

# Compensation for Trafficked and Exploited Persons in the OSCE Region



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Cover photo: Rocco De Benedictis, Today photo agency, Italy. The photo was part of Fabrizio Gatti's award-winning reportage "I was a slave in Puglia" published on 7 October 2006 in the Italian weekly *L'Espresso*. Written after Gatti's week-long experience as a tomato picker in the province of Foggia in southern Italy, it depicts the exploitative working conditions foreign migrants are subjected to in an industrialized country. The reportage won the European Union's "For Diversity. Against Discrimination" journalism award in 2006.

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**Note:**

*The initial research for this report was completed by April 2007. It has since been updated with relevant developments, but this is not necessarily a comprehensive updating. This does not affect the conclusions and recommendations.*

## List of abbreviations and acronyms

<b>CCP</b>	Criminal Procedure Code
<b>ECCVVC</b>	European Convention on the Compensation of Victims of Violent Crime
<b>EU</b>	European Union
<b>IGO</b>	Inter-governmental organization
<b>ILO</b>	International Labour Organization
<b>IOM</b>	International Organization for Migration
<b>NGO</b>	Non-governmental organization
<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>OSCE PCU</b>	OSCE Project Co-ordinator in Ukraine
<b>ODIHR</b>	OSCE's Office for Democratic Institutions and Human Rights
<b>PICUM</b>	Platform for International Cooperation on Undocumented Migrants
<b>UNTOC</b>	UN Convention against Transnational Organized Crime



## Executive summary

Strengthening access to justice for victims of trafficking in human beings is one of the main programmatic objectives of the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) and the right to compensation is an important aspect of this work. The aim of this assessment is to analyse this right and how it is implemented in eight different OSCE states. It also develops recommendations to improve the ability of compensation mechanisms to deliver compensation awards to a greater number of trafficked persons and promotes a broad rights culture to support that objective. The assessment is based on desk research and questionnaires with interlocutors from non-governmental organizations (NGOs), inter-governmental organizations (IGOs) and governments in: Albania, France, Moldova, Romania, the Russian Federation, Ukraine, United Kingdom, and the United States of America. It was also presented and discussed as the background paper for an ODIHR workshop on compensating trafficked persons held in Barcelona in December 2007.

The assessment analyses the right to compensation for trafficked persons in international law through the lens of a wide range of international standards that relate to combating trafficking, the rights of crime victims, the rights of migrants, labour rights and the rights of victims of gender-based violence. It concludes that the right to compensation 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. These 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.

Although there have been some successful claims against traffickers/exploiters, they have been limited to cases where the trafficker or exploiter has been prosecuted and convicted (in a criminal claim) or had been located and sued in a civil action. Civil claims can be pursued within the criminal procedure in all of the countries analysed, except the UK. The amount of damages awarded through such claims is assessed in different ways in each country. Civil claims can also be pursued independently from a criminal case, for example where a criminal procedure is not instituted. The US is the only country where a compensation claim for the victim (known in the US as "restitution") is automatically part of the criminal proceedings in trafficking cases. There have been a significant number of cases in the US, Ukraine, and Moldova where compensation has been granted to trafficked persons using civil claims

within criminal proceedings. In the UK a compensation order can be imposed by a court within criminal proceedings as part of the penalties imposed on a convicted criminal. In practice, this has been restricted to a nominal amount.

The amounts of compensation granted in court claims vary greatly between countries and within countries. However, in all the countries there is a significant problem of compensation awards not being paid, which leaves the trafficked person with the burden of pursuing enforcement proceedings against the trafficker/exploiter. Enforcement actions are also often unsuccessful, which means that, despite the existence of several compensation mechanisms, the actual receipt of a compensation payment by a trafficked person is extremely rare.

Trafficked persons may also pursue a claim against a trafficker/exploiter through labour law 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 "legal". In addition, there are national bodies that regulate labour standards e.g. labour inspectors which have the power to institute actions against employers or refer cases to judicial bodies 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.

For the most part, all claims against the trafficker/exploiter require the trafficked person to actively participate in legal proceedings including giving oral and documentary evidence in relation to the wrongdoing and the damages and losses they have suffered. This report finds that this can be an intimidating experience, and that free legal assistance and representation is necessary to improve the individual's chances of successfully navigating the procedures and receiving an award. It is also time consuming and can be costly. Having to prove damage by evidence of past and ongoing victimization, and the titles and definitions of some of the damages categories such as "loss of dignity" can have a re-traumatizing effect on the trafficked person.

Because of these problems and the issue of awards not being paid, the assessment suggests that 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) may have a greater chance of being pursued successfully and 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.

In addition to the ability to claim from the trafficker/exploiter, in France, the UK, Romania and the US there is also the possibility to claim compensation from a state fund. Payments out of such funds are usually restricted to victims of crimes of violence or where injury has been sustained. These systems usually compensate specified types of material (financial) loss although 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. However, access to them is restricted by nationality and character requirements, which have been used to invalidate claims of trafficked persons. In the UK and France there are well-established NGOs with expertise in assisting victims in making claims from these funds.

Advice services for trafficked persons 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 also 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.

There are also a wide variety of other factors that affect the success of compensation claims: the lack of evidence available to support a claim, or the failure of laws to allow for seized assets to be used to pay compensation can significantly influence the outcome of claims. Also, difficulties in making legal claims can arise where the trafficker is prosecuted in a different country to the location of the victim or where the trafficker's assets are located in a different country from the place where the compensation is awarded. 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 report finds that civil society groups have played a crucial role in the development and implementation of the right to compensation. NGOs and trade unions have lobbied for change at national and international level, they have been the dynamic for reform at the national level, and have engaged in the supply of essential services to trafficked persons.

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.

In conclusion, while compensation mechanisms exist in all countries in this study, only a small minority of trafficked persons have made claims for compensation and been granted awards, and still fewer have actually received the compensation payment. Although it may be inevitable that a majority of trafficked persons will never claim and receive compensation, there are nevertheless a number of barriers which can be removed to improve access.

States can also do much to enhance access by ensuring that a variety of methods to secure compensation are available to all types of trafficked persons.

By way of future action, states 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 instructive in improving existing methods elsewhere. States also need to develop policy on compensating trafficked persons, which should be based on consultation with the individuals themselves and NGOs that represent their interests. Measures might include the need to undertake systemic and legal reform in the areas of 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.

NGOs and trade unions should also continue to play an important role by assessing the criminal, civil and labour laws in their countries and developing advocacy strategies to improve access to compensation and remedies as well as providing assistance in mediation efforts. NGOs working in the area of trafficking would also 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.

# 1. Introduction

## 1.1. INTRODUCTION AND BACKGROUND

The OSCE/ODIHR identifies “strengthening access to justice and rights by trafficked persons in OSCE participating States” as one of its main programmatic goals. An important aspect of this work is the payment of compensation. The ODIHR’s *Handbook on National Referral Mechanisms* includes guidance on the importance of compensation as a means of redressing the rights violations experienced by trafficked persons and its important restorative and preventive effect.<sup>1</sup> International standards on trafficking, labour rights, migrants’ rights and the rights of victims have developed the right to compensation. They have also established the principle that the profits made by traffickers through their exploitative activities should be used to benefit the trafficked persons either individually or collectively. In this regard the OSCE Action Plan to Combat Trafficking in Human Beings recommends that states should:

consider legislative provisions for confiscation of the instruments and proceeds of trafficking and related offences’ and that the ‘confiscate proceeds of trafficking will be used for the benefit of victims of trafficking.’<sup>2</sup>

Numerous research and conference reports have devoted attention to issues relating to compensation for trafficked persons. Some problems with access to compensation have already been identified. Recommendations have included: improving awareness of rights, ensuring the victim has “standing” in criminal proceedings e.g. as “injured party”; making use of the assets of the trafficker; removing limitations on access to state compensation funds; and improving the restrictions on remaining in the country (or the ability to secure representation by a third party) to pursue civil actions.

This report reviews these studies and the relevant legal standards as well as examining in detail the situation in eight countries of the OSCE region. The countries selected are Albania, France, Moldova, Romania, Russian Federation, Ukraine, United Kingdom and the United States. The analysis in this report focuses on how compensation can be accessed

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<sup>1</sup> *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons, A Practical Handbook* (OSCE/ODIHR, 2004), pp. 83–87.

<sup>2</sup> Chapter III, s1.5.

by trafficked and exploited persons through criminal, civil or labour proceedings or state compensation schemes in each country. It aims to identify good practices and make recommendations for future action.

Section 2 outlines the international standards relating to compensation, with further detail contained in the Annexes. Section 3 reviews compensation mechanisms, based on claims against the trafficker or exploiter, or from the state, and the factors that influence their effectiveness. This section also considers how the types of losses claimed can influence the outcome of a claim; the importance of enforcement and asset-seizure regimes; the impact of transnational issues on the success of claims; and the necessity of an established system of rule of law. It also highlights the major differences and commonalities between systems and some of the specific problems faced by trafficked and exploited persons when making claims. Section 4 highlights the important role of the NGO community in advocating for the rights of trafficked and exploited persons and in the provision of services. Section 5 consists of the country profiles, which provide an overview of the national legal and institutional framework; the functioning of state-funded schemes; compensation available through civil, criminal and labour law proceedings; asset seizure; and assistance to trafficked persons in each country reviewed. The country profiles also highlight good practice. Section 6 concludes with recommendations for future action.

## **1.2. METHODOLOGY**

This study is built on a desk-based analysis of laws, case reports and secondary sources relating to compensation of trafficked and exploited persons. Reports, advice, and contributions have been received from representatives of OSCE missions, prosecutors' offices, NGOs, victim lawyers and international organizations working on the rights of trafficked persons, as well as migrant rights, crime victims' rights and employment rights. Some of the responses were based on a standardized questionnaire, others were submissions elicited through interviews and feedback with the researchers. The report also formed the background paper to an OSCE/ODIHR workshop on compensating trafficked and exploited persons in Barcelona in December 2007. Comments and feedback were provided on the paper during the workshop and subsequently in writing from many of the participants. Those comments and feedback have been integrated into this report.

Eight OSCE participating States were selected for close analysis to illustrate different compensation mechanisms, to explore the challenges to making successful compensation claims, to exemplify models of good practice and to develop the overall recommendations. The ODIHR would like to thank the eight profiled participating States and the civil society actors in these countries for their cooperation in facilitating and contributing to this research. All eight participating States were given the opportunity to provide feedback on the draft report in April 2008. The ODIHR would like to thank those participating States which provided feedback. Their valuable comments have been considered and have contributed to this report.

The focus on these eight countries, however, is not intended to imply that these or the remaining states of the OSCE have perfect or imperfect systems of compensation for trafficked or exploited persons. Rather they have been selected because they represent different legal traditions (common and civil law); western and eastern Europe; old, new and prospective

members of the European Union; countries where victim's rights and compensation have a long history and countries where the rights are still embryonic or undeveloped. Substantially more detail is provided on the US as the legislative steps and compensation possibilities are more numerous and the jurisprudence more developed than elsewhere. This should be beneficial to advocates and policy makers in other countries.

Although the research provides a broad overview of the standards and procedures in each selected country, information gaps are acknowledged in this report in particular in relation to:

- a) Labour law issues: including practice in claiming unpaid or underpaid wages, unfair dismissal, discrimination, loss of holiday and sick pay entitlements, and information on cases brought in labour law by migrants.
- b) Detailed information on asset seizure and confiscation in both civil and criminal cases.
- c) Information about whether existing compensation orders and civil judgments have been enforced and paid to the victims.
- d) The challenges for children (under 18) accessing compensation for trafficking and exploitation and an analysis of what happens to their compensation monies when received. Wherever possible information has been included on these issues in the report.

The report focuses on compensation for losses and injury caused to trafficked or exploited persons by private actors. Compensation arising out of claims against the state for human rights violations are not a focus of this study. The reader should therefore bear in mind that where a state actor is responsible for trafficking or where the state has failed to protect people to the extent that this failure amounts to a human rights violation, then a victim may have a legal action against the state (e.g. in a constitutional court or in the European Court of Human Rights) and may be entitled to compensation if the claim is upheld.

### 1.3. TERMINOLOGY

#### 1.3.1. Compensation

The terms "compensation", "damages", "restitution" and "reparations" are often used to refer to the same or very similar concepts i.e. "to make amends to someone for loss, injury or wrong, especially by suitable payment".<sup>3</sup>

In this report the term "compensation" has been used to refer to the overall concept of payment to a person, regardless of the source of payment or the mechanism used or the types of losses to be compensated. Compensation thus includes awards made by state-funded schemes as well as awards made in criminal, civil or labour law proceedings.

"Damages" is used more narrowly because it refers to "the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong."<sup>4</sup> Damages

<sup>3</sup> Definition of compensation in *Chambers 21<sup>st</sup> Century Dictionary*, 2004.

<sup>4</sup> *Black's Law Dictionary* (8<sup>th</sup> ed. 2004).



thus excludes compensation where the source of the funds is a state-funded scheme so the term “damages” is used when discussing the civil and labour procedure context.

Compensation claims are made up of several different elements (e.g. pain and suffering, medical bills, and unpaid wages) or of a single element (e.g. unpaid wages). These elements can be classified in to broad categories as “moral” or “material damages” (defined further below).

Where the terms “redress”, “restitution” or “reparation” are used and defined in the international or national legal setting they are used as appropriate in that particular setting but otherwise no other meaning is ascribed.

Occasionally one of these terms has a definition in the national context that is not used in other contexts e.g. in the US “restitution” means a payment by a criminal defendant to their victim as a result of a court order but in the UK and France “restitution” means the return of goods and property to the rightful owner.

### 1.3.2. Material and moral damages

In every country different terminology is used for the elements of loss that make up a compensation claim. However, broadly speaking, compensation claims are made up of elements that fall into two separate categories: compensation for “material damages” and compensation for “moral damages.”<sup>5</sup>

“Material damages” refers to financial or pecuniary losses, e.g. medical, funeral and hospital costs, loss of future earnings and employment-related benefits, unpaid wages,<sup>6</sup> and costs of damage to property. The definition and scope of material damages in the national setting is specified in law (or through case-law precedent in common-law countries) and varies from country to country. Some compensation mechanisms enable all forms of material damages to be claimed whilst others allow only limited categories to be claimed.

“Moral damages” refers to other non-financial or non-pecuniary losses, e.g. emotional suffering, loss of reputation or “honour”, “pain and suffering”, inconvenience, loss of enjoyment of life, loss of society and companionship. Again, the definition and scope of moral damages in the national setting is specified in law (or through case-law precedent in common-law countries) and varies from country to country. Some compensation mechanisms allow for all types of moral damages to be claimed, some allow only specific types of moral damages to be claimed and others do not allow moral damages to be claimed at all.

See section 3.3. and the individual country profiles for more detail as to how different definitions of moral and material damages and their calculation affect claims for compensation for trafficked persons.

<sup>5</sup> For discussion of punitive, exemplary or aggravated damages see section 3.3. below.

<sup>6</sup> It should be noted that unpaid wages are a subsection of material damages. It is possible that in some labour claims which only claim wages the award may be called “unpaid wages”.



### 1.3.3. Trafficked and exploited persons

This report considers compensation for trafficked and exploited persons. It examines mechanisms for compensating individuals regardless of whether they have been identified as victims of trafficking or whether there is a criminal case recognizing them as a victim or injured party.<sup>7</sup> The determining factor in the use of the word trafficked or exploited person for this report is whether their experience might fall within the international definition of trafficking under Art 3 of the UNTOC Trafficking Protocol (see Annex I). A trafficked person may have to meet certain criteria in order to qualify for “victim” status in a criminal trafficking case in a given country. This in turn influences that person’s ability to claim compensation and is discussed in the country profiles. However, it is not relevant to the general way in which the word trafficked person is used here.

There are also individuals who are the victims of exploitation, as referenced under Article 3 of the Trafficking Protocol, although it may not always be clear whether the facts of their experience would meet the international or a national definition of trafficking (for instance, whether they have been brought into the country for the purpose of exploitation). These persons may include many exploited migrant workers. Certain possibilities may be open to them to obtain compensation that might be of equal interest and benefit to trafficked persons. At the same time, possibilities open to trafficked persons may benefit exploited persons. This report therefore should also provide information useful to those working with groups such as exploited migrant workers or other exploited persons, as well as providing a broader picture of the remedies available generally to trafficked persons.

There are numerous international legal documents relating to trafficking, forced labour, labour rights and standards, human rights, migrant workers’ rights and rights of victims of crime which are all relevant to this study.<sup>8</sup> The right to compensation has also been accepted as a principle in the International Criminal Court.<sup>9</sup>

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<sup>7</sup> For a discussion of some of the different agendas underpinning the identification of trafficked persons see paper presented at Alliance Against Trafficking in Persons Conference 10th -11th September, 2007, Shivaun Scanlan, “The Identification of Trafficked Persons in the Face of Conflicting Agendas” (OSCE/ODIHR).

<sup>8</sup> For a complete overview of the international legal standards and analysis with ratification table see Annex V. Although not all standards have been ratified or are applicable to all of the countries focused upon in this report, they are all relevant to the OSCE region.

<sup>9</sup> See e.g. International Criminal Court — Rome Statute (adopted 17 July 1998, entered into force 1 July 2002) Article 75 Reparations to victims: “1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79...”

## 2. The right to compensation in international law — an overview

There are numerous international instruments that potentially can be used to protect the rights of trafficked and exploited persons. Generally those instruments that protect victims of crime, trafficked persons and that deal with forced labour are more widely ratified than those seeking to protect migrant workers. These standards illustrate that, together with increasing state practice, a right to compensation exists along with certain ancillary rights such as the right to legal assistance are becoming broader. The strength of the right in a particular state is dependent on whether that state has ratified the relevant conventions. It is, however, important to remember that these standards are **minimum** standards that should be respected and that states are at liberty to introduce enhanced provisions.

### 2.1. OVERVIEW OF THE RIGHT

States parties to the United Nations Convention Against Transnational Organized Crime (UNTOC)<sup>10</sup> and Trafficking Protocol,<sup>11</sup> must ensure that at least one type of legal procedure is available to trafficked persons to access compensation. They must also ensure that victims are provided with information about that possibility. Under the UNTOC, access to compensation should be promoted across borders.

The right to compensation for trafficked persons is strengthened under the Council of Europe Convention on Action against Trafficking in Human Beings,<sup>12</sup> which provides for a right to claim compensation for both moral and material damages from the trafficker. It also provides for the right to access a state-funded compensation scheme referring to the model set out in the European Convention on the Compensation of Victims of Violent Crime

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<sup>10</sup> Adopted 15 November 2000, entered into force 29 September 2003.

<sup>11</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (Trafficking Protocol) Adopted 15 November 2000, entered into force 29 September 2003. Ratified by all countries in this study.

<sup>12</sup> Adopted 16 May 2005, entered into force 1 February 2008.

(ECCVVC).<sup>13</sup> There is also more emphasis on the ancillary rights that make compensation an effective and practical possibility such as free legal assistance.

The right to compensation from the trafficker and the state are supported by certain politically binding (or “soft law”) instruments, most importantly the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and European Union law such as the EU Council Directive on Compensation of Crime Victims.

However, the “right to compensation” from the state is defined and limited. The ECCVVC limits compensation by the state to material damages in cases where the offence was an intentional crime of violence resulting in physical or mental injury. There are also limits on eligibility, which include the need to be a victim of specific types of crimes, types of violence, and types of injury as well as satisfying criteria regarding “good character” and immigration status. These factors can render a trafficked person ineligible for compensation according to this framework. The international and European Union standards also limit the right to compensation from the state to crimes causing serious injury and crimes of violence respectively.

However, all Council of Europe members are politically bound by the Council of Europe Council of Ministers Recommendations, for example the *Recommendation Rec (2006) 8 on assistance to crime victims*, which provides substantial detail on the right and ancillary matters. There are also very similar obligations on all EU member States and OSCE participating States are subject to OSCE’s politically binding commitments. These all reinforce the right to compensation from the trafficker and an award from the state in cases of violence or serious injury.

International labour standards also assert the right to remedies including compensation in cases of forced labour and where workers’ rights and migrant workers’ rights have been abused.<sup>14</sup> They also require national labour law standards to ensure the payment of wages<sup>15</sup> and the regulation of private agencies<sup>16</sup> in a way which protects workers’ rights. This includes the provision of “adequate remedies” to workers where these rights are abused.

## 2.2. CONCLUSION

There is a right to compensation in cases of trafficking, violent crime, violence against women, for serious human rights violations, and where international labour standards are breached. However, this right is limited to compensation from the trafficker/exploiter. It ap-

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<sup>13</sup> For more detail on this convention and its limitations see below and Annex III.

<sup>14</sup> ILO Conventions 29 of 1930 and 105 of 1957 and related documents and ILO Convention 97 Migration for Employment Convention (1949) and Convention 143 Migrant Workers (Supplementary Provisions) Convention (1975).

<sup>15</sup> ILO Convention 95 on Protection of Wages.

<sup>16</sup> ILO Convention 181 on Private Employment Agencies.

plies to compensation from the state only in limited circumstances of violent crime causing physical and mental injury.

International standards have also developed the principle that the profits made by traffickers through their exploitative activities should be used to benefit the trafficked persons either individually or collectively. The international politically binding guidelines also introduce the obligation to establish a pool of recovered criminal assets to compensate trafficked persons. The specific interests of children and women are also highlighted. Where the case amounts to a gross violation of human rights, serious violation of humanitarian law or international crime (as defined by the Statute of the International Criminal Court) then there is an even stronger emphasis on the right to compensation.

### **3. Compensation — national frameworks**

The main distinction between different compensation mechanisms is whether compensation is paid to the trafficked person by the state or the wrongdoer. This section provides an overview of the available compensation mechanisms and the challenges posed for all individuals in accessing compensation from both sources. It also examines the challenges that are specific to the trafficked person in making a compensation claim. The types of losses that are compensated by a particular mechanism also impacts on the success and amount of a claim. This is reviewed along with the need for effective enforcement and asset-seizure procedures. Finally, the complications posed by transnational issues and the absence of rule of law are also discussed.

#### **3.1. COMPENSATION MECHANISMS**

Different routes to compensation exist within countries and these also differ between countries. The legal justification (or cause of action) for a compensation claim varies in each regulatory setting (e.g. in civil or labour law), the types of loss compensated and the methods used to calculate the amount of the award may also vary. Furthermore, the procedures and criteria used to determine eligibility for an award are different depending on the mechanism used. Each difference in procedure or legal standard can have an impact on the ability of the individual to make a successful claim therefore each mechanism has its own specific challenges or advantages.

It should be noted that the US is the only country in this study where compensation is mandatory for trafficking victims in criminal cases, where there is a specific cause of action in civil law relating to trafficking, and where trafficking victims are typically eligible for claims on state funds for certain types of material losses. This eligibility for compensation exists regardless of whether the trafficking offence is classified as a crime of violence (see US country profile for further detail). In all other countries trafficked persons are treated in the same way as other claimants and a claim is determined on the merits of the individual case. This has significant repercussions on the actual number of successful claims, e.g. in the UK a compensation order is not automatically considered in criminal trafficking cases and a claim on the state compensation fund is limited to violent crimes where injury has been sustained, resulting in much fewer awards than in the US (for more detail see UK country profile).

Certain features of compensation mechanisms are common to all states in the OSCE region. All such legal and administrative structures pose challenges for anyone involved in seeking a remedy including compensation. A grasp of these general features and challenges should assist an overall understanding of the advantages and disadvantages of each type of mechanism for trafficked persons.

### 3.1.1. Compensation paid by the trafficker/exploiter

The right to compensation from the trafficker/exploiter is the focus of most of the international standards on compensation. This may be achieved “voluntarily” or by compulsion.

Voluntary agreements can be arrived at as part of a mediated settlement in a collective or individual action that takes place outside of litigation (e.g. with a view to litigation); through plea agreement negotiation (e.g. in the US) or a mediated settlement in a criminal case (e.g. in France); or as a negotiated settlement during a civil or labour law case (e.g. in all countries—see examples in the country profiles for the US and the Russian Federation).

Compulsory orders are made by order of a court in criminal, civil or labour proceedings. All countries in this study allow for the possibility of making a claim using at least one of these types of legal proceedings. In such cases a court must hear all the evidence in relation to liability (fault) for the loss and in relation to the nature and amount of damages. Any order made by the court may or may not be paid voluntarily. A failure to pay may require the victim or the state to pursue enforcement proceedings. These can ultimately be unsuccessful, which means that, despite the existence of several compensation mechanisms, the actual receipt of a compensation payment by a trafficked person is, in practice, extremely rare.

Proceedings can exist alone (e.g. only a criminal case) or in combination with another claim against the wrongdoer (e.g. a criminal case and a complementary labour-law case.). Alternatively, a claim for compensation in criminal, civil or labour law could be pursued in addition to a claim from a state fund where the eligibility criteria are met.

#### *Criminal law procedures*

A criminal case is taken by the state against a suspect, and the primary aim is to establish whether or not that person is guilty of the crime being prosecuted. There is therefore a high standard of proof. Victims’ rights in criminal procedures vary widely from country to country. For example, in Ukraine a victim has extensive rights such as the right to be represented and to question witnesses, while in Albania there are no defined rights.

In some countries, such as in France, Moldova and Ukraine, a civil claim for damages can be filed by the trafficked person against the wrongdoer and appended to the criminal case. Such a claim would be calculated on the same or a similar basis to a claim in normal civil proceedings. In other countries, the court can make an order for compensation to be paid by the perpetrator at sentencing, for example *restitution orders* in the US or *compensation orders* in the UK. These types of claims in criminal procedures clearly require a victim to have been identified by the authorities and for a perpetrator to have been prosecuted and found guilty.

Civil proceedings appended to a criminal case have the dual advantage of having two procedures rolled into one and also of the prosecutor being responsible for gathering and presenting the evidence on the liability of the wrongdoer. A possible disadvantage, however, is that where these “appended” civil claims are made the civil judgment tends to “stand or fall” depending on the success of the criminal case. This means that where a decision is taken not to prosecute or where a defendant is acquitted the civil claim against the same defendant can be nullified. This occurs in Romania and Albania.

In some countries this study found that the judges appear to understand the civil claim to play a minor role as compared to the criminal case and occasionally choose to ignore it altogether (see for instance Moldova). In others, prosecutors have expressed their reluctance or unwillingness to pursue compensation claims in criminal proceedings because it gives the victim the appearance of having an ulterior or suspect motive for being a witness in the case (in the UK, Moldova and Ukraine). This opens the door for hostile questioning and suspicion by the defence or the judge and risks the prosecution failing altogether. This problem seems to have been resolved in trafficking cases in the US by making a compensation order mandatory in criminal cases and thereby removing from the victim personal responsibility for pursuing the claim.

Where a trafficked person has managed to obtain a compensation order or a civil judgment in criminal proceedings this does not necessarily mean the full losses are actually awarded. A compensation order in criminal proceedings is not always calculated on the same basis as a civil claim and may well not reflect the full extent of the losses the trafficked person has suffered. In the UK, criminal courts fix nominal (i.e. low) compensation amounts usually bearing in mind only the criminal’s assets. In the US; moral damages e.g. “pain and suffering” are not within the scope of the criminal court’s compensation award. This means the individual is not *fully* compensated and would have to pursue a civil action in addition to the criminal proceedings to recoup the remaining losses. Pursuing civil proceedings where a criminal case has already resulted in a conviction means the liability (fault) of the defendant has already been decided. The civil action needs only to finalize the damages calculation in court. Such procedures can still, however, be highly contested especially where significant amounts of money are at stake. They nevertheless present less of a burden to the individual than a civil claim that has to establish both the liability of the wrongdoer and amounts of damages.

Other difficulties may arise through the fact that there may be no legal aid available to pursue these additional damages, the trafficked person may not have permission to stay in a country or be able to secure third party representation in her place, or the wrongdoer’s assets may have disappeared or have been spent on legal fees during the criminal case. Where litigation support is available free of charge and visas/residence permits are available to trafficked persons to pursue civil claims then this may be more feasible, as in the US.



Compared with international estimates of the number of trafficked persons there are very few cases prosecuted.<sup>17</sup> Prosecuting trafficking offences is difficult because often the offender is unknown or has fled the jurisdiction, the crimes require multiple elements to be proved, there is insufficient evidence of the involuntary nature of the work, or the trafficked person is unwilling or unable to co-operate with law enforcement. In many countries the laws are recent and there is often a time lag between entry into force and implementation. Thus criminal compensation is not an avenue currently available to most trafficked persons.

### *Civil law procedures*

Trafficked persons can pursue a civil claim for compensation as a private individual on the basis of a wrongdoing that has caused them loss e.g. based in tort law (fraud, assault, imprisonment, debt), breach of contractual rights or another cause of action as defined in national law. Civil proceedings are available in all countries and can be made against the person liable for the wrongdoing which can be an individual or a corporation including an employer. However, in this study civil proceedings not connected with criminal proceedings were in little evidence except in the US. In the UK and Romania legal practitioners responded that a civil claim was not an option considered on behalf of their clients due to the difficulties of negotiating the civil legal system (expense, time) and the novelty of such an action.<sup>18</sup>

Civil claims can be taken independently of whether criminal proceedings are being pursued and sometimes have a lower standard of proof than a criminal case.<sup>19</sup> If a trafficked person decides to make a civil claim without a criminal case having been concluded then they will have to prove that the person they are suing is liable for the wrongdoing, and that the wrongdoing caused loss and damages. They will have to provide evidence of the nature and extent of the loss and damages (receipts, bills, oral testimony). They will almost always have to make court appearances and give testimony to provide evidence of these issues. This may be intimidating, re-traumatizing or impossible for certain trafficked persons.

Civil cases are also likely to be lengthy and complex cases (lasting years in some countries). They also cost money in the form of court, legal and expert's fees. Trafficked persons require

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<sup>17</sup> The estimated numbers of trafficked people globally is 2.45 million according to *A Global Alliance Against Forced Labour* (ILO, 2005) para. 56, p14. The number of prosecutions can also only be estimated (see the country reports of the US Department of State "Trafficking in Persons Report 2006") but it is clear from the few cases found in this report that the numbers of victims whose cases are prosecuted is far fewer than the estimated number of existing victims (see also pp. 19–24 of aforementioned ILO report for overview of law and enforcement). An alternative view is that the actual number of victims is much smaller than estimated see "Human Trafficking Evokes Outrage, Little Evidence", *Washington Post*, September 23 2007 at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/22/AR2007092201401.html>.

<sup>18</sup> For a further overview of the difficulties in negotiating legal systems for undocumented migrants see *Ten Ways to Protect Undocumented Migrants* (PICUM, 2005), pp. 74–76.

<sup>19</sup> Whilst in common law legal systems the criminal standard of proof ("beyond reasonable doubt") is higher than the civil standard of proof ("balance of probabilities"), this is not always the case in civil legal systems, e.g. France where the standard of proof is the same for each type of case. In any event, where the civil claim and criminal case are dealt with simultaneously, the civil claim will usually fail if the suspect is acquitted, and cannot be re-started in a separate civil procedure (see Ukraine, Moldova country profiles).



specialized legal assistance to present the case facts and legal argument to the court. These factors particularly apply in the UK where civil claims can only be pursued separately to criminal proceedings. However, where a civil case is successful the damages would normally reflect the full losses of the trafficked person including both moral and material damages as defined in national law and including these costs. Although civil proceedings may seem more accessible to a trafficked person as the police are not involved, they still require a wrongdoer to have been identified and, in order for a trafficked person to receive the money, the wrongdoer must be within the jurisdiction and financially solvent. When an order is not paid voluntarily then enforcement proceedings must be taken by the trafficked person which presents further difficulties (see section 3.4 below). All these factors limit the usefulness of civil procedures in obtaining compensation for trafficked persons. In the US, the possibility exists for “class actions” which have the merit of pursuing a case on behalf of a group of individuals without the burden of the case and procedure falling on all of those people.

#### *Labour law procedures*

A trafficked person may have rights in labour law that exist regardless of whether they have a contract or regardless of the provisions of that contract. Alternatively, the trafficked person may have an action for breach of a labour contract (oral or written) that is actionable in a labour court. These rights and contractual breaches can be enforced against a wrongdoer (e.g. the exploitative employer or trafficker) in labour courts (sometimes known as tribunals) and compensation can be claimed. Such claims can be pursued in addition to or instead of criminal proceedings.

These claims may be based on (amongst others) unpaid wages, breaches of rights relating to sick pay, holidays, work-related accidents, discrimination, non-payment of minimum wages or overtime. Compensation can be claimed for material damages such as unpaid or underpaid wages or medical bills which are substantiated by oral or documentary evidence. Compensation for moral damages such as, for example, for discrimination are either fixed by a tariff or decided according to criteria laid down in law. In common-law countries they are calculated according to legal guidance set down in case precedents (in the UK there are also tariffs for guidance and a fixed maximum limit on awards). Claims can also lead to other types of outcome such as an order for reinstatement.

For a trafficked person to actually receive a payment, these claims require a wrongdoer to be identifiable, locatable and solvent. This may limit the trafficked person’s possibilities to claim although some employers are more likely to be insured for claims against them which may improve the chances of compensation actually being paid in labour proceedings.

Labour-law claims face similar practical barriers to civil claims although they can be easier and quicker to negotiate. This is the case in the UK and France where the labour courts have more easily understandable paperwork designed for use by ordinary claimants and where the decisions are made in a forum that is less formal than a court setting. In some countries labour-law options may not be available where the form of exploitation was sexual because providing services in the sex industry (forced or otherwise) is illegal or not recognized as employment. It would not then be possible to claim unpaid wages or other labour-law in-

fringements against an employer (see for example the US where the Fair Labor Standards Act does not apply to illegal employment).<sup>20</sup>

The labour-law rights of individuals without authority to live or work in the country (which is often the case for trafficked persons), are also fraught with difficulty. In some countries the rights exist in principle but the existence of a procedure may ultimately lead to an immigration official being alerted and using the case to locate and deport the individual, as this study found occurs in France. In other states the rights of irregular workers are non-existent as the labour contracts are not regarded as legal and are therefore not enforceable in labour courts, as this study found in Romania, Russia, Ukraine, and the UK.

Difficulties may also arise in labour law where individuals are employed through subcontracting or agency arrangements and it is not clear who is liable for labour violations. This introduces legal problems such as the liabilities and responsibilities of the agency itself and/or the question of exactly whose employee the worker actually was.<sup>21</sup> This study found cases where it was possible to prove that the responsibility did not purely lie with the immediate exploiter but with those who were benefiting from the production of goods and services at a cheaper rate. In the US in the case arising out of the El Monte sweatshop in California<sup>22</sup> the principles of joint contractor liability were applied to sub-contracting relationships. In order for a claim to be successful, the advice of a lawyer would be required in order to identify the defendant who should be sued. The defendant should be legally liable and ideally also solvent or insured.

Administrative bodies such as labour inspectorates or national minimum wage councils exist in some countries<sup>23</sup> which can take *ex officio* action to investigate exploitative employers. In some countries, however, these bodies are rather weak and under-resourced and extensive recommendations have been made by the ILO on how to strengthen their general impact<sup>24</sup> and by civil society groups on strengthening their role in protecting workers re-

<sup>20</sup> However, in Germany under the Prostitution Act of 2002 a prostitute can provide services either as an “independent contractor” or as an employee with an employment contract, for instance with a brothel. Prostitutes therefore have the legal right to the payment agreed to and can take action in court against the client, when operating independently, or against their employer. See “Sex Workers Rights” Report of the European Conference on Sex Work, Human Rights, Labour and Migration Brussels (2005) at 54.

<sup>21</sup> See in this regard new EU proposal for a directive providing for sanctions against employers of illegally staying third-country nationals and provisions on joint and several liability of contractors (article 9.2).

<sup>22</sup> *Bureerong v Uvawas*, 922 F Supp 1450, 1463 (C.D. Cal.1996).

<sup>23</sup> These should be established nationally under obligations of the ILO Convention 81 on Labour Inspections, adopted 11 July 1947, entered into force 7 April 1950. Ratified by 136 states including all of those in this study. See <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C081>.

<sup>24</sup> See ILO Press Release “ILO calls for strengthening labour inspection worldwide”, 16 November 2006 and General Survey of the reports concerning the Labour Inspection Convention, 1947 (No. 81), and the Protocol the Labour Inspection Recommendation, 1947 (No. 81), the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Labour Inspection (Agriculture) Recommendation, 1969 (No. 133), International Labour Conference 95th Session, 2006.

ardless of immigration status.<sup>25</sup> In general they have powers to negotiate with employers or to refer cases to judicial bodies where there have been violations warranting judicial remedies, including compensation.<sup>26</sup> Criminal and civil penalties can be pursued in courts. As a result settlements can be reached or court referrals can lead to orders for compensation payments for individuals or groups of victims.<sup>27</sup>

In the US, the Department of Labor has powers for imposing different penalties for violations of certain labour-law standards on employers (among others the Fair Labour Standards Act and Migrant and Seasonal Agricultural Worker Protection Act (MSPA), both of which apply to trafficked persons).<sup>28</sup> For example, when Wage and Hour Division investigators encounter violations, they can recommend changes in employment practices to bring the employer into compliance, and they can request the payment of any back wages due to employees. The employers can also be criminally prosecuted in cases of wilful violation under certain conditions. The Department of Labor may also bring a civil suit against the employers for the back pay. For violations of the MSPA the Department of Labor may impose civil money penalties, back-wage assessments, and, in the case of farm labour contractors, revocation or suspension of certificates of registration. Violations may also result in civil or criminal actions instituted against any person found in violation of the Act. This means that the Department of Labor can take action to investigate violations of laws that affect trafficked persons, including those working illegally as they are also protected by labour standards (see the US profile for more detail). In addition, it has a variety of penalties that it can impose and the ability to pursue the violator in the courts if necessary. Importantly, the potential penalties include the power to revoke the employer's licence to work, which threatens the existence of their whole enterprise and therefore gives them great incentive to follow the orders of the inspectors. Consequently, individual trafficked persons may benefit from the action of the inspectors even though they themselves have not actively pursued a claim. This demonstrates that a sufficiently empowered, proactive and well resourced labour inspectorate could assist numerous trafficked persons in recovering compensation. The Department of Labor is not obliged to investigate an individual complaint, however, and its enforcement mechanisms have sometimes been criticized for being weak.<sup>29</sup>

Proactive investigations by well-resourced labour inspectorates mean the burden is not on the trafficked person to take or enforce action against employers. An individual could alert these bodies to abuses needing investigation anonymously but without having to be personally responsible for driving the matter through the courts (although this will not necessarily result in action by the inspectorate). Increasing the resources and, in some cases, the powers

<sup>25</sup> Joint comments of ETUC, PICUM and SOLIDAR on expected Commission proposals to fight “illegal” employment and exploitative working conditions, 26 April 2007 para. 5 3rd bullet point.

<sup>26</sup> See pp. 97–99 of ILO General Survey on Labour Inspectors, *op. cit.* note 24.

<sup>27</sup> *Ibid.*, paras. 303–304, p. 99.

<sup>28</sup> For more detail see Department of Labor webpages: [http://www.dol.gov/esa/regs/compliance/whd/whd\\_fs.pdf](http://www.dol.gov/esa/regs/compliance/whd/whd_fs.pdf).

<sup>29</sup> A.J. Cortes, “The H-2a Farmworker: The latest incarnation of the judicially handicapped and why the use of mediation to resolve employment disputes will improve their rights” 21 *Ohio St. J. on Disp. Resol.* 409.

of such administrative bodies could increase access to compensation for trafficked persons for labour exploitation.

Certain organizations have also argued that the existence of several agencies dealing with different aspects of labour conditions and possible exploitation overcomplicates matters. They call for the establishment of national bodies to monitor employment practices and working conditions and link all the agencies carrying out various tasks of inspection such as the “Fair Employment Commissions” advocated for by the Citizens Advice Bureau in the UK. These would establish a more co-ordinated system for investigation of complaints and inspections and pursue a proactive approach to compliance and enforcement.<sup>30</sup>

Current European Union proposals<sup>31</sup> foresee an expansion of administrative and criminal penalties on employers for employing “illegally present third country nationals”. The proposed directive provides that employers would be required to pay outstanding remuneration to illegally employed third-country nationals and that EU member states would have to put in place mechanisms to ensure that third-country nationals receive any back payment of wages even if they have left the member state. (Art. 7). Further it provides that member states should introduce mechanisms to ensure that the procedures necessary to claim outstanding remuneration are triggered automatically without the need for the individual concerned to introduce the claim.<sup>32</sup> It also provides that “a work relationship of at least 6 months duration be presumed unless the employer can prove differently” (Art 7(2)) and for the possibility of being granted a temporary residence permit as already exists under EU law for victims of human trafficking<sup>33</sup> who co-operate with the authorities in cases of “particularly exploitative working conditions” (Art 14.3) and in such cases their return should be postponed until they have actually received back payment of their remuneration (Art 7(4)). It further includes an interesting provision on subcontracting chains placing liability for financial penalties, including any back payments due, with other contractors in the chain (article 9). To facilitate complaints, the proposed directive also provides that mechanisms should be provided through which complaints can be lodged against employers directly or through third parties. Importantly here it provides that:

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<sup>30</sup> See *Trafficking for Forced Labour in Europe: Report on a study in UK, Ireland, the Czech Republic and Portugal* (Anti-Slavery International, September 2006) at 12.

<sup>31</sup> Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, 16 May 2007, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007PC0249:EN:NOT>.

<sup>32</sup> It should be noted that a draft Ministerial Council decision on trafficking for labour exploitation of the OSCE (November 2007) also included reference to this principle of automatic payment of penalties for exploited persons, to remove the burden of seeking payment from the individual. However, subsequent drafts of the decision have removed reference to this principle.

<sup>33</sup> EU Council directive 2004/81/EC of 29 April 2004 on residence permits issued to third-country nationals who are victims of trafficking or who have been the subject of an action to facilitate illegal immigration or who co-operate with the competent authorities.

Member States shall not impose sanctions against designated third parties providing assistance to the third-country national to lodge complaints, on the grounds of facilitation of unauthorised residence. (Art 14.2).

Despite the minimal protections for third-country migrant workers provided in the proposal, it has been criticized for being potentially discriminatory and imposing such a great burden on employers that the impact on migrants will be negative overall.<sup>34</sup> It is proposed that a more adequate response to the employment of illegal foreigners would be to simplify procedures for issuing work visas and to enable them to work legally.<sup>35</sup>

#### *Concluding comments on compensation from the trafficker/exploiter*

The possibility to make a claim for compensation against the trafficker/exploiter exists in a variety of forms and can lead to substantial awards reflecting at least part of the losses experienced by the trafficked person. However, in all types of claims against a trafficker, the knowledge that a claim for compensation will usually require testifying against that person in court will often be a major disincentive to the claimant. This has been noted in Russia, Albania and Moldova. The procedures are also often lengthy and may require forms of evidence which the person is unable to furnish.

From the outset a trafficked person may also be justifiably cynical about the prospects of assets being available to pay any compensation order since a trafficker may have disposed of or hidden their assets in advance or in the course of a legal procedure. Alternatively the trafficker may have spent all their funds on their own legal fees in defending a criminal or civil suit and be left with nothing, as occurs in the US. There is equally the possibility that the trafficker may never have had sufficient assets in any event (especially if they have a minor role in the trafficking chain e.g. as a recruiter — see the cases in Ukraine, or if they are a small-scale business — see the US country profile.)

A trafficked person may decide to pursue a claim through any of the above processes but find that the actual award is humiliatingly low or not reflective of their losses, leaving them with a sense of injustice (see e.g. the extremely low awards made in criminal proceedings in the UK, which are substantially below the tariffs for pain and suffering that would be awarded in the civil courts or by the state scheme). There are great disparities internationally as to how compensation is calculated and awards vary even in relative terms. This study found that compensation awards in the UK criminal courts are especially low compared to those in the US and Ukraine.

Where state agencies such as labour inspectorates are adequately resourced they can uncover cases of rights violations and have the ability to negotiate a settlement between employers and employees or refer their evidence, their findings and group or individual claims to the

<sup>34</sup> Sergio Carrera and Elspeth Guild, *An EU Framework on Sanctions against Employers of Irregular Immigrants: some reflections on the scope, features and added value*, Policy Brief No. 140, (Centre for European Policy Studies, August 2007).

<sup>35</sup> *Ibid.*, p. 6.

courts thereby reducing the pressure on individuals or groups to pursue the claim themselves. Also, compensation claims that are dealt with by way of negotiated resolution through mediation or alternative dispute resolution are more likely to be paid by the wrongdoer as the settlements are agreed voluntarily in a non-litigious setting. Such schemes avoid the need for lengthy, expensive and alienating litigation and have the benefit that they can agree settlements for a number of trafficked persons through collective action e.g. a group of employees rather than having to pursue their own claims as individual victims. Trade unions, NGOs, lawyers and mediation agencies (such as ACAS<sup>36</sup> or the Citizen's Advice Bureau in the UK) have all played a significant role in negotiating such settlements. Trafficked and exploited persons still require assistance with pursuing such claims but these mechanisms are worth exploring in countries that have not already established them. They are usually developed within the civil- and labour-law setting to prevent the need for lengthy and expensive litigation. However, if used more frequently they could prove to be more inviting as justice mechanisms given the constraints of full litigation.<sup>37</sup>

Hence, although it may be technically possible to pursue the trafficker and secure an order that s/he pay compensation to the victim, this study found that an exclusive focus on the trafficked person suing the wrongdoer as the main source of compensation is affecting the numbers of individuals claiming or receiving compensation through judicial proceedings.

### 3.1.2. Compensation paid by the state

Compensation can also be *paid by the state* through a state administered and funded scheme.

Some countries have established these schemes, usually for victims of violent crime as in France, Romania, and the UK and as proposed in Ukraine. State funded or subsidized compensation schemes have the advantage of providing a guaranteed payment of compensation to the victim. This often includes the possibility of making an interim or urgent payment. Some schemes specifically allow the state to inherit (from the victim) the right to sue the defendant for reimbursement, as is the case in France and Ukraine. This measure retains the "moral" and punitive element of compensation schemes. An additional advantage of such schemes is that it is not necessary to locate or identify a specific wrongdoer. A police report together with a willingness to assist the police with the investigation will usually be sufficient.

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<sup>36</sup> <http://www.acas.org.uk>.

<sup>37</sup> It should also be noted that the conclusion of collective agreements, regarding working conditions and terms of employment, between representatives of workers and employers in work sectors prone to exploitation could provide an alternative means of protecting trafficked or exploited persons. The role of collective agreements has not been explored in this study, but should also be considered. For further information on international labour standards on collective bargaining and collective agreements see <http://www.ilo.org>.



State schemes may also be relatively streamlined, un-bureaucratic and quicker than civil proceedings. For example, in the UK and France there are agencies in place to assist victims with applications, and the procedures are straightforward and accessible. However, they often have restrictive eligibility criteria based on nationality or residency status, which a trafficked person may not be able to satisfy (see Romania where the nationality requirement is restricted to Romanians, those lawfully on Romanian territory and those nationals of countries with which Romania is bound by conventions). They may also only be available for victims of certain categories of crime such as certain specified offences or crimes of violence (in the UK and France) These criteria can put unreasonable barriers in the way of trafficked persons making claims.

Despite suffering trauma, exploitation and economic loss, the victim may not have suffered violence in the course of a trafficking event which would render them ineligible for most state-funded compensation schemes for crime victims. Widening eligibility to such schemes by basing it on the classification of the victim's experience as trafficking rather than on the experience of violence should automatically enable a victim to make a claim. (For further on this see discussion in the Annex III) This is the case in France, although in practice there has been only one trafficking case identified and prosecuted. The nature of that person's trafficking experience and the losses sustained would then determine the amount of damages.

Finally, the award granted by the state may not cover all the damages available in civil claims, for example it may not pay moral damages such as in Ukraine and in Romania. They may restrict the amount available by awarding according to a fixed tariff, as in the UK, thereby leaving the victim with a choice of being satisfied with a lower award or having to sue the defendant for the remainder in a civil court.

In some countries special schemes or funds have been established for victims of particular types of crime. This is mainly the case for victims of terrorist acts (see *Fonds de Garantie* in France<sup>38</sup> or the International Terrorism Victim Expense Reimbursement Program and the 9/11 Victim Compensation Fund<sup>39</sup> in the US) and their motivation is to ensure that death and serious injuries are compensated where there is no realistic prospect of a civil claim. Some advocates for trafficked persons may feel such a specific scheme is appropriate for trafficking cases especially where the number of practical and legal barriers to accessing compensation seem too numerous or onerous to overcome. However, the international legal standards negotiated by states do not recognize the right of all trafficked persons to state-

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<sup>38</sup> Law of 9 September 1986.

<sup>39</sup> "The 9/11 Fund was enacted ...with the stated goals of providing compensation and a no-fault alternative to tort litigation to individuals and their families who were killed or injured as a result of the attacks. In exchange for waiving their rights to sue, families of those killed in the attacks and those injured as a result were promised 'swift, inexpensive and predictable resolution of claims. Victims would receive full compensation. Awards would be funded by the US Treasury, with no limit placed on the total program budget. In this sense, the 9/11 Fund represented an unprecedented expenditure of public funding for compensation of victims of violent criminal wrongdoing." 79 *Tulane Law Review* 167, 197 (November 2004).

funded compensation whereas the standards on terrorism are stronger.<sup>40</sup> Furthermore, the moral justification for singling out trafficked persons rather than victims of other serious and humiliating crimes is not immediately obvious.

Another approach is that although these state-funded mechanisms have been established mainly to pay compensation to victims of violent crimes, there could conceivably be similar systems for victims of other forms of wrongdoing (e.g. those who have suffered wrongs in civil or labour law or for undocumented migrant workers who do not have a claim in another setting). Making a claim possible on a different basis to that of “crime victim” would prevent the need for a report to be made to the police which many victims may be reluctant to do for various reasons. It also means that those victims who are not aware they are victims of a crime but realize they have been done an injustice (e.g. not paid their wages) have a forum in which to make a claim. Given that state schemes in general have fewer procedural requirements they are more accessible to all victims, especially trafficking victims, and have the additional benefit of guaranteeing payment. Any form of state-funded mechanism specifically focusing on trafficked victims would need an efficient and fair identification procedure in line with international standards as well as an acceptable mechanism for calculating damages (for more on damages see 3.3).

State schemes are also expensive, both in terms of administrative costs and actual payment of compensation awards (see UK profile for an overview of the budget). Governments may consider it preferable to invest this money into other activities aimed at strengthening the rule of law or assisting trafficked persons generally. The situation of each state is different in terms of international legal obligations, and reform priorities will vary. However, the budgetary implications of such schemes must be considered by proponents of compensation for trafficked persons when deciding which types of schemes or reforms to advocate for.

### **3.2. SPECIFIC FACTORS TO CONSIDER IN TRAFFICKING CASES**

A number of factors may inhibit trafficked persons from seeking compensation.

In order to benefit from any form of compensation, trafficked persons need to be aware of their rights and be in a position to assert them. They may experience particular difficulties that may not apply to others who have been the victim of crime or suffered loss or damage. As most trafficked persons are foreigners in the country where they are entitled to make a claim they are less likely to know of their rights or will never exercise sufficient freedom to learn of them. This also presents more difficulties in trying to report their trafficker or to make a claim. At the same time those in a position to assist trafficked and exploited persons are also not always well informed of the rights and entitlements due. This means that information about how to access justice and the actual mechanisms for doing this need to be readily available in ways that are appropriate to trafficked persons especially those from other countries. The outreach activities of NGOs, trade unions or migrant communities may be

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<sup>40</sup> See e.g. Art. 13 European Convention on the Prevention of Terrorism adopted 16 May 2005, entered into force 1 June 2007.



particularly useful in this regard. This study found very little evidence of state activities to raise awareness about the right to compensation, compensation mechanisms or other types of justice mechanisms such as labour rights and labour courts.

Also, given the degree of trauma frequently suffered by trafficked persons, compensation claims will be hampered where victims are unsure of physical security, fear expulsion or lack medical and psychological support and shelter.<sup>41</sup>

Fear is perhaps one of the biggest obstacles... undocumented workers are often afraid to use governmental mechanisms to file a complaint, for fear that their irregular status might become known and would cause them to be deported. They also might fear that speaking out against an abusive employer would have negative repercussions for family members and/or friends who may be working for the same employer.<sup>42</sup>

The trafficked person may be unwilling or reluctant to enter a legal process that requires them to emphasize and prove their past, current and future physical and psychological damage at a time when they are attempting to rehabilitate their lives. Any evidence of damage will enhance the amount of a compensation award but has the effect of emphasizing trauma, which can be disempowering.<sup>43</sup>

Support services, mainly provided by NGOs, exist in all of the countries reviewed for this study. However their impact is limited because they are small scale; they focus almost exclusively on victims of sexual exploitation (see e.g. in the UK where the only shelter specifically for trafficked persons is available only to victims of sexual exploitation); they are underfunded or reliant on international donors; or there is an absence of formal recognition and co-operation agreements with the state. In Moldova and Russia these factors have impacted on the work of the NGOs advising and representing trafficked persons.

