

# **EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)**

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## **COUNCIL OF EUROPE CONVENTION ON THE COMPENSATION OF VICTIMS OF VIOLENT CRIMES**

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### *Compensation from the state as a fundamental victim's right*

State compensation is one of the major remedies available to victims and it is one of the principal ways for states to demonstrate support for victims. Compensation from the state is also one of the four guiding principles in the UN Victim Declaration and as such, the obvious starting-points for any deliberation on improved victim protection.

The right to compensation from the state recurs in a number of international victims' and human rights instruments, such as the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the Council of Europe Convention on the Prevention of Terrorism, the Council of Europe recommendation on assistance to crime victims and the UN Guidelines on the Protection of Victims of Terrorist Acts and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

The Council of Europe Convention on the Compensation of Victims of Violent Crimes, which is one of few instruments exclusively devoted to compensation, codifies a number of basic principles found in other instruments.

The pertinent issues in relation to state compensation are also at the heart of victimological research. They revolve around the role of reparative justice in the legal system, the basic needs of victims, how victims of crime can be remedied and how their rights can be implemented and enforced.

### *Justifications of state compensation*

It is well-known that the underlying philosophies of state compensation have been varied and often pragmatic. While social solidarity with victims has been the cornerstone of both national and international legislation on state compensation, it is also held that when the state has failed to protect its citizens, it has a moral duty to compensate them for the harm they have incurred from crime.

A more practical justification to legislation on state compensation is that the damages very often are difficult to obtain from the offender. A more recent way to justify compensation from the state has been the growth of cross-border crime.

### *The development of victim policies*

Since the adoption of the Convention almost thirty years ago, concern for victims has increased and society's response to victims of crime has changed. This has led to some significant developments in the field of victim protection and a proliferation of victims' rights instruments. While the 1980:s was marked by the recognition that victims deserved a more prominent role in the criminal justice system, in the 2000:s, protection of victims is considered as a matter of human rights. This development is visible in Council of Europe documents as well as in the case-law of the European Court of Human Rights. The right to compensation and access to justice are critical to human rights protection of victims. The states' acceptance of liability has increased and the support of victims of crime has become more and more globalised. Alongside this development, the victimological perspective has gained importance in legislation and legal science.

From 2000 and onwards, there has been an increasing focus on the cross-border dimension and on access to justice for claimants. In parallel, Europe is faced with a flow of migrants and new types of crime have emerged including committed by means of the Internet.

Some tendencies are noteworthy with respect to victim protection in recent years. One is the attention given to particularly vulnerable groups of victims such as women, children and victims of terrorism. While on the one hand, this focus increasingly recognised, it has also been held that by means of that approach, the state formally sanctions the normative distinctions between victims. Another tendency is the increasing focus on the enforcement of rights.

### *The relation of state compensation to other forms of support*

The possibilities of victims to receive compensation must be viewed in relation to other remedies available to this group. There are various reasons for the approach. Victims are a heterogeneous group, with different needs, and the need for state compensation may vary among different groups. To some victims, compensation is critical but to others, the value of state compensation is merely symbolic. Aside from pecuniary compensation, other measures may be considered by the states to acknowledge the victims

The other reason that state compensation cannot be seen in isolation is that compensation from the state is decisive of the civil liability of the offender and how claims for damages are pursued. It is also dependent on the functioning of social safety nets, possibilities to receive social support and the growing use of restorative justice arrangements.

Finally, the Convention cannot be considered without a view on the status of the EU directive 2004/80 EC of 29 April relating to compensation. The major reason is that to some of the member states of the European Union, the directive has made the Convention outdated. The directive has required some EU member states to adopt new legislation, to designate authorities for the transmission of applications and to communicate by means of standard forms. This also means that some of the member states that have ratified the Convention are more likely to use the system envisaged in the directive.

### ***Studies on compensation***

In the years that have passed since the Convention was adopted, some studies have been made on the domestic schemes on state compensation. Many of them were made several years ago and most of them are restricted to a handful of countries.

In 2000, with the aim of furthering minimum standards on compensation in the European Union, an overview of legislation was made with the Council of Europe Convention as the starting-point.

The European Committee on Crime Problems (CDPC) shall be kept informed about the application of the Convention. But little is known about this reporting and few evaluations have been made of how member states have performed with respect to the international system of co-operation in the Convention.

It appears that it is difficult to compare state compensation, because of different legal traditions and because of the diverging economic conditions in the states. The other reason is that an assessment of state compensation always relates to what could be provided from other sources. For this reason, a fair assessment requires more thorough research and possibly, case studies that could facilitate comparisons.

### ***Identified problems***

In the conclusions of the study mentioned above, three main points of criticism were raised. They were concerned with the limited scope of application of national legislation, inadequate information and lengthy procedures. Mindful that many years have passed since they were made, these conclusions have been restated in other contexts and there are reasons to suspect that the identified problems remain.

Despite the proclaiming of state compensation as one of the guiding principles in the Victim Declaration, at the national level, such compensation often emerge more as a good practice, and there are still considerable doubts as to whether compensation is considered as a right for victims of crime.

Given its significance and the overlap with the Convention, it would be unwise not also to consider findings about the operation of the EU directive on compensation. It has been concluded that EU member states provide fair and appropriate compensation but that claimants are less positive about the procedural aspects of the directive and the obstacles they meet with in the application process.

