

Remedying Harm

Lessons from International Law for Development Finance

Introduction

International law states that business enterprises should avoid infringing on the human rights of others and should address adverse human rights impacts when they have contributed to harm.¹ Many businesses and banks have acknowledged their role in addressing negative environmental and social harms in recent years, adopting policies and practices aimed at preventing or mitigating such harms. Although the principle of remedy is also central to this responsibility to address adverse impacts, efforts to guarantee adequate remedy when harms occur have been insufficient to date.

The right to effective remedy for harm is a core tenet of international human rights law, with substantive and procedural dimensions. Despite the principle's wide recognition, there is no one-size-fits-all approach to remedy, and every situation is predicated on a wide

array of factors, demanding tailored approaches that depend on the nature of the harm, the affected communities' needs, and more. Human rights law affirms that states have a duty to respect, protect, and fulfill this right, while business enterprises² have a responsibility to engage in ensuring that individuals and communities who experience human rights violations have access to remedy by providing for or cooperating in remedial action. Institutional investors — including development finance institutions (DFIs) — share this same responsibility to provide remedy.

In recent decades, DFIs have attempted to strengthen environmental and social frameworks and internal structures with the goal of avoiding harm to communities they are meant to benefit.³ DFIs have also made progress in improving internal accountability

¹ UN Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," RES 17/4 (June 16, 2011) at Principle 11.

² *Id.* at Principle 22.

³ The International Finance Corporation's (IFC) Policy on Environmental and Social Sustainability states: "Central to IFC's development mission are its efforts to carry out investment and advisory activities with the intent to 'do no harm' to people and the environment, to enhance the sustainability of private sector operations and the markets they work in, and to achieve positive development outcomes." International Finance Corporation, "International Finance Corporation's Policy on Environmental and Social Sustainability," (2012), para. 9.

mechanisms,⁴ such as the World Bank’s Inspection Panel and the Inter-American Development Bank’s (IDB) Independent Consultation and Investigation Mechanism (MICI). Independent accountability mechanisms (IAMs) provide an independent avenue for recourse to persons and communities who have been harmed or whose human rights have been violated by DFI-financed projects.

While many DFIs have strengthened their IAMs over time, and even expanded their accountability systems to include grievance functions,⁵ few are explicitly mandated to go beyond documenting a DFI’s failure to comply with its own policies and subsequently improving operations. An IAM’s mandate does not typically include the ability to compel the DFI to remedy harms to affected communities, even when the DFI is non-compliant. Those IAM policies that do refer to remedial and corrective actions often pertain only to measures within the scope of project operations and implementation, as monitored by the DFI, without addressing remedy for communities harmed by development projects. Further, of those mechanisms that reference the provision of remedy in their mandates,⁶ few are currently able to ensure in practice that DFIs do what is necessary to turn remedy into a concrete reality for communities.⁷

The need to provide substantive remedy to persons and communities who have been harmed in the context of

DFI-financed projects is now receiving long-overdue attention within some leading development banks. Recently, a 2019-2020 External Review⁸ of environmental and social accountability at the International Finance Corporation (IFC) and the Multilateral Investment Guaranty Agency (MIGA) identified the need for these institutions to establish a framework for remedial action.⁹ An internal Working Group is in the process of identifying options for such a framework, with the goal of presenting recommendations to the boards of the IFC and MIGA.¹⁰ At the time of writing, this process remained ongoing.

The External Review team was also tasked with reviewing the role and effectiveness of the IFC/MIGA’s independent accountability mechanism, the Compliance Advisor Ombudsman (CAO), which led to key policy reforms. The CAO’s mandate now includes explicit provisions on remedy for project-affected people in a manner that is consistent with international principles related to business and human rights.¹¹ However, IAMs are still ill-equipped to guarantee remedy on their own. While they are suited to provide guidance and valuable recommendations, without concerted efforts from bank management and approval from bank boards, the actual provision and implementation of remedy will remain elusive.

⁴These accountability systems have been analyzed and evaluated by the Center for International Environmental Law (CIEL) and others, *see, e.g.*, Caitlin Daniel, Kristen Genova, Mariëtte van Huijstee and Sarah Singh, eds., *Glass Half Full? The State of Accountability in Development Finance* (Amsterdam: SOMO, 2016), and Multiple Authors, *Good Policy Paper: Guiding Practice from the Policies of Independent Accountability Mechanisms*, (2021). A full discussion of these systems is beyond the scope of the present document.

⁵Examples of grievance response functions at development finance institutions (DFIs) include: the Stakeholder and Grievance Response unit at the IFC, the Management Grievance Mechanism at IDB Invest, and the Grievance Redress Service of the World Bank.

⁶The Independent Redress Mechanism of the Green Climate Fund (GCF), the Independent Project Accountability Mechanism of the European Bank for Reconstruction and Development (EBRD), and the Independent Recourse Mechanism of the African Development Bank (AfDB) contain explicit provisions on remediating harm in their mandates. Additionally, the policy of the accountability mechanism of the Inter-American Development Bank (IDB), the Independent Consultation and Investigation Mechanism (MICI), states that “[t]he Compliance Review report should be designed to provide the factual and technical basis for a decision by the Board on preventative or corrective action in connection with the Bank-Financed Operation under investigation” (para. 45) and that “[w]hen applicable, the MICI will monitor implementation of any action plans or remedial or corrective actions agreed upon as a result of a Compliance Review” (para. 49). *See* Inter-American Development Bank, “Policy of the Independent Consultation and Investigation Mechanism of the IDB,” (April 14, 2021).

