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Towards a New Standard for Assessing Compensation in Cases of Collective Human Rights Violations

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International human rights law and international courts have finally begun to recognize a new type of victim: local and indigenous communities. In key decisions over the past two decades, the Inter-American Court of Human Rights recognized the violations of indigenous communities' rights by national governments. At the same time, less attention has been paid to the nature of damages available for these violations. This Note highlights the underdevelopment of damages jurisprudence in the Inter-American Court of Human Rights, which has mostly relied on non-pecuniary damages to compensate collective victims. It argues that the Court's approach fails to recognize the evidentiary challenges faced by collective victims, who often cannot prove the harm they suffered due to their traditional way of living or the destruction of evidence caused by the violation itself. At the same time, the approach also fails to utilize the power of equity to compensate for clearly monetary harms, especially when a lack of quantitative proof is inevitable. This Note critiques the use of the non-pecuniary approach in the context of group victims and argues (1) that violators, not victims, should assume the risks associated with the uncertain value of harms; and (2) that non-pecuniary compensation is a misguided approach because it implies that harms suffered by group victims are non-monetary in nature. Drawing on the jurisprudence of other international tribunals, this Note shows that group cases are amenable to the use of equity in calculating monetary damages based on approaches to both collective and complex individual cases. This Note concludes by suggesting that monetary damages should be approximated, perhaps with the help of experts, in human rights cases when the only barrier to proof is the lack of a concrete value for a given harm.

INTRODUCTION

Only in the last two decades has the potential to recognize the intersectional and collective nature of human rights abuses started to develop in international tribunals. The Inter-American Court of Human Rights ("IACtHR") has handed down several decisions recognizing indigenous peoples' collective human rights and awarding monetary reparations. The challenge facing the tribunals, recognizing the collective nature of the abuses, is the reparations. The intertemporal character[1] of collective human rights abuses often makes it hard to trace the actual extent of the damage. The

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1. Dinah Shelton, *Reparations for Indigenous Peoples: The Present Value of Past Wrongs*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 47 (Federico Lenzerini ed., 2008).

collectiveness of the damage can blur the causation and make it hard for judges to decide which damages were actually caused by the perpetrators, while the evidentiary challenges make it difficult to calculate compensation.[2] Moreover, human rights abuses often involve the deprivation of intangible rights or relationships, such as life or traditional ways of living. This makes it even more difficult to calculate the appropriate amount of damages. Finally, collective compensatory awards rendered for human rights abuses have been subject to varying standards. The above obstacles often lead courts, which frequently impose high standards of proof for claimants, to undercompensate for the material dimensions of human rights abuses. In fact, the IACtHR itself has consistently awarded most compensation under the umbrella of "non-pecuniary" damages.[3]

This Note explores the existing standards for awarding pecuniary damages for human rights violations, with an emphasis on indigenous communities. It argues that the standards of proof for pecuniary damages are too high and overly burdensome for the victim communities, causing under-compensation and injustice. Courts, especially regional human rights tribunals, should recognize that material harms suffered by communities are often different from those suffered by individuals due to the special nature of their culture and indigenous and productive activities. Moreover, the precise values of those harms are often very hard to prove given the complicated nature of the harms, the violations themselves, and the customary lack of documentary evidence. Criticizing the approach currently adopted by the IACtHR, this Note suggests that equity and estimation are solutions more appropriate than deeming most indigenous injuries "non-pecuniary" because the equity and estimation approach imposes the risk of lack of evidence on the violators. Hence, human rights tribunals should adopt the approach of the European Court of Human Rights ("ECtHR"). The main requirement should be to prove the existence of harm caused by the violations. Then, the communities that reasonably lack evidence to substantiate the precise value of those harms should be allowed to prove just the extent of the harms, upon which the courts—perhaps enlisting the support of independent experts—should use the evidence available to approximate the damages and award greater pecuniary damages in equity. If that does not happen, the claimants will be forced to plead most damages under the non-pecuniary head, which in-

2. *See id.* at 48.

3. *See, e.g.*, Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010); Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005). In *Kichwa* (pecuniary=6.7%), *Sawhoyamaxa* (0.4%), *Yakye Axa* (4.5%), *Saramaka* (11%) and *Xákmok Kásek* (1%), pecuniary damages constituted between 0.4% and 11% of all damages awarded, while non-pecuniary constituted 89–99.6%.

creases the risk of under-compensation and leads to a false paradigm of indigenous communities not suffering material losses despite being unable to use their land.

This argument is especially timely in light of the human rights cases currently reaching other tribunals. For example, in the *Ogiek* case at the African Court on Human and Peoples' Rights, the indigenous community deprived of land by the government of Kenya could no longer carry out traditional farming and religious activities;[4] under modern Western benchmarks, such harm is not easy to quantify. The court found that Kenya violated seven human rights but has not yet issued its reparations decision. Human rights courts should, with more force than they have previously done so, be inclined to approximate the pecuniary damages in equity. This would result in a fairer system because material losses caused by human rights violations would be truly compensated. Moreover, this approach is more likely to deter human rights violators, who will now be held accountable for harm that is clear, but difficult to monetize. Furthermore, this approach avoids the total unpredictability of non-pecuniary damages, which often vary in ways not traceable to potential explanatory factors, making the awards seem arbitrary and the law harder to navigate by claimants.[5]

This Note begins with basic standards for reparations in human rights cases and the distinction between pecuniary and non-pecuniary damages. It proceeds by criticizing the IACtHR jurisprudence on collective reparations. Finally, it introduces and advocates for the more sensible ECtHR approach, utilized in both group and individual cases when evidence of the value of material harm is lacking and elaborates the approach by looking at cases from other tribunals.

I. Basic Standards

A. Standard for Reparations

"Reparation[s] must, as far as possible, wipe out all the consequences of the illegal act, and re-establish the situation which would, in all probability, have existed if that act had not been committed."[6] In other words, every violation of an international obligation gives rise to a duty to make adequate

4. African Comm'n on Human and Peoples' Rights v. Republic of Kenya, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (May 26, 2017).

5. *See* Damian A. Gonzalez-Salzberg, *Non-Pecuniary Damage under the American Convention on Human Rights: An Empirical Analysis of 30 Years of Case Law*, 34 Harv. Hum. Rts. J. 81, 81 (2021).

6. Factory at Chorzow (Ger. v Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, ¶ 125 (Sept. 13).

reparations, which may include restitution[7] and or compensation for the consequences of the violation.[8]

However, perfect restitution is not always viable because in many instances, harm caused by the inability to use property in the period between expropriation or harm to property and judicial compensation cannot be undone by restoration. Henceforth, damages are often required for fair compensation.[9] To obtain compensation, victims have the burden to prove (1) the existence of the harm and (2) a causal link between the violation of the right and the harm suffered.[10] This burden of proof can present a problem due to the lack of documentation and often long-lasting character of collective violations. Furthermore, the requirement that the *value* of harm must be proven is often impossible to satisfy.[11]

Still, compensation for human rights abuses should be granted for any "economically assessable" damages, proportional to the gravity of violations and harm suffered.[12] Compensation is not limited to strictly financial losses.[13] It can include environmental and moral damages.[14] Moreover, the lapse of time or longevity of ongoing harms should not prevent granting damages, because the aim of compensation is to also prevent the unjust enrichment of perpetrators through any harms they cause. Hence, the courts should aim to compensate for every harm proximately caused by the violation.[15]

There are no universal evidentiary requirements for reparations under international law.[16] The main evidentiary standard under international law is

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7. Restitution is usually preferred by courts, especially those dealing with group claims to property, because the most effective way to guarantee a right to property is to give that property to the rightsholder, which will also prevent any unwelcome damage to the property. *See Alexkor Ltd. v. Richtersveld Cmty.* 2003 SA 460 (CC) (S. Afr.) (recognizing the Richtersveld community's right to property and to their land, deciding it was violated by the government's removal of their land for the benefit of Alexkor corporation, and only granting restitution because when available the community's restoration to the land should be the main and only remedy); *see also Comunidad Kom Kiñe Mu: Sentencia Completa* (Exp. (2004-C)) (Arg.) (granting indigenous communities immediate challenges to administrative removal acts to prevent damages caused by expropriation). Note that under ICJ jurisprudence, there is a specific order of assessing reparations, reflecting the preference: restitution, then compensation, then satisfaction.

8. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 179, 184 (Apr. 11).

9. *See* Ger. v. Pol., 1928 P.C.I.J. ¶ 73.

10. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 2007 43, ¶ 462 (Feb. 26).

11. Shelton, *supra* note 1, at 48.

12. *Id.* at 67.

13. G.A. Res. 60/147, ¶ 20 (Mar. 21, 2006).

14. *See, e.g.*, Eritrea's Damages Claims (Eri. v. Eth.), Final Award, 26 R.I.A.A. 505, ¶ 155 (2009).

15. *See* Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective,* 20 Berkeley J. Int'l L. 11, 41 (2002) ("[N]ot seeking financial restitution, in the face of documented proof that financial giants worldwide are sitting on billions of dollars in funds made on the backs of . . . victims, which they then invested and reinvested many times over, amounts to an injustice that cannot be ignored.").

16. Diana Odier-Contreras Garduño, Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations 62 (2018).

the burden of proof—*onus probandi*—which rests on the claimant. However, this standard is subject to some flexibility at the reparations stage. Generally for damages, causation is crucial: damages claimed should not be too indirect or remote from the wrongful act.[17] Human rights courts sometimes use presumptions to determine the extent or value of the harm suffered. They often presume moral harm to the victim or next of kin,[18] shifting the burden to disprove allegations to the alleged violator. To prove material damage, courts require "sufficient" evidence.[19] However, even then presumptions are sometimes used to assess the damage. For instance, the Inter-American Court of Human Rights usually presumes that an adult victim carries out productive activities and a human rights violation deprives him of an income at least equivalent to a minimum wage.[20] Despite this, it is not always clear which standards of proof govern the evidence necessary to demonstrate the *value* of the harms suffered—and presumptions or estimations are only used in some cases, but not others. The next section outlines the difference between pecuniary and non-pecuniary damages and then goes on to compare the standards governing collective and group cases.

