Ewa Bagińska  
Chair of Civil Law, Gdańsk University  
Poland  

The XIXth INTERNATIONAL CONGRESS OF COMPARATIVE LAW IN  
VIENNA 2014  

General Report  
Section IV A 1. Public International Law  

**Damages for the infringement of human rights**

*Preliminary draft – do not reproduce or cite without the author’s consent*

Table of contents

I. Introduction

II. General Overview

III. Constitutionalisation of the right to damages for violation of human rights  
   III.1. Forms and scope of constitutionalisation of the right to damages for violations of human rights  
   III. 2. International human rights and constitutional human rights  
   III.3. The implications of constitutionalisation of the right to damages

IV. The creation of new causes of action for remedying human rights violations in separate provisions or judge-made law

V. The interplay between the ECHR remedies and domestic remedies

VI. General remarks on the scope of application of general rules of liability (tort) law

VII. Claims for compensation against private parties

VIII. Additional prerequisites of a claim for damages

IX. The purpose and functions of the damages remedies in cases of infringement of human rights

X. State liability for infringements of human rights  
   X. 1. Specific categories of rights protected by damages remedy  
   X. 2. Illegal conduct of a public authority:  
      2.1. Fault-unlawfulness-mere infringement
2.2. Can the legislator be held liable in damages for violations of human rights?

2.3. Compensation claims stemming from the acts and omissions of the judiciary

XI. Reparable harm and scope of damages
   XI.1. General remarks
   XI.2. Instances where no proof of harm is necessary
   XI.3. Scope of damages (compensation) and calculation:
   XI.4. On the various levels of discretion in adjudication damages
   XI.5. Limitations and caps on damages
   XI.6. Punitive or exemplary damages

XII. Legal standing and selective procedural issues
   XII.1. In general
   XII.2. The question of foreign states as defendants
   XII.3. Individuals (emanation of states, public officials, agents)
   XII.4. Jurisdictional issues:

XIII. Special indemnity regimes
   XIII.1. Indemnity for historical injustices
   XIII.2. Gross and systematic violations

Comparative Conclusions

ANNEX: the Questionnaire

I. Introduction

At the outset of the comparative report\(^1\) it should be stated that its subject matter relates to the legal grounds, premises and extent of pecuniary compensation (damages, reparation, just satisfaction) for the violations of human rights in domestic legal systems. The report does not cover all possible remedies that are available in national jurisdictions in cases of infringement of human rights, such as e.g. restitution (return of property), injunctions, declaratory judgments, guarantees of non-repetition, rehabilitation, satisfaction, annulment of decisions, revocation of judgments, etc.

The particular features of human rights as ‘right for humans’ or ‘rights for individuals’ and their international dimension implicate several questions and controversies as to the availability, foundations and scope of a claim for pecuniary compensation. The report considers all mechanisms by which public authorities and private persons can be obliged to compensate for violations of human rights, including

\(^1\) This report is based on 20 reports that came from 13 European civil law jurisdictions, including 6 post-Socialist
special (alternative) compensation systems. Compensation for historical injustices and for gross and systemic violations is also discussed.

International human rights law is primarily concerned with obligations that a state owes to its own citizens (or others in its territory), principally to protect them from abuse by the state’s organs, officials and other citizens. This is often conceptualised as ‘vertical effect of human rights’. In several jurisdictions this approach was the earliest starting point as regards effectiveness of constitutional rights. That has changed over times and the constitutional norms regarding fundamental rights are by and large directly applicable (albeit there may be distinctive treatment of some categories of so called second and third generation human rights).

Accordingly, the traditional focus of the protection of human rights has been on public law and State obligations and, as it will be shown, it has remained so until today in a number of surveyed jurisdictions. Although tort law rules protect most basic and most valued human rights, the law of torts has not been in the centre of attention of the international human rights and constitutional scholarship. Liability consequences of actions or inactions of public authority organs involving infringements of fundamental rights have been considered as subsidiary in many countries (the approach taken in Germany, the UK, Czech Republic).

The main focus of this investigation is whether compensatory claims based infringements of human rights or of constitutional rights have been made available through a special (independent) cause of action, or through existing liability rules (regardless of whether public authority law or general tort law) and what are the reasons and ramifications of either solution. A question that follows is whether human rights protection requires a new cause of action to be created in the given system, or the modification of existing causes of action will generally suffice to meet the standard of effective protection. It should also be considered whether the value of protection of human rights as expressed in international treaties and ius cogens as well as in national constitutions suffices to conclude that the interests at stake should enjoy protection under the existing civil liability rules or rather that another general system (a new set of rules), such as for example ‘constitutional law of torts’, should be developed alongside existing traditional systems of liability.

II. General Overview

In national legal systems violations of human rights may trigger protection on different normative levels and different methods of regulation are used. On the one hand, the protection may be guaranteed on the constitutional level and on the statutory level, and on the other hand, in substantive law and procedural regulations. The array of available remedies in the cases of infringements is to be found traditionally and primarily in administrative law, criminal law and tort law. However, the reports

---

2 In this draft citations to national reports are omitted unless a personal opinion or evaluation of the Reporter is referred to.
reflect a growing role of special statutory mechanisms that escape easy classifications and thus belong to the grey area between public and private law.

In a few reported jurisdictions (the UK, Ireland or Canada) legislators have enacted special acts on human rights protection, which are to a lesser or greater degree comprehensive, where a separate regime of liability for human rights violations has been laid down. Those acts aim at the realisation of the international obligations of governments under the relevant international or supranational agreements and in some instances also provide protective instruments for internal constitutional norms (e.g. in Ireland). The majority of investigated legal systems, however, lacks either a special human rights legislative enactment which would grant a direct claim for compensation on the statutory level, or explicit constitutional safeguards of the right to have the damage redressed. All systems are naturally in the constant process of shaping the relations between the human rights norms (whether constitutional or international) and the rules on tort law (or administrative liability).

Two further preliminary observations regarding European reports should be made. All European reports come from Council of Europe Member States that are bound by the European Convention on Human Rights of 1950 (ECHR). Moreover, except for Turkey, the other European jurisdictions are also the European Union (EU) Member States. The EU is a growing source of human rights law, which can be enforceable not only against the public bodies, but also between private parties, mainly through primary/treaty law, laws implementing directives and the case law of the Court of Justice of the EU. It must be borne in mind that the despite the on-going accession procedure to ECHR by the EU, currently also the Charter of Fundamental Rights of the European Union (2000/2009), that has a status of the EU primary law, must be respected in the EU Member States in addition to ECHR (with certain limitations on the application of the Charter in the UK and Poland\(^3\)). It should be recalled that ECHR contains the right to effective remedy (art. 13) and the right to just satisfaction – art. 41 ECHR and the Charter – the right to effective remedy (art. 47) in cases of violations of the rights guaranteed in those acts.

### III. Constitutionalisation of the right to damages for violation of human rights

#### III.1. Forms and scope of constitutionalisation of the right to damages for violations of Human rights

‘Constitutionalisation’ is understood here in its strict (formal) sense, i.e. as the process of elevating the right to damages in cases of infringement of human rights to the normative level of constitutional rules and principles. The constitutionalisation

\(^3\) See art. 2 of the Protocol no 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.
first results in prevalence of the constitutionally protected right over a right protected by ordinary legislation in cases of their conflict, and secondly, it may result in the creation of a special cause of action on the constitutional level, independent of ordinary law causes of action for such a claim. In consequence, a court will be able apply the constitutional cause of action were there no legal bases in ordinary law (whether statutory or case law, depending on the system) on which a claim for compensation could be based. In this way human rights receive effective and direct protection in domestic courts by operation of domestic legal rules.

‘Constitutionalisation’ is also just one of the methods of conceptualisation of the effect that human right may have in the private sphere. The other theories are the Germanic mittelbare and unmittelbare Drittwirkung or its equivalent – horizontal direct and indirect effect, among other examples\(^4\). As just mentioned, modern constitutions, and hence also the rights enshrined therein, enjoy direct applicability (direct enforcement, direct effect), although the extent of such a direct applicability may of course differ. While the vertical effect (State - citizen) is commonly accepted nowadays, the horizontal effect of rights and its scope (direct or indirect) is an evolving phenomenon\(^5\). In particular, the true effect of human rights in a given system will depend, among other factors, on the ability for an aggrieved person to file a constitutional complaint regarding legislation that violates fundamental rights (an action which is generally limited to constitutional rights).

It should also be indicated that from the perspective of international law, if domestic law were simply to be interpreted in conformity with international and regional human rights law we would not speak of constitutionalisation, but rather refer to it as ‘indirect effect of human rights’ (unless such rights were incorporated in the constitutional act).

For many legislators, the enforcement of human rights is first of all a matter of introducing a constitutional guarantee of the right to redress in cases of violations of such rights. Such a guarantee has been provided on the constitutional level in many jurisdictions.\(^6\) It has been designed as:

a) a general right to compensation for violation of every constitutionally protected right, or

b) a right implicit in the constitutional right to claim damages for unlawful conduct of public authorities,

c) a specific right to compensation in cases of violations of specific human (constitutional) rights.

---


\(^5\) See the general report to the XIX CONGRESS by V. Trstenjak, ‘The influence of human rights and basic rights in private law’.

\(^6\) By ‘constitutional level’ I mean a domestic constitutional act (or acts), such as the constitution or basic laws as well as any national rules of the constitutional ranking.
It is not surprising that it is hard to find a system with a general right to compensation for violation of constitutionally protected rights committed by any person (Estonia and Slovenia being notable examples). The mixture of b) and c) solutions appears to have been adopted most frequently. In fact, in each country we will find specific right to compensation in cases of violations of specific human (constitutional) rights (see X.I.).

Having been influenced by international and regional human rights systems, democratic constitutions provide for an effective remedy for the victims of infringements of human rights by the State. Since the obligation to compensate for damages incurred by individuals is regarded as a fundamental duty of a democratic state, many countries have introduced a right to claim damages for wrongs committed by public authorities.

The entitlement to damages has been designed either a standalone cause of action or in combination with tort or administrative law. Although it is evident that general provisions of state liability will also apply to breaches of human rights, the concept according to which a concrete, subjective right must have been violated in order to demand compensation has limited the operation of the constitutional norm. By way of example, in Germany the Basic Law stipulates that everyone who is violated in his rights by acts or omissions of the German public authority has a right to a judicial remedy (art. 19 § 4) and the principle of liability of the State for tortious acts of its agents (art. 34). However, in light of the German courts case law the right to effective remedy can be claimed only in connection with a subjective right conferred on the individual in the Basic Law, statutory law or international human rights law. The same solutions exists in Portugal (see also infra III.3).

In Italy the constitutional regime for claims based on violations of human rights enshrined in the Constitution is primarily grounded in the criminal and administrative law. For these cases, the legal basis for compensation is to be found in the Constitution and in the general liability clause in the Civil Code.

The constitutionalisation of the right to compensation for violations of human rights is hence of particular significance in post-Socialist democracies as well as in countries that are still undergoing a democratisation process (e.g. Brazil). In Slovenia, the right to be compensated for damage caused by unlawful actions by public authorities (that exists in addition to the general right to redress mentioned above) has been considered to be a human right in itself. Similarly in Poland, article 77 § 1 of the Polish Constitution is construed as providing for a subjective right to compensation that reflects the rule of law. In consequence, this right is subject to special constitutional protection as well as can be the basis of a constitutional complaint to the Constitutional Court.

---

7 According to § 25 of the Estonian Constitution (1992) everyone has a fundamental right to the compensation for damage, whether pecuniary or non-pecuniary, caused by an unlawful action of any person. The Slovenian Constitution 1991 - Bill of Rights in § 15 guarantees judicial protection and the right to obtain redress for the violation of human rights and fundamental freedoms. This has been interpreted to include a claim for compensation.

8 Czech Republic, Poland, Slovenia, Estonia, Croatia, Turkey Brazil, Portugal

9 Poland, Czech Republic, Slovenia, Estonia.
A right to compensation can be limited to certain violations or to certain rights. Principally, most political and civil rights are both directly applicable and protected by damages remedies, while the social, economic and cultural rights are considered as not directly applicable without further statutory contents, and in general a claim for compensation may not be raised\textsuperscript{10}. In consequence, damages remedies are more broadly admitted for violations of civil and political human rights than for violations of economic, social or cultural human rights. ‘All-rights-are-equal’ approach in the context of compensation claims exists rarely, and mainly in jurisdictions where reparable damage is not limited by the concept of protected rights, because the focal point (and the primary element triggering liability) is the existence of damage (i.e. in the French legal tradition). By contrast, in Brazil the constitutional right to damages is guaranteed in respect of inviolable rights: personality rights, privacy, private life, honour and image of persons – all rights rooted in dignity and respect for every human being\textsuperscript{11}.

