

EXPERT REMARKS
DEBATE ON COMPENSATION UNDER INTERNATIONAL LAW WITH A FOCUS ON
OPTIONS FOR ENFORCEMENT OF PAYMENTS AWARDED BY INTERNATIONAL
HUMAN RIGHTS COURTS, CAHDI MEETING ON 11 APRIL 2024

VERONIKA FIKFAK, 11 April 2024

Thank you, Mr President, members of the Committee,

I am a Professor of Human Rights and International Law at University College London and a co-Director of its Institute for Human Rights. I have been working on just satisfaction before the European Court of Human Rights since 2016 and for the past eight years I have led a project on the execution of judgments of the European Court of Human Rights. In this context, we have analysed 25,000 judgments of the Court and conducted a survey of different countries in Europe, to understand how enforcement of judgments takes place, even if a state is reluctant to comply.

In my remarks, I will focus on options for the enforcement of compensation awards, specifically in the context of judgments against the Russian Federation. This question fits within the broader debate about seizure and confiscation of Russian assets. Thus far this debate has concentrated on securing funds for Ukraine to fight the war or the establishment of a mechanism that would disburse these assets in the context of war reparations and rebuilding of Ukraine. My comments today concern the more limited and separate question of potentially using these assets to enforce compensation awards rendered by the European Court of Human Rights.

In this talk, I would like to make three points. First relates to the types of cases in which compensation is to be paid and the victims that are to benefit from these payments. Second relates to the mapping out of existing avenues pursued by lawyers in seeking to secure payment of damages and the obstacles they face in these processes. Third relates to the issue of countermeasures – the seizure and confiscation - proposed.

My first point: Victims or Beneficiaries of the compensation awards

As you know – the Council of Europe has set up a Public register of just satisfaction owed in all individual and interstate cases against Russia – some 1400 cases are on that list. If we focus on individual cases and leave aside the Yukos

case, two types of cases dominate this list and they represent more than 96% of all the monies that are to be paid out to individuals.¹

The first category relate to violations of physical integrity and in particular right to life, prohibition of torture, and arbitrary detention. These amount to about 93 mio euros in compensation. The second category of cases relate to violations of personal integrity and specifically to freedom of expression and association. These amount to 85 mio euros in compensation, the biggest one of these amounts to a 70 mio award for 1013 members of Jehovah's witnesses who had been prohibited from practicing their religion in violation of Article 9 of the Convention.

It is important to underline that none of the cases that have thus far been decided by the Court relate to the invasion of Ukraine 2022 or the damage connected to that. Instead, more than 90% of victims affected by these individual cases are Russian and currently live in Russia. These are protesters against the war, human rights activists and organisations that have been shut down, they are relatives of victims who have disappeared.

This means that at the moment if we are concerned with the question of enforcement of compensation in judgments that are final, the question is one of getting rather small amounts of money to Russian citizens who currently live on Russian territory. This obviously represents a number of problems: even if confiscation of assets were legal, even if we had a mechanism to distribute the money, the question is whether and how this money would get to the victims in Russia. And then secondly, whether these victims – for fear of repercussions - wanted those monies at all.

Now – the Committee of Ministers has linked the issue of enforcement to the interstate cases and pending cases against Russia - around 7500 applications are currently awaiting judgment from the Court, most of these are by applicants from Crimea, eastern Ukraine and Sea of Azov. Only a minority of these will be linked to the invasion of Ukraine in 2022. At this point, we do not know what the awards of the Court will be in these cases. But given previous case law the amounts of compensation may be comparatively quite small – between 10000-20000 euros per person for physical integrity violations, though potentially much more if property is involved.²

The strategies I will turn to now would be available to those potential claimants.

¹ See graph 1 at the end.

² See graphs 2, 3 and 4 at the end.

Second point: Mapping of avenues lawyers have been pursuing for enforcement of compensation awards

On average, European countries, including Russia until 2022, have been generally quite good at paying just satisfaction awards to victims of human rights violations (93% of all compensation is paid within 5 years of the judgment). But when states have resisted making the payment, lawyers have been looking at securing enforcement of compensation awards through domestic courts. And this is the route that is currently being considered in relation to Russia's outstanding debts.

Where a judgment has been rendered against Russia by an international court, such as the ECtHR, domestic courts should be entitled to enforce that judgment against Russian assets. In a survey we conducted around Europe, there have been about 100 cases in which victims of human rights violations have sought to enforce ECtHR judgments in national courts. Many of these have been successful either because domestic courts ruled in their favour or because the threat of suit nudged the state to comply with the judgment before the domestic courts ruled to enforce the decision.

National legal orders themselves determine whether judgments are self-executing/directly applicable in domestic legal orders. What is clear from our survey is that courts around Europe – Spain, Italy, UK, Cyprus – could either treat judgments of the European Court of Human Rights as a *res judicata*, and give it exequatur, thus enabling its enforcement. Or, in many jurisdictions in which the Convention stands above or equal to national law in the domestic constitutional order, judgments of the Court are considered part of domestic law and therefore directly enforceable by domestic courts.

