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**Preliminary Opinion on
the Draft Law of
the Republic of Ukraine on
the Compensation of Victims
of Violent Crimes**

**based on an unofficial English translation of the draft
provided by the OSCE Project Co-ordinator in the Ukraine**

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1. INTRODUCTION

1. *The Ministry of Justice of the Republic of Ukraine made a request to the OSCE Project Co-ordinator in the Ukraine, for comments on the Draft Law on Compensation of Victims of Violent Crimes of the Republic of Ukraine.*
2. *Further, the OSCE Project Co-ordinator in Ukraine requested assistance from the OSCE ODIHR in this regard and this preliminary opinion was drafted in response thereto.*

2. SCOPE OF REVIEW

3. This preliminary opinion does not equate to a full and comprehensive review, rather it has been drafted to serve as a set of considerations which should be taken into account in light of international standards in this field to which the Republic of Ukraine has committed or may seek to commit.
4. In this regard, the OSCE ODIHR and the OSCE Project Co-ordinator in Ukraine would like to make mention that the preliminary opinion contained herein is without prejudice to any opinion, recommendations and comments to the Draft Law on Compensation of Victims of Violent Crimes of the Republic of Ukraine that both aforementioned institutions may wish to make in the future.

3. EXECUTIVE SUMMARY

5. The Draft Law on Compensation of Victims of Violent Crimes of the Republic of Ukraine may be deemed to be generally in compliance with the European Convention on the Compensation of Victims of Violent Crimes, 1983¹. What must be borne in mind is that the aforementioned Convention provides a set of principles, rather than ready made solutions which may be transposed directly into domestic law. The following is a list of recommendation which may serve to improve the law, in particular its implementation and provide an indication of the gaps which may exist as regards its application to in particular, victims of trafficking.
6. It is recommended to:
 - A. **clarify some definitions** contained in the draft Law; [pars.8, 9 10]
 - B. consider **extending the right to compensation to persons incidentally affected by the crime** and persons who help the victim or the police in preventing the crime or apprehending the offender [par 11];
 - C. consider the regulations necessary to provide **compensation to victims of trafficking** who may fall outside the scope of this draft Law, in view of the international commitments that Ukraine has undertaken or may wish to undertake in the future; [pars. 13 and 14]

¹ CETS No.116, Strasbourg, 24.XI.1983.

- D. consider the issue of **territoriality** as regards its application to the crime of trafficking; [par. 15 and 16]
- E. ensure that **injury to mental health** is also included in the types of injuries which are subject to compensation claims; [par.19]
- F. refrain from assuming that the injuries sustained as a result of violent crime would only temporarily incapacitate a victim to undertake work; [par.20]
- G. ensure that **loss of earnings** includes those earnings which are lost during and not only after the crime is being committed; [par.21]
- H. delete or substantially extend the 48 hours limit for victims to report on the crime; [par. 22 and 23]
- I. clarify and amend the wording “when he or she has a real possibility to make such a report” and the discretion of the authorities in this regard; [par.24]
- J. clarify Article 8(2) of the draft Law; [par.26]
- K. ensure that compensation received by victims from other sources, such as, private insurance, on the basis of other legislation or social security are set-off against the compensation claims made under this draft Law; [par.27]
- L. delete Article 10(2) of the draft Law for reasons of possible discrimination of certain groups of victims; [par.28]
- M. ensure that victims who are not themselves implicated in the crime and delete assessment of the subjective criterion of ‘morality’ of the victim; [par.30]
- N. consider suspending payment of compensation, held in trust for the victim, in cases where this would lead to the unjust enrichment of the perpetrator; [par.32]
- O. consider including specialists, such as psychologists and social workers in the Commissions assessing compensation claims; [par. 33]
- P. review Article 12 and 23 of the draft Law in order to ensure that the same body for implementation of the draft Law, is also not responsible for supervision of proper implementation and is accountable to a separate authority; [par. 35]
- Q. ensure proper enforcement of penalties for crimes in order to fund the compensation pay-outs; [par. 37]
- R. consider establishing a **victims compensation fund**, to which **victims of trafficking** would also have access; [par. 38]
- S. conduct a **regulatory and cost assessment** of the draft Law; [par.40 and 41]
- T. consult the law with **non-governmental organisations** who work with victims of violent crimes; [par. 42]
- U. introduce a strict **obligation** under the draft Law for authorities **to inform victims of their compensatory rights**; [par.43]
- V. conduct, following adoption of the draft Law, a **comprehensive information and awareness raising campaign** on implementation of the Law; [par.44]

4. ANALYSIS AND RECOMMENDATIONS

7. The analysis and recommendations intend to discuss the overall effect of the Draft Law of Ukraine on the Compensation to Victims of Violent Crimes (hereinafter “Draft Law”) and its compliance with international standards. In addition, particular attention will be paid to the accessibility of the measures offered by the Draft Law to victims of the crime of trafficking in human beings².