Currently it is likely that victims will not learn of their rights until they come into contact with an advice agency, social services, health care worker, trade union, NGO, or a state official such as a police officer, labour inspector or immigration official. Even then they will not necessarily be informed of their rights in a way they can understand, either because of linguistic or cultural barriers or because the relevant actors are ill informed. These problems have been demonstrated in Russia and Moldova where the language used by the police to explain victims' rights is too complex and the time devoted to the task is too short. At the same time, a recent OSCE meeting of civil society organizations working on labour-exploitation issues reported that many in a position to identify and assist exploited persons are not aware of the rights and entitlements of such persons and more needs to be done to raise

<sup>41</sup> See *op. cit.* note 26, para. 5 final bullet point. See also *Trafficking for labour and sexual exploitation in Germany* (ILO, 2005), pp. 17–47.

<sup>42</sup> *Op. cit.* note 18, PICUM, *Ten Ways*, p. 74.

<sup>43</sup> Julie Barton of The Poppy Project, UK to the ODIHR Anti-Trafficking Programme Workshop on Compensating Trafficked and Exploited Persons, Barcelona, December 10–12 2007.

awareness of these “frontline” actors.<sup>44</sup> This study also shows that where rights are explained it is best done in an accessible format (e.g. information leaflet in a language known to victim or through a translator) and without the obligation to make a quick decision. Such simple measures allow the trafficked person to make an informed decision about their rights and could make a significant difference to their willingness to pursue a claim.

Also, when a victim comes into contact with advice services and state officials it is important that state officials are obliged by law to provide information about compensation possibilities to the victim. This is not the case in Albania where there are no known compensation claims appended to criminal trafficking cases.

Problems have also occurred for example in the UK where victims have been returned to their country of origin and efforts to gather evidence of their claim are seriously impeded by linguistic and bureaucratic barriers. It is extremely difficult to pursue compensation claims from outside the country, so services and systems ideally need to be in place in all destination countries to promote access to justice. Where the victim has no choice but to return or wishes to return without delay then legal representation needs to be secured so that a person can be represented in their absence.

Legal systems and rights are usually so complex that a lawyer is required to advise and represent a victim. This study shows that, although free legal aid is essential to improving access to justice, it is rarely available. Occasionally legal assistance is available to victims in criminal cases, such as in the US, or to be advised but not represented on labour rights such as in the UK. However, no states guarantee a comprehensive service to victims. This emphasizes the importance of the provision of free legal assistance that is capable of advising victims on all aspects of compensation and related issues. Alternatively, it also demonstrates that compensation mechanisms should be less complex and more accessible, and/or alternative systems need to be devised that are simpler or where the victim is not necessarily required to be the driving force behind a claim.

Additional difficulties with securing compensation arise from the fact that few trafficking cases are prosecuted compared to the number of victims (see footnote 16). Even where criminal investigations take place the specific offence of trafficking in persons, while existing in national law, may not be the offence prosecuted in a particular case. In France it is the offence of trafficking which triggers the right to state compensation but that offence is usually not prosecuted but replaced by a related offence.

Other disincentives to making a claim include the shame of admitting involvement in commercial sex or of having been exploited in a labour situation. Individuals may not wish to admit their situation to close family and friends. Some may also be scared to approach the authorities or assisting agency because of fear of retribution against family members in their

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<sup>44</sup> See “Report on Civil Society Meeting, Warsaw 24th April 2007: The NRM approach to Labour Trafficking and its Application to Trafficking for Labour Exploitation” (OSCE/ODIHR, 2007).

place of origin.<sup>45</sup> In Russia it has been noted that some trafficked persons focus on their immediate urgent needs for security, stability, food, shelter, work and a durable immigration status, and it takes some time before they are able to consider justice in the form of compensation claims.

Significantly, “trafficking victim” may be a label which a mistreated or exploited worker does not apply to himself or herself. Such workers may not consider taking action to obtain criminal sanctions against their employer/exploiter but be more inclined to seek justice e.g. for abuses in the workplace.<sup>46</sup> They may be eligible to make a claim for damages, however; through various actions in labour law e.g. that they are owed wages, or are subject to unsafe working conditions or discrimination. This avenue may also apply to those workers whose situation does not meet the legal definition of trafficking or those who are classified as crime victims but wish to pursue a labour law claim in addition to the criminal case. In the UK a claim against an employer in an industrial tribunal can be pursued in addition to a criminal case.

A related issue is the difficulty of the correct identification of a trafficked person. In certain countries being officially recognized as a victim of trafficking triggers a number of other rights that may not otherwise be available, such as residency permits and access to legal aid as in the US or eligibility for state compensation as in France. An effective and fair system of identification is clearly therefore an essential complementary feature to many compensation mechanisms. These are currently inefficient in most of the countries studied here, although in the US the use of professional victim advocates in police and prosecutors’ offices has been of great assistance. These officials assist law enforcement and prosecutors in interviewing potential victims, making credibility determinations, helping victims to access services, and keeping victims and other witnesses informed of case developments. Such a scheme could be replicated in other countries and in other parts of the legal and regulatory system such as labour inspectorates.

### 3.3. TYPES OF LOSS AND INJURY

Compensation is only paid to someone who has suffered a loss or injury. These losses and injuries usually have to be proved by presenting evidence. The specific types of losses and injuries experienced by a trafficked person may not always fit into the categories of damages envisaged by the available compensation schemes.

A compensation claim made by a trafficked person would typically be made up of several elements, which fall under the broad categories of “moral” (non-pecuniary) and “material” (pecuniary) damages (see section 1.3 Terminology). For example, a victim may claim pain and suffering due to physical or psychological violence (moral damages) and specified

<sup>45</sup> See cases of trafficking for forced labour in the sex industry reported in *Trafficking for labour and sexual exploitation in Germany* (ILO, 2005) pp. 17–21.

<sup>46</sup> See *op. cit.* note 45 “Report on Civil Society Meeting”, which found that many severely exploited persons do not consider themselves “victims”.

medical expenses (material damages). However, the compensation mechanism may only reimburse the material damages element or may make only a nominal payment for moral damages.

In assessing whether a victim will be awarded compensation, consideration will be given to a number of factors: the nature and extent of the loss, damage or injury; whether the available compensation mechanism will compensate those types of loss; whether there is an upper or lower limit on compensation awards; whether the victim can substantiate that loss with evidence and the strength of that evidence. These factors affect the victim's eligibility to make a claim, the nature of the claim, and the amount awarded.

Some compensation schemes specify that they compensate only "material damages" or they limit the reimbursable losses to certain specific types of "material damages". For example, in Albanian civil proceedings appended to a criminal case, claims for moral damages are not permitted. In the US and the UK, state subsidized compensation schemes only reimburse certain specified types of material damages and not all material damages (for exhaustive lists see country profiles e.g. in Romania compensation payments from the state scheme cover hospitalization costs, medical expenses, funeral expenses, damage to particular goods that have a market value, loss of income, maintenance of dependents). Other material losses may be sustained by trafficking victims that do not fall into the categories envisaged by existing compensation mechanisms. These could consist of e.g. unpaid wages, "fees" paid to recruitment agencies, "fines" imposed by traffickers for bad behaviour, or excessive, fraudulent or illegal "deductions" from wages for rent, subsistence, transport, tax or social security "payments". Such categories of material damages arising from the exploitation itself will not always be reimbursable by compensation schemes that have set strict limitations on which material damages they will pay. These limitations are derived from the original purpose of those schemes, which was to compensate injury from violent crime, and they have not been revised to deal with the kind of factual complexity that a trafficking case may present.

When awards are made to reimburse material damages they will usually reflect the actual loss claimed but the amounts would normally have to be evidenced in testimony or in receipts and other documentation. Trafficked persons will almost always have difficulty in proving their material damages especially if they arose in the course of the trafficking experience.<sup>47</sup> It is important therefore that compensation schemes accept the victim's oral or written statement as sufficient evidence to prove a claim (see for example Ukraine where written documentary evidence of losses is required and compare with the US where oral testimony can suffice). Due to this overriding need to provide evidence, one NGO counsels those advising undocumented migrants to assist them with creative ways of establishing this evidence through taking photos and giving descriptions of the workplace, finding witnesses, and producing uniforms and other equipment the worker has been provided with.<sup>48</sup>

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<sup>47</sup> *Op. cit.* note 18, PICUM, *Ten Ways*, pp. 74–75.

<sup>48</sup> *Ibid.*, p. 90.

“Moral damages” are also defined and calculated in different ways in different legal systems. For example they are calculated according to guidance given to judges by policy makers in the UK, through case precedent (UK and US), without any guidance or consistency but judges deciding and fixing amounts which seem appropriate (see Moldova and Ukraine). In Romania and other countries in transition from communism the concept is fairly underdeveloped having only been recently reintroduced into civil codes. As with material damages, the specific categories of moral damages and the nature of the evidence required to prove them will vary between countries and between compensation schemes. It is almost always the case that “pain and suffering” caused by physical or psychological injury should be evidenced by a medical or psychiatric report, which a victim would have to obtain themselves or via legal aid or through an NGO.<sup>49</sup> In some cases types of moral damages are given names and definitions that have connotations trafficked persons might wish to avoid, e.g. “loss of reputation” or damage to “honour”, especially as they attempt to preserve or rebuild their lives with a sense of dignity.<sup>50</sup>

Trafficked persons, especially those subject to sexual exploitation, are much more likely to be able to demonstrate a claim for moral rather than material damages especially in Eastern and Central Europe. This is because a claim for unpaid wages for provision of sexual services will not be accepted by the court where the activity itself is deemed illegal or immoral. However, a claim for moral damages in the process of sexual exploitation can be sustained more easily although in Ukraine trafficked women who knowingly entered the sex industry have had their damages awards reduced regardless of the seriousness of the exploitation they suffered. This means that if moral damages are not awarded by a particular compensation mechanism and/or the concept is underdeveloped, inconsistent or unrecognized then the claim may be rejected or undervalued (this occurs in Albania, Moldova, Ukraine and Romania).

Aggravated, exemplary or punitive damages may be available to trafficking victims in addition to moral and material damages in some countries (e.g. in UK and US they consist of a multiplier applied to all or part of the damages award) or under different causes of action (e.g. “treble damages” awarded under law based on the Racketeer Influenced and Corrupt Organizations Act (RICO) in the US). They usually function to punish a wrongdoer for particularly outrageous conduct and can be related to the wealth of the wrongdoer. They can therefore act as a deterrent. These concepts are unknown in other legal systems but they could be considered where the types of actions being compensated warrant a particularly punitive response as a matter of public policy.

Compensation of the unjustly earned profits or benefits obtained by an exploiter or trafficker is yet to be explored in the countries surveyed here, although it is considered in the US. For instance under the mandatory restitution provisions of the Trafficking Victims Protec-

<sup>49</sup> The OSCE/ODIHR is currently supporting the development of a mechanism in Romania through the NGO Alternative Sociali for evaluating the psychological trauma of trafficking on victims, which would be used to assess moral damages in compensation claims.

<sup>50</sup> Contribution of Natalia Ieseanu, Committee for civil rights of prostitutes in Italy (TAMPEP), ODIHR Barcelona Workshop, December 2007 see above note 44.

tion Act in the US, criminal compensation for lost wages is calculated as the greater of either “the gross income or value to the defendant of the victim’s services or labour or the value of the victim’s labour as guaranteed” so these two theories of compensation for lost wages include some notion of the value of the victim’s work to the defendant.

When making a compensation claim a trafficking victim needs advice on identifying all the types of losses they have experienced and in obtaining evidence of those losses. Compensation schemes may not reimburse the whole amount as they may have limits on the types of damages granted and the way they are calculated. Some schemes may award only notional payments, which do not reflect the actual loss, whereas others may simply award fixed amounts for certain types of wrong (see UK). A state scheme may function more efficiently where the compensation is fixed by a tariff although an individual victim may not feel this fairly represents their losses.

#### **3.4. ENFORCEMENT AND ASSET SEIZURE**

Where compensation is ordered to be paid by a wrongdoer, measures often need to be taken to ensure that the award will be paid. Where a claim is made against an insured party such as an employer or a defendant with “deep pockets” such as a wealthy contractor, an award is more likely to be paid and enforcement may not be necessary. However, asset seizure measures available at the outset of a criminal investigation or during a civil claim can be instrumental in securing payment

Where a defendant refuses to pay an order voluntarily then enforcement measures are necessary to secure payment. Collection and enforcement techniques vary considerably in their impact and efficiency depending on the circumstances of the case and on the wrongdoer (e.g. whether they own property that can be seized) and on the technique being used, for example a further criminal penalty can be imposed where a criminal compensation order is not paid (see UK); measures can be taken to make deductions from salary or social security payments at source (see France and UK); or an executing body such as bailiffs can be used to seize goods and realize their value (most countries). In France there has been a case of a judge holding an amount equivalent to the foreseen compensation through a civil damages claim as condition for granting bail. The success rates of collection and enforcement of court orders are not systematically monitored in any of the countries in this study. Different methods are used across countries.

Victims themselves must take action to execute an order because it is regarded as an issue of private law (as in France). It may also cost money. Such action may also be impossible for victims given the legal and procedural requirements necessary. Generally the bodies responsible for enforcement are separate to the courts that make the orders. The bureaucracy and expense of enforcement can prove impossible to negotiate and a victim may ultimately receive no payment.

Enforcement measures are not necessary where assets have been frozen or seized at the outset of a case. Asset freezing, seizure and confiscation law is complex. Certain measures are



obligatory to states parties to the UN Convention on Transnational Organized Crime “to the greatest extent possible in the domestic legal systems”<sup>51</sup> in relation to criminal investigation of serious, transnational, organized crime as defined in that Convention.<sup>52</sup> Separate powers usually exist in criminal and civil law to trace and freeze assets at the outset of a case, and later, to confiscate assets if the case is found to be proven.

Some countries have introduced new powers for the state to seize assets at the outset of a criminal case (as is the case in Albania and UK). The full powers of the state can therefore be used to trace the assets of a defendant including the information obtained from the defendant and intelligence gathered in the investigation. However, the usefulness of these powers can be limited by a number of factors. These include: the extent to which state officials are able and willing to spend time and effort on asset identification and tracing; the effectiveness of national record keeping in relation to e.g. bank accounts, shares and property; the existence and effectiveness of national money-laundering regulations; the expense and relative value of the exercise in a particular case; and the degree to which these powers can be exercised within the parameters of the legitimate human and civil rights of the individual defendant. There are human and civil rights issues relating to asset seizure that should be considered by those lobbying for increased powers as a solution to the problems of compensation enforcement.<sup>53</sup> In the US, there is a perception that “pre-trial freezing of assets is tantamount to a seizure of property without due process”<sup>54</sup> and there are constitutional (fourth amendment) protections against the taking of property without procedural protections.

In a civil case asset tracing, freezing and seizure powers need to be exercised by a private individual as a civil case against a trafficking defendant is usually a private action.<sup>55</sup> The exercise of such powers will usually be overseen by a civil judge. The powers, if they exist, are more limited than those of the state and the court will exercise greater discretion in authorizing them to be used. (For example, they may limit the order to an amount equivalent to the damages claimed rather than “all assets”, and they may authorize “search” powers or tracing powers only in very limited circumstance where the plaintiffs can show a strong risk that assets will be disposed of— see the UK country profile for more detail.). These processes are also expensive in terms of legal fees and related costs, and legal aid will not necessarily be available to pay for all of the costs of such an action.

Where assets can be traced and seized or frozen, then powers need to exist to actually confiscate them in order to achieve payment of a civil judgment or compensation order. In a civil case the confiscation is usually limited to the value of the damages awarded but in a crim-

<sup>51</sup> Art.12.

<sup>52</sup> Art.3.

<sup>53</sup> 2001/2 Joint Committee on Human Rights of the UK Parliament report on reviewing the Proceeds of Crime Bill.

<sup>54</sup> *United States Attorneys’ Manual*, Sec. 2084.

<sup>55</sup> The civil powers may be stronger when exercised by the state against a private individual than between private individuals.

inal case all assets arising from the crime or general criminal activity may be confiscated depending on the regulations in that jurisdiction. There must therefore be an explicit legal linkage between the confiscated assets and the payment of compensation orders (see the laws in UK and Albania). Where this does not exist it can inhibit or delay the compensation payment. Alternatively all or some of the seized assets could be used to establish or contribute to a fund to make compensation payments to victims of crime or trafficking specifically (as suggested by the law in Albania and section 3.1.2 above).

Art 14 (2) UNTOC, the OSCE, UNHCHR and Council of Europe all recommend the use of criminal assets to compensate victims or establish funds for victim support or rehabilitation (see section 3). This could take on various forms e.g. to establish or contribute criminal assets to a general fund to compensate all victims of crime; to establish or contribute to a general fund of traffickers' assets for compensation to all trafficked persons; to use an individual trafficker's assets to compensate the trafficker's own victims; to use the funds to provide services or support to trafficked persons or victims of crime generally; or any combination of the above. It should be noted, however, that establishing a scheme for general victim support does not meet the international legal requirement for effective compensation mechanisms for an individual victim.

Finally, these issues are only relevant where the defendant has assets or is likely to have assets in the future (the period when a judgment can be enforced) although that is dependent on national collection techniques. In France the law allows for compensation to be paid from allowances and wages received from the state while the defendant is a prisoner.

None of the countries surveyed for this study have yet managed to ensure asset tracing, seizure and confiscation practices that ensure victims receive compensation payments nor to establish state funds for assistance to trafficked persons. (In the UK a high profile government agency responsible for criminal asset seizure has been widely criticized for failing to do its job and not delivering value for money—see UK country profile). They have also not established effective enforcement of compensation orders either because of weak enforcement procedures, non-existent, weak or under-used asset seizure powers or both. It is technically and practically difficult to make improvements in these areas and is also dependent on the general rule of law and budgetary contexts. However, the issues are highlighted here as they are closely connected with the effective implementation of compensation mechanisms.

### **3.5. CHALLENGES OF TRANSNATIONAL CLAIMS AND JURISDICTION ISSUES**

Specific challenges are posed by the transnational nature of trafficking in human beings. Victims who have changed jurisdiction from the location of the crime or since their identification as trafficked persons face clear practical difficulties in pursuing a compensation claim across borders. They also face difficulties when a trafficker is transferred to another jurisdiction for prosecution or a criminal or defendant in civil/labour law suit has assets located mainly outside the territory. These problems increase where the countries in question are not bound by co-operation agreements on the subject as is the case between members of the Council of Europe or European Union.



Within the EU, efforts have been made to streamline the process of making transnational compensation claims to state-funded schemes through a directive aimed specifically at solving these problems as well as practical initiatives to promote information sharing.<sup>56</sup> This initiative is aimed at improving access to justice for victims of crimes of violence that have taken place in other countries. The US government also provides information resources about foreign compensation schemes for victims of crime on the Department of Justice website.<sup>57</sup> Similarly there are a number of standards regarding international co-operation on e.g. giving evidence, enforcement of civil judgments, and asset seizure but these exist mainly to enhance co-operation between EU or Council of Europe members.<sup>58</sup>

The quicker and easier a compensation scheme is to navigate, the more accessible it will be from another country. However, obvious linguistic and communication barriers arise and there are difficulties relating to the provision of evidence, travel costs and the need to obtain visas for attending hearings, and limited possibilities for transferring and investing funds obtained.

Attempts have been made to resolve these problems, e.g. some NGOs in Mexico exist specifically to assist those returning from the US in pursuing their civil claims over the border.<sup>59</sup> Some countries have a visa regime that enables the victim to stay in the country for the duration of a claim (see US) although it should be borne in mind that a victim may wish to return home and later decide to pursue a claim.

Where a victim is repatriated soon after receiving their payment they may need assistance in transferring and investing the money. This may be particularly difficult if the returning victim is a child and will have limited protection upon return.

NGOs assisting with reintegration could focus their efforts on gathering the right information and expertise to assist victims, and states of origin could attempt to establish institutional links with victim-support bodies in the countries of destination to obtain information and support claimants.

Where an offender has been extradited or transferred from another jurisdiction for prosecution it is likely that assets will be located elsewhere and enforcement of any compensation

<sup>56</sup> EU Council Directive on compensation of crime victims of 2004 and European Judicial Atlas in Civil Matters [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm). For information about enforcing judgments within the EU the following resource is available: European Judicial Network: Civil and Commercial Matters [http://ec.europa.eu/civiljustice/enforce\\_judgmentjudgment/enforce\\_judgmentjudgment\\_int\\_en.htm](http://ec.europa.eu/civiljustice/enforce_judgmentjudgment/enforce_judgmentjudgment_int_en.htm).

<sup>57</sup> Directory of International Crime Victim Compensation Boards, <http://www.ojp.usdoj.gov/ovc/publications/infores/intdir2005/colleague.html>.

<sup>58</sup> Within the EU the following resource is available: *European Judicial Network: Civil and Commercial Matters*.

<sup>59</sup> Centre de los Derechos del Migrante and Global Workers Justice Alliance (the latter, although it deals, with Central America is based in New York).

order will require trans-border co-operation of the type envisaged in UNTOC.<sup>60</sup> Victims also risk losing the ability to make a civil claim in criminal proceedings or a compensation claim where the matter is being dealt with elsewhere unless they are given specialist help to take the necessary legal measures. This could be especially challenging where a case which is prosecuted abroad is not based on some or all of the facts relating to the victim's own case (e.g. if there are other victims or evidence of crimes unrelated to that affecting the victim).

These types of complexities exist in relation to law enforcement on all trans-border criminal trafficking cases and they are always challenging. It is therefore crucial that working relationships are established between state agencies and NGOs in origin and destination countries. These relationships should, however, extend to include mutual co-operation on all victims' rights issues including claiming compensation in all areas and should not be restricted to criminal law enforcement. This is emphasized in the obligations of Art 25(2) of UNTOC, which also encourages the conclusion of bilateral agreements on other matters of mutual legal assistance.

### 3.6. RULE OF LAW

A compensation mechanism will not be able to function better than its overall legal environment. Given that compensation mechanisms are based essentially on systems of rules and procedure administered by the judiciary or civil servants their efficacy is a function of the state of the rule of law in a particular country. Where there are problems with the independence, competence, or integrity of state actors, then access to compensation will be compromised. Victims will not have the necessary confidence in the system to pursue a claim. Similarly, endemic problems such as lengthy civil procedures (which in some countries take years to conclude) will impact on the effectiveness of compensation schemes. Where these issues are real and pose practical challenges within a national setting, legal or institutional reform focusing on improving compensation mechanisms may be a wasted effort and the core problems may require other unrelated solutions.

In some instances the malfunctioning of a compensation mechanism for trafficked persons may be related simply to the unfamiliarity of prosecutors in dealing with the crime of trafficking (e.g. the relatively recent criminalization of trafficking in France as compared to the US) or of police, prosecutors and judges using a new legal concept or power (e.g. moral damages in Romania or asset seizure in Albania). In all jurisdictions legal changes do not have an immediate impact on practice, and sometimes the practical measures required for their implementation (e.g. judicial training, guidance for prosecutors) are delayed. In these situations IGOs and NGOs can assist countries without the relevant legal tradition through capacity-building activities. However, expectations of what can be achieved in short periods of time, often with limited resources and national experiences, should be tailored appropriately.

Finally, the challenges of improving an overall system of laws or procedures (e.g. the system of civil claims within criminal proceedings) may prove extremely difficult if only one state

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<sup>60</sup> Arts 12,13, 14 & 18.

actor is pushing for progress. A number of stakeholders need to be committed to action to reform or build a compensation mechanism (e.g. including ministries of justice and interior, and judiciary) and not simply a state body that deals with trafficking issues.

### 3.7. CONCLUSION

Various options exist for the provision of compensation for trafficked persons across the countries. Most commonly, compensation is available through the criminal procedure or as state-funded compensation for violent crimes. Independent claims for compensation/damages within civil and labour law actions are less explored and less well known.

There are specific legal or procedural challenges (e.g. eligibility criteria, length of proceedings, requirement for legal aid, availability of certain types of damages), which may mean that all the available systems largely fail to provide compensation to trafficked persons. This is the case whether claiming compensation from the wrongdoer or from the state. The available systems may not be accessible for trafficked persons even though the mechanisms themselves appear to meet international standards on compensation. The challenges that exist for anyone seeking to access justice are exacerbated in the case of trafficked persons who, among other factors, may not have legal status in the country where they are claiming, may face language barriers, and may be intimidated from pursuing a case by the procedures or by fear of their trafficker/exploiter.

Where orders for payment are made in compensation cases there are also challenges that relate to ineffective collection and enforcement techniques, which is linked with asset seizure. Other challenges include the complexities of transnational co-operation as well as compensation mechanisms being undermined by a general absence of rule of law.

As a result of these problems collective actions, mediated settlements and cases taken against employers by the state (e.g. labour inspectorates) rather than pursued by the individual may have a greater chance of delivering compensation payments to trafficked persons especially in cases of labour exploitation. Claims from state compensations schemes will be more successful where the eligibility criteria are reviewed to take into account the specific circumstances of trafficked persons. Other options include the establishment of specific funds for trafficked persons.

## 4. The role of NGOs and civil society in victim support and advocacy

Civil society groups such as unions, campaigners, lobbyists, diaspora organizations and NGOs have historically had a powerful impact on national and international standard setting on victims' rights, labour rights and migrants' rights including the right to compensation and effective remedies. As already noted in this report, the effective functioning of compensation mechanisms and victims' rights is not restricted solely to having a legal regime in place but is also dependent on the assistance provided to trafficked persons to inform them about their legal rights and assist in overcoming any practical barriers. Such assistance should be available from state bodies with relevant competency. However, non-governmental agencies have usually proved more efficient at delivering these services. It is recommended by the OSCE/ODIHR that, as part of the national referral mechanism (NRM), states forge active working relationships with such groups and in particular, fund or subsidize their activities.<sup>61</sup>

This section reviews the stances taken by NGOs on advocacy for compensation for trafficked persons and also the role of civil society in the national setting in ensuring compensation mechanisms are effective and accessible to victims. It should be highlighted that the longer a national lobby has existed and the more vocal it has been, the more effective the national victims' rights regime (see US<sup>62</sup>) including the implementation of the right to compensation.

### 4.1. ADVOCACY FOR COMPENSATION

At the international level there are different groups who work on issues relevant to compensation for trafficked persons. They work from the perspectives of trafficking in human beings; justice for victims of crime; labour rights, migrants' rights and the rights of prostitutes. It is important to recognize the role of all these actors in developing standards relating

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<sup>61</sup> Basic Principles of Cooperation Agreements, *op. cit.* note 1, *NRM Handbook*, pp. 65–79.

<sup>62</sup> See *Crime Victim's Rights in America: An historical overview*, National Center for Victims of Crime <http://www.ojp.usdoj.gov/ovc/ncvrvw/1999/histr.htm>.

to victims and the cross-fertilization of the issues they work on when considering trafficking in human beings.

Activities in relation to crime victims' rights have a long history. However, the rights of victims of crimes and "victimology" became a subject matter in its own right in the 1980s around the time of the drafting of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>63</sup> adopted in 1985. At the national level, governments were also beginning to respond to the issue by increasing the rights of victims in criminal proceedings in the US and the introduction of a state-funded compensation scheme in France. Shortly afterwards, in 1993, proposals were made on international standards for remedies and reparations for human rights and humanitarian law abuses<sup>64</sup> but these were not adopted until 2005 after lobbying by the international NGO community.<sup>65</sup>

At the national level many initiatives to advocate for victims of crime and the implementation of policy on victims' rights have been established (see for example INAVEM and partners in France, Victim Support in UK). The European Forum for Victim Services brings all of these organizations together and has a voice at EU level for the promotion and development of victims' rights including to "promote fair and equal compensation for victims of crime throughout Europe, regardless of the nationality of the victim concerned". It can also provide information resources for victims in all EU countries.<sup>66</sup> Many other NGOs organize themselves on the rights of certain types of victim and in general advocate for similar types of redress with compensation and reparations often being a key theme.<sup>67</sup>

The international NGO community advocating for trafficking victims who participated in the drafting of the Trafficking Protocol was active in importing victims' rights principles into the negotiation process and has subsequently continued to lobby for them and their implementation at national level. The issue of compensation in particular has been commented upon.<sup>68</sup> Studies have focused on the need for information and pro-active assistance from police, effective asset seizure laws and use of assets to compensate trafficked persons, acknowledgement of status of victim/injured party in criminal cases, making state compensation schemes accessible and allowing victims to remain in country while civil claims

<sup>63</sup> See Annex II.

<sup>64</sup> See Theo van Boven proposals *UN Doc E/CN.4/Sub.2/1993/8*, para. 137.

<sup>65</sup> See United Nations Commission on Human Rights 61th Session 14 March – 22 April 2005 Agenda Item 11: Civil and Political Rights 10 February 2005 *Joint Written Intervention on Concerning the 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*, available at <http://www.redress.org/publications/Principles2005.pdf>

<sup>66</sup> <http://www.euvictimservices.org>.

<sup>67</sup> See e.g. REDRESS for victims of torture, <http://www.redress.org>.

<sup>68</sup> See E. Pearson, "Historical Development of Trafficking—The Legal Framework for Anti-trafficking Interventions" and M. Cunneen, "Lobbying in Europe" in *Challenging Trafficking in Persons Theoretical Debate and Practical Approaches* (Nomos/GTZ, 2005).

are pursued with regard to compensation.<sup>69</sup> In 2006 the Global Alliance Against Traffic in Women held a conference, “Access to Justice”,<sup>70</sup> which found that even in the few cases which result in the conviction of an offender globally it is extremely rare for a victim to receive compensation and that mechanisms are weak and insufficient.<sup>71</sup>

From a different but related perspective, the Platform for International Cooperation on Undocumented Migrants (PICUM), aims to promote respect for the human rights of undocumented migrants within Europe by promoting respect for social rights (including labour rights and access to justice) and the regularization of undocumented migrants. It believes that “asserting rights of undocumented workers in the legal system” is one of the crucial ways of protecting undocumented migrant workers.<sup>72</sup> They explore mediation, collective action, law suits and the use of government agencies as ways of securing these rights in particular in relation to unpaid wages:

One of the most common forms of exploitation of undocumented workers concerns wages. Not only do employers propose wages that are below the minimum wage, but they consistently pay undocumented workers late, and in many cases, do not even pay them at all.<sup>73</sup>

National anti-trafficking NGOs also lobby in relation to victims’ rights in their countries as well as producing reports analysing the implementation of those rights including compensation. National NGOs are often in a good position to connect victims with information about compensation mechanisms in other countries or with victims’ advice agencies who can do so. In the US, NGOs have had a big impact on law reform to assist trafficking victims by drafting model legislation ensuring that criminal compensation is mandatory for trafficking offences, lessening the evidentiary burden on trafficking victims in submitting a claim to a state-funded scheme, and including trafficking within the list of eligible offences. NGOs have also drafted model legislation for states that creates civil causes of action for trafficking victims.

Trade unions and organizations of workers participate in the development of international standards through the ILO’s structure as a tripartite organization. They can also initiate complaints for violations of ILO conventions.<sup>74</sup> Many unions are also actively engaged in raising awareness of migrant workers as to their rights such as the Construction and Build-

<sup>69</sup> See *Human traffic, human rights: redefining victim protection* (Anti-Slavery International, 2002), pp. 57–59.

<sup>70</sup> Reported in *Alliance News*, Access to Justice, Issue 26 (Global Alliance Against Traffic in Women, December 2006).

<sup>71</sup> *Ibid.*, p 7.

<sup>72</sup> *Op. cit.* note 18, PICUM.

<sup>73</sup> *Ibid.*, p. 69. PICUM undertakes networking across Europe, gathers information on law and practice regarding social rights and formulates recommendations for improving the legal and social position of these immigrants. Detailed information and publications in relation to the implementation and enforcement of social rights are available by newsletter, publication and website. See [www.picum.org](http://www.picum.org).

<sup>74</sup> In accordance with procedures under article 24 of the ILO Constitution.



ing Materials Industry Workers Union of the Russian Federation amongst Tajik migrant workers in Moscow and the Trades Unions Congress in the UK, which has recently launched a website for Polish workers.<sup>75</sup> Migrant workers are also more likely than other workers to need the support of trade unions precisely because they are often in a position of vulnerability and unable to enforce their employment rights. At the same time workers acting on their own typically find it difficult to resist the kinds of exploitative employer practices which can degenerate into forced labour. There is a range of services which trade unions can provide to migrants including interpretation and translation facilities, the provision of information on employment rights in the migrant's language, and representation in dismissal, disciplinary and grievance procedures.<sup>76</sup> Because of the vulnerability of certain workers, calls have also been made to give trade unions autonomous rights within labour law, in particular rights to enforce employment laws independently of workers in circumstances where individual workers do not wish to come forward for fear of an employer response or simply do not wish themselves to pursue a complaint.<sup>77</sup>

#### 4.2. NGO VICTIM SUPPORT

As mentioned in the introduction to this section it has been well-established that NGOs are extremely effective in supporting trafficked persons even where state agencies fall short of their responsibilities in this regard. There are some examples of national "public-private" partnerships or "co-operation agreements" where both the state and NGO work together in a formal relationship to promote victims' interests and to support individual victims. Such arrangements enhance the appropriate identification of trafficked persons and the provision of information and services including legal assistance.<sup>78</sup> For example, the establishment of task forces in 42 states of the US consisting of federal, state and local law enforcement and NGOs:

serve as a way to incorporate NGO crime victim services organizations, funded by federal grant awards, into the law enforcement activities in their area. Local community- and faith-based organizations are essential to reaching those victims in communities that are isolated by geography, culture or language.<sup>79</sup>

Even where such formalized mechanisms are not in place it is clear that support takes place through a variety of voluntary activities or statutory arrangements with NGOs. Many NGOs provide specialist support to victims of trafficking, such as the Poppy Project in UK, Sisters in Russia, La Strada in Ukraine and Moldova, ADPARE in Romania, Coalition Against Slavery and Trafficking, Safe Horizon and Polaris Project in US. However, there are also agencies focusing on the provision of:

<sup>75</sup> <http://www.pracawbrytanii.eu>.

<sup>76</sup> For more on trade union rights see Bernard Ryan (ed.) *Labour, Migration and Employment Rights*, (London, 2005), p. 99.

<sup>77</sup> *Ibid.*

<sup>78</sup> As well as shelter, medical and psychological care, employment and immigration law advice, etc.

<sup>79</sup> *Attorney General's Annual Report to Congress on US Government Activities to Combat Trafficking in Persons* (Fiscal Years 2001–2005).



- free general legal and advice services (such as Law Centres and Citizen's Advice Bureaux in the UK, CLCI in Albania);
- the rights of victims of crime (INAVEM members in France, Victim Support in the UK);
- advice to specific immigrant and diaspora groups (Law and Migration Centre/Tajikistan Foundation in Russia, Chinese Information and Advice Centre in the UK, Florida Immigrant Advocacy Center (US), Refugee Women's Network (US), Refugee Women's Alliance (US), Asian-Pacific American Legal Centre (US));
- advice for migrants and undocumented workers' rights (e.g. GISTI in France and Sweatshop Watch (US), Worker's Rights Law Center (US));
- advice to specific sectors of workers (e.g. Kalayaan working with domestic workers in the UK, CODETRAS with agricultural workers in France, Farmworkers' Legal Services in the US); and
- unions advising and representing individuals regarding labour rights (TGWU in UK, CGT in France and the Construction and Building Materials Industry Workers Union of the Russian Federation).

NGOs working on issues ranging from domestic violence to discrimination are also involved in the direct provision of services to victims. This active community of advice givers is an asset to the anti-trafficking world. However, some of the resources available may not always be maximized for the benefit of the victim. For example victim-support agencies with expertise in compensation claims may not be sensitized to the needs of trafficked persons or be part of the network of support givers as evidenced by the lack of compensation claims submitted by victims in the UK to the state scheme. This means that advice on a specialist topic such as claiming compensation may be given by non-specialists when a victim would benefit more from another agency being brought in.

The practical challenges to a trafficked person in taking steps to access compensation have been emphasized recently by the IOM, which has been heavily involved in organizing and funding assistance to trafficking victims for 13 years. In a recent handbook to guide NGOs on assisting trafficked victims it states that: "Victims must be informed of their rights to compensation and redress and, where possible, be assisted to pursue such claims."<sup>80</sup> At the same time where trafficked persons are advised in connection with compensation payments, it is important that the advice of psychologists is also considered and that an assessment of the levels of risk posed to a victim by these causes of action e.g. in countries where the security of the victim cannot be guaranteed due to weak rule of law, corruption or simple lack of facilities.<sup>81</sup>

#### 4.3. CONCLUSION

Without the activism of civil society the right to compensation for crime victims generally, and trafficked persons in particular, would not have been so clearly established and imple-

<sup>80</sup> *The IOM Handbook on Direct Assistance for Victims of Trafficking*, (IOM, 2007), p. 280.

<sup>81</sup> *Ibid.*, pp. 282–283.

mented. NGOs can be a driving force in encouraging governments to make the necessary changes. In general the efforts made in relation to advocacy for victims' rights and compensation rights are made by a variety of different organizations sometimes separated by their particular interest group focus. They are not always aware, therefore, of the overlap of interests or of how the knowledge and experience they have accumulated could benefit each others' beneficiaries. It would be helpful for NGOs to engage in and promote joined-up activity across different interest groups on the subject of compensation and in advising and assisting victims.

## 5. Country Profiles

These country profiles were completed in April 2007. Since that time further information has been included e.g. if there have been significant changes to law or case developments or if important issues have been drawn to our attention by our interlocutors. However, the profiles have not been comprehensively revised.

### 5.1. ALBANIA

#### 5.1.1. Legal and institutional framework

Albania is a party to the main international conventions regarding trafficking, forced labour and migrants (except for the UN Migrant Convention). It has also signed the European Conventions against Trafficking and the European Convention on Compensation for Victims of Violent Crime.<sup>82</sup> It is not a member of the European Union but is a “potential candidate country” having signed a Stabilisation and Accession Agreement on 12 June 2006.<sup>83</sup> There are problems of corruption and weaknesses in the system of rule of law, which the European Union requires Albania to address as part of the EU accession process.<sup>84</sup>

The government set up an inter-ministerial working group that developed a national plan of action against trafficking in 2001. There is a State Committee and in November 2005 the office of a National Co-ordinator in the Fight Against Trafficking in Human Beings was established in the Ministry of Interior, supported by an Anti-Trafficking Unit.<sup>85</sup> They are currently operating under the 2005–2007 National Strategy, and a National Referral Mechanism adopted in 2005.<sup>86</sup> In 2005, a joint order by the Ministry of Interior, Ministry of Foreign Affairs and Ministry of Labour, Social Affairs and Equal Opportunities established

<sup>82</sup> See the ratification table in Annex V.

<sup>83</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/275&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>84</sup> [http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/l\\_035/l\\_03520060207en00010018.pdf](http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/l_035/l_03520060207en00010018.pdf).

<sup>85</sup> Prime Minister's Order no. 203 on 12.19.2005.

<sup>86</sup> *Cooperation Agreement to Establish a National Referral Mechanism for the Enhanced Identification of and Assistance to Victims of Human Trafficking* (2005) between: Ministry of Labour and Social Affairs,

the Responsible Authority, a joint body responsible for co-ordination and monitoring of the process of referral for assistance, protection, reintegration of victims and potential victims of trafficking, their registration and periodic reporting of data.

In June 2006 Regional Anti-Trafficking Committees were established comprising police, social services, education and health institutions, local government and other relevant actors.<sup>87</sup> In October 2006 a toll-free national “help line” became operational for reporting trafficking cases. In relation to trafficking in children a separate national strategy has been adopted and a specific agreement concluded with Greece.<sup>88</sup>

Trafficking in human beings was criminalized in 2001<sup>89</sup> and was later incorporated into Art. 110 of the Criminal Code. Additional provisions relate to trafficking in women and in children<sup>90</sup> and amendments were made to these definitions in 2004.<sup>91</sup> The Code criminalizes trafficking for both sexual and labour exploitation. Also in 2004 a court to deal with serious crimes was established and laws were adopted on the protection of witnesses and on fighting organized crime, focusing on asset seizure and confiscation (see below).<sup>92</sup>

Numerous active NGOs exist to provide assistance and support to Albanian trafficked persons including Vatra Psycho-Social Centre, Centre for Legal Civil Initiatives, “Different but Equal” and a state-run victim referral shelter. Co-operation between NGOs and law-enforcement authorities on identification and assistance to trafficked persons is reportedly improving.<sup>93</sup>

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National Reception Centre for the Victims of Trafficking, Ministry of Public Order, Ministry of Foreign Affairs, VATRA, Other Vision, and the International Organization for Migration—IOM.

<sup>87</sup> *Order for the Establishment of Regional Committees for the Fight against Trafficking in Humans at Quarku Level* (2006).

<sup>88</sup> *National Strategy for the Fight against Child Trafficking and the Protection of Child Victims of Trafficking* (2005) and *Agreement between the Government of the Hellenic Republic and the Council of Ministers of the Republic of Albania for the Protection and Assistance of Children Victims of Trafficking* (2006).

<sup>89</sup> Law No. 8733 of 24 January 2001.

<sup>90</sup> Arts 114b and 128b respectively.

<sup>91</sup> Amended by Law No.9188, dated 12.02.2004.

<sup>92</sup> *Law No. 9205 on the Justice Collaborators and Witness Protection* (2004) and *Law No. 9284 on Preventing and Striking at Organized Crime* (2004).

<sup>93</sup> See *The Girls and The Trafficking: Study on the development of trafficking in women in Albania*, (Vatra, 2005).

### 5.1.2. Compensation and damages schemes

#### 5.1.2.1. State compensation schemes

Despite ratification of the ECCVVC there is no information about any state-funded compensation scheme existing or envisaged at the time of writing.<sup>94</sup> However, see section on asset seizure below regarding a fledgling scheme for compensation from assets of traffickers.

#### 5.1.2.2. Compensation awarded through civil-, criminal-, and labour-law procedures

##### *Criminal and civil proceedings*

The laws of Albania allow for compensation to be paid either through a civil claim appended to the criminal procedure or an independent civil claim under civil procedure. The main difference between these two is that moral damages are not available in a suit taken with a criminal case. This may present a disincentive to claims from trafficked persons as, for the most part, their claims will be for moral damages and would need to be pursued in the civil court with the related problems of expense, time and unclear outcome. This point alone is likely to reduce the number of claimants for damages in Albania.

Art. 58 of the Criminal Procedure Code allow victims of crime to apply for “prosecution of the perpetrator... and compensation of the damage”.<sup>95</sup> Art.61 provides that:

A person who has suffered material injury from the criminal offence or his successors may file a civil lawsuit in the criminal proceedings against the defendant or the person liable to pay damages (defendant), claiming the restitution of the property and reimbursement of the injury.

The victim then becomes a “civil plaintiff” in the criminal proceedings and can be represented by their own advocate.<sup>96</sup> At the end of the case, and when dealing with sentencing and costs, the court should deal with the damages claim and can do so by accepting it partially, in full or rejecting it.<sup>97</sup> The court has the power to detach the civil case and send it to the civil court to be dealt with separately if it is deemed to “hinder or delay” the criminal proceedings.<sup>98</sup> “When the obtained evidence does not make possible the assessment of the damage, the court disposes of the right to file for compensation of the damage in its entirety and transfers the case to the civil court...”<sup>99</sup> In practice, this has been common practice

<sup>94</sup> July 2007.

<sup>95</sup> There is some confusion here created by the reference only to damages at Art.58 and material damages at Art.61. It is possible therefore to interpret a right to moral damages in criminal proceedings. However, it seems it is not understood this way by practitioners or judges.

<sup>96</sup> Art.67 Criminal Procedure Code.

<sup>97</sup> Art.68 Criminal Procedure Code.

<sup>98</sup> Art.62 Criminal Procedure Code.

<sup>99</sup> Art.395 Criminal Procedure Code.

whether or not legally justified, although recent reports from Albanian NGO representatives state that they believe the ratification of the ECCVVC may have had some impact on court practice because a Tirana court has recently accepted a civil suit within a criminal case regarding “exploitation for prostitution”.<sup>100</sup> However, if a case is rejected in the criminal court it cannot be brought again in the civil court.<sup>101</sup>

The only form of recompense for moral damage that can be granted by the criminal court, upon the request of the civil plaintiff, is the publication of the conviction of the perpetrator in a newspaper.<sup>102</sup>

The OSCE found in the course of the Fair Trial Development Programme that the laws on compensation were underdeveloped because in none of the criminal cases examined were claims made.<sup>103</sup> This study focused on a variety of different crimes. A separate study undertaken by the Centre for Legal Civil Initiatives, which focused on 54 criminal prosecutions for trafficking between 2001–2003, found no cases where compensation claims had been made.<sup>104</sup> The reasons given for this are: lack of free legal aid for victims of trafficking; low level of legal rights awareness on the part of the victims of trafficking; lawyers failing to advise clients properly; trafficked persons being frightened to claim for compensation because they are at risk of revenge or re-trafficking.<sup>105</sup> According to the Chairman of the Serious Crimes Court (responsible for trafficking cases) there has never been a claim for compensation for damages.<sup>106</sup>

Given the limitation of damages available in criminal proceedings to material damages, trafficked persons are unlikely to be able to pursue claims unless they can prove lost income as in the case reported above (see footnote 101). They may not have suffered material damages or may have so much difficulty proving these losses with documentation that a claim would be worthless. There is also no duty on investigators and prosecutors to inform victims of their right to compensation so the victim’s knowledge and level of support is likely to depend on whether they are being advised by an NGO. It is necessary that a victim is aware of their rights in criminal proceedings as early as possible so steps can be taken to properly draft a claim. Even with the current limitation on damages, a victim may have a claim e.g. for the “unfairly earned” profits made by the trafficker, of which he or she never becomes aware.

<sup>100</sup> It seems that in this case 2 million leke (approx. €16000) were granted to a victim plaintiff as material damages for lost earnings even though sexual exploitation would usually have been regarded as “illegal work”. The decision was challenged but unchanged by appeal courts. However, the decision has not been enforced. Information provided by CLCI following ODIHR Barcelona Workshop, December 2007, see note 44.

<sup>101</sup> Art.68 Criminal Procedure Code.

<sup>102</sup> Art.399 Criminal Procedure Code.

<sup>103</sup> *Analysis of the Criminal Justice System of Albania*, OSCE 2006 p. 131.

<sup>104</sup> *Monitoring of the Court decisions related to THB in the District Courts of Tirana, Vlora, Shkodra for the period 2001 – 2003*. CLCI 2005.

<sup>105</sup> Email correspondence between researcher and legal advocates of CLCI, 15 April 2007.

<sup>106</sup> Information obtained by OSCE Presence in Albania and communicated to researcher on 20 April 2007.

The Criminal Procedure Code ascribes no clear rights to the victim. It is only if given the status as a civil plaintiff within the criminal proceedings that he or she has the right to be represented. As a result, the overall recognition and role of the victim in the criminal proceedings is underplayed (e.g. no right to question witnesses), which is likely to have repercussions in practice with their general rights not being taken seriously by investigators, prosecutors, and judges alike. Even where a victim is legally assisted the representatives have little in the way of legal rights to enforce on their behalf.

Given the absence of information about civil claims in criminal proceedings it is not possible to assess their levels of enforcement. However, given the weaknesses in guaranteeing effective processing of civil claims it is likely that enforcement mechanisms are equally weak.

The Civil Code allows for compensation claims in civil proceedings where an individual has been damaged by a criminal offence.<sup>107</sup> The right to sue in the civil court extends to foreigners.<sup>108</sup> The right to material damage appears to consist of the following:<sup>109</sup>

- a) The defendant to compensate “the damage caused” and any “missed profit”;
- b) “Expenses incurred reasonably to avoid or reduce the damage”;
- c) “Reasonable expenses incurred in order to obtain compensation through extra-judiciary ways”;
- d) “...obliged to compensate for the damage (to health), taking into consideration the loss or the reduction of working capabilities of the damaged person, the expenses of his medical treatment, and other expenses that relate to the damage caused” (Art.641 and Art. 642 appear to allow for compensation to be increased if a further deterioration in health is experienced at a later time);
- e) Compensation for causing death consists of: living and food expenses for minor children, “consort” and other dependents, funeral expenses;
- f) Art. 644 establishes a right to claim the (unfairly earned) profits made by the defendant in causing the damages to the claimant.

Art. 625 Civil Code states that damage other than property damage (i.e. moral damages) can be claimed where:

“a) he has suffered injury to his health or is harmed in his honor and personality the memory of a dead person is desecrated and the spouse with whom he lived until the day of his death, or his relatives in the second degree, seek compensation, except when the offence is committed when the dead person was alive and his right to compensation for the desecration was recognized.”

<sup>107</sup> Art. 608.

<sup>108</sup> Art.3.

<sup>109</sup> Arts 640–644 Civil Code.



*Proceedings in Labour Law*

The Albanian Labour Code deals only with “legal” employer-employee relationships. If work is performed unwillingly, this would be a violation of the basic principles of the Code and would require redress through other Albanian legal instruments (e.g., Civil Code, Criminal Code) as no employer-employee relationship would be seen to exist.

Under Art.8 of the Labour Code forced labour is outlawed but according to CLCI<sup>110</sup> there are no foreseen sanctions for these cases. It seems that the only sanction that exists is an order for restraint from such illegal activity and civil liability under the Civil Code.

**5.1.2.3. Asset seizure**

Sequestration powers exist within the Criminal Procedure Code where a civil suit has been taken.<sup>111</sup> Additionally, under Law No. 9284 On the Prevention and Fight against Organised Crime powers are granted to the police and prosecutors to detect, identify, investigate, and sequester assets belonging to those, *inter alia*, who are reasonably suspected of involvement with trafficking in persons, their spouses and families.<sup>112</sup> The court can later confiscate these assets in favour of the state.<sup>113</sup> Chapter 7 of the same law states that assets can be sold for amongst other things the “indemnification of victims”<sup>114</sup> and social purposes such as “assistance centres for rehabilitating the victims of trafficking in human beings.”<sup>115</sup> This has not yet been done.

The National Co-ordinator’s annual report published in February 2006 states that this “scheme for the compensation and rehabilitation of the victims of trafficking, based, among others on the confiscation of the traffickers’ assets,...will be realized very soon.”<sup>116</sup> However, by December 2006, there was no case of confiscated property/assets used for the compensation of trafficked persons and government representatives announced that the Council of Ministers was expected to issue a further decision on this.<sup>117</sup> Among the National Co-ordinator’s priorities for the first 6 months of 2007 is the provision of:

Victim compensation by utilizing seizures of properties criminally assembled by the traffickers, and drafting a government decision on how to handle the criminal assets confiscated from Organized Crime groups. A mixed board will be set up to decide on

<sup>110</sup> Email correspondence between CLCI and researcher of 15 April 2007.

<sup>111</sup> Art.63.

<sup>112</sup> Art.3.

<sup>113</sup> Arts. 25 & 30 Law No. 9284.

<sup>114</sup> Art.34(1).

<sup>115</sup> Art.34(2).

<sup>116</sup> Page 12.

<sup>117</sup> According to Law 9284 on the prevention and fight against organized crime, this is the responsibility of the Ministry of Finance. However, the National Strategy for combating trafficking in human beings outlines that in addition to Ministry of Finance, this is also the responsibility of the Ministry of Interior, General Prosecution Office and Ministry of Justice.

each asset and divide it for social purposes, local government and law enforcement agencies as well as for victim compensation up to 40% of the confiscated assets.<sup>118</sup>

It remains to be seen how this system will work, how “victims” will be designated and how the assets will be distributed among them. It is also unclear how much money will be available in such a fund and consideration may have to be given to an additional state subsidy.

It should also be noted that such a scheme will not meet the obligations of the ECCVVC as ratified by Albania, which requires a state funded scheme for *all* victims of violent crime.

#### 5.1.2.4. Assistance

There are no obligations on police, prosecutors or judges to inform and advise victims of a crime of their rights. This is therefore very unlikely to happen unless an independent party takes steps to ensure the victim is informed. Where a victim is involved in criminal proceedings as a civil plaintiff they are entitled to representation by an advocate as they are party to the proceedings.<sup>119</sup> However, the fact that there is no legal aid available to pay for or subsidize this representation can deter victims unless the service is provided by an NGO acting voluntarily.

At least one NGO, CLCI, gives legal advice to trafficked persons but this does not seem to be as part of a state-sanctioned referral system. IOM provides free legal assistance to the state reception centre and the NGO “Different and Equal” runs a shelter. In general, shelters co-operate with NGOs such as CLCI and the Legal Clinic for Minors. The quality of service provided by these two organizations is reputedly of good quality as both have expertise in legal counselling. It is crucial that legal assistance extends to representation and that the right to this be enshrined in the Albanian Criminal Procedure.