Another distinction rights can be observed with respect to constitutioonal as opposed to ‘human’ rights. In Italy, the regime applicable to violations of constitutional rights differs from the rules on State liability, which primarily concern human rights violations.

The Estonian legislator introduced a rather unique distinction in the treatment of particular types of human rights depending on whether a person demands redress of pecuniary or non-pecuniary loss. As to the claim for pecuniary damages, it is irrelevant what individual right has been violated. Compensation of non-pecuniary damage, on the other hand, is available only for certain fundamental rights enumerated in the State Liability Act (wrongful degradation of dignity, damage to health, deprivation of liberty, violation of the inviolability of home or private life or the confidentiality of messages or defamation of honour or good name of the person).

Hence, in relation to some countries we can speak of an internal hierarchy of rights from the perspective of entitlement to damages.

\textit{III. 2. International human rights and constitutional human rights}

Although an unlawful conduct of public authorities frequently consists of the violation of internationally protected human rights, the national treatment of that category of rights and of constitutional (domestic) rights may vary. The distinction in protection of rights can be ascribed inter alia to the dualist or monist model of reception/incorporation of international law into domestic legal systems.

This distinction is particularly noticeable in American and Canadian law, where the doctrine of ‘State action’ plays a primary role. In acceding to human rights treaties, the U.S. declares such treaties as non-self-executing and thus dependent on domestic law-making to make treaty-based rights and duties enforceable through

\textsuperscript{10} Explicitly in Germany, Portugal, Italy, the US.
\textsuperscript{11} Art. 5 of the Brazilian Constitution.
private civil actions. According to court practice subsequent inconsistent congressional legislation may override any treaty-based rights. Much of the U.S. law providing damages remedies for acts that infringe international human rights focuses on domestic violations. When constitutional rights overlap with international human rights (e.g. freedom from unreasonable and warrantless searches, seizures and arrests; freedom from cruel and unusual punishment, equal protection of the laws) federal Civil Rights Act (Section 1983) as well as federal constitutional torts (Bivens) doctrine will apply (see infra III.3). Many international human rights, however, lie outside the scope of the U.S. constitutional rights or federal law rights and thus they are not bases for the types of claims mentioned above (human rights that impose affirmative duties of action on states, limitations on capital punishment, social and economic human rights). Moreover, American courts do not refer to international human rights norms in cases where no foreign or transnational element is present. The Alien Tort Statute, referring explicitly to international human rights legal norms, is the most distinctive federal U.S. law providing damage remedies for international human rights abuses.

The situation in Israel is distinct. International treaties and conventions, although ratified by the government, are not directly enforceable in Israeli law (but only indirectly – through favourable interpretation) until they are either formally imported by parliamentary legislation or recognized as customary international law. As no implementing legislation has been passed, only human rights that enjoy the status of customary international law form part of Israeli domestic law. No awards, however, have been adjudicated solely on the basis customary international law. The available avenue for the victim is thus a tort law cause of action. (predominantly through the tort of negligence) or special legislation.

In countries such as the US or France, were civil rights (libertes civils) became the corner stone of the legal order quite early (as well as in Germany in the post-war period) international human rights obligations have played a limited role in the domestic practice.

In the monist states the international norms protecting human rights have direct application (e.g. in Argentina, Italy, France, Poland, the Czech Republic - since 2001, Romania). Both in Argentina and in Council of Europe countries the victims can invoke the rights guaranteed by respective conventions before national authorities. This means that the domestic courts directly enforce the right to compensation for the infringement of human rights, if such a right is provided for in the treaty that is binding upon forum state. However, this does not necessarily mean that international human rights norms would be applied by a domestic court as a sole basis for adjudicating compensation or satisfaction.

In Argentina the Inter-American Convention and its interpretation by the Inter-American Court are part of domestic law in the field of human rights and the reparation of damages caused by the violation of rights enshrined in the Convention is

12 After the 2001 amendments to the Constitution – see the Czech report.
legally binding. Under the Constitution international and municipal laws are parts of the same system of norms.

The obligations of states under international treaties and customary international law implicate the duty to follow the jurisprudence of international courts and tribunals to whose jurisdictions the states submitted. However, neither Canada nor the United States has accepted the jurisdiction of the Inter-American Court of Human Rights, and no relevant international jurisdiction was accepted by Israel, either. By contrast, the CE countries accepted the jurisdiction of the European Court of Human Rights in Strasbourg (ECtHR)- see infra V.

III.3. The implications of constitutionalisation of the right to damages

The constitutional character of the right to damages implicates its direct application and enhanced protection. A question that arose in many countries is whether this direct applicability (direct enforceability) concept should be understood as granting a court the competence to apply the constitutional rule and not to apply ordinary law rules. In the context of damages remedy, the question essentially asks whether the court is generally permitted to ignore the rules of civil liability (or other special rules on liability) when such rules appear to be in conflict with the constitutional right to damages. The answer appears to be in the negative in most systems, but of course courts must anyway give effect to relevant convention rights through favourable interpretation of national law.

A rights-based-approach (specific to the Germanic tradition) rephrases the above question in the following way: should constitutional fundamental rights be regarded as containing a subjective claim against government to restore the legal situation and to compensate for harm sustained when infringed? This question is subject to theoretical discussions mainly in a number of civil law countries and also in Israel. The German Constitutional Court has denied the existence of a general obligation to compensate an individual for violations of fundamental (human) rights in the German legal system. In other words the German Constitution (Basic Law) does not create a separate cause of action for damages in every case of violations of human rights. From the constitutional law perspective the right to a judicial remedy (art. 19 §4) can be claimed only in connection with a subjective right conferred on the individual in the Basic Law, statutory law or the international human rights law. The German Constitutional Court has also held that the non-existence of an individual title in international law is no bar to a possible title based on German law tortious liability (art. 839 of the German Civil Code, BGB).

The solution according to which another fundamental right or other individual right must have been violated first in order to claim for compensation for damage is also present Portugal. Moreover, national restrictions on redressing non-pecuniary harm play an important role in this context. For example, from the perspective of Polish civil law claiming compensation for non-pecuniary damage caused by a violation of human rights is dependent on whether the violation can be considered an infringement of personal rights in the meaning of art. 23 of the Civil Code (which
contains an open-end catalogue of personal rights). Should this condition be disposed of through pro-constitutional (art. 77) construction of the Civil Code? The Polish Supreme Court has responded in the negative.

The admissibility of a right to compensation in every case of human rights’ violations with no additional duty to prove the elements of a tortious cause of action is currently under consideration of the Israeli Supreme Court. Until the decision is made common tort law is the right basis for the limited range of rights safeguarded by the Israeli Basic Laws. The latter are not regarded as constituting a new source of tort liability, neither through constitutional claims nor through the tort of breach of statutory duty.

In the systems that lack an explicit constitutional stipulation of the right to compensation in the case of violations of human rights, such a right is regarded to be rooted in the rule of law, the principle of equality and the protection of human dignity, and hence it can also be considered as being a constitutionally guaranteed right (e.g. in Greece, France, Ireland). Reference to the rule of law and the rule of legality implies that the right to damages aims to remedy the consequences of action or in action of public authorities bodies, their agents and functionaries, but not of private persons. Those jurisdictions that underline the public authorities liability approach do not favour a full (direct) horizontal effect of human rights (explicitly so in the reports for the Czech Republic, Slovenia, Poland, Norway, Italy, the UK).

IV. The creation of new causes of action for remedying human rights violations in separate provisions or judge-made law

In the UK under the of the Human Rights Act of 1998 a claim for a breach of a Convention right is a claim against a public authority, the latter notion having been interpreted by case law. Section 8(1) (HRA) provides that the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. The court must be satisfied, in the light of the circumstances of the case, that the award of damages is necessary to afford just satisfaction to the person in whose favour it is made. Just and appropriate in Convention terms really means ‘effective, just and proportionate’. ‘Just’ implies that it must be fair to all who are affected by it, including persons other than the person whose right was violated. Secondly, the remedy must be appropriate, i.e. effectively address the grievance brought about by the violation.

The English courts have a broad discretion in choosing the remedy appropriate in each case, a grant of compensatory damages being one amongst those remedies and rather restricted in its application. The question of compensation is often considered to be of secondary importance, after the declaratory judgment. The courts must take into

---

account the principles applied by the ECtHR under art. 41 ECHR. Damages may be awarded only by a court in civil proceedings (as generally competent to award damages), or by the High Court on an application for judicial review. If the victim brings judicial review proceedings against a public authority purely on Convention grounds, she may also claim damages.

**Canada** has two main human rights regimes. The Charter of Rights and Freedoms (1982) enforces civil and political rights throughout Canada. It only applies to the actions of government entities. The remedies to enforce the Charter are invalidation of laws that are contrary to the Charter or any ‘other remedy as the court considers appropriate and just in the circumstances’. In the light of the Supreme Court’s case law the Charter remedies, including damages, are determined by a ‘principle based’ approach, rather than a ‘rule-based’ approach. The Charter is enforced by the general court structure.

There also exists a quasi-constitutional regime (the Human Rights Codes) to remedy discrimination issues in each level of jurisdiction: federal, provincial and territorial. The codes have effect also between private parties. They are enforced through a special procedure that is first administrative and then judicial in nature. It typically involves a complaint to an administrative body (e.g. a Human Rights Commission), which does an initial evaluation and then submits it to an investigative officer for assessment, followed by an attempt at settlement; and then, where appropriate and necessary, the complaint is submitted to a judicial panel (e.g. a Human Rights Tribunal) which decides whether there has been a violation, if any, and awards the remedy. There can be recourse to the general court system either in exercise of a statutory right of appeal or a general right of judicial review.

In the **United States** the entitlement to damages remedy based on the violation of constitutional right escapes easy categorisation. In the US, Section 1983 of the Civil Rights Acts (42 U.S.C. § 1983) is a mechanism for obtaining damage awards in cases involving violations of U.S. constitutional rights and other federal rights embodied in domestic laws that overlap with civil and political human rights. Section 1983 claim can be brought against two types of defendants: local government entities and officials in their individual capacities. As regards local entities the plaintiff must prove that the violation of such rights followed from: an official “policy”, a “custom” or “practice” of pervasive rights violations of which policymaking officials had actual or constructive knowledge; or “deliberate indifference” toward recurring rights violation. The *Bivens* doctrine has extended this cause of action to cover federal officials as defendants. In the US, the courts will first apply any federal or state law remedies (such as Federal Tort Claims Act, state tort claims acts, specific anti-discrimination laws, among other examples) before that can address the same behaviour as falling under a constitutional tort under the Bivens doctrine. An explicit relief provided by the legislators is regarded as alternative to the

---

judicially created Bivens claims, in the sense that they justify a rejection of Bivens claim. Both Section 1983 suits and Bivens actions are referred to as ‘constitutional torts’.

In Ireland, the courts have created a unique solution of enforcing constitutional rights against any party (both public and private). The issue of remedies for infringement of human rights which are set out in the Constitution is not addressed in the Constitution act, and therefore, the courts have quite a lot of discretion in deciding the appropriate remedy, including damages, for infringements. Under the general principle of the supremacy of the Constitution over common law, the courts allowed litigants to challenge existing principles of common law on the grounds that they do not adequately protect or vindicate relevant constitutional rights. This has led to the creation of the concept of a ‘constitutional tort’, i.e. a cause of action on which basis damages can be awarded for tortious actions that have infringed human rights. This concept is different from the U.S. one in a significant way— in Ireland it is not limited by ‘State action’ doctrine, but it aims primarily at giving direct horizontal effect to constitutional rights. Hence, a constitutional tort can be committed by anyone: private individuals, corporations and by the State. If a constitutional right is also protected by means of legislation or may be enforced effectively and adequately within the parameters of an existing tort, then the trial court cannot exclusively rely upon the Constitution. Damages are calculated in accordance with common law principles. The concept of constitutional torts has been quite experimental in Europe, but so far it has found big support in the Irish legal scholarship.\(^\text{16}\)

In Israel, a mixed-legal system, the avenue for the victim is a tort law cause of action (predominantly through the tort of negligence) or special legislation. The same holds true for limited range of rights safeguarded by the Israeli Basic Laws\(^\text{17}\). The latter are not regarded as constituting a new source of tort liability, neither through constitutional claims nor through the tort of breach of statutory duty. However, the Israeli courts are on the road towards construing a new ‘constitutional tort’.