⁷*See, e.g.*, World Bank, *External Review of IFC/ MIGA Environmental & Social (E&S) Accountability, Including CAO’s Role and Effectiveness*, (June 9, 2020).

⁸*See id.*

⁹*See* World Bank, *supra* note 7, at paras. 58-62.

¹⁰*See* International Finance Corporation, *External Review: IFC/MIGA Update of Enabling Remedial Solutions*, (August 2021).

¹¹The new policy of the IFC/MIGA independent accountability mechanism, the Compliance Advisor Ombudsman (CAO), states: “In executing its mandate, CAO facilitates access to remedy for Project-affected people in a manner that is consistent with the international principles related to business and human rights included within the Sustainability Framework.” *See* World Bank, “IFC/MIGA Independent Accountability Mechanism (CAO) Policy,” (June 28, 2021).

As the IFC/MIGA and other DFIs seek to chart a course to ensure access to remedy, they would do well to learn from the development of the concept of remedy over many decades in the field of international law and, in particular, in international human rights law.¹²

This resource is presented with the hope and expectation that comparative examples and lessons learned from the field of international human rights law might illuminate ways for DFIs to establish rights-based frameworks for providing remedy. The brief begins with a description of the concept of remedy, its origins in international law, its development in the field of human rights law specifically, and its centrality to the sub-field of business and human rights. The brief then analyzes the critical distinction between the procedural and substantive elements of remedy before delving into a deeper discussion of the latter element, which is particularly relevant for DFIs grappling with the issue of remedy today. It then lays out a typology of forms of remedy that have been applied by international bodies and tribunals, which DFIs should consider in seeking to ensure robust and effective responses to harms occurring in the context of projects they finance. Finally, it outlines how DFIs may apply existing best practices and relevant international standards to advance remedy, and it provides specific recommendations in this regard.

1. The Concept of Remedy

From a legal perspective, the term remedy refers to “remedies provided by the law for the enforcement of a right when an illegal, detrimental, or harmful act is imposed”¹³ on a rights-holder. The concept has a long history in international law. As early as 1927, the oft-cited judgment of the Permanent Court of International Justice in the *Chorzów Factory* case set the precedent that any “breach of an engagement involves an obligation to make reparation in an adequate form.”¹⁴

Since then, the right to effective remedy has been extensively developed and is now well-established in many fields, including international human rights law. Provisions on the duty to provide remedy upon the commission of a wrongful act are largely codified in the Draft Articles on State Responsibility, created over decades by the International Law Commission (ILC) and accepted by the United Nations (UN) General Assembly.¹⁵ Many core international human rights treaties and declarations explicitly reference this right at universal and regional levels.¹⁶

Other international instruments — considered to be declaratory of legal standards in the area of victims’ rights¹⁷ — also provide authoritative guidelines on the right to remedy and reparations.¹⁸ These instruments include the Basic Principles and Guidelines on the

¹² Other areas of law, including international law specifically, have also developed robust concepts of remedy and practices to achieve it, such as in the areas of international criminal law and international environmental law, as well as practices emerging from the field of transitional justice. Certain concepts and practices from these fields have been included here, yet this document emphasizes the field of international human rights law given its particular relevance to DFIs in light of their obligations to respect human rights and participate in providing remedy for adverse human rights impacts in accordance with international standards.

¹³ Kirsten Schmalenbach, *Max Planck Encyclopedia of Public International Law, International Organizations or Institutions, Legal Remedies against Acts of Organs*, (Max Planck Institute for Comparative Public Law and International Law, 2017), at para. 1.

¹⁴ *Factory at Chorzów (Judgment)*, Permanent Court of International Justice, PCIJ Series A no 9. (July 26, 1927), at page 21.

¹⁵ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, Report Fifty-third Session, A/56/10 (2001), at articles 30-37.

¹⁶ As a result of the international normative process, the legal basis for the right to remedy and reparation has become firmly enshrined in the international human rights corpus. The Universal Declaration of Human Rights sets out in Article 8 that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” The International Covenant on Civil and Political Rights (ICCPR) recognizes in Articles 9(5) and 14(6) a right to compensation for persons subjected to unlawful arrest or detention or to miscarriages of justice. Other conventions, while focused on specific types of violations, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in Article 14 (1) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) in Article 24 (4)(5), adopt a more comprehensive notion of reparation, extending beyond “mere” financial compensation. At the regional level, Article 41 of the European Convention for the Protection of Human Rights (ECHR) empowers the Strasbourg Court to provide, “if necessary,” for “just satisfaction to the injured party” in the event that domestic law provides only for “partial reparation” of the harm suffered as a result of a violation of the Convention. Additionally, the American Convention on Human Rights (ACHR) in Article 63 (1) provides for a remedy and fair compensation paid to the injured party in cases where the Inter-American Court on Human Rights (IACtHR) finds that there has been a violation of a right or freedom protected by this Convention. This Convention also refers to “adequate compensation” in Article 10 and “compensatory damages” in Article 68.

