

# Balancing Specificity of Reparation Measures and States' Discretion to Enhance Implementation

## 1. Introduction

Decisions and judgments adopted by human rights supranational treaty bodies can and often include recommendations or orders providing remedies or reparations to the victims as well as what the State authorities should do to ensure violations do not occur in the future. However, implementation rates are considered to be low. Scholars, supranational courts and treaty bodies, and others have attempted to find ways to address this low rate of implementation (Open Society Justice Initiative 2010; Hillebrecht 2014, Viljoen and Louw, 2007). A recurrent statement when implementation of international orders/recommendations in individual cases is considered is the belief that greater specificity of the measures helps compliance: 'critical for increased compliance is appropriate specificity in remedial orders' (Antkowiak 2011: 313; Huneeus 2011: 524, Staton and Romero 2011; Baluarte 2012: 274). Indeed, judicial 'clarity' in decisions, it is argued, can influence compliance (Staton and Romero, 2011). Others, however, have been more cautious considering that specificity is only 'a potential cause of compliance' (Kapiszewski and Taylor 2013: 828).

This article is one of the outputs of an Economic and Social Research Council funded project which attempted to identify the extent to which the reparations ordered by supranational bodies were implemented by the state authorities ([www.bristol.ac.uk/law/hrlip](http://www.bristol.ac.uk/law/hrlip)). As detailed further in this issue (Murray) we selected nine countries, three each from Africa (Burkina Faso, Cameroon and Zambia), the Americas (Canada, Colombia and Guatemala) and Europe (Belgium, the Czech Republic and Georgia). We then chose decisions or judgments adopted by the African Commission and Court on Human and Peoples' Rights, the Inter-American Commission and Court on Human Rights and the European Court of Human Rights, as well as the UN Human Rights Committee, Committee Against Torture and CEDAW. We adopted a process-tracing approach (Kapiszewski and Taylor 2013), involving desk-based analysis; interviewed over 300 individuals who were members of supranational bodies and their secretariats, government officials, representatives of victims (lawyers or not), victims, scholars, parliamentarians, members of the judiciary and national human rights institutions (NHRIs), academics and others; held in-country workshops and focus groups and attended and participated in sessions and meetings with the supranational bodies themselves.<sup>1</sup>

This was not a comparative study. Rather, our aim was to garner a detailed insight, using the particular cases as lens, into what happens when a decision or judgment is adopted by a supranational body. We examined both the processes and dynamics that occur and the role that various actors play, as well as case-centred factors, namely issues associated with particular judgments/decisions that influenced different actors' responsive to them. One such question, and on which this article will focus, was whether the specificity of recommendations/orders in a judgment or decision impacted upon the domestic responsiveness towards it. We therefore explored how different domestic actors identified what was required of a judgment or decision, whether they understood what was needed, and whether they welcomed specificity or saw it as an encroachment on their decision-making. In addition, we also examined the extent to which

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<sup>1</sup> Further information on the methodology is given in Murray, this issue. The interviews are anonymous and therefore have been coded by the Project team. We indicate the code, the location and date. If, however, this information risks identifying the interviewee, the location and date have been omitted. See [www.bristol.ac.uk/law/hrlip](http://www.bristol.ac.uk/law/hrlip).

the supranational body deferred to states in respect of the discretion afforded to design appropriate reparations, and how ‘subsidiarity’ applied.

This article focuses primarily on the Inter-American and African human rights systems and on three UN treaty monitoring bodies: the Human Rights Committee, the Committee Against Torture, and CEDAW (see Donald and Speck 2019 for a more engaged discussion on Europe). Although their instruments most commonly do not indicate the types of remedies that can be awarded (Çali 2018: 227), we saw these supranational bodies recommending and ordering a wide range of, sometimes innovative, reparations (Naldi 2001; Myjer and Kempees 2009). Among the reparations examined in our Project were those articulated in the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines; Human Rights Committee, 2004), namely ‘restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition’. (UN Basic Principles and Guidelines, IX.18). In addition, the Inter-American Court on Human Rights (IACtHR) has opted for six forms of reparation: the obligation to investigate, prosecute and punish, which is both a form of reparation for the Court but also, and primarily, a substantive obligation that states have prior to any violation taking place under the American Convention and other regional treaties; restitution; rehabilitation; satisfaction; compensation for pecuniary and non-pecuniary damages and legal costs; and guarantees of non-repetition (i.e. IACtHR, *Coc Max and Others v. Guatemala* and *Sawhoyamaxa Indigenous Community v. Paraguay*). Restitution, as the Basic Principles and Guidelines explain, aims to ‘restore the victim to the original situation’ such as in *Mazou v Cameroon* where the Human Rights Committee called on the authorities to ‘reinstate the author of the communication in his career’ (*Mazou v Cameroon*, UN Doc. CCPR/C/72/D/630/1995, para.9). Compensation is the financial award which redresses pecuniary and non-pecuniary damage and was common in the cases we examined, although there was variability in terms of whether quantum was provided and on the quantum awarded for similar violations. Rehabilitation is provided for medical, education, work and legal services, among others. Satisfaction measures aim to dignify victims for the non-pecuniary damage suffered through public apologies or memorials, among others. In many of our cases the state was also required to publish the decision or judgment.

A great number of the cases studied in our Project included individual forms of reparation, but fewer included guarantees of non-repetition with the exception of the IACtHR and the IACommHR that often order and recommend them. Guarantees of non-repetition are those measures aimed at preventing the recurrence of similar violations in the future by trying to address the root and structural causes of human rights violations (Human Rights Committee 2016: para 2). During the course of our research we saw that some bodies tend to be relatively vague when they recommend or order guarantees of non-repetition. For example, the Human Rights Committee recommends that a state be ‘required to prevent such violations from occurring in the future’ (*Akwanga v Cameroon*, UN Doc. CCPR/C/101/D/1813/2008, para. 14); and CEDAW, has called on Georgia to intensify awareness-raising campaigns and introduce a zero-tolerance policy in respect of violence against women and, more specifically, domestic violence (*X and Y V Georgia*, UN Doc. CEDAW/C/61/D/24/2009, para. 11(b)(ii); See *Belousova v Kazakhstan*, UN Doc. CEDAW/C/61/D/45/2012, para. 11(b)(iii)).

Some of the decisions from the Inter-American system, both the Inter-American Commission and the Inter-American Court within the Organisation of American States, also included collective reparations, that acknowledged the harm suffered by groups or communities by the virtue of being an indigenous community or by their connection to their land, or because of their cultural ties, particularly in the context of massive human rights violations.

Finally, also among our cases were decisions or judgments which contained no specifics on the reparations at all, but simply required that the state provide the victim with ‘an effective remedy’ (e.g. Human Rights Committee, *Dorothy Kakem Titiahonjo v Cameroon*, Communication No. 630/1995, Views adopted: 26 October 2007).

