:

> "*The Constitution, however, does not stipulate the nature of relief which may be granted.* ***It is left to the High Court Division to fashion the***

[40] Id.

> ***relief according to the circumstances of the particular case. It need not be confined to the injunctive relief of preventing the infringement of a fundamental right*** *and in an appropriate case it may be a remedial one providing relief against a breach already committed*."[41] (Emphasis Added).

39 The Court stressed, citing Indian jurisprudence, that in cases relating to the violations of fundamental rights "*the court is not helpless and it should be prepared* ***to forge new tools and devise new remedies****, and, if necessary, to develop new principles of liability of vindicating those precious fundamental rights*" (Emphasis added).[42] South African jurisprudence places the same responsibility on courts.

40 Furthermore, the Court, citing jurisprudence from Trinidad and Tobago, emphasised that "***this remedy in public law has to be more readily available when invoked by the have-nots****, who are not possessed of the wherewithal for the enforcement of their rights in private law*" (Emphasis added).[43] In coming to its decision to award and quantify these damages, the court explicitly considered the socio-economic position of the country.[44] It is submitted that, in determining whether to award compensation in this matter, this court should consider both the socio-economic position of the country and the need for public law remedies to be more readily available to "have-nots" such as the residents in this matter.

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[41] CCB Foundation v Bangladesh http://www.bdpil.org.bd/assets/uploads/pdf/b23f9-70-dlr-2018-491.pdf, para 77.
[42] Id, para 78.
[43] Id.
[44] Id, para 111.

41 Importantly for the present purposes, the Court also explicitly clarified that "*this order of awarding compensation will not impede/affect other liabilities, if there be any, of the respondents concern or its officials*".[45] This leaves room for the simultaneous awarding of compensation, a supervisory interdict and a contempt finding which we support in this matter.

The Republic of India

42 In *P.K. Koul and Ors vs. Estate Officer*, the High Court determined that, where the constitutional right to adequate housing has been infringed, there is a right to an effective remedy.[46] In doing so the court acknowledged that:

> "*The Supreme Court has repeatedly judicially awarded compensation in cases of established breach of public duty to protect the fundamental rights and the violations thereof, especially the guarantees of personal life and liberty*."[47]

43 In coming to its conclusion in the case at hand, the Court explained that:

> "*The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen.* ***The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action***

[45] Id, para 112.

[46] *P.K. Koul and Ors vs. Estate Officer and Anr. And Ors,* 30 November 2010, Supreme Court of India, para 182 – 199.

[47] Id, para 199.

> ***for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.*"** (Emphasis Added).

44 Recognizing the state's "positive duty to provide basic necessities", the Court found that the authorities bore a "*constitutional duty and international legal obligations to ensure the right of every person to be free from want of basic essentials*",[48] and that their "*unique situation*" should be considered in determining a remedy.[49] This unique situation was as a result of a fact that the petitioners' vulnerability to forced eviction resulted from internal displacement within India which the Court had found to be due to the States' failure to protect their life and property in the first place.[50]

45 The Court therefore concluded that a "*just reparation*" and "*reasonable compensation*" in the circumstances of the case required the state to provide the petitioners with adequate shelter as part of the "proportional compensation" they were due.[51] Though the State had claimed it lacked the resources to make such provision, the Court rejected these arguments emphatically as a "*a vague suggestion of insufficiency of funds*" without any substantiation which show a clear failing to "*any consideration of the petitioners' needs, let alone any steps take to address their plight*". Simply

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[48] Id, para 219.
[49] Id, para 221.
[50] Id, para 231.
[51] Id, para 241.

put it found that "*the principle reiterated by the Supreme Court was that financial difficulties of the institution or the state cannot be above the fundamental rights of the citizen*".[52]

46 We submit, therefore, that Indian jurisprudence supports that an effective remedy in cases of fundamental rights violations includes securing "*compensation*" **and** "*guarantees of non-repetition*" as required by international law.

46.1 First, similarly to the Ugandan jurisprudence cited above, it provides support for the provision of "*exemplary damages*" outside of ordinary restitution-related damages in instances where human rights have been violated.

46.2 Second, it makes clear that courts should, in determining an effective remedy for an established violation of a socio-economic right, not place undue weight on the state's vague protestations about lack of available resources.

**CONCLUSION**

47 It is our submission that, in determining an effective remedy, this court should set as its departure point the applicable international standards, consistently applied in domestic and regional courts around the world, to

[52] Id, paras 198, 191. See also *Paschim Banga Khet Mazdoorsamity of Ors., Supreme Court of India (*1996) 4 Supreme Court Cases 37, paras 9, 16.

ensure "*restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition*".

48 As has been established, a holistic approach to an effective remedy may require it to include a series of measures. In this matter, ESCR-Net submits that measures aimed at ensuring compensation and guarantees of non-repetition should be the court's guide. Drawing on the comparative examples cited above, we submit that this court should consider a package of remedies including: a finding of contempt of court, damages awards, and supervisory order.

49 This is so irrespective of whether this Court finds that it is at liberty to award constitutional damages and make an order of contempt of court in terms of the Constitutional Court's decision. This is because "constitutional damages" is one particular form of remedy for a violation of rights in South African law. Further, South African courts are required, in terms of both South African and international law, to provide for an effective remedy which may include various forms of non-pecuniary compensation as is evidenced by the comparative jurisprudence set out above.

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