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Analysis of the current rights of victims of human trafficking in Ukraine to obtain compensation

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Summary:

This publication is an attempt to summarize the experiences of Ukrainian human rights advocates in obtaining compensation and reimbursement for victims of human trafficking. The document analyzes the international and national legislation in place which aims to guarantee the rights of victims to compensation, as well as identifying material and non-material forms of harm and how they are to be proven and substantiated in court. The document further describes the main obstacles faced by both adult and child victims of human trafficking seeking compensation. The paper analyzes the experiences of other countries in developing compensation funds for victims of human trafficking.

This document has been developed for teachers, law students, human rights advocates, social workers, lawyers and all parties interested in human rights and countering human trafficking.

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Introduction

Human trafficking has long been a problem in Ukraine. Every year, Ukrainian law enforcement open hundreds of criminal cases under Article 149 of the Criminal Code of Ukraine entitled 'Human trafficking and other illegal recruitment/transportation/transfer/harboring or receipt of persons.' Many individuals go on to be convicted of the recruitment, transfer and forced labor and sexual exploitation of Ukrainian citizens. While many trafficked persons are successfully identified as victims of human trafficking, not all go on to claim compensation for the material or non-material harm they have suffered, and of those that do, even fewer go on to actually successfully obtain this compensation.

Human trafficking is a serious crime, and convicted traffickers can face up to 15 years imprisonment. Successful prosecution is mostly based on victim testimonies, and practice shows that investigation agencies often do too little to protect the interests of the victim. Involvement in investigations can be dangerous for victims, as they are often required to publicly testify in an open court against their traffickers. They also spend time and money travelling to court, as well as being required to provide extensive proof and undergo cross-examination to prove their ordeal. As a result, a successful outcome is rare, and even when the court rules in favor of the victim, compensation is rarely obtained.

The issue of compensation for victims of human trafficking has been urgent in Ukraine ever since the country began to recognize and punish offenders for crimes related to human trafficking. One of the first pieces of research on the issue was conducted by La Strada-Ukraine and Anti-Slavery International¹ in 2002. The research examined human trafficking cases, court sentencing and the problem of obtaining compensation, along with the problems associated with investigating the crime.

In 2006, the Organization for Security and Co-operation in Europe commissioned a study of investigative and court practices dealing with cases under Article 149 of the Criminal Code of Ukraine. The analysis looked at 50 cases, including interviews with the main parties involved, material taken from the cases and an examination of the sentencing handed down. The results of the study were highlighted in the publication 'Investigation and consideration of human trafficking cases in court: an analysis of selected cases'². However, as in other similar publications, the study in question includes only one paragraph on the issue of compensation.

In 2009, the OSCE Office for Democratic Institutions and Human Rights carried out a piece of research on compensation entitled 'Compensation for victims of exploitation and human trafficking in the OSCE region.' The publication includes analysis of international documents and national experiences of OSCE countries. While the document does provide an analysis of compensation practices, a national overview of the problems associated with providing and obtaining compensation is not included.

A few further studies of the issues around compensation and court practices in handling

¹ Elaine Pearson Human traffic, human rights: redefining victim protection.- Anti-Slavery International, 2002.- 231 c.

² І. Шваб «Питання розслідування та розгляду в судах справ з торгівлі людьми; аналіз вибраних справ».- К, ОБСЕ 2007 .- 157 с.

human trafficking cases also deserve a mention. When looking at court rulings for cases being tried under Article 149 of the Criminal Code of Ukraine, there are several key points to be considered. These include the very specific criminal characteristics of human trafficking as a crime, the root causes of the crime, issues around protecting the rights of parties involved in criminal cases, sentencing according to Article 149 of the Criminal Code of Ukraine, and victim compensation³. A further publication, prepared with the support of the American Lawyers Association, summarizes the results of public monitoring of court hearings on human trafficking cases in the Kherson, Lugansk and Zhytomyr regions of Ukraine, as well as highlighting the problems associated with enforcing court decisions on victim compensation⁴.

An overview of the publications mentioned above is proof of both the urgency of the issue of victim compensation in Ukraine and also the lack of comprehensive research available on the issue. The International Women's Rights Center La Strada-Ukraine, in collaboration with the La Strada International, as part of the COMP.ACT project, has therefore decided to put together the following document. It aims to provide a comprehensive overview of the situation regarding compensation for victims of human trafficking and to provide practical recommendations to improve access for victims to such compensation. **It sets out to:**

- analyze international and national legislation on the rights of victims (both adults and children) to compensation;
- analyze whether courts award compensation to victims;
- summarize the methods used to prove injury (material and non-material);
- study the obstacles victims face when claiming compensation;
- summarize international experience in awarding compensation to victims of human trafficking;
- develop recommendations to improve access of victims of human in Ukraine trafficking to compensation.

This work is based on secondary analysis of compensation data. Experts on human trafficking and victim compensation (not only for trafficked persons) were invited to work on this publication. Their shared best practices for methods of proving and substantiating injury claims were adapted to human trafficking cases. Analysis of satisfying claims in court under Article 149 of the Criminal Code of Ukraine was based on data taken from the State Register of Court decisions of Ukraine, available on the Ministry of Justice of Ukraine website⁵. Obstacles faced by victims of human trafficking in claiming compensation are described in this work based on the experience of non-governmental organizations which support victims of human trafficking in court, with particular input from the NGO 'Successful Women' which works in the Kherson region of Ukraine.

³ Ахтирська Н.М. Торгівля людьми в Україні. Про що свідчить судова практика. - К, 2006.- 82 с.;

⁴ Стефанів Н.С. Узагальнення результатів громадського моніторингу судових засідань під час розгляду кримінальних справ про торгівлю людьми в Херсонській, Луганській та Житомирській областях. - К, American Bar Association, 2010.- 40 с.

⁵ <http://reyestr.court.gov.ua/>

An overview of human trafficking in Ukraine

Various internal and external factors exist which can go some way towards explaining the spread of human trafficking in post-Soviet countries. These include high unemployment, low living standards, low literacy levels among the population, a superficial and idealized notion of life in the West, a lack of real information about the risk of trafficking, highly sexualized culture, media and advertising, economic globalization, high levels of international labor migration, and increased opportunities for Ukrainian citizens to migrate and work abroad etc.

An assessment that we made of the situation several years ago remains relevant today. However, while high unemployment was cited 5-8 years ago as being the main contributing factor, today, women and experts stress that, although unemployment remains a problem, it a further factor is the low salaries among those actually *in* employment, even for those in highly skilled professions such as doctors, medical workers and teachers, amongst whom the majority are women. As a result, a significant proportion of the population is living below the poverty line and many in this group expressed strong feelings of hopelessness with their situation. They spoke of a severe drop in the living standards of those who, by international standards, belonged to the middle classes.

