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## Public Damage Funds. European Developments and some Comparative Observations

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prof. dr. Marc Groenhuijsen

## **Public Damage Funds. European Developments and some Comparative Observations**

### **1 Introduction**

It is a distinct pleasure and a privilege to have an opportunity to contribute to a book in the honor of Tony Peters. I have known him for many years, and during this period of time my admiration for his academic achievements has increased steadily. His writings demonstrate traditional scholarship, going hand in hand with a strong commitment to humanitarian values. For Tony Peters, the rule of law is not to be taken for granted. Legal institutions are to be scrutinized with a constantly critical eye. For quite a long time, this attitude did not make Tony Peters a happy professional researcher. The criminal justice system he was studying so intensely typically malfunctioned in an appalling way. It obviously did not serve the interests it is supposed to protect. The system could easily be proven to be manifestly unfair to its main clients, victims of crime and offenders alike. This only changed with the ascent of the concept of restorative justice. The idea - or ideal - of restorative justice opened up completely new horizons for criminologists and penologists. The non-repressive and non-retributive nature of this new paradigm<sup>1</sup> held the promise of finally contributing to substantive justice in the aftermath of crime. Hence, during the last decade and a half, promoting restorative justice became one of the academic aspirations of Tony Peters. It is with this background in mind that I have selected the topic for my contribution to the book written in his honor. It

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<sup>1</sup>Tony Peters and myself have been arguing for a long time about the question whether restorative justice does or does not constitute a new paradigm in the true sense of the word. He feels that is the case, I disagree strongly. It is easy to appreciate one another when sharing the same views; however, mutual respect deepens when there is fundamental disagreement on important issues which can be discussed in a friendly and constructive atmosphere.

is about public damage funds. These funds have been established by national governments in order to pay compensation to crime victims in cases where no other means of redress is available. In the subsequent sections of this paper I will examine the nature and the legal status of public damage funds. It will be demonstrated that these funds genuinely are resources of last resort. It is generally taken for granted that criminal law in itself only enters the picture when all alternative remedies have failed. Hence the common designation of criminal law as an *ultimum remedium*. But when this label corresponds to reality, than this is *a fortiori* the case with the availability of public damage funds. Their existence can easily be characterized as a *plus quam ultimum remedium*. And they are unique in another sense also. As far as I can see, provisions on damage funds constitute the sole statutory mechanism outside the criminal justice system where the legal position of crime victims is categorically determined. These characteristics by themselves justify specific attention directed to public damage funds. On top of that, however, it should be noted that State compensation is one of the criminal justice-related subjects which have been dealt with on a supra-national level. All of this lead to the following questions to be addressed in the following sections. What is the background and the content of international legal documents governing national State compensation schemes? How have the international guidelines been incorporated in some noteworthy domestic legal systems and how are these national schemes operated in actual practice? Can examples of best practice be identified and in what way could they be emulated in other jurisdictions? I am convinced this type of questions commands the attention of Tony Peters. They directly affect the well-being of a vulnerable category of citizens - the victims of crimes which (more often than not) have not been successfully investigated by the government - and they concern the crossroads between normative legal discourse on the one hand and empirical research on the other.

## **2 Legislative initiatives on the European level**

The first important document to be mentioned here is the 'European Convention on the Compensation of Victims of Violent Crime', which was agreed upon by member States of the Council of Europe in 1983. The objective of this convention is to define and prescribe minimum standards which have to be observed by national governments. The standards are based on the principles of equity and social solidarity. The focal provisions of the convention can be summarised as follows.

Compensation is to be paid by the State on whose territory the crime was committed to subjects of countries who have signed the convention and to subjects of any Council of Europe member State who has permanent residence in the country where the crime took place (art. 3). Compensation at least covers loss of income, hospital and other medical expenses, funeral costs and - for dependents of deceased victims - the cost of life sustenance (art. 4). The restrictive or limited nature of this first convention is evidenced by the conditions which may be incorporated by the member States in their domestic legislation. They are allowed to stipulate a threshold (minimum) sum of money and a maximum for each payment (art. 5). They can set a time limit for claims (art. 6) and they are allowed to refuse or diminish a claim in the light of the financial means at the disposal of the victim (art. 7). Refusal or reduction is also possible because of the conduct of the victim prior to, during or after the crime, or in connection with previous involvement with organized crime (art. 8). The principle of subsidiarity is further witnessed by the provision that payments from any other source (the offender, private insurance or social security) must be deducted from state compensation (art. 9). It is remarkable that the Convention states as a 'basic principle' that the signatory states will take steps in order to ensure that information about public damage funds be available to potential applicants (art. 11). Apparently the drafters of the Convention anticipated serious problems in this respect. Unfortunately, the two decades which have since elapsed have done little to ease their concerns.