V. The interplay between the ECHR remedies and domestic remedies

The ECHR is regarded as both a constitutional instrument of European public order for the protection of individual human beings and a multi-lateral treaty operating in the legal space of the Contracting States. The focus of the Convention is first of all on some special categories of rights (art. 5, art. 6 – see below at X.1). Secondly, it provides a general competence for the ECtHR to award just satisfaction to a claimant (art. 41). As we know, in some cases the Court’s declaration that a violation has occurred is considered sufficient satisfaction for the applicant.\(^\text{18}\)

---


We now turn to the problem of the interplay between domestic claims for compensation and the monetary compensation in the form of ‘just satisfaction’ that is directly available to the victim under art. 41 and which may or may not by awarded as financial compensation by the ECtHR.

In most European states art. 41 ECHR is not construed as a standalone cause of action in a domestic court. Some other systems accept the interpretation that the ECHR adds new compensatory claims and modifies existing ones (eg. in Germany). The issue was resolved by the legislator in Estonia: a complementary basis for compensatory claims have been set forth the State Liability Act for the breaches of the ECHR. It is an independent domestic cause of action.

In Italy the legal basis for State liability for breaches of ECHR was initially found in art. 2043 of the Civil Code (the general clause on liability for faulty conduct) and art. 5 § 5 ECHR. In 1992 the Supreme Court held that the ECHR could not be construed as self-executing source of law under domestic law, but in 2005 it reversed its case law and declared that the violation of the rights enshrined in the Convention has immediate relevance within the domestic legal order. Similarly in Croatia, where provisions of the ECHR insofar as they mention damages for violation of human rights are considered as an explicit legal basis for damages in such cases.

In France international/regional human rights have not been incorporated into the Constitutional documents as the Declaration of the Rights of Man of 26 August 1789 had long preceded the international and regional instruments. However, the French courts have developed a rather stable practice of application of the ECHR rights not only in lawsuits against public authorities within administrative jurisdiction (responsabilité administrative), but also in civil suits against private parties and in cases which entail a flagrant irregularity by the administration infringing a fundamental freedom or a property right (voie de fait), also decided by civil courts. In addition, criminal courts apply the ECHR when awarding compensation for crimes (in adhesion claims).

According to the Greek reporter the entitlement to just satisfaction under art. 41 is a quasi ‘secondary right’ recognised by public international law (the ECHR) as a personal claim of the victim against the state. Based on the same logic, the right to just satisfaction has the same character under Greek domestic law, hence it is not an enforceable claim.

Although Norway adopted the Human Rights Act in 1999, the said act does not stipulate any right to damages. It is unclear whether human rights infringements may give rise to a liability sui generis, possibly based on Articles 13 or 41 ECHR, in conjunction with Article 2 of the Human Rights Act (which gives full effect to the international instruments). A claimant must hence base her claim on tort law.

In the UK, a victim of a breach of Convention rights contained in primary legislation does not have a claim under the HRA; she may either receive an ex gratia payment from the state, bring proceedings in the ECtHR and seek just satisfaction under art. 41 ECHR.

19 See decision no. 28507 of 23 December 2005 – the Italian report.
By means of the Irish ECHR Act of 2003 the ECHR became part of Irish law at the sub-constitutional level. Consequently, Irish courts are obliged to interpret Irish laws in a way that gives effect to Ireland's obligations under the ECHR. Under the Irish ECHR Act, any person who has suffered injury, loss or damage due to a breach of the Act may, if no other remedy in damages is available, institute High Court proceedings; the High Court may then award damages if it deems it to be the appropriate remedy for the breach (sec. 3 ECHR Act 2003).

The CE states generally follow the jurisprudence of the ECtHR, although there have been some clashes between constitutional courts and European Court in the field of protection of human rights. In particular, the German Constitutional Court has allowed departure from rulings by international courts in regard to human rights when these decisions do not conform to the constant jurisprudence of domestic courts (e.g. this concerns the balancing of privacy rights and the freedom of the press and post-sentence preventive detention).

Except for the UK the European claimants are generally not prevented from seeking further compensation in domestic courts after they have been awarded just satisfaction by an international tribunal (ECtHR), provided that the time limit for filing a claim for compensation has not passed (see reports for Portugal, Poland, Estonia, the Czech Republic). In fact, a relatively low level of damages awarded by the ECtHR encourages applicants from some countries to seek further damages in domestic courts. As the Czech reporter explains, financial compensation under the Czech state liability law (Act No. 82/1998) is considered an internal legal remedy that ensures compliance with the respective obligations under HRs treaties. Compensation under Art. 41 the ECHR is seen as independent and different from compensation under Czech law, because it is contingent upon the declaratory decision on violation of human rights by the ECtHR.

Naturally, most jurisdictions follow the bedrock principle of *compensatio lucrī cum damno*, as long as monies from different sources aim to compensate the same prejudice. As regards the sums awarded in order to compensate non-pecuniary damages, it is submitted that it may be correct to take such sums into account when assessing whether and to what extent the claimant should be awarded further compensation for non-pecuniary harm.

Unlike in the majority of analysed jurisdictions, UK courts construed the purpose of the HRA quite restrictively. In consequence, domestic law (HRA) is ‘not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg’. The British reporter has rightly observed in this regard that the ECtHR does not undertake a fact-finding as detailed as a common court on the questions of damages. Also, the awards of just satisfaction are not based on the principle of full compensation, and lastly, they have the relative value of money in the contracting states. Despite these differences between an international court and domestic court, a UK court would most probably not allow further compensation.\(^{20}\)

---

\(^{20}\) See the UK report p.11.
It may be concluded that compensation for economic losses awarded under art. 41 ECHR must be accounted for in eventual compensation for economic losses founded upon another (domestic) legal basis. Compensation for non-pecuniary loss may be reduced or excluded if the sum already awarded was considered as sufficient. When the conditions for just satisfaction under Art. 41 ECHR differ from those under relevant national law, the claimant may seek compensation in the domestic system (except for the UK).

VI. General remarks on the scope of application of general rules of liability (tort) law

In principle, private law elements of a cause of action based on an infringement of a human right will find application without essential modifications. All the reports (except for the UK as far as HRA claims are concerned) agree that the specific type of damaging event (i.e. violation of human rights) will not change the applicability of general institutes of liability law, such as damage, causation, contributory conduct or burden of proof, unless they have been modified in the provisions on state liability. Naturally, this does not mean that the method of application is not changed. The interpretation of all elements of liability by a court will no doubt be influenced by considerations of human rights law. In Europe, the Convention, through its horizontal effect, has impacted the contents and balancing (in a concrete case) of general values and interests (dignity, autonomy, equal treatment) promoted by tort law. Where a tort implies a human rights infringement, a clear influence of the Convention values is seen in the enhanced compensability of non-pecuniary damage, alleviation of burden of proof of harm (see in more details at XI.) or the standard of proof of causation. Still, the traditional concepts of causation are applied as controlling mechanisms. Causation plays a role in identifying the victims who suffered from the breach of rights as well as limits the extent of damaging consequences to be compensated by the defendant.

In the UK the range of applicable tort law rules is not entirely clear, as the answer depends on the response to the question whether a cause of action under HRA is an action in tort. The dominant position is that the victim has no automatic right (claim) to damages, that would be correlated with the defendants obligation to pay. It is rather a competence of the court to award damages if no other relief or remedy could be granted in order to appropriately and justly sanction the violation. Even a finding of violation, without a grant of just satisfaction, will be an important remedy and vindication of the right of the claimant. The HRA is not considered by the UK courts a tort statute, because its objects are different and broader, albeit arguments in favour of a tort-based approach are also presented in the legal writings. If a given human right violation may be linked to a common law tort (false imprisonment,

nuisance, misfeasance in public office) or to breach of EU law damages can be awarded for a private law wrong or breach of EU law. Such a situation will be treated as an alternative route, and hence no further compensation would be required under Section 8(3)(a) of the HRA. Of course, a right to protection of private life and freedom of speech may also be breached by private parties. The cause of action is then the tort of breach of confidence as modified by Art. 8 and Art. 10 of the HRA (the award has to be proportionate).

Given that infringements of human rights are dealt with under general rules of tort law, which of course vary between the jurisdictions, there exist variations as to how the principles are interpreted and applied with regard to private and public defendants (noted in particular in the reports for France, Israel, Norway).

For some jurisdictions, in particular in the French legal culture, the distinction linked to the category of defendants, is irrelevant, as all person are put on equal footing. This approach results in either (a) the same rules of liability in damages being applied to all defendants, or (b) different bases, applicable by the person’s status:

(a) in the first group of systems, all claims for compensation for violations of human rights will be judged under the same private law rules (eg under the tort of negligence, or breach of statutory duty);

(b) In the second group, a claim against a public body will be judged under the relevant national rules of public liability, whereas a claim against a private corporation/person will be decided in the regime of private law (unless the fact of exercising public authority/functions permits to apply the regime of public liability). Hence, the foundation of liability (strict or fault) as well as the scope of liability can vary (although the victim has suffered the same type of harm).

If state liability law belongs to the realm of public law, one important implication is the possible hierarchy and interdependence of remedies (see infra). Moreover, different courts may have jurisdiction over matters belonging to the two categories of cases.

A rather unique position is occupied by Ireland. In situations where private law remedies are not clearly applicable, ‘constitutional rights’ have been treated as binding private individuals, hence providing a safety net to protect fundamental rights from infringements by private bodies.

VII. Claims for compensation against private parties

The admissibility of claims against private parties is of course linked with the mentioned concept of horizontal effect of human rights. It will be recalled that in most states the primary function of fundamental rights still remains to shape the relations of individuals vis a vis the State (and any organ or person emanating the
The direct horizontal effect of human rights has been clearly admitted in most European countries (apart from the already mentioned – also in Germany, Greece, Romania Portugal, Italy, Estonia), while in the US and Canada it is almost non-existent. In the US some human rights violations can ground tort claims for intentional infliction of emotional distress, false imprisonment, abuses in the employment context (including forced labor) and within the reach of statutory unfair business practices law.

Many jurisdictions are somewhere in between direct and indirect effect, in particular as regards direct application of certain rights (now human rights) that were never regarded as being exclusively against the state. In most countries, the link to tort law and its inherent limitations is clearly visible in the area of personality rights (personal liberty, right to health, reputation, image, right to privacy, to name a few). Those rights are traditionally protected by tort law, but are not equated with human rights (eg. in Poland). The scope of protection is shaped by courts, which ensure the compatibility of domestic rules with the standards of protection developed by the regional human rights tribunals. The process is dynamic. For example, in the new 2014 Czech Civil Code the regime of compensation for infringements of natural rights of individuals established in the Code has been based on the concept of delictual responsibility, i.e. responsibility for the violation of legal rules or of good manners. More importantly, the Civil Code presupposes the existence of harm.

It should be stressed that when violations relate to relations between private persons, new claims (types of torts – e.g. constitutional torts) are created or the courts expand the application of a general clause of liability. The horizontal effect is stronger in the systems where the judiciary is particularly active (Ireland, France, Italy, Israel). In particular, that process in France is conceptualized as ‘conventionalisation’ of private law. The trend has attracted criticism, mainly due to the fear of judge-made law (uncontrolled expansion of liability) and risk of too deep interference of the Convention logic with private law logic. The French reporter speaks of ‘invasion of human rights in private law relations’, albeit the invasion is limited to relations unequal by nature (eg. natural person- legal person, cases of subordination or hierarchy).

When a claim for redress is directed at a private person on account of violation of human rights in private relations it is either placed in the realm of tort law or in contract law. In general, the violation of individual rights by private parties falls within the realm of tort law (unless the violations occur within a contractual relations, mainly employment relations). For the claim to succeed all necessary elements of a tort (tort of negligence, breach of confidence, invasion of privacy, a general clause of liability for tort, etc.) must be proven.

In most countries fault (negligence) remains a prerequisite of such a liability, with a range of exceptions provided for the protection of personality rights, where simple wrongfulness of the defendant’s conduct might be sufficient. No report

---

23 Although the Argentinian report is unclear.
indicates that an automatic claim will arise when a ‘pure’ violation of the right to privacy or freedom of expression has occurred, without consideration of other elements of the claim stemming from relevant private law rules. Nevertheless, in respect of discriminatory conduct additional statutory entitlements, disposing of the requirement of fault, have been created in order to give better effect to human (constitutional) rights.

VIII. Additional prerequisites of the claim for damages

Additional requirements of liability can stem either from the logic of a given national liability system or from explicit norms of the human rights protection regime.

In the Germanic legal family, the alleged violation must concern a duty not only owed to the State, but to the citizen (drittbezogene Amtspflicht). In the case of human rights violations this precondition is generally met.