### **Between specificity and states discretion when crafting forms of reparation in international human rights judgments and decisions**

What does it mean to say that an order/recommendation is specific? Others have used different terms such as ‘clarity’ in judicial decisions (Staton and Romero 2011) or Çali’s ‘intrusiveness’ (Çali 2018). Donald and Speck have defined specificity to mean ‘the degree of detail contained in the indication of particular non-monetary individual or general measures...the more specific the judgment, the less discretion remains to the state as to what remedial measure is required and possibly also by when it should be achieved’ (Donald and Speck 2019: 84). While this definition captures important elements of the discussion, this is a concept developed to assess whether there are any relevant changes in the content of remedial measures at the ECtHR. We would argue that specificity is a feature that can apply to any form of reparation, monetary or non-monetary, individual or general, material or symbolic. Based on the data we gathered in our cases, specificity can refer to the indication of key criteria in the wording of the measure that would allow the state to know what it is obliged or recommended to do; when does the state have to deliver on it; which authorities should take responsibility for it; and how should the state report on steps taken towards implementation. Certainly, as Donald and Speck indicate, the more criteria that are provided by the supranational body, the less discretion the state would have to decide on how to comply with the decision that has been made.

Donald and Speck’s definition pictures ‘specificity’ as if it happens in one moment: when the decision is made. Such an understanding misses an important dimension of specificity that comes about as a result of the process of monitoring, cajoling and promoting implementation developed by some supranational bodies. During such a process, the decision, while in principle not altered, might be supplemented with further detail to help states to take the necessary steps towards compliance, whether this takes place when the decision is adopted or subsequently (Donald and Speck 2019: 113). This happens in relation to both specific and non-specific orders or recommendations. In this article we refer to both dimensions of specificity.

The debate on specificity needs to be situated within a consideration of what role supranational bodies should be undertaking in determining the reparations the state should provide to address its wrongful acts and the appropriate balance to be struck between specificity and discretion to the state authorities. Who, ultimately, is best placed to give this detail? This article takes Neuman’s ‘three model’ approach further by looking at how state authorities in our cases have responded to degrees of specificity from supranational bodies. Thus, did the body provide the victim with a specified remedy, setting out in detail what the state should do (‘direct remedy model’); leave it to the domestic authorities to decide how best to do so but providing criteria or boundaries for that discretion (‘monitoring model’); or ‘facilitate negotiation’ of the reparation at the domestic level through a framework or procedure for the victims and state authorities to reach an agreement (‘negotiation model’) (Neuman 2014)? And how did states respond

accordingly? These approaches will be a further factor to influence the degree of specificity that the international bodies should provide, both at the adjudication stage and post-decision.

This article argues that specificity is a constant process of refining and clarifying the meaning of different forms of reparation. Rather than simply consider it as applying to the content of the reparation, it needs to be further unpacked in the context of the dynamics of implementation that are unfolded before and after a decision, the deadlines imposed, who is responsible and who is a victim, and how the decision is reasoned. We conclude that a more nuanced approach to specificity versus ambiguity is needed, tailored to each reparation, each state and each case as specificity does not always yield better implementation although in the right circumstances it could trigger it.

### **3.1. Content of the reparation**

Three UN Human Rights Committee decisions illustrate the approach a supranational body can take, varying between 'remedial', to 'negotiation' to 'monitoring' (Neuman 2014), with greater specificity in its later decision. In *Lovelace v. Canada*, (1981), the first case decided by the Committee, concerning a discriminatory law which meant that a woman lost her Aboriginal status if she married a non-Aboriginal man, the Committee did not propose a specific remedy. In *Waldman v Canada* (1996) concerning financial hardship experienced by the father who sent his son to a Jewish School and not to a Catholic one that was subsidised by the state, the Committee called on the state 'to provide an effective remedy, that will eliminate this discrimination'. Furthermore, in *Maya Abromichik v Belarus* (2018), the Committee found violations regarding the detention and ill-treatment of the victim after a peaceful assembly in Minsk following the results of the presidential election. It called on the state to conduct an investigation into the allegations of ill-treatment, provide 'adequate compensation and appropriate measures of satisfaction, including reimbursement of any legal costs and medical expenses, as well as for non-pecuniary losses, incurred by the author', as well as to 'issue a formal apology to the author'.

The IACommHR, similarly, appears to have shifted towards recommending more specific forms of reparation (the remedial model). In one of the latest cases referred to the IACtHR, *Azul Rojas Marín and Other v. Peru*, concerning the illegal detention, discrimination, torture and sexual violence of Azul because of her sexual orientation, recommended the Court to order that Azul and her mother be fully repaired for the violations suffered, including compensation and satisfaction measures and a public act acknowledging international responsibility by the state; an effective investigation of the sexual violence suffered by Azul; and measures to prevent Peru from using *ne bis in idem* or other similar legal tools to obstruct the investigation. It also called for the IACtHR to impose administrative, disciplinary and/or criminal measures to all state servants that contributed to the denial of justice in the case; to provide, free of charge, immediately and for as long as necessary, the medical and psychological treatment needed by the victim; to provide various guarantees of non-repetition including legislative reforms to permit access to justice by members of the LGTBI community; and to recommend that Peru to ratify the Inter-American Convention Against all Forms of Discrimination and Intolerance.

For its part, the IACtHR has been recognised not only as the supranational body with the most holistic approach to reparations (Cavallaro et al 2019: 804), but also as the body that has engaged the most with specificity as a particular feature of its approach to reparations (Krsticevik 2007: 41, Cavallaro et al 2019: 838). The Court follows, most of the times, a reparations model although in recent years it has began a process of revision of its approach to reparation that, as explained in the next pages, show a Court more ready to embrace variants of Neuman's monitoring or negotiation models.

The African Commission and Court on Human and Peoples' Rights have varied from generic reparations (monitoring model) (such as 'take all the necessary measures for guaranteeing the effective protection of human rights at all times', in the context of post-electoral violence in Cameroon: Communication 272/03, *Association of Victims of Post Electoral Violence and INTERIGHTS*, Decision adopted: 25 November 2009) to the much more detailed (such as that Burkina Faso 'by repealing custodial sentences for acts of defamation': ACtHPR, *Konate*). Furthermore, as noted below, the ACtHPR has also been called upon to interpret its judgments to provide further clarity on the content of the reparations awarded (remedial model). It is difficult to discern a particular trend or strategy in their approach.

The approach to specificity can depend on the type of reparation. For example, with respect to the quantum of compensation (see e.g. Fikfak 2019; Murray and Sandoval 2020; Fox Principe 2017), neither the UN Human Rights Committee, nor the ACHPR tend to set an amount, although the latter has done so in a handful of cases (e.g. Communication 416/12, *Jean-Marie Atangana Mebara v Cameroon*, 8 August 2015). The three regional courts have ordered specific amounts of money as compensation.

