



Guidance on representing trafficked persons in compensation claims

**A practical tool for lawyers, counselling centres and
service providers**

TOOLKIT ON COMPENSATION FOR TRAFFICKED PERSONS

COMP.ACT is a European project by La Strada International and Anti-Slavery International and their partners to improve access to justice and guarantee compensation for trafficked persons. Based on the activities and assessments on the national and international level, several tools have been developed to assist practitioners in supporting trafficked persons to claim compensation.

At a broad level, the Toolkit aims to promote that compensation becomes one of the key elements of programmes of assistance and services to trafficked persons in Europe. More specifically, this Toolkit provides the user with common understanding of the right to access to justice and compensation, comprehensive background information and relevant legislation, expertise step-by-step guidance and promising practices. Thus, the Toolkit offers a theoretical understanding and a practical approach to compensation for trafficked persons, relevant to all countries regardless of their legal system.

Introduction to this tool

Non-governmental organisations, legal counsellors, lawyers or others who wish to support trafficked persons in claiming compensation often find themselves in situations where knowledge and expertise is insufficient in order for them to properly support their clients. This is not surprising, given the fact that awareness regarding the issue of compensation for trafficked persons has only recently manifested into the international anti-trafficking debate and the number of cases where compensation has been successfully claimed in Europe remains limited.

This *Guidance on representing trafficked persons in compensation claims* provides lawyers, counselling centres and other service providers information on the rights and needs of trafficked persons, the ways of claiming compensation for both material and non material damages, a detailed overview of the international legislation and includes a simple 5-Step Model for claiming compensation for trafficked persons.

The *Guidance on representing trafficked persons in compensation claims* is developed by COMP.ACT and is based on the methodology developed by Ms Annet Koopsen, lawyer at the Law firm *Advocatenkantoor Oudegracht* in Alkmaar, also connected to the Amsterdam Coordination Point For Trafficking in Human beings (ACM) and The Prostitution and Health Centre in Amsterdam (P&G 292).

The overview of the main international legal instruments on compensation for trafficked persons is based on the fact sheet developed by Ms Marjan Wijers, researcher and consultant on human rights and Co-owner, trainer and consultant at *Rights4Change*.

Practical information on the needs and understanding of trafficked persons was gathered from "Rights and Resource, a Guide to Legal Remedies for Trafficked Persons in the UK" (2011), by Anti Slavery International and the Poppy Project

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1. The importance of compensation for trafficked persons

Access to an effective legal remedy and compensation by a court is an important aspect of redressing the human rights violations endured by trafficked people.

The term 'access to justice' traditionally refers to extending the formal systems and structures of the law to disadvantaged groups in society. This includes removing legal and financial barriers to justice, but also social barriers such as language, lack of knowledge of rights and intimidation by the law and legal institutions, to allow all members of society their fair right to justice.

Access to justice has thus two dimensions: procedural access (having a fair hearing before a tribunal) and substantive justice (to receive a fair and just remedy for a violation of one's rights). It also refers not only to access to courts, but also access to civil and administrative processes such as an immigration review or state compensation funds. Further, protection of rights must continue through all stages of the legal process, from the time of reporting a crime to the police, to ensuring that the compensation order is enforced.

Compensation includes remuneration of unpaid wages and payment in restitution for both general damages and special damages suffered by a victim of crime. General damages compensate the claimant for the non-monetary aspects of the specific harm suffered, such as physical or emotional pain and suffering. Special damages compensate the claimant for the quantifiable monetary losses suffered, such as out-of-pocket medical expenses, repair or replacement of damaged property and lost earnings. Persons who are trafficked are subjected to a range of physical, mental and economic abuses, including emotional trauma, physical suffering and unpaid wages. Many are sexually abused, beaten, threatened with physical violence and deportation and forced to work long hours. The ability of a trafficked person to pursue and receive compensation is significant at a number of levels:

- At a societal level, awarding compensation acknowledges that a violent crime was committed against the person;
- At an individual level, the victim's pain and suffering are acknowledged and justice is restored. Compensation can constitute a first step towards overcoming trauma inflicted and abuses suffered;
- At a practical level, compensation can assist victims in rebuilding their lives;
- At a retributive level, compensation paid by traffickers can constitute a form of punishment and deter other traffickers.