Inefficient political and economic reforms, corruption amongst officials, social welfare policies which exist in name only, the deepening divide between the wealthy elite and the remaining majority of the population, and unrealistic and unfulfilled dreams of what the first years of independence in the country would bring has also led to a lack of belief in positive change for Ukraine. Young people see no future for themselves, and neither do their parents. Higher education is no guarantee of finding a good job and enjoying a good quality of life. Going abroad is seen not only as a solution to financial problems, but also as a life ambition for the younger generations. Clearly, under such circumstances, awareness campaigns are not enough; significant social and political change is required.

The situation is complicated further by the fact that there are not enough legitimate migration opportunities for those seeking to go abroad, which leads to the criminalization of migration. Indeed, experts in the field emphasize the general increase of criminalization in society as a whole as a further important contributing factor.

There have also been some changes in the law. Whilst a law against trafficking has been passed, there is no real functioning system in Ukraine in place to protect victims from traffickers. Similarly, there is no law in place to guarantee the protection of Ukrainian citizens abroad.

External factors which contribute to the spread of human trafficking include the opening of borders; simplified travel and work opportunities abroad; the globalization of the shadow economy; the spread of international organized crime; an increasing divide between richer and poorer countries; legislation decriminalizing prostitution in many countries; and the globalization of economies and migration. It would obviously be virtually impossible to eliminate such global factors. They must be understood and taken into account when trying to tackle human trafficking.

An important factor to emerge around the start of the century was the presence of so-called social networks abroad. According to a study by the International Labor Organization, the majority of migrants, both those who had fallen prey to traffickers and those who had had positive

experiences abroad, had either relatives or close friends already abroad when they left the country. These networks helped both to spread information about possible employment opportunities abroad and also facilitated travel arrangements for those back home. Individuals who travelled to distant countries for illegal employment organized through an intermediary who paid for travel arrangements and documents were the most likely group to become victims of trafficking. Individuals were less likely to refuse travel, even when they had doubts over safety, if these costs were covered by other parties. These costs then become debts which must be repaid, a further factor preventing workers from voluntarily leaving their 'employment' abroad.

Trends in human trafficking

There is no single, consolidated statistical database on the number of victims of human trafficking. Law-enforcement authorities do have official data on the number of identified victims, but these data obviously do not include unidentified cases. The IOM and various social services have their own statistics on the numbers of people to whom they have provided assistance which are not always taken into account by the Ministry of Internal Affairs statistical data.

Since 1998, the Ministry of the Interior has registered 2874 crimes and issued 528 court rulings for trafficking cases. More than 40 criminal groups in Ukraine have been identified and broken up, and more than 1300 trafficked persons, including more than 160 minors, were returned home.

Agencies and departments from within the Ukrainian State Border Agency both independently and in cooperation with other law-enforcement agencies of Ukraine carried out the following operations:

- They identified the following numbers of organized criminal groups: 2007 - 28/66, 2008 - 34/74, 2009 - 37/94, 2010 - 45/113;
- They stopped the activities of the following numbers of organized criminal groups: 2007 - 22/51, 2008 - 19/38, 2009 - 29/70, 2010 - 33/70;
- They arrested the following numbers of individuals involved in this type of organized crime: 2007 - 41, 2008 - 42, 2009 - 62, 2010 - 44;

In addition to this, based on evidence provided by the State Border Protection authority and in accordance with Art. 97 of the Code of Ukraine, law-enforcement agencies filed the following numbers of criminal proceedings: 2007 - 28, 2008 - 30, 2009 - 66, 2010 - 42;

The following numbers of criminal charges were brought against individuals: 2007 - 32, 2008 - 23, 2009 - 56, 2010 - 37.

According to the Department on Combating Cyber-crime and Trafficking in Human Beings of the Ministry of Internal Affairs of Ukraine, the number of children identified as being victims of human trafficking who were returned to Ukraine totaled 313 between 2003 and 2010 (2003 - 40, 2004 - 15, 2005 - 39, 2006 - 52, 2007 - 55, 2008 - 37, 2009 - 42, 2010 - 33).

Chapter 1. The right to compensation: an overview of national and international standards

In order to define the right to claim compensation for damages caused by human trafficking-related offences, it is necessary to consider the factors which facilitate access to compensation. It is particularly important to understand who is entitled to compensation, the process by which they are to claim, what types of compensation exist and what type of legislation regulates how compensation is awarded. The following chapter will examine these issues.

1.1 The legal status of victims of human trafficking

Although damages compensation exists in civil law, if the damages caused to the individual is the result of a criminal offence, it falls under the criminal procedural code. The criminal procedural code of Ukraine includes provisions for parties injured as a result of a criminal act to be eligible to claim compensation. The first step is to file a criminal complaint. Secondly, the victim must be awarded the legal status of victim.

Who is the victim? The grounds and procedures for victim identification

In accordance with Paragraphs 1 and 2 of Article 49 of the Criminal Procedure Code of Ukraine (CPC) **the victim is any person to have suffered moral, physical or material injury as a result of a criminal offence.** The investigator/investigating authorities must either award or deny victim status to the individual, and this decision must then be upheld by the court.

Awarding victim status to the individual is dependant on and requires that the investigating authorities and the court register the correct procedural documents, as set out by law. Without these documents confirming the individual's victim status, the individual cannot take part in criminal proceedings, and therefore has no rights under the CPC. The investigating authorities or the court must, independently of the individual, investigate the circumstances of the criminal case and identify whether harm was suffered by the individual. They may then award the individual victim status. Indeed, timely recognition of victim status aids the investigation process. The way in which the victim is treated at the beginning of the investigation can determine the general progress of the case.

Even when individuals applied for legal status as victims, the investigating authorities were slow to reach decisions and created artificial obstacles for the victims.

Which indicators are used to determine an individual's status as victim?

As already noted, the Criminal Procedure Code states that it is the investigating authorities which must identify an individual's status as victim and determine if 'the crime caused moral, physical and material damages' (Art. 49 of the CPC). The law, however, does not determine at what stage of preliminary investigations this issue should be addressed. It is obviously unacceptable to award victim status at the end of an investigation, since such an approach completely ignores the interests and rights of the victim to be protected from potential threats from suspects and defendants during the course of the investigation. It is very important, in our opinion, that the new CPC provide

additional procedural guarantees for the timely legal recognition of victims. Decisions to award or deny victim status should consider all instances and proof of physical, material or moral damages suffered by the victim, regardless of the victim's age, physical or mental condition.