B. The Pecuniary/Non-Pecuniary Distinction

International human rights jurisprudence generally divides the monetary compensation for violations into pecuniary or material versus non-pecuniary or non-material or moral. Pecuniary damages are awarded for the "loss of, or detriment to, the income of the victims, the expenses incurred as a result of the events and the pecuniary consequences that may have a cause-effect link with the events."[21] Their objective is to compensate for material, tangible harms caused by human rights violations: for the loss of income, including future earnings, property and other objects,[22] and all expenses causally linked to the violation.[23] They are subject to a higher evidentiary burden, requiring a clear nexus between the harm alleged and the violation.[24]

17. *Id.*

18. *See, e.g.*, Pueblo Bello Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 257 (Jan. 31, 2006); Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights 194 (2d ed. 2013).

19. *See* Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 257 (July 1, 2006).

20. Caracazo v. Venezuela, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 50(d) (Aug. 29, 2002).

21. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146 ¶ 216; *see also* Bámaca Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 91, ¶ 43 (Feb. 22, 2002).

22. Young v. United Kingdom, App. No. 7601/76; 7806/77, Eur. Ct. H.R. ¶¶ 10, 11, 68 (Oct. 18, 1982).

23. This includes expenses such as travel and legal fees.

24. Atala Riffo v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 292 (Feb. 24, 2012).

On the other hand, non-pecuniary[25] damages refer to the detrimental effects caused by human rights violations that are not financial or related to property and thus cannot be easily measured in monetary terms.[26] Non-pecuniary damages are usually awarded for moral or physical suffering, as well as harms to traditional relationships or ways of life—this includes the suffering of direct victims, emotional distress suffered by their families, and non-material changes in the lives of victims or their families. The damages can be awarded "on the basis of equity" and are subject to approximation by the court.[27] The court will consider factors such as the seriousness of the violation,[28] anxiety, inconvenience, or uncertainty suffered by the injured party, and the number of human rights violations.

II. Collective Human Rights Reparations Standards

The IACtHR, in cases concerning collective human rights violations, has awarded pecuniary damages more closely resembling symbolic awards than real compensation. In three cases involving a violation of indigenous groups' right to land, the court only awarded pecuniary damages for costs incurred by the communities while trying to recover their ancestral lands. Those damages are more akin to nominal damages confirming the finding of a violation, with the court focusing instead on non-pecuniary compensation. The court seemingly ignored the fact that the violations clearly caused material losses. Instead, it used the burden of proof to deny pecuniary damages and shift to largely discretionary non-pecuniary awards. These awards, moreover, vary significantly from case to case. A combination of factors such as the number of victims, the rights violated, and the time and nature of the wrongdoing hardly explains the relative, and not the absolute, value of *some* of the awards.[29] The cases demonstrate the inexplicable failure to compensate for material harms suffered by the victims.

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25. The African Court on Human and People's Rights refers to non-pecuniary damages as "moral" damages. *See* Mtikila v. Tanzania, No. 011/2011, Ruling on Reparations, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 34 (June 13, 2014).

26. Non-pecuniary damage in the Inter-American human rights system can "include the pain and suffering caused to the direct victims and their loves ones, discredit to things that are very important for persons, other adverse consequences that cannot be measured in monetary terms, and disruption of the lifestyle of the victim or his family." *See* Cantoral-Benavides v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 53 (Dec. 3, 2001). The European Court of Human Rights has held that "non-pecuniary damage is the applicant's subjective measure of the distress he had endured because of a violation of his rights and, by its nature, is not amenable to proof." Korchagin v. Russia, Eur. Ct. H.R. 576, ¶ 25 (2006).

27. *See* Cantoral-Benavides v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 53 (Dec. 3, 2001).

28. *See* Selçuk v. Turkey, 1998-II Eur. Ct. H.R. ¶ 118.

29. *See* Gonzalez-Salzberg, *supra* note 5.

A. Compensation of Collective Victims by the IACtHR

1. Sawhoyamaxa Indigenous Community v. Paraguay

In the *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, the court considered the case of a community expelled from its traditional land, finding violations of rights to property and life. The court first ordered communal restitution in the form of the return of their lands or granting alternative lands.[30] The court awarded $1,000,000 U.S. dollars ("USD") in non-pecuniary damages for non-material harms—namely, the detriment to living conditions and offending of community values—caused by denial of their rights to land.[31] Moreover, Paraguay was ordered to pay $20,000 USD per deceased for the pain, suffering, and death of seventeen deceased community members.[32]

By contrast, the court only awarded $5,000 USD in pecuniary damages to compensate for expenses incurred during the domestic claims for restitution of the land.[33] The court did not even consider whether the community's inability to use their land could be compensable as a material harm. Despite acknowledging the "special meaning of the land"[34] in the context of the need of the community to "generate productive yield from the lands,"[35] it adopted a very narrow approach to pecuniary damages. The Inter-American Commission on Human Rights had requested the court to award, in equity, an amount to compensate for the loss of earnings of the members of the community.[36] However, the court did not even consider the possibility of such a loss,[37] potentially because no precise evidence of its value was presented. Thus, despite stating that "the reparations *cannot imply* enrichment or *detriment for the victims* or their successors," the court did not award reparation for any material harms resulting from losing access to ancestral land and focused, instead, on non-pecuniary damages for pain and suffering.[38] Those damages can hardly be said to be compensation for material losses. The following four cases demonstrate a similar pattern.

30. Gabriella Citroni & Karla I Quintana Osuna, *Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights, in* Reparations for Indigenous Peoples: International and Comparative Perspectives 317, 338 (Federico Lenzerini ed., 2008); *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146 ¶ 212.

31. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146 ¶¶ 221-26; *see id.* ¶¶ 144, 178, 201 (emphasizing this non-material dimension of the harm).

32. *Id.* ¶ 226.

33. *Id.* ¶ 218.

34. *Id.* ¶ 222.

35. *Id.* ¶ 223.

36. *Id.* ¶ 201(c).

37. *See id.* ¶¶ 216-218 (discussing the award of pecuniary damages).

38. *Id.* ¶ 198 (emphasis added).

2. *Yakye Axa Indigenous Community v. Paraguay*

In the *Case of the Yakye Axa Indigenous Community v. Paraguay*, the IACtHR mostly awarded non-pecuniary damages. The court held that the community's collective rights to ancestral land, in addition to the right to protection and right to life, had been violated by the government on the grounds that it transferred their land to private owners. The court then underscored the requirement for pecuniary damages to have a causal nexus to the violations at issue.[39] However, it set pecuniary damages primarily as indemnification for the community's expenses in trying to recover its lands.[40] Because those expenses followed from the violation of their right to ancestral land, the court awarded $45,000 USD in equity.[41] Despite the court's apparent willingness to apply the principles of equity and the emphasis on the special value of the land for the community,[42] the court did not mention other material damages. Specifically, it did not award any pecuniary damages for either lost income or other material harms *also resulting* from the inability to use the community's land—despite the Inter-American Commission on Human Rights requesting such damages for justice and equity.[43] On the other hand, the court awarded $950,000 USD in non-pecuniary damages for suffering caused by a diminished quality of life, underlining the special *non-material* value land has for indigenous communities like the Yakye Axa.[44]

A similar consideration also led to the award of non-pecuniary damages in the *Case of Plan de Sáanchez Massacre v. Guatemala* for the effect of the deprival of land on the Achi Mayan peoples' values and identity. In both *Plan de Sáanchez Massacre* and *Yakye Axa Community*, the value of land was not considered to be a material or pecuniary damage, but rather an exclusively non-material one.[45] Therefore, although clear material loss stemming from an inability to use the land is *causally* related to human rights violations, there was no direct compensation for this loss. In this way, the court established a dangerous precedent of classifying traditional uses of land as purely non-material. This omission potentially suggests that traditional communities' land does not have material value, or at least that arguments based in equity will not lead to compensation. The Inter-American Court has been rightly applauded for recognizing collective rights to land and their special, non-material value. Yet why should the land cease to have material value? This presents a problem peculiar to collective human rights violations, where documentation is often sparse. But as argued below, the solution does

39. *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 125 ¶ 193.
40. *Id.* ¶ 194.
41. *Id.* ¶¶ 194–195.
42. *Id.* ¶¶ 202-203.
43. *Id.* ¶ 194.
44. *Id.* ¶ 205.
45. *Id.* ¶¶ 194-195; Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 105, ¶ 86 (Apr. 29, 2004).

not have to be peculiar: using equity and estimation known from individual human rights cases could suffice.[46]

3. *Xákmok Kásek Indigenous Community v. Paraguay*

Decided in 2010, the IACtHR in the *Case of the Xákmok Kásek Indigenous Community v. Paraguay* again found the violation of the right to property and life for expulsion from ancestral lands. The Inter-American Commission on Human Rights asked the court to take into account the inability of the community to use the land and carry out its traditional subsistence activities, resulting from having been ejected from their ancestral land, when calculating pecuniary damages.[47] However, the court, like in *Yakye Axa*, only awarded $10,000 USD for travel expenses incurred in trying to recover their lands.[48] Perhaps, again, the refusal was partly linked to a lack of evidence proving the precise material value of the harms suffered. Thus, the court seemingly did not think that the community suffered any material loss or any potential income loss from not being able to use its ancestral land. Again, the court awarded much higher non-pecuniary damages: $700,000 USD for the loss of a special relationship to land[49] and $260,000 USD for the deaths resulting from the violations.[50]

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Overall, in each of the three cases, the court took a very narrow view of pecuniary damages. Despite applying principles of equity elsewhere, the court did not award pecuniary damages for the loss of property, loss of income from the property, or *lucrum cessans* (loss of potential income) of the individuals who died.