#### 5.1.3. Conclusion on Albania

The current compensation mechanisms available to victims of crime, in particular trafficking, are extremely weak. There is no state-funded or subsidized scheme and no tangible plans for one despite ratification of the ECCVVC. To create a more streamlined system the implementation of a compensation scheme funded by assets seized from criminals and/or government funds should be examined. This would also enable trafficked persons who have not been able to identify or locate the defendant to make a claim.

The victim has a right to claim material damages as a civil plaintiff within criminal proceedings but in reality s/he is not advised of this right and it seems to be rarely exercised. A recent case does highlight some progress on the part of the courts’ willingness to process claims and to grant material damages. However, the overall impact of these problems

<sup>118</sup> National Coordinator on the Fight against Trafficking in Human Beings “Short-term priorities for the prevention and fight against trafficking in human beings and some of the main achievements in 2006” On file with ODIHR.

<sup>119</sup> Art. 67 Criminal Procedure Code.

on the rights of trafficked persons in Albania requires the National Co-ordinator to closely monitor civil compensation claims in criminal proceedings simultaneously with monitoring statistics on number and types of cases and sentencing. There is also a general need to strengthen the standing of the victim/civil plaintiff in the criminal procedure laws and to improve implementation of the right to make a civil claim by:

- imposing an obligation on investigators, prosecutors and judges to inform, advise and remind victims of their civil (and any other) rights as early as possible and regularly throughout the case;
- strengthening the legal obligations on investigators and prosecutors to ensure that evidence is gathered and presented to the court to support the claim;
- making legal advice and representation for all victims free and available at the earliest possible stage;
- adopting measures that give the victim and civil plaintiff standing in criminal proceedings with all the associated rights;
- ensuring both moral and material damages can be claimed to prevent the need for two sets of procedures, and reviewing and clarifying a) the definitions of moral and material damages and b) the types and nature of evidence required so that they reflect more clearly the needs of victims of crime especially trafficking victims.
- providing guidelines and training to judges and prosecutors on the implementation of these rights, the identification and calculation of damages, and on ensuring compensation issues are reasoned in their judgements.
- enabling criminal judges to make compensation awards *ex officio* i.e. without the victim having to initiate a civil claim. (cf. Moldova or Ukraine.)

A roundtable organized by the OSCE Presence in Albania in December 2006 also identified the following shortcomings in compensation for victims of trafficking:

- lack of information among shelters and lawyers of the possibility to request compensation for damages;
- the civil suit should not be separated from the criminal proceeding. The Albanian judiciary is known for its problems with lengthy trials, especially civil trials;
- unclear legislation.<sup>120</sup>

These findings have been reaffirmed by this study.

To improve the overall position of the victim in the criminal justice system, specialized legal advice and representation at the earliest contact with a trafficking victim is needed. At the same time, civil society needs to be a vocal advocate of victims' rights in general. The legal representation offered needs to improve the drafting of claims and argumentation to support the civil claims of trafficking victims including by attempting to claim "unfairly earned profits".

<sup>120</sup> Information from OSCE Presence in Albania.

#### 5.1.4. Good practice in Albania

- Ability to claim profits made by a trafficker from exploitation of victim as damages;
- Existence of state-level National Co-ordinator; and
- Efforts to streamline asset recovery law and the legal connection between asset confiscation and victim compensation.

### 5.2. FRANCE

#### 5.2.1. Legal and institutional framework

France is bound by all of the main international standards on trafficking and forced labour including the European Convention against Trafficking in Human Beings.<sup>121</sup> It is also a party to the European Convention on Compensation to Victims of Violent Crime.<sup>122</sup> It has not ratified the international Conventions regarding migrants' rights except ILO C97 on migration for employment. France is also a member of the European Union and therefore bound by all EU directives and decisions.

France has a civil law legal tradition. The Law on Internal Security criminalized trafficking in human beings,<sup>123</sup> which is defined at Art 225-4-1 of the Penal Code and includes trafficking for both sexual and labour exploitation.<sup>124</sup> It is punishable with maximum 7 years imprisonment and a €150,000 fine and the possibility of life imprisonment and a €4.5m fine in cases of "barbaric acts of torture."<sup>125</sup> The law also deals with issues relating to prostitution, security and immigration. Trafficking has been dealt with by the authorities primarily through the lens of regulating "public order" (e.g. the prosecution of procurement at Arts 225(9) and 225(10) of the Penal Code. The offence as classified at Art 225(4) has only once been prosecuted in a case relating to trafficking of babies of Bulgarian origin where only symbolic damages were granted.<sup>126</sup>

<sup>121</sup> 9 January 2008.

<sup>122</sup> See the ratification table in Annex V.

<sup>123</sup> Law no: 2003–239 of 18 March 2003 art. 32 *Official Journal* of 19 March 2003 modified by act No. 2007-1631 of 20 November 2007 art. 22 *Official Journal* of 21 November 2007.

<sup>124</sup> For penal code in English see [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_penal\\_textan.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm).

<sup>125</sup> Art 225.4.4 Penal Code.

<sup>126</sup> The court found insufficient grounds for granting higher damages: "Le Conseil Général de la Seine Saint-Denis, agissant en tant qu'administrateur ad'hoc, s'est constitué partie civile, pour un des enfants en tant que victime de l'infraction de traite des êtres humains. La demande a été acceptée par le tribunal sur toutes les infractions retenues. Toutefois, la partie civile n'ayant pas donné d'élément pour évaluer le préjudice, le tribunal a alors considéré « qu'il était difficile concrètement de pouvoir l'apprécier en dehors de la somme de 1euro ». De la même manière, le Conseil Général de Paris s'est également constitué partie civile pour un des enfants. Il a également été difficile pour le tribunal « de pouvoir apprécier toute l'étendue du préjudice de l'enfant et de chiffrer des dommages et intérêts qu'il réclame notamment aux futurs parents adoptifs, autrement qu'à la somme de 1 euro ». De plus, il a été fait droit aux deux demandes de 2000

On 13 September 2007, a decree was adopted specifically addressing the rights and protection of foreign victims of human trafficking. It is hoped that foreign victims' access to their rights during their stay on French territory will be enhanced through the implementation of this decree, which for the first time includes the provision of a reflection period for the victims.<sup>127</sup>

There are numerous official bodies dealing with trafficking and related issues, including a Central Office Against the Trafficking in Human Beings (*Office central pour la répression de la traite des êtres humains* – OCRTEH), which is part of the Central Direction of the Judicial Police (Ministry of Interior) and a Central Office for Combating Illegal Work (*Office central de lutte contre le travail illégal*) which is part of the criminal police direction of the National Gendarmerie.

There is a broad and active NGO community working on a wide variety of issues relating to victims of crime, trafficking in human beings, exploitation of children, anti-slavery, advocacy and support to those people “sans papiers” (irregular migrants) and victims of forced labour and domestic servitude.<sup>128</sup>

### 5.2.2. Compensation and damages schemes

France has a long history of recognizing victims' rights but it is only since the 1980s that concrete measures have been taken.<sup>129</sup> Numerous institutional, procedural and legal meas-

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euros au titre de l'article 475-1 du code de procédure pénale.” [“The Conseil General of Seine Saint-Denis, acting as ad hoc administrator, claimed damages as civil party, for one of the child victims of the crime of trafficking in human beings. The action was accepted by the tribunal on all the offences upheld. However, since the civil party did not give means for evaluating the damages, the tribunal considered ‘that it was difficult concretely to be able to value them above the sum of 1 euro.’ Similarly, the Conseil General of Paris was civil party for one of the children. It was also difficult for the tribunal ‘to be able to evaluate the extent of the damages to the child and to calculate the damages and interests that he claimed, notably from future adoptive parents, other than the sum of 1 euro.’ Furthermore, he had been awarded two actions for 2000 euros under article 475-1 of the criminal procedure code.”] Extract from ODIHR NRM assessment in France For extract of judgement: *TGI Bobigny, 13ème chambre, Affaires Ministère Public c/ Sandov, Hristova, Landouer et autres, 2 février 2007*. For information on the specific case see also “Dozens convicted in French trial over Bulgarian baby-trafficking network”, 2 February 2007, *International Herald Tribune*, <http://www.iht.com/articles/ap/2007/02/02/europe/EU-GEN-France-Baby-Trafficking.php>.

<sup>127</sup> Décret n° 2007-1352 du 13 septembre 2007 relatif à l'admission au séjour, à la protection, à l'accueil et à l'hébergement des étrangers victimes de la traite des êtres humains et du proxénétisme et modifiant le code de l'entrée et du séjour des étrangers et du droit d'asile (dispositions réglementaires), published in the *Official Journal*, 15 September 2007, text 17, p. 15340. For more details on the decree and its implementation see ODIHR NRM assessment on France (forthcoming).

<sup>128</sup> There is also an NGO coalition of 22 groups, which organizes anti-trafficking activities. See <http://www.contrelatraite.org>.

<sup>129</sup> In 1982 Robert Badinter established a committee under chairmanship of Prof. Milliez to study the position of victims. The resulting report led to the creation of a number of victim support services and changes in procedure. For detailed background on history and French legal system viz. victims see M.E.I. Brien and

ures have been taken including the establishment of a number of compensation schemes and strengthening of the role of the victim as civil claimant. There is also a well-established network of agencies providing support to general victims of crime.

### 5.2.2.1. State compensation schemes

Since 6 July 1990 the victims of intentional violent offences (or their dependents) have enjoyed a special status and are eligible for “national solidarity” in the form of compensation payments made by the Guarantee Fund for Victims of Acts of Terrorism and other Offences, *Fonds de Garantie des victimes des actes de terrorisme et d’autres infractions* (FGTI).<sup>130</sup> These are administered by the Commission on Compensation for Victims of Crime (*Commissions d’Indemnisation des Victimes d’Infraction* — CIVI).<sup>131</sup>

In order to claim compensation a victim must have reported the crime to the police. However, it is not necessary for an offender to have been identified or convicted. Where criminal proceedings are ongoing it is not necessary for them to have been finalized. It is also not necessary to pursue a civil claim against the offender.

For the victims of serious offences against the person, *full* compensation is payable:

- a) where the offence: results in death, permanent disability or total disability for work for one month or more; or
- b) where the offence consists of rape, sexual aggression, trafficking in human beings<sup>132</sup> or sexual offences against a minor aged less than 15.<sup>133</sup>

The FGTI provides very little detail about which types of damages constitute “full” compensation but states “All the forms of damage are taken into account, both for an injured victim and for the beneficiaries of any deceased victim: physical, economic, moral damage, etc...”<sup>134</sup> Information provided to the European Commission by the French government defined this as follows:<sup>135</sup> “all counts of loss or injury resulting from an attack on the person whether patrimonial or non-patrimonial in nature”<sup>136</sup> as defined in the general French law on liability.

E.H. Hoegen, *Victims* (2000), Chapter 8 *Victims of Crime in 22 Criminal Justice Systems*, pp. 295–352, available at <http://rechten.uvt.nl/victimology/Brienenhoegen/BH.html#index>.

<sup>130</sup> For detailed information see <http://www.fgti.fr/anglais/index.htm>.

<sup>131</sup> Act No 77-5 of 3 January 1977 established Victims Compensation Commissions (CIVI) amended by Acts No 81-82 of 2 February 1981, No 83-608 of 8 July 1983, No 90-589 of 6 July 1990 and No 2000-516 of 15 June 2000.

<sup>132</sup> Added in 2005 Law No. 2004-204 of 9 March 2004 art. 169, *Official Journal* of 10 March 2004, entered into force 1 January 2005.

<sup>133</sup> Defined at s706(3) of the French Code of Criminal Procedure (CCP).

<sup>134</sup> See information pages <http://www.fgti.fr/anglais/connaitre/missions.htm>.

<sup>135</sup> EC European Judicial Network Pages on Compensation to Victims of Crime, available at [http://ec.europa.eu/civiljustice/comp\\_crime\\_victim/comp\\_crime\\_victim\\_fra\\_en.htm#1](http://ec.europa.eu/civiljustice/comp_crime_victim/comp_crime_victim_fra_en.htm#1).

<sup>136</sup> “Patrimonial” refers to loss suffered directly or through loss of a breadwinner.



Where victims of crime do not meet the eligibility criteria for receiving full damages from FGTI (e.g. offences against the person entailing inability to work for less than one month and the victims of offences against property), they are entitled to limited compensation if criteria including a means test, are met.<sup>137</sup> In these cases, the compensation is limited to a maximum award of €3984 in 2008).<sup>138</sup>

The compensation schemes apply where the offence was committed in French territory (Metropolitan France, overseas departments or territories) and may be applied for by:

- a) French nationals;
- b) Nationals of member states of the European Union; and
- c) Nationals of states subject to international treaties and agreements, foreign nationals lawfully residing at the time of the facts or of the application.

If the offence was committed abroad, compensation may be applied for only by persons holding French nationality.

The compensation payment may be reduced or refused in a case where the victim fails to show a definite direct causal relation between the crime and the loss or injury. Where the victim is at fault, compensation may also be reduced or excluded e.g. if the victim uttered insults, took part in a brawl or participated in a serious misdemeanour (*une activité délictueuse*).<sup>139</sup> This also applies to relatives of a victim who has died. The CIVI will also deduct payments received by social security and by private insurance. The compensation amount can be reduced by any amount awarded to the claimant as a civil party in criminal proceedings (see below) or the victim can be required to repay that amount if it is later received.

Importantly, FGTI can take over the role of suing the defendant in criminal proceedings and it is reported that enforcement of civil damages is better in these cases than where the victim alone claims because there is a greater degree of co-operation between the courts and the FGTI than between courts and individuals.<sup>140</sup>

The application for compensation must be made within three years from the date of the offence or one year following the final judgment in criminal proceedings and the Commission has the possibility of extending this deadline further if there are valid grounds. The same procedure applies whatever the type of compensation applied for.

A provisional payment can be made, upon application by the victim. The application must include the following information:

<sup>137</sup> Defined at s706-14 of the French code of Criminal Procedure (CCP).

<sup>138</sup> See <http://www.fgti.fr/anglais/infra/infra-condition.htm>.

<sup>139</sup> "A titre d'exemple, la faute pourra être retenue en cas d'imprudence, d'injures proférées, de participation à une bagarre ou à une activité délictueuse." Website of FGTI <http://www.fgti.fr/francais/infra/infra-condition.htm>

<sup>140</sup> S706 9–11 CCP and p. 311 *op.cit.* note 129, Brienens and Hoegen.



- a) Date, place and circumstances of the relevant offence (attaching a record of the complaint filed, documents from the criminal proceedings, etc.);
- b) The court that tried the offence (attaching a copy of the judgment);
- c) Type of injuries, duration of absence from work (attaching medical certificates, sick notes, reports of medical examinations);
- d) Non-contentious applications made and court proceedings commenced, and any sums already paid by way of compensation (attaching vouchers for daily subsistence grants, pensions, amounts paid by the offenders, insurers, etc);
- e) Amount of compensation applied for from the CIVI.

If the application concerns a compensation claim from the means tested scheme (s. 706-14 CCP), the application must also specify the applicant's resources (evidenced by income tax assessment for the year preceding) and evidence why s/he is not insured as well as details of any serious material or psychological situation caused by the offence.

Once the application has come before the CIVI a magistrate investigates. Magistrates have extensive powers: among other things, they may send for copies of reports of the offences and all documents in the criminal proceedings, even where they are still ongoing; they may call witnesses and carry out investigations as they wish. The full file is then sent by the CIVI to the FGTI. The FGTI then has two months to make the applicant an offer. If the applicant accepts it, the FGTI sends the agreement to the Chairman of the CIVI, who endorses it so that the compensation can be paid. If the applicant rejects the offer or the FGTI opposes the compensation for reasons which it must state, the non-contentious stage comes to an end and the procedure continues in the CIVI. The application is then sent by the CIVI to the Prosecution Service and the FGTI for their comments no later than two weeks before the date set for a hearing. The applicant and the FGTI must be summoned at least two months ahead of the date. The hearing is not public. The CIVI issues a decision ordering compensation or rejecting the application. The applicant and the FGTI are then notified of the CIVI's decision, and the FGTI pays the agreed compensation within one month of the notification.

Both applicants and the FGTI have a right of appeal. The appeal must be entered by a lawyer within one month of notification of the decision. A request for a payment to be made into court may be put to the Chairman of the CIVI, who must respond within one month from the date of the request.

In 2004, 16,877 applications were processed by the FGTI. The benefits paid in 2004 totalled €209,541,638<sup>141</sup> and in the same year €32 million was seized from criminals.<sup>142</sup> This means that 15% of the total budget was recovered. However, this excludes the overall cost of running the scheme.

<sup>141</sup> See EC Manual p. 3 [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/pdf/manual\\_cv\\_fra\\_en.pdf](http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/manual_cv_fra_en.pdf).

<sup>142</sup> See <http://www.fgti.fr/francais/connaitre/stats.htm>.

The scheme has the great advantage of making it possible to claim compensation when there is no offender or criminal case ongoing, and the procedure is relatively straightforward. Legal aid is available and the victims are awarded compensation in full (including moral and material damages) where the offence is classified as trafficking. The scheme itself can also take over the role of suing the defendant for the damages thus ensuring their responsibility to pay is not abandoned but also relieving the victim of the burden of enforcing payment of civil damages.

Problems can occur in the application of this scheme to victims of trafficking. A case not prosecuted as human trafficking (Art. 225-4 Criminal Code) would not automatically qualify for full compensation. Such cases would only be eligible for this scheme if the applicant is capable of proving he or she suffered of violence carrying death, permanent incapacity or incapacity for work for more than a month.<sup>143</sup> This research has found no cases of victims of human trafficking who have been compensated by the scheme as trafficking victims.<sup>144</sup> There is one case where the facts are similar to a trafficking case but where the crime was classified as “obtaining unremunerated services from a vulnerable person”.<sup>145</sup> In this case, the criminal court also found there had been habitual violence. Because of this finding of violence the CIVI could consider the case. After considering medical evidence the CIVI found that the victim was eligible for compensation on the basis of a permanent partial (5%) disability from work. They held that this disability arose directly from verbal threats, which caused psychological problems. They particularly noted that the victim was put in a precarious economic and material situation and was socially isolated, which led to social and psychological vulnerability. The victim was awarded €6,000 in total damages.<sup>146</sup>

Additional problems that may be faced by a victim of trafficking include the need to be “lawfully resident” in France. A victim may not be lawful through no fault of their own (as a direct result of the trafficking offence) or may not have been granted a temporary visa. There is some discretion here in the hands of the authorities. The restrictions on the basis of “character” require the applicant to have refrained from a punishable act and it is unclear whether this would include those who were deemed to be illegal entrants or residents. Furthermore,

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<sup>143</sup> See [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpptextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm).

<sup>144</sup> In April 2008 the ODIHR received information from the Ministry of Justice that between 1 January 2007 and 31 December 2007, the FGTI had declared five cases involving trafficked victims eligible for compensation. Before this publication went to print, it was, however, not possible to establish precise information on these cases, including on their facts, classification as human trafficking or not, whether the victims had actually applied for compensation and whether there had been a decision by the CIVI. It is hoped that this information will be available from the Ministry of Justice or the FGTI for the ODIHR National Referral Mechanism assessment in France, which will be finalized by the end of 2008.

<sup>145</sup> Art. 225(13) Penal Code: Obtaining the performance of unpaid services or of services against which a payment is made which clearly bears no relation to the importance of the work performed from a person whose vulnerability or dependence is obvious or known to the offender is punished by five years' imprisonment and by a fine of €150 000. [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_penal\\_textan.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm).

<sup>146</sup> Case papers in French from Bénédicte Bourgeois of Comité contre l'Esclavage Moderne (CCEM) for this case. Decision was in November 2005. Author's translation.

the documentation requirements are substantial. These requirements would, by necessity, require the victim to be assisted by a lawyer.

#### 5.2.2.2. Compensation awarded through civil-, criminal-, and labour-law procedures

##### *Criminal and civil proceedings*

A victim of crime is entitled to be joined in the proceedings as a civil party (*partie civile*). Article 2 of the Code of Criminal Procedure, states that a civil action for damages caused by a crime, misdemeanour or offence is open to all who have personally suffered damage as a direct result of the offence. It is sufficient to prove the existence of a loss or injury caused by the offence in order to be able to claim damages with no upper limit to the amount claimed (section 420(1) CCP). Damages can be awarded against an accused together with other criminal penalties including imprisonment.

In the government information brochure on victims' rights the types of damages available to civil claimants are detailed as:

- a) Damages for physical or mental injury;
- b) Damages arising from inconvenience (*desagrément*): such as being unable to pursue a usual activity of every day life e.g. certain sport or hobby;
- c) Moral damages — non-quantifiable such as loss of a loved one, loss of reputation; and
- d) Material damage such as destroyed or damaged possessions.<sup>147</sup>

Although the claimant becomes a party to proceedings the responsibility for proving the case lies with the prosecutor and/or investigating judge. However, a victim can employ an advocate to represent his/her case<sup>148</sup> and costs of the advocate can be claimed as part of the damages award as well as other experts' fees.<sup>149</sup> A number of rights are vested in the civil party such as the right to present the claim to the judge and question witnesses,<sup>150</sup> the right to be notified of procedural decisions and information about the time of the trial<sup>151</sup> and the right to appeal any findings which interfere with his/her civil claim.

With the agreement of the public prosecutor, the claim for damages may be lodged by the victim with an officer or agent of the investigating police department during the inquiry. It is usually a straightforward declaration of the facts and the damage. This officer makes an official record of it. It can also be done by means of a simple fax or registered letter with advice of receipt to the court at least 24 hours before the date of the hearing. Evidence of harm should be provided. In these cases a victim need not attend court. However, the victim may

<sup>147</sup> *Les droits des victimes* p. 6.

<sup>148</sup> S. 424 CCP.

<sup>149</sup> S. 375,475 & 543 CCP.

<sup>150</sup> S. 460 CCP.

<sup>151</sup> S. 391 CCP.

also still claim damages by attending the hearing personally. It is possible to make a claim from the time of preliminary investigations until the day judgment is given.

A civil claim cannot be granted where the defendant is found not guilty of a punishable act except in two sets of circumstances (where the case has been heard before the Court of Assizes so the defendant's guilt is decided by laymen or where the defendant has a justification (absolution) for the offence).<sup>152</sup>

The claim should include figures for each item of loss or damage including material and moral damages. It must, however, be accompanied by documentary evidence, e.g. medical certificate, sick leave and loss of income, invoices, estimates, etc. In a case involving injury the court may order an expert examination in order to assess its seriousness, either on the court's own motion or at the victim's request. While awaiting the result of this expert examination, the victim may obtain a provisional award.<sup>153</sup> A court will grant the whole of the claim if proved regardless of whether the defendant has sufficient means to pay the whole amount. A sentencing judge is likely to order a payment in instalments usually having very little information about the defendant's means unless it was an integral part of the investigative process.

The actual payment of the damages by the perpetrator can have a positive effect on other judicial decisions relating to their case. For example the offender may receive a more positive response to a request to defer or suspend a prison sentence. The payment of compensation can play a major role in mediated settlements (i.e. cases which do not reach the court but are settled beforehand between the offender and the victim after mediation by a court mediator). Prosecutors are likely to drop the charge where compensation is paid following mediation.<sup>154</sup>

Otherwise at the end of a case the usual practice is for the victim's and defendant's lawyers to try to reach a settlement regarding payment and if this fails the usual enforcement methods are used.<sup>155</sup> Unfortunately, however, the civil claimant (as a *private* claimant) is the prime actor in enforcement proceedings against a defendant who is unwilling to pay. Lawyers and victims' aid associations provide a follow-up service for victims after the verdict has been pronounced and may guide the victim through the appropriate enforcement procedures. However, they are highly complex and require co-operation from state agencies as well as the defendant in order to be successful. If the perpetrator's sentence includes the obligation to compensate the victim, then a representative of the probation service or prison should contact the victim in order to look at the practical details of reimbursement (or according to the government's own guide on victims' rights the victim should contact the prison).<sup>156</sup> Where a defendant is imprisoned the prison administration will automatically open an account that will serve to manage prisoner's resources during imprisonment and

<sup>152</sup> SS. 372, 470 and 541 CCP.

<sup>153</sup> S. 464 CCP.

<sup>154</sup> *Op. cit.* note 129, *Victims of Crime in 22 European Criminal Justice Systems*, S. 7.1 Chapter 8.

<sup>155</sup> Information from Bénédicte Bourgeois of Comité contre l'Esclavage Moderne.

<sup>156</sup> *Les droits des victimes*, p. 33, available at [http://www.vos-droits.justice.gouv.fr/art\\_pix/guide\\_victime.pdf](http://www.vos-droits.justice.gouv.fr/art_pix/guide_victime.pdf).

a part of this money should automatically go to the victim.<sup>157</sup> A victim can also apply to a bailiff who can assist by negotiation or by seizing money from salary or bank account, and who may request the collaboration of the public prosecutor and access to the FICOBA file (a database on all existing bank accounts in France) making it possible to identify the bank accounts held by the debtor. This process is difficult and challenging for a victim who may be asked for details about the perpetrator that they cannot provide. The victim has claims on the defendant's other assets but the ability to execute these claims is dependant on assistance from the prosecutor to locate the defendant, the assets and to confiscate them.

Practically speaking all of these powers are very difficult to use and prosecutors have been unwilling to disclose the relevant details as to why.<sup>158</sup> In 1993 and 1998, Ministry of Justice reports concluded that even partial payment of damages awards was limited and in 2000 academics concluded that enforcement remains a "major problem" in France.<sup>159</sup> The CCEM has details of one case where the judge used a creative method in order to ensure payment of compensation: in anticipation of the civil damages, ordered the defendant to pay €22,000 as a security for bail. This money was then held by the court and was automatically available for payment of €18,000 damages and €4,000 legal fees at the end of the case.<sup>160</sup>

Although there were no actual cases of trafficking by the end of 2006, there have been numerous cases of civil judgments granting damages in criminal proceedings relating to trafficking e.g. involuntary domestic servitude.<sup>161</sup> It is not clear whether these victims actually received the damages, despite the awards made, as it has not been possible to obtain information as to enforcement:

*Case of Siliadin:*<sup>162</sup> A fifteen year old Togolese girl was brought to France to work in the household of a French family with promises that she would be sent to school and have her immigration status regularized. She was not paid for her work, was not allowed to go to school and her passport was taken away. She was shortly after "lent" to another family (family B) and became a housemaid working from 0730-2230 and only allowed to attend mass exceptionally on a Sunday. She slept in the baby's room on a mattress on the floor and had to attend to him in the night. She managed to escape the situation and worked elsewhere as a domestic for an appropriate salary but, under family pressure, returned to family B who promised to regularize her immigration status, which they failed to do and the other circumstances remained as previously. At a certain point she managed to recover her passport and explained her situation to a neighbour who then reported it to an NGO. Police then took action against the family who were prosecuted

<sup>157</sup> S728-1 CCP.

<sup>158</sup> *Op. cit.* note 129, *Victims of Crime in 22 European Criminal Justice Systems*, pp. 339–342.

<sup>159</sup> *Ibid.*

<sup>160</sup> Information from Bénédicte Bourgeois of Comité contre l'Esclavage Moderne.

<sup>161</sup> See e.g. *Esclavage Encore* — Actualites juridique: April & November 2006 editions, (CCEM).

<sup>162</sup> This case was taken to the ECHR for matters relating to the criminal law — since amended (Application no. 73316/01 26 July 2005).

and convicted at first instance and she was awarded civil damages (€15,245). In October 2003 an employment tribunal also awarded the applicant a sum that included €31,238 in salary arrears.

*Case of Fatima O*, April 2005:<sup>163</sup> A man was condemned to 12 years imprisonment and his wife to 6 months prison and they were ordered to pay damages of €35,000 and €15,000 respectively for having reduced to slavery two young Moroccan women and having raped one of them. Mr. and Mrs. Oughalmi had brought Fatima from Morocco, faking a marriage with the husband's brother. When she refused to prostitute herself she was beaten on numerous occasions before fleeing. Majda, the other girl, was a minor at the time and gave testimony that she was forced to provide sexual services to reimburse her illegal entry into France.

*Mimi Télé Mensah* was found guilty in 2006 of sexual aggression and violence with torture and acts of barbarism. The defendant was ordered to six years imprisonment and €25,000 moral damages for each of two victims. The Togolese victims, who had been children at the outset of the case, were brought to France on the promise of paid babysitting work and education. They received neither salary nor education and were subjected to years of humiliation, imprisonment, beatings and extreme violence.<sup>164</sup>

The rights afforded to civil claimants in criminal proceedings are great and have resulted in satisfactory awards for material and moral damages for victims. However, it seems enforcement provisions are not strong enough to ensure the victims actually receive even a partial sum from the defendants.

#### *Proceedings in Labour Law*

In France all workers formally have minimal protection even if they are employed irregularly.<sup>165</sup> Article L 341-6 of the Labour Code stipulates that an employer is the only party responsible for hiring an undocumented worker. The undocumented worker is thus seen as a victim so should be able to bring a court case against an employer for violation of rights. This is based on the assumption that the employer has profited from the advantages of paying low salaries, avoiding social security payments, etc. The worker's rights are implied from the existence of a working relationship with the employer.<sup>166</sup> An undocumented worker thus has the right to: a decent salary (that cannot be lower than the guaranteed minimum wage); payment for overtime; allowances foreseen by the collective agreement applicable to

<sup>163</sup> See "FATIMA O.—APRES LE PROCES", 21 April 2005 at CCEM website <http://www.esclavagemoderne.org/actujuridique.php?id=27>.

<sup>164</sup> See "Olivia et mabelle: Esclavage en HLM" in *Esclavage Encore* No.29, July 2006 (CCEM), available at [http://www.esclavagemoderne.org/img\\_ee/ee29.pdf](http://www.esclavagemoderne.org/img_ee/ee29.pdf).

<sup>165</sup> Information accessed at PICUM website: [http://www.picum.org/BASIC\\_SOCIAL\\_RIGHTS/France.htm](http://www.picum.org/BASIC_SOCIAL_RIGHTS/France.htm) and *Sans papiers mais pas sans droits*, 4th edition, (GISTI, June 2006), pp. 49–51 available at [http://www.gisti.org/doc/publications/2006/sans-papiers/np\\_sans-pap-pas-sans-droits\\_4.pdf](http://www.gisti.org/doc/publications/2006/sans-papiers/np_sans-pap-pas-sans-droits_4.pdf).

<sup>166</sup> Stipulated in Article L 341-6-1 of the Labour Code.



the business; compensation for annual paid holidays; and fixed compensation if the employment ends (this compensation cannot be less than one month's salary).

There is always a legal obstacle in proving that there was a work relationship between employer and irregular worker. The possibilities are limited even where witness evidence is available so the use of union advice services is regarded as essential. Membership of a union is not essential to obtain that representation.

The NGOs GISTI<sup>167</sup> and PICUM report that French courts have an increasing tendency to consider undocumented workers as freelancers (*travailleurs indépendants*) especially where they work from home. As such, they are legally liable and not regarded as victims with rights. There is less and less application of the principle that stipulates that irregularly hired undocumented migrants are considered as victims. As a result legal protection and compensation of withheld wages is becoming increasingly difficult to obtain.

When ILO researchers interviewed French practitioners about the exercise of these rights they were told that although the right to claim compensation for abuse of labour rights formally exists, there is no guarantee that the immigration authorities will not use the process to arrest or detain the victim. These interviews gave indications that this money had occasionally been received by irregular workers but unfortunately no actual cases were provided (however, see case of *Siliadin* above).<sup>168</sup>

CCEM report that they use the labour law procedure to claim unpaid wages in parallel to the institution of a criminal procedure and have developed jurisprudence along those lines. This procedure can be used even when the employer has diplomatic status.<sup>169</sup>

### 5.2.2.3. Asset seizure

Article 225-25 of the French Criminal Code provides the possibility to confiscate offenders' assets as an additional penalty related to trafficking and procuring offences (sections 1bis and 2 of chapter V of the criminal code). It includes "the confiscation of any or all of their property, of whatever type, movable or immovable, and whether jointly or separately owned". In a recent case of the trafficking of babies the prosecutor requested this penalty for the offenders but the tribunal did not grant it.<sup>170</sup>

<sup>167</sup> *Op. cit.* note 165, *Sans papiers mais pas sans droits*, p. 51.

<sup>168</sup> Gao Yun and Veronique Poisson, *Le trafic et l'exploitation des immigrants chinois en France* (ILO, March 2005), p. 106.

<sup>169</sup> Information from Bénédicte Bourgeois of Comité contre l'Esclavage Moderne.

<sup>170</sup> TGI Bobigny 13ème chambre, *Affaires Ministère Public c/ Sandov, Hristova, Landouer et autres*, 2 February 2007. Thanks to Georgina Vaz Cabral for the information contained in this paragraph.



#### 5.2.2.4. Assistance to the victims

Sections 53(1) and 75 of the code of criminal procedure state that the police investigation authorities must inform victims of their rights. This particularly includes the right to obtain compensation for the losses and injuries they have suffered. Trafficking victims who are foreign minors, witnesses and civil claimants are eligible for legal assistance. This legal assistance applies from the beginning of the proceedings since the police investigation department must inform the victim, from the inquiry and prosecution stage, of his or her right to be assisted by counsel.

A Victim's Rights Charter of 2002 was established in 2002, which does not contain much detail but outlines core information for victims. The Ministry of Justice has more recently produced a 40-page guide to victims' rights covering all issues relating to compensation and civil claims and legal aid.<sup>171</sup>

The 2003 Law on Internal Security allows a victim of trafficking to obtain a residence permit and work permits on restrictive criteria including the condition of collaboration with investigation.<sup>172</sup> In 2006 these provisions were loosened slightly to enable a victim to obtain a *permis de séjour* residence permit (rather than an *autorisation de séjour*, valid for only 3 months) which gives the victim more security. Although the legislation does not set out how long this permit is valid, the September 2007 decree specifies that the permit shall be for a period of at least six months and is renewable for the duration of the criminal proceedings.<sup>173</sup>

The Ministry for Employment and Social Cohesion and the local authority of Paris is financing accommodation and protection for individuals, including some victims of trafficking, who need a secure environment. An NGO, *Accompagnement Lieux d'accueil Carrefour éducatif et social* (ALC), is funded to coordinate the referral of victims to safe houses (using the capacities of the shelter network *Accueil Sécurisant* (Ac-Se)).<sup>174</sup> Although this is a positive development of state-NGO co-operation, it is limited in scale and impact. Between February 2002 and August 2007, 323 persons were referred for safe accommodation to Ac-Se, 235 were finally accommodated.<sup>175</sup>

There are 150 independent victim support organizations nationwide most of which are organized into a national network of agencies called INAVEM (*Institut national d'aide aux*

<sup>171</sup> *Op. cit.* note 147, *Les droits des victimes*.

<sup>172</sup> See also *Loi n° 2006-911 du 24 juillet 2006 relative à l'immigration et à l'intégration*.

<sup>173</sup> Art. 1, section 1, Décret n° 2007-1352 du 13 septembre 2007 *relatif à l'admission au séjour, à la protection, à l'accueil et à l'hébergement des étrangers victimes de la traite des êtres humains et du proxénétisme et modifiant le code de l'entrée et du séjour des étrangers et du droit d'asile* (dispositions réglementaires), published in the *Official Journal*, 15 September 2007, text 17, p. 15340.

<sup>174</sup> For details on ALC and Ac-Se see [www.acse-alc.org](http://www.acse-alc.org).

<sup>175</sup> Coordination Ac-Sé, Association ALC, Conférence de lancement du *Guide pratique—Identifier, accueillir et accompagner les victimes de la traite des êtres humains*, 26 September 2007.

*victims et de médiation*).<sup>176</sup> INAVEM also provides a telephone hotline for advice (08VIC-TIMES), which received 28,300 enquiries in 2005. Advice can also be obtained by email. The organizations receive funding from the state at national and local level (in 2004 the total cost of the INAVEM network and its members was €17.6 million). The advice consists of counselling and assistance with accessing medical, legal, psychological and social services and is provided free of charge. As a national body INAVEM also co-ordinates victim issues, promotes policy change and raises awareness of victim's rights and needs especially with those professionals working with victims. There is no evidence that this organization has specific experience in dealing with trafficking victims. However, they have a knowledge base, which should be available to such groups.

People with irregular status and trafficking victims can also receive free legal aid from the large network of NGOs, many of which have legal experts or lawyers on their staff, or who can refer to a legal expert or lawyer to receive free assistance. These organizations do not all focus specifically on trafficking but on related and overlapping issues e.g. CODETRAS is a collective of several NGOs that focus on support to agricultural workers. Legal support is provided by one of its members, ESPACE; GISTI (*Groupe d'information et de Soutien et des immigrés*) supports migrants' rights; and CCEM (*Comité contre l'esclavage moderne*) works with workers exploited in slavery and slavery-like conditions.

### 5.2.3. Conclusion on France

France has well-developed schemes of claiming compensation from the state and from the defendant and has some positive examples of good practice in this regard. Legal aid is available and there are a wide range of active and experienced NGOs. However, the schemes have not been tailored to the needs of trafficking victims and the prosecution of the offence of trafficking is almost non-existent. This means that access to compensation is, in practice, restricted. There are also prevailing problems of the enforcement of civil judgments which means that although awards are often made they are rarely paid. This leaves the trafficking victim with a substantial burden in taking the necessary measures to obtain the money unless the judiciary and lawyers are able and willing to be creative about securing payment. The enforcement proceedings would be particularly difficult to undertake if the victim was no longer located in France (e.g. following the expiry of a residence permit).

Labour law has traditionally protected all sorts of undocumented workers but NGOs are less confident that workers can use this system without their details being referred to the immigration authorities. Procedures are available to secure unpaid wages and NGOs have been actively using them in parallel with criminal proceedings.

### 5.2.4. Good practice in France

- Provisional payments made by the state compensation scheme;
- State-funded compensation scheme can pursue the defendant in civil proceedings;

<sup>176</sup> For more information see <http://www.inavem.org>.

- Full damages available from the state-funded scheme;
- Psychological violence accepted as violence by the state scheme;
- In civil claims attached to criminal proceedings a claim does not have to be made at the outset but can be left until the final day of judgment;
- Police have a legal obligation to provide information to victims about their rights;
- The principle of paying substantial amounts for moral damages (prejudice) is accepted by courts;
- Victims have standing in criminal proceedings as a civil party and have free legal aid to assist them;
- Using money paid by the defendant as bail security to pay damages;
- There is a large and active NGO community to support a diverse range of victims and some examples of partnership between NGOs and with state agencies;
- Jurisprudence is being developed regarding parallel criminal and employment law actions. The employment tribunal awarded unpaid wages in the Siliadin case that was almost double the civil damages awarded in the criminal case.

### 5.3. MOLDOVA

#### 5.3.1. Legal and institutional framework

Moldova is a party to the main international conventions on trafficking and forced labour and ILO C97 on migrants' rights. It has also signed the European Conventions against Trafficking but not the European Convention on Compensation for Victims of Violent Crime although this is envisaged.<sup>177</sup> It is not a member of the European Union but has a Partnership and Cooperation Agreement with the EU and participated in the Action Plan drawn up by the European Commission as part of the European Neighbourhood Policy.<sup>178</sup>

A specialist prosecutor's office has existed since 2000 to prosecute trafficking and related cases. The Criminal Code of 2002 criminalizes trafficking at Arts.165 and 206, and extensive commentary on the nature and meaning of the offence has been issued by the Supreme Court.<sup>179</sup> There is also a law on preventing and combating trafficking in human beings,<sup>180</sup> which adopts a national plan of action. A national committee was established to implement the national action plan. It defines the functions of other public administration bodies and ministries as well as law-enforcement agencies in relation to trafficking in persons. It defines

<sup>177</sup> See Para 1.2 regarding NPA commitments.

<sup>178</sup> [http://ec.europa.eu/comm/external\\_relations/moldova/intro/index.htm](http://ec.europa.eu/comm/external_relations/moldova/intro/index.htm).

<sup>179</sup> Decision of the plenum of the supreme court of justice of the Republic of Moldova, *On application of legislation concerning trafficking in human beings and trafficking in children* No. 37 of 22 November 2004, *Bulletin of the Supreme Court of Justice of the Republic of Moldova*, 2005, No. 8, p. 4.

<sup>180</sup> No. 241-XVI of 20 October 2005 and no. 164-167/812 of 9 December 2005, *Official Monitor of the Republic of Moldova*.

a host of protections, assistance measures and commitments to the rehabilitation of trafficked persons, many of which are envisaged to be implemented by NGOs.<sup>181</sup>

On 8 December 2006, a Government Decision brought a Framework Regulation on Assistance and Protection Centers for Victims of Trafficking into force. It was drafted at the initiative of the Ministry of Health and Social Protection, in order to implement the Anti-Trafficking Law adopted in 2005. The Regulation details the creation and administration of Territorial Assistance and Protection Centres; the range of services to be offered by them; and stipulates that the government and the local public administration authorities will ensure that the centres will receive funding from the central and local budgets. The centres' beneficiaries are victims of trafficking and potential victims, as well as victims' children.<sup>182</sup>

On 6 September 2005, the governments of Moldova and the United States entered into a Letter of Agreement to work together to create an inter-agency Centre for Combating Trafficking in Persons. The special law-enforcement unit focused on combating trafficking in human beings, formerly located within the Ministry of Internal Affairs, has been integrated into the new Centre. The Centre includes a witness-protection programme and an analytical bureau. The witness-protection element includes among its aims the enhancement of victim-protection services including advice throughout legal proceedings.

There is a vibrant NGO community that has been working to provide effective assistance and support to trafficked persons. This includes La Strada, Committee for the Prevention of Trafficking in Women and an IOM shelter. They also engage in advocacy, research and implementation of services for trafficked persons through a referral mechanism.

### 5.3.2. Compensation and damages schemes

The law on preventing and combating trafficking in human beings essentially reiterates existing legal rights on compensation and goes no further:

Victims of trafficking in human beings are entitled to compensation for damages, as provided by the law.<sup>183</sup>

However, the National Action Plan to Prevent and Combat Trafficking in Human Beings<sup>184</sup> aims to establish legal provisions ensuring access to compensation from traffickers or the

<sup>181</sup> For copies of relevant laws, NPA, etc see "Trafficking in Human Beings in Moldova Normative Acts" (OSCE/La Strada, 2006) at [http://www.osce.org/documents/mm/2006/06/19678\\_en.pdf](http://www.osce.org/documents/mm/2006/06/19678_en.pdf).

<sup>182</sup> Minutes of Technical Coordination Meeting chaired by OSCE Mission in Moldova, December 2006.

<sup>183</sup> Art. 23(2)

<sup>184</sup> Approved by Government Decision No. 903 of 25 August 2005 and published in the *Official Monitor* No. 119–122/987 of 9 September 2005.

state<sup>185</sup> and to ensure implementation of laws and regulations which provide access to compensation.<sup>186</sup> It is intended that compensation by the state should be achieved by:

replenish(ing) the Fund of compensations for trafficked people by financial means obtained from impounding and confiscation of traffickers' criminally gained property.

An additional aim is to:

raise the victims' level of knowledge about the possibilities of compensation [...by] ensur(ing) trafficked people have legal assistance from lawyers at all stages of a criminal proceeding" and "providing informational materials about the rights and the possibility to execute thereof during a criminal proceeding.

Although the responsibility for this lies with state bodies, most of this work has been undertaken by NGOs without the government fulfilling its responsibilities. This may change with the activity of the new Centre.<sup>187</sup>

#### 5.3.2.1. State compensation schemes

Despite the commitments of the NPA there are no concrete plans, as yet, for a state-funded compensation scheme or fund of trafficker's assets to fund compensation to trafficking victims.

Until 2005, Art.60(1) the Criminal Procedure Code provided a state guarantee for redemption of moral and material damages caused by crimes, including trafficking in persons. This provision was deleted.

#### 5.3.2.2. Compensation awarded through civil-, criminal-, and labour-law procedures

##### *Criminal and civil proceedings*<sup>188</sup>

The Constitution of Moldova declares that:

[e]ach individual shall be entitled to effective satisfaction on the part of the competent courts of law against acts that violate his/her lawful rights, liberties and interests<sup>189</sup>

<sup>185</sup> Para. 1.2 (e).

<sup>186</sup> Para. 4.4.

<sup>187</sup> Responsibilities with the General Prosecutor's Office and the National Committee for Combating Trafficking in Human Beings, As reported in ABA CEELI *Human Trafficking Assessment Tool Moldova Report*, June 2005, p. 86.

<sup>188</sup> This section borrows heavily from Lori J. Mann and Igor Dolea, *OSCE Trial Observation Manual for the Republic of Moldova* (OSCE, 28 February 2006), available at [http://www.atnet.md/public/49/en/Final%20Trial%20Monitoring%20Manual%20\\_28%20Feb%202006\\_.pdf](http://www.atnet.md/public/49/en/Final%20Trial%20Monitoring%20Manual%20_28%20Feb%202006_.pdf).

<sup>189</sup> Article 20(1) on Free Access to Justice.

The criminal court can require convicted defendants to “offer financial support to the victim’s family” and to compensate the victim for damages caused within a specific time limit set by the court.<sup>190</sup> This claim can consist of moral and material damages as defined in Article 219 of the Moldovan Code of Criminal Procedure:

- (2) ...1) restitution in kind of the assets of the counter value of lost or destroyed assets as a consequence of the fact prohibited under the criminal law;
  - 2) compensation of expenses for the procurement of lost or destroyed assets or for reestablishing the quality, the trade image, as well as the reparation of deteriorated assets;
  - 3) compensation of lost profit as a result of the acts prohibited under the criminal law;
  - 4) reparation of moral damages or in certain cases of the damage brought to the professional reputation.
- (3) The material damage is considered to be related to the commission of the action forbidden under the criminal law if it may be expressed in expenses for:
- 1) treatment of and care afforded to the injured party;
  - 2) burial of the injured party;
  - 3) payment of insurance, indemnities and pensions;
  - 4) execution of the assets deposit contract.
- (4) Assessing the amount of the pecuniary reparation of the moral damage, the court shall take due consideration of the physical suffering of the victim, the aesthetic damage, loss of hope in life, loss of trust for conjugal faithfulness, loss of honor by slander, psychological suffering determined by the decease of close relatives, etc.

These are fairly broad definitions of damages, which would encompass unpaid wages and physical suffering and therefore give the victim a broad scope for a claim and the judge enough legal scope for making an award where sufficient evidence of loss is provided.

National criminal procedure distinguishes a “victim of a crime”, “civil party”, “injured party” and “witness.” The scope of a participant’s procedural rights depends upon this status. Victims have the right to request to be recognized as an injured party or civil party.<sup>191</sup>

<sup>190</sup> Article 90(6)(d),(e), Moldovan Criminal Code.

<sup>191</sup> According to the CPTW Activity Report 2003–2006 p. 19 the classifications of victims of trafficking represented by them broke down as follows:

*As victims*—of the total number of trafficked persons, only 22% were heard as victims, which is only one in five trafficked persons.

*As damaged persons*—79% of the total number of trafficked persons were heard as damaged persons. Every fifth trafficked person (10%) is heard as damaged person several times. How does this reflect categories given above?

*As civil party*—those victims have been heard, who solicited establishment and compensation of damage, caused to them by the crime. Thus, of the total number of victims, 85%”.

(However, these figures may include double counting as victims have more than one status at one time.)



A “victim” is defined as any physical or legal person who suffered moral, physical, or material damages resulting from a crime. The victim must file a claim with the legal authorities in order to be officially registered as the victim of a crime.<sup>192</sup> (There is no national-level provision recognizing persons related to the direct victim as victims.) Victims have the right to request information from the prosecution body or the court with respect to decisions adopted that refer to the victim’s rights and interests.<sup>193</sup>

Victims also have the right under criminal procedure to be recognized as a “civil party” in a civil suit attached to the criminal case against the same perpetrator.<sup>194</sup> This entitles the victim to claim damages for moral or material prejudice as a result of the crime and the case.<sup>195</sup> As a civil party, the victim can also seek the return of property that was taken by authorities with his or her consent to be used as evidence in the proceedings as well as the return of property that was taken by the perpetrator.<sup>196</sup>

Victims can also be recognized as an “injured party” i.e. a physical person who suffered moral, physical, or material prejudice resulting from a crime. The criminal investigation body issues an order, in accordance with the law, recognizing an injured party immediately after determining the qualifying reasons and with the consent of the victim.<sup>197</sup> While conferring additional rights, injured parties also assume an obligation to make statements to police, prosecutors, and the court.

As official parties to the case, injured and civil parties are granted the right to make declarations and accusations before the court as well as to present documentary and other evidence for examination. They have the right to raise objections to actions taken by the criminal investigation body or the court. They are also allowed to participate in pleadings related to damages.<sup>198</sup>

The successors of injured or civil parties obtain the same rights as the deceased.<sup>199</sup> Victims who have the status of injured or civil parties or witnesses should be afforded the possibility of reimbursement of expenses incurred whilst participating in the criminal proceedings.<sup>200</sup> This includes reimbursement of costs for witnesses located in a different state, for their physical travel as well as the costs of establishing technological communications, such as telephone or video linkages.

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<sup>192</sup> Article 58(1),(2), Moldovan Code of Criminal Procedure (“Moldovan CCP”).

<sup>193</sup> Articles 58(3) & 62, Moldovan CCP.

<sup>194</sup> Article 58(3)(6), Moldovan CCP.

<sup>195</sup> Article 61, Moldovan CCP.

<sup>196</sup> Article 62(1)(20), Moldovan CCP.

<sup>197</sup> Article 59(1)-(2), Moldovan CCP.

<sup>198</sup> Articles 60 & 62, Moldovan CCP.

<sup>199</sup> Article 81, Moldovan CCP.

<sup>200</sup> Article 7, European Council Framework Decision on the standing of victims in criminal proceedings.



The criminal procedure code requires that all judicial decisions include (*inter alia*), a judgment regarding the instituted civil action. It also gives the court the power to take a decision regarding the reparation of material damages and a judgment regarding special confiscation regardless of whether the victim actually made a claim.<sup>201</sup> The court also has the power to separate the civil claim and to send it to the civil court for finalization.

The numerous possibilities for status in the criminal court may seem confusing and may in practice require the victim to testify many times. They do, however, confer legal standing and therefore rights upon the victim and allow for them to be represented in proceedings.

The criminal procedure code requires the enforcement of “civil law judgments, orders and decisions adopted by the courts”.<sup>202</sup> After a judgment has become final, the court issues an enforcement warrant to the claimant of the compensation. Immediate enforcement can also be issued after the final judgment.<sup>203</sup> The bailiff commences the procedure on the enforcement order upon the request of the claimant or following an order by the judge.<sup>204</sup> However, responsibility for “the correct and prompt enforcement of judgments” falls under the auspices of the Department for Execution of Judgments within the Ministry of Justice under a new Code.<sup>205</sup> This system of enforcement of judgments was reported to be “confused”.<sup>206</sup> The civil procedure code also ensures the execution of judgments<sup>207</sup> including in certain cases their immediate execution<sup>208</sup> although again problems have been noted of the state refusing to use execution powers due to lack of resources.<sup>209</sup>

According to the non-governmental organization CPTW:

most civil claims filed against traffickers in court pertain only to moral claims, due to the lack of evidence confirming causation of material damage. Moreover, expenses borne in connection with repatriation, treatment, restoring identity documents and judicial outlays are borne by the CPTW and by IOM. On average, the amount of moral damages claimed by the victims of trafficking in persons is 50 thousand Lei. In two thirds of the criminal trials, upon issuing the conviction judgment, the court admits, in principle, material claims filed by CPTW lawyers, directing the filing of such claims to the civil procedure court, in order to establish the exact amount of moral and material damage claimed by the victim.<sup>210</sup>

<sup>201</sup> Art 385 (11) and Article 397(1),(2),(4),(5), Moldovan CCP.

<sup>202</sup> Article 336, Moldovan CCP.

<sup>203</sup> Article 338, Moldovan CCP.

<sup>204</sup> Article 343, Moldovan CCP.

<sup>205</sup> Article 349, Moldovan CCP.

<sup>206</sup> CPTW verbal report at Technical Coordination Meeting, recorded in minutes of 8 February 2006.

<sup>207</sup> Article 258, Civil Code of Procedure.

<sup>208</sup> Article 255, Civil Code of Procedure.

<sup>209</sup> CPTW verbal report at Technical Coordination Meeting, recorded in minutes of 8 February 2006.

<sup>210</sup> CPTW Activity Report 2003–2006 p. 19.