This means that domestic courts will not relitigate decisions that have been rendered by the ECtHR. This applies both when the claim for enforcement is made in domestic courts of respondent state but also in certain states when it is made against a third party – like Russia. This has in fact happened – for example – a Cyprus court has held that a decision of the ECtHR against Turkey is directly enforceable by a Cyprus Court because under the Cypriot constitution the Convention stands above domestic law. In English Courts, in contrast, international decisions are treated as acquired rights and directly enforceable out of international comity towards the European court (*Dallal v Bank Mellat*).

Now – litigation in domestic courts raises issues of state immunity from execution – specifically that state owned property – such as diplomatic, military and cultural property, and property of central banks situated on foreign territory is immune from execution in a judicial process. But immunity is not an insurmountable problem:

FIRST for property, which is intended for commercial purposes, there is an exception from immunity from execution. In two recent decisions from 2021, for example, the Swedish Supreme Court and a Belgian court have held that sovereign wealth funds are not immune from execution. The property of the National Fund of Kazakhstan, a sovereign wealth fund managed by the Kazakh central bank, was held as being used to maximise returns in the same way as a private investment and was thus not entitled to immunity. Russia's sovereign wealth funds, which are currently immobilised and amount to about 9 billion euros each, could be used to pay compensation currently owed by Russia.

SECOND, aside from the commercial/private exception to state immunity, some states have adopted measures through legislation or executive action that allow for seizing or confiscation of state assets or lifting of immunity and thus make claims over state property viable in domestic courts.

For example, in April and May 2022, Ukrainian Supreme Court held that sovereign immunities do not protect assets of the Russian Federation for war reparations. In turn, Ukrainian courts have rendered several decisions allowing individuals' claims for reparations against this property.

In Canada, new legislation has been adopted – Special Economic Measures Act, which allows for confiscation of assets for compensating victims of grave breaches of international peace and security and gross and systemic human rights violations. The enforcement of some of the judgments of the ECtHR could fall under this head.

Other states – like the UK, US, Estonia - have also proposed similar legislation, most of which focuses on ensuring immobilised Russian assets are used to rebuild Ukraine. Using frozen assets and transferring them to victims of abuses in domestic law is not without precedent. Since 2011, victims of the Saddam Hussein regime have obtained judgments against Iranian frozen assets in US courts, on the basis of which the US has transferred these funds to the victims in fulfilment of the courts' judgments. If countries therefore decide to make these assets available also to Russia's human rights victims, then victims who already have an ECtHR judgment can turn to domestic courts and seek payment of their just satisfaction claims.

All of these options enable, facilitate enforcement of compensation awards in domestic courts through an existing route and do not require a new separate mechanism.

Thus far – There have not been many cases in which enforcement of an ECtHR award was sought. That is mostly because states pay compensation promptly but also because taking a claim to court can be a lengthy and at times expensive process. But the present circumstances have changed the game and there are now several claims being pursued before different domestic courts seeking enforcement of compensation awards against Russian assets.

Third point - Countermeasure

On the issue of countermeasures, I have concerns about the reversability of measures such as confiscation of assets. I also have concerns whether the transfer or confiscation of assets would fill the inducement purpose in Article 49 of the Draft Articles of State Responsibility. The Articles require that the measures are intended to ‘induce’ Russian federation to comply. In this regard, the inducement purpose does not extend to cover measures taken by an injured State to bring about compliance. Thus, taking the wrongdoer’s assets to satisfy a claim of compensation would not be a lawful countermeasure (Paddeu).

The other option is to keep the assets immobilised until Russia has decided to agree to a peace deal and pay reparations for war and in that process, also require it to pay its debts from all ECHR judgments, including claims due to Russian citizens.

But if states wish to go further than this option and opt for a potential transfer of assets to an international mechanism/commission, they may rely on the UN General Assembly Resolution and the CM Resolution to establish the commission, since both documents recognise the need for establishment of an international mechanism for damage, loss and injury. But the Resolutions seems to limit such a mechanism to damages stemming from the 2022 invasion. In this context, the majority of just satisfaction claims against Russia would not fall under this mechanism as they predate the invasion.

This would of course have implications for the categorisation of claims on the Public register of just satisfaction. At the moment, the register does not distinguish cases based on facts. If cases related to war were given priority, then the register would have to make a distinction between cases relating to the war and those that are not. In addition, the relationship between claims made to the newly created Register for damages caused in the war and any potential decisions of the ECtHR relating to the same facts would need to be resolved.

In contrast - If the international commission’s jurisdiction were to be extended to all claims against Russia – including debt from human rights claims, then there would be two questions to address: one is a question of political priorities – how

should the assets be used and which types of claims should be satisfied first and in what order. Should war reparations come before satisfaction of other ECTHR compensation claims?

Secondly, we need to consider what precedent the creation of a broader claims commission creates for other countries within the Council of Europe who have not paid their just satisfaction claims. Are we singling out Russia and treating it differently because it is no longer a member of the COE and because we have no other incentive options or are we creating a new precedent of how we will now treat other states who fail to pay their JS awards?

