

**FINANCIAL COMPENSATION FOR VICTIMS OF CRIME
ASSESSING THE PREJUDICE. INDICATORS AND EVIDENCES**

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Our NGO projects and activities are focused on the need of better harmonization of legislation and jurisprudence to ensure rights protection for victims of crime when accessing the justice system. A special focus is on victims of human trafficking as many Romanian citizens are subjected to exploitation in other EU Member States and also on victims of gender-based violence as this phenomenon is affecting a high number of women.

Through past and present projects and activities at national & European level we were able to identify problems such as:

- Insufficient empathy from lawyers and magistrates. The training of lawyers and magistrates still tends largely to focus on legal topics, ignoring subjects such as re-victimization in the criminal trial, the impact of trauma and PTSD, the relevance of forensic and psychological reports when assessing the prejudice. *The justice system with all its legal professionals should recognize the fact that the impact of trauma is life-changing and life-long and this should also be reflected in the level of compensation granted to victims.*
- Insufficient channels to provide information to victims that have different social/educational/ethnic/cultural background, victims from remote areas in certain country.
- Discrepancies in the quantum of financial compensation in the same case, first court vs. appeal court.
- Difficulties in receiving compensation from the offender, especially when he has no assets in his name, due to the fact that he transferred them to other people (not necessarily family members). Confiscation/seizure of assets can prove to be more difficult in case of persons not directly involved in the criminal trial.
- Judicial practice shows that victims of certain crimes can obtain a higher amount of compensation than others (i.e. victims of terrorism vs. victims of human trafficking / victims of gender-based violence).

Assessing material and moral prejudice

The court must establish a certain balance between the prejudice and the compensation that may be awarded to the victim.

Many times the damage (especially the non-pecuniary/moral prejudice) cannot be quantified exactly according to mathematical criteria, but by analyzing a whole range of evidences from the file it may be possible to obtain an amount that can be considered a **"just satisfaction"**. It is important for all national courts to have an in-depth look into the European Court of Human Rights jurisprudence and interpretation of the *principle of equity for a just claim*. It is important to show flexibility, but also to have an objective

consideration of what is fair and reasonable based on the circumstances of each case, including not only the victim but also the overall context in which the offense was committed.

By analyzing jurisprudence we find that the judges sometimes appreciate differently the factual situation and the evidences administrated in a certain case. In practice, sometimes there are differences in the way of assessing the damage and the amount of compensation - the judge from first court deciding upon a certain amount of money and the judge in the appeal reducing it.

Major discrepancies in the assessment of damage (especially moral damage) could be diminished or avoided if it would exist *a trauma-informed judicial practice*; if every judge involved in criminal cases or cases on compensation would better understand trauma impact.

Recognizing the impact of past, current, continuous trauma concerning victims does not mean to transform legal professionals in treatment providers. But understanding trauma impact, it is important when assessing the damage.

Many forms of non-pecuniary damage are by nature not amenable to proof. The victim should not be required to submit multiple evidences to prove the damage. In the case of moral prejudice, it is about harming values without economic content, it is also about the protection of right to private life as stipulated in the European Convention on Human Rights and national legislation.

The judge must be able to make a just and fair appreciation of the damage, with regard to the nature and importance of non-pecuniary values, victims' psychological profile, trauma impact and personality.

It is difficult to quantify moral damage, and often the guarantee for a "just satisfaction" remains the *personal and professional qualities of the judge* who must fully understand the impact of trauma, the impact of the damage on the personal and social life of the victim.

Indicative Criteria must be taken into account for assessing the prejudice and the quantum of compensation that should be granted, based on: victim's age, gender, personality, duration and intensity of the psychological and physical harm; the amount granted to really represent a concrete possibility of alleviating the sufferings.

In the court decision should be presented in detail the logical arguments on how the judge has come to appreciate that a certain amount is fair and equitable in relation to the sufferings.

