"Strengthening judicial and non-judicial remedies for the human rights protection of the war-affected people in Ukraine"

Study of the European Court of Human Rights case-law on just satisfaction awarded in cases related to armed conflicts

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This study was prepared in the framework of the Council of Europe Project "Strengthening judicial and non-judicial remedies for the human rights protection of the war-affected people in Ukraine" implemented by the Co-operation Programmes Division of the Council of Europe

Executive summary

The present Study has been drafted in the framework of the Council of Europe Project "Strengthening judicial and non-judicial remedies for the human rights protection of the war-affected people in Ukraine" at the request of the Ukrainian courts to benefit from a compilation of international standards and guidance in developing their administrative policies and case-law on the adjudication of just satisfaction claims brought by the victims of international crimes and human rights violations in the context of the Russian Federation's aggression against Ukraine. Its purpose is to explain the difference between the issue of just satisfaction and the question of determining responsibility and attribution, which is neither researched nor explained in the present Study. Only specific questions pertaining to the manner of examination, evaluation, and awarding just satisfaction by the European Court of Human Rights ("the Court") have been researched and explained.

The Study begins by describing the question of just satisfaction from a general international law perspective, clarifying the relevant legal terminology, and then outlines the principles of the Court's case-law under Article 41 of the European Convention on Human Rights ("the Convention"). It explains the system of awarding just satisfaction under the Convention, making references to the Court's case-law, from which general and specific rules have been drawn. It underlines distinctions between substantive and procedural rules and the specific forms, such as declaratory judgments, monetary compensation for pecuniary and non-pecuniary damages, and costs and expenses, as well as other forms of reparations ordered by the Court, along with brief clarifications of procedural rules and some aspects of the execution process of just satisfaction.

Next, the Study resolves the legal question of whether an armed conflict modifies the general rules of awarding just satisfaction, as it appears to be the primary concern of the Ukrainian judges and authorities. To address this concern, the Study refers extensively to the customary rules on reparations, which include just satisfaction as *lex specialis*, as the international community has codified so far. It confirms that just satisfaction under Article 41 of the Convention is applicable in cases originating from or related to armed conflicts and does not significantly change its own and specific manner of evaluating damages and methods of reparation. In other words, just satisfaction is not exempt from application in armed conflicts.

With this in mind, the Study turns to the issues that the Ukrainian authorities may wish to consider in the specific context of the armed conflict and provides recommendations for developing a consistent case-law of the courts and administrative policies. It provides a list of the relevant cases with indicative value for the courts and authorities of Ukraine to guide them in the implementation of the recommendations.

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Abbreviations

ASRIWA. Articles on Responsibility of States for Internationally Wrongful Acts adopted by International Law Commission

Court. European Court of Human Rights

IHL. International Humanitarian Law
ILA. International Law Association
ILC. International Law Commission

Practice Directions. *The Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 03 June 2022)*

1. Introduction

1. The Council of Europe is implementing the Project on "Strengthening judicial and non-judicial remedies for the human rights protection of the war-affected people in Ukraine" ("the Project") aiming at improving human rights protection, access to justice, and information for war-victims in the context of civil and administrative proceedings in Ukraine. This Study was drafted by Lilian Apostol, international consultant of the Council of Europe, following the administrative authorities and, most notably, the Ukrainian courts' request to benefit from a compilation of international standards and guidance in developing their administrative policies and case-law on adjudication and evaluation of just satisfaction claims brought by the victims of international crimes and human rights violations in the context of the aggressive war. The courts pointed to the practice of the European Court of Human Rights ("the Court") as a source of inspiration and requested specifically the compilation of its case-law on awarding just satisfaction in cases originating from an armed conflict. The overall context of the request is as follows.

2. The Ukrainian courts and administrative authorities have recently been confronted with an increasing number of claims for damages following the aggression of the Russian Federation against Ukraine. Physical and legal persons bring these claims before the authorities and courts, seeking compensation for the acts of war and serious breaches of human rights attributable to the Russian Federation and individuals acting under its jurisdiction. Apart from challenges in determining attribution and responsibility for such acts, the Ukrainian courts encounter difficulties in evaluating and awarding just satisfaction in compliance with international law and the case-law of the international courts developed in that area.

3. In the same context, by Resolution CM/Res(2023)3 of 16 May 2023, the Committee of Ministers of the Council of Europe established the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine[1]. It constitutes the first component of a future international compensation mechanism to be established in co-operation with Ukraine. Natural and legal persons concerned, and the Ukrainian authorities will be able to submit claims and evidence of damage, loss, or injury, the adjudication and examination of which are yet to be determined at the international level. In this sense, the consistent case-law of the domestic courts and the domestic policies of the Ukrainian administrative authorities at the national level shall play a crucial role in building the intended international compensation mechanism and its implementation in practice.

4. To establish such domestic policies and case-law, the administrative authorities and, notably, the courts of Ukraine should be made aware of the current principles and standards of adjudication of damages and making reparations set out by international courts and other international adjudication mechanisms. The future international compensation mechanism will normally be subsidiary to the determination of the amounts of compensation to be made by the Ukrainian courts and authorities at the national level, which in doing so must follow the standards of international law established in this area.

5. The international standards on reparations following an armed conflict are complex, involving several elements and procedural steps for their final determination. First, the question of responsibility and attribution must precede the question of reparations, especially in the case of an international armed conflict where various forms of state and individual responsibility coexist. Second, the reparations are composed of several autonomous elements, such as restitutions, compensations, damages, satisfactions, remedies, etc., all of

[1] Committee of Ministers, 'Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine' (2023).

which need a specific explanation to overcome the confusion they may imply in the domestic courts' practice. Third, material and procedural rules for the determination of reparations may vary depending on the typology of damages and the practice of some international adjudication mechanisms or international courts, which have elaborated different approaches to the question of reparations in armed conflicts, especially in light of the said subsidiarity principle.[2]

6. Accordingly, before going to more detailed explanations of the substantive and procedural rules for reparation in armed conflicts, particularly the description of the Court's case-law on just satisfaction, the Study first defines its scope, structure, and terminology used.

Scope

7. The Ukrainian courts and administrative authorities, dealing with the claims for reparations brought by war-victims, sought guidance and practical advice on how to adjudicate the reparations and, most importantly, the amounts for monetary compensations following the armed conflict in Ukraine. Given the extensive jurisprudence in these matters and the Court's notoriety and authority in the Ukrainian legal system, the Ukrainian courts suggested drafting a study of its case-law. This suggestion, however, should not be taken to undermine the importance of other international courts' or adjudication mechanisms' practice in awarding reparations for human rights violations in armed conflicts. The Court's case-law cannot be taken in isolation and should be interpreted in harmony with other rules of international law, of which it forms part.[3]

8. Therefore, though the Study focuses primarily on the Court's case-law on just satisfaction, it briefly overviews universal international standards on adjudicating reparations in armed conflicts. The Court has followed these international standards in many instances. At the same time, in other cases, it may have elaborated its specific interpretation of just satisfaction, given the particularities of the Convention system. In any case, the Court plays a particular role in developing the customary norm of international law on awarding just satisfaction.[4] It is, therefore, the primary scope of the present Study to explain the customary character of the Court's case-law on just satisfaction as 'one of the basic principles of contemporary international law on State responsibility and only as the consequent obligation of the violation to cease and to repair the damage caused'[5].

9. The Study, however, does not reflect upon the questions of attribution, jurisdiction, and sovereign immunities as such or the international responsibility of the Russian Federation or individuals acting under its jurisdiction, in particular. Though these questions may be related to the issue of reparations because they precede the question of adjudicating just satisfaction, they fall outside the scope of the Study. This Study focuses solely on the issues related to procedures, methods of assessing evidence, and evaluation of just satisfaction, and only after state responsibility has already been determined on the merits.

10. Finally, the Study formulates a set of general recommendations intended to be of practical use for judges and other public officials who examine the claims for just satisfaction resulting

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[2] C. Sandoval, 'International Human Rights Adjudication, Subsidiarity, and Reparation for Victims of Armed Conflict' in C. Sandoval, C. Correa, S. Furuya (eds.), Reparation for Victims of Armed Conflict, (Cambridge: Cambridge University Press, 2020), pp. 179–264.

[3] *Al-Adsani v. the United Kingdom [GC]* (2001) para. 55; *Hassan v. the United Kingdom* (2014) para. 77.

[4] A. Solomou, 'The contribution of the European Court of Human Rights and the Inter-American Court of Human Rights to the emergence of a customary international rule of just satisfaction and the creative expansion of its scope' (2014) 14 *Magazine of the Brazilian Institute of Human Rights* 11–32.

[5] *Goiburú et al. v. Paraguay (Merits, reparations and Costs)* (2006) para. 141.

from various breaches of human rights in the concrete context of the on-going armed conflict in Ukraine. In this context, the Study unveils two important aspects:

- whether general international law or the Court set up specific, derogatory rules for adjudicating just satisfaction in the specific context of an armed conflict and
- whether and how the specific substantial and procedural rules on just satisfaction used by the Court in international proceedings can be applied by courts or administrative authorities at the national level.

Structure

11. Chapter 2 briefly describes the question of just satisfaction from a general international law perspective to reflect why and how the Court follows customary rules of reparations set up even before the creation of the Convention system. It is also important to understand that the Court's case-law on just satisfaction cannot be viewed in isolation from other rules and branches of international law applicable in armed conflicts (e.g., IHL). The chapter explains the distinction between two forms of responsibility in international law relevant to the purposes of the present Study. It also explains the difference between the issue of just satisfaction and the question of determining responsibility and attribution, which is neither researched nor explained in the present Study. This question has been referred to only as an essential preliminary step in examining and awarding just satisfaction.

12. Chapter 3 explains the system of awarding just satisfaction under the Convention, making references to the Court's case-law, from which general and specific rules have been drawn. The chapter also draws distinctions between substantive and procedural rules on awarding just satisfaction and a list of its specific forms. Given the importance of the monetary compensations on that list, this form of just satisfaction is explained in a more detailed manner with reference to the key cases awarding compensations for pecuniary and non-pecuniary damages and costs and expenses. The chapter also delineates the specific aspects of the procedure and execution of just satisfaction.

13. Chapter 4 resolves whether an armed conflict modifies the general rules of awarding just satisfaction. It separates this question into two elements concerning the applicability and specific customary rules on reparations. The rules have been codified so far as soft law and examined in a separate sub-chapter, given their specific character and relevance for the Study.

14. The last chapters 5, 6 and 7 concern the issues that the Ukrainian authorities may wish to consider in the specific context of the armed conflict and, respectively, provide recommendations for developing a consistent case-law of the courts and administrative policies. The Study eventually provides a list of the relevant cases with indicative value for the courts and authorities of Ukraine to guide them in the implementation of the recommendations.

Concepts and terminology

15. International courts and adjudication bodies use autonomous concepts and specific legal terminology to name these concepts, which sometimes vary depending on the international legal instrument they refer to. The Court has recognised on many occasions, including in the interpretation of Article 41 of the Convention, that 'in order to interpret the provisions of the Convention and the Protocols thereto in the light of their object and purpose, [it] has developed additional means of interpretation through its case-law, namely the principles of

autonomous interpretation'.[6] Translation into a national language and adaptation of these concepts and terminology to domestic legal systems may accentuate discrepancies and the differences between international and national legal terminology. Some legal terms and concepts they reflect may not be found in the national systems; other terms may have different meanings.

16. Laws should be drafted using consistent legal terminology, and administrative bodies and courts should refer to such terminology in a consistent manner since a semantic inaccuracy could lead to an erroneous interpretation. Proper terminology is equally vital for disseminating and translating case-laws of the Court. It is, therefore, important for the authorities and domestic courts to agree on terminology consistent with domestic legal terms and legal concepts and comply with the international glossary, in our case the Court's autonomous concepts.

17. In the area at hand, defining and naming the concepts in appropriate legal terms is even more important because their improper use may have serious and, sometimes, incongruous legal consequences. Each concept and term used in matters of reparations has its own meaning and purpose, different from a common understanding. A term may mean different concepts and reflect specific relationships between a part and a whole or between a rule and an exception. For example, from a legal perspective, a clear distinction must be drawn between the terms "compensation," "restitution," "reparation," etc., which in common parlance could be used interchangeably. The concept of "just satisfaction" is specific and falls into a separate category, which includes one or more of the above concepts. Other related terms, such as "remedies", "damages," or "injuries", must also be referred to and explained.

18. For the purposes of the present Study, the terminology in the researched area is explained from two important sources of soft international law: the works of the International Law Commission (hereafter "ILC") on the Responsibility of States for Internationally Wrongful Acts[7] and the resolutions of International Law Association (hereafter "ILA") on Reparation for Victims of Armed Conflict[8], as well as the sources referred thein.

19. The specific terminology and the autonomous concepts used by the Court with meanings different from those explained in the present subchapter are described in Chapter 3.

"Reparation"

20. This term is general and includes all other concepts related to the scope of the Study. ILC conceptualised the term in its broadest sense, which includes mainly three other forms: restitution, compensation, and satisfaction.[9]ILA defined the term "reparation" as including "restitution, compensation, satisfaction, guarantees, and assurances of non-repetition".[10]

21. All other concepts are related to reparation as part of the whole.

"Restitution"

22. According to ILC, this concept is not uniformly defined. One narrow definition is that restitution 'consists in re-establishing the status quo ante, i.e. the situation that existed prior

[6] *Engel and Others v. the Netherlands* (1976) para. 51; *Sabri Güneş v. Turkey (preliminary objections)* (2012) para. 41; *Öneryildiz v. Turkey* (2004) para. 124; *Mihalache v. Romania* (2019) para. 91.
[7] ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) II *Yearbook of the International Law Commission*; ILC, 'Responsibility of States for Internationally Wrongful Acts' (2001) II *Yearbook of the International Law Commission*.
[8] https://www.ila-hq.org/en_GB/committees/reparation-for-victims-of-armed-conflict
[9] ILC, 'ARSIWA', 31 and 34; ILC, 'ARSIWA Commentaries', 31 and 34.
[10] Article 1 ILA, 'Conference Resolution. The Hague' (2010).

to the occurrence of the wrongful act.' Another definition sees restitution as 'the establishment or reestablishment of the situation that would have existed if the wrongful act had not been committed'[11], which the Court[12] and the Committee of Ministers[13] referred to as *restituo in integrum.* This last definition was accepted as customary in view of the concept of reparations delineated in the *Chorzów* case.

23. ILC puts two conditions on the restitution to give it the necessary force: possibility and proportionality. Under the first condition, it must be materially possible to execute the restitution. Under the second condition, restitution should not overburden the responsible party, which may choose to pay monetary compensation instead. Restitution could be partial; in which case it could be enforced with monetary compensation.[14]

24. ILA defined restitution more narrowly in the context of armed conflicts as "measures that re-establish the situation that existed before the violation of rules of international law applicable in an armed conflict occurred."[15] It, however, acknowledged that such a definition is consistent with the ILC's concept of restitution but opted for a more victim-based approach to draw a clear line between restitution and compensation.[16]

25. It will be shown below that the Court embraces the concept of ILC, leaving large discretion to the responsible States to choose the means and the measures of restitution. Restitution for the Court is a concept examined as a preliminary step to the question of compensation.

"Compensation"

26. ILC regarded compensation as a form of reparation that is either complementary or alternative to restitution. It defined it as an obligation of the State responsible for an internationally wrongful act, which is to compensate for any financially assessable damage, including loss of profits, insofar as such damage is not made good by restitution.[17]

27. ILA narrowed this definition to the obligation to cover any financially assessable damage[18] since it 'does not determine the interplay of compensation with other forms of reparation and does not include a reference to the loss of profits'[19].

28. In the most common understanding of the Court's case law, this concept is usually assimilated into the concept of "just satisfaction." The Committee of Ministers refers to "just satisfaction" almost exclusively as the obligation to pay the amounts awarded by the Court as compensation for material and moral damages and costs and expenses.[20] Though, from the perspective of international law, compensation should not be confused with the concept of satisfaction.

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[11] ILC, 'ARSIWA Commentaries', 35 Commentary (3).
[12] *Papamichalopoulos and Others v. Greece (just satisfaction)* (1995) para. 34.
[13] Committee of Ministers, 'Recommendation No. R (2000)2 of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights' (2000).
[14] ILC, 'ARSIWA', 35; ILC, 'ARSIWA Commentaries', 35 Commentary 7-11.
[15] ILA, 'Conference Resolution. The Hague', art. 7.
[16] ILA, N. Ronzitti, and R. Hofmann, 'Conference Report. The Hague' (2010) art. 7 Commentary 2.
[17] 'ARSIWA', 36.
[18] 'Conference Resolution. The Hague', art. 8.
[19] 'Conference Report. The Hague', art. 8 Commentary 1.
[20] Committee of Ministers, 'Information document: CM/Inf/DH(2021)15 Monitoring of the payment of sums awarded by way of just satisfaction: an overview of the Committee of Ministers' present practice' (2021).

“Interest”

29. ILC does not observe the notion of “interest” as “an autonomous form of reparation, nor [as] a necessary part of compensation in every case." It is a necessary part of the process of making reparations, ‘required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.’[21] It, however, does not classify the interest as moratory but only compensatory in character.[22]

30. Instead, ILA considers the notion of interest as ‘a proper element of compensation’[23].

“Satisfaction”

31. In the view of ILC, this is the last form of reparation, which intervenes when neither the restitution nor the compensation seems sufficient. It is, therefore, defined as an obligation to give the injured party any appropriate modality of satisfaction insofar as it cannot be made good by restitution or compensation. ILC illustrates mainly three forms of satisfaction, an acknowledgement of the breach, an expression of regret, and a formal apology, but it does not exclude other modalities. As with the restitution, the satisfaction should comply with two conditions of proportionality and non-humiliating character for the responsible State.[24] ILC explains that satisfaction is a form of ‘remedy for those injuries, not financially assessable, that amount to an affront to the State’, i.e. the ‘injuries [that] are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned’.[25]

32. ILA endorses this concept almost literally but narrows down the second condition of non-humiliating character.[26] It explains that satisfaction may be subjectively perceived as humiliating by responsible parties despite being just and equitable, therefore unduly limiting the right to reparation. It also notes that two conditions must be fulfilled to grant satisfaction, namely, the existence of harm that cannot be expressed in financial terms and the possibility of alleviating the harm by way of satisfaction. This makes satisfaction subsidiary to the previous two forms of reparations.[27]

33. The Court, however, interprets the term "satisfaction" (literally “just satisfaction” in Article 41 of the Convention) in the broader sense as including various forms of reparations, such as financial compensations, restitutions (e.g., returning ownership), or ceasing continuing violations (e.g., release from detention). Its interpretation of the term differs from the current narrower meaning of satisfaction.

“Remedy”

34. The term "remedies" is even broader than the term "reparation" and may include all three forms described above, as well as other means and measures not only to repair the violation but also to prevent its future occurrence. Scholars consider the concept of remedies all-

[21] ILC, ‘ARSIWA Commentaries’, 38 Commentary (1).
[22] ILC, ‘ARSIWA Commentaries’, 38 Commentary (12).
[23] ILA, Ronzitti, and Hofmann, ‘Conference Report. The Hague’, art. 8 Commentary (4).
[24] ILC, ‘ARSIWA’, 37.
[25] ILC, ‘ARSIWA Commentaries’, 37 Commentary 3.
[26] ILA, ‘Conference Resolution. The Hague’, art. 8.
[27] ILA, ‘Conference Resolution. The Hague’, art. 9 Commentary 2-3.

inclusive[28], while the States regard remedies separately from the concept of reparations[29]. In the Convention, the term "remedy" is used more narrowly as a subsidiary right (Article 13) and as a means of exhaustion (Article 35 (1)).

35. Anyway, the term "remedy" is too complex and broad to be explained in one subchapter. Though closely related to the issue at hand, it falls outside the scope of the present Study. The most all-inclusive definition of the concept, relevant to the Study, defines remedies as 'means by which a right is enforced or the violation of a right is prevented or redressed'[30]. Four basic forms of remedies have been distinguished so far: (i) by act of the party injured, (ii) by operation of law, (iii) by agreements between parties and (iv) by judicial remedies.[31] The present Study concerns only the second and last forms of the concept, which involve the first adoption of remedial laws and the second judicial attribution of responsibility with the consequential ordering of reparations. In this logic, the term "remedy" is used throughout the present study.

"Injury" or "harm"

36. ILC has defined the term "injury" with reference to the concept of "damages"[32], which includes any material or moral damage caused by the wrongful act, and that is to be understood both broadly and as limitative. The notion broadly covers material and moral damage and could be understood as excluding merely abstract concerns or the general interests of a State.[33]

37. ILC defined harm with reference to the definition of the victim and regarded it as the negative outcome resulting from the comparison between two situations in which a victim could find himself or herself: the situation with and without the causing event. It deliberately decided not to refer to the definition from the UN Basic Principles on Remedies[34], which define injury as "physical or mental injury, emotional suffering, economic loss, or substantial impairment of [victims'] rights". ILC considered that this definition significantly limits the possibility of reparation in the context of armed conflicts.[35]

"Damages"

38. ILC defines the notion of damages as '"material" (property or other interests of the State and its nationals that are assessable in financial terms) and '"moral" (individual pain and suffering, loss of loved ones, or personal affront associated with an intrusion on one's home or private life). The definition is both illustrative and all-inclusive, which means that damage within the meaning of ILC 'is to be understood as including any damage caused by [the internationally wrongful act]'[36]

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[28] D. Shelton, 'Remedies and Reparation' in M. Langford, W. Vandenhole, M. Scheinin, W. Van Genugten (eds.), Global Justice, State Duties, (Cambridge University Press, 2012), pp. 367–90; D. Shelton, *Remedies in International Human Rights Law* , Third Edition, Third Edition ed. (Oxford University Press, 2015).

[29] 'The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: ... Provide effective remedies to victims, including reparation...' UNGA, '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 (Res A/RES/60/147)' (2005) sec. lit. d).

[30] F. Capone, 'Remedies' (2020).

[31] Capone, 'Remedies'.

[32] ILC, 'ARSIWA', 31(2).

[33] ILC, 'ARSIWA Commentaries', 31 Commentary (5).

