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

**CASE NO: 26902/2015**

In the application for admission as *amicus curiae* of –

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| **ESCR-Net** | Applicant |

In re: 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

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| **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 |
| **SECTION27** | First *Applicant Amicus Curiae* |

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**ESCR-NET'S HEADS OF ARGUMENT**

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**INTRODUCTION**

1 The fundamental issue, in this case, is what an appropriate and effective remedy is in these circumstances, where the respondents have not only infringed the applicants' right to access adequate housing but are also in breach of two court orders designed to protect and promote this right.

2 As their primary relief, the applicants seek an order of contempt together with amongst others, an order for the provision of houses to the applicants plus structural relief. In the alternative they seek a claim for constitutional damages together with the provision of houses plus structural relief.[1] Whereas the respondents submit that they are not in wilful or *mala fide* breach of the court orders, and therefore that the contempt application ought to be dismissed.[2] They also contend that the applicants have already failed to get constitutional damages, already have a remedy in the form of the Teffo J order, and that the once and for rule also bars any "further claim to compensation."[3][4] And, in any event, this Court should follow the *dictum* of Jafta J that there can be no compensation for breach of a socio-economic right.[5]

3 This Court must determine an effective remedy crafted to suit the circumstances of this case, including the fact that court orders have

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1 CaseLines ("CL"), 007-1 to 007-4.

2 CL, 007-165 to 007-167, paras 71 – 74.

3 CL 007- 169, paras 74 and 79.

4 CL 007-166, para 74.

5 CL 007-166 – 007-167, paras 77 – 78.

already been granted in the matter directing that the applicants be provided with housing. These submissions are intended to assist the Court in determining what constitutes an effective and appropriate remedy, by focusing first on what international law requires and second on how international law fora and regional and other domestic jurisdictions have grappled with the question of appropriate remedies to protect, promote and enforce the right to adequate housing and other socio-economic rights.

4 Fundamentally, international law requires that effective remedies be granted, while the various jurisprudence we refer to illustrates, that effective remedies to ensure the protection and promotion of socio-economic rights may include a variety of remedies, including the initiation of contempt proceedings, the award of constitutional damages and other appropriate remedies, which remedies are not, necessarily, mutually exclusive.

5 These heads of argument deal with the following:

5.1 brief details about ESCR-Net's expertise in socio-economic rights jurisprudence at comparative and international levels;

5.2 an explanation of the application and relevance of international and comparative law in our courts;

5.3 a brief outline of the applicable international law relating to rights violations, which imposes a duty on South Africa, and by

extension, the executive and judiciary, to take all appropriate measures to progressively realise the right to adequate housing and provide effective remedies for violations of that right;

5.4 effective remedies that have been used to protect, promote and enforce socio-economic rights in a matter where they have been infringed. In so doing, we highlight precedent and cases from the following international and comparative forums:

5.4.1 the United Nations Committee on Economic, Social and Cultural Rights, including cases from Spain and Belgium;

5.4.2 the inter-American human rights system, including cases from Paraguay, Mexico, Peru, Chile, Brazil, and Argentina;

5.4.3 the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, including cases from Kenya; and

5.4.4 domestic courts, including the United States of America, Kenya; Uganda; Bangladesh and India.

5.5 finally, we deal with the issue of condonation for the late filing of the *amicus* application and the application to be admitted as *amicus*, in so far as is necessary.

## ESCR-NET'S EXPERTISE IN SOCIO-ECONOMIC RIGHTS IN COMPARATIVE AND INTERNATIONAL LAW

6 ESCR-Net is a collaborative initiative of groups and individuals from around the world working to secure human rights and social justice. ESCR-Net has over 230 organizational members and some 50 individual advocates across more than 75 countries, including members who work on issues related to access to justice and remedies concerning violations of economic, social and cultural rights ("ESCR").[6]

7 Over the years, ESCR-Net has worked extensively on issues related to violations of human rights, including ESCR, as guaranteed in the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and civil and political rights as provided under the International Covenant on Civil and Political Rights ("ICCPR"). Specifically, ESCR-Net has extensive experience in the right to housing and its implementation.[7] More of ESCR-Net's experience is detailed in the application to be admitted as *amicus curiae*, which demonstrates that ESCR-Net is well placed to assist the Court in the adjudication of the

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6 CL, 010-16, para 16 – 17.

7 CL, 010-7, para 19 - 23. For instance, ESCR-Net has coordinated third-party interventions by different sets of members regarding the right to housing in cases before United Nations treaty bodies (e.g., *Mohamed Ben Djazia and Naouel Bellili v. Spain* (2017), United Nations Committee on Economic, Social and Cultural Rights (2015), (Views) and the Supreme Court of Justice of the Nation in Mexico (*Un Techo para Mi País v Instituto Nacional de Estadística y Geografía, Amparo de Revisió*n 635/2019), among others.

matter. ESCR-Net has drawn on its extensive database and its global expertise in making its legal submissions.[8]

8 In preparing this *amicus* intervention and submissions, ESCR-Net benefited from inputs from members Amnesty International, Bangladesh Legal Aid and Services Trust; Dejusticia – Centro de Estudios de Derecho, Justicia, y Sociedad; Due Process of Law Foundation; Human Rights Law Network; International Commission of Jurists, Observatori DESC; Professor Tara Melish; Pro Public; and the Women's Legal Centre.

**CONSTITUTIONAL PROVISION FOR RELIEF WHERE A RIGHT HAS BEEN INFRINGED**

9 The right to approach a court for appropriate relief where a right in the Bill of Rights has been infringed is entrenched in section 38 of the Constitution.[9]

10 In addition, section 34 of the Constitution states that everyone " has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

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8 CL, 010-22, para 30 – 31.

9 Section 38 states, in relevant part, that anyone "has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

11 Critically, section 172(2)(b) of the Constitution states that when "when deciding a constitutional matter within its power, a court may make any order that is just and equitable."

12 In accordance with South Africa's international obligations, the Constitutional Court has reinforced the critical need for effective and appropriate remedies when rights are violated:

12.1 In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd*, the Constitutional Court held that the constitutional right to an effective remedy is entrenched in section 34 of the Constitution and the rule of law in terms of section 1(c) of the Constitution.[10]

12.2 In *Fose v Minister of Safety and Security*, the Constitutional Court held that "an appropriate remedy must mean an effective remedy".[11] Ackermann J continued:

> "[W]ithout effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated." [12]

12.3 The Constitutional Court went on to state that the "courts have a particular responsibility in this regard and are obliged to "forge new

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[10] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), para 51.

[11] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), para 69.

[12] *Fose,* para 69.

tools: and shape innovative remedies, if needs be, to achieve this goal."[13]

## USE OF INTERNATIONAL AND COMPARATIVE JURISPRUDENCE IN THE SOUTH AFRICAN CONTEXT

13 The Constitution makes plain that international law must, and foreign law may be considered when a court is interpreting the Bill of Rights.[14] Crucially, section 233 of the Constitution sets out that when a court interprets any legislation, it requires a reasonable interpretation of laws that accord with South Africa's international obligations to be preferred over any alternative interpretation that is inconsistent with international law.

14 The Constitutional Court has affirmed the importance of international law in *Glenister v President of the Republic of South Africa and Others* and confirmed that South Africa's failure to comply with international agreements may result in incurring responsibility under international law.[15]

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[13] *Ibid*. See also International Commission of Jurists, A Guide to the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa, August 2019, p. 241-243.

