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# **Anti-human trafficking manual for criminal justice practitioners**

Module 13



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

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Compensation for victims of trafficking in persons



UNITED NATIONS  
New York, 2009

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This publication has not been formally edited.

# **Module 13:**

## **Compensation for victims of trafficking in persons**

### **Objectives**

On completing this module, users will be able to:

- Understand the concept of compensation and its value in trafficking in persons cases;
- Describe the international legal basis for compensation;
- Explain the different modes of administering compensation;
- Explain the funding mechanism of compensation;
- Understand different procedures of claiming compensation.

### **Introduction**

“Compensation” is understood differently, depending on the context and the circumstances. It is often confused with “restitution” and sometimes used interchangeably. It is important to understand the legal definitions and connotations of the two words from the beginning.

While compensation is generally regarded as payment or reparation for injury or harm, restitution on the other hand is a form of payment or action taken to restore the victim to the position he or she would have been but for the victimization. In this module the meaning used connotes a form of payment, most commonly in cash, to a person who has suffered harm as a victim of crime, specifically trafficking in persons crime.

It should be noted that compensation to a victim of trafficking in persons will not necessarily remove the traumatic effects of the process of human trafficking but it will improve the chances of his/her psychological recovery and eventual reintegration into society as well as assuage his/her feelings. It will also offer economic empowerment and protection from being re-trafficked.

The modes of administering compensation to victim differ from one jurisdiction to another. In some jurisdictions, it is an administrative action while in some it is judicial. Whichever form is adopted or is in practice in your jurisdiction, it is important to ensure that the procedure of claiming compensation is made as simple, accessible and well outlined as possible. Any cumbersome procedure that frustrates and discourages victim from making claims will

defeat the purpose of compensation. These factors are likely to result in victims having little confidence in the justice system and therefore reducing the likelihood that the victim cooperates with the system.

### **International legal basis for compensation**

Article 25(2) of the UNTOC Convention requires States Parties to establish appropriate procedures to provide access to compensation and restitution for victims and requires that this right be communicated to victims.

Article 14 of the UNTOC Convention requires States Parties to give priority consideration to returning confiscated proceeds of crime or property to a requesting State Party so that it can give compensation to victims.

In addition, Article 6(6) of the Trafficking Protocol requires that States Parties to ensure their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.

Although the international basis for compensation is well defined, it is important to keep in mind that it is the implementation of these provisions in the domestic settings that may or may not create an enabling environment for victims to claim compensation.



### **Case example**

In a case of trafficking, a North African couple pleaded guilty after being charged with forced labour and concealing and harbouring an alien for holding their niece as a slave. In exchange for lodging and the chance for a good education, the victim cared for the defendants' young son, prepared breakfast and dinner, performed household cleaning chores, and worked weekends and summers without pay at the defendants' espresso stand. When the defendants learned of the victim's complaints of mistreatment, they assaulted her, threatened to report her illegal status in the country, withdrew her from school, and forced her to work longer hours at the espresso stand, without pay.

In the court proceedings, the defendants were ordered to pay a large sum of money in restitution to the victim and one defendant was sentenced to six months of electronic home detention, 240 hours of community service and three years of probation. The other was sentenced to 90 days of electronic home detention, 60 hours of community service, and three years of probation.



### Case example

In a case of human trafficking, two affluent doctors and their son were convicted in a forced labour conspiracy of coercing for more than 20 years a young Pacific Islands national into providing domestic labour and services for them. The defendants allegedly told the victim that she would be imprisoned if she left their service and used a variety of other coercive means to break her will, including forbidding her from having social contacts, monitoring and limiting her mail, forbidding her use of the telephone, and requiring her to hide in her basement room when guests were in the house. The parents were sentenced to 48 months in prison and ordered to pay over a large sum in back wages to the victim for her 15-hour workdays over those two decades. Their son was sentenced to 120 days of home confinement; three years of supervised release, and ordered to pay a fine.

## Routes to compensation<sup>1</sup>

Compensation laws differ around the world.