In a joint report of a project implemented by the US Embassy and Supreme Court of Justice, 106 closed trafficking case files from 2004-September 2005 were analysed. Forty-five per cent (approximately 38) of a total of 84 victims filed claims for damages and 11 per cent (approximately 9) were granted. Unfortunately the reasons for rejection and making the award are not given in the report but it seems that some may have been remitted to the civil courts. The average sum granted to a victim was 12,618 Lei (approximately €756). It is not clear whether this was for material or moral damages.<sup>211</sup>

The CPTW reported that in 2005, out of 79 victims represented, 38 victims filed civil actions for damage resulting from the criminal actions.<sup>212</sup> Out of the eight civil actions tried in court, the victims were successful in all of them, as well as in two administrative actions. The smallest sum obtained by a victim was 5,000 Lei (€295) and the highest sum was 180,000 Lei (€10,638). (No information has been provided on the details of the cases and it is not clear how these divided between material and moral damages.)

There is no explanation available for the disparity between the amounts claimed and the amounts awarded or for the basis upon which moral damages are claimed. There are also no reports as to whether any of the compensation monies were received by the trafficked people. It is thus not easy to establish a clear picture of court practice in relation to the right to compensation in Moldova and it would be helpful if a consistent assessment was made of all the trafficking cases so far prosecuted. However, there is a practice of making claims and of courts accepting victims' claims for moral damages albeit with variation in the awards.

Where the civil claim has not been solved within the criminal case or there has been no criminal case, trafficked persons can take action to pursue the claim in a civil procedure against the trafficker/exploiter. Article 1398 of the Civil Code will apply. According to this, a person acting illegally in respect of another shall be obliged to repair the material damage, and in cases provided by the law, also the moral damage caused by action or omission.

#### *Proceedings in Labour Law*

Article 44 of the Moldovan Constitution prohibits forced labour. In cases of forced labour, action can be taken using the civil and criminal procedures as detailed above or alternatively victims can use the Labour Code.

Article 7 of the Labour Code prohibits forced (compulsory) labour, defined as any work or service imposed upon a person being threatened or without their consent. The acts that constitute forced (compulsory) labour according to Article 7 para 4 are:

- the payment of salary outside the due date or partial salary payment;

<sup>211</sup> C. Cojocaru and H. Wiseman, *Trafficking in Persons—An in-depth Analysis of Closed Criminal Case Files in Moldova for 2004-September 2005* (June 2006) p. 28.

<sup>212</sup> Please note that some of these cases and those from the US Embassy report (previous paragraph) may be the same ones. The CPTW was the implementing partner for the US Embassy report.

- failure by the employer to ensure collective or individual social protection schemes apply or when the work poses a danger to the health or life of the employee.

Article 329 of the Labour Code states that the employer is obliged to compensate entirely the material and moral damage to the employee that resulted from his work or from the illegal deprivation of work. Labour claims can be submitted to court within a year from the day when the employee found out or must have found out about the rights violation; or within three years from the moment when the relevant right was acquired by the employee.<sup>213</sup>

In a case of forced labour under Article 7 of the Labour Code, the employee can bring a claim to court under Article 355 of the Labour Code, even if there is no labour contract in writing signed with the employer. A written contract is only necessary in cases when the employer is a company. Article 58 para 3 of the Labour Code states that if the labour contract is not written, a labour agreement is considered to be signed for an indefinite period of time and in force from the day when the employee was taken to work by the employer. If the employee manages to prove the act of being employed, the employer will be obliged to sign subsequently a written contract.

#### 5.3.2.3. Asset seizure

Moldovan criminal procedure permits the state to take title to assets that were used in the commission of a crime or the proceeds from that crime. If such assets no longer exist, then the state can confiscate assets of the same value. Assets can be confiscated even if the perpetrator is not sentenced to serve a criminal penalty.<sup>214</sup> These powers have not been extensively used in trafficking cases to pay compensation to victims.

The National Plan envisages the creation of a compensation fund for trafficked persons with financial means obtained as a result of seizure and confiscation of the property of traffickers obtained by criminal means. No steps had been taken to realize this plan at the time of writing.

#### 5.3.2.4. Assistance

The National Plan of Action ensures the provision of legal assistance to trafficked persons at all stages of proceedings. Likewise, the Anti-Trafficking Law declares that “free access to justice” is a basic principle of combating trafficking in human beings.<sup>215</sup> The Code of Criminal Procedure requires that the victim be provided with *pro bono* (free) legal assistance as part of the court’s duty to ensure the protection and security of victims and witnesses. Victim’s counsel can be provided either upon the victim’s request or by the court *ex officio* (on

<sup>213</sup> Art. 355 Labour Code.

<sup>214</sup> Article 106(1),(4), Moldovan CCP; see also Articles 203–210 (outlining the general procedure for the seizure of assets).

<sup>215</sup> Article 4(e), Law on Preventing and Combating Trafficking in Human Beings, No. 241-XVI, 20 October 2005.

its own motion).<sup>216</sup> Victims who are foreign citizens or stateless persons are further entitled to free legal assistance during all stages of criminal proceedings as well as civil proceedings related to trafficking.<sup>217</sup> The General Prosecutor's Office, *inter alia*, "shall supervise the observance of human rights, including of victims of trafficking". However, the government does not make provision for this assistance and in reality the services have been provided by NGOs and the IOM funded from other sources.

Among the forms of "social rehabilitation" and other "protection and assistance" granted to victims under this law, "legal assistance" is specifically mentioned.<sup>218</sup> The protection centres (envisaged in the law of December 2006) should be equipped to provide "emergency legal assistance," and NGOs may protect and assist trafficking victims, including protecting their interests in a criminal or civil suit.<sup>219</sup> It is unclear as yet how the role of the new centres will increase government commitment or funding to legal representation.<sup>220</sup>

It is crucial that victims/witnesses understand their various options in participating in proceedings. The scope of a victim's right to information often varies according to his or her procedural status, for example, as an injured party, civil party, or witness so it is crucial they are advised on this at an early stage. In reality victims tend to be referred to NGOs for advice and therefore it is difficult to assess implementation of the right to information by the state.

### 5.3.3. Conclusion on Moldova

The state has taken significant steps legally and in policy to regulate trafficking and support the victims. In addition the government could consider ratification of ECCVVC and the implementation of a state-funded or subsidized scheme for victims from which trafficked persons would benefit.

The criminal courts can grant compensation as a result of a claim by the victim for a wide variety of damages. Also a compensation award for material damages can be made on the judge's own initiative. There is no evidence of this *ex officio* power being used in the available criminal cases but it is an important power, which does not always exist elsewhere. The Criminal Procedure Code enumerates detailed and specific rights for the victims of crime which vary according to their status in proceedings. Additionally, they are entitled to representation free of charge although in practice this right is not fulfilled by the state. A number of civil claims for moral damages have been successful. However, the quality and success of

<sup>216</sup> Article 58(4)(2), Moldovan CCP.

<sup>217</sup> Article 24(4), Law on Preventing and Combating Trafficking in Human Beings, No. 241-XVI, 20 October 2005.

<sup>218</sup> Articles 16 & 20(1), Law on Preventing and Combating Trafficking in Human Beings, No. 241-XVI, 20 October 2005.

<sup>219</sup> Articles 17(1) & 20(1),(7), Law on Preventing and Combating Trafficking in Human Beings, No. 241-XVI, 20 October 2005.

<sup>220</sup> Article 11(5), Law on Preventing and Combating Trafficking in Human Beings, No. 241-XVI, 20 October 2005.

claims and enforcement needs further analysis to identify barriers to the implementation of the right to compensation. The consistency in the quality and nature of the applications and in quantifying awards may be alleviated by guidance and training for lawyers, prosecutors and judges. Many of these awards may not actually been received by the victims. Attention needs to be paid to the development of more effective enforcement and asset seizure practices.

Rights also exist in relation to forced labour situations, which can be adjudicated by the labour courts, and for which compensation can be awarded. This even extends to include compensation claims that arise where there is no officially registered contract.

There is an active and experienced NGO community that supports, advises and represents trafficking victims, sometimes going so far as to fulfil the responsibilities of the state (e.g. paying witnesses travel costs).

#### 5.3.4. Good practice in Moldova

- The existence of a Law on Trafficking in Human Beings, which strengthens and reinforces other existing rights and improves co-ordination;
- Right to free legal assistance recognized in law;
- Right to be a party in criminal proceedings;
- The criminal court's ability to grant some elements of compensation on the judge's own initiative;
- It is accepted court practice to grant moral damages in trafficking cases;
- State is taking steps to co-ordinate and fund a national system of protection and support in relation to trafficking;
- There is an active NGO community to support and assist victims including by provision of legal support and representation as well as to advocate for victims' rights; and
- There is a specialist prosecutorial team.

### 5.4. ROMANIA

#### 5.4.1. Legal framework

Romania is a party to UNTOC and the Trafficking Protocol, ILO Conventions on Forced Labour and the European Conventions against Trafficking and on Compensation for the Victims of Violent Crime. As a recently acceded member of the European Union it is bound by all relevant directives and decisions.

Romania has recently made specific efforts to bring its national legislation into line with international commitments.<sup>221</sup> The following laws have been adopted and are in force: Law No.

<sup>221</sup> See report by Ministry of Justice of Romania to 27th Conference of European Ministers "Victims: Place, Rights, Assistance" 12–13 October 2006 Yerevan. Council of Europe MJU-27 (2006)12 available at [http://www.coe.int/t/dg1/legalcooperation/minjust/mju27/MJU-27\(2006\)12E-Romania.pdf](http://www.coe.int/t/dg1/legalcooperation/minjust/mju27/MJU-27(2006)12E-Romania.pdf).

678/2001 on trafficking in persons, Law no 211/2004 certain measures to protect victims of crime and Law no. 272/2004 to promote and protect the rights of children. Two specialized agencies have been established: the National Agency for Family Protection and the National Agency for Preventing Trafficking in Persons and for Monitoring the Assistance Granted to Victims of Trafficking in Persons.

There are a number of active NGOs working on the issue of trafficking including to provide legal advice and assistance as well as shelter and other services. It seems these are not provided on the basis of a government agreement although with government co-operation.

#### 5.4.2. Compensation and damages schemes

##### 5.4.2.1. State compensation schemes<sup>222</sup>

The Law on Victim Protection came into force on 1 January 2005.<sup>223</sup> The law deals with a variety of issues such as legal aid, provision of counselling to victims as well as the payment of compensation for material damages from a state fund. The compensation provisions apply only to victims of “serious crimes”, which include crimes of violence and sexual crimes.<sup>224</sup> The Law covers crimes committed in Romanian territory, where the claimant is a Romanian citizens or lawfully dwelling foreign citizen, or where there is a relevant international convention binding Romania.

The Law dictates that, in these cases, compensation should be provided to victims on request/application but only where “he/she notifies criminal prosecution bodies or the court within 60 days from the date of the commission of the offense.”<sup>225</sup> However, the 60-day deadline can be counted from the day of cessation of physical and psychological problems rendering reporting impossible. This means the victim must be willing to participate in a judicial procedure in order to qualify to make a claim. This is analysed by UNICEF who present the “cleavage” in prevailing views on this problem:

State institutions, with the exception of the courts of law, consider that this is a good provision, in the sense that it encourages the victims to cooperate with judicial bodies in uncovering and punishing crime. At the same time, it discourages potential profiteers by the system, i.e. persons who would claim compensations without being the injured party of the offense.

<sup>222</sup> This section was drafted with the benefit of input and assistance from Alexandru Surcel, Attorney with NGO ADPARE, Romania and pp. 234–235 *Victims—Support and Assistance*, (Council of Europe, September 2006) and a paper given by Eugenia Chivulescu, General Prosecutor attached to the Ploiești Court of Appeal at a conference organised by Ludwig Boltzmann Institute in Vienna in March 2007.

<sup>223</sup> OUG (Government Emergency Order) no 211/2004 Protection of Victims of Crime.

<sup>224</sup> These are defined as murder, attempted murder, serious bodily harm and deliberate offences resulting in death or serious bodily harm, rape, sexual intercourse with a minor, sexual perversion committed upon a minor or committed with the use of violence.

<sup>225</sup> Art 23(1) Law 211/2004.



Nevertheless, the representatives of civil society, social workers and psychologists who work directly on the recovery and rehabilitation of the victims of trafficking of human beings caution that the consequence of this outlook of the authorities is that the victim does not receive any kind of help just when he/she needs it most, because a trafficked person needs a longer time for behavioral stability. In the opinion of some experienced psychologists in the field, the post-traumatic stress disorder may appear even 6–12 months after the victim's removal from trafficking. Not lastly, the victim has to decide to face the social stigma associated with his/her circumstances (or perceived as such by the victim due to other relational factors), to overcome his/her distrust of state institutions (fueled by the traffickers too, in order to maintain more easily the victim in slavery), and, not lastly, to escape the psychological complex of the bond with the aggressor. (Apparently, the traffickers get better and better at using this weapon.)<sup>226</sup>

The final grant of compensation does not, however, depend on the identification of a perpetrator. In fact the law contains different criteria depending on whether or not the perpetrator is known. Where a perpetrator is known there is a time limitation of one year from finalization of a criminal case for submission of an application. Also the victim must have brought a civil claim in criminal proceedings (except where the case was dropped by the prosecution), the perpetrator should be solvent or missing, and the victim should not have received full damages from an insurer. Where the perpetrator is not known then the victim has three years to file a claim and if they are a minor then this is three years from their 18<sup>th</sup> birthday.

There are other eligibility criteria, which apply to the victim's character—the victim must not have been convicted for membership of an organized criminal group or other serious violent crime. The victim must not have provoked the perpetrator to self-defence nor “challenged him/her”. The former presumably refers to a physical attack while the latter to a verbal encounter.

Claims for compensation should be addressed to the court of second instance where the victim is domiciled. At each of these locations a Service for Probation and Victim Protection has been established. Compensation claims are dealt with by the Crime Victims Financial Compensation Board consisting of at least two judges. The procedure does not necessitate verbal evidence being given but usually the victim should be present at the hearing.

An “advance payment” can be granted at the outset of proceedings where an application is made speedily.

Compensation payments from the state compensation scheme covers hospitalization costs, medical expenses, funeral expenses, material damages (e.g. damage to particular goods which have a market value), loss of income, and maintenance of dependents.

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<sup>226</sup> “Evaluation of Anti-trafficking Policies in Romania” (UNICEF), p. 43, available at [http://www.childtrafficking.org/pdf/user/UNICEF\\_Evaluation\\_of\\_Antitrafficking\\_Policies\\_in\\_Romania.pdf](http://www.childtrafficking.org/pdf/user/UNICEF_Evaluation_of_Antitrafficking_Policies_in_Romania.pdf)



The scheme does not grant “moral damages” although these can still be claimed and made by a civil procedure (see below). Any payments made through a civil damages claim against the perpetrator or by insurance payments may be deducted from the compensation payment (or vice versa).

The scheme, while approaching European standards theoretically, is not yet running smoothly in terms of practical implementation. Although not particularly bureaucratic, the state bodies remain under-funded. In addition, there is an ongoing problem of hostility or antagonism from judges and prosecutors towards trafficked persons, which regards the victims “as being as guilty as the criminals.”<sup>227</sup> There are also problems with informing the victims of their rights (see section on “assistance” below).

Children are not well catered for by the legislation. This is due to the fact that the damages are restricted to specified types of material damages. If granted the compensation monies should be administered by the legal guardians of the child and there is usually no protection or oversight from child-protection authorities. This means the money can easily be used in ways that are not beneficial to the child victim.

This scheme is in its early phases but no examples have been found of a trafficking victim making a successful claim to the state for compensation. Trafficked victims will find themselves limited by the criteria of violent crime, the time limit for reporting the offence, and the type of damages available (i.e. no moral damages).

#### 5.4.2.2. Compensation awarded through civil-, criminal-, and labour-law procedures

Under the Romanian Penal Code and Civil Code<sup>228</sup> a civil claim can be taken against the trafficker, the trafficker’s parents/guardians (if a minor) or the trafficker’s employer (if the crime was related to the criminal’s job). The procedure can be commenced at the same time as a criminal case and be submitted to the same judge or can be commenced as a separate civil case. In practice, the first option is more common. It is possible (but extremely rare) that a civil claim can be successful even when a criminal prosecution is not. However, if a civil claim is unsuccessful in the criminal proceedings it cannot be reformulated and submitted separately under civil procedure.

The eligibility to take a civil claim is not dependent on nationality or residence in Romania. A claim can be taken even where the crime is not classed as “serious” for the purposes of the state compensation scheme. The level of seriousness will only affect the level of damages awarded.

As in all jurisdictions, it is necessary that a causal link be found between the wrong committed and the damages being claimed. This should be done through evidence provided at a court hearing where the claimant and defendant/respondent are usually both present.

<sup>227</sup> Questionnaire response from ADPARE lawyer.

<sup>228</sup> Articles 998–1002 Romanian Civil Code establish responsibility for damages caused by *illicit deeds*.

Given that most civil claims take place in the criminal proceedings then both victim and accused give verbal evidence in the criminal trial process.<sup>229</sup> It should be noted that if a claim is pursued as a civil proceeding alone then attendance at court and verbal evidence by the claimant is not always necessary.

The requirement for the physical presence of a victim in a criminal court and the necessity to give oral testimony with all the associated risks and trauma for the victim is clearly a major disincentive to participating in a criminal case and to achieving a successful claim for compensation. Moreover, the cases can be lengthy often lasting years rather than months.

The civil court can award the same categories of damages as the compensation scheme with the addition of “moral” damages. These include compensation purely for the physical and psychological injury, moral suffering, stress to self, reputation and public image. The concept of moral damages was reintroduced following the fall of Communism and their calculation and payment is still subject to great debate amongst the legal and judicial profession in Romania. This can lead to some arbitrariness and lack of consistency in the awards. They are computed by the court according to the findings of the court in relation to the victim’s claim, the gravity of the claim and any moral damage. Evidence to prove damages should be provided regardless of the type of proceedings (e.g. damages for physical and psychological injury would need to be evidenced by medical reports.). All other damages require receipts and documentation, or witness evidence for contracts or incomes under 250 Lei.<sup>230</sup>

According to a Romanian prosecutor there have only been four cases of trafficking where a compensation award was made. This limited number of successful claims impacts on the faith of other trafficked people that the justice system can deliver damages.<sup>231</sup> One case example has been provided by NGO ADPARE of three women trafficked for sexual exploitation to Turkey, one of whom became pregnant as a result of the exploitation, who claimed material and moral damages in a civil procedure. Two of the victims were awarded 5000 RON (€1480) and the other 4000 RON (€1184). The traffickers also received prison sentences of 12 years 8 months and 8 years. These findings were finalized and upheld in the Court of Appeal in 2006. However, there are ongoing problems with enforcing the orders.

Once a court order is made for civil damages the victim then faces the problem of extracting the payment from the trafficker/guardian/employer. If this is not done by free will then the victim must apply to a “judicial executioner” for a civil execution procedure, which is complicated and costly. Clearly the damages may never be paid.

<sup>229</sup> With certain protections available as prescribed in Law 682/2002 Witness Protection Law.

<sup>230</sup> Until the 2006 revaluation of the Lei the burden on the claimant to provide documentary evidence for all contracts or incomes over 250 Lei was very high (250 Lei being a very low amount). This prohibited claims. However, 250 new Lei is the equivalent of 2.5 million old Lei so the problem has been rectified.

<sup>231</sup> Information provided by Iulia Diaconu, prosecutor, at the ODIHR Barcelona workshop, December 2008, see note 44.

### *Labour Proceedings*

Unpaid or underpaid wages can be claimed using provisions in the Labour Code and the Civil Code depending on the type of wages. Incomes which come under the Labour Code should be at least at the level of the minimum wage, established every year by the government, and they also can be evaluated in comparison with the labour market. According to local NGOs there have been few cases of migrant workers in exploited situations in Romania so there is little experience of the particular difficulties they would face making a claim in the Romanian legal system.

#### **5.4.2.3. Asset seizure**

The Law against Trafficking gives clear powers to seize assets when courts are dealing with the offences under that law. This extends to “Money, valuables or any other assets obtained from the performance of the criminal offences” or “that have been used to commit these criminal offences.” This includes “Vehicles used to transport trafficked persons as well as lodgings that were used to accommodate those persons...if they belong to the criminal offenders.”<sup>232</sup> It is not, however, made clear how these assets are to be disposed of (e.g. whether they contribute to the state fund) or whether they will be used to fund any damages or compensation claim made by the witness in the case.

#### **5.4.2.4. Assistance**

In theory, any judicial authority (police, prosecution, judiciary) are obliged to inform the victim of their rights at the point of first contact. This practice was not well implemented until the 211/2004 victim protection law, which was more specific than the trafficking law on this point. However the practice is still poor and NGOs continue to step in to take on this role. According to one practitioner, although effective, the work of NGOs is done unofficially without any formal co-operation agreement with the authorities and with insufficient funding.<sup>233</sup>

Commentators have also made the point that, due to a failure to define “victim” in any of the laws, victims can be mislabelled or not recognized as such and are then rendered ineligible for protection measures including compensation.<sup>234</sup> For example, during trials judges tend to incorrectly label victims as “witnesses” rather than as “injured parties” and that this tendency deprives the victim of certain legal rights.<sup>235</sup>

Free psychological counselling for up to three months (up to six months for children) should be made available to victims of the offences outlined in the Law against Trafficking and con-

<sup>232</sup> Arts 19(1) & (2) Law 679/2001.

<sup>233</sup> See analysis of Judge Nicoleta Stefanoi, on victim protection. Available at Antitrafic website: [http://www.antitrafic.ro/sections/l/asfgds/?t\\_id=op12p4&lang=en](http://www.antitrafic.ro/sections/l/asfgds/?t_id=op12p4&lang=en).

<sup>234</sup> *Op. cit.* note 226, UNICEF report, p. 42.

<sup>235</sup> *Ibid.*

firmed in the Victim Protection Law 211/2004. This counselling should be provided by the (state) Service of Victims' Protection and Social Reintegration of the Defenders.

Despite containing a commitment on the provision of legal aid to trafficked persons (Art.44) the law is ambiguous as to who is entitled, what kind of assistance should be provided and whether this assistance extends to civil proceedings and compensation claims. It has therefore been the subject of criticism.<sup>236</sup> In practice it seems legal aid is usually provided, upon application, to direct victims of serious crimes including all victims of trafficking,<sup>237</sup> to indirect victims where the victim is deceased, where a victim is under 18 or where an adult victim has no means. However, even where legal aid is granted the payment that lawyers receive for this work is not high and hence the standard of assistance can be low. Because of these factors specialist NGOs have been taking on this role using their own funds.

The recently founded state National Agency for Preventing Trafficking in Persons and for Monitoring the Assistance Granted to Victims of Trafficking in Persons should be able to monitor and improve assistance to victims of trafficking but its existence and impact is too new to be evaluated here. In 2006 the Agency was being reorganized but the Ministry of Justice stated it would consist of 15 regional centres and a telephone advice line. Transit centres have been established for temporary shelters and assistance with trauma. However, even on the government's own figures, these measures appear to have assisted only a very small proportion of identified victims (in 2006 132 of more than 1000 victims were receiving assistance).<sup>238</sup>

#### 5.4.3. Conclusion on Romania

Romania has made significant steps towards improving the situation of victims of crime in general and victims of trafficking in particular. These steps are reflected in the fact that the country has ratified the ECCVVC and the European Convention against Trafficking.

In order for the recently established scheme to be of tangible benefit to trafficking victims it is likely that damages provisions would have to be reviewed to include a moral damages element. The current restriction on the types of damages available as well as the obligation to become a civil claimant in criminal proceedings means that victims of trafficking have to pursue two avenues for compensation. This may prove intimidating and time-consuming. The state could instead consider a system whereby the state pays all the compensation but also inherits the right to pursue the civil damages case against the perpetrator and may therefore recoup some payments made to victims (compare the systems of Ukraine (proposed) and France). Where a victim cannot identify the perpetrator they are entitled only to material losses. The other eligibility criteria, in particular the requirement for violence and the time lines, may also impact negatively on a trafficked person and should be reviewed af-

<sup>236</sup> See *op. cit.* note 226, UNICEF report, p. 63 and recommendation no.3 p. 95. See also Judge Nicoleta Stefanoi, note 227 above.

<sup>237</sup> Art.44 Law on trafficking.

<sup>238</sup> See MoJ report n1, pp. 8–9.

ter a period of evaluation. Such a review could also involve monitoring and evaluating the speed of processing claims and assistance provided to trafficked persons.

The victim is in a position to put forward a civil claim in criminal proceedings for all types of damages and can obtain legal assistance to do so. The obligations on state actors to inform the victims of this right have recently been strengthened. However, it seems that in practice the representation and the information still mainly comes from the NGO community, which has managed to argue successfully for moral damages.

It is a positive sign that the courts are willing to grant moral damages in reasonable sums although the basis for the calculations is not clear.

As in all jurisdictions, attention needs to be paid to improving asset seizure and enforcement of judgements as, although powers are in place, they are not ensuring that victims receive their damages awards.

The rights to legal aid and information are established in law. However, reliance on the NGO community for implementing these provisions is still high. It would help to clarify the law in relation to legal assistance and representation for trafficked persons, and to ensure independent lawyers are properly trained in representing victims and are well paid for their services.

#### 5.4.4. Good practice in Romania

- National agencies with clear responsibilities for trafficking;
- Existence of a state-funded scheme, although in its infancy, is very positive;
- Establishment of state agencies to administer compensation and to co-ordinate trafficking assistance activities;
- Ability to grant advance payments through the state scheme;
- Courts accept the principle of paying moral damages to trafficked persons;
- Legal entitlement to free legal assistance and information; and
- Practical help provided by many specialized NGOs.

### 5.5. RUSSIAN FEDERATION

#### 5.5.1. Legal Framework

The Russian Federation is a party to the main international conventions on trafficking and forced labour. It is a member of the Council of Europe but has not signed the Convention on Action against Trafficking in Human Beings nor the European Convention on the Compensation of Victims of Violent Crimes. The Russian Federation is bound by UN declarations and documents.<sup>239</sup>

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<sup>239</sup> See ratification tables in Annex V.

Trafficking in persons was criminalized in 2003 by amendments to the criminal code that introduced three new offences of trafficking in persons (Art.127(1)), the usage of slave labour Art.127(2) and child pornography (242(1)). It also amended the laws relating to recruitment into prostitution (Art.240) and organization of the activity of prostitution (Art.241).<sup>240</sup>

There are several active NGOs and trade unions working with people subject to labour exploitation (Law and Migration Centre/Tajikistan Foundation; Trade Union of Construction Workers, Association of Forced Migrants and others) and sexual exploitation (e.g. Angel Coalition<sup>241</sup>, Centre Sisters<sup>242</sup> and others). There is no national formalized agreement with the state regarding the services they provide but according to research sources in Russia the possibilities of such formal co-operation, including a model form of the agreement, have been widely discussed.<sup>243</sup> The Russian Federation has been the subject of comment by the International Confederation of Free Trade Unions for inadequate victim protection services and for the absence of national level co-ordinated responses to trafficking including specific national anti-trafficking legislation and policy.<sup>244</sup>

The ILO has also identified problems in relation to migration policy, which can result in labour migrants being entrapped in exploitative situations,<sup>245</sup> and in problems relating to the response to child labour.<sup>246</sup> However, it is hoped that new more liberal migration provisions in force since 15 January 2007 may assist the situation of labour migrants.<sup>247</sup>

A draft Law on Combating Trafficking in Human Beings drafted by a working group of the State Duma<sup>248</sup> in 2003 is currently being considered, which “provides for a system of bodies to combat trafficking and contains provisions concerning prevention of trafficking, as well as protection and rehabilitation of victims.”<sup>249</sup> The eventual passage and implementation of this law may significantly enhance the Russian response to the trafficking problem.<sup>250</sup>

<sup>240</sup> Federal Law No. 162-FZ *On introducing changes and amendments to the Criminal Code of the Russian Federation*, 21 November 2003, entered into force 16 December 2003, pp. 10–13 *Rossijaka Gazeta* 16 December 2003 (unofficial translation).

<sup>241</sup> <http://www.angelcoalition.org>

<sup>242</sup> <http://www.owl.ru/syostri>

<sup>243</sup> Information from Elena Tyuryukanova, research consultant on trafficking for ODIHR.

<sup>244</sup> *Report of ILO Committee of Experts on the Application of Conventions and Recommendations*, ILO 2007 p. 206.

<sup>245</sup> E. Tyuryukhanova, *Forced Labour in the Russian Federation Today: Irregular migration and trafficking in human beings* (ILO, 2005).

<sup>246</sup> *Op. cit.* note 244, ILO Report 2007, pp. 260–261.

<sup>247</sup> Information from Elena Tyuryukanova and *US TIP report 2007* Russia Country Profile at <http://www.state.gov/g/tip/rls/tiprpt/2007/82807.htm>.

<sup>248</sup> The draft law can be accessed at the Duma web site: <http://www.duma.gov.ru/comlaw/job/conf.shtml>

<sup>249</sup> *Op. cit.* note 247, ILO Report 2007 citing government response, p. 206. Draft available at <http://www.legislationline.org/legislation.php?tid=178&lid=514&less=false>.

<sup>250</sup> For more details on anti-trafficking laws, policies and practices in the Russian Federation see ODIHR NRM assessment in the Russian Federation.

### 5.5.2. Compensation and damages schemes

The right to compensation for victims of crime is protected in the Constitution of the Russian Federation at Article 52:

The rights of persons who have sustained harm from crimes and abuses of power shall be protected by the law. The state shall guarantee the victims access to justice and compensation for damage.

This refers only to the possibility for compensation claims from the individual who caused the damage and not to state guarantees of compensation payment. As detailed below the state has accepted its responsibilities to pay compensation in limited circumstances where the state may be deemed directly or indirectly responsible. However, the crime of trafficking is not perceived to be so classified.<sup>251</sup>

Generally, it is acknowledged that cases of compensation under Russian criminal procedure are rare. This has been extensively discussed at a recent round table organized by the NGO *Resistance* (Сопrotивление) in the Russian Duma.<sup>252</sup>

#### 5.5.2.1. State compensation schemes

There is no state-funded compensation scheme for trafficked persons or for victims of crime in general.<sup>253</sup>

#### 5.5.2.2. Compensation awarded through civil-, criminal-, and labour-law procedures

##### *Civil and criminal proceedings*

During criminal proceedings a victim can present a civil claim against the accused, which is judged alongside the criminal action.<sup>254</sup> The claim can include both material and moral damages as defined in the Civil Code:<sup>255</sup>

<sup>251</sup> According to Marianna Kochubei of the Ministry of Interior as reported by Elena Tyuryukanova see note 246.

<sup>252</sup> “Challenges of the legal and social status of victims in Russia”, held on 15 January 2007 in the Russian State Duma. See I.L. Trunov “The Issues connected to the Respect of Rights and Freedoms of Crime Victims” at <http://www.pvlast.ru/archive/index.pr378.php> and the website of the political party United Russia at <http://www.edinros.ru/news.html?id=118380>.

<sup>253</sup> However, the phenomenon of state compensation is not unknown. In 1998, the Russian Federation established a scheme for victims of terrorism, which gave the duty to compensate such victims to the federal districts. Law against Terrorism, 25 July 1998.

<sup>254</sup> Art.44 (1) Criminal Procedure Code of Russian Federation.

<sup>255</sup> Arts 130, 150 & 151 For unofficial translation see <http://www.russian-civil-code.com/PartI/SectionI/Subsection3/Chapter8.html>.



*Article 150 Civil Code. The Non-Material Values*

The life and health, the personal dignity and personal immunity, the honour and good name, the business reputation, the immunity of private life, the personal and family secret, the right of a free movement, of the choice of the place of stay and residence, the right to the name, the copyright and the other personal non-property rights and non-material values, possessed by the citizen since his birth or by force of the law, shall be inalienable and untransferable in any other way. In the cases and in conformity with the procedure, stipulated by the law, the personal non-property rights and the other non-material values, possessed by the deceased person, may be exercised and protected by other persons, including the heirs of their legal owner...

*Article 151. Compensation of the Moral Damage*

If the citizen has been inflicted a moral damage (the physical or moral sufferings) by the actions, violating his personal non-property rights or infringing upon the other non-material values (see Art.150) in his possession, and also in the other law-stipulated cases, the court may impose upon the culprit the duty to pay out the monetary compensation for the said damage. When determining the size of compensation for the moral damage, the court shall take into consideration the extent of the culprit's guilt and the other circumstances, worthy of attention. The court shall also take into account the depth of the physical and moral sufferings, connected with the individual features of the person, to whom the damage has been done.

Art. 150 provides detail as to what may constitute moral damages by defining non-material values, although it is not an exhaustive definition. This differs from many civil codes of the countries of the former Soviet Union or other Eastern European codes, which often provide no guidance as to the meaning of moral damages. The meaning of moral damages is left to the discretion of the judge. This is considered to be problematic as damages are assessed on the basis of "rationality" and "fairness", which have proven difficult concepts for judges to interpret. As a result, the damages awarded have been minimal.<sup>256</sup>

Since 1992 the Code states that a civil claim made in criminal proceedings is then separated into a special procedure. In practice judges consider such claims after completing sentencing in the criminal case, so if the sentence is not completed it can halt the civil claim as well.<sup>257</sup>

At the outset of an investigation there is a formal procedure, where a victim signs a protocol stating that they are officially considered an "injured party" and that they will participate in the criminal procedure as such. A victim as an injured party in the proceedings should be notified by the police officer/investigator or prosecutor about his/her rights, including the right to make a civil claim during criminal procedures. The claim cannot be initiated *ex officio* by the court so it is crucial that victims claim their right at this stage. The prosecutor can initiate a civil suit only on behalf of children, disabled persons or other individuals who

<sup>256</sup> *Op. cit.* note 253, Trunov.

<sup>257</sup> See ODIHR NRM assessment in Russian Federation.

for various reasons cannot protect their rights.<sup>258</sup> Therefore, the injured party has to file a civil suit and bring evidence to support it. As the civil suit is regulated by various laws, the injured party is not able to support it without legal advice and normally this advice is not provided free of charge.<sup>259</sup> The police and prosecutors have to gather sufficient evidence to demonstrate that the suspect committed the crime but are not obliged to gather evidence to prove the nature and scale of damage suffered by the victim. This is the responsibility of the claimant. If a court finds the damages to be unproven, then they can reject the civil claim.

Victims of trafficking have the possibility to sue the trafficker whether or not there has been a criminal investigation or trial of that person in civil proceedings. As is usual in all civil cases, the victim must then prove the facts of the acts which s/he alleges led to the damages and provide evidence for the value of the damage. As well as being long and cumbersome, many experts believe that traffickers or employers/exploiters sometimes seek protection from high-ranking officials in law-enforcement bodies and are therefore “immune” from court-based claims.<sup>260</sup> Furthermore, migrants live in fear of retribution easily meted out in an environment where they enjoy little or no protection from police.

During the ODIHR assessment of the Russian National Referral Mechanism, victim-assistance NGOs informed the researchers that they were aware of no persons trafficked for sexual exploitation that had instituted a claim for compensation through civil or criminal proceedings. Russian NGOs cite as reasons: fear of re-establishing contact with the trafficker, the person’s wish to forget the trafficking event, and distrust of the courts.<sup>261</sup> However, the problem of being pressured to make a claim very soon after trafficked persons come into contact with assistance or law-enforcement agencies is also frequently raised. There is usually quite a long time span for commencing a civil procedure (e.g. three years in the Russian Civil Procedure Code from the date of the damages arising). The Russian NGOs themselves state that women, after a period of stabilization, regret not taking action earlier. Therefore assistance and advice agencies could advise their clients that they could pursue civil proceedings within this three-year time period and do not always have to exercise the right immediately; bearing in mind this will create some practical challenges such as locating the defendant.

One case that has been reported in Russia is the award of 144,000 (€3817) Russian roubles (44,000 roubles unpaid salary and 100,000 roubles for moral damages) by the Horolsk court of the Primorsk region to a victim exploited on a cattle farm.<sup>262</sup> Cases such as this one should be documented and publicized more widely to raise awareness among both the authorities and victims of trafficking of the existing possibilities for claiming compensation.

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<sup>258</sup> Article 44 paragraph 3 of the Criminal Procedure Code.

<sup>259</sup> <http://www.pvlast.ru/archive/index.pr378.php>.

<sup>260</sup> *Op. cit.* note 247, NRM assessment in the Russian Federation, p. 5.

<sup>261</sup> *Ibid.*, citing interviews with NGOs “Centre Sisters” and “Angel Coalition”, p. 3.

<sup>262</sup> For more details see the press release at <http://www.prosecutor.ru/pressrelease/print/118697842>.

*Claims in labour proceedings*

Russian law contains prohibitions on forced labour at Art.37 of the Constitution and Art.4 of the Labour Code. The Labour Code contains a definition of “forced labour” that extends to a situation where there is a “disregard of set dates of payment as well as their incomplete payment” without the requirement for other forms of coercion or menaces.

Art. 381 of the Labour Code provides for the circumstances under which an individual labour dispute can be dealt with. It specifies that the individual employee and employer “who were previously engaged in labour relations” are entitled to claim. In practice, many trafficked persons are undocumented workers so their labour relations are unofficial and unregistered, which means that they will not be protected by this Labour Code. Art.11 regulates labour relations for foreign citizens with regular status (i.e. those with a permit issued according to Art.18). An additional problem is that where a migrant worker wishes to argue their case they may have their freedom of movement restricted making it impossible to address a lawyer, NGO or court<sup>263</sup> or they may be in fear of deportation because of their irregular status. Thus there is no protection for irregular migrant workers in Russian legislation through labour law.<sup>264</sup>

However, with regard to victims of labour exploitation, compensation claims have been successfully negotiated by unions or NGO representatives on behalf of trafficked or exploited migrant workers. According to the Construction Worker’s Union employers are often scared of potential court appearances and so will settle claims e.g. for unpaid or underpaid wages or work-related injuries simply following telephone negotiations.<sup>265</sup> These claims are not therefore strictly dealt with within a legal framework. Furthermore, unions only have access to workplaces where at least one member is working and workers must join the union to obtain representation and assistance from them.<sup>266</sup>

According to an NGO assisting predominantly Tajik migrant workers, the Law and Migration Centre/Tajikistan Foundation, courts are less effective in securing compensation than is negotiation. The NGO will take details of the workforce and employer from a person requesting help and then commences telephone negotiations, followed by threats of legal proceedings and requests for assistance from the relevant union. They also use the Federal Migration Service, which can fine the employers for employing illegal migrants. These methods have resulted in successful claims.<sup>267</sup>

However, many of the most vulnerable trafficked or exploited migrant workers are working in entirely non-unionized settings without contracts or work permits and often in situations

<sup>263</sup> *Op. cit.* note 246, Tyuryukhanova, pp. 24–25.

<sup>264</sup> *Ibid.*, p. 27.

<sup>265</sup> *Op. cit.* note 247, NRM assessment in the Russian Federation, p. 3.

<sup>266</sup> Information obtained by ODIHR during interviews with Construction Worker’s Union, Moscow, July 2006.

<sup>267</sup> Information obtained by Elena Tyuryukanova during her research for the ODIHR NRM assessment. See also ODIHR NRM assessment in the Russian Federation.

where freedom of movement and communications is restricted. They therefore do not have the benefit of union assistance and their compensation/damages claims based on the existence of labour relations become very difficult to establish and prove in a court of law. This should all be considered against a backdrop where even regular workers have difficulties enforcing their labour rights.<sup>268</sup>

### 5.5.2.3. Asset seizure

A police or prosecutor can apply to the court for restraint on disposal of assets at the outset of an investigation to prevent them being quickly disposed of by a person who realizes s/he is under investigation.<sup>269</sup> The confiscation of property or its use as compensation is then possible within criminal proceedings for certain offences (including trafficking).<sup>270</sup> It is restricted to:

*Art 104.1 a. & b: Money, valuables and other property* obtained through criminal conduct or profits (or the equivalent in its “converted form” e.g. profits of crime used to purchase a house),

*Art 104.1 c. Money, valuables and other property* used to finance terrorism, an armed unit or a criminal organization,

*Art 104.1 d Weapons, equipment of other instruments of crime* belonging to the accused.

(Money or property that has been passed on to another person can only be confiscated where that party was aware that it had been obtained through criminal means. Where property is being used then its monetary value can be taken.)

Upon passing sentence at the end of criminal proceedings the judge decides whether the seized or restrained assets can be used in direct settlement of a compensation or civil damages award made in the criminal proceedings or if they should be confiscated or both.<sup>271</sup>

<sup>268</sup> See ILO Report 2007 on Russian Federation Protection of Wages Convention, 1949 (No. 95) (ratification: 1961): “...The Committee recalls its previous observation concerning the persistent phenomenon of accumulated wage arrears affecting millions of workers and their families, and the need to intensify the Government’s efforts in order to prevent that phenomenon from becoming endemic or cyclical. It notes with regret that the Government’s report has not yet been received. In addition, the Committee takes note of the observations made by the Independent Union of Fishermen of Kamchatka concerning the application of the Convention. The workers’ organization alleges that wages due to fishers and workers in the production of fish products—a branch of economic activity with an estimated workforce of 20,000 fishers generating 80,000 jobs onshore—are in general not paid, and that there are no appropriate and effective remedies to allow the recovery of unpaid wages. The Committee invites the Government to reply so that these comments may be examined in detail at its next session. [The Government is asked to reply in detail to the present comments in 2007.]”

<sup>269</sup> Art.115 Criminal Procedure Code of the Russian Federation.

<sup>270</sup> Art.15.1, 104.1–3 Criminal Code of the Russian Federation 20/11/2006, Art.115 Criminal Procedure Code, 2011/2006.

<sup>271</sup> Arts.230, 299 Criminal Procedure Code of the Russian Federation.

However, in order for this to happen a victim must have filed a compensation claim before the end of the investigation in the court of first instance.<sup>272</sup> No such claims are known in cases of trafficking in human beings.

#### 5.5.2.4. Assistance

The police or prosecutors are obliged under the Criminal Procedure Code to provide information about the rights of the injured party including the right to make a civil claim. There is, however, no legal aid for victims'/injured parties' representation in court.

There is no nationwide state scheme for assistance to trafficked persons although there is an Ombudsman institution or Office of the Human Rights Commissioner of the Russian Federation, which has dealt with victims' rights in the past<sup>273</sup> and has a mandate to deal with reviewing and following up individual human rights complaints, including of foreigners on Russian territory, and reviewing legislation to raise human rights concerns.<sup>274</sup> In the Ombudsman report of 2006 the issue of trafficking in persons is not specifically addressed although for the first time it includes a chapter on human rights and liberties in the context of migration issues.<sup>275</sup> The report also mentions the exploitation and inadequate treatment by law-enforcement authorities of people who have been forced into slave labour:

According to expert assessments, the total number of illegal immigrants permanently in Russia ranges from 5 to 10 million and there is a steady tendency for this figure to increase. The problem is obvious. Its essence ... is also in the fact that, not having a legal status, they remain deprived of their rights and as a result are subjected to overt exploitation, even to forced labour. The adverse consequences of this situation are enormous. In the Russian society tolerance is developing towards harsh forms of exploitation of migrants. Representatives of the authorities, and in the first instance, of the law enforcement agencies, extort bribes from "illegals" [нелегалы] and impose unlawful penalties. Employers cheat them.<sup>276</sup>

In the same report, the Ombudsman stated that in 2006 the human rights offices in Russia received ten per cent more complaints from refugees, internally displaced people, migrants and Russians living abroad but did not specify how many of them were migrants and what kind of complaints those were.

<sup>272</sup> Art.44(2) Criminal Procedure Code of the Russian Federation. (Para introduced by Federal Law 92-F3 2/4/2003.)

<sup>273</sup> Annual Report of 2003 focusing mainly on victims of terrorism, available at <http://www.ombudsmanrf.ru> along with other documents and reports from the Ombudsman.

<sup>274</sup> Art. 15 Ombudsman Law accessed at <http://www.ombudsmanrf.ru/institut/fkz.shtml>.

<sup>275</sup> See the Ombudsman report at <http://www.ombudsmanrf.ru>

<sup>276</sup> Unofficial translation. For the quote in original language see <http://www.ombudsmanrf.ru/doc/ezdoc/06.shtml>.

As mentioned above there are a number of NGOs who assist specific victim groups such as migrant workers, trafficked women/girls, female victims of violence, victims of terrorism, etc. NGOs are offering innovative assistance to Russian migrants and trafficked people. However, they are under-funded and report having to cut back on legal assistance work.<sup>277</sup>

### 5.5.3. Conclusion on the Russian Federation

As outlined in the previous section, there is a lack of confidence in the general system of rule of law especially that it can enable trafficked people to obtain compensation or damages through criminal proceedings. This is reflected by the attitudes of NGOs and individuals to the judicial system and undermines the usefulness of the existing laws and procedures in that they are not used. Usefully prosecutors and investigators are obliged to inform victims of their rights to claim compensation but in reality this does not mean the right is genuinely accessible. Victims do not obtain free legal advice and representation and are unaware of what is involved in pursuing a claim and how to obtain the evidence, which results in no claims being made. There are no reported cases of compensation being granted in the criminal procedure in a trafficking case.

There is no state-funded scheme for victims of violent crime or specifically for trafficked persons. There have been some successful cases, however, in obtaining unpaid wages from employers in labour exploitation through mediation by NGOs and trade unions.

### 5.5.4. Good practice in the Russian Federation

- NGOs and civil society groups are actively supporting a wide range of trafficked and exploited people;
- Trade-union and NGO efforts to negotiate compensation and damages from traffickers/exploiters have proved to be creative solutions;
- Judges can directly use seized assets to pay civil claimants in civil proceedings; and
- The existence of an independent complaints mechanism. The Ombudsman's office could be used to promote positive change for victims' rights as well as to highlight issues relating to individual cases.

## 5.6. UKRAINE

### 5.6.1. Legal and institutional framework

Ukraine is a party to the main international conventions regarding trafficking and forced labour. It has also signed the European Conventions on Trafficking and Compensation to

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<sup>277</sup> Information from Elena Tyuryukanova.



Victims of Violent Crime.<sup>278</sup> It is not a member of the European Union but has begun negotiations on an “enhanced agreement.”<sup>279</sup>

The government has a State Programme on Combating Trafficking in Human Being for the period until 2010.<sup>280</sup> The government’s anti-trafficking efforts are co-ordinated by an Inter-Agency Coordination Council. A police Counter-Trafficking Department was established in 2005. These agencies and the numerous NGO agencies<sup>281</sup> that exist to provide assistance, shelter and support to trafficked persons are supported by several international organizations and donors. Currently, there are seven regional shelters for trafficked persons. One more shelter is about to be opened in Lugansk.

The legal system of Ukraine is based on civil codes with influences from the Soviet system. Trafficking for sexual and labour exploitation was criminalized in 1998 with revisions in 2001<sup>282</sup> and in 2006 when the law “On amendments to the Criminal Code of Ukraine on enhancing the responsibility for human trafficking or engaging people in Prostitution” was introduced.<sup>283</sup> There are also various legal and institutional measures taken to regulate private employment agencies.<sup>284</sup>

A strategy for ensuring the protection of the legitimate rights and interests of victims of crime was passed by a presidential decree of 28 December 2004.

### 5.6.2. Compensation and damages schemes

#### 5.6.2.1. State compensation schemes

Ukraine is making efforts to bring its national legislation into line with its current and foreseen international commitments regarding victims of crime. There are currently two drafts of new laws on compensation to the victims of crime in Ukraine.

One of these, the Draft Law on the Compensation of Victims of Violent Crimes, was prepared by the Ministry of Justice and remains at the preparatory stage not having been cleared by the Cabinet of Ministers. The OSCE/ODIHR has extensively commented upon

<sup>278</sup> See the ratification table in Annex V.

<sup>279</sup> “EU-Ukraine start negotiations on new Enhanced Agreement”, EU press release, 2 March 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/275&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>280</sup> Adopted by Cabinet of Ministers, March 2007.

<sup>281</sup> 32 different NGOs are mentioned by the IOM in their *Statistics for 2007* with the five most active in terms of referrals to IOM for reintegration and assistance being Revival of the Nation (Ternopil), Faith, Hope and Love (Odessa), Road to Life (Kharkiv), Women of Donbas (Lugansk), Volyn Perspectives (Lutsk).

<sup>282</sup> Passed by Verkhovna Rada on 5 April 2001, entered into force on 2 September 2001.

<sup>283</sup> Trafficking in human beings is criminalized at Art.149 Criminal Code.

<sup>284</sup> T. Kiryan and M. van der Linden, *Trafficking of migrant workers from Ukraine: Issues of labour and sexual exploitation* (ILO, 2005), p. 45.



this draft. This law foresees a state system for “ensuring payment” of compensation when an intentional crime of violence is committed on the territory of Ukraine that causes impairment of health or death.<sup>285</sup> This envisages that the state will pay compensation to the victim regardless of whether the offender has been identified and is being prosecuted or located. The state can, wherever possible, subsequently sue the offender in civil proceedings for the compensation it has “advanced” to the victim.<sup>286</sup>

The scheme is envisaged to be run by commissions established by the Ministry of Labour and Social Policy.<sup>287</sup> Eligibility for the compensation is limited to: citizens of Ukraine, stateless persons permanently resident in Ukraine, citizens of a Council of Europe member with a compensation scheme who are permanently resident in Ukraine, or citizens of a state party to ECCVVC.<sup>288</sup>

In order to realize the right to the compensation, the victim or the applicant must have reported the crime within 48 hours of having a “real possibility” of doing so and should diligently fulfil procedural obligations in case of a criminal investigation.<sup>289</sup> (Amongst other documentary evidence, a copy of the ruling giving victim status is required.)<sup>290</sup> The grounds for refusal of compensation include: circumstances when the person knowingly agreed to the risk of injury or death; cases of self-inflicted injuries or death; or where the victim sustained the damages as a result of participation in a political or military conflict.<sup>291</sup> The damages would include loss of earnings, medical, hospital and health expenses, funeral expenses, and maintenance for dependents. Although moral damages are not covered, the law explicitly permits a victim to sue a defendant in addition to this claim.<sup>292</sup>

Where there is no identified defendant this law would clearly introduce a possibility of compensation to trafficked persons that did not previously exist. There is also a guarantee of payment from the state. In other cases, the law simply sees the state as an intermediary in civil proceedings thereby relieving the victim of the burden of pursuing the civil action together with or independent to criminal proceedings but also guaranteeing them payment. A victim can also claim other damages not covered by the state compensation if they pursue the claim themselves via the prosecutor or their own lawyer (see below). However, they would then be subject to two stressful procedures—one with the court and the other via the commission—but material damages would be “guaranteed” by the state.

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<sup>285</sup> Art 2 Draft Law on Compensation of Victims of Violent Crimes.

<sup>286</sup> *Ibid.*, Art.22.

<sup>287</sup> *Ibid.*, Art.12.

<sup>288</sup> *Ibid.*, Art.4.

<sup>289</sup> *Ibid.*, Art.5.

<sup>290</sup> *Ibid.*, Art.8.

<sup>291</sup> *Ibid.*, Art. 11.

<sup>292</sup> *Ibid.*, Art.6.

The second draft law was proposed by three MPs entitled “On Compensation at the Expense of the State of Material Damages Caused to Citizens Who Suffered from Crime”. The Parliamentary Committee on Legislative Support to the Law Enforcement recommended dismissing this draft law and this recommendation was upheld by the parliament in its decision of 19 April 2007.

#### 5.6.2.2. Compensation awarded through civil-, criminal-, and labour-law procedures

##### *Criminal and civil proceedings*

Article 28 of the Criminal Procedure Code states that a person who has sustained material or moral damage as the result of a crime is entitled to lodge a civil claim during criminal proceedings against the accused who should bear material responsibility for their actions. Where the victim has died the claim may be taken by one of a list of relatives and where the person is a minor it should be taken by a parent or appointed guardian. This claim should be reviewed by the judge together with the criminal charges and the amount of damages is based on evidence provided in the course of the trial. The claim should be lodged prior to the court investigation although there is authority for stating that it should not be rejected if submitted during the court investigation.<sup>293</sup> It is also possible to pursue a separate civil claim after the finalization of a criminal case using civil procedural rules so long as the case was not dismissed during criminal proceedings.

The prosecutor must present the facts and evidence for the claim to the court, and a judge in a criminal case must come to a conclusion on it providing well reasoned motives for his/her decision. The only exception to this is if the victim fails to attend court or the defendant is acquitted.<sup>294</sup>

Damages available to a victim include material damages defined by Art.22 of the Civil Code as follows:

- 1) losses incurred by a person as a consequence of destruction or damage to a possession, and expenses a person has incurred or will have to incur to restore his/her infringed rights (actual damages);
- 2) income a person could have received under normal circumstances if his/her right had not been violated (lost profit);

<sup>293</sup> “a court may not reject a civil claim lodged by a person who has suffered material or moral damages as the result of a crime committed against him or her purely because it was lodged during the court investigation” (Resolution of the Board of Judges in the Judicial Chamber for Criminal Cases of the Supreme Court of Ukraine from 12 October 2004) cited in N. Akhtirskaya, *Trafficking in Persons in Ukraine: Evidence of Court Practice* (Ukrainian Academy of Judges, 2006) .