So, the Council of Europe took the lead in setting standards on State compensation. The European Union has traditionally been a legal entity where

it is much more difficult to accomplish binding agreements in matters related to national criminal justice systems. As far as the topic under consideration is concerned, in December of 1998 the first breakthrough was achieved in the Viennese Plan of Action by the European Council and Commission concerning the execution of the Treaty of Amsterdam.<sup>2</sup> The decisive conceptual legal innovation in this document is constituted by a broader definition of the quintessential term 'freedom': 'the Treaty of Amsterdam (...) opens the way to giving 'freedom' a meaning beyond free movement of people across internal borders. It is also freedom to live in a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power (...) to combat and contain those who seek to deny or abuse that freedom.' In connection with the issue of State compensation a prudent first step is then taken in the 51<sup>st</sup> (and final!) priority set in the Action Plan: 'address the question of victim support by making a comparative survey of victim compensation schemes and assess the feasibility of taking action within the Union.'

Since that time developments have taken place at rather high speed. In July 1999 the European Commission issued a 'communication' to a number of EU-institutions on the legal position of crime victims in the Union.<sup>3</sup> In this document, the Commission first notes that not all member States have yet ratified the Council of Europe Convention and implores the members concerned to do so forthwith. Next, the Commission observes that existing domestic legislation reveals major differences between the various States, for instance when it concerns the required nationhood of potential applicants of a public damage fund. The Commission reminds all authorities of the famous verdict of the Court of Justice in the *Cowan-case*, prohibiting the limitation of

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<sup>2</sup>Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice (OJ C19/1 23.1.99) adopted on 3.12.1998.

<sup>3</sup>*Crime Victims in the European Union - Reflexions on Standards and Action*, Communication to the European Parliament, the Council, and the Economic and Social Committee, Brussels July 14, 1999, COM (1999) 349.

State compensation schemes to the scope of their own nationals, thus excluding residents of other EU-countries. In this judgement it was held equally illegal to restrict applications to those ‘nationals or countries that have entered into a reciprocal agreement with that state’. Accordingly, the Commission recommends to consider a number of important changes in national legislation. It is stated as a priority that compensation should be awarded as soon as possible after the crime occurred, when necessary by means of up front interim-payments. On top of that, the government should actually assist the victim in the process of debt collection from the offender. And finally, the member States must intensify mutual cooperation in order to improve claims for compensation abroad by allowing these claims to be filed in the home country of the victim.

The first concrete results were achieved during the meeting of the European Council in October 1999 at Tampere. The heads of government agreed to the following conclusion<sup>4</sup>: ‘Having regard to the Commission’s Communication<sup>5</sup>, minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims’ access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims.’ This carefully crafted conclusion at first sight looks rather restrained and is therefore apparently not overly impressive. Upon closer inspection, though, the deeper meaning of this conclusion is that it has subsequently been interpreted as a *mandate* for deeper involvement in various victim-related issues. This is evidenced by the progress made during a follow up-meeting in October 2000 in Umea in Sweden.<sup>6</sup> During this meeting more focus was given to the direction

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<sup>4</sup>Conclusions of the Presidency, European Council in Tampere, October 15-16, 1999, SN 200/99, conclusion 32.

<sup>5</sup>This is a reference to the *communication* mentioned in footnote 3 above.

<sup>6</sup>I refer to the document entitled *The Umea Expert Meeting on Compensation to Crime Victims in the European Union*, Umea, Sweden October 23-24 2000.