In two other collective rights cases, the court did award pecuniary damages beyond expenses. Still, they were almost negligible in comparison to non-pecuniary damages.

4. *Saramaka People v. Suriname*

In the *Case of the Saramaka People v. Suriname*, the government of Suriname's decision to grant logging concessions on land that belonged to the Saramaka people was found to be a violation of their right to land and prop-

46. *See infra* section II.B; section II.C; Part III.
47. *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 214 ¶ 316.
48. *Id.* ¶ 318.
49. *Id.* ¶¶ 321, 323.
50. *Id.* ¶ 325. The court seemingly did not consider the deaths of potentially productive adults to have caused material damage to families. Normally, when a violation results in death, courts assume that the deceased adult would have been productive and awards pecuniary damages for lost income based on its own wage estimate, which does not always require proof of income before death. *Cf.* Neira Alegría v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 29 (Sep. 19, 1996).

erty.[51] Nevertheless, the court only awarded $75,000 USD in pecuniary damages for valuable timber extracted from the land taken from the community and for material property damage from the logging concessions.[52] The non-pecuniary award, on the other hand, totaled $600,000 USD for suffering as a result of taking the Saramaka people's ancestral land away.[53] Here, material damage to land with valuable timber, the main source of material support for the Saramaka, was valued at only $75,000 USD, with the court primarily relying on non-pecuniary awards to compensate the community.[54]

5. *Kichwa Indigenous People of Sarayaku v. Ecuador*

In the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, the court compensated the Kichwa community for damage to its territory and natural resources, right to property, and to life.[55] The community asked for pecuniary damages, including the loss of earnings from tourism and production resulting from lack of access to and damage to its land and natural resources.[56] Like in *Saramaka*, the court only awarded $90,000 USD of pecuniary damages, in equity, for damage to territory and natural resources as well as suspension of production and activities.[57] The court explained its low award by stating that in order for the court to use equity, the parties have to provide clear evidence of damages suffered and prove the causal link between the violation and the harm.[58] The court held that the evidence of the value of the injuries was not specific enough.[59]

At the same time, the court recognized that due to the Kichwa peoples' traditional, non-recorded way of life, it was natural that the harms were difficult to prove. Ultimately, the court arrived at $90,000 USD because it found that some damages and expenses could be reasonably assumed.[60] The court thus recognized the obstacles facing the community, expressed willingness to rely on principles of equity, but still made a relatively low award for long-lasting, ongoing injuries.[61] In other words, the IACtHR failed to recognize that it is reasonable for a community to not have precise value documentation, either due to its way of life or the nature of the violations.[62] Giving a low damages award for these reasons is to the benefit of the violator, who pays less not because the damage caused was lower, but because the

51. *Saramaka People*, Inter-Am. Ct. H.R. No. 172.
52. *Id.* ¶ 199.
53. *Id.* ¶¶ 200–201.
54. *Id.* ¶ 199.
55. *Kichwa Indigenous People of Sarayaku*, Inter-Am. Ct. H.R. No. 245 ¶ 317.
56. *Id.* ¶ 311.
57. *Id.* ¶ 317.
58. *Id.* ¶ 314.
59. *Id.* ¶ 315.
60. *Id.* ¶ 317.
61. *Id.* ¶ 315.
62. *Id.* ¶¶ 315–317.

victims targeted do not have documented evidence. While the court's acknowledgment of the obstacles in documenting the value of damages and its willingness to use equity leaves the door open for change in the future, the IACtHR nonetheless failed to recognize that some of the information on the value of the harm might have been in the hands of the State. Hence, the court recognized non-material injury, but only awarded nominal damages for material harm.

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In sum, the IACtHR has consistently rejected any notion of severe material damage caused by deprivation of communal land. It has been inconsistent in its pecuniary awards: sometimes only compensating for proceeding expenses, and at other times negligibly compensating for speculative harms to land and resources. The IACtHR also seems hesitant to use equity to award more than nominal pecuniary damages; conversely, under non-pecuniary damages, the court does not require clear evidence and tends to be eager to award non-material damage for losses to ways of life. It raises the question: why can moral damages be assumed and approximated, while material damages to a community that subsists through the use of land cannot? The indigenous communities' cases at the Inter-American Court highlight unaddressed complexities. What if the respondent is in a better position to produce evidence? What if there is no clear evidence due to the victims' traditional ways of life? What if the value of the damages cannot be proven due to displacement caused by the violation? The absence of evidence based on these reasons should not preclude awarding just amounts of damages for material damage, even if it cannot always be proven with certainty. By ignoring most of the potential material harms for which evidence was not produced, the court invites perpetrators—often powerful governments—to violate the rights of groups that often cannot produce precise evidence.[63]

Interestingly, the issue of lack of evidence to provide exact proof of the value of the harm has been addressed in other cases involving non-indigenous groups.[64]

B. Documentation Lost Due to Factual Circumstances of the Case

The first category of cases to be discussed involves situations where the victims do not have evidence of the value of the harm suffered due to the actions or events that took place *during* the violation alleged. For example, in *Mapiripán Massacre*, the Inter-American Commission on Human Rights and the victims (the inhabitants of the town) of a massacre and destruction of a

63. For further information on how difficulties gathering evidence can affect recovery, *see* Shelton, *supra* note 1, at 47, 48.

64. Odier-Contreras Garduño, *supra* note 16, at 162.

town by a government-approved paramilitary group asked the IACtHR for compensation for consequential damages and lost earnings in fairness, with flexibility regarding the missing invoices and other evidence, due to the abrupt displacement of the victims as a result of the violations.[65] The court agreed with the statement that the "evidence supplied was insufficient to establish with certainty the pecuniary losses suffered by most of the victims."[66] However, it also acknowledged that the victims did not have much evidence due to the violation itself.[67] Thus, despite insufficient evidence to establish the ages, activities or lost earnings of most of the victims, the court set pecuniary damages in fairness for victims that had *some* evidence.[68] Nevertheless, somewhat contradictorily, it still required evidence establishing the losses with certainty and did not award any damages to victims for whom there was no proof of potential future activities.[69] Still, the court awarded $985,000 USD in pecuniary damages for harms to nine of the victims.[70] However, the court again awarded non-pecuniary damages for suffering and changes in conditions of life of the victims, without requiring clear evidence for each of them.[71] Relying on statements from victims and witnesses, and on the gravity of the case—in this case, a massacre—the court awarded $3,500,000 USD to thirty-five victims.[72] Though acknowledging that evidentiary issues faced by the victims were partly caused by the violators, the court still limited pecuniary damages due to doubts, not about their existence, but about the precise value of the losses.[73]

1. *The ECtHR's Emphasis on Pecuniary Damages*

In *Selçuk and Asker v. Turkey*, which involved government security forces burning down a Kurdish village, the European Court of Human Rights used a different approach from that used by the IACtHR, reaching a strikingly different conclusion.[74] In that case, Turkish security forces had entered and burned down the claimants' village. The applicants claimed pecuniary damages for the loss of houses, cultivated land, household property, livestock, and a mill.[75] The court did not require clear and precise proof of loss since the context made it difficult for the claimant to substantiate the quantity and value of the harm sustained.[76] Because of the security forces' actions, the

65. Case of the "Mapiripán Massacre" v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 262–63 (Sep. 15, 2005).
66. *Id.* ¶ 266.
67. *Id.*
68. *Id.* ¶ 267.
69. *See id.* ¶ 276.
70. *Id.* ¶ 278.
71. *Id.* ¶ 282.
72. *See id.* ¶ 290.
73. *Id.* ¶ 288.
74. *Selçuk*, 1998-II Eur. Ct. H.R. ¶ 115 (1998).
75. *Id.* ¶ 104.
76. *See id.* ¶ 106.

claimants were not able to provide evidence as to the value of the houses and household property.[77] However, the ECtHR decided that because it found the houses were destroyed by security forces, damage was sustained, and hence pecuniary damages were due. Although not explicitly stated, it appears that the court took into account the fact that evidence could not have been produced *due* to the human rights violations committed.[78] Hence, the ECtHR awarded pecuniary damages for houses, mills, and household property lost based *on equity and speculation*.[79] For the houses, it awarded ₺1,000,000 Turkish Liras ("TRY") to each of the claimants, roughly one-third to one-half of the amounts claimed.[80] For other properties, it noted that the applicants' houses had been destroyed by fire, again implicitly linking lack of evidence to the violation itself, and concluded that there must have been some additional property loss.[81] The court then awarded ₺4,000,000 TRY and ₺5,000,000 TRY, respectively, roughly two-thirds of the amount claimed by the victims. For lost income, despite lack of independent evidence, the ECtHR also awarded pecuniary damages based on equity, assuming that not being able to use the land or the mill would create a loss of income despite clear evidence of the amounts.[82] In total, the court awarded $17,000 USD and $22,000 USD in pecuniary damages to the two victims. In contrast, the non-pecuniary damages awarded for suffering[83] only totaled about $13,000 USD each. Hence, the ECtHR estimated pecuniary damages resulting from the loss of houses and the lost opportunity to use the land, despite the lack of clear evidence of the value of the losses.[84] Using equity and approximation, it awarded more damages under pecuniary than non-pecuniary damages.

The outcome in *Selçuk* can be compared with the *Ituango Massacres* case at the IACtHR. In *Ituango Massacres*, the IACtHR set pecuniary damages for the loss of earnings and livestock in the absence of documentation.[85] In contrast to the indigenous peoples' cases, especially *Kichwa*, the court agreed to grant compensation, on grounds of equity, in favor of those victims whose loss of income was not proved specifically.[86] But, because the IACtHR found no way to establish the value of homes lost by the victims due to no docu-

77. *See id.* ¶¶ 106, 108, 110, 112 (implicitly acknowledging that compensation is due despite the proof issues).