Finally, in our Project we noted instances where the supranational body's approach to specificity was influenced by its attempt to anticipate what the state would say/do to implement orders/recommendations and pre-empted, in the reparations, any implementation obstacles before they arose. So, for example, with respect to investigations, national laws such as statutes of limitations, will dictate whether and how an investigation could be initiated. In cases where states rely on *ne bis in idem* to avoid complying with the obligation to investigate, prosecute and punish alleged perpetrators of human rights violations, the Inter-American bodies have pre-empted these actions by clearly indicating that such legal measures could not be used. The IACommHR did so in the case of *Azul Rojas Marin* referred to above, and in *V.P.R v. Nicaragua* (IASHR032 and Baluarte 2012: 317, IACommHR, Case 12.690, Report N. 4/16, 13 April 2016). The IACtHR has also used this approach, for or example, in *Dos Erres v. Guatemala*, explicitly listing various obstacles, such as amnesties, statutes of limitation and *non bis in idem* that the state could not use to avoid investigating with due diligence (*Dos Erres*, para. 233).

### **3.2. Deadlines**

Specificity does not just relate to the content or type of reparation but also the timeframe relevant to its implementation. The supranational bodies use deadlines in a number of ways, the majority of them to indicate when the state should report back on the actual implementation of the measures. The ACHPR and UN Human Rights Committee ask that the state report back within 180 days as a single deadline. While the wording of the decision is usually that the state is required to report on the measures they have taken to implement the decision, the implication has been, among some state officials we spoke with, that this is also the time within which the state should have actually implemented the decision. They then consider this, as one official told us, 'too short', not least because it did not permit them to obtain even relevant information from other government departments (Interview, February 2018).

As a general rule, the IACtHR usually gives a year to the state to report on actual implementation of measures and this is counted from the moment of notification of the judgment (i.e. IACtHR, *La Rochela v. Colombia*, operative para 14). But the Court also provides a more sophisticated approach to deadlines. For example, in *Pueblo Bello*, concerning the disappearance and extrajudicial execution of 43 victims by paramilitary forces in 1990, the Court ordered Colombia to report every six months on all the measures taken, and particularly the results

achieved, to ensure that an effective investigation took place (IACtHR, *Pueblo Bello*, para. 269). However, often, in cases concerning the duty to investigate, the Court's usual approach is that the state should report within one year but that it should take effective measures 'within a reasonable time' to clarify what happened (IACtHR, *La Rochela*, para. 295 or *Velásquez Paiz and Others v. Guatemala*, oper. para. 9). The Court often reminds states in its resolutions on monitoring compliance of the serious consequences of not investigating within a reasonable period of time (IACtHR, *Resolution 12 Guatemalan Cases*, 2015, para. 170).

In other cases, measures of satisfaction, such as the building of a monument or giving an apology, the IACtHR determines that these should take place within a year (*Pueblo Bello*, operative paras. 13-14, *Genesis*, para. 447, *Dos Erres*, para. 265); publication of the judgment within six months (*Pueblo Bello*, operative para. 15, *Genesis*, para. 445); and the payment of compensation within 12 months (*Dos Erres*, para. 305). If the state was unable to pay within the timeframe given by the Court because of causes attributable to the beneficiaries of the measures and not to the state, the state has been required to place the money in a bank account for the victims. This will be held there for 10 years, after which time, if not claimed, it will be returned to the state (*Genesis*, paras. 482-483). If the deadline for the payment of compensation is not complied with, as a general rule the state has to pay default interest, an approach also adopted by the ACtHPR. The payment of legal costs should happen within a year (*Genesis*, para. 340).

The degree of specificity given by the IACtHR to deadlines shows that the Court uses them both as a mechanism to put pressure on states but also to ensure that things move forward. It is thus worth considering whether different deadlines in relation to different measures, such as those provided by the IACtHR, offer a more structured way for the supranational body or victims to engage with the state authorities post-decision (Interview D.2, April 2017) and thus for actual compliance to occur. Different deadlines may be more realistic in enabling the state to take action. They also constitute a tool to be used by the legal representatives of the victims to put pressure on the state so that it implements measures (COL016, Bogota, 28 July 2015). In addition, a deadline makes it clear to the state authorities that the supranational body expects results within x amount of time, and this in turn can, we were told, help to move things along at the national level (COL015, 28 July 2015). Variable deadlines can enable the supranational body to take into account the nature and complexities involved in the implementation of the reparation measure at stake, and the hurdles the state would have to overcome to comply with the measures ordered. Finally, they can signal to the victims and their legal representatives that the measures may require more time, thereby underscoring that the state is expected to take at least some action (Berinstain 2008:312).

### ***3.3. Indication of state actors responsible for compliance***

In most instances, in our cases, the recommendations or orders were addressed simply to the 'state' or the 'government', although this is not an approach consistently adopted. While identifying particular state authorities to implement aspects of the decision or judgment at least clarifies the lines of responsibility, yet it is not without its challenges. For example, the ACHPR has on in one decision, addressing its recommendations to 'the Respondent State', then called on it to '[e]nsure that the Supreme Court finalises the determination of the application by Mr Meldrum, on the denial of accreditation', with respect to deportation orders against him and thereby enabling him to return to Zimbabwe see *Communication 294/05, Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, 3 April 2009). As Murray and de Vos (this issue) explore further, calling on the 'Respondent State', to require the judiciary, an entity independent from the executive, to undertake action can be problematic if no clear national procedural process is in place to trigger

their consideration of the application. The IACtHR as a general rule, addresses its orders to the state. We were made aware of some discussion at the Court on this issue (IASHR013, 09 February 2018), and indeed in some of its resolutions (compliance), the Court has named particular state authorities. For example, among many references to various state authorities, in a resolution in the *Molina Theissen* case, the Court ordered that a member of the army should be appointed ‘to act as liaison’ to relevant authorities and the victims in the case so that information could be requested to help locate the body of Marco Antonio. It also asked for the member of the military and COPREDEH (Comisión Presidencial Coordinadora de la Política del Ejecutivo en materia de Derechos Humanos, the commission responsible for coordinating implementation) to present a schedule and plan on how to ensure the military cooperated with the investigation (*Molina Theissen*, Resolution, para. 32, Nov 2009).

On the one hand, setting out in the decision the specific department or post that should undertake various tasks requires an in-depth understanding of the government structures of that particular country and was not an approach that had the approval of all treaty body members we spoke with (e.g. Interview D.7, May 2017). However, this level of specificity may be a ‘risk worth taking’ (Huneus 2011: 524), as one litigant told us, having a key department or contact would avoid ‘running around looking for an office to go to for implementation’ (Interview, April 2017). A middle ground could be to encourage, as the ACtHPR has done, states to identify ‘focal points’ in government (ACtHPR, 2017, para 60ix) who do not just communicate with the Court generally but particularly in relation to implementation of the decision or judgment itself, akin to the Government Agent before the ECtHR. The IACtHR offers some similar examples by requesting the state to present some sort of implementation plan of its reparation orders that includes an indication of the state institutions responsible for implementation (IACtHR, *Acosta and Others v. Nicaragua*, oper. para. 13). Naming institutions might be important, particularly in states that do not have a system yet in place to implement orders/recommendations given by supranational bodies, as this would pre-empt the lack of implementation. So, the level of domestic institutional development is a key factor that supranational human rights bodies should keep in mind when considering whether specific institutions should be named.