¹⁷ See Frank Haldemann, Thomas Unger, and Valentina Cadelo, eds., *The United Nations Principles to Combat Impunity: A Commentary*, First edition, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2018).

¹⁸ See Theo Van Boven, “Victims’ Rights To A Remedy And Reparation: The New United Nations Principles And Guidelines,” in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, eds., Carla Ferstman, Mariana Goetz, and Alan Stephens (Brill | Nijhoff, 2009), 17-40.

Right to a Remedy and Reparation, adopted by the UN General Assembly in 2005.¹⁹ Likewise, the Updated Principles to Combat Impunity,²⁰ developed under the UN Commission on Human Rights, reflect existing international law on the core victims' rights, including reparation procedures²¹ and the right to reparation. In a 2012 landmark decision, the International Criminal Court (ICC) established the principles, modalities, and procedures to be applied to reparations in *The Prosecutor v. Thomas Lubanga Dyilo* case. This was the first reparations decision by a Chamber of the ICC, and it reflected the state of international law on remedy at that time.²²

In addition, access to effective remedy is a cross-cutting component of the UN Guiding Principles on Business and Human Rights (UNGPs).²³ The UNGPs are considered an authoritative statement of the duties of states to protect human rights, the responsibility of business entities to respect human rights, and their shared role in providing remedy for human rights abuses that occur in the context of business activities. These elements are known as the UNGPs' three pillars, with remedy regarded as a "common thread running through all three interconnected and interdependent pillars."²⁴ As articulated in the UNGPs and further developed by UN independent experts,²⁵ those affected by business-related human rights harms should be able to seek remedy from those responsible, including both states and business actors.

Speaking to states' obligations to provide remedy for violations occurring in the context of business activities,

Guiding Principle 1 requires states to take appropriate steps to redress business-related human rights abuses within their territory and/or jurisdiction. Following the same reasoning, Guiding Principle 25 reminds states to "take appropriate steps to ensure" that those affected by business-related human rights harms "have access to effective remedy."

Similarly, Guiding Principle 22 establishes what is expected of business enterprises if it is identified that they have caused or contributed to adverse rights impacts. It states that business enterprises "should provide for or cooperate in their remediation through legitimate processes." The responsibility applies equally to "investors regardless of size, location, ownership or structure,"²⁶ including "development finance institutions who are responsible for respecting human rights like any other business enterprise."²⁷

2. The Procedural and Substantive Dimensions of Remedy

The right to effective remedy is a human right comprised of two dimensions: The first is procedural remedy, which refers to the existence of remedial institutions and mechanisms to which a complainant has access in order to press their claim.²⁸ The bearers of the duty or responsibility concerning the right that has been violated or the harm that has been incurred should provide the remedial mechanisms. The second dimension is substantive

¹⁹ UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", A/RES/60/147 (March 21, 2006).

²⁰ The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, and their different versions — final (UN Doc. E/CN.4/Sub.2/1996/18), revised final (UN Doc. E/CN.4/Sub.2/1997/20/Rev.1) and Updated (UN Doc. E/CN.4/2005/102/add.1) — were developed under the aegis of the UN Commission on Human Rights and affirmed by the Human Rights Council. These international standards — relating to the promotion of truth, justice, reparation, and guarantees of non-recurrence — are widely accepted as constituting an authoritative reference point for efforts in the fight against impunity for gross human rights abuses and serious violations of international humanitarian law.

²¹ See *id.*, at Principle 32.

²² Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, "Decision establishing the principles and procedures to be applied to reparations", International Criminal Court, Trial Chamber I, ICC-01/04-01/06 (August 7, 2012).

²³ United Nations, *supra* note 1.

²⁴ UN General Assembly, "Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises", A/72/162", (July 18, 2017), at page 17.

²⁵ See *id.*

²⁶ UN General Assembly, "Taking Stock of Investor Implementation of the UN Guiding Principles on Business and Human Rights", Adendum Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/47/39/Add.2 (April 22, 2021), at page 2.

²⁷ See *id.*, at page 8.

²⁸ See Schmalenbach, *supra* note 13.

remedy, consisting of the outcome of remedial processes. It entails the duty to provide the redress to which a complainant is entitled due to the harm suffered.²⁹ This can take the form of restitution, compensation, rehabilitation, satisfaction, and/or guarantees of non-repetition,³⁰ as will be discussed in greater detail in Part 4.