4.1 Definitions

8. For the purposes of coherence, it may be considered to include persons dependent on the victim³, within the definition of “close relatives”, instead of within the definition of ‘applicant’⁴. In this way the definition of ‘applicant’ would simply read – “victims and or his/her close relative. The term ‘dependant’ should also be defined. This would be particularly helpful, since the term ‘dependant’ re-appears throughout the Draft Law, and in some circumstances has great bearing on the eligibility for compensation, or lack thereof, for instance, by the operation of Article 6 (2) of the Draft Law.

9. As regards the definition of ‘intentional crime of violence’ it is recommended to consider specifying those articles of the Criminal Code of the Republic of Ukraine that would be applicable.

10. The definition of “compensation” states that it shall mean a “lump sum of money...aimed at partial covering of damages under this Law.” It is not clear what is meant by “partial covering of damages under this Law” and this phrase is proposed to be clarified.

4.2 The Person Entitled to Compensation and the Principle of Territoriality

11. Thought may also be given to whether ‘bystanders’ that is, persons incidentally affected by the crime and ‘samaritans’, that is, persons who help the victim or the police prevent a crime or apprehend the offender should also be eligible for compensation⁵.

12. It is commendable that Article 4 seeks to expand the category of persons eligible for compensation to include not only citizens but also stateless persons having their permanent residence in Ukraine, citizens of States signatory to the European Convention on the Compensation of Victims of Violent Crimes⁶ (hereinafter “the Convention”) and

² Article 149 of the Criminal Code of the Republic of Ukraine, 2001

³ Such as, adopted children, de facto partners etc.

⁴ see for example: Law No. 1415 of the Republic of Poland on State Compensation for Victims of Certain Intentional Crimes, of 7 July, 2005, Article 2(2).

⁵ Paragraph 18. of the Report on the Commission Green Paper on Compensation to Crime Victims COM (2001) 536 – C5-0016/2002- 2002/2022(COS))

⁶ ETS No.116, 24.XI.1983.

all citizens of members States of the Council of Europe who are permanent residents of Ukraine.

13. From the limitations set out in the Draft Law, in particular, Article 4 thereof, which limitations are in compliance with Article 3 the Convention⁷, victims of trafficking who are trafficked into Ukraine, and who are not permanent residents of Ukraine or any other Council of Europe members State, or State party to the Convention, would not be eligible for compensation under this Draft Law. For this reason it is important for Ukraine to regulate this issue under for instance, specialised anti-trafficking legislation, which would ensure compliance with the international standards to which the State has committed and importantly, address the needs of victims of trafficking in recovery and rehabilitation⁸.

14. The additional pre-requisite set out in the Draft Law, for entitlement to compensation is for the crime to have been committed on the territory of the Republic of Ukraine. This requirement is stipulated in Article 2 (1) of the Draft Law. Again, this requirement is considered in compliance with Article 3 of the Convention⁹. However, in the case of the crime of trafficking in persons, it is unclear whether the victims of this crime, would fall within the scope of the compensatory benefits to ensure their recovery. The reasons are stated below.

15. Further to the above, given that trafficking in human beings can be not only accomplished inside the territory of the State, but also and often, across borders, the requirement of territoriality may exclude these victims from eligibility under this draft Law. It should be borne in mind, that the act of luring or ‘recruitment’ may take place in the Ukraine, the intention to traffic and exploit the person, on the part of the trafficker would also therefore be present on the territory of the Ukraine, however, the exploitation (and injury) may take place outside its territory, possibly on the territory of another Council of Europe member State. It is therefore recommended to consider exactly what the understanding of the Draft Law is, on the question of territoriality, and whether supplementary regulations to cover any possible gaps would need to be introduced. This is a particularly important consideration and the possibility of exercising extra-territorial

⁷ „Compensation shall be paid by the State on whose territory the crime was committed: (a) to nationals of the State party to the Convention; (b) to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.”

⁸ As required by Article 15 (3) of the Council of Europe Convention on Action Against Trafficking In Human Beings, CETS No.197 which states that : “Each Party **shall** adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures of programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23” *Note: Article 23, related to confiscation and seizure of assets which are the proceeds of crime.* Also Article 6 (6) of the United Nations Protocol to Prevent Suppress and punish Trafficking in Persons, Especially Women and Children states that: “Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking the possibility of obtaining compensation for damages suffered”.