in which change in Europe might take shape. The principle of subsidiarity retains its prominent status - the perpetrator carries the primary as well as the ultimate responsibility for the crime.<sup>7</sup> On a European level it is generally considered to be a reasonable eligibility requirement that the crime must be reported to the police.<sup>8</sup> In order to increase the number of legitimate claims coming to the attention of the authorities, it is stipulated that the victim ought to have the choice between filing the application in the country of the *locus delicti* or in his home country. In cases where only the former option is available, authorities of the home country must be prepared to give assistance in filing the application. Another idea which surfaced is that better use should be made of the *network* of national State compensation schemes in order to increase the number of applications resulting from cross border victimization. And it was stressed that priority must be given to the dissemination of *information* to victims about compensation opportunities, which is deemed to be a prime responsibility of the police force. And finally it was decided that more work should be devoted to establishing common minimum standards for compensation. As far as material damages are concerned the Council of Europe Convention is still regarded as a benchmark: compensation must be provided for hospital and other medical costs, for loss of income and for personal properties. Regarding moral damages, however, there is a conspicuous degree of uncertainty at the European level. The optimum conclusion in this respect was that: ‘there was agreement that further work was necessary to define the concept of moral damages, after which further consideration should be given to the possible inclusion of such damages in the minimum standards.’ The official report of the meeting at Umea concludes with the statement that ‘the future ambition could be to fulfill the mandate given at Tampere, by proposing binding legislation at Union-level.’

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<sup>7</sup>The principle of subsidiarity has also been recognised on a global level, e.g. in the United Nations *Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985). From an Australian perspective: Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy*, Sydney: Law Book Company 2001.

<sup>8</sup> This requirement is, however, optional. It is, for instance, not part of Dutch law.

We have not reached that stage yet. In the Framework decision of the European Council dated 15 March 2001 on the status of the victim in criminal procedures<sup>9</sup>, the issue of State compensation is carefully treated with benign neglect. The preamble of this document recalls the previously stated intention to conduct a comparative survey of State compensation schemes. And it is specifically mentioned that the provisions of the framework decision are not confined to attending to the victims' interests under criminal proceedings proper: they explicitly also cover certain measures to assist victims before or after criminal proceedings which might mitigate the effects of the crime. But that is it. Contrary to earlier drafts of the framework decision<sup>10</sup>, there is not a single article in it dealing with the matter of State compensation. The 'ambition to fulfil the mandate given at Tampere' is still a promise or an aspiration in dire need of substantive follow up-action.

### **3 National compensation schemes and their implementation**

The preceding account of developments on a European level is illuminating in more than one sense. It is striking that the principle of subsidiarity is the unquestioned starting point and constant frame of reference. State compensation only enters the equation in the most serious cases and when no alternative remedies are available. On the other hand, however, it is remarkable that quite a bit of debate within European institutions is about underserving of eligible victims. Many people qualifying for compensation just do not apply for it, and this is a cause for widespread concern. Finally, it can be concluded that the involvement of 'Europe' has been inspired and accelerated by the specific problems caused by cross border victimization. This is easily understandable in

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<sup>9</sup>2001/220/JHA.

<sup>10</sup>I myself have played a modest part in the preparatory stages leading up to the adoption of the framework decision. During the negotiations it became evident that quite a few member states are reluctant to accept the idea of binding legislation at the Union level because they are afraid of possible financial implications. This sealed the fate of dealing with the topic in the framework decision.



the light of the standards determining the ‘competency’ of the European Union. Conversely it makes sense that the debate on compensation in the international arena also provoked national authorities to ponder the legal situation of their own citizens. It would clearly be inexplicable to pay attention to the needs of victims of foreign origin without providing at least the same type of care to local victims.

Carrying these observations in mind we now turn our attention to some of the European jurisdictions operating State compensation schemes.

### 3.1 *England, Scotland and Wales*

In England, Scotland and Wales<sup>11</sup> a State compensation fund has been in operation since 1964. It is this fund which has repeatedly been presented to the rest of the world as an example to be imitated. This begs the question whether this reputation is well-deserved. In 1996 the new *Criminal Injuries Compensation Act 1995* came into force. The present discourse is restricted to this latest legislative Act and its application in daily practice.

Payments according to this scheme are not to be regarded as corollaries of liability in the legal sense of the word. Instead, the transfer of money is to be considered as ‘expressions of public sympathy and support for innocent victims’. An eligibility requirement is that there is a case of an intentional violent crime (including arsony and poisoning). It is interesting to note that compensation can also be awarded when the injury was incurred while apprehending a criminal, while trying to prevent crime and when assisting police activities in this respect.<sup>12</sup> The relevant statute contains a specific provision concerning the notoriously difficult subject of domestic violence. Compensation can only be claimed when the perpetrator is criminally prosecuted and when the claimant and the perpetrator are no longer living in the same household. Furthermore, the violence has to be reported as a crime to

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<sup>11</sup>It must be noted that Northern Ireland has its own Scheme.