As stated in Chapter 3 of Decree № 13 of the Plenum of the Supreme Court of Ukraine, dated 02/07/2004, entitled 'Court use of legislation pertaining to the rights of crime victims,' persons cannot be recognized as victims of crimes which they have themselves committed. It does state, however, that courts should award victim status to victims regardless of whether the crime committed against them was provoked by their actions. In such cases, any illegal behavior on the part of the victim may influence judgment and sentencing of the actions of the defendant. Decree № 13 also explains that 'a person who has suffered injury and has filed a claim for compensation is recognized both as a victim and as a civil plaintiff, and should be afforded all the rights of a victim and civil plaintiff, as foreseen by law.'

Thus, where a written request has been submitted by an individual or entity to the investigating authorities for legal victim status and to claim compensation, the investigating authorities are required to reach a conclusive decision on the status of said victim and civil plaintiff.

Who is able to represent the interests of the victim?

Generally speaking, there are two types of representation considered across the full range of civil, administrative and criminal proceedings: representation by law and by agreement.

Representation by law

In cases where the victim is a child or is a person suffering from physical or mental health problems and who is therefore unable to fully represent themselves and their interests, legal representation is provided by the victim's legal representative. Examples of legal representatives include: parents/adoptive parents, guardians, trustees or representatives of care institutions and organizations looking after the individual. One important point to note is that the representation by law does not require the consent of the victim in order to act on their behalf. The representative is required to submit to the investigating authority a document certifying their status as parent, guardian or other person under whose guardianship the victim is currently placed.

Special conditions regarding legal representatives of minors are set out in legislation. In particular, Paragraph 8 of Decree № 13 of the Plenum of the Supreme Court of Ukraine, dated 02/07/2004, states that: 'After the victim has reached 18 years of age, the functions of the legal representative shall be terminated, although the latter may continue to act on behalf of the victim in the case.' At this point the Decree also stresses the need to protect the interests of minors during trial proceedings: 'In the absence of parents or legal representatives of the child victim, the court must ensure that the victim is represented by one of the persons mentioned in Art. 52 of the CPC.' This refers to lawyers, relatives, or others.

Representation by agreement

Representation by law does not deny the possibility of representation by agreement, should the individual wish it. A representative by agreement may be any person who is fit to provide legal

assistance, including, but not necessarily, a lawyer.

Further issues related to representation by law

Section 5 of Article 49 of the CPC of Ukraine states that in cases where a criminal act has resulted in the death of the victim, the rights provided for in this article are transferred to the deceased's close relatives, which, according to Section 11, Art. 32 of the CPC includes parents, spouses, children, siblings, grandparents, and grandchildren. This list of persons entitled to compensation on behalf of the deceased is exhaustive, and further persons not listed cannot replace the deceased as victim. More than one of these close relatives can replace the deceased as victim; indeed, all can be awarded victim status in place of the deceased.

1.2. Legal grounds for compensation – international law and Ukrainian legislation

Where a victim's human rights and freedoms have been violated, and in accordance with the relevant international legal institutions and international organizations to which Ukraine is party, the victim is entitled to legal protection from the national legal system. This right is upheld in Art. 55 of the Constitution of Ukraine.

A legal mechanism to guarantee compensation for moral/non material damages caused to victims as a result of a violation of their rights or freedoms does exist. However, this mechanism of compensation for moral/non material damages is rarely used in everyday legal practice in Ukraine, nor is it used in individual cases of human rights' violations, especially for victims of trafficking.

INTERNATIONAL LAW

One can refer to the provisions set out in the UN *Universal Declaration of Human Rights* (1948) when examining the right to compensation for moral/non material damages. Article 8 of the Declaration states that everyone has the right to an effective remedy by the competent national tribunals, granted by the constitution or laws, where their fundamental human rights have been violated.

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) is the most important regional international document on human rights, and includes Ukraine. It proclaims the following rights as the right to life (Article 2), prohibition of torture (Article 3), prohibition of slavery and forced labor (Article 4), and the right to liberty and security (Article 5). The Convention also contains a provision regarding protection of the declared rights, namely, the right to effective legal protection (Article 13). In line with Art. 13 of the Convention, Article 41 defines fair compensation as one means of achieving effective legal protection.

Another important international instrument is the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted at the 40th UN General Assembly, 29 November 1985. Thus, Paragraph 4 of the preamble of the Declaration contains calls to member states to identify and confiscate offenders' property to provide restitution to victims.

In Article 1 of the same Declaration, Section A defines a 'victim' as a person who

individually or collectively has suffered harm, including physical or mental injury and emotional suffering, through acts or omissions that are in violation of existing national criminal laws that are operative within Member States.

Articles 4, 5 and 7 of the section entitled 'Access to justice and fair treatment' of the Declaration ensure the rights of victims to prompt redress, that judicial and administrative mechanisms should be established to enable victims to obtain redress, and also indicate the possibility of informal mechanisms to provide compensation to victims. In addition, it is stated that victims who seek compensation through such mechanisms should be informed of their rights.

Article 8 of this Declaration, in the section entitled 'Restitution', ensures the provision of fair restitution to victims, which should also include payment for the harm or loss suffered. Thus, the term 'harm' specifies neither material nor moral damage, the concept being used in its general sense, covering all possible types of such damage.

Where appropriate, offenders or third parties who are responsible for their behavior should provide fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for harm or loss suffered, reimbursement of the expenses incurred as a result of victimization, the provision of services and the restoration of rights.

The following section entitled 'Compensation' contains two articles which state the obligations of the State to take measures to provide financial compensation to victims, their families and dependants, as well as emphasizing the importance of establishing, strengthening and expanding national funds for compensation to victims, including:

12. When compensation is not fully available from the offender or other sources, States should endeavor 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 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 guidelines and common standards outlined in the Declaration were specified in Resolution (77) 27 on compensation to victims of criminal offences, adopted by the Committee of Ministers of the Council of Europe. The Declaration's provisions were later taken into account and significantly expanded upon in the *European Convention on the Compensation of Victims of Violent Crimes* in Strasbourg, adopted on November 24, 1983.

Ukraine signed the Convention in April 2005, but as of December 2011 it has yet to be

ratified. As part of measures to prepare for the ratification by the Parliament of Ukraine of the *European Convention on the Compensation of Victims of Violent Crime*, the inter-agency group of the Ministry of Justice has developed a draft law entitled ‘On compensation to victims of violent crime.’ The Convention contains specific and general provisions. Part 1 of Article 2 of the Convention contains a general provision for the State to provide compensation if it can not be obtained from other sources (offenders’ property or funds, etc.), and also specifies which categories of victims are entitled to such compensation, as well as any possible dependants they may have.

