



Tool 8.17 Restitution and compensation for victims

Overview

This tool refers to the provisions of the Organized Crime Convention and the Trafficking in Persons Protocol that require appropriate procedures to be established to provide compensation. The tool also discusses the purpose and source of compensation, and principles concerning its provision contained in international and regional instruments. Lastly, some promising examples of domestic systems providing compensation to victims of trafficking are highlighted and resources for strengthening compensation mechanisms are recommended.

The Trafficking in Persons Protocol and the Organized Crime Convention

Article 6, paragraph 6 of the Trafficking in Persons Protocol states: “Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered”. This means that when the possibility of obtaining compensation does not exist under national law, legislation may be required to establish appropriate schemes.

The corresponding provision of the Organized Crime Convention, found in article 25, paragraph 2, requires that at least some “appropriate procedures” are established to provide access to compensation or restitution.

The Protocol does not specify any potential source of compensation. Consequently any or all of the following general options would probably meet the requirements 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 (i.e. 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 the result of a criminal offence.

The legislative framework establishing the mechanisms to make compensation claims is an important starting point for providing trafficked persons with access to compensation for harm suffered and wages lost. However, the mere existence of such laws is not sufficient.



Source: Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations publication, Sales No. E.05.V.2). These guides can be consulted at:

www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html

Victims of human trafficking have a right to receive compensation from the trafficker for the physical or mental harm suffered at the hands of the trafficker or because they did not receive any payment for their labour or services. Access to compensation is closely linked to other issues:

- **Information.** Trafficked persons are often prevented from gaining access to compensation because they do not know about their right to receive compensation and the necessary procedural steps to take. Therefore, information provided by law enforcement officers or private lawyers is an important prerequisite for such access. For more on this, see Tool 8.4 and Tool 8.15.
- **Confiscation of assets.** Traffickers often hide their money or move it abroad, which prevents trafficked persons from enforcing their compensation claims. In order to overcome this obstacle, States should confiscate any property and money resulting from trafficking and use it to compensate victims. States should also strengthen international law enforcement cooperation to secure access to the traffickers' assets moved abroad. See Tool 4.6 and Tool 5.7.



Despite the importance to victims of trafficking of receiving compensation, their right to compensation is much neglected.

The purpose of compensation

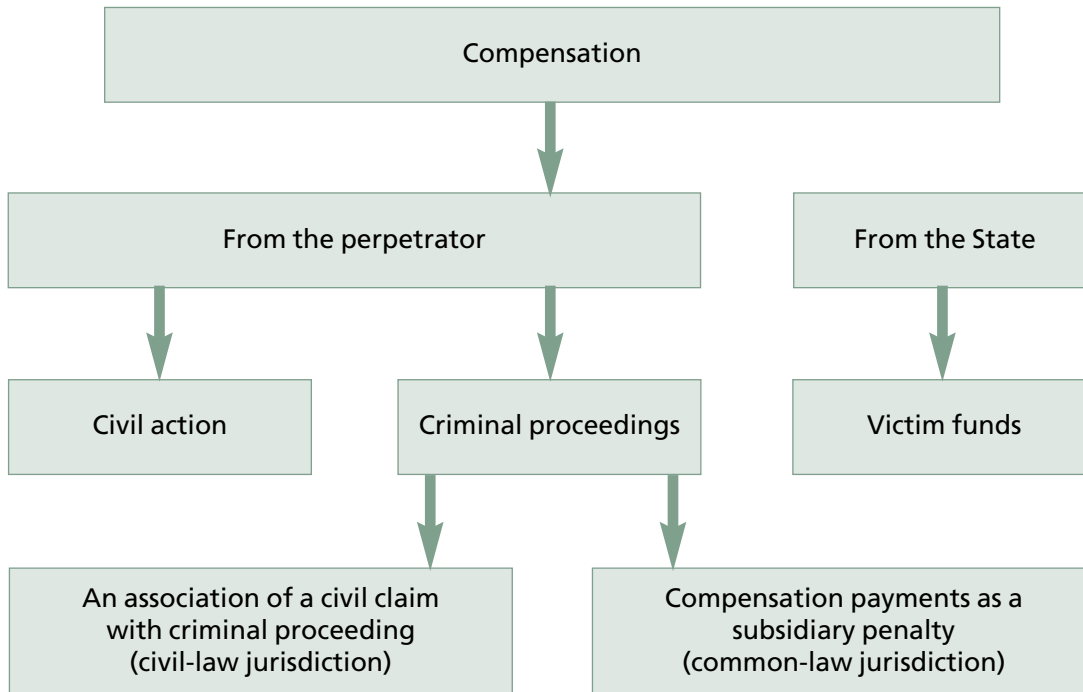
Receiving compensation is important for victims of trafficking not only because of the financial component but also because it has a symbolic meaning.