Commonly each system has two basic ways of funding compensation: through the assets of offenders (traffickers in this case) and through State-funded compensation schemes. Of these, offender-funded compensation is significantly more desirable than that funded by the State.

The administration of compensation payment to the victim could either be by judicial process or by administrative action. In the case of judicial action, it could be in two ways; namely,

- The court trying the trafficker ordering compensation to be paid to the victim at the end of a criminal trial or,
- The victim filing a separate civil claim.

Thus compensation claims could either be by criminal court or civil court process. The two courts are courts of equal jurisdiction in terms of adjudication. Definitions for each system are difficult, but broadly criminal courts adjudicate crimes committed against the State. While civil courts adjudicate claims by one citizen (or entity) against another. A variation of civil courts is a court which has a specific function such as a labour court or tribunal.

### Varying legal systems

Use of the terms “criminal court” and “civil court” can be confused with “common law systems” (one based largely on precedent and jurisprudence) and “civil law systems” (one based largely on codified legislation and legal process). Both common law and civil law systems generally have a set of courts that judge crimes against the State and another set that judge private claims of harm or loss.

<sup>1</sup> See OSCE report, Compensation for Trafficked Persons in the OSCE Region, OSCE-ODIHR 2007.

This section of the module explains what each of the court processes (criminal, civil and labour) is and what is generally common in the process of awarding compensation under each system. It then gives a similar brief description of State-funded schemes and their common processes.

## **Criminal courts**

The set of courts that administer criminal cases are regarded as courts of criminal jurisdiction or criminal courts. During the criminal trial of a trafficking offence, the court may (depending on the law) award compensation. In many jurisdictions, compensation may be awarded as part of the criminal court process. If a person is found guilty of the offence as charged, there may be a specific provision to award compensation to the victim by the convicted criminal as part of the sentence imposed by the court.

## **Criminal law procedures**

A defendant must have been identified by the prosecuting authorities and that defendant must have been found guilty in legal proceedings before compensation can be considered through the offender.

In some jurisdictions, a victim can file a claim for civil damages to be heard at the same time as the criminal case. This has the advantage of combining two potentially lengthy procedures into one to be managed by one person, the prosecutor.

In other jurisdictions, there may be a specific procedure that allows compensation to be paid as part of a sentence. Calculating what may be appropriate in the circumstances may be based on the civil court procedure of assessment or it may be a completely separate procedure.

Some jurisdictions may use payment of compensation by the defendant to the victim as a mitigating factor to reducing the sentence that may be imposed. There may be a formal opportunity to “plea bargain” where compensation is an element under discussion.

### **Calculating compensation for lost wages**

With regard to calculating lost wages that may be part of a claim for compensation, several different possibilities exist. For example, the claimed amount could be based on the local prevailing wage, a legislated minimum wage or on the basis of the promised contractual wage.

## **Civil courts**

Civil courts handle civil cases other than criminal. The claim in civil court does not involve imposition of punishment but award of damages against the defaulting party. The cases are usually between two individuals or an individual against the State in a claim for rights. This



court is empowered to adjudicate over compensation claims. In jurisdictions and cases where a court of criminal jurisdiction is not empowered to award damages in the cause of criminal trials, the victim has an option to lay his or her claim before a civil court. In some jurisdictions, whether the law provides for such claims or not, the victim is entitled to lay such claims where he or she has suffered harm or loss. This is based on the principle of law that says that wherever there is a wrong, there is a remedy.

Depending on the jurisdiction, harm or loss may not be strictly defined or there may be specific types of harm or loss described in the legislation. Harm might result from someone being a victim of a crime against the State's criminal law, or it might be harm through something such as not honouring a contract.

In a civil court the outcome is most commonly an order of compensation or restitution. These courts often work with much defined legal principles and decide on the award of appropriate compensation. In many jurisdictions it is possible that a person who has been convicted of a crime in a criminal court can also be sued for harm or loss in a civil court.

### **Common legal terms**

The structure and processes of all courts is very dependant on the legal structure of individual States. It is not possible to describe all legal terms here as they are interpreted in different ways in different jurisdictions.