78. *Cf. id.* ¶ 86 ("The court recalls its findings that the applicants' homes and household property, and Mrs. Selçuk's mill, were destroyed by security forces . . . .").

79. *See id.* ¶¶ 106, 110.

80. *Id.* ¶ 108.

81. *Id.* ¶ 110.

82. *Id.* ¶¶ 111–12.

83. *Id.* ¶ 118.

84. The claimants did not physically lose ownership of the lands. The claimants lost the ability to use the land. For this reason, the court did not find it appropriate to compensate for loss of land per se. *See id.* ¶¶ 112–12.

85. Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 373 (July 1, 2006).

86. *Id.*

ments surviving the massacre, it awarded no pecuniary damages for the houses and claimed this injury would be repaired by non-pecuniary damages.[87] However, non-pecuniary damages were awarded for pain, suffering, hardship, and changes in the living conditions of the victims, as well as harm of objects of value to the victims, using "judicial discretion" based in equity.[88] It is not clear why harm to objects of value is not considered a material damage. The IACtHR cannot claim to be compensating the victims for loss of a material nature (for example, a house) through damages awarded exclusively for non-material harm as this practice risks distorting the system and leaving the amounts of damages entirely to judicial discretion and sympathy.

C. Documentation Not Kept Due to Tradition

The second category of cases involves victims who did not maintain documentation pertaining to the value of their property or their productive activities due to their traditional practices.

1. *The ECtHR's Emphasis on Pecuniary Damages*

In *Akdivar and Others v. Turkey*, the ECtHR found that the right to respect for private and family life and the right to state protection of property of seven applicants had been violated by Turkey when the security forces burned the applicants' houses and forced them to flee from their village.[89] Although the claim was a combined suit of seven individual applications, destruction of property and forced expulsion are similar to many group claims, especially those resulting from violations of traditional communities' rights, who often suffer deprivations of their lands and lose their homes due to state actions.[90] Because the houses were burnt down, like in *Selçuk* and *Ituango*, they could not serve as evidence during the lawsuit. More importantly, however, for four of the seven houses, no documentary evidence of their area or value was available for the court to base the damages award on.[91] However, the court did not require clear and convincing evidence about the houses' quality and did not regard it as "conclusive that no record exists" with regards to the four unregistered houses.[92] Because the violations took place in a rural area where there was no tradition of registering houses, the ECtHR found the absence of evidence to be reasonable and opted to speculate and rule in equity when deciding on the value of compensation for

87. *Id.* ¶¶ 376, 383.
88. *Id.* ¶¶ 375, 383.
89. Akdivar v. Turkey, 1996-IV Eur. Ct. H.R. ¶ 88.
90. Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006); Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C.) No 105 (Apr. 29, 2004); *Case of the "Mapiripán Massacre,"* Inter-Am. Ct. H.R. No. 134; *Selçuk*, 1998-II Eur. Ct. H.R.
91. *See* Akdivar v. Turkey, 1998-II Eur. Ct. H.R ¶ 16.
92. *Id.* ¶ 18.

the houses.[93] It accepted the experts' estimation of base value per square meter and made an award for fifty percent of the area that the unregistered houses claimed.[94]

More strikingly, the *Akdivar* court also decided to award the applicants for loss of income from the use of land, even though they remained lawful owners of the land, just like the peoples in IACtHR jurisprudence. The ECtHR recognized that being expelled and deprived of the right to use the land must have created a loss of income and calculated the pecuniary damage for lost income using "equitable considerations."[95] Even though there was no evidence regarding individual land-holdings of the applicants, the ECtHR used the experts' estimate of income per acre per year to calculate damages.[96] The pecuniary damages, awarded partly based on speculation and no conclusive evidence, were much higher than the non-pecuniary damages for suffering and moral harm.[97] Thus, the ECtHR preferred to estimate pecuniary damages instead of claiming that non-pecuniary damages would suffice.

2. *Relaxing Evidentiary Requirements:* Shell Petroleum Dev. Co. Nigeria Ltd. v. Anaro

A Nigerian domestic court case provides an illuminating extension of awarding damages for presumed loss of income. In *Shell Petroleum Dev. Co. Nigeria Ltd. v. Anaro*, the Bendel State High Court held Shell liable for breach of statutory duties and awarded traditional communities damages for destruction of property and loss of income after their lands, lakes, and rivers were contaminated by oil.[98] The court[99] held that the damages for loss of income were not individual compensation, but rather compensation to the entire community, a common right, deriving from joint ownership of the lands and waters for the benefit of the community.[100] Hence, no individual proof of income was required.[101] Instead, the court required some proof of joint income from the lands.[102] Despite that last requirement, the case shows flexibility and recognition that a violation of the right to use communal land definitely causes detriment to the common income of the community—an admission that the IACtHR should consider.

93. *Id.* ¶ 17, 25.
94. *Id.* ¶¶ 19–20.
95. *Id.* ¶¶ 24–25.
96. *Id.* ¶ 25.
97. *Id.* at ¶ 2.
98. For a description of the Bendel State High Court's decision, see Shell Petroleum Dev. Co. Nigeria Ltd. v. Chief Joel Anaro [2001] FWLR 1815 (Nigeria).
99. The judgment and award were later upheld on appeal. *See Shell Petroleum Dev. Co. Nigeria Ltd.*, FWLR 1815; Shell Petroleum Dev. Co. Nigeria Ltd. v. Chief Joel Anaro & Ors. [2015] 1 CLRN 52 (Nigeria).
100. *Shell Petroleum Dev. Co. Nigeria Ltd.*, 1 CLRN at 53.
101. *Id.*
102. *Id.* at 54.

The contrast between the ECtHR and the IACtHR's approach is especially significant for compensating collective human rights abuses. They very often relate to the right to land and property and involve a group or a community being expelled from their traditional land or a place they call home. In such cases, documentation relating to their traditions might get lost,[103] or they do not exist in the first place due to their way of life.[104] This lack of proof of the value of the activities halted by the violation is *reasonable* in these circumstances. Hence, it should not bar recovery of pecuniary damages once they are proven (or presumed) to be caused by the violation.

D. Individual Claims and Compensating Uncertain Material Losses

There have also been several individual awards in which courts adopted standards potentially applicable to group cases, for instance, presumptions in favor of loss of income and pecuniary value of lost intangible (or uncertain) opportunities. More importantly, these individual awards allow the victims to prove only the extent of the damages, not their precise value. Thus, these courts award pecuniary damages using equity, recognizing that uncertain value should not preclude finding and compensating a real, material loss.

1. *Presumption of Lost Income*

Standards of proof for pecuniary losses are often stricter than for non-pecuniary and tied to precise proof of value lost. There are fewer presumptions than for moral harm, and the burden is usually on the applicant to prove harm, causality, and value. However, the cases on individual violations below show that when causality, but not the harm's precise value, is proven, courts can use presumptions, or inferences.[105] Even the IACtHR presumes a loss of income at least equivalent to minimum wage when an adult who could work dies as a result of a violation.[106] The fact that standards for proving income of individuals are lower than those for communities who are more likely to reasonably refrain from keeping records of their activities means that there should be more, not less, leeway for the latter group.

The ECtHR has presumed lost income if a violation denied the victim an opportunity to carry out a certain specified potentially productive activity. For example, in *Hornsby v. Greece*, two British nationals' right to equal treatment was violated when they were prevented from opening a foreign language school on Crete by prolonged administrative proceedings.[107] In the

103. *Case of the "Mapiripán Massacre,"* Inter-Am. Ct. H.R. No. 134.

104. *See* Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 48 (Sep. 10, 1993).

105. Dinah Shelton, Remedies in International Human Rights Law 320 (2nd Ed. 2006).

106. Caracazo v. Venezuela, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 50(d) (Aug. 29, 2002).

107. Hornsby v. Greece, 1998-II Eur. Ct. H.R 727 (1998).

reparations phase, they could not prove the value of fees lost in the delay period with certainty.[108] However, the ECtHR presumed that some income must have been lost due to the school not operating. Hence, there was evidence of an injury causally linked to the violation, and despite no precise valuation, the ECtHR decided to award damages for the lost opportunity to earn income.[109] Thus, in equity and partly speculating, it awarded 84,000 USD.[110]

Similarly, in the *Case of Open Door and Dublin Well Woman v. Ireland*, the ECtHR held that the rights of owners of two businesses offering abortion support services were violated by limits to the operation of their businesses.[111] They claimed $62,000 USD in income lost due to the violation, but this was not proven with certainty and the ECtHR was not clear on how it was calculated.[112] However, it held that, "the discontinuance of the counselling service must have resulted in a loss of income."[113] Inferring lost income due to the violations, the court awarded IR 25,000 in equity for pecuniary damages.[114] Even though in both *Kichwa* and *Open Door*, the causality between the violations and harms was clear,[115] in *Kichwa*, the IACtHR held that the parties needed to provide clear evidence of the damages suffered for it to be able to use equity in awarding pecuniary damages, and awarded almost negligible pecuniary damages.[116] One can only ask why standards for individual business owners are lower than for traditional communities, for whom it is more reasonable to have less records and who usually suffer more harms. This leads to a distortion in international human rights jurisprudence and less deterrence for States with respect to collective violations.

A similar approach was taken by the African Court on Human and Peoples' Rights ('ACtHPR') in *Lohe Issa Konate v. Burkina Faso*. There, the ACtHPR found human rights violations when the State prevented the publication of Konate's newspaper.[117] In the reparations phase, the claimant proved that he had published many copies of the newspaper before the violation prevented further sales. However, he had no evidence confirming how many copies he would have sold had the State not prevented the sales. Still, the ACtHPR decided that the *extent* of the injury caused by the violation

108. SHELTON, *supra* note 105.

109. *Id.*

110. The court made a lump sum award, notwithstanding the lack of proof of value of the injury sustained. *Hornsby*, 1998-II Eur. Ct. H.R.