Part 2 of the article defends the right of victims of violent crime to fair and mandatory restitution, and emphasizes that compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished.

Article 4 of the Convention outlines the types of damages that are subject to compensation under any circumstances.

Compensation shall cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalization expenses and funeral expenses, and, as regards dependants, loss of maintenance.

Returning to Article 2 of that Convention, which specifies that in cases ‘when compensation is not fully available from other sources the State shall contribute to compensate’, the definition of ‘serious bodily injury or impairment of health’ used is not exhaustive and does not have a single meaning. For example, serious bodily injury or impairment of health can be followed by or can go on to cause moral suffering, and therefore become an integral part of the damage.

Thus, the Convention is the basis according to which the general principles of protection of victims of violent crime in the form of compensation for all forms of harm suffered are founded.

The right to compensation of victims of violent crimes is outlined in other documents of international law, in particular the Final Document of the XI Congress of the International Association of Criminal Law, the Final Document of V Congress of the United Nations for the Prevention of Crime and Treatment of Offenders (Geneva, 1-12 September 1975), and Recommendations № R (85) 11 ‘Status of the victim in criminal law and criminal procedure’ adopted by the CE Committee of Ministers in 1985.

It should also be noted that although international law uses specific terms such as ‘damages’, ‘lost profits’, ‘revenue’, etc., this does not mean that it places particular emphasis on certain types of damages (e.g. material or moral/non material) or that it recognizes only certain types of restitution. On the contrary, the lack of reductive and restrictive definitions is indicative of the importance of maintaining a comprehensive value-based understanding and approach to damages compensation, in which it is viewed as separate and independent from causality but which is perceived and used as a mechanism by which to restore the violated rights of crime victims, irrespective of the type of damages (material or moral) and how they was caused (through direct or indirect harm, loss of earnings, financial loss, personal injury, harm to mental health, etc.), and to guarantee the rights of victims to fair compensation for all possible damages suffered.

In terms of ensuring the right to compensation for trafficked persons, it is necessary to mention two documents that contain specific provisions regarding such rights.

In 2000, the United Nations adopted the *Protocol to Prevent and Punish Trafficking in Persons, especially Women and Children*, supplementing the United Nations *Convention against Transnational Organized Crime*, to which Ukraine became signatory in 2004, and which includes provision for the duty of the State to create a system which provides victims of human trafficking with compensation.

Palermo Protocol provisions were strengthened in the regional document adopted by the Council of Europe in 2005, in particular the *Convention on Action against Trafficking in Human Beings*, which Ukraine ratified in 2010. The convention contains several provisions that establish the obligation of State Parties to ensure the right to compensation (Article 15).

Accordingly, Part 2 of Article 23 entitled ‘Sanctions and Measures’ requires that States provide an opportunity to award compensation to victims of trafficking through appropriate sanctions on entities or persons that are brought to justice. One such sanction is enforced through fines.

UKRAINIAN LEGISLATION

A review of Ukrainian legislation regarding the legal basis for compensation should start with the Constitution of Ukraine as the basic law of the State. Thus, within Article 3 of the Constitution of Ukraine, the State awards the highest social value to its citizens, and should be guided and defined by its attempts to guarantee the rights and freedoms of its citizens.

Where the victim’s human rights and freedoms have been violated, the victim is entitled to legal protection within the national judicial system, and, where this fails, is entitled to appeal to relevant international judicial institutions or relevant international organizations to which Ukraine is party. This right is upheld in Art. 55 of the Constitution of Ukraine:

Everyone has the right, after exhausting all domestic legal remedies, to seek protection of their rights and freedoms before the relevant international judicial institutions or before the relevant bodies of international organizations, to which Ukraine is party.
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The constitutional right to restitution in Part 4 of Article 32 of the Constitution of Ukraine includes the right to compensation for material and moral damages suffered as a result of unlawful information-gathering or slander. Article 56 of the Constitution of Ukraine upholds the right to compensation for material and moral damages suffered through illegal decisions, or acts or omissions of State authorities and local government. Paragraph 4 of Article 62 of the Constitution of Ukraine upholds the right to compensation for material and moral damages in the event of quashed sentences in cases of miscarriages of justice.

A number of articles in the Civil Code of Ukraine outline regulations concerning compensation for damages. The important sections are Section 22 entitled ‘Damages and methods of restitution for material damages’ and Article 23 entitled ‘Compensation for moral damages’.

Thus, pursuant to Paragraph 1 of Article 22 of the Central Committee of Ukraine, the individual's right to receive compensation is upheld in Part 2 of that article, the term 'damages' meaning both 'actual damages' and 'lost profit'.

The right to compensation for damages caused by crime is also regulated by special laws. In 2011, a new law 'On combating human trafficking' was adopted in Ukraine. Although it does not contain specific articles on compensation for damages suffered as a result of human trafficking, it does include provisions for such compensation. Thus, Article 12 stipulates that the main objectives in combating human trafficking is, amongst other things, to ensure the restoration of the rights of trafficked persons. Article 16 of the same Act states that an individual legally recognized as a victim of human trafficking has the right to guaranteed personal safety, respect, and freedom, as well as the right to obtain compensation for moral and material damages suffered as a result of harm caused them by other individuals, in the manner prescribed by the Civil Code of Ukraine. Unfortunately, the law does not make special provisions for compensation to be covered by the State in the event that compensation can not be fully obtained from the offender. However, this and the creation of a special compensation fund were included in draft provisions. The new law states only that legally recognized victims of human trafficking should receive a one-off compensation pay-out in the manner prescribed by the Cabinet of Ministers of Ukraine (Section 5. 16).

The Law of Ukraine 'On ensuring equal rights of men and women' contains a separate Article 23 entitled 'Compensation for material losses and moral damages caused as a result of gender discrimination or sexual harassment.'

Article 23. Compensation for material losses and moral damages caused as a result of gender discrimination or sexual harassment

A person is entitled to compensation for material losses and moral damages suffered because of gender discrimination or sexual harassment. Compensation for moral damages is awarded regardless of whether material losses are recoverable and regardless of the size of the material losses.

The procedures for compensation of material losses and moral damages as a result of gender discrimination or sexual harassment is defined by law.