[14] Section 39(1) states:

"When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law" [Own emphasis]

[15] *Glenister v President of the Republic of South Africa and Others* 2011 (2) (SA) 347 (CC), paras 92, 95 and 102.

15 Our Courts have adopted a wide interpretation of the term "international law" to encompass binding and non-binding norms, which include decisions by international and regional courts, human rights treaties, decisions and publications of human rights treaty bodies and the United Nations ("UN") mandate holders.[16] The Constitutional Court further emphasised in *S v Makwanyane* that both binding and non-binding international law may be used "as tools of interpretation".[17] For instance, as early as Grootboom, the Constitutional Court referenced UN treaty body General Comments as "helpful in plumbing the meaning" of constitutional socio-economic rights.[18]

## APPLICABLE INTERNATIONAL LEGAL STANDARDS

### *International treaties*

16 South Africa has ratified and is bound by international treaties that entrench and recognise the need for effective remedies for infringements of all rights, including socio-economic rights, including:

16.1 Article 2(3) of the International Covenant on Civil and Political Rights ("ICCPR") requires that when the rights it entrenches are violated, the victims "*shall have an effective remedy*," and that such remedy shall be "*determined by competent judicial,*

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[16] *S v Makwanyane* 1995 (3) SA 391 (CC), para 35; *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W), para 17.

[17] *Supra*, para 35.

[18] *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, para 45.

*administrative or legislative authorities*," and that "*the competent authorities shall enforce such remedies when granted*."[19]

*16.2* The UN Committee on Economic, Social and Cultural Rights ("CESCR") has likewise explained that the duty to provide such effective and enforced legal remedies for claimed violations of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") is a "central" obligation under Article 2(1) of said treaty."[20] As it has affirmed, "the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place."[21] As it has stated with regard to the right to social security guaranteed in Article 9:

> "Any persons or groups who have experienced violations of their right ... should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of violations of the right to social security should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudspersons, human rights commissions, and similar national human rights institutions should be permitted to address violations

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[19] *Supra*. The United Nations Committee on Economic, Social and Cultural Rights ("CESCR") has explained in General Comment 19 states that: "*Any persons or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of violations of the right to social security should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudspersons, human rights commissions, and similar national human rights institutions should be permitted to address violations of the right. Legal assistance for obtaining remedies should be provided within maximum available resources*."

[20] CESCR General Comment No. 9, para. 1.

[21] CESCR General Comment No. 9, para. 1.

> of the right. Legal assistance for obtaining remedies should be provided within maximum available resources."[22]

16.3 The CESCR has also explained that "the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place."[23]

16.4 The UN Committee on the Elimination of Discrimination Against Women has specifically emphasised that "[w]ithout reparation, the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; and bringing to justice the perpetrators of violations of human rights of women."[24]

16.5 The African Commission on Human and Peoples' Rights ("ACHPR") has held that a right to remedy "can be generated implicitly and automatically" through a combined reading of Articles 1 and 7 of the African Charter.[25] Such a view is further supported by the Commission's "Principles and Guidelines to a Fair Trial and Legal Assistance in Africa" which explicitly state that

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22 ESCR General Comment No. 19.

23 CESCR General Comment No. 9, para. 2.

24 See also CEDAW, GC n°28, para. 32.

25 *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Republic of Congo*, ACHPR, Communication 259/2002, 24 July 2013, para 78.

"everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter".[26]

16.6 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa entrenches a free-standing right to an effective remedy by requiring state parties to "*provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated*."[27]

16.7 In relation to access to remedies, The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights provide that:

> "[a]ny person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels."[28]

In relation to Adequate reparation, the Maastricht Guidelines provide that:

> [a]ll victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition."[29]

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[26] ACHPR, '*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa',* 2003, section C.

[27] Art 25(a) Protocol to the African Charter on the Rights of Women.

[28] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, Para 22, available at http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html.

[29] *Ibid*, para 23.

16.8 In 2007, the Special Rapporteur on adequate housing presented to the Human Rights Council a set of "Basic principles and guidelines on development-based evictions and displacement". These guidelines aim to assist States in developing policies and legislation to prevent forced evictions at the domestic level. In relation to remedies for forced evictions and housing generally, the Guidelines provide that:

> "59. All persons threatened with or subject to forced evictions have the right of access to timely remedy. Appropriate remedies include a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation, and should comply, as applicable, with the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law."[30]

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[30] In addition:

"A. Compensation

60. When eviction is unavoidable, and necessary for the promotion of the general welfare, the State must provide or ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interests in property. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, such as: loss of life or limb; physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services. Cash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better.

61. All those evicted, irrespective of whether they hold title to their property, should be entitled to compensation for the loss, salvage and transport of their properties affected, including the original dwelling and land lost or damaged in the process. Consideration of the circumstances of each case shall allow for the provision of compensation for losses related to informal property, such as slum dwellings.

62. Women and men must be co-beneficiaries of all compensation packages. Single women and widows should be entitled to their own compensation. 63. To the extent not covered by assistance for relocation, the assessment of economic damage should take into consideration losses and costs, for example, of land plots and house structures; contents; infrastructure; mortgage or other debt penalties; interim housing; bureaucratic and legal fees; alternative housing; lost wages and incomes; lost educational opportunities; health and medical care; resettlement and transportation costs (especially in the case of relocation far from the source of livelihood). Where the home and land also provide a source of livelihood for the evicted inhabitants, impact and loss assessment must account for the value of business losses, equipment/inventory, livestock, land, trees/crops, and lost/decreased wages/income."

***Effective Legal Remedies at International Treaty Level***

17 Decisions of UN treaty body mechanisms, regional human rights bodies and several comparative domestic jurisdictions support this conclusion. International Human Rights Law makes no distinction between civil, cultural, economic, political and social rights with respect to the state's legal duty to provide effective legal remedies, and full reparation, for violations of fundamental human rights.

18 Indeed, both the CESCR – the body created by the treaty to monitor the implementation of the ICESCR – and the United Human Rights Committee ("HRC") – the body created by the treaty to monitor the implementation of the ICCPR – have consistently made clear in their case-based jurisprudence and General Comments that the "*central obligation about the Covenant is for States Parties to give effect to the rights recognised therein… by all appropriate means*."[31]

19 Both Committees have made clear that such "appropriate means" or "measures" include the provision of effective legal remedies for alleged breaches of norms, as well as the enforcement of such legal remedies when granted by competent authorities. Therefore, while the precise nature of "appropriate measures" or "measures" must be responsive to context, the provision and enforcement of effective legal remedies for

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[31] See CESCR General Comment No. 9, para. 1; UN HRC General Comment No. 31, para. 13-14. This same conduct-based obligation to under the ICCPR is framed as a duty to "*take the necessary steps*" or "*adopt appropriate measures"* to give effect to the Covenant rights in the domestic order. UN HRC General Comment No. 31, para. 13-14.

claimed breach will always be *prima facie* required as an "appropriate means" to give effect to protected norms. Hence, the CESCR has affirmed: "[ICESCR] *norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place*."[32]:

> "[A] State party seeking to justify its failure to provide any domestic legal remedies for violation of [socio-economic rights] would need to show either that such remedies are not 'appropriate means' within the terms of [art. 2.1] of the [ICESCR] or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies."[33]

20 The enforceability of a State's legal duty to provide and enforce effective legal remedies, including full reparation, for human rights violations has particularly been emphasised with regard to the right to adequate housing under international and comparative law.

