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The right to reparations in the contentious process before the African Court on Human and Peoples' Rights: A comparative analysis on account of the revised Rules of Court

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Summary: *The purpose of this article is to examine the possible repercussions that the revised Rules of the Court adopted in September 2020 may have on the right to reparations. In particular, the article focuses on the two procedures to issue a judgment on reparations, specific procedures and third party interventions. The information therein has been assembled by reviewing relevant regional legal instruments such as the African Charter, the African Court Protocol and the Rules of Procedure of the African Commission and the Court with their counterparts in the European and Inter-American systems, as well as through an appraisal of pertinent case law. The revision of the Rules of Court demonstrates a constructive attempt by the African Court to clarify previously imprecise rules, expand the scope of specific procedures and reiterate its competencies. These additions are evident in the new arrangement of the contents of an application, and the inclusion of the pilot-judgment procedure or the revised Rule 72 which reaffirms the*

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binding nature of all Court decisions. The article highlights relevant changes to the Rules of Court while arguing that additional rules need to be amended or expanded to more effectively guarantee the right to reparations. To that end, it provides recommendations for the African Court to consider.

Key words: *African Court on Human and Peoples' Rights; Rules of Court; right to reparations; contentious process; special procedures; third-party interventions*

1 Introduction

The African Court on Human and Peoples' Rights (African Court) adjudicates on cases brought before it by state parties, African intergovernmental organisations, the African Commission on Human and Peoples' Rights (African Commission) and filed by or on behalf of individuals and non-governmental organisations (NGOs) of states that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) and made a declaration accepting the competence of the Court under article 34(6) of the Court Protocol.¹

During the years 2009 and 2010 the African Court and the African Commission conducted three joint meetings aimed at harmonising their corresponding interim Rules. This process culminated in 2010 when the Court adopted its Rules of Court on 2 June 2010. These internal rules guided the African Court until 25 September 2020, when the revised Rules of Court entered into force. The Court noted that the revised Rules of Court aspired to enhance the effectiveness of the Court by facilitating access to it, improving the management of cases and ensuring better implementation of the judgments and other decisions.²

1 Organisation of African Unity (OAU) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 art 5 (African Court Protocol).

2 African Court 'The African Court of Human and Peoples' Rights adopts new Rules of Court', <https://www.african-court.org/wpafc/african-court-on-human-and-peoples-rights-adopts-new-rules-of-court/> (accessed 27 May 2021).

2 Normative framework of right to reparations in the African Court on Human and Peoples' Rights

Adopted in 1981, the African Charter on Human and Peoples' Rights (African Charter) expressly refers to the right to reparations in article 21(2), which reads: 'In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.' Even if this provision only refers to limited forms of reparation, the case law of the African Commission and the African Court has further developed the content and extent of the right to reparations.³ According to article 27(1) of the African Court Protocol, the African Court has an express mandate to award reparation: 'If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.'

Article 27(1) of the Court Protocol, therefore, grants the African Court a great degree of discretion that can be used to achieve a holistic approach to the right to reparations. This provision may be interpreted as an unequivocal and explicit mandate to order reparations when states are found to have violated a right enshrined in the African Charter. Moreover, articles 60 and 61 of the African Charter and revised Rule 29(1)(a) of the Rules of Court provide that the African Commission and African Court draw inspiration and take into consideration African instruments and practices, instruments of international law to which the parties to the Charter are members, as well as legal precedents and doctrine. This means that the African Commission and African Court may expand the concept of reparations in view of the provisions contained in articles 9(5) and 14(6) of the International Covenant on Civil and Political Rights (ICCPR); article 14 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT); articles 16(4) and (5) of the Indigenous and Tribal Peoples Convention; article 19 of the Declaration on the Protection of all Persons from Enforced Disappearance; Principle 12 of the Declaration

3 See, eg, *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) where the Commission urged the respondent state to conduct an investigation, prosecute those responsible and ensure adequate compensation to the victim, but it also appealed to the government to undertake a comprehensive clean-up of lands and rivers damaged by oil operations and to provide information on health and environmental risks to the affected community. See also *Application 13/2011 Norbert Zongo & Others v Burkina Faso* AfCHPR (5 June 2015) para 60, where the Court affirmed that, under international law, reparations may take several forms and used art 34 of the ILC Draft Articles and the jurisprudence of the UN Committee against Torture to exemplify these.

of Basic Principles of Justice for Victims of Crime and Abuse of Power; article 9(2) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms; article 68 of the Third Geneva Convention; and article 91 of the First Additional Protocol to the Geneva Conventions, among others.

In addition, the African Commission and the African Court have developed the right to reparations through decisions and judgments. In the case of *Reverend Christopher R Mtikila v Tanzania* the African Court referred to the jurisprudence of the African Commission to affirm that a state that has violated the rights enshrined in the African Charter should 'take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation'.⁴ This view was later upheld in *Beneficiaries of the Late Norbert Zongo & Others v Burkina Faso* where the Court affirmed that, under international law, reparations may take several forms and used article 34 of the ILC Draft Articles⁵ and the jurisprudence of the UN Committee against Torture to exemplify them.⁶ In the *Norbert Zongo* case⁷ the African Court also recognised the concept of 'full reparations commensurate with the prejudice suffered': 'Reparation consists of measures tending to eliminate the effects of the violations that have been committed.'

2.1 Right to reparations in the Rules of Court

The process by which reparations may be awarded by the African Court is outlined in its Rules of Court. The revised Rule 40(4) relates to article 27(1) of the African Court Protocol asserting that an applicant who wishes to receive reparations should include such request in the original application. The revised Rule 40(4) substituted former Rule 34(5) with two noticeable amendments. The first is that the revised

4 Consolidated Applications 9/2011 and 11/2011, *Reverend Christopher R Mtikila v United Republic of Tanzania* AfCHPR (14 June 2013), quoting *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 229(d).

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

6 Communication 212/2002, *Kepra Urra Guridi v Spain* CAT (17 May 2005) para 6(8); and Communication 269/2005, *Ali Ben Salem v Tunisia* CAT (7 November 2007) para 16(8).