In theory, if a victim of trafficking was also the victim of gender discrimination, he/she would be eligible to apply to court to claim compensation for material losses and moral damages. In reality, the practice of awarding compensation for harm suffered because of gender discrimination is non-existent, and neither is there any detailed legal mechanism for this. The main obstacles remain the difficulty in obtaining adequate evidence and the lack of understanding of the issues amongst those in the legal system.

1.2.1. Compensation for material damages

As mentioned above, the victim is understood to be a person who has suffered moral, material or personal injury as a result of a crime. Accordingly, such a person has the right to compensation to redress the negative consequences of such unlawful acts.

The nature of the negative consequences of crime vary greatly and can be divided into two groups: material and moral damages, dependent on the presence or absence of any material losses.

The former includes restitution for destroyed or damaged property, or for loss of ownership of property. For example, in cases of robbery, theft and resale of stolen goods, it may be impossible to return stolen property. This category also includes the cost of medical treatment. **Material damages can be clearly defined in monetary terms and claims for material damages are usually substantiated based on expert opinion.** By referring to documented evidence of the value of the destroyed or damaged property, the court will decide to award compensation commensurate with the material damages suffered by the victim. Besides direct damage to personal property, material damages can also include cases of infringement of certain individual rights, such as copyright and labor rights.

Compensation for material damages may cover:

1. Direct material and financial damages inflicted on the person;
2. Loss of income as a result of crime;
3. The cost of medical treatment, prosthetics, rehabilitation, and in case of death, burial costs and care for any disabled members of the victim's family or any children belonging to the victim;
4. Costs covered by health services for hospital treatment of the victim

Physical injury is any negative physical change to have occurred in the person as a result of the offence. This includes: personal injury, damaged health and physical pain. An essential feature of physical injury is that it impacts on a person's life and health, the effects of which can rarely be reversed.

According to the medical and legal guidelines which are used to determine the severity of physical injuries, as approved by Decree 6 of the Ministry of Health of Ukraine as of 17 January 1995, 'from a medical point of view, physical injuries involve damage to the anatomic integrity of tissues, organs and their functions as a result of one or more external damaging factors, be they physical, chemical, biological, or psychological.'

The right to compensation of victims who have sustained moral or physical injury, or who's property has been damaged, is upheld in different sections in current legislation:

- The filing, hearing and resolution of civil claims in criminal proceedings is covered in Article 28 of the Criminal Procedure Code (CPC) of Ukraine;
- Compensation for damages initiated by the court with a civil claim made by a prosecutor is covered in Part 3 of Article 29 of the CPC of Ukraine. It is also used in cases where costs are incurred for the hospital treatment of the victim, for reimbursement of hospital expenses or in cases where a victim cannot independently claim redress due to health problems or for other valid reasons. Persons on whose behalf prosecutors present a civil claim have a right to abandon that claim. However, if the court decides that the abandonment contradicts the law or violates another

party's rights and interests as protected by law, it is not accepted and the claim is considered regardless;

- The return of property to victims of crime is covered in Article 81 of the CPC of Ukraine;
- As part of compulsory educative measures, youth offenders are required to provide compensation for damages they have caused.

The points made below can be defined in terms of action and non-action.

'Action' refers to the right to file for civil action in criminal proceedings, as stipulated in Article 28 of the CPC of Ukraine, for claims filed either by the victim or by a prosecutor on behalf of said victim. In such cases, the court considers the evidence and sentencing is determined according to how fully the civil plaintiff's demands have been satisfied.

The second are 'non-action', and refer to cases brought to court independently of the victim's wishes, even if the claimant cannot or does not want to claim compensation. Their practical implementation falls under the responsibility of the State to safeguard the material rights of victims. The court should also, on behalf of the State, encourage defendants to take independent steps to compensate the injured party.

Key aspects of damages compensation

According to current national legislation, including Part 1, Art. 1177 of the Civil Code of Ukraine, the State has a duty to compensate material damages caused as a result of crime if:

- the offender is not found;
- the offender is insolvent.

A similar rule exists in cases of personal injury or death due to crime (Part 1 of Art. CC 1207). However, in such cases, the right to claim belongs not only to the victim but also to other persons approved by the applicable law should the victim be deceased (Article 1200 of the CC); this applies to any child up to 18 years of age, spouses, pension-aged parents for the remainder of their lives, disabled dependants, and other persons who may have been dependent on the victim for up to 5 years after the death of the deceased.

In cases where the offender is insolvent, the State has an obligation to provide restitution for material damages.

It should be noted that the procedure for compensation for material damages by the State, according to Paragraph 2 of Article 1177, was supposed to be provided for by a special law. However, as of December 2011, there has yet to be any such special law that would regulate the procedures in place for State-paid compensation in Ukraine.

Considering the very specific nature of personal injury damages caused to the life and health of any individual, the State, represented by state agencies and local government authorities, has the right to request that the offender cover the costs of medical treatment for victims of the crime

committed (Part 2, Art. 1191 of the CC).

An important guarantee of the rights and interests of the victim in compensation claims is that the financial circumstances of the offender are irrelevant in determining the amount of compensation due to the victim, and compensation claims can therefore not be reduced for victims of less wealthy offenders (Part 4, Art. 1193 of the CC of Ukraine).

1.2.2. Compensation of moral damages for victims

Part 1 of Article 23 of the Civil Code of Ukraine provides for the right of crime victims to moral compensation. Part 2 of the same Article defines moral damages.

Moral damages can include:

- physical pain and suffering due to physical injury or other damage to health;
- distress caused by illegal behavior inflicted on the victim or the victim's family members;
- distress due to destruction or damage of property;
- humiliation and violation of honor and dignity of the victim.

It is worth mentioning that Part 3 of the same article upholds compensation for moral damages and sets out the criteria according to which the monetary equivalent of the damages caused should be decided.

The monetary equivalent for damages is determined by the court and is dependent on the nature of the offence, the degree of physical and mental pain inflicted, the degree to which the condition of the victim has deteriorated, the degree of fault of the offender where fault caused moral damages and is the basis for compensation, as well as other essential circumstances. In determining the amount of compensation due, fair and reasonable judgment is required. Since victims of trafficking may, in many cases, face a variety of complex negative social and legal repercussions as a result of having their rights violated (e.g. personal property rights, loss of reputation, etc.) it should be noted that the Civil Code of Ukraine has a broad understanding of compensation for moral damages.

Examples include Paragraph 2 of Article 200 of the Civil Code of Ukraine entitled 'Information,' which upholds the right to compensation for moral damages in cases such as copyright infringement or where informational content has been used illegally.