⁹ It is also in compliance with Article 2 of the Council Directive 2004/80/EC of April 2004 relating to compensation to crime victims.

jurisdiction over the crime of trafficking by the Ukrainian authorities, where the crime is not committed on the territory of the Ukraine, however, it is committed against a Ukrainian citizen, should also be taken into account.

16. Again on the question of territoriality it is noted that a lack of clarity in a resolution to the problem outlined above may also create difficulties for those victims of trafficking who are returned to the Ukraine from the countries of destination, where they did not receive a real chance to report the crime (for lack of identification as victims amongst others). In the case that the crime would be reported in the Ukraine, but given that it may be considered to have been committed outside its territory – the victim’s eligibility to seek compensation would be in jeopardy. This again speaks for clarification of the situation of victims of trafficking, vis-à-vis the requirement of territoriality.

17. In relation to the above, development of strong mechanisms for co-operation with other States should be prioritised, in particular for crimes which cross-borders and with the aim of giving victims a real and practical chance to seek and access compensation for injuries suffered¹⁰.

18. Additionally, the above mentioned concerns strongly speak for assessing the possibility of introducing special measures for victims of trafficking to receive compensation, as a separate or additional category of victims of violent crimes, in order for Ukraine to meet international commitments already undertaken or those it will seek to undertake¹¹.

19. As regards Article 2(2), it is recommended to ensure compensation also in the cases when the offender dies.

4.3 The Kinds of Injury Covered

20. Article 6 sets out the injuries for which compensation may be awarded. Although the provision in broad terms complies with Article 2(1)(a) of the Convention, it is not clear from the Draft Law whether costs of injury to mental health are covered. Compensation for the repair of injury to mental health should be considered as an important element in recovery of victims, especially since the Draft Law applies only to

¹⁰ Paragraph 32 of the Report on the Commission Green Paper on Compensation to Crime Victims COM (2001) 536 – C5-0016/2002- 2002/2022(COS))

¹¹ As required by Article 15 (3) of the Council of Europe Convention on Action Against Trafficking In Human Beings, CETS No.197 which states that : “Each Party **shall** adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures of programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23” *Note: Article 23, related to confiscation and seizure of assets which are the proceeds of crime.* Also Article 6 (6) of the United Nations Protocol to Prevent Suppress and punish Trafficking in Persons, Especially Women and Children states that: “Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking the possibility of obtaining compensation for damages suffered”.

those most serious crimes which often result trauma¹². Such crimes include trafficking in human beings. Expanding the notion of injury to include injury to mental health would also cover victims such as minors, who are witness to acts of domestic violence, but do not personally sustain physical injury. Compensation for injury to mental health as a result of an ‘intentional crime of violence’ should therefore be considered to be included within Article 6 of the Draft Law.

21. Also with regard to Article 6, it is suggested to remove the wording contained in par 1 (1) stating “during the temporary period of incapacity for work”. This suggests that the draft Law already assumes that injuries sustained as a result of the crime will only be temporary, whereas, this may not be the case – injuries sustained as a result of the crime may be of a long term nature and incapacitate a victim permanently. The draft Law is not recommended to assume a time period for which the victim will be unable to work, as this will be the decision of the Commission examining the compensation claim. Furthermore, it is understood that the loss of earnings, in cases where the violent crime is being committed over an extended period of time (such as trafficking, labour exploitation, and slavery) the loss of earning during that time would also be recoverable by the victim.

4.4 Requirements for the Receipt of Compensation and Ground for Refusal and Reduction of Compensation.

22. Article 5 of the Draft Law sets a 48 hour time limit within which a victim must report the crime in order to be eligible for compensation. The setting of a time limit is an unnecessary step in the procedure, as each citizen, under the ordinary principles of criminal law, has the obligation to report a crime. It is recommended that for the purposes of making a compensation claim, it is sufficient for the victim to show that the crime was reported and for him or her to submit the application for compensation within the limitation period set out in Article 7 of the draft Law.

23. In any case, should the 48 hour time limit be retained in the draft Law, it is considered that it is unreasonably short, and it is recommended either to be extended and for clear exceptions to be made in circumstances concerning victims such as minors.

