

A retrospective evaluation of the determination of reparations for non-pecuniary loss: a comment on *Lucien Ikili Rashidi v Tanzania*

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ABSTRACT: The African Court on Human and Peoples' Rights is a distinct body that protects human rights and develops jurisprudence in international and regional law. It is on this basis that it often awards compensation for human rights violations. However, while the Court gives reasons for compensation for pecuniary loss, it does not do so for nonpecuniary loss. With the aid of a conceptual approach, the contribution evaluates the argument that the Court's failure to give reasons for compensation for nonpecuniary loss indicates a lack of clarity. With the aid of *Lucien Ikili Rashidi v Tanzania* (2015), *Mtikila v Tanzania* (2011), *Norbert Zongo v Burkina Faso* (2015), *Lohe Issa Konate v Burkina Faso* (2016) and *Armand Guehi v Tanzania* (2015) this contribution evaluates the Court's approach to the grant of compensation for nonpecuniary loss. The Court's failure to give reasons in instances of nonpecuniary loss affects the application of the rule of law in the adjudication of cases. This contribution argues that the Court's jurisprudence presents an inconsistent approach to this problem. To substantiate this argument, this case discussion gives the facts and holding in *Lucien Ikili Rashidi* and identifies the lack of clarity by the African Court in dealing with non-pecuniary loss. This is followed with a close evaluation of the four earlier cases of *Mtikila*, *Zongo*, *Konate* and *Guehi*. A two-stage approach in dealing with compensation for the non-monetary loss is proposed. First, a finding of the existence of a human rights violation should be presumed sufficient to warrant the award of compensation for non-pecuniary loss. Second, the Court should then evaluate the amounts claimed against the principles of equity and the circumstances of the case.

TITRE ET RÉSUMÉ EN FRANCAIS:

Une évaluation rétrospective de la détermination des réparations pour préjudice moral: un commentaire de l'affaire *Lucien Ikili Rashidi c. Tanzanie*

RÉSUMÉ: La Cour africaine des droits de l'homme et des peuples est un organe distinct qui protège les droits de l'homme et développe une jurisprudence en droit international et régional. C'est sur cette base qu'elle accorde souvent des réparations pour des violations des droits de l'homme. Cependant, si la Cour motive l'indemnisation du préjudice pécuniaire, elle ne le fait pas pour autant s'agissant des préjudices non pécuniaires. À l'aide d'une approche conceptuelle, la contribution évalue l'argument selon lequel le fait que la Cour ne motive pas l'indemnisation du préjudice moral révèle un manque de clarté. S'appuyant sur les affaires *Lucien Ikili Rashidi c. Tanzanie* (2015), *Reverend Christopher Mtikila c. Tanzanie* (2011),

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Norbert Zongo et autres c. Burkina Faso (2015), *Lohe Issa Konate c. Burkina Faso* (2016) et *Armand Guehi c. Tanzanie* (2015), cette contribution évalue l'approche de la Cour concernant l'octroi d'une indemnité pour préjudice moral. L'absence de motivation de la Cour dans les cas de préjudice non pécuniaire affecte l'application de la règle de droit dans le jugement des affaires. Cette contribution soutient que la jurisprudence de la Cour présente une approche incohérente de ce problème. Pour étayer cet argument, cette discussion de cas présente les faits et le jugement dans l'affaire *Lucien Ikili Rashidi* et identifie le manque de clarté de la Cour africaine dans le traitement du préjudice non pécuniaire. Elle est suivie d'une évaluation approfondie des quatre affaires antérieures, *Mtikila, Zongo, Konaté* et *Guehi*. Une approche en deux étapes dans le traitement de la compensation pour le préjudice non pécuniaire est proposée. Premièrement, la constatation de l'existence d'une violation des droits de l'homme devrait être présumée suffisante pour justifier l'octroi d'une indemnisation pour le préjudice non pécuniaire. Deuxièmement, la juridiction devrait alors évaluer les montants demandés en fonction des principes d'équité et des circonstances de l'affaire.

KEY WORDS: compensation, non-material loss, remedies, reparations, rule of law

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1 INTRODUCTION

Reparations refer to steps that a judicial body or tribunal hands down to a person or an individual who has wronged another, to repair the consequences of a violation.¹ Some of the common forms of reparations include restitution, compensation, satisfaction, and guarantees of non-repetition.² In comparison with remedies, reparations offer an effective method of ensuring that there is redress for a recognised human rights violation. Consequently, the process that ensures that the redress is effected, informs the reparations. Various scholars believe that reparations offer specific steps that render a remedy to be effective.³ This definition contextualises reparations as a tool that validates access to justice.

From a historical perspective, reparations were limited to the national or domestic domain. This position changed in the *Factory in*

1 D Shelton *Remedies in international human rights law* (2015) 7.

2 B Bollecker-Stern *Le préjudice dans la théorie de la responsabilité internationale* (1973) 10.

3 J Sarkin 'Providing reparations in Uganda: substantive recommendations for implementing reparations in the aftermath of the conflicts that occurred over the last few decades' (2014) 14 *Africa Human Rights Law Journal* 528.