[34] UNGA, 'The UN Basic Principles on Remedies'.

[35] ILA, Ronzitti, and Hofmann, 'Conference Report. The Hague', art. 3 Commentary 3 Subchapter "Harm".

[36] ILC, 'ARSIWA Commentaries', 31 Commentary 5.

39. ILA does not use the specific term "damages" except with reference to the financially assessable harm that is able to be compensated.[37] Though it does not exclude moral damages or other suffering, it prefers to use the generic term "harm."

"Victim" or "injured party"

40. The notion of "victim" is crucial for understanding the international law of reparations.

41. ILC does not explicitly define the term "victim" and refers to it in its generic sense. It focuses on the specific term "injured State" (or a number of "injured States") as a victim of an internationally wrongful act, and, it seems, it does not mean individuals as victims of that act unless these individuals are not covered by the claims of the injured State(s). The reason for this is the specific, limited scope of its articles, which 'do not deal with the possibility of the invocation of responsibility by persons or entities other than States'.[38]

42. ILA, on the other hand, covers only victims who are not States and defines them as 'natural or legal persons who have suffered harm as a result of a violation of the rules of international law applicable in armed conflict'.[39] This notion includes relatives or representatives of a victim, who may not be a direct victim of a violation but still retain the procedural right to make a claim on behalf of a victim provided that they have a legal interest. However, reparation has to be awarded to the direct victim.[40]

"Responsible party"

43. Both ILC and ILA refer to the State(s) as a "responsible party" to make reparations. ILA, contrary to ILC, includes international organisations and non-State actors (other than international organisations) as subjects to the law of reparations.[41] ILA mentions that 'there is no consensus on the question whether, and if so, to what extent, member States of international organisations are liable for acts of the latter, save that reparation is owed for violations by either'.[42]

44. ILC does not dismiss the responsibility of an individual or an international organisation but notes that these forms of responsibility are outside the scope of its articles, which were supposed to regulate only inter-state responsibility.[43] ILA, on the other hand, acknowledges the possibility that an individual could be held liable for making reparations provided that he or she is included in the generic term of a non-State actor, which is to be further developed.[44]

45. The UN Basic Principles on Remedies also refer to the State as a "responsible party" but do not exclude individuals or legal persons from the notion, provided that if 'a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim."'[45]

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[37] ILA, 'Conference Resolution. The Hague', art. 8.
[38] ILC, 'ARSIWA Commentaries', 33 Commentary 4.
[39] ILA, 'Conference Resolution. The Hague', art. 4.
[40] ILA, Ronzitti, and Hofmann, 'Conference Report. The Hague', art. 4 Commentary 5.
[41] ILA, 'Conference Resolution. The Hague', art. 5 (1) and 5 (2).
[42] ILA, Ronzitti, and Hofmann, 'Conference Report. The Hague', art. 5 Commentary 2.
[43] ILC, 'ARSIWA', 57 and 58.
[44] ILA, Ronzitti, and Hofmann, 'Conference Report. The Hague', art. 5 Commentary 3 sub-chapter "non-State actors".
[45] UNGA, 'The UN Basic Principles on Remedies', para. 15.

Other relevant terminology

46. The present Study employs other terminology from various branches of international law. For example, the term “armed conflicts” is defined by IHL and the term “jus cogens” is defined by international public law. It is beyond the scope of the present Study to define and describe these terms and the terminology other than that explained above. For its purposes, the Study uses this terminology in the same meaning as in these branches of international law.

2. Reparations in general international law

Overview

47. The whole concept of the right to reparation in contemporary international law originates in the then Permanent Court International Court of Justice’s principle set in the factory at *Chorzów* case:

> *"... reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."*[46]

48. This statement is often associated with the *restitutio in integrum* principle, but contemporary international law has been developed to include more than this Latin expression covers. Though restitution remains the basis for the whole concept of reparations, it is not the sole obligation to which a responsible party can be bound.

49. Before describing the right to reparation in international law and, to a consequential extent, the case-law on just satisfaction of the Court, some explanations on international responsibility must be provided. The right to reparations is not self-standing, and it cannot emerge without establishing the responsibility for an act causing damages or harm and the responsible party to whom the obligation to repair is attributable. It is also important to determine whether there has been a violation of an international obligation by the responsible party and then to ascertain whether there has been a causal connection between that violation and the reparation claimed by the injured party. Therefore, the right to reparations is closely linked to the determination of responsibility and its substantial assessment.

50. In this respect, ILC stated that the right to reparation is a consequence of an internationally wrongful act attributable to the State. In contemporary international law, notably international human rights law, this logic has been extended to impose this obligation to provide remedy and make reparations to states, as well as to individuals responsible for an internationally wrongful act. Two conditions, therefore, predetermine the right to reparations in international law: (i) attribution and (ii) wrongfulness[47], each of which retains its own substantial and procedural rules of determination, which the present Study does not intend to describe in detail.

51. Yet to understand certain aspects of the right to reparations and, most importantly, the basis of the case-law of the Court on just satisfaction, some specific elements of international responsibility need to be explained for the purposes of the present Study. These are “attribution”, “wrongfulness”, and “subjects of the litigation on international responsibility”. And

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[46] *Factory at Chorzów* (1928) para. 47.
[47] ILC, ‘ARSIWA’, 2.

only after that could the specific rules awarding reparations and relations between various obligations resulting from an international wrongful act be better explained and understood.

Attribution

52. The first and foremost requirement for the right to reparation is the establishment of attribution. It refers to the process of assigning responsibility for a particular action, omission, or conduct, involving a determination of whether any of these can be legally attributed to a responsible party and, if so, what legal consequences follow from that attribution.

53. Attribution, in general international law is understood as a link between a responsible party, whether a State, a person, a non-State actor, or an international organisation, and the actions imputed to any of them. The concept of attribution plays a crucial role in various branches of international law, IHL, and international private law, including human rights law, to establish responsibility for internationally wrongful acts and liability for the actions of their agents or entities.

54. The concept of “attribution” is mainly used in establishing the international responsibility of States and international organisations; each retains its own rules of determination. The terms “liability” or “accountability” are often used instead of the term “attribution” to reflect individual international responsibility or the responsibility of non-State actors (e.g. individuals or legal entities responsible for the commission of various acts amounting to a breach of international obligations; international crimes or breaches of IHL by private military companies, etc.).

55. It is a relation of part and whole between the concept of “attribution” and “international responsibility”, so these terms must not be confounded. Attribution is just the first but the most basic element of international responsibility, without which the latter cannot exist. On the other hand, responsibility can be excluded even if the attribution to an act exists but lacks the second element, “wrongfulness”. In this latter situation, the right to reparations does not arise.

56. In the Court’s case-law, the term “attribution” is used in examining the jurisdiction of States, especially in cases related to extra-territorial jurisdiction or the responsibility for the acts of individuals acting under State jurisdiction.[48] It was argued that the Court distinguishes the concept of “attribution” from that of "jurisdiction", the latter essentially referring to the concepts of “territory”, “State agent” authority and control, “effective control” over an area, and the “Convention legal space”. In this context, some judges of the Court saw the concept of “attribution” as mainly concerning the “imputability” of internationally wrongful acts.[49] But in general, the Court uses the rules of general international law concerning “attribution” to determine whether the State, party to the Convention, has jurisdiction over the victim of the alleged violation. However, it does this in its own manner and not without causing criticism, especially in the inter-State cases and the cases related to armed conflicts.[50]

57. Anyway, neither the concept of attribution nor the rules governing it should be blindly associated with the concepts of jurisdiction and responsibility. The Court clearly

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[48] e.g. *Catan and Others v. Moldova and Russia* (2012) para. 115; *Jaloud v. the Netherlands [GC]* (2014) para. 152; *Hassan v. the United Kingdom*, para. 74.

[49] concurring opinion of judge Spielmann, joined by judge Raimondi para. 2 *Jaloud v. the Netherlands [GC]*.

[50] Marko Milanović, ‘Jurisdiction and Responsibility. Trends in the Jurisprudence of the Strasbourg Court’ in Anne van Aaken, I. Motoc (eds.), The European Convention on Human Rights and General International Law, (Oxford University Press, 2018); M. Milanovic, ‘Georgia v. Russia No. 2: The European Court’s Resurrection of Bankovic in the Contexts of Chaos’ (January 2021); K. Dzehtsiarou, ‘The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights’ (2021) *Völkerrechtsblog*.

acknowledged that 'the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has not been equated with the test for establishing a state's responsibility for an internationally wrongful act under general international law'[51]. This means that the relationship between attribution, responsibility, and the right to reparation is the same as the relationship between jurisdiction, responsibility for violation of the Convention, and just satisfaction. As with "attribution", the jurisdiction is an intrinsic condition for the responsibility under the Convention, which does not mean the responsibility is implicit once the jurisdiction has been established. The Court must establish that the State has violated the Convention in order to award just satisfaction. It is the same as the second condition for the right to reparations to arise under general international law, which is to establish "wrongfulness".

Wrongfulness

58. The establishment of attribution is insufficient for granting reparations. To whomever it is attributed, the alleged act must be wrong, namely to be in breach of an international obligation. In general, two conditions should be fulfilled to ascertain the wrongfulness of an act: (i) the existence of a legally binding international obligation and (ii) the lack of conditions excluding responsibility.

59. Ascertaining wrongfulness under international law is merely a legal exercise. It starts by identifying the relevant norms of international law that have been allegedly breached and evaluating the compliance of the responsible party with these norms. Usually, the character and origin of the norms, and therefore of the obligation, do not matter,[52] but they may have consequences on evaluating the modalities of reparation and amounts for compensation. If the breached obligation is serious, a judge can award more in reparations. Still, given the complexity of international disputes and the large discretion given to, in particular, international judges, the classification of international obligations as serious or less serious for the purposes of awarding compensation has rarely been accepted as a rule. It is rather a common understanding of how the seriousness of the breach is connected to wrongfulness and the amount of reparation.

60. The second part of assessing wrongfulness is answering whether there have been conditions excluding it, in which case the alleged responsible party is being exempted from responsibility and, therefore, non-liable to make reparations. There are two types of conditions exempting from responsibility: substantive and procedural. The first category may exempt the responsible party from the responsibility either in whole or in part, and the second category may postpone, suspend, or prevent the responsible party from acknowledging the responsibility and, thus, making reparations.

61. For example, in the area of State responsibility, consent, self-defence, countermeasures, force majeure, distress, necessity, and compliance with jus cogens norms preclude wrongfulness and, thus, responsibility.[53] These are the substantive conditions exempting the State from responsibility, which, however, in certain circumstances, do not preclude the right of the prejudiced State to seek compensation for the material damages caused by the harmful act. The range of such situations is too wide to be described in a more detailed manner.[54]

62. Procedural conditions alleviate the responsibility and vary depending on the norms, treaties, and obligations. It is too hard even to classify them in the limited space and scope

[51] *Catan and Others v. Moldova and Russia*, para. 115.
[52] 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.' ILC, 'ARSIWA', 12.
[53] ILC, 'ARSIWA', 20–26.
[54] ILC, 'ARSIWA Commentaries', 27 (b) Commentary 3.

of the Study. It is, therefore, useful to refer to them by mentioning the most known and widely used procedural conditions affecting the responsibility.

63. For example, the procedural rules for a claim based on the so-called *ratione temporis* criteria[55], such as status of limitations, terms of lodging a complaint or submissions to the court, etc., may preclude holding legally the party responsible but, in principle, do not exclude the responsibility as such.

64. The same is valid with certain forms of immunities, which may be substantive or procedural guarantees from prosecution or trials. For example, sovereign immunity is based on the idea that one sovereign state should not be subjected to the jurisdiction of another state's courts without its consent, which is without prejudice to its responsibility.[56] Sovereign immunities preclude national procedural mechanisms for holding that state responsible, but they do not halt international mechanisms to hold the state accountable.

65. The Convention contains a number of procedural conditions precluding responsibility, with which the Court deals typically at the admissibility stage. The admissibility guide classified them into a separate category of "procedural grounds for inadmissibility," consisting of the rule for exhaustion of domestic remedies, compliance with the four-month time limit, duplicity, anonymity, and abusiveness of an application.[57] Some procedural conditions have been classified as grounds of inadmissibility precluding the Court's jurisdiction from examining an application, which includes incompatibilities ratione personae, ratione loci, ratione temporis, and ratione materiae.[58] Other inadmissibility grounds established by the Convention - manifestly ill-founded application and non-significant disadvantage - represent substantive conditions excluding wrongfulness and, therefore, the responsibility of States.[59]

66. In the Convention system, ascertaining wrongfulness is a legal exercise equated with "finding a violation" of the right(s) it guarantees. If none of the substantive or procedural conditions excluding or precluding the responsibility of the State has been met, and if the alleged breach of the Convention is attributable to that State, the Court may proceed to the examination of the merits of the application. This procedural step still does not guarantee that the State may be compelled to pay just satisfaction because passing the admissibility stage does not necessarily lead to wrongfulness. The Court must determine that there has been a violation of the Convention in order to proceed to the examination of the question of just satisfaction.

Subjects

67. Ascertaining responsibility is an especially complex process in international law, specifically under the Convention system. ILC has recognised that its vision on responsibility concerns only States, which, despite its authority, still does not cover all existing subjects of responsibility in international law[60], save those that could emerge in the future (for example, the responsibility of business entities[61] or non-state actors for breaches of human rights law[62]

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[55] *Phosphates in Morocco (Italy v. France) Judgment* (1938).
[56] *Jurisdictional immunities of the state (Germany v. Italy: Greece intervening)* (2012).
[57] ECtHR, *Practical guide on Admissibility Criteria* (Council of Europe Publishing, 2022) chap. I.
[58] ECtHR, *Practical guide on Admissibility Criteria*, chap. II.
[59] ECtHR, *Practical guide on Admissibility Criteria*, chap. III.
[60] ILC, 'ARSIWA Commentaries', 4 Commentaries to Articles 56 et seq.
[61] Human Rights Council, 'Resolution on Human rights and transnational corporations and other business enterprises (A/HRC/RES/17/4)' (2011); OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011).
[62] J. H. Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1–47; A. Clapham, *Human rights obligations of non-state actors* (Oxford University Press, 2006); P. Wesche, 'Business

based on the theory of “horizontal application”, also known as the Drittwirkung effect). ILA has adopted an extended vision of international responsibility that goes beyond States and includes non-State actors and international organisations as responsible subjects for the breaches of human rights in armed conflicts.[63]

68. Scholars observe the institution of responsibility in international law as a more dynamic concept, which includes states [as] the primary agents of responsibility, with international organisations being assigned secondary responsibility’. According to some of them, ‘contemporary international law makes a range of uses of the term responsibility [for] … a competence, [of an international organisation] as is the case for Article 24 UN Charter, … obligations for states, … individual criminal liability under international law, … concepts such as “the responsibility to protect” or “common but differentiated responsibility”, [and] … in the theory of organisation and of global administrative law responsibility … as a term for accountability’.[64]

69. The present Study refers to the term “responsibility” in the latter sense, namely "accountability," which can be the only basis for making reparations. The meaning of responsibility as “competence” or “protection” does not imply making reparations. Similar to the concepts in national tort law (civil law) and criminal law, international law observes the obligation of making reparations as a consequence of an action accountable to a subject.

70. However, contrary to national law, a distinction must be drawn between various subjects of international law that could be held accountable for a breach of international obligations and those who could claim reparations. Naturally, not all of these subjects can have the same obligations following a breach and not all could be ordered or asked to make reparations in the same way. It is, therefore, important to classify these subjects to understand the specific consequences of the breach and whether they could be ordered or seek to make reparations in the same way.

71. The present Study classifies the subjects as those responsible for a breach, therefore bound to make reparations, and as those who suffered following a violation, thus having the right to seek reparations.

Responsible

72. These are States, persons, international organisations, and non-State actors.

States

73. States are primary subjects of international law, so various norms and customs have covered their accountability. ILC has codified the principles of state responsibility in ASRIWA, which is extensively quoted and referred to in the present Study.

74. Its main provisions on reparations provide that an international wrongful act attributed to a State gives rise to certain consequences for that State. These consequences imply that the wrongful State must still fulfil the obligation it has breached[65] and cease the wrongful act, providing assurances of non-repetition[66]. Then and only then, this State must make a full or

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Actors, Paramilitaries and Transitional Criminal Justice in Colombia’ (2019) 13 *International Journal of Transitional Justice* 478–503.

[63] See Footnote 41

[64] V. Roeben, ‘Responsibility in International Law’ (2012) 16 *Max Planck Yearbook of United Nations Law* 99–158 at 103–4.

[65] Article 29 ‘ARSIWA’.

[66] Article 30 ‘ARSIWA’.

partial reparation for the damages, which may include one of the three forms: restitution, compensation, or satisfaction[67], either separately or in combination.[68]

75. Thus, for States as subjects of international responsibility, the obligation to make reparation, in either form, is only a part of their international obligations after the commission of an internationally wrongful act.

76. The Convention provides solely for this form of accountability, where only the State-Parties could be subjected to international responsibility and thus ordered to pay just satisfaction.

Persons

77. In contemporary international law, physical persons are directly accountable for breaches of international obligations under international criminal law. Thus, a physical person could be held liable to make reparations, including for human rights violations committed in armed conflicts. Article 75 of the Rome Statute provides that the International Criminal Court may award reparation while taking into account the scope and extent of any damage, injury, or loss that occurred.[69]

78. Legal persons could be held responsible for a breach of an international obligation, mainly under the rules of private international law, and therefore ordered to make reparations. On the other hand, their responsibility for human rights violations remains unsettled and based on the rules of attribution to a state that is a party to a human rights legal instrument.[70] This means that only that State to whom the violation has been attributed can be ordered to make reparations instead of the legal person who may have been directly responsible for the breach of that legal human rights instrument. Whether or not the State should turn back against that legal person (e.g., a regress action) is irrelevant to international law and has been left at the exclusive discretion of States.

79. Anyway, this form of responsibility exceeds the scope of the present Study because the Convention does not presuppose such responsibility. According to the rules of attribution[71], a physical or private legal person cannot be held responsible for violating the rights guaranteed under the Convention unless their actions are imputable to the State[72]. In the latter case, only the State is held responsible and bound to make the necessary just satisfaction.

International organisations

80. The rules of responsibility of international organisations for the breaches of international law have not yet been settled in the same way as the principles of State responsibility[73], even

[67] Article 34 ILC, 'ARSIWA'.
[68] Article 31 'ARSIWA'.
[69] Similar rules existed in article 24 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia and article 23 (3) of the Statute of the International Criminal Tribunal for Rwanda.
[70] OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*; Human Rights Council, 'A/HRC/RES/17/4'; Committee of Ministers, 'Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business' (2016).
[71] ILC, 'ARSIWA', 5 and 8.
[72] ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020) paras 111–120.
[73] M. Möldner, 'Responsibility of International Organizations – Introducing the ILC's DARIO' (2012) 16 *Max Planck Yearbook of United Nations Law* 281–328; J. Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 *European Journal of International Law* 1133–61; C. Samara, 'International Responsibility Of International Organizations (The Draft Articles of the International Law Commission)' (2017).

though the ILC completed its work on that matter and drafted such rules[74]. There is not much practice or case-law of international courts clarifying these rules, save the legal system of the EU and the case-law of the European Court of Justice concerning the responsibility of EU institutions. This form of responsibility is worth mentioning because it illustrates that, despite some differences between the rules on establishing substantive responsibility for States and international organisations, the rules on making reparations do not change. Both forms of responsibility imply 'a concept that "is common to all the international law sub-systems" and [express] "the ordinary meaning to be given to the concept of damage in international law"'[75].

81. The Court cannot attribute international responsibility to an international organisation given the limited scope of the Convention, which regulates only the international responsibility of States. International organisations cannot be held responsible and, therefore, compelled to pay just satisfaction under the Convention unless the alleged violation is directly imputable to the States Parties. For example, the Court has declined its jurisdiction to rule over the allegations addressed against States part of the military coalition forces in Iraq formed on the basis of UN Security Council Resolution 1546 (2004).[76]

Non-State actors

82. The question of the responsibility of international organisations and the responsibility of non-State actors in international law is also a complex and evolving area. It has not yet been settled as a separate form of responsibility, but it can involve holding individuals, corporations, armed groups, and other entities responsible for their actions under various existing forms of international responsibility. The development of this area of international law is ongoing, and new norms and principles emerge over time.

83. Non-state actors cannot be held directly responsible for a breach of the Convention unless their actions are attributable to the State Party(s).

Victims

84. In international law, it is equally important to identify the subjects who may or may not claim reparations. Victims could be individuals, collectives, physical or legal persons (with national or international legal personality), and States. It depends on the character of the breached international obligation, the procedure, and the features of the litigation as to who might be the victim.

85. In matters involving inter-state litigation, such as those falling under the jurisdiction of the ICJ, only States could retain victim status and, therefore, initiate an action seeking to establish international responsibility and reparation. Some other disputes, such as international commercial arbitration (e.g. UNCITRAL, ICSID, etc.), may involve States, business entities, or individuals as victims. International criminal tribunals or various ad-hoc mechanisms, such as compensation or truth commissions, could specify the range of individuals who may claim compensation or states who may initiate an action instead of the victims.

86. Human rights treaties, and the Convention is not an exception, normally provide that only physical persons, taken individually or collectively, and legal persons not affiliated with a state

[74] ILC, 'Draft articles on the responsibility of international organizations' (2001) II *Yearbook of the International Law Commission*.
[75] *Axel Walz v Clickair SA* (2010) paras 27–28.
[76] *Hussein v. Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom (dec.)* (2006).

could claim victim status for the breach. States cannot be regarded as victims of human rights violations.

Reparations

87. Making reparations is just one of the many other consequences of an internationally wrongful act. The rules of state responsibility compel the injured party(s) to follow specific steps and not jump directly into asking for monetary compensation. Therefore, it is wrong to assume that responsibility under international law inevitably implies an obligation to pay sums of money as compensation. A range of other obligations precede the question of payments.

