

## INTERNATIONAL STANDARDS AND ALBANIAN LEGISLATION RELATING TO THE RIGHT TO COMPENSATE TO CRIME VICTIMS

**Prof.Asoc.Dr.Adrian Leka**

Adrian.leka@unishk.edu.al

Luigj Gurakuqi University, Faculty of Law, Shkodër, Albania  
Square “2 Prilli“, nr.24  
Shkodër, Albania

**Msc.Eraldi Ndoj**

eraldindo@gmail.com

University of Tirana, Faculty of Law, Albania  
“Mito Tutulani“ Street  
Tirana, Albania

### ***Entry***

*Increasing the opportunity for victims of crime to turn to the judiciary is one of the most important goals in democratic societies and, consequently, in our country. The victim's right to compensation is an important aspect of this opportunity. The purpose of this paper is to analyze this right and how it is implemented in our country and internationally. The study first analyzes the right to compensation of victims of crime under international law, examining acts of international law related to the rights of victims, the fight against trafficking, the rights of migrants, the rights of workers and the rights of victims of violence due to gender. Subsequently, the study analyzes the Albanian legislation in this aspect, focusing especially on the 2017 amendments to the Criminal Procedure Code.*

### **Some terms used and their meaning in the literature**

The terms "indemnity," "reparation," "repayment," and "reparation" are often used for concepts that are the same or very similar, meaning, to make amends for someone's loss, damage, wrongdoing, especially through appropriate payment<sup>1</sup>. Often, in the literature and studies, the term “indemnity” refers to the general concept of payment to the person, regardless of the source of payment or the mechanism used or the types of losses that are compensated. Thus, compensation includes compensation from state-funded schemes, as well as rewards given in criminal, civil or labor law proceedings.

"Compensation for damage" is used in a narrower sense, because it refers to "the amount of money that belongs to the person affected by the criminal offense, received as compensation by the perpetrator of the criminal offense<sup>2</sup>." Compensation excludes compensation in cases where the source of funding is the state scheme, and therefore the term “compensation (indemnity)” is used in the context of civil and labor proceedings. Compensation claims may contain several different elements (e.g., pain and suffering, medical expenses and unpaid wages) or a single element (e.g., unpaid wages). These elements can be classified into broader categories as "non-pecuniary" and "material" damage.

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<sup>1</sup> Definition of Compensation in the Chambers 21st Century Dictionary 21st, 2004.

<sup>2</sup> Black's Law Dictionary (8th edition, 2004).

International law and the laws of certain countries also use "redress", "restitution" or "reparation". There are times when any of these terms have one meaning in the legislation of one country and another meaning in other countries, e.g. The term "restitution" in the United States means payment made to the victim by the defendant pursuant to a court decision, but in the United Kingdom and France "restitution" means the return of goods and property to the owner. lawful.

Each country uses different terms for the loss elements included in the indemnity claim. However, in a general sense, claims for damages mainly contain elements that fall into two distinct categories: indemnification for "pecuniary damage" and indemnity for "non-pecuniary damage." "Material damage" refers to financial or monetary loss, eg, medical expenses, hospitalization or burial, loss of expected income and benefits arising from employment, unpaid wages and property damage costs. The definition and scope of pecuniary damage in the national context is defined in legislation (or through precedents in common Anglo-Saxon traditions) and varies from country to country. Some compensation mechanisms enable the payment of all forms of material damage, while others enable only limited categories. "Non-pecuniary damage" refers to other non-financial or non-monetary losses, eg, emotional suffering, damage to honor or reputation, "pain and suffering," anxiety, loss of life satisfaction, loss of company and friendship. Again, the definition and scope of non-pecuniary damage in the national context is defined by law (or through precedents in common law countries) and varies from country to country. Some compensation mechanisms allow all forms of non-pecuniary damage to be claimed, some allow only certain types of non-pecuniary damage, and some do not allow the filing of a claim for non-pecuniary damage at all.

### **Compensation of victims in international law**

The right to compensation is one of the most important rights of victims of crime. The wrong has been recognized in international and European instruments.

