

## Access to Redress Mechanisms in Spain

### I. Introduction

The purpose of this memo is to investigate the ways to access redress (restitution, compensation) within the Spanish system. This research outlines the steps that can be taken in relation to a trafficking case pursuant to COMP.ACT in order to seek compensation via criminal as well as civil law.

In order to access compensation, it is important to undertake a proper investigation of assets, which will ultimately be necessary to secure the payment of financial liability, including **civil liabilities** – *ex delicto*- deriving from the criminal offence, court costs and fines.

At times, the only method of compensating for the damage caused by a crime is through economic restitution or a payment of compensation to the victim. The object of civil liability “ex delicto” is restitution of the goods the subject matter of the crime, the payment of damages, reparation of the damage and compensation for economic/material and moral damage caused. Judicial actions carried out with this objective should ensure the identification and securing of the goods to be returned, as well those belonging to the persons who may be held civilly liable.

Procedural law states that “Any felony or misdemeanour gives rise to a criminal action to punish the guilty party, and may also give rise to a civil action for the recovery of the thing, the reparation of the damage and compensation for the damage caused by the punishable act.”<sup>1</sup> This is also reflected in the Criminal Code: “Every person criminally responsible for a crime or misdemeanour is also civilly responsible where the act gives rise to damages”.<sup>2</sup> Thus, the commission of a crime or misdemeanor requires the reparation of the damage caused.

Civil responsibility can be pursued through criminal proceedings, whereby the crimes to which there has been a victim are prosecuted in a separate section on civil liability or alternatively there can be an entirely separate civil proceeding. The former option is the more frequently employed, as prosecutors are required to seek civil responsibility in criminal indictment proceedings.

Civil liability may thus be pursued along with the criminal action, or it may be pursued completely separately. If it is pursued together with the criminal action, it is not possible to separately pursue the civil element until the criminal action has resulted in a final decision.<sup>3</sup>

#### I. Civil Responsibility within criminal proceedings.

The determination, identification and safeguarding of sufficient assets to meet the satisfaction of the civil liability is one of the aims of the investigative stage of the criminal proceedings.

Court proceedings with this objective are undertaken in the civil liability section, which specifies the amount claimed, along with the other financial liabilities, costs and fines. The

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<sup>1</sup> Article 100 Criminal Procedure Act.

<sup>2</sup> Article 116 of the Penal Code.

<sup>3</sup> Article 111 Criminal Procedure Act.

effectiveness of such proceedings is ensured through the use<sup>4</sup> of the precautionary measures of bail and attachment.<sup>5</sup> The use of such precautionary measures aims to ensure the ultimate effectiveness of this procedure, as well as the other economic responsibilities such as court fees and fines.

Any renunciation of the claim by the victim does not terminate the taking of the *ex officio* criminal action for a crime or misdemeanor.<sup>6</sup>

Any victim of a crime or misdemeanour who has not waived their right to participate in the proceedings may request to be a party to the case at any moment prior to the procedure to qualify the crime, and take the appropriate civil or criminal action, or both, as convenient.

**While the injured party may not be a party to the action itself**, this does not mean that they have waived their right to restitution, reparation or compensation which may be awarded in their favour in the final judgment. Thus any renunciation of this right must be explicit and conclusive.<sup>7</sup>

**Once the criminal procedure is instigated, the civil procedure is automatically initiated** unless the injured party or the victim has renounced the claim or has expressly reserved the right to take a civil action upon the completion of the criminal trial. Where a civil action arises from a crime which can only be prosecuted due to particular claim, the right to undertake a criminal action is deemed extinguished.<sup>8</sup>

Both types of actions may be expressly brought by the same person or several persons; but where there are two or more persons pursuing actions arising from the same crime or misdemeanour, they must bring them in the same procedure and, where possible, they should be represented by the same lawyer.<sup>9</sup>

It is not necessary for the exercise of the criminal action that the civil action originating from the same crime or misdemeanor has been previously exercised.<sup>10</sup>

The criminal action is terminated on the death of the accused, but where this occurs the civil case against the heirs and assigns of the deceased accused subsists. This type of case falls solely within the jurisdiction of the civil courts.<sup>11</sup>

The termination of the criminal action does not entail the termination of the civil action unless the criminal action was terminated by a final judgment stating that the criminal offence from which the right to a civil action would have arisen does not exist.

