

Encyclopedia of Transitional Justice

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compensation and other forms of transitional justice, may contribute to reconciliation and positive normative change in old and new democracies alike.

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Cross-references: Australia; Commission on Wartime Relocation and Internment of Civilians; Germany – the Nazi Past; Japan; New Zealand; Poland; Russia; South Africa; South Korea; Truth and Reconciliation Commission, Canada; Truth and Reconciliation Commission, South Africa.

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Compensation Packages

Compensation packages are a form of reparations that entails providing money or other benefits to victims of human rights violations. To qualify as a transitional justice method, compensation packages should fund any economically measurable damage caused by such violations as “physical or mental harm, including pain, suffering and emotional distress; lost opportunities, including education; material damages and loss of earnings, including loss of earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services” (United Nations Economic and Social Council Commission on Human Rights, 2000). Thus, compensation packages differ from case to case and country to country, depending on the types of crimes that qualify victims as compensation beneficiaries, the number of victims and their relatives to be compensated, the total funds allocated to the compensation program, the nature of the compensation (financial or nonfinancial), the disbursement procedure (whether compensation takes the form of lump sums or monthly payments), and the time frame during which victims can apply for compensation.

The Method in Detail

Compensation packages as a transitional justice method date back to post-World War II Germany. In 1952, Germany signed a treaty with the state of Israel and the nongovernmental Conference on Jewish Material Claims against Germany, which represented twenty-five Jewish organizations from various countries, whereby it agreed to provide collective compensation to Jews persecuted by the Third Reich (see entries on Germany – the Nazi Past, and Israel). While initially compensation only targeted former or present German citizens subjected to persecution between 1933 and 1945, over time, victims beyond the borders of the German Reich were also taken into account. With the end of the Cold War and the reunification of Germany in 1990–1991, other victims of persecution, including the East European Holocaust survivors and former forced laborers of the German war economy, have also benefited from modest compensatory sums. Since 1952, as a result of negotiations with the Jewish Claims Conference, the German government has paid more than US\$60 billion in indemnification for suffering and losses resulting from Nazi persecution. Negotiations have also resulted in the creation of funds from the Austrian government and German and Austrian industry.

Since the 1950s, other governments across the world have used compensation packages as a transitional justice method. These packages have differed in their scope and management. In some cases, they were completely managed by international organizations like the United Nations. One such example is the United Nations Compensation Commission (UNCC), which was created in 1991 as a subsidiary organ of the UN Security Council with the mandate of processing claims and paying compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait during the first Gulf War of 1990. In other cases, individual states have taken direct responsibility for designing and managing compensation packages. In Argentina, for example, the state has passed laws on compensation for victims of human rights violations that occurred during the military dictatorship of 1976–1983. In August 2004, a law granted monetary compensation to children born in captivity during that period. Likewise in Chile, legislation adopted after the creation of the National Commission for Political Imprisonment and Torture (see separate entry) in 2004 provided pensions to political prisoners and torture victims identified by the Commission. Yet another example is Malawi, where, since 1994, the compensation process has been managed by the National Compensation Tribunal, an autonomous body within the judiciary. The Tribunal has compensated those who were born in detention or exile or were subjected to wrongful imprisonment, forced exile, personal injury, lost property or business, lost educational opportunities, and/or lost employment benefits. Because the Tribunal has had insufficient funds at its disposal, most of its payments were mostly symbolic, failing to fully compensate victims for their suffering. Moreover, the Tribunal remains poorly known in the country, and applicants are discouraged by its cumbersome procedures.

There are two main types of compensation packages. First, compensation programs can be funded by the government, where the executive or some other governmental agency/fund mandated by it decides who is to receive compensation and how much they receive. This is a way for the government to acknowledge the suffering of the victims and/or their surviving relatives. Second, compensations can be ordered by courts and paid by perpetrators to their victims, which is a way for the perpetrators to acknowledge the suffering of the victims. Beside providing material compensation to victims,

these packages can also have a symbolic meaning. For example, despite its considerable limitations in substance and implementation, Law 5233/2004 on the Compensation of Damages that Occurred Due to Terror and the Fight against Terrorism remains an important step toward normalizing relations between Turkey and its sizeable Kurdish minority, particularly the Kurds internally displaced since the 1980s.

There are two main questions regarding compensation packages as a transitional justice method. The first question is how to define the victims and to select the beneficiaries. Ideally, the program would ensure that every victim is a beneficiary of compensation, either directly or through his or her relatives. This is seldom the case, however, because the large number of victims and the serious nature of the human rights abuses make the full compensation of each and every victim impossible to sustain by most state budgets. Therefore, the question relates to how to choose the rights whose violation will generate access to benefits. Most compensation packages are directed toward violations of rather limited rights, usually fundamental civil and political rights, without explaining why benefits are granted for the violations of some rights and not of others. As a result, compensation programs have been criticized for creating hierarchies of victims and suffering.

