

MODULE 10

The right to compensation

UNCAT. Art. 14 of the UN Convention against Torture (UNCAT) requires every State party “to ensure in its legal system that the victim of torture obtains redress and has an enforceable right to fair and adequate compensation”.

- General Comment No. 3 of the Committee Against Torture (CAT) states that compensation should be prompt, fair, and adequate, covering “any economically assessable damage,” including medical expenses, loss of earnings, and lost educational opportunities (para.10).
- The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law indicate that compensation should be proportionate to the gravity of the violations, the harm suffered and the circumstances of the case (para.20).

Functions of compensation

Compensation serves a variety of important functions, such as:

- providing victims with a symbolic form of accountability and recognition for the material and moral harm suffered by them;
- helping victims manage the material aspects of their loss, by bringing immediate economic relief and fulfilling basic survival needs;
- ensuring survivors of gross human rights violations receive proper treatment;
- deterring future abuses by the State.

Limits of compensation

Monetary compensation is only one form of redress to survivors. It stands alongside other forms of reparation, *inter alia*, rehabilitation, restitution, satisfaction, and measures of non-repetition. In that regard, compensation should be complemented by other measures, such as public apologies, collective reparations, and improved provision of services. Under the right circumstances, monetary compensation can provide practical support for survivors and be part of a symbolic recognition of the harm inflicted on individual victims by the State. See also *Module 9: Reparations*.

The CAT has made clear that the provision of monetary compensation on its own is not sufficient for States to comply with their obligations under Art. 14 UNCAT.

The ECtHR has similarly held that in cases of ill-treatment, an Art. 3 ECHR violation cannot be remedied exclusively through an award of compensation to the victim. In Romanov v. Russia, the ECtHR determined that if the authorities could confine their reaction to acts of ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for State agents to abuse rights with virtual impunity, and the legal prohibition of torture and inhuman and degrading treatment would be ineffective in practice. The ECtHR emphasised that a judicial award of compensation represents only one part of the group of measures necessary to provide redress for ill-treatment by State agents.

Entitlement to compensation

The impact of torture is complex, affecting the victim, their family, and the wider community. The UN Basic Principles define victims as those who have individually or collectively suffered harm. The term “victim” refers to those who have suffered harm as a direct consequence of being tortured and also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims or to prevent victimisation.

Additionally, the term could include members of the community or a targeted ethnic minority.

For instance, civil party admissibility before the ECCC (Cambodia) has not been restricted to direct victims but also includes indirect victims who personally suffered injury as a direct result of the crime committed against the direct victim. Indirect or secondary victims can include family members and extended family members, and people from the same community or ethnic group.

In the context of enforced disappearance, the IACTHR has found in the Chitay Nech v. Guatemala case that the forced disappearance of indigenous leaders was used to “punish indigenous communities in their struggle to claim their rights as an indigenous people,” thereby extending the concept of victimhood to include communities.

Forms of Compensation

The UN General Assembly declared in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that “persons who have suffered harm in intervening to assist victims in distress or prevent victimisation” are also to be considered victims (para.2).

In its General Comment No. 3 (para. 10), the CAT states that the right to prompt, fair, and adequate compensation is multi-layered, comprising compensation for pecuniary damages (monetary harm), non-pecuniary damages (physical and mental harm that is not quantifiable), and costs and expenses.

Compensation should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary. This may include: medical and rehabilitative expenses; pecuniary and non-pecuniary damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or ill-treatment; and lost opportunities such as

employment and education. Additionally, compensation should provide for legal and specialist assistance, as well as other costs associated with bringing a claim for redress.

Pecuniary damages

These are meant to cover material loss actually suffered and loss or diminished gain expected in the future.

In Aksoy v. Turkey the ECtHR awarded the applicant pecuniary damages consisting of medical expenses of 16,635 Turkish lira and loss of earnings amounting to £40. In Landaeta Mejias Brothers et al. v. Venezuela the IACtHR ordered Venezuela to pay US \$360,000 in pecuniary damages for loss of earnings of two of the victims, and US \$500 as compensation for funeral expenses.

To support a claim for pecuniary damages, one needs to: a) establish the harm; b) establish the link between the treatment inflicted and the harm; and c) substantiate the claim with evidence, including former salary sheets, property documents, valuation reports, medical or psychological bills, and other documents.

In Azul v. Peru, the IACtHR noted that pecuniary damage involves the loss of income, expenses incurred, and the pecuniary consequences that have a **causal nexus** with the facts of the case. In Romanov v. Russia the ECtHR observed that the applicant had not indicated the amount of the compensation claimed and had not provided any receipts or documents to corroborate his claim. The ECtHR therefore held that he had failed to properly substantiate his claim for pecuniary damage, and accordingly dismissed it.

Non-pecuniary damage (moral damage)

These seek to provide for non-material harm, such as physical injuries, psychological trauma, the time during which the victim has not seen their family, and stigma. In practice, human rights bodies and national courts typically award moral damages for arbitrary detention, torture, and other human rights violations, taking into account the gravity, duration, and consequences of the human rights violations as well as the severity of the victim's suffering.