- At a societal level, awarding compensation acknowledges that trafficking is a crime
- At an individual level, the victim's pain and suffering are acknowledged and compensation can constitute a first step towards overcoming trauma inflicted and abuses suffered
- At a practical level, compensation can assist victims in rebuilding their lives
- At a retributive level, compensation paid by traffickers can constitute a form of punishment and deter other traffickers

Sources and types of compensation

Article 14 of the Organized Crime Convention provides a legal basis for States parties to cooperate internationally in matters of compensation. Article 16 of the Convention requires States parties to give priority consideration to returning the confiscated proceeds of crime or property to the requesting State party so that it can give compensation to victims. Article 25 requires States Parties to establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention. Their right to such access must be communicated to victims.

Within different legal frameworks, there are three main methods of obtaining compensation payment: through criminal proceedings, through civil action (including claims for damages and under labour laws) and through administrative systems (such as State compensation schemes—funds established by Governments).



Source: OSCE, *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons; a Practical Handbook*, p. 84

Civil law procedures

In most countries, victims can pursue a civil claim for compensation on the basis of a wrongdoing which has caused them loss in tort law or under contractual rights (fraud, assault, imprisonment, debt). It is also necessary to note that victims of trafficking may have rights in labour law regardless of the existence of any form of contract. Although such civil law proceedings may seem more accessible to a trafficking victim than criminal proceedings, as the police are not involved, they still require a perpetrator to have been identified and, if the victim is to receive compensation, the perpetrator must be within the jurisdiction and financially solvent. Damages will be calculated on the basis of national civil law and will usually include both moral and material damages.

Criminal law procedures

Some countries connect civil actions for compensation with criminal proceedings against the perpetrator. This means that a single trial both punishes the perpetrator and compensates the victim, thus reducing the stress on victims. This is also achieved in countries where payment of compensation is part of the sentence imposed on the perpetrator. Where civil proceedings are appended to a criminal case, there is the dual advantage of having two procedures rolled into one, and the prosecutor is responsible for gathering and presenting

evidence on the liability of the perpetrator to pay compensation. In some countries, a court order for compensation to be paid by the perpetrator can be made at the sentencing. Criminal compensation calculations may be made on the same basis as in national civil law or on a completely different basis. These types of claim require a victim to have been identified by the authorities and for a perpetrator to have been prosecuted and found guilty in criminal proceedings. Prosecuting trafficking offences is difficult, however, because often the offender is unknown or has fled the jurisdiction or there is insufficient evidence of the involuntary nature of the work performed by the victim, or the victim is unwilling or unable to cooperate with law enforcement.

Special funds to provide compensation claims

Compensation can also be paid by or through the State. Some countries have established State-administered schemes for victims of violent crime. State-funded or State-subsidized compensation schemes have the great advantage of providing a guaranteed payment of compensation to the victim and it is not necessary for a specific perpetrator to be located or identified. A police report, together with a willingness on the part of the victim to assist the police with the investigation is usually sufficient. State schemes may also be relatively streamlined and unbureaucratic, and quicker than civil proceedings.

Compensation schemes may be funded from several sources, including: fines, confiscated property of the perpetrators, tax revenues, other means of State funding, donations from private individuals and institutions. In order for such funds to assist victims effectively:

- There should be no exclusion on the grounds of “illegality” (given that people who are trafficked rarely have legal status in their destination country)
- The process should be simple and efficient (given that most victims are promptly returned to their country of origin)
- Victims should be protected from revictimization by the court process to the greatest extent possible

The compensation claim

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

- Pain and suffering due to physical or psychological violence
- Medical expenses
- Unpaid or underpaid wages
- Reimbursement of illegal “fees” paid to a recruitment or employment agency, or for smuggling or transportation
- “Fines” imposed by traffickers for bad behaviour
- Excessive, fraudulent or illegal “deductions” from wages for rent, subsistence, transport, tax or social security “payments”

Enforcement is far easier where assets have been traced, seized or frozen and confiscated in the course of civil or criminal proceedings. For more on asset seizure and confiscation, see Tool 4.6 and Tool 5.7.

Aggravated, exemplary or punitive damages may be available to trafficking victims in some jurisdictions. They usually serve to punish a wrongdoer for particularly outrageous conduct, therefore having a deterrent element, and can be related to the wealth of the wrongdoer. These concepts will be novel to other jurisdictions but there is nothing to prevent States introducing such concepts where the types of action for which compensation is being claimed warrant a particularly punitive response as a matter of public policy.