It is therefore important to consider how the solutions adopted are to be limited to a specific set of facts or situation.

To conclude:

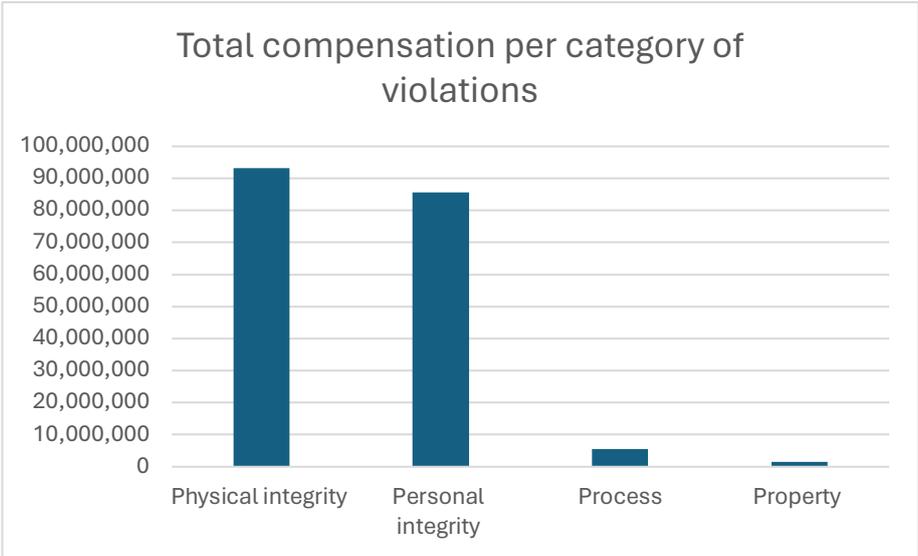
My view is that confiscation or transfer of assets to compel enforcement of compensation awards against Russia would not be a lawful countermeasure under current international law.

Immobilised assets can be kept frozen until such time as Russia agrees and consents for these to be used by an international mechanism, including for payment of compensation awards to all claimants.

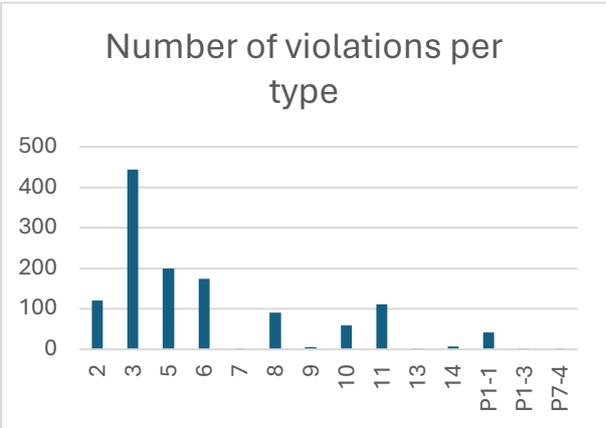
In the meantime and until an international commission is created, we need to keep an eye on alternative and potentially viable option that victims can pursue in different jurisdictions – that is enforcement through domestic courts.

Thank you.

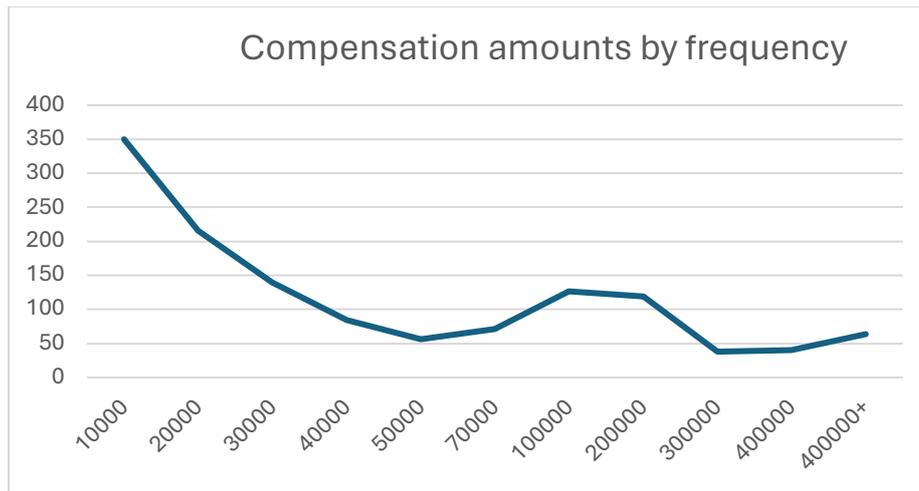
Relevant Statistics from the 1254 individual cases on Public Register



Graph 1: Showing 96% of all compensation concentrated in first two categories of violations



Graphs 2 and 3: Showing most frequent violations are physical integrity violations



Graph 4: Showing most frequent compensation amounts in ECtHR judgments – the lower amounts are for individual victims, the higher amounts are for groups of individuals