<sup>12</sup>I leave aside the typically English provisions dealing with railroad offenses.

the police. Conversely, State compensation in general does not depend on the arrest or conviction of the perpetrator. The claim has to be filed within two years of the time of the crime committed.

From a comparative point of view, the scheme is relatively generous. For this reason, I quote the entire list of damages which can be compensated.<sup>13</sup>

For *personal injury*, the scheme contains three possible components:

- the tariff of injuries<sup>14</sup>, which fixes a standard amount of compensation according to the type of injury. There are some 380 injury descriptions ranked against 25 levels of award between £ 1,000 and £ 250,000 (the values having been drawn by reference to awards made under the former common law damages scheme)
- actual net loss of earnings or earning capacity, which excludes the first 28 weeks of loss but can run in cases of severe injury for the remainder of the victim's working life and may include ultimate pension loss
- the cost of medical or other care, which, subject to incapacity exceeding 28 weeks, can be assessed from the date of injury for the remainder of the victim's natural life.

In claims following homicide, the components are:

- a standard amount of £ 5,000 for each qualifying claimant (or £ 10,000 if there is only one claimant)
- dependency on the deceased's income, running until he/she would have reached normal retirement<sup>15</sup>
- funeral expenses.

The subsidiary nature of the compensation scheme is also in the United Kingdom manifested by a number of eligibility requirements. There is the

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<sup>13</sup>E.g. CICA's Third Report, Annual report 1998/99, Edinburgh: The Stationery Office 2000, p. 7.

<sup>14</sup>The fundamental difference with the system before 1996 is that awards for the non-financial elements - principally pain and suffering - are fixed according to a tariff of injuries.

<sup>15</sup>A rather special component is: loss to a child under 18 of a deceased parent's services, made up of a standard amount of £ 2,000 a year until age 18, plus the actual costs incurred, again running to age 18, in replacing that parent's services, whether by the surviving parent giving up or reducing employment so as to provide the care, or by engaging paid help, or by a combination of measures.

requirement that the crime has been reported to the police and the obligation to assist the police in their investigation of the case. Naturally, the victim has to cooperate with the CICA in the procedure leading up to a decision on the claim. It is of singular importance that the conduct of the victim prior to, during or after the incident can constitute grounds to reduce or to refuse the claim for compensation. Simply speaking, this consideration is tantamount to an assessment of the level of co-responsibility on the part of the victim. Particularly remarkable is the fact that payment from the fund can be adversely affected by the character of the applicant as this is shown by his own criminal record. The relevant provisions far exceed the exclusion of payments in cases of internal feuds within criminal gangs. The British legislation is based on the view that 'a person who has committed criminal offenses has probably caused distress and loss and injury to other persons, and has certainly caused considerable expense to society by reason of court appearances and the cost of supervising sentences ...'. On the basis of this rationale another extensive tariff list was drawn up, indicating which prior convictions lead to 'penalty points' (ranging from 0% to 100%).

As far as procedure is concerned, the first item of note is the wide discretionary power of the 'claims officer'. He has the authority to extent the period in which the claim can be filed and he is responsible for the investigation on the legitimacy of the claim. The procedure allows for the possibility of interim payments, up to 50% of the amounts indicated by the applicable tariff. The final decision by the claims officer is taken on the evidentiary criterion of the 'balance of probabilities'. Usually, compensation is awarded as a one-time lumpsum. Interestingly, the claims officer has the power to issue directions as to the way the money is to be managed. When the compensation involves a very large amount, there is the possibility of an annual, inflation-proof and tax-free payment, a method which can be particularly beneficial to dependents of homicide victims. If the applicant disagrees with the decision of the claims officer, he can ask for a review by a more senior officer of the CICA. When the result of that review is still

unsatisfactory, he can appeal to the *Criminal Injuries Compensation Appeals Panel* (CICAP), an institution which is completely independent from the CICA.

Because of space constraints only the most basic facts can be reported here about the way the legal provisions are applied in daily practice. After the introduction of the new Act the period of 1996-1997 has to be considered as a trial year, when the competent authorities still had to get used to changed circumstances.<sup>16</sup>

In 1997-1998 a decision was taken on 80,000 claims. The number of cases in stock slightly decreased to 104,000 cases. In nearly 58,000 instances the decision was favourable, benefitting some 31,500 victims. Total amount payed out was £ 80 million, averaging over £ 2,500 per victim. The highest individual award was £ 190,000. The expenditures on administering the fund were some £ 19 million. The average duration of the procedure leading up to payments was 6 to 8 months. The most frequently obtaining grounds for refusing a claim were: the damage was below the threshold level of £ 1,000, the victim cooperated insufficiently in bringing the offender to justice, lack of evidence of a violent crime, co-responsibility of the victim for the crime having occurred, and prior criminal conviction of the applicant (accounting for over 90% of the refusals).

