



Explanatory Report to the European Convention on the Compensation of Victims of Violent Crimes

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I. The European Convention on the Compensation of Victims of Violent Crimes, drawn up within the Council of Europe by a Committee of Governmental Experts under the authority of the European Committee on Crime Problems (CDPC), was opened for signature by the member states of the Council of Europe on 24 November 1983.

II. The text of the explanatory report prepared by the committee of experts and submitted the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the Convention although it might be of such a nature to facilitate the application of the provisions contained therein.

I. Introduction

1. In recent decades, policy makers and criminologists have been particularly concerned with the victim's position in crime and with protecting the victim's interests. They have emphasised that assisting victims must be a constant concern of crime policy, on a par with the penal treatment of offenders. Such assistance includes measures designed to alleviate psychological distress as well as to make reparation for the victim's physical injuries.

One of these concerns is to provide compensation for the victim or his dependants. In principle, the offender should pay the compensation, by order of the civil or – in some countries – criminal courts or by a judicial or extrajudicial arrangement between him and the victim. However, though the victim can obtain satisfaction by this means in theory, full reparation is seldom made in practice, in particular because of the offender's non-apprehension, disappearance or lack of means.

2. In the 1960s, therefore, various Council of Europe member states started setting up schemes to compensate victims from public funds when compensation was otherwise unavailable. In view of this development, the CEPC (now the CDPC) decided in 1970 to add the compensation of victims of crime to its work programme. This decision was approved by the Committee of Ministers of the Council of Europe at their Deputies' 192nd meeting, but no action was taken on it pending the outcome of relevant work by the International Association of Penal Law (11th International Congress on Penal Law, Budapest, 1974).

Having discussed the compensation of victims of crime, the 9th Conference of European Ministers of Justice (Vienna, 1974) recommended that the Committee of Ministers of the Council of Europe instruct the CEPC to hold an exchange of views and information on the subject.

This was duly held by the CEPC in January 1975.

Finally, a CEPC sub-committee was asked to draw up common principles governing the compensation of victims of crime, with particular reference to compensation from public funds. The subcommittee produced a draft resolution and a report on the subject, which were submitted to the CEPC and approved in 1977.

In September 1977, the Committee of Ministers of the Council of Europe adopted Resolution (77) 27 on the compensation of victims of crime. This recommended that the member States provide for state compensation of victims, or dependants of victims, of intentional violence where compensation could not be ensured by any other means, and set out guidelines.

The CEPC report on the compensation of victims of crime was published in 1978.

3. In the five years following the adoption of Resolution (77) 27, various Council of Europe member States, guided, *inter alia*, by the said resolution, either introduced state schemes for compensating victims of crime or drafted legislation on the subject.

Various member states soon found, however, that if foreigners moving between member States – notably migrant workers – were to be socially protected, the principles laid down in Resolution (77) 27 (and more particularly in Article 13) needed to be reconsidered and an instrument drawn up which would have binding force.

These considerations are mentioned in the report submitted by Mr Luster on behalf of the European Parliament's Legal Affairs Committee (Doc. 1-464/80). During the European Parliament debate on 12 March 1981, it was stated that the EEC should draw up a directive in this sphere, unless the Council of Europe embarked on producing a convention on the basis of Resolution (77) 27. The Resolution on Compensation for Victims of Acts of Violence, adopted by the European Parliament on 13 March 1981, reflects this view.

4. At its 30th plenary Session (1981) the CDPC heeded this concern by instructing the Select Committee on the Victim and Criminal and Social Policy to begin its work by drawing up a European convention on compensation of victims of crime on the basis of Resolution (77) 27 on the same subject.

5. The Select Committee met twice in 1982 (24-26 February and 29 September-1 October) under the chairmanship of Mr J. G. Schätzler (Federal Republic of Germany). Its meetings were attended by experts from France, Iceland, Italy., Luxembourg, the Netherlands, Portugal, Switzerland, Turkey and the United Kingdom, as well as by Mr H.J. Schneider (Federal Republic of Germany) and Ms J. Shapland (United Kingdom), consultants, and observers from Canada and the IAPL.