International human rights courts have awarded moral damages for arbitrary detention and torture and ill-treatment by State officials ranging from approximately US \$15,000 to US \$200,000, depending on the circumstances. National courts have also awarded non-pecuniary damages for torture. For example, in South Africa courts have awarded amounts ranging from about US \$7,500 to US \$50,000 in cases of police torture (i.e., in Marwana v Minister of Police, Ndlazi v Minister of Safety and Security). In the United Kingdom, the British Government paid an average of US \$110,000, including costs, to Iraqi nationals who were illegally detained and tortured by British forces during the period from 2003-2009.

The IACtHR has also ordered compensation for moral damage in a case of gender discrimination, awarding US \$20,000 to the direct victim and US \$10,000 to each of her daughters. Similarly, the ECtHR awarded €31,000 in respect of non-pecuniary damage in a case of gender discrimination. Other examples include:

- Azul v. Peru. The IACtHR noted that the concept of non-pecuniary damages, as developed in its jurisprudence, includes the suffering and afflictions caused to the direct victim and their close friends, the impairment of values of great significance to the individual, as well as alterations of a non-pecuniary nature in the living conditions of the victim or their family. The Court ordered a reparation for non-pecuniary damage of US \$60,000 for Azul and US \$15,000 for her mother.
- Aksoy v. Turkey. The ECtHR also awarded the victim non-pecuniary damages of GB £50,000 for “moral damages”.
- Landaeta Mejias Brothers et al. v. Venezuela. The IACtHR ordered Venezuela to pay US \$270,000 in non-pecuniary damages to eight victims.

To support a claim for non-pecuniary damages, one needs to: a) establish the harm; b) establish the link between the treatment inflicted and the harm; and c) support the claim with evidence, including medico-legal and psychological reports. Non-pecuniary harm is however often presumed in torture cases, whether for the direct victim or their first degree family members.

- Azul v. Peru. The Court relied on the psychosocial expert report to conclude that there was serious non-pecuniary damage.
- In cases such as Romanov v. Russia in which the ECtHR held that the applicant failed to substantiate their claim for pecuniary damage, the ECtHR found that the applicant must have suffered pain and distress on account of the ill-treatment inflicted on him, which could not be sufficiently compensated by a finding of a violation, and accordingly awarded non-pecuniary damages.

Costs and expenses

This covers expenses incurred during proceedings that are connected to the violations, such as legal assistance, court registration fees, travel expenses to attend court hearings, and others. For these, one would usually need to provide receipts of the expenses incurred and explain how these expenses were necessary, proportionate, and linked to the proceedings.

- Aksoy v. Turkey. The applicant was awarded £20,710 to cover his legal fees and expenses.
- Dimitrov and Others v. Bulgaria. The government submitted that the hourly rate charged by the applicants’ lawyers was several times higher than those usually charged in Bulgaria. However, the ECtHR awarded the applicants the full sums claimed in respect of legal fees. The ECtHR reiterated that, according to the Court’s case-law, costs and expenses claimed under Article 41 must have been actually and necessarily incurred and the quantum must be reasonable. The Court noted that it is not bound by domestic scales or standards. Given the fact that the case raised a range of complex issues, and the hourly rate was comparable to that charged in recent cases against Bulgaria of a similar complexity, the ECtHR awarded the requested amount.

Challenges and obstacles

International mechanisms with the mandate to order compensation (such as the UN system, regional courts, and universal jurisdiction cases) can involve barriers related to know-how, cost, distance, and language. This means that they might be out of reach for victims who do not receive *pro bono* assistance or have the required means (see *Module 8: Forum Choice*).

Domestic legal avenues (civil and administrative actions) therefore play an important role in pursuing compensation in torture cases. However, these also pose challenges and obstacles, such as immunities, statutes of limitations, insufficient victim protection mechanisms, lack of rule of law, and unresponsive legal systems.

A v. Bosnia and Herzegovina. This case concerned the rape and ill-treatment of a woman by a member of the *Republike Srpske* army, which amounted to torture. The CAT observed that although the complainant was granted compensation by a domestic court, there was no possibility to receive it in practice since the perpetrator had no property or financial means to compensate the complainant. Further, the domestic legislation regulating civil claims for non-pecuniary damage foresaw a statute of limitations for such cases, and the Constitutional Court jurisprudence failed to acknowledge the principle of subsidiary liability. The CAT therefore held that the State party had failed to fulfil its obligations under Art. 14 of UNCAT.

Payment of Compensation

Whether compensation is paid is dependent on the respect given to court orders, even from international tribunals. In criminal cases, compensation is generally only available if the accused person is convicted. The enforcement of compensation awards can be complex and the barriers to enforcement can be so great that even when compensation is ordered it can take months or years to be processed, and many survivors who are awarded compensation by courts never receive it.

These barriers and limitations mean that it is important for States to afford other routes to compensation. The Preamble of the UN Basic Principles and Guidelines states that “the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged.”

Some States have put in place criminal injury compensation schemes, for instance in relation to SGBV. These are administrative mechanisms which victims can apply to. They require very low thresholds of proof for a victim to be eligible for compensation payments. Equally, in transitional justice contexts reparations (including compensation) are sometimes awarded by the State through transitional justice mechanisms to those victims that meet the registration requirements.

It is key to explore avenues for enforcement of compensation awards. Some domestic systems provide for avenues in their legal system. Depending on where a perpetrator holds their assets, consideration can be given to ways of recovering those assets. This demands time, funds, and good knowledge of asset recovery methods. The assets recovered through these routes can then be assigned to funding compensation – and other types of reparations – for victims of torture.