The next year, 1998-1999, shows a slightly upward curve. The unfinished case-load was again somewhat diminished to a level of 103,000 cases; the average period needed to take a decision remained the same at 6 of 8 month (60%). 85,000 cases were dealt with, leading to 75,000 positive outcomes and awards to some 40,000 applicants who received a grant total of £ 107 million. The highest amount of compensation in a single case equaled the legal maximum of £ 500,000. Administrative costs of running the program remained at the level of £ 18,5 million. The grounds for refusing claims did not change much, with the exception that the number of applications for amounts below the threshold dropped significantly.

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<sup>16</sup>The following data are drawn from the annual reports of the CICA.

The most recent numbers I have been able to trace are about the year 1999-2000. The number of files on the shelf went back to some 87,000. A decision was taken on 76,000 claims, with compensation awarded to 46,000 victims. It is estimated that this figure corresponds to 10-25% of all victims of violent crime who would have met all eligibility requirements. The sum total of awards was £ 108 million. Over 50% of the applications were processed within 6 months. After 12 months a final decision was taken in 85% of all the claims filed.

### 3.2 Germany

The German Act on State Compensation (the *Opferentschädigungsgesetz*) came into force in 1976.<sup>17</sup> The ideological background of this Act is the consideration that when the government is unable to prevent serious violent crime, the least it can do is to take care of the victims of these transgressions. The principle of social justice requires the State to intervene when the fate of innocent citizens in great distress is at stake. In the light of this *ratio legis* it follows that property crime and traffic offenses are kept outside of the scope of State compensation.

As far as the relevant criminal conduct is concerned, it must be noted that intentional poisoning is included in the terms of reference, as well as causing danger- either intentionally or by negligence - by means of intrinsically hazardous goods.

The nature of damages which can be compensated is not clearly defined. The Act refers to 'medical or scientific consequences' of the crime, resulting in a claim on the government 'to supply care by corresponding application of the *Bundesversorgungsgesetz*' (an Act on social security). Physical damage (injuries) is meant to also include damage to objects like

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<sup>17</sup>The Act was later on changed in 1984 and in 1993. The first period of its operation is described and discussed from a comparative point of view by Ulrike Weintraud, *Staatliche Entschädigung für Opfer von Gewalttaten in Grossbritannien und der Bundesrepublik Deutschland*, Baden-Baden: Nomos Verlagsgesellschaft 1980.

glasses or artificial teeth. The reference to the 'Versorgungsgesetz' indicates that it is more common in Germany than elsewhere to award *periodical payments*: in 1997, for instance, some 7000 victims were entitled to this type of pension. There is no compensation for pain and suffering.

The German compensation scheme is also based on the principle of subsidiarity. Other sources of redress are given priority (insurance, social security, restitution by offenders) and an award from the State compensation fund is means tested. And finally the subsidiary nature of the scheme is also evidenced by some of the eligibility requirements. Equity dictates that compensation is not awarded in cases of inappropriate conduct by the victim. An example of this is when the victim fails to contribute adequately to police investigations or to the prosecutor preparing charges. An award can equally be refused when the damage resulted from political controversies to which the victim was a party. The same principle obtains when the victim is - or has been - involved in organized crime, unless he can prove that the damages he suffered are completely unrelated to this involvement.

Empirical data on the application of the State Compensation Act are scarce and hard to retrieve. The numbers I have been able to find nevertheless indicate that expenditures under the Act have over the years consistently and substantially increased. In 1980 the total amount of compensation paid to victims was 7,5 million DM, rising to 27 million DM in 1985, over 42 million DM in 1990, nearly 97 million DM in 1995, and - after the most recent changes in the legal provisions - over 190 million DM in 1998.