21 For its part, the CESCR has emphasised this state's duty to provide domestic legal remedies in its General Comment No. 4 and No. 7 on the Right to Adequate Housing under Article 11 of the ICESCR.[34]

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[32] CESCR General Comment No. 9, para. 1

[33] CESCR General Comment No. 9, para. 3.

[34] CESCR General Comment No. 4, para. 17 ("The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies," citing, among other examples, "legal procedures seeking compensation following an illegal eviction"); CESCR General Comment No. 7, para. 15 ("Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions…").

22 The UN Special Rapporteur on the right to adequate housing Leilani Farha likewise made clear, in her final report to the UN Human Rights Council in 2019, 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."[35]

Decisions of the UN Committee of ESCR

23 The CESCR has developed a strong and consistent jurisprudence on the enforceable legal duties of judges and courts, as organs of the state, to ensure effective legal remedies for individuals who have had their right to adequate housing violated by the conduct of State actors – often by

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[35] 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.)

omissions or failures to take reasonable measures to ensure such effective legal remedies in practice.

45 In *López-Albán*,[36] *El Goumari* and *Tidli*,[37] and *Walter*s,[38] the Committee found the State responsible for the domestic court's failure to provide effective legal protection and recourse against state actions and/or infringements of the right to adequate housing under Article 11 of the ICESCR. Such failure of legal protection included the failure of domestic courts to engage properly in a proportionality review prior to issuing eviction orders. Importantly, it also included the failure of municipal housing authorities to properly apply fair, reasonable, non-arbitrary and publicly-noticed criteria for determining who could and could not access limited social housing provided by the State – as is the case in this matter. The Committee ordered that compensation be paid.

46 In the *Lopéz-Albán* matter, among others, the state's duty to provide adequate access to justice and apply human rights standards for those facing eviction and potential for homelessness stood at the forefront of the adjudication.[39]

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[36] *Lopéz-Albán v. Spain*, UN Committee on ESCR (2019), para. 14.

[37] *El Goumari and Tidli v. Spain*, UN Committee on ESCR (2021), para. 9.1-9.4, 12.

[38] *Walters v. Belgium*, UN Committee on ESCR (2021), para. 10.1-10.4. The Committee held that:

[39] "9.1 Evictions should not result in individuals becoming homeless or vulnerable to further human rights violations. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. The State party has a duty to take reasonable measures to provide alternative housing to persons who are left homeless as a result of eviction, irrespective of whether the eviction is initiated by its authorities or by private entities such as the owner of

24 In each of these cases, the Committee found that the right to an effective legal remedy for infringements of the right to adequate housing had been violated by the State, thereby violating the right to adequate housing under Article 11 itself. These violations necessitated, in turn, the provision of effective legal remedies to repair the harm caused and prevent its recurrence in the future, which included compensation and other remedies.

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the property. In the event that a person is evicted from his or her home without the State party granting or guaranteeing alternative accommodation, the State party must demonstrate that it has considered the specific circumstances of the case and that, despite having taken all reasonable measures, to the maximum of its available resources, it has been unable to uphold the right to housing of the person concerned. The information provided by the State party should enable the Committee to consider the reasonableness of the measures taken in accordance with article 8 (4) of the Optional Protocol.

9.2. The obligation to provide alternative housing to evicted persons who need it implies that, under article 2(1) of the Covenant, States parties must take all necessary steps, to the maximum of their available resources, to uphold this right. States parties may choose a variety of policies to achieve this purpose. However, all measures adopted should be deliberate, concrete and targeted as clearly as possible towards fulfilling this right as swiftly and efficiently as possible. Policies on alternative housing in cases of eviction should be commensurate with the need of those concerned and the urgency of the situation and should respect the dignity of the person. Moreover, States parties should take consistent and coordinated measures to resolve institutional shortcomings and structural causes of the lack of housing.

9.3. Alternative housing must be adequate. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location which allows access to social facilities (education, employment options, health-care services); and cultural adequacy, such that expressions of cultural identity and diversity may be respected." (para. 9.3) "In certain circumstances, States parties may be able to demonstrate that, despite having made every effort, to the maximum of available resources, it has been impossible to offer a permanent, alternative residence to an evicted person who needs alternative accommodation. In such circumstances, temporary accommodation that does not meet all the requirements of an adequate alternative dwelling may be used. However, States must endeavour to ensure that the temporary accommodation protects the human dignity of the persons evicted, meets all safety and security requirements and does not become a permanent solution, but is a step towards obtaining adequate housing."

25 Notably, in these and other similar several housing rights cases, the CESCR awarded the claimants "financial compensation for the violations suffered."[40]

***Inter-American Court of Human Rights***

47 Much of the caselaw of the Inter-American Court of Human Rights shows the relevance of the awarding of damages as a remedy in matters involving a state's breach of economic, social, cultural, and environmental rights, including violations found under Article 26 of the American Convention.

48 Compensation awards in the Inter-American Courts are awarded in terms of Article 63(1) which provides: any violation of an international obligation that has caused harm entails the obligation to repair it adequately (own emphasis). Reparations must have a causal nexus to the facts.

49 The Inter-American Court has ordered the payment of damages or reparations as part of the remedies available in the following circumstances:

[40] *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), para. *Lopéz-Albán* para. 14; *Walters v. Belgium*, UN Committee on ESCR (2021), para. 15 (in the latter worded as "The State party is under an obligation to provide effective reparation to the author, in particular: ... (b) to compensate him for the violations suffered").

49.1 The payment of reparations in regard to the land and related rights of indigenous peoples.[41]

49.2 The payment of reparations where a violation of Article 26 of the American Convention (guaranteeing economic, social, cultural and environment). was found.

49.3 The payment of reparations for state failures to provide effective remedies for harms to socio-economic rights.[42]

Remedies awarded for violation of socio-economic rights include the payment of damages

50 The Inter-American Court of Human Rights has granted damages awards in connection with violations it found of Article 26 American

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[41] The Inter-American Court of Human Rights judgments in the *Sawhoymaxa Indigenous Community v Paraguay,* Inter-American Court of Human Rights (2006. In this decision the Court explored the nature of remedies, including damages, and their effective enforcement in the landmark cases concerning land and related rights of indigenous peoples.

The Court observed that reparation of the damages caused for the violation of an international obligation, requires, whenever possible, the full restitution (restitutio in integrum,) which consists of the reinstatement of the situation prior to the violation. Where this is not possible, a court may determine a series of measures that, apart from the guaranteeing observance of the human rights that have been violated, may also remedy the consequences of the breaches and impose the payment of a compensation for the damages caused.

The Court stated that the duty to remedy, which in this instance is/was governed in all its aspects (scope, nature, forms and determination of beneficiaries) by International Law, cannot be modified or not complied with by the State owing such duty, by alleging domestic law provisions. Reparations, as the term itself indicates, consist of measures tending to eliminate the effects of the breaches perpetrated. Their nature and amount depend on both the pecuniary and non-pecuniary damages caused, and the reparations cannot imply enrichment or detriment for the victims or their successors.

[42] For instance, in the case of the Five Pensioners v. Peru, concerning social security, the Inter-American Court of Human Rights found the state violated the petitioners' right to judicial protection in connection with state authorities' failure to comply with domestic court orders concerning their pensions. Five Pensioners v. Peru, Inter-American Court of Human Rights (2001), Judgment, para. 133-138, 141, 187.3.

Convention on Human Rights guarantees economic, social, cultural, and environmental rights in cases on several occasions.