7 Application 13/2011, *The Beneficiaries of the Late Norbert – Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* AfCHPR 5 June 2015) para 60, quoting *Goiburú & Others v Paraguay* IACHR (22 September 2006) Series C 153 para 143. This concept has been reaffirmed in the *Fact Sheet on Filing Reparation Claims* developed by the African Court in 2019.

Rule does away with the provision that compelled applicants to determine the amount of the reparation together with the application. This change is relevant as it does not forbid applicants from stating a pecuniary amount in the form of compensation for the alleged human rights violations endured but seems to provide applicants with the latitude to subscribe to the diversity of forms of reparation beyond the often over-emphasised right to compensation.⁸

The second relevant change is that the revised Rule 40(4) additionally states that ‘the supporting documents and evidence relating to the claim for reparations must be submitted *together with the application* or within a time limit set by the Court’. The explicit inclusion of this provision seems to respond to a situation endured by the Court where it received applications in which applicants had not duly substantiated specific claims for reparations, which forced the Court to delay a decision on reparations.⁹

2.2 Content of an application in contentious cases

One of the most noticeable amendments to the Rules of Court is the inclusion of Rule 41, which outlines a detailed list of elements that shall be part of an application. This revised Rule codifies previously scattered information and underlines the need to include relevant details towards ensuring the admissibility of the application. Although the list of elements is extensive, making the complaint procedure arguably more intricate, the Registrar avails an application form to all potential applicants wherein the contents of the application are delineated.¹⁰ However, the substantiation of all these elements in the order laid out by the Court may jeopardise the access of applicants who may not have access to legal representation, be currently imprisoned or where the nature of the case may not allow the applicant to include one of the elements. Fortunately, Rule 41(9)(c) allows the Court to accept applications that may present procedural defects. In this regard, the jurisprudence of the Court to date has not struck out any application due to procedural defects. In the case of *Lohé Issa Konaté v Burkina Faso* the Court made an exception to the rule of exhaustion of local remedies as the national legal system

8 In this regard, see the historical separate decision of AA Cançado Trindade J where he reflects on the inhuman interpretation that reduces reparations as measures aimed at simply addressing material and moral damages. *Case of the ‘Street Children’ (Villagrán-Morales et al) v Guatemala* IACHR (26 May 2001) Series C 77.

9 See, eg, Application 4/2013 *Lohé Issa Konaté v Burkina Faso* AfCHPR (3 June 2016) para 42; and *Mtikila* (n 4) para 30 (my emphasis).

10 African Court ‘Application Form – Revised October 2020’, <https://www.african-court.org/wpa/c/forms-for-parties-2/> (accessed 28 May 2021).

did not permit a constitutional review in the instant case.¹¹ Similarly, in *Beneficiaries of the Late Norbert Zongo & Others v Burkina Faso* the Court also applied an exception to the rule of exhaustion after the applicant proved that that domestic remedies had been unduly prolonged and, therefore, there was no obligation to exhaust further remedies.¹²

3 The two procedures to issue a judgment on reparations

Once the African Court has determined its jurisdiction on the matter (Rules 29 and 49), the conditions for admissibility of the application (Rule 50) and any preliminary objections have been raised by parties (Rule 60) following the time limits set by the Court (Rule 44), the Court will proceed to set the date for the hearing (Rule 53). Following the outcome of the hearing, the Court may decide to issue a judgment on the merits and reparations or, if the circumstance so require, issue a separate decision dedicated to reparations (Rule 69). The revised Rule 69(3) merged and clarified the previous seemingly confusing Rules 61 and 63 which dealt with judgments, in general, and judgments on reparations, respectively. Accordingly, the Court may decide on the reparations in two different procedural moments.

3.1 Judgment on the merits and reparations

The African Court may include orders on reparations in the judgment on the merits. This option nevertheless is contingent upon the fulfilment by the applicant of the conditions set forth in Rule 40(4) which comprises the inclusion of sufficient evidence and the justification of the causal link between the violation that occurred, and the damage suffered. In this regard, the Court stated in *Mtikila* that it does not suffice to show that the respondent state has violated one of the rights enshrined in the African Charter, as applicants are expected to prove the damages suffered.¹³ In order to further justify the need to establish a causal link between the violation and the harm suffered, the Court has referred to the jurisprudence of the Inter-American Court of Human Rights and the European Court of

11 Application 4/2013, *Lohé Issa Konaté v Burkina Faso*. AfCHPR (5 December 2014) paras 110-114.

12 Application 13/2011, *The Beneficiaries of the Late Norbert – Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* AfCHPR (24 June 2014) paras 72-106.

13 *Mtikila* (n 4) para 31; *Lohé Issa Konaté v Burkina Faso* (n 9) paras 46 & 47.

Human Rights.¹⁴ With the exception made on moral damages,¹⁵ the causal link generally is never assumed and the burden of proof is on the applicant, who is forced to submit any relevant documents to support the claims of damages and, where possible, assess the consequent pecuniary amount resulting from the wrongful act.

3.2 Separate judgment on reparations

The revised Rule 69(3) foresees the possibility to issue a judgment on reparations in a decision separate from that on the merits. This power allows the African Court to defer a decision on reparations in circumstances where the applicant's prayers on reparations are formally incomplete. Nevertheless, such situations do not impede the Court to order certain reparations that were properly substantiated while leaving the rest for a specific ruling on reparations. This position was demonstrated by the Court in *Onyachi and Njoka v United Republic of Tanzania* where the Court decided to deal with 'certain forms of reparation in this judgment, and rule on other forms of reparation at a later stage of the proceedings'.¹⁶ Additionally, the Court may choose to defer the decision on other forms of reparation such as in *Christopher Jonas v United Republic of Tanzania*, where the Court noted that since none of the parties made any specific prayer regarding other forms of reparation, it decided to make a separate ruling on the matter at a later stage.¹⁷

While there may be different reasons behind the applicant's failure to include a request for reparations, the stand-alone position of former Rule 63, explicitly dedicated to describing the judgment on reparations, may have led to confusion. Applicants and their representatives could have interpreted that the submission of documentation and evidence to justify claims on reparations was only necessary if the Court found that the respondent state had incurred in a violation of one the rights enshrined in the African Charter. Therefore, the codification of the contents of judgments under the revised Rule 69 is a positive step as it explicitly clarifies that the African Court's deliberation on reparations can occur together with the judgment on merits while leaving enough latitude to rule on reparations when the circumstances so require. When read together

14 *Norbert Zongo and Others v Burkina Faso* (n 7) para 82.