Often, the procedural dimension of remedy is instrumental in securing the outcome of the process, namely, substantive redress for the rights-holders. Because the two dimensions are closely intertwined, international human rights standards recognize the right to effective remedy as a dual concept. As stated by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights), “merely providing access to remedial mechanisms will not suffice: there should be an effective remedy in practice at the end of the process.”³¹

In practical terms, states and business enterprises must address both dimensions of the right to remedy to fulfill their respective obligations and responsibilities. As the Working Group on Business and Human Rights states, “[a]s duty bearers, States should, therefore, ensure that they put in place effective remedial mechanisms that can deliver effective remedies. Similarly, when a business enterprise provides remediation in cases in which it identifies that it has caused or contributed to adverse impacts, such remediation should be effective in terms of both process and outcome.”³²

In short, a remedy is only effective if it entails both access to remedial procedures *and* adequate redress for victims of human rights abuses or harm in the context of business-related activities, including investment activities or DFI-funded projects.

3. The Substantive Dimension of Remedy: The Right to Reparations

As outlined above, the substantive dimension of the right to effective remedy refers to the redress to which the rights-holders are entitled due to the harm suffered. In international law, this dimension is typically described as the right to reparations.³³

Traditionally understood, the aim of the right to reparations is “to place an aggrieved party in the same position as he or she would have been had no injury occurred.”³⁴ Often known as “restitution,” this understanding of reparations seeks complete reparation or *restitutio in integrum*, which is unimpeachable: “from the perspective of victims and survivors, it attempts to neutralize the consequences of the violation they have suffered.”³⁵ This interpretation was influential in the early practice of human rights bodies and courts. Over time, challenges have spurred the development of additional or alternative approaches to reparations.

One of the main challenges that called into question this traditional understanding of the right to reparations is that, in many cases, returning victims of human rights abuses to their original position is “impossible, insufficient, and inadequate.”³⁶ For example, it is impossible to return an individual who has been tortured or killed to their initial state, as if no injury had occurred. With regard to development projects, it is likely to be infeasible to restore an entire ecosystem in the wake of a mining project that resulted in environmental degradation and biodiversity loss, affecting the livelihoods of local communities. Similarly, in cases of large-scale hydroelectric projects, it would not be possible for displaced community members to return to their homes after their lands have been flooded. Under this conception, the right to

²⁹ See *id.*

³⁰ See UN General Assembly, *supra* note 24.

³¹ *Id.*, at page 7.

³² See *id.*

³³ See Haldemann, Unger, and Cadelo, *supra* note 17.

³⁴ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2015), at page 19.

³⁵ Pablo de Greiff, “Justice and Reparations,” in *The Handbook of Reparations*, ed., Pablo de Greiff (Oxford University Press, 2006), at page 456.

³⁶ *Blake v. Guatemala (Reparations and Costs)*, Inter-American Court of Human Rights, IACtHR, Series C No 48 (January 22, 1999), at page 11.

reparation is often rendered “both necessary and impossible.”³⁷

The Inter-American Court of Human Rights (IACtHR), the regional human rights court that has been at the forefront of developing jurisprudence on reparations, provides a salient example of how the concept of remedy has evolved. The IACtHR has historically advanced the concept of “full restitution” wherever possible.³⁸ However, cognizant of the limitations of this “corrective justice” approach and that “nothing can ever ‘wipe out’ the wrong done as if it had never occurred,”³⁹ the IACtHR has pioneered a number of innovative forms of remedy. The IACtHR has opened the door for a broad range of monetary and non-monetary reparative measures when restitution is not possible. For example, the IACtHR has ordered public apologies, the memorialization of victims through monuments or street names, and the amendment or repeal of laws or public policies incompatible with international and regional human rights standards — often in tandem with other more typical monetary measures, such as compensation.⁴⁰

4. A Current Typology of Reparations

The UN’s 2005 Basic Principles on Remedy and Reparations rigorously capture the expansion of the range of reparation measures from the 1980s to the 1990s.⁴¹ Reflecting existing international law and practice, these principles laid out the idea that “full and effective reparation” can be provided through a number of remedial measures: i) restitution, ii) compensation, iii) rehabilitation, iv) satisfaction, and v) guarantees of non-repetition.

This remedial human rights approach, which identifies five forms that reparations can take, is also reflected in the sections of the UN’s Updated Principles to Combat Impunity that deal with the right to reparation and guarantees of non-recurrence.⁴² Although these forms of reparations have been developed mainly within the context of human rights violations for which states are responsible, the Working Group on Business and Human Rights recognizes that “they provide a useful reference point to understand what would constitute an effective, including rights-compatible, remedy under the Guiding Principles [UNGPs].”⁴³

³⁷ This expression is borrowed from Martti Koskeniemi in *The Politics of International Law* (Hart Publishing, 2011), at page 153.

³⁸ Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2. ed., 1. paperback ed (New York, NY: Cambridge Univ. Press, 2014).

³⁹ Haldemann, Unger, and Cadelo, *supra* note 17, at Principle 31.

⁴⁰ Pasqualucci, *supra* note 38.

