

## Case law of the European court of human rights on compensation for non-pecuniary damage: Certain issues

 Makhinchuk Vitalii<sup>1</sup>,  Bobryk Volodymyr<sup>2</sup>,  Pozov Denys<sup>3</sup>,  Karmaza Oleksandra<sup>4</sup>,  Koroied Sergii<sup>5</sup>

<sup>1</sup>The F.G. Burchak Scientific-Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, 23A Pavla Zahrebelnoho street, 02000, Kyiv, Ukraine; olia.panchenko@ukr.net (M.V.).

<sup>2</sup>The F.G. Burchak Scientific-Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, 23A Pavla Zahrebelnoho street, 02000, Kyiv, Ukraine; bobryk@gestors.com.ua (B.V.).

<sup>3</sup>The F.G. Burchak Scientific-Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, 23A Pavla Zahrebelnoho street, 02000, Kyiv, Ukraine; dpozov@gmail.com (P.D.).

<sup>4</sup>Taras Shevchenko National University of Kyiv, 60 Volodymyrska street, 01601, Kyiv, Ukraine; karmazaoleksandra@gmail.com (K.O.).

<sup>5</sup>Koretsky Institute of State and Law of National Academy of Science of Ukraine, 4 Tryokhsviatitelska street, 01601, Kyiv, Ukraine; koroied\_sergey@ukr.net (K.S.).

**Abstract:** Compensation is considered a means of restoring the violated rights. Ukrainian legislation directly provides for the possibility of compensation for non-pecuniary damage, however, a number of problems arise when considering cases on this issue in national courts. Firstly, there is no legally enshrined definition of this concept in Ukraine. Secondly, there is no single methodology or model for assessing moral damage, no formula for calculation is established at the legislative level, due to which judges assign different amounts of compensation for harm caused under the same or similar circumstances. Besides, there are no clear criteria for determining the amount of damage caused, which makes it almost impossible to unambiguously calculate, for example, the extent of the mental pain or the infringement on dignity and honor in property equivalent, that is, it is in fact a conditional compensation. Reference to the case law of the ECHR on this matter may contribute to solving these problems, because its decisions are referred to by national courts. The ECHR has not developed a universal formula for calculating the amount of non-pecuniary damage, but there are certain criteria for its assessment: the nature of the offense and violated right; payments accrued based on the results of consideration of previous cases; victim's personality; the respondent State; collective statements or mass offenses; other circumstances of the case.

**Keywords:** Civil science, ECHR (Court), Non-pecuniary (Moral) damage, Rights, Violation.

### 1. Introduction

Damage compensation in Ukrainian law is a complex activity in its nature and content, which is based on a system of legislative rules, basic provisions, main ideas, the observance of which is mandatory for all participants in the relevant legal relationship.

Compensation is considered a means of restoring the violated rights. It can be monetary or equivalent compensation for the damage caused, or loss of profit resulting from unlawful act. The purpose of compensation is to make good the damage caused and return of the victim to the situation that existed before the harmful act was committed. The injured party shall be entitled to compensation for all losses suffered as a result of the wrongful act of the guilty person, that is, both material and moral.

Thus, according to Art. 56 of the Constitution of Ukraine [1] (Verkhovna Rada of Ukraine, 1996), everyone has the right to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions, actions or omission of bodies of state power, bodies of local self-government, their officials and officers during the exercise of their authority.

The concept of non-pecuniary damage appeared in 1993 in Ukrainian legislation, and since then it has been gradually supplemented and expanded. Certain provisions of the Constitution of Ukraine (Articles 32, 56, 62, 152) directly provide for the possibility of compensation for non-pecuniary damage. This right is also enshrined in the Civil Code of Ukraine, the Economic Code of Ukraine, the Labor Code of Labor of Ukraine, the Laws of Ukraine “On Information”, “On the Protection of Consumer Rights”, etc., as well as in the Resolution of the Plenum of the Supreme Court of Ukraine No. 4 of March 31, 1995.