50.1 *Muelle Flores v. Peru* which involved the violation of the right to social security[43] and the right to effective judicial protection as a consequence of the State's failure to comply for 24 years with an order of a domestic court ordering that Mr Muelle Flores' pension be reinstated. The Court stated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[44] Accordingly, the Court considered the need to grant different measures of reparation in order to fully redress the harm caused; thus, in addition to pecuniary compensation, this court will order measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition, which have special relevance owing to the nature of the damage caused.[45]

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[43] *Muelle Flores v. Peru, Inter-American Court of Human Rights* (2019), Judgment, para. 251, 257-259, 262-267, 284.5-284.6, 284.10.

[44] *Supra*, para 220. In addition, the court further stated that the reparation of the harm caused by the violation of an (international) obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the re-establishment of the situation prior to the commission of the violation. If this is not feasible, the court will determine measures to guarantee the rights that have been violated and to redress the consequences of those violations.

[45] *Supra*, para 221. See also para 222 – 223, where the court held that it has established criteria in this regards and that is that reparations must have a causal nexus with the facts of the case, the violations declared, the damage proven and the measures requested to repair the resulting harm – which had to be observed concurrently. Ultimately the court concluded that under the relevant provisions of the Convention and in light of the established criteria in its case law regarding the nature and scope of the obligation to make reparation,

50.2 *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru* involved the violation of the right to social security and judicial protection, among others, owing to the failure to comply with a judgment of the Supreme Court of Justice of Peru of October 25, 1993, which recognised pension rights to the members of ANCEJUB-SUNA.[46] The court held that the State was, responsible for the violation of the rights to a decent life, judicial guarantees, property, judicial protection, and social security.[47] The Court ordered the State to pay, within one year of notification of this judgment, the sum of money as ordered as compensation for non-pecuniary damage. [48]

50.3 The Court awarded compensation also in *Poblete Vilches v. Chile*. This case involved violations of the right to health, arising from inadequate healthcare linked to, among other factors, a lack of available critical patient beds at a public hospital[49].

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the court would analyse the claims presented, as well as the arguments of the State, with a view to ordering measures aimed at making reparation for those violations.

[46] The Commission found that the Peruvian Judiciary had not taken the necessary measures to implement a judicial ruling in favour of a group of pensioners, and added that the fact that more than 23 years had passed without the Supreme Court's judgment of October 1993 being executed exceeded a reasonable time. The Commission submitted that, as result of the lack of this compliance with the order, the State had violated the right to property of the presumed victims because they were unable to enjoy fully the patrimonial effects of their pension as established in the judgment of October 25, 1993.

[47] As established in Articles 4(1), 8, 21, 25 and 26 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument

[48] *Supra*, para 284.

[49] *Poblete Vilches v. Chile, Inter-American Court of Human* Rights (2018), Judgment, para. 246-253, Operative para. 2-4, 17, 53, 81, 175, 196.

50.4 Similarly, the Court ordered compensation in *Cuscul Pivaral et al. v. Guatemala* (involving violations of the right to health, including non-fulfilment of positive state duties pertaining to the provision of healthcare to persons with HIV).[50]

50.5 In 2021, in *Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil,* the Inter-American Court of Human Rights found violations of the right to work guaranteed under Article 26 of the American Convention on Human Rights relating to hazardous work in which children were employed, and the Court "establishe[d], in equity…compensation for non-pecuniary damage", along with determining pecuniary damages.[51] The court awarded compensation in the form of pecuniary damages ($ 50 000 for pecuniary damage for each victim who died, and those who survived the explosion) and non-pecuniary damages ($ 60 000 for non-pecuniary damages for each victim and survivor of the explosion and $10 000 to each kin accredited as victims).[52]

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[50] *See Cuscul Pivaral v. Guatemala, Inter-American Court of Human Rights* (2018), Judgment, para. 234, 238-239, Operative para. 1-6, 15, 119, 126, 147-148, 211.

[51] *Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil* (2020), Judgment, para. 181, 295, 303. This matter relates to the explosion in a fireworks factory in Santo Antonio de Jesus in 1998, in which 64 persons died and six survived; they included 22 children. Under the laws of Brazil, activities related to explosives must be authorised and inspected by the State, and the State had failed, inter alia, to fulfill its positive duties to oversee and implement the labour and other laws regulating the industry.

[52] *Ibid*, para 296 and 303. In respect of pecuniary damages, the court emphasised that "the loss of, or detriment to, the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case." Compensation in the form of non-pecuniary damages and has established that this "may include both the suffering and afflictions caused by the violation and the

50.6 The Court also awarded compensation in *Hernández v. Argentina* (involving violations of the right to health of a person deprived of liberty by the state) and [53] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (involving violations of the rights to food, water, a healthy environment, and cultural identity which the Court noted when “order[ing] the State to set up a community development fund ... especially to redress the harm to cultural identity, and considering that it also serves to compensate the pecuniary and non-pecuniary damage suffered”).[54]

50.7 The *Lhaka Honhat* matter dealt with the presumed violation of the right to property over the ancestral territory of the indigenous communities that are members of the Lhaka Honhat Association of Aboriginal Communities. The Argentine Republic, in this matter, failed to grant the communities “effective title to their ancestral territory”.[55] There was no dispute about the indigenous communities' right to the land or that they are the rightful owners

impairment of values of great significance for the individual, as well as any alternation of a non-pecuniary nature if the living condition of the victims."

53 *Hernández v. Argentina, Inter-American Court of Human* Rights (2019), Judgment, para. 169-172, 183.3, 183.9.

54 *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Inter-American Court of Human Rights* (2020), Judgment, para. 337-342, 370.3, 370.13.

55 The territorial claims process is detailed at para 56 and para 89. The Court considers the content of the right to indigenous communal property from, one major factor being the possible relocation of settlers who are "*criollos*" – non-indigenous settlers., as well as the arguments on the absence of appropriate procedure to guarantee the ownership and granting of an adequate property rights and title.

thereof. What was disputed, was whether the State's actions provided legal certainty to the right to property.[56]

50.7.1 The Court held, notwithstanding the obligation to adopt measures to achieve 'progressively' and 'full realization' of rights, the content of such rights includes aspects that are enforceable immediately.[57] The manner in which the rehabilitation in this matter is crafted is of significance and once again demonstrates the flexibility of the Court to craft remedies unique to each case - based “on this case, the Court has considered the need to grant diverse measures of reparation.”[58]

50.7.2 The Court took a multi-pronged approach and structured the relief in the form of compensation for the community by way of a community development fund and ordered the State to allocate the sum of $ 2 000 000, to be invested in accordance with the proposed objectives, which would serve to compensate the communities’ pecuniary and non-pecuniary damages.[59]

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56 *Supra,* para 89.

57 *Supra*, para 272.

58 *Supra*. para 307. See also para 320, where the court held that, when establishing the appropriate measures of preparation, it has taken into consideration the particular characteristics of the case.

59 *Supra*, para 338 and 370.

50.8 In *Spoltore v. Argentina,*[60] the Court awarded compensation for violations of the right to health of the worker as well as the delay and denial of justice in the context of Labour proceedings, where the Argentinian Labour Court, for reasons that are not clear, delivered the decision 9 years after the case was initiated.[61]

50.8.1 The Inter-American Court's focus was on the lack of judicial protection of the right to just and equitable working conditions, due to the excessive delay of the judicial proceedings. In this case. an effective remedy took the following form of compensation, in the form of pecuniary damages; non-pecuniary damages premised on the suffering and distress caused to the victim and his family; and other measures of satisfaction, where the state was ordered to publish operative paragraphs of the judgment in newspapers and circulate it around the country.[62]

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[60] *Spoltore v. Argentina, Inter-American Court of Human Rights* (2020), Judgment, para. 117, 120, 135.4, 135.8.

