

OSCE Office for Democratic Institutions and Human Rights

Extract from the 8-country study on compensation to victims of trafficking

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Introduction

The OSCE/ODIHR has identified strengthening access to justice and rights by trafficked persons in OSCE participating states as one of its main goals. An important aspect of justice and rights in its view is the payment of compensation.

The ODIHR's Handbook on National Referral Mechanisms recalls the importance of compensation to redress the rights violations experienced by trafficked persons and the restorative and preventive effects such payments may have.¹ The OSCE Action Plan to Combat Trafficking in Human Beings also recommends that states should

“consider legislative provisions for confiscation of the instruments and proceeds of trafficking and related offences” and that “the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking”.²

Assessment report

To further its aims, the OSCE/ODIHR has recently conducted an assessment in 8 countries in the OSCE region to review both the systems in place and practice on compensating trafficked persons. The countries reviewed include Albania, France, Moldova, Romania, Russia, UK, USA and Ukraine. The selected countries represent not only important origin

1 See National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons, A Practical Handbook, OSCE-ODIHR 2004.

2 Chapter III, s.1.5.

and destination countries for trafficked persons but also different legal traditions (common and civil law), Western and Eastern Europe, countries where victims' rights and compensation have a long history and countries where victims' rights are still embryonic or undeveloped. The assessment analyses the systems of compensation available in the individual countries, identifies good practices and challenges to its payment, and develops recommendations for future action for states, international organisations, NGOs and donors. The report, currently being finalised, also provides a general overview of how national frameworks of compensation are organised.

Initial findings

It recognises that compensation possibilities exist in various forms. They can exist as a payment made through a state-funded or subsidised scheme for losses experienced by a victim; they can consist of 'damages' to be paid by the person responsible for the loss or injury (a defendant or perpetrator) or 'restitution' of property as ordered by a criminal, civil or labour law court. The legal justification (or cause of action) for the compensation claim may vary in each legal or regulatory setting and the methods used to calculate the

types of loss compensated and the amount of the award may also vary. Additionally, the legal procedures and criteria used to determine eligibility for compensation are different. All of these variations can exist between different compensation systems within a country as well as between countries.

The report finds that in assessing the effectiveness of compensation systems, a particular difficulty relates to the fact that, although existing in national law, the offence of trafficking may often not be the offence prosecuted in a particular case, which in turn may impact on the victim's eligibility for compensation (such as in France). Related to this is also the issue of being identified as a victim of trafficking -- in certain countries being officially recognised as a victim of trafficking triggers a number of other rights, such as residence permits and legal aid (eg. USA), the provision of which facilitate access to compensation. Therefore, an effective and fair system of identification is seen as essential to many compensation systems. The report also finds that a compensation system is unable to function better than its overall legal environment; its effectiveness therefore reflects the adequacy of the rule of law in a particular country. Not only are

problems in relation to the independence and competence of state actors of relevance but also endemic problems such as lengthy civil procedures are seen to impact seriously on the effectiveness of compensation schemes. In such instances, focusing on improving compensation mechanisms may be a wasted effort where the core problems, requiring unrelated solutions, are not being addressed.

In some instances, the report finds that the malfunctioning of a compensation system for trafficking victims may be related to the unfamiliarity of prosecutors in dealing with the crime of trafficking (such as the relatively recent criminalisation of trafficking in many countries compared to the USA) or the novelty for the police, prosecutors and judges in using a new legal concept or power (such as 'moral damages' in Romania or asset seizure in Albania). In all jurisdictions the report shows that legal changes do not have an immediate impact on practice and sometimes the practical measures

required for their implementation (such as judicial training, guidance for prosecutors) are delayed. Also sometimes the challenges of improving an overall system of laws or procedures (eg. the system of civil claims within criminal proceedings) may prove extremely difficult when the momentum for change issues from one perspective only, such as trafficking in human beings. To reform or build a compensation system requires the commitment of a number of stakeholders (such as Ministries of Justice, Interior, judiciary) and not simply a state body dealing with trafficking issues.

Finally, the report provides an overview of the relevant international legal frameworks and the nature of the 'right to compensation', emphasising the role of the NGO community in advocating for a 'rights culture' in connection with victims of trafficking. It is expected to be finalised shortly and presented for discussion at a workshop in September.