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<sup>4</sup> Measures ordered by the Court.

<sup>5</sup> Measures outlined in article 589 of the Criminal Procedure Act.

<sup>6</sup> Article 106 Criminal Procedure Act.

<sup>7</sup> Article 110 Criminal Procedure Act.

<sup>8</sup> Article 112 Criminal Procedure Act.

<sup>9</sup> Article 113 Criminal Procedure Act.

<sup>10</sup> Article 114 Criminal Procedure Act.

<sup>11</sup> Article 115 Criminal Procedure Act.

Similarly, the termination of the civil action does not entail the termination of the criminal action arising from the same crime or misdemeanour. A final decision in favour of the respondent in the civil suit shall not preclude the taking of a corresponding criminal action.<sup>12</sup>

All diligence in relation to bail and attachment, as well as everything related to the civil liability of third parties and incidents that were raised due to seizure, and in due course, the restitution of goods and assets within the power of the third party, shall be undertaken in a separate section of the proceedings.<sup>13</sup>

When the defendant cannot be located, his or her family shall be summoned. If no member of the family can be located, or if those that are found, or the defendant or his/her representative are unwilling to identify any property, those goods considered to belong to the defendant will be subject to a lien pursuant to the order and within the limits<sup>14</sup> set out in the Civil Procedure Law.<sup>15</sup>

Cuando se señalen bienes y el encargado de hacer el embargo creyese que los señalados no son suficientes, embargará además los que considere necesarios<sup>16</sup>.

When the goods are seized and it is believed that they are not sufficient to cover the charge underlying the lien, a further lien may be required.

If, during preliminary investigation it is shown that third party liability exists pursuant to the relevant articles of the Penal Code, or that a third party has participated in the gains from the crime, the judge, at the request of the civil party, will require a bond against the person responsible. If not granted, the court clerk may seize the necessary assets.<sup>17</sup>

The person whose goods are seized may, during the proceedings, state in writing the reasons why he should not be held civilly liable and may produce any evidence to the same end.<sup>18</sup>

The court clerk will inform the interested party of the content of the document, who will deliver his or her findings three days later, referring to evidence that should be included to support his or her claim.<sup>19</sup>

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<sup>12</sup> Article 117 Criminal Procedure Act.

<sup>13</sup> Article 619 Criminal Procedure Act.

<sup>14</sup> Articles 605 y 606 LEC.

<sup>15</sup> Article 294 of the Civil Procedure Code (LEC) states: "[...] the clerk/judicial secretary responsible for execution shall seize the goods/assets the subject matter of the execution order/in such a manner so as to/attempting to bear in mind/to take into account the greatest ease of disposal and the least onerous method/means of doing so/ensuring execution. 2. If due to the circumstances of the execution it becomes impossible or very difficult to apply the criteria in the previous section/aforementioned criteria, the property/assets will be seized in the following order: 1º Cash or current/checking accounts of any kind. 2º Credits/Loans and duties/actions immediately realizable or relizable in the short term, and titles/bonds, securities or other financial instruments admitted to trading on an official secondary market of securities. 3º Jewellery and art objects. 4º Cash rent/Rent in cash form, whatever its origin and the reason for its accrual/payment. 5º Interest, rents and gains/fruits of every kind. 6º Movable goods or livestock, stocks, bonds/titles or securities not admitted to the stock exchange listing/official listing and shares. 7º Real Estate. 8º Wages, salaries, pensions and income from commercial/professional/trading activities and independent business activities. 9º Credits, rights/actions and values realizable in the medium and long term.

<sup>16</sup> Article 599 LEC.

<sup>17</sup> Article 615 Criminal Procedure Act.

<sup>18</sup> Article 616 Criminal Procedure Act.