The quicker and easier a compensation scheme is to navigate, the more accessible it will be for victims, both internally and internationally. Specific challenges are posed by the transnational nature of trafficking in human beings. Victims who have changed jurisdiction 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 when a criminal or defendant in a civil/labour lawsuit has assets located mainly outside the territory. Some important things to ensure are:

- Access to translators to overcome language barriers (see Tool 8.4)
- Access to information about laws and procedures in the country where the claim is made (see Tool 8.15)
- Efficient and comprehensive evidence gathering (see Chapter 5)
- Assistance to cover travel costs and in obtaining visas for attending hearings



Source: *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons; a Practical Handbook* (Warsaw, OSCE, 2004), available at:

www.osce.org/documents/odihhr/2004/05/2903_en.pdf

Principles of providing compensation to victims of crime

International principles

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

In accordance with principles 8 to 13 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex), compensation should include the return of property or payment for harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, provision of services and restoration of rights. States should encourage the establishment, strengthening and expansion of national funds for compensation to victims of crime.

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.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

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 is available at:

www.un.org/documents/ga/res/40/a40r034.htm

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

The relevant paragraphs of the Basic Principles and Guidelines (General Assembly resolution 60/147, annex) read:

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.

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.



The Basic Principles and Guidelines are available at:
www2.ohchr.org/english/law/remedy.htm

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (General Assembly resolution 45/158, annex) stresses the right of migrant workers to receive compensation even in the case of their expulsion (art. 22, paras. 6 and 9; art. 68, para. 2). Expulsion shall not prejudice any rights of a migrant worker acquired in accordance with the law of the State of employment, including the right to receive wages and other entitlements due to her or him. Before or after departure, the person concerned shall have a reasonable opportunity to settle any claims for wages and other entitlements due to him or her and any pending liabilities. Measures to eliminate the employment of undocumented migrant workers shall not impair their rights with respect to the ability to bring civil claims against their employers.



The text of Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is available at:
www.un.org/documents/ga/res/45/a45r158.htm

European principles

Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings

This Framework Decision of the Council of the European Union is designed to afford the best legal protection and defence to victims, irrespective of the member State in which they find themselves. To that end, member States are called upon to align their legislation so as

to guarantee victims various rights, including those of compensation and refund of legal costs. In relation to victims' rights to compensation in criminal proceedings, article 9 of the Framework Decision states:

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.



The full text of the Council Framework Decision is available at:

http://ec.europa.eu/justice_home/doc_centre/criminal/doc_criminal_intro_en.htm

European Convention on the Compensation of Victims of Violent Crimes

The European Convention on the Compensation of Victims of Violent Crimes (*European Treaty Series*, No. 116) of 1983 provides for victim compensation as follows:

Article 2

1. When compensation is not fully available from other sources the State shall contribute to compensate:

- (a) Those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
- (b) The dependants of persons who have died as a result of such crime.

2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished.

...

Article 3

Compensation shall be paid by the State on whose territory the crime was committed:

- (a) To nationals of the States party to this Convention;
- (b) To nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.

...

Article 8

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 organized crime or his membership of an organization 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*).



The full text of the European Convention on the Compensation of Victims of Violent Crimes is available at:

<http://conventions.coe.int/treaty/en/Treaties/Word/116.doc>

Council of Europe Convention on Action against Trafficking in Human Beings

The Council of Europe Convention on Action against Trafficking in Human Beings (*Council of Europe Treaty Series*, No. 197, adopted by the Committee of Ministers on 3 May 2005 and opened for signature in Warsaw on 16 May 2005), contains several provisions about compensation, including the following key article:

Article 15. Compensation and legal redress

1. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.
2. Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.
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 full text of the Council of Europe Convention on Action against Trafficking in Human Beings is available at:

www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/default_en.asp

Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe

The OSCE Office for Democratic Institutions and Human Rights conducted an eight-country study to review systems and practice of awarding compensation to trafficked and exploited persons in Albania, France, Moldova, Romania, the Russian Federation, Ukraine, the United Kingdom and the United States, representing different legal traditions within the OSCE region. A background paper on the study, entitled “Compensation for trafficked and exploited persons in the OSCE region” was prepared for a workshop on the issue held in Barcelona, Spain, from 10 to 12 December 2007. It reported that there were various ways in which compensation can be paid:

- State-funded or subsidized compensation schemes
- “Damages” paid by the person responsible for loss or injury through criminal or civil proceedings
- Compensation through labour court proceedings

In assessing the effectiveness of compensation systems, the background paper found, inter alia, that:

- Access to other rights, so-called ancillary rights, such as advice services, security, legal, social and medical assistance as well as residence permits, for the duration of a claim procedure, is crucial to making compensation schemes accessible and effective for trafficked persons.
- The offence of trafficking may not be the offence prosecuted in a particular case, even though it exists in national law. This in turn may affect the victim’s eligibility for compensation.
- The effectiveness of a compensation system is dependant on its overall legal environment; therefore efforts to improve compensation schemes may be fruitless if the rule of law is not adequate in a particular country and unless broader rule of law reforms are undertaken at the same time.