⁴¹ During the late 1970s and through the 1980s and 1990s, the UN Human Rights Committee, created pursuant to the ICCPR, insisted that the applicants be afforded an effective remedy. It has suggested appropriate remedies, including (a) public investigation to establish the facts, *see* Comm. No. 84/1981 (Guillermo Ignacio Dermit Barbato and Hugo Harold Dermit Barbato v. Uruguay) U.N. GAOR, 38th Sess., Supp. No. 40 at 124, U.N. Doc. A/38/40 (1983) (deprivation of the right to life); (b) bringing the perpetrators to justice, *see* Comm. No. 30/1978 (Irene Bleier Lewenhoff and Rosa Valino de Bleier v. Uruguay) U.N. GAOR, 37th Sess. Supp., No. 40 at 130, U.N. Doc. A/37/40 (1982) (deprivation of the right to life); (c) compensation, *see* Comm. No. 25/1978 (Carmen Amendola and Graciela Baritussio v. Uruguay) U.N. GAOR, Hum. Rts. Comm., 37th Sess., Supp. No. 40 at 187, U.N. Doc. A/37/40 (1982) (torture); (d) ensuring non-repetition of the violation, *see* Cases Bleier v. Uruguay above cited; (e) amending the law, *see* Cases Bleier v. Uruguay above cited; (f) providing restitution of liberty, *see* Comm. No. 577/1994 (Polay Campos v. Peru), U.N. Doc. A/53/40, vol. II, 36, para. 10 (denial of a fair trial requires release of the applicant), employment, *see* Comm. 641/1995 (Gedumbe v. Congo), U.N. Doc. A/57/40, vol. II, 24, para. 6.2 (the author is entitled to reinstatement to public service and to his post, with all the consequences that this implies, or, if necessary to a similar post, with arrears in salary), or property, *see* Comm. 747/1997 (Des Fours Walderode v. the Czech Republic), Views of 30 Oct. 2001, U.N. Doc. A/57/40, vol. II, 88, para. 95; (g) providing medical care and treatment, *see* Comm. No. 63/1979 (Raul Sendic Antonaccio v. Uruguay), Views of 28 Oct. 1981, U.N. Doc. A/37/40, Annex VIII, 114 (cruel, inhuman or degrading treatment or punishment); and (h) guarantees of non-repetition, *see* Comm. No. 161/1983 (Joaquin David Herrera Rubio v. Columbia) U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 190, U.N. Doc. A/43/40 (1988) (in this case of disappearance and death, Committee said the State had the duty to adopt effective measures of reparations, proceed with the investigations, and take measures to ensure that similar violations did not occur in the future). Likewise, at the UN level, some special rapporteurs had also noted or emphasized the right to reparations. In 1998, the report of the special rapporteur on violence against women, its causes and consequences, referred to the need for legal remedies for victims, including an individual right to compensation, rehabilitation, and access to social services, as well as the provision of economic, social, and psychological assistance to victim-survivors of sexual violence during times of armed conflict (E/CN.4/1998/54.). At the regional level, the IACtHR afforded early remedies. From the initial case of Velásquez Rodríguez v. Honduras, on July 21, 1989, the tribunal asserted that “reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.” Consequently, the court ordered compensation for the family members of the direct victim, based on the loss of earnings and for moral damages. In addition, the tribunal pointed out that “the judgment (...) is in itself a type of reparation and moral satisfaction of significance and importance for the families of the victims.” Likewise, in Blake v. Guatemala (Reparations), on January 22, 1999, the Court also awarded moral damages to the family. In Loayza Tamayo v. Peru, on November 27, 1998, the Court accepted the applicant’s argument for a new category of damages, in addition to *daño emergente* and *lucrum cessans*. The judgment recognized that victims of human rights abuses suffer interference with their ‘proyecto de vida,’ a concept similar to but broader than enjoyment of life. Linked to the notion of individual self-determination, it allows a damage claim for interference with the victim’s fulfillment founded upon personal capabilities and goals.

⁴² *See* UN General Assembly, *supra* note 20, at Principles 31-38.

⁴³ UN General Assembly, *supra* note 24, at page 13.

Notably, commentary on Principle 25 of the UNGPs recognizes that the responsibility of business actors to actively engage in remediation may take a wide range of substantive forms.⁴⁴

It is paramount to highlight that this typology of five forms of reparations is not meant to be an exhaustive list of all possible remedial measures. Rather, it emerged through years of practice by human rights bodies and courts and was later distilled into international legal standards. At the same time, this typology of reparations is deeply valuable precisely because it grew out of practices that sought to address specific harms and respond to the expectations and needs of those whose rights had been violated in numerous cases.

The forms of reparations presented below are constantly being developed and expanded in response to victims' needs and priorities. For remedy to be adequate and effective, those directly harmed must participate in the design, implementation, and monitoring of reparation measures or remedial action plans.⁴⁵

i) Restitution

As described above, restitution seeks to restore the victims to their original situation before a human rights violation or harm occurred. Although this is an aspiration that can rarely be fulfilled, there may be cases where restitution is possible, such as through:

- restoration of liberty, identity, family life, or citizenship;
- return to one's place of residence; and
- return of property.⁴⁶

The Working Group on Business and Human Rights provides the following examples in the context of

business-related human rights abuses: “if a woman was dismissed from her job or denied a promotion because of her pregnancy, she should be reinstated or promoted to the position that she deserved; if an enterprise caused pollution, it should be required to restore the environment as part of the ‘polluter pays’ principle.”⁴⁷