The report by the UN High Commissioner for Human Rights - 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2002) states that:

Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realise their right to adequate and appropriate remedies.

In most European countries, laws exist to allow victims of crime to claim compensation for material and immaterial damages. The compensation claims can either be pursued in courts as a part of criminal or civil proceedings; in labour courts or tribunals; or by

application to special compensation funds. The administrative and court proceedings vary in the national legal systems.

Despite the legal frameworks in place, access to compensation remains one of the weakest rights of trafficked people. Namely, the obstacles at national level that make the actual receipt of compensation in trafficking cases are significant. Examples include long or delayed trials that do not conclude with a verdict before the trafficked person departs from the country of offense, traffickers that have moved the assets abroad to avoid paying compensation, and specific moral grounds that prevent certain groups from obtaining the compensation that they are otherwise legally entitled to.

Next to such systematic obstacles there are also many barriers for trafficked persons themselves to apply for compensation. They are often not informed about their rights and may not have access to legal aid at all. In many cases, there is a general lack of knowledge on compensation measures by the authorities, legal specialists and others within the field of human rights - including NGOs.

2. Rights and needs of trafficked persons

Trafficked persons have the right to justice through criminal and civil law. In most European countries, criminal laws allow the state to prosecute the trafficker for the exploitation of others, while civil laws provide trafficked persons with the ability to claim compensation or restitution from their trafficker.

The rights of trafficked persons

The rights of trafficked persons often derive from international legislation (see chapter 6). Important rights for trafficked persons in relation to claiming compensation, according to international legislation, are:

- Access to appropriate and secure accommodation
- Access to emergency medical treatment
- The right to a reflection and recovery period
- The right to a temporary residence permit
- The right to remain in the country for the duration of proceedings
- The right to legal assistance and legal aid (free of charge where the victim does not have sufficient financial resources)
- The right to information on relevant judicial and administrative proceedings in a language the trafficked person understands.

The needs of trafficked persons

The best legal representation of a trafficked person requires a comprehensive understanding of the client's background, experiences and exploitation suffered; as these factors bear directly on the type of claims and remedies that may be available to the individual to pursue. A trafficked person is first and foremost a victim of a serious human rights violation and should be viewed as such for purposes of compensation. The lawyer should exercise appropriate sensitivity and patience in all of his or her interactions with the client and understand that the client may likely still be traumatised by his or her experiences. The level of trauma will depend on the individual and the severity of abuse or exploitation he or she endured at the hands of the trafficker.

Additionally, the need for comprehensive assistance to a trafficked person cannot be emphasised enough. As such, it is critical that any practitioner representing a trafficked person in criminal or civil proceedings ensures that, in addition to legal representation, the client has access to appropriate support mechanisms – including an interpreter, medical care, counselling, food and shelter, protection from his or her traffickers, access to immigration services, and contact with family and friends.

Because many trafficked persons are non-native speakers in the country where the proceedings take place, procuring a competent and qualified interpreter will also likely be necessary to meet the individual's needs. Interpreters should specifically be trained with high standards of professionalism; both in the quality of their interpretation and in appropriate interactions with the victims.

Understanding trafficked persons

The attitude of a trafficked person towards law enforcement, legal practitioners and the legal system may be heavily influenced by prior interactions with authorities upon leaving or escaping his or her trafficking experience. For example, a trafficked person who was detained in an Immigration Detention/Removal Centre and treated as a criminal or illegal immigrant would understandably have deep-rooted concerns about whether he/she would be treated fairly by the law in the future or whether anyone in a position of authority would ever prove trustworthy again. Additionally, trafficked persons may be unsure as to the role of each of the professional support individuals who endeavour to assist them and may not perceive themselves as victims because they are unaware of their rights. Thus, legal and social service providers should be sensitive to the victim's reluctance to trust unfamiliar individuals, regardless of their role or the services they offer. Service providers should also clearly explain their role as advocates to the individual and create a non-judgemental and non-threatening environment that aims to make the client feel as comfortable as possible.

The individual may be hesitant to speak of the trafficking experience out of fear of deportation, fear for the safety of family members and fear of being judged by others. Initial contacts with law enforcement and service providers may yield little or false information about the victim's experiences; instead the victim may repeat a story that the trafficker has coached her or him to say. As a result of the ongoing trauma, trafficked persons are unlikely to be able to talk about their experiences in an organised, linear way. A lawyer should not expect the client to be able to tell his/her story in one meeting. On the other hand, the client's story may emerge in more detail as he/she recovers and receives counselling.