Subsequently, the judge shall order the hearing of the proposed evidence and will, where possible, always rule on the claims without delay or prejudicing the principle object of the investigation.<sup>20</sup>

The restitution to the owner of the instruments and objects the subject matter of the crime, which are in the possession of a third party, may not be possible until after the conclusion of the oral trial.<sup>21</sup>

Orders made in these types of cases, will take effect without prejudice to right of the affected parties to reproduce their claims (again) during the trial itself, or the corresponding civil action, which may be separately undertaken.<sup>22</sup>

#### Seizure as a means of accessing goods from criminal networks.

Every penalty imposed for a malicious felony or misdemeanor shall lead to a loss of the original assets and goods as well as any means or instruments with which the crime was prepared or executed. **Likewise the proceeds of the crime or misdemeanor**, howsoever they have been transformed, fall within the court's purview. All such assets shall be confiscated unless they belong to a bona fide third party who is not responsible for the crime and has acquired them legally. The judge or court shall extend the forfeiture to goods, assets, instruments and proceeds of criminal activities committed in the framework of a criminal or terrorist group or organization or of a crime of terrorism. The wealth of every single person condemned for a crime committed within the context of a criminal or terrorist organization or group or a crime of terrorism will be deemed obtained from the criminal activity where its value is disproportionate to the legally obtained income of each of such persons. If, for whatever reason, it is not possible to confiscate the aforementioned assets, it may be decided that assets of an equivalent value belonging to the responsible criminals can be seized. The assets that are seized will be sold whenever trade is lawful, and the value obtained will be applied to cover the civil liabilities of the offender, providing no law provides otherwise.<sup>23</sup>

With regard to these types of crimes or misdemeanors committed with the collaboration, co-operation of or through companies, organizations, groups or any other entity or group of persons which lack legal personality, the judge or court, in a legally reasoned decision, may impose on the said companies, organizations, groups, entities or groups of persons one or more ancillary punitive consequences in line with the penalty imposed on the principal perpetrator of the crime. Such ancillary measures are outlined in paragraphs (c) to (g) of article 33.7. They may also impose a permanent ban on the conduct of any activity, even if it is lawful. Additionally, the temporary closure of the premises or facilities, the suspension of social activities and judicial intervention may be granted by the trial Judge as a precautionary measure during the pre-trial

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<sup>19</sup> Article 617 Criminal Procedure Act.

<sup>20</sup> Article 618 Criminal Procedure Act.

<sup>21</sup> Article 620 Criminal Procedure Act.

<sup>22</sup> Article 621 Criminal Procedure Act.

<sup>23</sup> Article 127 Penal Code.

phase for the purposes set forth in this Article and in accordance with the limits set out in Article 33.7.<sup>24</sup>

Judges and Courts making findings of civil responsibility shall outline in the findings, in a reasoned manner, the basis for the amount of damages and compensation at the time of the issuing of the judgment or in the execution phase.<sup>25</sup>

## **II. Civil Liability Proceedings**

The civil action is terminated by an express renunciation,<sup>26</sup> which will only affect the individual making the renunciation.<sup>27</sup>

If civil action is to be pursued separately, it cannot be exercised until the criminal action has culminated in a final judgment.<sup>28</sup> In all other cases, the person entitled to take the civil action against the individual/s who is/are obliged to return the good, make reparations for the damage suffered or compensate must do so according to the jurisdiction of the civil courts and in accordance with the required civil proceedings.<sup>29</sup>

The civil action is terminated when it is declared in a final judgment that no facts supporting liability have arisen.

## **III. Prosecutorial Responsibility with regard to civil liability**

In a number of instructions issued by the Attorney General's office<sup>30</sup> prosecutors are reminded of their duty to ensure that they pursue civil responsibility deriving from a crime in their written submissions and also that they monitor compliance during the execution phase of the judgment. These duties are:

- Adopt, from the initiation of the action, the necessary precautionary measures to ensure the economic and social protection of the victim.
- Before the Judge or judicial organ with jurisdiction, promote a thorough investigation of the assets of the accused, and, where appropriate, of the persons who may be held to be civilly liable, in order to ensure the payment of the amounts, such as monetary liabilities, outlined in the decision.<sup>31</sup>

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<sup>24</sup> Article 129 Penal Code.

<sup>25</sup> Article 115 Criminal Procedure Act.

<sup>26</sup> Article 106 Criminal Procedure Act.

<sup>27</sup> Article 107 Criminal Procedure Act.

<sup>28</sup> Article 111 Criminal Procedure Act.

<sup>29</sup> Article 116 Criminal Procedure Act.