Chorzow Case,⁴ where the Permanent Court of Justice stated that the reparation ‘must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed’.⁵ This position was later extended to other international treaties such as the Universal Declaration of Human Rights,⁶ the International Covenant on Civil and Political Rights,⁷ and the United Nations Convention Against Torture.⁸ Other treaties include the Convention on the Rights of a Child,⁹ the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict,¹⁰ and the African Charter on the Rights and Welfare of the Child.¹¹

The current framework that guides the application of reparations is provided in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law.¹² While these basic principles do not lay down new international or domestic legal obligations, they, however, identify modalities, procedures and methods for the implementation of the existing legal obligations under international human rights law and international humanitarian law.¹³ It is also instructive to note the work of the International Law Commission (ILC) in its drafts article of state responsibility.¹⁴ It also recognises various forms of reparations, such as restitution,¹⁵ compensation,¹⁶ rehabilitation,¹⁷ satisfaction,¹⁸ and guarantees of non-repetition.¹⁹ The

4 *Factory in Chorzow Case (Germany v Poland)* 1927 PCIJ (Ser A) No 9.

5 *Chorzow Case* (n 4).

6 Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948, art 8.

7 International Covenant on Civil and Political Rights, 999 UNTS 171 art 2(3)(a), 9(5) & 14(6).

8 United Nations Convention Against Torture, 1465 UNTS 85 art14 (1).

9 The Convention on the Rights of a Child 1577 UNTS 3 article 19.

10 The Optional Protocol to the Convention on the Rights of the Child adds value to the application of Art 19 of the Convention on the Rights of a Child (n 9).

11 African Charter on the Rights and Welfare of Children, CAB/LEG/24.9/49 (1990).

12 Basic Principles and Guidelines on the Right to a Remedy and Reparations for victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law, adopted vide Resolution A/RES/60/147 at the 60th session, Agenda item 71(a) of the General Assembly 21 March 2006.

13 Basic principles (n 12) preamble.

14 Part II on art 28 of the ILC Commentaries, 2001.

15 Basic principles (n 12) rule 19.

16 Basic principles (n 12) rule 20.

17 Basic principles (n 12) rule 21. Rehabilitation as a form of reparation includes medical, psychological, legal and social services.

18 Basic principles (n 12).

19 Basic principles (n 12). Finally, the Basic Principles recommend the use of guarantees of non-repetition; largely aimed at requiring the state to take steps to ensure the prevention of the re-occurrence of the violations. These have been used by some international human rights bodies including the Rome Statute of the International Criminal Court.

principles that underscore the grant of compensation for non-pecuniary loss are governed by the decisions from the Court.

Considering the above, the African Court is situated in a position to develop jurisprudence on human rights, including reparations. It is argued that the failure to give reasons for compensation for non-pecuniary loss indicates a lack of clarity. At its core, the Court does not unpack or define the concept of the basis of equity as a critical aspect in determining non-pecuniary loss. This contribution gives the facts and holding in *Lucien Ikili Rashidi* and identifies the lack of clarity by the African Court in dealing with non-pecuniary loss. This is followed with a close evaluation of four earlier cases of *Mtikila*, *Zongo*, *Konate* and *Guehi*. A conclusion and recommendations to improve the Court's approach, follow.

2 FACTS AND HOLDING IN *LUCIEN IKILI RASHIDI* AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS APPLICATION 3 OF 2015 (28 MARCH 2019)

In 1983, the applicant, a Congolese national from the DRC moved to the respondent state on a temporary visa, and his wife and children joined him in 1999.²⁰ In 2005, when he had filed a civil case in a local court, he lost his passport and applied through his embassy in Dar es Salaam for a replacement.²¹ Although the embassy confirmed the process of replacing his passport, and the Tanzanian Police issued him with a certificate of loss of his passport.²² On 9 June 2006, the Tanzanian immigration authorities arrested the applicant for illegal stay in the country.²³ His wife and children were also arrested and detained for five days before being produced in court on criminal charges of illegal stay. The DRC Embassy obtained an authorisation from the Tanzanian authorities for the applicant to be released and granted seven days to exit the country.²⁴ After his family exited the country in September 2007, the applicant filed a case against some immigration officers for illegal arrest and degrading treatment. In 2010, he added the Permanent Secretary of the Ministry of Home Affairs and the Attorney General of Tanzania as parties to the case.²⁵ In January 2014, the High Court ruled that based on the applicant's illegal stay in the country, the applicant's arrest was lawful. He filed a request to the High Court for a copy of the proceedings to pursue an appeal to no avail. He was issued with a 'Notice of Prohibited Immigrant' and the request to have it waived to pursue his appeal was not granted.

20 *Lucien Ikili Rashidi v Tanzania* Application 009/2015 (reparations) (decided 28 March 2019) para 4.

21 *Lucien* (n 20) para 6.

22 *Lucien* (n 20) para 7.

23 *Lucien* (n 20) para 8.

24 *Lucien* (n 20) para 8.

25 *Lucien* (n 20) para 10.