However, a number of issues arise when considering cases of compensation for non-pecuniary damage in national courts. Firstly, there is no legally enshrined definition of this concept in Ukraine. Secondly, there is no single methodology or model for assessing moral damage, no formula for calculation is established at the legislative level, due to which judges assign different amounts of compensation for harm caused under the same or similar circumstances. Besides, there are no clear criteria for determining the amount of damage caused, which makes it almost impossible to unambiguously calculate, for example, the extent of the mental pain or the infringement on dignity and honor in property equivalent, that is, it is in fact a conditional compensation.

The complexity of assessing moral damage is due to the following reasons:

- Lack of legally established criteria for determining the amount of compensation for non-pecuniary damage;
- The vagueness of the criteria that the court takes into account in assessing non-pecuniary damage;
- «Blurriness» of the reasoning of the respective amount of compensation in the decisions of the courts;
- Assignment of different amounts of compensation for moral damage under the same or similar circumstances [2] (Panchenko 2022, p. 174).

In this regard, there is a need to study the European Court of Human Rights (hereinafter – the ECHR, the Court) practice regarding consideration of claims for compensation of non-pecuniary damage, whose decisions, among other things, are referred to by national courts. Decisions of the ECHR are made on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which is an international document protecting civil and political human rights, and are aimed specifically at restoring the violated rights enshrined in it.

The practice of the Court is a source of development and positive transformations of national law, therefore it is of interest both for civil studies and for international legal science.

## 2. Materials and Methods

The methodological bases of the work are general scientific and special scientific research approaches, methods and techniques. The research is grounded on dialectical general scientific approach, which was applied, in particular, to the study of the Court’s legal positions on the compensation for non-pecuniary damage.

Among the general scientific methods, an important role plays the systematic method, which was used, in particular, to analyze the ECHR’s approaches to determining the criteria for assessing moral damage in each particular case. The method of ascending from abstract to concrete served to analyze the Court’s decisions, in which each of criteria is present.

Grouping method, as well as logical method made it possible to identify the problems, which arise when considering cases of compensation for non-pecuniary damage both in the ECHR and in national

courts. These approaches were also implemented for identifying the constituent elements of the criterion of justice, applied by the Court.

The method of interpreting legal rules, as well as content analysis method were used to study the content of the Convention on the Protection of Human Rights and Fundamental Freedoms, on which the decisions of the ECHR are made, and also Ukrainian legal instruments governing the issues related to the compensation for non-pecuniary damage.

The methods of induction and deduction were applied for the clarification of the terminological and conceptual apparatus of the study (non-pecuniary damage, just satisfaction, causal link, etc.).

Summarization method helped to draw relevant conclusions, deriving from the research.

The literature review indicates that the issue of compensation for non-pecuniary damage in the ECHR practice is of particular interest to the scholars.

For example, Fikfak (2020) [3] studied how the ECHR adjusts damages for human rights violations. In particular, she empirically analyzed 13 years of the Court's case law in relation to Articles 2, 3 and 5 of the European Convention.

Solomou (2014) [4] paid attention to the contribution of the European Court of Human Rights and the Inter-American Court of Human Rights to the emergence of a customary international rule of just satisfaction and the creative expansion of its scope.

Prymak (2013) [5] examined some of the fundamental approaches of the European Court of Human Rights to identification of key aspects of the construction and functioning of the mechanism of compensation for moral damages. On the basis of decisions by this Court he formulated proposals for the improvement of national court practice on the application of this measure of civil liability.

Sherstiuk (2021) [6] devoted his research to the awarding of non-pecuniary damages in the European Court of Human Rights practice. The problem of research arises from the lack of criteria that the Court uses for calculating non-pecuniary damages which leads to unfair compensation for the injured party.

Vovk and Zaiats (2023) [7] drew attention to the problems of legal regulation of the concept of moral harm. It was established that according to the practice of European Court of Human Rights, the content of moral (non-property) harm is determined differently in relation to individuals and legal entities. In addition, the methods of determining the amount of compensation for moral harm were analysed.

Khutor et al. (2024) [8] presented the analysis of the practice of compensation for non-pecuniary damage in Ukrainian law, as well as the UN Compensation Commission and the European Court of Human Rights and came to the conclusion that the peculiarity of non-pecuniary damage is that it cannot be calculated precisely. Kyiv: Institute of Legislative Ideas.