15 *Zongo* (n 7) para 55.

16 Application 3/2015, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* AfCHPR (28 September 2017) para 165.

17 Application 11/2015, *Christopher Jonas v United Republic of Tanzania* AfCHPR (28 September 2017) para 97.

with Rule 40(4), Rule 69 supports the Court's desire to elude deferrals in the determination of reparations.

3.3 Role of the Court in granting reparations

Whereas the revised Rules of Court are categorical in compelling applicants to submit their claims for reparation together with the application under Rule 40(4), the Court remains cautious and foresees a possibility to issue a separate decision to rule on reparations under Rule 69(3). The choice to maintain such a possibility ensures that the Court can effectively assess the applicant's needs while granting them the possibility to raise prayers on different forms of reparation that were not originally submitted. Further, this procedure prevents situations where the Court could develop a ruling on reparations without the certitude that such measures would be effective and commensurate with the prejudice suffered.

However, the African Court at times seems to have taken a conservative stance insisting that it will not consider measures of reparation for the violation of a particular right enshrined in the African Charter if the applicant fails to do so in their brief on reparations.¹⁸ This reserved position may trump the Court's jurisdictional mandate to interpret and apply the African Charter established under Rule 29(1)(a). The Court ought to not only interpret the provisions of the African Charter in accordance with the claims raised by the applicant but should assess whether the facts and evidence made available by the parties could amount to additional or alternative violations of the African Charter. As the supreme interpreter of the Charter, the Court cannot be limited by the claims laid down by the applicant and should be able and willing to recognise and address violations of rights that were not explicitly mentioned by the applicant. In fact, this interpretative power has allowed the African Commission and the African Court to develop their jurisprudence around the automatic violation of article 1 whenever a violation of any provision of the Charter is found.¹⁹

The chief goal of the African Court is to safeguard the provisions of African Charter by rendering decisions, including judgments on the merits and reparations, which are necessary to meet the ends of justice.²⁰ Subsequently, the Court cannot be limited by the applicant's prayers for reparative measures and should be able and

¹⁸ *Zongo* (n 7) para 2.

¹⁹ See, eg, *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 46; *Zongo* (n 7) para 199.

²⁰ See Rule 90 of the revised Rules of Court.

willing to grant certain reparations to best achieve the principle of 'full reparations, commensurate with the prejudice suffered'.²¹ The Court has taken measures to encourage applicants to make specific submissions on reparations in line with international standards as spelt out in the Court's jurisprudence, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation and in any other relevant instruments adopted by the African Court. To that end, the development of the Fact Sheet on Filing Reparation Claims in 2019 marked an important initiative to guide applicants in forwarding a complete brief on reparations stating all the specific reparations requested from the Court, including the evidence and the causal link between the violation and the harm suffered.²²

Considering the practice of the African Court of granting 30 days to the applicants to submit their request on reparations and 30 days for the respondent state to reply to it,²³ it would be advisable for the Court to set the date for the hearing on reparations three months from the date on which the judgment on the merits is delivered. Should this judgment be publicised during one of the ordinary sessions of the Court, there should be enough time for the parties to submit their views on reparations and hold the hearing during the next ordinary session. This could be both a measure to ensure the promptness of the reparative measures as well as deterring the parties from requesting unnecessary extensions that would further delay the implementation of the reparations. This suggestion might find an exception in cases of collective victimhood where a needs assessment is essential for the Court to issue adequate and effective reparations. In these cases it would be advisable for the Court to take advantage of Rule 55(3) of the Rules of Court and to conduct informal hearings, visiting the affected communities or requesting that a fact-finding investigation be conducted by the African Commission under Rule 36(4).

Making use of these mechanisms may be a way of enhancing victim participation in the process and ensuring that victims' needs are duly considered in view of a decision on reparations. This suggested victim-oriented approach to reparations is in line with the African Commission's Principles and Guidelines on the Right to a Fair

21 *Zongo* (n 7) para 60. In this regard, see also *The Rochela Massacre v Colombia* IACHR (11 May 2007) Series C 163 para 286.

22 African Court 'Fact Sheet on Filing Reparation Claims', https://www.african-court.org/en/images/Basic%20Documents/Reparations_Fact_Sheet-FINAL_25_Nov_2019.pdf (accessed 27 May 2021).

23 See Application 5/2013 *Alex Thomas v United Republic of Tanzania* AfCHPR (20 November 2015) para 159; Application 7/2013 *Mohamed Abubakari v United Republic of Tanzania* AfCHPR (3 June 2016) para 242; *Christopher Jonas* (n 17) para 100.

Trial and Legal Assistance in Africa, which provides several principles that ensure a victim-sensitive approach when affording reparations, including that victims should be treated with compassion and respect for their dignity and have access to prompt redress.²⁴ Regardless of the procedural moment where the Court decides to issue reparative orders, it is critical to be as clear as possible and leave little room for the respondent state to make biased interpretations of the judgment that may contravene the principles of prompt and effective reparations to victims.