An enlarged meeting of the committee took place from 17 to 21 January 1983 under the chairmanship of Mr J. G. Schätzler. The meeting was attended by all the Council of Europe's member States, except Belgium, Ireland, Liechtenstein and Malta.

The Select Committee's draft European Convention on the Compensation of Victims of Violent Crimes, as approved after amendment by the enlarged committee, and the draft explanatory report were approved by the CDPC at its 32nd plenary Session (April 1983). At the 361st meeting of the Deputies (June 1983), the Committee of Ministers adopted the Convention and decided to open it for signature on 24 November 1983.

II. General considerations

A. Framework of the Convention

6. The Council of Europe's aim of promoting closer unity between its member States is pursued in particular through the harmonisation of their legislation and agreement among them on common policy.

In this context, the European Committee on Crime Problems has sought, since its inception, to promote joint policy on crime prevention and the treatment of offenders.

Such a policy demands that balanced consideration be given to all the components of the criminal act. Victim studies carried out in various countries in the last few decades have revealed the interaction which may exist between criminal and victim during the commission of a crime. At the same time, they have thrown light on victims' psychological and physical distress after a crime and on the difficulties they often encounter in asserting their rights. These considerations lead one to conclude that as much importance must be attached to the victims, and in particular to the protection of their interests, as to the treatment and social rehabilitation of offenders.

7. This points to the need to compensate the victim, not only to alleviate as far as possible the injury and distress suffered by him, but also to quell the social conflict caused by the offence and make it easier to apply rational, effective crime policy.

8. Various provisions in force in member States are designed to induce the offender to compensate the victim (for example, suspended sentence or probation may depend on payment of compensation, payment of compensation may constitute the main penalty, etc.). In very few cases is compensation for injury actually paid, however. A State contribution to compensation is accordingly thought necessary.

9. Various arguments for State involvement in compensation have been put forward:

a. One theory is that the State is bound to compensate the victim because:

- it has failed to prevent the crime by means of effective criminal policy,
- it introduced criminal policy measures which have failed,
- having prohibited personal vengeance, it is bound to appease the victim, or his dependants (principle of State responsibility for crime);

b. Another theory is that State intervention is justified on grounds of social solidarity and equity: since some citizens are more vulnerable, or unluckier, than others, they must be compensated by the whole community for any injury sustained:

c. Lastly, it has been suggested that by removing the victim's sense of injustice, State compensation makes it easier to apply a less punitive criminal policy, but one which is more effective.

10. Resolution (77) 27 accepted equity and social solidarity as the basic principles of compensation.

These same principles underlie the European Convention on the Compensation of Victims of Violent Crimes (second preambular paragraph).

The majority view in the committee was, however, that these principles did not mean that the State should intervene only in cases of absolute necessity (that is hardship). Compensation awards may nevertheless take the victim's or victim's dependants' financial position into account (Article 7).

B. Aims of the Convention

11. The European Convention on the Compensation of Victims of Violent Crimes, based on Resolution (77) 27, pursues the following aims:

a. To harmonise at European level the guidelines (minimum provisions) on the compensation of victims of violent crimes and to give them binding force.

States ratifying the Convention will have to comply with the principles laid down, either by amending existing legislation and administrative arrangements or by introducing these principles to any new legislation or arrangements.

b. To ensure co-operation between the Parties in the compensation of victims of violent crimes, and more particularly to promote:

- the compensation of foreign victims by the State on whose territory the offence was committed;

- mutual assistance between Parties in all matters concerning compensation.

The presence of numerous foreigners on the Parties' territories (migrant workers, tourists, students, etc.) makes such co-operation necessary.

III. Commentary on the articles of the Convention

PART I – Basic principles

Article 1

12. By the terms of Article 1, the Parties undertake to ensure that their present and future legislation and administrative arrangements on the compensation of victims of crimes of violence comply with the Convention. It follows that this Convention is not directly enforceable.

It is for the Contracting States to establish the legal basis, the administrative framework and the methods of operation of the compensation schemes having due regard to these principles.

13. Since several member States have for some years effectively operated schemes for paying compensation from public funds, the committee decided to draw up minimum provisions rather than a model act, whose rigidity might have prevented several member States from ratifying the Convention.