88. At the beginning of the process of seeking responsibility for the wrongful act, the injured party must invoke the responsibility of the wrongdoer and require its cessation if the breach is continuing. Only after that, and once the responsibility has been legally established, may the injured party seek one or all three forms of reparation. ILC observes the right to seek reparations corresponding to "the **second general obligation** of the responsible State upon the commission of an internationally wrongful act"[77]. In other words, the injured party cannot jump directly into asking the responsible State to make reparations without first establishing responsibility and requesting that the wrongful act be stopped. Even so, the process of claiming and making reparations implies three forms that follow specific rules and order, which may concur or alternate.

89. The basic principle of reparation in any of three forms has been well-established in the quoted *Chorzów* case[78], which remains valid now. It implies a specific relationship between all forms of reparation—restitution, compensation, and satisfaction—that should follow in order.

a. Firstly, the responsible States must cease the wrongful act and only then make full or partial restitution if possible.

b. Secondly, and only if restitution is no longer an option or can be done only partially, the responsible State can be compelled to pay compensation for material and/or moral damages, including default interest. Moratory interests, or post-judgment interests, are a matter of procedure and do not represent a mandatory requirement under international law.

c. Thirdly, the measure of satisfaction, as the last form of reparation, can be ordered along with restitution and/or compensation, which can be either alternative to or concurring with these two forms of reparation.

90. This is a simplified explanation of the general rules ordering reparations in international law. The rules and procedure awarding just satisfaction under the Convention generally follow these principles, though the Court has developed its own specific approach to the question of making reparations. It was acknowledged that the Convention system of just satisfaction is *lex specialis* in relation to these general rules of reparations under international law.[79] Therefore, it retains its specific features, on which the next chapter is focused.

3. Just satisfaction under the Convention

91. Article 41 of the Convention read as follows:

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[77] ILC, 'ARSIWA Commentaries', 31 Commentary para (1).
[78] See footnote 46
[79] *Cyprus v. Turkey (just satisfaction)* (2014) para. 42.

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

92. The former Article 50 did not essentially differ from the current reading. The wording marked by a strikethrough has been simplified and has not changed the meaning or the conditions of just satisfaction:

If the Court finds that ~~a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from~~ the ~~present~~ Convention, and if the internal law of the ~~said~~ Party allows only partial reparation to be made ~~for the consequences of this decision or measure~~, ~~the decision of~~ the Court shall, if necessary, afford just satisfaction to the injured party."

93. Despite its apparent simplicity, the interpretation given by the Court to the issue of just satisfaction has been criticised for inconsistency and lack of clarity[80]. In the context of the recent reforms of the Convention system, the States Parties first invited the Court to 'establish and make public rules foreseeable for all the parties concerning the application of Article 41 of the Convention, including the level of just satisfaction that might be expected in different circumstances'[81]and then, themselves proposed 'to initiate comprehensive examination of: … the affording of just satisfaction to applicants under Article 41 of the Convention[82].

94. It appears that neither of these initiatives has yet been fulfilled. The Court issued a press-release briefly explaining a judgment awarding just satisfaction and then updated its procedural guidelines on submitting just satisfaction claims without explaining substantive rules[83]. States Parties have not published the results of their 'comprehensive examination'.

95. It is not the purpose of the present Study to appraise or share critiques of the Court's case-law on just satisfaction. The study should explain this case-law in a way that is practically useful for the Ukrainian judiciary in the context of the current armed conflict. The critiques, whether justified or not, do not add value to the matter and certainly do not help in the practical implementation of that case-law, irrespective of its inconsistency and scarce judicial motivation. However, the Ukrainian judiciary must be made aware that such critiques exist, and some of them are pretty justified.

96. For this reason, the Study proposed to analyse and describe the Court's case-law on just satisfaction compared to the principles of general international law in matters of making reparations. In what follows, the Study proposes to follow the same structure used above, namely to reflect on the concept of 'just satisfaction' in comparison with the concept of 'reparations' in general international law. Then, the Study briefly explains the features and conditions, the subjects responsible for and the beneficiaries of just satisfaction, the principles the Court uses in evaluating and affording it, the specific forms, the procedure, and the execution of just satisfaction.

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[80] V. Fikfak, 'Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it's all about the state' (2020) 33 *Leiden Journal of International Law* 335–69.

[81] Council of Europe, 'High Level Conference on the Future of the European Court of Human Rights: Izmir Declaration' (2011) para. 2 d).

[82] 'High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration' (2012) para. 35 f) ii).

[83] ECtHR, 'Rules of the Court. The Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 03 June 2022)' (2022).

Meaning

97. The concept of “just satisfaction” under the Convention should not be confused with the notion of “satisfaction” as one of the three forms of reparation under international law. Satisfaction under general international law has a narrow meaning of being a non-financial measure or being a measure “any other than restitution or compensation." “Just satisfaction," on the other hand, in the Convention system means rather a special way of naming “the right of an injured party to reparation”. In other words, if, in general international law, the term “satisfaction” means a separate form of reparation, a measure of a non-financial character, the notion of “just satisfaction” under the Convention is broader and more inclusive.

98. It was argued that the signatory States, in then-Article 50 (currently Article 41) of the Convention, originally meant the non-financial character of "just satisfaction." However, the argument to the contrary referred to the broad perception of satisfaction in international law, which existed well before ILC delineated this concept in 2001.[84] In this view, satisfaction was a more general obligation to provide any "remedy or form of reparation (in the wide sense) for the breach of an international obligation.[85]

99. Indeed, the drafters of the Convention originally used the term “just satisfaction” in its wide sense[86], which the Court has lately interpreted as a concept including other forms of reparations, such as monetary compensations and/or restitution. The Court, however, has never ordered the responsible States to make any forms of apologies or expressions of regret within the meaning of the notion of “satisfaction” under Article 37 ARSIWA. Even in the cases of unilateral declarations or friendly settlement agreements, the Court has not requested an acknowledgement of the violation from the States.[87] It, however, refused to accept such declarations or settlements if they were not accompanied by a proper form of reparation.[88]

100. Therefore, the first rule of understanding the case-law of the Court on awarding just satisfaction is to grasp the meaning of the concept. Just satisfaction is an autonomous concept under the Convention, which is not equal to the general concept of “reparation” under international law, but it is more inclusive than the third form of reparation, "satisfaction." Yet, the concept of “just satisfaction” does not include measures of a non-financial character (e.g. apologies, excuses, etc.), namely those included in the term “satisfaction” under general international law. In other words, the term “just satisfaction” can be viewed as including two forms of reparation - “restitution” and "compensation” - within the meaning of general international law, but not the third form, "satisfaction."

101. “Just satisfaction” originally did not mean to include restitution within the meaning of the first form of reparation under general international law. It, however, meant more than “compensation”, as the Court has gradually developed this concept into a more inclusive notion. It includes compensation in three specific forms: payments for pecuniary non-pecuniary damages and costs and expenses. But the concept of "just satisfaction" also

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[84] O. Ichim, *Just Satisfaction under the European Convention on Human Rights* , 1 ed. (Cambridge University Press, 2014) chap. 2.1.

[85] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, , vol. XX (, p. 215 (1990).* (1990).

[86] ECtHR, *Preparatory work on Article 50 of the European Convention on Human Rights (information document prepared by the Registry)* (1970).

[87] B. E. P. Myjer, ‘It is never too late for the State - Friendly settlements and Unilateral Declarations’ (2007) *Human Rights - Strasbourg views* 309–28; L. R. Glas, ‘Unilateral declarations and the European Court of Human Rights: Between efficiency and the interests of the applicant’ (2018) 25 *Maastricht Journal of European and Comparative Law* 607–30.

[88] *Tahsin Acar v. Turkey (preliminary objections)* (2003).

includes other specific forms of reparations, such as ordering release from unlawful detention, restitution of unlawfully seized goods, or reopening domestic proceedings in individual cases.

102. As with the question of reparations under general international law, the question of just satisfaction under the Convention is part of ascertaining State responsibility and requires the Court's decision on attribution and wrongfulness. Given that the present Study observes just satisfaction as a specific form of reparation under general international law, some explanations are required on its features, conditions, and comparisons with other substantive rights under the Convention providing the right to reparations.

Comparisons

103. Just satisfaction is subsidiary to other rights, but it can be decided separately. This does not mean that just satisfaction is self-standing right under the Convention. It is the consequence subsidiary to the violation of one or more rights. In this sense, just satisfaction can be compared with some specific self-standing rights, such as the right to remedy, the right to compensation for unlawful detention, and the right to compensation for judicial mistakes.

Right to remedy and just satisfaction

104. The concept of "just satisfaction" can be better understood in comparison with another legal concept, which is similar in character and scope but not identic. This latter concept is the right to remedy within the meaning of Articles 13 and 35 (1) of the Convention. There are two main differences in the substantial and procedural application of the right to remedy and just satisfaction, which might be relevant to explain in the context of the present Study.

105. The first difference is substantive, which refers to the character of both. Despite its specific meaning and features, just satisfaction is not a right under the Convention, unlike the right to remedy. It remains an obligation of the States Parties accessory to the obligation to repair the consequences of a violation that arises only after the Court has found a breach of one or many of the Convention's rights in a judgment, including the right to remedy.

106. Just satisfaction is only due when the responsible State could not have provided the injured party with any form of remedy in full or in part at the moment when the Court has delivered its judgment. It could be claimed and awarded only pending the Court's proceedings and only after exhausting domestic remedies. Contrary to the right to remedy, just satisfaction is accessory to the findings on State responsibility under the Convention and cannot be regarded as a part of that right or as a separate right arising after the Court's judgment. Just satisfaction can be awarded only when necessary but not mandatory following a finding of a violation. Indeed, in some cases, the Court rendered judgments finding a violation without awarding just satisfaction.

107. Another essential difference between the right to remedy under Article 13 of the Convention and just satisfaction is procedural. The object of Article 13 is to provide a means whereby individuals can obtain relief at the national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.[89] On the other hand, just satisfaction can be claimed and obtained only pending the Court's proceedings and only if it finds a breach of the Convention in a judgment. A decision of the Court accepting the terms of a friendly settlement or a unilateral declaration can hardly be viewed as part of just satisfaction. However, the Court evaluates whether the responsible State has remedied the alleged violation through sufficient compensation.

[89] ECtHR, *Kudła v. Poland [GC]* (2000).

Other substantive rights to compensation and just satisfaction

108. Compared with other rights to compensation under the Convention, just satisfaction keeps its subsidiary role. Just satisfaction is awarded for the inability of the victim of a miscarriage of justice to claim compensation for non-pecuniary damage after acquittal, and the right to compensation for wrongful conviction is guaranteed under Article 3 of Protocol No. 7[90].

109. The same relation of subsidiarity could be discerned between just satisfaction and the special right to compensation for unlawful detention under Article 5 § 5 of the Convention. The latter creates a directly enforceable right before the national courts,[91] and these courts should apply the criteria of just satisfaction as the Court does[92]. However, this right can be violated separately in cases where compensation is negligible or wholly disproportionate to the seriousness of the violation, which entails compensation under Article 41 awarded by the Court in addition to the low compensation granted by the domestic courts.[93]

Features

110. The first feature of just satisfaction is its **compensatory** effect. While some authors argued[94] that the Court may have used it sometimes as a means of retributive justice, namely to punish the wrongdoer State, the compensatory character of just satisfaction remains the basis for the Court to award moral damages. The Court defines the scope of just satisfaction to 'serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned.' [95]

111. The idea of retributive justice and the use of punitive damages is generally rejected in international law, and, as recognised by ILC in ARSIWA, 'even in relation to serious breaches of obligations arising under peremptory norms, … the function of damages is essentially compensatory.[96]

112. From the first feature derives the second character that qualifies satisfaction as only an **individual** relief. It has been long discussed whether the Court delivers individual or constitutional types of justice, which may reflect on the Court's awards of just satisfaction, especially in cases where it has found a systemic violation of the Convention and rendered pilot judgments.[97]

113. The Court has contributed to this dispute by recognising the double function of its judgments, which "in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard, and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties'.[98] In another case, the Court noted that: 'although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of

[90] *Poghosyan and Baghdasaryan v. Armenia* (2012).
[91] *A. and Others v. the United Kingdom* (2009) para. 229.
[92] *Vasilevskiy and Bogdanov v. Russia* (2018).
[93] *Cristina Boicenco c. Moldova* (2011).
[94] P. Pinto de Albuquerque and A. van Aaken, 'Punitive Damages in Strasbourg' (2016).
[95] *Varnava and Others v. Turkey* (2009) para. 224.
[96] ILC, 'ARSIWA Commentaries' Chapter III Commentary (5) and Article 36 Commentary (4).
[97] *Hutten-Czapska v. Poland* (2006); ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine* (2009).
[98] *Ireland v. the United Kingdom* (1978) para. 154.

protection of human rights and extending human rights jurisprudence throughout the community of Convention States.'[99]

114. Scholars argue, in this sense, that the Court uses two models of awarding non-pecuniary damages. The victim-oriented model is meant to compensate victims of human rights violations, while the state-oriented model has the purpose of retribution and deterrence from repeating human rights violations on a larger scale. In the first model, the Court delivers individual justice, and in the second, it renders judgments on systemic violations.[100] Other quoted authors, including former judges of the Court, view these forms of damages as punitive justice for '(1) gross violations of human rights protected by the Convention …, multiple violations..., …, repeated violations over a significant period of time, or a single continuing violation over a significant period of time; (2) prolonged, deliberate non-compliance with a judgement of the Court delivered with regard to the recalcitrant Contracting Party; and (3) the severe curtailment, or threat thereof, of the applicant's human rights with the purpose of avoiding, impairing, or restricting his or her access to the Court, as well as the Court's access to the applicant.'[101]

115. One might ask why this dispute is relevant for the purposes of the present Study. It needed to understand the Court's awards in the inter-State cases, where the just satisfaction may seem to exceed this individually-oriented character.

116. The Court has established that awarding just satisfaction in the inter-State cases depends on the character of the complaints. Where complaints about general issues were raised, the Court's primary goal was that of vindicating the public order within the framework of collective responsibility under the Convention, therefore, in such circumstances, it may not be appropriate to make an award of just satisfaction. However, where a State denounces violations by another State Party of the human rights of individual victims, such complaints are substantially similar to an individual application, so awarding just satisfaction is justified to offer relief to those victims. Therefore, if just satisfaction is afforded **in an inter-State case, it should always be done for the benefit of individual victims**.[102]

117. In brief, this principle was applied in other subsequent inter-State cases originating from an international armed conflict, confirming the individually-oriented character of just satisfaction. It has been developed to include three main criteria for establishing and awarding just satisfaction to benefit the victims: (i) the type of complaint made by the applicant Government, which had to concern the violation of basic human rights of its nationals (or other victims); (ii) whether the victims could be identified; and (iii) the main purpose of bringing the proceedings.[103]

118. The third and last feature of just satisfaction is that **it could neither compensate nor repair the violation totally**.[104] The Convention system has been designed to provide just satisfaction in lieu of the full reparation.[105] Its function is to provide 'just' reparation, sometimes as an alternative to restitution, as it was asserted in one case that 'just satisfaction" does not necessarily require 'complete satisfaction' but only that that is 'necessary'[106].

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[99] *Karner v. Austria* (2003) para. 26.
[100] Fikfak, 'Non-pecuniary damages before the European Court of Human Rights'.
[101] Pinto de Albuquerque and van Aaken, 'Punitive Damages in Strasbourg'.
[102] *Cyprus v. Turkey (just satisfaction)*, para. 46.
[103] *Georgia v. Russia (just satisfaction)* (2019); *Georgia v. Russia (ii) (just satisfaction)* (2023).
[104] Ichim, *Just Satisfaction under the European Convention on Human Rights*, chap. 2.1.
[105] Commentary to Article 32 para (2) 'ARSIWA Commentaries'.
[106] *Stran Greek Refineries and Stratis Andreadis v. Greece* (1994) paras 79–80.

Conditions

119. In its interpretation of the former Article 50, the Court drew up three conditions of just satisfaction:

> *Where the consequences of a violation are only capable of being wiped out partially, the affording of "just satisfaction" in application of Article 50 (art. 50) requires that:*
>
> *(i) the Court has found "a decision or measure taken" by an authority of a Contracting State to be "in conflict with the obligations arising from the ... Convention";*
>
> *(ii) there is an "injured party";*
>
> *(iii) the Court considers it "necessary" to afford just satisfaction.*[107]

120. From the current reading of Article 41 of the Convention, one scholar deducted the following three conditions preceding an award for just satisfaction:

a. finding of a violation,
b. internal law allowing only partial reparation, and
c. if necessary, to afford just satisfaction. [108]

121. Other scholars considered that there are four general conditions for an award:

a. a decision or measure taken by an authority of a contracting state in conflict with its obligations under the treaty;
b. the consequences of the violation are only capable of being wiped out partially at the internal level;
c. the existence of an injured party; and
d. an estimation by the Court that it is necessary to afford just satisfaction.'[109]

122. At last, other scholars have deduced five legal requirements[110]:

a. The Court must have determined that a right contained in the Convention or a Protocol was violated….
b. The domestic law of the involved state must not allow for a full "reparation" to be made for the human rights violation….
c. Under the Rules of the Court (Rule 60(1)), "[a]n applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect"…
d. There must be a causal link between the human rights violation and the nonpecuniary damage…
e. The award of non-pecuniary damage must be "necessary".

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[107] *De Wilde, Ooms and Versyp v. Belgium (just satisfaction)* (1972) para. 21.
[108] Fikfak, 'Non-pecuniary damages before the European Court of Human Rights'.
[109] Ichim, *Just Satisfaction under the European Convention on Human Rights*, chap. 3.2.
[110] S. Altwicker-Hamori, T. Altwicker, and A. Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights' (2015) chap. 2.

123. It could be seen that scholars disagree on what to consider a requirement for affording just satisfaction. Even from a terminological point of view, some call them "conditions," while others consider them "legal requirements." It is clear, however, that some of these conditions (or requirements) are present in every analysis, though in different wording. Other conditions differ depending on the scope of the analysis and the purpose of the academic paper. Some conditions are procedural; others are substantive. This difference in opinions could be explained, first, by the re-wording of former Article 50 and, second, by the lack of consistency and codification of its case law coming from the Court.

124. Not all conditions could be considered legal requirements needing classification. For example, the existence of an "injured party" is an obvious condition that does not require a separate explanation. On the other hand, the existence of an "injury" is a requirement under general international law, which needs a specific explanation because a violation of the Convention does not necessarily presuppose affording just satisfaction. However, while explaining the existence of an "injury" or of an "injured party," the scholars inevitably turn to explaining the requirement of "necessity" for just satisfaction, namely what they call the last condition.

125. The same reasons could be raised regarding the first condition requiring that the Court find a violation of the Convention. This condition is also self-explanatory. Just satisfaction cannot be awarded in cases where there has been no violation. In the words of general international law on state responsibility, there must be attribution and wrongfulness in the act of the responsible State for which reparation is sought.

126. Some conditions are procedural, which cannot, strictly speaking, be attributed to the legal requirements. This is so because procedural rules may change and be subject to exceptions, which indeed happened with the procedural rules on claiming just satisfaction. For example, Rule 60 of the Rules of the Court, requiring a specific claim for just satisfaction, is not absolute. The Court consistently deviated from this rule in some exceptional cases, where it considered the awards for just satisfaction somewhat necessary.[111] One scholar implied that these exceptional deviations are a transgression of the principle *ne ultra petita*[112], from which the Court should refrain. In such controversies, it is disputable to consider this procedural rule as a legal requirement for affording just satisfaction.

127. The present Study does not intend to bring even more confusion to the matter. Its scope is to offer practical guidance and clear, simplified explanations. Therefore, and only for the purposes of the present Study, the following **two conditions** were considered relevant to merit classification as legal substantive requirements for just satisfaction:

a. **Finding at least one violation of the Convention rights, and**

b. **Impossibility, partial or full, to repair that violation at the domestic level.**

128. Other conditions or requirements, such as the necessity or presence of an "injured party" or the requirement to advance a claim, were explained in subsequent chapters, where practitioners could better understand them. For example, the necessity requirement or the causality condition have been classified as principles of evaluation of just satisfaction rather than legal requirements. Requirements to ask for reparation in the proper moment have been explained in a separate chapter dedicated to the procedure for just satisfaction. The so-called condition of existence of an "injury" or an "injured party" implies explanations on the subjects of legal relations concerning just satisfaction.

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[111] *Nagmetov v. Russia* (2017).
[112] Ichim, *Just Satisfaction under the European Convention on Human Rights*, chap. 4.2.2.

Violation of the Convention right(s)

129. This first condition presupposes that the Court delivered a judgement in which it found at least one violation of the Convention. It is straightforward. Just satisfaction cannot be awarded in cases where there has been no violation of the Convention.

130. The decisions striking out the applications on the basis of a friendly settlement or unilateral declaration, even if the respondent state acknowledges the existence of a violation, do not qualify as the first condition for just satisfaction. Though the Court requires the responsible State to remedy the acknowledged violation to the level of being satisfied that the friendly settlement[113] or 'unilateral declaration'[114] offers a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case'. In such cases, just satisfaction appears to be an issue of the effectiveness of national remedies, examined under Article 13 of the Convention[115].

131. If the Court has decided on the merits of the case and issued a judgment, the applicant cannot be required to reapply for the domestic remedies, irrespective of their effectiveness. In that case, the first condition of just satisfaction is fulfilled, and Article 41 applies.[116]

132. In brief, this condition requires a violation of the Convention and a judgement of the Court on that matter. It is the condition that, in terms of general international law, fulfils the primary condition of making a reparation, namely determining the responsibility by assessing the attribution and wrongfulness of an act incumbent on the State (see Attribution and Wrongfulness).

Impossibility to re-establish the *status quo ante* at the domestic level

133. One author rightly classified this condition as being of rather historical significance for the Court.[117] In practice, this condition is no longer applicable because even if the possibility of reparation arises pending the Court's proceedings (for example, with the introduction of new remedies or the reopening of the proceedings pending examination of the case), the Court applies this condition quite discretionarily.