Lastly, it is worth noting that the revised Rule 41(1), which describes the elements that shall be contained in any application, is silent regarding claims on reparations. This omission is partially solved in the actual application form provided by the office of the registrar which includes a section dedicated to the prayers to the Court, encompassing a link to the Fact Sheet on Filing Reparation Claims. However, the efforts of the Court to encourage applicants to submit their request for reparations together with the main application would be better met if these become a visible element in one of the most consulted Rules of Court.²⁵

4 Specific procedures and the right to reparations

Chapter IV of the Rules of Court contains several specific procedures. Among these are provisional measures, amicable settlements and the new pilot-judgment procedure that may have an indirect impact on reparations. This section analyses the relevant novelties of specific procedures, compares them with the counterparts in the European and the Inter-American systems and makes suggestions as to how the African Court may interpret and apply these.

4.1 Provisional measures

According to article 27(2) of the African Court Protocol, in 'cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary'. Provisional measures thus have a clear intent to prevent the continuation of human rights violations until a judgment is delivered. Consequently, the lack of determination of a provisional

24 ACHPR 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' adopted at the AU Heads of State and Government Summit in Maputo, Mozambique 20, <https://www.achpr.org/legalinstruments/detail?id=38> (accessed 29 May 2021).

25 See African Court (n 10).

measure may cause irreparable harm to the applicant. In turn, the adoption of effective and prompt provisional measures may influence the ruling on reparations. For instance, in cases where the applicant is about to be judicially executed, the adoption of a provisional measure for the state to refrain from executing the applicant will have an impact on the scope and forms of reparation that the Court may determine if it finds that the respondent state is responsible for violating one or more of the rights enshrined in the African Charter.

Provisional measures, previously known as interim measures, are described under the revised Rule 59 which substituted Rule 51. There are two relevant additions to Rule 59. The first is that sub-rule (1) indirectly reiterates that provisional measures are limited in time by the determination of the main application. The second addition, sub-rule (6), explicitly determines that orders for provisional measures are binding on the parties affected.²⁶

Matters that have been considered urgent and grave by the African Court were primarily situations of execution of the death penalty such as in *Dexter Eddie Johnson v Republic of Ghana*, *Mulokozi Anatory v United Republic of Tanzania* and in *Oscar Josiah v United Republic of Tanzania*.²⁷ Other matters that have been considered referred to the applicant's right to health under detention in *Lohé Issa Konaté v Burkina Faso*;²⁸ the applicant's right to have access to his lawyer and communicate with his family while under detention in *Léon Mugesera v Republic of Rwanda*;²⁹ and in *African Commission on Human and Peoples' Rights v Libya*;³⁰ the applicant's rights to property, individually as in *Alfred Agbesi Woyome v Republic of Ghana*³¹ and collectively as in *African Commission on Human and Peoples' Rights v the Republic of Kenya*, where the Court also took into account the right to economic, social and cultural development;³² or the threat

26 The website of the African Court currently offers two different versions of the revised Rules of Court. In one of these Rule 59(6) does not appear. See http://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf against <https://www.african-court.org/wpafc/wp-content/uploads/2021/04/Rules-Final-Revised-adopted-Rules-eng-April-2021.pdf> (accessed 30 May 2021).

27 Application 16/2017, *Dexter Eddie Johnson v Republic of Ghana* AfCHPR (28 September 2017); Application 57/2016, *Mulokozi Anatory v United Republic of Tanzania* AfCHPR (18 November 2016); and Application 53/2016, *Oscar Josiah v United Republic of Tanzania* AfCHPR (18 November 2016).

28 Application 4/2013, *Lohé Issa Konaté v Burkina Faso* AfCHPR (4 October 2013).

29 Application 12/2017, *Prof Léon Mugesera v Republic of Rwanda* AfCHPR (28 September 2017).

30 Application 2/2013, *African Commission on Human and Peoples' Rights v Libya* AfCHPR (15 March 2013).

31 Application 1/2017, *Alfred Agbesi Woyome v Republic of Ghana* AfCHPR (24 November 2017).

32 Application 6/2012, *African Commission on Human and Peoples' Rights v the Republic of Kenya* AfCHPR (15 March 2013).

to undertake actions that may result in the loss of lives and other physical damages in *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*.³³

Under certain circumstances, the African Court might deem it necessary to complement the requested measures with other measures that will prevent immediate and irreversible harm to the applicant. The revised Rule 59(1) states that the Court may do so in the interests of the parties or of justice. In practice, the Court granted provisional measures proprio motu in the case of *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*.³⁴

Most of the cases where the European Court granted interim measures are related to deportation and extradition proceedings. In the case of *Mamatkulov and Askarov v Turkey* the Court referred to the importance of Rule 39 of the Rules of Court as interim measures play a fundamental role in 'avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted'.³⁵ According to the Factsheet on Interim Measures, the length of an interim measure generally covers the whole duration of the proceedings before the Court, but can also be shorter.³⁶ While these measures are generally directed against respondent states, the European Court invoked Rule 39 in the case of *Ilaşcu & Others v Moldova and Russia* to urge one of the applicants to call off his hunger strike.³⁷ Moreover, the Factsheet on Interim Measures states that the application of Rule 39 may be revoked at any time by a decision of the Court, but fails to indicate whether this is a discretionary power of the Court or it can also be requested by one of the parties involved. Rule 39 of the Rules of Court includes among the parties entitled to submit an interim measure any other person concerned. This provision serves to give the possibility to relatives of the applicant to seek an immediate remedy to an urgent situation. Even though the binding nature of these measures is not clear under Rule 39, the Court has repeatedly

33 Application 4/2011, *African Commission on Human and Peoples' Rights v State of Lybia* AfCHPR (25 March 2011).

34 Application 4/2011 (n 33) paras 10-12.

35 Applications 46827/99 and 46951/99, *Mamatkulov and Askarov v Turkey* ECHR (4 February 2005) para 125.

36 ECHR 'Factsheet on Interim Measures', http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf (accessed 29 May 2021).