<sup>30</sup> See instructions 2 / 2008 and 1 / 2010 in relation to/on Functions of the Public Prosecutor in the investigation phase and the execution of criminal trials, respectively, 8 / 2005 on the duty to inform/of information in guardianship actions and the protection of victims in criminal proceedings; 1 / 1992, concerning the processing of the sections of civil liability.

<sup>31</sup> In order to locate the goods the subject matter of aforementioned seizure, Art. 614 LEC provides that the regulation contained in the Civil Procedure Act is directly applicable in the criminal proceedings. Article 589.2 of that Code provides that *the execution summons for the production of the goods shall at a minimum include a notification of the penalties that may be imposed for gross disobedience, where the statement of assets includes assets which are not owned by person the subject matter of the order, excludes assets owned by the said person which may be seized*

- Include, in the provisional complaint or the indictment, the plea for restitution, reparation or indemnification for the damages and/or prejudices caused by the crime. The amount to be sought in the context of the civil liability or the criteria used to determine the amount should be specified; the person or persons to whom liability is attributed should be indicated; and a brief description of the acts or facts on which liability is based should also be included.
- Ensure, during the execution phase, the complete satisfaction of all civil liability as set out in the ruling of the court, and oppose the filing of any document alleging full compliance with judgment until the payment of compensation is confirmed in court or a verified situation of insolvency is proven to exist.

The civil action must be instituted along with the criminal action by the public prosecutor, whether or not a private prosecutor is involved in the process; but if the victim waives his right to restitution, reparation or compensation, the public prosecutor will be limited to seeking the punishment of the offenders.<sup>32</sup>

#### **IV. Spanish Decisions regarding compensation**

According to art. 14.4 of the Criminal Procedure Act, the provincial courts have jurisdiction over those cases where the penalty for the offence exceeds five years. Art. 847 b of the same Act outlines the remedy of appeal for violation of substantive law and violation of procedural law against decisions issued by provincial courts in oral trial and at first instance<sup>33</sup>.

While not all crimes set out in Articles 318 bis, 188 and 312 of the Penal Code provide for terms exceeding five years, all the decisions included in this memo related to trafficking in persons for sexual exploitation and prostitution-related offenses have been prosecuted in provincial courts in oral proceedings at first instance. To this end, recourse has been had to the Second Chamber of the Supreme Court due to the final nature of its decisions. Such final decisions may come from the Supreme Court itself which repeals the ruling of the corresponding Provincial Court, from the Provincial Court where the appeal has not been accepted or from the Provincial Court together with the Supreme Court where the appeal is only partly successful. This memo also reviews the judgments of the corresponding Provincial Courts to see whether the grounds of the order to pay compensation have aspects that deserve mention.

The majority of appeals reviewed were filed by the accused; only seldom was an appeal filed by the victim claiming an effective remedy pursuant to Article 24.1 of the Constitution. No judgment was found where the impugned conduct was the trafficking of human beings for the purpose of sexual exploitation pursuant to Article 177bis as this article was only adopted in June 2010 (and effective as of December 2010).

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*pursuant to the order or where encumbrances and liens on the assets are not disclosed.* Articles 590 and 591 of the same Act outline the duties of all persons, public and private entities to cooperate with the investigation process in relation to the legal seizure and freezing of the assets.

<sup>32</sup> Article 108 Criminal Procedure Act.

<sup>33</sup> This is a special remedy to be lodged only before the Supreme Court.



After a review of some 50 judgments, it is clear that the Provincial courts have no hesitation in finding against the defendants and ordering them to pay (binding) compensation (which amount can be increased on default by the corresponding interest pursuant to article 576 LEC) when they have made their determination. Further the Supreme Court has never accepted any alleged ground of appeal in relation to the payment of compensation awarded. These orders for compensation are, in all cases, for moral damages or general damages.