### 3.3 *Belgium*

The establishment of the Belgium State Compensation Fund dates back to the middle 1980<sup>ties</sup>. Here, as elsewhere, the idea on which the scheme is founded is collective solidarity among citizens of a single nation. Any award is governed by equity: there is never any right to compensation based on liability of the State. The fund is resourced by the ministry of Justice on the one hand and by a

so-called 'victim-tax' on the other: this is a surcharge of 5 BF levied on any person sentenced in a criminal court.

A condition to receive support from the State is that an intentional violent crime was committed on Belgian soil. Direct victims and dependents of homicide victims qualify to make an application to the scheme. A rather special category of victims who are eligible is constituted by those who voluntarily assisted the law enforcement officers in clearing up crime (art. 42). There is a separate provision requiring the decision makers to take into account 'relationships between the victim and the perpetrator'. This special clause is designed with an eye to not completely excluding innocent victims of domestic violence.

The Belgians make a distinction between main compensation, interim payments (in very urgent circumstances) and additional compensation (after the main payment has taken place and new circumstances have surfaced). Main compensation equals the amount of the actual damages incurred by the victim, with a deduction of 10,000 BF in every case and a ceiling of 2,5 million BF. Relevant damages have to concern loss of income, medical expenses and physical disablements. For dependents of homicide victims the focus clearly is on sustenance costs. Compensation for pain and suffering is excluded as a general rule. However there is a caveat here. According to the applicable regulations the assessment of physical disabilities caused by the crime opens up an opportunity to pay compensation for moral damage and physical or mental hardship during the period of illness, even when these hardships have not affected the economic activity or circumstances of the victim. Dependents and next of kin of homicide victims can not claim moral damages.

In Belgium, the subsidiary nature of the scheme is exemplified by the relatively large number of cases in which an award is refused on the ground of favorable financial circumstances of the victim. And like in the countries we have reviewed before, all other possible means of redress (insurance, restitution by offenders) take precedence over State compensation. When the offender is known, it is even an eligibility requirement for the victim to

constitute himself as a civil claimant during the criminal proceedings.

In as far as empirical data are available, they show that the use being made of the scheme has been extended over the years. In 1987 the sum total of awards reached the modest level of 1 million BF, which increased to nearly 13 million BF in 1991. A further hike was achieved to 32 million BF in 1993. In terms of eligibility requirements it stands out that many applications were refused on the ground of absence of a pressing financial need and by reason of failure to constitute oneself as a civil claimant during the criminal trial. In 1994-1995 the total amount of State compensation was 50 million BF; in 1996 is reached 60 million BF and in 1997 it slightly depressed to 52 million BF. Only in the past couple of years a rapid - even an explosive - increase in the volume of awards took place. In 1998 the fund encompassed 95 million BF, in 1999 it totaled 168 million BF, which had further risen to 254 million BF in 2000.<sup>18</sup> The spectacular blossoming of State compensation in the past three years can be attributed to several factors. Firstly the notorious Dutroux-case has increased public awareness of the difficult position of many crime victims. And the resulting increased level of sensitivity has lifted the veil of denial which for a long time prevented the opportunity of open discussions about criminal victimization. In this new climate it is easier for victims to step forward and claim their rights, including the right to State compensation. Secondly, a legislative initiative which came into force in 1997 has been instrumental in bringing about improvements. The accessibility of the fund was facilitated, the administrative capacity of the fund was enlarged (from 2 chambers to 6), close relatives of deceased victims were allowed more room to file claims and payments for moral damages were expanded. And finally, these statutory innovations were seconded by several policy measures taken by the Belgian government (including a large publicity campaign) aimed at increasing public knowledge about the existence and accessibility of the fund.

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<sup>18</sup>The increase in the volume of awards was naturally matched by a similar trend in the number of applications (1997: 391; 1998: 873; 1999: 715; 2000: 740) and the number of decisions rendered (1997: 125; 1998: 192; 1999: 530; 2000: 732).



### 3.4 *Other countries*

There are many other European countries operating State compensation schemes. It is - for obvious reasons - impossible to account for all of these in the present contribution. It will just have to suffice to list some details about other countries which confirm the above mentioned main features of standing State compensation schemes throughout Europe.