Two terms commonly used in respect of harm or injuries done to one are "tort" and "delict". Tort is a term found mainly in common law systems, delict mainly in civil law systems. They have a similar meaning, which is (broadly) harm to a person's body, property or rights. The concepts underlying tort and delict are the basis of many civil court compensation procedures.

## **Procedures in civil courts**

Civil courts are those courts that judge claims of harms or injuries by one party against another.

Victims can make a claim for compensation from harm or loss for wrongdoing that is defined in national law or harm or loss resulting from more general wrongdoing (tort or delict).

Proceedings in civil courts require an identified party as a respondent. In most trafficking in persons cases this will be an individual trafficker, although it is possible it may be a company or other organization that has exploited a victim.

The defendant must be within the jurisdiction and must be financially solvent (i.e. have some assets that can be used to pay compensation). Damages calculation is typically based on national civil law and will often include both moral and material damages.

### **An alternative to criminal court?**

Some victims may see civil court procedures as an attractive alternative to criminal courts. However, as outlined above, you still need to have identified someone to respond to your claims (i.e., someone to sue) in a civil court. Also, a civil court may question why the respondent has not been prosecuted in a criminal court if the alleged harm has involved criminal activities.

In many jurisdictions the burden of proof varies between criminal and civil courts. It may be possible to have a “not guilty” verdict in a criminal court and still be able to pursue a claim for compensation in a civil court. This is generally because the proof required of a criminal trial is proof beyond reasonable doubt while civil courts require proof on the balance of probabilities.

## **Labour courts and tribunals**

In some jurisdictions, the main form of specialized court you are likely to use in a trafficking in persons case is a labour court or tribunal. A labour court or tribunal often functions in a similar way to a civil court. Standards of proof required are often the same and the purpose is to judge a claim of harm by one party (often an employee or employer) against another party (often an employer).

Procedures for compensation included in labour law are not as frequently used as the other models represented here.

### **International basis**

The International Labour Organization (ILO) standards on forced labour, migrants, wages and private agencies all reinforce numerous labour rights which are 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 ILO Conventions is necessary to protect trafficked people by improving their labour rights and access to compensation.

## **Procedures in labour courts**

A victim may have rights under labour law even if they have no labour contract. Rights and contractual breaches can be enforced against a wrongdoer (e.g. trafficker or exploitative employer) in labour courts or tribunals and compensation can be claimed.

Claims may be based on unpaid wages, failing to provide sick pay, not giving holidays, work-related accidents, discrimination in the workplace, not paying overtime, etc. The standard of proof in these actions will generally be lower than in a criminal case.

As with civil court claims, a wrongdoer must be identifiable, locatable and have assets to recover. A potential advantage of using labour courts is that employers may be insured for claims against them which may improve the chances of success of a compensation claim.

With regard to calculating the lost wages that may be part of a claim for compensation in labour law, several different possibilities exist. For example, the claimed amount could be based on the local prevailing wage, a legislated minimum wage or on the basis of the promised contractual wage.

## **State-funded compensation schemes**

Compensation can also be paid by the state through a state-administered scheme. Some countries have established these schemes usually for victims of violent crime or specifically for victims of trafficking in persons.

State-funded or subsidized compensation schemes have the great advantage of providing a guaranteed payment of compensation to the victim. An additional advantage of such schemes is that it is not necessary to locate or identify a specific perpetrator.

### **Source of funds for compensation schemes**

The law generally prescribes the sources of funds for compensation schemes and funds. Examples of such practices include where the law provides that funds for compensation schemes could only be paid from certain sources such as the confiscated assets of offenders, or the sales of the confiscated assets of offenders. Some laws include a broader base to include donations and budgetary allocations from the central Government. It is good practice to create a broad funding base for compensation schemes. Reliance on confiscated assets of the offender may not be identified or traced in time or, where the funds are traceable, it may take a long time for them to be disposed and the proceeds paid, as outlined by law.

## **Procedures in compensation schemes**

To qualify for these schemes, jurisdictions have chosen different approaches. In many cases victims have to show they have reported the matter to the police and have been willing to cooperate with investigations. Investigations must have also disclosed a case of trafficking in persons. In some jurisdictions, State-funded compensation is only available if a person has been legally declared to be a victim within the meaning of the existing law. State schemes may still be relatively streamlined, unbureaucratic and quicker than civil proceedings.

