

Side Event Report
“Compensation of trafficked persons: Law and practice in the OSCE region”

Human Dimension Implementation Meeting
1 October 2009, Warsaw

Background

Supporting trafficked and exploited persons’ access to rights and remedies is one of the main components of the ODIHRs Anti-Trafficking Programme. Trafficked persons may suffer serious moral and material injuries and losses through their exploitation, yet few ever receive compensation for this harm. In 2008 the ODIHR published a study on *Compensation for Trafficked and Exploited Persons in the OSCE Region* which highlighted many of the difficulties in law and practice that victims face in making successful claims for compensation. The study has served as guidance for civil society organizations, international organizations and state actors in many OSCE countries in developing research frameworks and concrete action to enhance trafficked persons’ access to compensation.

The right to compensation of trafficked persons is now firmly established on the agenda of anti-trafficking stakeholders throughout the OSCE region. Many civil society organizations in recent years have taken up the challenge of pursuing compensation for trafficked persons and have intensified their efforts to make this right effective.

This side event provided a forum for the exchange of knowledge and practice on how victims of human trafficking can access compensation. It also aimed at raising awareness amongst policy makers and practitioners of some of the issues currently undermining trafficked persons’ access to justice. It brought together non-governmental organisations La Strada International, the German Institute for Human Rights, the Albanian Center for Civic and Legal Initiatives and the Bureau for Human Rights in Tajikistan to present their experiences in making compensation for trafficked and exploited persons a reality.

Panel Participants

- Marieke van Doorninck, Advisor Public Affairs at La Strada International, coordinates La Strada International and Anti-Slavery International’s compensation ‘COMP.ACT Europe’ project;
- Petra Follmar-Otto, leads the Human Rights Policy Department at the German Institute for Human Rights, co-author of the study “Human Trafficking in Germany” (2009);

- Aurela Bozo, lawyer with the Center for Legal and Civic Initiatives in Tirana, Albania, coordinates the Center's project on human trafficking and victims' access to justice;
- Zulfikor Zamonov, Attorney-at-Law, Head of the Analysis Center at the Bureau on Human Rights in Dushanbe, Tajikistan;
- Zafar Akhmedov, Attorney-at-Law with the Sughd region Bar Association in Tajikistan, Director of the Khujand branch of the Bureau for Human Rights;

Introductions

The meeting was introduced and moderated by Ms. Astrid Ganterer, Advisor on Anti-Trafficking Issues for the ODIHR. In her introduction she highlighted that trafficked persons had entitlements under a number of laws, including criminal law, civil law, labour law and administrative laws. She pointed out that in many OSCE countries much still needs to be done to establish a culture, both in institutions and society, which is sensitive and responsive to the need of victims of crime, including victims of human trafficking. In many countries victims were still often not informed about their rights nor assisted in accessing remedies and justice.

The introduction also highlighted a number of points for the discussion, including:

- The significant disparities between the numbers of prosecutions and convictions of human traffickers (including with asset and property confiscation) and compensation claims filed and awards made to victims;
- The lack of information for trafficked persons on their right to compensation by law enforcement and courts;
- The lack of access to free legal aid and other essential assistance (such as social, residence status) for victims of trafficking to claim compensation in legal proceedings;
- The lack of practice of state actors in documenting, calculating and awarding unpaid wages or lost income as material damage, in particular in cases of trafficking for sexual exploitation;
- The absence of financial investigations as well as a lack of documentation of injuries and losses suffered by victims in human trafficking investigations and prosecutions;
- The inability of trafficked persons to access state compensation funds for victims of violent crime where such funds exist;
- The lack of effective mechanisms in criminal proceedings to ensure that compensation awards are executed and actual payments made to the victims.
- The absence of civil or labour proceedings to claim damages, including unpaid wages.

Overview of presentations

Marieke van Doorninck pointed out the framework in which anti-trafficking policies have been developed over the last years, criminal justice and immigration, is not adequate to protect the rights of victims. These processes often in fact treated the rights of trafficked persons as secondary which also affected trafficked persons' access to compensation. She emphasized that increased efforts to claim compensation for trafficked persons have changed the way state and civil society actors look at victims of human trafficking.

Trafficked persons needed to be seen and treated as holders and claimants of rights and not just as victims in need of humanitarian assistance.