134. In fact, while assessing the option to make a reparation at the domestic level, the Court distinguishes between the rule of exhaustion of domestic remedies provided for by Article 35 § 1 and just satisfaction claims made under Article 41 of the Convention[118]. It observes that, even if new remedies are available, the victim of a violation cannot be expected to initiate new proceedings at the domestic level, claiming compensation for the violations found by the Court in its judgment.[119] Thus, as a rule, the requirement that domestic remedies be exhausted, including the option of reopening the proceedings to seek a review of a criminal

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[113] *Broniowski v. Poland (striking out)* (2005) Claim for compensatory land in respect of property abandoned as a result of boundary changes following the Second World War: friendly settlement (general and individual measures following finding of violation originating in a systemic problem).
[114] *Tahsin Acar v. Turkey (preliminary objections)*, para. 75.
[115] *Demopoulos and Others v. Turkey (dec.)* (2010) Failure to seek redress from Immovable Property Commission under Law no. 67/2005 in respect of deprivation of property in northern Cyprus in 1974: inadmissible.
[116] *Xenides-Arestis v. Turkey (just satisfaction)* (2006) Applicant hindered from returning to her home and property in northern Cyprus not required, once the Court had already decided on the merits of her case, to apply to new domestic Commission in order to seek reparation for damages.
[117] Fikfak, 'Non-pecuniary damages before the European Court of Human Rights', 339.
[118] *De Wilde, Ooms and Versyp v. Belgium (just satisfaction)*, paras 15–16.
[119] *Agurdino S.r.l. v. the Republic of Moldova (just satisfaction)* (2013) para. 9.

conviction and compensation for a wrongful sentence[120] or reopening of civil proceedings to seek compensation again[121], does not apply to the issue of just satisfaction claims.

135. However, in some cases involving complex assessments of just satisfaction claims, the Court may reserve the question of just satisfaction and invite the victim and the respondent State to pursue various forms of settlement. It is unclear what criteria the Court may or may not reserve its decision on just satisfaction claims. This means, however, that it can consider this second condition as an option for reparation at the domestic level before deciding on the question of just satisfaction itself.

136. For example, the Court normally reserves the question of just satisfaction in high-profile cases or cases involving extensive pecuniary claims. It issues a judgement on the merits, proposing that the matter of just satisfaction be resolved at the national level. If the State and the victim have reached an agreement, the Court does not proceed to the examination of the issue of just satisfaction[122] unless the settlement proceedings have been flawed[123] or the settlement has failed, in which case the Court decides on the issue of just satisfaction on its own[124].

137. In other situations, when the Court has ruled on structural or systemic problems giving rise to many repetitive violations, it can exceptionally refer the applicants back to exhaust newly available domestic remedies and seek reparations at the national level.[125] If the respondent State fails to introduce such remedies, the Court proceeds to examine claims and orders paying just satisfaction[126]. This approach, however, is also inconsistent, as the Court may find other non-traditional avenues to compel the States to resolve structural problems and institute mechanisms to secure reparation[127].

138. Overall, this condition is unclear and rather inapplicable. Scholars argue that the Court disregards this particular condition, favouring the principle of “necessity” of just satisfaction and using wide judicial “discretion” instead.[128] These considerations of “necessity” and "discretion", including "equity," "proportionality,” and "causality," are not conditions for granting just satisfaction but rather principles of its assessment.

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[120] *Barberà, Messegué and Jabardo v. Spain (just satisfaction)* (1994) para. 12; *Jalloh v. Germany* (2006) para. 129.
[121] *S.I. and J.I. v. Croatia (just satisfaction)* (2016) para. 15.
[122] *Von Hannover v. Germany (striking out)* (2005).
[123] *Žáková v. the Czech Republic (just satisfaction)* (2017) Failure to respect the rule of confidentiality after the principal judgment has been handed down, but before the Court has ruled on just satisfaction, where the Court found it appropriate to continue the examination of the case and award just satisfaction. .
[124] *Sovtransavto Holding c. Ukraine (just satisfaction)* (2003); *Oao Neftyanaya Kompaniya Yukos v. Russia (just satisfaction)* (2014).
[125] *İçyer v. Turkey (dec.)* (2006) Adoption of a Compensation Law to redress the problem of internally displaced persons who had been denied access to their possessions in their villages (as a result of terrorist acts or measures taken by the authorities to combat terrorism): inadmissible.
[126] *Scordino v. Italy (no. 3) (just satisfaction)* (2007).
[127] *Burmych and Others v. Ukraine [GC]* (2017).
[128] ‘Even when the first two pre-conditions are met, an award of damages will not be made unless the Court considers that it is “necessary” to afford just satisfaction to the injured party. This final requirement gives the Strasbourg Court wide discretion to determine when an award of damages should be made. … The phrasing of Article 41 accords great discretion to the Court and imposes few, if any, limits on the Court’s powers. The choice of terminology by the drafters (“satisfaction”) appears to even further contribute to the Court’s extensive powers.’ Fikfak, ‘Non-pecuniary damages before the European Court of Human Rights’, 339.

Subjects

States or High Contracting Parties

139. Only States Parties to the Convention could be held accountable for a breach and, therefore, ordered by the Court to afford just satisfaction. Individuals or non-state actors, even if their actions are attributable to that State, could not be regarded as directly responsible under the Convention. Thus, the Court cannot compel them to make reparations and pay just satisfaction:

> *…the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention[129]. That is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities, which are not recognised by the international community.[130]*

Victims or applicants

140. As mentioned, the Convention system has been drafted and developed to provide relief for individuals rather than States. Individuals are the only beneficiaries of the rights guaranteed by the Convention, therefore, only they could claim just satisfaction. Even in inter-State disputes, just satisfaction has been awarded to benefit the individual victims of a violation rather than injured States.[131] Therefore, only the persons with the right to an individual application under Article 34 of the Convention and those on behalf of whom the injured State has initiated an inter-State case under Article 33 of the Convention could claim just satisfaction.

141. Victims who can claim just satisfaction should not be confused with their representatives or relatives substituting them in the Court's proceedings. The latter category could claim just satisfaction, but only on behalf of a person having the necessary victim status under the Convention[132].

Principles

142. It could not be stated that the Court follows specific principles while assessing the issue of just satisfaction. On the contrary, as it was asserted on many occasions in the scholar literature, the Court's case-law in these matters is "cloaked in mystery," and the national judges, referring to the awards in human rights cases and this case-law, usually assert that "they have no principles to apply".[133] Even with some attempts to unveil some principles in this area[134], they have been dismissed for narrowness and limited focus.[135]

143. Again, this Study has no purpose to analyse or summarise academic disputes about how the Court awards just satisfaction. It must offer practical advice to the national judges, explaining how the Court interprets and applies Article 41 in the context of the rules of general international law and specific cases related to or originating from an armed conflict. In this

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[129] ECtHR, *Cyprus v. Turkey [GC]* (2001) para. 81.
[130] *Ilaşcu and Others v. Moldova and Russia* (2004) para. 318.
[131] *Cyprus v. Turkey (just satisfaction)*, para. 46; *Georgia v. Russia (just satisfaction)*; *Georgia v. Russia (ii) (just satisfaction)*.
[132] See more on the victims and 'victim status' in Chapter A. Sub-Chapter 3 ECtHR, *Practical guide on Admissibility Criteria*.
[133] Fikfak, 'Non-pecuniary damages before the European Court of Human Rights', 336–37.
[134] Altwicker-Hamori, Altwicker, and Peters, 'Measuring Violations of Human Rights'.
[135] Fikfak, 'Non-pecuniary damages before the European Court of Human Rights', 337.

sense, it could be argued that the principles described below offer only guidance, not obedience, to judges in assessing claims for reparation in human rights-related cases.

144. However, these principles should be applied carefully and only on a case-by-case basis. Because the Court has not yet elaborated guidelines or codified its case-law on just satisfaction, the below principles result from an academic analysis. Some principles are stated in the Convention or the Court's case law; others were deducted from the Court's interpretation of Article 41 and Practice Directions.

145. Practice Directions could be considered as offering some guidelines for what to consider principles on awarding just satisfaction. In their relevant part, they read as follows (marked in bold):

> *Additionally, the wording of Article 41 allows the Court* ***discretion*** *in deciding on the matter of just satisfaction. It makes it clear that the Court shall award just satisfaction only "if the internal law of the High Contracting Party concerned allows only partial reparation to be made", and even then, only* ***"if necessary"*** *(s'il y a lieu in the French text). Moreover, the Court shall only award such satisfaction as it considers to be "****just****" (****équitable*** *in the French text), namely, as appears to it to be* ***appropriate in the circumstances****. …*
>
> *A* ***direct causal link*** *must be established between the damage and the violation found. …*
>
> *Hence,* ***the causal link*** *between the alleged violation and the moral harm is often reasonable to assume, the applicants being not required to produce any additional evidence of their suffering.*[136]

146. In any case, all these principles, except the principle of "necessity," have been deducted by scholars following the analysis of the Court's case-law. Probably for this reason, they could not be codified by the Court because they would limit its judicial powers and discretion, which is one of the main principles in the matter of just satisfaction. Moreover, given that implementing these principles depends too much on the individual and specific circumstances of a case, their codification and generalisation are objectively impossible.

147. Therefore, these principles are described as briefly as possible with reference to the Court case-law.

Necessity

148. Article 41 provides that just satisfaction should be afforded if necessary. This principle could be explained from two perspectives.

149. First, the Court would award just satisfaction only in cases where the victim really needs reparation. Secondly, just satisfaction, in its most obvious form of monetary compensation, would be necessary only in cases where other forms of reparations are not available. In both senses, the necessity principle means an assessment on a case-by-case basis and with exclusive reference to the individual victim's damage suffered.

150. In the first sense, the necessity principle in just satisfaction should not be confused or equated with the necessity requirement to limit substantive rights under the Convention (for example, the necessity requirement to interfere with some qualified rights such as privacy (Article 8), freedoms of expression (Article 10), or religion (Article 9)). The latter necessity justifies a limitation of a right on the basis of the public interest prevailing over the individual interest of the rightsholder. In the issues concerning just satisfaction, an individual interest matters only, and therefore, it could not be compared with the necessity originating from

[136] ECtHR, 'Rules of the Court. The Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 03 June 2022)', paras 3, 9, 10.

general public interests. In other words, the first meaning of necessity is subjective, with exclusive reference to the needs of the individual who suffered an injury as a result of the violation found by the Court.

151. For example, the Court refused to award costs and expenses in accordance with the domestic rules (‘costs follow the event") because these were not necessary in its own proceedings. [137] In another case, the Court considered it unnecessary to award just satisfaction on the basis that the victims were ‘suspects who had been intending to plant a bomb’[138].

152. The second meaning of the principle of necessity is the objective need to make an individual reparation when other avenues are exhausted or can no longer be applicable. In other words, the necessity to award just satisfaction appears as an option only when neither full reparation nor restitution is possible. In this sense, this principle has been consistently worded by the Court in almost all judgments on just satisfaction:

> *If the nature of the breach allows restitutio in integrum, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.[139]*

153. A narrower meaning of the necessity principle could be observed in the Court’s case-law on awarding costs and expenses. When assessing the amounts for this head of claims, the Court has always referred to the necessity and reasonability of the expenses and costs incurred by applicants:

> *According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum.[140]*

Discretion

154. This is the most disputed principle. As mentioned, Article 41 of the Convention has been perceived and applied by the Court as affording almost unlimited judicial discretion to decide on the issue of just satisfaction. However, this power should not be viewed as absolute or arbitrary:

> *The Court enjoys a certain discretion in the exercise of that power, as the adjective “just” and the phrase “if necessary” attest[141].*

> *Article 41 of the Convention confers on the Court the competence to afford just satisfaction (“shall ... afford” in the English text; “accorde” in the French text) and allows the Court discretion in deciding on this matter (“if necessary” in the English text; “s’il y a lieu” in the French text).[142]*

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[137] *The Sunday Times v. the United Kingdom (no. 1) (just satisfaction)* (1980) para. 15.
[138] ECtHR, *McCann and Others v. the United Kingdom [GC]* (1995) para. 219.
[139] *Papamichalopoulos and Others v. Greece (just satisfaction)*, para. 34; *Kurić and Others v. Slovenia (just satisfaction)* (2014) para. 80.
[140] *Iatridis v. Greece (just satisfaction)* (2000) para. 54; *The Sunday Times v. the United Kingdom (no. 1) (just satisfaction)*, para. 23.
[141] *Comingersoll S.a. v. Portugal* (2000) para. 29.
[142] *Guzzardi v. Italy* (1980) para. 114.

The exercise of such discretion encompasses such decisions as to refuse monetary compensation or to reduce the amount that it awards. Naturally, it includes a decision to award compensation.[143]

155. First and foremost, the discretion awarding just satisfaction should not be confused with the discretion of the States to choose the methods and means to remedy and repair the violation:

The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1).[144]

156. The Court retains discretion to establish whether just satisfaction is necessary in the particular circumstances of the given case and what form it takes. Obviously, the Court's discretion covers its powers to establish the amounts of compensation, mainly for non-pecuniary damages.

157. Second, when the Court speaks about its large discretion, it usually refers to its powers to establish the amount of compensation for non-pecuniary damages. The determination of pecuniary damages, costs, and expenses has always been subject to more strict rules and, thus, less discretion:

On the other hand, neither the above principle nor Rules 60 and 75 have invariably prevented the Court from applying a degree of flexibility, ***essentially in respect of non-pecuniary damage****, and, for instance, agreeing to examine claims for which applicants did not quantify the amount, "leaving it to the Court's discretion."*[145]

158. Lastly, the discretion of the Court to establish just satisfaction also refers to setting up procedural rules on submissions of just satisfaction claims and their evaluation. This discretion has been extensively applied in some cases where the Court has made a just satisfaction award in the absence of a properly made claim:

At the same time, Article 41 of the Convention being the primary legal provision on just satisfaction, the norm of a higher hierarchical value and the norm which is applicable in the context of the system for the protection of human rights agreed by the Contracting Parties, the Court holds that while it would normally not consider of its own motion the question of just satisfaction, neither the Convention nor the Protocols thereto preclude the Court from exercising its discretion under Article 41 of the Convention. The Court therefore remains empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case, where a "claim" has not been properly made in compliance with the Rules of Court.[146]

Equity

159. It was argued that this principle derives from the heading of Article 41, which in French version reads "*satisfaction équitable*" and in English "just satisfaction." It was therefore implicit that this provision meant compensation in the sense of "fair", therefore enforcing the understanding that 'the system of reparation under the Convention has been designed to secure a just satisfaction in the sense of a fair rather than a full redress'.[147]

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[143] *Nagmetov v. Russia*, para. 74.
[144] *Brumarescu v. Romania (just satisfaction)* (2001) para. 20.
[145] *Guzzardi v. Italy*, paras 112–114.
[146] *Nagmetov v. Russia*, para. 76.
[147] Ichim, *Just Satisfaction under the European Convention on Human Rights*, chap. 2.4.

160. In this sense, like in situations when it uses its discretion, the Court mainly refers to equitable considerations in the context of evaluating and awarding compensation for non-pecuniary damages:

> *… as regards just satisfaction on account of non-pecuniary damage, the Court's guiding principle is equity, which involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.*[148]

161. However, the Court extensively used this principle in evaluating the damages for pecuniary damages, which in some particular cases could be especially difficult to determine because of the nature of the violation, lapse of time, value, and reasonable considerations:

> *… unless the Government decide on their own initiative to return the properties to the applicants, the Court deems it appropriate to fix a lump sum based, as far as possible, on an amount "reasonably related" to the value of the property taken, i.e. an amount which the Court would have found acceptable under Article 1 of Protocol No. 1, had the Greek State compensated the applicants. In determining this amount the Court will take into account the claims of each applicant, the question of the movable property, the valuations submitted by the parties and the possible options for calculating the pecuniary damage, as well as the lapse of time between the dispossession and the present judgment. The Court considers that in the unique circumstances of the present case resort to equitable considerations is particularly called for.*[149]

> *The Court must now determine the amount to be awarded to the applicants on the basis of the pecuniary damage sustained (damnum emergens). … In the present case, the Court reiterates that it was the extreme disproportion between the official cadastral value of the land and the compensation awarded to the applicants, and not the inherent unlawfulness of the taking of the land, that was at the origin of the violation found. In those circumstances, the Court finds that the compensation to be determined in the present case will not have to reflect the idea of a total elimination of the consequences of the impugned interference, nor the full value of the property in issue. … having regard to the particular circumstances of the present case, the Court must have recourse to equitable considerations in calculating the relevant sums...*[150]

162. This principle is also the safest way for the Court to make a global assessment and award lump sums, without accurate and detailed numbers, especially where an applicant claimed one or more heads of damage that could not be calculated precisely:

> *If one or more heads of damage cannot be calculated precisely or if the distinction between pecuniary and non-pecuniary damage proves difficult, the Court may decide to make a global assessment… Having regard to the lapse of time, the large number of imponderables involved and the impossibility of quantifying the applicant company's pecuniary and non-pecuniary losses in exact terms, the Court considers that it must rule in equity and make a global assessment,…* [151]

163. This principle is sometimes referred to in awards for costs and expenses, where the applicants and their lawyers may have exceeded the reasonability of their claims by seeking excessive sums for representation fees:

> *Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant [the sum] under this head.*[152]

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148 *Varnava and Others v. Turkey*, para. 224.
149 *The Former King of Greece and Others v. Greece (just satisfaction)* (2002) para. 79.
150 *Vistiņš and Perepjolkins v. Latvia (just satisfaction)* (2014) para. 36.
151 *Agrokompleks v. Ukraine (just satisfaction)* (2013) paras 80, 93.
152 *Iatridis v. Greece (just satisfaction)*, paras 57–60.

Causality

164. Though some scholars do not consider this a separate principle in describing the Court's case-law on just satisfaction, it is nevertheless an important requirement in ascertaining whether reparation is due in the particular case. Causality between the violation of the Convention and the prejudice alleged by the applicant is the principle originated in general international law that ILC provisioned in ASRIWA. The casual link is a prerequisite condition to establishing whether the reparation is necessary and, if yes, to what extent it is required.[153] In the Court's case-law, the issue of causality has been explained mainly from two perspectives.

165. Firstly, the Court has observed the causality between a violation and the alleged pecuniary damage, referring to it as the rather procedural duty of applicants to prove that the causal link existed:

> *Proof of pecuniary damage, the amount claimed in respect thereof and the causal link between the damage and the violations found, must in principle be adduced by the applicant.*[154]

166. Secondly, the Court retains its discretion to evaluate the existence of a causal link in cases where the applicants claim non-pecuniary damages, which do not require proof of causality:

> *Once a violation of a Convention provision has been found, the Court must ascertain if a direct causal link may be established between that violation and the damage alleged by the applicant*[155]

167. In the end, the existence of a causal link between a violation and the sustained damage is required to evaluate just satisfaction under both pecuniary and non-pecuniary damages. The only difference is that the Court shifts the burden of proof on the applicants to substantiate the claims for pecuniary damages. In contrast, the assessment of non-pecuniary damages does not require specific evidence or proof:

> *La Cour rappelle que la condition sine qua non à l'octroi d'une réparation d'un dommage matériel au titre de l'article 41 de la Convention est l'existence d'un lien de causalité entre le préjudice allégué et la violation constatée … Elle estime qu'il en va de même du dommage moral.*
>
> *(non-official translation) The Court recalls that the sine qua non for the award of compensation for material damage under Article 41 of the Convention is the existence of a causal link between the alleged damage and the violation found ... It considers that the same applies to non-pecuniary damage.*[156]

168. It is challenging to offer a clear-cut answer to the question of how to evaluate and establish the existence of a causal connection between the violation and the claimed damage. The answer depends on the particular circumstances of the case and the nature of the violation. The Court is able to observe if there is a causal link between a violation and moral damages. Moral suffering comes as an inherent consequence of any violation; the only problem is how to quantify it. Discussions and problems arise mainly in the context of the evaluation of causality between the violation and pecuniary damage.[157]

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[153] ILC, 'ARSIWA Commentaries' Article 31 Commentary (9).
[154] *Societe Anonyme Thaleia Karydi Axte c. Grece (just satisfaction)* (2011) para. 18.
[155] *O'keeffe v. Ireland* (2014) para. 201.
[156] *Kadiķis c. Lettonie (n° 2)* (2006) para. 67.
[157] Ichim, *Just Satisfaction under the European Convention on Human Rights*, chap. 2.2.

169. For example, if the violation is procedural (for example, violation of the reasonable length requirement, examination of an impartial tribunal, or access to a court), then the Court is likely to dismiss the applicants' claims for loss of profits of opportunities based on the idea that it could not speculate on the outcomes of the judicial proceedings, which were flawed by those procedural violations:

> *The Court cannot speculate as to the outcome of the proceedings for contempt of court had they taken place before an impartial tribunal. It will therefore not make an award in respect of the pecuniary damage claimed.*[158]

> *The Court refers to its findings of a violation of Article 6 of the Convention in respect of the failure to summon the applicant company to the hearing of the Supreme Court of Justice. As it has already stated above, the Court will not speculate as to what the outcome of the hearing before the Supreme Court of Justice might have been if the applicant company had been properly summoned.*[159]

170. If the violation is substantial (for example, limiting the use of property but not actual deprivation or loss of profits as a result of quashing a final domestic judgment in breach of the res judicata principle), the Court would require evidence from the applicant to prove the claim:

> *As regards, lastly, the sum claimed under (c) [a compensation of sum resulting from the fact that the applicant company had not been able to realise the property], the Court points out that there has been no expropriation or situation tantamount to a deprivation of property, but a reduced ability to dispose of the possessions in question (…). As there is no evidence that the applicant company had attempted, but had not been able, to sell the property, this claim is dismissed.*[160]

> *The Court first notes that the applicant has failed to specify how the loss of his job was connected to the quashing of the judgment, and it rejects this part of the claim. He also claimed pecuniary damage on the basis of the value of the car which was confiscated. However, it was the applicant's claim in the proceedings, and indeed the basis for the court's judgment of 23 October 2000, that he was not the owner of the car. The issue under Article 41 of the Convention is how much pecuniary compensation, if any, should be granted in respect of the loss of the judgment of 23 October 2000. The Court notes that the applicant has not made any submissions in this respect, considers that it cannot speculate on the matter and also rejects this part of applicant's pecuniary damage claims as unsubstantiated.*[161]

171. In this latter sense, it is also speculative to consider otherwise. Should the applicants have produced evidence to support their claims, then the Court may have granted them compensation despite the lack of a clear causal link:

> *The Court considers that in the present case the applicant company has the right to recover the money to which it is entitled by virtue of the judgment of 27 October 1999, less all the amounts to which reference is made in paragraphs 20, 22 and 26 above (MDL 5,291,801).* ***It is also entitled compensation for the inability to make use of it until now.*** *Taking into account the provisions of Article 619 of the Civil Code governing the calculation of default interest for non-consumer related debts (…) and the circumstances of the case under consideration,* ***the Court, making its own calculations,*** *awards the applicant company a total amount of EUR 2,500,000.*[162]

172. In conclusion, the existence of a causal link is indeed a requirement for the Court to award just satisfaction. Still, it remains for the Court to examine whether it is sufficient (or

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158 *Deli v. the Republic of Moldova* (2019) para. 60.
159 *Bucuria v. Moldova* (2010) para. 34.
160 *Immobiliare Saffi v. Italy* (1999) para. 79.
161 *Khristov v. Ukraine* (2009) para. 54.
162 *Oferta Plus S.r.l. v. Moldova (just satisfaction)* (2008) para. 71.