24. Furthermore, the expression “when he/she has got a real possibility to make such a report” requires further attention. It is not clear from the draft Law, who would be making the decision on what constitutes a “real possibility” to report, and whether the decision would be based on objective or subjective criteria – for instance, would it suffice for a victim to say that he or she did not come forward for fear of retaliation by the perpetrator? This requirement would also create uncertainty in cases where the completion of a crime is extended over time, for instance, in the case of domestic violence, would the 48 time limit begin to run from the first act of abuse or the last in a series of those? If this article is indeed retained in the draft Law, it is strongly

¹² Paragraph 20 and 23 of the Report on the Commission Green Paper on Compensation to Crime Victims COM (2001) 536 – C5-0016/2002- 2002/2022(COS)).

recommended to ensure that the draft Law clearly states that the assumption will always be that the time at which the victim has come forward was when he or she “got a real possibility to make such a report”, and that the evidentiary burden to prove that the victim could have come forward earlier, is on the authorities. It should also be possible for the victim to appeal any decision by the authorities that he or she could have come forward earlier. Without such clarity, the draft Law risks that many victims will be excluded and not receive compensation, particularly since, paragraph 2 of Article 5 gives further discretion to the authorities to reject any claim which does not comply with these requirements.

25. As shown in the above discussion, Article 5, which sets these strict limits is problematic, and upon implementation, may result in non-compliance with the obligations of the State to compensate victims of violent crimes, it is therefore strongly recommended to be deleted or amended.

26. Article 8 (2) is proposed to be clarified, unless by reason of translation, the requirement of providing a “copy of a ruling which gives the status of a victim to a person” is not clear. It is recommended to suffice for a victim to provide a copy of the filing of a police report and any further decisions of the authorities, on the instigation (or not) of criminal proceedings.

27. It is recommended for Article 10 to include a reduction of compensation when the victim has received compensation from his or her private insurer (if applicable) and not only based on legislation on social security. Currently, this issue is dealt with in Article 11(1), that is, insurance payouts (which cover the compensation amount) constitute the grounds for outright refusal (stipulated in Article 11 (1)). For the purposes of consistency this principle would be better located in Article 10 on reduction. It would then be clear that, regardless of whether the victim receives social security or private insurance payments, he or she would still be able to make a claim, that claim would still be assessed and any amount received from social security or the victim’s insurer would then be set-off against the compensation due to the victim. If the amount paid on the basis of social security legislation or from the private insurer would exceed the compensation due, of course no payment would be made to the victim.

28. Article 10(2) permits a reduction of the compensation in consideration of the financial situation of the person applying for compensation. Although implementation of compensation schemes in Europe varies, it is generally recommended that this should not be criteria for reduction of compensation¹³. This norm may also be contrary to Article 24 of the Constitution of the Republic of Ukraine which States that all citizens are equal before the law, and that privileges and restrictions based amongst others, on property

¹³ Paragraph 25 of the Report on the Commission Green Paper on Compensation to Crime Victims states that “ a minimum standard should lay down that the crime victim’s right to compensation and to the concrete determination thereof should be established **without** taking into account their financial situation” COM (2001) 536 – C5-0016/2002- 2002/2022(COS))

status are prohibited¹⁴. This view is based on two important principles which underlie the very purpose of compensation – the first being that the perpetrator is in any case (regardless of the material situation of the victim) responsible for reparation of damage and the second is that the State should take responsibility for a failure to protect persons on their territory from crime.

29. It is proposed to clarify the reason why persons involved in political or military conflict would be excluded from the operation of this draft Law. In the case that these groups of person are covered by provisions granting the right to claim compensation contained in other legislation, it may be considered to include references to this legislation.

30. In addition to the requirement set out in Article 11(2), it may be considered introduce a principle which would state that an ‘applicant’ for compensation under the Draft Law should be innocent of criminal activity or significant illegal acts that caused or contributed to the victim’s injury or death¹⁵. At present Article 11(1) reflects this principle to a degree, however the draft article would benefit from further clarification. In particular, it is unclear what is meant by “immoral acts of a person incited and offender to commit the crime against the person”. Any reduction should only be based on the proven criminal or illegal acts of the person, not on a subjective criterion such as the assessment a victim’s ‘immoral’ behaviour by the Commission.

31. Furthermore, it is recommended to be made clear that Article 11(1) does not include applicants who, in accordance with the law, were forced or deceived into committing certain criminal or illegal acts and those to whom defences, mitigating circumstances and non-punishment are applicable under criminal law. For instance, in the case of victims of trafficking, involvement in organised crime when under coercion and deception should not constitute barrier to claiming compensation.

32. It may be considered to introduce the possibility of refusal of compensation pay out after the assessment of an application where such payment would result in the unjust enrichment of the perpetrator. Such situation may arise in cases where the victim is dependent on the perpetrator and does not have individual control of finances, for instance, in the case of crimes of domestic violence, child abuse or even in cases of trafficking where the victim is nonetheless under the effective control of the trafficker. In this case, the right to receive compensation and the payment due should be held in trust by the State for the victim, until he or she is freed from the effective control of the perpetrator.