[61] *Supra*, para 67 and 69. Victorio, worked for the a private company for approximately more than 20 years, during the course of which he suffered from heart failure on two occasions. After suffering a heart attack the first time he applied for retirement on the basis of disability. While waiting for the outcome of the decision, he suffered another heart attack. He claimed that he fell ill as a result of his hostile employment environment The Medical Board of the Welfare granted his application for disability and assessed that he had a 70% work disability. In the delayed Labour Court judgment, the Court rejected Victorio's claim on the basis that his sickness was not connected to work. This judgment was then appealed, which was rejected 2 years later. The matter ultimately reached the Inter-American Court.

[62] *Supra*, para 109 – 110; 114; 117.

51 The decisions of the Inter-American Court illustrate that an effective remedy can take different forms and are tailored to the needs of the victim. It is clear that when adjudicating violations of socio-economic rights, what is not appropriate is a 'one size fits all remedy', rather the needs of the victims and the redress required must be at the forefront when crafting effective remedies. The Court has emphasised on numerous occasions the importance of granting compensation to redress injuries suffered by the victims of rights violations.

***African Charter on Human and People's Rights***

26 Effective remedies, in the context of the African Charter on Human and People's Rights, are provided for in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. To this end, Article C provides that parties have a right to effective remedies:

> "a) Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by person in an official capacity.
>
> b) The right to an effective remedy includes:
>
> (i) access to justice;
>
> (ii) reparation for the harm suffered;
>
> (iii) access to the factual information concerning the violations,
>
> c) every State has an obligation to ensure that:
>
> (i) any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body;
>
> (ii) any person claiming a right to remedy shall have such a right determined by competent judicial, administrative and legislative authorities;
>
> (iii) any remedy granted shall be enforced by competent authorities;
>
> (iv) any state body against which a judicial order or other remedy has been granted shall comply fully with such order or remedy."

27 Accordingly, the African Charter provides for the judicial enforcement of Charter rights, including socio-economic rights, and the implementation of effective remedies to further access these rights.

Examples of effective remedies awarded for violation of socio-economic rights

28 The ACHPR's decision in the *Endorois Welfare Council v. Kenya* case, involving the eviction of hundreds of Endorois families by the Kenyan government from their traditional lands around the Lake Bogoria area in the Rift Valley in the 1970s, to create a game reserve for tourism.[63]

52 The ACHPR found that the Kenyan government violated the African Charter in respect of the *Endorois* people's ancestral land rights; cultural rights; natural resources rights (including access to clean water); and rights to economic, social, and cultural development as per Articles 1, 8, 14, 17, 21 and 22.[64] The AHCPR consequently ruled that an adequate remedy, for these violations, included that Kenya:

> "(a) Recognise rights of ownership to the Endorois and restitute Endorois ancestral land.
>
> (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
>
> (c) Pay adequate compensation to the community for all the loss suffered

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[63] *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.

[64] *Ibid,* p 38, para (a) – (f).

> (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the reserve.
>
> (e) Grant registration to the Endorois Welfare Committee,
>
> (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.
>
> (g) Report on the implementation of these recommendations within three months from the date of notification"

53 As is evidenced from the *Endorois* case, the nature of the remedies, in providing access to socio-economic rights, are multi-faceted – the ultimate aim is to give effect to fundamental rights, which include, as a corollary, the right to adequate housing.[65]

**DOMESTIC JURISPRUDENCE**

54 Some domestic courts often order both damages and contempt sanctions for violations of socio-economic rights, as set out below. That is to say, domestic courts, in several jurisdictions, have also found damages awards to be appropriate remedies in socio-economic rights cases, while also issuing contempt sanctions when local authorities

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[65] The African Court of Human and People's Rights delivered its judgment on the reparations in the *Ogiek People* case on 23 June 2022. At the time of drafting these heads, the decision had not, as yet, been published. In summary, the Court unanimously rejected the Kenyan Government's objections; ordered Kenya to grant collective title to the Ogiek through delimitation and demarcation of their ancestral lands in the Mau Forest; request full recognition of the Ogiek, including their language, cultural and religious practices, within one year of the ruling; recognise, respect and protect the rights of the Ogiek to be effective lively consulted in accordance with their traditions and customs in respect of all development, conservation and development projects on Ogiek ancestral land; full publication of the judgment in national newspapers as well as an official government website; the award of damages in the amount of 57 m KES for material damages and 100m KES for moral damages to the Ogiek from the government of Kenya, to be paid into a Community Development Fund established within 12 months from the date of the judgment. The live stream of the judgment can be found at: https://www.youtube.com/c/africancourtenglishchannel. To the extent necessary, a copy of the decision will be made available prior to the hearing of this matter.

wilfully fail to comply with court orders designed to give effect to constitutionally enshrined socio-economic rights.

***United States of America***

55 Contempt sanctions have frequently been ordered in the United States at the state (as opposed to federal) level for failures by state and local authorities to enforce court orders designed to give practical and meaningful effect to the right to affordable housing and the right to adequate education, amongst other core rights. In the case of the right to housing, the U.S. Supreme Court has upheld the power of the lower courts to issue contempt fines against both city legislatures as a whole and, as a last resort, individual council members for failure to comply with court orders designed to guarantee that right. Indeed, in *Spallone v. United States*, the U.S. Supreme Court upheld a contempt order against the City of Yonkers, New York, that included fines approaching $1,000,000 a day for the city's failure to comply with a consent decree order that required the adoption of a legislative package known as the Affordable Housing Ordinance.[66]

56 State supreme courts in the U.S. have likewise issued contempt orders for willful failures of state authorities to comply with court orders directing specific actions to guarantee the right to education under state constitutions. In *McCleary v. State*, for example, the Washington Supreme Court unanimously issued an order of contempt holding the

[66] *Spallone v. United States*, 493 U.S. 265 (1990).

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, thereby giving effect to Article IX, section 1 of the Washington state constitution.[67] Having retained jurisdiction over the case to monitor the legislature's implementation of funding reforms through the 2018 deadline, and having required a plan to be submitted detailing each step toward the 2018 deadline, which was not done, the Court in 2014 required the State to appear and show cause why it should not be held in contempt. When it failed, the Chief Justice issued a unanimous contempt order admonishing that:

> "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…."

57 When the legislature continued not to comply by the end of the 2015 legislative session, the Washington Supreme Court imposed contempt sanctions of US $ 100,000 per day on the legislature for its repeated failure to devise a remedial school finance plan as ordered.[68]

58 The New Jersey Supreme Court has likewise issued contempt orders against state officials to enforce the constitutional right to adequate education under the New Jersey Constitution. In the case of *Robinson v. Cahill*, after finding the state in violation of its constitutional duties for

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[67] *McCleary v. State*, No. 84362-7 (Wash. Sept. 11, 2014) (order of contempt).

[68] 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).

failure to ensure an adequate free public education to school children in the state, the Court approved a law that increased funding to low-income school districts as a constitutional remedy.