Part 2 of Article 276 of the Civil Code of Ukraine ('Moral Reparations') establishes a rule according to which if there is not immediate redress of the moral violation suffered by the individual, the court may decide to restore the individual's rights and provide compensation for moral damages.

Article 280 of the Civil Code of Ukraine entitled ‘The right to compensation for individuals who have suffered moral violations.’

If material or moral damages were caused to the individual as a result of a moral violation, this person is entitled to compensation.

Article 386 of the Civil Code of Ukraine (‘The principles of protection of material rights’), upholds the right to compensation for moral damages in cases of violation of material rights. Part 3. Article 1167 of the Civil Code of Ukraine (‘Grounds for liability for moral damages’) describes the general basis of liability for moral damages, namely:

1. moral damages to a person or to an entity caused by unlawful decisions and actions or by the absence of lawful decisions and actions, shall be compensated by the offender, where guilt has been proven, except for cases prescribed in Part 2 of this article;
2. moral damages should be compensated regardless of fault committed by a government agency, by the authority of the Autonomous Republic of Crimea, or by a local authority, person or entity to have caused the damage;
3. moral damages should be compensated where the individual has suffered personal injury or death;
4. moral damages should be compensated if the damages were caused as a result of unlawful conviction, unlawful criminal prosecution, unlawful detention or bail, illegal imposition of administrative penalties in the form of detention or correctional work;
5. and in other cases prescribed by the law.

As victims of trafficking are often subjected to violence, they may suffer injuries to their health. The provision of compensation in such cases is foreseen in Article 1168 of the Civil Code of Ukraine:

1. Moral damages caused by personal injury or other harm to health can be compensated through a lump sum payment or through monthly payments.
2. In the case of moral damages caused by the death of an individual, it is spouses, parents/adoptive parents, children/adopted children, and those who lived with the individual as a family who shall receive compensation on behalf of the deceased.

The question of how courts are to go about providing compensation for moral damages is addressed in the relevant resolutions of the Supreme Court of Ukraine. However, due to the multitude of different national legislative provisions governing the practice of compensation for moral damages, the fact that they function across different branches of the law, and that the various legal provisions feature in different legal documents, such as, for example, the above mentioned guidelines for court practice in Ukraine and the resolutions set out by the Plenum of the Supreme Court of Ukraine, their effective use in judicial practice in Ukraine is hindered.

From a practical point of view, both the legal definition of moral damages and the process by which persons affected by such moral damages are assisted through compensation are severely lacking.

1.2.3 Key aspects of criminal proceedings for damages compensation

Regardless of whether the injury inflicted as a result of a criminal offence is related to material or moral damages, the victim must have their rights reinstated.

The most effective way of protecting the rights of the victim is (or should be) to bring a civil claim before the criminal courts. Having analyzed the provisions of Articles 28, 50, 51, 52, 123 and 124 of the CPC of Ukraine, we can highlight key features of a civil claim for damages.

Requirements for civil action.

1) Who has the right to claim compensation for damages?

A person who has suffered material damages as a result of an offence, or an authorized representative (prosecutor) on that person's behalf, in cases established by law.

2) Who must provide compensation for damages?

The accused/defendant or persons legally responsible for the actions of the accused/defendant.

3) Where should compensation claims be filed?

They should be filed with the relevant bodies in charge of the criminal proceedings.

4) Under whose direction is a claim filed?

A criminal case and criminal proceedings are filed by order of the courts.

5) What information is required as part of a compensation claim?

The full circumstances of the injury are required, with reference to relevant evidence, (although, as stated in Resolution № 3 of the Supreme Court of Ukraine, dated 31/03/89, in cases where there is a lack of evidence, civil action should also be considered, since as outlined in Paragraph 4 Art. 64 of the CPC of Ukraine, the nature and degree of harm caused by a criminal offence is directly subject to proof in criminal proceedings).

Article 28 of the CPC of Ukraine determines that the person who suffered material damages may file civil action as part of a criminal case. Such cases raise the question of the possibility of compensation being awarded as a result of civil action in criminal proceedings. Generally speaking, we might question the expediency of considering moral damages in criminal proceedings, since the concept of moral damages is absent from the CPC of Ukraine. However, Resolution 4 of the Plenum of the Supreme Court of Ukraine 'On judicial practice in cases of moral damages', dated 31.03.95, amended in accordance with Resolutions 5, dated 25.05.2001 and 1, dated 27.02.2009, of

the Plenum of the Supreme Court of Ukraine, explains in Paragraph 1.17 that the victim has the right to file for compensation for moral damages in both civil and criminal proceedings.

Based on the rules set out in Articles 4 and 5 of the CCP and Articles 28, 49, 50 of the CPC of Ukraine, the victim, that is, the person to have suffered personal injury, or moral and material damages (harm to health, honor, dignity, destruction of property, etc.) as a result of a criminal offence, has the right to file for compensation in either criminal or civil proceedings.

In a criminal case, the request for compensation for moral damages shall be considered and resolved by the court if the victim to have suffered these damages is legally acknowledged to be the victim and civil plaintiff, and if a written statement exists, the contents of which correspond to Art. 137 of the CCP. Such criminal cases, in accordance with Art. 27 of the CCP, are to be filed only if the victim wishes to file a complaint. Compensation claims for moral damages may be contained in the complaint of a criminal case.

In cases where the victim to have suffered these damages is not legally acknowledged to be the victim and civil plaintiff, these issues should be resolved at the stage where the accused is in court, or in accordance with Art. 296 of the CPC of Ukraine in the preparatory part of the trial.

The Supreme Court's definition is correct and logical, since material damages as a result of a criminal offence can not only be defined as damage to an individual's property but can also involve violation of the individual and of the individual's rights.

The filing, hearing and resolution of civil claims as part of criminal proceedings are not subject to court fees and the costs of any technical support required during proceedings are not charged. For identical claims filed as part of civil proceedings, the costs outlined above would be applied.

A civil claim may be brought to court during the preliminary investigation stages and also while the case is being considered by the court, **but this must be done before the court case begins.**

A person who has not filed a civil action in a criminal case, and a person whose civil action is not being considered in court, is entitled to file it as part of civil proceedings.

One reason behind the inadequate level of protection of the rights and interests of such individuals is that the relevant investigating authorities neglect their duties. As a result, in many cases, civil actions are not filed and do not make it to court simply because victims are not made aware that the option to file a complaint exists.

To ensure and protect the rights of victims to compensation for material or moral damages, Article 29 of the CPC of Ukraine states that offenders' property should be confiscated as a means of obtaining compensation for victims.