Amongst some of the main challenges she noted that trafficked persons were not (or not early enough) informed about their right to claim compensation and the possibilities to do so. This was partly due to the fact that NGOs that provide support and assistance to trafficked persons and lawyers who represent them have too little knowledge about the right to and possibilities for compensation. Also the scope of state compensation funds was very limited and they often exclude persons from eligibility for payments on moral grounds. In practice this has meant that some trafficked persons were denied compensation because of their irregular immigration status or their involvement in the sex industry. The long duration of criminal and civil proceedings, and the fact that most trafficked persons are not given a residence status that entitles them to stay in the country of destination longer term and/or they do not have the means to do so, also makes compensation inaccessible. The uncertainty of their immigration status prevents many trafficked persons from claiming their rights generally, not just the right to compensation. In the few cases where compensation claims were submitted to courts, it has been difficult to establish and calculate material and moral damages and make compensation awards.

Ms van Doorninck concluded by outlining the three-year project to enhance compensation for trafficked persons which La Strada International started this autumn with partners from 14 European countries. The project established a European coalition (COMP·ACT EUROPE) with activities at the national and European level. It includes lawyers, trade unions, migrant rights' organisations, academics, international umbrella organizations, and civil society organizations providing social assistance to victims.¹ The project's specific objectives are (a) to reduce systemic and procedural obstacles in access to compensation, (b) to mainstream compensation into anti-trafficking policies and practice, and (c) to make compensation accessible for trafficked persons on a systematic and sustainable basis. This will be done through, amongst others, the analysis of existing compensation schemes, the collection of case studies to identify gaps and good practice, lobbying for legal reform, the development of practical national guidelines, the support of test cases and capacity building of relevant actors to assist trafficked persons in seeking compensation.

Petra Follmar-Otto explained that the interest of the German Institute for Human Rights in the issue of human trafficking and compensation of trafficked persons arose because

¹ La Strada International's partners in the project are: Anti-Slavery International (UK), Information, education and support for migrant women/Intervention Centre for Trafficked Women (LEFO-IBF Austria), Animus Association Foundation (La Strada Bulgaria), La Strada Czech Republic, Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess e.V. (KOK Germany), Migrants Rights Centre Ireland, On the Road (Italy), La Strada Poland, Projecto Esperanza (Spain), La Strada Moldova, La Strada Belarus, La Strada Macedonia, La Strada Ukraine, the Platform for International Cooperation on Undocumented Migrants/PICUM (Belgium), Churches Commission for Migrants in Europe/CCME, International Trade Union Confederation/ITUC and the OSCE-ODIHR Anti-Trafficking Programme.

policies to combat human trafficking were not embedded in a human rights approach. Strengthening the rights of victims of human trafficking importantly meant strengthening their rights at work and to compensation. Payments of compensation empowered victims to continue their lives, provided them with concrete means to secure their lives and therefore also contributed to preventing re-trafficking.

She presented the findings from the report “*Human Trafficking in Germany. Strengthening Victim’s Human Rights*” (July 2009), researched and published by the German Institute for Human Rights and funded by the Foundation “Remembrance, Responsibility and Future (EVZ). The study showed that generally the legal framework for compensating trafficked persons was in place, but that in practice trafficked persons do not receive compensation. It was clear that compensation was not a focus of criminal courts and prosecutors and that also lawyers were reluctant to include civil claims as part of criminal proceedings (“Adhesion procedure”) in human trafficking cases. In practice, compensation within criminal proceedings had only been awarded to women victims of trafficking for sexual exploitation, in less than one-third of cases, with inadequate amounts of compensation awarded (from 1000-4000 Euros). In many cases where compensation was forthcoming, offenders had offered certain compensation amounts to receive a lesser sentence. Compensation claims in civil proceedings were made only in isolated cases and again only in cases of trafficking for sexual exploitation. Generally these were very lengthy proceedings as the civil proceedings were initiated only after the criminal proceedings. While it was important that victims were present during their claims in civil proceedings, this was not possible in Germany as currently victims could only obtain a residence permit if they participated as witnesses in criminal proceedings. Claims for compensation through labour law proceedings were also found to have occurred only in isolated cases and only in cases of trafficking for labour exploitation. It was noted positively that claims in labour law proceedings could be based on a “de facto employment relationship” independent of the legality under immigration or labour law. Labour court cases and out-of-court settlements were evaluated as successful, with significant amounts of compensation awarded, such as for example in the area of domestic work 22,500 Euros and 47,000 Euros. Often these victims however had an irregular immigration status and had to live in fear of being reported to immigration authorities during such claims. Compensation through state compensation schemes was possible under the Crime Victims’ Compensation Act. The scope of the Act was however very limited. It only covered physical and emotional restoration and the interpretation “victim of a violent act” had so far been interpreted in a narrow manner; applying to victims of physical attacks only (which not all victims of human trafficking, in particular for the purpose of labour trafficking would be). In all cases where compensation was claimed, assistance of specialized civil society organizations and lawyers had been essential for the success of the claims.