He brought the application before the African Court seeking orders that the respondent state had violated the right to residence and free movement, the right to right to dignity, and the right to a fair trial,²⁶ and reparations.²⁷ The applicant claimed eight hundred million Tanzanian Shillings (approximately 348 000 United States Dollars) for non-material loss and one thousand five hundred dollars for each of the indirect victims.²⁸ The Court found that the respondent state had violated the applicant's right to integrity under article 4 of the Charter. In addition to all the rights specified above, the Court granted reparations for both pecuniary and non-pecuniary loss.²⁹ It informed itself of the principles that guide the grant of reparations, thus, the applicant had to prove that the state had international responsibility, causation, the burden of proof, and *restitutio in integrum*.³⁰

Concerning the prayer for non-pecuniary loss, the Court stated that, first, the findings of violations by the Court led to the presumption that a victim was entitled to compensation for non-pecuniary loss. Second, the Court ordered that the amount to be granted as the compensation had to be calculated on the basis of fairness and circumstances of the case.³¹ This use of these principles pointed to some expectations: the first principle is uniformly applied, the second principle is informed by the basis of equity or fairness and the circumstances of the case.³²

The Court upheld the first expectation, but there was no in-depth reasoning on the application of the basis of equity principle and the circumstances of the case. As indicated in the introduction, the Court did not unpack or define the concept of the basis of equity and the circumstances of the case. The lack of guidance, it is argued, connotes a subjective application of the 'basis of fairness or equity, and the circumstances of the case' without communicating the reasons for the decision. This leads to the conclusion that it exercised its discretion as it deemed fit.³³ While the author does not propose a definition of the key terms, there should be a uniform process in the application of this principle.

This was exacerbated by the grant of a reduced amount of ten million Tanzanian shillings (approximately 4 035 US Dollars). For non-pecuniary loss for indirect victims, the Court reduced the amount to one million Tanzanian Shillings (approximately 435 US Dollars). It should

26 *Lucien* (n 20) para 12.

27 *Lucien* (n 20) para 25(2).

28 *Lucien* (n 20) paras 132-133.

29 *Lucien* (n 20) paras 132-133.

30 The engagement of these principles is beyond the scope of this paper. This is, however, an indication of the principles in the Basic Principles.

31 *Lucien* (n 20) para 119; The court referred to previous jurisprudence of *Nobert Zongo* para 62. This principle has also been referred to as the basis of equity principle.

32 See the discussion of these concepts in the decisions in this comment.

33 *Lucien* (n 20) para 119; the court referred to previous jurisprudence of *Nobert Zongo* para 62. This principle has also been referred to as the basis of equity principle.

be noted that the normative framework of the African Commission does not offer guidance on the concepts of equity of fairness and the circumstances of the case.³⁴ The closest guidance is in the following provision:

If the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.³⁵

Other instructive sources of reparations include the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that requires that victims access mechanisms of justice and prompt redress under national legislation.³⁶ A look at the guidelines on a fair trial and legal assistance in Africa shows insights into the need to use a 'victim-sensitive approach' concerning reparation, through compassion and respect for their dignity and have access to prompt redress.³⁷ This principle has not been engaged in the decisions leading to the grant of non-pecuniary compensation.

3 UNPACKING THE PROBLEM

This section unpacks the research problem of the Court's failure to give guidance in dealing with compensation for non-pecuniary loss and the subjective application of the 'basis of equity principle' without due communication of the reasons for the decision. This brings to the fore, the relevance of the rule of law, and the proof and process to be used about the basis of equity and the circumstances of the case.

3.1 Relevance of the rule of law

It is desired that a court offers substantive reasons for its findings as a practice.³⁸ While this is usually tagged to the independence of the courts in the wider context of the three arms of government, adherence to the rule of law calls for the Court to offer well-reasoned judgments.³⁹ A reasoned judgment is punctuated by reasons the court uses to justify its evaluation of the law and the facts. It also points to the need to prove some aspects of the prayers sought; an evaluation of the position of the burden of proof; and the decisions by the Court. If the Court in the exercise of this discretion does not give reasons for its findings, but substantively reduces or increases the quantum of damages, the

34 The concept of fairness is not provided for in the Protocol on the Statute of the African Court of Justice and Human Rights, 2008.

35 Protocol (n 34) art 27(1).

36 The Victims' Declaration, adopted 29 November 1985 by GA resolution 40/34); The American Convention on Human Rights, 1985; art 63(1); American Convention on Human Rights, *Godínez Cruz v Honduras* (Interpretation of the Compensatory Damages) IACtHR, Ser C No 10, 17 August 1990, para 27.

37 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.

38 *Jacobs and Others v S* [2019] ZACC 4; 2019 (5) BCLR 562 (CC).