"necessary"). It does not matter how strong or direct the causal link might be. It depends on the circumstances of the case and the applicants' procedural ability to produce evidence, as well as the Court's discretion, to evaluate that link. Further factors play a role in the evaluation of causality, such as the "remote" or "direct" character of the causality. Or, in the words of ILC, 'causality in fact is a necessary but not a sufficient condition for reparation. … The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.'[163]

173. Thus, the causality in just satisfaction may take various forms, such as direct or implicit, remote or foreseeable. What matters is that it should be consequential to the injuries and be quantifiable.

Proportionality

174. The proportionality principle is difficult to define, making it all the more difficult to explain briefly. It is now part and parcel of human rights law[164], including assessing just satisfaction by the Court. The Court defines it as the principle 'inherent in the whole of the Convention, that is, search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[165] Scholars view the proportionality principle as rather procedural judicial legal reasoning 'to decide hard cases, which are cases where two or more legitimate rights collide'[166].

175. The principle could also be called the principle of appropriate reparation, as referred to by the Court. It employs a similar judicial exercise to evaluate various circumstances, juxtaposing them against some objective criteria. It is clear that just satisfaction is designed to balance the gravity of the violation and individual suffering to eliminate the consequences or alleviate the suffering. However, some elements of public interest should be taken into account to address the key public concern that "a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach."[167]

176. The Court, in awarding just satisfaction, mainly for non-pecuniary damages, relies on such public-interest considerations, namely other non-individual factors, such as its own practice in similar cases and the economic situation in the respondent State:

> *Consequently, in examining the matter before deciding what amount to award, if any, regard will be had to the particular features and context of each case, an important role being played by the nature and the effects of the violation(s) found, the Court's own practice in respect of similar cases, as well as different economic situations in the Respondent States.*[168]

[163] ILC, 'ARSIWA Commentaries' Article 31 Commentary (10).
[164] 'The principle of proportionality and the concept of margin of appreciation in human rights law' (2003) *Basic Law Buletin*.
[165] *Soering v. the United Kingdom* (1989) para. 89.
[166] T. Sobek and J. Montag, 'Proportionality Test' in A. Marciano, G. B. Ramello (eds.), Encyclopedia of Law and Economics, (New York, NY: Springer, 2018), pp. 1–5.
[167] ILC, 'ARSIWA Commentaries' Commentary (14) Article 31.
[168] ECtHR, 'Rules of the Court. The Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 03 June 2022)', para. 3.

The Court's awards in respect of non-pecuniary damage serve to give recognition to the fact that non-material damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage.[169]

177. It is observed that the principle is mostly relevant to evaluating the compensations for non-pecuniary damages, while for material damages, the principles of equity and necessity take the leading role. It should be noted that the Court follows the rules of State responsibility in general international law, stating that the notion of "proportionality" applies differently to the different forms of reparation.[170]

178. For example, in general international law, the restitution form excludes proportionality considerations because it means restoring the situation to its status before the breach, involving no balancing exercise. The principle here is "full reparation" but not "in lieu" as in the Convention system.[171] The compensation form is limited to the damage actually suffered, and the satisfaction must "not be out of proportion to the injury."[172]

179. The specificity and exceptional status of the Convention system of just satisfaction give the proportionality principle a different meaning. The Court must balance the interests of individuals with the respondent State's interests (States represent public and general interests). Given that any violation of human rights involves individual interests, the principle of proportionality remains relevant to balance out individual suffering with the public interest, especially if the character of the violated right involves an assessment of proportionality (for example, the proportionality of intrusion into privacy (Article 8), freedoms (Articles 9 and 10), or even deprivation of property for the just cause).

180. It is disputable to involve the proportionality test in the assessment of non-pecuniary damages for violations of rights of absolute character (e.g. prohibition of torture, forced labour). These rights do not imply an assessment of the proportionality of an interference; therefore, it is highly debatable to justify the proportionality of just satisfaction in these cases. However, as mentioned above, with references to the rules of state responsibility in international law, the proportionality test works differently in matters of reparation. The Court must make a balancing exercise in assessing just satisfaction, including in cases of violation of absolute rights, to prevent excessive compensation or underpayments. That is why the proportionality test in assessing just satisfaction must be applied irrespective of the character of the right but taking into consideration the gravity of the violation.

The description of the principles the Court applies in assessing just satisfaction has inevitably brought to attention their various forms. In one or another form of just satisfaction, one or two principles prevail. Other principles, such as "necessity" or "equity," have more or less universal application regardless of the form. The next chapter explains what these forms of just satisfaction are and how they are relevant for the purposes of the present study.

Forms

181. Reparation in international law takes three forms: restitution, compensation, and satisfaction. Just satisfaction under the Convention is different and retains special forms, which could be, and they usually are, associated with compensation (the second form of reparation). Indeed, just satisfaction is mainly viewed and expressed in one of the three basic

[169] *Varnava and Others v. Turkey*, para. 224.
[170] ILC, 'ARSIWA Commentaries' Commentary (14) Article 31.
[171] Commentary to Article 32 para (2) 'ARSIWA Commentaries'.
[172] ILC, 'ARSIWA Commentaries' Commentary (5) Article 34.

forms of monetary compensation for pecuniary and non-pecuniary damages (also called material and moral damages, respectively) and costs and expenses. However, the Court can also decide to grant no compensation and consider that an alternative solution to resolve the applicants' claims is in order. Such a solution might involve a suggestion to reopen domestic proceedings or an order to release the unlawfully detained applicant. It could also imply that no monetary compensation is due to the applicant, even if he or she suffered certain moral damage as a result of the violation.

182. Does such an alternative solution constitute another form of just satisfaction, or are these other forms of reparations that could be classified as one or another under general international law? It is worth explaining these specific forms to understand the meaning of "just satisfaction" in general and, in particular, to be able to apply the reasoning of the Court at the national level. Moreover, the forms of just satisfaction bring more clarity to the principles and reasoning of the Court's case law.

183. The present Study distinguished two basic forms of just satisfaction - declaratory judgments and monetary compensations - that can be explained in terms of the general meaning and scope of Article 41. Other reparation measures that the Court may order, such as release or reopening, could not be technically considered a form of just satisfaction for the reasons explained below.

Declaratory judgments

184. The Court can issue the so-called declaratory judgement finding a violation of the Convention, which 'constitutes in itself sufficient just satisfaction'.[173] However, it is unclear whether the Court applies some criteria in opting for this solution. This is a matter for the Court's discretion:

> *The Court recalls that in certain cases which concerned violations of Article 5 §§ 3 and 4 it has granted claims for relatively small amounts in respect of non-pecuniary damage (…). However, in more recent cases concerning violations of either or both paragraphs 3 and 4 of Article 5, the Court has declined to accept such claims (…). In some of these judgments the Court noted that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the guarantees of Article 5 § 3 and concluded, according to the circumstances, that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage suffered.*
>
> *In the present case the Court sees no reason to depart from the above case-law. The Court cannot speculate as to whether or not the applicant would have been detained if there had been no violation of the Convention. As to the alleged frustration suffered by her on account of the absence of adequate procedural guarantees during her detention, the Court finds that in the particular circumstances of the case the finding of a violation is sufficient.*[174]

185. Its Practice Directions give some clues, though in the most general manner:

> *… it is recalled that under Article 41 the Court remains free to decide that no award should be made, for example,*
>
> - *where there is a possibility of reopening of the proceedings or*
> - *of obtaining other compensation at domestic level;*
> - *where the violation found was of a minor or of a conditional nature;*
> - *where general measures would constitute the most appropriate redress; or otherwise,*

[173] *Maksimenko v. Ukraine* (2011); *Amihalachioaie v. Moldova* (2004).
[174] *Nikolova v. Bulgaria* (1999) para. 76.

- *because of the general or specific context of the situation complained of.*

It should be borne in mind that the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself.[175]

186. It is, therefore, almost impossible to foresee the cases and deduce the rules by which the Court is guided to offer such a non-monetary form of relief. The cases where it has already decided on just satisfaction on a purely declaratory basis could offer a lead as to whether the Court might or might not award compensation. The only valid criterion remains the principle of necessity, which states that the Court awards monetary compensation only if it is necessary. And, even this principle is subject to the Court's exclusive discretion.

187. It must be borne in mind that the Court's refusal to grant monetary compensation for moral damages should not be equated with a refusal to make just satisfaction. The Court calls it a measure sufficient to constitute just satisfaction and only for moral damages sustained by the applicant. A declaratory judgment may contain orders to pay other forms of just satisfaction for pecuniary damages or costs and expenses. It is, therefore, a form of just satisfaction decided in the framework of Article 41 of the Convention, which considers finding a violation as a form of just satisfaction for moral damages.

188. It is the line between the Court's decision to grant moral damages or to refuse such an award that constitutes the subject of the dispute and uncertainty.[176] For this reason, refusal to grant monetary compensation for non-pecuniary damages could be classified as a form of moral just satisfaction, similar to symbolic compensation for moral damages. However, even if somehow similar to the latter, a declaratory judgment does not offer even a tiny monetary compensation. It, therefore, cannot be classified as compensation at all but rather as a form of non-financial reparation within the meaning of the general term "satisfaction" in general international law[177]. Only this form of just satisfaction comes as an alternative to monetary compensation for moral damages. In contrast, "satisfaction", in general international law of state responsibility, normally supplements the two other principal forms of reparation: restitution and compensation.[178]

189. In conclusion, this form of just satisfaction under the Convention represents the most lenient form of reparation that could be applied first when monetary compensation for moral damages is not required.

Monetary compensation

190. Monetary compensation is the most known and used form of just satisfaction under the Convention. For this reason, even the formal language of the Council of Europe usually refers to "just satisfaction" as an obligation of payment rather than an obligation of actions or measures.[179]

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[175] ECtHR, 'Rules of the Court. The Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 03 June 2022)', para. 4.
[176] Altwicker-Hamori, Altwicker, and Peters, 'Measuring Violations of Human Rights', chap. III.
[177] ILC, 'ARSIWA', 37.
[178] ILC, 'ARSIWA Commentaries' Commentary (1) Article 37 refers to the phrase that satisfaction comes "insofar as [the injury] cannot be made good by restitution or compensation".
[179] Department of Execution refers to just satisfaction only in the context of obligation to pay the awarded sums of money and the default interest": Execution measures [imply] the payment of any sum awarded by the Court as just satisfaction or agreed between the parties in a friendly settlement. Default interest is due in case of late payment. When mere monetary compensation cannot adequately erase the consequences of a violation, the Committee of Ministers makes sure that the authorities take any other individual measures which may be

191. Monetary compensation is neither a right nor an automatic consequence of the violation found by the Court. As mentioned above, monetary compensation can be awarded only if necessary, and no other form of reparation, such as restitution, whether in part or in full, is possible. The leading principle in deciding on monetary compensation is, therefore, restitution:

> *'If the nature of the breach allows of restitutio in integrum, it is for the respondent State to effect it. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.*[180]

192. However, this principle can only be applicable with respect to pecuniary damages because moral damages can never be subjected to restitution. If the restoration is no longer possible or is available only in part, the Court follows the same logic as the restitutio in integrum in order to ascertain the amounts of just satisfaction for pecuniary damages:

> *The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place.*[181]

193. At last, monetary compensation as a form of just satisfaction should not be confused with the Court's decision on default interests. The latter, also known as "penalty" or "default rate", is applied to the just satisfaction sums when the respondent State fails to meet its obligations to pay the monetary compensation in time. The scope of default interest is to secure execution, while the monetary compensations awarded by the Court as just satisfaction mean to repair the injuries caused to the applicant.

194. There are only three types of monetary compensation: pecuniary, non-pecuniary, and costs and expenses. Normally, the Court can distinguish between these types, but in some cases, this seems complicated, especially concerning pecuniary and non-pecuniary damages. In such cases, the Court makes a global assessment on an equitable basis:

> *If one or more heads of damage cannot be calculated precisely or if the distinction between pecuniary and non-pecuniary damage proves difficult, the Court may decide to make a global assessment.*[182]

Pecuniary damages

195. The Court's case law could be split into two groups: those that deal with claims for damages in property cases (violations of Article 1 of Protocol No. 1 to the Convention) and those that deal with damage caused by violations of rights that are not economic but can lead to harm that can be measured in money.

property cases

196. As mentioned, the Court facing claims for pecuniary damages first ascertains whether the restoration is possible or has taken place in part or in full. The obligation to restore the

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required to remedy the violation. The judgments themselves contain on occasion additional recommendations." https://www.coe.int/en/web/execution/the-supervision-process#{%2214997657%22:[0]}
Decisions and resolution of the Committee of Ministers adopted in the context of supervisor of execution refer to the just satisfaction as a obligation to pay the awarded sums.

[180] *Brumarescu v. Romania (just satisfaction)*, para. 20.

[181] ECtHR, 'Rules of the Court. The Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 03 June 2022)', para. 8.

[182] *Comingersoll S.a. v. Portugal*, para. 29.

applicant to the original position extends to the loss actually sustained, and to the loss, or diminished gain, to be expected in the future.

197. However, in the issue of just satisfaction, the type of claims and the reasoning of the Court should not be confused with types of "possessions" in the cases involving property claims. There is a range of property cases involving the right to property in various types of possessions, for example, legal claims and judgment debts, company shares, financial instruments, business assets, professional clientele, business licences, future enforceable income, intellectual property, lease on property and housing rights, social security benefits, etc.

198. Not all cases, however, could involve similar claims or be able to substantiate claims for future loss or the loss that has actually been incurred. It is, therefore, important to separate the cases on the basis of the claims, not on the basis of the type of "possessions". Therefore, the Court's reasoning on the awards can also be separated into the categories corresponding to two types of claims: *damnum emergens* and *lucrum cessans*[183].

199. The examples of these two categories of claims for pecuniary damage are not exhaustive. They have been selected only for illustrative purposes.

actual loss (damnum emergens)

200. These claims refer to the damage that has been incurred in fact. The following claims fall into this category:

a. compensation of the loss of property or the value of the taken property[184].
b. compensation in the case of partial restitution of property[185];
c. compensation in the alternative to the respondent State's refusal for restitution[186]
d. etc.

201. The Court requires hard evidence to prove such claims and makes awards following assessment in adversarial proceedings, using the rule of evidence and judicial reasoning like any other national court in civil proceedings (or tort proceedings in common law systems). The burden of proof lies on the applicant to submit both claims and evidence and to substantiate the claims. If the claims are difficult to prove or the burden of proof cannot be fully satisfied, the Court can make a global evaluation on an equitable basis without detailing every claim.[187]

202. In some cases, including those that originated from or were related to armed conflicts, the Court did not put an excessive burden of proof on the applicants and reversed that burden, lowering the requirement of hard evidence. It drew interferences and presumptions from the facts about the damage. It did so by applying the so-called Pinheiro Principles[188] in cases involving the displacement of victims following long-standing armed conflict. These

[183] ECtHR, 'Rules of the Court. The Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 03 June 2022)', para. 8; Ichim, *Just Satisfaction under the European Convention on Human Rights*.
[184] *Guiso-Gallisay v. Italy (just satisfaction)* (2009).
[185] *Immobiliare Saffi v. Italy*.
[186] *Oferta Plus S.r.l. v. Moldova (just satisfaction)*; *Dacia S.r.l. v. Moldova (just satisfaction)* (2009).
[187] *Agrokompleks v. Ukraine (just satisfaction)*, paras 80, 93.
[188] Commission on Human Rights and Sub-Commission on the Promotion and Protection of Human Rights, 'The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (E/CN.4/Sub.2/2005/17, Annex)' (2005).

Principles were used to prove the existence of ownership and, to a consequential extent, the existence of the pecuniary damage[189].

future loss (lucrum cessans)

203. These claims rely on the expected gain or profit, and they should be distinguished from an actual loss because they have never been incurred. They are difficult to evaluate because they imply a certain degree of speculation.

204. Reasonability and a certain degree of foreseeability are the only relevant criteria to evaluate these claims[190]. The claims for the future loss should be capable of being reasonably anticipated in such a manner as to be compensable and not be "simple plans or predictions":

> *On the basis of the above figures and of the submissions made by the applicant company, the Court notes that the bulk of its claimed pecuniary losses do not derive from an activity that came into existence prior to the withdrawal of the licences, but from plans that never went further than anticipation. In particular, it does not appear that the applicant company undertook any steps in order to implement the 2003 business plan. The Court agrees with the Government's submission that the applicant company would have needed new licences for the implementation of its business plan and that there was a great degree of conjecture involved in any attempt to predict how long it would have taken to obtain such licences and whether it would have been able to obtain them at all. In such circumstances, and leaving aside the fact that the applicant company's claims refer also to a business entity which is not an applicant in the present case, the Court is not convinced that the applicant company's anticipated income could be considered a legally protected interest of sufficient certainty to be compensable.*[191]

205. Examples (non-exhaustive) of these claims include:

a. inability to use property for a certain period because of the quashing of the judgment in breach of legal certainty (*res judiciata*)[192]
b. loss of profits or earnings
c. loss of interest[193]
d. loss of opportunity that the Court may award only on an exceptional basis[194], especially if there is no avenue to reopen proceedings[195].

206. The Court imposes even the highest standards of proof for these claims, normally requiring expert reports or assessments of rentability and profitability. In some instances, the Court relies on national statutory interests[196], banking rates or even civil law provisions[197] to resolve these claims.

<u>non-property cases</u>

207. The pecuniary damages in these cases could also be classified according to the character of the claims as referring to actual or future loss. However, the standards of proof in these cases are less strict than in cases involving disputes over the right to possessions.

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[189] *Sargsyan v. Azerbaijan (just satisfaction)* (2017); *Chiragov and Others v. Armenia (just satisfaction)* (2017).
[190] *Dacia S.r.l. v. Moldova (just satisfaction)*, para. 47.
[191] *Megadat.com Srl v. Moldova (just satisfaction)* (2011) para. 12.
[192] *Brumarescu v. Romania (just satisfaction)*.
[193] *Schuler-Zgraggen v. Switzerland (just satisfaction)* (1995).
[194] *De Geouffre De La Pradelle v. France* (1992).
[195] *Sporrong and Lönnroth v. Sweden (just satisfaction)* (1984); *Sovtransavto Holding c. Ukraine (just satisfaction)*, para. 72; *Guiso-Gallisay v. Italy (just satisfaction)*.
[196] *Guiso-Gallisay v. Italy (just satisfaction)*.
[197] *Oferta Plus S.r.l. v. Moldova (just satisfaction)*.

Given the seriousness of the violations, the Court may even lower the burden of proof on the applicant and award just satisfaction based on reasonable interferences.[198]

actual loss (damnum emergens)

208. Under this heading, the Court compensated monetary losses that otherwise would not have been sustained without a violation. The prerequisite for this form of compensation is a causal connection with the violation. For example, the Court normally does not discern a causal connection between the lost salary and detention.[199] Evaluation of such a connection is subject to the exclusive Court's discretion.

209. These claims include (non-exhaustive):

a. medical expenses for the treatment following torture[200] or as a result of loss of health due to unacceptable prison conditions[201]
b. costs of funerals[202]
c. fines and penalties paid by the applicants following their sanctioning[203]
d. extra taxes paid for the registration of religious organisation[204]
e. costs and administrative fees of custody proceedings[205]
f. estate agency fees in the cases interfering with the right to home[206]
g. unquantifiable material damage in environmental cases[207]
h. etc.

future loss (lucrum cessans)

210. The principle for evaluating this type of loss is similar to that in property cases. A certain degree of foreseeability is required to sustain such a claim, though it may depend on the type of violation and methods of calculation. The applicants may claim interest, loss of salaries, or disability pensions. The range of these claims is widespread and impossible to categorise. However, the reasoning of the Court in dealing with such claims can be illustrated by the awards for the loss of a breadwinner as a result of the violation attributed to the State.

211. For example, in one case, the Court dismissed the applicants' methods of calculation but engaged in its own evaluation. The applicants calculated the future losses on the basis of the assumption that the victim, disabled as a result of torture by police, might have received a medium salary if he had continued working until pension age. However, the Court dismissed such assumptions as speculative:

> *The Court considers that the method of calculation applied in the present case is not in line with the Court's approach to the calculation of future losses. Furthermore, the calculation of his lost income does not include the amount which he collects as a disability pension. Therefore, the Court cannot accept the final figure claimed under this head by the applicant. Nonetheless, bearing in mind the uncertainties of*

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198 …
199 *Nevmerzhitsky v. Ukraine* (2005) para. 112.
200 *Aksoy v. Turkey* (1996).
201 *Nevmerzhitsky v. Ukraine*, p. 142.
202 *Abdurrahman Orak c. Turquie* (2002).
203 *Jersild c. Danemark* (1994); *Öztürk v. Turkey* (1999); *Hyde Park and Others v. Moldova* (2010).
204 *Association Les Témoins De Jéhovah c. France (just satisfaction)* (2012).
205 *Keegan v. Ireland* (1994).
206 *Gillow v. the United Kingdom (just satisfaction)* (1987).
207 *López Ostra v. Spain* (1994).

the applicant's situation, and the fact that he will undeniably suffer significant material losses as a result of his complete disability and the need for constant medical treatment, the Court considers it appropriate, in the present case, to make an award in respect of pecuniary damage based on its own assessment of the situation.[208]

212. In another case, the Court applied national rules in work-injury related cases to calculate the loss of earnings by the family, which lost a breadwinner who had been beaten by police and died:

The Court is aware that any calculation of future income is prone to some degree of speculation since it is subject to unpredictable circumstances and that it is virtually impossible to predict with precision the amount of lost income. In the present case, however, it does not find the method of calculation used by the first applicant to be excessively speculative or unreasonable. It notes, in the first place, that the calculation is based on a method employed by the domestic courts to calculate lost income in work-related circumstances, even in cases in which an employer is not responsible for the death of his or her employee. Moreover, the applicant's calculation does not take into consideration any possible career advancement, any capitalisation of earnings or any earnings which Leonid Ghimp could have had after retirement. In these circumstances and bearing in mind the fact that the first applicant has to raise two children alone, the Court, judging on an equitable basis, decides to award to the first applicant EUR 50,000.[209]

213. It is really unpredictable how the court may calculate future losses in cases involving a violation of non-economic character. Again, the only relevant rule is individualisation and the use of the principles of necessity, equity, causality, and proportionality.