She summarized some key challenges for Germany: ensuring that persons trafficked for sexual and labour exploitation were supported by specialized civil society organisations, strengthening the involvement of trade unions in trafficked persons’ access to justice and compensation, enabling trafficked persons to access legal aid in practice, eliminating barriers for exploited irregular migrants in accessing courts, improving the possibilities for

third-country nationals to institute civil and labour proceedings and adjusting the scope of crime victim compensation schemes to ensure eligibility of trafficked persons.

Concluding, she outlined the three-year project on compensation (started this summer) that the German Institute for Human Rights is implementing in cooperation with the Foundation “Remembrance, Responsibility and Future” (EVZ). The main aim of the project was to establish compensation of trafficked persons as a regular practice in Germany. Its activities would focus on: providing a legal aid fund for victims of human trafficking for strategic litigation; awareness raising and capacity building of authorities, lawyers and counseling centers; research and documentation as well as policy advice.

Zafar Akhmedov and **Zulfikor Zamonov** noted that their organization was not specialized on human trafficking issues, but dealt with a variety of human rights issues, including trafficking in human beings and exploitation. Tajikistan was a country of origin with more than half a million citizens migrating abroad for work and the Russian Federation being the main destination country. Most migrants worked in low income jobs, many in construction. Typically Tajik migrant workers in Russia would enter the Russian Federation legally, but fall into irregularity by not registering once there. It was also noted that trafficking for sexual exploitation was a problem for Tajikistan.

A case of trafficking for labour exploitation of Tajik workers in Poland was presented in detail. In 2007 over 30 Tajik men addressed the Bureau for Human Rights in Tajikistan for legal assistance. The workers had been recruited, as part of a group of sixty persons, by a local employment agency to work for a well-known construction company in Poland. Once in Poland the workers were told to perform different work than that which they had been hired for and were not told what their salary would be. When they demanded their salaries after a month of work, the Polish company told them the Tajik employment agency had to pay them, while the Tajik agency said the Polish company would pay. Those workers who were able returned home by their own means, some stayed in Poland, others left for the Russian Federation and were detained there for illegally crossing the border. Back in Tajikistan, the employment agency started a public campaign against the workers who had demanded their wages for being lazy and unskilled. The Bureau of Human Rights filed a claim against the employment agency with the prosecutor’s office, but the authorities did not react to the claim and the workers were sent from one authority to the other without any action against the employment agency being taken. The employment agency then filed a case against each of the workers for breach of contract in an attempt to intimidate them. The Bureau for Human Rights filed counterclaims and the court decided to drop the employment agency claims. The workers however were no longer interested in pursuing criminal or civil claims as they were intimidated and exhausted by the obstacles presented so far and negative consequences of their complaints.

Even though the criminal procedure code of Tajikistan provides for the possibility to claim compensation, there was no practice in using the relevant provisions. A state compensation fund for victims of crime did not exist in Tajikistan. It would be important to establish such a fund. Lack of trust in law enforcement and the judiciary was a key reason why victims of human trafficking were reluctant to take legal action on their cases. In Tajikistan no

continuing legal education (CLE) was in place for lawyers and advocates; for judges, a judicial training centre existed, however it lacked practical skills training. Judicial reforms were urgently needed. Without an effective criminal justice system it was also difficult to pursue compensation in civil proceedings.