37 Application 48787/99, *Ilaşcu & Others v Moldova and Russia* ECHR (8 July 2004) para 11.

insisted on its binding character throughout its case law, especially in conjunction with the right to individual petition.³⁸

The practice of the African Court shows that there is a temporal inconsistency when setting a time limit for respondent states to respond to requests for provisional measures. This uncertainty is particularly severe when related to precarious situations where respondent states are asked to refrain from executing the death penalty on an applicant. Given that there is no specific provision regarding the time limit for responding to requests for provisional measures, the registrar sometimes includes a specific limit. Whereas in the case of *Léon Mugesera v Republic of Rwanda* the registrar requested the respondent state to submit comments on the request for provisional measures within 21 days,³⁹ in *Dexter Eddie Johnson v Republic of Ghana* the registrar indicated that the respondent state could comment on the request for provisional measures within 15 days if they so wish.⁴⁰ This inconsistency also occurs with regard to the time given to respondent states to report on the measures taken to comply with a decision on provisional measures. Whereas the Court ordered the respondent state to report on the measures taken to implement its order on provisional measure within 30 days in the case of *Armand Guehi v United Republic of Tanzania*,⁴¹ the Court granted the respondent state 60 days in *Eddie Johnson v Republic of Ghana*.⁴² Such inconsistency was noted by four judges who dissented with the majority on the time frame given.⁴³ This disparity is further highlighted by Rule 100(5) of the Rules of Procedure of the African Commission which states that the respondent state shall respond on the requested provisional measures within 15 days.

Regrettably, the revision of former Rule 37 into the revised Rule 44 on time limits for responding to pleadings does not include a specific time frame to respond to requests for provisional measures. The different time limits set by the registrar of the African Court to respond to the request for provisional measures and the inconsistent time limits set by the Court in ordering respondent states to report on the measures taken call either for the amendment of the Rules of

38 Application 24668/03, *Olaechea Cahuas v Spain* ECHR (10 August 2006) para 81; and *Mamatkulov and Askarov* (n 35) para 109.

39 *Mugesera* (n 29) para 11.

40 *Dexter Eddie Johnson* (n 27) para 6.

41 Application 1/2015, *Armand Guehi v United Republic of Tanzania* AfCHPR (18 March 2016) para 23; and Application 7/2015, *Ally Rajabu & Others v United Republic of Tanzania* AfCHPR (18 March 2016) para 22.

42 *Dexter Eddie Johnson* (n 27) para 21.

43 See the partly dissenting opinions of Niyungeko and Ben Achour JJ in *Dexter Eddie Johnson* (n 27) and joint separate opinion of Chafika and Mukamulisa JJ in the same case.

Court and the establishment of a unique time limit or, at least, for the development of a public document endorsed by the Court where it is stated that the presiding judge or the judge-rapporteur has a discretionary margin, according to the gravity of the case, to set a time limit for the parties to respond to the request.

Additionally, the African Court should also consider amending the Rules of Court to include the option to evaluate provisional measures in force, either at its own initiative or at the request of a party, with the possibility to maintain, modify or revoke them. While the burden of proof is on the applicant by default, the Court must consider the urgency of the matter and the difficulties in meeting the same standards of proof that are required in other circumstances. This might be particularly pertinent in cases where the applicant is under detention and has limited access to documentary evidence to prepare the submission.

4.2 Amicable settlements

An amicable settlement is an agreement reached by the parties to a case before the African Court whereby the facts and solutions to be adopted are mutually recognised. Within the solutions available, the parties may decide to include reparative measures to solve their dispute. The process by which this accord may take place can be at the parties' own initiative or under the auspices of the Court, in conformity with article 9 of the Protocol to the African Charter and Rules 29(2)(a) and 64(1) of the Rules of Court. According to the revised Rule 64, the parties to a case may resolve their dispute amicably at any point in time before the Court issues its judgment. Once the agreement is attained, the parties must report it to the Court, which will render a judgment supporting the solution adopted. A judgment based on an amicable settlement by the parties has the same enforceability upon the parties in accordance with article 30 of the Court Protocol and Rule 72, which reaffirms the binding nature of all the African Court's decisions.

However, Rule 64(5) foresees that the Court may 'decide to proceed with a case notwithstanding that an amicable settlement has been reached by the parties'. This is an important and relevant provision grounded in the discretionary powers of the Court that ensures the observation of the principles of preservation of public interest and justice. This provision would allow the Court to refuse an amicable settlement in instances where the violation occurred because of discriminatory laws, or a systemic unjust practice of the

respondent state and the solutions contained in the settlement do not include legislative reforms to ensure non-recurrence.

To date, the African Court has not been appraised with any amicable settlement. Nevertheless, the other two institutions in charge of monitoring the compliance of member states with the African Charter and other African human rights instruments have dealt with amicable settlements. In *Government of Malawi v Institute for Human Rights and Development in Africa* the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) handled its first amicable settlement. The Committee endorsed an amicable settlement containing reparative measures aimed at ensuring non-recurrence.⁴⁴ However, the settlement did not address the effects of the damage suffered by victims. Even if the case dealt with widespread violations that occurred due to national legislation contrary to the African Charter on the Rights and Welfare of the Child (African Children's Charter),⁴⁵ the African Children's Committee could have also ordered the state to set up a fund to contribute to children affected by those violations through rehabilitation services and alternative access to education.

In the case of *Open Society Justice Initiative* the parties reached an amicable settlement that was ultimately not complied with by the respondent state. Upon reopening the communication, the African Commission refused the request by the respondent state to grant a second attempt at an amicable settlement and determined that this would only further delay the examination of the communication.⁴⁶ In its decision the African Commission went beyond the original amicable settlement and ordered the respondent state to grant the victim's next of kin with various forms of reparation, including compensation for damaged goods, loss of earnings and moral damages.⁴⁷

The European system foresees under article 39 of the European Convention that the Court may place itself 'at the disposal of the parties concerned with a view to securing a friendly settlement', respecting the human rights enshrined in the Convention as well as in its Protocols. The proactive role that the Court has taken since the implementation of Protocol 11 has materialised in the practice

44 Communication 4/Com/001/2014 *IHRDA on behalf of Malawian Children v Republic of Malawi* ACERWC (2014).

45 African Charter on the Rights and Welfare of the Child adopted by the Organisation of African Unity on 11 July 1990.

46 *Open Society Justice Initiative (on behalf of Njawe Noumeni) v Cameroon* (2006) AHRLR 75 (ACHPR 2006 para 123).