### ***3.4. Ordering the establishment of specific domestic mechanisms***

We saw occasions where the supranational body, as part of the decision and in a combination of both a remedial and monitoring models, required that the state establish a national procedure or body which itself would then determine the reparations or play a particular role in their implementation. Thus, the supranational body here did not give complete discretion to the state but, as in Neuman’s ‘monitoring model’ (Neuman 2014) rather, it dictated the modalities by which specificity should then be determined. For example, in a particularly innovative recent example, the ACHPR in its decision in Communication 393/10, *IHRDA, ACIDH and RAID v Democratic Republic of Congo*, June 2016), requires, as part of the reparations listed in the decision, for the state to ‘ensure that the implementation of the present decision is supervised by a Monitoring Committee which includes the representatives of victims and their successors, and a Member of the African Commission on Human and People’s Rights in charge of the country’. It is too early to tell if this has been effective.

Similarly, the IACtHR ordered Colombia to establish an official mechanism to monitor implementation with some forms of reparation such as compensation, searching and identifying the bodies of the victims and protecting victims from threats. The body was to exist for two years and include state and victim representation (*Mapiripán*, para. 311). The Court did not abrogate its power to monitor the work of the domestic mechanism, and indeed scrutinised its functions for longer than envisaged.

A legal representative in the *Mapiripán* case saw this mechanism as significant as it allows ‘concertation’ between the parties and considered that implementation moves faster if there is dialogue (COL017, 28 July 2017). Such mechanisms also avoid the supranational body having to clarify, for example, complexities of who are victims, or the quantum of compensation, when they do not know the subtleties of the national situation. It may also permit the supranational body to end the monitoring if they are confident that the domestic mechanism is functioning well (See Donald Long and Speck in this Special Issue).

Both the IACtHR and the ACHPR have instances where they have maintained a connection to the domestic mechanisms, one by monitoring it, and the other by writing into the mechanism a role for themselves. The state could thus retain discretion, perhaps reflecting the ‘co-sharing of the interpretation task’ that Çali suggests states in the European system are increasingly seeking (Çali 2018b). We also found other cases where the IACtHR does not order the establishment of a mechanism but rather defers to existing domestic mechanisms the implementation of some forms of reparation such as compensation or rehabilitation in the terms and quantum decided by the state but as far as they follow basic standards set by the Court in its judgment. For example, in *Genesis v. Colombia* the Court ordered the payment of compensation and rehabilitation to victims through the national domestic reparations programme that had already been set up to redress victims of gross human rights violations of the armed conflict (*Genesis* 469-476). This is a form of ‘qualified deference’, permitting the state some discretion by enabling it to provide reparation in its own terms but with the Court directing the limits of what the state is allowed to do (Sandoval 2018: 1198).

### 3.5. Specifying the victims

Specificity can also relate to identifying who is a victim and thus to whom the reparation is owed. The ACtHR in *Zongo et al*, for instance, set out in the Ruling on Reparations its determination of who should be the beneficiaries from among the relatives of the deceased individuals, and who would therefore be entitled to damages for moral prejudice suffered (App. No. 013/2011 – *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples’ Rights Movement v Burkina Faso*, Ruling on Reparations, 5 June 2015).

The experience of the Inter-American system, dealing with massacres, disappearances or massive displacement, shows that identifying and individualising victims is not an easy task and that it is important to use a combination between the remedial and monitoring models so as to prevent victims from being excluded from reparation at the domestic level, while at the same time recognising that supranational bodies are limited in their capacity to identify each victim in such situations by the time the judgment is handed down. As a consequence, the IACtHR has used its Rules of Procedure (Article 35(2)) to apply a flexible concept of the victim that allows it to order reparations even for those who have not been identified or individualised as a result of mass and gross human rights violations. In *Río Negro v. Guatemala*, concerning the destruction of the community of Río Negro through various massacres carried out by the Guatemalan Army and members of civil patrols between 1980 and 1982, as well as other violations, the Court ordered the state to ‘establish an appropriate mechanism’ to identify other victims of Río Negro so that they can claim reparation from the state in the terms indicated by the Court in the judgment (*Río Negro*, 251-253). Similarly, in *El Mozote v. El Salvador*, concerning various massacres that took place between 11 and 13 December 1981 and where more than 1,000 people were killed, the Court ordered the state to continue putting together the ‘single list’ of victims and next of kin of El Mozote so that they could benefit from its orders (*El Mozote*, paras. 310-311). It is also the usual practice of the Court to dedicate a section of its judgment to the ‘injured party’ establishing those eligible for reparation. This part of the judgment is often complemented by lists that include the names of beneficiaries of reparation measures.



### 3.6. *Quality of reasoning*

Specificity also relates to the depth of reasoning in the decision on how the reparations were determined. For the ACHPR, the reparations appear at the end of the decision after the merits. They tend to be given in a list and often there has been little, if any, indication in the decision as to the reasoning and criteria that went in to determining the reparations. A consequence is that there is a risk that the credibility of the decision may be questioned, a view echoed by one state representative (Interview, February 2018). We were also told that a lack of reasoning can give the impression that the supranational body is being inconsistent and unpredictable when looking across a number of cases; and could raise allegations of bias at worst, or arbitrariness at best (Interview February 2018; Glas 2016: 59). Such concerns are also apparent in the decisions of the UN Human Rights Committee or the Committee Against Torture. While these UN treaty bodies have become more specific with their decisions, they have not presented the criteria they have applied to arrive at their views on reparation. An important step given by the Human Rights Committee to clarify some of the criteria it applies to reparations are its *Guidelines on Measures of Reparation* (2016). The IACommHR and the IACtHR, but particularly the latter, have developed substantive and procedural principles and criteria to be applied to their considerations of reparation even if such principles and criteria are not always fully explained or applied (Sandoval 2018). The ACtHPR, for its part, has the choice of elaborating reparations as part of the judgment on the merits or in a separate ruling on reparations and has adopted both methods in practice. The latter, in particular, enable it to articulate in detail its reasoning for not only its choice of reparation but also, for example, who is a victim and who is therefore entitled to compensation (as in *Zongo et al*).

#### 1.7. *Deliberate ambiguity*

Conversely, the lack of reasoning in a decision or judgment should not necessarily be taken at face value: there may be reasons why a supranational body chooses to be ambiguous in some situations. As one representative of a supranational body aptly commented:

‘What might look [like] inconsistency, is in many instances an attempt to be more flexible and adjust to the national circumstance ... so there are many, many other considerations which might be taken into account’ (Interview, 8 November 2017).

This may be of particular importance for quasi-judicial treaty bodies whose weight of authority derives from things other than the perceived legal status of their decisions. As one treaty body member remarked:

‘we have to focus on the clarity of our reasoning, the persuasiveness of our process, the integrity of the system, those are the things- so, for me, the process is open-ended, persuasion, collaboration, but we don’t have other weapons at our disposal, really. We can’t force them’ (Interview, February 2019).