Secondly, a claim for damages may depend on first using another, non-compensatory remedy or on exhaustion of all available non-compensatory remedial means. According to the German approach, the ultima ratio of the Constitutional State\(^{24}\), the individual is not free in the choice of remedies. An important implication of this is that a person may not claim damages if she was able to prevent harm by challenging an act of state violating her rights. For example, if the right to trial in due time was breached, compensation may only be awarded if prior to filing a compensatory claim a party to the dispute has complained about the length of the proceedings to the court of proceedings. This censure of delay does not prevent a tort action based on art. 839 BGB that, although requiring the proof of fault, remains a complementary basis.

The German approach as shared in the UK (see above) and the Czech Republic, where the claimant must exhaust all legal remedies available under the Czech legal order. A court may in exceptional cases, waive this condition. By contrast, no exhaustion of legal remedies is required as regards compensation for harms done to natural rights of individuals established in the new Czech Civil Code.

If a claim for compensation is governed by public law (e.g. Estonia, Turkey), it is almost always not a primary, but a secondary remedy. Exceptions concern unlawful expropriations, where public and private interests are balanced by the legislator and the choice between the preference of restoration or compensation is not always obvious.\(^{25}\)

In most jurisdictions there is no requirement to exhaust other remedies before claiming compensation. This notwithstanding, traditional models of state liability admit a civil action for damages against the state only after an earlier or simultaneous complaint against the administrative or judicial act that caused the damage was filed.


\(^{25}\) See reports for Germany and Israel.
Annulment or a similar action purporting to cancel that act or to established its illegality is the prerequisite of a claim for damages in Poland, the Czech Republic and Estonia.

In other jurisdictions an action for damages is independent or can be joined with other legal remedies (e.g. Greece, Portugal). In the systems whose focal point is on the infliction of damage (the French tradition), the claim for damages can be brought regardless of other remedial means.

In Slovenia, a friendly settlement procedure with the State Attorney’s Office, must be undertaken before the claim can be litigated. The State Attorney must respond in thirty days and is authorized ex lege to conclude an out-of-court settlement. Also in Croatia, a claimant is obliged, prior to submitting his or her claim to court, to submit it to public prosecutor in order to reach settlement.

IX. The purpose and functions of the damages remedies in cases of infringement of human rights

From the public and international law perspective, the response of any legal system to the violation must be proportionate and just and these two criteria appear in constitutional rules or human rights legislation.

From the perspective of tort law three goals of damages can be identified:
- compensation,
- deterrence (prevention).
- punishment

In some countries promoting social solidarity and repression are seen as subsidiary functions of compensation in human rights cases.

All reports agree that the main purpose of the claim for compensation of the infringement of human rights is to compensate those who fell victims of abuses. The victim must be put to the position she/he would have been in had she/he not suffered the injury. The reports have shown that, except for the UK and Canada, the general principle of full compensation applies, except in some specific cases expressly foreseen in the law. These exceptions include inter alia liability arising from State political and legislative power and compensation for sacrifice in the name of the public interest. The concept of ‘just satisfaction’ is distinct from the concept of damage. The former is about equitable indemnity rather than reparation of the proven damage (harm). Interestingly, the House of Lords held ‘that the general principle applied to affording just satisfaction was to put the applicant so far as possible in the position in which he would have been if the state had complied with its obligations
under the HRA’. This interpretation brings most cases on the same level of financial compensation, be it just satisfaction or classical damages.

In general, the leading principle of full compensation for damage is supplemented by the deterrent function. Repression is less frequently emphasized. Deterrent function as well as repression is often ascribed to the award of non-pecuniary loss damages. As the Estonian Supreme Court has ruled, an award for any non-pecuniary damage ‘embodies a deterrent purpose while it reflects in addition to the compensatory purpose to a certain extent the condemnation of the society in regard to the unlawful act of the offender, and it furthermore offers to the injured party a relief for the injustice caused with the violation of his or her personality rights’.

As regards State liability for breaches of human rights, two more ideas should briefly be mentioned. In the Germanic legal tradition the rationale behind the entitlement to pecuniary compensation lies in the idea of ‘sacrificial encroachment’, because the aggrieved person has to bear a ‘special burden’ for the interest of the public (the whole society). ‘Sacrificial encroachment’ justifies property-related claims as well as compensation for personal harms of a person criminally prosecuted, lawfully detained or arrested and then acquitted. By the same token, in the French legal tradition, the principle of égalité devant les charges publiques says that compensation should be provided for those that have suffered a disproportionately large burden or loss caused by activities pursued in the common good. In this way the too onerous burden is shared by means of taxation between all members of society who benefit from the activities.

X. State liability for infringements of human rights in more detail

X. 1. Specific categories of rights protected by damages remedy through explicit rules

Following the internationally recognized standards explicit claims for financial compensation are widely provided for:
- specific cases of the violation of personal freedom: unjust or unlawful detention and arrest,
- property-related infringements,
- the delay of justice (a violation of right to process in reasonable time),
- discriminatory conduct.

Other examples of specific entitlements include i.a. laws on data protection that seek to protect privacy rights and other rights relating to the general right of personality, and protection of individuals against terrorism (in the US, Greece, Turkey).

---

26 See reports for the UK.
27 Supreme Court Civil Law Chamber judgment of 26.6.2013, 3-2-1-18-13, para. 29 (Note 24). Report point A.4
28 In Germany and Portugal, as well as in other countries, special entitlements to compensatory remedies supersede other titles based on sacrificial encroachment.
Below we shall focus on the first category of specific rules, except for delay of justice that is dealt with in more detail in section III.3.

The right to personal freedom has always enjoyed enhanced protection in the international and national laws. In all reported jurisdictions explicit provisions give effect to the right to compensation for violations of the right to liberty in cases of deprivation of freedom through arrest or detention (if the victims have been subsequently acquitted or sentenced to a different penalty). In many instances also secondary victims, such as family members and persons entitled to maintenance from the person deprived of freedom, have claims of their own. In cases of unlawful detention the claim stems directly from international or regional human rights acts, hence in European countries it is art. 5 § 5 ECHR. This title is very specific and provides for strict state liability. In practice, the awards are similar in both domestic and international or regional bases of the claim.\textsuperscript{29} By contrast, degrading conditions of detention are subject to art. 3 ECHR protection and according to the courts must meet the requirement of an action in tort.\textsuperscript{30} The rules governing the said claims are typically found in the provisions on criminal procedure (Greece, Turkey, Poland, Ireland, Israel) or in separate legislation (Germany\textsuperscript{31}), which implement both constitutionally and internationally set standards.

The property-related cases account for a vast number of State liability cases in many countries, including Germany, Israel and post-Socialist states. Legislation that provides for expropriation is not immune to liability if unconstitutionality or other illegality could be established. This could be the case if the right to adequate compensation complying with the principle of proportionality were not provided.

The length of proceedings right has been enforced mainly due to the obligations imposed by the Convention and case law of the ECtHR (Art. 6 §1 ECHR) – see X.2.3.

A common feature of all three cases is, firstly, that the violator may only be a state entity. Secondly, the claims embedded in the special provisions do not necessarily follow the principles of civil law, hence the scope of redress is not identical. The national reports provide details on caps, limitations, flat rates, adequate instead of full compensation, shorter prescription periods, and different procedure of seeking damages.

Prohibition of discrimination is usually guaranteed by an independent entitlement to compensation. This is a common solution in the EU countries, derived from the anti-discrimination directives.\textsuperscript{32} In the US anti-discrimination laws provide—by explicit text or judicial interpretation—private rights of action that

\textsuperscript{29} In the case of Germany this means applying fixed rates, of approx. 30 euros per diem.

\textsuperscript{30} The German and Polish reports.

\textsuperscript{31} The Law on Compensation for Prosecution Measures (Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen, StrEG)

include claims for money damages. Interestingly, discrimination in particular based on gender or race is considered as more serious and thus may lead to awards of compensatory as well as punitive damages. The form, scope and amount of damages vary across the laws. Freedom from discrimination, particularly on the basis of race or gender is of primary importance in the US. ‘Bivens action’ and Sections 1983 actions. Also Canada adopted particular legislation at federal and provincial levels to prevent various forms of discrimination (now contained in Human Rights Codes).

X. 2. Illegal conduct of a public authority:

2.1. Fault-unlawfulness-mere infringement

For many systems human rights violations are traditionally regarded as a sub-category of an illegal conduct of a public authority. Hence, the claims stemming from such violations, if brought against public organs or persons, are accommodated within the existing system of public authority liability.

Accordingly, the applicable regime can have, depending on the country, vertical structure that may or may not begin at the constitutional level and be further developed by statutory substantive rules and procedural measures.

Given the domestic constitutional norms (see III.1.) a public organ’s breach of human rights is frequently subject to the same rules as breaches of other rights. However, the involvement of human rights will be crucial for the condition of fault or unlawfulness. It should be added that commercial activities of the public administration are not per se exempt from the risk of being in violation of human rights (eg in employment, marketing of consumer products).

The traditional principle of liability is fault. Many jurisdictions have followed the French idea of faute de service that comes close to the understanding of wrongfulness. Faute de service is sufficient to hold the authorities liable for administrative risk. Illegality of an act equals fault in France. Despite the language liability is generally objective.

In many other countries the liability is strict (objective), the element of unlawfulness being sufficient to claim remedy (i.a. in Poland, Czech Republic, Slovenia, Croatia, Estonia, Portugal, Greece\(^{33}\)) or depending on the nature of the violated right - partially strict and partially based on objective fault (Norway, Turkey). Under the UK HRA there must be a finding of unlawfulness or prospective unlawfulness based on breach or prospective breach by a public authority of a Convention right.

Furthermore, in countries where the notion of subjective right is the centre of the liability law (Germany, Portugal) unlawfulness of the conduct and unlawfulness of

---

\(^{33}\) Greece: art. 105 of the civil code expressly states that ‘The State shall be under a duty to make good any damage caused by the unlawful acts or omissions of its organs in the exercise of public authority, except where the unlawful act or omission is in breach of an existing provision which is intended to serve the public interest."
the result is required. Unlawfulness of the result relates to the offence of subjective rights or legally protected interests.

In other jurisdictions public liability is fault-based liability (the US, the UK, Canada, Romania, Israel). In Estonia, only compensation for non-pecuniary damage is conditional upon the existence of fault. Fault for causing damage is not taken into consideration if compensation for non-patrimonial damage is awarded on the basis of a decision of the ECtHR declaring violation of the ECHR or any of its protocols by a public authority.

On balance, the requirement of unlawfulness can be seen as a general trend (currently under consideration in Israel). Different legal devices have been adopted by courts to reach the objectivization of fault and, in consequence, of liability.

It is unclear whether mere infringement suffices for a court to acknowledge unlawfulness of that infringement. It appears that it does not. The countries may be grouped in various ways. In the systems where a subjective right is at the centre of the liability logic, the violation of such a right, ie also of a human right – as a right for a person – can suffice to trigger liability for moral harm.

Of course, many of the human rights violations have an inherent element of fault, as they involve deliberate or negligent wrongdoing, such as e.g. in cases of intentional deprivation of liberty, torture, deprivation of property. In addition, in a few jurisdictions bad faith is a precondition of an award of damages if the victim alleges the violation of human rights by a judicial act (e.g. the UK, Romania).

Combined illegality of conduct of public authorities and the fault of a functionary/personnel member in the form of intent, malice or gross negligence, will in most jurisdictions trigger personal liability of the latter. Personal liability may be realised either through direct liability of both the public organ and a physical person acting in the capacity of a functionary (the liability will hence be joint and several) or – a majority view- through recourse actions, while the public authority answers primarily and directly in lawsuit instituted by the injured party.

2.2. Can the legislator be held liable in damages for violations of Human rights?

A right to claim damages is uncontroversial when the infringements are authored by an institution or person who can be regarded as emanation of the State’s executive power, charged with executive acts, omissions or misconduct. The other two branches of government, legislature and judiciary, tend to implicate modifications to the contents of the right to compensation if the damage is alleged to arise from the performance of the legislative or judiciary power in breach of human rights.

