

The Right to a Remedy under International Law
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Justice at Last: European Action for Compensation for Victims of Crime

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[1] This paper looks at the legal regime for enabling people who have been trafficked to obtain compensation for the physical, sexual and/or psychological harm they have suffered at the hands of their traffickers, as well as for earnings they have been denied for work they have been forced to do.

[2] If we consider in more detail the kind of harm inflicted upon trafficked people, we are looking at the crimes of rape, sexual and other assaults, kidnap, deprivation of liberty – just to start. In civil (non-criminal) law terms, these would be the torts of battery, false imprisonment, assault and intentional infliction of emotional distress; all of these are recognised in some form or another in most legal systems. Furthermore, these legal systems allow individuals to bring actions for remedies without the need for any consent or approval of the State.

[3] Accordingly, unless an international instrument adds something to this entitlement, that instrument is, in legal terms, more a platitude, mere window-dressing, than a real tool to help trafficked people get compensation.

[4] In principle, the position is not too bad. The reality is very different, rather like the law – for those old enough to remember 30 years ago – of the German Democratic Republic that permitted all GDR citizens to travel freely in and out of that country. The issue is less about the principle of compensation and more about *effective access* to compensation.

[5] The international legal regime on compensation is extensive, both for trafficking in human beings (THB) in particular and for victims of crime in general;¹ it is not enough just to look at the Council of Europe Convention or the EU anti-trafficking Directive.²

Types of Compensation

[6] There are essentially two ways of financing compensation:

- by the trafficker or the State directly, or by the trafficker indirectly through the State;
- through a fund for victims of crime.

[7] Some instruments stipulate that a trafficked person (or victim of crime) should be able to bring an action against the perpetrator (as noted above). This is already possible in most legal systems. It is quite simple; all the trafficked person has to do is:

- learn the language (often)
- find the law
- understand the law
- learn the legal procedure
- locate the trafficker
- launch a legal action
- win the legal action
- obtain an order for compensation
- enforce that order
- apply for costs
- hope that the trafficker has not hidden their assets in the meantime
- and possibly find a way to remain in the country for several years.

There has to be a better way.

[8] Alternatively, the trafficked person may seek to obtain compensation from the traffickers' assets which have been seized by the State. It may be that such funds are ring-fenced exclusively for trafficked people, but they may go into a general fund accessible to other victims of crime.

[9] States may establish special funds for victims of trafficking or of violent crime, to which trafficked persons may apply for compensation. One potential difficulty with this is that not all trafficked people have been subjected to physical violence but they may nevertheless have been severely exploited. Alternatively, there may be a fund exclusively for trafficked persons. This is already unusual: how many other crimes attract their own dedicated compensation schemes?

[10] But how are such funds financed? If the money is derived only from the assets of the traffickers/criminals, the fund may be very meagre indeed. That is why there is much to be

¹ Liliana Sorrentino, Legal Assessment: Compensation Practices (LaStrada, 2018), Annex 1, 55-59. There is also a number of soft-law instruments - 62-65 as well as child-specific measures – 65-66

² Council of Europe Convention on Action against Trafficking in Human Beings (2005); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

said for a state-funded scheme. Given that the State may have failed in its duty to prevent a person being trafficked in the first place, there arguably a legal duty to compensate, in addition to the policy argument that it could be desirable to do so.³ Some instruments call for the establishment of a fund if none such already exists.

[11] The notion of compensation should be seen as wider than the opportunity for individuals to obtain financial redress. The State could also establish, and fund, programmes aimed at social assistance and integration of trafficked persons.

Procedures

[12] Some of the practical challenges in obtaining compensation were noted above. It is, quite bluntly, farcical for any State to claim that trafficked people have a right to compensation unless they make it happen in reality. There must be *effective access* to compensation; this is much more than just *locus standi* to bring an individual claim.

[13] This means that there must be accessible procedures which can be understood by those who need to use them – like the small claims system in the UK:

- There must be information available – possibly in relevant foreign languages – on how to bring a claim
- There should be legal advice available free of charge to those who need it
- That advice should be guaranteed where it is necessary to understand legal procedure
- There must be access to interpretation services
- There should be access to compensation from abroad, where the trafficked person has returned to his/her home country.

The blame game

[14] People who have been trafficked are entitled to compensation, but for what? For sure, they should be compensated for the fact that they have been exploited and maltreated by the traffickers. But – *Rantsev* again – they should also be entitled to compensation where they have been failed by the State. There has emerged in recent years widespread recognition that trafficked persons should not be penalised for offences they have been compelled to commit in the course, or as a consequence, of being trafficked.⁴ The scope of the principle may be subject to debate but its existence is not.

³ *Rantsev v Cyprus and Russia*, ECtHR, Application No. 25965/04 (2010), para 286; Ryszard Piotrowicz, “States’ Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations”, (2012) 24 *International Journal of Refugee Law* 181, at 196-199

⁴ Council of Europe Convention on Action against Trafficking in Human Beings (2005), Article 26; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Article 8; ASEAN Convention Against Trafficking in Persons, Especially Women and Children (2015), Article 14.7; OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013); Ryszard Piotrowicz and Liliana Sorrentino, “Human Trafficking and the Emergence of the Non-Punishment Principle”, (2016) 16 *Human Rights Law Review* 669-699

[15] States fail trafficked people if they do not protect them adequately from being trafficked. But they also fail trafficked people when they drag them before the courts and either fail to recognise that they have been trafficked and they are convicted; or else they do recognise that they have been trafficked but the courts convict them anyway.

[16] Should trafficked people be compensated for this? Should everyone be compensated if they have been wrongfully convicted? The issue here is that the trafficked person should arguably not have been in court in the first place, because it should have been recognised earlier that they had been trafficked, and a prosecution discontinued.

[17] State practice on this is variable. If we accept that a trafficked person should not be prosecuted or penalised in the first place, then the State has failed should such prosecution go ahead or penalty be imposed. This issue needs to be discussed further.