47 *Open Society Justice Initiative* (n 46) para 212.

of the European Court sending settlement proposals to the parties.⁴⁸ The European Court rejected the friendly settlement in the interests of justice reached between the parties in *Ukrainian Media Group v Ukraine*. In this case the Court argued that the rejection was necessary due to 'the serious nature of the complaints made in the case regarding the alleged interference with the applicant's freedom of expression'.⁴⁹

In the Inter-American system the concept of 'full reparations commensurate with the prejudice suffered' is not diminished by the procedural differences between a friendly settlement and that of a contentious process where the Court undergoes a thorough examination of the facts and renders a judgment on the merits. In the case of *García Cruz and Sánchez Silvestre v Mexico* the Inter-American Court endorsed the friendly settlement agreed by the parties but also analysed the reparative measures to determine the scope and method of implementation as the Court has an obligation 'to provide comprehensive redress for the damage caused to the victims'.⁵⁰ However, the Court has been guided by the principles of necessity and suitability in determining that in cases of enforced disappearances where the respondent state denies the existence of such acts, as 'it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment, and to personal liberty'.⁵¹

Even though the African Court is yet to deal with a case where an amicable settlement is proposed, there are important lessons for the Court to reflect upon. First, the Court ought to reasonably consider the uneven power position of the parties and ensure that the solution to the dispute is not unfair to any of the parties. Second, as it is the Court's mandate to uphold the rights enshrined in the African Charter, the recognition of any violations of the rights therein must be included in the amicable settlement. Lastly, the assessment of a violation of the African Charter ought to entail appropriate reparative measures aimed at redressing the situation of the applicant but also at possibly preventing the recurrence of similar violations. Bearing in mind the unequal position of power of the parties, the Court may also make use of Rule 64(5) to avoid ordering reparations that are manifestly unfair or inadequate. For instance, the Court may consider that the payment of US \$5 000 to the immediate relatives

48 P Leach *Taking a case to the European Court of Human Rights* (2011) 64.

49 Application 72713/01, *Ukrainian Media Group v Ukraine* ECHR (29 March 2005) para 36.

50 *García Cruz and Sánchez Silvestre v Mexico* IACHR (26 November 2013) OEA/Ser./L/V/II.118 Doc 70 Rev 2 390 para 66.

51 *Godínez-Cruz v Honduras* IACHR (26 June 1987) Series D 3 (1994) para 49.

of a victim of enforced disappearances in the concept of loss of earnings may be insufficient if not accompanied by other measures such as compensation for moral damages, rehabilitative measures, specific measures of satisfaction and guarantees of non-recurrence in line with the concept of 'full reparations commensurate with the prejudice suffered'.

4.3 Pilot-judgment procedure

The pilot-judgment procedure was introduced by the revised Rule 66 of the Rules of Court. The African Court can initiate this procedure on its own accord or upon a request from any of the parties when several applications are filed against a particular respondent state, and these respond to the existence of 'a structural or systemic problem in the respondent state(s)'.

This pilot-judgment procedure at the African Court draws its inspiration from the European system of human rights protection. The pilot-judgment procedure was created as a measure of procedural economy that sought to respond to the overwhelming number of cases with which the European Court had to deal. In essence, it seeks to both speed up the process and avoid the Court from thoroughly examining cases sharing the same root causes. This procedure relies on the assumption that a remedy to these violations should be obtained more rapidly and effectively at the national level.⁵² To that end, the African Court shall select one case, which presents the gravest human rights violations or that serves to best represent the others, and develop a complete and thorough explanation of the facts, the legal grounds, the operative provisions of the judgment, the decision, and other formalities stated under Rule 71 of the Rules of Court. The aim would thus be to achieve a solution that extends beyond the selected case and to the greatest extent possible cover other cases with the same stemming problem. This procedure is meant to support the respondent state in identifying and putting to an end the structural issues that gave rise to the same human rights violations while granting reparations to those adversely affected.⁵³

In the European system of human rights protection, the pilot-judgment procedure is defined by Rule 61 of the Rules of Court of the European Court. This Rule states that the pilot judgment may indicate the specific time limit for the respondent state to adopt the

52 ECHR 'The Pilot-Judgment Procedure' para 6, https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf (accessed 30 May 2021).

53 ECHR (n 52) para 3.

remedial measures to address the structural or systemic problem. Accordingly, the Court may adjourn the examination of its related applications 'pending the adoption of the remedial measures required by virtue of the operative provisions of the pilot judgment'. Rule 61 also highlights that, should the adjournment take place, the Court will duly inform the applicants of related applications about the decision to adjourn. This time limit might also be suspended at any given time in the interests of justice. The decision to adjourn cases related to the pilot judgment is justified as a way to provide enough time to adopt the remedial measures that should, eventually, serve those applicants to seek effective and prompt remedy at the national level.

The first pilot-judgment procedure conducted by the European Court was in *Broniowski v Poland*.⁵⁴ Subsequently, the Court issued a decision in *EG v Poland* where it concluded the pilot-judgment procedure for the particular case and 175 other cases that shared the same systemic problem.⁵⁵ While the judgment in *Broniowski v Poland* is no different from any other judgment regarding its format, the case of *EG v Poland* presented certain characteristics that became essential for forthcoming decisions issued under the pilot-judgment procedure. First, the Court had decided to adjourn the examination of cases with the same systemic problems identified in the *Broniowski* case. Second, in establishing the facts, the Court succinctly recalled the historical background that all the pending cases shared with the *Broniowski* case and proceeded to analyse the circumstances of the case, focusing on the facts, not the merits. Third, the Court gave effect to the pilot-judgment procedure by connecting the pending cases to the original pilot judgment and subsequently striking them out from the list of cases. Fourth, there was an explanation of the consequences of the execution of the pilot-judgment procedure, indicating that should the respondent state not comply with the measures ordered in the pilot judgment, the Court 'will have no choice but to examine and take to judgment the remaining applications pending before it in order to trigger the execution process before the Committee of Ministers'.⁵⁶ Lastly, the European Court included an annexe with the list of pending cases that were affected by the pilot-judgment procedure. The pilot-judgment procedure had a successful conclusion since the respondent state introduced new legislation to