<sup>294</sup> Para 3 Decree 3 by the Plenary Session of the Supreme Court of Ukraine of 31 March 1989 On the Practice of Application by the Courts of Ukraine of the Legislation on Compensation of Material Damages Inflicted by a Crime and on the Recovery of Groundlessly Acquired Property.

and moral damages defined by Article 23(3) of the Civil Code:

- 1) physical pain and suffering inflicted on a natural person as a consequence of disability or other damage to health;
- 2) mental suffering inflicted on a natural person as a consequence of unlawful acts against this person, his/her family members and close relatives;
- 3) mental suffering inflicted on a natural person as a consequence of destruction or damage to his/her property;
- 4) derogation of honour and dignity, business reputation of a natural person or legal entity.<sup>295</sup>

The amount of financial compensation for moral damage is determined by the court depending on the nature of the offence, gravity of physical and mental suffering, the deterioration of the victim's abilities and deprivation of possibilities for their use, degree of guilt of a person who inflicted moral damage if the guilt can be invoked as grounds for redress, and with account to other relevant circumstances. Moral damages are compensated regardless of the material damages liable for compensation.

According to a 2006 study supported by the OSCE Project Co-ordinator in Ukraine (PCU) only 45 out of 198 individuals lodged claims and, from those, the courts often did not give reasons for rejecting claims or failed to conclude the amounts of the awards that should be granted, contrary to their legal obligations.<sup>296</sup> In another study financially supported by the OSCE PCU, out of 51 criminal cases of trafficking for sexual exploitation in Ukraine only 20 claims for compensation were lodged by the victims.<sup>297</sup> All of these cases received at least partial awards. The main reason for failing to lodge a claim was lack of awareness of the full extent of the right. They were either not informed or were not fully informed of the right (e.g. that they could also claim moral damages). However, they also cited lack of confidence in the system for obtaining compensation and lack of willingness to engage with the bureaucracy, fear of reprisals, and lack of evidence of material losses as other reasons for not pursuing compensation.<sup>298</sup>

<sup>295</sup> See also Para 3 Decree 4 by the Plenary Session of the Supreme Court of Ukraine of 31 March 1989 On Court Practices in Cases on Redress of Moral (Intangible) Damages as amended: "moral damage is defined as intangible losses caused by moral or physical suffering or other negative occurrences inflicted upon a natural person or a legal entity by illegal acts or omission of other persons." According to ch. 8, Y. Strekalov, *Ukrainian Legislation Against Trafficking in Human Beings* (OSCE, 2006):

"In accordance with the effective legislation, moral damage can include disparagement honour, dignity; detriment to prestige or business reputation; moral sufferings caused by damage to health; violation of property rights (including intellectual property), consumer rights, and other civil rights; unlawful investigation or court procedures; disruption of normal social relations due to impossibility of pursuing active social life; disruption of relations with other people and other negative consequences."

<sup>296</sup> *Ibid.*, Strekalov, ch 8.

<sup>297</sup> Inna Shvab, *Issues of pre-trial and judicial investigations into human trafficking cases: An analysis of selected cases* (2007).

<sup>298</sup> *Ibid.*, pp. 116–117 of the published Ukrainian version.

A minority of victims had been advised not to pursue a civil claim because it would reflect negatively on them at trial as they could be perceived by the judge to be testifying only for gain. In some cases the law-enforcement officers could not find any other reason for a victim to refuse to testify except that payments must have been made by traffickers to victims to convince them not to give evidence at court.<sup>299</sup>

In cases where claims had been made to the court, the researchers found the work done by investigators lacked professionalism, the amounts claimed were unreasonably high and was unsubstantiated by documentation.<sup>300</sup> Where the work was done by lawyers the quality was improved. The cases focused mainly on moral damages as victims had either suffered no material damage or they had not kept evidence of those expenses given the length of time over which the crime had been committed (5 out of 20 claimed material damages). Five of the claims were allowed in full but most often they were only partially granted e.g.:

- A claim for UAH 50 000 moral and UAH 17 000 material resulted in an award of UAH 2000 (approx. €300).<sup>301</sup>
- Claims for UAH 10 000 and 5000 reduced to UAH 2,000 each (approx. €300);<sup>302</sup>
- Claims for UAH 50 000 moral damages in 2 cases, each granted UAH 20 000 (approx. €3000).<sup>303</sup>

<sup>299</sup> *Ibid.*, p. 71 of the published Ukrainian version.

<sup>300</sup> *Ibid.*, p. 119 of the published Ukrainian version.

<sup>301</sup> *Ibid.*, p. 120, Dnipropetrovsk region. Case information from OSCE PCU: A woman from Dnipropetrovsk who often visited the United Arab Emirates requested her daughter in Ukraine to look for poor girls and to offer them employment in the UAE as waitresses, baby-sitters or prostitutes. Overall about 6–7 girls were recruited (one of the victims was 11 years old). All travel arrangements (including false marriages to obtain visas) were made by the traffickers. Upon arrival all the girls were forced into prostitution and all earnings were taken by the traffickers. When back in Ukraine, two victims went to the police. The trafficker tried to influence the victims by offering them a “compensation” payment. Later, one of the victims refused to continue the cases, supposedly because she received money from the trafficker. The verdict of the court was 5 years in prison with 3 years probation delay. The verdict was “soft” for several reasons but mainly the negative attitude of the court caused by the victims behaviour—they started arguing with one another. Also, the claim was composed by the investigator in a way that implied that they had knowingly gone to work in sex services and were seeking the money they had been promised rather than using any of the legal arguments for moral damages.

<sup>302</sup> *Ibid.*, Shvab report, Luhansk region, p. 120.

<sup>303</sup> *Ibid.*, Zhytomyr region, p. 120. (Case information from OSCE PCU: During 2001–2004 three men from Zhytomyr based on a prior agreement with two Russian women used deception to recruit three girls-minors from a village in the region to work as “highly-paid waitresses” in a café in Moscow owned by a sister of one of the recruiters. In Moscow the minors were threatened and forced to provide sexual services to men. The victims suffered from physical violence and were subject to debt bondage. Within some period of time the victims managed to escape and returned to Zhytomyr region. The court found the perpetrators guilty of trafficking and sentenced to eight, six and three years in jail with compensation of moral damage to victims.)

The compensation amounts were found to vary for a number of reasons: insufficient proof of moral damage; a lack of established legal norms for “measuring” moral damage; the circumstances of the defendant; too high an amount having been claimed; incorrect behaviour by victims in court; and one case of an incompetently drafted claim.<sup>304</sup> Crucially, however, none of the victims have, until now, actually been paid their compensation despite the awards. The reasons for this include the complex and lengthy procedures required for confiscation of assets, the absence of assets to be confiscated or general difficulties with the execution of judgements and the bailiffs system in Ukraine.<sup>305</sup>

It is clear from case verdicts that judges make an adjustment to their findings of damages depending on whether they believe the victim was aware they were travelling to work in the sex industry. In at least one case a claim was rejected by a court that called into question a victim’s character and motives:

... she voluntarily went to work in the Czech Republic, without any coercion. She knew what the work would be. She agreed to the sharing of her income between herself and the defendant. She had not laid any claims for material damages before she was summoned by the Department for Fighting Organized Crime (OBOP).<sup>306</sup>

This case is unusual in that it appears the victim had been proven to be a victim of trafficking who was subjected to unjustifiable “fines” and beatings whilst working as a prostitute on the Czech/German border. However, even so the judge was clearly not inclined to see her as deserving of compensation on the grounds that her initial recruitment had not been coerced. In another case, the verdict states that:

The court partially accepts the civil claim of victim B. The court considers that the combined actions of the defendants inflicted moral damages on the victim through her having been sold for sexual exploitation. At the same time, the victim agreed of her own free will to go to Moscow and engage in prostitution, thus placing herself in the position of object of sale<sup>307</sup>

In the study *Ukrainian Legislation Against Trafficking in Human Beings* there is a case where 20,000 UAH and 15,000 UAH were granted to two victims trafficked to Turkey for sexual exploitation. In another case the amount of compensation for moral damages was decreased because the judge found the victim to have consented to work as a prostitute:

When determining the amount of redress for moral damages, the Court disagreed with the amount of 10 000 UAH per person claimed by the victims L. and Ye. and stated that only 1 200 UAH can be ordered in compensation, as the victims failed

<sup>304</sup> *Ibid.*, p. 121.

<sup>305</sup> *Ibid.*, p. 122.

<sup>306</sup> Verdict 26 August 2004 cited in *op. cit.* note 284, Akhtirskaya pp. 47–48.

<sup>307</sup> Verdict from 10 November 2004, a court in Kharkiv, cited in *ibid.*, p. 49.

to prove that the damage was inflicted to a greater amount, because they consented to work as prostitutes and were detained at the state border.<sup>308</sup>

The highest level of compensation in the cases published in this report was 20,000 UAH (€3000) which was awarded in two cases. Somewhat smaller amounts, namely UAH 10,000 (€1500) were awarded to 3 victims in a separate case. The lowest level of moral damages namely UAH 1000 (€150) was awarded in another case.<sup>309</sup>

#### *Proceedings in Labour Law*

Essentially, Ukrainian labour law does not regulate “exploitation” cases due to the fact that under Soviet labour law “exploitation” was considered an obsolete phenomenon. The new draft Labour Code has been long debated within parliament and elsewhere, including with the expert input from the ILO, for some years now and remains a highly contested piece of draft legislation. There are also no specific labour courts but a labour law violation would come before a first instance court or administrative court dependent on the cause of action.

Art, 173 of the Criminal Code envisages punishment for a grave violation of a labour agreement, and forcing the victim to perform work not mentioned in the agreement is listed as one potential violation. The same crime exists in relation to labour agreements to work abroad.

#### **5.6.2.3. Asset seizure**

Under Art. 29 Criminal Procedure Code the police and prosecutors are obliged to take measures to guarantee the possibility to confiscate the property of the accused in cases where the punishment might include confiscation (including trafficking). However, the study found that in many trafficking cases they have failed to do so either because the accused are not making huge amounts of money from their crime (being mainly recruiters) and hence do not have assets, the assets are needed by dependants of the defendant (e.g. their children) or the defendant has prepared well by registering assets in the name of a friend or relative or disposing of them quickly at the outset of the investigation.<sup>310</sup>

If, during the criminal proceedings, it can be shown that the property was obtained by criminal means then it may be used to recompense the damages regardless of whether the property is jointly owned with another individual. Under Art.125 of the Criminal Procedure Code any property of the criminal can be used for compensation if confiscation is one of the potential sanctions for the crime.

NGOs have suggested the establishment of a fund made up of seized assets from which compensation should be paid as well as legal expenses.

<sup>308</sup> *Op. cit.* note 295, Strekalov, ch.8.

<sup>309</sup> *Ibid.*

<sup>310</sup> *Op. cit.* note 297, Shvab, pp. 122-123 of the published Ukrainian version.



#### 5.6.2.4. Assistance

Police investigators are obliged to inform victims of their rights including the right to make a civil claim.<sup>311</sup> Additionally, according to Plenum of the Supreme Court of Ukraine Decree No. 13 of 02.07.2004 the courts are under a continuing obligation to ensure victim's rights are implemented and respected. The Supreme Court decreed:

1. To draw attention of courts to the fact that consistent and implacable compliance throughout all stages of criminal judicial proceedings with the provisions of the criminal procedure legislation of Ukraine that provide for the rights of victims of crime, is one of major preconditions for the fulfillment of citizens' rights for court protection from unlawful trespasses, as declared in Article 55 of the Constitution of Ukraine.

Having the legal status of "victim" confers upon a trafficking victim certain rights<sup>312</sup> including that of representation, which could be by a lawyer, friend or close relative (or social worker or NGO representative).<sup>313</sup> The victim proposes the representative and the head of investigation or the judge in the court proceedings allows or refuses the proposal. The victims and representatives can participate in court as parties and enjoy equal rights and freedoms in submission of evidence, examination of the evidence and proving its pertinence before the court.<sup>314</sup> As a "civil claimant" the victim enjoys further rights.<sup>315</sup>

<sup>311</sup> Article 122 CPC Procedures of Notification of a Victim on his/her Rights. An investigator who recognizes a person as a victim of a crime, shall explain this person his/her rights stipulated in Article 49 of this Code and shall note these matters in a resolution that shall be confirmed by signature of the victim. If a crime caused material damages to a person, an enterprise, an institution or an organization, an investigator shall notify a victim and his/her representative on the right to make a civil lawsuit and shall note these matters in a protocol of interrogation or shall send a written notification to the victim; a copy of the notification shall be incorporated into the case materials.

<sup>312</sup> As cited in M. Wijers and R. Haveman, *Trafficking in human beings for the criminal justice chain in Ukraine* (IOM, July 2006), *Article 49 CPC Rights of the victim*: "A citizen, recognised as a victim of a crime, shall have the right to testify in a case. A victim and his/her representatives shall have the following rights: - to submit evidence, - to submit requests, - to review all materials on the case from the moment of completion of the pre-trial investigation, or from the moment of transfer of the case for court examination (in cases that do not incorporate pre-trial investigation); - to participate in the court examination; - to submit motions on dismissal; - to appeal against actions of a person in charge of inquiry, an investigator, a prosecutor and a court, as well as to appeal against the court sentence or court orders and resolutions of a people's judge; and, provided relevant reasons - the right to have one's security ensured. In cases, stipulated in the CPC, a victim shall have the right to uphold a charge in the course of the court examination, personally or via his/her representative. A victim can participate in court debates."

<sup>313</sup> Art. 52.

<sup>314</sup> Article 16(1) CPC.

<sup>315</sup> As cited in *op. cit.* note 312, M. Wijers and R. Haveman, Article 50 CPC Rights of the civil claimant: "A civil claimant or his/her representatives have the following rights: - to submit evidence; - to submit requests; - to participate in court examination; - to apply to a body of enquiry, an investigator and a court with requests to take measures in order to secure enforcement of their claims; - to pursue a civil charge; - to review materials on the case from the moment of completion of the pre-trial investigation, or from the



There is, however, no free legal aid or state subsidized provision of lawyers for victims, which impinges on the realization of the rights of victims:

without a lawyer the chances of the victim being able to prove her/his case are minimal. Theoretically the prosecutor is supposed to defend the interests of the victim; in practice the victim is highly dependent on a lawyer to do so;<sup>316</sup>

Of the cases examined in the *Shvab* study<sup>317</sup> less than half of the victims were represented by a lawyer. They were either unable to find a lawyer or pay their fees or they did not want to have a recommended lawyer. In several cases the same lawyer represented several victims. Often lawyers did not meet their clients in advance of the court hearing and did not prepare the victims for court. There were wide-ranging findings regarding the quality of the representation but some of the victim's representatives were considered to be inexperienced and unskilled at their jobs.

### 5.6.3. Conclusion on Ukraine

Substantial efforts have been made to build a body of law that implements the legal rights of victims in Ukraine including guidance on the nature and scope of damages. There is also a proposal for a state-funded compensation scheme, which, while being available only to victims of violent crime and only for paying material damage, is laudable and could make a real difference in terms of whether compensation awards are actually paid. However, the state will have to make substantial efforts to ensure the commissioners are appointed and trained, have an accessible administrative system, and have sufficient guidance to make consistent decisions.

Otherwise the right to sue an accused within the criminal procedure is well-established as is the right to be informed of one's rights and to be represented in the proceedings. There is also a body of case law where compensation has been awarded in cases that are identified as trafficking for sexual exploitation. This has resulted from a vibrant NGO community and lawyers providing assistance and advice to trafficked persons, which has developed court practice.

In principle it is therefore accepted by the courts that victims have a right to make a claim for compensation and that they are eligible for damages. Moral damages have been demonstrated to be more pertinent than material damages as trafficked persons have, in general,

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moment of transfer of the case for court examination (in cases that do not incorporate pre-trial investigation); - to submit motions on dismissal; - to appeal against actions of a person in charge of inquiry, an investigator, a prosecutor and a court; as well as to appeal against a court sentence or court orders to the extent of their connection with a civil lawsuit; and provided relevant reasons; – the right to be granted security.”

<sup>316</sup> IOM Report see above n 312.

<sup>317</sup> *Op. cit.* note 297, Shvab, pp. 109–110 published Ukrainian version.

not been able to support material damages claims with documentation. Unfortunately, as in many jurisdictions, victims rarely, if ever, receive payment of the awards.

However, criminal court practices appear to be inconsistent when it comes to drafting civil claims, processing claims, deciding on their validity, and the levels of awards. There is evidence that judges are occasionally guided by their own personal assumptions about trafficking rather than by the evidence when deciding claims. There is also evidence of “pay-offs” by traffickers in order to convince the victim to drop the legal case. This demonstrates the need for guidance and training of judges and investigators in terms of sensitization to trafficking cases and to how to calculate a damages claim in a consistent manner.

Labour law does not currently offer any accessible remedies but this could alter with the passage of a new Labour Code.

#### 5.6.4. Good practice in Ukraine

- There are attempts being made to establish a state fund to pay compensation in cases of violent crime. The model involves the state inheriting the ability to sue the trafficker/exploiter on behalf of the victim, which fulfils the moral imperative of making the wrongdoer pay and will enable the state to recoup some of the funds;
- The law obliges victims to be informed of their rights to claim compensation at an early stage;
- There is a substantial body of case-law regarding claims for moral damages granted in cases of trafficking for sexual exploitation;
- Representation by lawyers is available and has a positive impact on the claim; and
- The efforts of civil society groups and their work in advising trafficked persons have made a great impact on the development of the principle of granting compensation.

### 5.7. UNITED KINGDOM

#### 5.7.1. Legal and institutional framework

The UK is a party to UNTOC and the Trafficking Protocol as well as the European Convention on Compensation to the Victims of Violent Crime. It has also ratified the ILO Conventions relating to Forced Labour but only one of those regarding the Protection of Migrants (ILO C97). The government has recently signed the Council of Europe Convention against Trafficking and has commenced measures to implement the requirements of that Convention.<sup>318</sup>

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<sup>318</sup> See “New Deal for Trafficking Victims”, 24 March 2007, *The Guardian*, <http://www.guardian.co.uk/immigration/story/0,,2041718,00.html>. Please note there are numerous initiatives in the UK in relation to trafficking in persons since April 2007. These have not been updated unless they specifically relate to compensation issues.

The UK has a common law legal tradition. The national laws criminalising trafficking are sections 57–60 Sexual Offences Act 2003 (trafficking for sexual exploitation) and s.4 Asylum and Immigration Act (Treatment of Claimants) Act 2004 (trafficking for labour exploitation). There are several other legislative measures that are relevant to trafficking such as the Gangmasters (Licencing) Act 2004, the creation of an Authority for regulating Gangmasters, and the Proceeds of Crime Act 2002, which deals with money laundering and asset seizure issues.

Institutionally the UK does not have a national rapporteur or co-ordinator on trafficking. However, the government has recently published a National Action Plan on Human Trafficking.<sup>319</sup> There is a Ministerial Group on Trafficking and an Advisory Stakeholder Group established in 2005 under the auspices of the Home Office (Under-Secretary for Policing, Security and Community Safety) but bringing together other relevant departments. There is also an Illegal Working Stakeholder Group chaired by the Home Office Minister for Immigration, Citizenship and Nationality. A UK Human Trafficking Centre was launched in 2006 and aims to co-ordinate the law-enforcement response.<sup>320</sup> Additionally, a London-based police, immigration service and NGO partnership in the form of the Poppy Project has been established to provide a victim identification and assistance service to a limited number of victims of sexual exploitation.<sup>321</sup>

The government has been criticized for taking an “immigration law” approach to trafficking in human beings rather than a human rights based approach<sup>322</sup> and problems have recently been reported in relation to licensed gangmasters.<sup>323</sup>

### 5.7.2. Compensation and damages schemes

#### 5.7.2.1. State compensation schemes

The Criminal Injuries Compensation Authority administers a government-funded scheme that provides compensation to victims of violent crime who have sustained physical or psychological injury which is “not purely minor”. The crime must have taken place within England, Scotland or Wales<sup>324</sup> and a claim should be made within two years of the crime.<sup>325</sup> The scheme is also available to compensate relatives of a person who died as a result of a crime and to people who have a close relationship with a victim of crime and who sustained a psychological injury as a result of their presence at the crime or their close involvement

<sup>319</sup> See documents at <http://www.homeoffice.gov.uk/documents/human-traffick-action-plan>.

<sup>320</sup> See <http://www.ukhtc.org>.

<sup>321</sup> [http://www.eaves4women.co.uk/POPPY\\_Project/POPPY\\_Project.php](http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php).

<sup>322</sup> Letter/submission by Solicitors International Human Rights Law Group to Home Office, 19 March 2007.

<sup>323</sup> “Migrants deceived and exploited” and “Joining the Immigrant Underclass”, BBC News, 25 April 2007, available at [http://news.bbc.co.uk/2/low/uk\\_news/6593321.stm](http://news.bbc.co.uk/2/low/uk_news/6593321.stm).

<sup>324</sup> There is a separate scheme for Northern Ireland.

<sup>325</sup> Unless special circumstances apply.

soon afterwards. The types of damages available include an element for both moral and material damages:

- a) An award for the pain and suffering caused by the physical or mental injury. The actual amount for this is fixed by a “tariff” which has 25 levels of compensation for injuries ranging from £1,000 to £250,000.<sup>326</sup> (e.g. £27,000<sup>327</sup> for loss of one eye, £1,000–33,000<sup>328</sup> for sexual abuse, £8200<sup>329</sup> for a disabling mental illness and temporary mental anxiety, confirmed by psychiatric diagnosis, lasting 2 to 5 years).<sup>330</sup> The current tariff was set in 2001 by Parliament.
- b) A fatal injury award available to a parent, child, spouse or partner. The amount is fixed at £11,000<sup>331</sup> if there is just one person who is able to claim an award, or £5,500 each if there is more than one. If such a person was dependent on the deceased then an award may also be made in relation to this.
- c) Special expenses: Funeral costs and costs of specialist medical treatment or equipment can be claimed.
- d) Loss of earnings: compensation is only available if the victim is unable to work for a full 28 weeks from the date of the injury and requires written reports from the employer and doctor.

Loss of earnings and special expenses (c & d) above) are paid up to a maximum of £250,000 so the maximum combined amount payable under the scheme is £500,000 for one injury.<sup>332</sup> If more than one injury is sustained then only the three most serious are compensated at 100 per cent of the tariff amount for the highest rated injury; plus 30 per cent of the tariff amount for the second highest rated; plus 15 per cent of the tariff amount for the third-highest rated.

For a successful claim a criminal conviction is not required. However, a victim is required to have reported the matter to the police in a timely manner and to have medical evidence. They should also have been prepared to co-operate and assist the investigation and prosecution (in 2004/5, 30 per cent of claims were refused for a delay in reporting or “failure to cooperate”).<sup>333</sup> Additionally, the CICA may refuse or reduce the amount if the victim has

<sup>326</sup> Approx. €1400–351,830.

<sup>327</sup> Approx. €38,000.

<sup>328</sup> Approx. €1,400–46,438.

<sup>329</sup> Approx. €11,539.

<sup>330</sup> See tariff calculator at [https://www.cica.gov.uk/portal/page?\\_pageid=115,65157&\\_dad=portal&\\_schema=PORTAL](https://www.cica.gov.uk/portal/page?_pageid=115,65157&_dad=portal&_schema=PORTAL).

<sup>331</sup> Approx. €15,479.

<sup>332</sup> Approx. €351,830 which makes a maximum claim just over €700,000 for one injury.

<sup>333</sup> See CICA Annual Report and Accounts 2004/5 p. 6 available at [https://www.cica.gov.uk/pls/portal/docs/PAGE/INFORMATION\\_PAGES/INFO\\_BOX\\_BOTTOM\\_WHODOWEHHELP/AR%20](https://www.cica.gov.uk/pls/portal/docs/PAGE/INFORMATION_PAGES/INFO_BOX_BOTTOM_WHODOWEHHELP/AR%20)

been involved in criminal activity or if the victim provoked the violence by behaving aggressively or starting a fight (in 2004/5, just under 21 per cent of claims were refused for these reasons).<sup>334</sup> The other restrictive criteria which may affect trafficking victims is the fact that a victim should not be living with or associated with the perpetrator at the time of the application unless the perpetrator is actually convicted of a crime. The rationale for this is to prevent the perpetrator from benefiting from the award.

An application is made to CICA which authorizes them to obtain confidential information from the police, doctors, hospitals, etc. A named caseworker is allocated to the case who processes the claim and aims to come to a decision within one year. Usually the CICA awaits the outcome of a criminal trial where it is pending or ongoing before making a decision. Cases involving complex calculations of damages can take longer. If a claimant is not satisfied then they can apply for an internal review of the decision. If this process does not prove satisfactory then an appeal can be made to an independent body called the CIC Appeals Panel.

Information and applications for the scheme are accessible online and the CICA also provides guidance publications in numerous minority languages accessible on the web.<sup>335</sup> The administration of claims on the CICA from claimants located elsewhere within the EU are dealt with under the Victims of Violent Intentional Crime (Arrangements for Compensation) (European Communities) Regulations 2005 which came into force on 1 July 2006 but are not applicable to applicants whose injuries result from crimes committed on or before 30 June 2005.

The CICA provides a relatively streamlined service to victims as compared to a civil procedure. It is quicker and less bureaucratic than a civil court. It also has the benefit of taking the defendant out of the equation, which may be an attractive proposition to many victims although, at the same time, it relieves the perpetrator of moral responsibility. On the other hand, the damages are granted only where eligibility criteria are met and. Also, because it is fixed by a tariff the award may not be as high as an award made by a judge in civil proceedings. The award is therefore likely to be smaller but more easily recoverable than in civil cases. A direct payment is made by the state and is not reliant on the execution of a judgement on a civil defendant. However, where given the time taken to make a decision and the restrictive eligibility requirements it can be less accessible than a compensation order made in criminal proceedings (see below). A CICA award can be made where other types of award have also been made although the relevant amounts will be deducted.

The total costs of running the CICA scheme in terms of administration and staff in 2004/5 was £19 million and in this period 67,000 cases were resolved. In addition £321 million

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%26%20A%2004-05.PDF.

<sup>334</sup> *Ibid.*

<sup>335</sup> [https://www.cica.gov.uk/portal/page?\\_pageid=115,63526&\\_dad=portal&\\_schema=PORTAL](https://www.cica.gov.uk/portal/page?_pageid=115,63526&_dad=portal&_schema=PORTAL).

was spent on the compensation payments themselves.<sup>336</sup> It is not appropriate to compare these costs to other OSCE states budgets directly given differences in salary/cost of living, population and number of claims, etc; they are provided to illustrate the scale of the state commitment.

The criterion that demands a victim must have been subject to violent crime causing more than minor injury can create a barrier to eligibility for trafficked victims if they were only subject to psychological violence. The restrictions placed on eligibility have already been used against victims of labour exploitation (also being presumed victims of trafficking) due to the finding that they voluntarily engaged in an unlawful act though their illegal entry into the UK and hence they failed the eligibility test on “character grounds”. It appears that the relatives of the 21 Chinese cockle pickers who died in the tides of Morecambe Bay in 2004 were refused compensation under the scheme despite a conviction of their exploiters for manslaughter, perverting the course of justice and immigration offences.<sup>337</sup> Victims of trafficking for sexual exploitation have also been refused on similar grounds.<sup>338</sup> Although this restriction on eligibility is legitimate in terms of the ECCVVC, it is not in the spirit of the Trafficking Protocol nor the European Convention Against Trafficking, which both foresee appropriate identification of trafficking victims as part of an integrated response to the problem including the grant of compensation. Where the UK has failed to take steps to identify trafficked victims it is arguable whether the decision not to compensate reflects properly the UK’s international obligations. Where victims are killed in the course of exploitation that could have been related to trafficking, the identification of trafficking victims is rendered more difficult. However, the authorities could make a presumption of trafficking in the light of the surrounding circumstances and could use their discretion to grant compensation. In the case of the Chinese cocklepickers it is alleged that the immigration authorities were well aware of the exploitation of the Chinese people in question before they died, as well as the danger they faced in their work but did nothing to prevent it.<sup>339</sup> As a result the victims’ right to life could also have been violated. Thus, the narrow application of the rules

<sup>336</sup> See *op. cit* note 333, p. 10. In 2004/2005, 35,446 Tariff awards were made, 56% received only between £1,000 and £2,000 to recognise their pain and suffering. Six cases received £250,000, the maximum tariff award and ten cases received the maximum award of £500,000, including lost earnings and special expenses.

<sup>337</sup> For details of the case and convictions see [http://www.cps.gov.uk/news/pressreleases/archive/2006/117\\_06.html](http://www.cps.gov.uk/news/pressreleases/archive/2006/117_06.html). See also “Are Chinese Lives Cheaper?”, 8 July 2004 <http://www.irr.org.uk/2004/july/ak000009.html> for information about compensation claim. See Mark Ryan, a lawyer for the families. “...the families’ claim has been rejected because the victims ‘voluntarily engaged’ in an ‘unlawful act’. They were human beings and deserve to be treated as such...”, Socialist Worker online, 24 July 2004, [http://www.socialistworker.co.uk/article.php?article\\_id=1020](http://www.socialistworker.co.uk/article.php?article_id=1020). Several queries have been sent to lawyers representing the group requesting confirmation of this. However, no response has been received so the reports remain unconfirmed. It is possible that an appeal is still pending.

<sup>338</sup> Information from Deirdre O’Leary, Assistant Manager of pro bono unit at Lovells.

<sup>339</sup> “MP meets Ministers over cocklers”, BBC News, 12 February 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/england/lancashire/3480979.stm](http://news.bbc.co.uk/2/hi/uk_news/england/lancashire/3480979.stm), “The Scandal of Morecambe”, *Daily Telegraph*, 13 February 2004 at <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2004/02/13/dl1302.xml>.



of the CICA scheme appear more oriented to policing immigration than to identifying and compensating in cases of trafficking.

Other documented problems that have been faced by individual victims pursuing compensation claims include the early return of victims to their countries of origin. This means that where claimants have already begun claims lawyers have difficulty in communicating with them as well as obtaining evidence of their physical and psychological injuries and information from home-country authorities.<sup>340</sup> Where clients have not already begun claims before they leave the territory and they seek legal advice from the UK, lawyers' firms can be restricted from representing them due to obligations (arising from money laundering regulations) to physically see the client and check their identity and address details.<sup>341</sup>

As of May 2007, the Poppy Project had referred 12 potential cases of compensation claims to lawyers. Seven had been submitted for a claim and were awaiting adjudication. In July 2007 the CICA granted the first successful claim to victims of trafficking:<sup>342</sup>

Two young women of Romanian origin were trafficked into the UK for the purposes of sexual exploitation. Over a period of years they were subjected to persecution in the form of slavery, forced prostitution, multiple rapes and beatings. They escaped from their trafficker in January 2006 and were referred to the Poppy Project. They gave evidence in a criminal case against their traffickers who were convicted and sentenced to 21 years imprisonment. The traffickers were not convicted of trafficking but of rape and controlling prostitution (*it appears the trafficking law may not have been in force at the time*) however they were identified as victims of trafficking by the Poppy Project. With the assistance of lawyers acting pro bono they made applications to the CICA on the basis that they should be entitled to compensation for sexual abuse and to compensation for loss of opportunity/income for the period of years they were falsely imprisoned by their trafficker. After a period of communication between lawyers and the CICA the CICA made an award of £66,000<sup>343</sup> to one claimant on the following basis:

- a. For sexual abuse, of over three years, £22,000. This is the amount awarded under the standard CICA tariff for cases of sexual abuse of over three years.
- b. For past loss of earnings/opportunity, £40,000. This sum was a discretionary award, calculated on the basis of £10,000 per year for the duration of the period when the victim was being held against her will.

The second claimant was granted £36,500<sup>344</sup> based on a similar calculation: £16,500 for a pattern of repeated sexual abuse for up to three years, and a discretionary award of £20,000 for loss of opportunity. The discretionary award is lower because

<sup>340</sup> Information from Poppy Project, 19 April 2007.

<sup>341</sup> Interview with Bronwen Byrnes of the SIHRG, 26 April 2007.

<sup>342</sup> Information provided by Anti-slavery International and Parosha Chandran, barrister, November 2007.

<sup>343</sup> Approx. €93,000.

<sup>344</sup> Approx. €51,000.



the second victim was younger at the time so her earning potential was lower and she was not held under control of the trafficker for so long.

This award demonstrates that with the active assistance of lawyers these young women managed to convince the CICA that they should receive money to compensate them for what they could have earned during the relevant period had they not been trafficked. It appears that this is based on sums which their earning capacity in the formal economy. It remains to be seen whether the CICA would be receptive to a similar claim and similar types of argumentation when the case is not supported by a conviction in a criminal court.

In December 2007 it was reported that the CICA would change the interpretation of their guidelines to enable victims of forced prostitution and false imprisonment to ensure compensation claims are more accessible to trafficked persons who have been sexually exploited.<sup>345</sup>

#### **5.7.2.2. Compensation awarded through civil-, criminal-, and labour-law procedures**

As the UK has a common law legal tradition the victim has no standing in criminal proceedings and is not able to become a civil party in the case or be represented. There are no special provisions entitling victims of trafficking to any special measures in relation to representation or compensation different than for ordinary victims of crime (unlike e.g. in the US). There are some limited “victim friendly” procedures which have recently been incorporated into court practice (see criminal procedure below). There are also provisions for compensation to be ordered in a criminal case and a victim is always at liberty to pursue a civil case for damages where conditions allow (see civil proceedings below). The civil procedure can be pursued regardless of whether or not there is a criminal conviction.

Labour rights cases are usually pursued in a separate forum called “employment tribunals”.

##### *Criminal Proceedings*

There are possibilities for both restitution of goods and compensation for loss in criminal law. If a victim has been unlawfully deprived of goods during a crime then under s.28 Theft Act 1968 a court can order seizure and return of these goods. This is known as “restitution” in UK criminal law and covers concrete items such as victims’ belongings, passport, etc that have been in the possession of the convict as a result of the crime.

Also, upon the conviction of an offender, the court should consider making a compensation order against the offender:

<sup>345</sup> “‘Sex slaves’ win cash in landmark legal deal”, *The Observer*, 16 December 2007.

to pay compensation (to the victim) for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence.<sup>346</sup>

Compensation can be paid for

personal injury, losses through theft of, or damage to property, losses through fraud, loss of earnings while off work, medical expenses, travel expenses, pain and suffering...<sup>347</sup>

Unpaid or underpaid earnings as a result of the offence itself would be excluded from such compensation orders unless they could successfully be argued to fall within “losses through fraud” or if the court were open to using its discretion. In the magistrates’ courts (which deal with less serious offences) a maximum of £5000 compensation can be awarded whereas in the crown courts there is no limit.

In practice, compensation awarded by the court does not reflect the full extent of the loss and damage as would be calculated in a civil procedure. The courts may be reluctant to grant damages where the nature of the injury or loss is not a clear-cut injury but where is a result of psychological trauma. It may constitute only a nominal amount especially if the defendant has been sentenced to prison and no assets have been seized from the offender (see table below for more detail on amounts). In calculating the amount of the award the offender’s assets are taken into account but the system for calculation of damages is otherwise not subject to guidance. The defendant is entitled to pay the amount in instalments and makes the payment to the court which, in turn, pays the victim.

The victim is not represented in criminal proceedings in the UK and so cannot make the application for compensation directly to the court. The victim is therefore reliant on the police, prosecutors and judges in the court process to ensure their claim is heard. The Poppy Project reports that law-enforcement agencies have been reluctant to help victims access compensation, apparently fearing that the possibility of compensation would be attacked by defence lawyers as enticement to women to give evidence against their traffickers.<sup>348</sup> The police should take details of the loss and damages through a “Victim’s Personal Statement”. The prosecutor should then make the court aware of the losses and damages. However, the law on the obligations on the prosecutor to put the claim before the court at the sentencing hearing is unclear. The law does state that where compensation is not granted in cases of death, injury, loss or damage then reasons should be given by the court.

The Crown Prosecutor’s Service Guidelines state that

<sup>346</sup> S.130 Powers of Criminal Courts (Sentencing) Act 2000.

<sup>347</sup> <http://www.cjsonline.gov.uk/victim/compensation.index.html>.

<sup>348</sup> See Solicitors International Human Rights Law Group to Home Office, 19 March 2007 at note 322.

The prosecutor may draw the court's attention to its powers to award compensation and to invite them to make such an order where appropriate.<sup>349</sup>

This guidance to prosecutors could be worded more strongly and grounded in law to ensure that compensation is considered and the relevant information to support the claim is prepared in readiness for the court hearing.<sup>350</sup> The guidance goes on to say that:

Victims may have suffered considerable distress, personal injury or financial loss and they are entitled to have these facts and requests for compensation put to the court. Courts attach considerable importance to the making of compensation orders and must give reasons where they do not make an order. Prosecutors should note what compensation was requested, what orders were made and what comments the court may have made in making an award or reducing the amount ordered.<sup>351</sup>

The Code of Practice for Victims of Crime,<sup>352</sup> which binds a number of criminal justice agencies (including the CPS, police, courts, probation, etc) to a comprehensive set of duties to victims of crimes, does not contain any mention of the duty to inform victims of their right to compensation in the criminal courts or to follow up their claim.

On 30 April 2007 the Sentencing Advisory Council issued guidelines for judges and magistrates on all aspects of sentencing in trafficking cases. These guidelines are issued on the basis of case law, government policy, detailed advice from lawyers and academics, and consultations with all interest groups.<sup>353</sup> In relation to compensation these state that in all *exploitation* cases including trafficking:

6.9 Confiscation and compensation orders have particular relevance in the context of exploitation offences, where it is extremely likely both that there will be prop-

<sup>349</sup> [http://cps.gov.uk/legal/section15/chapter\\_c.html#10](http://cps.gov.uk/legal/section15/chapter_c.html#10).

<sup>350</sup> The *Prosecutor's Pledge* leaflet published in 2005 makes several "pledges" to victims of crime, amongst which is a "PLEDGE: On conviction, apply for appropriate order for compensation, restitution or future protection of the victim. The prosecutor will always consider whether there should be an application for compensation or restitution on your behalf. In appropriate circumstances the prosecutor may also encourage the court to impose a restraining order to ensure your future safety. In doing so, they will take into account anything you have said in your Victim Personal Statement."

<sup>351</sup> [http://www.cps.gov.uk/publications/docs/prosecutors\\_pledge.pdf](http://www.cps.gov.uk/publications/docs/prosecutors_pledge.pdf).

<sup>352</sup> October 2005. Available at <http://www.homeoffice.gov.uk/documents/victims-code-of-practice?view=Binary>.

<sup>353</sup> Under *Section 172 of the Criminal Justice Act 2003* a court is obliged "to have regard to" a relevant guideline, and section 174(2) of the same Act requires a court to give reasons where it imposes a sentence of a different type from that which would come within the guideline. However, this mainly refers to sentences which are outside of the broad sentencing bands proposed in the Guidelines, e.g. a community penalty being imposed rather than prison. Issues such as the non-payment of compensation and confiscation are less likely to be appealable because of a failure to follow the Guidelines but not impossible especially as the Guidelines have recently been strengthened on this issue.

erty that can be seized from the offender and also that exploited victims will have been caused a degree of harm that might merit compensation.<sup>354</sup>

This paragraph explicitly links compensation to the ability to recover assets from the offender (for more detail see section on asset seizure below). In relation to trafficking in particular the guidelines go on to state that:

10. Where an offender has profited from his or her involvement in the prostitution of others, the court should consider making a confiscation order<sup>355</sup> approximately equivalent to the profits enjoyed.<sup>356</sup>

The following statistics are the most recently available regarding the numbers of compensation orders made in criminal cases and the amounts awarded. The percentage of cases where awards are made is very low especially for sexual offences. This may reflect the fact that judges have been unwilling to impose compensation orders and custodial penalties simultaneously. They may also indicate that the defendants are seen as having insufficient means to pay; asset seizure powers have only recently been strengthened. Equally the actual awards are extremely low. It could be concluded that a payment of less than £700 for a sexual or violent act is likely to be viewed by the victim more as a humiliation than an act of justice.

#### Compensation orders in criminal proceedings:

2005	Crown Court		Magistrate's Court	
	% of cases where compensation granted	Average amount of compensation	% of cases where compensation granted	Average amount of compensation
<b>All offences*</b>	7%	£1576	17%	£158
<b>Sexual offences†</b>	1%	£654	25%	£193
<b>Violent offences*</b>	15%	£655	32%	£252
<b>Fraud/forgery*</b>	8%	£8092	28%	£424
<b>Criminal damage*</b>	15%	£660	49%	£212

Taken from *Home Office Statistical Bulletin, Sentencing Statistics 2005 England and Wales*.<sup>357</sup>

\* Includes serious and minor (summary) offences but not road traffic cases.

† Includes only serious offences i.e. those which could be dealt with by a Crown Court.

In 2005 there were no compensation awards made for trafficking for sexual exploitation although 12 individuals were convicted and sentenced to immediate imprisonment.<sup>358</sup> No

<sup>354</sup> Sentencing Guidelines Council Sexual Offences Act 2003 Definitive Guidelines, part 6, p. 105, para. 6.9 available at [http://www.sentencing-guidelines.gov.uk/docs/0000\\_SexualOffencesAct1.pdf](http://www.sentencing-guidelines.gov.uk/docs/0000_SexualOffencesAct1.pdf).

<sup>355</sup> Under Proceeds of Crime Act 2002—see below.

<sup>356</sup> *Op. cit.* note 354, Sentencing Guidelines, p. 130 para. 10, [http://www.sentencing-guidelines.gov.uk/docs/0000\\_SexualOffencesAct1.pdf](http://www.sentencing-guidelines.gov.uk/docs/0000_SexualOffencesAct1.pdf).

<sup>357</sup> Page 97.

<sup>358</sup> Similarly no compensation orders were made for those found guilty of “prostitution for gain” (the UK equivalent of exploitation for prostitution) in 2005. See *2005 Criminal Statistics, England and Wales*

cases of compensation awarded to trafficking victims in criminal cases could be identified in the course of this study. Equally, prosecutors interviewed for the ODIHR UK NRM study did not know whether any compensation had been ordered in trafficking cases. They stated their priorities were securing criminal convictions and seizing the assets of offenders to disrupt criminal activity.<sup>359</sup>

If the defendant fails to pay the compensation owed to the victim then the court (not the victim) has the right to enforce the order. The decision on any enforcement action is for the court to make, in the light of all the circumstances of the case. The courts can order that deductions be taken from an employed person's earnings or, if the offender is unemployed, from certain state benefits. They can also issue a warrant of distress, which instructs bailiffs to seize and sell goods belonging to the offender up to the value of the compensation order and any related costs. Two further possible methods of enforcement are the "clamping" of an offender's vehicle and the inclusion of the unpaid compensation order on a register of fines and judgments that is open to public inspection, which may have an effect on the offender's ability to obtain credit, housing and other services. The ultimate sanction is a period in custody for non-payment.<sup>360</sup> Any award made and received is deducted from the amount of enforceable civil damages although it is not taken into account in calculating the actual amount of civil damages.

At least one NGO, the Solicitor's International Human Rights Group, has lobbied the government for an increased use of this power to grant compensation in criminal cases on the basis that it prevents the trafficked victim having to negotiate two sets of procedure where there is a criminal conviction. They also conclude that, because victims are repatriated soon after criminal cases, they have a better chance of pursuing a claim in a criminal case than through the CICA. They also state that compensation orders system should ideally be reviewed to entail a "broader interpretation" of the notion of loss and damage and to reflect similar levels of compensation paid by the CICA. They also suggest that a government fund made of seized criminal assets could be used to pay such orders where the defendant does not have assets available.<sup>361</sup>

#### *Civil claims against traffickers*

Actions in the civil courts against traffickers are possible for claims on the basis of different causes of action such as assault or false imprisonment. Claims can be made for various types of damages including:

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(Home Office) supplementary tables vol. 2.

<sup>359</sup> Draft NRM Report on file with author. *R v Dulghieru and others*, who were convicted of facilitating illegal migration, trafficking and money laundering offences in relation to eastern European women trafficked into prostitution is awaiting a hearing for confiscation of assets and compensation.

<sup>360</sup> Information from Her Majesty's Court Service (HMCS), <http://www.hmcourts-service.gov.uk/infoabout/attend/witness/compensation.htm>.

<sup>361</sup> Solicitors International Human Rights Law Group letter/submission to Home Office regarding National Action Plan, 19 March 2007 at note 322.

- a) “General” damages such as emotional distress, pain and suffering, loss of amenity (i.e. moral damages);
- b) “Special” damages (i.e. material damages) such as loss of earnings and promotion prospects, cost of care, accommodation (for example in adapting a house for a disability), special aids and equipment, travel costs (including those of relatives visiting the claimant in hospital) and medical costs. In the case of trafficked victims this may extend to unpaid or underpaid wages, “recruitment agency costs” or other spurious fees paid to traffickers, evidence of which would have to be provided to the court;
- c) Future damages: these are usually special damages that are expected to be lost in future years and are the most complex to calculate (e.g. loss of earnings over a lifetime caused by sustaining permanent disability); and
- d) Bereavement (fixed sum of £10,000) and dependency damages in the event of death of a victim.

These civil actions can only be pursued separately from criminal proceedings according to civil procedure and on the initiative of the victim. The standard of proof would be lower than in a criminal case i.e. on the basis of “the balance of probabilities” rather than “beyond reasonable doubt”. Where a criminal has already been convicted then the court would not have to address the question of fault but would only have to address the question losses and damages.

Although the final damages awarded may be greater than e.g. a CICA award or a compensation order, a civil action would require legal advice and representation to achieve optimal results.

The enforcement of civil claims by a private individual involves applying to the court for a number of powers to be enabled and exercised, such as the use of bailiffs to seize goods or an attachment of earnings order. The procedures are currently cumbersome and expensive although there are government proposals to modernize and “streamline” them in the Tribunals, Courts and Enforcement Bill currently making its way through Parliament.<sup>362</sup>

No civil claims for trafficking cases in the UK have been found during the course of this study and it is believed none have been issued.

#### *Employment law claims*

Claims against traffickers under various actions defined in employment law (breach of contract, unpaid or underpaid wages, deprivation of rights such as sick leave, or health and safety regulation breaches) can be made to an employment tribunal. However, there are serious practical problems with this for trafficked persons in that claims must be made within a strict 11-week timescale and migrants may not have access to the tribunal at all. If the employee knew (or should have known) the contract was unlawful (e.g. they do not have legal

<sup>362</sup> For drafts, debates and details of parliamentary schedule see <http://www.dca.gov.uk/legist/tribenforce.htm#lp>.



status to work or is using false papers, etc) then they do not have the right to take a claim and can be investigated (including by the immigration authorities).<sup>363</sup> The employment tribunal has, in the past, refused to consider cases relating to undocumented workers on the basis that the contract had been fraudulently obtained.<sup>364</sup> In another case the tribunal rejected claims that the minimum wage did not apply to irregular migrant workers on public policy ground.<sup>365</sup> The Trades Union Congress (TUC) obtained a judgment for a Portuguese worker in forced labour conditions. However, the company subsequently disappeared, and so the judgment could not be enforced.

Domestic workers will generally be considered “employees” or at least “workers” under UK employment law depending on the specific contractual arrangements in place. Accordingly, they are entitled to all employment rights, including health and safety provisions, the national minimum wage and rests under the Working Time Regulations 1998. Even in these cases the workers may experience problems taking a claim as one of the main problems is producing evidence. There are usually no records of how many hours they have worked nor how much was paid to them if they are paid cash in hand, and they do not tend to be believed against the evidence given by their employers, who are often “reputable people” such as doctors or rich families.<sup>366</sup> The Home Office Human Trafficking Action Plan (at page 24) states that domestic workers will no longer be considered “migrant workers” but “people ordinarily employed and resident *outside the UK*”. This would potentially exclude UK employment rights. The accumulation of rights would depend on the visa status of a domestic worker and how long they had been employed in the UK as compared to other countries throughout the duration of the whole employment relationship. A short period of service in the UK relative to the source country, would result in a strong argument that UK employment law would not apply to the relationship.<sup>367</sup> In addition, the unclear legal rights of an individual domestic worker may be sufficient disincentive to pursue a claim even where s/he has an arguable case.

The government’s proposals contained within Making Migration Work for Britain released in March 2006 intend to bring back a restriction on domestic workers’ visas that previously existed namely prohibiting them from changing employers while in the UK. Interest groups are concerned that this will lead to a situation of exploitation for workers who will be un-

<sup>363</sup> The position in any particular case is likely to depend on the seriousness of the illegality and the extent to which the employee colluded with the employer in allowing the illegality to take place. Provided, it could be established that an employee did not consider his or her contract was illegal, the employee would be able to claim all employment rights such as minimum wage, rest breaks, unlawful deduction from wages (where money is taken from wages to pay accommodation without the worker’s consent) and breaches of health and safety regulations. (Information in email correspondence with Bronwyn Byrnes, Solicitors’ Human Rights Law Group as of May 2007.)

<sup>364</sup> UK/EAT/0565/03/RN. “The illegal conduct was entirely that of the Applicant and it was the employer who was the innocent participant in what was, in fact, an illegal contract” in relation to a case where an asylum seeker was seeking damages for discrimination.

<sup>365</sup> *Sharma v Hindu Temple* cited in *op. cit.* note 18, PICUM.

<sup>366</sup> Information from Bronwyn Byrnes, Solicitor, May 2007 and NGO Kalayaan, see <http://www.kalayaan.org.uk>.

<sup>367</sup> *Ibid.*



able to leave abusive situations and still remain in the UK. This restriction was previously removed after years of campaigning on the issue.

In gangmaster situations, where different entities pay wages and supervise work, one entity might seek to argue that there is no contract of employment, as the workers are “self contractors”. If argued successfully these “self-contracting” workers would be entitled only to some employment rights but not all the rights of “employees”. For example, only employees can sue for unfair dismissal (after 12 months employment) but all workers are entitled to the minimum wage and rest breaks and holidays pursuant to the Working Time Regulations 1998.

All workers will be able to take action under discrimination rights where the facts are made out but they will usually need good quality legal advice and representation to do so.<sup>368</sup>

HM Customs and Excise also has powers to enforce National Minimum Wage legislation through Compliance Teams.<sup>369</sup> These can be pursued alongside individuals taking action in employment tribunals. A complaint can be made by an individual (e.g. by post, online or by using a government helpline) and should be dealt with in confidence.<sup>370</sup> The compliance inspectors then have the right to inspect an employer and impose penalties and orders to pay unpaid wages to employees and certain former employees. Where the employees fail to comply with this request the compliance teams can impose further orders and enforce their orders through a civil procedure (also used to enforce employment tribunal awards).<sup>371</sup> The enforcement process is, however, long-winded and complex and the teams cannot receive payments on behalf of workers. This means that complainants’ identities may eventually be revealed to the employer. There are also restrictions on the usefulness of the agency’s work as they assert that the minimum wage only applies to those working legally and they are not trained to identify cases of trafficking or exploitation in order to refer the victims for assistance.

A similar body exists for individuals working in the agricultural setting: the Agricultural Wages Team enforces the Agricultural Wages Order for England and Wales.<sup>372</sup> Their enforcement work is undertaken in response to specific complaints and is preceded by a

<sup>368</sup> For other information see the following weblinks:

[http://news.bbc.co.uk/1/hi/uk\\_politics/6580917.stm](http://news.bbc.co.uk/1/hi/uk_politics/6580917.stm)

[http://news.bbc.co.uk/1/hi/uk\\_politics/6424377.stm](http://news.bbc.co.uk/1/hi/uk_politics/6424377.stm)

<http://news.independent.co.uk/uk/politics/article2338402.ece>.

<sup>369</sup> There are 16 teams in the UK. <http://www.cipd.co.uk/subjects/pay/minimumwage/nmw.htm?IsSrchRes=1ww.hmrc.gov.uk/manuals/dmbmanual/DMBM570060.htm>.

<sup>370</sup> See <http://www.hmrc.gov.uk/nmw/complaint.htm>.

<sup>371</sup> For detailed guidance given to inspectors see <http://www.hmrc.gov.uk/manuals/dmbmanual/DMBM570060.htm> and to employees see National Minimum Wage Policy Guidance as to Penalties at <http://www.dti.gov.uk/files/file36381.pdf>.

<sup>372</sup> On behalf of the Secretary of State for Environment, Food & Rural Affairs using powers incorporated into the Agricultural Wages Act 1948 from the National Minimum Wage Act 1998.

period of informal arbitration aimed at bringing the parties to an amicable settlement. Formal inspections of employers pay records are conducted by Agricultural Wages Inspectors.... Where an inspector concludes that a worker has been underpaid he or she can issue an Enforcement Notice.<sup>373</sup>

In the guidance given to agricultural workers regarding their rights and enforcement powers it states that, although a complaint can be pursued following the anonymous complaint of an individual, that anonymity cannot be preserved once an Enforcement Notice is issued.<sup>374</sup> The enforcement proceedings are very similar to those used by the compliance teams for other forms of work.