Accordingly, Article 49 of the CPC of Ukraine stipulates that a person who has suffered damages as a result of a criminal offence (moral, physical or material) acquires the procedural status of victim, and is thus entitled to provide appropriate evidence of injury suffered and to petition such

evidence, including through the use of forensic and psychological examination to determine moral damages suffered.

In cases of material damages suffered by trafficked persons, Article 50 of the CPC of Ukraine provides for the right of that individual to be recognized as a civil plaintiff in cases where the individual intends to claim for compensation for damages suffered. The civil plaintiff and the victim have the right to petition certain proceedings in order to ensure that proper claims for compensation for damages are made.

According to the aforementioned rights of the victim or civil plaintiff to petition for evidence as a means of proving the degree of injury suffered, Part 4 of Article 64 of the CPC of Ukraine states the necessity of proving the circumstances to have caused such damages.

The following information must be proven at the pre-trial investigation stage, as well as during the inquiry and during the course of the criminal proceedings in court:

1) The nature and degree of the damages caused by the criminal offence, and the health costs incurred as a result of medical treatment for the victim of the criminal offence.

Article 66 of the CPC of Ukraine gives broad powers to persons conducting the inquiry, to investigators and to courts involved in gathering evidence. The victim may use this provision for timely securing of the evidence to prove the nature of the damages suffered and the costs incurred as a result of the damages suffered, and also for the examination of witnesses, and the recovery of documents from other physical or legal entities etc.

Since the task of proving moral damages requires specific expertise and plaintiffs are required to sit a psychological examination as part of the process of proving moral damages, the plaintiff may contact the appropriate specialist, psychologist or forensic expert for help in this matter. The right to obtain and the grounds governing the appointment of forensic psychological assessments are outlined in Article 75 of the CPC of Ukraine. It should be noted that under Paragraph 2 of this article, it is not only professional psychologists certified by the Ministry of Justice of Ukraine as court experts, but any persons who have the necessary knowledge to respond to questions, who may be appointed.

Examinations are held in cases where specific scientific, technical or other specialized knowledge is required. Any person with the relevant expertise can be called on as an expert. The questions put to this individual can not go beyond the scope of their area of expertise. They may not provide opinions on any area that goes beyond the scope of their area of expertise.

1.2.4. Legal grounds for access to compensation for moral and material damages suffered by trafficked persons, including children

Ukraine is party to many international legal agreements on human rights and in particular, child rights. Among these international documents are the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, the *UN Convention on the Rights of the Child*, the *Protocol to Prevent and Punish Trafficking in Persons, especially Women and Children*, the *UN*

Convention against Transnational Organized Crime, and the *Council of Europe Convention on action against trafficking in human beings*. In fact, all international legal instruments to combat trafficking in persons, ratified by Ukraine, establish the obligation of State parties to take measures to ensure access to compensation for victims, taking into account the special needs of child victims.

To determine the degree to which national legislation corresponds to international standards on access to compensation for child victims of trafficking, we need to answer the following questions:

1. How are child victims of trafficking in human beings recognized and identified as such?
2. Who is able to represent the interests of child victims?
3. What compensation are child victims entitled to?
4. Who should pay compensation to child victims of trafficking?

Human trafficking is a criminal offence; criminal liability for the offence is outlined in Art. 149 of the Criminal Code of Ukraine. Committing the offence against a child is an aggravated offence and is treated as a serious crime. Ukrainian legislation does not contain special provisions to recognize the status of child victims of human trafficking. The first step in obtaining compensation is achieving the legal status of a victim of a criminal offence, necessary in order for a criminal investigation to be opened. Due to their young age and psychologically and emotionally fragile states, children are unable to personally and independently represent their own interests before investigating authorities and courts in criminal proceedings. The legislation of Ukraine therefore contains appropriate provisions for the legal representation of children. According to Art. 52 of the CPC of Ukraine, representatives of the victim can include, amongst others, lawyers, relatives, and legal representatives. According to Art. 237 of the Civil Code of Ukraine, representation arises under contract, under law, through the act of a legal entity and on other grounds established by acts of civil law.

According to Art. 242, parents, adoptive parents and legal guardians can all be legitimate representatives for minors in their care. Moreover, Art. 39 of the CPC of Ukraine stipulates that the rights, freedoms and interests of minors under the age of fourteen years and minors between the age of fourteen to eighteen years are to be represented in court by their parents, guardians or other persons specified by law. Article 45 of the CPC foresees that when considering civil action for recovery of compensation for moral and/or material damages, or a similar civil action within criminal proceedings, the prosecutor and executive body may be involved in the process in order to protect the rights of the child involved. Executive authorities in this case represent the authorities who are legal custodians and who are legally required to care for the child.

However, despite the above mentioned provisions in the legislation, there are currently no provisions to ensure children's access to actual compensation.

Firstly, State children's services are not duty-bound by Ukrainian legislation to represent the interests of child victims of crime in court

Secondly, the legislation does not contain provisions on access to free legal assistance for child victims.

Thirdly, in both the current legislation and thus also at a practical level, no special training is provided for specialists on representing child victims in criminal proceedings.

As a result, children face the same difficulties as adult victims; the special needs of children in access to compensation are not fully reflected in national legislation.

According to Ukrainian legislation, a child is entitled to file a claim for compensation for moral and/or material damage through their representative. Such a claim may be filed either as a criminal case (where the child has both the status of victim and of civil plaintiff in criminal proceedings) and as a civil case. Filing a claim in criminal proceedings is more effective, since criminal cases are dealt with more quickly than civil ones. In addition to this, there are greater opportunities to obtain compensation in criminal cases. Article 125 of the CPC of Ukraine stipulates that an investigator, whether at the request of the civil plaintiff or on their own initiative, is required to take the necessary steps to file a civil claim as part of criminal proceedings and any possible future civil action. In cases of criminal offences for which criminal law provides for the confiscation of property, the investigator shall take the necessary measures to ensure enforcement of possible forfeiture of the property.

According to Art. 126, a civil claim and possible confiscation of property is made by the seizure of deposits, valuables and other property of the accused or persons who are legally liable for the actions of the accused, where these deposits, valuables and other property are located, and by confiscation of the main property which has been seized. Seizure of deposits is made solely by the court.

We have already described the grounds for State-paid compensation in cases where the offender is insolvent or has not been identified. It has also been noted that the national legislation is lacking due to the absence of a special law that would have defined the conditions and procedure for compensation for damages (Art. 1177 of the Civil Code of Ukraine). It should also be noted that even were such a law to be passed, it would have little impact on improving access to compensation for child victims, since according to Art. 1177 of the Civil Code, the State is only required to reimburse material, not moral, damages. Practice shows that child victims of trafficking primarily suffer moral damages, since they very rarely own any property or valuables.