Consequently, vagueness could be deliberate. In selecting ambiguity, the supranational body can thereby maintain its own legitimacy by giving space to a state to decide how best it should implement. The supranational body is then not exposed (in coming up with inappropriate or unworkable reparations) but neither is the state embarrassed in failing to deliver: vague

reparations are harder to measure (see Donald Long and Speck, this issue; Staton and Romero 2011: 2).

Further, one of the factors that determines the explanation for the reparations in the decision or judgment is the submissions made by the parties. Consequently, the quality of the reasoning is, in part, contingent on due process, and the extent to which the parties themselves have a say in determining those reparations (see Donald and Speck 2019: 115).

## **2. Does specificity of reparation measures help implementation?**

The UN High Commissioner for Human Rights has recommended that treaty bodies include in their merits decisions ‘not only specific and targeted remedies for the victim in question but also general recommendations in order to ensure the non-repetition of similar violations in the future’, requiring that they are drafted so as to enable their ‘implementation to be measured and should be prescriptive’ (High Commissioner for Human Rights, 2012: para 4.3.2). Thus, underlying some of the discussion around specificity is the presumption that greater specificity increases the likelihood of implementation (Fox Principi 2015; Staton and Vanberg 2008, 504).

Indeed, this perception was apparent from some (but not all) of the actors we interviewed. Firstly, some representatives of treaty bodies and litigants considered that specificity in the content of the reparation prevented states from having free reign and ‘just [doing] what they want to’ and gave them some direction (e.g. Interview D.15, February 2019; Interview D.1, April 2017; Interview D.8, May 2017). This implies that any action taken by the state risks being sub-standard or inadequate in addressing the violations, with scepticism raised by litigants, for example, as to whether in fact the state ‘failed to understand or whether it wanted to not understand’, thus, ‘if the ... government really wanted to implement, it could have found a way to do this’ (Interview with litigant, April 2017). Some of the treaty body members and state officials we spoke with also believed that greater specificity on what reparations were required would make it ‘easier’ for state authorities to implement, as they will be clearer on what needs to be done (Interview B.4, July 2017; Interview D.13, November 2017; Interview C.5, March 2018).

However, we also found evidence that if the content of the reparations is not clear (e.g. that the state should ‘comply with its international obligations’), the state authorities might then have to negotiate with the complainant or victim to reach an agreement post-decision. The difficulty in this context is, as one parliamentarian in Cameroon told us: ‘[i]t is near impossible for a citizen to negotiate with the state, it is like a lion against a cat’ (Interview, July 2017). Here specificity, whether in terms of the content, deadlines or process, can help level the playing field between the parties. A mechanism is available before the ACtHPR where parties can request the Court to interpret the judgment including the parts relating to reparation (in effect the ‘direct remedy’ approach (Neuman 2014) (for example, with Tanzania requesting clarification of the meaning of take ‘all necessary measures’ to remedy the violations: App. No 001/2017 – Interpretation of Judgment of 20 November 2015 - *Alex Thomas V. United Republic of Tanzania*, judgment of 28 September 2017. See also App. No 002/2017-Interpretation of Judgment of 3 June 2016 - *Mohamed Abubakari V. United Republic of Tanzania*, judgment of 28 September 2017; App. No 003/2017- Interpretation of the Judgment of 18 November 2016 - *Actions pour la Protection des Droits de l’Homme V. Republic of Cote D’Ivoire*, judgment of 28 September 2017).

Similarly, the IACtHR has the power to interpret its judgments. For example, between 2016 and 2018, the Court issued 18 interpretation judgments (IACtHR, Annual reports 2016, 2017 and 2018). Of these, 15 included issues raised by states or legal representatives of the victims concerning one or more issues related to the content of orders on reparation or means of compliance with the measures. In three of the cases included in our project (*La Rochela v. Colombia*, *Pueblo Bello v. Colombia* and *Raxcaco Reyes v. Guatemala*), the state and/or the legal representatives requested an interpretation of the judgments. All of them related to measures of reparation, in particular compensation or legal costs, and means of compliance. The Court clarified the scope and content of its orders. For example, in *la Rochela* the Court ordered that the results of the criminal proceedings in the case be released to the public. The state asked the Court to clarify the order. The Court indicated that it means ‘the criminal judgments of final nature, which lead to the end of the procedure and resolve the main controversy, whether these are acquittals or convictions. These results must be made known to the public, so that society may know the facts analysed and, should it be the case, those responsible for them’. (IACtHR, *La Rochela* 2008: 27).

Further, we also had evidence in our research that greater specificity can facilitate better monitoring by national and supranational bodies. Indeed, we were informed by staff of supranational bodies that if the recommendations are ‘so general, or so open, or so ample, ...it’s actually kind of hard to measure what compliance would consist of’ (interview IASHR030, 02 December 2017; also IACHR019, 15 February 2018). Thus, measures such as a requirement that conditions of detention be improved in Honduras (IACtHR, *Lopez Alvarez v. Honduras*), we were told: ‘never in life we will be able to know if it was complied with as it is too general’ (IASHR06, San Jose, 12 February 2018).

Conversely, we found instances where specificity was not considered helpful. If the supranational body sets the ceiling this may restrict what the victim could have argued for at the national level (Neuman 2014: 338; Glas 2016) or it may restrict broader reform (CAN07, Ottawa, 10 June 2017). There is a risk that the state may feel constrained by what the supranational body ordered. The state may believe, as one official informed us, it could, in fact, have been more progressive than the supranational body in its interpretation of what was required to implement the decision (e.g. Interview C.5, 15 March 2017).

In addition, some government officials in Africa argued that specificity in reparations may not give sufficient leeway to the state to decide how best to implement ‘under the circumstances’ (Interview, March 2018; Interview, February 2018). Thus, state authorities, as one representative informed us, may feel that the supranational body does not trust them if the reparations ordered are too specific (HRLIP 2017; Donald and Speck 2019). Indeed, there may be a perception that the supranational body is not well-versed in the complexities of the national situation (Staton and Romero 2011: 2). This then could lead to the government to view the reparation being ordered as ‘not realistic’ (e.g. Interview B.7, 28 February 2018), increasing the risk that the state loses faith in the supranational body and will subsequently fail to implement. As one Ministry of Justice official told us:

‘Those kinds of recommendations [that order an investigation] make the state very reluctant to engage with the Committees’ (Interview, February 2018).

Thus, the reparation itself may not be problematic (for example, undertaking an investigation). Rather, it was the belief that the supranational body failed to comprehend the complexities of the domestic procedures involved in making such an order which required the actions of an independent arm of the state, namely judicial engagement.