The right of victims to seek redress was first recognized by the international community in 1985 when the UN General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>3</sup>. Recognizing that millions of people fall victim to crime each year and that their rights are not adequately recognized, the Assembly wanted to provide assistance and justice for them, through a series of rights for victims, including compensation.

The Council of Europe was the first in the field of victim compensation with the European Convention on the Compensation of Victims of Violent Crime in 1983<sup>4</sup>. Under the Convention, States Parties have an obligation to compensate victims of acts of intentional violence resulting in bodily injury or death.

At European Union level, the first step in recognizing the importance of compensation for victims of crime was the adoption of the Council Framework Decision on the situation of victims in criminal proceedings in March 2001<sup>5</sup>. The decision encourages Member States to take measures to ensure that victims of criminal offenses have the right to a decision on compensation in criminal proceedings. However, the decision does not mention compensation by the state. As another major step towards

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<sup>3</sup> UNGA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985; UN Doc. A / RES / 40/34, <http://www.un.org/documents/ga/res/40/a40r034.htm>

<sup>4</sup> European Convention on the Compensation of Victims of Violent Crimes, ETS No.116.

<sup>5</sup> 2001/220 / JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.

establishing European victims' rights, the Compensation Directive was adopted in 2004<sup>6</sup>. The Directive imposes a clear obligation on Member States to have state compensation schemes for intentionally violent crime, including the crime of terrorism. The instrument also includes mechanisms to facilitate compensation claims in cross-border cases. According to Article 1 of the Compensation Directive “Member States must ensure that where an intentional violent crime is committed in a Member State other than that Member State where the claimant is a habitual resident, the applicant has the right to report request. an authority or any other body in the latter”.

In 2012, the EU took another important step towards guaranteeing the rights of victims of crime with the 2012 Directive setting minimum standards for the rights, support and protection of victims of crime (Victims' Rights Directive)<sup>7</sup>. This Directive strengthens the rights of victims compared to the 2001 Council Framework Decision. This horizontal directive forms the cornerstone of EU victim rights policy and has been applicable in the Member States since November 2015. The Rights Directive of Victims provides for a set of binding rules for all victims and all crimes. Does not include the right to be recognized and treated in a respectful, sensitive, adapted, professional and non-discriminatory manner. With regard to compensation, does it provide for the right to take a decision on compensation by the perpetrator within a reasonable time during the criminal proceedings and that Member States shall take measures to encourage perpetrators to provide adequate compensation to victims (Article 16).

On 15 March 2017, the European Union adopted Directive (EU) 2017/541 on the fight against terrorism (Counter-Terrorism Directive)<sup>8</sup>. Chapter V of this directive explicitly sets out provisions for the protection, protection and rights of victims of terrorism. These new rules are based on the already existing EU horizontal rules for victims of crime (Victims' Rights Directive and Compensation Directive). Member States should establish confidential, free and easily accessible support services to assist victims of terrorism immediately after a terrorist attack and for as long as necessary. In terms of compensation, these support services are required to assist victims of terrorism with claims regarding compensation that is available under national law. This Directive entered into force in the Member States in September 2018 and has not yet been fully transposed into the Member States.

Another instrument specifically dedicated to the victims of a certain category of crime is my 2001 Anti-Trafficking Directive<sup>9</sup> on preventing and combating trafficking in human beings and the protection of its victims. The Directive sets minimum standards to be applied throughout the European Union to prevent and combat trafficking in human beings and to protect victims. It is based on a human rights approach and a gender perspective. It contains provisions for the protection, assistance and support of victims, but also for prevention and prosecution of crime. The Anti-Trafficking Directive explicitly states in Article 17 that Member States must ensure that victims of trafficking in human beings have

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<sup>6</sup> Council Directive 2004/80 / EC of 29 April 2004 relating to compensation to crime victims,  
<http://eurlex.europa.eu/legalcontent/EN/TXT/?uri=celex:32004L0080>