It is important to estimate the sufferings based on *scientific data*, which for example can result from medical reports, And also to perform an *interpretation of data in a personalized manner*, on a case-by-case basis, depending on the situation of each victim. The psychological expertise should play a more important role – it can help the judge in understanding the impact that trauma had and continues to have, at emotional/cognitive/behavioral/inter-personal level of each victim.

When it comes to the existence of prejudice, the legislation and practice often divide it into two main categories: temporary and permanent. And the amount of compensation is in general a global one.

However a greater attention should be paid also to *"evolutionary damage"*. There are damages that can evolve, symptomatology can change. In such cases the trauma has to be considered a dominant element. *The victim becomes aware of the fact that eventually she will die, how this has impact on the victim and*

on her family members (i.e. HIV infection of the victim as a result of the crime). In such case the judge has to take into consideration not only the past and current consequences but also the future ones and their impact. One might consider not just a global amount but also a periodic compensation.

Procedures in domestic and cross-border cases:

I would like to highlight certain issues and suggestions, based on bottlenecks:

- **Precautionary measures** in the criminal proceedings have generated over the years discussions on their applicability. Assets that are the result of the illegal acts must be confiscated and also precautionary measures have to be taken concerning the defendant assets/properties in order to ensure victim's compensation for the damages suffered.
 - ✓ In practice (i.e. cross-border human trafficking cases of Romanians exploited in other EU Member States), in our past and current activities we encountered a frequent issue raised by legal practitioners: *-the difficulty in tracing assets that were transferred on the name of third-persons which are not in the destination country but rather in the origin state. –the challenge of executing a confiscation order issued by a court competent in criminal matters from one EU Member State in another EU Member State¹.*
 - ✓ The presumption of the licit nature of acquiring goods by third persons should be only relative (*juris tantum*) and should be a more easy procedure to combat if there are indications that lead to the conclusion that the person knew the origin of those goods, how they were acquired (free of charge -donation or by paying a modest amount of money compared to the real value of those goods).
 - ✓ The prosecutor / court should dispose *ex officio* provisional measures concerning the defendant assets. The measure should be taken from an early phase of the proceedings in order to avoid strategic movements to make those assets difficult to be traced.
 - ✓ There are situations when the precautionary measures for repairing the damages are conditioned – *the injured party should be also a civil party in the trial*. Given that there is often a certain deadline until when the victim can decide if she wants to become a civil party, it is important that the prosecutor and the judge to support victims' interests by disposing the applicability of precautionary measures even before the expiry of the deadline until when the victim has to decide if she will be a civil party in the trial.

¹ Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders.

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

- **Legal assistance from lawyers**

The important role that a lawyer has on providing legal assistance and representation in cases concerning compensation (as well as other procedures in a trial) cannot be substituted by other entities. Many victims cannot afford to pay for a lawyer's legal services, and there must be a better involvement from bar associations alongside institutions with an active role in protecting victims' rights.

In compensation cases, the victim needs legal information both in the country where the offense occurred and also in the country of origin if she returns there (if the victim is not a citizen of the state where the illegal act was committed).

The right to free legal assistance should always exist for all victims of violent acts that request financial compensation in domestic and cross-border cases - without having to prove that they do not have financial resources. In all Bars, there should be contact points/special departments where, based on a written request, the victim could easily obtain a lawyer paid from the state budget to advise on the steps he / she must follow (extra-judicial assistance if the compensation was not has been requested, legal assistance if the procedure has already been triggered). For a proper access to justice, there is a need for continuity in the process of providing legal support, and a uniform practice should exist in all EU Member States that if the victim started to be assisted by a lawyer paid from a state fund, the same lawyer should advise & represent the victim throughout all extra-judicial and judicial procedures. As there are special departments at the level of the ministry of justice or other government agencies that carry out the exchange of information and documents in cross-border compensation procedure, there should also be better cooperation among bar associations in the European Union regarding the services provided by lawyers in the country of origin and destination. The legal assistance provided by lawyers should be better monitored and evaluated by competent bodies that regulate this legal profession.