However, except in five of the examined judgments of the Provincial Court<sup>34</sup>, the Court has never taken any steps to secure payment of compensation due. This is surprising as, since 1992, by virtue of Instruction No. 1 / 1992 relating to the handling of civil liability procedures, the Attorney General's Office drew the attention of prosecutors to the need to adopt, from the start of the procedure, the precautionary measures necessary to ensure the socio-economic protection of the victim. More recent Instructions of the Attorney General, such as the No. 8 / 2005, No 2 / 2008 and No 1 / 2010,<sup>35</sup> also show that Office's concern with strict compliance by the prosecutors with their legally assigned functions in relation to the protection of the rights of victims and those affected by crime.<sup>36</sup> Circular 4 / 2010 of the Attorney General of the State on the functions of prosecutors in assets investigation in the field of criminal procedure again underlines the importance of obeying the aforementioned instructions and states that the identification and securing of goods sufficient to meet the satisfaction of the liability is one of the purposes of the investigation stage of criminal proceedings. This Circular is dated December 30, 2010. There are still no decisions in 2011 in relation to cases involving human trafficking or smuggling for purposes of sexual exploitation.

In relation to the five cases mentioned above:

The judgments of the Provincial Courts in Almeria, Murcia and Huesca ordered, as directed by the Public Prosecutor in the investigation stage, the confiscation of monies found in the clubs referred to in the decisions without adding further explanation. In the judgment of the Provincial Court of Almeria of the 5th of April 2005, it was added, without elaboration, that the confiscated cash would be dealt with "according to the law". The Supreme Court judgment of the 28th of September 2007 which partially upheld the appeal against the decision of the Provincial Court of Huelva dated January 16, 2007, ordered the defendant to pay compensation as well as ordering a preceding examination of his, her or its solvency. However, the Provincial Court makes no provision for situations where the defendant is insolvent.

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<sup>34</sup> Judgment of the Provincial Court of Oviedo 150/2005 Section 3a, 28/06/2005, legal basis no. 13 ° (the Judge agrees with the Public Prosecutor and extends the interpretation of forfeiture -para. 2 of the Facts Pleaded. It was under appeal before the Supreme Court: STS 09/10/2006, which approved certain parts of the appeal); Judgment of the Provincial Court of Almería Section 1ª, 80/2005, 05/04/2005, legal basis no. 5° (appealed to the Supreme Court: STS 06/05/2006, which dismissed the appeal); Judgment of the Provincial Court of Murcia Section 1a, 16/07/2007 (this judgment could not be found, the quote comes from para. 1 of the Facts Pleaded of the Supreme Court's Judgment of the 10/10/2008 where the appeal against the judgment of the Provincial Court was dismissed); Judgment of the Provincial Court of Huesca Section 1a, 105/2009 , 15/07/2009, legal basis no. 12 (accepted the compensation proposed by the Public Prosecutor - para. 3 of the Facts Pleaded. Appealed to the Supreme Court: STS 13/04/2010, which admitted six of the appeal arguments in full and one in part.

<sup>35</sup> Instruction no. 1/2010 in relation to the functions of the Office of the Prosecutor during the execution phase of the criminal process.

<sup>36</sup> Circular 4/2010 of the State Attorney General on the functions of the prosecutor in the investigation of assets in the ambit of criminal proceedings, p 4.

In its decision of June 28, 2005, the Provincial Court of Oviedo is more concerned with the confiscation order. The following is the 12<sup>th</sup> legal reasoning of the decision: *That in accordance with Article 127 of the Penal Code the seizure of the passbooks, bank balances, money, documents, and household effects and destruction of seized narcotic substances found shall be ordered in light of their connection with the crimes the subject matter of the prosecution as the fruit or means of carrying out the crimes. Said seizure shall serve to meet the payment of the appropriate responsibilities arising from the present case and corresponding responsibilities. The closure of establishments owned by defendants, where criminal activities occurred shall be ordered given the entity, the nature, the ramifications and implications of the crimes prosecuted, as they were used as an activity to conceal other crimes.*



### Access to Redress Mechanisms in Spain

#### V. Regulatory rules at Community level in relation to compensation mechanisms for victims of crime.

**Table 1**

Instrument	Rights of victims and obligations of States
<p><b>Council Framework Decision 2001/220 of 15 March 2001 on the standing of victims in criminal proceedings</b></p>	<p><b>Article 4<sup>37</sup> Right</b>            - To obtain information in relation to what extent and on what terms free legal assistance can be accessed.            - To obtain information about the requirements for entitlement to compensation.</p> <p><b>Article 6<sup>38</sup></b>            Right of the victim to free legal aid in accordance with Article 4 when they become a party to criminal proceedings.</p> <p><b>Article 9<sup>39</sup></b></p> <ul style="list-style-type: none"> <li>- Right to a decision in criminal proceedings relating to <b>compensation by the offender, unless national law provides for compensation to be awarded in another manner in specific cases.</b></li> <li>- States shall take the measures necessary for the offender to adequately compensate the victim</li> <li>- The right of the victim to restitution without delay of the goods belonging to them, which were</li> </ul>