Despite active coverage of the ECHR practice in matters of awarding just satisfaction, there is a lack of analytical studies aimed at identifying the Court's systemic vision of the proper structure and basic principles of the functioning of the moral damage compensation mechanism. In particular, it is about the assessment of the legal nature of this measure of civil liability, the criteria for determining its amount, the methodology or model for assessing moral damage, and the formula for its calculation.

Therefore, the aim of the Article is to study and analyze the ECHR practice regarding consideration of claims for compensation of non-pecuniary damage in the context of the issues of interest.

### 3. Results and Discussion

According to Art. 9 of the Constitution of Ukraine [1], international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. In particular, they include the Convention on the Protection of Human Rights and Fundamental Freedoms and other international treaties ratified by the Verkhovna Rada of Ukraine.

Upon joining the Council of Europe on November 9, 1995, Ukraine, becoming its full member, signed the Convention on the Protection of Human Rights and Fundamental Freedoms. After its

ratification by the Verkhovna Rada on July 17, 1997, our State recognized the binding jurisdiction of the European Court.

Thus, according to the provisions of the Convention [9] (Council of Europe, 1950), the Court may accept applications from any person, non-governmental organization or group of persons who consider themselves victims of the violation of the rights set forth in the Convention or the Protocols thereto committed by one of the High Contracting Parties. The High Contracting Parties undertake not to prevent in any way the effective exercise of this right. The Court may take up a case only after all national remedies have been exhausted, in accordance with generally accepted principles of international law, and within six months of the date of the final judgment at the national level.

We immediately note that in the process of making a claim for damages before the ECHR, the plaintiff must follow a certain procedure. The first step is to exhaust all domestic remedies before applying to the Court. After that, the plaintiff should submit a complaint, setting out the circumstances of the violation of the right and indicating the amount of damages he/she suffered. The process of submitting a complaint also involves determining whether the case meets the formal requirements, including the deadlines and compliance with internal procedural requirements. The claimant should actively interact with the representatives of the ECHR, provide all the necessary evidence and information to substantiate the claim for compensation. This process is an important stage in ensuring effective protection of human rights and compensation for the specified damages before the EU judicial body. An important stage is checking the admissibility of the complaint, which determines the possibility of further legal consideration. This stage is an important filter aimed at ensuring the efficiency and discretion of the consideration of cases before the ECHR, ensuring that the complaint complies with the requirements of the legal process and the competence of the Court. The requirements of the ECHR are aimed at ensuring that the claimant has exhausted all domestic remedies before applying to the Court. In addition, the Court must make sure that the complaint falls within the scope of application of the norms and is determined by those rights or freedoms protected by the Convention. This requirement contributes to the elimination of possible disputes at the national level and to their effective resolution at the international level [10] (Aliiev, 2024).

On February 23, 2006, the Law of Ukraine “On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights” [11] (Verkhovna Rada of Ukraine, 2006) was adopted, which guaranteed that the Court’s decisions are binding for Ukraine, thereby officially recognizing the decision of the specified Court as a source of national law.

As already mentioned above, the Civil Code of Ukraine (which is the main normative legal act regulating the issue of our research) does not provide a definition of moral damage. This is due to the impossibility of a clear definition of such an evaluative concept, what many scientists pay attention to. Therefore, Part 2, Art. 23 of the Civil Code of Ukraine [12] (Verkhovna Rada of Ukraine, 2003), the legislator only outlined the ways of manifesting such damage.

Therefore, in accordance with the provisions of the above-mentioned article, moral damage lies in: 1) physical pain and suffering experienced by an individual in connection with mutilation or other health damage; 2) the individual’s mental suffering as a result of unlawful conduct towards him/her, his/her family members or close relatives; 3) the individual’s mental suffering as a result of destruction or damage of his/her property; 4) in degrading the individual’s honor and dignity, as well as the business reputation of the individual or legal entity.