---

34 Except for Israel where the Civil Wrongs Ordinance in its current version grants immunity to civil servants, including state organs for acts performer in the course of governmental duty and in a public capacity. See the Israeli report, at A.
35 Germany, Italy, Portugal.
36 Greece, in Turkey, Brazil, Poland
This problem is connected with the concept of the control of constitutionality of laws, on the one hand, and the admissibility or non-admissibility of a claim against the legislative organs or executive organs who legislate (pouvoir réglementaire). The admissibility of the liability in damages for violations that stem from legislative acts is first of all dependent on the choice of the constitutional control model in a given country. In several democratic systems the concrete control of the constitutionality of laws is embedded in the legal culture (e.g. Greece, Poland, Turkey, Portugal, Czech Republic, Slovenia), yet in other systems there is no direct right of appeal to the Constitutional Court (e.g. France, Italy). The possibility of lodging a constitutional complaint is in a few countries linked with an option to claim compensation for damage in the same procedure, albeit this competence is neither characteristic nor narrowed to cases of legislative wrongs (Slovenia, Croatia).

Legislative unlawfulness or wrongfulness, if accepted as a source of civil liability, requires typically the determination of the unconstitutionality of a defective act (Poland, Estonia, Romania) or of unlawful legislative omission (Portugal). In Greece, it can be accepted if a parliamentary enactment contravenes higher sources of the Greek legal order and does in concreto cause a violation of a protected human right of concrete person(s). It is also accepted that the state can incur civil liability for human rights violations in the exercise of delegated normative competence of the executive, if the state organ authorised to issue the normative act is bound by the authorising provision to adopt the act it omitted. In Slovenia only the most severe infringements of constitutional provisions or basic civilized standards by a legislative act can trigger State liability. In effect, the courts have to distinguish different violations of different constitutionally protected human rights assessing their severity, albeit the constitution makes no such distinction.37

The nature and scope of compensation substantially differs. It resembles ex gratia payment or relates to the scope of real loss. In Portugal, it is the only case foreseen in the 2007 Act on public authorities liability in which a court can award compensation on the basis of equity.

In all EU countries when laws or regulations or court decisions infringe individual rights conferred by EU law (such as the CFR rights), the duty to compensate is rooted directly in EU law. This has in many countries added yet another cause of action to the system.

State liability for legislative wrongs is alien to the Germanic legal tradition. The main obstacle to the liability of the legislator is the doctrine of drittwirkung. Since the legislator is not understood to be obliged towards specific individuals, but towards the common good (i.e. there is no “drittbezogene Amtspflicht”), violations of individual rights by laws and statutes do not give rise to compensation according to § 839 BGB. The “expropriating encroachment” action has practically been reduced to cover unforeseeable effects of statutory law or its application; while foreseeable effects of legislation must be compensated by the legislator according to the doctrine

37 See Slovenian report.
of the determination of content and limits to property subject to a compensation (ausgleichspflichtige Inhaltsbestimmung).

This liability is not accepted in Italy or in common law jurisdictions. In Ireland damages could be recovered where constitutional rights had been infringed as a result of an invalid legislative act once the damage is proved to have flowed directly from the effects of the invalidity without intervening events.

2.3. Compensation claims stemming from the acts and omissions of the judiciary

First of all we should distinguish between the violation of the right to due process and other cases of miscarriage of justice. National positions differ to a great extent with regard to liability for judicial errors. In most reported jurisdictions judicial errors that make a judgment unlawful are not a source of compensatory claims even if they violate fundamental rights. The liability may arise in few systems (Poland, Portugal), provided that the judgment is first annulled or declared unlawful in proper proceedings. In a few countries (the UK, Greece) the judges may be held liable in their personal capacity.

By contrast, excessive delays in the judicial proceedings normally give rise to some kind of pecuniary indemnity. The delay of justice appears as the most common systemic problem of the judicial system in Europe and also in Brazil (where no damages remedy is available). Domestic damages remedies are introduced in Council of Europe countries in realization of art. 6 ECHR. Not infrequently, ‘effective measures’ against excessively lengthy court proceedings had been preceded by the ECtHR pilot judgment against a country or a judgment that imposed a deadline to introduce such measures (so was the case with the Czech Republic Poland Germany, Greece, Italy, Slovenia, Turkey.) The protection is not always complete as not all legal proceedings are necessarily covered. For example, since only delays in administrative proceedings were condemned by the ECtHR as a structural problem to be resolved by the Greek government, the damages remedy has been restricted in Greece to administrative proceeding. Naturally, any limitations of a national mechanism are questionable as regards the effectiveness and completeness of protection.

The reports show that most often a new title to compensation is introduced. That title is, nevertheless, different to damages in their civil law sense, and in some countries is not even called ‘damages’. For example, German law provides for ‘reasonable’ compensation and a lump sum for the immaterial disadvantages (harm to reputation, or estrangement between child and parent in custody cases), in Italy the “Pinto Law” of 2001 provides for ‘indemnity’ rather than ‘restoration’, and in Poland it is called ‘an appropriate sum’. Typically, lower and/or upper limits of such indemnity are imposed (see infra).

38 See i.a. the reports for the US, Greece, UK, Germany.
XI. Reparable harm and scope of damages

XI. 1. General remarks

With respect to damage, in general, compensation may be awarded when there is a legally recognized form of damage. As regards human rights infringements, the requirement of legally relevant damage generally does not create much debate.

The existence of a violation will not suffice. In most cases an economically assessable damage that is proven by the claimant will be redressed. Private law rules govern both reparable damage and the causal link between the damage and the damaging event.

In the French legal tradition a claimant must prove concrete, actual and direct damage arising from the defendant’s conduct. In other systems the reports refer to pecuniary loss and non-pecuniary losses.

Material damage typically encompasses positive loss (the decrease of the assets, expenditures, etc. - *damnum emergens*) as well as lost profits (*lucrum cessans*). All elements must be causally linked to the unlawful/faulty act or omission of the actor (tortfeasor). Reparable material damage may also include costs and expenses, loss of earnings, including loss of earning potential, loss of chance, lost opportunities, including employment, education and social benefits.\(^39\)

When personal injury is the consequence of the human rights violations, all claims available under the general rules are also available in the discussed scenario. By the same token, no discriminatory distinction in treatment of claims by the relatives of the deceased can be noted.

In principle, except for France, the reparation of non-pecuniary harm has to be explicitly provided for by the law. Non-pecuniary damage includes distress and anxiety, loss of reputation, humiliation, insult, indignation bouts of depression, enduring psychological harm, feelings of helplessness and frustration. In many countries, such as Estonia or Poland any physical or emotional distress that was brought upon the person needs to be related to the fault-based violation of person’s subjective (individual) right (or personal right).

The burden of proof of harm may be alleviated with a view of granting effective protection to the injured person. For certain violations of law, the existence of harm is presumed (eg. deprivation of liberty).

\(^{39}\) Damages for violations of human rights are treated as damages for torts, hence tax rules apply equally to all categories (in most countries they are tax exempt).
XI.2. Instances where no proof of harm is necessary

There are several instances in which compensation without proof of harm has been admitted:

In Israel, the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Place Act (2000) stipulates that a violation of the right to equality in public services may give rise to an action in tort, and can lead to liability of up to approx. 10,400 euro without proof of harm.

Under the **UK** HRA the House of Lords observed that art. 8, which guarantees a right of privacy, may justify a monetary remedy for an intentional invasion of privacy by a public authority, even if no damage is suffered other than distress for which damages are not ordinarily recoverable.

The **US** reporter points out that in the US plaintiffs in constitutional torts actions (Section 1983 and *Bivens*), including some involving rights that overlap with international human rights, may not be able to prove measurable harm. In such cases courts sometimes awarded nominal damages.

In **Irish** law, in a case where the plaintiff has established a wrong but has not suffered any harm nominal damages can be awarded.

In **Estonia** a person who has been unjustly deprived from his or her liberty or injured as a result of the use of force does not need to prove neither the occurrence of the damage nor the extent of the damage. The Estonian CUDLA regulation draws on the assumption that the restriction of the fundamental right of liberty causes non-pecuniary damage and results in a loss of profit in any case.

XI.3. Scope of damages (compensation) and calculation

In almost all jurisdictions under survey, damages for infringement of human rights are calculated in accordance with general rules. This holds true even if a claim is directly and solely based on the constitutional norm (such as in Ireland). Commonly recognized principles such as individual calculation and consideration of concrete circumstances are taken into account.

The damages due in case of patrimonial loss should be full, i.e. they should repair every and all loss sustained. In a number of cases the principle of encroachment/sonderopfver only obliges the State to pay an appropriate compensation, not full damages.
The discretion of the courts is greater as far as damages for non-pecuniary loss are concerned. A variety of factors are taken into account by the courts in awarding damages, including the gravity of the violation and severity of the injury. Levels of compensation are influenced by international practice. In personal injury cases breach of conventional rights may justify a rise in a particular level of compensation\textsuperscript{40}.

XI. 4. On the various levels of discretion in adjudication damages remedy

It should be stressed that according to commonly accepted principles if damages claim is determined under applicable tort/private law rules there is hardly any discretion for the court not to award damages for harm that has been proven by the plaintiff.\textsuperscript{41} Naturally, some discretion (as to the calculation of the award) is permitted as regards non-pecuniary loss compensation. In many countries no codified criteria of assessment may be found. All circumstances of particular cases must be taken into account to reflect the individualisation of the award. National case law provides more or less formalistic guidelines in this respect.\textsuperscript{42}

If, however, the award of money is to provide just satisfaction – and not to repair the damage – the court’s discretion is broad: both as to ‘award-no award’ and with respect to the extent of the award.

More specifically, there is no right to monetary compensation under the UK HRA. Awards under HRA are seen as equitable, they are not precisely calculated, but were judged to be fair in the individual case. The British courts’ competence mirrors the one of the ECtHR. The discretion of award-no award is extended also to the scope of damages, if they are to be awarded. In general, it seems to be a common position that the victims of human rights infringements ‘should receive damages equivalent to what they would have obtained had they taken their case to Strasbourg’. The British courts practice is unclear as to whether a victim would receive a higher or similar level of compensation under the HRA than under tort law. According to the House of Lords in awarding damages under the HRA courts should not follow the domestic scale (ie the damages level under tort law) but that of the ECtHR. A ‘restrained’ or ‘moderate’ approach to quantum is advisable.

The Italian Court of Cassation has held that “domestic judges retain an autonomous margin of appreciation, which allows them to reasonably distance themselves from ECtHR case law.”\textsuperscript{43} However, as underlined by the Italian reporter, whilst Italian courts cannot completely depart from the supranational judges’ interpretation, they must nonetheless provide adequate justification for their decisions.

\textsuperscript{40} See e.g. the Norwegian report.
\textsuperscript{41} One exception provided in Estonian report (based on the Code of Administrative Court Procedure of 2012).
\textsuperscript{42} E.g. the Croatian Supreme Court established criterions to determine the amount of damages (Orientation criterions and amounts for determining the value of equitable monetary compensation of non-patrimonial damage, 2002)
\textsuperscript{43} See Court of cassation, decision no. 10894 of 11 May 2006 and the Italian report, at 4.
By contrast, in Irish common law damages for infringement of constitutional rights are generally assessed “on the same basis as damages in tort, not on any higher basis”, but the discussion about lower damages if breach of human rights is involved would probably be seen as paying little respect to the intrinsic value of constitutional rights.

The EU courts appear to have a tendency to apply the lower scale of sanctions provided for by law and in terms of the level and amount of compensation awarded in discrimination cases. Meanwhile, the Directive 2000/43/EC precludes national law under which sanctions are purely symbolic and that under certain conditions it would be in breach of the Directive if it is only possible to give a warning in a case of discrimination.

In discrimination cases in Canada awards of damages for material losses (especially lost wages and other benefits) can be large as the aim is to put the complainant back into the position they otherwise would be if it were not for the discriminatory activity; award for non-material losses (loss of dignity, etc) are less generous, more token in nature – although they have been increasing in the last decade.

As English practice indicates, damages for procedural infringements may be denied for lack of harm beyond simple stress and frustration. In Estonia, a person whose procedural rights have been violated in the procedure may claim only the reimbursement of expenses incurred upon the participation in the procedure.

XI. 5. Limitations and caps on damages

According to most European reports special rules on damages for deprivation of freedom through arrest or detention introduce limitations on both pecuniary and moral harm. In some systems a lump-sum, a rate per day, per month or per year, is allowed.

In Germany compensation is fixed at 25 € per diem of detention or arrest. In case if unlawful detention and arrest, the cause of action in “quasi-sacrificial encroachment” (aufopferungsgleicher Eingriff) only allows an adequate compensation and excludes compensation of moral damages. By virtue of the direct reference to art. 5 § 5 of the ECHR, the victims of unlawful arrest or detention may seek full compensation of pecuniary and non-pecuniary harms. Also in Greece there are fixed rates – between € 8,80 and €29 per day of unjust or illegal detention. Within these limits, the competent court determines the exact amount of the compensation taking into account the financial and family situation of the claimant.