<sup>37</sup> **Article 4. Right to receive information.** 1. Each Member State shall ensure that victims in particular have access, as from their first contact with law enforcement agencies, by any means it deems appropriate and as far as possible in languages commonly understood, to information of relevance for the protection of their interests. Such information shall be at least as follows: (...) f) to what extent and on what terms they have access to: (i) legal advice or (ii) legal aid, or (iii) any other sort of advice, if, in the cases envisaged in point (i) and (ii), they are entitled to receive it; (g) requirements for them to be entitled to compensation; (...)

<sup>38</sup> **Article 6. Specific assistance to the victim.** Each Member State shall ensure that victims have access to advice as referred to in Article 4(1)(f)(iii), provided free of charge where warranted, concerning their role in the proceedings and, where appropriate, legal aid as referred to in Article 4(1)(f)(ii), when it is possible for them to have the status of parties to criminal proceedings.

<sup>39</sup> **Article 9. Right to compensation in the course of criminal proceedings.** 1. Each Member State shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner. 2. Each Member State shall take appropriate measures to encourage the offender to provide adequate compensation to victims. 3. Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay [in a simplified judicial procedure, Judgment of 28 June, 2007, Dell'Orto, C-467/05, 28].

	seized during the criminal activities.
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**Table 2**

Instrument	Rights of the victims and obligations of States
Council Directive 2004/80/EC, 29 April 2004 relating to compensation to crime victims	<p>Article 1<sup>40</sup></p> <ul style="list-style-type: none"> <li>- Right to lodge an application in the Member State of residence as distinct from the Member State where one is habitually resident.</li> </ul> <p>Article 2<sup>41</sup></p> <p>Right to receive compensation from the State within whose territory the crime was committed.</p> <p>Article 4<sup>42</sup></p> <ul style="list-style-type: none"> <li>- Right of access to essential information in relation to the possibility to apply for compensation by whatever means that Member States consider appropriate</li> </ul> <p>Article 12<sup>43</sup></p> <ol style="list-style-type: none"> <li>1. Equal application of the national rules on compensation for victims of violent intentional crime committed in the territory of the Member State concerned as regards the rules on access to compensation in cross-border situations as per the Directive.</li> <li>2. Duty of Member States to establish a compensation scheme for victims of violent intentional crime committed in their respective territories, to ensure that victims receive fair and adequate compensation.</li> </ol>

<sup>40</sup> **Article 1. Right to submit an application in the Member State of residence.** Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.

<sup>41</sup> **Article 1. Right to submit an application in the Member State of residence.** Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.

<sup>42</sup> **Article 4. Information to potential applicants.** Member States shall ensure that potential applicants for compensation have access to essential information on the possibilities to apply for compensation, by any means Member States deem appropriate.

<sup>43</sup> Article 12.

1. The rules on access to compensation in cross-border situations drawn up by this Directive shall operate on the basis of Member States' schemes on compensation to victims of violent intentional crime committed in their respective territories. 2. All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.

## VI. Regulations governing the scope of the Council of Europe mechanisms on compensation to victims of crime

### 2.1. Legally Binding Instruments

**Table 3**

Instrument	Rights of Victims and Obligations of States
<b>European Convention on Compensation of Victims of Violent Crimes</b>	<p><b>Article 2<sup>44</sup></b>: Right to receive compensation from the State when no other available source exists in order to fully ensure compensation for serious bodily injury or health problems arising from a violent intentional crime. Similarly: the right of families to receive compensation in the case of the death of the victim Right to receive compensation even when the perpetrator cannot be prosecuted or punished.</p> <p><b>Article 4<sup>45</sup></b> Right to receive compensation at a minimum: loss of income, medical expenses and hospitalization, funeral expenses and loss of maintenance for the victim's dependents.</p> <p><b>Article 11<sup>46</sup></b> Information relating to means to obtain compensation should be available to victims.</p>

<sup>44</sup> *Article 2.* 1. When compensation is not fully available from other sources the State shall contribute to compensate: a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence; b. the dependants of persons who have died as a result of such crime. 2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished.