59 The legislature, however, then refused to appropriate any monies to actually enforce the law. With this overt legislative failure, the New Jersey Supreme Court enjoined the legislature from spending any money on public schools unless it funded the act it had created or found some new way to appropriate funds under the constitution. When the legislature still did nothing, the court shut down schools for eight days because of the legislature's failure to comply. Only then did the legislature decide to act, allowing the injunction to be withdrawn and the schools to reopen.[69]

60 For its part, the Ohio Supreme Court has also upheld its authority to enforce its own court orders to ensure compliance with the state's constitutional right to education. Otherwise, the "power to find a particular act unconstitutional would be a nullity."[70] If a remedy is never enforced, it is not actually a remedy, the court opined.[71]

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69 *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976) [Robinson VII].

70 *DeRolph v. State*, 728 N.E.2d 993, at 1003 (Ohio 2000).

71 *Ibid*.

***Republic of Kenya***

61 The Kenyan Supreme Court has also affirmed the remedies of compensation in right to housing cases.

62 In *Mitu-Bell Welfare*, the Supreme Court affirmed that state authorities could be duly judicially ordered to compensate the more than 3,000 families forcefully evicted from the land near the Wilson airport in September 2011; the Court remitted the case to the trial court to determine appropriate remedies in line with the Supreme Court judgment.[72] The Supreme Court's ruling set aside an Appellate Court decision that had found:

> "that the 3rd respondent as Commissioner of Lands was under no legal obligation to allocate or alienate land that was already alienated and registered to a third party; that there was no violation of the appellants' Constitutional right to property (land) under Article 40 of the Constitution and that the 3rd respondent neither demolished nor evicted the appellants from the suit property. It thereby set aside in entirety the trial Court's Judgment and decree and any and all consequential orders and directions applicable and enforceable against the 3rd respondent."[73]

In the victims' arguments to the Supreme Court taking issue with the Appellate Court, "[i]t is submitted that a critical analysis of the positive obligation imposed upon the State with regard to the right to housing, would have enabled the Court to appreciate the fact that the appellants were entitled to certain remedies."[74] The Supreme Court noted, "under

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[72] *Mitu-Bell Welfare Society v. Kenya Airports Authority*, SC Petition 3 of 2018, Supreme Court of Kenya (2021), para. 2-5, 152, 155.

[73] *Supra,* para. 26.

[74] S*upra*, para. 66 (victims' arguments as summarised by the Supreme Court).

Article 23 (3) of the Constitution, the Court may craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (U.N Guidelines), the provision of alternative land for settlement, etc."[75]

63 In the judgment of *William Musembi & 13 others v Moi Education Centre Co. Ltd & 3 others*, later in 2021, the Supreme Court of Kenya again affirmed this principle, ruling in favour of a High Court order of damages against the State and private actors in a case finding petitioners were subjected to forced evictions.[76]

***Republic of Uganda***

64 Article 50 of the Ugandan Constitution provides that any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened is entitled to apply to a competent Court for redress which may include compensation.

65 The Human Rights Enforcement Act that gives effect to Article 50 of the Constitution, provides for the award of orders it considers appropriate, including an order for compensation, restitution of victims to the original position, rehabilitation of the victim, restoring the dignity, the reputation

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75 *Supra*, para 152.

76 *William Musembi & 13 others v Moi Education Centre Co. Ltd & 3 others*, Supreme Court of Kenya (2021), para 80, 81(vi) and 82.

and the rights of the victim and persons closely connected with the victim; and a public apology, including acknowledgement of the facts and acceptance of responsibility.

66 The Constitutional Court of Uganda has awarded the payment of damages in various instances. In some cases, the court has applied the general principles for the quantification of damages – that the claimant must be put in a position he would have been if he had not suffered the damage.

66.1 *Centre for Health and Human Rights Development and others v Attorney General*,[77] involved the violation of the right to health. The Constitutional Court awarded exemplary and general damages to the third and fourth petitioners for the violation of their right to health. Justice Cheborion in his lead decision relied on the general principles on damages holding that the law will always presume damages as a direct and natural consequence of an act complained of. Cheborion J held that in the quantification of general damages, the court must bear in mind that the plaintiff must be put in a position he would have been if he had not suffered the damage.[78]

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[77] *CEHURD v Attorney General* Constitutional Petition No. 16 of 2012

[78] On exemplary damages, the court held that they are granted in two circumstances: in circumstances where the act complained of was as a result of an arbitrary or unconstitutional act of a servant of government

67 In *Centre for Health and Human Rights Development and others v Attorney General v Mulago National Referral Hospital*,[79] a matter on the enforcement of the right to health, relied on General Comment 22 of 2016, as justification for the award of damages.[80] The Court indicated that remedies include adequate, effective and prompt reparations in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as appropriate.[81]

68 In *Esoko & 3 Ors v Attorney General & 4 Ors*,[82] the Court referred to *Jennifer Muthoni & 10 others vs Ag of Kenya* [2012] eKLR, where the court held:

> "... 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."

The Court relied on this decision to award damages to the claimants. While this case did not directly concern enforcement of a socio-economic right, it nonetheless highlights a pertinent principle in the award of damages, that the damages should not only be aimed at compensating

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79 *Mulago National Referral Hospital* CIVIL SUIT NO. 212 OF 2013 and *Esoko & 3 Ors v Attorney General & 4 Ors* (Miscellaneous Cause 42 of 2019).

*Supra*.

80 The Committee on Economic Social and Cultural Rights stated that States must ensure that all individuals have access to justice and to a meaningful and effective remedy in instances where the right to sexual and reproductive health is violated.

81 *Supra*, para 22.

82 *Supra*.

a person whose right is violated but should encompass a deterrent principle and policy reform.

***People's Republic of Bangladesh***

69 Bangladesh has adopted and ratified the provisions of the ICESCR.[83] In addition, its statutory and constitutional mandate is outlined in Articles 15 and 16 of its Constitution as well as its National Housing Policy 2016. Articles 15 and 16 provide:[84]

> "15. It shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing its citizens-
>
> the provisions of the basic necessities of life, including food, clothing, shelter, education and medical care.
>
> […]
>
> 16. The State shall adopt effective measures to bring about radical transformation in the rural areas through the promotion of an agricultural revolution, the provision of rural electrification, the development of cottage and their industries, and the improvement of education, communications and public health, in those areas, so as to progressively remove disparity in the standards of living between the urban and rural areas."

"

70 The right to adequate housing has been held to be a fundamental right in the matters of *Ain O Salish Kendro [ASK] Vs. Government and Ors*

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[83] The ICESCR as adopted and ratified on 05 October 1998. Bangladesh has also ratified and adopted the following conventions and treaties that include the right to adequate housing, namely: Global Strategy for Shelter for the year 2000; UN Istanbul Declaration on Human Settlement; The Rio Declaration and Agenda 21 – United Nations Conference on Environmental and Development, commonly known as the Earth Summit held in Rio-De Janeiro, Brazil in July 1992; The International Convention on the Right of the Child; the International Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW").

[84] Its Constitution was adopted and given effect on 04 November 1972.

and *Kalam and others vs. Bangladesh and Others*, respectively.[85] In the *Kalam* matter, the High Court emphasised that:[86]

> "Bangladesh came into being as a fulfillment of the dreams of the millions of Bangalis so that they can breathe in an independent country of their own. They knew that their country is not rich, but expected that social justice shall be established and the people shall be provided with the bare minimum necessities of life
>
> […]
>
> [T]hey are only struggling a losing battle to earn for themselves and to care and provide the bare minimum necessities of life to their children, which are the primary objectives of any democratic government. After all, the slum dwellers, poorest of the poor they may be, without any future or dreams for tomorrow, whose every day ends with a saga of struggle with a bleak hope for survival tomorrow, but they are also citizens of this country, theoretically at least, with equal rights. Their fundamental rights may not be fully honoured because of the limitations of the State, but they should not be treated, for any reason, as slaves or chattels, rather as equal human beings and they have a right to be treated fairly and with dignity, otherwise all commitments made in the sacred Constitution shall prove to be a mere mockery"

71 The *ASK* and *Kalam* matters illustrate that cooperative efforts by the executive and the judiciary may contribute to promoting and safeguarding the right to shelter of slum dwellers and other basic necessities of the vulnerable sections of the society.