Another limitations apply to the length of proceedings breaches:

44 sec 7 of The Law on Compensation for Prosecution Measures.
45 See the German report.
46 These amounts can be modified by joint decision of the Ministers of Finance and of Justice.
In Slovenia, the Protection of Right to Trial without Undue Delay Act, and sets the floor for the damages award at €300 and the ceiling at €5000. An aggrieved party can also file a separate lawsuit claiming monetary compensation for material damage caused by delay in judgment. In Poland the threshold is €500 and the ceiling €5000. The Italian “Pinto Law” stipulates the right to indemnity in between €500-1500, providing specific criteria for award calculation. In Germany a sum of €1,200 can be claimed for every year of the unreasonable delay of judicial proceedings, although this sum may be adjusted by the court on account of the particularities of the case. This regulation has an impact on the standards of State liability in arrest and detention cases.

In Turkey the law on the Compensation of Losses Arising from Terrorism and the Fight against Terrorism, provides extremely low, flat rates as pecuniary damages for death and bodily harm while excluding claims for non-pecuniary losses. The compensatory scheme, however, seems to have satisfied the ECHR as an effective domestic remedy, flooded with almost 1500 similar applications of victims of terrorism. The Court, following the adoption of the law, rejected all pending applications for non-exhaustion of domestic remedies.47

It should additionally be noted that the EU Commission considers it incorrect to maintain an upper limit for compensation in cases of discrimination as far as the laws implementing Anti-discrimination directives are concerned.

Finally, limitations of damages normally appear in the alternative compensatory schemes (see below).

XI.6. Punitive or exemplary damages

No punitive damages can be awarded in most countries except for a few common law jurisdictions where punitive or aggravated damages are permissible. This is possible if general law on damages is applicable to claims based on human rights violations, as is the case in Ireland. In general, aggravated or punitive damages can be awarded under the Irish Defamation Act 2009, but the breach of constitutional rights does not, per se, result in the award of punitive damages. Exemplary damages may be awarded when the severity of the wrongful conduct requires certain deterrence, provided that a conscious and wilful disregard of the plaintiff’s constitutional rights could be proven48.

In the US punitive damages are available in many instances of human rights infringements. First of all, many antidiscrimination laws include bases for punitive damages. Punitive damages require intentional discrimination and are in some cases capped. Secondly, in suits against officials under Section 1983 if the defendant had malicious or evil intent, or showed reckless or callous indifference to the plaintiff’s federally protected rights. Punitive damage awards cannot, however, exceed single-digit multiples of compensatory awards (requirement of proportionality accepted by

47 İçyer v. Turkey (inadmissibility decision, no. 18888/02, 12 January 2006).
48 See the report for Ireland.
the U.S. Supreme Court. As regards cases with a transnational or foreign dimension the Anti-Terrorism Act (1994) authorizes a court to award treble damages for a U.S. national who suffered pecuniary or non-pecuniary loss due to an act of international terrorism.49

XII. Legal standing and selective procedural issues

XII. 1. In general

In the CE countries virtually all persons present in the country may claim countries human rights. The national systems may vary as far as the protection of constitutional rights is concerned. In most countries political rights are usually confined to citizens as opposed to be vested with “anyone” or “a person”. The defendant category includes State organs, municipalities and persons acting as an emanation of the state (in the US and Canada: ‘state action doctrine’), which may include de facto state organs whose existence is based on violence or an illegal act (Greece).

An exception has been made in Norway, where the Supreme Court expressly stated that only the States are subjects of duty under ECHR, and, hence only the State level may be sued and held to pay damages. This holding excluded municipalities, hence it is the State that must be held liable for breaches committed at the municipality level.50

XII.2. The question of foreign states as defendants

In European civil law countries the principle of sovereign equality of States and the principle of par in parem non habet imperium, prevents national courts to accept any claim relating to a foreign act of State unless the state in question waives its right to immunity. In particular, this immunity is embedded in art. 11 of the European Convention on State Immunity (1972)51.

Interestingly, a number of lawsuits brought by Italian and Greek citizens against the German government or a Germany-based corporation for historical injuries suffered in the Second World War period (mass killings in Italian or Greek villages, expropriations) has led to a number of domestic awards in Italy and Greece. The cases, in which the immunity of the Germany state was considered waived by the courts, reached the phase of execution, which was successful in Italy and unsuccessful in Greece and Germany. The ICJ in Germany v. Italy ruled in favour of Germany, stating that any possibility to bypass State immunity in cases of gross violations of

50 As the reporter underlines this position is contrary to the decisions of the Swedish courts.
51 ‘A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.’
human rights and international humanitarian law is excluded. Only special agreements might provide otherwise.

The laws and courts of the United States have been unusual in offering private law damages through the Alien Tort Statute, the Torture Victims Protection Act, and the Foreign Sovereign Immunities Act, which are interpreted in conjunction with U.S. law’s relatively broad rules on personal jurisdiction and tort liability. The US is the unique system where explicit jurisdictional bases make it possible to adjudicate a case in a federal US court and obtain damages when the alleged violations of human rights were committed abroad or against non-nationals and by a foreign state (exceptions to immunities granted by The Foreign Sovereign Immunities Act, however, limited to harms ‘occurring in the US’). The ATS is a jurisdictional statue, providing the federal district courts with original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. In 2013, the U.S. Supreme Court held that for the ATS to provide relief, a case must “touch and concern the territory of the United States” with “sufficient force to displace the presumption against extraterritoriality,” and that “mere corporate presence” of the defendant in the United States will not suffice.

XII.3. Individuals (emanation of states, public officials, agents)

In many European systems and Israel direct perpetrators may be held personally liable for human rights abuses and be sued for damages directly. In some countries the public organ has legal standing in a suit, but the legislators reserve the right of recourse to the official responsible for the violation at a later stage.

In almost all countries compensatory claims directly against judges are inadmissible (unless it is bad faith or ultra vires situation).

Specifically in the US, under Section 1983 of Civil Rights Act and so called Bivens actions suits are brought against individuals who act as official or agents of the federal or state government. Official immunity can, however, bar both Section 1983 and Bivens suits. In practice, the government entity often bears the burden of the award against official personal assets through indemnification or insurance.

Furthermore, The Torture Victims Protection Act of 1991 provides for civil liability of natural persons for torture or extrajudicial killing; however, a plaintiff must first exhaust any ‘adequate and available remedies in the place in which the conduct giving rise to the claim occurred’.

In the US legislators, prosecutors and judges—and other officials exercising similar authority—enjoy absolute immunity for actions taken within the scope of their legislative, prosecutorial or judicial functions. Such officials when acting outside those functions and other officials enjoy lesser, ‘qualified immunity’ in damages suits.

---

52 ICJ, judgment of 3 February 2012, Germany v. Italy.
53 See the US report.
Qualified immunity applies unless the defendant official knew or reasonably should have known that his or her conduct violated a clearly established legal right of which a reasonable person in the official’s position would be aware.

XII.4. Jurisdictional issues

Civil law claims (between private parties) are within competence of ordinary civil courts.

When infringements of human rights amount to a crime (right to life or health or dignity or other personal rights are infringed) most European jurisdictions permit the victim to attach their compensatory claim against the perpetrator to the criminal proceedings (adhesive procedure). In addition special provisions regarding compensation of victims of violence are widely introduced. This means, that the victims’ harm is at the centre of attention, because they may obtain redress for serious harm to their health and their economic situation resulting from the crime from the State, while the latter is charged with the right of recourse against the perpetrator.

If a claim is directed against a public defendant, jurisdiction and applicable procedural laws primarily depends on a model of public authorities liability in the given legal systems. In part of the civil law countries civil courts have jurisdictions over compensatory claims. In the UK, court must have the power to award damages under Section 8(2) HRA, which means that damages may be awarded only by a court civil proceedings, it is not possible for a criminal court to award damages. Similar model is present in Canada and Ireland.

In a number of jurisdictions administrative courts have been competent for adjudicating claims for damages for human rights abuses attributed to the state. In the German model, characterised by the distinguishing of primary and secondary remedies, an action addressing the violation as such is brought before administrative courts, whilst a claim for compensation, being a secondary remedy belongs to the jurisdiction of civil courts. The dual system also exists in Portugal.

In Ireland damages may be sought under common law of torts, in civil courts for the violation of constitutional rights, or under ECHR ACT of 2003. In general, there is nothing distinctive about the procedures applied by ordinary courts that have jurisdiction to award damages. Damages are also available on application to the Attorney General, only after a declaration by High Court or Supreme Court is made that a statutory provision or common law rule is incompatible with the Convention. The Government may then, at its discretion, make an ex gratia payment of compensation, seeking advice of an advisor appointed to it with regard to the amount of compensation. The proposed amount of compensation should take into consideration the principles and practice applied by the ECtHR in relation to affording just satisfaction under art. 41 ECHR.

In the US, states courts have jurisdiction in state tort claims act cases. Under the Federal Tort Claims Act the federal US Court of Claims is a special court that has
jurisdiction in cases against the federal government, including tort claims governed by FTCA. Federal courts enjoy jurisdictions over constitutional torts.

Exceptionally, claims arising from violations of human rights have been assigned to the competence of constitutional courts (e.g. in Romania, Croatia - with respect to infringements of rights by the judiciary, since 2012 in Turkey55).

Class or group actions are permitted on general grounds, but are not very popular in the context of human rights violations56. In Israel, the availability of class actions in anti-discrimination law, the protection of minimum wages law, and the Consumer Protection act grants additional constitutional-like effect to the human rights protected by those laws and make the process more effective and cheaper57. However, in accordance with the Class Action Act the class action may only be brought against non-State defendants.

In general, one way to deal with mass cases is to establish an ad hoc compensatory scheme, as the ECtHR sometimes suggests it58.

The survival of claims upon the death of a direct victim and the standing of successors of the victim are governed by private law rules (unless special compensatory scheme introduces special rules in this respect).

XIII. SPECIAL INDEMNITY REGIMES

XIII.1. Indemnity for historical injustices

According to the view that prevails in public international law compensation for historical injustices involving violations of human rights stemming from international conflicts should be regulated at inter-state level. This approach is still represented by most reports. Since thousands of words have been written upon the question of historical injustices, such as post-World War II reparations by the German government, the focus of this comparative report is not on inter-state reparation agreements, but on domestic mechanisms and domestic practice regarding both international and domestic violations.

It should be observed that historical injustices are increasingly met with apologetic statements by governments (e.g. in France), in particular when personal injuries and rights of personalities form the subject matter of mass claims. The most

55 The individual complaint mechanism before Turkish Constitutional Court was introduced in 2012. The Court hears complaints filed against both judicial decisions and administrative actions, after the exhaustion of domestic judicial remedies or where there are no remedies for the occurrence of the alleged human rights violation were available.

56 In Greece courts admitted a claim lodged by the same Local Self-Administration authority as an agent of 118 victims and victims’ successors, in order to facilitate the victims in seeking damages from the foreign state.

57 See the Israeli report, at. B.

58 See the reports for Slovenia and Turkey.
frequently used method of remedying personal harms is the rehabilitation of political prisoners, annulment of criminal sentences and of administrative decisions. The national positions differ to a great extent. In Poland, for example, the Act of 1991 on Declaring Void The Judgments Rendered against Persons Prosecuted for Activities Performed for the Benefit of the Independent Polish State entitles the victims or their families who sustained pecuniary and non-pecuniary losses arising from such judgments issued in the period 1944 – 1956 to claim compensation from the State Treasury. The most important Czech enactment was the Act No. 87/1991 on Extra-judicial Rehabilitations, which addressed the largest scope of historical injustices.

We should observe that financial compensation for historical violations of personal rights and freedoms is not a true compensation at all, but a type of social allowance or benefits (see examples below). Hence, the reparations for historical injustices almost always have an equitable nature and do not follow the principle of full compensation (they usually cover consequences of deprivation of freedom and the loss of working capacity).

As regards historical injustices tort law is not very helpful, because under the commonly accepted rules of intertemporality, the law of the period must be applied to any tort action. Hence, under private law rules private claims for damages have long been prescribed before they are filed in national courts.

Therefore, historical injustices are most often subject to special compensatory schemes, which are created in result of a political compromise and of balancing budgetary concerns and societal expectations. The idea of social state prevails over the idea of corrective justice. The tort law notions of wrongfulness or fault are put in the shade and the idea of full compensation of damages is replaced by the philosophy of the welfare state. The aim of the remedies is to restore the integrity of human society, which had been destroyed by the injustices of Fascism, socialism and atrocities of the past wars.