A landmark decision by the IACtHR in 2020 provides guidance on specific restitution measures related to the environment. In the case *Indigenous Communities Members of the Lhaka Honhat Association v. Argentina*,⁴⁸ the Court-ordered actions aim to: conserve the surface and groundwater in the Indigenous territory, guarantee permanent access to drinking water, avoid further loss of forestry resources, and provide permanent access to culturally appropriate food to all the members of the Indigenous communities in this case.

ii) Compensation

Compensation refers to a form of monetary reparation, and it is often used when restitution is found to be impossible. Compensation involves “measures that seek to make up for the harms suffered through the quantification of harms”⁴⁹ and can be awarded for or encompass both pecuniary harm (such as damages to goods and trade, including loss of wages and the capacity to earn a living) and non-pecuniary harm⁵⁰ (including physical and psychological injuries, as well as moral damage such as individual pain or suffering).

One area where compensation is often employed as a form of reparation is when attempts are made to remediate harm to the environment. Such environmental damage is often impossible to undo, such as when oil spills irreversibly harm or destroy fragile marine ecosystems. In these instances, various approaches may be applied in an

⁴⁴ See United Nations, *supra* note 1, at Commentary on Principle 25: “Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.”

⁴⁵ UN General Assembly, *supra* note 24, at Part III on “Centrality of rights holders in access to effective remedies.”

⁴⁶ See Haldemann, Unger, and Cadelo, *supra* note 17, at Principle 34.

⁴⁷ UN General Assembly, *supra* note 24, at page 13.

⁴⁸ *Indigenous Communities Members of the Lhaka Honhat Association v. Argentina*, (Merits, Reparations and Costs), IACtHR, Series C No 400 (February 6, 2020).

⁴⁹ Greiff, *supra* note 35, at page 452.

⁵⁰ See Douglass Cassel, “The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights,” in *Out of the Ashes: Reparations for Gross Violations of Human Rights*, ed., M. Bossuyt et al. (Intersentia, 2006).

attempt to translate the value of lost habitats and biodiversity into financial compensation.⁵¹

However, as with restitution, compensation as a form of remedy has considerable limitations. When it comes to remediating environmental damage, for example, there is often a lack of consensus about what constitutes this damage. In addition, it is frequently impossible to quantify this damage in financial terms. For instance, in the case of communities living in the Cajón del Maipo in Chile, the devastating impacts of a hydroelectric project on the entire Maipo River basin have resulted in severe loss of water, biodiversity, livelihoods, and cultural cohesion. The losses caused by these impacts — particularly when considered in the aggregate — are impossible to calculate.⁵² For this reason, any attempt to determine appropriate compensation for such harms must be informed by the communities who have been affected by the environmental damage directly. At the same time, many communities whose lands have been polluted or degraded — such as the communities from Chile mentioned above — also emphasize that the value of religious, spiritual, and social cohesion linked to having a strong sense of belonging in a particular place⁵³ often goes beyond what money can buy, thus rendering compensation inadequate.

iii) Rehabilitation

Rehabilitation as a form of reparation may include medical and psychological care and legal and social services.⁵⁴ A holistic conception of rehabilitative remedies should be employed in the context of business-related human rights abuses, in order to encompass “all sets of processes and services ... to allow a victim of serious human rights

violations to reconstruct his/her life plan or to reduce, as far as possible, the harm that has been suffered.”⁵⁵ The Working Group on Business and Human Rights provides this example to illustrate the holistic approach required: “if people are displaced from their land because of an infrastructure project or the construction of a dam, only a provision for a suitable alternative piece of land may offer an effective remedy, because land can support livelihood for generations.”⁵⁶

iv) Satisfaction

Satisfaction is an especially broad category that encompasses numerous dissimilar measures, often aiming to emphasize the wrongful nature of the harm, publicly and symbolically acknowledge suffering, and respect the dignity of those who have been harmed. These measures might include:

- the cessation of continuing violations,
- disclosure of truth,
- recovery of bodies,
- an official declaration to restore dignity,
- a public apology and acknowledgment of wrongdoing,
- sanctions of perpetrators,
- commemorations, or
- the inclusion of an account of the violations in educational material.⁵⁷

For example, a “fact-finding inquiry to ascertain who caused human rights abuses (e.g., forced disappearance or killing of human rights activists) may assist in healing the emotional or psychological injury of the victims or survivors.”⁵⁸ Moreover, “[t]he rights holders affected by business-related human rights abuses often regard a

⁵¹ For example, the United Nations Compensation Commission (UNCC) is a unique model for liability and compensation of environmental damage in an international context. The 1990-1991 Gulf War to evict Iraq from Kuwait, a public spectacle of environmental damage, was followed by the UNCC’s more discreet legal process that catalogued, assessed, and awarded money to pay to clean and repair the damaged soil, water, coastal ecosystems, and other harms. The UNCC environmental claimants most frequently sought compensation for the cost of response, monitoring, assessment, remediation, and restoration activities. See e.g., Cymie R. Payne, *Developments in the Law of Environmental Reparations*, vol. 1 (Oxford University Press, 2017).