72 In other cases, where inter-related socio-economic rights came into play, the Bangladeshi courts have determined, in line with Article 44 as read with Article 102 of its Constitution,[87] to give effect to socio-economic rights or to include orders for damages and contempt, in matters about

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[85] *Ain O Salish Kendro [ASK] Vs. Government and Ors* and *Kalam and others vs. Bangladesh and Others* 19 BLD (1999) 488, p 15 and 21 BLD (HCD) (2001) 446 (judgment delivered on 30 April 2001), p 448, para 6.

[86] *Ibid*, p 448, para 6.

[87] These provisions confer powers on the Bangladeshi court to invoke "efficacious" remedies.

socio-economic rights violations as held in the *CCB Foundations v Bangladesh*[88] matter, summarised below:

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

72.2 The court determined that the "*inaction and/or negligence, and/or failure on the part of the respondent Nos. 3, 5 and 4 respectively in respect of rescuing a minor boy of 4 (four) named Jihad which resulted in his tragic and shocking death, is hereby declared illegal, without lawful authority and hence, of no legal effect being violative of the law of the country, as well as his fundamental rights as guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh*."

73 In making its order, the court considered the socio-economic position of the country, as well as the failure of the respondents and the transgressions of the countries' constitutional imperatives in awarding monetary compensation, Ultimately, it awarded monetary compensation

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88 *CCB Foundations v Bangladesh* 70 DLR (2018), at http://www.bdpil.org.bd/assets/uploads/pdf/b23f9-70-dlr-2018-491.pdf.

to the victim's parents in the amount of Taka 10,000,000, instead of Taka 30 The award for compensation is analogous to constitutional damages in South African context.[89]

74 The award for constitutional damages goes hand-in-hand with other forms of "*efficacious*" remedies as espoused in Article 44 as read with Article 102 of the Bangladesh Constitution, which provides that the High Court "*may give such directions and order to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred in Part III of this Constitution*."[90]

***The Republic of India***

75 Whilst there is no stand-alone provision for the realisation of adequate housing as per its South African counterpart, the Supreme Court of India has, through several judgments, held that the socio-economic right to adequate housing is a fundamental right as invoked by, *inter alia*:[91]

[89] *CCB Foundation* para. 1, 72, 110-111.

[90] An example of the hand-in-glove approach can be seen in the matters such as *Suo-Moto Rule No. 05 of 2018*, held in the Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction) on 08 April 2018.

[91] See *Francis Coralie Mullin v the Administrator, Union of Delhi & Ors, Supreme Court of India* (1981).

75.1 Article 19(1)(e) of the Constitution of India, which provides that "*All citizens shall have the right to reside and settle in any part of the territory of India*";[92] and

75.2 Article 21 of the Constitution of India provides that "*No person shall be deprived of his life or personal liberty except according to procedure established by law*".[93]

76 In *Francis Coralie Mullin v. The Administrator, Union of Delhi & Ors*, the Supreme Court held that:[94]

> "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing commingling with fellow beings."

77 This *dictum* was reaffirmed by the Supreme Court in *U.P Avas Evam Vikas Parishad & Anr vs Friends Coop. Housing*, the Supreme Court found that the "*Right to shelter is a fundamental right, which springs from*

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[92] The Republic of India is governed in terms of the Constitution of India which was adopted by the Constituent Assembly on 26 November 1949 and came into force on 26 January 1950.

[93] In addition, India has adopted various acts and policies that aim to give effect to the fundamental right to adequate housing including, *inter alia*, the Scheduled Tribes and Other Traditional Forest Dwellers Act (Recognition of Forest Rights) (2006); the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (2013); the Protection of Human Rights Act (1993); the Slum Areas (Improvement and Clearance) Act (1956); the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act (2014); the National Urban Housing and Habitat Policy (2007); Draft National Slum Policy (2001); the Rajiv Awas Yojana national scheme, which intends to build a 'slum free' country while providing shelter and basic services to the urban poor.

[94] *Francis Coralie Mullin v. The Administrator, Union of Delhi & Ors* (1981) 1 Supreme Court Cases 608, p 3. See also: *Shantistar Buiders vs. Narayan Khimalal Totame* AIR 1990 SC 630, para 9, where the Supreme Court held that: "*The Constitution aims at ensuring the full development of every child. that would be possible only of the child is in a proper home.*"

*the rights to residence under Article 19(1)(e) and the right to life under Article 21*":[95]

78 In addition, India's Supreme Court has determined that the right to adequate housing creates not only a negative obligation but a positive obligation to ensure that this fundamental right is given effect as held in the matter of *Chameli Singh and Others v. State of Uttar Pradesh*:

> "Shelter for a human being ... is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right… Want of decent residence therefore frustrates the very object of the constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself."96

79 This positive obligation is canvassed in the matter of *Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan & Ors*, where the Supreme Court directed, amongst its remedies, that the state had to construct affordable houses for the impoverished as "*the State has the Constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful, effective and fruitful. .It would, therefore, be the duty of the State to provide the right*

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[95] *Chameli Singh and Others v. State of Uttar Pradesh*:1996 AIR 114, 1995 SCC Supl (3) 456, p 3.

[96] *Supra.*

*to shelter to the poor and indigent weaker sections of the society in fulfillment of the Constitutional objectives.*"[97]

80 As espoused in the High Court case of *P.K. Koul and Ors vs. Estate Officer and Anr. And Ors.*, the Court determined that, where the constitutional right to adequate housing has been infringed, citizens are entitled to enforcement and effective remedies:[98]

> "182. The expansion and interpretation by our courts has affirmatively established a positive right to housing and shelter for every person as part of the fundamental right. Human rights and fundamental rights are inalienable; their violations are indefensible. The state is under a constitutional obligation and duty to protect these rights. When violated, a citizen is entitled to their enforcement, The constitutional mandate upon it, is coupled with statutory duty and public law obligations to ensure the protection of the fundamental and basic human rights to all, in addition to its obligation under the several international instruments noticed above. This essentially remains the exclusive domain of state functions. Failure to protect the citizens from imminent loss of life and property as well as maintenance of public order, implicates the state for culpable inaction.
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> […]
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> 184. […] In the instant case given the nature and extent of the violation, the Union of India cannot abdicate responsibility in this matter, or avoid its constitutional obligation of at least ensuring adequate shelter or a roof to the petitioners.
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> 191. 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 […].
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> 192. […] the respondents have clearly admitted their responsibility and are bound by their commitments.
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> […]
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> 199. It is now necessary to consider the nature of the remedy and the relief which would be available to a citizen for violation of the fundamental right to life as well as threat thereto, 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 and of personal life and liberty."

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[97] *Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan & Ors* 11 October 1996, Supreme Court of India, p 6.