The second problem is how to ensure the availability of financial resources during the processing of compensation packages. As in the case of Malawi, funding problems can turn compensation packages into symbolic condolences rather than actual means to rebuild the lives of former victims and their relatives. In Sierra Leone (see separate entry), the compensation of war victims has been jeopardized because securing funds for the program has proven difficult. Thus, the availability of funds becomes a real problem in the case of postwar or post-conflict countries where the state has to provide compensation packages when it is impoverished, it has difficulty collecting taxes, the infrastructure is damaged by the war, the national budget is depleted, and more urgent social and economic problems must be addressed. Countries have tried to solve the issue of funds with the help of international donors and by setting up independent funds through the sale of some government property.

In some cases, countries offer different types of compensations. For example, the Czech Act 119/1990, the Law on Judicial Rehabilitation, provides for a range of nonfinancial solutions. It states that the method of payment or delivery of compensation packages can be the surrender of (nonagricultural) property to the owner (or heir, including surviving family) by the legal entities holding it prior to the Act, or, if this is not possible, financial reimbursement. Another method can be the repeal of military call-up orders and of decisions terminating education, employment, or social security. Lastly, compensation can take the form of rehabilitation, an increase in pension entitlements, and the ability to apply for other, legally stipulated financial compensation programs.

Outcomes

Ideally, compensation packages should allow victims and their relatives to rebuild their lives and help them get over the material burden caused by their suffering or by the violations of their rights. Ensuring that every victim gets fair compensation is the real challenge that compensation packages must deal with. The vast variety of compensation packages offered by governments, organizations, and individuals proves that no one solution can fit all cases.

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For example, in the case of El Salvador, the Truth Commission (see separate entry) created to investigate human rights violations issued recommendations designed to secure reparations for the victims. While they were never implemented, the Commission's recommendations on moral reparations showed that compensation is not only about material losses. The Commission suggested the construction of a national monument in the country's capital, San Salvador, displaying the names of all identified victims of the conflict, the proper recognition of these victims and the violations they were subjected to, and the declaration of a national holiday in commemoration of the victims as an expression of national reconciliation. In Haiti, the National Truth and Justice Commission (see separate entry), established for similar reasons, asked the government to ensure a decent education and quality of life for children fifteen years or younger orphaned as a result of the violence. The recommendation was not implemented. In the case of the Japanese American internment during World War II (see entry on Commission on Wartime Relocation and Internment of Civilians, United States), a presidential apology accompanied reparation payments authorized by the U.S. Congress in 1988 to former internees.

In cases where property claims are involved, compensation packages prove to be more effective than full restitution as victims do not wish to go back to the places that remind them of their pain and suffering. Victims sometimes prefer to resettle somewhere else and to build new lives instead of going back home to the community where they suffered. For example, in Bosnia, some of those who could get back the property they lost in the war chose not to return home, but sold their property in order to resettle elsewhere. Thus, compensation packages can enable victims to rebuild their lives when they provide victims with the freedom to choose where to live. However, compensation can replace restitution in kind only if initial owners of a property agree with it, not when the state or government arbitrarily deny restitution and favor compensation. Given that the value of such compensation packages is almost always less than the value of the property that should be returned, initial owners have generally opted for restitution in kind whereas government authorities have been more willing to use compensation packages. For example, hundreds of initial owners from Romania and Cyprus have approached the European Court of Human Rights with requests against court decisions that refused restitution in kind while promoting compensation.

There are several reasons why compensation packages may fail to represent an effective method of redressing past injustices. The property may be in a very bad shape, thus lowering the level of compensation to a token level. Tenants might continue to occupy the dwellings slated for restitution because they have nowhere else to go. In Romania, the interests of the tenants trumped the rights of the initial owners during the 1990s. In some countries, beneficiaries can only be citizens of those states, because the governments are reluctant to place large amounts of property in the hands of non-nationals, although non-nationals were deprived of the property (and some were citizens at the time of the deprivation, but subsequently lost that status). In other cases, victims cannot prove that the property is rightfully theirs, because of the duration of conflict or the fact that confiscation took place decades before the restitution claim. Competing compensation claims can also arise in some cases. For example, in 1990, when the Greek Catholic Church in Romania asked for the return of its places of worship that the communist regime had transferred into the use of the dominant Romanian Orthodox Church in 1948, the Orthodox Church reminded the Greek Catholics that many of the buildings had been

built by Orthodox communities that were forced to convert to Greek Catholicism in 1700 (see entry on Romania). If more than one dictatorial regime engaged in human rights abuses in the recent past, then the government must decide whether to compensate victims of all or only some regimes. For example, when the Baltic states announced their intention to compensate victims of the communist regime, the international community reminded them that victims of the Nazi occupation should not be overlooked (see entries on Estonia, Latvia, Lithuania).