<sup>45</sup> *Article 4.* Compensation shall cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance.

<sup>46</sup> *Article 11.* Each Party shall take appropriate steps to ensure that information about the scheme is available to potential applicants.

**Table 4**

Instrument	Rights of Victims and Obligations of States
<p><b>Council of Europe Convention on preventing and combating violence against women and domestic violence</b></p>	<p><b>Article 30<sup>47</sup></b>            Right to receive compensation from the State when no other available source exists in order to fully ensure compensation in cases of serious (bodily) injury or health problems.            Right to receive compensation within a reasonable time.</p> <p>El procedimiento debe continuar incluso si la víctima hubiera retirado la denuncia.            Se debe regular la posibilidad de las organizaciones gubernamentales o no gubernamentales de atender y apoyar a las víctimas durante los procedimientos judiciales.</p> <p><b>Article 55<sup>48</sup></b> The investigation or prosecution of a crime shall not be wholly dependent on complaint by the victim if the crime was committed in part or fully in the territory of the Member State.</p> <p>The procedure shall continue even if the victim withdraws the complaint. The possibility of governmental or non-governmental organizations to attend and support victims during the judicial proceedings should be regulated.</p>

<sup>47</sup> *Article 30 – Compensation* 1. Parties shall take the necessary legislative or other measures to ensure that victims have the right to claim compensation from perpetrators for any of the offences established in accordance with this Convention. 2. Adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions. This does not preclude Parties from claiming regress for compensation awarded from the perpetrator, as long as due regard is paid to the victim’s safety. 3. Measures taken pursuant to paragraph 2 shall ensure the granting of compensation within a reasonable time.

<sup>48</sup> *Article 55 – Ex parte and ex officio proceedings*. 1. Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be wholly dependant upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint. 2. Parties shall take the necessary legislative or other measures to ensure, in accordance with the conditions provided for by their internal law, the possibility for governmental and non-governmental organisations and domestic violence counsellors to assist and/or support victims, at their request, during investigations and judicial proceedings concerning the offences established in accordance with this Convention.

**Article 57<sup>49</sup>** The right to legal assistance and aid to pay legal fees.

## 2.2. Politically Binding Instruments

**Table 5**

Instrumento	Recomendaciones a los Estados
<b>Recommendation no. R (85) 11 of the Committee of Ministers to member states on the position of the victim in the framework of criminal law and procedure<sup>50</sup></b>	<p><b>5<sup>51</sup></b> Any discretionary decision concerning legal actions to be taken against the offender shall take into account the issue of compensation of the victim, including any action that will have to be undertaken by the offender to that end.</p> <p><b>10<sup>52</sup></b> The criminal courts shall be able to order <u>compensation by the offender</u>.</p> <p><b>11<sup>53</sup></b> The legislation shall provide that compensation may be either a criminal penalty, an alternative to a criminal penalty or that it shall be imposed in addition to the penalty.</p> <p><b>14<sup>54</sup></b> If compensation is imposed as a criminal sanction, it shall be levied as a fine and take precedence over any other economic penalties imposed on the offender.</p>
<b>Recommendation Rec(2006)8 of the Committee of Ministers to member states on</b>	<b>7<sup>56</sup></b> States shall take all necessary steps to ensure that victims have access to all civil remedies and legal

<sup>49</sup> *Article 57 – Legal aid.* Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.

<sup>50</sup> Available at: <http://polis.osce.org/library/f/2669/468/CoE-FRA-RPT-2669-EN-Recommendation%20No.%20R%2885%29%2011.pdf>

<sup>51</sup> 5. A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender.

<sup>52</sup> 10. It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.

<sup>53</sup> 11. Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction;

<sup>54</sup> 14. If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.