Many special schemes were reported as regards indemnities paid by respective states to the victims of the Second World War (i.a. the victims of Holocaust and the persecutions of Jews during the war) and other post-war conflicts:

a) In Germany, several legislative acts enacted in the period of 1956-1965, including the Federal Compensation Act of 1956 covered a wide range of harms suffered and awarded fixed sums of financial compensation, pensions and regular allowances by subsidies and in other forms. These laws in general granted rights to victims who lived in the Federal Republic of Germany or on the territory of the German Reich within its boundaries of 1937, and later to also stateless and displaced persons and for Jewish emigrants from Eastern Europe. Other victims were to be compensated via reparation agreements with their respective State of nationality. Certain categories of victims, such as Sinti and Roma (included in a special fund in the 1980s), homosexuals or victims of forced sterilisation were, however, excluded. As the German reporter observes, damages for victims of Nazi persecutions is often set as a standard of protection. After the reunification of Germany in 1990, rehabilitation and compensation have been regulated in detail in three statutes,
devoted to criminal law, administrative law, and professional disadvantages, respectively. For example, in criminal law moral damages are redressed through social adjustment payments or a supportive payment. The statutes do not pre-empt further claims directed against private individuals responsible under civil law.

b) In France, for example, two decrees provided for financial awards to the orphans whose parents were the victims of anti-Semitic persecutions (Decret no 2000-657) and the orphans whose parents were the victims of barbaric acts during WWII (decret no 2004-751). Similar legislation was enacted with a view to compensate the victims of the civil war in Algeria. The French legislator while affording a right to indemnity appears to permit concurrent State liability, without however, indicating the basis of such liability, and especially avoiding the language of fault. It seems that the liability is based on the violation of l’égalité devant le charges publiques.

c) In Italy the so-called Terazzini law (Law n. 96 of 10 March 1955) provided for compensation in the form of pensions for Italian citizens who fell victims of persecution due to their political activities in opposition to the Fascist regime and who had become unable to work. Article 2 recognises the same form of compensation to the heirs of the victims of racial and political persecution. Later statutory measures required survivors to prove that they were still suffering a disease at the time when they applied for a pension. The Constitutional Court in the judgment of 18 December 1987 rejected the solution according to which compensation should be linked to the pension system and the calculation of damages linked to the loss of capacity for work, hence limiting the benefit exclusively to pecuniary harm suffered by the victims. Terracini Law was later extended the victims of racial hatred.

d) In Slovenia the constitutional guarantees of special protection to war veterans and victims of war served as a basis for the creation of a special compensatory scheme for victims of the Nazi and fascist occupiers which after judicial review was extended to cover civilian victims of the 1991 Independence War with Yugoslav forces. Under the scheme, the eligible persons can claim a fixed monthly life annuity (e.g. 1.25 euro for every month a person spent in a concentration camp) and other entitlements connected to the pension, social security and health system. It is noteworthy that the Republic of Slovenia has not taken on responsibility for the violations, but committed to pay based on the principle of solidarity (principle of social state). After the political and economic transition and gaining independence in 1991, the Slovenian parliament passed The Redress of Injustices Act, introducing a special compensatory fund, which pays monetary compensation for former prisoners (the time of detention counts towards their pension entitlements) and granted the right to compensation (of material and immaterial harm) Other eligible persons are the victims of war violence and veterans. The fund was created only in 2001 and the delay in the organization of the fund was found unconstitutional.
e) In Brazil the claims of victims of the military dictatorship were partially solved by special laws enacted in 1995 (Loi no 9140 with respect to the murdered and the disappeared) and in 2002 (Loi no 10.559 with respect to forced labourers). Slavery and the violations of the rights of autochthons are the greatest concerns in Brazil as far as remedying historical injustices is concerned. Affirmative actions and the restitution of proprietary rights in land are regarded as more appropriate than damages, partly because those sanctions address what is seen as a social (collective) debt rather than individually suffered harms.

Despite the existence special entitlements and because of their many drawbacks and limitations, many post-WW II victims have brought individual claims for compensations based on civil law and international human rights regulations. Despite the lapse of prescription periods some claimants were successful in trial courts. We should take a note of the claims filed by former forced labourers and war crime victims, who were not embraced by reparation treaties or inter-states agreements. Lacking any legislative entitlements, their claims were dismissed by German courts with the support of the Federal Constitutional Court. In this negative legal environment the victims made an effort to seek redress in other jurisdictions, such as the United States (on the basis of the Alien Tort Claims Act), Italy and Greece. It is worth noting that in the U.S. the slave labourers sued not the German state, but the German corporations who employed forced labourers of slave labourers in the period 1933-1945. A solution quickly negotiated by the German government was simple: a special fund was established59 which was financed partly by the government and partly by the mentioned companies (albeit, formally on a voluntary bases). This mechanism resulted in payments to the victims of forced and slave labour (including the Holocaust victim), which were made in the period 2000-2007. The pressure mounted on the German government was linked to the fact that the Fund was the prerequisite for an agreement with the US Government in July 2000 guaranteeing that any claim before US courts would be quashed by raising the ‘political questions’ defence. Hence, tort law damages were not seen as a right method of reparation in a ‘host-country’ but could be subject to the jurisdiction of another country through ‘forum–shopping’.

Also the Italian and Greek reporters cite to cases of awards being made by victims’ domestic courts (including the highest courts) and then subjected to enforcement procedures against the German state’s assets in the given country. In particular, the Italian Supreme Court held that “the specific actions performed by German military forces constituted systematic infringements of rights, which took inter alia the form of slavery. In cases involving serious breaches of human rights, the State cannot claim immunity from jurisdiction in order to avoid paying compensation to victims.” Ultimately, the efforts made by Italian courts to assert the right to obtain redress for gross and systematic violations of human rights were frustrated by the

59 Foundation “Remembrance, Responsibility and Future" (Erinnerung, Verantwortung und Zukunft, EVZ).
ICJ’s judgment in *Germany v. Italy*. As a result, the principle of State immunity was reinstated.\(^60\)

As far as the **property rights protection** is concerned (war-time and post World War II expropriations, nationalisation) among the traditional private law remedies claims for the restitution of property and other resources seem to find support in most countries (in particular in post-Socialist states) while in other countries damages awards are preferred to any restitution demands (in particular in claims related to property in former Eastern German Republic). The latter preference is clearly seen in Israel with regard to persons evacuated and deprived of homes from the Gaza Strip and North of Judea (the Disengagement Act of 2005). However, the compensation for lost property must be proportionate and appropriate, which means it will not necessarily be linked to the actual value of the property.

In the **post-Socialist countries**, claims related to property unlawfully expropriated by the Socialist authorities are most often addressed by special (reprivatisation) laws. For example, in Estonia special rules were introduced to allow compensating for property unlawfully seized in the Soviet period. There is a choice between the return of property or pecuniary equivalent of the property. In the Czech Republic several special acts have been adopted relating to restitution and/or compensation for certain losses and injuries suffered by Czechoslovak and Czech citizens during the periods of the Nazi occupation (1938-1945) and the communist regime (1948-1989). The recent Czech Act on Settlement of Claims of Churches and Religious Associations of 2012 aims at mitigating certain injuries in the period 1948-1989 and reaching settlement of property relations between the State and churches and religious associations. The Act envisages either restitution in kind or financial compensation. The Act set forth the precise amount for each of 17 recognised churches and religious societies in the Czech Republic to be paid in 30 annual instalments.\(^61\)

By contrast in *Norway*, historical injustices and systemic violations are handled through *ex gratia* payments from the State, which by their nature do not involve the question of prescription. For example, the *ex gratia* payments were awarded to the citizens of the Romani-people due to maltreatment following from an assimilation-policy which was at some point the policy of the Norwegian State, citizens of certain minorities due to lack of schooling in their own language, as well as claims of Jews due to confiscations of properties during the occupation of Norway during the Second World War.

**XIII.2. Gross and systematic violations**

---

\(^60\) See the Italian report, 3.2.

\(^61\) See the Czech report.
The problem of gross and/or systematic violations in the international human rights law relates to violations which are both qualitatively and quantitatively serious in nature (‘gross’) and are an element of an official, widespread pattern or practice (‘systematic’). The violations often stem from armed conflicts, non-necessarily of international dimension, but often authored by a terror political regime. This kind of violations is especially unsuitable to be embraced by a compensatory tort action. The category of mass violations of human rights overlaps with the category of ‘historical injustices’, which are linked to big international conflicts.

The main impediments to compensatory claims include the fact that any redress is in fact hindered by state terror until a new democratic government is in place. Moreover, a mass number of victims means that the whole society has in fact suffered, thus remedies other that compensation granted to individual victims are regarded as more appropriate to reach the aim of reparation. Apart from cessation of conflicts and rehabilitation of victims, criminal responsibility, lustration processes and deterrence of individuals charged with crimes against humanity are remedies of prime importance. Notwithstanding the above remedial preference, victims of gross and systemic have an internationally recognized individual right to reparation.

As regards domestic compensation claims, two common themes that can be drawn from the reports are the following:
1) pecuniary compensation is limited in scope and most often aimed at the restoration of property rights, if possible,
2) only limited financial awards are envisaged to redress personal injuries and deaths.

As regards the latter injuries, compensatory schemes are put in place in order to limit the financial burden on the state that pays for an unknown number of consequences of violations authored or ascribed to the previous political regime. Such schemes were developed in countries in political transitions to democracy, i.a. in Central and Eastern Europe. In a few states the schemes were prompted by the decisions of the ECHR (most recently by pilot judgments). Under a typical compensatory scheme the state may not invoke defences related to the conduct of the responsible officials, hence the liability is strict (no-fault).

An interesting example of a compensatory scheme involving claims that can be described as based on mass violations is the ad hoc Slovenian compensatory scheme set up by the Act on restitution of damage for persons who were erased from the Register of Permanent Population (2013). In 1992 the newly established Slovenian authorities erased approximately 25,000 non-citizens without any notification and without being heard. These systematic violations were found unconstitutional in 1999, but only in 2010 the victims were given a legal avenue to obtain permanent residence in Slovenia. As civil litigation was unsuccessful due to the

---

63 See D. Shelton, Remedies, p. 389-390
64 In Argentina, part of Central and Eastern Europe.
66 Act on restitution of damage for persons who were erased from the Register of Permanent Population, Official Gazzette no. 99/2013 – see the Slovenian report.
lapse of prescription periods under private law, the ECtHR in *Kurić and others* found Slovenia to have violated art. 8 ECHR and held that Slovenia should set up an ad hoc compensation scheme. Under this scheme an administrative authority awards € 50 per month of the person being erased. An alternative judicial avenue is through civil litigation, and the courts must apply the same cap on damages, and private law of obligations by analogy (except for the rules on time limits).

**In Estonia,** according to The Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act (CUDLA) compensation for damage does not require establishment of lawfulness or unlawfulness of the deprivation of liberty. All persons who have been unjustly deprived of liberty shall be paid an equal amount for compensation that is deemed to cover the non-pecuniary damage and the loss of profit. The claimant need not prove neither the occurrence of the damage nor the extent of the damage. The CUDLA regulation draws on the assumption that the restriction of the fundamental right of liberty causes non-pecuniary damage and results in a loss of profit in any case. Nevertheless, it rules out the possibility of receiving additional compensation for both types of losses caused by unlawful deprivation of liberty on the basis of any other legislation. The constitutionality of this limitation has already been called into question.67

There are three, quite recent compensation systems for particular human rights violations in Turkey, two of which are mentioned below:
- The Law on the Compensation of Losses Arising from Terrorism and the Fight against Terrorism of 2004 (No. 5233) provides protection for the internally displaced persons (IDP) in Turkey. The state is strictly liable for social risk;
- The Law on the Settlement of Some Applications Lodged with the European Court of Human Rights (ECHR) By Means of Paying Compensation of 2010 (No. 6384) established the Human Rights Compensation Commission (only in 2013). The scheme covers delay of justice cases as well as consequences of frequent violations of other rights, such as the restrictions on the right to defence for disciplinary sanctions applied to prisoners as well as the inability of prisoners to communicate in the language other than Turkish. In Turkey low flat rates and a short compensation procedure before administrative commissions have been criticized in the literature as contradicting the general principles of law of damages.

---

67 See the report for Estonia.
Comparative Conclusions:

Liability in damages for violations of human rights is governed by a plethora of rules scattered between the directly enforceable constitutional norms, directly or indirectly applicable regional convention rights, public authority liability regimes and tort law.

There are divergent tendencies in monist and dualist legal systems as regards the legal status of unincorporated international conventions that can give rise to rights enforceable in national courts. In the United States and Canada (both federal and dualist systems), there is a clear distinction of treatment of international human rights and other civil rights protected by the federal and state constitutions.