### *The scope of state compensation*

The scope of legislation or the eligibility for compensation has been a recurring concern. In this respect, the concept *intentional crimes of violence* in the Convention calls for examination. It goes without saying that this notion is subject to diverse interpretations. Given the development and the adoption of new instruments, it is imperative that vulnerable groups of victims in other Council of Europe instruments are covered by this notion. One way of furthering the development in the future may be to list the crimes that should be covered by this notion.

### *Information*

It is well-known that many victims are unaware of their right to compensation and the circumstances under which they may receive compensation. It is recognised that victims should be able to receive information by the first point of contact in society. To execute this objective, comprehensive out-reach and training activities are required.

### *Lengthy procedures*

The principle that compensation should be paid as soon as possible after the crime occurred has been repeated in various contexts. It is however known that the process for applying in many countries is time-consuming. This raises the issue how procedures could be made smoother and the possibility to issue of advance payments or interim payments.

### *Cross-border victims*

As it has been found that the risk of crime is higher for tourists/travellers than for other groups in society, the Convention must be considered with respect to the specific situation of cross-border victims and in particular to the situation of tourists who become victims of criminal offences.

In several contexts, it has been concluded that it is necessary to have specific knowledge and basic data about the situation of this group but few studies have been undertaken on cross-border victims. There seems to be a general lack of knowledge about the number of cross-border victims, and the number of victim seeking cross-border compensation. The persons managing claims for are often unaware of legislation and procedures in other member states. In light of these problems, calls have been made for closer co-operation the future. In the context of the EU co-operation envisaged in the directive, it has been concluded that few applications and decisions have been made in cross-border cases.

### *Access to justice*

Given the basic principle that appropriate steps must be taken to ensure that information about the scheme is available to potential applicants, it needs to be clarified if victims have *effective* access to the state compensation schemes, and to what extent access to the national schemes is facilitated, also in cross-border situations.

According to the principle of subsidiarity, states should endeavour to provide financial compensation when compensation is not fully available from the offender or other sources. Although well-accepted, this principle must be assessed in relation to the principle that victims should have access to justice. More generous standards could be applied with respect to subsidiarity but it appears that in a number of countries, state compensation is the last resource. The process of enforcing damages is often time-consuming and aggravates the victim's situation. In this process, victims risk being re-traumatized and subjected to secondary victimisation. The aims to improve access to justice are very much tied to how civil claims are brought in the various criminal justice systems. The objective to improve access to justice in this area should include identification of best practices, such as making the prosecutor obliged to pursue claims on behalf of the victim.

### ***Points to consider***

First and foremost, it is clear that compensation from the state is critical to the overall objective of protecting crime victims. The demands for a holistic system of victim protection have been strengthened over the years. The claims for stronger victim protection come from different directions. They emanate from international law as well as a growing body of victimological research on the harms sustained by victims, and about the effects of crime on the mental health of victims.

It is claimed that the number of ratifications of the Convention are fairly satisfactorily but twenty-two member states have not signed, neither ratified the Convention. This may signify some ambiguity towards the principles in the Convention and the relation to other international instruments. In this respect, the decision on how to proceed with

the Convention, must be made with a view to the states that have abstained from ratifying the Convention, and their reasons for not doing so.

It is an accepted principle that state compensation should be restricted to deserving victims. The groups of victims eligible for compensation in the Convention are those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence, and the dependants of persons who have died as a result of such crime. This provision must be considered in light of the emergence of new types of crime, the commission of traditional crimes by means of new technologies, and the fact that the image of the ideal and deserving victim is increasingly questioned.

Several Council of Europe conventions affirm that legislative measures should guarantee compensation for victims. It raises the issue of whether these vulnerable groups of victims are covered by article 2 in the Convention or if they may be excluded from compensation due to the provision which refers to the possibility to reduce compensation on account of the applicants' financial situation.

In light of the objective, enshrined in the preamble, to achieve a greater unity between member states, it is valuable to know if and how the system of cooperation envisaged in the Convention has operated over the years. With respect to articles 12-13 in the Convention, there seems to be no reports about how the international cooperation has been carried out. Given that the systems for managing cross-border cases in the Convention on the Compensation of Victims of Violent crime and the EU directive overlap, the possible synergies between the existing systems should be exploited.

### *Conclusions*

To conclude, the decision on what steps that must be taken with the Convention should consider;

1. the uncertainty that prevails with respect to how the Convention is applied,
2. the fact that a number of states are bound by the EU directive relating to compensation,
3. that the efficiency of the Convention could be improved,
4. that it is redundant to pursue an update or amendment of the Convention without acceptance and support from the member states.

Starting out from the international law on victims' rights, the ultimate aim must be to strengthen the possibilities of victims to receive compensation. The proposal in this report is therefore that before taking further steps, some aspects need to be further investigated.

As a first step, it is suggested that a questionnaire is developed in which the CDPC delegations are requested to provide information on the means of co-operation in matters concerning compensation but also on the number of victims applying for and receiving compensation. Other issues that could be examined are the knowledge among legal professionals about the compensation schemes, the level of victim satisfaction, the information on compensation that is available to claimants, and which measures that are taken to encourage offenders to provide adequate

compensation to victims. If a questionnaire still provides unsatisfactorily results, it is suggested that more thorough research is undertaken.

A tentative estimation is that the information provided from a questionnaire can provide support to the development of a recommendation in which the issues pinpointed in this paper are regulated more precisely or that guidelines are developed in which best practices are highlighted and documented. It is possible that this information may lead to the conclusion that an update of the Convention is not the immediate concern but rather that practical measures are needed which can facilitate that compensation is accessible to eligible victims.