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**Presentation to OSCE Human Dimension Implementation meeting
8th October 2008, Afternoon Session.**

Access to Justice: Compensation for Trafficked Persons.

Trafficking is largely about poverty and lack of economic opportunity. A person who has been tricked or deceived into taking up an offer of work or an opportunity to migrate for work – which, in fact, ultimately led to their exploitation either sexual or in the labour market – is usually someone who was simply seeking a chance to better the financial situation of themselves and/or their loved ones. Absence of economic opportunity (e.g. in poor countries/regions, among youth in rural areas, amongst women in vulnerable situation), provides traffickers and exploiters - armed with the “promise” of riches in big cities or in rich countries - with the perfect conditions for their criminality to flourish. Once in a situation of exploitation trafficked individuals may have several desires: to see their exploiter punished (our usual focus) But also - to get home, to regularise their status, to get out of the exploitative situation and find a better one, AND CRUCIALLY to obtain their well-deserved and hard-earned wages and financial compensation for harm they have suffered. IE: To obtain the money they had always intended to earn for themselves and their families.

In trafficking cases the nature of the exploitation is often such that a criminal conviction alone is not an adequate form of justice for the trafficked person who has spent several months in a situation of forced labour or for weeks been forced into prostitution. Other forms of restitution are necessary.

This is the basis upon which the right to compensation for trafficked persons has been established in international law. This right mainly consists of a right to claim compensation from the trafficker/exploiter and, in cases of violent crime, a right to compensation from state funds. International standards have also developed the principle that the profits made by traffickers through their exploitative activities should be used to benefit trafficked persons either individually or collectively.

In the study *Compensation for Trafficked Persons in the OSCE region*, which was commissioned by the ODIHR, we examined the implementation of this right in eight different and diverse OSCE states. We attempted to understand how this right was being implemented through the various compensation systems in place. Our findings concluded the following:

- Each country had legal possibilities for claiming compensation – as part of criminal, civil, labour, or state compensation schemes.
- Information about these schemes is often not automatically provided even to victims identified in criminal proceedings.
- In criminal proceedings the success of a claim depends on whether the accused is convicted or not. It is evidentially difficult and very high standard of proof required.
- State compensation schemes can restrict the ability of trafficked persons to access awards by establishing very narrow eligibility criteria or imposing very demanding evidence requirements.
- A claim in labour law is only possible where the national law recognizes the labour rights of that person. This can vary according to the individual's immigration status, the basis and nature of the employment contract, and whether the work is classified as “legal”.
- Legal systems are slow, difficult to navigate, and intimidating to victims especially. Often oral testimony needs to be provided to prove damage or loss. Need to confront the accused in criminal and civil cases.
- Legal advice and representation for victims are not provided systematically if at all – except the USA.

- Methods of calculating losses and damages vary hugely: between countries; between compensation scheme; and in some countries, alarmingly, between cases. High level of inconsistency in awards.
- Even in the USA where there have been a number of successful claims and high awards there is no consistent monitoring of payments by the trafficker and it is strongly suspected that payment rates are low and enforcement poor.
- Despite the existence of compensation mechanisms: few compensation claims are made by trafficked persons, even fewer are being granted and very few are actually being paid to the victim.

On the positive side:

- In the USA a compensation claim against a trafficker is an automatic part of criminal proceedings and there are a number of ancillary rights to ensure the victim is able to participate in proceedings such as legal assistance and representation, shelter and regularisation of status.
- There are national bodies that regulate labour standards e.g. labour inspectors which have the power to impose compensation or to institute actions against employers which can lead to compensation being paid, for example, for unpaid wages or for injuries at work. This type of third-party action against an exploitative employer assists trafficked persons by avoiding the need for them to pursue a case individually.
- Compensation awards arrived at by way of voluntary or mediated agreement or which are instituted through a third party (e.g. a trade union in a collective action or a labour inspectorate) have a greater chance of being paid as well as having a less traumatizing effect on the trafficked person. Therefore, methods of facilitating collective actions and mediations through state or civil society actors (e.g. NGOs or trade unions) need to be further explored.
- Payments out of state funds are usually restricted to victims of crimes of violence or where injury has been sustained. These systems usually compensate ONLY specified and proven types of financial loss - HOWEVER in France and the UK

other types of damage (such as “pain and suffering”) can also be claimed. These mechanisms are relatively straightforward in terms of procedure and they guarantee payment to victims.

Recommendations:

- Countries need to review their current compensation mechanisms and determine whether these are delivering justice to trafficked persons. In doing so consideration of the best attributes from existing schemes or practices in other countries can be imported.
- States should develop policy on compensating trafficked persons based on consultation with the individuals themselves and NGOs that represent their interests.
- Measures should include systemic and legal reform in civil, criminal and labour law so that access to justice is improved; the provision of legal aid for trafficked persons; the provision of information and support services to trafficked persons; opportunities for trafficked persons to regularize their status for the duration of a claim; strengthening the powers of labour inspectors and similar bodies to impose orders including the grant of compensation; and exploring non-litigious systems of negotiating compensation payments such as mediation.
- Advice and support services for trafficked persons should be in place. They are an essential element of the right to compensation. To pursue a claim for compensation trafficked persons must be aware of their rights and how to access them. Measures need to be in place to guarantee the security and well-being of the person for the duration of a claim procedure. This means that adequate housing, social assistance, legal advice, medical assistance and residence permits are essential ancillary rights without which access to compensation is restricted. Such assistance should ideally ensure that a person is sufficiently supported and able to come forward and provide evidence to substantiate a claim.
- NGOs and trade unions should be empowered to play a role in building a victims’ rights culture by lobbying for legal and policy reform, by developing advocacy

strategies to improve access to compensation and remedies as well as providing assistance in assistance and mediation efforts.

- NGOs themselves working in the area of trafficking would benefit from networking with other groups working with victims of crime, migrants' rights and workers' rights, as all of these groups have useful perspectives on this theme which need to be shared in order for implementation of the right to improve.
- In order for states to meet their obligations under international law it is crucial that multiple legal avenues for compensation are available to trafficked persons to maximise the chances of them being able to find a modality of claiming which suits their situation and their choices. And also to maximise the chances of them pursuing AND receiving a successful claim.
- Finally, the rule of law is crucial; a compensation system can only function as well as the judicial and administrative environment in any specific country, so it is important that a culture of independence, competence and efficiency exists, especially within the judicial and prosecutorial services. The UNDP Programme which I now work for seeks to do this through delivering comprehensive Rule of Law Programmes in numerous crisis countries with a focus on improving access to justice for ordinary people and ensuring justice for victims of sexual and gender based violence.

The situation of children remains largely unexplored in this report due to difficulties accessing detailed information. However, it is clear that wherever problems exist for trafficked persons they are probably amplified in the case of child victims. For instance, legal procedures are more intimidating to children, and advice and representation are even more greatly needed to enable them to understand the legal system and their entitlements. There are also additional issues specifically relating to children such as the need for effective systems of social work and guardianship to ensure that the grant and expenditure of any compensation money can be monitored, including ensuring that children are protected from parents or guardians who do not act in the child's best interests.