Non-pecuniary damages

214. If the assessment of the awards for pecuniary damages is subjected to some, more or less clear rules, the awards of the Court on account of moral damages are, on the contrary, totally unpredictable. Almost all scholars, quoted in the present Study, have studied this type of awards. Even in the presence of various studies and extensive explanations, it remains almost impossible to discern what rules the Court applies while evaluating and awarding just satisfaction for non-pecuniary damages. The Court is also brief in this respect, making quotations from its case law:

It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. The claim for non-pecuniary damage suffered needs therefore not be quantified or substantiated, the applicant can leave the amount to the Court's discretion.[210]

215. It is known that 'the Court adopted and regularly employs a 'series of detailed tables setting out a method of calculation of non-pecuniary damage in respect of each article of the Convention'.[211] The Court implicitly referred to those tables, saying it established 'scales on equitable principles for awards in respect of nonpecuniary damage under Article 41, in order

[208] *Mikheyev v. Russia* (2006) paras 161–162.
[209] *Ghimp and Others v. the Republic of Moldova* (2012) para. 65.
[210] ECtHR, 'Rules of the Court. The Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 03 June 2022)', para. 11; *Varnava and Others v. Turkey*, para. 224.
[211] Fikfak, 'Non-pecuniary damages before the European Court of Human Rights', 349; Ichim, *Just Satisfaction under the European Convention on Human Rights*, n. 490.

to arrive at equivalent results in similar cases'.[212] However, it neither confirms nor denies the existence of such tables, laying the basis for either criticism or approval of their use.[213]

216. However, even with such uncertainty and speculations over the Court's practice of using the "tables" or "scales," the practical considerations of the present Study impose drafting some recommendations on the matter. Such recommendations could be deduced not from the rules or guiding principles, which seem not to exist, but from the identifiable patterns of the Court's reasoning in its case law.

217. These patterns can shed light on the issue, but they cannot offer an all-inclusive calculation formula. Evaluation of moral damages follows the principles of necessity, causality, equity, and most importantly, proportionality and exclusive judicial discretion, which the Court itself has prioritised in its leading dictum:

> *The Court would observe that there is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction has distinguished situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity ... and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right ... In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned."*[214]

218. Some criteria could be deduced from this dictum; others can be discerned from the case-law and academic analysis. In any case, for the purposes of the present Study, the next subchapters address issues of **types** of compensation and **criteria** for calculation, given that the leading principle is proportionality and the Court's discretion. The consequence of these latter principles is that the Court does not require evidence and, in exceptional cases, makes claims for non-pecuniary damage ex oficio. It can rule on the non-pecuniary damages on its own motion, deciding on whether the moral damage should be compensated and, if yes, how much the moral damage is worth.

Types of moral compensations

219. Once the Court considers that a simple finding of a violation would not be able to compensate moral damages, it can award the following types of compensation: symbolic compensation, for potential suffering, or at the Court's discretion.

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[212] *Scordino v. Italy (no. 1)* (2006) para. 179.

[213] 'The presence of tables effectively removes the most frequent bias in damage determination – the so-called anchoring effect, when those victims who assess their harm and suffering as higher also receive higher awards.' Fikfak, 'Non-pecuniary damages before the European Court of Human Rights', 349.

[214] *Varnava and Others v. Turkey*, para. 224.

Symbolic compensation

220. This is the rarest form of moral compensation, almost one step aside from declaratory judgment. (see Declaratory judgments). The Court awarded this compensation only at the request of the applicants, who reasoned that "no amount of money would be capable of compensating the harm suffered by them" and claimed a symbolic sum.[215] The Court granted the requested amount, though the violations commonly had called for higher compensation. In the cases that followed, the Court took note of the friendly settlements that compensated other victims in a similar position by paying them higher amounts.[216]

221. The practice of awarding symbolic compensation in the amounts claimed by the applicants has not been abandoned but applied on an exceptional basis.[217] However, recently, faced with this type of claim, the Court shifted to declaratory judgment rather than granting the symbolic compensation requested by the applicant, who had claimed 1 Euro. The Court awarded no compensation for moral damages, considering that finding a violation would suffice; a judge dissented from this solution.[218]Many other cases demonstrate that the Court regularly dismisses the respondent States' submissions, asking to award a symbolic payment.

222. In the end, the essential condition for an award to be considered symbolic compensation is the Court's agreement. If the applicant requests whatever amount and calls it "symbolic" and the Court grants that request, though it could have awarded more, such an award can be considered "symbolic compensation". If the compensation exceeds the requested amount or turns into a declaratory judgment, the Court exercises its discretion and the award for just satisfaction cannot be considered symbolic.

Compensation for potential violation

223. This is seemingly an issue depicted in academic literature, noting that the Court sometimes may render awards for violations that have never occurred. With reference to the dissenting opinions of some judges[219], it was noted that the Court 'still continues to award damages in the absence of an effective breach (for example, in the cases revealing a potential violation of Article 3 or Article 8)'[220]. The reasoning of the Court is relatively short:

> *The Court considers that the applicants must have suffered anguish and distress and that there is a direct causal link between this and the matter found to constitute a potential violation of Article 8 of the Convention. This prejudice cannot be compensations solely by that finding*[221]

224. In the end, it appears that this problem is only about fulfilling the first requirement of just satisfaction under Article 41 of the Convention, which reads that there must have been, - not could have been - a violation in order to award compensation. In any case, it is difficult, if not impossible, to ascertain whether the awards for potential violations differ from the awards for actual violations. It may be that the Court lowers the amounts for a violation if it is potential. Still, without clear objective criteria for a general assessment of moral damages, it is impossible to prove this assertion. This type of award is intrinsically individual and cannot be generalised.

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[215] *Lorse and Others v. the Netherlands* (2003) para. 98.
[216] *Salah v. the Netherlands (striking out)* (2007).
[217] *Kasparov and Others v. Russia (no. 2)* (2016).
[218] *Besnik Cani v. Albania* (2022).
[219] Partly dissenting opinion of Judges Caflisch and Türmen *Gürbüz c. Turquie* (2005).
[220] Ichim, *Just Satisfaction under the European Convention on Human Rights*, chap. 3.2.1.
[221] *Butt v. Norway* (2012) para. 95.

225. In any case, this type of award should be mentioned for the purposes of the present Study to demonstrate that the Court awards compensation on an individual basis rather than following some general rules.

Compensation at the Court's discretion

226. This is the main type of compensation for moral damages that the Court calculates on its own motion in cases where the applicants either leave the question at its discretion or claim specific sums based on their own evaluation. This compensation is calculated on the basis of the criteria mentioned below in the next subchapter.

Calculation of moral damages

227. The Court has not elaborated an all-inclusive formula for calculating moral damages. However, it could not be asserted that the Court does not use criteria at all and simply relies on its unlimited discretion and freedom. For example, it developed criteria but only for specific cases involving repetitive violations subject to well-established case-law of the Court (e.g. violations of a reasonable length of domestic proceedings)[222]. Still, these latter criteria have no generic applicability for the calculation of moral damages in all cases, and the Court seems to be 'embarking on a revision of its just satisfaction practice' on awarding non-pecuniary damages, going beyond the dictums of precedent and scales.[223]

228. Scholars[224] have found some patterns and empirically proved the existence of some general criteria which do not bind the Court. For example, the scholars argued that the Court, despite its official denial of the hierarchy of rights, takes great account of the character and seriousness of violations in calculating compensations for moral damages. In this sense, the awards for these damages following deprivations of life, torture, or unfair trials vary significantly.[225] Another academic analysis referred to the seriousness of the violation as the first and most important element of calculation, along with applicant-related and overall-context factors additional to that first criterion.[226] Other scholar studies depicted a number of criteria and factors but categorised them in relation to Articles of the Convention.[227]

229. With such a variety of criteria, choosing and compiling a set of criteria useful for domestic practice is difficult. Still, the present Study selected a set of criteria that are present in one form or another in all academic and official sources. This selection, which is neither exhaustive nor universal, illustrates that the Court normally bases its calculations of moral damages on the criteria related to:

a. character of the violation and the nature of rights;

b. awards calculated in previous cases;

c. victims

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[222] *Apicella v. Italy* (2006) para. 135 et seq.

[223] Fikfak, 'Non-pecuniary damages before the European Court of Human Rights', 362.

[224] Fikfak, 'Non-pecuniary damages before the European Court of Human Rights'; V. Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29 *European Journal of International Law* 1091–1125; Altwicker-Hamori, Altwicker, and Peters, 'Measuring Violations of Human Rights'; Solomou, 'The contribution of the European Court of Human Rights and the Inter-American Court of Human Rights to the emergence of a customary international rule of just satisfaction and the creative expansion of its scope'; H. Bakirci, U. Erdal, and B. Wijkstrom, 'Section 7. Just Satisfaction (Article 41)' Article 3 of the European Convention on Human Rights: A Practitioner's Handbook, (Geneva: Organisation Mondiale contre la Torture, OMCT, 2006).

[225] Ichim, *Just Satisfaction under the European Convention on Human Rights*, para. 4.2.3 Monetary awards.

[226] Altwicker-Hamori, Altwicker, and Peters, 'Measuring Violations of Human Rights'.

[227] Annex to Fikfak, 'Non-pecuniary damages before the European Court of Human Rights'.

d. responded States

e. collective claims or mass violations

f. overall-context

Criteria related to the character of the violation and the nature of the rights

230. These criteria refer to the variations in awards depending on the informal classification of the violations into grave, serious, or less serious. The character of the rights as derogable or non-derogable may also be taken into account. Also, the Court distinguishes between substantive and procedural violations.

231. For example, absolute prohibitions do not involve a proportionality assessment of the moral damages, while qualified rights may include an evaluation of the victim's behaviour. The absolute character also involves less relaxed procedural requirements for the submission of claims, meaning that even in the absence of the claims[228] or the failure to submit claims, the Court grants compensation depending on the gravity of the violation and not taking into account the applicant's opinion or the submissions of the respondent State.

Criteria related to its own case-law

232. This is the second and most important set of criteria by which the Court guides itself in calculating moral damages. It uses the rules of judicial precedent (*stare decisis*), which means that an amount awarded in previous cases could serve as the basis for evaluating the damage in the case at hand. However, compared to the classic stare decisis doctrine in common law systems, the Court refers to the rulings in its previous cases as persuasive, not binding authority. This is especially true in respect of the calculation of moral damages.

233. Anyway, it is the most common and reasonable option to refer to a previous and similar case to evaluate moral damages. It is the most optimal step to begin with.

Criteria related to the victim

234. The Court may take into account age, gender, vulnerability, and the seriousness of the consequences suffered by the victim. It may also take into account the victim's behaviour and lower the amounts[229] or refuse compensation.

235. For example, even if Article 3 does not involve proportionality assessment, the Court may distinguish between the forms of ill-treatment to calculate moral damages (torture being the most severe form requiring more compensation). It does not include the factors related to the victim's behaviour.[230] On the contrary, the calculation of moral damages for violation of Article 2 may take into consideration that behaviour[231], like in the cases of violations of Article 5, where the Court may consider the victim's behaviour[232] together with the character of the breach, especially if the violation is combined with arbitrary actions of the responsible State[233].

236. Yet, it has been empirically proven that the victim's vulnerability has more impact on establishing the character of the violation than calculating the amounts for just satisfaction.[234]

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[228] *Mayzit v. Russia* (2005); *Igor Ivanov v. Russia* (2007).
[229] *A. and Others v. the United Kingdom*.
[230] *Vladimir Fedorov v. Russia* (2009) para. 87.
[231] *Kats and Others v. Ukraine* (2008) para. 149; *Nagmetov v. Russia*.
[232] ECtHR, *Buzadji v. the Republic of Moldova [GC]* (2016).
[233] *Ilgar Mammadov v. Azerbaijan* (2014); *Merabishvili v. Georgia* (2017); ECtHR, *Lutsenko v. Ukraine* (2012).
[234] Altwicker-Hamori, Altwicker, and Peters, 'Measuring Violations of Human Rights'.

Overall, it is unpredictable how and when the Court uses these criteria and what impact they might have on calculating moral damages.

Criteria related to the respondent State

237. This set of criteria includes the economic development of the respondent States, their GPD and other state-related factors.[235] These factors are balanced against individual interests. Application of these criteria is the subject of academic analysis, exceeding the scope of the present study.

Criteria related to collective claims or mass violations

238. In the cases assessing collective claims for mass violations, the awards for non-pecuniary damages could be lower than if the same claims had been submitted separately.[236] This appears to be true regarding calculating moral damages in inter-State cases[237] or quasi-inter-State disputes[238] involving a global assessment of damages. The present Study refers to this criterion below (see Ch. 4).

Criteria related to the overall context of the violation

239. The Court may use a general phrase to justify the awards for moral damages based on "the overall context in which the breach occurred".[239] It used this phrase in almost all inter-State and quasi-inter-State cases, including individual cases related to or originating from armed conflict.[240] It remains unclear whether this phrase means that the Court may vary its calculations of moral damages depending on the context.

240. It is objectively impossible to answer whether an award for a violation that originated in an armed conflict differs from a similar violation committed in times of peace. As scholars rightly argued, the principle of equity does not demand identical but appropriate treatment of all applicants in the same context, and just satisfaction for non-pecuniary damage mainly concerns the relationship between the victim and the respondent State, which matters for the calculation.[241]

There could be other criteria or other methods of assessing the calculations made by the Court. The difference in opinions and various approaches used by academics, including the silence of the Court on its own criteria, only confirm that the issue of calculating moral damages cannot be dissected and mapped into some general rules. This calculation is intrinsically discretionary and individualised.

Costs and expenses

241. The Court has constantly examined the claims under this head from three aspects. It ascertains whether the claimed amounts have been (i) actually, (ii) necessarily and (iii)

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[235] *Cocchiarella v. Italy* (2006); *Scordino v. Italy (no. 1)*.
[236] Fikfak, 'Non-pecuniary damages before the European Court of Human Rights'.
[237] *Georgia v. Russia (ii) (just satisfaction)*; *Cyprus v. Turkey (just satisfaction)*; *Georgia v. Russia (just satisfaction)*.
[238] *Varnava and Others v. Turkey*; *Catan and Others v. Moldova and Russia*; *Chiragov and Others v. Armenia (just satisfaction)*; *Sargsyan v. Azerbaijan (just satisfaction)*.
[239] ECtHR, *Al-Skeini and Others v. the United Kingdom [GC]* (2011) para. 182.
[240] *Cyprus v. Turkey (just satisfaction)*; *Varnava and Others v. Turkey*; *Georgia v. Russia (just satisfaction)*; *Georgia v. Russia (ii) (just satisfaction)*; *Sargsyan v. Azerbaijan (just satisfaction)*; *Chiragov and Others v. Armenia (just satisfaction)*.
[241] Altwicker-Hamori, Altwicker, and Peters, 'Measuring Violations of Human Rights', chap. c) Overall Context-Related Factor.

reasonably incurred.[242] These claims may or may not include the costs of domestic proceedings, but they normally include the proceedings before the Court.

242. The calculation of lawyers' fees is a special question in the calculation of costs and expenses. The fees may be based on the average fees recommended or used by national bar associations.[243] The question of one or many lawyers representing the applicant at the Court has been examined from the point of view of whether it is necessary and whether the legal case implies complex issues.[244] The Court dismissed the claims for costs and expenses as not reasonably incurred, even if the applicants called them symbolic from the perspective of their national rates.[245]

243. Some claims are, however, excluded from the compensation by default. For example, the Court does not compensate costs if the applicants benefited from legal aid at the national level[246] or the Court proceedings[247]. However, if the case is complex, the Court may grant compensation even if some of the expenses have been compensated by legal aid offered by the Council of Europe.[248]

244. On the other hand, the Court is adamant in refusing to accept contingency fee agreements, "whereby a lawyer's client agrees to pay the lawyer, in fees, a certain percentage of the sum, if any, awarded to the litigant by the court":

> *Agreements of this nature – giving rise to obligations solely between lawyer and client – cannot bind the Court, which must assess the level of costs and expenses to be awarded with reference not only to whether the costs are actually incurred but also to whether they have been reasonably incurred. Accordingly, the Court will take as a basis for its assessment the other information provided by the applicant in support of his claims, namely the number of hours of work and the number of lawyers necessitated by the case, together with the hourly rate sought.*[249]

245. In any case, all claims for costs and expenses should be properly proved and substantiated by hard evidence. Without producing evidence supporting this claim, such as a contract or a timesheet describing working hours, invoices, etc., the applicants, even experienced and notorious lawyers, have been refused compensation.[250]

Other forms of reparations

246. It should be noted first that these are not reparations falling under the specific concept of "just satisfaction" under Article 41. Even if the Court has already extended its interpretation of the Convention and assumed powers to order some specific measures providing reparation, these measures are not technically just satisfaction awards. They simply follow the first rule of reparation from general international law, which says that restitution is the primary form of reparation (see Reparations). Because of this, these measures should not be confused with just satisfaction. In so doing, the present Study refers to them in a less detailed manner, only as a matter of comparison with the just satisfaction.

247. These measures normally precede just satisfaction, and if implemented, they may render any compensation unnecessary. For example, in some cases, the Court may order

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[242] *Iatridis v. Greece (just satisfaction)*.
[243] *Boicenco v. Moldova* (2006) paras 172, 175–176.
[244] *Rinau v. Lithuania* (2020).
[245] *Devecioğlu v. Turkey (just satisfaction)* (2009) para. 18.
[246] *Baybasin v. the Netherlands (just satisfaction)* (2007).
[247] *Luedicke, Belkacem and Koç v. Germany (just satisfaction)* (1980).
[248] *Manole and Others v. Moldova (just satisfaction)* (2010).
[249] *Iatridis v. Greece (just satisfaction)*, para. 55.
[250] *Amihalachioaie v. Moldova*, para. 47.

the responsible States to fulfil international obligations, which could hardly be included in the generic term "just satisfaction" under Article 41 of the Convention. For example, ordering the release of the continuously and unlawfully detained applicant is a manifestation of the international obligation to cease the continuing wrongful act within the meaning of Article 30 (a) ASRIWA. Still, the Court includes this form of obligation in the generic meaning of "just satisfaction" under Article 41, though it makes a parallel reference to the general obligation to abide by its judgments under Article 46 of the Convention:

> *The Court further considers that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46 § 1 of the Convention to abide by the Court's judgment.*
>
> *Regard being had to the grounds on which they have been found by the Court to be in violation of the Convention (see paragraphs 352 and 393 above), the respondent States must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release.* [251]

248. The Court has ordered a number of specific forms of reparations, either in advance or together with just satisfaction.

Restitution

249. The purpose of this form of reparation, under general international law, is restoration of the *status quo ante*, while the scope of just satisfaction is mainly compensation in situations when such restoration is not possible or cannot be fully achieved. According to the Court, the issue of restitution is primarily for the State to decide, though in its case law it has sometimes ordered restitution measures instead of monetary compensations, under the condition that the respondent State must act in good faith:

> *55. The Court holds that the respondent Government must return to the applicant company the "Dacia" hotel with all its furnishings and equipment and the underlying land, or pay EUR 7,612,000 representing its current market value. It finds in addition that the applicant company is entitled to a total amount of EUR 890,625 in respect of pecuniary damage.*
>
> *56. At the same time, the Court considers that the applicant company must return to the Government EUR 1,264,924 (…). This amount should therefore be deducted from the overall amount due to the applicant company if the Government are unable to transfer the hotel back to the applicant company and instead pay compensation. If the hotel is returned, the applicant company is to pay the difference between EUR 1,264,924 which it owes to the Government and EUR 890,625 which represents the pecuniary damage caused to the applicant company, the difference amounting to EUR 374,299.*
>
> *57. The Court must proceed on the assumption that the Government will comply with its judgment in good faith. For that reason it cannot accept the applicant company's claim that it should be awarded daily and monthly damages to be paid by the Government for the period between the adoption of the present judgment and its full enforcement. Instead, the Court will apply its standard approach*[252]*.*

250. However, the Court has never ordered only restoration, restoration instead of just satisfaction, or restoration without deciding on just satisfaction. It may have reserved the question of just satisfaction in order to give the respondent State a chance to resolve the claims by restoration, but it has never ordered this form in exclusivity.

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[251] *Ilaşcu and Others v. Moldova and Russia*, para. 490.
[252] *Dacia S.r.l. v. Moldova (just satisfaction)*.

Release from detention

251. The Court's powers to order such a measure of individual relief are no longer contested.[253] This measure is ordered together with just satisfaction, and in the cases where the respondent state has not complied with such orders, the Court awards just satisfaction anew for continuous detention.[254]

252. In the cases where the victim had been released or the term of unlawful detention had been deducted from his or her sentence, the Court reiterated that the principle of re-establishing the situation before the violation had occurred is materially impossible. In one case, the Court awarded compensation for non-pecuniary damages, stating that a deduction from the sentence offered instead of monetary compensation does not comply with the *restitutio in integrum* principle because "no freedom is given in place of the freedom unlawfully taken away".[255]

Reopening of proceedings

253. The Court normally does not order a reopening of the domestic proceedings, considering that this form of reparation remains at the discretion of the respondent State as a measure of execution of the judgment rather than as a means for just satisfaction[256].