3. What kind of damages can be compensated?

Non-material damages

Non-material damages are the physical and psychological damages caused by human trafficking. A problem that may arise here is that in some cases, trafficked persons possess a degree of psychological damage prior to being trafficked. Research has shown that persons who were victims of rape, sexual abuse or child abuse and/or come from underprivileged families in which there was a significant level of (domestic) violence, are especially vulnerable to becoming victims of human trafficking. Therefore, not all the psychological problems may have been caused by the trafficking experience. It is important to acknowledge that a woman exploited in the sex industry confronted by her community or family, can lead to stigmatisation or to social exclusion.

In terms of long term damages, the interruption of trauma due to trafficking may prevent individuals from continuing with day-to-day living and the flow on effects of being unable to resume education or employment in a traditional sense.

In short, the non-material damages and losses which a trafficked person may seek to recover through criminal and or civil proceedings include:

- Abuse and offences committed against the individual (i.e. physical or mental harm including pain, suffering and emotional distress);
- Lost opportunities, including education and loss of potential earnings;
- Harm to the reputation or dignity of the individual, including harm that is likely to continue in the future (e.g. as a result of stigmatisation).

Material damages

Material damages can be twofold:

- Damages (of monetary value) that are a direct consequence of human trafficking; these may include money the victim had to pay to the trafficker for e.g. travel expenses, expenses for housing and food (some traffickers demand the victim to pay a high sum of money for housing and costs of living, etc.). Additional costs could include costs for legal aid, for shelters and housing and medical or psychological care.
- Unpaid wages; costs of services and labour that the victim has rendered for the trafficker, but for which she/he was not paid (or only partially paid). Also if the person was trafficked into the sex industry money was earned by the trafficked person providing an income for the trafficker. This applies also in countries where prostitution is not seen as a form of labour.

Some of the material damages and losses which a trafficked person may seek to recover through criminal and or civil proceedings include:

- Money taken from the individual which he/she earned legitimately;
- Money taken from the individual which was acquired in the course of activities that he/she was instructed to carry out and worked to earn, even if the activities were not legal (e.g. through prostitution);
- Unpaid or underpaid wages or their equivalent in terms of the time which the individual was obliged to spend earning money for a trafficker or exploiter;
- Earnings or other property to which the individual was entitled but that were held by the trafficker or exploiters and not returned;
- Medical and professional services related to physical, psychiatric or psychological care, including psycho-social counselling;
- Physical and occupational therapy or rehabilitation;
- Costs of transportation and residential care or temporary housing;
- Fees and other costs for a legal representative and expenses incurred in relation to legal proceedings by the legal representative, the individual or his or her family;
- Costs incurred by the individual and members of her or his family for the investigation of their case, and in supporting the trafficked person escaping the trafficking situation.

4. What are the ways for claiming compensation?

Criminal court proceedings

How does it work?

The lawyer representing the trafficked person in a criminal case against the trafficker presents a compensation claim at the start of the trial. The final judgement includes a verdict, the penalty for the trafficker and the amount of compensation for the trafficked person. Stipulated precisely are all the actors who have the power to make a compensation claim on behalf of the victims in criminal proceedings – in some countries, the police can make a request to the prosecutor to include a compensation claim already stated at the initial stages of the proceedings.

Advantages

In successful cases, the trafficker is required by law to pay compensation; the public prosecutor and not the trafficked person needs to prove the case; generally, the verdict is made quicker than in civil proceedings; there is a possibility that the judge will grant a longer prison sentence if the trafficker does not fulfil his legal obligation; legal aid is free. In some countries, the State will act to collect the money from the trafficker on behalf of the victim.

Disadvantages

There is limited time during the criminal court proceedings to deal with the claim; if the claim is complex, judges often refer the claim to civil proceedings; it may be difficult to obtain compensation for all the damages incurred; if the case is not proven by law there is no right to compensation; the trafficked person is not a party in the procedure; if the claim is rejected but the public prosecutor is otherwise satisfied with the verdict the victim may be less likely to appeal. Also, judges can be prejudiced and believe the person is only cooperating in the case for the money.

Civil court proceedings (including Labour Courts)

How does it work?