## The basis of a compensation claim

Depending on the legislation in your jurisdiction, a claim could potentially be made up of several bases on which compensation is requested including, but not limited to:

- Unpaid or underpaid wages;
- Legal fees;
- Excessive, fraudulent or illegal “deductions” from wages for rent, subsistence, transport, tax or social security “payments”;
- Reimbursement of illegal “fees” paid to a recruiting or employment agency or for smuggling or transportation;
- “Fines” imposed by traffickers for bad behaviour;
- Medical expenses;
- Loss of opportunities while kept as a victim;
- Pain and suffering due to physical or psychological violence;
- Degrading and inhuman treatment.

In some jurisdictions aggravated, exemplary or punitive damages may also be available to trafficking victims. Their purpose is to punish a wrongdoer for particularly outrageous conduct. Punitive damages can be related to the wealth of the wrongdoer.



### Self-assessment

Describe briefly the various funding mechanisms of a compensation fund.

How can compensation be claimed?

What can be the basis for a compensation claim?

## Seizure and confiscation of assets

### International legal basis

Article 12 of the UNTOC requires States Parties to enable the identification, tracing, freezing, or seizure of any proceeds (in any form) of crimes for the purpose of confiscation. In addition, States Parties are also required to empower their courts to order that bank, financial or commercial records be made available.

Asset freezing, seizure and confiscation law is complex and detailed. Generally, separate powers 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 proven. Module 16: “Financial investigations in trafficking in persons” provides further guidance.

Specific challenges are posed by the transnational nature of trafficking in persons. Victims who have changed jurisdiction from the location of the crime or since their identification as trafficking victims face clear practical difficulties in pursuing compensation claim across borders. They also face difficulties when a trafficker is transferred to another jurisdiction for prosecution or assets are located outside the territory.

Where assets can be traced, frozen and seized, States must be empowered to confiscate them. If those assets can be used for compensation, the procedures in a civil case and in a criminal case differ. In a civil case, the confiscation is usually limited to the value of the damages awarded but in a criminal case all assets arising from the crime or general criminal activity may be confiscated depending on the regulations in that jurisdiction.

There must be an explicit legal linkage of the confiscated assets to the payment of compensation orders. Where this does not exist it can inhibit or delay the compensation payment. Alternatively all or some of the confiscated assets could be used to establish or contribute to a fund to make compensation payments to victims of crime, including trafficking in persons.



### Practical guidance

The following points should be considered:

- Find out what the procedures for compensation of victims are in your jurisdiction;
- Think “compensation” from the outset of a case;
- Always identify and do what you can to identify, trace, freeze or seize assets as soon as you can in an investigation;
- Investigators and prosecutors should ensure they have proof and all documentation required to obtain compensation in a criminal court case. This includes supporting any claims for compensation with as much comprehensive detail of the harm done as possible;
- In claiming for compensation, victims should be provided with as much information and assistance as possible to allow them to follow this route. Such information includes laws and procedures on compensation;
- Consider working with lawyers, paralegals, including law students, NGOs and other bodies that may be able to advise and support compensation claims;
- Do not just consider the compensation possibilities in your own jurisdiction. Other jurisdictions may provide compensation opportunities;
- Make sure victims have access to interpreters and translators to overcome language barriers.

## Summary

There are two basic ways of funding compensation: through the assets of offenders (traffickers in this case) and through State-funded compensation schemes.

The administration of compensation payment to victims could either be by judicial process or by administrative action. In the case of judicial action, it could be in two ways; namely,

- The court trying the trafficker ordering compensation to be paid to the victim at the end of a criminal trial or,
- The victim filing a separate civil claim.

A claim could potentially be made up of several bases on which compensation is requested including, but not limited to:

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- Medical expenses;
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# UNODC

United Nations Office on Drugs and Crime

Vienna International Centre, PO Box 500, 1400 Vienna, Austria  
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-5866, [www.unodc.org](http://www.unodc.org)