Relatedly, greater specificity may impose more demands on the supranational body to obtain the necessary information to assess the domestic context (Neuman 2014: 341-342), whether this is at

the adjudication or post-decision phase, something that can be difficult to do for bodies that lack the necessary human and financial resources to monitor, trigger and cajole compliance with their decisions. The supranational body will need material from a variety of sources and a system to manage and process it 'to begin to properly track what is actually happening' (Interview B.1., London, July 2017, see also Donald Long and Speck, this issue; and Sandoval Leach and Murray, this issue).

Representatives of supranational bodies we spoke with in the course of our Project differed in how specific they considered they should be, with some displaying some reluctance in being too specific on the basis that this would undermine their legitimacy (e.g. Interview, February 2019). Here two factors appear to have influenced their views: the context; and the authority the body is assumed to have when ordering reparations. In the Americas region, for example, the IACtHR considers itself to have the authority to order very specific measures and so has been its tradition until very recently (Cavallaro et al 2019). Equally important, context appears to explain such a response in states where the Court considers rule of law and human rights protection to remain a challenge. This view resonates in Latin America, the part of the Americas region where the Court exercises most of its jurisdiction, as specificity appears to be an intrinsic element of its legal culture, even if in recent years the Commission and the Court have been criticised by some states in the region for being too intrusive in their approach to reparations (Argentina et al, Joint Communication 2019). Conversely, in Europe subsidiarity is at the heart of their human rights adjudication model (Çalı 2019).

Ultimately, looking at the factors and dynamics at play in influencing implementation in our cases, specificity in its various forms may or may not have been determinative. Two cases from our Project illustrate the complexities of the factors at play.

### **2.1. *Mebara v Cameroon***

In August 2015 the ACHPR adopted a decision against Cameroon, *Jean-Marie Atangana Mebara v Cameroon* (Communication 416/12, 8 August 2015). Here it found that Mebara, the former Secretary-General of the President of the Republic, had been detained in violation of Articles 6, 7(1)(b), 7(1)(c), and 7(1)(d) of the African Charter and specifically 'urgently requests the Republic of Cameroon to order the immediate release of the complainant'; that he be paid 400,000,000 CFA as compensation; that the state 'take prompt and appropriate measures to sanction all government employees responsible for the violations perpetrated'; and that it report within 180 days on the measures taken to implement the decision. Our Project found that as of the time of writing Mr Mebara remained in the Central Prison in Yaoundé after a 20 year prison sentence was upheld by the Supreme Court in June 2017 (<https://cruxnow.com/global-church/2018/04/07/archbishop-gives-hope-to-cameroon-prisoners>). No compensation appears to have been paid. This decision was detailed in what was required, yet no implementation followed.

### **2.2. *Supervision of Guatemalan cases before the IACtHR***

The orders on the duty to investigate or provide rehabilitation to victims have grown in specificity over the years in the Inter-American system, both at the IACommHR and at the IACtHR. However, this has not yielded full implementation of the measures, as apparent in the joint supervision of 14 Guatemalan cases and their orders on the duty to investigate (IACtHR 14 cases, duty to investigate; Provisional measures and monitoring compliance, 2019). Of these 14 cases, only in *Molina Theissen* and *Myrna Mack* has important progress been made (see Practice Note by Lucrecia Molina, this issue), but not necessarily as a result of specificity but for other

factors including international pressure as well as the role played by victims and civil society organisations involved in the cases. This is despite various hearings and detailed resolutions of the Court instructing Guatemala as to what should be done (IACtHR, *12 Guatemalan cases*, Monitoring compliance, 2015). To put it simply, Guatemala knows what it should do but it does not want to do it. During the focus group we carried out in Guatemala with members of the judiciary, civil society organisations and victims on this particular order of the Court, it was very clear that authorities knew what had to be done to fulfil the obligation to investigate but they also expressed the many challenges they faced to be able to deliver. These included an unwillingness to carry out prosecutions, and the lack of means to deliver on their prosecutorial strategy (Focus group, 8 August 2017).

In contrast, where wording has been kept very general, it is nevertheless arguably clear what the IACtHR requires the state to do. A recurrent problem identified by the Court and the litigants in various cases against Guatemala has been the malicious use of the amparo proceedings at the domestic level by alleged perpetrators and their lawyers. The amparo is a typical constitutional writ aimed at protecting in a prompt manner the constitutional rights of an individual person. In the cases we are referring to, the amparo was used to try and protect the rights of the perpetrators, with one after the other using an amparo thereby halting the progress of justice. The IACtHR firstly referred to this in a very general manner in the case of *Myrna Mack v. Guatemala* concerning the killing of Myrna, ordering that ‘the state must remove all de facto and legal obstacles and mechanisms that maintain impunity in the instant case [...] and resort to all other means available to it so as to expedite the proceeding [...]’ (*Myrna Mack* 2003: 276-277 and operative para.6). When Guatemala presented its reports on actual implementation of the judgment to the Court it indicated that there was a draft Law in Congress aiming to reform amparo proceedings (IACtHR, *Myrna Mack*, Monitoring compliance, 26 November 2007, par. 5b.). Guatemala, therefore, appeared to have understood what it had to do to implement the Court’s decision, but it failed to do so. Six years later a more specific measure was ordered by the IACtHR in *Dos Erres v. Guatemala*, concerning a massacre of 251 people of las Dos Erres, ordering it to ‘adopt all the necessary measures to amend the Law on the Appeal for Legal Protection, Habeas Corpus, and Constitutionality in Guatemala’ (operative para. 10) so that it can play ‘its real goal and end’ (para. 242). This is yet to be complied with.

What both these situations illustrate is firstly that specificity, whether in terms of the deadlines or content of the reparation, or process, does not necessarily lead to implementation. Despite what appear to be quite specific reparations, in *Mebara* and, the 12 cases joined for monitoring purposes on the duty to investigate and *Dos Erres*, the political complexities of the situation, and the lack of clarity on how the quantum of compensation was reached in *Mebara*, among other factors, seem to have impacted on their implementation. In *Mebara*, in addition, the ACHPR decision was adopted a few days after the Cameroonian Supreme Court had rejected Mebara’s appeal ([www.cameroonpostline.com/why-africa-court-ordered-release-of-atangana-mebara/](http://www.cameroonpostline.com/why-africa-court-ordered-release-of-atangana-mebara/)). This case also demonstrates some of the challenges of a decision which requires implementation by one of the independent arms of the state, the judiciary, who have ruled otherwise (see Murray and de Vos, this issue). Secondly, with respect to the Guatemalan cases, one sees the Court tailoring its approach to the state, crafting different orders, with varying degrees of specificity, in an attempt to elicit implementation. The amparo discussion is also relevant as an illustration of how specificity as a ‘process’ should be seen, not only as happening within one case but also as part of a process that could and often involves various cases against the same state where similar violations and reparations are at stake. *Myrna Mack* and *Dos Erres* show this, whereby the Court moves from a monitoring model to a remedial one as a result of the dynamics of implementation that were taking place in Guatemala.