⁵² See “No Alto Maipo: The Chilean Government Must Act Upon the Call from UN Experts with Urgency, Prioritizing Water and Health Rights over Economic Interests,” Center for International Environmental Law, Press Room, August 21, 2020, <https://www.ciel.org/news/no-alto-maipo-the-chilean-government-must-act-upon-the-call-from-un-experts-with-urgency-prioritizing-water-and-health-rights-over-economic-interests/>

⁵³ See generally, Bruley, E., B. Locatelli, and S. Lavorel. “Nature’s contributions to people: coproducing quality of life from multifunctional landscapes.” *Ecology and Society* 26(1):12. (2021)

⁵⁴ See Haldemann, Unger, and Cadelo, *supra* note 17.

⁵⁵ Clara Sandoval, *Rehabilitation as a Form of Reparation under International Law*, (London, UK: Redress Trust, 2009), at page 10.

⁵⁶ UN General Assembly, *supra* note 24, at page 15.

⁵⁷ See Haldemann, Unger, and Cadelo, *supra* note 17.

⁵⁸ UN General Assembly, *supra* note 24, at page 15.

genuine and meaningful public apology as a vital remedy to partly restore what cannot be compensated by money.”⁵⁹

v) Guarantees of Non-Repetition

Guarantees of non-repetition are measures that aim to prevent the recurrence of similar harm in the future. As the Working Group on Business and Human Rights has noted, states and business enterprises must “learn lessons from past instances of human rights abuses and take steps to avoid any replication of similar abuses at the same or other sites in future. Guarantees of non-repetition can be a useful forward-looking tool in this context, both in avoiding a repeat of specific abuses and in preventing business-related human rights abuses generally.”⁶⁰ Examples of guarantees of non-repetition include:

- institutional reforms,
- raising awareness about integrating human rights norms into business operations, or
- introducing compliance programs.

These five forms of reparations are not mutually exclusive; rather, it may often be appropriate and even necessary to adopt numerous forms of reparations to ensure that remedy is as effective and comprehensive as possible. Since each measure addresses different aspects of the consequences of the harm suffered, they are not easily interchangeable. Carrying out a remedial action without considering the comprehensive nature of the reparation scheme might compromise any reparative effect as a whole. For example, disclosure of truth as a satisfaction measure in the absence of compensation or rehabilitation efforts may be received as an empty gesture. In the same

way, material or monetary compensation in the absence of truth-telling, official acknowledgment of wrongdoing, or a public apology may be perceived as an attempt to buy the acquiescence of victims to avoid assuming responsibility.⁶¹

Additionally, while many of the above-described forms of reparations (specifically restitution, compensation, rehabilitation, and satisfaction) are characterized by a “backward-looking” focus on remedying harms that have already occurred, guarantees of non-recurrence are “forward-looking” in that they seek to prevent similar violations or harms from occurring again in the future. It is often important to include both types of reparations to ensure that remedy is seen as effective and meaningful. For example, applying an exclusively “backward-looking” approach to remedy might effectively return the victim to an original state of vulnerability, such as one of deprivation or discrimination, in which violations were and will continue to be likely. In such contexts, victims may only perceive remedy to be effective if it transforms the conditions that allowed for or caused the initial violation to prevent future violations.⁶² Similarly, victims who are only provided with “forward-looking” remedial actions designed to avoid hypothetical harms to others in the future are likely to question why their present situation of harm is not being addressed in some way, whether concretely or symbolically.⁶³ An exclusive focus on preventing future harm undermines the ability of reparations to serve as a way to recognize and acknowledge past wrongdoing while also repairing harm that has already occurred.⁶⁴

⁵⁹ See *id.*

⁶⁰ See UN General Assembly, *supra* note 24, at page 16.

⁶¹ Greiff, *supra* note 35.

⁶² Rodrigo Uprimny Yepes, “Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice,” *Netherlands Quarterly of Human Rights* 27, no. 4 (December 2009): 625-47.

⁶³ In 2017, the Coordinadora Ciudadana No Alto Maipo, Ecosistemas, and CIEL filed two separate complaints regarding the Alto Maipo Hydroelectric Project at the Independent Consultation and Investigation Mechanism (MICI) of the Inter-American Development Bank (IDB) and Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC). The Management Action Plan created as a result of the findings and recommendations of the MICI’s Compliance Review Report contained forward-looking remedial actions for the creation of a blanket zero-tolerance policy toward gender-based violence as part of the IDB Group’s environmental and social safeguard policies, as well as a series of measures regarding ongoing project operations. Conversely, the Management Action Plan stemming from the CAO’s Compliance Investigation Report contained only forward-looking remedial actions on numerous topics including the IFC’s approach to hydropower projects, stakeholder engagement for cumulative impact assessment and management, guidance on the management of gender-based violence for staff, broad community support disclosure, ambient air quality monitoring, disclosure regarding environmental and social impact assessment-related documentation, and disclosure systems. Though none of the measures addressed the situation of harm to communities in the Cajón del Maipo in Chile, they will likely have bearing on future projects at both the IDB and the IFC.

⁶⁴ Margaret Urban Walker, “Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations,” *International Journal of Transitional Justice* 10, no. 1 (March 2016): 108-25.