Information about the minimum wage and its enforcement is available in English, Lithuanian, Latvian and Polish on government websites. However, none of this is easily accessible online without detailed searching.

The government has an independent advisory body called the Low Pay Commission which is mandated to:

Monitor, evaluate and review the NMW and its impact, with particular reference to ... the effect on different groups of workers, including ...migrant workers;<sup>375</sup>

The 2007 report of this body reviews in some detail the impact of the legislation on migrant workers and agency workers and makes a number of recommendations including that enforcement of the law in respect of migrant workers needs to be improved:

While we can understand the Government's position, we believe that the evidence of exploitation of migrant workers is compelling and has heightened our belief that it needs to be addressed as a priority. Therefore we recommend that the Government, as part of its enforcement programme, choose a low-paying sector to target in 2007/08 that has a high concentration of migrant workers.<sup>376</sup>

### 5.7.2.3. Asset seizure

There are numerous laws and provisions regarding asset and property seizure and confiscation in UK law. They vary according to whether they are undertaken in civil or criminal procedures.

<sup>373</sup> See Official website: <http://www.defra.gov.uk/farm/working/agwages/index.htm>.

<sup>374</sup> Minimum Wages for Agricultural Workers: Agricultural Workers—Your Rights And How You Can Expect Them to be Enforced, <http://www.defra.gov.uk/farm/working/agwages/pdf/awo-minwage.pdf>.

<sup>375</sup> Low Pay Commission Terms of Reference 2008 <http://www.lowpay.gov.uk/lowpay/TOR.doc>.

<sup>376</sup> Para 6.44 National Minimum Wage Low Pay Commission Report 2007, p. 230 available at [http://www.lowpay.gov.uk/lowpay/report/pdf/6828-DTi-Low\\_Pay\\_Complete.pdf](http://www.lowpay.gov.uk/lowpay/report/pdf/6828-DTi-Low_Pay_Complete.pdf).

In a criminal case a court may use powers under the Powers of Criminal Court (Sentencing) Act 2000 in relation to any property seized from the offender upon arrest. These powers can deprive an offender of such property if it was used or intended to be used to commit or facilitate the commission of *any* offence (i.e. not necessarily the offence for which the offender has been convicted).<sup>377</sup> The proceeds arising from the disposal of this property can be awarded to the victim “where the offence resulted in personal injury, loss or damage.” (s.145 (1) (a)) and where the court feel the offender’s means are too inadequate to justify ordering a compensation order (s.145 (2)). According to the Crown Prosecution Service guidelines it is “the responsibility of the prosecutor to ask the court to consider making a deprivation order under the relevant legislation.”<sup>378</sup> Also “The court should not make an order unless there is adequate supporting evidence and so any application should be fully prepared.”<sup>379</sup>

The Proceeds of Crime Act 2002 regulates the state’s power to restrain and confiscate criminal assets mainly in more serious cases using civil actions. This can currently be done by the Assets Recovery Agency using civil powers separate from a criminal prosecution (e.g. where there is no prosecution) and by the crown court alongside a prosecution. However, it was recently announced that due to the problems encountered by the Assets Recovery Agency in seizing sufficient assets to justify its own existence it will effectively be abolished by 2008 and its powers passed to the Serious Organised Crime Agency and Crown Prosecution Service.<sup>380</sup> It remains to be seen whether these agencies will have more luck in seizing criminal assets through civil cases or whether the challenges are inherent in the nature of the task. The police also have separate civil powers relating to the seizure of cash relating to criminal misconduct.

In a criminal case the Act applies where the court is satisfied that the offender has a “criminal lifestyle” and has benefited from “his or her general criminal conduct” (Part 2, s.6). An offender has a criminal lifestyle if the offence concerned is a “lifestyle offence” listed in schedule 2 to the Act which includes drug trafficking, money laundering, trafficking for sexual and labour exploitation, pimping and running a brothel.

The Proceeds of Crime Act itself suggests that funds confiscated should be held available for civil claims that a victim might bring. If the court believes that any victim “has started or intends to start proceedings against the defendant in respect of loss, injury or damage” it is under an increased obligation to make a confiscation order against the offender’s proceeds of crime (Part 2, ss 6(6)). Unfortunately this legal power is not emphasized in the guidance to prosecutors so they are not told to take specific steps to find out about the victim’s intentions in relation to a civil claim. There is also no clear legal connection between confiscated assets and the payment of a compensation order made in a criminal case under the Powers

<sup>377</sup> S.143.

<sup>378</sup> [http://cps.gov.uk/legal/section15/chapter\\_c.html#11](http://cps.gov.uk/legal/section15/chapter_c.html#11).

<sup>379</sup> *R v Pemberton* (1982) 4 Cr App R (S) 328.

<sup>380</sup> See “Assets Recovery Agency abolished”, BBC News, 11 January 2007 at [http://news.bbc.co.uk/2/hi/uk\\_news/6251339.stm](http://news.bbc.co.uk/2/hi/uk_news/6251339.stm). and “Proposed merger” at ARA website <http://www.assetsrecovery.gov.uk/AboutARA>.

of Criminal Court (Sentencing) Act 2000 (despite what is stated in the sentencing guidelines—see under criminal procedure).

In general there is much greater emphasis to police and prosecutors to use their new powers to restrain and seize assets than there is to ensure that the victim receives compensation from those same proceeds. It would assist if the CPS Guidance to Prosecutors was amended to reflect the compensation concerns of a victim when it is dealing with confiscation matters given that the prosecutor is, in the main, the driving force behind the application for restraint and confiscation.

In civil cases a private individual has limited powers of search to establish the assets of a civil defendant. However, these must be granted by the court on application. Likewise, a plaintiff can apply for an order “freezing” the defendant’s assets to the limit of the damages claimed (such an order can also apply internationally under a Worldwide Freezing Order). In order to obtain such an order the applicant must have a good arguable civil claim case; there must be a “real prospect” that the assets are located within the jurisdiction, and there must be a serious risk of the dissipation of the assets. The usefulness and success of these powers in a trafficking case will depend on how quickly they are used in a particular case. For example, if the civil case begins after finalization of a criminal case then the impact will be limited as the assets are likely to have been spent, hidden or seized already. However, if used quickly against a defendant with relatively “deep pockets” in a situation where assets can easily be traced then the powers will be of use. Legal representation would be required in order to take the relevant steps and the costs are very likely to be high.

#### 5.7.2.4. Assistance

Some victims of trafficking have been granted temporary residence visas on the basis of their participation in the Poppy Project but this is available only to a limited category of victims of trafficking for sexual exploitation. Most victims have been returned to their countries of origin. Identified trafficked victims are currently eligible to apply for a visa to remain in the UK on humanitarian grounds or in asylum law. These are not specific to trafficking victims but have been granted in a limited number of trafficking cases. Nationals of the new European Union countries are entitled to stay in the UK but are not allowed to have “recourse to public funds” during the first two years of residence. As noted in previous sections, the absence of a defined visa regime for trafficking victims covering reflection, recovery and a period of time to engage in legal proceedings has created barriers for trafficking victims to access redress in the form of compensation.

Depending on the particular situation of the victim they may or may not become aware of the possibilities for compensation. Unless the victim is interviewed by the police and identified as a witness in criminal proceedings they are unlikely to obtain information about compensation orders or the CICA from the police. As victims are not separately legally represented in criminal proceedings, advice and representation of a claim for a compensation order would have to come from the police and the prosecutor in the case, from an NGO such as Victim Support or from a court-based witness-support employee. Victims may only

be made aware of the right to pursue a civil claim or a CICA claim through advice from a lawyer dealing with their immigration status, an NGO assisting them e.g. a national NGO (e.g. Victim Support), or a specialist anti-trafficking service such as the Poppy Project.

The pursuit of a CICA claim is possible without legal advice and representation but in order for the best supporting arguments to be made and for the evidence to be maximized it would always be better to use an experienced lawyer especially where the victim has a limited command of English. Legal aid is not available in such cases and can only be provided by Law Centres, Citizen's Advice Bureaux or lawyers acting *pro bono*.

In order to pursue an employment or civil law claim a victim must first be able to access initial legal advice on whether the trafficker/exploiter could successfully be sued (e.g. whether there is a cause of action, how strong the case is, whether the defendant can be located and served with papers, and whether court orders can be executed and payment actually made by the defendant) and on the nature and length of proceedings. A lawyer acting under a Community Legal Service (legal aid) contract, *pro bono* (free of charge), for a union or not-for-profit advice agency is likely to be able to give this kind of initial advice to a client

In employment law cases no further legal aid is available to cover the costs of representation in a tribunal and so this would have to be provided free of charge, on a private fee paying basis or as a "no win no fee" case. An additional problem is that since 1 April 2007, changes to the regulations of the Community Legal Service mean that employment lawyers have been restricted to working on a very low fixed-fee basis in legally aided cases. This means they are paid the same amount regardless of the amount of work done on a case.<sup>381</sup> As a result many lawyers firms may well decide not to provide any legal-aid service to clients in employment law cases but will rely only on private paying clients.

In civil cases, the lawyer or organization would be able to provide representation services through legal help (legal aid) granted by the Community Legal Service. The latter will be dependent both on very restrictive financial eligibility and the lawyer's assessment of the chances of success of the claim. In civil cases there is no legal assistance for claims which amount to personal injury unless they involve "deliberate harm". Claims arising from trafficking claims may not be affected by this restriction unless they were based on negligence claims e.g. claims based on health and safety obligations of employers being pursued in civil courts.

Restrictions on the availability of free legal aid means that representation can only occur in cases where a lawyer offers services *pro bono* or with a "no win no fee" agreement. In civil cases a no win no fee agreement would have to be linked to the purchase of an insurance policy to cover the opponent's costs in the event of a loss.

Currently legal-advice work pertaining to all types of compensation claims and civil claims is being taken on by a variety of over-burdened not-for-profit agencies (such as the Law Cen-

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<sup>381</sup> Certain exceptionally expensive cases will be paid in full but this is not common practice.

tres, Citizen's Advice Bureaux, etc), unions and lawyers working mainly *pro bono*.<sup>382</sup> There are also a number of specialized agencies e.g. Kalayaan working on behalf of domestic servants. Despite their efforts the legal provision is still insufficient given the complexity of the issues and the vulnerabilities of trafficked people. Many exploited migrants have difficulty accessing advice and justice due to language difficulties, fears about their immigration status or threats from their traffickers or even peers.

### 5.7.3. Conclusion on the United Kingdom

The existence of a generous state-funded scheme that pays both material and moral damages is positive. It has also demonstrated some flexibility in terms of the types of damages paid to trafficked victims. Its limitations, however, present problems for trafficking victims especially regarding restrictive eligibility criteria and the limited categories and amounts of damages awarded. Also, the state scheme is restricted to crimes of violence causing injury which may not always cover those suffering "psychological violence" and needs to be reviewed to ensure that all trafficking victims are automatically eligible. It is possible that a separate fund established within the CICA scheme (possibly funded from criminal assets) could deal specifically with trafficking cases. This would mean that the criteria for eligibility and the types of damages available could be reviewed and adapted to the specificities of these kinds of cases.<sup>383</sup> Focused training could be provided to the CICA staff and adjudicators in the establishment of such a scheme and for processing the claims. The claims could also be dealt with more quickly than other cases. A separate scheme would not detract from the need to judge each case on its merits.

The existence of the power to order compensation orders in the criminal courts is positive, especially in the absence of a possibility to "append" a civil claim, but prosecutors and judges are taking insufficient steps to ensure such orders are considered and granted. These orders are more likely to be paid and are more easily enforced. However, the currently awarded amounts are so low that they risk humiliating the victims further. The guidance to judges on compensation awards in trafficking cases should be improved to ensure the nature and scale of damage is reflected. Pro-active steps should be taken by police and prosecutors alike to seize suspected traffickers' assets. The assets seized through Proceeds of Crime Act criminal law powers should be available to trafficked victims, and the nexus between those powers and the powers of the criminal court to use those assets to pay compensation should be clearer. The victims' interests remain underrepresented in criminal proceedings, and respect and implementation of their rights neither obligatory nor in statutory form.<sup>384</sup>

<sup>382</sup> See joint campaign on access to justice <http://www.accesstojusticealliance.org.uk>.

<sup>383</sup> Acknowledgement to Bronwen Byrnes and the lawyers of the SIHRG for this suggestion.

<sup>384</sup> Substantial problems and recommendations were made by the National Audit Commission report: *Victims and Witnesses: Providing Better Support*, 2 December 2003, <http://www.auditcommission.gov.uk/reports/NATIONAL-EPORT.asp?CategoryID=ENGLISH^573&ProdID=7CF96FD1-C357-4fe8-AD04-CC1783620077>.



The limitations on access to civil justice and enforcement of labour rights are illustrated by the fact that applications to the civil courts or employment tribunals are not surfacing in cases of trafficking and exploitation. This may be due to a number of reasons relating to overall civil procedure in the UK including the absence of or reduction in legal aid, and the impracticality of a lengthy and separate procedure to a trafficking victim (who may wish to or by necessity have to leave the jurisdiction). The issue of enforcing employment law claims is especially important for labour exploitation cases. Whilst case law in this area has not restricted these rights completely it remains limited and the government may take further steps to restrict these rights. Access is already restricted through practical barriers especially to irregular migrants who experience a fear of expulsion (however bad the exploitation they are suffering) and the current legal barriers exacerbate this situation.

The wage inspectorates dealing with the national minimum wage should be strengthened and information about their powers should be more accessible to workers, especially migrants. The national minimum wage should apply to workers in trafficked situations and they should be able to access remedies in situations of exploitation. The inspectors should be empowered to identify situations of trafficking in the course of its work.

There is insufficient information and legal and material assistance available to trafficked persons to ensure they are aware of their rights to compensation and to enable them to instruct those assisting them accordingly. Their insecure residence status or their deportation is a further barrier to compensation claims. A residence permit scheme is required along with better access to legal counselling and representation. Prosecutors and police should be put under a duty to ensure victims are advised of their rights and their views represented in court. Judges should be made aware of their powers to grant compensation orders without a specific request and should be more intent on using this power in combination with a custodial penalty.

The involvement of the NGOs in the process of identification and assistance to victims of trafficking is limited to short-term funding of one NGO based in London. Although this is a positive step, a wider network of advice and support agencies are necessary to deal with a broader constituency of trafficked persons and in greater numbers.

The problems with the current compensation schemes in the UK are perhaps best proven by the fact that only one known case of compensation has been identified in the course of this research and that relevant case law is extremely limited in all areas of law.

#### 5.7.4. Good practice in the United Kingdom

- Existence of an efficient and accessible state-funded scheme that pays material and moral damages;
- Ability of criminal courts to grant compensation orders with enforcement powers;
- Existence of National Action Plan;
- Existence of *pro bono* services from lawyers and entitlement to free legal assistance in limited cases;



- Practical help provided by many specialized NGOs; and
- Existence of a national minimum wage legislation and enforcement bodies.

## 5.8. UNITED STATES OF AMERICA

### 5.8.1. Legal and institutional framework

#### 5.8.1.1. International obligations

The United States is a party to the UN Convention on Transnational Organised Crime and the Trafficking Protocol. The United States has not ratified the ILO Forced Labour Convention or the Migrant Workers Convention, but it has ratified the ILO Convention on the Abolition of Forced Labour (C 105) as well as the ILO Convention on the Worst Forms of Child Labour (C 182).

#### 5.8.1.2. Domestic law: legal and institutional background<sup>385</sup>

The United States' oldest anti-slavery statutes date to the period immediately following the Civil War.<sup>386</sup> For much of the twentieth century, contemporary manifestations of slavery and involuntary servitude were prosecuted under 18 U.S.C. § 1584 (involuntary servitude) or 18 U.S.C. § 1581 (peonage).<sup>387</sup> This changed in October 2000, when the Trafficking Victims Protection Act (TVPA) was signed into law.<sup>388</sup> The TVPA was adopted by Congress in response to *United States v. Kozminski*, 487 U.S. 931 (1988). In *Kozminski*, the Supreme Court narrowly construed the involuntary servitude statute to reach only cases “involving the compulsion of services by the use or threatened use of physical or legal coercion.” *Id.* at 948.<sup>389</sup> In part, because the Supreme Court’s interpretation of the involuntary servitude

<sup>385</sup> A note on terminology: Criminal statutes are codified in Title 18 of the United States Code. A statute is usually referred to by either its name or its section number (symbolized by §) within Title 18. The standard way of citing the involuntary servitude statute, for example, is 18 U.S.C. § 1584. A piece of legislation, commonly known as an “Act,” may contain many separate statutes, each denoted by a separate section number. Within Title 18, criminal statutes that concern the same topic are grouped into “chapters.” Thus all trafficking related provisions are contained within Chapter 77 (titled “Peonage, Slavery, and Trafficking in Persons”). The Trafficking Victims Protection Act added a number of statutes to Chapter 77 of Title 18. Each statute has its own section number.

<sup>386</sup> The Slave Trade statute, as amended in 1909, formerly 18 U.S.C. 423 (1940 ed.), and the 1874 Padrone statute, formerly 18 U.S.C. 446 (1940 ed.).

<sup>387</sup> See *United States v. Kozminski*, 487 U.S. 931, 945 (1988) (describing § 1584 as a consolidation of the two earlier statutes). While § 1584 criminalizes “involuntary servitude,” § 1581 criminalizes “peonage,” which is a status or condition of compulsory service based on real or alleged indebtedness. Because § 1581 thus requires that the government prove all the elements of § 1584 plus the additional element of a debt, § 1584 became the preferred prosecutorial tool.

<sup>388</sup> Pub. L. No. 106-386, 114 Stat. 1464 (signed into law on October 28, 2000).

<sup>389</sup> In *Kozminski*, the Supreme Court held that § 1584’s reach was “limited to cases involving the compulsion of services by the use or threatened use of physical or legal coercion.” *Id.* at 948. In enacting the TVPA, Congress explicitly stated that it wished to reach cases of psychological coercion.

statute did not reach cases of psychological coercion, Congress addressed the issue when it adopted the TVPA.

The new statutes criminalize forced labour; trafficking with respect to peonage, slavery, involuntary servitude, or forced labour; sex trafficking of children or by force, fraud or coercion; unlawful conduct with respect to documents in furtherance of trafficking (document servitude); and attempts to violate any of the substantive provisions.<sup>390</sup> In addition, the TVPA provided for mandatory restitution for victims and both criminal and civil forfeiture of property.<sup>391</sup> In 2003, the Trafficking Victims Protection Reauthorization Act (TVPRA) created a civil cause of action for violations of §§ 1589, 1590 and 1591.<sup>392</sup> The TVPRA of 2005, which was signed into law in 2006, expanded victim assistance programs. The TVPA and the TVPRA will be discussed in detail below.

Institutionally, the United States does not have a national rapporteur or co-ordinator on trafficking. Responsibilities for prevention of trafficking, protection of trafficking victims, and prosecution of trafficking defendants are distributed among several agencies at the federal level. There is an inter-agency working group, called the Senior Policy Operating Group, which is chaired by the Director of the State Department's Office to Monitor and Combat Trafficking in Persons and reports to the President's Interagency Task Force to Monitor and Combat Trafficking in Persons. It consists of senior officials from over 10 federal agencies.<sup>393</sup> In brief, the Department of Health and Human Services certifies foreign national adults who are victims of a "severe form of trafficking," thus enabling them to receive cash assistance, medical care, food stamps, and housing.<sup>394</sup> The Department of Homeland Security investigates human trafficking cases and provides immigration relief to non-citizens who are found to be victims of a severe form of trafficking. The Department of Justice prosecutes trafficking defendants. In addition, the Department of Labor and the Equal Employment Opportunity Commission investigate allegations of worker abuse and discrimination and can file civil cases on behalf of workers. Furthermore, many states have anti-trafficking legislation,<sup>395</sup> there are 42 joint state-federal task forces whose purpose is to co-ordinate the law enforcement and social service sectors,<sup>396</sup> and the anti-trafficking NGO community is very active.

<sup>390</sup> 18 U.S.C. §§ 1589-1592, 1594(a).

<sup>391</sup> 18 U.S.C. §§ 1593, 1594(b) and (c).

<sup>392</sup> Pub. L. No. 108-193, 117 Stat. 2875 (2003) (signed into law on 19 December 2003).

<sup>393</sup> For a description of SPOG's activities, see *Attorney General's Annual Report to Congress on U.S. Government Efforts to Combat Trafficking in Persons FY 2006* (May 2007) at 40, available at [www.usdoj.gov/olp/human\\_trafficking.htm](http://www.usdoj.gov/olp/human_trafficking.htm); *Report on Activities to Combat Human Trafficking FY 2001-2005* at 5-7, available at [www.usdoj.gov/crt/crim/trafficking\\_report\\_2006](http://www.usdoj.gov/crt/crim/trafficking_report_2006).

<sup>394</sup> Certification as a victim of a severe form of trafficking is an administrative process that does not affect the ability to file a civil lawsuit, apply for state compensation, or be named as the victim of a criminal offence. See Section 5.8.6 (Assistance) for a fuller discussion of certification.

<sup>395</sup> Thirty-four states have their own anti-trafficking statutes. See Enacted Laws by State at [www.centerwomenpolicy.org/programs/trafficking/map/statelist.cfm](http://www.centerwomenpolicy.org/programs/trafficking/map/statelist.cfm).

<sup>396</sup> Each task force is comprised of members from the local United States Attorney's Office; various federal, state, and local law enforcement; and representatives from non-governmental service providers. See *Le-*

### 5.8.1.3. Introduction to compensation and damages schemes

There are three means by which a trafficking victim can recover financially. These three avenues can and often do occur simultaneously. Immigration status is not a legal bar to any of these means of recovery. Nor is there any requirement that an abused or exploited worker be certified as a victim of a severe form of trafficking in order to obtain compensation. Certification is an administrative step that triggers certain immigration and other benefits and is not a prerequisite for either criminal or civil compensation, or application to a state compensation fund. Certification is discussed in Section 1.2.6 (Assistance to the Victims).

First, a crime victim may apply to a state-run compensation fund for reimbursement of financial losses directly related to the crime. Although programme specifics vary by state, victims generally may recover for “material damages”—medical and hospital care, dental care, mental health counselling, lost earnings due to crime-related injuries, loss of support for dependents of a deceased victim, and funeral and burial expenses.<sup>397</sup> Note that “lost earnings due to crime-related injuries” would not include the financial losses suffered by a trafficking victim who is simply unpaid or underpaid for his or her compelled labour. Rather, the term is intended to apply to those crime victims who are unable to work as a result of injuries caused by the criminal conduct itself. Application to a compensation fund is fairly straightforward and should not require legal representation, but there are agencies at the state and local level that can help with the process. If a victim does hire a lawyer, some states will reimburse a portion of the legal fees.<sup>398</sup> The process will involve submitting claims for expenses, including receipts or other proof, but should not require oral testimony.

Second, an identified victim in a criminal case will almost always be entitled to an order of restitution. The term “restitution” refers to money that a court orders a convicted criminal defendant to pay to the victim or victims of the offence. It is the same as “criminal compensation.” An order of restitution is issued by the court when the defendant is sentenced. Restitution is mandatory for all trafficking offences and all crimes of violence. Thus a criminal case built around a trafficking victim need not actually include trafficking charges in order for restitution to be ordered by the court. The losses that restitution covers are discussed in greater depth below.

Because the victim does not initiate the criminal case and has no standing in a criminal case, a restitution order will be issued in a trafficking case regardless of whether the victim has legal representation. Legal representation should help the victim identify and articulate losses and thus should lead to a larger restitution amount. In practice, all or nearly all

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*gal Options to Stop Human Trafficking*, Statement of Grace Chung Becker, Deputy Assistant Attorney General, Civil Rights Division, Before the Subcommittee on Human Rights and the Law, Committee on the Judiciary, United States Senate (26 March 2007).

<sup>397</sup> See FAQ: Benefits, available at <http://www.nacvcb.org/faq>.

<sup>398</sup> See New York State Crime Victims Board Application, available at [www.cvb.state.ny.us](http://www.cvb.state.ny.us).

the persons named as victims in criminal cases do have legal representation.<sup>399</sup> If the victim named in a criminal case is unrepresented, the prosecutor's office may assist with referrals to civil attorneys.

Third, a victim may bring a civil suit for damages. The term "damages" refers to money awarded by a court in a civil suit. Civil damage awards are greater than criminal restitution orders because damages cover nonpecuniary as well as pecuniary losses. Plaintiffs in civil cases may also bring "class actions" or "collective actions" on behalf of unnamed or undiscovered victims. Civil litigation is the only compensation option that requires legal representation for the victim. There are a number of non-governmental organizations and partially government-funded legal aid organizations that assist victims of trafficking.

Both civil cases and criminal cases often settle before trial. That means that the parties agree on a resolution. In a civil case this is called a settlement and in a criminal case it is called a plea agreement. When civil parties agree to settle a dispute, the defendant usually pays some amount of money that is less than what he or she anticipated being held liable for at the conclusion of a civil trial. Settlements often also include specific court orders, referred to as "injunctive relief," to ensure that the parties will not repeat their illegal practices. When parties to a criminal case reach a plea agreement, the defendant agrees to plead guilty to criminal offences that are fewer or perhaps less serious than the offences he or she feared being convicted of at trial. The defendant is still convicted and sentenced according to the law, but as the result of a plea rather than a trial.

Plea agreements or settlements are often beneficial to trafficking victims because they help to ensure that they are actually paid specific restitution or civil damages amounts. A defendant who has pleaded guilty is required to pay any restitution money before he or she is sentenced. Furthermore, the amount of restitution negotiated through a plea in a criminal case might be higher than the amount calculated by a court. In a plea, a defendant can agree to a restitution amount that is greater than that required by law.

### 5.8.2. Crime victim compensation schemes

Compensation for victims of crime is provided by state-run crime compensation programmes. Each of the 50 states as well as the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands has a crime victim compensation programme. The federal government partially funds these programmes through the Crime Victims Fund, but there is no direct federal compensation scheme.<sup>400</sup> The remainder of the funding for state crime victim compensation programmes comes from fees and fines charged to state offend-

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<sup>399</sup> The fact that a victim named in a criminal case has his or her own legal advocate does not mean that the victim is a party to the criminal case. The victim's lawyer helps the victim in a variety of areas, including obtaining immigration and other benefits, but does not advocate for the victim before the court in the criminal case.

<sup>400</sup> According to the National Association of Crime Victim Compensation Boards (NACVCB), the states themselves fund about 60% of awards to victims. See <http://www.nacvcb.org>.

ers. Although individual state programmes vary, there are many common features because of the statutory requirements of the Victims of Crime Act (VOCA). The Act requires that states offer compensation to victims and survivors of victims of criminal violence. Trafficking victims are eligible for crime victim compensation to the same extent and in the same manner as other crime victims.

A review of state compensation board websites shows that usually there is no citizenship requirement.<sup>401</sup> To qualify for compensation, victims must (1) report the crime promptly; (2) co-operate with law enforcement; (3) file a timely application; (4) be innocent of wrongdoing; and (5) have an expense or loss not covered by insurance or another public benefit programme. There is no requirement that a criminal case be filed. Furthermore, the federal Office for Victims of Crime (OVC), which issues regulations and guidance to the state compensation funds, encourages consideration of potential barriers to law-enforcement co-operation, such as age, cultural or language differences, psychological factors, and shame or trauma.<sup>402</sup>

VOCA mandates that state compensation schemes cover medical expenses, mental health counselling, and lost wages if attributable to crime-related physical injury, as well as funeral expenses. A few states choose to cover other losses, such as compensation for “pain and suffering” (also known as “moral damages”), but are prohibited by VOCA from using federal funds for property damage. States may set caps on the amount of reimbursement for medical and medical-related services and for mental-health and counselling services.

Since restitution, if paid at all, is often received over a long period of time, “compensation programs usually will pay in advance rather than force the victim to wait to receive restitution.”<sup>403</sup> For this reason, the New York Crime Victims Board website states that acceptance of victim compensation from the board “creates a lien in favour of the State on any court ordered restitution. The Board’s lien attaches if the restitution was ordered to compensate the claimant for the same expense compensated by the Board.”<sup>404</sup> California law creates a similar statutory lien against recovery from any third party to the victim.<sup>405</sup> Other states have similar provisions.

Maximum awards usually range from \$10,000 to \$30,000 (€7,514 to €22,542), but some states have higher limits.<sup>406</sup> Each state’s compensation programme has a website and applications

<sup>401</sup> Alabama is an exception in that it does require that the victim be lawfully present in the United States, but adds that a person certified by the federal government as a trafficking victim is eligible regardless.

<sup>402</sup> See 66 Fed. Reg. 27158 (May 16, 2001) (Final Program Guidelines for VOCA Crime Victim Compensation Grant Program).

<sup>403</sup> *Crime Victim Compensation: an Overview* at [www.nacvcb.org/articles/Overview](http://www.nacvcb.org/articles/Overview).

<sup>404</sup> See Information for Attorneys at <http://www.cvb.state.ny.us/attorney>.

<sup>405</sup> See FAQs at <http://www.vcgb.ca.gov/Victims>.

<sup>406</sup> In California, for example, the total of all benefits for crimes that occurred on or after January 1, 2001, may not exceed \$70,000 (€51,731). See <http://www.vcgb.ca.gov>.

for compensation are available online.<sup>407</sup> Many application forms are now also available in Spanish. If an application is denied, there is an appeals process. Every state has a victim assistance agency and there are victim co-ordinators in almost every law-enforcement and prosecutorial office to assist victims with the application process. There are also emergency funds available to assist victims who are faced with immediate financial hardship directly related to the crime. A nationwide analysis of state compensation programmes for fiscal year 2005<sup>408</sup> shows that 158,588 claims were approved as eligible and 56,155 were denied as ineligible or closed. The greatest number of payments went towards medical/dental services.

Two of the leading anti-trafficking NGOs, Safe Horizon (based in New York) and the Coalition to Abolish Slavery and Trafficking (CAST) (based in Los Angeles), reported that they routinely apply for and receive crime victim compensation funds on behalf of their clients.<sup>409</sup> A California statute codifies that trafficking victims are indeed eligible for crime victim compensation and that the compensation board can not deny an application for lack of a police report. In New York, the crime victim board has been receptive to accepting documentation other than police reports.

The advantage of a payment from a crime victim compensation board is that the applications are relatively short and simple, and no legal representation is required. The disadvantage is that the losses covered by such compensation boards are limited to out-of-pocket costs directly caused by the offence, and hence payments are not large. For a trafficking victim, his or her greatest financial loss might be caused by the number of weeks, months, or years without any pay or with very minimal pay. State crime victim compensation programmes simply do not compensate for the economic nature of the trafficking offence.

### 5.8.3. Compensation awarded in criminal and civil cases

#### 5.8.3.1. “Restitution” in criminal cases

If a trafficker is convicted of a trafficking offence or a crime of violence, then the court is required to enter an order of restitution for the victims. This is because of the operation of two statutes, the Mandatory Victims Restitution Act (MVRA) and the TVPA. The TVPA is the more comprehensive statute, but the procedures governing collection and enforcement of all restitution orders are contained in the MVRA. In order to understand how restitution for a trafficking victim works, it is necessary to understand restitution generally.

<sup>407</sup> See <http://www.nacvcb.org/statelinks> for a complete listing of state compensation boards.

<sup>408</sup> The federal fiscal year (FY) refers to the period from 1 October to 30 September of the following year. FY 2005 begins in 2004 and ends in 2005.

<sup>409</sup> Email from Charles Song, Legal Services Director, Coalition to Abolish Slavery & Trafficking, dated 11 April 2007; email from Florrie Burke, Senior Director of International Programs, Anti-Trafficking Program, Safe Horizon, dated 11 April 2007.



### *Mandatory restitution for crimes of violence*

In the United States, “restitution” refers to money paid by a convicted criminal defendant to the victim of the offence as the result of a court order.<sup>410</sup> Convictions by trial or by plea agreement are legally the same and both result in a judgment of guilty and a sentence. The principle of restitution holds that “the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being.”<sup>411</sup> Thus a principle of civil damages has been imported into the American criminal justice system. Restitution is intended to compensate the victim for losses proximately caused by the offence, although the type of losses compensable by restitution is limited by statute.

Restitution was not a traditional feature of the American judicial system. Until 1982, courts could only impose restitution as a condition of a sentence of probation. However, the victims’ rights movement of the 1970s and 1980s pushed for restitution as a way of acknowledging the harm done to the victim.<sup>412</sup> Beginning in 1982, Congress gradually expanded restitution rights, first giving courts discretionary authority and then making restitution mandatory for certain crimes. In 1996, Congress made restitution mandatory for all crimes of violence and almost all property offences, when it passed the MVRA.<sup>413</sup>

A court may also use its discretionary authority to award restitution in cases that do not meet the requirements for mandatory restitution.<sup>414</sup> In ordering discretionary restitution, a court must consider both the harm to the victims of the offence and the defendant’s financial resources. In *United States v. Calimlim*, the defendants, who had been convicted of violating 18 U.S.C. § 1589 (Forced Labour) for holding a domestic servant in conditions of forced labour for 19 years, argued that the mandatory restitution statute did not cover the time period before the enactment of the TVPA.<sup>415</sup> The court refused to consider whether the restitution statute limited recovery to the post-TVPA period “because the facts of this case

<sup>410</sup> There is a distinction between restitution “as a term of art meaning ‘unjust enrichment law,’ and ‘restitution’ as part of a sentence in a criminal case.” Andrew Kull, *Restitution’s Outlaws*, 78 Chi. Kent L. Rev. 17 (2003). Although restitution was originally rooted in unjust enrichment law, that concept has changed. “Following the integration of crime victim restitution laws into the federal sentencing structure in 1982, damages and restitution no longer stand as autonomous principles. . . Compensation, in essence, no longer exists solely in damages received in a civil judgment; instead, it has journeyed into criminal proceedings in the form of victim restitution.” Linda Trang, Note, *The Taxation of Crime Victim Restitution: An Unjust Penalty on the Victim*, 35 Loy. LA L. Rev. 1319, 1320 (2002).

<sup>411</sup> *United States v. Webb*, 30 F.3d 687, 689 (6th Cir. 1994) (citing legislative history of the Victim Witness Protection Act, S. Rep. No. 532, 97th Cong. 2nd Sess. 1, 30 (1982), reprinted in 1982 USCCAN 2515, 2536).

<sup>412</sup> See Kleinhaus, Brian, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 Fordham L. Rev. 2711, 2719–20 (May 2005) (describing victims’ rights movement’s goals); see also *Crime Victims’ Rights in America: A Historical Overview* at <http://www.ovc.gov/ncvrv/2005> (describing history of crime victims’ rights movement from 1965 through 2005).

<sup>413</sup> Pub. L. No. 104–132, 110 Stat. 1214 (1996).

<sup>414</sup> See 18 U.S.C. § 3663 (discretionary restitution statute).

<sup>415</sup> 2007 WL 527481 (E.D. Wisc. 2007).



provide more than ample justification for the Court to exercise its discretionary authority ... to order restitution for the entire period of time.” The court found that the victim was entitled restitution in the amount of \$916,635.16 (€685,533.33).

Even when restitution is not mandatory, a plea agreement can require a defendant to pay restitution. The restitution provided for in a plea agreement can also cover losses that would not be covered by statutory restitution. For example, in *United States v. Boehm* (D. Alaska 2004), the defendant pleaded guilty to conspiring to commit the crime of sex trafficking of children. He agreed to pay \$1.2 million (€897,462) into a trust fund for the benefit of the victims. The prosecutor’s press release stated: “[T]he trust fund can be used to pay for educational and professional training expenses for the victims, which would not have been otherwise available under federal statutes if Boehm had been convicted after trial.”<sup>416</sup> He was also sentenced to 11 years and 3 months of incarceration.<sup>417</sup>

### *Restitution for trafficking victims*

The TVPA made restitution mandatory for all trafficking victims.<sup>418</sup> 18 U.S.C. § 1593 provides that, in addition to any other civil or criminal penalties authorized by law, “the court shall order restitution for any offense under this chapter.” The restitution order shall be for “the full amount of the victim’s losses.” This means that even if the trafficking offence did not involve a crime of violence, and would therefore not fall under the provisions of the mandatory restitution statute, trafficking victims must nonetheless be awarded restitution.

A “victim” is defined as “the individual harmed as a result of a crime under this chapter” or their guardian or representative (if a minor or incapacitated).<sup>419</sup> The “full amount of the victim’s losses” is defined as any costs incurred by the victim for any of the following:

- (1) medical services relating to physical, psychiatric, or psychological care;
- (2) physical and occupational therapy or rehabilitation;
- (3) necessary transportation, temporary housing, and child care expenses;
- (4) lost income;<sup>420</sup>

<sup>416</sup> United States Attorney’s Office (D. Alaska) Press Release (22 November 2004).

<sup>417</sup> *AG Annual Report to Congress* at 19 (FY 2005).

<sup>418</sup> The term “victim” is used here to mean the person harmed by the offence. It does not mean that a person must be certified as a victim of a severe form of human trafficking by the Department of Health and Human Services (HHS). Certification by HHS is an administrative step that enables a victim to receive services and benefits. It is not done by the prosecutors or by the court. See *Fact Sheet: Certification for Victims of Trafficking* at [http://www.acf.hhs.gov/trafficking/about/cert\\_victims.html](http://www.acf.hhs.gov/trafficking/about/cert_victims.html). Certification is not a requirement for a criminal case to proceed. For both a criminal case and certification, however, a victim must be willing to co-operate with reasonable requests from law enforcement. In practice, a criminal case cannot proceed without a co-operative victim because these cases are so dependent on victim testimony and credibility.

<sup>419</sup> 18 U.S.C. § 1593(c).

<sup>420</sup> The issue of future lost earnings arises either when a victim is incapacitated by a crime-related injury and unable to work; or when the crime has resulted in a victim’s death and his or her dependents are seeking

- (5) attorney's fees as well as other costs incurred; and
- (6) any other losses suffered by the victim as a proximate result of the offense.<sup>421</sup>

In trafficking cases, restitution for lost income includes

the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act.

The reason for two theories of lost income is so that victims engaging in illegal activity, such as prostitution, may be awarded restitution for the value of their work to the defendants. In explanatory notes accompanying its Model State Anti-Trafficking Criminal Statute, the Department of Justice explained:

The first measure of restitution, the value to the trafficker of the victim's labor or services, not only prevents the traffickers from profiting from their crime, but also avoids the unpalatable situation of assigning a wage valuation to instances of forced prostitution.<sup>422</sup>

In *United States v. Cadena*, Mexican women and girls were lured to the United States by the defendants with promises of legitimate jobs, only to be forced to work as prostitutes in trailer park brothels in Florida. At the sentencing of the ringleader and six other men in 1999, the defendants argued against restitution: "Save for the illegal proceeds from prostituting themselves, the victims incurred no other monetary loss and as such restitution is inapplicable." The United States responded that restitution, rather than rewarding victims for illegal activity, instead denied the defendants the "windfall of the women's forced labor." Holding the defendants jointly liable, the court ordered restitution of approximately \$1 million (€747,951) to the 17 victims.<sup>423</sup> The *Cadena* case predated the TVPA. The restitution provision of the TVPA makes explicit the government's position, articulated in *Cadena*, that trafficking victims must be compensated for the value of their work, even if the work is illegal.

There have been other sizeable awards for sex trafficking victims. For example, in *United States v. Jimenez-Calderon* (D. N.J.), the court awarded \$135,000 (€ 100,991) to four Mexi-

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to be compensated for the victim's future lost earnings. If, for example, a trafficking victim was injured by a defendant and thus temporarily or permanently disabled, he or she might seek to recover for future lost earnings. This has not yet come up in a trafficking context. Whether the statutory phrase "lost income" includes future lost earnings is a matter of debate. At least two federal courts of appeals have held that "lost income" includes future lost income. *United States v. Cienfuegos* 462 F.3d 1160 (9th Cir. 2006) (interpreting MVRA); *United States v. Oslund*, 453 F.3d 1048 (8th Cir. 2006) (interpreting MVRA). The 7th Circuit, however, has concluded that future lost income is not covered. *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985).

<sup>421</sup> 18 U.S.C. § 2259(b)(3). Courts have sometimes awarded attorney's fees as part of restitution.

<sup>422</sup> Available at [http://www.usdoj.gov/crt/crim/model\\_state\\_law](http://www.usdoj.gov/crt/crim/model_state_law).

<sup>423</sup> Member of Mexican Trafficking Ring Sentenced on Involuntary Servitude Charges, DOJ Press Release (Nov. 22, 2002). [http://www.usdoj.gov/opa/pr/2002/November/02\\_crt\\_689.htm](http://www.usdoj.gov/opa/pr/2002/November/02_crt_689.htm)

can girls held in captivity in a brothel. In *United States v. Babaev*, the defendant pled guilty to sex trafficking for bringing women from Azerbaijan into the US to work as prostitutes; he was sentenced to ten years of incarceration and ordered to pay \$325,000 (€ 243,126) in restitution. In *United States v. Valle-Maldonado et al.*, the defendant pled guilty to a sex trafficking conspiracy and was ordered to pay \$135,000 (€ 100,991) to the victims. In *United States v. Trakhtenberg*, (D. N.J. 2005), the defendant pled guilty to conspiracy to commit forced labour and was ordered to pay \$66,380 (€48,996) in restitution.

Because restitution does not compensate for pain and suffering, some critics have noted the inadequacy of the awards to truly compensate victims for their suffering. “Restitution awards, which exclude damages for emotional and physical injuries as well as punitive damages, grossly understate the harms suffered by victims.”<sup>424</sup>

#### *Procedures governing all restitution orders*

Orders of restitution under the TVPA are issued and enforced in the manner provided for in the MVRA. That statute provides that the prosecutor must consult with the identified victims and give the court with a listing of the amounts subject to restitution.<sup>425</sup> Notice must be provided to all identified victims and each victim must be given an opportunity to file a separate affidavit relating to the amount of losses subject to restitution. The government has the burden in proving the amount of loss to the court, and the standard is “preponderance of the evidence,” which is a lower standard than the standard of “beyond a reasonable doubt” necessary to secure a criminal conviction. The court may require additional documentation or hear testimony. If a victim’s losses are not ascertainable by the sentencing date, the court may set a later date for a final determination of the victim’s losses. If precise information about the amount of loss is not available, the court need only make a reasonable estimate of the range of loss. If a victim subsequently discovers further losses, he or she has 60 days after the discovery of those losses to petition the court for an amended restitution order.

In each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.<sup>426</sup> The fact that a victim has received or is entitled to receive compensation from insurance or any other source shall not be considered in determining the amount of restitution.<sup>427</sup> A court may, however, order that restitution be paid to the entity that provided such compensation. All victims must be paid before any insurance company is paid. If a victim later recovers compensatory damages for the same loss in a civil

<sup>424</sup> Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 Harv L Rev 2574, 2583 (2006).

<sup>425</sup> In practice, the prosecutor provides such information to the U.S. Probation Office, which is responsible for calculating recommended sentences and fines and forwarding such information to the court.

<sup>426</sup> 18 U.S.C. § 3664(f)(1)(A).

<sup>427</sup> 18 U.S.C. § 3664(f)(1)(B).

proceeding, the amount paid under the order of restitution shall be reduced.<sup>428</sup> The defendant, however, bears the burden of proving that the civil damages award is for the same harm as the restitution order.<sup>429</sup>

An order of restitution is enforced by the federal government.<sup>430</sup> During incarceration, it can be enforced by the Bureau of Prisons. During a period of supervision following incarceration, it can be enforced by the probation officer. Following supervision, it can be enforced by the Financial Litigation Unit of the United States Attorney's Office that prosecuted the defendant. A victim can also enforce a restitution order. The MVRA provides that the victim named in a restitution order can obtain a copy of the judgment from the clerk of the court that sentenced the defendant. The victim can then register that judgment as a lien on property of the defendant.<sup>431</sup>

In addition to federal restitution laws, every state has granted its courts discretionary authority to award restitution. In some states, statutes provide for mandatory restitution.<sup>432</sup> Nine states have anti-trafficking statutes that also contain mandatory restitution provisions.<sup>433</sup>

#### 5.8.3.2. Causes of action in civil proceedings<sup>434</sup>

A trafficking victim may file a civil complaint. Such a complaint exists independently of any restitution ordered through the criminal process. There is no requirement that criminal charges be brought as a prerequisite to a civil complaint. Nor is there any requirement that a victim be certified as a victim by the government, although the lack of secure immigration status and work authorization might create logistical difficulties for the plaintiff. Both civil and criminal complaints are heard in federal district courts and both may be tried to a jury or, with the consent of the parties, to a judge. The standard of proof in a criminal case is beyond a reasonable doubt, whereas the standard of proof in a civil case is the lower one of preponderance of the evidence. A preponderance of the evidence standard means that the plaintiff must only show that it is more likely than not that his or her allegations are true. Because statutes of limitations for civil causes of action are usually shorter than criminal

<sup>428</sup> 18 U.S.C. § 3664(j)(2). Presumably, an award of punitive damages would not impact the restitution amount, although it is hard to envision a court awarding punitive damages without also awarding compensatory damages.

<sup>429</sup> See Catharine Goodwin, *Imposition and Enforcement of Restitution*, Federal Probation 62–72 (June 2000); *United States v. Manzer*, 69 F.3d 222, 230 (8th Cir. 1995) (finding that defendant had failed to show that the same conduct was the basis of both the civil judgment and the restitution order).

<sup>430</sup> See 18 U.S.C. § 3613.

<sup>431</sup> See 18 U.S.C. § 3664(m)(1)(B).

<sup>432</sup> See *Ordering Restitution to the Crime Victim*, Legal Series Bulletin # 6, Nov. 2002 (Office of Victims of Crime).

<sup>433</sup> Those states are Arizona, California, Illinois, Indiana, Mississippi, Missouri, New Jersey, Pennsylvania, and Rhode Island. See <http://www.centerwomenpolicy.org/programs/trafficking/map/statelist.cfm>.

<sup>434</sup> This section benefited enormously from conversations with practitioners Kathleen Kim, Dan Werner, and Kent Felty.

statutes of limitation, a victim may need to file his or her lawsuit prior to the conclusion of any criminal case. The civil lawsuit, however, will usually be held in abeyance by the court pending the conclusion of the criminal case.

Civil damages are awarded to compensate for losses or suffering. They include damages for past and future pecuniary loss (material damages) and non-pecuniary loss (moral damages), such as emotional harm, pain and suffering, inconvenience, and mental anguish. Punitive damages may also be awarded to punish the defendant and to deter future illegal conduct. In a civil complaint, a plaintiff will specify the type of damages he or she is seeking—most often all three types—but will frequently leave the amount to be determined at trial. Recovery through civil damages is potentially much greater than recovery through a restitution order because civil damages traditionally compensate for a greater variety of harms. Furthermore, some statutes specify that the damages award should be double or treble the amount of actual pecuniary loss.

A trafficking victim has many possible causes of action for civil damages, based on both statutory and non-statutory (common law) provisions. Even before the passage of the TVPRA in December 2003, civil attorneys representing trafficking victims filed claims in federal court based on a variety of legal theories.<sup>435</sup> (Although the trafficking victims named in these complaints came from a diverse group of professions, including domestic workers, migrant agricultural workers, and sweatshop workers, the author is unaware of any civil complaints on behalf of victims of sex trafficking, owing perhaps to the high degree of shame or embarrassment such victims may experience.) Causes of action included various worker rights' statutes, anti-discrimination statutes, civil RICO, tort and contract law, the Alien Tort Claims Act, and the Thirteenth Amendment.<sup>436</sup>

Labour-exploitation cases involving a large number of workers may be brought as “class actions” or “collective actions.” These mechanisms allow a relatively small number of plaintiffs to bring suit on behalf of every individual who shares common claims against the defendant. This can be a powerful tool in cases where it is difficult to locate the victims or where victims are reluctant to participate in litigation because of concerns about safety and security.

<sup>435</sup> Prior to enactment of the TVPRA, civil attorneys were forced to rely on a variety of worker rights and civil rights statutes designed to remedy general worker mistreatment and exploitation, not forced labour and slavery.

<sup>436</sup> The Thirteenth Amendment prohibits slavery and involuntary servitude. Since the TVPRA created a civil cause of action, reliance on an implied right of action under the Thirteenth Amendment and its enabling statute, 18 U.S.C. § 1584, is presumably no longer necessary. Courts hesitate to create implied rights of action and the Supreme Court has “repeatedly said that a decision to create a private right of action is one better left to legislative judgment.” *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Nevertheless, for an interesting discussion of why such a right does exist, see *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 384 (E.D.N.Y. 2002) (noting that “recognizing a private civil cause of action for involuntary servitude would be consistent with the underlying legislative purpose of section 1584 because it would provide a victim with a direct and efficient means of protecting his or her rights and deter potential offenders from engaging in behavior that the statute was designed to prohibit”).

Prior to passage of the TVPRA, trafficking NGOs and advocates had lobbied vigorously for a civil cause of action so that the harm of trafficking could be precisely identified and redressed. They felt that the existing causes of action were of limited value. “Defining the relationship of trafficker and trafficking victim as one between an employer and employee presumes a lesser harm that can be corrected by simple calculations of wage and hour discrepancies and does little to vindicate the trafficked person’s human right to be free from slavery.”<sup>437</sup> With passage of TVPRA, a trafficking victim now has the option of filing a civil trafficking lawsuit. The TVPRA and other causes of action and relevant cases are reviewed below.<sup>438</sup>

### *TVPRA*

The TVPRA created 18 U.S.C. § 1595. Section 1595 provides that an individual who is a victim of § 1589 (forced labour), § 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labour), or § 1591 (sex trafficking), may bring a civil action against the perpetrator and may recover damages and reasonable attorneys fees.<sup>439</sup>

Since Section 1595 was added in December 2003, there have been almost no judicial opinions interpreting it.<sup>440</sup> Although it has been included in a few cases involving trafficking victims, those cases either settled before trial or have not yet reached a conclusion. Thus the interpretation of “damages” under § 1595 is speculative, but practitioners assume that the phrase would cover both compensatory and punitive damages. It is also generally assumed that Congress did not intend § 1595 to have retroactive effect.<sup>441</sup>

In one recent case that has produced a judicial decision, although the case has not yet come to trial, the plaintiffs brought suit alleging violations of FLSA, TVPRA, civil RICO, state wage laws, breach of contract, false imprisonment, outrageous conduct, and promissory estoppel. The plaintiffs sought \$3.2 million in damages. In a January 2007 interim opinion, the court denied defendants’ motions to dismiss on a variety of grounds, including their argument that the TVPRA count failed to state a claim. The defendants argued that the TVPRA claim should be dismissed because the plaintiffs had not alleged that they were threatened with physical violence or harmed physically. The court disagreed. “It is enough to state

<sup>437</sup> Kathleen Kim & Kusia Hreshchshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 *Hastings Women’s L. J.* 1, 25 (2004).

<sup>438</sup> For a comprehensive review of the causes of action potentially available to trafficking victims, see Kathleen Kim and Daniel Werner, *Civil Litigation on Behalf of Victims of Human Trafficking* (2005) (hereafter *Civil Litigation Manual*).

<sup>439</sup> Section 1595 also codifies the routine practice of delaying the civil suit until any related criminal proceedings are concluded.

<sup>440</sup> One exception is *Roy Abraham et al v. B. J. Singh et al*, Case No. 2:04-cv-0044 (E.D. Louisiana, July 5, 2005). There the court held that § 1595 could not be applied retroactively to conduct predating its enactment. This portion of the district court’s opinion was not appealed.

<sup>441</sup> The TVPRA also does not specify a statute of limitations. Pending legislation would provide for a statute of limitations of ten years.



a claim for a violation of the TVPRA if it is alleged that plaintiffs were forced to work by ‘threatened abuse of law or the legal process.’ The court found that since the complaint alleged that the plaintiffs were threatened with deportation, that was sufficient to state a claim for relief. *Catalan v. Vermillion Ranch Limited Partnership*, 2007 WL 38135 (D. Colo. 2007). Thus the court found that being threatened with deportation would, if the allegation proved true, amount to an abuse of law or the legal process.

In addition to § 1595, almost half the states have enacted anti-trafficking laws and legislation is pending in a number of others. At least seven states provide for some trafficking-related civil causes of action.<sup>442</sup> Some of these laws are much more detailed concerning the damages that a trafficked plaintiff may recover. For example, the Connecticut law provides that a plaintiff may recover actual damages as well as statutory damages of “not more than \$1,000 for each day such person was coerced by another person,” as well as attorney’s fees. The Florida law provides that a plaintiff may recover either treble damages or threefold the actual amount gained by the defendant, as well as attorney’s fees and court costs. These laws are very recent and the authors are unaware of any cases that have been brought under the state civil causes of action.<sup>443</sup> Model state anti-trafficking laws also contain civil causes of action.<sup>444</sup> Many of these models are also more detailed than the TVPRA in terms of the type of damages recoverable and the statute of limitations.