The trafficked person, represented by a lawyer, conducts a civil proceeding against the trafficker. Often this is done after the trafficker is acquitted by the criminal court or if the case is suspended.

In some countries exploited irregular migrants, including trafficked persons, can claim unpaid wages, based on 6 months minimum wages as stipulated in Article 6 in the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009, providing minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

Advantages

In successful cases, the trafficker is required by law to pay compensation; the aim of the procedure is solely to secure compensation; there is enough time to discuss in length the damages, both general and specific damages caused by the trafficking offence; there is a possibility for professional consultation with specialists throughout the procedure (for instance doctors); compensation can be claimed even if the trafficker was acquitted; if there is a verdict from the criminal proceedings, the evidence can be brought in the civil case; the trafficked person is party in the proceeding, he/she can appeal. In labour courts you can use labour laws to claim compensation.

Disadvantages

The proceedings can exceed several years in duration; proceedings must be initiated by the trafficked persons themselves who need to prove the case; court costs must be borne by the trafficked person, if the case is lost this might be the costs of the entire procedure, including the costs of the trafficker's lawyer; the trafficked person is responsible for securing the compensation from the trafficker him/herself; in some countries, trafficked persons may not be permitted to remain in the country for civil proceedings due to national immigration laws.

Compensation funds

How does it work?

Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings and article 17 of the EU Directive of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims advises member states to establish compensation funds for victims of violent crimes. Several countries have such funds, though some of them are limited and/or conditional.

Claims through a compensation fund generally are much lower in value than those secured via court cases.

Advantages

A victim receives compensation despite the verdict; compensation through this avenue does not require authorities to track down the trafficker.

Disadvantages

The trafficker does not pay the compensation; not all the damages incurred from the offence are compensated; when compensation is refused by the compensation fund, this can lead to additional psychological harm for the victim.

5. 5-Step Model for claiming compensation for trafficked persons

The *5-Step Model* for claiming compensation for trafficked persons was developed by a Dutch lawyer, Ms Mr Annet Koopsen - a specialist in supporting women trafficked into the sex industry. Some of the procedures that are explained in these steps may not be applicable to all countries or for people trafficked into other economic sectors.

The idea is that the 5-Step Model is to be translated in the different legal systems and languages. The model is intended to be an evolving document that can be modified according to the experiences of people (councillors and lawyers) utilising it.

Step 1: Determining the most suited means of securing compensation

To claim compensation for a trafficked person and to ensure that the trafficked person will be awarded compensation, the following initial questions must be asked:

1. What are your clients' (the trafficked person) wishes?
2. Is the trafficker known?
3. Is the trafficker being prosecuted?
4. Are the damages obvious and evidential?
5. Does the trafficker have the means to pay compensation?
6. Is your client (psychologically) capable of sustaining (lengthy) legal proceedings?

The answers to these questions will give you an indication which means of claiming compensation are best suited for your client, being:

- Through criminal court proceedings
- Through civil proceedings (incl. labour courts)
- Through a compensation fund
- A combination of the above

See chapter 4 of this tool for detailed explanation of the different ways to claim compensation.

Tips for Step 1

1. If you attempt to secure compensation for your client through civil proceedings, wait until you have a verdict in the criminal case to determine if there is a good chance that the trafficker will be sentenced. You have taken already the first step of proving that the trafficker is guilty of trafficking your client. If chances of getting an acquittal are high, do not wait for the verdict in the criminal proceedings.

2. COMP.ACT research shows that trafficked persons need to be informed about their rights to compensation from the first moment they are identified as victims and should receive psychosocial and legal support throughout the entire justice process. Close cooperation between the NGO/trade union supporting the trafficked person and the lawyer representing him or her enhances the chances of a successful claim.

3. It can be difficult for third country nationals to receive legal aid free of charge. Remember that in international treaties, trafficked persons are provided with information on available remedies and with access to legal assistance (Palermo Protocol article 6; UN HCHR Guidelines principle 9 & guideline 4.8; CoE CAT article 15; EU Directive 2011/36/EU article 12).

4. A compensation claim may be a lengthy and often traumatic process for the trafficked person. Be clear from the start what your client can expect and how the procedures will be, so he/she can take an informed decision.

Good practice

In Ireland, solicitors' offices can sign up to a "Legal Panel Charter"; firms that support a client claiming compensation, will only charge a small percentage of compensation if the case is successful.

