

Compensation and Trafficking Victims: The Work of Civil Society Human Dimension Implementation Meeting, Warsaw

Side Event Report 8 October 2008

Background

Compensation is an important yet often neglected part of access to justice. It is also frequently misunderstood. As the recent report *Compensation for Trafficked and Exploited Persons in the OSCE Region* (OSCE-ODIHR May 2008) documented, many states offer procedures in criminal, civil and labour law through which trafficked and exploited persons may seek compensation from offenders. A limited number also provide state-funded compensation. Despite these various routes to obtaining compensation, in practice very few victims of trafficking are actually compensated either by the state or by the offender.

The reasons are due mainly to a lack of prioritization on the part of state actors, a low level of awareness of the right by victims and advocacy organizations, and a series of procedural barriers that make enforcement difficult. Victims may not be aware of their right to claim compensation in the criminal case or may lack the legal representation to put forward a successful claim. A court may decide not to order compensation. If compensation is ordered, the offender may lack funds, sometimes due either to the state's failure to freeze or attach assets and sometimes due to the state's failure to conduct an effective financial investigation. If a victim is returned to his or her country of origin, she may find it impossible to access compensation procedures. In addition, the bulk of the proceeds may be located in the country of destination. State procedures for enforcing compensation orders are weak. Where state funds exist for victims of crime, there may be restrictions based on the nature of the offense or the citizenship or residence status of the victim. In addition, some state funds impose "moral character" requirements that might effectively bar victims of sex trafficking.

Despite these barriers, the right to offender-based compensation for victims of trafficking is recognized in a variety of international instruments, including the UN Trafficking Protocol. The European Convention on Action against Trafficking in Human Beings provides that a state must establish a means of providing compensation, either from the offender or through the establishment of a state fund. Furthermore, both the European Convention on Compensation to Victims of Violent Crime and the EU Council Directive of 29 April 2004 on compensation to crime victims provide for the establishment of state funded compensation schemes for crime victims. Compensation is increasingly on the agenda of advocacy organizations, who are doing all they can to ensure that trafficking victims are provided with the support and information needed to make the right to compensation a reality.

Panelists at the side event discussed the primary mechanisms for compensation – as a damaged party in the criminal case, as a plaintiff in a civil case, through a state-funded compensation scheme and through labour law and the work of trade unions. The panel was moderated by Alli Jernow, ODIHR consultant and author of the United States chapter of *Compensation for Trafficked and Exploited Persons*.

The panelists presented a summary of the most common means for trafficked persons to access compensation. Each also identified the practical barriers to actually receiving an award. They emphasized the importance of building bridges and alliances with organizations representing migrants and workers rights also.

Panel Participants

- Tatiana Catana, Association of Women in Legal Careers, Rehabilitation Center for Victims of Trafficking, Chisinau, Moldova;
- Amanda Kloer, Project Coordinator, American Bar Association, Commission on Domestic Violence, Washington, DC, USA;
- Jeroen Beirnaert, Project Coordinator, Forced Labour and Trafficking, International Trade Union Confederation, Brussels, Belgium
- Eleanor Taylor-Nicholson, Advocacy Coordinator, International Secretariat, Global Alliance Against Traffic in Women, Bangkok, Thailand
- Klara Skrivankova, Programme Coordinator, Anti-Slavery International, London, United Kingdom

Overview of presentations

Compensation for Trafficked Persons in Moldova

Tatiana Catana introduced the work of the Rehabilitation Center for Victims of Trafficking, with a focus on its efforts in obtaining compensation for trafficking victims as damaged or injured parties within the criminal justice system. In Moldova, a victim may attach a civil claim for compensation within the context of the criminal case. A damages award includes both financial and non-financial (sometimes referred to as “moral”) damages.

Since 2001, the Rehabilitation Center for Victims of Trafficking has provided legal and social assistance for victims of trafficking and domestic violence. The Center, which receives no government funding, has 4 branches throughout the country and 10 lawyers working full-time. Their primary legal work is filing claims for damages within the criminal case. Ms. Catana reports that the prosecutor is required to inform the victim of her right to claim compensation. Almost all of the victims they represent are sex trafficking victims, but the number of labour trafficking victims is increasing. The amounts awarded typically range from \$1-3,000.