111. Open Door and Dublin Well Woman v. Ireland, 1992 Eur. Ct. H.R. 68 (1992).

112. *Id.* ¶ 85.

113. *Id.* ¶ 87.

114. *Id.*

115. There was lost potential for material gain from using what the violation denied the victims in both cases. The loss was the use of business in *Open Door* and land in *Kichwa*.

116. *Kichwa Indigenous People of Sarayaku*, Inter-Am. Ct. H.R. No. 245 ¶ 314.

117. Lohe Issa Konate v. Burkina Faso, No. 004/2013, Judgment on Reparations, Afr. Ct. H.P.R. ¶ 7 (2013).

had been proven and that it had enough information to use equity and award 25,000,000 Central Africa Francs ('XAF') in pecuniary damages[118] — lower than what was asked for, but much higher than the 10,000,000 XAF awarded in non-pecuniary damages.

Unlike in *Konate*, the ACtHPR did not award pecuniary damages based on income statements and the existence of a violation alone in *Mtikila*.[119] The existence of a violation of the right to political participation was not sufficient per se to establish material damage; income statements from before the violation had no proven nexus with the facts of the case.[120] However, the lack of an award in *Mtikila* was probably due to the applicant's failure to meet his burden of establishing causality (i.e., linking damages with the violation),[121] and not due to a failure to establish value. The court held that because the violation did not necessarily prevent the victim from carrying out his usual productive activities, there could not be a presumption of lost productivity.[122] Moreover, the court did not even award money as non-pecuniary damages, holding that the judgment was sufficient compensation.[123] Hence, the court did not see any compensable damages in the case. There was an extent, not a valuation problem. Thus, causality and extent are the main requirements for pecuniary damages, not precise valuation.

Thus, causality can be the most important requirement only for the extent of the harm and not for the precise value. This approach could be transplanted into the collective human rights cases. Proving that a violation caused a loss of opportunity to conduct productive activities on a communal property is not too burdensome—and would satisfy the causality requirement. Then, the community would be able to prove the extent of a harm, even if the value was uncertain, simply by proving the violation caused a productive activity to halt. Of course, there would likely not be any documents indicating the value of the activity halted due to the community not normally thinking of it in purely monetary terms, not keeping documents, or losing such evidence as a result of the violation itself. The IACtHR could then relax the evidentiary requirements for proving its value and rely on equity to guarantee that the very real harms are not left uncompensated. As the IACtHR itself has concluded, "the reparations cannot imply enrichment or detriment for the victims or their successors."[124]

118. *Id.* ¶ 44.
119. Reverend Christopher R. Mtikila v. The United Republic of Tanzania, No. 011/2011, Ruling on Reparations, Afr. Ct. H.P.R., ¶ 46(2) (2011).
120. *Id.* ¶ 31.
121. *Id.* ¶ 32.
122. *Id.* ¶ 30.
123. *Id.* ¶ 37.
124. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146 ¶ 198.

2. *Intangible Opportunity Loss*

Some courts have also given compensation for intangible or uncertain future opportunities lost because of a violation. Even without precisely quantifiable losses, pecuniary damages can be awarded if material losses in the future are foreseeable. In *Campbell and Cosans v. United Kingdom*, a student who suffered corporal punishment at school had his right to education violated. Although there was no proven quantifiable loss, the ECtHR observed that the victim's educational opportunity was limited as a result of the violation and "it is true that, in the normal course of events, an individual who has not had the full benefit of educational opportunities will be likely to encounter greater difficulties in his future career than one who has."[125] Hence, it saw a clear, material damage resulting from the violation and awarded pecuniary damages to the victim even though the damage was uncertain in value.[126] The same reasoning could be applied to collective human rights abuses. As a result of many violations, especially of the right to land, indigenous communities' cultural and developmental opportunities are severely, and clearly, limited. Those harms should be acknowledged as presumptively caused by the violations. More generally, the loss of opportunity—to develop, to earn an income, to pursue an idea—should be presumed even if the opportunity loss is not easily quantifiable.

Unfortunately, even the International Court of Justice ("ICJ") has failed to combine a presumption of lost income with an award of pecuniary damages for an unquantifiable opportunity loss. In *Diallo*, the Democratic Republic of Congo ("DRC") expelled the Guinean victim from the country without a proper proceeding, which forced him to abandon his job and his apartment and prevented his company from recovering debts, thus violating his rights to liberty and freedom from arbitrary expulsion.[127] The ICJ seemed to present some flexibility in the reparations stage, stating that *onus probandi* could be shifted to the respondent state if it were in a better position to establish certain facts or locate evidence.[128] Indeed, it awarded $85,000 USD in non-material damages in equity for the victim's psychological suffering, aggravated by having been prevented from recovering his debts.[129]

The victim also claimed material damage for lost property in his apartment in the DRC as well as loss of earnings. The ICJ awarded $10,000 USD in pecuniary damages for lost property based on equitable considerations,

125. Campbell and Cosans v. United Kingdom, 60 Eur. Ct. H.R. (ser. A) ¶ 26 (1983).

126. Although it awarded the pecuniary damages again as part of a lump sum $4,000 award, which makes it impossible to compare the amount of pecuniary and non-pecuniary damages awarded.

127. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 324, ¶ 3 (June 19).

128. *Id.* ¶¶ 54–56.

129. *Id.*

despite no evidence of its value,[130] since the DRC gave the victim no opportunity to take care of his apartment before leaving the country and did not try to safeguard his apartment and property.[131] However, the ICJ rejected any pecuniary award for lost income. The dispositive factors for the ICJ were that there was no actual proof of income (no tax records);[132] and that there was no proof his company was conducting business during the violation.[133] Both arguments seem strong, but as the ICJ recognized, Diallo had no access to tax records in the DRC because he was expelled.[134] Moreover, because he was responsible for his company's business, his expulsion denied him the opportunity to lead its operations in the DRC, which the court failed to adequately recognize. Therefore, it is possible that the company could have produced income had he remained in the DRC, and it is certain that he lost the opportunity to earn more income due to the State's violation. Lastly, he had no chance to recover his company's debts from outside the country.[135] Thus, Judge Yusuf, in a separate opinion, argued for a more flexible standard and an equitable pecuniary award for lost income since the lost business opportunity was reasonably and causally linked to the violation.[136]

Despite clear evidence that Diallo ran a company in the DRC at the time of the violation, the ICJ gave the benefit of the doubt to the perpetrator—the DRC—denying any recovery for lost earning opportunity. Thus, *Diallo* differs from *Campbell*, *Hornsby*, and *Open Door*, as the latter group of cases awarded damages even though the loss of material benefits resulting from violations was uncertain. The only way *Diallo* could be aligned with the approach of awarding damages for the proof of the extent of harm, and not the precise value of harm, is if the company activity could not be proven.

3. *Proyecto de Vida*

Lastly, *proyecto de vida*, a doctrine developed by the IACtHR, is used not only to monetarily compensate for lost material benefits based on real expectations *and* current, standard characteristics of the victim, like age and occupation, but also for more uncertain, developing and subjective factors.[137] In *Loayza-Tamayo*, the IACtHR recognized that the so-called "life plan" of an

130. Another case and another court underscoring the fact that equity and speculation are and can be used to award pecuniary damages.

131. *Id.* ¶¶ 29–34.

132. *Id.* ¶ 41 (holding that no tax records precluded the award under this head).

133. *Id.* ¶ 23.

134. *Id.*

135. *Id.* ¶ 17 (separate opinion by Yusuf, J.).

136. *Id.*

137. Arturo J. Carillo, *Justice In Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past, in* HANDBOOK OF REPARATIONS 504, 516 (Pablo de Greiff ed., 2006); *cf.* Sherrod v. Berry, 629 F.Supp. 159, 162–63 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd en banc on other grounds*, 856 F.2d 802 (7th Cir. 1988) (holding evidence on the 'hedonic' value of life admissible in a civil rights action on behalf of deceased killed by a police officer).

individual could be compensated in a pecuniary manner.[138] That life plan could be based on the documented undertakings and aspirations of a person, such as her studies or other personal and professional development. Judges Cançado Trinidade and Abreu Burelli also added a separate opinion to reinforce their view that reparations should consider individuals as more than *homo economicus*, "a mere agent of economic production," but rather should accept that humans have needs and aspirations that go beyond economic worth.[139] Indeed, the IACtHR followed a similar line of logic to award pecuniary damages for potential that was unfulfilled due to a violation. For instance, in *Cantoral Benavides*, the IACtHR awarded as pecuniary damages the lost earnings of a biologist for the death of a student who was merely studying to become a biologist.[140] The award was based on an approximation of the predicted earnings of a biologist over a lifetime;[141] in other words, it was based on the victim's disrupted *potential*.

Communities, like individuals, pursue their own needs and aspirations in special ways. They are more than "agents of economic production" and should also be judged by the projects and ways of life they are undertaking or prevented from undertaking through violations of their human rights. Therefore, this approach could also apply to intangible or uncertain opportunities of *desarrollo de la comunidad* taken from group victims. For example, it could categorize the damages caused by an inability to pursue a traditional or planned-for way of life as pecuniary, especially when rights violations are connected to the use of land,[142] to traditional professions, and, possibly, to tourism.

III. Postulates

The jurisprudence on evidentiary standards and burdens of proof for collective intersectional human rights violations is scant. Existing jurisprudence has opted for unclear yet strict standards for pecuniary damages, limiting compensation in light of sparse evidence. However, that approach leaves everything subject to judicial discretion. Moreover, courts that have addressed this issue have asserted that there is no pecuniary harm without a certain, proven, fully quantifiable loss. This potentially increases violators' incentives to ensure that there is no evidence to demonstrate the value of

138. Loayza-Tamayo v. Perú, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 42 (Nov. 27, 1998).

139. *Id.* ¶¶ 9–10 (joint concurring opinion of Trindade, J. and Abreu-Burelli, J.).