The wording of the concept of moral damage enshrined in Clause 3 of the Resolution No. 4 “On judicial practice in cases of compensation for moral (non-property) damage” [13] (hereinafter – Resolution No. 4) is more of a recommendation and was developed as a result of judicial practice. According to its provisions, non-pecuniary damage should be understood as losses of non-property nature due to moral or physical suffering or other negative effects caused to a natural or a legal person by illegal actions or inactivity of other persons (Plenum of the Supreme Court of Ukraine, 1995).

Clause 3 of the Resolution No. 4 additionally states that non-pecuniary damage may also be manifested: in moral suffering in connection with damage to health, in violation of property rights

(including intellectual), rights granted to consumers, other civil rights, in connection with illegal stay under investigation and court, in violation of normal life ties due to the impossibility of continuing active public life, violation of relations with other people, in the event of other negative consequences.

The definition of this concept can also be found in relevant court decisions. Thus, according to the case No. 752/17832/14-ts [14] (Supreme Court of Ukraine, 2020) moral damage is recognized as suffering caused to a citizen as a result of physical or mental influence, which led to deterioration or deprivation of the possibility of realizing his habits and desires, deterioration of relations with other people, other negative consequences of a moral nature.

Non-pecuniary damage in the ECHR practice is understood as mental or physical suffering resulting from the violation of fundamental human rights, and reflects in the broadest of terms the severity of the damage [15] (Case of Nagmetov v. Russia, 2017).

It is worth noting that the content of moral (non-property) harm is determined differently in relation to individuals and legal entities. The practice of the European Court of Human Rights considers moral harm caused to an individual as moral and physical suffering, namely: evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity [16] (case of Varnava and others v. Turkey, 2009).

The ECHR includes the following moral harm that can be caused to a legal entity: 1) uncertainty of the legal entity's managers and shareholders in the management and planning of its activities as a result of the established offense; 2) harm caused to the reputation of a legal entity and its trademark; 3) emotional state of the management of the legal entity; 4) financial consequences of violation of the rights of a legal entity that cannot be accurately calculated [7] (Vovk & Zaiats, 2023, p. 170).

Turning to the question of establishing criteria for compensation for non-pecuniary damage, it should be noted that although the issue of determining the amount of compensation belongs to the competence of the court, the problem of the lack of clearly formulated criteria for assessing and a clear methodology for quantifying the amount of this award has always caused certain difficulties.

In the most general form, the criteria to be taken into account by the court when determining the amount of compensation for non-pecuniary damage could be presented as follows: 1) degree of culpability; 2) the extent and nature of the physical and moral suffering associated with individual characteristics of the victim; 3) requirements of reasonableness and fairness; 4) other circumstances deserving attention.

The general criteria enshrined in Art. 23 of the Civil Code of Ukraine (Supreme Court of Ukraine [12]) are: 1) the nature of the offense, the depth of physical and mental suffering, impairment of the victim's abilities or inability to realize them; 2) the extent of the fault of the person who has caused moral damage, if the fault is a ground for compensation; 3) other circumstances, which are of significant importance. In determining the amount of compensation the court takes into account the requirements of reasonableness and fairness.

Clause 9 of the Resolution No. 4 [13] additionally states that the criteria for determining the amount of non-pecuniary damage are the nature and amount of suffering (physical, emotional, mental, etc.), the character of non-property losses (their duration, possibility of restoration, etc.) and other circumstances, in particular, the state of health of the victim, the severity of the forced changes in his/her life and work relationships, the degree of decline in prestige and business reputation, the time and effort required to restore the previous state, voluntary – on own initiative or at the request of the victim – refutation of information by the editorial office of the mass media. At the same time, the court must proceed from the principles of reasonableness, balance and justice.

The ECHR, using its discretionary powers, relies on its own practice in considering this category of cases by establishing internal guidelines when assigning the appropriate amount of compensation. Among the criteria taken into account by the Court are the nature and severity of the violation, its duration and consequences; whether there have been several violations of rights; whether a domestic arbitration decision was issued or other measures taken at the state level that may be considered the most appropriate means of redress; any other circumstances relevant to the case.