54 Application 31443/96, *Broniowski v Poland* ECHR (22 June 2004).

55 Application 50425/99, *EG v Poland* ECHR (22 September 2008).

56 *EG v Poland* (n 55) para 28. See also Rule 61(8) of the ECHR Rules of Court.

tackle the systemic problem identified by the Court and the pending cases were settled at the national level.⁵⁷

The practice of the European Court regarding the pilot-judgment procedure is largely influenced by the principle of subsidiarity, in that respondent states generally have a great margin of appreciation in deciding the measures to be taken to comply with the Court's judgments.⁵⁸ However, the African Court should aspire to order clear reparative measures aimed at eradicating the identified dysfunction, including the creation of national mechanisms to give remedy to other similar cases that have arisen or may arise in the future. Therefore, these cases may lay a greater focus on measures of satisfaction and guarantees of non-repetition, especially when it comes to ordering the amendment of domestic legislation contrary to the African Charter or the implementation of new laws and procedural guarantees. Other measures may include training courses aimed at educating the civil servants affected by such changes to accommodate their actions to avoid repeating similar human rights violations in the future. The order on reparations must be very specific, including tight timelines, to avoid biased interpretations of the judgment that may further delay the implementation of reparations aimed at alleviating the damage suffered by the victims.

Additionally, the African Court must bear in mind that the pilot-judgment procedure was created mainly as an additional measure under Protocol 14 to mitigate the backlog of cases pending before the European Court.⁵⁹ Therefore, considering the context wherein the procedure was created, the use of this special procedure must ensure that the cases are very similar in their nature and that the trigger of the procedure does not unduly delay the right to reparations of other applicants. In particular, the due respect owed to the applicants must be reflected by duly informing them of any change in their applications and by paying close attention to any substantial differences between the cases.

57 Council of Europe 'Protection of property: Landmark judgment', <https://www.coe.int/en/web/human-rights-convention/property1> (accessed 30 May 2021).

58 G Füglistaler 'The principle of subsidiarity and the margin of appreciation doctrine in the European Court of Human Rights' post-2011 jurisprudence' (2016), https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF (accessed 30 May 2021).

59 L Wildhaber 'Pilot judgments in cases of structural or systemic problems on the national level' in R Wolfrum & U Deutsch (eds) *The European Court of Human Rights overwhelmed by applications: Problems and possible solutions* (2009) 69-76.

5 Third party interventions and the right to reparations

During the contentious process before the African Court, parties other than the applicants, the respondent state, the Court itself or, when applicable, the African Commission, may intervene. This part aims at differentiating the role of each party in the process and laying out the great impact that these parties may bring when considering reparative measures.

5.1 Interventions by other states

The revised Rules 39(2) and 61 foresee the possibility for states other than the respondent state to participate in the process by submitting written observations on the matter. This, however, is not an automatic competence of third states. First, they must submit an application for leave to intervene in which they must indicate their legal interest in the matter, the purpose of their intervention and a list of all supporting documents. Only then will the Court proceed to rule on the admissibility of the application and set a time limit for the intervening state to submit its written observations. Once the Court has ruled on the admissibility of the application, the intervening states will be invited to submit their written observations and participate during the oral proceedings, should they occur. The impact of these interventions may be helpful in terms of bringing the parties closer to an amicable agreement, by sustaining or disputing the claims of one party or by bringing new relevant information to the matter, including by proposing different forms of reparation. Remarkably, the revised Rules of Court no longer require that the intervening state establishes the relation between it and the parties to the case. This is a substantial revision that may allow third states to intervene in a matter in the interests of justice.

5.2 Witnesses, experts and others

At times the contributions of persons acting as witnesses, experts or in any other capacity may result in beneficially elucidating the facts of the case and contributing to forms of reparation to address the assessed harm. According to Rule 55(1) of the Rules of Court, these persons may be summoned by the African Court itself, at the request of a party or by the African Commission where applicable. For the purposes of protecting the safety of these interveners, the revised Rule 33(2) provides that the Court may request state parties to take

special measures that ensure the security of any party summoned by the Court.

5.3 *Amici curiae*

The African Court referred to the judgment of the Inter-American Court in the case of *Kimel v Argentina* to define the role of the *amicus curiae*. In this case the Inter-American Court stated that *amicus curiae* are 'third parties which are not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court'.⁶⁰

The Inter-American Court also identified the double role of *amicus curiae*: on the one hand, their contribution to the legal proceeding, supplementing the arguments of the parties, which enables the Court to be better informed and thus improving the decision-making process and, on the other, their participation itself, which strengthens the legitimacy of the system as it reflects the views of more members of society, furthering democratic values.⁶¹

Even if *amicus curiae* are only implicitly mentioned under Rule 55(2) and indirectly under Rule 71(1)(f), the practice of both the African Commission and the African Court *de facto* has included the possibility to receive assistance from them. In fact, the African Commission affirmed in the case of *Muzerengwa* that accepting briefs from *amicus curiae* is in sync with its case law.⁶² In the case of *Ingabire Victoire Umuhoza v Republic of Rwanda* the African Court affirmed the possibility to obtain briefs from *amicus curiae* stating that the Rules of Court empower the Court to receive evidence from any individual that could contribute to enlighten a case.⁶³ In fact, the Court has insisted that the admission of *amicus curiae* is a matter of discretion of the Court, as well as the decision on what it 'considers relevant and non-partisan from the *amicus curiae*'.⁶⁴

The African Court has determined in its Practice Directions the procedure for *amicus curiae* to submit a brief to the Court.⁶⁵ First, the

60 *Kimel v Argentina* IACHR (2 May 2008) Series C 177 para 16, mentioned in Application 3/2014, *Ingabire Victoire Umuhoza v Republic of Rwanda* AfCHPR (5 July 2016) para 38.