<sup>442</sup> See California AB 22, Connecticut SB 153, Florida SB 250, Illinois HB 1299 (limited to victims of sex trafficking), Kentucky SB 43 (limited to juvenile victims of sex trafficking), Oregon SB 578, and Washington HB 1175.

<sup>443</sup> Although no cases have yet been brought under the California trafficking victims’ civil cause of action, other civil cases have been brought under California state law, which has a very favourable damages provision. An NGO called the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area was active in representing trafficking victims and filed several suits alleging violations of California labour statutes as well as tort claims such as fraud and emotional distress. These cases reached settlement prior to trial. In addition, a Filipino domestic worker named Nena Ruiz filed suit against her employers, alleging that they had held her against her will and paid her only \$300 for a year of work. She won an \$850,000 (€627,550) judgment (\$551,000 in compensatory damages and \$275,000 in punitive damages) in California state court in August 2004 following a jury trial on claims of involuntary servitude, false imprisonment, invasion of privacy, negligence, fraud, and violations of California wage and hour laws. She was helped by the anti-trafficking NGO Coalition to Abolish Slavery and Trafficking (CAST). The award is doubled under a provision of California law that provides for double damages where an employer has fraudulently induced an employee to change residence. See California Labor Code § 972 (providing for double damages for a violation of § 970 (Solicitation of Employee by Misrepresentation)). Section 970 was originally enacted to protect migrant workers. Washington state has a similar double damages provision for wilful failure to pay wages. See RCW 49.52.070. Following Nena Ruiz’s civil suit, the U.S. Department of Justice brought criminal charges against the couple who employed her. *Tacoma Couple Indicted on Forced Labor Charges*, DOJ Press Release (Sept. 14, 2006).

<sup>444</sup> For examples of model legislation for states, see Model State Law at <http://www.polarisproject.org/polarisproject/programs> and Trafficking Resource Guide at <http://www.centerwomenpolicy.org>.

***Workers' Rights Statutes: The Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Workers Protection Act (MSPA)***

The FLSA<sup>445</sup> establishes minimum pay and overtime pay for full- and part-time employees. Overtime pay at a rate of not less than one and one-half times the regular rate of pay is required for more than 40 hours of work in a week, unless certain exemptions apply. FLSA coverage extends to all workers, regardless of whether one is a citizen or an undocumented alien.<sup>446</sup>

The FLSA provides for both *compensatory damages* and *liquidated damages*.<sup>447</sup> Compensatory damages include unpaid wages, including unpaid overtime compensation. Liquidated damages are equal to the amount of unpaid wages that were denied or lost because of the statutory violation. Liquidated damages are meant to constitute “compensation for the retention of a workman’s pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.”<sup>448</sup> They are considered compensatory in nature because they are meant to compensate for losses that employees suffer because they have not received their lawful wages.<sup>449</sup> Attorney’s fees and court costs are also recoverable.

The FLSA statute of limitations is two years, but increases to three years for a wilful or repeat violation.<sup>450</sup> If a plaintiff is prevented by his or her employer’s actions from bringing a FLSA claim, then courts usually toll or suspend the statute of limitations for reasons of equity. In a domestic worker case in which the plaintiff alleged violations of FLSA as well as a conspiracy to deprive her of her civil rights in violation of the 13<sup>th</sup> Amendment, the court found that equitable tolling of the statute of limitations was appropriate where the plaintiff alleged that, whenever she inquired about her pay, the defendants answered her with a variety of misleading responses, including that they were holding her money for her so that she would have it when she returned to her country of origin.<sup>451</sup> In a case arising out of the El Monte sweatshop in California, more than 100 Thai and Latino workers brought suit alleging violations of the FLSA, California labour statutes, and civil RICO as well as various common law tort claims. The court rejected the defendants’ motion to dismiss the case based on the statute

<sup>445</sup> 29 U.S.C. § 201–219.

<sup>446</sup> Department of Labor Fact Sheet # 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division (describing how Department of Labor will enforce worker rights statutes without regard to citizenship or legality of worker).

<sup>447</sup> The only exception to the liquidated damages provision of the FLSA is if the employer acted in “good faith” and had “reasonable grounds for believing” that he was not violating the law. See 29 U.S.C. § 260.

<sup>448</sup> *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 707 (1945).

<sup>449</sup> *E.E.O.C. v. First Citizens Bank of Billings*, 758 F.2d 397, 403 (9th Cir. 1985).

<sup>450</sup> 29 U.S.C. § 255(a).

<sup>451</sup> See *Deressa v. Gobena*, 2006 WL 335629 (E.D. VA 2006) (denying defendants’ motion to dismiss complaint) (plaintiff alleged breach of contract, common law tort claims, FLSA, and conspiracy to hold her in involuntary servitude, in violation of the 13th Amendment and 18 U.S.C. § 1585, but for unknown reasons plaintiff did not plead § 1595).

of limitations, noting that plaintiffs could not have met the statute of limitations during the time that they were allegedly physically restrained inside the sweatshop.<sup>452</sup>

The MSPA establishes employment standards relating to wages, housing, transportation, disclosures, and recordkeeping for agricultural workers, and requires farm labour contractors to register with the federal Department of Labor. The Act requires that farm labour contractors, agricultural employers, and agricultural associations disclose to workers information about wages, hours and working conditions and provide workers with written statements of earnings and deductions. If housing is provided, it must meet safety and health standards. Under MSPA, a private plaintiff can receive either actual damages or statutory damages of up to \$500 for each violation of the Act.<sup>453</sup> However, the MSPA does not allow for a recovery of the plaintiff's attorney's fees.

Compliance with both MSPA and FLSA is enforced by the Department of Labor, which has the authority both to assess civil monetary penalties and bring charges against individuals. According to the Department of Labor, more than \$220 million in back wages were collected for over 341,000 employees in fiscal year 2007. Most of these were administrative actions under the FLSA. In 2007, there were 24,950 complaints and each complaint took an average of 97 days to resolve.<sup>454</sup>

In addition, private individuals may sue for violation of MSPA or FLSA rights. The number of FLSA lawsuits in particular has increased dramatically over the past decade, with some courts awarding over \$100 million in damages to workers.<sup>455</sup> The Department of Labor has prosecuted some significant worker exploitation cases. In August 2004 it reached a settlement in which a janitorial contracting firm agreed to pay \$1.9 million (€1,422,155) in back wages under the FLSA to 775 employees.<sup>456</sup>

Under both MSPA and FLSA, joint employers are individually responsible, and therefore potentially liable, for violations.<sup>457</sup> This means that a large employer who hires workers through an intermediary, such as a farm labour contractor or employment agency, cannot avoid liability for worker mistreatment. The test of joint employment usually applied by courts is whether the worker is, as a matter of economic reality, economically dependent on more than one person. In *Flores v. Albertsons* (C.D. Cal. 2002), undocumented workers sued three large grocery store chains for violations of FLSA. The defendants argued that the workers were independent contractors employed through a cleaning service company. The cleaning service

<sup>452</sup> *Bureerong v. Uvawas*, 922 F Supp. 1450, 1463 (C.D. Cal. 1996). This case settled in 1997 for \$2 million (€1,476,478). The criminal case led to convictions for conspiracy, involuntary servitude, and harbouring illegal aliens

<sup>453</sup> Section 504(c)(1) of MSPA. Note that multiple infractions of a single provision of the Act "constitute only one violation for purposes of determining the amount of statutory damages."

<sup>454</sup> See 2007 *Statistics Fact Sheet* at [www.dol.gov/esa/whd/statistics/200712.htm](http://www.dol.gov/esa/whd/statistics/200712.htm).

<sup>455</sup> See "Wage Wars", *Business Week* (1 October 2007).

<sup>456</sup> *Janitorial Firm Pays \$1.9 Million in Back Wages for Overtime*, U.S. Department of Labor Wage and Hour Division News Release (25 August 2004).

<sup>457</sup> The FLSA joint employment doctrine was adopted in MSPA. See 29 CFR 500.20(h) (definitions); see also DOL Fact Sheet 35 ("[T]he failure to provide the required protections will result in joint liability for all joint employers.").

company had since gone bankrupt, leaving only the grocery store defendants as potential sources of damages. The court denied motions for summary judgment, finding that there were significant questions about whether the grocery stores had control over the janitors while they worked in the stores. The case eventually settled for \$22.4 million (€16,533,194).<sup>458</sup>

In *Bureerong v. Uvawas*, the civil defendants included eight apparel companies whose clothes the garment workers sewed. The civil suit thus extended liability much farther than the criminal suit, which only reached the immediate operators of El Monte, the garment manufacturing facility.<sup>459</sup> The plaintiffs alleged that the apparel companies acted as their “joint employers” because they “exercised meaningful control over the work plaintiffs performed.”<sup>460</sup> While recognizing that the retailers were “clearly removed from the actual garment manufacturing process that transpired in the El Monte facility” and that there was no “traditional” employment relationship, the court noted that FLSA was intended to be construed liberally and that the determination of joint employer required looking at “the economic realities of the relationship between the parties.”<sup>461</sup> The court found that plaintiffs’ allegations sufficiently alleged an employment relationship within the meaning of FLSA to survive the motion to dismiss. This decision not only hastened a settlement in which the retailers agreed to pay \$2 million (€1,476,178), but was crucial for the plaintiffs because at that point the individual criminal defendants had no significant monetary resources.<sup>462</sup>

Perhaps the largest FLSA judgment in a case that went to trial involved Chinese and Vietnamese sweatshop workers on American Samoa (see text box). The case also illustrates how civil, administrative, and criminal procedures can happen simultaneously.

*Case of Nguyen Thi Nga et al. v. Daewoosa Samoa, Ltd., Kil-Soo Lee et al*

After years of mistreatment, Daewoosa factory workers filed a class action lawsuit in the High Court of American Samoa alleging non-payment of wages and breach of contract.

<sup>458</sup> James S. Petrie, *\$22.4 Million FLSA Settlement for Contract Janitors*, 25 Labor Law 1 (February 2005).

<sup>459</sup> See *United States v. Manasurangkun*, (C.D. Cal. Filed Nov. 9, 1995). Interestingly, some states have been willing to extend criminal liability much farther than federal law. In Arkansas, it is a felony to benefit financially from trafficking. See Arkansas HB 2979. In Florida, it is a felony to receive anything of value from participation in a venture that has subjected a person to forced labour. See Florida SB 250. In Georgia, a corporation may be prosecuted if an agent of the corporation acts within his employment capacity and such action was sanctioned by the corporation or part of a pattern of illegal activity. See Georgia SB 529. The authors are not aware of any criminal prosecutions under these state statutes.

<sup>460</sup> 922 F. Supp. at 1460.

<sup>461</sup> *Id.* at 1468.

<sup>462</sup> In the criminal case, the government seized from the El Monte defendants and distributed to victims more than \$1 million in March 1996. When the balance of personal property was auctioned off, the government distributed an additional \$202,887 in November 1997. See *Personal Assets of EL Monte Slavery Perpetrators Produce More Back Wages for Employees* at [www.dir.ca.gov/DIRNews/1997/ir97-57.html](http://www.dir.ca.gov/DIRNews/1997/ir97-57.html).

As the suit proceeded and factory owner Kil Soo Lee retaliated against workers who were involved in the litigation, the Department of Labor became involved. The Department of Labor fined the company \$213,000 (€157,212) in civil monetary penalties and obtained \$367,000 (€270,878) in back wages for 213 employees. “In cases where former Daewoosa workers had returned to their homes in other countries, the Labor Department arranged payment through the American embassy in those countries.”<sup>463</sup> Yet even as DOL-ordered paychecks were being issued to workers still at Daewoosa, Kil Soo Lee pressured and threatened them into signing over the paychecks to him.<sup>464</sup> Workers who refused to sign over their checks were turned in to the authorities for deportation.

As the civil litigation progressed, federal prosecutors also began investigating Lee. In 2001 he was arrested and indicted on a variety of charges, including involuntary servitude and forced labour. Meanwhile, the civil case proceeded to trial. In April 2002, the High Court of American Samoa held Daewoosa, Kil Soo Lee, and two labour agencies run by the government of Vietnam, jointly and severally liable for \$3.5 million (€2,583,311) owed to the workers in back wages and liquidated damages under the FLSA.<sup>465</sup> That amounts to about \$13,000 (€9,595) for each of the 270 workers. At the criminal trial, Lee was convicted in February 2003. In June 2005, he was sentenced to forty years in prison and ordered to pay \$1.8 million (€1,328,364) in restitution to the victims, which the court identified as the plaintiffs in the civil case. Because Lee now claims he is bankrupt, the workers and their lawyers are trying to pressure Vietnam to pay the \$3.5 million restitution order.<sup>466</sup>

The protection of these two worker rights statutes should extend to all workers, regardless of citizenship or immigration status, but a recent Supreme Court case has led defendants to raise arguments that immigration status does matter. These arguments are generally unsuccessful. In the 2002 case *Hoffman Plastics*, the Supreme Court held that the National Labor Relations Board could not order an award of back pay to a worker without work authorization for a period of time *after* he was wrongfully fired for trying to organize a union.<sup>467</sup> Concluding that such an award by the administrative tribunal conflicted with federal immigration policy, the Supreme Court held that back pay could not be awarded “for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud.”<sup>468</sup> Since *Hoffman Plastics*, lower courts have

<sup>463</sup> Department of Labor Wage and Hour Division News Release (22 June 2000).

<sup>464</sup> Brief for the United States as Appellee at 11–12.

<sup>465</sup> *Nguyen Thi Nga et al. v. Daewoosa Samoa, Ltd., Kil-Soo Lee, Tourism Company 12, and IMS*, CA No. 68–99 and CA No. 133–99, High Ct. of Am. Samoa (2002).

<sup>466</sup> Brad Wong, *Largest U.S. Human Trafficking Case Leads to 40-year Sentence*, Seattle Post-Intelligencer Reporter (June 29, 2005); Testimony of Dr. Nguyen Dinh Thang before the House Subcommittee on Africa, Global Human Rights and International Operations (June 20, 2005). Available at [foreignaffairs.house.gov/archives/109/21973.pdf](http://foreignaffairs.house.gov/archives/109/21973.pdf).

<sup>467</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

<sup>468</sup> 522 U.S. at 149.



limited that decision to its factual context—an award of back pay by an administrative agency for work never actually performed.<sup>469</sup> In the wake of *Hoffman Plastics*, the Department of Labor released a fact sheet explaining that it would “continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented.”<sup>470</sup> The Department emphasized that under the FLSA or MSPA, the Department or an individual plaintiff seeks back pay for hours actually worked, under laws that require payment for such work. The fact sheet was made available in Chinese, Korean, Thai, Vietnamese, and Spanish.

***Civil Rights Statutes: Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991***

Two main civil rights statutes give all workers, regardless of citizenship status, protection against discrimination. First, Title VII of the Civil Rights Act of 1964<sup>471</sup> prohibits employers from discriminating against employees on the basis of race, colour, religion, national origin, sex or pregnancy. Under Title VII, compensatory and punitive damages are available but are subject to statutory caps based on the size of the employer. Second, the Civil Rights Act of 1991<sup>472</sup> prohibits discrimination on the basis of race and, in some cases, national origin in employment contracts. Section 1981 of Title 42 of the United States Code permits recovery of unlimited compensatory and punitive damages and also has a longer statute of limitations than Title VII. The two types of civil rights lawsuits are referred to in legal shorthand as Title VII and § 1981 lawsuits respectively.

<sup>469</sup> See *Flores v. Lawton Limehouse, Sr.*, (D.S.C. 2006) (holding that immigration status was irrelevant to claims for unpaid wages under the FLSA or claims based on RICO); *Flores v. Albertsons, Inc.*, (C.D. Cal. Apr. 9, 2002) (rejecting defendants’ request for discovery of plaintiffs’ immigration status as irrelevant to FLSA claims) (suit, involving 2,100 illegal alien contract janitors, eventually settled for \$22.4 million); *Liu v. Donna Karan Int’l*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (same); *Trejo et al v. Broadway Plaza Hotel*, (S.D.N.Y. 2004) (where plaintiffs’ alleged violations of FLSA, 18 USC § 1589, and state labour law, court rejected discovery into immigration status). See generally Christopher Ho & Jennifer Chang, *Drawing the Line After Hoffman Plastic Compounds v. NLRB: Strategies for Protecting the Undocumented Worker in the Title VII Context and Beyond*, 22 Hofstra Labor & Empl. L. J. 473 (2005).

<sup>470</sup> U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Fact Sheet #48 (Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division).

<sup>471</sup> 42 U.S.C. § 2000e-2. “Unlawful employment practices” are defined in part as discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, colour, religion, sex, or national origin.” § 2000e-2(a)(1).

<sup>472</sup> 42 U.S.C. § 1981. The Civil Rights Act of 1991 modified the Civil Rights Act of 1866, which was the first comprehensive civil rights legislation and was passed by Congress to enforce the 13th Amendment of the United States Constitution. The 13th Amendment outlawed slavery. In its current form, § 1981 states in relevant part: “All persons within the jurisdiction of the United States shall have the same right .... to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” “Make and enforce contracts” is defined as including “all benefits, privileges, terms, and conditions of the contractual relationship.” § 1981(b).



In order to file a Title VII lawsuit alleging employment discrimination, a plaintiff must first file a claim with the Equal Employment Opportunities Commission (EEOC). Of significance for trafficking victims, the EEOC website states that its statutes apply to all workers regardless of citizenship.<sup>473</sup> The EEOC may issue a “right to sue” letter or may itself file suit in federal court. The EEOC has been involved in two high profile trafficking-type cases recently.<sup>474</sup> One, *Chellen v. Pickle*, is discussed below (see box). In the other, *EEOC v. Trans Bay Steel*, EEOC filed a Title VII case alleging that Thai workers, who had legitimate work permits, were discriminated against and exploited by the company, held against their will, had their passports confiscated and movements restricted, and were forced to work without pay. The case settled for \$1 million (€737,980) in monetary relief and compensation.<sup>475</sup>

### *Chellen v. Pickle*

*Chellen v. Pickle* is the most significant trafficking-related case to date involving civil rights claims.<sup>476</sup> In *Chellen*, more than 50 men left their homes in India to work in Tulsa, Oklahoma, at the John Pickle Company. They had visas authorizing their entry into the US for purposes of training at that company. In 2002, 52 of these workers sued the company and John Pickle individually, alleging violations of the Fair Labor Standards Act; race discrimination under 42 U.S.C. § 1981; deceit; false imprisonment; and intentional infliction of emotional distress. The Equal Employment Opportunity Commission (EEOC) subsequently brought an action on the workers’ behalf for violations of Title VII and §1981. The complaints alleged that the company had restricted the workers’ movement, communications, privacy, worship, and access to health care; had confiscated their passports, visas and airline tickets threatened to report them to law enforcement if they left the premises without permission; and hired an armed guard to prevent unauthorized departures.<sup>477</sup>

<sup>473</sup> “While federal law prohibits employers from employing individuals lacking work authorization, employers who nonetheless employ undocumented workers are prohibited from discriminating against those workers.” *Section 13: National Origin Discrimination*, in *EEOC Compliance Manual* at [www.eeoc.gov/policy/docs/national-origin.html](http://www.eeoc.gov/policy/docs/national-origin.html). However, the EEOC generally will not seek post-termination back wages for undocumented workers, although it continues to seek other damages regardless of immigration status. It is an open question whether the Supreme Court decision in *Hoffman Plastics* would prohibit an award of post-termination back wages in a discrimination case.

<sup>474</sup> Although criminal trafficking charges were not brought in either case and the civil complaints did not allege a trafficking violation, descriptions of the conditions facing each group of workers sound like typical trafficking fact patterns. There was, however, no legal finding of a trafficking violation.

<sup>475</sup> *EEOC Resolves Slavery and Human Trafficking Suit Against Trans Bay Steel for an Estimated \$1 Million*, EEOC Press Release (8 December 2006).

<sup>476</sup> EEOC itself described it as a trafficking case, although no trafficking criminal charges were ever brought. See “Judge Orders John Pickle Co. to Pay \$1.24 Million to 52 Foreign Workers in ‘Human Trafficking’ Case”, EEOC Press Release (26 May 2006).

<sup>477</sup> This description is taken from *Chellen v. John Pickle Co. and John Pickle Jr.*, 446 F. Supp. 2d 1247 (N.D. Oklahoma 2006).

After a bifurcated non-jury trial,<sup>478</sup> the court found for the plaintiffs on all their claims and awarded the following as damages:

- (1) back pay and liquidated damages equal to the full amount of lost wages for wilful violations of FLSA;
- (2) compensatory damages under §1981 for emotional and mental distress (\$1,000 per plaintiff);
- (3) punitive damages because of the egregious nature of the conduct (\$1,000 per plaintiff);
- (4) prejudgment interest;
- (5) damages for the tort of deceit (wages for the ten-month period when they had been told they would be working but were wrongfully denied the opportunity to work by the defendant's conduct); and
- (6) damages for the tort of false imprisonment (\$1,000 per plaintiff).

The total damages award was more than \$1.2 million (€897,464) for the 52 plaintiffs.

*Chellen* should serve as a signal that trafficking victims may rely on traditional anti-discrimination laws, as well as trafficking and worker protection statutes. As the EEOC lead attorney stated:

We expect that a decision like this, which wraps the civil rights laws of Title VII and §1981 around the country's growing problem of human trafficking, will serve as valuable precedent and give the government one more weapon in the fight against exploitation and forced labor.<sup>479</sup>

#### ***Racketeer Influenced and Corrupt Organizations Act (RICO)***

The Racketeer Influenced and Corrupt Organizations Act (RICO) makes it unlawful for any person employed by an enterprise affecting interstate commerce to conduct the enterprise's affairs "through a pattern of racketeering activity or collection of unlawful debts."<sup>480</sup> "Racketeering activity" is defined as behaviour that violates certain statutorily specified other laws. Mail and wire fraud, fraud in connection with identification documents, misuse of visas, and importation of an alien for immoral use are all specified racketeering activities and

<sup>478</sup> The non-jury trial in the first phase determined that the plaintiffs were employees and not trainees under the FLSA. See *Chellen v. John Pickle Co.*, 344 F. Supp. 2d 1278 (N.D. Okla. 2004) (*Chellen I*). The Court then combined the liability and damages phases for all claims and held a second non-jury trial in March 2005.

<sup>479</sup> "Judge Orders John Pickle Co. to Pay \$1.24 Million to 52 Foreign Workers in 'Human Trafficking' Case", EEOC Press Release (May 26, 2006).

<sup>480</sup> 18 U.S.C. § 1962(c).

the TVPRA added the new trafficking offences of the TVPA.<sup>481</sup> A “pattern” requires at least two acts of racketeering activity.

A civil RICO charge is a powerful weapon against traffickers because it carries the threat of treble damages, meaning that actual damages are multiplied by three. Damages are only available for quantifiable injuries to business or property, not other types of injury, and only for injuries that are proximately caused by the racketeering activity and not other wrongful conduct.<sup>482</sup> However, a worker not being paid by an employer should constitute an injury to business, and the fact that a complaint might also include personal injury does not “extinguish standing based on ... economic loss alleged.”<sup>483</sup>

RICO claims have sometimes survived where substantive allegations of trafficking or slavery have not. In *Does I v. The Gap*, plaintiffs were garment factory workers who alleged that factories in Saipan and retailers who purchased their garments had violated FLSA, civil RICO and other labour laws.<sup>484</sup> Although the district court found that the plaintiffs had not adequately alleged involuntary servitude or common law peonage as predicate acts for their civil RICO charge, nor had they stated a claim for violation of the Alien Tort Claims Act, the case went forward on the other RICO acts. The plaintiffs eventually reached a settlement with the garment manufacturers and retailers for a \$20 million (€14,756,339) fund to pay back wages to 30,000 workers and develop an independent monitoring system to end sweatshop abuse.<sup>485</sup> Despite this apparently promising result, a journalist reported in the spring of 2006 that “only \$5.8 million is earmarked for direct pay to workers, and very little of that has yet been paid out.”<sup>486</sup>

#### *Non-Statutory Claims: Tort and Contract Law*

Attorneys representing trafficking victims have usually included one or more common law tort claims in their civil suits. Tort law permits recovery for both compensatory and punitive damages. Tort law varies by state, but the following causes of action have been argued in trafficking type cases: false imprisonment, invasion of privacy, intentional and or negligent infliction of emotional distress, assault, battery, fraud, negligent supervision, and deceit

<sup>481</sup> Prior to enactment of the TVPRA, the definition of racketeering activity did not include §§ 1589, 1590, or 1591.

<sup>482</sup> 18 U.S.C. § 1964(c); see also *City of Huntsville v. Proliance Energy* (N.D. Alabama 2005) (“The provision cannot be construed as authorizing, much less requiring, the trebling of damages sustained due to other causes.”); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (finding no compensable injury where harm was not proximately caused by racketeering activity).

<sup>483</sup> See *Doe I v. Reddy*, 2003 WL 23893010 (N.D. Cal.) (finding requisite injury to business or property where plaintiffs alleged that they were forced to work long hours without pay).

<sup>484</sup> 2002 WL 1000068 (D. N. Mar. I.).

<sup>485</sup> For a full description, see <http://www.globalexchange.org/campaigns/sweatshops/saipan> (“*The Saipan Victory*”).

<sup>486</sup> Rebecca Clarren, “Paradise Lost: Greed, Sex Slavery, Forced Abortions and Right-Wing Moralists”, *Ms. Magazine* (spring 2006).

or fraudulent misrepresentation. Because tort law is not statutory, it may be less rigid and courts may be better able to accommodate the particular harms of trafficking in a common law tort action.<sup>487</sup> Moreover, some defendants' homeowner insurance policies may provide coverage for claims of false imprisonment and invasion of privacy. Although insurance policies usually do not cover wilful acts, the torts of false imprisonment and invasion of privacy can be accomplished by negligent or non-intentional conduct.<sup>488</sup> In a domestic worker case, where the individual was victimized in the employer's home, the existence of an insurance policy substantially increases the chances of the judgement being paid to the victim.

Trafficking victims may also have contractual (breach of contract) or quasi-contractual claims (unjust enrichment), but in many states an award of contract damages will preclude an award of tort damages.<sup>489</sup>

### *Alien Tort Claims Act*

Another potential cause of action is the Alien Tort Claims Act (ATCA), a 1789 statute that provides that US federal courts have original jurisdiction of any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States.<sup>490</sup> The ATCA has become a vehicle for human rights litigation in the United States, usually involving violations committed extraterritorially, and courts have awarded both compensatory and punitive damages. It has also recently been used in trafficking suits. One successful case was *Jane Doe v. Lakireddy Bali Reddy*, 2003 WL 23893010 (N.D. Cal.). Eleven plaintiffs, all young Indian women and girls, filed suit against Lakireddy Bali Reddy and members of his family alleging peonage, involuntary servitude, slave labour, Alien Tort Claims Act, civil RICO, the 13<sup>th</sup> Amendment, and various common law tort claims such as assault and battery, false imprisonment, fraud and deceit, emotional distress, and negligence. The district court found that the ATCA claim could proceed because "modern forms of slavery violate *jus cogens* norms of international law, no less than historical chattel slavery." The case eventually settled for \$8.9 million.<sup>491</sup>

<sup>487</sup> See Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 Harv. L. Rev. at 2589 ("Whereas courts may hesitate to interfere with the parameters of rights established by legislative bodies, they have traditionally guided the development of torts through the common law and are therefore more likely to be responsive to tort claims against traffickers.").

<sup>488</sup> Standard liability insurance doesn't cover wilful acts and excludes coverage "in situations in which the insured knew or should have known to a very high probability that harm would result." Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 Wisc. L. Rev. 101. For a more thorough discussion of homeowners insurance policies, see Della Bahan and Puja Batra, *Seeking Justice for Trafficked Domestic Workers in American Courts* at 8, Paper Presented at IWPR's Eight Annual International Women's Policy Research Conference (June 2005).

<sup>489</sup> *Civil Litigation Manual* at 50–52.

<sup>490</sup> 28 U.S.C. § 1350.

<sup>491</sup> See Matthew Artz, *Reddy Victims Sue Their Own Lawyers*, Berkeley Daily Planet (28 June 2005). In the related criminal case, Reddy pled guilty to conspiracy and transporting minors for illegal sexual activity and paid \$2 million in restitution to four victims in 2001. *California Man Admits He Brought Indian Girls to U.S. for Sexual Exploitation, Pleads Guilty to Federal Charges*, Department of Justice Press Release

*Comments on civil suits*

There are a wide variety of claims available to trafficking victims. A review of recently filed civil trafficking cases reveals that most complaints allege a variety of causes of action. Recovery under some statutes, such as FLSA's liquidated damages provision or RICO's treble damages provision, may be potentially greater than recovery under the as yet undefined damages provision of TVPRA. FLSA, civil RICO, tort and contract law claims appear to be the most prevalent, but a number of complaints also allege violation of the Alien Tort Claims Act. The cases involve a variety of types of workers—domestic servants, migrant agricultural workers, and workers with legitimate work visas, although all involve non-US citizens. No cases were discovered involving prostitutes, perhaps because of the stigma associated with bringing such a claim. Because these cases are all very recently filed, none has yet reached a conclusion and we have no information about damage awards.

In a significant number of cases the plaintiffs are represented by an organization that is funded by the Legal Services Corporation. For example, legal aid organizations in Colorado and North Carolina recently filed suits on behalf of ranch workers and agricultural workers, respectively. The Legal Services Corporation is itself funded by the federal government and the federal trafficking laws specifically state that a legal aid organization may represent an individual who has been certified by the government as a victim of a severe form of trafficking, regardless of immigration status.<sup>492</sup> The other cases have been brought by law school clinics, small law firms, and NGOs.

One civil practitioner who has litigated on behalf of trafficking victims makes the point that cases involving large numbers of victims or defendants would be difficult for a small NGO to manage.<sup>493</sup> The resources required for document production alone could be overwhelming. In some instances, NGOs have partnered with lawyers at large private law firms. The New York law firm of Kaye Scholer, for example, joined forces with two small NGOs, Farmworker Legal Services and the Workers' Rights Law Center, to represent Mexican migrant workers in a case alleging, among other things, violations of the FLSA, the MSPA, the 13<sup>th</sup> Amendment, the Alien Tort Claims Act, and civil RICO.<sup>494</sup> In *Chellen v. Pickle*, the solo practitioner representing the plaintiffs was aided immensely when EEOC lawyers joined the lawsuit.

While the US appears to have a large number of anti-trafficking NGOs available to provide legal representation, as well as traditional civil rights, immigrants' rights, and domestic violence NGOs that have joined the anti-trafficking movement, the availability of legal help is very dependent on whether an exploited worker received certification by the federal gov-

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(7 March 2001). (His case predated enactment of the TVPA, which criminalizes sex trafficking.) Reddy reportedly paid the \$2 million "within several days of being sentenced." "Civil Lawsuit Settled in Reddy Sex-Slave Case", *Berkeley Daily Planet* (9 April 2004).

<sup>492</sup> Legal aid organizations can also represent individuals in the pre-certification stage, but must cease representation if the individual is undocumented and certification is denied. See LSC Program Letter 05-2.

<sup>493</sup> Conversation with Legal Director Dan Werner, Workers' Rights Law Center, March 2007.

<sup>494</sup> *Javier H. v. Garcia-Botello et al.*, Case No. 02-CV-523S (W.D.N.Y.).

ernment as a victim of a severe form of trafficking. Although NGOs, unlike Legal Services Corporation-funded aid organizations, are not barred from representing plaintiffs who have been denied certification as a victim, a plaintiff's uncertain immigration status and lack of work authorization might make it logistically difficult to pursue a lawsuit. Most NGOs representing immigrant victims of labour exploitation, however, are prepared to handle these challenges.

Another reality of civil litigation in the US is that the costs of defending a lawsuit are quite high. If a defendant has been both prosecuted criminally and sued civilly, he or she might well be destitute at the conclusion of the legal proceedings. For example, in *Ruiz v. Jackson*, the case brought by a domestic worker against her former employers, the defendants filed for bankruptcy at the start of legal proceedings.<sup>495</sup>

Finally, one of the most significant obstacles is simply the passage of time. Complex lawsuits often take years to reach a conclusion. Courts have over-crowded dockets and defence attorneys are often skilled at delaying tactics. As time passes and memories fade, it becomes more difficult for plaintiffs to meet their burden of proof. Such delays are especially frustrating and demoralizing for the plaintiffs themselves.

#### 5.8.3.3. Concluding comments on compensation in criminal and civil cases

Since its enactment in December 2003, very few cases have been filed under the TVPRA. Most legal representation on behalf of trafficking victims has focused on immigration benefits. Many of the social service organizations that traditionally help victims do not consider litigation as an avenue for recovery.

Civil lawyers would benefit from conferences or workshops on civil litigation on behalf of trafficking victims, in order to share theories of liability, disseminate copies of complaints, and discuss litigation strategies. A central clearinghouse for complaints and motions could be established on the internet. Since the government funds many services for trafficking victims and has promoted the work of Legal Services Corporation grantees on behalf of trafficking victims, and since an HHS grant already was involved in funding the *Civil Litigation Manual*, it would make sense for government support to extend to this important area. Many of the theories that are associated with civil litigation on behalf of trafficking victims could then be tested in court. Giving a higher profile to civil litigation might also serve to entice private law firms to play a *pro bono* role, which is especially crucial in cases with large numbers of victims.

#### 5.8.4. Enforcement of restitution and civil judgments

There is a well-documented problem with collecting on court-ordered restitution for crime victims generally. In a 2005 study of five financial fraud cases, the Government Accounta-

<sup>495</sup> "Woman Forced Into Slavery Wins Jury Verdict Against California Couple", *Law Reporter* (November 2004).



bility Office (GAO) found that only about 7 per cent of court-ordered restitution had been collected.<sup>496</sup> The GAO further found that the Justice Department’s Financial Litigation Units responsible for restitution collection were hampered by the long time intervals between the criminal offence and the judgment and the fact that there were few “apparent negative consequences to these offenders for not paying their restitution debts.”<sup>497</sup> The GAO had earlier concluded that some factors contributing to the increase in outstanding criminal debt—consisting of both criminal fines and restitution—was due to inadequate debt-collection processes.<sup>498</sup> The significant increase in outstanding criminal debt began in 1996, which is the year that restitution became mandatory under the MVRA.<sup>499</sup> Legislation is currently pending in both the House and Senate to improve the collection of court-ordered criminal debt and restitution.<sup>500</sup>

There are no studies for the collection of restitution amounts owed to trafficking victims, but anecdotal evidence suggests that trafficking victims may well encounter similar problems in actually receiving court-ordered restitution or civil damages. When the *Cadena* victims were awarded \$1 million in restitution, one defence lawyer remarked, “It’s a fictitious award. They [the Cadena family] don’t have anything anyway.”<sup>501</sup> The victims in the *Kil Soo Lee* case have yet to collect on either their civil damages or restitution order.

Now that mandatory restitution is a feature of trafficking prosecutions, it would be extremely beneficial to have a systematic way of tracking whether victims actually obtain restitution.<sup>502</sup> The Financial Litigation Units responsible for collecting restitution should share information about recovery rates in trafficking cases. This information will be useful because the actual collection rate should inform a prosecutor’s decision about whether a plea agreement that involves the up-front payment of restitution to the victims is actually a better course of action. Sizeable restitution orders have been part of criminal pleas.<sup>503</sup>

<sup>496</sup> *Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Crime Victims in Selected Financial Fraud Cases*, GAO-05-80.

<sup>497</sup> *Ibid.*

<sup>498</sup> *Actions Still Needed to Address Deficiencies in Justice’s Collection Processes*, GAO-04-338 (March 2004).

<sup>499</sup> *Ibid.* Non-federal restitution is restitution that is owed to private individuals, not the government.

<sup>500</sup> H.R. 845, Criminal Restitution Improvement Act of 2007, introduced 6 February 2007, would, among other things, require courts to enter orders requiring immediate payment of full restitution, require courts to enter protective orders to preserve assets available for restitution, and prohibit termination of probation for convicts with unsatisfied orders of restitution. S. 973, introduced 22 March 2007, contains similar provisions.

<sup>501</sup> Stephanie Smith, *Women Smuggled into US, Forced into Prostitution, Try to Recoup \$1 M*, Palm Beach Daily Business Review (8 April 1999).

<sup>502</sup> Since victims may also recoup damages through a civil cause of action, it would also be useful to collect information on the success of obtaining money awarded as damages. If the success rate is low, it might persuade plaintiffs to enter into settlements. But because this process is outside the responsibility of the U.S. government, it will depend on individual practitioners to gather and share information.

<sup>503</sup> See *Doe v. Reddy* and *United States v. Boehm*; see also *United States v. Ibrahim* (defendant pled guilty to forced labor, involuntary servitude, harbouring, and conspiracy, agreed as part of plea to pay \$78,000 in

Knowledge about restitution collection rates should also encourage prosecutors to seek pre-indictment seizure of assets and to ensure that forfeited assets are available to victims through the processes of remission and restoration.<sup>504</sup> This will avoid the problem, noted in the GAO study, of offenders transferring assets to family members or others or moving them to foreign accounts.

#### 5.8.5. Asset seizure

The TVPA provides for the criminal and civil forfeiture of any real or personal property that facilitates a trafficking violation or that constitutes the proceeds of a trafficking violation.<sup>505</sup> Forfeiture is exclusively a tool of the government and forfeited assets become the property of the government, but there are procedures to award such assets to victims.

In forfeiture proceedings, the court must determine whether the government has established the requisite nexus between the property and the offence. Forfeiture allegations are evaluated by the court under a “preponderance of the evidence” standard. Because forfeiture is part of the penalty for the crime, it is impermissible without a conviction on the underlying substantive offence.

In most cases, property subject to seizure will remain in the possession of the defendant until the court enters a preliminary order of forfeiture.<sup>506</sup> However, the government may seek a pre-trial restraining order, either upon the filing of an indictment charging a violation for which forfeiture may be sought, or prior to the filing of such an indictment if the court determines that there is a “substantial probability” that the government will prevail and that failure to enter a forfeiture order would result in the property “being destroyed” or “removed from the jurisdiction of the court” or otherwise rendered unavailable for forfeiture.<sup>507</sup> In certain circumstances, a temporary restraining order may be entered without notice to the parties or opportunity for a hearing.<sup>508</sup>

Once property is forfeited, there are three procedures by which it can be transferred to crime victims: (1) a petition for remission submitted by an individual victim to the Department of Justice’s Asset Forfeiture and Money Laundering Section; (2) a petition for restoration submitted by the federal prosecutor on behalf of the victim; and (3) termination of forfeiture

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restitution to victim before sentencing); *United States v. Aronov* (E.D. Mich. 2005) (agreed as part of plea to restitution of at least \$537,043).

<sup>504</sup> Discussed in Section 5.8.5 (Asset seizure).

<sup>505</sup> 18 U.S.C. 1594(b). In addition, § 1594(c) contains civil forfeiture provisions.

<sup>506</sup> Federal Rule of Criminal Procedure 32.3 governs criminal forfeiture. Rule 32.2(b) provides that a court must enter a preliminary order of forfeiture as soon as practicable after a verdict or plea of guilty and that the entry of the preliminary order authorizes the Attorney General to seize the specific property. After seizure, an ancillary proceeding may be held to third party interests in the property.

<sup>507</sup> 21 U.S.C. § 853(e)(1)(B)(i).

<sup>508</sup> 21 U.S.C. § 853(e)(2).

proceedings before the court enters a final order of forfeiture, with an order instead entered in favour of the victim.<sup>509</sup>

In criminal prosecutions of trafficking defendants, asset forfeiture has been included as part of plea agreements. For example, in *United States v. Zavala and Ibanez*, the couple pled guilty to conspiring to commit forced labour as well as immigration violations. As part of their plea, they agreed to forfeit their residence, valued at \$220,000 (€162,499), as well as \$30,000 (€22,159) in cash. The lead defendant was also sentenced to fifteen years in prison.<sup>510</sup> In *United States v. Maksimenko*, one defendant charged with conspiracy to commit slavery pled guilty and agreed to forfeit more than \$500,000 (€369,317) in proceeds.<sup>511</sup>

Although it is government policy that forfeited assets be applied toward satisfaction of a restitution order in trafficking cases, the actual procedures of restoration and remission have been little used.<sup>512</sup> The reason for this is unknown. It may be that there have been sufficient assets to satisfy a restitution order without conveying forfeited assets, that prosecutors neglected to seize assets, or that defendants had no assets for either seizure or restitution. In perhaps the first example of its kind, the prosecutors in *Maksimenko* obtained a civil forfeiture order for \$570,000 and will submit a petition for restoration so that the forfeited funds and property can be distributed to the victims.<sup>513</sup> On 25 June 2007, the lead defendant, Aleksandr Maksimenko, was sentenced to 14 years in prison and \$1.5 million in restitution for his role as the ringleader in the conspiracy.<sup>514</sup> In its sentence, the court ordered that more than \$500,000 in cash seized from Maksimenko's home and bank accounts as well as about \$30,000 worth of jewellery be used to satisfy a portion of the restitution order.

In addition to asset forfeiture, there are also procedures for private litigants to use to prevent the dissipation of assets pending the conclusion of a civil case. These procedures are governed by the laws of the individual 50 states. Most states have statutes that authorize prejudgment attachment when a plaintiff sues a defendant for money damages. However, states limit prejudgment attachment to certain kinds of cases, such as contract claims only, and others have restrictions based on the residency status of the defendant.<sup>515</sup> Assets located outside the state cannot be the subject of prejudgment attachment. As a result, there has been

<sup>509</sup> "The term victim means a person who has incurred a pecuniary loss as a direct result of the commission of the offense underlying a forfeiture." 28 C.F.R. § 9.2(v).

<sup>510</sup> "Suffolk County Woman Sentenced for Her Role in Forced Labor and Alien Smuggling Scheme", United States Attorney's Office Press Release dated Nov. 9, 2005.

<sup>511</sup> *Attorney General's Annual Report on U.S. Government Activities to Combat Trafficking in Persons* at 19 (FY 2005).

<sup>512</sup> Email from Asset Forfeiture Money Laundering Section, U.S. Department of Justice, 24 April 2007.

<sup>513</sup> Email from AUSA Peter Ziedas dated 27 April 2006.

<sup>514</sup> "Livonia Man Sentenced to 14 Years in Prison and \$1.5 Million in Restitution for Forcing Eastern European Women to Work at Detroit Area Strip Clubs", United States Attorney's Office Press Release, 25 June 2007.

<sup>515</sup> See Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 Wash. L. Rev. 257 (1992) (describing subject matter restrictions on attachment and limited geographic reach); Lars E. Johansson, *The Mareva Injunction: A Remedy in the Pursuit of the Errant Defendant*,

very little use of prejudgment attachment procedures in civil litigation on behalf of trafficking victims or workers' rights litigation generally.

### 5.8.6. Assistance

#### 5.8.6.1. Rights of all victims of crime

A crime victim has a number of statutory guarantees of his or her right to be heard, to be kept informed, and to have his or her safety and security provided for. The Crime Victims' Rights Act provides crime victims with certain specified rights and the means of enforcing them. The Act provides that a crime victim has:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.<sup>516</sup>

Victims must be informed by designated responsible officials—specifically law-enforcement officers during the investigation stage and prosecutors once charges have been filed – about these rights as well as places where they may receive emergency medical or social services, the availability or restitution or other relief, including crime victim compensation programmes, to which the victim may be entitled, and public and private programmes that are available to provide counselling, treatment and other support. Victims must also be notified of legal protections and remedies (including protective orders) that are available to prevent intimidation and harassment.<sup>517</sup>

Every employee of the Justice Department is required to undergo mandatory training on victims' rights. There are disciplinary sanctions, including suspension or termination of employment, for wilful or wanton failure to comply with provisions of federal law pertaining

31 U.C. Davis L. Rev. 1091 (1998) (describing reluctance of American courts to provide prejudgment relief and "gap" in American prejudgment attachment laws).

<sup>516</sup> 18 U.S.C. § 3771(a) ("Rights of Crime Victims").

<sup>517</sup> 42 U.S.C. § 10607(b) and (c) (Identification of Victims and Descriptions of Services).

to the treatment of crime victims.<sup>518</sup> The Attorney General issued guidelines on the Justice for All Act in May 2005.<sup>519</sup>

#### 5.8.6.2. Child victims

There are numerous special provisions relating to child victims and issues such as protection of privacy and identity. A court may appoint a guardian *ad litem* to protect the best interests of a child who was the victim of or a witness to a crime involving abuse or exploitation.<sup>520</sup> A guardian *ad litem* is a legal guardian appointed for an incapacitated party, such as a child. The Attorney General Guidelines also state that prosecutors should consider whether it would be appropriate to request the appointment of a guardian *ad litem* in any case in which a child is a victim or witness to a crime.

In some trafficking cases with child victims, prosecutors' offices have arranged long-term shelter, counselling, schooling, and job training.

#### 5.8.6.3. Rights of victims of trafficking

In addition to the general rights accorded all crime victims, discussed above, individuals who have been certified as victims of a severe form of trafficking by the federal government have certain rights. A "severe form of trafficking in persons" is statutorily defined as

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>521</sup>

Thus the certification process is a significant hurdle for exploited workers, particularly in terms of legal status, work authorization, and access to legal services, although crime victims who are not certified are still eligible for the standard victim benefits. Certified trafficking victims are eligible for special services regardless of whether an indictment is eventually filed or whether any indictment that is filed includes trafficking charges. Some services, however, may not be available to US citizen victims because they only pertain to immigration status. The services and rights fall into the following areas:

- (1) Detention—To the extent practicable and allowed by law, victims of severe forms of trafficking should not be formally detained.<sup>522</sup>

<sup>518</sup> See 18 U.S.C. § 3771(f)(1) and (2)(C).

<sup>519</sup> See *Attorney General Guidelines for Victim and Witness Assistance* at <http://www.usdoj.gov/olp/final>.

<sup>520</sup> 18 U.S.C. § 3509(h)(1).

<sup>521</sup> 22 U.S.C. § 7102(8).

<sup>522</sup> See 28 C.F.R. § 1100.31. See generally AG Guidelines at 68–72.

- (2) Information—Trafficking victims shall be provided with information about legal services, immigration benefits, social-service organizations, victim compensation and assistance programmes, restitution, and availability of medical services.<sup>523</sup>
- (3) Interpreter Services—Trafficking victims shall have reasonable access to translation/interpreter services if they are not able to communicate in English or are illiterate in their own language.<sup>524</sup>
- (4) Immigration Benefits—If a victim is certified as a victim of a severe form of trafficking and meets the other requirements specified below, he or she is eligible for two forms of immigration relief: (1) continued presence<sup>525</sup> and (2) T non-immigrant status (commonly called the “T visa”).
- “Continued presence” is a term of art for giving a trafficking victim temporary legal status in the United States, even if that person entered illegally. Continued presence is granted to victims of severe forms of trafficking who are potential witnesses in a criminal investigation or prosecution. When an individual receives continued presence, he or she also receives work authorization. Continued presence must be requested by a law-enforcement agent.
  - A T visa is a non-immigrant visa available to a victim of a severe form of trafficking who has complied with reasonable requests for assistance in the investigation or prosecution of trafficking and who would suffer extreme hardship upon removal.<sup>526</sup> After three years of continuous physical presence in the United States in lawful T non-immigrant status, a T visa holder may apply for permanent residence. To establish eligibility for adjustment of status to lawful permanent resident, the applicant must demonstrate that the applicant has been a person of good moral character and either that he or she has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking or that he or she would suffer extreme hardship involving unusual and severe harm upon removal from the United States. An individual victim may apply directly for a T visa and, after three years, for adjustment of status. T nonimmigrants and applicants for adjustment of status are eligible for employment authorization.

There is a cap of 5,000 noncitizens who may be granted T visas each year and a cap of 5,000 T nonimmigrants who may be granted adjustment of status each year. The numerical caps do not apply to eligible spouses, sons, daughters, siblings, or parents of the victims. In the financial year (FY) 2005, there were 160 requests for continued presence and 158 grants of continued presence. Also in FY 2005, 229 individuals applied for T visas and 112 applications were approved.<sup>527</sup>

<sup>523</sup> See 28 C.F.R. § 1100.33.

<sup>524</sup> See 28 C.F.R. § 1100.33.

<sup>525</sup> 22 U.S.C. § 7105(c)(3).

<sup>526</sup> Child victims are not required to comply with the law enforcement cooperation requirement, nor are adult victims who are unable to assist due to psychological or physical trauma.

<sup>527</sup> *Attorney General’s Annual Report to Congress* at 11–12 (FY 2005). The Report notes that the high number of denials for FY 2005 resulted from 170 denials of applicants “from one case in which it was determined that the applicants were not victims of trafficking as defined in the TVPA statute.” The TVPA’s immigra-



- (5) Refugee-type Benefits—A victim of a severe form of trafficking is eligible for benefits that each of the individual states makes available for refugees. Such benefits typically include cash assistance, medical care, food stamps, and housing.<sup>528</sup>
- (6) Legal Services Corporation—LSC is a private, non-profit corporation established by Congress which funds legal aid programmes across the country to help poor people. The TVPA required LSC to make legal assistance available to trafficking victims regardless of immigration status. LSC grantees may assist victims with seeking certification and other immigration benefits and may file civil suits on their behalf. If a victim is ultimately denied certification, however, representation must cease. The TVPRA required LSC to make legal assistance available to family members as well.<sup>529</sup> In 2005, eleven LSC grantees assisted 141 trafficking victims.<sup>530</sup>

The federal government, through the Department of Health and Human Services (HHS), funds non-governmental organizations that provide direct services to trafficking victims as well as organizations that provide training and technical expertise. (A federal grant partially funded the manual *Civil Litigation on Behalf of Victims of Human Trafficking*.) Approximately \$3.2 million was awarded to direct service grantees in 2005.<sup>531</sup> In addition, the Justice Department's Office of Victims of Crime funded 25 different direct service projects for victims in 2005, as well as a project that provided technical assistance to service organizations and one that focused on building shelter capacity for trafficking victims.

All these benefits for trafficking victims depend on certification by the government as a victim of a severe form of trafficking. To obtain certification, a person must not only be a victim of one of the statutorily defined offences but must also be "willing to assist in every reasonable way in the investigation and prosecution" of the offence, and also have either applied for a T visa or be a person whose "continued presence" is necessary for the prosecution.<sup>532</sup> Without certification, the undocumented victim has no legal right to remain in the United States and no authorization to work. (Note: Child victims are not required to co-operate

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tion relief program has been the target of much criticism by anti-trafficking NGOs and commentators, who point out that the twin requirements of being a victim of a "severe form of trafficking" and cooperating with law enforcement fail to adequately protect all victims. See Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 Harv L Rev 2574, 2581 (2006). Kathleen Kim & Kusia Hreshchyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 Hastings Women's L. J. 1, 14–15 (Winter 2004).

<sup>528</sup> One NGO points out that these benefits, which vary by state, are fairly modest. "In California, for example, victims receive refugee assistance for a period of eight months. This aid consists of \$300 per month in refugee cash assistance, \$120 per month in food stamps, as well as access to medical care during this period." *Hidden Slaves: Forced Labor in the United States*, 23 Berkeley J. Int'l L. 47 at n. 83.

<sup>529</sup> "The 2003 Reauthorization expands permissible representation by LSC grantees to include certain family members of victims of trafficking." LSC Program Letter 05-2 (6 October 2005).

<sup>530</sup> *Attorney General's Annual Report to Congress* at 10 (FY 2005).

<sup>531</sup> *Attorney General's Annual Report to Congress* at 7 (FY 2005). This does not include the amount awarded to organizations for street outreach in FY 2005. See *id.* At 37.

<sup>532</sup> 22 U.S.C. § 7102(E)(i).

with law enforcement in order to receive a letter of eligibility from HHS, which allows them to receive the same benefits and services made available through certification.)

The certification process thus presents two immediate and obvious obstacles. First, a person may be an exploited and abused worker, unpaid or underpaid and severely mistreated, and yet the conduct at issue does not rise to the level of a violation of one of the criminal trafficking statutes. Second, a person may be too fearful of either law enforcement or the trafficker to want to co-operate during the investigation and prosecution. Advocates have pointed out that, “from the perspective of trafficked persons, the prosecutorial focus of the law makes benefits contingent upon the prosecutorial process and therefore poses substantial barriers to full recovery.”<sup>533</sup>

For victims of worker exploitation that does not rise to the level of a trafficking offence, there will be no TVPA benefits, no stable residency status, and no legal support from a government-funded legal aid organization. Borderline cases will fall through the cracks in such a system. In the US, however, there are a number of organizations dedicated to workers’ and immigrants’ rights, and such organizations have historically represented undocumented immigrant workers, sometimes achieving significant victories in court. The absence of benefits under the TVPA regime does not necessarily mean that a worker cannot win compensatory damages in a civil suit, but the challenges are clearly much greater.