Considering the criterion of “just satisfaction”, the Court also takes into account the economic circumstances of the respondent state. To this end, it learns the open macroeconomic data released by the International Monetary Fund (IMF). Given the variability of economic factors, the amounts of compensation paid to victims in similar circumstances may differ [17] (The Council of Europe, 2007).

With regard to the criterion of “just satisfaction”, the key principle guided by the Court in determining the amount of compensation, is fairness, which means flexibility and objectivity in establishing the truth, which must be fair, honest and reasonable, considering all the circumstances of the case in which the offence occurred, and not only the position of the applicant [16] (Varnava and Others v. Turkey, para. 224).

Having analyzed the content of Art. 41 ECHR, Practical recommendations and directly the practice of the Court, Oliinyk [18] (2022, p. 24) singles out the following constituent elements of the criterion of justice for the application of this article, which are the defined framework, the boundary between arbitrariness and actual justice. Such elements are:

1) establishing the fact of breach of the Convention or the Protocols thereto and violation of the relevant right of the applicant (if the Court has found the application inadmissible or has not established the right violated, just satisfaction is not awarded);

2) the damage (material, moral or incurred expenses) suffered by the applicant must be sufficient, significantly affect the rights protected by the Convention and the Protocols, and this is relevant already at the stage of deciding on the admissibility of the application;

3) compliance by the claimant (not a third party) who has suffered damages with procedural requirements for making statements / demands for just satisfaction (in the case where the relevant claim/demand is not declared or is not filed in the proper manner, the Court refuses to satisfy the application);

4) existence of a cause-and-effect relationship between the violation of guaranteed rights and non-pecuniary damage;

5) Just satisfaction must be necessary;

6) Considering the specifics of each case;

7) Economic indicators.

A vivid example of the use of this criterion is the case of *Comingersoll S.A. v. Portugal* [19] (2000). According to it, the applicant, which is a state-owned enterprise, sought 2,000,000 escudos in property damages and 5,000,000 escudos in non-pecuniary damage for the significant delay in the recovery proceedings. The Government, in turn, argued that a legal entity – a subject of entrepreneurial activity – cannot claim compensation for moral damage in this regard.

The ECHR found that there were significant delays during the trial, which in themselves already indicate that the hearing is unreasonably long. The Court noted that its decision, which recognizes the fact of violation of the right, imposes on the respondent State an unconditional obligation to cease such a violation and to compensate for the damage caused by it. Among the circumstances that the Court took into account when assessing the amount of compensation was pecuniary damage, that is, losses of a pecuniary nature, which were a direct consequence of the violation of the right, and non-pecuniary damage, which lied in causing disturbance, inconvenience, uncertainty of the applicant’s position caused by the offence, as well as in other losses of a non-property nature.

In this case, the applicant was unable to prove the fact of property damage caused by the violation of the law, and therefore the key issue for the Court was the right of the applicant as a legal entity to demand compensation for moral damage. Based on its own precedents, as well as the practice of the Committee of Ministers of the Council of Europe and Member States of the organization, the Court concluded that the possibility of receiving such compensation by a legal entity – a subject of entrepreneurial activity – is not excluded. Based on the principle of fair compensation enshrined in Art. 41 of the Convention, the Court awarded 1,500,000 Portuguese escudos as compensation for non-pecuniary damage.

As we have already clarified above, one of the elements of the fairness criterion is the presence of a causal connection between the violation of guaranteed rights and non-pecuniary damage. Although some scholars do not consider it a separate aspect of just satisfaction in the practice of the Court, it is still an important condition for the award of compensation. The causal link between the violation of the Convention and the non-pecuniary damage alleged by the applicant is a principle of general international law that the ILC enshrined in ASRIWA and a necessary condition for establishing the need and scope of its compensation.

The case law of the Court has addressed the question of causation from two perspectives. Firstly, the ECHR proceeds from the fact that proving the existence of a causal link between the offense and the material damage caused is the procedural duty of the applicants. At the same time, the Court retains the discretion to assess whether there is a causal link in cases of non-pecuniary damage compensation, which do not require proof of causation – after establishing violation of a certain article of the Convention, the Court must find out whether there is a direct causal link between the violation and the damage claimed by the plaintiff.