Step 2: Establish the nature of the damage and collect evidence

1. What is the nature of the damages your client has suffered?

- Non-material damages:
 - Physical and/or psychological damages caused by the trafficking experience
 - Stigmatisation and/or social exclusion by family or community
 - Implications from discontinuation of work or education.

- Material damages:
 - Costs of living during the trafficking experience that were paid to the trafficker, e.g. expenses for travel, housing, clothing, food etc.
 - Money the trafficked person earned for the trafficker/ wages due
 - Costs incurred due to legal aid, shelter, housing, medical or psychological care.

2. Secure as much evidential proof of the damages as possible:

- Ensure that the damages suffered are included in the official police report, so it is part of the criminal file.
 - Ensure the client communicates the nature and degree of the damages suffered in their statement at the police and authorities;
 - In case of physical injury: have the police take pictures or secure a statement from a medical professional;
 - In regards to psychological damages: ensure the police or a psychologist make a written statement explaining the psychological condition of your client;
 - Ensure the police include day-to-day costs (travel costs, ‘mediation’, housing, food, fines, medical treatment such as abortions, etc.) incurred by the victim that was paid directly to the trafficker in a report;
 - Ensure police make a calculation of the money the trafficked person earned for the trafficker (number of days worked, number of clients per day, amount per client).
- Collect evidence: reports from doctors, the hospital, psychologists, financial experts, case law, diaries of your client, etc.
 Find witnesses who can confirm/testify that your client was abused, exploited, battered, how long he/she worked, number of hours per day, number of days per week, average number of clients, etc.

Tips for Step 2

1. The most important factor for a successful case is cooperation between all the actors that are or should be involved - law enforcement, prosecution, social services and counselling centres. Cooperation increases the mutual understanding and can provide lawyers with much information to substantiate the claim.

2. As with most professionals, the police often have very little knowledge on the rights to compensation for trafficked persons. Together with other service providers, establish an information sheet for the police on compensation, which explains what is required from the police to enhance the chances of a successful case. If working relations between lawyers and/or service providers with the police are good, you can also consider a workshop on compensation.

Step 3: Freezing /confiscation of the assets of the trafficker

An important barrier for trafficked persons to receive compensation is the fact that the trafficker/perpetrator does not have the means to pay the compensation. Despite a legal obligation to pay compensation and the means to fulfil this obligation, the trafficker may transfer assets (out of the country) or take other steps to conceal them from those who may have a rightful claim to them so to avoid paying.

To prevent this possibility and safeguard the defendant’s legal right to compensation and payment of their work, it is possible to apply to a High Court for a freezing injunction. The

application is normally made without notice to the defendant; however, the applicant is under a duty of full and frank disclosure.

The requirements for granting a freezing injunction are that:

- The claimant has a good arguable case against the defendant;
- There is a real risk that the defendant will either remove assets from the jurisdiction or dissipate them so as to frustrate the judgement; and
- It would be just and convenient in the circumstances to grant the order.

The application can be made at any stage in proceedings, even before a claim form has been issued but also after a judgement to assist in its enforcement. The application should be supported with evidence in the form of an affidavit.

Although freezing injunctions do not generally extend to assets outside the country of the legal proceedings, in an exceptional case a court may grant a worldwide freezing injunction.

Tips for Step 3

1. If you are claiming compensation for your client in a criminal case, cooperate with the prosecutor in the application for a freezing injunction. This cooperation makes the application stronger and you ensure that the confiscated assets are designated for your client and not the State.

2. Your client may know about the assets of the trafficker and could provide useful information regarding their inventory.

Step 4: Present the claim

In criminal proceedings:

- Discuss the claim with the public prosecutor and try to get her/him to support and defend your claim in court;
- Make a calculation of the money the trafficker took from your client that avoids discussion;
- In cases of trafficking into the sex industry, prepare for statements from Defence lawyers that suggest your client chose to work in prostitution from her own free will (use the CoE Convention, the UN Trafficking Protocol, the ILO guidelines on forced labour);
- Ask for compensation as an advance payment to retain the future opportunity for future claims.

In civil proceedings:

- Aim to secure (expert)witnesses to confirm the damages incurred by your client in court.