254. However, the Court may order such a measure, though randomly, when it examines the matter of just satisfaction. For example, it considered that a criminal conviction rendered by an impartial tribunal needs to be re-examined[257]. In another case it suggested that the reopening is available and thus assessed non-pecuniary damages taking into account this fact[258]. In some other situations, the Court decided that the mere availability for reopening is enough to be treated as appropriate form of relief.[259]

255. It is unclear whether the possibility of reopening influences Court's solution on the non-pecuniary awards, and if yes, how it may determine the Court to calculate these damages. Still, that possibility may definitely impact the Court's assessment of the necessity of awarding pecuniary damages.

256. For example, in some cases, the Court may refuse to award pecuniary damages given that the applicant may seek reopening of the domestic proceedings and obtain relief at the domestic level.[260] The Court may directly invite the applicants to ask for the reopening of the domestic proceedings and the restoration of material damages at the national level. In some cases, the Court established an alternative solution and left the question to the respondent State, whether to seek reopening or pay material damages, given that the applicants had rejected the option of reopening.[261]

257. Anyway, it cannot be argued that this practice of choosing reopening instead of awards for pecuniary or non-pecuniary damages is constant. There are too many variables to consider, including the practice of the Committee of Ministers on supervising the reopening

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[253] *Ilgar Mammadov v. Azerbaijan*; *Judgment in proceedings under Article 46 § 4 of the Convention in the case of Ilgar Mammadov v. Azerbaijan* (2019).
[254] ECtHR, *Ivanţoc and Others v. Moldova and Russia* (2011).
[255] *Ringeisen v. Austria (just satisfaction)* (1972) para. 21.
[256] *Greens and M.T. v. the United Kingdom* (2010) para. 107.
[257] *Gencel c. Turquie* (2003) para. 27.
[258] *Lesjak v. Croatia* (2010) para. 54.
[259] *Balažoski v. 'the Former Yugoslav Republic of Macedonia'* (2013) para. 39.
[260] *Gereksar et autres c. Turquie* (2011) para. 75; *Romanenco c. République de Moldova* (2019) para. 32.
[261] *Ojog and Others v. the Republic of Moldova (just satisfaction)* (2020).

of the proceedings as a matter of execution of judgments (under Article 46) rather than as a matter of just satisfaction.

Other measures

258. On rare occasions, the Court may order or imply taking some other specific measures to restore the victim's rights. For example, the Court may express its opinion that the restoration of ownership is possible without awards of pecuniary damages[262] or indicate that reversal of the eviction order would be the appropriate form of restoration of the applicant's title as a good-faith owner of the flat.[263] In another case, the Court took note of the inter-State agreement on paying social benefits that removed discriminatory clauses and, therefore, considered that no specific measures were necessary apart from a global sum covering pecuniary and non-pecuniary damages.[264] Examples could continue.

259. These specific measures of relief cannot be generalised other than in the category of measures other than just satisfaction. They depend on the particular circumstances of the case and the Court's discretion. Again, it is unclear whether and how these measures could impact the Court's decision on the issue of just satisfaction.

260. In the end, the existence of these measures confirms the rule that the Court always looks at the restitutio in integrum principle before or along with the issue of compensation. Still, lawyers continue disputing whether the Court is entitled to order measures of restitution other than compensation. Some argue that the large discretion of the Court afforded by the very general provisions of Article 41 of the Convention implies that it can and must order other measures than compensation. Other opinions narrow down the concept of "just satisfaction" to the Court's powers to award compensation and not restitution. They rely on the large discretion of the States to choose how to implement the Court's judgments.

261. In any case, the present Study does not mean to resolve this dilemma but to mention its existence. Some other aspects, such as the procedure of examining just satisfaction claims and their subsequent execution, may shed light on this dilemma.

Procedure

262. The procedure for examining just satisfaction claims is quite simple, and it has already been referred to above while explaining some substantive rules for assessing just satisfaction. To recall, the Court retains certain discretion in establishing the rule of evidence and the distribution of the burden of proof. For example, the Court establishes higher standards of proof in substantiating claims for pecuniary damages, especially those referring to future losses, but requires no evidence in order to prove moral damage. It also gives an extensive interpretation of the rules of submission of claims and procedural time limits in the mattes of moral damages for particularly serious violations[265] but adamantly refuses to accept submissions out of time claiming pecuniary damages or cost and expenses. Other procedural aspects could be also relevant in this matter.

263. In brief, the proceedings of the Court on just satisfaction retain all the principles applied in adversarial proceedings but with the specific aspects of international litigation. The rules of the Court refer to the just satisfaction procedure only in Rule 60, which mainly establishes the obligation of the applicant to submit claims and the duty of the Court to submit these

[262] *Colesnic c. République de Moldova* (2019) para. 34.
[263] *Gladysheva v. Russia* (2011) para. 106.
[264] *Andrejeva v. Latvia* (2009) para. 110.
[265] *Nagmetov v. Russia*.

claims to the respondent state for comments. Practice Directions are more explicit in this regard and explain the procedural powers of the Court in more detail.

264. It may take too long to dwell on all the intricacies of the Court's procedure on just satisfaction, which would bring less or no value to domestic courts. It is enough to mention that the Court's procedure is of a specific international character; thus, it differs in many aspects from the domestic procedures. The domestic courts may or may not get inspired by these proceedings, but in formal systems of law, such as in Ukraine, the courts are bound by written rules, which they can neither write nor change. The domestic courts, nevertheless, may follow the principles regulating the Court's procedure.

265. For the purposes of the present Study, these principles could be deducted from the basic procedural rules and the Court's practice and summarised as follows:

a. the Court is empowered to change its own rules and establish procedures that seem appropriate to the particularities of an international litigation (Article 25 d) of the Convention);
b. submission of evidence and claims for just satisfaction is the primary procedural duty of the applicant, following instructions of the Court in compliance with the procedural time-limits it has established in the case (Rule 60 of the Rules of the Court);
c. in inter-State cases, the submission of the claims for just satisfaction is on the burden of the applicant State and could be made only on behalf of the alleged injured party(s) (Rule 46 (e) of the Rules of the Court);
d. in ordinary procedures, the Court invites the applicants to submit their claims for just satisfaction after the exchange of comments on the admissibility and merits of the case;
    i. however, this rule is subject to the Court's discretion as it may invite parties to include in their observations any submissions concerning just satisfaction and any proposals for a friendly settlement, at any stage of proceedings (Rule 54 of the Rules of the Court);
e. failing to submit claims or evidence or their submission out of procedural time-limits may result in dismissing such claims in full or in part;
    i. with the exception of non-pecuniary damages in the cases failing into specific category (the *Nagmetov* criteria), when
        1. a number of prerequisites had been met and
        2. weighing the compelling considerations in favour of making an award;
f. the Court should submit claims for just satisfaction to the respondent State for comments and submission of evidence, thus complying with the principle of adversarial proceedings;
g. the respondent State cannot make a counterclaim but must prove that the claimed damage has been fully or partially repaired or that there is an avenue for *restitutio in integrum* at the national level;
h. in light of the parties' comments, the Court may also decide that the question of just satisfaction is not ready for consideration and may reserve it either in full or

in part for certain heads of just satisfaction, such as pecuniary damages, and render a separate judgment on those issues (Rule 75 of the Rules of the Court)[266]

i. in reserving the question of just satisfaction, the Court may invite the parties to reach settlement, and if the parties have succeeded, it can then strike out the case[267]; the friendly settlement is therefore possible at the stage of comments on just satisfaction.

266. It could thus be observed that the examination of just satisfaction is subjected to a less complex procedure, but it is extremely difficult from a substantive point of view. It is also quite complex to execute, as many issues may arise concerning the payment of the awards of just satisfaction.

Execution

267. As explained, the meaning of "just satisfaction" is to secure a reparation in addition to other measures of restoration. Restitutio in integrum is therefore the guiding principle in the execution of the Court's judgments and the process of the supervision of the Committee of Ministers under Article 46 of the Convention.[268] Yet, the process of execution is not limited to adopting measures on restitution or payment of compensation awarded by the Court. It is a complex and multilevel process involving the execution of individual and general measures left at the discretion of the responding States under the supervision of the Committee of Ministers and with active involvement of the Court's reasoning (especially in pilot judgments or judgments ordering special individual measures).

268. It is not the purpose of the present Study to explain the full process of execution but to pinpoint the place of just satisfaction in it. This place is quite evident. Once the judgment of the Court becomes final, paying just satisfaction becomes a mandatory, unconditional obligation of the respondent State. The Committee of Ministers considers such a payment as one of the individual measures meant to repair the situation after the violation.[269] Thus, just satisfaction retains its intrinsically individual character.

269. The States can pay just satisfaction in the manner they wish, save in specific situations when the Committee of Ministers may decide on specific modalities of payment and special measures to compel the respondent States to pay just satisfaction. For example, following the 2008 Russo-Georgian War, the Court dealt with an inter-State case in which it decided to award just satisfaction. Given the complexity of such claims and the manifest disobedience of the respondent State, the matter turned into a special register of just satisfaction concerning the Russian Federation.[270]

270. Still, the payments of just satisfaction in such cases, especially those originating from armed conflicts, are not straightforward. It takes a dozen years and unprecedented effort to resolve these disputes, including to compel the States to comply with the seemingly simple

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[266] ECtHR, *Cyprus v. Turkey*; *Cyprus v. Turkey (just satisfaction)*; *Agrokompleks v. Ukraine* (2011); *Agrokompleks v. Ukraine (just satisfaction)*.
[267] *Von Hannover v. Germany*; *Von Hannover v. Germany (striking out)*.
[268] Committee of Ministers, 'Recommendation 2000(2)'.
[269] Committee of Ministers, 'Information document CM/Inf/DH(2021)15. Monitoring of the payment of sums awarded by way of just satisfaction: an update of the overview of the Committee of Ministers' practice. Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights' (2021).
[270] Committee of Ministers, 'Interim Resolution CM/ResDH(2022)254. Execution of the judgments of the European Court of Human Rights. Georgia v. Russia (I)' (2022); Committee of Ministers, 'Information document CM/Inf/DH(2022)25. Strategy paper regarding the supervision of the execution of cases pending against the Russian Federation' (2022).

obligation to pay just satisfaction.[271] Almost all just satisfaction awards in cases entering the category of "originated from armed conflicts" remain unpaid.[272]

Does this situation make just satisfaction irrelevant to inter-State disputes, and is the case law of the Court actually applicable to cases originating from an international armed conflict? The last chapter attempts to answer this question.

4. Just satisfaction in the context of armed conflicts

271. It is a predominant opinion that the Convention in general and, the Court in particular have never been designed to prevent or resolve armed conflicts.[273] The said issues on the non-execution of the Court's judgments in the cases that originated from armed conflicts may only substantiate that opinion. To a consequential extent, one may argue that if the Convention as a whole, though applicable to such cases, is regarded as ineffective in armed conflicts, then just satisfaction follows the same faith.

272. However, the situation and the applicability of just satisfaction in armed conflicts should not be seen as pointless. Human rights law is applicable to armed conflicts, though with particularities and in close relation with IHL. And, of course, the fact that international general law on reparations is directly applicable to armed conflicts could not and should not be disregarded. Therefore, just satisfaction, even if as *lex specialis* in relation to those branches of international law, continues to be applicable to armed conflicts. In other words, the question of the effectiveness of just satisfaction in armed conflicts should not be equated with the question of its applicability.

273. In line with the purpose of the present Study, just satisfaction in relation to armed conflict is, therefore, explained in the context of the general applicability of human rights law and from the applicability of general international law in armed conflicts. Next, certain principles of the international law on reparations are explained from procedural and substantive points of view. Eventually, the present Study produces a summary of the relevant Court's case-law on just satisfaction in cases originating from armed conflicts to illustrate applicability, but mainly to provide guidance to Ukrainian judges, who deal with similar claims in their day-to-day activity. All these considerations constitute the basis for formulating recommendations.

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[271] '...The supervision by the Committee of Ministers of the execution of inter-state and other conflict-related cases is particularly challenging due to their political dimensions and complexities. Such cases, some of which have been on the Committee's agenda for a long time, continued to be examined throughout 2022.' Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights. 16th Annual Report of the Committee of Ministers' (2023) chap. D. Inter-state and other cases related to post-conflict situations or unresolved conflicts; there are still persistent difficulties in the execution of certain judgments linked to the absence of political will or even an open disagreement with a judgment of the Court, especially when it comes to inter-State cases or cases having inter-State features. … In the Inter-States cases or cases related to territorial disputes between Council of Europe member States …, progress has been slow or non-existent. PACE and Committee on Legal Affairs and Human Rights, 'Report (Doc. 15123). The implementation of judgments of the European Court of Human Rights' (2020) para. 40.

[272] Department for the Execution of Judgments of the European Court of Human Rights, 'Information relating to payment awaited or information received incomplete. Status as of 30 August 2023' (2023).

[273] "The human rights protection systems worldwide could not and cannot prevent wars…. in international law the instrument for securing peace is not the ECHR, but the UN Charter with the prohibition of the use of force. Even if the ECHR is an agreement on common values – among them friendship among peoples – it is not fit to stop military action when hostilities get out of control. … The compensations fixed by the Court certainly have more of a symbolic effect in view of the sufferings, but they are not "nothing" A. Nußberger, 'Promoting Peace and Integration among States (Speech)' (Strasbourg, 2020).

Applicability

274. Human rights law continues to be applicable in times of armed conflict; therefore, just satisfaction, being part of that law, is applicable as well. However, this is not a clear-cut answer to the question of whether and how just satisfaction is applicable. The applicability of human rights law in armed conflicts is a matter of continuous dispute; therefore, the applicability of just satisfaction could also be viewed as problematic, especially in relation to the rules of general international law on state responsibility and reparations.

275. It is generally recognised that human rights continue to apply in times of an armed conflict [274] as they continue to coexist with the rules of IHL in three ways: '[i]some rights may be exclusively matters of international humanitarian law; [ii] others may be exclusively matters of human rights law; [iii] yet others may be matters of both these branches of international law.'[275] The Court confirmed that in respect of the Convention[276].

276. Despite the complex questions of the applicability of human rights law in armed conflicts, the question of the applicability of just satisfaction is less controversial. Once the Court decides that the Convention is applicable to a case related to an armed conflict, there should be no question of the applicability of just satisfaction, which is subsidiary to that decision.

277. Yet, in armed conflicts, another issue arises in relation to the question of the applicability of just satisfaction. Since just satisfaction is a special part of general international law rules, how does it apply in relation to those rules. Does its lex specialis status mean that just satisfaction prevails or substitutes the rules on reparation in general international law?

278. It is no longer in dispute that general international law on reparation is applicable in armed conflicts. Even if it is an extremely complex issue, involving 'numerous subfields of international law, among which international human rights law, ICL, IHL, and the law on State responsibility," the question of applicability of the law of reparation is no longer in dispute[277]. Victims of armed conflicts retain a right to reparations, which has acquired the status of being a rule of customary law.[278] Just satisfaction has acquired the same status[279], but it still retains it lex specialis status.

279. In order to understand how just satisfaction is applicable armed conflict, being a customary rule and lex specialis at the same time, one must observe how the right to reparations functions in this context.

Reparation

280. During an armed conflict, especially an international one, ensuring the rule of law is challenging due to multiple obstacles. National courts are unlikely to challenge the decision

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[274] '...the protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby provisions may be derogated from in a time of national emergency' *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) para. 25.

[275] Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency* (2001) para. 106.

[276] *Hassan v. the United Kingdom [GC]* (2014) paras 102–104.

[277] C. Marxsen, A. Peters, L. Beinlich, F. Brachthauser, C. Ferstman, S. Furuya, L. Lo Giacco, A. Haffner, M. Hartwig, L. van den Herik, R. Hofmann, M. Kazazi, F.-J. Langmack, C. Moser, T. Neumann, C. L. Sandoval, C. Sperfeldt, S. M. Wood, and N. Wuehler, 'Reparation for Victims of Armed Conflict: Impulses from the Max Planck Trialogues' (2018).

[278] C. Evans, *The right to reparation in international law for victims of armed conflict* (Cambridge University Press, 2012) chap. 2.8. A customary right to reparation?

[279] Solomou, 'The contribution of the European Court of Human Rights and the Inter-American Court of Human Rights to the emergence of a customary international rule of just satisfaction and the creative expansion of its scope'.

of their own government to aggress another state; international courts rarely have jurisdiction over those matters. Nation states rarely prosecute their military forces for war crimes, and courts are hesitant to decide cases against their own side. International law of sovereign state immunity can also thwart claims for reparation in domestic courts. “In the end, even where the political and technical obstacles can be overcome, wars do not easily lend themselves to litigation. There is an assumption among many lawyers that war damage is too big to be dealt with in courts.”[280]

281. In this sense, it was rightly pointed that ‘the harm resulting from armed conflict pertains to a specific class of damage originating from state conduct that by necessity causes mass injuries. Accordingly, the financial consequences of armed conflict cannot be dealt with as everyday problems that fit into the ordinary legal framework.’[281]

282. From this point of view, two specific elements of the right to reparations in armed conflicts can be discerned. First, the responsibility for violations of human rights in armed conflicts is **attributable to states**, and second, that the **violations cause mass injuries**. From the perspective of the right to reparations and, respectively, just satisfaction, these two aspects are important. However, it is equally important to establish a **specific, non-ordinary legal framework** for the exercise of the right to reparations in armed conflict.

283. How this special legal framework should look is subject to discussion. So far, the most authoritative work on this matter has been completed by ILA. It has codified the principles and rules on reparations for victims of armed conflict, which can be regarded as a source of soft law in this area. ILA has considered that such a framework must be developed from two perspectives: substantial and procedural.

284. **Substantive rules** must establish that a right of victims to reparations in armed conflicts exist in all three forms – restitution, compensation and satisfaction, taken either singly or in combination. Restitution consists of measures that re-establish the situation which existed before the violation; compensation covers any financially assessable damage and satisfaction can be any other non-financial modality, which should be proportional to the harm. Responsible parties for causing harm are, however, largely considered as being States, individuals accused of international crimes, international organisations and non-state actors.[282]

285. Next, from a substantive point of view, a legal framework should outline the specific obligations of the international community to secure the victims’ rights to reparation, along with the process of promoting justice and reconciliation. But, in the view of the present Study, the most important obligation is that of the States to "assure that victims have a right to reparations under national law."[283].

286. From a **procedural** perspective, ILA developed ten principles by which the victims’ right to reparation in armed conflicts can be effectively fulfilled. In brief, these principles require that there be a mechanism to claim reparation available to victims, who must have the right to be heard at all stages of proceedings and be treated equally. Such a mechanism must have an adequate organisational structure, be accompanied by outreach activities, and, most importantly, have adequate rules for collecting, registering, and processing claims, as well as

[280] A. Clapham, *War* (Oxford University Press, 2021) chap. 10. Accountability for Violations of the Laws of War.
[281] Tomuschat, ‘State Responsibility and the Individual Rights to Compensation Before National Courts’ A. Clapham and P. Gaeta (eds.), *The Oxford handbook of international law in armed conflict* , First edition ed. (Oxford University Press, 2014) p. 821.
[282] Article 1 ILA, ‘Conference Resolution. The Hague’.
[283] ILA, ‘Conference Resolution. The Hague’ Article 13.

the rules for decision-making and the valuation of claims. The reparation mechanisms must render enforceable decisions and be properly funded.[284]

287. Many examples of such reparation mechanisms have been brought forward by the ILA to illustrate the functioning and practical applicability of these substantive and procedural principles. All reparation mechanisms vary in the legal sources and frameworks based on which they have been established or proposed (some proposals have not been implemented in practice). But all of them were **international** in character, which is their common feature.

288. For example, some mechanisms were based on or proposed by bilateral agreements between the States, such as the Iran-United States Claims Tribunal (IUSCT), the Eritrea-Ethiopia Claims Commission (EECC) administered by the Hague Permanent Court of Arbitration; the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC). Some reparation mechanisms were created, or proposed, by instruments adopted by UN or other international organizations, such as the United Nations Compensation Commission (UNCC) for claims resulting from the Gulf War (1990-1991) based on resolutions of the Security Council, the proposed Compensation Commission for international crimes perpetrated in Darfur, Sudan (CCDS), the Housing and Property Claims Commission (HPCC) and the Kosovo Property Claims Commission (KPCC) based on the regulations of Special Representative of the UN Secretary-General within the mandate of the UN Interim Administration Mission in Kosovo (UNMIK); the predecessor of the Commission for the Resolution of Real Property Disputes (CRRPD) in Iraq, the Iraq Property Claims Commission (IPCC), based on a regulation promulgated by the Coalition Provisional Authority.

289. At last, some reparations mechanisms have been initially established by bilateral agreements and thus retained the feature of being supranational mechanisms. However, they have recently become national and have continued to operate solely within the legal framework. For example, the German Forced Labour Compensation Programme (GFLCP) was launched by an agreement between the United States and Germany, which eventually continued its work on the basis of German federal law. The Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I) was based on a Memorandum of Understanding between the World Jewish Restitution Organization and the World Jewish Congress, on the one hand, and the Swiss Bankers Association, on the other. It was then established as an independent international arbitral tribunal under Swiss law.[285]

290. If the reparation mechanism dealing with claims originated or related to armed conflict has been originally established within the national legal system by national law, then it can be considered a remedy within the meaning of Articles 13 and 35 (1) of the Convention or a compensation mechanism within the meaning of Article 5 § 5 of the Convention or Article 3 of Protocol No. 7. National remedies include an element of satisfaction assessment but should not be equated with the latter.

291. All these examples of reparation mechanisms are relevant for understanding how the right to reparation can be realised in the context of cases originating from an armed conflict and what reparation mechanisms can be created for that matter. They are especially relevant to compare the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine[286] in order to understand its role and place in the panoply of international

[284] ILA, 'Conference Resolution. Washington' (2014); ILA, 'Conference Report. Washington' (2014); ILA, 'Working Session Report. Washington' (2014).
[285] ILA, 'Conference Report. Washington'.
[286] Committee of Ministers, 'CM/Res(2023)3'.

reparation mechanisms, including that offered by the Convention in the forms of just satisfaction.