Thus, according to the case *O’Keeffe v. Ireland* [20] (2014) the applicant complained that the State did not protect her from sexual abuse by a teacher in a public school, in connection with which she has not been entitled to an effective remedy. She referred to Article 3 (separately and in conjunction with Article 13), Article 8, Article 2 of Protocol No. 1, as well as these latter Articles in conjunction with Article 14 of the Convention.

The ECHR emphasized in its decision that if it establishes a violation of an important right under the Convention, that has caused considerable pain and suffering, it can award compensation for non-pecuniary damage. Given the nature of the seriousness of the ill-treatment to which the applicant was subjected, the Court considered that she had suffered non-pecuniary damage which cannot be sufficiently compensated by a mere finding of a violation of the Convention. Taking into account the monetary compensation received by the applicant, and in light of the uncertainty regarding any future payments by the perpetrator, the Court decided to award a total amount of compensation for pecuniary and non-pecuniary damage of EUR 30,000.

According to the circumstances of another case of *El-Masri v. the former Yugoslav Republic of Macedonia* [21] (2012) the applicant claimed 300,000 euros of compensation for non-pecuniary damage for suffering, anxiety and psychological distress caused by the ill-treatment, detention, uncertainty about his fate, the refusal of the respondent State to admit the truth and the impossibility of restoring his reputation.

The Court found that the applicant had been subjected to torture and ill-treatment and that the respondent State was responsible for knowingly transferring the him to the custody of the CIA, even though there were serious grounds to believe that he might have been mistreated contrary to Article 3 of the Convention. The Court also stated that the applicant had been detained in violation of Article 5. The respondent State had also failed to conduct an effective investigation as required by Articles 3 and 5 of the Convention. In addition, the Court found a violation of the applicant’s rights under Article 8. Finally, the Court found the respondent State responsible for failing to provide an effective remedy within the meaning of Article 13 of the Convention in relation to the applicant’s complaints under Articles 3, 5 and 8. The Court considers that, in view of the above, the violation has undoubtedly caused moral damage to the applicant, which cannot be compensated only by the recognition of the violation itself. Accordingly, having regard to the seriousness of violations of the Convention to which the complainant was a victim, and deciding on a fair basis as required by Article 41 of the Convention, the Court awards him EUR 60,000.

Finally, the existence of a causal relationship is necessary to determine the fair amount of compensation for both pecuniary and non-pecuniary damage. The difference lies in the fact that the Court puts the burden of proof on the applicants to prove their claims for compensation for material damage; however, the fact of non-pecuniary damage does not require such evidence.

In its decision in the case of *Kadiķis v. Lettonie* (N° 2), [22] (2006), the Court emphasized that causal link between the damage and the offense is a necessary condition for providing compensation for material damage in accordance with Article 41 of the Convention. The same applies to moral damages. However, in this case, most of the sums claimed by the applicant have no causal connection with the violations of Articles 3 and 13 of the Convention, which the Court found during the proceedings. As for the non-pecuniary damage caused to the applicant as a result of his detention in degrading conditions, the Court considers that it is indisputable; however, the amount claimed by the victim is excessive. Making a decision on the equitable basis and taking into account all the specific circumstances of the case, the Court awards the applicant EUR 7,000 as compensation for non-pecuniary damage.

The problem of developing a methodology for determining the amount of compensation for moral damage is one of the most controversial issues of special interest for scientists and practicing lawyers. This damage is non-property by its nature, which causes difficulties in its assessment, because there are no (and cannot be) exact criteria for the property expression of emotional pain, honor, and dignity of a person. Any compensation for non-pecuniary damage cannot be adequate to actual suffering, so any amount can be only conditional.

Currently, there is no single method or model for assessing moral damages in Ukraine, no calculation formula has been established at the legislative level, which creates certain difficulties for judges in determining the amount of compensation, due to which we observe heterogeneous judicial practice on this issue.

In that regard the Court first of all notes that the proceedings complained of primarily concerned compensation for non-pecuniary damage, that is, a type of damage which is inherently difficult to assess (case of *Klauz v. Croatia*) [23].