Article 2

14. This article sets out the basic conditions governing State compensation of victims of violent crimes. Since the rules given are minima, more generous compensation arrangements by Parties are not precluded.

The succeeding articles foresee, for specific cases, limitations to the obligations laid down by Article 2.

15. The State pays compensation only where compensation is not fully available from other sources (the offender, social security, etc.).

As is clear from Articles 9 and 10, however, this provision must not be taken to preclude an interim State contribution to compensation of the victim pending decision of an action, judicial or extrajudicial (arbitration), to recover damages. A victim urgently needing help sometimes cannot await the outcome of often complicated proceedings (cf. paragraph 8 of Resolution (77) 27). In such cases, the Parties can provide that the State or the competent authority may subrogate in the rights of the person compensated for the amount of the compensation paid (Article 10) or, if later the person compensated obtains reparation from any other source, may reclaim totally or partially the amount of money awarded (Article g).

16. For compensation to be payable to the victim from public funds, offences must be:

- intentional,
- violent,
- the direct cause of serious bodily injury or damage to health.

17. The Convention applies only to intentional offences, because they are particularly serious and give rise to compensation less often than non-intentional offences, which include the huge range of road traffic offences and are in principle covered by other schemes (private insurance, social security, etc.).

18. The violence inflicted by the offender need not be physical. Compensation may also be payable in cases of psychological violence (for example serious threats) causing serious injury or death.

19. The Convention aims at protecting victims of offences against life, physical integrity and health.

The term health may include, according to the domestic law of each State, mental as well as physical health.

Injury must be serious and directly attributable to the crime, a relationship of cause and effect being proven.

Having regard both to the underlying principle of solidarity, which requires the alleviation of major distress and injury, and to financial constraints, the Convention does not cover:

- slight injury or injury not directly caused by the offence;
- injury to other interests, notably property.

Poisoning, rape and arson are to be treated as intentional violence.

20. The persons eligible for compensation are:

- a. The victim

In the event of serious bodily injury or damage to health, compensation is payable to the victim direct. The victim's dependants thus benefit indirectly.

Victims of violent crimes may include anyone injured or killed in trying to prevent an offence, or in helping the police to prevent the offence, apprehend the culprit or help the victim.

b. The dependants of persons who have died as a result of a violent crime

It is for the Parties to define the term according to the requirements of their domestic law (children, spouse, etc.).

21. Compensation from public funds is payable to the victim irrespective of the offender's prosecution or conviction.

Particular categories of offender specified in national legislation (for example, minors, the mentally ill) may not be subject to prosecution, being regarded as not responsible for their actions.

Offenders prosecuted may escape conviction for other reasons (act arising from necessity, for example).

The State may nonetheless make reparation, even in respect of these acts, if compensation is not fully available from other sources.

Article 3

22. This article regulates international aspects of the compensation of victims of violent crimes.

23. Like Resolution (77) 27 before it, the Convention recognises the principle of "territoriality": compensation is payable by the State in whose territory the offence is committed.

Where different parts of a crime are committed in different States, compensation shall be paid by the State in which the victim or his dependants are permanently resident, provided part of the offence is committed in the territory of this State.

The Convention does not provide for compensation of nationals who fall victim to violent crimes while abroad, but there is nothing to prevent the Parties from recognising the nationality principle in certain cases.

24. Compensation of foreign victims of violent crimes on the same basis as nationals – already provided for in some of the Council of Europe's member States – seems necessary for the following main reasons:

- solidarity and equity demand that, on certain conditions, the State contribute to the compensation of other victims in its territory and not just its own nationals;
- foreigners often contribute to a country's economic and social development (for example, as migrant workers); consequently, they are entitled to the same advantages as nationals.

25. The Convention specifies categories of foreigners to be entitled to compensation:

a. Nationals of Parties to the Convention.

This provision complies with the principle of reciprocity.

b. Nationals of any Council of Europe member State who are permanently resident in the State in whose territory the offence is committed.