Aurela Bozo presented key findings from the Center's research on trafficked persons' access to justice, with a focus on victims' rights protection and compensation, in Albanian law and practice (forthcoming). There was very little practice in compensating not just trafficked persons, but victims of crime in general. Albanian legislation provided the possibility to claim compensation in criminal and civil proceedings – either through a civil claim appended to the criminal proceedings or an independent claim under civil procedure. There were different interpretations however as to whether moral damages could be claimed in a civil claim appended to criminal proceedings. Albanian legal doctrine has interpreted the possibility to claim compensation in criminal proceedings restrictively, limiting its scope to material damage. The scope of material damage was equally disputed and unclear in Albanian law, excluding for example compensation for lost income or unpaid wages. Guidance was also needed for law enforcement and prosecutors on how to document a victim's injuries and losses from the early stages of investigation/prosecution in order to ensure that the evidence collected is comprehensive. Judges needed guidance in calculating awards for material and moral damages and should not be allowed to detach a civil claim from criminal proceedings as a standard measure. Victims of crime, in particular victims exploited through trafficking, should not be ordered to pay court fees/taxes in civil compensation claims in advance of the payment received (as has been the case in a recent case where a victim of trafficking had been ordered to pay fees at the outset of filing the claim). This effectively prevented them from filing compensation complaints in civil proceedings. Also, victims of crime, including trafficked persons, were not as a matter of course, informed from their first contact with law enforcement and prosecutors about their rights as victims of crime. As a consequence, only those victims who were lucky to contact or get referred to a civil society organization which provides legal counseling and aid, were aware of their rights, including the right to claim compensation, and how to claim. The recently adopted Law on Legal Assistance (December 2008) introduces free legal assistance for parties to criminal or civil proceedings without financial means. This was an important step. In practice, however, it is not yet clear how the free legal assistance scheme functions. So far, no victim of human trafficking has benefited from it.

Even though Albania was bound by the Council of Europe Convention on Compensation for Victims of Violent Crime, no state fund for victims of violent crime has been established yet. Only victims of organized crime had the possibility of being compensated (directly or indirectly through funding of victim support measures) through a state fund derived from assets confiscated from organized crime. The law however which entered in force in late 2004 has so far not been adequately implemented with no clear secondary legislation and guidance on implementation issued so far. No victims of organized crime have been compensated or assisted through it so far (even though assets have been confiscated).

In conclusion, she put forward some key recommendations for action to make victims' access to compensation more effective in Albania: make law enforcement, prosecutors and judges more aware about international standards and commitments on the rights of victims of crime in general and victims of human trafficking in particular; develop and adopt clear guidelines for these state stakeholders on when and how to provide information to victims of crime about their rights and how they can access support services, including legal assistance; enhance the standing and rights of victims of crime, in particular serious and violent crime, in criminal proceedings; consider introducing automatic compensation orders in cases of victims of violent crime, including trafficking in human beings, to facilitate victims' access to justice; provide guidance to judges on the scope of both material and moral damage and on how to calculate damages; establish a state compensation fund for victims of violent crime, including victims of human trafficking; ensure that victims of human trafficking are eligible for free legal aid under the Law on Legal assistance.

In conclusion, she highlighted the following issues as key obstacles to trafficked persons' access to compensation in Albania: the absence of an explicit obligation and clear instructions to law enforcement and prosecutors to inform victims of crime about their rights, including to compensation; their lack of collection of evidence of the victim's losses and injuries suffered during investigations and prosecutions on human trafficking; the limitation of the possibility to file a compensation claim within criminal proceedings to the first stage of the investigation; the absence of a functioning legal aid system for victims of crime and the lack of trafficked persons' access to free legal aid; the general practice of judges separating compensation claims in criminal proceedings and transferring them to the civil court which has a demotivating impact on the victim and prolongs the procedure to obtain compensation; the insufficient standing (and rights) of victims of serious crime under the criminal procedure code in Albania. Judges had no guidance and little experience on how to calculate damages for the compensation of victims of crime. The enforcement of judgments, in particular compensation awards, were problematic in Albania, not just in relation to human trafficking cases, but as a general issue. Financial investigations were rarely undertaken or successful in human trafficking cases, including the seizure or confiscation of assets and property.