140. *See Cantoral Benavides*, Inter-Am. Ct. H.R. ¶ 60 (Dec. 3, 2001) ("It is obvious to the court that the facts of this case dramatically altered the course that Luis Alberto Cantoral Benavides' life would otherwise have taken. The pain and suffering that those events inflicted upon him prevented the victim from fulfilling his vocation, aspirations and potential, particularly with regard to his preparation for his chosen career and his work as a professional. All this was highly detrimental to his 'life project.'").

141. *Id.*

142. *See Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146 ¶ 91 (referring to the expert opinion of Mr. Andrew Leake).

harms suffered by communities, decreasing the system's deterrent function.[143] Lastly, it decreases the fairness of the system by suggesting that some tangible harms do not need to be compensated for. Instead, the system groups all these considerations under moral and intangible harms, which, though important categories, do not describe what these damages are.

Human rights courts agree that proving a causal link between the violation and the harm suffered is the most important inquiry and is preliminary to any other evidentiary requirements when proving damages. In collective abuse cases, there is often no difficulty proving general causality between violations of rights to life or land and the class of harm suffered. Instead, problems arise when attempting to prove the precise value of specific harms. However, in both group and individual cases, courts have not always required evidence of the precise value of claimed harms and have instead engaged in approximation exercises.[144]

If human rights courts have been able to forego strict evidentiary requirements for valuing individual harms that often require well-documented business undertakings, they should be able to relax the standards of proof for valuing collective damages. Communal property and activities using such property are usually less documented, are subject to more subjective valuations, and feature more non-standard uses of the land. Thus, while proving that violations caused lost opportunities to use communal property is as easy for communities as for any other victim category, proving value can be much harder for communities. Moreover, the communities affected are often in need of special protection because they are at special risk due to their non-Western ways of life and reliance on their lands. Their special need for redress should be reflected in predictable, low evidentiary standards.

Thus, courts should allow victims of collective human rights abuses to recover pecuniary damages so long as they prove the extent of the damages. This way, cases with a material dimension can be compensated for under pecuniary damages when the difficulty of quantifying harms is understandable. Thus, reliance on non-pecuniary damages would be reduced. Furthermore, courts should not shy away from applying equitable principles to approximate damages in the absence of clear proof of precise value. This will deter violators who know that courts may approximate pecuniary damages instead of awarding nothing. Moreover, it is only fair to award pecuniary damages for pecuniary losses, even if not proven with certainty. It will shift the risk to the violators: they can expect to pay an estimate of the harm they cause, which could include speculative components potentially exceeding the benefit gained by the violators. This would also prevent non-awards. This mechanism could serve as an incentive for perpetrators to cooperate in

143. *See* SHELTON, *supra* note 105, at 48, 353 (discussing social and economic power advantage of violators over victims, often connected to the difficulty in proving widespread wrongs such as intersectional human rights violations).

144. *See, e.g.*, *Akdivar*, 1998-II Eur. Ct. H.R. ¶¶ 19, 25, 31.

the reparation process to prevent courts from exercising discretion against them. Lastly, relying on experts to give assessments or benchmark numbers would help human rights courts arrive at figures for pecuniary damages in a fairer manner.

A. Extent as Sufficient in Proving Value of a Harm

Courts should allow recovery based on proof of the extent of a harm without further proof of the precise value of the loss. This standard should apply if there is a reasonable basis for the lack of evidence of precise value. There are four justifications for employing this standard: (1) the injuries are complicated and thus their value is extremely hard to prove; (2) evidence cannot be produced of the violation; or (3) documentation is not usually kept by the community due to tradition; and (4) shifting the risk of difficult calculations on the violator risks imposition.

1. *Recognizing Challenges of Proof in Complicated Injury Cases*

Indeed, several cases have awarded damages where plaintiffs proved the extent, but not the precise value, of the harms. In the following decisions, the losses were clear from the facts of each case and were obviously caused by the violation at issue. While the precise values of the losses were too complicated to prove in these specific cases, there was a monetary component to these losses. For example, in *Hornsby*, the victim's inability to start a foreign language school clearly caused an injury.[145] The extent of the injury—lost fees for the duration of the delay—was proven.[146] However, a precise value of those fees was not proven, partly because it was not certain. It depended on many factors and would have required evidence about the future if it was to be proven with certainty. Nevertheless, the ECtHR considered the harm established enough to award about $111,000 USD in damages.[147] The most persuasive authority for the proposition of not requiring mathematical precision in compensating for complex injuries, however, might be the Eritrea-Ethiopia Claims Commission, which compensated harms sustained as a result of a war. It held that "in light of enormous practical problems" in proving extensive, complicated damages sustained in a war setting, no clear and convincing proof of the precise value of the harms was required; it just required best possible estimates based on some form of available evidence.[148]

This rationale for allowing victims to merely prove the existence and extent of injuries should be applied to cases of intersectional collective human rights abuses. These cases often involve very complicated losses, connected to the denial of their right to use property in a traditional way that is not

145. Hornsby v. Greece, 1998-II Eur. Ct. H.R. ¶ 1.
146. *Id.*
147. *Id.*
148. Eritrea's Damages Claims, Eth.-Eri. Cl. Comm'n., Final Award ¶¶ 36-37 (Aug. 17, 2009).

always profit-oriented.[149] Moreover, because collective human rights abuses often last for a long time, even over generations, it would be a kind of *probatio diabolica* to require them to prove the value of all injuries going back decades with precision: the fact that some injuries may have been superseded over time or had their effects fade away does not deny their existence and compensability.[150] Thus, calculating the precise monetary amount of the loss can be impossible. However, the fact and extent of an injury is often clear.[151] Thus, allowing victims to just prove extent would ensure that all harms can be compensated, regardless of whether their precise value can be proven with certainty. After all, the fact of compensation for material harm itself can constitute justice by itself, just as a judgment does,[152] and giving an approximated recovery is often the best human rights courts can do for indigenous peoples or other harmed groups in the reparations stage, especially when injuries are hard to quantify.

2. *Inability to Produce Evidence of Value Due to the Violation Itself*

Lowering evidentiary standards for damages because evidence might have been destroyed by the wrongdoer is endorsed in jurisdictions that have a *reasonable certainty* burden of proof for damages or lost profits. Although not an international human rights jurisdiction, a Wisconsin court concisely laid out the justifications for approximating damages solely based on the extent of a harm in light of a reasonable lack of precise evidence:

> If the wrong itself is of such a nature to preclude the ascertainment of the amount of damages with certainty, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference or estimation, although the result may be only approximate.[153]

Not being able to produce evidence to substantiate the value of damages is not an infrequent problem for group victims. One possible reason is the nature of violations, which often destroy life or property, thus obliterating evidence. This often happens in group or collective abuses in which the group victims are expelled from land.[154] For example, in *Xákmok Kásek*, the indigenous community was forced to leave its land.[155] Thus, the community

149. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146 ¶ 131.

150. La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006) (separate opinion by Trindade, J.).

151. *See Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146 ¶¶ 144, 222.

152. *See*, *e.g.*, Reverend Christopher R. Mtikila v. The United Republic of Tanzania, No. 011/2011, Ruling on Reparations, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 37 (June 13, 2014); *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146, ¶ 219.

153. Wisconsin Jury Instructions-Civil 3725.

154. Diana Odier-Contreras Garduño, Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations 162 (2018).

155. *Xákmok Kásek Indigenous Cmty*, Inter-Am. Ct. H.R. No. 214, ¶ 316.

swiftly lost access to its property and could not easily prove losses. In that case, the IACtHR did not award much in pecuniary damages and opted for non-pecuniary damages instead. Similarly, in *Mapiripan Massacre*, the victims of attacks were displaced from the place of the harm, so they were not able to prove the value of their harm with certainty.[156] The IACtHR did not find sufficient grounds to award the pecuniary damages requested despite acknowledging that the victims were abruptly displaced from Mapiripan, and only awarded $985,000 USD to nine victims in fairness,[157] as opposed to $3.5 million USD to 35 victims in non-pecuniary damages.[158]

The claimants in *Selçuk* faced a similar problem. After Turkish security forces burnt their houses down,[159] some of the damage could not be proven with certainty because the evidence disappeared as a natural result of the violation. Nevertheless, the ECtHR awarded pecuniary damages, finding that because the existence and the extent of the damage had been proven, the value could be approximated.[160] However, the ECtHR's approach seems to be an outlier so far: in *Diallo*, where the claimant could not prove the value of property lost in his apartment because he had been expelled from the country, the ICJ was not sympathetic and still required proof of the value of lost property, even though it was clear that some losses had been sustained.[161] Therefore, this argument could be made on behalf of communities whose rights have been violated and whose evidence had been destroyed by the violation.