Ms. Catana identified the following obstacles in obtaining compensation for trafficking victims:

- The offender, who is often a low-level or village recruiter, does not have sufficient assets to pay the compensation order.
- Most of the assets are usually located in countries of destination.
- International cooperation and information exchange are poor.
- It is difficult for victims to enforce compensation orders.

- In countries of destination (such as Turkey , United Arab Emirates and Western European countries), victims are not given any information about the possibility of claiming compensation.
- Only “damaged parties” are eligible to claim compensation in the criminal case. If a case is not charged as trafficking, then the victim has no right to claim compensation.

In relation to this last point, Ms. Catana has filed an application with the European Court of Human Rights after a victim was denied compensation because the prosecutor had charged “pimping” rather than “trafficking.” The decision on admissibility is pending.

Compensation for Trafficked Persons in the USA

Amanda Kloer introduced the work of the American Bar Association in training trafficking victims and organizations representing trafficking victims (including NGOs and pro bono attorneys from private law firms) about the uses of civil litigation to access justice and obtain compensation. Unlike many of the OSCE participating States, there is no concept of a civil claim attached to the criminal case in the American legal system. Although courts are required to order compensation to all victims of violent crimes, the victim does not have the status of a “damaged party” in the criminal case.

In the US, there is a specific civil cause of action under the Trafficking Victims Protection Reauthorization Act (TVPPRA). A number of cases have recently been filed under the TVPPRA. In addition, attorneys have used a variety of claims under tort and labour law to seek compensation for their clients. Damages typically include both financial and non-financial losses, including back pay and emotional pain and suffering, as well as punitive damages. These claims are all filed together in trial-level courts. There are no specialized criminal or labour courts. If a criminal case has also been filed, the civil case is held in abeyance until the conclusion of the criminal proceeding. All trafficking victims who are recognized as such by the US Government – a process known as “certification” – are entitled to free legal aid. However, those who are not recognized as victims have no such entitlement.

Ms. Kloer believes civil lawsuits are an effective means of empowering victims. Rather than simply being a passive witness in the criminal case, the victim, in choosing to file a civil lawsuit, restores her sense of agency and control.

Compensation for Trafficked Persons: The Work of Trade Unions

Jeroen Beirnaert introduced the work of ITUC in awareness-raising and capacity-building among trade unions. Their first goal is to educate trade unions generally about trafficking and their second is to stimulate trade unions to focus on compensation of trafficked and exploited workers. Primary targets are migrant workers, domestic workers, and agricultural workers. The idea is to use labour legislation to compensate victims of trafficking. Although labour legislation does not usually cover non-financial damages, Mr. Beirnaert said that sometimes workers can obtain moral damages based on claims of discrimination in employment. Trade unions also have a traditional role negotiating collective bargaining agreements with employers which determine terms and conditions at work. There are examples of

unions obtaining unpaid wages on behalf of exploited/trafficked migrants under collective agreements and seeking damages against companies for breaching the agreements.¹ According to Mr. Beirnaert, one of the chief advantages of trade union work is the possibility of sectoral improvements rather than change that is limited to the specific civil or criminal case.

Trade unions face certain barriers to increasing membership among especially vulnerable groups of workers, such as migrant workers, agricultural workers, and domestic workers. Seasonal workers especially often have difficulty joining unions. Outreach can be impeded by problems of access, language and culture. In some countries, national legislation excludes (1) specific economic sectors from labour regulation or (2) types of workers, such as irregular migrants, from labour law protection. Although at the international trade union level, the viewpoint that all migrant workers are workers is widely accepted, national unions sometimes adopt a protectionist stance, prioritizing national workers over migrant workers. Finally, Mr. Beirnaert noted a tendency to bifurcate categories into “exploited workers” versus “trafficking victim.” He pointed out that trafficking NGOs rarely build bridges with trade unions, and vice versa. This compartmentalized view disadvantages all workers and hinders the formation of productive alliances between different groups.

Compensation for Trafficked Persons: The Work of the Global Alliance against Traffic in Women

Eleanor Taylor-Nicholson introduced the work of GAATW. Her goal over the past two years’ has been to increase awareness of compensation issues. As advocacy coordinator of GAATW, she offered a global perspective. She discussed the various factors that contribute to building a victims’ rights culture, one that looked beyond the specific outcome of the criminal case and took a holistic view of the trafficking victim. She noted that in Korea, Thailand and Brazil workers have obtained compensation in labour courts. She feels that compensation is now on the agenda of trafficking advocacy organizations. In Thailand, a state compensation scheme was set up, funded by the lottery. The scheme caused division, however, when victims discovered they had been awarded widely differing amounts.