The background paper entitled “Compensation for trafficked and exploited persons in the OSCE region” will be published in 2008 and made available at:

www.osce.org/odihr/publications.html

Promising practice

Assistance and Compensation to Crime Victims Act (Bulgaria)

At its plenary sitting on 18 December 2006, the National Assembly of Bulgaria adopted the Assistance and Compensation to Crime Victims Act, which provides for the compensation of victims of crime, including persons who have been trafficked, and for the provision to them of support, such as medical assistance and legal advice. The authorities are given the responsibility of informing victims of such rights.

New South Wales Victims Compensation Tribunal (Australia)

The New South Wales Victims Compensation Tribunal was established under the Victims Support and Rehabilitation Act 1996, and consists of magistrates who determine appeals against rulings and make orders for recovery of money from convicted offenders, compensation assessors who make determinations in compensation claims and approve counselling applications, and tribunal staff who provide administrative support in the processing and determination of compensation and counselling claims, appeals and restitution. In May 2007, the Tribunal awarded compensation to a Thai woman who was trafficked to Australia as a child for the purpose of sexual exploitation.

www.theage.com.au/articles/2007/05/28/1180205160434.html

Law on Combating of Trafficking in Persons and Sexual Exploitation of Children Law No. 3 (1) of 2000 (Cyprus)

By virtue of article 8 of this law, victims of exploitation have a right to special and general damages from their perpetrators. In assessing such damages, courts can take into account the extent of exploitation, the benefit the perpetrator derived from the exploitation, the extent to which the future prospects of the victim were adversely affected by having being trafficked, the culpability of the offender and the relationship of the offender with the victim. Special damages can include all costs incurred as a result of the trafficking, including the cost of repatriation.

Israel

Legislation enables the Government to seize traffickers' assets for use in the rehabilitation of victims and for compensation.

Nigeria

The National Agency for the Prohibition of Traffic in Persons and other Related Matters of Nigeria was established pursuant to the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003. That Act, as amended in December 2005, provides for the creation of a trust fund to provide for victims' needs while they are in the care of the Agency and to provide them with compensation. The fund is to be derived from the auction of the seized and forfeited assets of traffickers. The Victim's Support Manual of the Agency states that a trafficked person has a right to compensation against his or her trafficker for economic, physical and psychological damage.

www.naptip.gov.ng/victimsup.htm

Serbia

Victims are able to file civil suits against traffickers. Victims pursuing criminal or civil suits are entitled to temporary residence permits and may obtain employment or leave the country pending trial proceedings.

Thailand

The draft prevention and suppression of human trafficking act criminalizes all forms of trafficking and provides for greater care and compensation for victims.

The former Yugoslav Republic of Macedonia

Victims can institute civil proceedings against traffickers to claim damages and compensation.

Hong Kong Special Administrative Region of China

Victims may initiate civil proceedings for damages or compensation arising from injuries sustained as a result of being trafficked.

Recommended resources

Global Alliance against Traffic in Women, "Material justice: seeking compensation in trafficking cases"

Alliance News, Issue 27 July 2007

In this issue of its *Alliance News*, GAATW provides overviews and analyses of avenues of compensation for trafficked persons.



Issue 27 of *Alliance News* is available at:

www.gaatw.net/publications/Alliance%20News/July2007/AllianceNews_July07final.pdf

Organization for Security and Cooperation in Europe, National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons; a Practical Handbook

The OSCE national referral mechanisms handbook discusses compensation and seizure of criminal gains or assets. In section 5 of the handbook, types of compensation victims may be entitled to are examined, as well as the mechanisms by which such compensation can be delivered.



National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons; a Practical Handbook (Warsaw, OSCE, 2004) is available at:

www.osce.org/documents/odihr/2004/05/2903_en.pdf

“Compensation for trafficked and exploited persons in the OSCE region”

This document was prepared by Katy Thompson and Allison Jernow for the workshop on compensating trafficked and exploited persons in the OSCE region, organized by the OSCE Office for Democratic Institutions and Human Rights in Barcelona, Spain, from 10 to 12 December 2007.



Upon publication in 2008, the document will be available from:
www.osce.org/odihr/publications.html

Civil Litigation on Behalf of Victims of Human Trafficking

This manual on civil litigation by Kathleen Kim and Daniel Werner was published in 2005 by the Legal Aid Foundation of Los Angeles.



The manual can be downloaded by visiting:
www.lafla.org/clientservices/specialprojects/trafres.asp

Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto

The UNODC legislative guides to the Organized Crime Convention and its Protocols provide some guidance on those provisions pertaining to compensation.



The guides can be consulted at:
www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html