Finally, just as harms can be experienced both individually and collectively (for example, through the destruction of livelihoods and relationships, as well as “community bonds, capacities, and knowledge”⁶⁵), so, too, can reparations seek to remedy individual and/or collective harm. Generally speaking, collective reparations “can better fulfill victims’ shared needs.”⁶⁶ For example, in the case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the IACtHR ordered the state to adopt measures for the creation of an effective mechanism for delimitation, demarcation, and titling of the Indigenous communities’ territory, in accordance with their customary law, values, and customs.⁶⁷ Although this precedent was groundbreaking for Indigenous Peoples throughout Latin America, more than 20 years after the decision, communities continue to face obstacles in the process for demarcation and titling due to land exploitation and conflict in Nicaragua, demonstrating just how difficult it is for communities to obtain effective remedy.

Similarly, a collective approach to reparations is usually present in “symbolic measures aimed at repairing the group harm, awakening public understanding, and remembrances of victims’ suffering, such as apologies, memorials, and guarantees of non-repetition.”⁶⁸ For instance, in cases of severe damage to ecosystems or communities’ territories, forms of collective reparation could serve a vital role in rehabilitating their lands and livelihoods, providing relief to an entire affected community and helping its members rebuild their lives.

5. Applications from International Law to Inform DFIs Advancing the Issue of Remedy

In recent years, many DFIs have made significant progress in establishing systems and mechanisms to ensure that communities harmed by development projects have access to spaces where they can voice their concerns,

have them investigated, and even enter a dialogue with the project developers. This could be considered progress in terms of establishing the procedural aspect of remedy. However, the institutions are still failing to provide substantive remedy for harms that occur in the context of projects that they finance, even when their accountability mechanisms establish that they have fallen short of their own environmental, social, and governance standards. As a result, communities around the world bear harmful consequences.

While DFIs’ existing accountability mechanisms could serve as a foundation on which to build policies or frameworks for remedial action, development banks must go further in establishing their commitments to providing remedy when it is due. It is both necessary and possible for DFIs to move swiftly to establish rights-based frameworks where the IAM, management, and staff act in concert, with board support, to provide remedy based on relevant international standards and existing best practices.

When considering how to bridge this gap, DFIs should closely examine the treatment that the concept and practice of remedy has received in international human rights law. In particular, DFIs should recognize that no single form of remedy is sufficient to respond to the many kinds of harm that may occur. Just as no single reparation measure is adequate to deal with the myriad harms that the field of international law sought to address, so, too, will it be insufficient for DFIs to conceive of any one form of remedy — whether monetary compensation or forward-looking institutional reforms — as the only tool with which to remedy harm.

Instead, DFIs should consider the whole range of tools available to provide remedy. In doing so, DFIs must recognize that participation by affected communities is essential to ensuring that remedy is effective and

⁶⁵ Hugo van der Merwe, “Reparations through Different Lenses: The Culture, Rights and Politics of Healing and Empowerment after Mass Atrocities,” in *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation*, eds., Jo-Anne M. Wemmers, Routledge Frontiers of Criminal Justice 19 (Milton Park, Abingdon, Oxon: Routledge, 2014), at page 202.

⁶⁶ Luke Moffett, “Transitional Justice and Reparations: Remediating the Past?,” in *Research Handbook on Transitional Justice*, eds., Cheryl Lawther and Dov Jacobs, *Research Handbooks in International Law Series* (Cheltenham, UK: Edward Elgar Publishing, 2017), at page 388.

⁶⁷ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs), IACtHR, Series C 79 (August 31, 2001) at paras. 164-167.

⁶⁸ See Luke Moffett, *supra* note 64, at page 387.

meaningful. Each affected community's experience of harm is different, and therefore, their identified needs and priorities for remedy vary. In addition, the people most affected are those most intimately aware of what measures — concrete or symbolic, backward- or forward-looking, individual or collective — could be most effective at remedying their particular situation. Finally, as illuminated by the experiences from the field of international law, input by those harmed can mean the difference between remedial actions being perceived as empty gestures or as profoundly meaningful steps toward repair.

Recommendations

- DFIs should promptly develop frameworks for remedial action when harms occur in the projects that they finance. Such remedial frameworks are essential to ensuring that existing accountability processes lead to meaningful outcomes for affected communities. They are also necessary to meet banks' responsibilities to provide not only procedural but also substantive remedy.
- DFIs should incorporate the perspectives of affected communities and learn from past complaints and experiences as they engage in the process of developing frameworks for remedial action.
- The remedial frameworks ultimately adopted by DFIs should be expansive in their conception of remedy, recognizing that remedy may take many forms. Depending on the nature of the harm, the community's expressed needs and priorities, and other factors, effective remedy may require restitution, compensation, rehabilitation, satisfaction, or guarantees of non-recurrence. In many cases, a combination of these forms of reparations will be necessary to provide effective remedy.
- The remedial frameworks ultimately adopted by DFIs should guarantee that affected communities have the opportunity to directly participate in determining what remedy should entail in their cases by engaging in the design, implementation, and monitoring of remedial action plans.



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