The ECHR has not developed a universal formula for calculating the amount of non-pecuniary damage. However, no one will claim that the Court relies on its own discretion in deciding this matter. Thus, certain criteria for the calculation of the amount of moral damage are defined for a number categories of cases, in which it was caused under similar circumstances (for example, in cases of violation of the reasonable duration of the trial).

For example, in case of *Apicella v. Italy* [24] (2006), the Government of Slovakia highly appreciated the Court's attempt to determine criteria for determining compensation for moral damage. However, they added that the considerations on which the Court was based in determining moral damages should be part of the reasons for making the decision. This is the only way for the decisions of the ECHR to become clear instructions for national courts in cases of compensation for non-pecuniary damage caused by delays in proceedings.

In response to the Government, the Court stated that "similar cases" mean any two cycles of proceedings that have the same duration and are almost identical in matters of jurisdiction, importance, conduct of the applicant and concern the same country.

It should be noted that such criteria are not developed for all categories of cases, which forces the Court to constantly review its practice, going beyond the precedents.

Scientists have established certain regularities and empirically proved the existence of some general criteria that are applied by the Court on a permanent basis. For example, scholars claim that the ECHR always takes into account the nature and seriousness of the offense when calculating compensation for moral damage, due to which the compensation for slaughter, torture or illegal deprivation of liberty can be significantly higher [3] (Fikfak, 2020).

Another category of researchers claims that the ECHR has a certain "set" of criteria that it applies in accordance with the violated article of the Convention.

With such a variety of approaches to this issue, it becomes difficult to determine which of them can be applied in domestic judicial practice. However, there is still a general set of criteria, which is mentioned in absolutely all scientific sources, and which is usually used by the Court when calculating the amount of compensation for non-pecuniary damage. They are:



1) The nature of the offense and the violated rights. This criterion refers to variations in the amount of compensation depending on the informal classification of offenses as very serious, serious or less serious. The nature of the rights that allow or do not allow derogation is also taken into account (derogations are not allowed when it comes to the violation of the fundamental right to life, as well as torture, slavery or punishment outside the framework of the law). For example, considering the case of *Kats and others v. Ukraine* [25] (2009) the court emphasized that under such circumstances, as a rule, it does not award compensation; however, in this case, a violation of Art. 2 of the Convention (right to life) was established. Since this right is of a fundamental nature, the Court considers it possible, in an exceptional manner, to award 7,000 euros of compensation for non-pecuniary damage to each of the applicants.

### 3.1. The Court Also Distinguishes Material and Procedural Offenses

2) Payments accrued based on the results of consideration of previous cases. This is the second and most important criterion that the Court is guided by when calculating moral damage. It applies the rule of judicial precedent (*stare decisis*), according to which the amount awarded in previous cases can serve as a basis for assessing damages in the case under consideration. However, compared to the classic doctrine of *stare decisis* in the common law family, the Court treats its own decisions in previous cases as persuasive but not binding; this especially applies to the calculation of non-pecuniary damage. In any case, for its assessment, the most reasonable option is to refer to a previous similar case.

3) Victim's personality. The Court may take into account the age, gender, vulnerability and severity of the consequences for the victim. Besides, it can consider behavior of the victim and accordingly reduce the amount of compensation or refuse it.

For example, in case of *Buzadji v. Moldova* [26] (2014) the applicant demanded EUR 50,000 as compensation for non-pecuniary damage. He noted that he is a well-known person in Moldova, and that his arrest, which was widely covered in the media, caused great stress and loss of reputation. In addition, his health deteriorated during his detention and now he requires medical assistance.

The Court came to the conclusion that the applicant must have experienced some stress and anxiety as a result of the violation of his rights under Art. 5 of the Convention (right to liberty and personal integrity). Solving the case on the basis of equity, taking into account the victim's personality and other circumstances of the case, it awarded the applicant EUR 3,000.