### **3. Factors influencing the approach to specificity**

On the one hand, there is the broader trend that claims that specificity (certainly with respect to the content of the reparation) increases implementation. On the other hand, if one takes the view that subsidiarity, a key principle of international law and adjudication, requires that the domestic actors have first the opportunity to remedy the issue(s) and only after they have failed to do so should the supranational body step in, then specificity in the actual decision or judgment would appear to be neither timely nor appropriate. Instead Neuman's 'monitoring' or 'negotiation' models might be more suitable with the supranational body displaying 'complementary' rather than 'competitive' subsidiarity (Besson 2016: 93). Consequently, what is very apparent from our research is that defining specificity needs more thought: it can relate to the content, timeframe and process of implementing a reparation.

In addition, while supranational bodies display a variety of approaches, and at times their rationale is not at all clear, we did ascertain a number of factors, discussed below, that they take into account in determining their approach to specificity. As is discussed by Sandoval Leach and Murray (this issue) these bodies adopt different stances at different times as they aim to first persuade, then more forcefully attempt to ensure states implement the reparations. Our Project shows the supranational body needs to be able to determine which degree of specificity it adopts and how, in any given context.

#### ***3.1. Legitimacy and capacity of the supranational body***

The legitimacy of the supranational body was a factor in determining not only what approach the body itself would take to specificity, but also how others would respond to it. Thus, we had some evidence from some of our cases that suggested that a supranational court considered its judicial authority, as compared to the ability of the commissions or committees to issue only recommendations, as a factor in the extent to which it would be willing to be intrusive. Put in another way, these tribunals considered that they were allowed to find violations and also had jurisdiction over the choice of reparations ordered. (IASHR026, Washington, 28 November 2017; IASHR035, Washington, 1 December 2017). In contrast, commissions or committees did not have such prerogative. For example, in the case of Canada, during our workshop on strengthening Canada's institutional coordination in the implementation of views and recommendations by supranational bodies, we were told both by state personnel as well as members of civil society organisations, that Canada acts in 'good faith' in relation to the recommendations in individual cases by the IACommHR and UN treaty bodies, but that they are not binding, giving Canada considerable discretion to decide whether it complies or not (Workshop Canada, 12 June 2017).

As seen above, a supranational body may be able to enhance its legitimacy in the eyes of the state authorities if it explains the rationale for its approach. So, for example, with respect to who should determine the quantum of compensation, we found that some state authorities who had been willing to pay compensation had considered it unhelpful when the supranational body set the amount as this was not in line with national standards (e.g. Interview February 2018, IASHR014, San José de Costa Rica, 14 February 2018, Bogotá, COL04 and COL 05, 26 July 2017). Others, including litigants, considered the supranational body should be able to determine the amount but this would need a clear methodology setting out how the figure had been reached in order to ensure that it was not perceived to be 'random' (e.g. Interview D.2, April 2017, IASHR014, 14 February 2018), with one government official suggesting that this was indeed its view where an amount had been set (Interview, February 2018). In cases where quantum was provided, such as by the ACtHPR, we were also told that if the reasoning had been insufficient in the ruling then the executive would have approached the Court for clarification (Interview

A.4, December 2017) a possibility available in other systems (e.g. Rule 79 ECtHR; Article 46(3) ECHR).

At the IACommHR, the lack of technical capacity to indicate the quantum of compensation was one explanation given for why the Commission preferred not to give the amount (IASHR030, Washington, 2 December 2017). Others also indicated that if the IACommHR were to engage with quantum, then it would further judicialize the process as it required the Commission to assess evidence, and this would also impact on the time taken to process cases (IASHR032, Washington, 5 December 2017).

The extent to which the supranational body would be comfortable taking on this more ‘intrusive’ (Ali 2018) role was questioned by some members from the African and UN bodies. On the one hand, as one told us, it would require the supranational body to

‘second-guess the domestic procedures in the absence of indication that there was manifest injustice in the procedures, then we are overplaying our aims and then states will systematically ignore us. So it’s in the interests of implementation that we’re not too specific and we don’t push too hard. ... Other people say we have to be very strong from the [supranational body] side. I think it’s counterproductive’ (Interview, February 2019).

On the other, however,:

‘there may be members [of the treaty body] ... who say, “For God’s sake, let’s tell them to stop this violation.” That’s on the one extreme and on the other extreme is someone like myself who says, “We can’t tell them to stop this thing. We’re over-estimating our power.”’ (Interview, February 2019).

### 3.2. *The position of the parties*

Supranational bodies vary in the extent to which they take into account the positions of the parties when determining the reparation, a factor that may affect their approach to specificity (e.g. Human Rights Committee, 2016: para 4). The UN Committee Against Torture (CAT), for example, emphasizes the importance of victim participation and that the restoration of the dignity of the victim is the ultimate objective in the provision of redress (CAT, 2012, para. 4).

In the Americas, victims are not expected to present pleadings on reparation before the IACommHR, although experienced litigants make their views known. The IACommHR in turn will always make recommendations as to what should be the forms of reparation to be awarded and often takes into account the views of victims or their lawyers. Before the ACHPR there is evidence from our research that what the Commission orders in terms of reparations depends on what the victim requests and the response, if any, to that request from the state. If the latter does not respond, then we were told that the ACHPR would be inclined, in some cases, to go with the victim’s request (Interview, November 2017).

When a case reaches the IACtHR, the victims or their legal representatives gain *locus standi in judicio* and are called to present, in an autonomous manner, their pleadings, motions and evidence, including their legal arguments on reparation together with any evidence of harm. They can also then indicate to the Court if they need a hearing and what kind of expert opinions might be necessary, including on reparation. The state is given the opportunity to respond to such pleadings. For many years, the Court held hearings on reparation before deciding on what forms of reparation to order. However, in an attempt to simplify, not all cases will be granted a hearing before the Court and if they do, it will not necessarily be about reparation (Cavallaro and

Brewer 2008). The IACtHR tends to award reparation based on the pleadings of the parties. Exceptionally it can award forms of reparation that have not been asked for by the parties using its *motu proprio* powers. For example, in *Dos Erres v. Guatemala*, the Court ordered the construction of a monument that had not been requested by the victims or the state (*Dos Erres*, para 265).

Similarly, Rule 34(4) of the Rules of Court of the ACtHPR provide that in their submissions, applicants should indicate the ‘alleged violation, evidence of exhaustion of local remedies or of the inordinate delay of such local remedies as well as the orders or the injunctions sought’.

However, even if the views of the parties are part of the decision-making process of the supranational body, it is important to consider the time that may have elapsed between when the request for reparations was made and when the decision or judgment is actually adopted. Before the UN Human Rights Committee and ACHPR the parties make submissions on reparations in their pleadings on the merits, yet this is information on which the bodies need to rely when it finally adopts its decision often years later. To have greater specificity would require more information from the parties and this, in the words of one interlocutor who worked in a supranational body, would add to an already overburdened treaty body ‘another layer ...[and] likely demand another exchange of information between the parties’ (Interview, May 2019). In contrast, the IACtHR permits supervening information to be provided during litigation, the ACtHPR can receive separate pleadings on reparations post judgment on the merits, and the IACommHR, through a flexible approach, provides different opportunities for the parties to present views on reparation if they wish before it adopts a confidential report on the merits.