39 Richardson ILM (2002) generally.

aggrieved litigant is not accorded the right to a fair and speedy trial.⁴⁰ As such, this failure amounts to an abuse of the rule of law within the context of the procedural failure to offer reasons. It is not in doubt that a Court relies on the available evidence to quantify the amount of material compensation to a deserving party; the deserving level of scrutiny should also inform the grant of damages in the non-pecuniary loss.⁴¹ The point of departure (as will be shown), that forms the crux of this contribution is the grant of reparations for non-pecuniary loss once the court finds a violation of one's rights under the African Charter. At its core, this contribution evaluates the mode through which a decision on the amount of pecuniary loss is arrived at, based on equity and the circumstances of the case in the determination of compensation.⁴²

Consider a hypothetical whether one seeks non-material compensation of 20 000 US Dollars for moral prejudice due to the violation of his right to torture. While the Court may grant the non-monetary compensation due to the violation, it would use the basis of equity requirement and the circumstances of the case to grant the 20 000 dollars. This process of the exercise of discretion that leads to the grant of said amount is tested to establish the engagement of the principle of rule of law by the African Court. In this regard, it is argued that the rule of law is dependent on how the Court subjects the consequential grant of the 20 000 US Dollars to a process, the onus of proof before arriving at the said amount. Based on the evaluation of its subjective or objective approach would subsequently inform its decision. It should be recalled that the African human rights system, requires that remedies have to be available, effective and sufficient.⁴³ It is further argued such a remedy that is within these bounds answers the erstwhile glaring questions of the nature of the court's evaluation; the reasons that inform the basis of equity of fairness, and the circumstances of the case. Where this process is not adequately clarified, the issue of the grant of non-material compensation will remain a fussy area.

Some principles may be borrowed from domestic courts concerning the need to give reasons for decisions that a court arrives at. The South African Constitutional Court has stated that despite the lack of an express constitutional or statutory provision requiring courts to furnish reasons for their decisions, a reasoned judgment is indispensable because it is a form of accountability by judges.⁴⁴ In addition, it points to the greater picture of the rule of law within the adjudication sphere

40 D Slater & G Even-Shoshan 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (2004) available <https://bit.ly/3oYmzGg> (accessed 27 May 2021).

41 JS Lee & JH Lee 'A case study on the recovery criteria of reliance damage in marine transport contract and charterparty' (2017) 333(4) *The Asian Journal of Shipping and Logistics* 245

42 There are cases where the Court leave this role to the domestic courts, which is beyond the scope of this case discussion. This contribution looks at instance where the Court decides the amount to be paid.

43 *Jawara v Gambia* African Commission on Human and Peoples' Rights, Communication 147/95 and 149/96 (2000) para 31.

44 *Strategic Liquor Services v Mvumbi* NO 2010 (2) SA 92 (CC), para 17.

that requires that judges do not act arbitrarily.⁴⁵ It is further settled that the furnishing of reasons is an indication to the parties and the public, that the Court imbibes openness, transparency and discipline that curbs arbitrary judicial decisions.⁴⁶

3.2 Use of process and proof

It is important to evaluate the use of process and proof and how it informs the basis of equity and the circumstances of the case to determine the amount that is to be granted as compensation in non-pecuniary losses.⁴⁷ Courts must be able to subject their decisions on each main issue to a process, proof thereof, in a manner that should be acceptable to the litigant(s).⁴⁸ As such, the process requires that some principles are used to guide the facts in a given case in a manner that portrays objectivity other than subjectivity with a wide array of discretion. As such the court has to identify the issues that arise from the assertion of a party seeking to have a decision passed in his or her favour. It is argued that the collective engagement of the process and the onus of proof informs the reasoned judgment that is acceptable to a party that identifies with the decision. It is imperative that before the Court reduces or increases the quantity of reparation of non-pecuniary losses, it addresses its mind to the legal principles that, first, inform the equity of fairness and, secondly, the circumstances of the case. It is hoped that this will go a long way in ensuring that the applicant and respondent both receive well-reasoned judgments.

If these principles are not evaluated, the court will continue to hand down non-reasoned decisions on the aspects of non-pecuniary loss. As such, this will not help to ensure that the right to a fair trial to the applicant and the respondent state is followed to the letter. Conversely, the Court's objectivity in the grant reparations of a non-material will continue unabated. The issue of fairness in a court decision will be punctuated with a similar question on the Court's ability to maintain a fair trial for all the parties concerning from the inception to the conclusion of the trial.

45 *S v Molawa; S v Mpengesi* (A388/2009, A421/2009) [2010] ZAGPJHC 157; 2011 (1) SACR 350 (GSJ) para 17. It is important in the informing the reasons of appeal, but this is beyond the scope of this contribution.

46 *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC).

47 *Lucien* (n 20) para 119. The court referred to previous jurisprudence of *Nobert Zongo*, para 62. This principle has also been referred to as the basis of equity principle.

48 See *Lucien* (n 20).

4 THE TREND ON THE COURT'S APPROACH IN EARLIER DECISIONS LEADING TO *LUCIEN*

An evaluation of the trend of the Court on the grant of non-pecuniary losses questions the consistency of the approach by the Court; where it exercises discretion to grant compensation for non-pecuniary loss without showing how it deals with the process and proof (or the lack thereof) in arriving at the rate.