Tips for Step 4

1. If you want to claim compensation for the money the trafficker took from a woman exploited in the sex industry it can be hard to prove how much money she earned per day and how much she was forced to give to the trafficker. The Dutch lawyer, Mr Koopsen has developed a calculation method that avoids discussion: if a client indicates that she earned about € 500 to € 1,000 a day, the courts were asked to grant her compensation for € 100 a day, 5 days a week and 4 weeks per month, totalling € 2,000 per month. With a calculation

like this, there will not be any dispute to whether she was allowed to keep any money for herself, whether she had to buy food, clothes, rent etc., since the amount of money that she had to give to the trafficker was so much more and that this calculation is a minimum estimation. Dutch courts have accepted this and the highest amount on record that has been granted to one of her clients has been € 100.000.

2. If you ask for compensation do not forget to ask for the money as an advance, since it is difficult to forecast future damages, and retains the opportunity to pursue claims in the future.

3. Compensation is not a priority in criminal cases; lengthy procedures run the risk of being referred by the transferred judge to a civil procedure. Therefore, it is important to establish a good relationship with the Prosecutor. Inform him/her from the start about the claim and the importance for the trafficked person but also for case law.

4. In civil cases, when initiating a claim, a payment must be paid for court fees must be paid and for covering the costs for the bailiff to seize and confiscate assets. Additional fees need to be paid for special services. You can apply for fee exemption pertaining to both bailiff fees and court fees (judicial and execution of decision).

5. In order to get legal aid for civil claims, in some European countries you require a guarantee that your claim is likely to succeed. The claimant has to indicate the source for freezing assets and identify the assets (salary, property etc.). You can file a claim both for a legal entity and a natural person to increase the chances of identifying and securing the assets of the trafficker.

Step 5: Collect the money

Obtaining a successful judgement does not bring the litigation to a satisfactory conclusion if the defendant refuses to comply with the judgement and order of the court.

Assets in the country where trial takes place

If the claimant prevails in the lawsuit and is awarded monetary damages by the court, several methods of enforcement are available to collect the judgement if the defendant has assets in the country where the trial takes place.

The claimant can ask the court for any of the following:

- *A warrant of execution:* having a Court Officer attend at the defendant's home or premises and seize the defendant's goods to sell them and pay the proceeds (after costs) to the claimant;
- *An attachment of earnings order:* stopping the money from the defendant's wages;
- *A third party debt order:* freezing the defendant's money that is located, for example, in a bank account and directing the money to pay the claimant; or
- *A charging order:* obtaining a charge that certifies defendant's assets (e.g. property, stocks and shares) and then obtaining an order to ensure that those assets be sold and the proceeds paid to reduce the judgement debt.

No assets in the country where the trial takes place

If a defendant has no assets within the country, it may be a long road to enforcing the judgement in another country. Nevertheless, several states are signatory to a number of treaties providing for mutual recognition and enforcement of judgements. These include the Brussels Regulation 2001 and Lugano Convention 1988, which provide for the recognition

and enforcement of judgements obtained from the courts of other member states. Thus, judgements obtained in one member state are generally easily recognised and enforced in other member states. However, it is generally only EU states that are parties to such Conventions.

Tips for step 5

Cooperate with the prosecutor and plea for an added prison sentence: not paying compensation will be an aggregated circumstance. You can also plea for an instalment of future income of perpetrator for compensation.

Good practice

In the Netherlands, if a compensation claim is awarded by the judge, the state is responsible for collecting the money. If the state does not succeed in doing so within eight months, the state pays the compensation to the trafficked person.

6. Overview of the main international legal instruments on compensation for trafficked persons

A number of international treaties established procedures to provide access to compensation and restitution for victims of trafficking. These procedures may include the use of confiscated proceeds of crime, property to compensate victims or the obligation of States to provide for special funds for victims of (violent) crimes. Other treaties include the right for workers to claim unpaid wages.

Legislation on the right to compensation for trafficked persons

There the three major treaties on combating trafficking in human beings that are applicable in Europe the right to claim compensation is included- the UN Organized Crime Convention (including the Palermo Protocol), the Council of Europe Convention and the EU Directive.

United Nations Convention Against Transnational Organized Crime (2000), article 14 & 25

- Art. 14.2: Requires States Parties to give priority consideration to returning confiscated proceeds of crime or property to a requesting State Party for compensation of (or return to) victims.
- Art. 25.2: Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention
- Art. 25.3: 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.