¹⁴ Article 24 Constitution of the Republic of Ukraine, 1996, states: “Citizens have equal constitutional rights and freedoms and are equal before the law. There shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.”

¹⁵ European jurisdictions vary on this principle, in particular, in terms of participation in organised crime See also: Goodey, Jo, “*Compensating Victims of Violent Crime in the European Union With a Special Focus on Victims of Terrorism*” Discussion Paper, May 2003, pg 12.

4.5 The Commission and the State Budget.

33. The composition of the Commission is recommended to include, at least in part, independent specialists such as psychologists, social workers, judicial experts etc and not only representatives of State authorities. The provisions of the Law should also foresee circumstances where specialised personnel may need to be part of the board, for instance in cases concerning minors.

34. Further to the above, some progressive States have implemented laws whereby one member of the Commission reviewing the compensation claims is a victim of a violent crime or the victims him or herself. It has been noted in this State that this type of participation increases the understanding of the nature of injuries both physical and mental, suffered by victims¹⁶. This is indeed a unique approach and the proposal is made for consideration only.

35. It is recommended to review the provisions of both Article 12 and Article 23, in which it is stated that the Ministry of Labour and Social Policy is the central body responsible for payment of compensation. Simultaneously, the same ministry is empowered to exercise supervision over the decisions on compensation and their adequacy, and the use of financial resources of the State Budget designated for the purposes provided in the draft Law. It is strongly proposed to amend these provisions, in order to ensure that one State body is not given the power to both implement and exercise supervisory control, over its own implementation.

36. According to Article 19, the Cabinet of Ministers shall establish the procedure of assessment of compensation to be granted and the payment thereof. It is not entirely clear what kind of procedure is being referred to in this article, as Article 20 develops on the examination of applications and decision making power of the Commission. It is therefore recommended for Article 19 to be clarified.

37. The main pre-requisite to proper implementation of this law is the proper enforcement of fines and penalties paid by perpetrators of crime, as well as effective seizure of assets of crime, which by way of Article 22(4) of the Draft Law, is the responsibility of the prosecutor. Some States have opted to establish State Owned Victim Compensation Funds for this purpose¹⁷. In any case, whether there is a separate fund established or whether the compensation comes directly from the State budget - solutions only have a chance to serve their real purpose if enforcement of penalties and fines from perpetrators is ensured. In each case the result is that responsibility for rehabilitating victims of crime lies on the part of both the perpetrators and the State¹⁸.

38. It should also be considered to give access to these funds to victims of trafficking, whether by virtue of this law, or as recommended above, by introducing specialised

¹⁶ Crime Victims Compensation Commission Law, June 1, 1984, State of Alabama, USA.

¹⁷ such as Germany.

¹⁸ Paragraph O. Report on the Commission Green Paper on Compensation to Crime Victims COM (2001) 536 – C5-0016/2002- 2002/2022(COS))

regulations which would address the particularities of the crime of trafficking, but also the needs of victims of the crime.

4.6 Additional Comments and Recommendations.

39. Given the numerous government ministries which are proposed to be involved in the implementation of this law, it is recommended that the Draft Law be consulted to the greatest extent possible with the appropriate ministries.

40. Additionally, it seems of utmost importance to conduct a financial impact assessment and consult with the Ministry of Finance, in light of the evident financial implications of the Law.

41. A regulatory impact assessment is recommended to be undertaken. Furthermore, in as far as legislative technique is concerned the Draft Law may seek to reference more clearly those other legislative acts which would be affected by the Draft Law. This would ensure better understanding of how the Draft Law fits into the framework of legislation and acts which concern victims and their standing in criminal and civil proceedings.

42. Further to the above, it would be important to consult this law with non-governmental organisations and service providers who work with victims of violent crime. In particular, as they would also be an obvious source of information for victims of crime, and would be able to provide victims with information on the compensation that is available to them under the law.

43. The Draft Law is also recommended to include a stipulation on the persons who are responsible for informing victims of their right to seek and receive compensation. Officers and law enforcement organs should be under a strict obligation to inform of the right to compensation, ensuring at the same time compliance of the draft Law with Article 13 of the European Convention on Human Rights, which speaks of the right to an effective remedy. It is also proposed for this obligation to be contained in the Criminal Procedure Code of Ukraine. Clearly, in the case that state authorities fail to inform the victims of their rights, the draft Law should set up provisions which would provide recourse to the victim or applicant in such case.

44. A coherent and comprehensive information and awareness raising campaign is recommended to accompany the introduction and implementation of the Draft Law.

[End of Text]