The question that has not found a clear response in many systems is whether a right to effective remedy or a right to just satisfaction form a separate claim under domestic law, or whether this is foremost a standard to ‘test’ the domestic liability rules against. The first option prevails not only in the systems, which themselves have introduced the right to just satisfaction (the UK and Canada), but also in the few monist states that have opened, either via the constitutional rule (e.g. Ireland) or around the constitution (France) and via the Convention (France, Italy) to claims for compensation in both public and private spheres.

The remedy of just satisfaction based on the principle of subsidiarity is not a preferred choice in all surveyed systems except for the UK and Canada. It is a Convention concept that is distinct from the damage concept underlying the national tort law systems. This notwithstanding, it is open to debate why it should not be a preferable choice. In many jurisdictions other legal remedies, and not compensation, are considered as a more appropriate means of reaction to abuses of (at least some types) fundamental rights. As the German reporter put it “If the Constitution were allowed to add a general obligation to compensate for any infringement of human rights that cannot be redressed otherwise, for the treasury this would open up Pandora’s box.” It is hard not to agree with this concern. Adding new, specific entitlements to compensation every now and then in order to conform to transnational obligations is thus a preferable solution in Germany and Israel, and – a bit covertly - in a few more systems. Ultimately, the choice between the equitable financial award and compensation of sustained loss depends on the tradition of the national liability system, more specifically, on what is the primary element that triggers liability. In some systems it is the damaging event, in others it is the existence of damage (loss).

Other countries appear to prefer to leave the matter of the legal basis for compensation in human rights cases in the hands of the courts. This approach is quite safe from the perspective of the coherence of the legal system, because in most states human rights law and the principles of direct or indirect horizontal effect have not impacted the main institutes of civil law and have not changed the core pre-requisites of liability established for different types of torts. The rules on torts (civil liability)
were not originally designed, whether by legislators or by courts, in order to resolve claims for damages involving breaches of human rights; they have had little connection to international human rights law, and until recently also to constitutional law. But this has changed over time and under the influence of regional (ECHR) standards of human rights protection. As all reports indicate in accord, in response to the societal needs and expectations the courts have been developing a new function and purpose of the general liability rules. Some specially elevated rights, such as the right to liberty, freedom of speech, right to privacy or equality have had a significant impact on tort law litigation. Notwithstanding this clear trend, tort law limitations are still applied by courts and, in consequence, the treatment of private and public defendants may differ.

Of course, the judicial balancing of (human) rights is made on a case by case basis, and so there is a risk of compromising the principle of legal certainty. However, what appears to be a correct balance of rights in one country is not necessarily correct for another one: there is not one proper solution for all legal cultures and for all societies (certainly not for Europe, where quality of public service, legal cultures and societal expectations vary). Naturally, certain infringements will only trigger liability of public authorities, because certain human rights may only abide state institutions (e.g. right to fair trial within reasonable time/due process, right to compensation for unlawful detention or arrest, right to be adequately compensation for expropriation). One of the greatest impacts of the ECHR on the national systems is the adequacy of compensation for the breaches of Convention rights. The focus of the Convention on some special categories of rights (art. 5, art. 6) forced the national legislators to amend their legislation at least in these fields (under the pain of being declared guilty of breaching art. 13 ECHR). This process resulted in the significant enhancement of protection of victims of judiciary errors (primarily in criminal justice) and judicial delays. It should be noted that systemic violations of this kind are preferably dealt with through special compensatory routes rather than through ordinary courts and litigation based on general tort law rules. A clear convergence of European governments’ legal policies in these fields, brought about by the case law and policy of the ECtHR, can be observed. The general measures, however, are convenient for the government and for the ECtHR, but not necessarily for individuals. It is therefore important not to completely compromise individual interests, and allow further claims to be submitted outside a compensatory system by those who suffered exceptional loss of harm. It is rather clear that the underlying policy consideration of many of the European legislators was to minimize the number of violation judgments and awards of just satisfaction under Article 41 of the ECHR.

When infringements of rights occur in relations between private persons, a claim for compensation has in some systems given rise to the creation of a new claim (new basis of liability), sometimes conceptualised as ‘a constitutional tort’ (Ireland), although the same name also relates to the direct liability for breaches of
constitutional rights by public defendants (in the US and in Israel). The sense and utility of creating a new type of tort to deal with new sources of harm may be put into question, although it is an attractive solution. It is perhaps worthy of exploring an approach (present e.g. in France, Italy, Portugal) that is be based on an innovative, pro-constitutional and pro-conventional interpretations of liability rules contained in the civil codes while surpassing the restrictions contained in those rules, such as e.g. the limited availability of non-pecuniary loss damages or fault as a prerequisite of non-pecuniary damages. It is almost a truism that the liability norms can and should be interpreted and applied in a human-rights-protecting manner. The fact that human rights have been violated may mean that one is faced with a legally relevant interest, and this will influence the rules on liability.

A major concern for the creation of constitutional torts as well as the Conventionalisation of private law is the expansion of liability through broadening the contents of rights that had already been protected by tort law based on a careful balance of individual and public interests. The legislators introduce instruments to control the expansion of the liability. The principle of subsidiarity of the damages remedy, friendly settlements as pre-conditions of filing a suits are concepts alien to tort law, but they play a controlling function. Other methods include restricting compensation for breaches of second and third generation human rights, and setting caps on the amount of damages, as well as establishing financial compensation schemes. Limiting the monies spent on monetary compensation by the creation of compensatory funds or schemes is an attractive idea to the government and taxpayers. Budgetary constraints and the ‘floodgate’ argument support the controlling mechanisms. Under Section 8(3)(b) HRA a UK court must take into account the consequences of any decision (of that or any other court) in respect of an unlawful act of public authority. The consequences of any decision may be that the same duty is imposed in a ‘wide range of similar situations’ with the result that the burden of liability on the class of defendant ‘may be considered to be disproportionate to the conduct involved’.

In the last decades American courts appearing swayed by considerations of policy try to strike the right balance between the individual interests and public interests. They have shown reluctance to imply private rights of action in statutes and regulations. Through judicial review the courts ‘strike down human rights-resonant rights-protecting and remedy-providing legislation as beyond Congress’s constitutional powers’.

Finally, where historic or systemic violations embrace civil and political rights, the creation of a scheme that allows for expeditious and less expensive dealing with claims is clearly preferred to tort law liability.

---

68 See the UK report.
69 See the US report
ANNEX

IV A 1. Droit international public / Public International Law

TOPIC: Les dommages-intérêts pour violation des droits de l’Homme / Damages for the infringement of human rights

PROJECT DESCRIPTION AND QUESTIONNAIRE

I. PROJECT DESCRIPTION

The topic Damages for the infringement of human rights relates to the legal grounds, premises and extent of pecuniary compensation (damages, réparation) for the violations of human rights in your domestic legal system. The subject does not cover all possible remedies that are available in your jurisdiction in cases of infringement of human rights [HRs], such as e.g. restitutionary means, injunctions, declaratory judgments, guarantees of non-repetition, etc. Therefore, you should focus on financial reparation (compensation) and refer to the other, non-monetary remedial sanctions insofar as it is necessary to provide a clear context, delimitation, the hierarchy of sanctions or the characteristics of your jurisdiction.

You are free to structure your report in a way that is logical for your jurisdiction. Please, consider all mechanisms by which public authorities or other persons can be obliged to compensate for violations of human rights, including special (alternative) compensation systems (if any). This questionnaire is just a guideline; it is quite detailed though in order to give you an idea of the subject matter and scope of comparison. It is important that your report reflects any unique features of the relevant rules in your national system. Feel free to omit questions irrelevant to your jurisdiction or to deviate from the sequence of the questionnaire where needed. Please, provide illustrative examples of case law where useful and necessary. A publishable report should not exceed 25 pages.

II. QUESTIONNAIRE

A. LIABILITY REGIME – IN GENERAL

1. Please, describe the main features of the general law of public authority liability insofar as it concerns the liability for violations of HRs in your jurisdiction.
2. Does liability/responsibility for violations of HRs fall under public law or private law (the law of tort or civil responsibility)? Is compensation (also/only) available under other branches of the law (e.g. criminal law)?
3. Is there an explicit legal basis for claiming damages for violations of human rights? Does a claim for financial compensation arising from infringement of HRs involve the application of general principles or special rules?
4. What is the purpose (idea) of the damages in cases of infringement of HRs?
5. What is the correlation between different remedies for violations of HRs in your jurisdiction? Does one remedy exclude the other (or must be preceded by the other)?
6. What doctrines are used to support a claim for financial compensation (subjective public right, protected interests/protective purpose of the rule doctrines, etc.)?

B. SCOPE OF LIABILITY REGIME
1. What types of rights that have been infringed are covered by explicit/implicit liability rules? Is there any distinction in treatment of claims stemming from violations of international norms/duties (also referred to as “State responsibility”) and violations of domestic (e.g. constitutional) norms?
2. Is compensation for historical injustices available under the same rules?
3. Are gross and systematic violations covered?
4. What is the scope of any applicable special compensatory schemes (if any)?

C. LIABILITY REGIME\(^{70}\) IN DETAIL

1. The foundation of claims for damages (grounds and premises of liability):
   - What is considered as the principle (basis) of liability for infringement of HRs: fault, strict liability (risk) or equity (or other)? Indicate the approach of case law and/or legal scholarship in a jurisdiction where no special legislative solutions exist. Please, indicate the correlation of concepts used, such as e.g. ‘infringement’, ‘fault’, ‘illegality’, ‘wrongfulness’ (where appropriate);
   - Are the same principles, whether tort law rules or public law, applied to compensatory and non-compensatory remedies for violations of human rights?
   - Is harm (loss) to property or person considered as a prerequisite of a claim for damages, or is “pure violation” considered sufficient to claim compensation?
   - What is the burden of proof concerning damage/harm?
   - What doctrine of causation is applied?

2. What is the nature of harm (damage/injury):
   - Reparable non-material (moral) harm;
   - Reparable material damage: real loss, lost profits (lucrum cessans), loss of chance (opportunities), costs and expenses, etc.

3. Scope of damages (compensation):
   - Do general or special rules apply to the scope (extent) of damages?
   - Please, specify elements of pecuniary damages for the following instances: personal injury, including death, loss or damage to property, deprivation of liberty, procedural infringements;
   - How is compensation for non-pecuniary harm calculated?
   - Taxation of damages and interest;
   - Are damages discretionary (equitable awards)? if yes, what are the levels of discretion (award-no award, calculation)?
   - Is there a limitation/cap on damages?
   - Is accumulation of claims (damages) permitted in cases of multiple violations?
   - Do pecuniary claims survive the death of a direct victim if she dies during the proceedings? What is the standing of successors of the victim before the commencement of the proceedings? Can the heirs/family/next of kin/other beneficiary have claims sui generis (in its own right)?

4. Are punitive or exemplary damages allowed?

5. Defences:

\(^{70}\) ‘State responsibility’ where appropriate.
- Is contributory conduct (negligence, fault) taken into account? What is its role?
- Is the claimant obliged to exhaust all available procedures before claiming financial compensation?
- What are the exclusions (including immunities) of liability?

6. Who to sue and who may sue:
- Who incurs liability in damages for infringement of HRs? Does the liability in damages embrace non-state actors (private entities performing public functions, multinational corporations)?
- Does the liability also fall on the individuals (public official, agent)?
- Are aliens entitled to claim compensation?

7. Courts/competent bodies and procedures
- What, if anything, is distinctive about the procedures applied by courts or other competent bodies?
- Do any special time limits apply?
- Are group claims available?

D. THE INTERPLAY BETWEEN PRINCIPLES OF NATIONAL AND INTERNATIONAL HUMAN RIGHTS LAW (CONCERNING FINANCIAL COMPENSATION)
- Describe the correlation between monetary remedies (financial compensation) available to victims of violations of HRs under international law (such as e.g. under the European Convention system, Inter-American system, international criminal tribunals and other) and under domestic law.
- What is the influence of compensation granted by an international tribunal (body) on the claim brought under relevant domestic regime? In particular, is the claimant who has already been awarded compensation by an international tribunal/organization/body (such as e.g. “just satisfaction” under art 41 ECHR) entitled to seek further compensation in the domestic system? Is compensation awarded by a national court (other competent body) in any way influenced (reduced, excluded) by the sums already awarded?
- What are policy considerations that have exerted the greatest influence on the development of your legal system in the discussed area?

E. Please, provide any other remarks; personal evaluation of the system; calls for reforms or reforms under way.