The term restitution is not defined and has multiple meanings, including the concept of compensation. One can therefore assume that restitution in this context covers full damages for all types of losses, including unpaid wages.

Palermo Protocol, article 6

- Art. 6.2: Each State Party shall ensure that information on relevant court and administrative proceedings is provided to victims of trafficking in persons.
- Art. 6.6: Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damages suffered.

The Interpretative Notes to the Protocol indicate that this should apply both in the destination State and the country of origin of the victim.

Council of Europe Convention on Action against Trafficking in Human Beings (2005), article 15

- Art. 15.3: Each State Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators. According to the Explanatory Memorandum compensation may cover material injury (such as the costs of medical treatment) and non-material damage (the suffering experienced).
- Art. 15.4: Each State 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 or 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 Art. 23 [monetary sanctions]. In deciding the compensation arrangements the Explanatory Memorandum refers to the principles contained in the *European Convention on the Compensation of Violent Crimes* (ETS no. 116), which limits the requirement that States pay compensation to cases of “serious bodily injury or impairment of health directly attributable to an intentional crime of violence” (art. 2.1).

Para 1 & 2 oblige States Parties to ensure that victims have access, as from their very first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language they understand (15.1), and to provide for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law (15.2). In relation to the latter, the Explanatory Memorandum refers to the ECtHR, which held that in certain circumstances there is a right to free legal assistance under art. 6.1 ECHR (*Airey v. Ireland*, 9 October 1979). Effective access to a court may necessitate free legal assistance if someone is not in a position to present her or his case properly and satisfactorily without the assistance of a lawyer (*Golder v. UK*, 21 February 1975).

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims

- Art. 12.2: Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.
- Art. 17: Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.

Next to these legally binding instruments, there are two important politically binding international instruments on trafficking in human beings.

UN HCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (politically binding)

- Principle 16 & 17: States shall ensure that trafficked persons have access to effective and appropriate legal remedies, and that, to the extent possible, confiscated assets shall be used to support and compensate victims.
- Guideline 4.4 (ensuring an adequate legal framework): States should consider making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences. Where possible, legislation should specify that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund.
- Guideline 9 (access to remedies): Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. States should consider ensuring that victims have an enforceable right to fair and adequate remedies; providing information as well as legal and other assistance to enable trafficked persons to access remedies; making arrangements for trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings.

OSCE Action Plan to Combat Trafficking in Human Beings (Decision no. 557, 2003) (politically binding)

Section III, para. 1, art 1.5: Recommends considering legislative provisions for confiscation of the instruments and proceeds of trafficking and related offences, specifying, where not inconsistent with national legislation, that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking; and giving consideration to the establishment of a compensation fund for victims of trafficking and the use of the confiscated assets to help finance such a fund.

Specific legislation on compensation funds

In addition to the legal to the right to compensation, the obligation for States to provide specific funds for victims of crimes are included in several treaties.

Council Directive 2004/80/EC relating to compensation to crime victims

- Art. 1: sets up a system of cooperation to facilitate access to compensation for victims of violent intentional crime committed on their territory.
- Art. 12.2: requests States to establish a State-funded scheme for payments in these cases and to establish cooperation structures for individuals from other EU member States to ensure that they can easily access the schemes from their home country.

European Convention on the Compensation of Violent Crimes (ETS no. 116)

- Art. 2.1 envisages a State funded compensation scheme which, at a minimum, covers nationals and permanent residents who are victims of “serious bodily injury or impairment of health directly attributable to an intentional crime of violence”.
- The compensation should be available even where the offender is not prosecuted or punished (art. 2.2), and should cover at a minimum, the loss of earnings, medical, hospital and funeral costs, and maintenance for dependants (art. 4).
- Art. 8 allows limitations on the eligibility of the claimant related to their character and antecedents, e.g. the conduct of the applicant before, during or after the crime, or in relation to the injury or death. This means that, e.g., a claimant can be denied

compensation if s/he is deemed to have “provoked” the crime or when s/he has an unrelated criminal record.

Legislation on claiming unpaid wages

ILO Forced Labour Conventions no. 29 (1930) and 105 (1957)

The 1930 ILO Forced Labour Convention does not specify a right to compensation. However, the ILO Committee of Experts issued the following commentary to art. 25 which deals with penalties for forced labour:

Where a form of forced labour is found to exist, those responsible must be effectively punished in accordance with the penal sanctions established by law. The State has to ensure that the victims of such practices are able to complain to the competent authorities, have access to justice and obtain compensation for the harm they have suffered (ILO Forced Labour Survey 2007, p. 75, para. 139).