The main purpose of this provision, a departure from the principle of reciprocity, is to protect migrant workers, a lower-income group which nonetheless contributes to the receiving country's economy and ought not to be penalised where the State of origin is still unable to ratify the Convention.

Compensation of all foreign victims of crime without a reciprocity requirement was also recommended by the 11th International Congress on Penal Law (Budapest, 1974, Conclusions, item A. 7).

26. The concept of permanent residence must be construed in the light of Committee of Ministers Resolution (72) 1 on the standardisation of the legal concepts of "domicile" and of "residence".

27. Though the Convention lays down minimum provisions, this need not prevent Contracting States from compensating:

- nationals of any State (and not just nationals of Council of Europe member States) who are permanently resident in their territory;
- all foreigners (which would enable tourists to be compensated).

Article 4

28. This article specifies as minimum requirements items for which reasonable compensation shall be paid, when the loss is verified in a particular case. These are the following:

- loss of earnings (for example, as a result of immobilisation through injury);
- medical expenses (which may include prescription charges and the cost of dental treatment);
- hospital fees;
- funeral expenses;
- in the case of dependants (children, spouse, etc.), loss of maintenance.

Other possible items, subject to the provisions of national legislation, are, in particular:

- pain and suffering (*pretium doloris*);
- loss of expectation of life;
- additional expenses arising from disablement caused by an offence.

Compensation of these items is to be calculated by the State paying the compensation according to the scales normally applied for social security or private insurance or according to normal practice under civil law.

Article 5

29. This allows the setting of:

- An upper limit to compensation.

As the public funds earmarked for the compensation of victims of violent crimes are not unlimited, a ceiling on such compensation may be necessary in certain circumstances.

- A minimum threshold below which compensation is not payable.

In line with the principle of *de minimis non curat praetor*, this provision narrows the scope of the Convention to exclude minor damage the victim can readily make good.

30. The Convention obviously cannot set rigidly quantified limits, since resources and living standards vary from State to State. These differences will mean that the sum awarded in compensation by different States will vary, and this will be particularly noticeable where foreign victims are compensated. In such cases, it is desirable that due regard should be had to the standard of living in the country where the victim habitually resides. Limits are to be set with particular reference to:

- administrative constraints (for example individual States' resources),
- financial factors (for example, wages, medical or hospital fees, etc.).

These limits may apply either to the total amount of compensation in a particular case or to the Individual elements of compensation, for example for loss of earnings or pain and suffering.

Article 6

31. Applications for compensation of a victim or, if he has died, of his dependants, should be made within a period of time to be laid down by each State according to its own customary practice.

An application must be made as soon as possible after the crime has been committed, so that:

- the victim may be assisted if in physical and psychological distress;
- the damage may be ascertained and assessed without untoward difficulty.

Article 7

32. Since compensation of the victim from public funds is an act of social solidarity, it may be unnecessary where the victim or his dependants are plainly comfortably off. In such a case, the State may reduce or even withhold its contribution to compensation of the victim without being regarded as discriminating unfairly against a section of the population. However, this provision must not be construed as precluding State compensation where no hardship exists.

Nor need it prevent States from paying compensation regardless of the victim's or his dependants' financial position (on the same basis as war disablement pensions, for example).

Article 8

33. Whereas Article 7 contains an objective criterion for reducing or withholding compensation, Article 8 allows compensation to be reduced or withheld where the victim is at fault.

34. a. Improper behaviour of the victim in relation to the crime or to the damage suffered

There is frequent evidence of a degree of interaction between the victim's behaviour and the offender's. The first paragraph of Article 8 refers to cases where the victim triggers the crime, for example by behaving exceptionally provocatively or aggressively, or causes worse violence through criminal retaliation, as well as to cases where the victim by his behaviour contributes to the causation or aggravation of the damage (for example by unreasonably refusing medical treatment).

Refusal to report the offence to the police or to co-operate with the administration of justice may also give grounds for reducing or withholding compensation.

35. b. *Membership of criminal gangs or of organisations which commit acts of violence*

Where the victim belongs to the world of organised crime (for example drug trafficking) or of organisations which commit acts of violence (for example terrorist organisations), he may be regarded as forfeiting the sympathy or solidarity of society as a whole. As a consequence, the victim may be refused compensation or be paid reduced compensation, even if the crime which caused the damage was not directly related to the foregoing activities.