3. *Unpreserved Evidence: Tradition and Custom as Not Precluding Pecuniary Compensation*

The third reason is even more inherent to collective human rights abuses, which often involve traditional[162] groups or communities: no documentation or evidence is kept due to custom or tradition. This often happens in cases of intersectional abuses suffered by indigenous peoples or other communities whose ways of life do not include record keeping. For example, in *Selçuk* and *Akdivar*, some of the damaged houses had not been registered due to the lack of custom of registering houses in those areas of Turkey.[163] Hence, evidence about the value of the lost property could not be produced, due to area custom and by no fault of the victim. The ECtHR took this fact into con-

156. *Mapiripán Massacre*, Inter-Am. Ct. H.R. No. 134, ¶ 266.
157. *Id.* ¶¶ 267, 278.
158. *Id.* ¶ 290.
159. *Selçuk*, 1998-II Eur. Ct. H.R. ¶¶ 27–28.
160. *Id.* ¶ 106.
161. *Diallo*, 2012 I.C.J. Rep. 324, ¶ 29–35.
162. In this Note, I use "traditional" and "indigenous" synonymously.
163. *Akdivar*, 1998-II Eur. Ct. H.R. ¶ 18; *cf. Selçuk*, 1998-II Eur. Ct. H.R. ¶¶ 105–106 (acknowledging lack of precise evidence of value of the houses but finding that it is "undoubtedly necessary to award compensation for pecuniary damage").

sideration when it decided not to require definitive proof of the value of loss when awarding pecuniary damages.[164]

The absence of evidence usually affects indigenous peoples. For example, the indigenous peoples of South America, Africa, and other continents often do not have a habit of using documentation to track their income, nor do they record value and items of property due to their traditional ways of life. The Inter-American Court even recognized that the Kichwa faced this problem, but still did not award much in pecuniary damages.[165] However, the lack of evidence of value should not preclude an award so long as the extent of the harm can be proven.

4. *Risk Imposition: Reason to Approximate*

"The law will not reward a party in breach by depriving the other party of compensation merely because no precise basis for determining the amount of damages exists."[166] Although taken from an arbitral award, this idea is reflected in cases like *Selçuk*, but omitted in many other IACtHR awards.[167] When the value of the harm suffered cannot be precisely ascertained, the actor who caused that harm should not benefit by not having to pay for it—especially if they caused the calculation problem.

Regardless of why a claimant is unable to prove the precise value of pecuniary damage, that responsibility should not be imposed on the victim. Of course, the *Chorzow* principle[168] states that the victim should not be enriched, but it is arguably more important to ensure that the perpetrator does not benefit from the victim lacking evidence of the value of harm caused, or from their the perpetrator destroying or limiting access to evidence. It would ensure that human rights violations, especially those of a collective, intersectional nature, are not subject to a *probatio diabolica* standard of proof in the reparations stage.[169] This can effectively prevent many of the victims who generally do not keep or have lost evidence of value from ever obtaining compensation for their material losses—and likely force them to rely on courts' discretion to compensate moral injuries.[170]

Hence, allowing claimants to prove only the extent of damage to obtain pecuniary compensation imposes the risk of imprecise value calculations of

164. *Akdivar*, 1998-II Eur. Ct. H.R. ¶¶ 15–16; *Selçuk*, 1998-II Eur. Ct. H.R. ¶ 106.

165. *Kichwa Indigenous People of Sarayaku*, Inter-Am. Ct. H.R. No. 245 ¶ 148.

166. Case No. 8362 of 1995, 22 Y.B. Comm. Arb. 164, 177 (ICC Int'l Ct. Arb.).

167. *See supra* section II.A (discussing the denial of pecuniary damages due to lack of proof).

168. *Factory at Chorzow*, 1928 P.C.I.J. No. 17 ¶ 125.

169. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146 ¶ 20 (separate opinion by Trinidade, J.) (arguing that a high evidence standard could amount to the unfortunate mistake of requiring a probatio diabolica); *La Cantuta*, Inter-Am. Ct. H.R. No. 162 ¶ 45 (concurring opinion by Trindade, J.).

170. *See* Sean Burke, *Indigenous Reparations Re-Imagined: Crafting a Settlement Mechanism for Indigenous Claims in the Inter-American Court of Human Rights*, 20 MINN. J. INT'L L. 123, 126–129 (2011) (asserting that not enough judgments are enforced in the Inter-American system, which may have been a result of excessive discretion to the judges).

damage on those whose wrongdoing caused the uncertainty.[171] Moreover, it would increase deterrence because fewer violations could be left without pecuniary compensation. For example, in *Selçuk*, Turkey could not rely on its security forces wiping out evidence to preclude pecuniary compensation.[172] Lastly, it would increase the incentives of perpetrators to cooperate and not destroy evidence, thereby increasing the efficiency of the system.[173] Hence, "it is particularly in the area of quantifying the amount of lost profits that courts impose the risk of uncertainty on the breaching party whose breach gave rise to the uncertainty."[174]

B. Equity

The fact that the value of pecuniary damage is not proven with certainty does not mean that it is not "economically assessable." That basic requirement for awarding damages[175] can and should be read expansively because courts do have the power to estimate and approximate damages—it is their role to come up with the amount of damages, even if they do not have evidence regarding their value from the parties.[176] Using equity to set damages when they cannot be calculated with certainty will promote fairness by compensating for all losses that can be approximated and further the deterrent effect.

1. *Assessability*

First, equity should be used in order to facilitate awarding damages for every harm that is economically assessable. Economically assessable harms do not only mean certain financial losses and loss of earnings, but also physical and mental harm or lost opportunities such as employment or education.[177] Therefore, intangible and uncertain harms should also be compensated. Of course, one could argue that this is precisely what the Inter-American Court does with non-pecuniary damages. However, the uncertainty of the harm does not mean they are non-material or cannot be quantified. As seen in *Campbell*, even lost educational opportunity has a material, pecuniary com-

171. *See, e.g.*, *Selçuk*, 1998-II Eur. Ct. H.R. ¶ 106 (rejecting the government's argument that because loss cannot be proven, the victim should not be compensated); *see also Open Door*, 1992 Eur. Ct. H.R. ¶ 87 (imposing lost income on the violator, with the violator assuming the risk of having to establish the damage by equity).

172. *See Selçuk*, 1998-II Eur. Ct. H.R. ¶ 105.

173. Consider the security forces destruction of evidence in *Selçuk* or *Akdivar*. The *Selçuk* court seemed to underline the fact that Turkey "[has] not provided any detailed comment" as to the pecuniary valuation of the losses, further justifying the use of equity and estimation in light of that lack of cooperation.

174. Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1367 (7th Cir. 1996).

175. G.A. Res. 60/147, ¶ 20 (Mar. 21, 2006).

176. *Cf.* Yukos Universal Limited v. The Russian Federation, No. 2005-04/AA227 (Perm. Ct. Arb. 2014). The court, having expert calculation from both sides based on different scenarios, did not award those numbers, but instead used them as benchmarks to award different amounts of damages, not following any specified formula.

177. *Supra* note 175.

ponent.[178] Therefore, the material potential of a human is broader than mere financial worth.[179] Hence, pecuniary damages could be awarded for lost opportunities relating to the use of property, land or benefits derived from the environment. Tourism, like education, has the potential to bring tangible material benefits to a community. Similarly, detriments to health caused by the deprivation of land – for instance, living on the roadside,[180] lack of access to adequate services or damage to the natural environment on which many traditional communities rely – can result in lost future opportunities or simply material losses due to bad health.

When the exact value of those lost potentials is not proven, courts necessarily have to use equity to arrive at a figure or deny compensation. Indeed, even in cases such as *Kichwa*, the IACtHR was willing to award both pecuniary and non-pecuniary damages "based on the situation as a whole" – recognizing that pecuniary damage is not necessarily only the harm that has a proven precise value.[181] Thus, the IACtHR should not indiscriminately categorize non-purely-financial uses of land property and opportunities as non-pecuniary damages. As in *Open Door,*[182] a clear loss of opportunity to engage in the productive use of a piece of property should be compensated as pecuniary damages based on equity and approximation if the precise value lost cannot be proven.

Human rights courts sometimes go even further and use equity to override a more formalistic methodology, showing the potential flexibility of human rights jurisprudence. In *Neira Alegria*, even though the Inter-American Court had used minimum wage as a basis for calculating damages, it considered the Peruvian minimum wage too low.[183] Therefore, "for reasons of equity and in view of the actual economic and social situation [condition] of Latin America," it used equity to fix the monthly wage at $125 USD.[184] In this way, equity is a tool that courts, especially in complex cases such as international investment arbitration or human rights violations, have used to arrive at a sum of monetary damages when the value could not be proven with precision. There is no reason this method could not be used in intersectional collective human rights abuses where there are difficulties with calculations, but no doubt as to causation.

178. *See generally Campbell and Cosans*, 60 Eur. Ct. H.R.

179. Judges Trindade and Abreu-Burelli in *Loayza Tamayo* wrote a separate opinion to reinforce their view that reparations should consider the individual as more than homo economicus, "a mere agent of economic production," but rather should accept that humans have needs and aspirations that go beyond economic worth. *Loayza–Tamayo*, Inter-Am. Ct. H.R. No. 42, ¶¶ 8–9 (joint concurring opinion by Trindade, J. and Abreu-Burelli, J.).

180. *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. No. 146, ¶ 145.

181. *Id.* ¶ 248; *Saramaka People*, No. 172 ¶ 208; *Xákmok Kásek*, No. 214, ¶ 337.

182. *Open Door*, 1992 Eur. Ct. H.R., at 68.

183. Neira Alegria v. Peru, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 29, ¶¶ 49–50 (Sep. 19, 1996).

184. *Id.* ¶ 50.

2. *Fairness*

Fairness should also ensure that pecuniary damages cover all opportunities lost as a result of a violation leading to material damages. Due to their nature, it may be difficult to prove the value of many opportunities, especially those involving large groups where the violation necessarily causes the loss of common rights. However, this should not preclude the courts from compensating collective victims. Equity can correct for the lack of precise evidence of value.

Because the aim of reparations should be to compensate the victims, the approach of Judge Yusuf in *Diallo* (flexibility and presuming lost opportunity even in absence of documented value), the IACtHR in *Cantoral Benavides* (compensating for lost future potential of the victim, though uncertain) and *Anaro* (not requiring precise, individual proof of the value of material harms to each victim) should be combined. As recognized in *Anaro*, the loss of the ability to exercise a common right by a community is compensable on a group basis.[185] Even though the losses were easily quantifiable in *Anaro*, it should not be a requirement to compensate for the loss of exercise of rights.[186] The communities who are expelled from their land lose the common right to use their ancestral lands *as they see fit*. This includes carrying out their own productive activities on the land and therefore having opportunities to contribute to the development and well-being of their community through land usage. Moreover, those opportunities are diminished from the deaths of community members that the violations caused.