4.1 *Mtikila v Tanzania*

In the first case of *Mtikila v Tanzania*,⁴⁹ the Court found that the applicant's right to freedom of association,⁵⁰ right to free participation in the governance of one's country⁵¹ and the right to equality and equal protection before the law were violated.⁵² It should be noted that the violation of these rights arose out of the government's failure to ensure the applicant's enjoyment of his electoral rights. The Court identified that the reparations may be granted once the applicant has established that the state is obligated to make reparations as an element of positive international law.⁵³ Concerning non-pecuniary damages, it stated that non-material damages may be offered for the moral damages and afflictions accessioned to the applicant as a direct victim, as well as emotional distress to family members of the victim as the indirect victims.⁵⁴ Despite the existence of this principle, the facts did not disclose how the violation of the rights of the accused would lead to non-pecuniary loss. Three principles stand out from this case. First, the Court recognised the violation of the rights of the applicant; secondly, the Court recognised that the applicant was entitled to reparations based on the violations and thirdly; the applicant had to prove a nexus between the human rights violations and the compensation for the non-pecuniary loss. The first two requirements align with the position in *Lucien's* case. The third requirement implies a disconnect with the principle in *Lucien* which states that the proof of human rights violations is sufficient for the grant of compensation for non-pecuniary loss. The relevant portion of the ruling on reparations stated that

with regard to his claim for non-pecuniary damages, the Applicant has failed to produce any evidence to support the claim that these damages were directly caused by the facts of this case. The court will not speculate on the existence, seriousness, and magnitude of the non-pecuniary damages claimed. In any event, in the view of the Court, the finding of a violation by the Respondent in the Court's judgment of

49 *Mtikila v Tanzania* Application 11/2011 (decided 14 June 2013).

50 The African Charter (n 11) art 10, 13.

51 The African Charter (n 11) art 13(1).

52 The African Charter (n 11) art 3(1)(2).

53 *Mtikila* (n 49) paras 27, 28.

54 *Mtikila* (n 49) paras 34, 37.

14 June 2013 and the orders contained therein are just satisfaction for the non-pecuniary damages claimed.⁵⁵

This is an indication that the proof of a human rights violation may not be sufficient to warrant the automatic grant of compensation concerning non-monetary loss. As such, the Court's requirement for the applicant to show a connection is an exception to the general rule. The explanation by the Court points to the failure to show the connection to mean that the orders on the violation on their own stand out as a form of satisfaction to the applicant. It suffices to state that since the court found that the applicant had not proved the connection, it had no reason to inquire into the basis of equity requirement and the circumstances of the case. In relation to *Lucien*, a few contradictions are evident. First, the presumption that a victim is entitled to compensation for non-pecuniary loss has an exception that requires that the applicant has to show a nexus between the human rights violation and the compensation that is prayed for. The failure to show this connection eludes the Court from establishing the rate of compensation. Retrospectively, the expectations in the application of the first principle and ultimate failure affect the operation of the second expectation of in-depth reasoning by the court.

Regard should, however, be placed on the nature of the rights that the Court found to have been violated. These were socio-economic rights relating to the right of an individual to participate in the elections and governance of his state. As such, the beginning point should be the analysis of the nature of the human rights violations, before applying the basis of equity requirement, and the circumstances of the case. It is added, that the court should have dealt with this issue differently, in light of the need to give reasons for its decision.

4.2 *Norbert Zongo v Burkina Faso*

In a subsequent case of *Norbert Zongo v Burkina Faso*, the beneficiaries of the estate of Norbert Zongo brought this complaint against the respondent state for its failure to use diligence to apprehend, investigate, prosecute or try the persons responsible for the murder of the deceased.⁵⁶ In the main application, it was contended by the estate of the deceased that the state had violated article 1 (on the obligation to take appropriate measures to give effect to the rights enshrined in the Charter); article 3 (equality before the law and equal protection of the law); article 4 (the right to life); article 7 (the right to have one's cause heard by competent national courts); and article 9 (the right to express and disseminate his or her opinion).⁵⁷ The Court found that the respondent state had violated the deceased's rights under

55 *Mtikila* (n 49) para 37.

56 *Norbert Zongo v Burkina Faso* Application (Reparations) 13 of 2011 (decided 5 June 2015), para 2.

57 *Zongo* (n 56) para 8.

articles 7 and 1 of the African Charter about the obligation to adopt measures other than legislative measures;⁵⁸ and article 9(2) of the Charter. It, however, found that the respondent state had not violated articles 3 and 1 of the Charter as far as they related to the obligation to adopt legislative measures.⁵⁹