The ILO *Guidelines on Human Trafficking and Forced Labour Exploitation* (2005) state that (in addition to criminal remedies) the existence of civil, administrative and labour law remedies is critical and that workers will often require assistance to bring claims to court or tribunal. In particular, States are asked to use their administrative legal system to protect foreign workers and provide them with remedies against exploiters (p. 26-29).

Migrant Workers Conventions

- The *ILO Conventions on migrant workers* (no. 97 and 143) set standards to ensure migrants are not deprived of their rights to be paid for work that they have performed. These standards are relevant to claims by exploited migrant labourers in civil or labour law for unpaid or underpaid wages and other losses and damage arising due to abuse of employment law standards (e.g. vocational health and safety, deprivation of holidays, excessive hours and other violations).
- Similar provisions are contained in the *International Convention on the Protection of Migrant Workers and Their Families* (art. 25.3). However, both conventions are not widely ratified.

Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

Art. 6 deals with back payments to be made by employers to trafficked persons, and the States' obligation to ensure that employers are liable to pay, and that illegally employed third country nationals may (a) introduce a claim against their employer and eventually enforce a judgment against the employer for any outstanding remuneration, including in cases in which they have, or have been, returned; or (b) when provided for by national legislation, may call on the competent authority of the Member State to start procedures to recover outstanding remuneration without the need for them to introduce a claim in that case. Illegally employed third-country nationals shall be systematically and objectively informed about their rights under this paragraph and under Article 13 before the enforcement of any return decision. In respect of cases where residence permits of limited duration have been granted under Article 13(4), Member States shall define under national law the conditions under which the duration of these permits may be extended until the third-country national has received any back payment of his or her remuneration recovered under paragraph 1 of this Article.

Legislation on the rights of victims

Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)

Contains detailed guarantees that should be provided to all victims of crime in EU Member States, including the right to support and information about proceedings (incl. the matter of compensation), the right to legal assistance and aid, the right to protection and trauma minimization during proceedings, the right to victims residing in other EU States to be accorded the same rights, and the right to compensation. Art. 9 provides that Member States 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 (9.1) and that recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay, unless urgently required for the purpose of criminal proceedings (9.3).

In 2011 the European Commission proposed a *Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of Crime*. This proposal also includes the right to legal support and compensation. Through amendments by the Parliament the proposal ensures that these standards are applicable for all victims (irrespective of their residence status). As of September 2012, the proposed Directive had not been adopted by the European Council.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN GA Res. 40/34 of 29 November 1985) (politically binding)

- Restitution and compensation should be available for victims of crime, their families or dependants. Restitution should include the return of property or payment for harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, provision of services and restoration of rights (para 8).
- 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 (para 9).
- When compensation is not fully available from the assets of the offender or other sources, States should endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes (para 12).
- States should encourage the establishment, strengthening and expansion of national funds for compensation to victims of crime (para 13).
- Para 4, 5 and 6 contain provisions obliging other assistance that should be provided to victims including information on their rights to redress and assistance throughout the proceedings.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN GA Res. 60/147 of 16 December 2005) (politically binding)

Reparation includes both restitution and compensation.

- Restitution should, wherever possible, restore the victim to the original situation and includes restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property (para 19).
- Compensation should be provided for any economically assessable damage, such as physical or mental harm, lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damages (such as pain and suffering, loss of reputation, emotional distress); and costs required for legal or expert assistance, medical, psychological or social services (para 20).

Legislation on the confiscation of assets

Early 2012 the European Commission published the Proposal for a Directive of the European Parliament and of the council on the freezing and confiscation of proceeds of crime in the European Union. The proposed Directive creates the opportunity to use confiscated criminal profits to finance social services and assistance. Civil society has advocated the inclusion of compensation of victims of crime to the European Parliament and the European Council. As of September 2012, the proposal had not yet been discussed in the European Parliament or adopted by the European Council.

More information on the Toolkit and on the COMP.ACT project can be found at www.compactproject.org

La Strada International: www.lastradainternational.org

Anti-Slavery International: www.antislavery.org



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