Finally, the reparations requested may also depend on the litigants’ knowledge of the variety of types of reparation and of the system. Relatedly, as one seasoned litigant informed us, what they asked for in terms of reparation was influenced by what information they thought the Human Rights Committee needed to engage in the case ‘to help’ it (Interview B.1, July 2017).

### 3.3. *The likely response and attitude of the state authorities*

We saw various examples of supranational bodies varying the specificity of reparations depending on which state they were dealing with, how the state perceived the supranational body, and the extent to which the supranational body considered that particular state would implement its decision or judgment in good faith (e.g. Interview B.7., 28 February 2017, IASHR014, IASHR 017, 15 February 2018). This has been documented with respect to compensation in the European system (Fikfak 2019) but also in relation to other measures (Çali 2018), with the ECtHR, for instance, anticipating which measures may be complied with (Donald and Speck 2019: 98) and approaching resistance from state actors through ‘variable geometry, recognizing differentiation in the individual circumstances of states as a basis for human rights review’ (Çali 2018b: 242).

States such as Colombia, have a strong history of litigation before the regional bodies and have been perceived by the IACtHR to be responding to its orders or at least engaging with the Court and its rulings. The Court may, consequently, specify reparations that provide Colombia with a certain discretion, in line with Neuman’s monitoring model, in how they should be implemented (e.g. *Genesis* and the order of the Court that Colombia should provide compensation and rehabilitation through its domestic reparation programme (Sandoval 2018). As one lawyer at the IACtHR informed us:

‘The Court should have some deference with states that ... adopt policies that are, in principle, in line with human rights. ... When states begin to respond, and adopt policies, you cannot be indifferent to this, as in the case of Colombia’ (IASHR017, San Jose, 15 February 2018).



### 3.4. *Availability of information*

The ability of the supranational body to decide whether its approach should be specific or not relies on detailed information being made available to it, which, as noted above, does not always occur (Tsereteli et al 2017: 239). In the absence of such material, the supranational body may be reluctant to adopt the 'remedial model' and adopt a role which facilitates negotiation between the parties, enabling them to come to their own conclusions. Whether the information is available to the supranational body or not, we heard from several state authorities and litigants of a desire for some form of dialogue to clarify what reparations victims need or want, what the state should do, and the process by which they should be implemented (Interview D.1, April 2017; Interview D.13, November 2017).

We saw this dialogue taking place prior to the decision or judgment being adopted (if it is to contain the reparations), or afterwards. The role the supranational bodies in our Project played in this dialogue varied, for example, with some 'mapping out' what steps the state should take over a particular period of time and with whom it should engage (Interview B.4, July 2017; Interview D.15, February 2019), offering their good offices through meetings, and other processes, in order to facilitate a dialogue, mediating and proposing solutions or a space for engagement. The Inter-American bodies enable private and public hearings post-decision to monitor implementation. In contrast, the ability to have this interaction before the ACtHPR, the ACHPR, and the UN treaty bodies is much more limited and restricted, at present, largely to a paper-based correspondence where victims play almost no role (see also Sandoval Leach and Murray, this issue). In addition, this dialogue, pre or post-decision/judgment, could be enhanced by national actors such as NHRIs, academics and civil society organisations through, for example, amicus briefs or affidavits to inform supranational bodies (see Murray and de Vos, this issue) or facilitating processes for discussion and negotiation. Committees established to monitor implementation, such as National Monitoring, Implementation and Reporting Frameworks (NMIRF) can play a role. The Inter-Ministerial Committee in Cameroon, for example, attempts to engage with the complainant in determining compensation (Interview B.7, February 2018; HRLIP 2017; see Murray and de Vos this issue). Alternatively, it could be a mechanism co-shared between the international and national levels, set out in the decision or ordered by the supranational body playing some role in the 'negotiating' of identifying reparations, as in *Kilwa* case above.

## 4. Conclusion

At a particular, or indeed a number of, stages in determining and implementing reparations, evaluations must be made about the content of each, by when it should be implemented and by whom, and how this should occur. Where these assessments take place varies depending on the system: as part of the process of adjudication for some (and therefore with the reparations and degree of specificity being reflected in the decision or judgment itself); and/or at the post-decision/judgment phase. Considerations of specificity may therefore be settled by the supranational body that adopted the decision/judgment finding the violation (as in the Inter-American, African and UN systems we examined), or by another actor outside the state (as with the CM with respect to ECtHR decisions), and/or at the national level. In all of these processes specificity can play a role, but it can take different forms and can happen at different times.

Consequently, a tailored approach is needed which takes into account these various factors. The supranational body will need to make an assessment as to what is best suited to that particular

reparation decision/judgment, the particular state at that particular moment, bearing in mind the national political context (Staton and Romero 2011: 19). This means that at times a ‘remedial model’ would be more beneficial than a ‘monitoring model’ or that on other occasions, a ‘negotiation model’ would be more useful. For bodies like the IACommHR and the IACtHR that regularly recommend or order various forms of reparation, this also means that a tailored approach might require careful consideration of how these elements and processes affect different forms of redress. This would necessitate these bodies being more intrusive with some forms of reparation such as compensation, the duty to investigate or guarantees of non-recurrence, and less so with others.

All of this has implications for the various actors involved in these processes. For the supranational bodies determining the reparation, the degree of specificity of a measure should depend on various factors and a case-by-case, reparation-by-reparation and state-by-state approach appears to be ideal. Determining the specificity of a particular reparation requires a detailed and up-to-date knowledge by the supranational body not only of the case but also of the context of the state where the order is to be implemented. This will, in turn, have an impact on the level of resources needed by the body which may need to invest more time, staffing and processes in order to receive and manage the necessary information to enable it to undertake such an assessment.

If supranational bodies are setting out specificity in their reparations (whether these be deadlines, indicators, actors responsible, or substantive content) this should be accompanied by reasoning explaining the basis on which this conclusion has been reached or a direct reference to the substantive paragraphs of the judgment that contextualise the measure. Where specificity is not provided, then the supranational bodies should consider adopting guidelines for litigants and states on how it approaches reparations in order at least to clarify its policy (CCPR, Guidelines, 2016).

Governments, litigants (victims and legal representatives), NHRIs, civil society organisations and other interested actors should continue to engage with the supranational bodies around the issue of specificity, encouraging greater consideration and clarification of their approach (Donald and Speck, 2019: 115-116).

For the parties to the case, considerable thought needs to be given to the complexities of the types of reparations, and how they are likely to be implemented in the political and social context of the state. Depending on the particular supranational body, deliberating on these issues may need to come at a much earlier stage than others.

Nevertheless, specificity remains an important tool to craft reparation measures even if it alone cannot guarantee implementation. As this Special Issue and this Article have shown, specificity should be seen as a process that is triggered by the dynamics of implementing international decisions, all of which are affected by various actors and multiple causes.

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