The Court reiterated the same principles that govern reparations, thus; before reparations are granted, one has to show state responsibility to make reparations for the injury caused by the unlawful act.⁶⁰ Concerning moral prejudice, the applicants stated that on account of the pain, physical and emotional suffering, and the trauma that they suffered during the duration of the lengthy legal process of eight years.⁶¹ As indirect witnesses, beneficiaries of Norbert Zongo claimed a lump sum amount of approximately 332 million CFA (approximately 568 516 US Dollars).⁶² In addition, the estate of the late Ernest Zongo claimed 115 million CFA (approximately 196 926 US Dollars).⁶³ The beneficiaries of late Blaise Ilboudo claimed 70 million CFA (119 868 US Dollars),⁶⁴ while the estate of Abdoulaye Nikiema claimed 155 million CFA (265 422 US Dollars).⁶⁵ The Court reiterated the principle that non-material damages may be offered for the moral damages and afflictions accessioned to the applicant indirect victims.⁶⁶ It interpreted indirect victims to be persons who needed not be first heirs but close relatives who were inclusive of mothers, children and spouses, brothers and sisters of the victims.⁶⁷ It further stated that concerning proof of compensation for non-monetary compensation,

there is the presumption according to which violations of human rights and a situation of impunity regarding these violations causes grief, anguish and sadness both to the victims and their next of kin and that in such circumstances no proof is required.⁶⁸

From a general perspective, this assertion is a departure from the position in *Mtikila* where one has to prove a connection between the violation and the non-pecuniary loss. This position of the Court portrays the two cardinal findings in *Lucien*. First, that it is the practice

58 *Zongo* (n 56) para 203(3).

59 *Zongo* (n 56) para 203(4).

60 *Zongo* (n 56) paras 20, 21.

61 *Zongo* (n 56) para 33.

62 *Zongo* (n 56) para 36(i). This covered 149 million CFA for 43 beneficiaries, 25 million CFA for the spouse, 1 million CFA for each step mother, 15 million CFA for each child and 2 million CFA for each step sibling.

63 *Zongo* (n 56) para.36(ii). This covered 49 million CFA for 37 beneficiaries, 10 million CFA for the spouse, 1 million CFA for each step mother, and 2 million CFA for each step sibling.

64 *Zongo* (n 56) para.36(iii). This covered 30 million CFA for 7 beneficiaries, 10 million CFA for the father, 10 million CFA for the mother and 2 million CFA for each sibling.

65 *Zongo* (n 56) para 36(iv). This covered 29 million CFA for 4 beneficiaries, 10 million CFA for the mother, and 15 million CFA for the son and 2 million each sister.

66 *Zongo* (n 56) paras 34, 37.

67 *Zongo* (n 56) para 46. This was in line with the UN Basic Principles on Reparations, principle 8

68 *Zongo* (n 56) para 55.

of the Court to presume that a victim is entitled to compensation for non-pecuniary loss; and secondly, the amount to be granted as the compensation has to be calculated on the 'basis of fairness and circumstances of the case.'⁶⁹ It reiterates the expectations in *Lucien*, thus that the presumption is uniformly applied, and in addition, the compensation granted is based on equity or fairness and the circumstances of the case. While the case represents a departure from *Mtikila*, it confirms the lack of in-depth reasoning on the application of the basis of equity principle and the circumstances of the case in *Lucien*.

It may be argued that the Court contradicts itself and gives no reasons for departing from its position in *Mtikila*. The only plausible explanation that one adduces from the two decisions is, that the exception to this rule applies to the nature of rights that are violated. This is discernible from the reference to civil and political rights in *Zongo*; and the socio-economic rights in *Mtikila*. This poses a dire problem at the Arusha Court as far as it attaches different principles in determining reparations to the cases before it. This creates a bigger problem of the lack of equal protection before the law, especially where decisions are not adequately reasoned.

In respect of the various amounts claimed for moral prejudice, the Court stated that this would be done following an equitable consideration of the circumstances of each case.⁷⁰ In comparison, in *Mtikila*, the Court does not bother to consider this position due to the lack of a nexus between the violation and compensation claimed. In *Zongo*, the Court does not give any principles to guide the interpretation and application of the concept of 'equity' or the 'circumstances of the case'. Rather, it considers the suffering that the victims have undergone for many years to qualify the grant of the amounts of non-monetary compensation as equitable and in accordance with the case.⁷¹ The amounts that the court awards following its discretion are 25 million CFA (approximately 42 810 US Dollars) for each spouse, 15 million CFA for each child (approximately 25 686 US Dollars) and 10 million CFA for each parent (approximately 17 124 US Dollars).

A reflection of these figures illustrates two points. First, the Court did not directly substantiate on the use of 'equity' and 'circumstances of the case requirement' before arriving at the rates of compensation. Secondly, although the applicants sought to get reparations for beneficiaries, parents, spouses, children and other relatives; the Court qualified the nature of relatives who could receive compensation. Thus according to the circumstances of the case, the persons who suffered morally in varying degrees were spouses, children, fathers and mothers of the deceased.⁷² This is an indication that the Court offered reasons

69 *Zongo* (n 56) para 119. The Court referred to previous jurisprudence of Nobert Zongo, para 62. This principle has also been referred to as the basis of equity principle.

70 *Zongo* (n 56) para 61.

71 *Zongo* (n 56) para. 62.