36. c. *Compensation repugnant to the sense of justice or contrary to public policy (ordre public)*

States which introduce compensation schemes usually want to retain some discretion in awarding compensation and to be able to refuse it in certain cases where it is clear that a gesture of solidarity would be contrary to public feeling or interests or would be contrary to the basic principles of the legislation of the State concerned. This being so, a known criminal who was the victim of a crime of violence could be refused compensation even if the crime in question was unrelated to his criminal activities.

37. The principles justifying the withholding or reduction of compensation are valid not only in respect of a victim in person but also in relation to dependants of a victim who has died as a result of a violent crime.

Article 9

38. To avoid double compensation, compensation already received from the offender or other sources maybe deducted from the amount of compensation payable from public funds.

It is for the Parties to specify which sums are so deductible. In some of the member States, for instance, sums paid to the victim under private insurance schemes are not generally deductible from compensation.

39. A State may require any compensation the victim receives from the offender or other sources after being compensated from public funds to be repaid in full or in part (depending on the sum received) to the State or the authority paying compensation from public funds.

This eventuality is liable to arise, for example, where:

- a victim suffering hardship receives State compensation pending decision of an action brought against an offender or agency;
- the offender, unknown at the time of compensation from public funds, is subsequently traced and convicted, and has fully or partly made reparation to the victim.

40. Informing the compensating authority of subsequent compensation awards poses obvious problems. In some States, the courts inform the compensating authority of awards made to the victim, thus facilitating restitution of the sums allowed by the compensating authority.

Article 10

41. Where the victim or his dependants receive compensation from public funds, their rights against the offender or other sources of compensation (social security, etc.) may, if the domestic law so provides, pass to the State or the compensating authority, which may then take action to obtain reimbursement on that basis.

Article 11

42. In States with schemes for paying compensation from public funds, it has often been found that they are rarely used. This is mainly due to public ignorance of the existence of compensation schemes and brings home the need to publicise them better.

The main responsibility for informing the victim of his compensation rights should lie with the authorities and agencies dealing with him immediately after the offence (the police, hospitals, the examining judge, the public prosecutor's office, etc.). Information, specially published by the competent authorities, should be available to such agencies who should distribute this, whenever practicable, to the persons concerned.

The mass media (press, radio, television) could also help publicise such arrangements.

PART II – International co-operation

Article 12

43. Various matters relating to the implementation of the Convention may necessitate co-operation between the Parties, particularly:

- information about compensation available to a foreign victim in his country of origin;
- facilities whereby a State which compensates a victim can seek reimbursement from the offender resident abroad (or from a foreign agency, such as a social security authority);
- information from medical authorities or employers.

44. International co-operation here may be helped by Council of Europe conventions, particularly the European Convention on Mutual Assistance in Criminal Matters and its Protocol and the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, and by bilateral and multilateral agreements concluded by the Contracting Parties.

45. As well as recommending that the Contracting Parties assist one another in all matters covered by the Convention, Article 12 also requires that, when depositing its instrument of ratification, acceptance, approval or accession, each State designate a central authority to receive and take action on requests for assistance. This will not prevent a State, with more than one compensation scheme, from designating more than one such authority.

Article 13

46. This article indicates that the European Committee on Crime Problems must be kept informed of the application of the Convention.

47. To this end, the Parties accept the obligation to transmit periodically to the Secretary General of the Council of Europe information about new legislation or regulations on compensation schemes; by this is meant provisions introducing methods of operation for these schemes which are of some interest and not merely internal administrative regulations.

48. This information will:

- a. help the CDPC to collect sufficient documentation for making available to member States who request it (member States who envisage introducing a compensation scheme, for example); and

b. enable the CDPC to identify any difficulties arising from the application of the Convention and see whether it is necessary to hold meetings to solve such problems or whether protocols to the Convention need to be drawn up.

PART III – Final clauses

Articles 14-20

49. These articles are inspired by the final clauses usual in European conventions.