

Chapter 17: Right to Compensation for Unlawful Deprivation of Liberty or Miscarriage of Justice

Article 346: Establishment of a Compensation Mechanism for Unlawful Deprivation of Liberty or Miscarriage of Justice

1. Anyone who is unlawfully deprived of his or her liberty has an enforceable right to compensation.
2. When a person has by a final decision been convicted of a criminal offense, and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction must be compensated, unless it is proven that the nondisclosure of the unknown fact at the time is wholly or partly attributable to him or her.
3. The competent legislative authority must establish a mechanism for the award of compensation for unlawful deprivation of liberty or for cases in which there are conclusive evidence of a miscarriage of justice.

Commentary

Paragraph 1: Paragraph 1 duplicates the right to compensation set out in Article 9(5) of the International Covenant on Civil and Political Rights and Article 5(5) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This right applies only to persons who have been arrested or who have been unlawfully detained prior to a trial. It is distinct from the right contained in Para-

graph 2, which applies to persons who have been wrongly convicted, imprisoned, and then found to be innocent by a final verdict of the court.

Paragraph 2: The right to compensation for a miscarriage of justice is contained in Article 14(6) of the International Covenant on Civil and Political Rights, Article 3 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 10 of the American Convention on Human Rights. The right to compensation for miscarriage of justice pertains to a person who has been tried and wrongfully convicted of a criminal offense and who has subsequently been punished for it, for example, by imprisonment. In addition to providing the right to compensation, the MCCP also contains a mechanism by which a conviction can be appealed on the basis of an alleged miscarriage of justice (Chapter 12, Part 2).

Paragraph 3: In order for the rights set out in Paragraphs 1 and 2 to be effected, it is necessary to establish a mechanism to provide due compensation. This mechanism would exist separate to criminal proceedings and separate from the MCCP. Legislation would be required to establish such a mechanism. Paragraph 3 provides the imprimatur to a state to establish a compensation mechanism without prescribing it. National dialogue and discussion need to take place relating to its establishment. One fact that should be borne in mind is that post-conflict states are typically resource starved, and therefore providing compensation may be inherently challenging. When a mechanism for compensation is established, a sufficient budget must be allocated to it to make it practical and effective.