72 *Zongo* (n 56) para. 50.

for excluding relatives who did not fall in this group, which is a depiction of equity in light of the facts of the case. However, the reasons for the grant of the sums as compensation were not engaged. This is explained by the fact that each amount that the estate claimed, as compensation for a spouse, child, father or mother was granted.⁷³

4.3 *Lohe Issa Konate v Burkina Faso*

In the subsequent cases of *Lohe Issa Konate v Burkina Faso*⁷⁴ and *Armand Guehi v Tanzania*,⁷⁵ the applicants as direct victims sought the grant of compensation for non-pecuniary loss due to human rights violations. In *Konate*, the applicant was tried and convicted for the offences of defamation, public insult and the use of abusive language against judicial officers.⁷⁶ He was sentenced to 12 months imprisonment, a fine of 1.5 million CFA (about 3 000 US Dollars), damages of 4.5 million CFA (about 9 000 US Dollars), and costs of 250 000 CFA (about 500 US Dollars).⁷⁷ Other actions included the suspension of the weekly newspaper for six months.⁷⁸ He brought this application before the African Court seeking orders that the respondent state violated article 9 of the African Charter, article 19 of the ICCPR, and article 66 of the revised ECOWAS Treaty,⁷⁹ and an award of reparations.⁸⁰ Concerning compensation for non-pecuniary loss, the applicant sought 17 500 000 CFA (approximately 29 967 US Dollars).⁸¹ The court found a violation of all the provisions referred to by the applicant as far as they placed a custodial sentence on defamation in the national laws, the payment of an excessive fine, damages and costs and the suspension of his newspaper for six months.

This case is important because it projects an applicant presenting his case in a detailed manner. As such, this case is peculiar for how the applicant presented his claim for compensation for moral prejudice in great detail.⁸² First, he characterised the moral prejudice he was subjected to throughout the trial, conviction and imprisonment. Concerning the trial, the applicant's hearing, and sentence took place the same day without regard to the principles of a fair trial.⁸³ This was exacerbated by the award of a fine that was beyond his means and the

73 As such the Estate of Noberet Zongo was granted the figures that it applied for as compensation for the spouse, child and parent. As for the estate of Ernest Zongo, Blaise Ilboudo and Abdoulaye Nikiema, they received the figures they applied for, with regard to fathers and mothers of the deceased.

74 *Lohe Issa Konate v Burkina Faso*, Application 004 of 2013 (decided 3 June 2016).

75 *Armand Guehi v Tanzania* Application 001 of 2015 (decided 7 December 2018).

76 *Konate* (n 74) para 2.

77 *Konate* (n 74) para 3.

78 *Konate* (n 74) para 4.

79 *Konate* (n 74) para 6.

80 *Konate* (n 74) para 6.

81 *Konate* (n 74) para 56.

82 *Konate* (n 74) paras 52-59.

83 *Konate* (n 74) paras 52-53.

subsequent imprisonment.⁸⁴ Secondly, he explained the poor living conditions in jail and the trauma that his wife went through in trying to provide for the family.⁸⁵ Thirdly, he also pointed to the trauma that his children went through as a result of his conviction.⁸⁶ Just like in *Zongo*, the Court recognised that ‘moral prejudice is assumed by international courts in cases of human rights violations.’⁸⁷ However, it did not subject the applicant’s evidence to the existence of proof, the onus thereof before arriving at a decision. In the exercise of its discretion, the Court stated that ‘the claim is exaggerated and based on equity, decides to reduce the amount to 10 000 000 CFA’.⁸⁸

A reference to two principles and the expectations in *Lucien* is important to guide our evaluation. The Court upholds the presumption that a victim was entitled to compensation for non-pecuniary loss, and the amount to be granted as the compensation had to be calculated on the ‘basis of fairness and circumstances of the case.’⁸⁹ While the expectation of the first principle indicates the uniform application of the presumption, the Court still fails to develop jurisprudence on the use of the basis of equity or fairness and the circumstances of the case. The lack of in-depth reasoning on the application of the basis of equity principle and the circumstances of the case continues to thrive. In this regard, while the Court referred to the basis of equity, it did not add value to the term. Second, the court does not evaluate the facts on a moral prejudice that the applicant presented. Rather it simply referred to the amount as exaggerated. It would have been expected that the Court would relate the facts presented by the Applicant to establish whether they were proved, whether the applicant discharged the burden of proof, such that the court would have a reasoned decision. The referral to the amount as exaggerated without giving reasons was a mistake on the part of the Court. In addition, this is a departure from the trend in *Zongo*, which to a given extent evaluated the context of indirect victims. The case is, however, instructive on the role of the applicant in proving the amount of compensation for the non-monetary loss.

4.4 *Armand Guehi v Tanzania*

A point of departure is evident in *Armand*, where non-pecuniary loss arising out of the violation of civil and political rights does not automatically result in the grant of any compensation for the non-monetary loss.⁹⁰ The Court’s decision was based on the principle in *Mtikila*, thus where the applicant cannot substantiate a link between

84 *Konate* (n 74) para 54.

85 *Konate* (n 74) para 54.

86 *Konate* (n 74) para 55.

87 *Konate* (n 74) para 58.

88 *Konate* (n 74) para 59.

89 *Zongo* (n 67).