292. It was rightly pointed by a scholar that the said Registry is only the first component of the future compensation mechanism and that the Convention mechanism must be applied coherently with that future version. She only meant to include pending inter-State cases of Ukraine against Russia and all pending, or upcoming individual applications submitted to the Court in relation to or originating from the armed conflict. Other 'cases related to damage caused in military conflicts' were meant to prove the Council of Europe's 'necessary experience and organisational capacity to support the establishment of a new [compensation mecanism]'.[287]

293. However, the purpose of the present study is to answer the question of what place and role the just satisfaction mechanism under the Convention occupies now in the current context of the conflict in Ukraine. This question brings the Study to its last chapter, explaining the role and place of the Court's case-law on just satisfaction in the particular context of the armed conflict in Ukraine.

5. Just satisfaction the context of the armed conflict in Ukraine

294. What is the role of the just satisfaction mechanism in the context of the armed conflict in Ukraine? The answer to that question is rather simple: the Court's case-law has double-sided value: (i) as a precedent for its own cases related to the conflict and (ii) as an indication for the Ukrainian courts or for the authorities of Ukraine willing to set up reparation mechanisms at the national level, whether through judicial practice or administrative proceedings.

Precedential value

295. In the first sense, the Court's case-law will be relevant for the pending inter-State cases of Ukraine against Russia and all pending individual applications related or originated from the armed conflict in Ukraine. This means that the Court will be guided in its solutions on awarding just satisfaction by the principles and the case-law in similar cases.

296. It must be noted that the Study does not mean that the Court will definitely award just satisfaction in all these cases, as it would imply that the Court would find violations. The Study cannot and will not speculate as to the outcomes of all these cases and it is for the Court to decide on the attribution and wrongfulness of the alleged breaches of the Convention. It remains for the Court to calculate and award just satisfaction, in the cases where it has found violations according to its own case-law. This later phrase "according to its own case law" means the precedential value to which the Study refers.

297. In this later sense, the Study cannot even assert that the Court will follow strictly its own case-law on awarding just satisfaction. The Court may find sufficient basis in the particular circumstances of the cases related to the conflict in Ukraine to change its previous principles or develop new case-law on the matter of just satisfaction. This is an even more speculative assertion, but it is still possible.

298. By the said precedential value, the Study means only the Court's choices of some cases based on which it can award just satisfaction, provided that the criteria and requirements for

[287] A. Mężykowska, 'Establishment of the Registry of Damage – The first element in ensuring Russia's financial accountability for the aggression against Ukraine – European Society of International Law | Société européenne de droit international' (2023) 12 *ESIL Reflections*.

such an award have been met. It also means that some principles of the its own case-law on just satisfaction can be relevant in this context.

299. While the relevant cases that the Court may choose are listed below, the relevant principles are as follows:

a. In the inter-State cases the just satisfaction is applicable and could be awarded only to benefit of the individual victims of violations claimed by the applicant State on behalf of those victims,[288]but these awards are being assessed as collective rather than individual claims (see § 238);

b. In the cases originating from individual applications, the just satisfaction awards primarily follow the principles of individualisation and the Court's discretion, but the calculations for certain forms of reparations, (e.g. complex pecuniary damages, moral damages) may deviate from these principles and be based on "global" assessment as collective claims (similarly to the claims originating systemic or structural violations)[289]

300. How and whether the Court may coordinate awards for just satisfaction, if any, with the future compensation mechanisms in Ukraine, including the Council of Europe's Registry[290], is an issue for another study.

Indicative value

301. In this sense, the Court's case law has a role as a source of inspiration for the Ukrainian courts and the authorities, should they decide to establish a special judicial or administrative mechanism for reparations. Establishment of such mechanisms appears to be an obligation for the Ukrainian authorities according to the rules of general international law as codified and explained above[291] as well as under Article 13 of the Convention.

302. Just satisfaction is special in this regard. From both substantive and procedural perspectives, the domestic courts and the authorities cannot replicate it in their domestic proceedings mimicking the Court's proceedings. They however can use it as a source of inspiration and implement it according to the principles explained above. This is what the present Study proposes to understand under the meaning of "indicative value" of the Court's case-law on just satisfaction.

303. Indicative value means that the domestic courts take inspiration from the Court's reasoning on just satisfaction when awarding compensations or ordering other reparation measures. The courts do so like the Court does in its own cases.

304. For the domestic authorities, other than courts, willing to implement the Court's case-law on just satisfaction, the indicative value means that they can develop policies and introduce effective remedies to ensure that the victims of violations are properly compensated and offered other forms of reparations.

305. Both the Ukrainian courts and the authorities may imitate the manner of the Court's examination and use the Court's awards for just satisfaction as a source of inspiration for the calculation of compensations. However, the indicative value of the Court's case law goes

[288] *Cyprus v. Turkey (just satisfaction)*; *Georgia v. Russia (just satisfaction)*; *Georgia v. Russia (ii) (just satisfaction)*.
[289] *Varnava and Others v. Turkey*; *Kurić and Others v. Slovenia (just satisfaction)*; *Chiragov and Others v. Armenia (just satisfaction)*; *Sargsyan v. Azerbaijan (just satisfaction)*; *Catan and Others v. Moldova and Russia*.
[290] Committee of Ministers, 'CM/Res(2023)3'.
[291] ILA, 'Conference Resolution. The Hague' Article 13. Reparation under National Law; ILA, Ronzitti, and Hofmann, 'Conference Report. The Hague' Comentary to Article 13.

beyond mimicking the proceedings and a simple mathematical calculation of compensations. Indicative value means knowing the Court's case-law and applying similar judicial and legal reasoning in individual cases. It does not imply that the domestic courts and authorities should copy-paste the amounts of compensation awarded in similar cases.

306. The indicative value of the Court's judgments is comparable with the concept of "persuasive authority" in common law systems, used to describe a judgment that carries some authoritative weight but does not bind a court. In other words, the domestic court may but need not apply the judgment of the Court on just satisfaction when deciding the case before it.

307. In this latter sense, almost any principle derived from the Court's case-law on just satisfaction, not only from cases originating from or related to armed conflicts, may have that indicative value. In the context of the present Study, given its practical purposes, the principles can only be summarised as concrete recommendations deriving from the above description of the Convention's legal framework on just satisfaction.

308. The Court did not develop special just satisfaction rules dealing with claims originating from or related to armed conflicts. Just satisfaction is only special in relation to general international law, but it is generally applicable to any claim arising from a violation of the Convention, not from an armed conflict. An armed conflict matters as a context for the examination of questions of attribution and wrongfulness, namely in deciding whether there has been a violation of the Convention. It is less relevant for the evaluation of just satisfaction, except, probably, for the calculation of moral damages. But this latter aspect is still debatable (see §§ 239, 240).

309. Therefore, given the practical purpose of the present Study and the generic applicability of just satisfaction, it would be appropriate to frame the Court's case-law and the principles derived therefrom as recommendations. The principles framed as recommendations could better guide the Ukrainian courts and authorities in developing their own practice and/or specific reparation mechanisms.

310. In addition to the recommendations, the study proposes a selection of the judgments of the Court falling into the category of cases originating from or related to armed conflicts (see Ch 7). This selection is useful as an indicator for the Ukrainian judges, who may be willing to implement the manner of the Court's examination of the claims and be guided as to the amounts of compensation awarded in such cases. It is necessary to note that the selected cases are only suggestive and not mandatory; in the end, the decision on just satisfaction lies at the exclusive discretion of the Ukrainian judges.

6. Recommendations

311. The recommendations neither can nor should be applied in the process of deciding the questions of attribution and wrongfulness of the act giving rise to the right to reparation (and just satisfaction). In the Convention terms, these recommendations do not refer to the questions of jurisdiction, admissibility, or merits of violations. In other words, the recommendations are valid only if applied subsidiary to the determination of the responsibility for human rights violations, namely only after these issues have already been decided and the responsibility has been attributed to a responsible party.

312. Given the complexity of the issues arising from claims for reparation, especially in the context of an armed conflict, it is worth formulating the recommendations from two perspectives: substantive and procedural.

313. The recommendations refer to both the Ukrainian courts and authorities in a broad sense, unless specified otherwise. Some recommendations are self-explanatory; others may be accompanied by an explanation.

Recommendations of substantive character

1. Consider learning in more detail about general international law on state responsibility, as codified by the International Law Commission, and, in particular, the rules on reparation of victims in armed conflicts, codified by the International Law Association; Just satisfaction is the lex specialis of those laws and rules that must be applied in harmony (§§ 7, 90)

2. Define terminology consistent with this international law, specifically the concepts of reparation, compensation, and satisfaction, as well as other relevant legal terms. A terminology is important for both the Ukrainian courts and authorities in establishing a consistent legal language in legislation and practice.

3. During the examination of the claims for reparations, follow the principles of general international law on the responsibility of states and, in particular, the law on reparations, to which the Convention system of just satisfaction is related.

4. Even in the context of claims originating from or related to an armed conflict, apply the same substantive rules on awarding just satisfaction and reparations as in peaceful times; the context of an armed conflict may be relevant only for assessing claims for moral damages which should be accompanied by proper reasoning; individualisation remains the leading principle in this regard.

5. Check first whether the key requirements for awarding just satisfaction have been fulfilled, and then proceed to the evaluation of the claims only after:

   a. finding of at least one violation of human rights, and
   b. verifying if there is a possibility of partial or full restoration of the victim's situation to the situation that existed before the breach.

6. If the violation is continuing, demand and ensure that the act causing damages has ceased (for example release from unlawful detention), and only then proceed to the examination of the claims for reparation.

7. If the restoration of the victim's situation to the *status quo ante* is possible, then order the concrete measures pursuing *restitutio in integrum* (e.g. restoring ownership).

8. If the restoration is impossible or possible in part, proceed to the examination of the claims for monetary compensation, while at the same time seeking answers to the following issues:

   a. whether the sought monetary compensation is necessary (Necessity),
   b. whether the claimed damage has been caused by the violation (Causality).

9. If the claimed damage is necessary to repair and has been caused by the violation at hand, distinguish its three forms: material damages, moral damages, and expenses.

10. Examine and evaluate each of these forms of claims for damages according to their own specific rules:

   a. Material damages:
      i. should be separated into actual (damnum emegens) and future losses (lucrum cessans), requiring the highest standards of evidence but not

excessive burden where such evidence cannot be objectively submitted (see ...);

ii. should be examined following rules of adversarial proceedings;

iii. should be separated according to the character of the violation as involving property rights (property cases) and human rights of non-economical character (non-property cases); assessment of pecuniary damages in these categories of cases may differ (e.g. loss of a breadwinner, in § …)

iv. can be examined taking into consideration their complexity; if the claims cannot be properly evaluated due to lapse of time, recessions, inflation, or other factors precluding their objective assessment, consider making an award of a global sum on an "equitable basis." (see Equity)

b. moral damages

i. fall into exclusive judicial discretion (Discretion);

ii. must be individualised and quantified on the basis of some foreseeable criteria related to:

1. the character and the gravity of violations
2. previous awards for moral damages or the Court's case-law in similar cases; courts may take into consideration their own judicial practice, which must be at least appropriate to the Court's case-law;
3. the victim's character, the degree of individual suffering, and, if any, his or her behaviour contributing to the violation;
4. any general public interests at stake, which may alleviate or reconsider the claimed damage;

iii. could take into consideration the factors concerning the overall-context of the violation but not as a primary criterion; even if the violation has occurred in or has been related to armed conflict in Ukraine, the courts should calculate the awards for moral damages based on individual circumstances (See Ch. Criteria related to the overall context of the violation);

iv. may include comforting some less serious violations with simple acknowledgement of the violation or awards of symbolic compensations;

c. expenses

i. could be compensated only if they have been

1. actually,
2. necessarily and
3. reasonably incurred;

ii. does not include certain categories of costs and expenses failing these criteria (e.g. contingency fees) and cannot be compensated in human rights cases.

11. in the process of evaluation and quantifying compensations, or ordering other reparatory measures, provide reasons based on the principles of necessity, equity, judicial discretion, causality and proportionality; the latter principle is the cornerstone of the judicial reasoning but it can be used in administrative decisions too.

Recommendations of procedural character

12. Reparations in human rights law, especially in cases originated from or related to armed conflicts, impose adopting special rules of procedure and a specific legal framework, which may be derogatory from ordinary procedural rules examining civil responsibility; consider elaborating and adopting a special legal framework.

13. This framework must comply with the requirements of an effective remedy within the meaning of Article 13 of the Convention. Evaluation of just satisfaction claims is an intrinsic part of remedies, especially those securing compensation for the breach of substantive rights under the Convention. Consider revisiting and learning about the right to effective remedy under general international law and under Article 13 of the Convention.

14. Consider regulating the procedure for submission and examination of just satisfaction claims based on the principles of adversarial proceedings securing the rights of the victims to be heard and submit claims for just satisfaction and evidence substantiating those claims. The following considerations are relevant in this context:

a. These procedures can put the burden of proof, not an excessive one, on the victim to submit and claim compensation, including providing procedural timeframes for such submissions;

b. Failure to comply with the procedural timeframes, may result in a refusal to grant compensation, with the exception of moral damages in cases involving specific violations (see Procedure); these moral damages can be awarded ex-oficio by courts;

c. An adequate organisational structure, right to appeal, jurisdictional powers, etc. can be provisioned by the procedural rules in accordance with key principles of fairness (Article 6 of the Convention) and effectiveness (Article 13 of the Convention);

d. Specific remedies of an administrative character may provide detailed rules for collecting, registering, and processing claims, as well as the rules for decision-making and the valuation of claims; judicial remedies could be more flexible and less detailed in this respect, offering more discretion to judges;

e. Rules of procedure on just satisfaction extend to provisions on enforceability of the decisions.

7. Indicative list of the relevant cases

The below selection of the Court’s judgments on just satisfaction has only indicative value for the assessment of the claims for reparation in the cases that originated from or were related to armed conflicts. It is not necessary to copy the amounts awarded as moral damages or to duplicate the evaluation of the claims for pecuniary damages and costs and expenses. Each case is individual, but it can be compared with the cases that the Court has already examined. A case or cases from this list serve as a starting point for the examination of the claims in the manner of the Court and as the basis for the calculation of moral damages. The amounts of satisfaction are persuasive but not mandatory.

Inter-State cases related to armed conflicts

Ireland v. the United Kingdom, 5310/71, 18 January 1978

Violations of Articles 3 and 5 following the exercise of a series of extrajudicial powers of arrest, detention and internment, as well as the alleged ill-treatment of persons thereby deprived of their liberty, in period from August 1971 until December 1975 in the Northern Ireland.

The Court did not apply the then-Article 50 (just satisfaction) because, as Ireland submitted, the case had 'not as an object the obtaining of compensation for any individual person and did not invite the Court to afford just satisfaction'.

Cyprus v. Turkey (Just Satisfaction), 25781/94, 12 May 2014

Numerous violations of the Convention by Turkey, arising out of the military operations it had conducted in Northern Cyprus in July and August 1974, the continuing division of the territory of Cyprus and the activities of the "Turkish Republic of Northern Cyprus";

Awards in respect of missing and enclaved citizens in Northern Cyprus.

Georgia v. Russia (Just Satisfaction), 13255/07, 31 January 2019

Coordinated policy of arresting, detaining and expelling Georgian nationals" had been put in place in the Russian Federation amounting to an "administrative practice" constituting a collective expulsion of aliens, contrary to Article 4 of Protocol No. 4. The Court also found that the practice had infringed Article 5 §§ 1 and 4, Article 3 and Article 13 of the Convention, owing in particular to the arbitrary nature and conditions of detention of the persons arrested;

Quantification and identification of victims eligible for compensation in respect of non-pecuniary damage in an inter-State case.

Georgia v. Russia (II) (Just Satisfaction), 38263/08, 28 April 2023

Administrative practices on the part of the Russian Federation, in the context of the armed conflict between Georgia and the Russian Federation in August 2008, in violation of Articles 2, 3, 5 and 8 of the Convention and Article 2 of Protocol No. 4;

Award of non-pecuniary damages to applicant Government, for benefit of identified victims, based only on evidence submitted by it in view of respondent Government's failure to participate in proceedings.

Other relevant cases related to or originating from armed conflicts

Al-Jedda v. the United Kingdom, 27021/08, 7 July 2011

Detention of Iraqi national by British Armed Forces in Iraq; non-pecuniary damages awarded

Al-Skeini and Others v. the United Kingdom, 55721/07, 7 July 2011

Continued preventive detention of Iraqi national by British Armed Forces in Iraq on basis of United Nations Security Council Resolution; non-pecuniary damages awarded;

Catan and Others v. the Republic of Moldova and Russia, 43370/04, et seq. 19 October 2012

Educational policy within separatist region; collective evaluation of non-pecuniary damages

Chiragov and Others v. Armenia (Just Satisfaction), 13216/05, 12 December 2017

Aggregate award for pecuniary and non-pecuniary damage for individuals displaced in the context of the conflict over Nagorno-Karabakh.

Demopoulos and Others v. Turkey (Dec.), 46113/99, et seq., 1 March 2010

Special reparation mechanisms (Immovable Property Commission under Law no. 67/2005 in respect of deprivation of property in Northern Cyprus in 1974) on compensation of the claims for pecuniary damages were effective and could have been used by the applicants before bringing a claim to the Court.

Doğan and Others v. Turkey (Just Satisfaction), 8803/02 et seq., 13 July 2006

Damage suffered by villagers deprived of access to their village for nearly ten years.

Jaloud v. the Netherlands, 47708/08, 20 November 2014

killing of Iraqi national by Netherlands serviceman, member of Stabilisation Force in Iraq; Moral damages awarded for ineffective investigation.

Loizidou v. Turkey (Just Satisfaction), 15318/89, 28 July 1998.

Uncertainties inherent in assessing economic loss caused by denial of access to properties in the Northern Cyprus, sum awarded on equitable basis;

Non-pecuniary award made in respect of anguish, helplessness and frustration suffered by applicant.

Mozer v. the Republic of Moldova and Russia, 11138/10, 23 February 2016

Detention ordered by "courts" of separatist region; other rights breached in this respect; non-pecuniary damages awarded

Sargsyan v. Azerbaijan (Just Satisfaction), 40167/06, 12 December 2017

Aggregate award for pecuniary and non-pecuniary damage for individuals displaced in the context of the conflict over Nagorno-Karabakh

Varnava and Others v. Turkey, 16064/90, et seq, 18 September 2009

Silence of authorities in face of real concerns about the fate of Greek Cypriots missing since Turkish military operations in northern Cyprus in 1974; failure to conduct effective investigation into their fate.

Non-pecuniary damage to each of the applicants, in view of the grievous nature of the case and decades of uncertainty the applicants had endured. The Court explained that it did not apply specific scales of damages to awards in disappearance cases, but was guided by equity, which involved flexibility and an objective consideration of what was just, fair and reasonable in all the circumstances.

Xenides-Arestis v. Turkey (Just Satisfaction), 46347/99, 7 December 2006.

Applicant hindered from returning to her home and property in Northern Cyprus not required to apply to new domestic Commission in order to seek reparation for damages, once the Court had already decided on the merits of her case.

Pecuniary, non-pecuniary damages and costs and expenses awarded.

Other relevant cases

Agrokompleks v. Ukraine (just satisfaction), 23465/03, 6 October 2011

Global assessment of actual and future losses.

Akdivar and Others v. Turkey (Just Satisfaction), 21893/93, 1 April 1998

Awards made in respect of houses, cultivated and arable land, household property, livestock and feed and cost of alternative accommodation. Having regard to high rate of inflation in Turkey, sums to be converted into pounds sterling.

Having regard to the seriousness of the violations found, an award should be made. Claim for punitive damages dismissed.

Andrejeva v. Latvia, 55707/00, 18 February 2009

Refusal to take applicant's years of employment in former Soviet Union into account when calculating her entitlement to a retirement pension because she did not have Latvian citizenship;

Global award for pecuniary and non-pecuniary damage.

Ghimp and Others v. the Republic of Moldova, 32520/09 , 30 October 2012

Material damaged awarded following the loss of breadwinner died after being subjected to police abuse.

Immobiliare Saffi v. Italy, 5238/10, 28 July 1999

Various pecuniary claims for inability to use property following

Jalloh v. Germany, 54810/00, 11 July 2006

Non-pecuniary awards for forcible administration of emetics to a drug-trafficker and use of evidences in trial

Khristov v. Ukraine, 24465/04, 19 February 2009

Failure to take special characteristics of listed building into account when assessing compensation for its expropriation

Kurić and Others v. Slovenia (Just Satisfaction), 26828/06, 12 March 2014

Award in respect of pecuniary damage incurred by the applicants as a result of "erasure" from the State Register and impossibility to acquire identity documents

Megadat.Com SRL v. Moldova (Just Satisfaction), 21151/04, 17 May 2011

Refusal to grant compensation for the future loss because of the speculative claims.

Menteş and Others v. Turkey (Just Satisfaction), 23186/94, 24 July 1998,

Awards made in respect of first three applicants' houses, household property, agricultural machinery of one applicant and livestock and feed of two applicants.

Mikheyev v. Russia, 72166/01, 26 January 2006

Calculation of future loss as material damage following torture.

Oferta Plus S.r.l. v. Moldova (Just Satisfaction), 14385/04, 12 February 2008

Complex claims for actual and future losses

Ojog and Others v. the Republic of Moldova (Just Satisfaction), 1988/06, 18 February 2020

Alternative resolution of pecuniary claims; the applicants refused to use available restitutio in integrum

Sovtransavto Holding v. Ukraine (just satisfaction), 60634/12, 02 October 2003

pecuniary damage suffered by the applicant company as a result of the loss of real opportunities to manage in practice the company of which it was a partial owner and to control the latter's assets,

non-pecuniary damage resulting from the situation of prolonged uncertainty in which the applicant company had been placed.

The Former King of Greece and Others v. Greece (Just Satisfaction), 60797/17 et seq., 28 November 2002

Pecuniary damages awarded in lack of restitution.

Žáková v. the Czech Republic (Just Satisfaction), 2000/09, 6 April 2017

Moral damages for lack of legal requirements for rectification of civil status for transgender persons