Therefore, there are lost opportunities that, despite not having a fully proven monetary value, are not of a moral (non-pecuniary) character. Just as the victim in *Diallo* lost the opportunity to conduct his company's business as a result of being ousted from the country,[187] the indigenous community in *Kichwa* lost the opportunity to use their land in a productive way, earn money from their traditional activities, or even benefit from tourism.[188] And just like the victim in *Cantoral Benavides* lost the opportunity to pursue his career as a biologist, the communities lose the opportunity to pursue their collective goals on ancestral lands.[189] In both *Diallo* and *Cantoral Benavides*, it was not certain that the opportunities lost would have been profitable, but the victims could be compensated for the financial repercussions of having lost the chance to benefit from them.[190] Additionally, the courts in *Kichwa*, *Cantoral Benavides*, and *Diallo* acknowledged that equity could be used to

185. *Shell Petroleum Dev. Co. Nigeria Ltd.*, 1 CLRN at 52.
186. *Shell Petroleum Dev. Co. of Nigeria Ltd.*, SC.52/2005 (2015).
187. *Diallo*, 2012 I.C.J. Rep. 324 ¶ 41 (separate opinion by Yusuf, J.).
188. *Kichwa Indigenous People of Sarayaku*, Inter-Am. Ct. H.R. No. 245.
189. *Cantoral Benavides*, Inter-Am. Ct. H.R. ¶¶ 60–62.
190. *Id.*; *Diallo*, 2012 I.C.J. Rep. 324, ¶ 41 (separate opinion by Yusuf, J.).

calculate pecuniary damages when the precise value could not be established.[191]

Equity does carry potential problems due to the variability of awards: equity allows judges to exercise discretion, which leads to unpredictability. Therefore, similarly-situated parties could be treated differently contrary to the fundamental requirements of fairness. Moreover, confidence in the system and its deterrent function could be diminished.[192] However, fairness also requires that no victims are denied compensation for their injuries and opportunities lost. Especially in human rights cases, the principles of consistency and deterrence would be better served even if the awards end up varying as this state of affairs is still better than if no damages are awarded due to lack of evidence of precise value. As described in the following section, the concerns about arbitrariness and unpredictability can be mitigated if courts use the help of experts in calculating the value of the harm.

C. Experts

Experts have not been an important factor in the cases discussed above. However, in *Akdivar*, the ECtHR used experts to provide base values of standard income per acre per year for its estimation of a pecuniary award for lost income.[193] Thus, experts in collective rights cases could play an auxiliary role. They would not have to be expected or relied upon to calculate the final award but they could give the courts some quantitative information that could provide a benchmark. This way, experts could help avoid *completely* arbitrary decisions and reduce the risk of variability. Moreover, having courts approximate and award high pecuniary damages using the expert assessment as a starting point is preferable to the IACtHR's approach of categorizing most of the award as non-pecuniary, which is awarded through a court's discretion and does not alleviate the uncertainty or variability issue. In fact, experts can be a reliable source of benchmark numbers in the pecuniary damages analysis, such as average earnings or costs per year.[194] On the contrary, in non-pecuniary analysis, quantum experts are by definition inappropriate. The purely arbitrary nature of non-pecuniary analysis has already led to unexplained variation between awards.[195]

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191. *Kichwa Indigenous People of Sarayaku*, Inter-Am. Ct. H.R. No. 245 ¶ 314; *Diallo*, 2012 I.C.J. Rep. 324, ¶ 41 (separate opinion by Yusuf, J.); *Cantoral Benavides*, Inter-Am. Ct. H.R.

192. SHELTON, *supra* note 105, at 353 ("There are serious problems caused by variability of awards in human rights tribunals. First, fundamental fairness requires that similarly situated parties be treated in a similar fashion by the legal system. The inability to achieve consistency in awards tends to erode general confidence in justice and the integrity of the human rights systems. In addition, highly variable, unpredictable valuations undercut the deterrence function of tort law. For the object and purpose of human rights treaties to be achieved, much more attention should be given to compensatory damages").

193. *Akdivar*, 1998-II Eur. Ct. H.R. ¶¶ 6, 17, 18, 21, 25, 29, 31, 34.

194. *See, e.g.*, *id.* at 16, 22.

195. Gonzalez-Salzberg, *supra* note 5, at 109–110 (asserting that the amounts awarded as non-pecuniary damages by the Inter-American Court have varied in a way that cannot be fully explained by the varying number of victims, different rights violated, nor other logically related factors).

In *Aloeboetoe*, the IACtHR found violations of the right to life of twenty members of the Maroon indigenous community.[196] The Commission asked for pecuniary damages for the deceased's dependents.[197] While there was no evidence of the actual damages sustained, the IACtHR acknowledged that written testimony could not be produced because the victim's community is living in the jungle and does not utilize written documents.[198] Nevertheless, the IACtHR rejected the claim for pecuniary damages due to the lack of *any kind of evidence* and only awarded non-pecuniary damages for moral injuries. To award pecuniary damages, the IACtHR required more information than necessary to calculate a precise sum.[199] For this reason, the IACtHR sent its own experts to Suriname to assess the economic conditions of the country and the situation of the community.[200] It then used the information supplied to fix the amount of non-pecuniary damages in equity.[201] Therefore, the IACtHR in *Aloeboetoe* considered it necessary to have expert help where the precise monetary value of the harms was uncertain. Furthermore, instead of using the expert-provided sum, it used the experts for benchmark economic information in order to arrive at a sum of compensation.

Similarly, the ECtHR relies on expert information, even if it is not complete, as a basis for approximating the award. In *Akdivar*, records for four of the houses that Turkish security forces burned did not exist.[202] Nevertheless, the ECtHR relied on an expert's testimony of the approximate base rate per square meter and estimated the area of the houses to speculate an appropriate award.[203] Similarly, when awarding compensation for loss of income, the ECtHR relied on experts' estimate of the loss of income per acre per year. Based on these estimates and equitable considerations, the ECtHR approximated an award for loss of income caused by expelling the victims from their village.[204]

Lastly, experts are highly valued in all types of international proceedings, and human rights tribunals would likewise benefit from their use. For example, arbitral tribunals are much more experienced in complicated quantum calculations than human rights courts, which focus on whether there was a violation and the nature of the violation.[205] In *Yukos*, for example, the PCA looked at calculations by experts testifying for both sides and arrived at a different number under each category of compensation.[206]

196. *See Aloeboetoe*, Inter-Am. Ct. H.R. No. 15 ¶¶ 8–12 (Sep. 10, 1993).
197. *Id.* ¶ 69.
198. *Id.* ¶ 72.
199. *Id.* ¶ 39.
200. *Id.* ¶ 40.
201. *Id.*
202. *Akdivar*, 1998-II Eur. Ct. H.R. ¶ 18.
203. *Id.* ¶¶ 23–24.
204. *Id.* ¶ 25.
205. *See generally* Christine d. Gray, Judicial Remedies In International Law (1990).
206. *See Yukos*, 2005 Perm. Ct. Arb. ¶ 227.

Yukos also demonstrated that courts may exercise discretion when both sides use their own experts, perhaps because they are unable to fully agree with either side.[207] Hence, appointing an independent expert by the relevant court could work in human rights adjudication—especially since side-appointed experts often have unequal access to documents and other evidence. This argument is supported by Richard Posner, who has suggested that reliance on an independent expert reduces bias and hence is of real use to a court that is ill-equipped to calculate compensation for a complicated claim.[208] Human rights cases often suffer from this very gap.

Conclusion

The evidentiary standards for monetary compensation for collective, intersectional human rights abuses are unclear and inconsistent in the current international jurisprudence. Part of the reason is the novelty of the field and the recent recognition of collective human rights, especially for indigenous peoples. Additionally, tribunals have applied unclear, ambiguous standards when setting and deciding between different types of damages. More specifically, the Inter-American Court of Human Rights seems to impose overly demanding standards even though it is prepared to award pecuniary damages. The main distinction is between pecuniary damages, which are designed to compensate for material harms caused by human rights violations, and non-pecuniary damages, which have been deemed appropriate for moral injuries. This Note does not deny that indigenous peoples and communities often have a special relationship to their lands, which results in moral suffering when their property rights are violated or when community members pass away.[209] Accordingly, this Note does not deny that those injuries are best compensated under the non-pecuniary category. However, collective victims also suffer material damages, especially resulting from their inability to use their ancestral land. The fact that they cannot prove the precise value of that harm—as a result of not keeping records or having those records destroyed by the violator—should not preclude compensation for material harms. Instead, courts should recognize that the risk of imprecision should fall on the wrongdoer. The evidentiary standards for pecuniary damages should be relaxed by the use of equity and estimation in setting the value of the compensation—once causality and extent of the injury are shown.

Judgments suggesting that group victims of intersectional human rights abuses mostly suffer moral instead of material harm "live in a lie." Furthermore, it is important to establish a norm of compensating collective human rights victims when the field is still in development. The evidentiary stan-

207. *Id.* ¶ 1785.

208. Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 J. Econ. Persp. 91, 96 (1999).

209. *Xákmok Kásek*, Inter-Am. Ct. H.R., No. 214 ¶¶ 323, 325.

dards should be relaxed to reflect the victims' approach to formal records and to protect them from abuse by governments that seek to exploit their non-documented way of life. Furthermore, legal obstacles should be shifted from the communities to the violators, and human rights should ensure the global community understands that indigenous peoples can suffer not only intangible harms to their non-Western ways of life but are also hurt in a way that every human would understand—losing their means of material subsistence.