#### 5.8.7. Conclusions on the United States of America

The United States has a well-developed legal system providing for both criminal and civil damages. In addition, state compensation boards reimburse all crime victims for the actual out-of-pocket costs associated with the offence. A trafficking victim thus has at least the opportunity to recover lost wages, through either criminal restitution or civil damages, and compensation for emotional pain and suffering, as well as punitive damages to deter egregious conduct. Although the private right of action created by the TVPRA is untested, civil attorneys have already brought suit against traffickers using a variety of legal theories and have won substantial judgements.

Now that there is a civil cause of action for trafficking violations, civil case law should substantially develop the contours of the rights protected by these criminal statutes. In an analogous context, civil cases under the civil rights statute Deprivation of Rights<sup>534</sup> contributed to the development of law under the companion criminal statute Deprivation of Rights Under Color of Law<sup>535</sup> and courts readily draw examples from civil cases to inform their understanding of criminal cases. Because civil practitioners may be more willing to push the boundaries—both in terms of what constitutes forced labour or sex trafficking and in terms of who is liable to the victim-plaintiff—civil cases may eventually expand areas of

<sup>533</sup> Kathleen Kim and Kusia Hreshchyshyn, *Human Trafficking Private Right of Action*, 16 *Hastings Women’s L. J.* at 14.

<sup>534</sup> 42 U.S.C. § 1983. These lawsuits are commonly referred to as § 1983 suits.

<sup>535</sup> 18 U.S.C. § 242.

criminal responsibility. In other words, a court in a criminal trafficking case may consider the fact that a similar situation was the basis for a finding of liability under the civil trafficking law. By analogy, the court may reason that what constitutes “trafficking” under civil law also constitutes “trafficking” under criminal law. Because civil practitioners are often less risk-adverse than government prosecutors, their lawsuits will help define the legal concepts of trafficking.

#### 5.8.8. Good practice in the United States of America

- Restitution is mandatory for all victims of violent crimes and all victims of trafficking offences, regardless of whether the trafficking offence meets the definition of a crime of violence;
- State compensation boards help crime victims with material losses, without restrictions based on citizenship or legal status and without any need for a defendant to be identified or in custody. They also provide emergency funding;
- On the administrative level, the Department of Labor monitors employers’ compliance with workers’ rights statutes and can assess monetary penalties and obtain back pay for workers. The Equal Employment Opportunity Commission performs a similar function with respect to the civil rights statutes;
- There is an explicit civil cause of action under the TVPRA. Although the damages provision is vague, it will presumably be informed by cases decided under FLSA and civil rights laws that award compensatory damages for back pay and pain and suffering as well as punitive damages, attorney’s fees and court costs. As case law develops under the TVPRA, it will assist courts in evaluating criminal trafficking prosecutions as well;
- The federal government funds the Legal Services Corporation, which in turn funds a number of legal aid organizations that have helped trafficking victims;
- A strong victims’ rights movement and culture of respect for all crime victims benefits trafficking victims. Although victims are not parties to criminal prosecutions, they have statutory protections and rights;
- Duties of responsible officials, including law-enforcement agents, prosecutors and courts, towards victims may be enforced in court by victims, thus guaranteeing that their rights are not disregarded;
- Civil society is very active and NGOs have proliferated that provide services, including legal representation, to trafficking victims. This means an increasing number of civil claims are being filed against traffickers; and
- The TVPA creates a visa regime that permits certified trafficking victims to have a stable residency status, work authorization, and the opportunity to apply for permanent residency.

## 6. Conclusions and recommendations

The right to compensation mainly consists of the right to be paid compensation by the wrongdoer, which presumes that the state must ensure legal and procedural mechanisms are in place to pursue and enforce these claims. There is also an emerging norm that compensation should be paid by the state for victims of violent crime causing physical or psychological injury. For some states (i.e. parties to ECVVC) this is a binding obligation. States are also bound by the core labour standards of the ILO and are obliged to provide an effective remedy for abuses of labour rights. Trafficked persons are also entitled to other ancillary rights relating to protection and assistance which enables them to access remedies especially compensation.

While all countries in the study have, at least, a criminal, civil or labour law procedure in place that enables compensation claims to be pursued against traffickers/exploiters, fewer have established state compensation schemes. The existing compensation mechanisms, whether they envisage payment by the state or wrongdoer, still pose barriers to individuals claiming and receiving compensation awards. They are complex, expensive, and lengthy. They have restrictive eligibility requirements and may not grant the full range of damages claimed by victims. In addition the orders may not be paid nor be enforceable due to difficulties with enforcement or asset seizure provisions. Transnational co-operation and the absence of rule of law can further contribute to the systems not functioning.

A particular problem relates to schemes that order the wrongdoer to pay damages as these are rarely paid; very few trafficked persons have received compensation monies in all the countries in this study.

State compensation ensures the claimant receives at least some payment even if it does not cover all losses. State schemes therefore have potential for delivering justice so should be established or improved by widening eligibility criteria. Given the budgetary constraints of such schemes it is important to address whether they should cover all types of offences or all types of losses. Restricting the types of offences would reduce the number of eligible victims and restricting the losses covered would reduce the amount received by each successful claimant. Both would be less expensive than covering all the losses of all types of victims.

Trafficked persons are affected by specific factors inherent to their situation, which prevent them accessing compensation even where compensation mechanisms work well. Problems such as fear, language barriers, reluctance to contact authorities, feelings of humiliation and insecurity about immigration status all need to be overcome. Furthermore, accessing remedies requires knowledge and support. Information about justice measures and compensation claims is essential and needs to be made available in creative ways so that trafficked persons are aware of their rights. Independent legal aid and assistance will always have a positive impact on a victim's chances of securing a compensation award but needs to be available free of charge and as early as possible after the victim comes into contact with authorities or a support agency.

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

In view of the fact that a small minority of trafficked persons claim compensation and even fewer receive compensation payments, states must make more efforts to improve compensation systems for the benefit of trafficked persons, in light of their international legal obligations. There is no single model that will guarantee that compensation is made to all or a majority of trafficked persons and there are numerous practical barriers which may prove difficult to overcome. They should therefore ensure that a multiplicity of remedies is available so that trafficked persons have some chance of success in making a claim.

It is possible for states to borrow the best attributes from some existing schemes in order to establish or improve their own systems. However, states should do this within the development of a comprehensive policy on compensating trafficked persons. This would involve consultation with victims themselves and NGOs representing their interests. States should explore measures to undertake systemic and legal reform in the areas of civil, criminal and labour law so that access to justice is improved; provide legal aid for trafficked persons; focus information and support services on trafficked persons; provide the possibility of regularized status to trafficked persons for the duration of a claim; strengthen the powers of labour inspectors and similar bodies to impose orders including the grant of compensation; and explore non-litigious systems of negotiating compensation payments such as mediation.

NGOs and trade unions should also continue to play an important role by assessing the criminal, civil and labour rights in their countries and developing advocacy strategies to improve access to compensation as well as providing assistance in mediation efforts. NGOs working in the area of trafficking would benefit from networking with other groups working

with victims of crime, migrants' rights and workers' rights among others. All of these groups have useful perspectives on the theme of compensation for trafficked persons.

From this analysis of eight OSCE states, numerous recommendations and practical ideas for improving implementation of the right to compensation have been identified, which should be considered in the different national contexts.

#### *Building a national victims' rights culture*

- Establish a co-ordinated body for policy making and guidance on trafficked persons' rights/access to justice at national level.
- Establish contacts with appropriate rights bodies in relevant countries of origin/destination to facilitate rights of returning trafficked persons.
- Provide accessible information regarding all types of compensation schemes available in countries of destination/origin.
- In co-operation with victims' groups and NGOs, focus on developing a victims' rights policy, standards and services that account for the different needs of different types of victim (e.g. children, migrants, undocumented workers, forced and voluntary prostitutes, agricultural and sweatshop workers).
- Provide information about trafficked persons' rights and compensation schemes in a clear and accessible format ideally translated into the languages common to migrants and trafficked persons in that country and distribute this information in an accessible manner and through outreach work.
- Incorporate trafficked persons' rights into criminal procedure and labour law through amendments to all relevant laws e.g. criminal procedure laws, legal aid laws, the powers and duties of law enforcement and labour inspectors, prosecutors and judiciary.
- Incorporate good practice from other countries especially those with similar legal traditions.

#### *Evaluating and monitoring the right to compensation at national level*

- Undertake a systematic review of access to justice at national level including all compensation mechanisms especially as they relate to trafficked persons.
- Regularly evaluate and monitor national compensation systems with a view to assessing access for trafficked persons.
- Regularly evaluate and monitor the execution of civil judgments and court orders in criminal proceedings to improve efficiency and speed. Pay particular attention to the needs of trafficked persons (i.e. to ensure they are not obliged to pursue enforcement measures themselves).
- Where a state body has responsibility for co-ordinating issues relating to trafficking in human beings ensure that statistics gathered on trafficking criminal cases includes the following: whether a compensation claim was made, whether it was granted, the amount of the award, whether it was paid, any steps to seize trafficker's assets, and the length of time taken to carry out these steps.



- The state body should also gather the same categories of information regarding private civil claims and their enforcement, claims awarded through state bodies such as labour inspectorates and claims to state compensation schemes.
- Ensure that the types of damages available under each compensation mechanism are full and consistent and do not require the trafficked person to pursue more than one remedy at one time in order to cover all their losses.

*Law enforcement, lawyers, prosecutors and judiciary*

- Strengthen the legal obligations on police and prosecutors to provide information about the right to compensation to trafficked persons in an appropriate language and medium.
- Provide training for all police, judges and prosecutors on trafficked persons rights and their own role in realizing those rights (e.g. drafting claims for damages, gathering evidence regarding damages, ensuring a claim is dealt with adequately in proceedings).
- Prepare practical guidance and tools for officials to use e.g. in the form of standard information sheets or questionnaires to ease the implementation of these rights.
- Integrate guidance to legal and other actors to ensure consistent application within each profession and across professions. Avoid issuing too many guidance documents with unclear legal status. One core document entrenched with enforcement powers is useful and focuses the minds of officials and victims alike.
- Consider the merits of a specialized team of prosecutors focusing on trafficking cases.
- Within each prosecutor's office establish a post specifically responsible for victim/witness support (e.g. victim-witness co-ordinator in the US).
- Develop ways of sharing information about legal developments and case law e.g. in relation to damages calculations and within and across the professions (e.g. newsletters, regular meetings of judges or bar associations).
- In order to encourage crime reporting and redress for trafficked persons ensure that individuals with irregular status who come forward to the police or prosecution service are not automatically referred to immigration services.
- Lawyers should network more with NGOs and trade unions assisting trafficked persons to work together to find creative solutions to seeking compensation.
- Lawyers should be trained to use civil and labour law creatively when assisting trafficked persons to ensure they maximize their claims e.g. train in jurisprudence and practice from other legal systems, borrow legal argumentation, use creatively sourced evidence. Professional communities of lawyers (e.g. bar associations) should be pro-active in developing their knowledge of the law as it relates to trafficked person's rights and compensation both in countries of origin and destination.
- Lawyers should pool resources and share experiences on trafficking cases and should offer their help free of charge where a trafficked person cannot finance the costs.

*State compensation schemes*

- Ratify the European Convention on Action against Trafficking in Human Beings and European Convention on Compensation to Victims of Violent Crime.
- Establish a state-funded or subsidized compensation scheme.
- Consider using confiscated criminal assets to contribute to the scheme.
- Develop clear criteria as to what types of crime are eligible for compensation and emphasize the application of these principles to the facts of the case rather than the technical classification of the crime. (i.e. avoid a situation where the crime of trafficking can be compensated but where prosecutors rarely prosecute trafficking facts as trafficking).
- Reconsider the nature of the crimes which are entitled to state compensation (e.g.. extend the eligibility beyond the requirement for physical violence which causes injury and consider adding psychological violence instead) in order to cater for many different manifestations of the crime of trafficking e.g. where a worker is physically prevented from leaving a premises but has not experienced actual violence. Existing indicators developed to identify trafficked persons could be used to enable the development of these criteria.
- Relax character or residency requirements which preclude trafficked persons from eligibility (e.g. irregular entry, irregular status).
- Ensure all types of damages (moral and material) are available through the scheme to trafficked persons.
- Provide clear and transparent guidance on how damages are calculated and how these compare with claims made in the civil setting.
- Relax stringent criteria on the type and nature of evidence required from trafficked persons to prove their losses. (The criteria could vary on the facts of their case.)
- Ensure the deadline for submissions of applications is not unreasonably short (i.e. a matter of months not days).
- Review any requirement for the trafficked person's ongoing co-operation with the police in a criminal enquiry e.g. to actively consider "reasonable excuses" like fears for security and the inadequacy of available protection measures.
- Enable the state to pursue the wrongdoer in civil proceedings for recovery of the damages.
- Ensure emergency and interim payments can be made.
- Establish quick, streamlined and accessible procedures with an independent appeal process.
- Ensure applicants receive legal advice to enable them to draft their claim properly and realise their losses fully.
- Improve accessibility to trafficked person's applying from abroad e.g. by paying special attention to appropriate communication methods, provision of information in different languages, etc.
- Examine the relative merits of establishing a scheme specifically for trafficked persons (and ensuring that the criminal assets seized from traffickers contribute to fund it).

- Examine the relative merits of establishing a state compensation scheme for wrongs that are not classified as crimes e.g. state compensation to reimburse economic loss to exploited workers.
- Consider expanding existing schemes for crimes of violence to cover all categories of loss and/or all categories of trafficking (including where non-violent).

*Compensation in civil and criminal proceedings*

- Ensure compensation orders made in criminal proceedings are not humiliatingly small and provide clear guidance as to how these are arrived at.
- Ensure criminal compensation orders are efficiently enforced and take priority over other payments such as fines.
- Make sure the burden is not on the trafficked person to enforce a compensation order/judgment.
- Try to establish, as far as possible, the need for a trafficked person to participate in only one set of legal proceedings e.g. by ensuring that all types of damages can be awarded by all types of court. Where this is not possible try to ensure that civil proceedings are accessible, speedy and streamlined and reduce all need for civil plaintiffs to repeat oral testimony previously given in criminal proceedings.
- Ensure free legal assistance and representation is available to assist in all legal proceedings relating to compensation/damages claims.
- Ensure trafficked persons have procedural rights entrenched in law such as the right to be represented in court, the right to present evidence to support their claim, the right to be present at judgment.
- Where appropriate train judges to identify the appropriate categorization of a trafficked person as an injured party eligible to make a claim in the proceedings.
- Provide clear guidelines and training for judges on how to assess damages claims. Provide regular updates for them on legal developments and other case law to promote consistent practice.
- Ensure that judge's personal attitudes towards trafficked persons or personal notion of what constitutes moral behaviour do not lead to inconsistent application of guidelines to assess damages.
- Reduce emphasis on the need for documentary evidence of losses and reform the law to accept other forms of evidence including a greater preparedness to take into account the testimony of the trafficked person.
- Ensure judges always consider an application for compensation made in criminal proceedings in the same depth that they consider the case against the accused and provide written reasoning for the decision.
- Ensure a trafficked person has the power to appeal a decision made on the merits of their claim or the amount awarded.
- Consider introducing novel damages concepts such as punitive damages or the right to claim an amount equivalent to the unjust enrichment of a trafficker/exploiter.
- Introduce compulsory victim impact statements in criminal proceedings.
- Introduce mediation and alternative dispute resolution mechanisms to promote negotiated settlements.

*Labour/employment rights*

- Enact and enforce legislation to implement international labour standards on forced labour, child labour, discrimination, migrant workers, wages, working time and health and safety and private employment agencies.
- Ensure undocumented workers do not suffer discrimination in the enjoyment or exercise of labour rights; in particular ensure that they have the right to a fair wage, the right to compensation for work accidents, the right to organise, and the right to defend these rights in labour courts.
- Ensure that it is unlawful for employers to provide goods or services as an alternative to wages and to make deductions from wages for goods and services provided.
- Ease the evidential burden for proving a work relationship with an exploitative employer.
- Treat the intermediary and main user of services in sub-contracting employment chains as jointly liable for compliance with labour laws to maximise protection to trafficked persons.
- Ease the evidential burden for proving claims e.g. by introducing simplified procedures to compensate persons for unpaid wages when exploitation is detected resulting in automatic payments of penalties.
- Ensure labour tribunals are not obliged to refer case names to immigration services.
- Ensure applicants receive free legal advice and assistance regarding the claim.
- Support trade unions in raising awareness of labour rights and remedies among groups vulnerable to trafficking and exploitation
- Permit trade unions or other appropriate agencies to enforce employment laws independently of individual workers, where such persons are unable or unwilling to do so, by representing such persons in proceedings.
- Train labour courts/tribunals on the legal standards on forced labour and trafficking in human beings and familiarize them with the appropriate indicators to enable them to identify a case.
- Strengthen training of and provision of resources to labour inspectorates especially in sectors prone to exploitation.
- Strengthen the powers of labour inspectors so they can order compensation and have other penalties available to them e.g. the ability to revoke licences to operate.
- Support multi-agency partnerships between trade unions, civil society and state agencies with a labour protection mandate to monitor working conditions, provide support and assistance to exploited persons and intervene in labour sectors prone to exploitation.
- Establish an independent complaints mechanism for migrant workers that can be approached anonymously and without fear of referrals to immigration authorities and expulsion.
- Ensure that workers' organizations and migrants' rights groups are involved in policy making regarding reforms to labour laws and procedures.

*Enforcement and asset seizure*

- Evaluate enforcement practice of court orders in civil and criminal cases and identify main challenges to enforcement.
- Ensure enforcement agents are adequately trained and resourced.
- Establish and monitor co-ordination and communication between courts, probation, prisons, bailiffs and claimants (and other relevant agencies).
- Ensure specialized advice is available to trafficked persons regarding enforcement and support where they have to deal with the matter themselves.
- Consider criminal sanctions for non-payment of orders made in criminal cases.
- Ensure payment of orders by instalment is possible.
- Asset confiscation should be linked to the payment of damages i.e. it should be legally possible to reserve assets for payment of criminal and civil orders.
- Ensure victims of crime take high priority in the list of “creditors” for criminal assets.
- Establish specialist police and prosecutors responsible for asset seizure who can be used in trafficking cases.
- Establish powers to freeze, seize and confiscate assets in criminal and civil cases as early as possible in the proceedings while respecting human rights.
- Establish effective ways of tracing assets through money laundering regulations, effective banking laws, property registration, etc.

*Right to information and assistance (see also “Building a national victim’s rights culture” above)*

- In criminal proceedings free and specialized legal assistance should be available to all victims regardless of their status in criminal proceedings. Such lawyers should be remunerated at a rate equal to that of defendant’s lawyers and be given equal status.
- Free legal assistance should be available to trafficked persons seeking advice about their rights and representation in negotiations and making claims for compensation.
- Provide training for lawyers to work as victim advocates to ensure they are familiar with national and international victim’s rights laws; capable of drafting damages claims and civil suits; forming arguments for damages for unusual types of loss; can collect evidence to support claims; encourage asset seizure in criminal cases or freezing of assets in civil cases.
- Ensure state funding for NGOs that can provide advice, support and legal services.
- Ensure the availability of a residence permit for trafficked persons at minimum for the duration of a compensation claim and support services providing a secure environment for trafficked persons.
- Waive administration fees for making applications for compensation.

*Role of NGOs*

- NGOs should extend their networks to include different organizations (e.g. trafficking, victims of crime, migrant labour support groups) to share information and practice regarding obtaining compensation through different routes.
- NGOs could develop their role in organizing collective actions by trafficked persons with a view to achieving settlements such as the payment of compensation and rectifying other labour rights abuses such as health and safety standards.
- Trafficking NGOs should establish legal support for trafficked persons of all kinds of exploitation and should not restrict themselves to other forms of support e.g. psycho-social, medical, shelter, etc. Alternatively they should establish close working relationships with other organizations or lawyer who can provide this service.
- Monitor and report on compensation issues and related victims' rights.

*Role of IGOs*

- Monitor and evaluate implementation of existing standards and make reports easily accessible to the public.
- Take pro-active steps to promote trafficked persons rights.
- Incorporate an analysis of victims' rights and compensation issues in trial-monitoring exercises.
- Bring together practitioners from different countries to compare experiences and share good practices e.g. victim-witness co-ordinators from the US, NGOs from the US or France that have been active in pursuing civil claims for trafficking clients.

*Further research required*

- Labour-law issues as they affect trafficked persons including practice in claiming unpaid or underpaid wages, unfair dismissal, discrimination, loss of holiday and sick pay entitlements and information on cases brought in labour law by exploited migrant workers.
- Detailed information on asset seizure and confiscation in both civil and criminal cases.
- Information about whether existing compensation orders and civil judgments have been enforced and paid to the trafficked persons.
- The specific challenges of children (under 18) accessing compensation claims for trafficking and an analysis of what happens to their compensation monies.



## Annexes: International standards and obligations

### ANNEX I: INTERNATIONAL LEGALLY BINDING DOCUMENTS

#### UNTOC and Trafficking Protocol

The United Nations Convention Against Transnational Organized Crime<sup>536</sup> (UNTOC) is applicable only in cases of serious, transnational crime.<sup>537</sup> It has been ratified by 134 states including all of the states focused on in this study and therefore sets a binding standard regarding the issues it deals with.<sup>538</sup> It contains two provisions relating to compensation. Firstly, within Article 25, which deals with “assistance to and protection of victims”, it states that:

2. Each State Party shall establish appropriate procedures to provide access to compensation *and* restitution for victims of offences covered by this Convention.

And that states parties should:

- enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings.<sup>539</sup>

In cases of trafficking in human beings the Convention should be read together with its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (Trafficking Protocol),<sup>540</sup> which contains further provisions in relation to victims of trafficking in human beings. These Conventions regulate trafficking that is being treated as

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<sup>536</sup> Adopted 15 November 2000, entry into force 29 September 2003.

<sup>537</sup> As limited by Arts.2 , 3, 5, 6, 8 of same Convention.

<sup>538</sup> On 17 July 2007.

<sup>539</sup> Art. 25(3)

<sup>540</sup> Adopted 15 November 2000, entry into force 29 September 2003. Ratified by all countries subject to this study.

a crime i.e. where the case has come to the attention of law-enforcement agencies and been classified as such:

Article 6 ...

(2) Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;...

(6). "Each State Party shall ensure that its domestic legal system contains that of-fer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

The interpretative notes for the Protocol indicate this provision should apply in the destination state and also the country of origin of the victim.<sup>541</sup> UNTOC establishes a slightly stronger obligation on states to establish procedures for compensation in cases of transnational organized trafficking than the Protocol does for trafficking cases that do not have this dimension. This is helpful because of the general emphasis of UNTOC on international legal co-operation on all issues it covers. However, neither is specific about the type of compensation mechanism, the type of damages to which the victim should be entitled or the envisaged source of the compensation. The UNODC Legislative Guide which aims "to assist States seeking to ratify or implement" the Convention and its Protocols states that:

The Protocol does not specify any potential source of compensation, which means that any or all of the following general options would suffice to meet the requirement of the Protocol:

(a) Provisions allowing victims to sue offenders or others under statutory or common-law torts for civil damages;

(b) Provisions allowing criminal courts to award criminal damages (that is, to order that compensation be paid by offenders to victims) or to impose orders for compensation or restitution against persons convicted of offences;

(c) Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages suffered as a result of a criminal offence.<sup>542</sup>

It appears that the mere existence of the possibility to pursue a civil suit (whether independent or appended to criminal proceedings) against a wrongdoer would be sufficient to meet the requirements of UNTOC and the Protocol. The only indication as to exactly what kind of

<sup>541</sup> A/55/383/Add.1 Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto [http://www.unodc.org/pdf/crime/final\\_instruments/383a1e.pdf](http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf), p.13.

<sup>542</sup> UNODC *Part Two Legislative Guide for the implementation of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention Against Transnational Organized Crime*, pp 285–286, [http://www.unodc.org/pdf/crime/legislative\\_guides/03%20Legislative%20guide\\_Trafficking%20in%20Persons%20Protocol.pdf](http://www.unodc.org/pdf/crime/legislative_guides/03%20Legislative%20guide_Trafficking%20in%20Persons%20Protocol.pdf).

damages the victim is entitled to can be traced in the Convention, which states that access to compensation and restitution is required in cases of serious, transnational crime. However, the use of the concept of “restitution” is not commented on by the drafters or by the UNODC guide so it is not clear whether it carries legal significance. As mentioned previously, the term restitution has a variety of meanings including simply compensation (see section 1.3). One can therefore assume that cases which are identified as trafficking within criminal procedure are entitled to claim full damages for all types of losses including unpaid wages.

The question remains whether the mere existence of a civil legal system or state-funded compensation scheme can, in practice, truly “offer the possibility” of compensation to trafficking victims as required by UNTOC and the Trafficking Protocol without certain ancillary rights being implemented, e.g. the right to information (see Art 6(2)(a) Trafficking Protocol above) and the right to legal advice and assistance. A recent extensive UK study on access to civil justice demonstrated that individuals taking civil action with legal advice obtained better resolutions than those without, that those who were legally represented before a court were more likely to meet their objectives than those who were not, and that those who were actually granted legal aid to pay their lawyer for this work fared even better again.<sup>543</sup> This study takes the position that the *possibility* to claim compensation does not exist solely because of the existence e.g. of a civil, criminal or labour law framework but only when the compensation mechanism is complemented by effective information and free or subsidized legal advice and representation for trafficking victims.<sup>544</sup>

The psychological and physical needs of trafficking victims are of paramount concern in the course of legal procedures especially if they have been recently identified. The existence of medical help, counselling, shelter and a regularized immigration status will all contribute to enabling the victim achieve the security needed to be an active participant in legal proceedings (whether as a witness or claimant/plaintiff). These rights are not the focus of this study but are mentioned here to remind the reader that a legislative procedure and legal services are only one part of a wider package necessary to make compensation a realistic *possibility* for victims of trafficking as required by UNTOC and the Trafficking Protocol.

### **International Labour Organization standards**

The ILO standards on forced labour<sup>545</sup> have also been widely ratified by OSCE participating States<sup>546</sup> and deal with issues relating to relevant labour rights which should be justiciable at the national level in cases of this type of labour exploitation. Where the ILO conventions have not been ratified, the 1998 ILO Declaration on Fundamental principles and Rights

<sup>543</sup> “Causes of Action: Civil Law and Social Justice” Prof. P. Pleasence, Legal Services Research Centre, 23 March 2006. Summary available at: <http://www.lsrc.org.uk/publications/summary2006english.pdf>.

<sup>544</sup> See rationale in ECHR case *Golder v UK*, 21 Feb 1975. Further discussed below under the European Convention against trafficking in human beings.

<sup>545</sup> ILO Convention 29 of 1930 and 105 of 1957. Each ratified by over 160 states.

<sup>546</sup> With the exception that the US has not ratified C29 the countries in this study are parties to these conventions.

At Work and its Follow-up binds the ILO member States to certain core principles, which include a prohibition on forced labour, child labour and discrimination. The ILO Forced Labour Convention 1930 does not deal directly with compensation. However, in the recent general survey on its implementation issued by the ILO Committee of Experts the following commentary was issued in relation to Article 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 the 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.<sup>547</sup>

In relation to forced labour and trafficking in persons, the ILO states that the existence of civil, administrative and labour law remedies is critical (alongside criminal remedies) and that workers will often require assistance to bring claims. In particular states are asked to use their administrative legal system to protect foreign workers and provide them with remedies against exploiters.<sup>548</sup>

The ILO conventions on migrant workers<sup>549</sup> set standards to ensure migrants are not deprived of their rights regarding work 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 loss and damage arising from abuse of employment law standards (e.g. health and safety at work, deprivation of holidays, excessive hours, etc).<sup>550</sup> In relation to irregular workers Art 9(1) of Convention 143 aims “to ensure that illegally employed migrant workers are not deprived of their rights in respect of the work actually performed” and that they should be accorded the same rights as regularly admitted and employed migrants.<sup>551</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>552</sup> provides similar obligations on states parties at Art.25(3). Unfortunately these conventions are not so widely ratified which means that many states are not bound by these provisions. Some countries had even informed the ILO Committee that:

<sup>547</sup> See *ILO Forced Labour Survey 2007*, p. 75, para. 139 Available at: <http://www.ilo.org/public/english/standards/reim/ilc/ilc96/pdf/rep-iii-1b.pdf>. See also Committee comments on Japanese “comfort women” where the compensation issue was raised (p. 195 2007 report, pp. 141–142) and also in relation to Brazil, p. 142.

<sup>548</sup> *Human Trafficking and Forced Labour Exploitation, Guidance for Legislation and Law Enforcement* (ILO Special Programme to Combat Forced Labour, 2005), pp. 26–29.

<sup>549</sup> Migration for Employment Convention (1949) No.97 and the Migrant Workers (Supplementary Provisions) Convention (1975) No. 143.

<sup>550</sup> For a comprehensive overview of the rights of undocumented migrants see *Undocumented Migrants have rights: an overview of the international human rights framework*, (PICUM, March 2007).

<sup>551</sup> *Migrant Labour survey of ILO Committee of Experts*, 1999, paras. 302 & 303.

<sup>552</sup> Adopted by General Assembly resolution 45/158 of 18 December 1990, Entry into force on 1 July 2003.

violation of the legal provisions on the employment of foreigners results in the nullity of the contract of employment so that the worker has no contractual basis on which to claim, inter alia, unpaid remuneration.<sup>553</sup>

The labour rights of trafficked persons who are legally present and working in a country are therefore stronger than those relating to irregular migrants. This means that trafficked persons who unintentionally (through force, threats, deceit, or coercion) find themselves working irregularly often have no basis for labour law claims relating e.g. to unpaid remuneration unless states have specifically taken the step of ensuring they enjoy the same rights as regular migrants and that their contracts will be recognized by the courts. The weaknesses in the protection of the status of irregular migrant workers has been recognized by the ILO and dealt with in a 2004 International Labour Conference resolution concerning a fair deal for migrant workers in a global economy,<sup>554</sup> which states that:

As part of the broader commitment to promoting decent work, the ILO and its constituents agree on the desirability of maximizing the benefits to all that can flow from: (i) promoting policies that give priority to economic growth and employment; and (ii) encouraging regular labour migration. It is recognized that this goal requires a commitment to adopt national policies aimed at equal treatment of migrant workers with nationals in respect of national labour laws and access to applicable social protections, combating the exploitation often associated with migrants in irregular status, and the promotion of basic human rights for all migrants.

The application of the International Covenant on Economic, Social and Cultural Rights is also relevant in this context:

Art. 7: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

<sup>553</sup> *Migrant Labour survey of ILO Committee of Experts*, 1999, para. 305.

<sup>554</sup> [http://www.un.org/esa/population/meetings/thirdcoord2004/IILC\\_2004\\_Resolution.pdf](http://www.un.org/esa/population/meetings/thirdcoord2004/IILC_2004_Resolution.pdf).

Other relevant ILO standards include C.95 on Protection of Wages<sup>555</sup> and C.181 on Private Employment Agencies.<sup>556</sup> C.95 regulates a number of areas highly relevant to trafficking victims, i.e. wages should be paid regularly, in full, directly to the worker, without unreasonable deductions or conditions as to how they should be spent, and there should be no deductions to pay an intermediary. The regulation of deductions specifically aims to safeguard “the maintenance of the worker and his family.”<sup>557</sup> Art.15 obliges states parties to ensure the existence of “adequate penalties and other appropriate remedies” for violations of the laws which implement these provisions. “Appropriate remedies” would include rights in civil or labour law and/or to negotiate a settlement via a trade union or similar representative. C.181 details protections for workers and job seekers who are dealing with private employment agencies and contains numerous provisions aimed at regulating such agencies to prevent abuses. The rights deriving from this convention include the prohibition on discrimination by such agencies (Art.5), the prohibition on the need to pay fees to such agencies (Art. 7) and the requirement for the state to take action to regulate agencies that recruit migrant workers, especially those engaged in fraud (Art.8). Art.14 (3) provides that “adequate remedies” should be in place for violations of the rights in this convention.

The ILO standards on forced labour, migrants, wages and private agencies all reinforce numerous labour rights relevant to the trafficked person, as well as the right to a remedy including compensation for those subject to abuses of these rights. The ratification and effective implementation of these conventions is necessary to protect trafficked people by improving their labour rights and to improve access to compensation through enforcing these rights. The emphasis on the right to a remedy in these documents reinforces the right to compensation in international law especially for victims of labour exploitation.

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<sup>555</sup> Adopted 1 July 1949 and entry into force 24 September 1952. Ratified by 95 countries, of which 28 are OSCE participating States. (17 July 2007).

<sup>556</sup> Adopted 19 June 1997 and entry into force 10 May 2000. Ratified by 20 countries, 13 of which are OSCE participating States (17 July 2007).

<sup>557</sup> Para1.1 *ILO Recommendation R085 concerning the Protection of Wages*.



## ANNEX II: INTERNATIONAL POLITICALLY BINDING DOCUMENTS

Numerous relevant politically binding documents (“soft law standards”) have emanated from the UN system. Notably the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>558</sup> which states that restitution and compensation should be available to a crime victim:

### Restitution.

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. 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.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.....

### Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

The Declaration essentially places the main burden on the offender to make “restitution” to the victim, and where this fails the state should step in to pay “compensation” but only in cases of serious crime and serious injury.<sup>559</sup> This acknowledgement of a limited right to state-funded compensation is repeated in the Council of Europe and European Union standards (see below). Interestingly it was not picked up in the Trafficking Protocol even though it was assumed that trafficking is necessarily a serious crime. Another interesting outcome

<sup>558</sup> Adopted by the *GA Res 40/34* of 29 November 1985.

<sup>559</sup> The difference between the concepts of restitution and compensation is not made clear except with reference to the source of the payment. Some detail is provided regarding restitution but the concept is not significantly different from compensation in other settings.

here is that restitution (from the offender) possibilities should be considered as a penalty in all criminal cases and should not be confined to the possibility of making a civil claim. However, it is clear this Declaration cannot be relied upon to support calls for state-funded compensation in all trafficking cases, but only where serious injury or impairment of physical or mental health has taken place.

Also importantly, the Declaration contains provisions obliging other assistance that should be provided to victims including information on their rights to redress and assistance throughout the proceedings.<sup>560</sup>

A helpful differentiation between rights to compensation and restitution exists in the 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:<sup>561</sup>

*Para 19 Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: 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 20. Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services

This document applies only to a limited scope of trafficking victims who may have a human rights case or a case that amounts to a violation of humanitarian law, e.g. where state actors take advantage of their position to be systematically responsible for trafficking in persons, or where trafficking of civilians occurs during an armed conflict. Also, it provides some detail about the types of damage that it envisages being compensated, which include not only material (or pecuniary) but moral damages (i.e. non-economically quantifiable losses such as pain and suffering, loss of reputation, emotional distress). The envisaged source of compensation in all cases is the state given the inherent state responsibility for human rights violations. These types of cases have not been dealt with in this report.

<sup>560</sup> Paras 4, 5 & 6

<sup>561</sup> *UN General Assembly resolution 60/147* of 16 December 2005.

The UN Guidelines on Justice for Child Victims and Witnesses of Crime<sup>562</sup> focus on giving a child friendly approach to the granting of “reparations”, emphasizing that proceedings should be accessible and where possible dealt with simultaneous to a criminal case. The guidelines also take steps to delineate the types of awards that a child should receive focusing on material costs:

*I. The right to reparation*

36. Child victims and witnesses should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.

37. Provided the proceedings are child-sensitive and respect the present guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice.

38. Reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure automatic enforcement of reparation orders and payment of reparation before fines.

The UNICEF *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, based on the *Guidelines for Protection of the Rights of Child Victims of Trafficking*, reiterates the requirement to provide information and assistance to child victim and provides an extensive list of types of damages and loss that should be compensated including material and moral damages (including for lost opportunities such as education) and regardless of the nature of the work.<sup>563</sup>

The UNHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking*<sup>564</sup> connects the issue of asset recovery from criminals and compensation to trafficked victims.<sup>565</sup> This theme is picked up by the OSCE (see below). It also calls for children’s interests to be protected during compensation procedures.<sup>566</sup> Guideline 9 connects the victim’s right to a remedy (including compensation) to “the availability of legal and other material assistance” as well as accessible information and the right to remain in the country while legal proceedings are ongoing.

In cases where trafficking amounts to gender-based violence, other soft-law standards apply to reinforce the right to compensation, obliging states to establish compensation mechanisms that are accessible to female victims.<sup>567</sup>

<sup>562</sup> ECOSOC 2004/27.

<sup>563</sup> Prepared by Mike Dottridge for UNICEF Regional Office for CEE/CIS, 2006 pp. 99–101.

<sup>564</sup> Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, E/2002/68/Add.1, ECOSOC, 20 May 2002.

<sup>565</sup> *Ibid.*, Guideline 4.

<sup>566</sup> *Ibid.*, Guideline 8.

<sup>567</sup> “A number of relevant human rights standards and treaties dealing with violence against women also stress the importance of compensation:

### ANNEX III: REGIONAL LEGALLY BINDING DOCUMENTS (FOR STATES PARTIES)

#### Council of Europe

The Council of Europe Convention on Action against Trafficking in Human Beings<sup>568</sup> (European Convention against Trafficking) entered into force on 1 February 2008. It has so far been ratified by 17 states and signed by 21 others.<sup>569</sup> Therefore it does not yet have binding power but is likely to become a stronger standard over the course of the next several years. The 17 parties are all participating States of the OSCE states (the Convention is open to non-members of the Council of Europe.)

The Convention deals with issues of “compensation and legal redress” at article 15 and connects the right to a remedy squarely with ancillary rights such as: the right to information about remedies in a language they understand, legal assistance and legal aid (although not the automatic right to free legal aid), and residence permit for the duration of the proceedings.<sup>570</sup> Crucially for this study it states that:

- 3) Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.
- 4) Each 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 Article 23.

The language of the obligation to provide access to compensation appears to be stronger than the Trafficking Protocol. However, the right remains a right to obtain compensation from the wrongdoer and insofar as state-funded compensation shall be provided, it is limit-

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- Para 10c UN General Assembly Resolution 52/86 (Crime prevention and criminal justice measures to eliminate violence against women: Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice) urges Member States to ensure that women subjected to violence receive redress, including the right to seek restitution or compensation from the offenders or the State.<sup>78</sup>
  - UN General Recommendation No. 19 of the UN Committee on the Elimination of Discrimination against Women in 1992 acknowledges that “states may be responsible for private acts if they fail to act with due diligence to ... provide compensation.”
  - The Beijing Platform for Action, adopted by the Fourth UN World Conference on Women in 1995(118) Para 124 (d) states that governments should “take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims.” Solicitors International Human Rights Law Group, see UK country profile.

<sup>568</sup> Adopted 16/5/2005, will enter into force 1st February 2008.

<sup>569</sup> As of 18 April 2008. see [http://www.coe.int/t/DG2/TRAFFICKING/campaign/default\\_en.asp](http://www.coe.int/t/DG2/TRAFFICKING/campaign/default_en.asp) for update.

<sup>570</sup> See explanatory report paras 192 -196.

ed by “conditions under internal law”. The Council of Europe explanatory report states that “The purpose of this article is to ensure that victims of trafficking in human beings are compensated for damage suffered.”<sup>571</sup> Helpfully, it is envisaged that the right consists of a civil claim against the trafficker covering “both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced).”<sup>572</sup> The logistical difficulties in suing a trafficker are acknowledged.

The Council of Europe also suggests that funds of criminal assets could be used to fund a state scheme (and confusingly mixes this with a state scheme to support victims generally rather than a focus on individual compensation) with its main emphasis on the standards of the European Convention on the Compensation of Victims of Violent Crimes<sup>573</sup> (ECCV-VC) as a model.<sup>574</sup> Significantly therefore the European Convention against Trafficking does not state that all victims of trafficking have a right to compensation from the state but that the state should establish a fund, which can be limited in terms of the “legal basis for compensation, the administrative framework and the operational arrangements” by internal law or by the standards set out in the ECCVVC. This limits the requirement that the State pay compensation to cases of “serious bodily injury or impairment of health directly attributable to an intentional crime of violence.”<sup>575</sup>

In relation to the ancillary rights, the explanatory report states that “It is of paramount importance that (victims) be told about any procedures they can use to obtain compensation” and about their rights to residence permits to enable them to stay in country to pursue their claim. It also states that this should happen “as from their first contact with the competent authorities.”<sup>576</sup> While the right to free legal aid is not entrenched in this convention, states parties are reminded in the Explanatory Memorandum that the European Court of Human Rights has held that in certain civil cases there is a right to free legal assistance under Art. 6(1) European Convention on Human Rights.

The Court’s position is that it must be ascertained whether appearance before a court without the assistance of a lawyer would be effective in the sense that the person concerned would be able to present their case properly and satisfactorily.

In the case of *Golder v UK* the ECtHR took into account the complexity of the proceedings and the emotional nature of the situation in deciding whether a person could represent their own case. If not, they decided that s/he should be granted free legal assistance in the inter-

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<sup>571</sup> *Explanatory Report—Action against Trafficking in Human Beings*, 16.V.2005 p. 52.

<sup>572</sup> Para 197.

<sup>573</sup> European Convention on the Compensation of Victims of Violent Crimes [ETS No.116]  
<http://conventions.coe.int/Treaty/en/Treaties/Word/116.doc>

<sup>574</sup> Paras 198–199.

<sup>575</sup> Art 2(1).

<sup>576</sup> Pages 52–53.

ests of justice.<sup>577</sup> Thus the right to information about compensation and free legal assistance is more strongly emphasized for states parties bound by this document than any other.

The ECCVVC<sup>578</sup> envisages a state-funded compensation scheme which, at minimum, compensates nationals and permanent residents<sup>579</sup> of the state party who are victims of “serious bodily injury or impairment of health directly attributable to an intentional crime of violence.”<sup>580</sup> While not all OSCE or EU States are parties to this convention it is regarded as the core European standard on state-funded compensation schemes. The commentary to the Convention suggests that the definition of injury can extend to injuries caused by psychological violence and that the term health “may” refer to mental health.<sup>581</sup> The compensation should be available even where the offender is not prosecuted or punished<sup>582</sup> and should cover at minimum: loss of earnings, medical, hospital and funeral costs, and maintenance for dependants.<sup>583</sup> The commentary mentions that moral damages such as pain and suffering, loss of expectation of life as well as additional expenses caused by resulting disablement are not compulsory but subject to national policy and legislation. Importantly, there are the following allowable limitations on the eligibility of the claimant related to their character and antecedents:

1. Compensation may be reduced or refused on account of the victim’s or the applicant’s conduct before, during or after the crime, or in relation to the injury or death.
2. Compensation may also be reduced or refused on account of the victim’s or the applicant’s involvement in organised crime or his membership of an organisation which engages in crimes of violence.
3. Compensation may also be reduced or refused if an award or a full award would be contrary to a sense of justice or to public policy (*ordre public*).<sup>584</sup>

This means that, for example, a claimant with an unrelated criminal record can be denied compensation, or if they are deemed to have “provoked” the crime or contributed to it in some way.<sup>585</sup>

<sup>577</sup> Page 53.

<sup>578</sup> Of the countries focused upon in this study ECCVVC is ratified by Romania, France, UK, Ukraine and Albania.

<sup>579</sup> The notion of permanent residents was designed to protect regular migrant workers although irregular migrants would clearly fall outside of these provisions. See Paras 22–27 Explanatory Report and Commentary.

<sup>580</sup> Or their dependents, Art 2(1)

<sup>581</sup> Paras 18–19 Explanatory report and commentary.

<sup>582</sup> Art.2 (2).

<sup>583</sup> Art.4.

<sup>584</sup> Art.8.

<sup>585</sup> Paras 33–37 Explanatory report and commentary.



## European Union

The EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings<sup>586</sup> outlines numerous detailed guarantees that should be provided to all victims of crime in EU member states, including the right to support and information about proceedings (including on compensation),<sup>587</sup> the right to legal assistance and aid,<sup>588</sup> the right to protection and trauma minimization during proceedings,<sup>589</sup> the right to victims resident in other EU States to be accorded the same rights,<sup>590</sup> and, importantly, the right to compensation:

*Article 9 Right to compensation in the course of criminal proceedings*

1. Each Member State 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, except where, in certain cases, national law provides for compensation to be awarded in another manner.
2. Each Member State shall take appropriate measures to encourage the offender to provide adequate compensation to victims.
3. Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay.

This right confines itself to being entitled to a quick decision on compensation from the offender awarded during criminal proceedings and to “encouraging” rather than compelling the offender to provide adequate compensation to victims. This does not therefore create an entitlement to damages from the offender or compensation from the state, which is probably due to the fact that this decision confines itself to issues relating to criminal proceedings and acknowledges the fact that, in some EU states, this may not be the forum for compensation claims.

The EU Council Directive on Compensation of Crime Victims<sup>591</sup> of 2004 sets up a system of co-operation to facilitate access to compensation for victims of violent intentional crime committed on their territory.<sup>592</sup> It compels states to establish a state-funded scheme for payment in these cases<sup>593</sup> and to establish co-operation structures for individuals from other EU member states to ensure they can easily access the schemes from their home country.

<sup>586</sup> [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l\\_082/l\\_08220010322en00010004.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_082/l_08220010322en00010004.pdf).

<sup>587</sup> Art.4, 13 & 14.

<sup>588</sup> Art.6.

<sup>589</sup> Arts.2, 5, 8 & 15.

<sup>590</sup> Art.11.

<sup>591</sup> 29 April 2004, [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l\\_261/l\\_26120040806en00150018.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_261/l_26120040806en00150018.pdf).

<sup>592</sup> Art. 1.

<sup>593</sup> Art. 2 & 12(2).

A state-funded compensation mechanism should therefore be in place in all member states albeit for a limited category of crime. There is of course nothing to prevent states going further than this limited category or, for example, taking steps to compensate victims for crime committed outside of their territory.

It is the view of the EC Experts Group on Trafficking that trafficking victims should be considered to automatically qualify for schemes aimed at victims of violent intentional crime<sup>594</sup> and they go so far as to suggest:

a legally binding EU instrument on the standing of trafficked persons in criminal proceedings to ensure the proper treatment, assistance, protection and compensation of victims<sup>595</sup>

as a priority for the EU as they consider the available provisions to be underdeveloped in relation to trafficking victims. They also make the point that legal aid and temporary residency are needed while legal proceedings are ongoing and that victims should be entitled to compensation for economic loss as well as injuries suffered.<sup>596</sup> Notably, the Council Framework Decision on Combating Trafficking in Human Beings<sup>597</sup> contains no specific provisions on compensation, damages or access to justice and nor does the EU Plan on Best Practices, Standards and Procedures for Combating and Preventing Trafficking in Human Beings.<sup>598</sup>

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<sup>594</sup> Para.129 *Report of the Experts Group on Trafficking in Human Beings* (Brussels, 22 December 2004).

<sup>595</sup> *Opinion Of The Experts Group On Trafficking In Human Beings Of The European Commission* of 11 October 2005.

<sup>596</sup> Section 6.6 *Report of the Experts Group on Trafficking in Human Beings* (Brussels, 22 December 2004)

<sup>597</sup> 2002/629/JHA.

<sup>598</sup> 2005/C311/01.

#### ANNEX IV: REGIONAL POLITICALLY BINDING DOCUMENTS

##### Council of Europe

The Council of Europe Council of Ministers has issued numerous recommendations relating to the victims of crime or specific types of crime which politically bind all member States.<sup>599</sup> The most recent, Recommendation Rec (2006) 8 of the Committee of Ministers to Member States on Assistance to Crime Victims, post-dates the Trafficking and Compensation Conventions and essentially confirms the main themes regarding entitlements which we have examined above e.g.:

- 8.1. Compensation should be provided by the state for:
- victims of serious, intentional, violent crimes, including sexual violence;
  - the immediate family and dependants of victims who have died as a result of such crime.

It does, however, assert that such schemes should apply “irrespective of the victim’s nationality” and encourages co-operation between Council of Europe member states along the same lines as those required in the EU. They go into some detail regarding the nature of the damages which should be compensated by the state, and include an emphasis moral damages and rehabilitation:

- 8.6. ...should be provided for treatment and rehabilitation for physical and psychological injuries.
- 8.7. ...should (be) considered for compensation for loss of income, funeral expenses and loss of maintenance for dependants. States may also consider compensation for pain and suffering.
- 8.8. States may consider means to compensate damage resulting from crimes against property.

The 2000 Recommendation that focuses on trafficking in human beings<sup>600</sup> restricts itself to ensuring that “victims can also take their claim to civil courts which are competent to rule... and award them compensatory damages”<sup>601</sup> but in 2002 the Council of Europe Committee of Ministers recommended that member states should ensure that states “envisage the establishment of financing systems in order to compensate (female) victims (of violence).”<sup>602</sup>

<sup>599</sup> See *Victims—Support and Assistance*, (Council of Europe, 2006) for all the documents.

<sup>600</sup> Action against trafficking in human beings for the purpose of sexual exploitation Recommendation No. R (2000) 11 of the Committee of Ministers on 19 May 2000 (and explanatory memorandum).

<sup>601</sup> See explanatory memorandum.

<sup>602</sup> See Recommendation R (2002)5 on the protection of women against violence, paras. 36 and 37.

## OSCE

The OSCE Action Plan to Combat Trafficking in Human Beings<sup>603</sup> asks participating States to consider establishing a fund based on the confiscated proceeds of trafficking to be used for the benefit of trafficking victims including the establishment of a compensation fund for them.<sup>604</sup>

### **Stability Pact for South Eastern Europe**

The Guidelines for National Plans of Action to Combat Trafficking in Human Beings<sup>605</sup> of the Stability Pact Task Force on Trafficking in Human Beings emphasizes compensation from exploiters and the need for unbiased supervision of the damages obtained.

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<sup>603</sup> OSCE Permanent Council Decision No.557, 24 July 2003.

<sup>604</sup> Section III Para 1.5.

<sup>605</sup> <http://www.stabilitypact.org/trafficking>.

**ANNEX V: TABLES OF SIGNATURES & RATIFICATIONS OF RELEVANT INTERNATIONAL STANDARDS**

KEY: P = Party, S = Signed, R = Ratification date, F = in force/entry into force, A = Applicable (politically binding)

**International Conventions—legally binding for states parties:**

	Albania	France	Moldova	Romania	Russia	U.K.	U.S.	Ukraine
UN Convention on Transnational Organised Crime (UNTOC) 29/9/03	P R 21/8/02	P R 29/10/02	P R 16/9/05	P R 4/12/02	P R 26/5/04	P R 9/2/06	P R 3/11/05	P R 21/5/04
Protocol to UNTOC to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 15/12/2003	P R 21/8/02	P R 29/10/02	P R 16/12/05	P R 4/12/02	P R 26/5/04	P R 9/2/06	P R 3/11/05	P R 21/5/04
Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	-	-	-	-	-	-	-	-

	Albania	France	Moldova	Romania	Russia	U.K.	U.S.A	Ukraine
ILO Convention 29 Forced Labour 1930	P R 25/6/57	P R 24/6/37	P R 23/3/00	P R 28/5/57	P R 23/6/56	P R 3/6/31	-	P R 10/8/56
ILO Convention 105 Abolition of Forced Labour 1957	P R 27/2/97	P R 18/12/69	P R 10/3/93	P R 3/8/98	P R 2/7/98	P R 30/12/57	P R 25/9/91	P R 14/12/00
ILO Convention 97 Migration for Employment (Revised) 1949	P R 2/3/05	P R 29/3/54	P R 12/12/05	-	-	P R 22/1/51	-	-
ILO Convention 143 Migrant Workers (Supp. Provisions) 1975	P R 12/9/06	-	-	-	-	-	-	-
ILO Convention 95 Protection of Wages 1949	P R 2/8/01	P R 15/10/52	P R 12/08/96	P R 6/6/73	P R 4/5/61	Denounced in 1983	-	-
ILO Convention 181 Private Employment Agencies 1997	P R 30/06/99	-	P R 19/12/01	-	-	-	-	-





**Regional conventions, directives, recommendations—legally & politically binding—by organization**

	Albania	France	Moldova	Romania	Russia	U.K.	U.S.A	Ukraine
<b>European Union—legally binding to EU members</b>								
EU COUNCIL DIRECTIVE 29 April 2004 relating to compensation to crime victims (2004/80/EC)	-	F	-	F	-	F	-	-
EU COUNCIL FRAMEWORK DECISION of 19 July 2002 on combating trafficking in human beings (2002/629/JHA)	-	F	-	F	-	F	-	-
<b>Organization for Security and Co-operation in Europe (OSCE)—politically binding for participating States</b>								
OSCE Action Plan to Combat Trafficking in Human Beings. OSCE Permanent Council Decision No.557 24 July 2003	A	A	A	A	A	A	A	A
<b>Stability Pact for South-Eastern Europe—politically binding for partner states in SEE</b>								
Task Force on Trafficking in Human Beings Guidelines for National Plans of Action to Combat Trafficking in Human Beings	A	-	A	A	-	-	-	-



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