<sup>7</sup> Directive 2012/29 / EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220 / JHA, <https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=FR>

<sup>8</sup> Directive 2017/541 / UE of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475 / JHA and amending Council Decision 2005/671 / JHA, <https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541&from=FR>

<sup>9</sup> Directive 2011 / 36 / UE of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629 / JHA, <https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=en>

access to existing compensation schemes for victims of intentional violent crime . Furthermore, Member States should ensure that victims of trafficking in human beings have immediate access to legal representation, including in this respect the purpose of seeking compensation. Member States were required to complete the transposition of the Anti-Trafficking Directive by 6 April 2013. All Member States bound by the Directive had notified the European Commission of their transposition measures. With regard to the introduction of the EU Anti-Trafficking Directive into national law, the European <sup>10</sup>Commission 's Transposition Report concluded that although there had been substantial efforts by the Member States In the EU , there is still considerable room for improvement in various aspects , including compensation . The Commission continues to monitor the transposition and correct implementation of the Directive. A number of Commission reports, studies and documents address the issue of compensation for victims of trafficking.

### **Developments in Albanian legislation on victim compensation**

Recently, there has been a marked evolution of international standards regarding access to justice for victims of violent crime, for their right to compensation. This fact is also affecting the Albanian legislation to create new opportunities.

The Constitution of the Republic of Albania provides as one of the fundamental rights, the right of the citizen for rehabilitation and / or compensation, in case he / she has been harmed due to an illegal act, action or inaction of state bodies <sup>11</sup>. This right is reserved to the law to determine the modalities of its implementation. Law no. 9381, dated 28.04.2005 "On the compensation of unjust imprisonment", is one of the main laws adopted pursuant to Article 44 of the Constitution. Since its adoption, the case law has shown an increase in cases of compensation sought from the court for illegal conduct of police bodies, or for unjust imprisonment. The mechanism provided by the Constitution for the acceptance of international acts in the domestic legal system, fully allows the judge to decide on claims for compensation / indemnity, referring directly to conventions and other international acts ratified by the Republic of Albania.

In general, legal remedies for damages can be sought in the Code of Criminal Procedure and the Civil Code. From the point of view of case law, it is worth mentioning the Unifying Decision, no. 12, dt. 14.09.2007, of the Joint Colleges of the High Court, which unifies the case law in terms of material and non-pecuniary damage.

Albanian procedural legislation provides for the possibility of compensating victims, through procedural means in two processes: the civil lawsuit in the criminal process and the lawsuit for damages in the civil process. Until 2017, the main difference between these processes was the fact that the civil lawsuit in the criminal process was related only to the claim for material damage. The Code of Criminal Procedure did not provide for the possibility to claim "non-pecuniary damage" as part of a lawsuit in criminal proceedings. However, the victims had the legal opportunity to claim non-pecuniary damage through civil proceedings. Also, in the case of the request of the accusing injured party before the court, the request for compensation of damage was provided, without necessarily conditioning it with material damage <sup>12</sup>.

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<sup>10</sup>COM (2016) 722 .

<sup>11</sup> Article 44

<sup>12</sup> See Article 59 of Penal Procedure Code.

From the point of view of international standards, in the Albanian mechanisms of the right to compensation we can clearly distinguish:

- the right to seek redress from the perpetrator, through criminal and civil proceedings.

Albanian procedural legislation provides for the possibility of compensating victims through civil lawsuits in criminal proceedings and lawsuits for damages in civil proceedings. Historically, the main difference between these processes has been the fact that civil lawsuits in criminal proceedings were related only to the claim for pecuniary damage, whereas non-pecuniary damage could be claimed only through civil proceedings. This position of the Code of Criminal Procedure has been interpreted by the Albanian legal-criminal doctrine. *"The volume of rights that the civil plaintiff has in the criminal process are determined by the purpose of this institute to ensure the replacement of material damage caused by the commission of a criminal offense"*<sup>13</sup>.