90 *Armand Guehi v Tanzania* Application 001/2015 (decided 7 December 2018) paras 153, 169.

the violation and the loss, then compensation cannot be granted. The court stated as follows:⁹¹

The Court notes that the same request for compensation is based on chronic illnesses and poor health due to lack and failure of treatment, physical and psychological abuse, and delayed the trial. The Court further notes that the Applicant does not adduce evidence that the Respondent State denied him medical attention or its agents subjected him to abuse. As the Court found earlier, the actions complained of related to restrictions which are inherent to detention and imprisonment. The related claims are therefore dismissed.

In this regard, while the rights that were violated were civil and political in nature, the court held that the applicant could not prove a link because the violation was according to an order of imprisonment arising from due process.⁹² In addition, the Court reiterated the principle that non-pecuniary loss is evaluated on the account of fairness and the circumstances of the case.⁹³ This case, therefore, extends the nature of the violation to cover instances where the violations are in the exercise of an order of the court. This case represents a different approach from *Mtikila*. In *Mtikila*, the Court summarily denied extending the violation of a right as a presumption of proof of moral prejudice to the applicant. In *Armand*, the Court presumed the existence of moral prejudice and the applicant bore the burden to prove it.⁹⁴ The questions that require reflection are, first; how to use the approaches in *Mtikila* and *Armand* to improve the practice of the grant of compensation for non-monetary loss and secondly; following the evaluation of *Zongo* and *Konate*, how one can improve the interpretation of the use of 'equity' and the 'circumstances of the court' in the grant of compensation for the non-monetary loss.

The case of *Armand* offers insights into the application of the principles in *Mtikila* and *Lucien*. First and concerning *Mtikila*, the exception to the presumption that a victim is entitled to compensation for non-pecuniary loss as far as s/he proves a connection between the human rights violation and the compensation is reiterated. However, the expectations flowing from the application of the first principle is affected by the lack of in-depth reasoning in the second expectation.

5 CONCLUSION

The Court's failure to give reasons, before offering a rate of compensation different from the amount prayed for by the victim, is a clog on the application of the rule of law in the adjudication of cases. The retrospective reflection on the decisions before *Lucien* indicates that there has been a lack of consistency in the application of the 'basis of equity and circumstances of the case' principle. This should be interpreted as a missed opportunity at the development of jurisprudence that either defines or guides the basis of equity and

91 *Armand* (n 90) para 179.

92 *Armand* (n 90) para 179.

93 *Armand* (n 90) para 177.

94 *Armand* (n 90) paras 177, 179.

circumstances of the case. This presents a lack of objectivity from the Arusha-based Court; and lends credibility to the position that the decisions at this juncture, are not adequately reasoned. The overall effect is a failed attempt at ensuring the rule of law through reasoned decisions.

The jurisprudence of the African Court has indicated that the violation of a human right is a presumption to the grant of compensation for non-pecuniary loss. The exception to this presumption may be where the violated right is, a social-economic right or as a result of an order of Court that limits the enjoyment of a given right. For this exception to affect the grant of compensation, the applicant should fail to show a link between the violation and the compensation claimed. It is proposed that the existence of this presumption should always be in favour of the applicant to the extent sought. However, the proof of the amounts claimed should shift from the current unclear and discretionary assessment to a discretionary and objective model. This will guide the Court is based on equity and the circumstances of the cases.

To further the proposition above, the Court should use a two-stage approach in dealing with compensation for the non-monetary loss. Concerning the first stage of the application of the principle, once the court finds that the existence of a human rights violation, it should presume that this is sufficient to warrant the award of compensation for non-pecuniary loss. The second stage inquiry should then question the amount the applicant claims. As such, the applicant has to, first; prove the link between the violation and the compensation sought, and secondly; by discharging the onus, prove the link. The Court would then be required to evaluate amounts claimed against informed principles of equity and the circumstances of the case. The effect of the two-stage approach ensures that the sums that the Court awards are as a result of an informed and reasoned judgment. This would tilt the scales to connote the existence of the rule of law through reasoned decisions on compensation in non-pecuniary matters.

This approach retrospectively deals with the facts surrounding the nature of the human rights that were violated in *Mtikila*. It is proposed that if the Court was to be subjected to a case where it would seek to follow the approach in *Mtikila*, it would end up giving a non-reasoned decision that would question its application of the rule of law within its domain. To ensure consistency, following the first stage of the inquiry, the Court would accord the applicant (in a similar case like *Mtikila* or *Armand*) the benefit of the established human rights violations as reason for the presumption of a grant of non-pecuniary loss. Thereafter, the victim, according to the second leg of the inquiry, would then have the onus to prove that the grant of sums applied for is linked to the human rights violation. This would be synonymous with the approach that the applicant used in *Konate* used to substantiate his claims for proof of the amount of compensation for moral prejudice. The Court would then apply the 'principle of equity' and 'the circumstances of the case' and give reasoned answers for its decision. It is argued that this will lead to the organic development of the concepts

of 'equity' and 'the circumstances of the case' within the discretionary and objective bounds of the Court.