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

81 This sentiment that financial difficulties do not override the enforcement of socio-economic rights was also explored in the case of *Paschim Banga Khet Mazdoorsamity of Ors*., where the Supreme Court effectively protected positive obligations relating to the right to health as integral within the right to life and found violations concerning the petitioner who was physically injured from an accident but did not receive timely admission to (and thereby, treatment at) several healthcare facilities due to the unavailability of beds; as part of the constitutional remedies, the Court ordered the payment of "*adequate compensation*" to the victim by the state.[99] As reasoned by the Court:

> "It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. [See: Khatri (II) v. State of Bihar, 1981 (1) SCC 627 at p. 631]. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life. In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view." [100]

82 Effective remedies are catered for in Articles 32 and 226 of India's Constitution, which provide the Supreme Court with wide powers to make appropriate orders for the enforcement of fundamental rights. In

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[99] *Paschim Banga Khet Mazdoorsamity of Ors., Supreme Court of India (*1996) 4 Supreme Court Cases 37, para 16.

[100] *Ibid*, para 9: "*In respect of deprivation of the constitutional rights guaranteed under Part III of the Constitution the position is well settled that adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Articles 32 and 226 of the Constitution.:*

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addition, the effective enforcement of socio-economic rights issues is catered for in, amongst others, section 2(d) of the Protection of Human Rights Act, 1993, which defined "*human rights*" as "*rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by the Courts of India.*" [101] This Act provides, in section 18 thereof, that where an inquiry has been held and a there has been a violation of human rights, a recommendation can be made that Government or a similar authority pay compensation or damages; initiate proceedings or a similar suitable action against the concerned persons; to order immediate interim relief and to take such further action as it may think fit. The relief envisioned is vast and open-ended.

83 What is unequivocally clear is that these remedies ought to be effective, as held in the matter of *Nilabati Behara Alias Lalita Behura vs. State of Orissa*, and the duty of the court does not stop at giving a mere declaration in cases of infringements of constitutional rights.*"*[102] What this envisages is a <u>multi-faceted judicial remedy</u> – in *P.K. Koul and Ors vs. Estate Officer and Anr. And Ors,* the court affirmed that that "*the court*

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[101] These "*international conventions*" are defined in section 2(f) of the Act to include "*the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th of December 1966 and such other Covenants or Conventions adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify*." In addition, India has adopted various acts and policies that aim to give effect to the fundamental right to adequate housing including, *inter alia*, the Scheduled Tribes and Other Traditional Forest Dwellers Act (Recognition of Forest Rights) (2006); the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (2013); the Protection of Human Rights Act (1993);

[102] *Nilabati Behara Alias Lalita Behura vs. State of Orissa* 1993 AIR SC 1960, p 206.

*must proceed further and give compensatory relief, not by way of damages as a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of the public duty by the State of not protecting the fundamental right to life of the citizens. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.*"[103]Furthermore, the court held that:[104]

> "221. The instant cases relate to a unique situation, It has been repeatedly stated by the Supreme Court that in case of violation of the right to life and personal liberty, the court is not helpless to grant the relief and should be prepared to forge new tools and devise new remedies for the purposes of vindicating the most precious of the precious fundamental right to life and personal liberty.
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> […]
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> 223. The jurisdiction of the court to mould the relief so as to do justice to a party complaining of infringement of Chapter III rights is wide and requires to fit the contours of the right which is violated. It is essential, therefore, that while adjudicating on the questions raised, the relief to be granted has to be moulded keeping in mind the unique challenges laid and the claims made in these petitions"

84 In this instance, and within the context of this application, an effective remedy might include the order of contempt together with an order for constitutional damages and other interdictory relief. This approach would be supported by the abovementioned Indian jurisprudence.

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[103] *Supra*, p 203 – 204.

[104] *Supra*, para 221; 223.

**ADMISSION AS *AMICUS CURIAE* AND CONDONATION**

85 The applicants and respondent have consented to ESCR-Net's admission as *amicus curiae* and the timelines proposed. However, to the extent necessary, ESCR-Net brought an application to be admitted as *amicus curiae* and to condone the late filing of its application as *amicus curiae*.[105]

86 The Rule 16A notice was filed on 8 February 2022.[106] On 20 May 2022, some three months later, ESCR-Net first became aware of this matter and the Rule 16A notice. Once it had an opportunity to consider the papers, particularly the issues highlighted in the Rule 16A notice, it believed that its admission as *amicus curiae* will greatly assist this Court given its specialist expertise central to the issue before this court, as set out above.[107]

87 ESCR-Net then engaged CDH's Pro Bono and Human Rights Practice to assist with its *amicus* submissions. Its mandate was confirmed on 1 June 2022, whereafter counsel was briefed.[108] On 9 June 2022, it requested the parties' consent to be joined as *amicus*. Both parties consented to ESCR-Net's admission as *amicus* in terms of Uniform Rule 16A.[109]

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[105] CL, 010 – 1 – 010-36.

[106] *Supra*.

[107] CL, 010-13, para 9.

[108] CL, 010-23, para 32 – 41.

[109] *Supra*.

88 The delay in its request to be admitted as *amicus* in this matter has caused no substantive prejudice to the parties. This is further evidenced by the parties' respective consent to ESCR-Net's admission as *amicus*. It would, therefore, be in the interest of justice to condone ESCR-Net's application.[110]

**CONCLUSION**

45 To ensure that the applicants' rights to housing are realised, the Court must adopt remedies which are effective and appropriate. These should take into account the need to compel the respondents to comply with existing court orders that seek to enforce and protect the applicants' rights to housing, but also we submit, the ongoing injuries suffered by the applicants and the constitutional imperatives underlying the need for effective remedies.

46 As outlined above, at an international treaty and regional court level the following principles apply:

46.1 The remedies must be responsive to their context.[111]

[110] *Ferris and another v Firstrand Bank Ltd and another* 2014 (3) BCLR 321 (CC), para 10 – 12.

[111] General Comment 9, paras 1 and 3.

46.2 The remedies must be appropriate means of ensuring government accountability, which may in many instances include the payment of damages or reparations.[112]

46.3 Where violations of socio-economic rights have caused harm, as in this case, there is an obligation to repair the harm adequately which includes identifying a causal nexus between the state's violation and the suffering and distress caused to the victims.[113]

47 Domestically, courts have adopted the following approaches:

47.1 finding the state entity to be in contempt and awarding a fine, as a form of restitution, compensation and/or satisfaction;[114] and/or

47.2 awarding constitutional damages using 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 damages.[115]

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[112] General Comment 4 para 17 and UN Committee of ESCR and also *Lopéz-Albán v. Spain*, UN Committee on ESCR (2019), para. 14. *El Goumari and Tidli v. Spain*, UN Committee on ESCR (2021), para. 9.1-9.4, 12. *Walters v. Belgium*, UN Committee on ESCR (2021), para. 10.1-10.4.

[113] For example: *Muelle Flores v. Peru, Inter-American Court of Human Rights* (2019), *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, Inter-American Court of Human Rights (2019) *Poblete Vilches v. Chile, Inter-American Court of Human* Rights (2018), Judgment, para. 246-253, Operative para. 2-4, 17, 53, 81, 175, 196. *Cuscul Pivaral v. Guatemala, Inter-American Court of Human Rights* (2018), *Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil* (2020)

[114] As was the case in the US in *Spallone v US* referred to above.

[115] As was the approach in the Ugandan Constitutional Court cases outlined above.

48 We submit that in crafting a remedy in this case, the Court ought to take cognisance of the principles and approaches outlined above.

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24 June 2022