In this panorama, it is to emphasize the place of the accusing injured party, ie the victims who have suffered damage from a criminal offense of minor importance, and raise the accusation directly in Court. Only a few figures of criminal offenses are included in this category, according to the categorization defined in the closed list made by the Code of Criminal Procedure itself<sup>14</sup>. The accusing injured party has always had the opportunity to seek compensation for material and non-pecuniary damage.

With the changes made in 2017 in the Code of Criminal Procedure, the victim was recognized another role in criminal proceedings. In a subject without rights and with the role of mainly a witness, unless he presented himself as a civil plaintiff, the victim was promoted to the rank of a subject who has rights in criminal proceedings. However, compensation to the victim can only be done in the same ways known as before: through a civil lawsuit in criminal proceedings and a claim for damages in civil proceedings. With legal changes, civil lawsuits in criminal proceedings can include material and non-pecuniary damage. Thus, the only difference between the processes remains the place of their development (criminal or civil court) and the time (simultaneously with the criminal process or after its completion).

### **Material damage**

The right to claim pecuniary damage is related to the meaning that the Civil Code has given to pecuniary damage<sup>15</sup>. To better understand this, a special help is given by the unifying decision of the High Court no. 12, dt. 14.09.2007. Based on this decision:

*"Damage to health (biological damage) is, in essence, the violation of the good of health, physical and / or mental integrity of man."*

Despite the fact that our Civil Code lists the damage to health as non-property damage, it should be noted that biological damage can be distinguished as property damage. The United Colleges, regardless of the type, emphasize that this damage is the object of search and compensation independent of other property and non-property damages suffered by the injured party. Thus, the compensation for the damage to health according to article 625 / a of the Civil Code is required independently of the claim

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<sup>13</sup> Fehmi Abdiu, "Civil lawsuit in the Albanian criminal process", Botim Pex, Tirana, 2003.

<sup>14</sup> Article 59 of the CPC.

<sup>15</sup> Articles 640-644.



for property damage of loss or reduction of ability to work, provided in article 641 of the Civil Code. At the same time, it is of legitimate legal interest to reduce the property of the injured party in the form of expenses he incurs for care and, in particular, for the treatment of damaged health as a continuous consequence of the same illegal fact <sup>16</sup>.

Article 61 of the Code of Criminal Procedure provides: *"A person who has suffered damage from a criminal offense or his heirs may file civil lawsuits in criminal proceedings against the defendant or civil defendant, to seek the return of property and claim damages."*

In the Albanian case law and legal doctrine, different opinions have been expressed on the meaning of the damage in general, and the material damage in particular. This has been influenced by the previous understanding in the Albanian legislation of material and civil responsibility. Thus, for example, there are authors who think that only effective damages can be sought through a civil lawsuit in the criminal process and no other damages that necessarily come in the future, as a result of a crime committed by a civil defendant, or missing profit. <sup>17</sup>.

Article 61 of the Code of Criminal Procedure deals with material damage in two aspects: in the return of property and compensation for damage. These terms are not the same. In our legislation, the return of property means the return of goods and property to the rightful owner of the latter. But, this term can not be equated with the meaning of material damage. Therefore, it is necessary to emphasize that the return of the item is a narrower category than the term "compensation for damage".

According to international standards, "Material damage" refers to financial or property loss, for example, medical, funeral and hospital expenses, loss of future earnings and benefits derived from employment, unpaid wages and costs. property damage <sup>18</sup>. Material damage includes everything related to financial or property losses. This includes property damage to health, or what is today called biological damage. This position is in line with the treatment of some Albanian authors <sup>19</sup>, as well as the unifying decision of the Supreme Court. From the above we can conclude that the purpose of the civil lawsuit in the criminal process can not be reduced only to the return of property to the rightful owner, but also to the compensation of material damage, which can be understood as property damage resulting from the criminal offense. , which includes all types of financial or property losses. These losses can not be fully covered even by the social security scheme.