61 *Kimel v Argentina* (n 60) para 16.

62 *Muzerengwa & Others v Zimbabwe* (2011) AHRLR 160 (ACHPR 2011) para 78.

63 *Ingabire Victoire Umuhoza* (n 60) para 37.

64 *Ingabire Victoire Umuhoza* para 38.

65 African Court 'Practice directions to guide potential litigants', <http://www.african-court.org/wpafc/wp-content/uploads/2020/06/Practice-Directions-to-Guide-Potential-Litigants-En.pdf> (accessed 30 May 2021).

potential *amicus curiae* should submit a request to the Court indicating the contribution they wish to make and the case to which it is related (paragraph 42). The Court will then proceed with the examination of the request and decide whether it is accepted or not (paragraph 43). Successful applicants will be invited to make submissions to the registrar and will receive the application submitted to the Court together with subsequent pleadings related to it (paragraph 44). The *amicus curiae* will be able to submit the brief at any point during the proceedings, which will be immediately shared with the parties to the case (paragraphs 44 and 46). Lastly, the Practice Directions also foresee the possibility for the Court to invite *proprio motu* an individual or organisation to act as *amicus curiae* on a pending case (paragraph 45).

The participation of amici curiae in the contentious process can be very useful in providing information that supplements the arguments of the parties and enriching the knowledge of the Court. The approach taken thus far by the African Court must remain as welcoming as possible; there is no requirement that *amici curiae* be individuals or organisations based in Africa. While *amici curiae* may result especially helpful in assisting the Court with relevant precedents from other regional courts, thus easing the time and budgetary burden on the Court itself, they can also result in being helpful beyond legal arguments and include statistics, forensic expertise, socio-economic considerations and other relevant contributions from a wide range of disciplines.

The important role of *amici curiae* calls for the creation of an inclusive procedure that actively promotes the participation of third party contributors. Once an application has been received by the Court, the office of the registrar develops a summary of the case. Together with the publication of this summary, the registrar could include a second document, a template, an invitation for admission of potential *amici curiae* containing information about the case, time limits and a link to the notice of application to act as *amicus curiae*.⁶⁶ The time limit set by the Court to apply can be 12 weeks, such as that indicated under Rule 44 of the Rules of Procedure of the European Court for third party interventions. This time limit ensures enough time for potential contributors to develop and send their concise requests and ensures that the Court will be able to deal with all requests in an ordinary session. Once the African Court grants

66 African Court 'Notice of application to act as *amicus curiae*', <http://www.african-court.org/en/images/Party%20Forms/AfCHPR%20017%20NOTICE%20OF%20REQUEST%20TO%20ACT%20AS%20AMICUS%20CURIAE%20FORM%20017.pdf> (accessed 30 May 2021).

the status of *amicus curiae* to some or all the interested parties, the registrar should immediately inform them about such decision, share with them the application and subsequent pleadings, and request them to submit their written contribution which may be capped to 10 to 20 pages and a certain font and size. The parties to the case shall also be duly notified of such a decision. Once the registrar receives the contributions of the *amici curiae*, it should make these available to the parties. If deemed necessary, the Court should have the discretionary power to request more detailed information to a particular *amicus curiae*. This suggested procedure must be complemented by measures that increase the awareness of its existence.

The possibility for the African Court to actively approach individual experts and organisations is advantageous in two circumstances: First, in cases where the Court is aware of its limitations as to the facts and legal issues, it allows the Court to contact individuals or organisations and request specific information regarding the problematic issue; and, second, it provides a possibility for the Court to obtain additional information in cases where no parties have requested to act as *amici curiae* during the time limit set or the information provided has not sufficiently assisted the Court in the determination of a case.

6 Conclusions

The revised Rules of Court clarify previously imprecise rules and expand the scope of specific procedures. The revised Rules 40(4) and 69(3) clearly are aimed at encouraging applicants to include all requests for reparations together with the main application for the Court to be able to determine pertinent forms of reparation together with the judgment on the merits. This initiative of procedural economy also seeks to shorten the time for victims of human rights violations to receive reparations for the harm endured.

Whereas there are important developments with regard to provisional measures, such as the implicit reaffirmation of their binding nature under Rule 59(6), the revised Rules of Court fail to address the temporal inconsistency when setting time limits for the respondent state to respond to requests for provisional measures and do not foresee the possibility of amending or revoking them at the initiative of the Court or at the request of a party.

Since the African Court is yet to face an amicable settlement and deal with a pilot-judgment procedure, it is important for the judges

and the registrar to reflect further on and draw inspiration from the experience of other African and regional bodies. In particular, it is suggested that the Court ensures that future amicable settlement provides adequate and effective reparations, taking into account the unequal position that applicants may face in comparison with the respondent states and that all applicants involved in a pilot-judgment procedure are given the opportunity to share their views and are duly informed of any changes affecting their application.

At the reparations stage, by promoting the participation of victims, witnesses, experts and *amici curiae*, the African Court can prepare itself to better assess the harm suffered by the victims and order measures of reparation accordingly. In this regard, it would be advisable for the Court to continue encouraging the participation of *amici curiae* through the amendment of the outdated 2012 Practice Directions in line with the revised Rules of Court and including clear time limits that would avoid undue delays in the examination of the case.

Lastly, the Court could consider speeding up the process of ordering reparations by developing a steady jurisprudence of ordering certain quasi-automatic reparative measures in judgments where the Court finds a violation of the African Charter. These quasi-automatic measures would include both guarantees of non-repetition, which are generally best assessed by the Court itself, and measures of satisfaction that the Court may consider necessary, such as the common order to publish the judgment, public apologies, actions aimed at honouring the memory of the deceased or reminders of states' obligations to investigate and prosecute perpetrators of human rights violations, together with a tight deadline for the respondent state to implement such measures.