<p><b>assistance to crime victims<sup>55</sup></b></p>	<p>assistance.</p> <p>States should provide procedures that allow victims to obtain compensation from the offender in the context of the criminal proceedings. They should be given assistance when filing the claim and enforcing payment.</p> <p><b>8.<sup>57</sup></b> Compensation should be provided by the State for victims of violent intentional crimes, <u>including sexual crimes</u>. Compensation should also be awarded to the families of victims who have died as a result of the crime.</p> <p>The compensation should cover treatment and rehabilitation for physical and psychological harm, loss of income, funeral expenses, loss of livelihood/maintenance for dependents of the victim and pain and suffering.</p>
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<sup>56</sup> 7. *Right to effective access to other remedies* 7.1. Victims may need to seek civil remedies to protect their rights following a crime. States should therefore take the necessary steps to ensure that victims have effective access to all civil remedies, and within a reasonable time, through: –the right of access to competent courts; and legal aid in appropriate cases. 7.2. States should institute procedures for victims to claim compensation from the offender in the context of criminal proceedings. Advice and support should also be provided to victims in making these claims and in enforcing any payments awarded.

<sup>55</sup> Available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1011109&Site=CM>

<sup>57</sup> 8. *State compensation Beneficiaries* 8.1. Compensation should be provided by the state for: victims of serious, intentional, violent crimes, including sexual violence; the immediate family and dependants of victims who have died as a result of such crime. *Compensation scheme* 8.2. States should adopt a compensation scheme for the victims of crimes committed on their territory, irrespective of the victim's nationality. 8.3. The compensation awarded to victims should be based on the principle of social solidarity. 8.4. The compensation should be granted without undue delay, at a fair and appropriate level. 8.5. Since many persons are victimised in European states other than their own, states are encouraged to co-operate to enable victims to claim compensation from the state in which the crime occurred by applying to a competent agency in their own country. *Damages requiring compensation* 8.6. Compensation should be provided for treatment and rehabilitation for physical and psychological injuries. 8.7. States should consider compensation for loss of income, funeral expenses and loss of maintenance for dependants. States may also consider compensation for pain and suffering. 8.8. States may consider means to compensate damage resulting from crimes against property. *Subsidiarity* 8.9. State compensation should be awarded to the extent that the damage is not covered by other sources such as the offender, insurance or state funded health and social provisions.

**VII. Regulations governing the international mechanisms on compensation of victims of crimes**

**3.1. Legally binding instruments**

**Table 6**

Instrument	Obligations of States
UNTOC	<p><b>Article 14<sup>58</sup></b> 2. When a State Party receives a request for international cooperation for the purposes of confiscation from another State Party (art. 13) it will prioritize the return of proceeds of crime or goods confiscated (see art. 12) to the requesting State so that it can compensate victims of crime.</p> <p><b>Article 25<sup>59</sup></b>                      Duty of States to establish procedures which allow victims to obtain compensation and restitution.</p>

**3.2. Politically Binding Instruments**

**Table 7**

Instrument	Obligations of States
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<sup>58</sup> Article 14. *Disposal of confiscated proceeds of crime or property*. 1. Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures. 2. When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners. (...)

<sup>59</sup> Article 25. *Assistance to and protection of victims*. 1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation. 2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention. 3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.



<p><b>Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power</b></p>	<p><b><u>Restitution</u></b><sup>60</sup></p> <ul style="list-style-type: none"> <li>- The perpetrators must provide restitution to the victims or persons in charge of them.</li> <li>- The restitution must include the return of property and payment for damage or loss suffered, reimbursement of expenses incurred on foot of/due to the assault and the provision of services and the restoration of rights.</li> <li>- - Governments should review their (national)systems and consider restitution as an additional option available to judges in criminal proceedings at the time of sentencing.</li> </ul> <p><b><u>Compensation</u></b><sup>61</sup></p> <p>When the compensation due from the perpetrator is not fully available, States should endeavor to provide financial compensation to:</p> <ul style="list-style-type: none"> <li>- Victims who have been seriously injured or whose mental or psychological health has suffered as a consequence of serious crimes.</li> <li>- To the family and especially the victim's dependents where the victim has died or suffered a physical or mental disability due to the assault.</li> </ul> <p>It should promote the establishment, strengthening and increase in national funds for compensation to victims.</p>
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<sup>60</sup> *Restitution.* 8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights. 9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

<sup>61</sup> *Compensation.* 12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization. 13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.