4) Responded State. This criterion includes the economic development of the respondent States, their GDP and other factors related to the country. However, these facts are taken into account considering individual interests of the plaintiff.

collective statements or mass offenses. In cases where collective claims for mass violations of rights are considered, the amount of compensation for moral damage may be lower than if the same claims were filed separately [3] (Fikfak, 2020)

5) Other circumstances of the case. The Court may use the phrase "the general conditions under which the offense occurred" to justify an award for non-pecuniary damage. Such wording can be found in almost all interstate and quasi-interstate cases. For example, in case of *Al-Skeini and others v. the United Kingdom* [27] (2011) the ECHR emphasized that the appointment compensation for non-pecuniary damage serves to recognize the fact that it occurred as a result of a violation of a fundamental human right, which in the broadest sense reflects the seriousness of this offense. Having regard to all the circumstances of this case, the Court considers that the just compensation to each of the five applicants for the suffering caused by the lack of an independent investigation into the deaths of their relatives is approximately EUR 17,000.

## 4. Conclusion

Moral damage is often more tangible than property damage and therefore causes the victim more acute suffering. It cannot be fully reimbursed as such, but must be compensated in some way. Because

there is no better way to overcome the emotional discomfort of the victim, monetary compensation becomes such a way.

In the case law of the ECHR, violations of human rights by the State involving mental and physical suffering are qualified as causing moral harm. The latter can be expressed in evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity (for individuals); uncertainty in the management and planning, harm caused to the reputation and trademark, emotional state of the management, financial consequences (for legal entities).

Using discretionary powers, the ECHR relies on its own practice regarding the consideration of this category of cases by establishing internal guidelines when assigning the appropriate amount of compensation. Among the criteria taken into account by the Court when determining the amount of such compensation are the nature and severity of the violation, its duration and consequences; whether there have been several violations of rights; whether a domestic arbitration award has been made or other measures have been taken at the state level that may be considered the most appropriate means of redress; any other circumstances relevant to the case.

With regard to the criterion of “just satisfaction”, the key principle guided by the Court in determining the amount of compensation is fairness, which means flexibility and objectivity in establishing the truth. The elements of this principle are: breach of the Convention or the Protocols thereto and the violation of the corresponding right of the applicant; damage (material, moral or expenses incurred); compliance with procedural requirements for making claims for just satisfaction; existence of a cause-and-effect relationship between the violation of guaranteed rights and non-pecuniary damage; necessity; taking into account the specifics of each case and specific circumstances; economic indicators of the country.

The ECHR has not developed a universal formula for calculating the amount of non-pecuniary damage. However, no one will claim that the Court relies on its own discretion in deciding this issue. Thus, for a number categories of cases in which damage is caused under similar circumstances, certain criteria for its calculation are defined.

In the context of this issue, scientists have established certain patterns and empirically proved the existence of general criteria, which are applied by the Court on a permanent basis. They are: the nature of the offense and violated right; payments accrued based on the results of consideration of previous cases; victim’s personality; the respondent State; collective statements or mass offenses; other circumstances of the case.

## Copyright:

© 2024 by the authors. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<https://creativecommons.org/licenses/by/4.0/>).

## References

- [1] Verkhovna Rada of Ukraine, “Constitution of Ukraine”, Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96%D0%B2%D1%80#Text>. [Accessed 02 August 2024], 1996.
- [2] O. Panchenko, “Methodology for determining the amount of compensation for moral damage, caused to an employee, in some European states”. Amparo, Special Issue, no. 2, pp. 173 – 179, 2022. <https://doi.org/10.26661/2786-5649-2022-spec-2-25>
- [3] V. Fikfak, “Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it’s all about the state”. Leiden Journal of International Law, vol. 33. No. 2, pp. 335 – 369, 2020. doi:10.1017/S0922156520000035
- [4] A. Solomou, “The contribution of the European Court of Human Rights and the Inter-American Court of Human Rights to the emergence of a customary international rule of just satisfaction and the creative expansion of its scope”. Journal of the Brazilian Institute of Human Rights, no. 14, pp. 11 – 32, 2014. <https://revista.ibdh.org.br/index.php/ibdh/article/view/259/259>
- [5] V. Prymak, “Moral Damages In The Decisions Of The European Court Of Human Rights: Guidance To National Legislators And Court Practice”. The collection of «Uzhhorod National University Herald. Series: Law», vol. 1, no. 1, pp. 258 – 262, 2013.