On the one hand only Finland and France offer opportunities for State compensation in cases of property crime. Conversely, only Italy and Greece do not have any institution resembling the basic function of State Compensation Funds described in the previous sections. This state of affairs only underlines that the perspective resembled by the Council of Europe Convention of 1983 has been generally accepted in its main components in virtually all countries in Europe.<sup>19</sup>

## **4 Final remarks and conclusions**

What lessons can be drawn from the developments described and analysed in the preceding sections? The first element which needs to be highlighted concerns the *ratio legis* of State compensation schemes. In all the countries we have reviewed it became evident that the state does not accept liability for the crime committed against the victim. Awards from a compensation fund are based on the idea of social justice and collective solidarity. This also accounts for the subsidiary nature of State compensation. Awards are only granted in the most serious cases and on the basis of equity. The notion of 'equity' is not without its own problems. In several countries, this criterion effectively forces the authorities to scrutinise the behavior of the victim prior to, during or after the crime. For the victim, this procedure might easily evoke the image of a world turned upside down: as if not the perpetrator, but the victim is the one

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<sup>19</sup>Of all the EU-countries, only Italy, Austria, Ireland and Spain have not yet signed the Convention. Belgium, Greece and Portugal have signed but not yet ratified the Convention.

who has to justify his conduct. Furthermore, in some countries the standard of 'equity' is taken as a ground to exclude victims who themselves have criminal records. As we have seen, England - for instance - goes as far as to impose mandatory reductions on awards to victims who have prior convictions. In this respect Germany employs a more sophisticated system, by allowing full compensation when it can be demonstrated that the intentional violent crime was in no way connected to the victims prior involvement with organised crime. In Belgium it is not uncommon to use the criterion of 'equity' in a way which leads to reduced awards when the victims life style and general demeanor is not impeccable and, inversely, grant higher sums of compensation when the victim is one of commendable reputation. This shows that the somewhat feeble *ratio legis* underlying State compensation schemes might in actual practice lead to distinctions between 'classes' of victims who are more or less worthy of financial protection by the state. I very much doubt whether this kind of moral differentiations is consistent with the general ideas which inspired the Council of Europe to adopt the Convention in 1983.

A second point which needs to be highlighted is that victims of crime in general do not spontaneously tend to ask for help, neither for emotional support, nor for financial assistance. From a policy point of view, this means that it is by definition insufficient to set up a State compensation scheme and then expect the victims to find a way to contact the system. This is confirmed by experience throughout Europe. In all the jurisdictions under consideration only a relatively small fraction of those eligible actually apply for an award. This is not likely to change by the mere passing of time. The international trend clearly shows an increasing number of victims finding their way to the compensation schemes. The background of this development is formed by policy measures aimed at improving public knowledge about the existence and scope of these funds, as well as establishing better referral channels involving the police and non governmental victim support units. The Belgium accomplishments in recent years can serve as an example of best practice in this respect. It is also extremely important to pay attention to the *proportion* of

applications which is *refused*. Denying a claim is tantamount to not meeting existing expectations. It is common knowledge that this can easily lead to secondary victimisation. From this point of view it is disconcerting that in the countries I have examined over 50% of the applications do not lead to an award by the compensation fund.

A few more examples of best practice can be inferred from the preceding sections. In terms of eligibility requirements the British and Belgium experience indicates how important it is to have special provisions for the victims of domestic violence. If there are no statutory safeguards to protect their interests, this singularly vulnerable category of victims is likely to be underserved by State compensation schemes. As far as the *level* of awards is concerned, the British tariff-system proves to be valuable. I would like to emphasize that this is partly due to the fact that the values of the tariffs have originally been drawn by reference to awards made under the former *common law* damages scheme. Experience in other countries - like The Netherlands - shows that there will be widespread disillusionment with the fund when awards for (moral) damages by the compensation fund are systematically at a lower level than similar claims would yield when filed against an opponent in a civil court. The specific *way* in which the award is payed can also be of extreme importance. The British and German examples of offering a possibility for annual (periodical) payments turns out to be beneficial in many instances. And for a long time it has been recognised that interim payments before the fund makes its final decision are quite nearly a necessity. The Belgium option of also offering *additional* payments - in the light of changed circumstances after the main compensation has been awarded - is also a rare yet fruitful option.

Finally, a State compnsation scheme cannot be operated in a responsible way without paying attention to solid *communication* with its main clients. As always, information is of paramount importance. The victim needs to know what is going on and why. He needs to understand rules and procedures. He needs explanation of opportunities and limitations of the

scheme. And if by chance the outcome is unfavourable, there is an additional reason for being careful. The least that government officials ought to do in cases like that, is to explain the reasons why the victim could not be compensated for his losses. In today's actual practice, though, this very basic requirement is still not met in quite a few jurisdictions.