Equally important is to decide whether institutions, individuals, or both should be compensated. Payments may be dispensed restrictively, being available only via pension payments that can be received by some, but not all, victims. Sometimes, compensations are offered when victims, especially those of the Holocaust and Stalinism, are too old, and are thus unable to make much of a difference in the lives of the victims. The level of the financial compensation is sometimes so low that it trivializes the magnitude of the violation and the resulting suffering and may be inappropriate and even insulting, causing victims to refuse the compensation altogether. Finally, some states refuse to execute the process. Brazil, for example, adopted no national program to address all human rights violations committed by the military regime of 1964–1985 and has poorly implemented Law 9140/1995 on the Disappeared, the only federal instrument providing reparations to victims killed as a result of political violence. The Law allows the Brazilian government to prove to the international community that it has not exhausted all the domestic remedies on addressing the human suffering caused by the military regime. In South Africa (see separate entry), despite legal obligations to provide reparations, the government has committed only a negligible amount of financial compensation to the victims of apartheid.

Conclusion

Compensation packages have been used as a transitional justice method since after World War II, when West Germany began to compensate the victims of Nazi persecution. During subsequent decades, a wider range of compensation packages has been used in different post-conflict and newly democratizing states. Until the 1980s, compensation was generally the outcome of legal proceedings related to material losses. More recently, it has been integrated into wider social, political, and judicial reform processes that contribute to social reconstruction or reconciliation, represent political recognition of the crimes, and offer remedy to victims and their families. The nature, scope, and level of compensation packages differ across countries, depending on the nature and magnitude of the conflict or preceding repression, the willingness of the state to implement compensation, the definition of the perpetrator and the victim, and the resources available for such programs. This transitional justice method hinges on how to define the beneficiaries and how to ensure funds for the process.

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Cross-references: Algeria; Argentina; Austria; Bolivia; Bosnia-Herzegovina; Brazil; Commission on Wartime Relocation and Internment of Civilians; Croatia; Cuba; Czech Republic; Denmark; Ecuador; Estonia; France; Germany – the Communist Past; Germany – the Nazi Past; Hungary; Kosovo; National Truth and Justice Commission; Property Restitution; Reparations; Restorative versus Retributive Justice; Romania; Serbia; Sierra Leone; Truth Commission, El Salvador; Turkey.

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Court Trials for Redress

As a transitional justice method, the use of court trials for redress involves the legal adjudication of acts of violence committed during past conflicts or atrocities. Court trials seek to bring the perpetrators to account and provide redress to the victims by officially recognizing their harms, establishing the truth and, in some cases, providing reparations to them. This transitional justice method functions through the charging of an accused, the prosecution and defense teams bringing evidence as to the role and actions of the accused in relation to the crimes charged against him or her, and a judge or panel of judges rendering judgment as to his or her guilt or innocence. For court trials to be seen as an effective and legitimate method of redress, they must uniformly apply the rules of law with procedural and evidential fairness. They should be as public as possible so that all persons, and particularly the victims of the crimes, can observe and understand how the law is being applied with the hope that they will find redress from the court's practices.

The Method in Detail

The primary purpose of court trials is to prosecute the perpetrators of serious violations such as murder, torture, rape, or illegal detention during a situation of conflict or mass atrocity. These crimes can constitute human rights violations, ethnic cleansing, war crimes, crimes against humanity, or genocide in contravention of national or international laws and conventions. Court trials can help redress such violations by providing accountability and punishment of the perpetrators, overcoming impunity, establishing an official record or "truth" of the crimes, and deterring others from committing crimes. Trials can also lead to redress for the victims of crimes by allowing their participation in legal proceedings, providing reparations, and helping facilitate reconciliation between individuals, groups, and communities by addressing violations rather than leaving them unanswered.

In recent decades, court trials have increasingly been utilized as a method of legal redress for crimes and injustices committed under a previous regime by countries moving from undemocratic, repressive, and/or exclusionary rule to democracy or dealing with the aftermath of an armed conflict (Teitel 2000). Undertaken in both national and international contexts, trials have followed different models of legal justice and redress.