### ***Non-pecuniary damage***

For a relatively long time non-pecuniary damage equated to moral damage. But over the last twenty years, first doctrine and then jurisprudence, has identified two new figures of non-pecuniary damage. In our country, the unifying decision of the United Colleges of the High Court no. 12, dt. 13 and 14 September 2007, gave new dimensions to the category of non-pecuniary damage by putting next to the figure of moral damage (whose non-pecuniary nature was consolidated) also the figure of existential damage and biological damage.

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<sup>16</sup> Marjane Tutulani , " Damage non -property ( non -property ), sub regulation legal of Civil Code ", published in "Jeta Juridike" , Nr. 1, August 2003.

<sup>17</sup> Fehmi Abdiu, "Civil lawsuit in the Albanian criminal process", Botim Pex, Tirana, 2003.

<sup>18</sup> Compensation for Trafficked and Exploited Persons in the OSCE Region, OSCE / ODHIR, 2008.

<sup>19</sup> Marjane Tutulani , " Damage non -property ( non -property ), sub regulation legal of Civil Code ", published in "Jeta Juridike" , Nr. 1, August 2003.

Thus, through this decision it is accepted that in the category of non-pecuniary damage provided in Article 625 of the CC are included three figures:

- figure of moral damage;
- figure of biological damage;
- figure of existential damage.

It is accepted from the jurisprudence that moral damage (*pretium doloris* or *pecunia doloris*) is an internal, temporary manifestation of the unjust turmoil (*non iure perturbatio*) of the human state of mind, pain and spiritual suffering or a state of anxiety and spiritual torment. arising as a consequence of the illegal fact. Anyone who suffers violations in the field of health and his personality from illegal actions or omissions and through the fault of a third party has the right to seek compensation for the moral damage suffered. This right, in the capacity of the injured party, belongs individually (*ius proprius*) to each of the close relatives of the person who has lost his life or been injured in his health by the illegal fact, if their special family connection is established, sensory and coexistence. The moral damage suffered by the relatives themselves is considered as a consequence, an immediate and direct consequence of the same illegal fact.

On the other hand, damage to health (biological damage) is, in essence, the violation of good health, physical and / or mental integrity of man. This non-pecuniary damage, provided by letter " a " of Article 625 of the Civil Code, is the object of claim and compensation independent of other property and non-pecuniary damage suffered by the injured party due to the same illegal fact.

According to the aforementioned unifying decision, existential damage is the damage caused by the illegal fact of the third party violates the human personality rights by almost permanently damaging the expression and realization of the injured person as a human being, the manifestation of his personality in the world of external, objectively shaking his daily life and ordinary activities, causing deterioration of the quality of life by changing and upsetting the balance, behavior of life habits, personal and family relationships. Due to such a psycho-physical condition, the injured party can no longer perform certain activities that positively characterized his being or could characterize him positively in the future, forcing him to be pushed towards different solutions in life from those of desired and expected or in renouncing the latter due to the establishment of an illegal fact.

### **Identification of the civil plaintiff in the criminal process**

The Code of Criminal Procedure (Article 62) sets out the stage and deadlines for the legitimation of a civil plaintiff in criminal proceedings. The legitimacy of the civil plaintiff can be done by the procedural body until the court proceedings have started. This term can not be extended in any case. It is clear that the legitimacy of the request will be made by the court before the main trial begins.

The above wording does not exclude the possibility for the request to be submitted to the prosecutor as a procedural body, which may also perform actions in relation to it, despite the fact that the court will further legitimize it, before the main trial begins. This practice actually helps the smooth running of the civil lawsuit in the criminal process and is a requirement that also comes from the obligations that the prosecutor has in relation to the victim throughout the criminal process.

In the first instance, at the stage of the investigation of the case, the victim should be assisted with information about her right to claim damages, as well as to accept in the file of the case, the civil lawsuit filed by her. Under Albanian law, the prosecutor has the obligation to inform the victim and to seek evidence regarding the civil lawsuit in the criminal proceedings. The effective exercise of this obligation would also assist the criminal court in reviewing the civil lawsuit, in order not to proceed with its segregation, which would turn the civil lawsuit in the criminal process into an unnecessary institute.