She connected the treatment of trafficked persons and their ability to access justice to general attitudes about migrants. She stressed the importance of building a culture of sensitivity to victims’ rights. For example, one recurring issue has been whether irregular workers could make claims in labour law. In Malaysia, a court reached a negative decision, but in Thailand a court came to the opposite conclusion. Ms. Taylor-Nicholson concluded that this reflected different cultural assumptions about migrant workers. In Thailand, trafficking and migrant NGOs are more active and civil society in general is given more room to develop. She also noted different country-specific mechanisms for accessing justice. For instance, the use of informal mediation in Indonesia has been successful, in part because of a lack of trust in state mechanisms.

¹ See for instance ‘Swedish union steps in for tree planters from Romania’
<http://www.bwint.org/default.asp?Index=1931&Language=EN>

Compensation for Trafficked Persons in the UK

Klara Skrivankova discussed the state compensation system in the United Kingdom and the recent awards made by the Criminal Injuries Compensation Authority to several victims of sex trafficking. CICA is a state-funded system of compensation for victims of violent crime. Awards cover both financial losses and non-financial pain and suffering. There is no explicit requirement of cooperation with law enforcement or that there be a criminal prosecution or conviction, but crime victims do have to submit documentation and the procedures can be complicated and time-consuming.

In July 2007, CICA made its first awards to trafficking victims. The recipients were two young Romanian women who had been sexually exploited for a number of years. One claimant received £66,000 and the second received £36,500. The awards covered sexual abuse and lost earnings/opportunity. The amount for lost earnings/opportunity was based on an estimate by CICA of what the victims might have earned during the period that they were held.

In the case of the trafficking victims who received awards, Ms. Skrivankova pointed out that they were all assisted by the Poppy Project (a government-funded residential program and counseling center for victims of sex trafficking) and also received pro bono representation from a private law firm. All of them had also provided witness testimony in criminal cases that led to convictions, leading Ms. Skrivankova to query whether acting as a witness might be a de facto prerequisite to receiving an award. She predicted it would be quite hard if not impossible for a trafficking victim who has been returned to her country of origin to access compensation procedures. What that means is that the CICA model, while significant because it is a non-litigious procedure and is state-funded, is of limited use for those trafficking victims who are not willing or are unable to cooperate with law enforcement or whose cases are not prosecuted.

Summary of Main Findings

- In any given country, there are typically multiple routes for trafficked persons to receive compensation. The most common are compensation as a damaged party in the criminal case; compensation from a state-funded scheme or program for victims of crime; and compensation for the trafficked person as the plaintiff in a civil lawsuit; and compensation (or awards of back pay) from labour tribunals.
- Each route to compensation, however, presents certain hurdles that may be especially difficult for a trafficked person to overcome, especially without legal representation. Compensation in a criminal case requires that there be an identified defendant whom the state has decided to charge with a crime that recognizes the right of a damaged party to compensation and, moreover, that the defendant be convicted. Actual payment of compensation will depend on the effective tracing and seizure of a defendant's assets. Similar obstacles exist in a civil case. A trafficked person who has been returned to his or her country of origin will face difficulty in receiving compensation if the offender who is criminally prosecuted or civilly charged is a low-level actor in the criminal operation and/or if the majority of assets are located in another country. A trafficked person who has been returned from the country of

destination is unlikely to receive information about how to obtain compensation in the country of destination. In terms of state compensation boards, requirements usually include that the injury result from an intentional act of violence. There might also be a de facto higher chance of success in claims from funds where the applicant has been a witness in criminal proceedings against the offender.

- In some countries compensation has been more frequently awarded through labour tribunals. Trade unions are also being encouraged to focus on compensation for trafficked and exploited workers alongside working for sectoral improvements.
- Where state mechanisms for redress are not trusted, informal mediation might provide alternative remedies for some.
- Panelists emphasized the importance of creating alliances among different groups representing workers and victims of crime. Panelists also recognized the importance of creating conditions for effective implementation of the right to compensation, such as ensuring that the trafficked person has information and legal assistance and ensuring that state actors are aware of possibilities for compensation and are able to seize and transfer assets.