Discussion

Gavkhar Dhzuraeva from the Moscow based NGO Tajikistan Foundation pointed out that her Centre deals with up to 70 cases of migrant workers monthly who seek assistance in claiming unpaid wages from their employers. She noted that in case of death of a migrant worker, employers sometimes informally agreed to pay the medical costs and the return of the body to the worker's country of origin. This was mainly done to avoid spreading information about and publicity of the case. Compensation was a concept she had so far only understood in the context of cases of misconduct by state officials, for example killings of civilians by police officers. She noted that claiming compensation through court proceedings from the employer would open new possibilities for her clients.

Shivaun Scanlan from the ODIHR highlighted a case of Tajik and Uzbek workers exploited by a transport company in Poland. The workers, once in Poland, were requested to perform a different type of work from what was agreed, they were not paid as promised and were provided with substandard accommodation without heating or running water. When the workers demanded payment and the work they had been promised, they were intimidated and one worker was beaten by company staff. Some of the workers got seriously sick and needed medical treatment. With the assistance of a Polish labour law firm, 13 workers filed claims for unpaid wages and damages in the civil court. Criminal charges were also brought in relation to breach of contract and health and safety violations by the employer. The employer brought counterclaims against the workers (which put the migrant workers in difficult legal situation as their stay permit was bound to the contract to this particular employer). The role of the labor inspection which was alerted to this case and inspected the employer was unclear as the inspection did not produce any findings of serious breaches of the law. The work place inspections by the labour inspectors are document based and, as a matter of course, do not include interviews with workers. The civil cases were still pending with the employers. Interim payments were already ordered by the court and paid to some of the workers; the claims of other workers were still in the first stages of the proceedings. Recently – and very untypical for such cases - the criminal case was suspended until the civil court decisions had been reached. This case showed the complexity of human trafficking and labour exploitation and that the capacity of the authorities (police, civil courts, criminal courts, labour inspection) and civil society organizations to deal with such cases was limited. Lessons should be learned from this case in order to be able to better address cases like these in future.

Stana Buchowska from La Strada Poland pointed out that social and legal assistance in this case had only been possible thanks to funding from the ODIHR. Specialized legal assistance through labour lawyers and ad hoc accommodation for the male workers would otherwise not have been affordable. For La Strada Poland it was the first case in which they assisted a group of men exploited at work. This also meant that unknown gender and cultural issues needed to be addressed.

Marieke van Doorninck from La Strada International replied to a question on whether special compensation funds for victims of human trafficking were needed. She noted that it was important to improve existing mechanisms for compensation for all victims of crimes and make them more effective (both in court proceedings and state funds) and accessible for trafficked persons. Many countries already had state compensation funds for victims of violent crimes. There was no need to create special mechanisms for trafficked persons.

Petra Follmar-Otto highlighted that workers employed by diplomatic families face a particular obstacle in accessing justice. In Germany, out of court settlements have been reached in individual cases after lengthy negotiations between NGOs representing the victims, the Ministry of Foreign Affairs and the respective embassies. Workers who become victims of exploitation of a member of the diplomatic community are practically barred from accessing justice and exercising their right to claim compensation due to the diplomatic status of their employer. Diplomats in Germany have so far been exempted from criminal and civil liability for human trafficking.

Summary of main findings

- It is important to ensure that exploited and trafficked persons, regardless of their immigration status, have access to justice and claiming compensation. Measures should be put in place by states to guarantee that exploited and trafficked migrants with an irregular status can access justice and compensation.
- It is important that a variety of avenues for compensation exist and are accessible to exploited and trafficked persons. More effort should be made by state and civil society actors to enable trafficked and exploited persons to use existing compensation mechanisms such as through criminal proceedings, civil and labour proceedings, state funds for victims of crime. Where such mechanisms do not exist or function, efforts should be made to ensure they are effective.
- States need to make it an explicit obligation for law enforcement and prosecutors to inform exploited and trafficked persons of their rights, including their right to compensation, and enable victims to access these rights through, amongst others, free legal aid.
- Civil society organizations assisting exploited and trafficked persons need to cooperate with lawyers specialized in criminal, civil, labour and immigration law as well as trade unions in order to ensure victims have effective access to justice and remedies and that the best solution is found in the individual case.
- Training and capacity building as well as specific guidance for all relevant state stakeholders - law enforcement, prosecutors, judges - on their obligations and role in enabling victims' access to compensation is needed.