### **Separation of civil lawsuit**

The criminal court is fully allowed to separate the civil lawsuit from the criminal process and send it for trial in the civil process. This can happen not only at the request of the parties, but also mainly, if the trial of the civil lawsuit complicates or delays the criminal process. In general, the separation of the civil lawsuit in the criminal process becomes the reason for the prolongation of the trial procedures. The Albanian practice in these cases has proven that it was almost impossible to make its trial in the civil process, without first completing the criminal process. The separation of the Civil Lawsuit in the Criminal Procedure is available with an intermediate decision. The court has the obligation to present this interim decision in its final decision in its reasoning part. This stems from the Court's obligation to respond to all procedural requests of the parties, but at the same time, stems from the right of the party to appeal the decision. In this case, the civil plaintiff in the criminal proceedings has the right to appeal the interim decision of the court in relation to his claim, together with the final decision. This right arises on the basis of the K.Pr.P, which provides that "the appeal of court orders, when not provided otherwise by law, can be made only by appeal against the decision."

### **The right to be represented by a lawyer**

This right is an essential element of the right to compensation. To seek redress, victims must be aware of their rights and how to benefit from them. International standards even dictate the existence of measures that guarantee the safety and well-being of the person during the duration of the lawsuit procedure. This means that adequate housing, social assistance, legal advice, medical assistance and a residence permit are essential ancillary rights, without which the possibility of receiving compensation is limited. The civil lawsuit in the criminal process requires the active participation of the victim in the legal process. In general, this causes fear, especially if it is a violent crime, so free legal aid and representation are needed to increase the chances of her receiving the reward. The absence of a lawyer weakens her position and, in particular, informing the victim about her rights to seek redress. In this regard, civil society has an indisputable role, as it can advocate for victims, disseminate information and provide free legal aid.

### **Execution of compensation decisions**

Enforcement of final court decisions is another issue that faces major barriers in practice. As in the civil process, even in cases where the compensation has been decided by the criminal court, the burden of following the procedures for the execution of the court decision is left to the victim. These proceedings are directed against the property of the perpetrator, which causes a shyness or fear for the victim. Also, the execution of the decision is encountered in other obstacles and barriers. For example, it may happen that the person or property is located in another place, the property may not be identifiable as it is hidden in other names, other court proceedings may be needed as it is in co-ownership, etc.



### **Opportunity to receive compensation from the state fund**

Through the implementation of law, no. 9284, dated 30.09.2004 "On the prevention and crackdown on organized crime", or the so-called "anti-mafia law", in Albania was created the opportunity to provide a state compensation scheme for victims of trafficking. The importance of this law lay in the provision of special measures to crack down on property created as a result of organized crime activity.

*"There is no denying the fact that the adoption of this law was the result of the failure of the usual criminal legislation to achieve significant results against the economic power of organized crime"<sup>20</sup>.*

The law had a special focus on compensating victims of organized crime. It envisioned, directly or indirectly, three forms of spending confiscated assets from which victims of organized crime, including victims of human trafficking, could benefit.

The first form was presented as individual indemnity. The law provided that confiscated cash and immovable property were used to compensate victims of organized crime (Articles 33 / a and 34 / a of the law).

The law also provided for the use of property for social purposes. This provided for the direct transfer of immovable property to the ownership of the local government units where the property was located, for the performance of their functions or for social purposes.

The law also created a special fund aimed at crime prevention and legal education, financially supporting projects that generally aim at the administration for institutional, social or public interest purposes of confiscated real estate, as well as for projects that are specifically addressed. in the assistance and rehabilitation of victims of trafficking in human beings (Article 39 of the law).

With its repeal and approval of Law no . 10 192, dated 3.12.2009 , " On the prevention and crackdown on organized crime and trafficking through preventive measures against property ", the first form of direct compensation to victims of trafficking was removed and only the funding of institutions or NGOs was left. for programs to help victims.

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<sup>20</sup> Ardit Mustafaj, " Products of the work CRIMINAL from perspective legal - criminal and political criminal ", Tirana , 2007.