The conclusion to be drawn is therefore that child victims of trafficking are not in a position to obtain compensation. The special needs of child victims of human trafficking are taken into account neither at the legislative nor at the practical level. To provide access to compensation to child victims of trafficking and other crimes, legislation should clearly identify a public authority to represent the interests of child victims of crime, provide training for representatives of such an authority, whilst also providing free legal assistance for child victims. The law should also state that child victims of crime who cannot be compensated by the guilty party should receive compensation for material and moral damages from the State, since moral injury will have been suffered in all cases.

1.2.5. Legal grounds for recovery of compensation and reimbursement

Filing a claim and obtaining a favorable court decision is not enough to successfully obtain compensation. Successful compensation claims depend on the actual retrieval of the allocated compensation being enforced once the ruling has been passed. Legislation on the recovery of compensatory damages is set in the CPC, CCP and the Law of Ukraine 'On Enforcement Proceedings'.

In cases where a civil action for compensation was declared as part of a criminal case, the decision to award compensation is dependent on a guilty verdict being passed in the criminal case. Directions on upholding and enforcing the court verdict are outlined in Art. 401 of the CPC. Convictions are then enforced once the verdict has been upheld. The procedures for enforcing convictions are established in Art. 404 of the CPC.

Where compensation is awarded as part of civil proceedings, the procedures for enforcement of rulings in civil cases are set out in the Code for Civil Procedures (CCP) of Ukraine.

Art. 367 of the CPC of Ukraine establishes that **the court should enforce the immediate implementation of rulings** in certain types of cases, including those where compensation is awarded for damages caused by personal injury, harm to health or death, to the nature of a fixed monthly amount. Courts may also enforce immediate collection of the entire amount to be paid.

It is the State Executive Service's responsibility to enforce court rulings. The State Executive Service is part of the Ministry of Justice of Ukraine. Court rulings and decisions handed down by other agencies for recovery of funds are enforced by the tax authorities, by banks and by other financial institutions.

Art. 19 of the law 'On Enforcement Proceedings' states that during enforcement proceedings for any particular case, the creditor (the person in whose favor the decision has been reached), or their representative, must themselves submit an application for enforcement of the court decision. In cases where the interests of the individual or of the State have been represented by the public prosecutor, it is the latter who must put forward the application. Art. 22 sets out the deadline for submission of the application; executive documents on the decision to award compensation should be provided within a year, unless otherwise stated by law. Where immediate enforcement of judicial decisions is required, this should take place the day after they have entered into force. Where court rulings have been postponed, they should be enforced within the specified deadline. Payments due (for the recovery of maintenance, for injuries or damage to health, death of breadwinner, etc.) should be enforced during the period for which such payments are due to be awarded.

Article 30 of the Law of Ukraine 'On enforcement periods' sets the period of enforcement.

The State Executive authority shall enforce rulings within six months of the ruling having been decided, and rulings on moral damages shall be enforced within two months. The enforcement period does not include delays that may be caused as a result of suspension of the enforcement period in order to examine or sell property belonging to the offender, or to prepare documents relating to the property. It also does not include time set aside as part of the enforcement proceedings for any institution, organization, individual or businessperson to make the necessary

deductions from the wages, pensions or other income of the offender. The enforcement period is calculated from when final enforcement proceedings are enacted.

Article 47. The return of enforcement orders to plaintiffs

The enforcement order, according to which the enforcement proceedings are opened, and according to which rulings are enforced, wholly or in part, is returned to the plaintiff if:

- 1) **the debtor has no property** on which the penalty can be imposed, and measures taken by a State enforcement officer or bailiff to investigate and locate the property in accordance with this law were unsuccessful;
- 2) **the debtor has no property, as defined in the enforcement document**, to give to the claimant, or property on which the penalty can be imposed (other than money), and attempts by a State enforcement officer or bailiff to locate such property were unsuccessful;
- 7) **the debtor or the debtor's property** were not found within one year of a search having been opened by the police authorities (this deadline does not apply in cases where the enforcement proceedings relate to alimony, compensation for serious personal injury or other harm to health as a result of loss of breadwinner, and removal of children);
- 8) funds obtained from sale of the debtor's property are **insufficient to satisfy the claim**.

In comparing national legislation on individual rights to compensation for damages caused by criminal offences, including trafficking, with international standards, it is clear that the legislation of Ukraine is generally comprehensive and corresponds to the norms and principles of international law. The legislation of Ukraine is consistently moving towards increased compliance with international standards, and contains numerous regulations that guarantee reparations to victims of violent crimes and which determine the order in which these rules can be applied to victims. However, there are certain failings which hinder the practical implementation of such legal provisions. The Criminal Procedure Law, based on the Criminal Procedure Code adopted under the Soviet Union, and which has been repeatedly amended, establishes that the scope of the rights of victims is much smaller than that of the accused/defendant. Ukrainian Criminal procedural legislation is mostly aimed at ensuring crimes are fully investigated and that offenders are brought to justice, rather than ensuring that the rights of victims are protected. This in turn means that victims continue to suffer.

Criminal Procedure Law upholds certain procedural rights of victims to commence criminal proceedings.

Article 28 of the CCP entitles victims of material damages as a result of crime to file a civil claim as part of a criminal case. This can lead to inconsistencies in civil law, which also uses the terms 'material' and 'moral' damages. Although the Supreme Court has provided some guidance on these issues, a change to legislation such as this could cause problems at the practical level of enforcement for claimants seeking moral damages as part of civil claims.

In terms of victim compensation for victims of trafficking, national legislation does not yet meet international standards. While special legislation on State responsibility to provide compensation has been created, it has as yet not been adopted. Thus, mechanisms to guarantee State-paid compensation for crime victims when restitution cannot be obtained from the offender do not exist.

Chapter 2. Jurisprudence in criminal cases of combating trafficking in human beings in Ukraine

This section examines legal proceedings under Article 149 entitled "Trafficking in human beings or other illegal recruitment/transportation/transfer/harboring or receipt of persons" for the period 2009 - 2011. The analysis in this chapter is based on official statistics from criminal cases in Ukrainian courts related to trafficking in human beings. This information was provided by the State Court Administration. Sentencing figures used in the analysis were found in the State Register of Court Decisions.

According to data from the State Court Administration, under Art.149 of the Criminal Code of Ukraine, 85 sentences were handed down in 2010 and 46 in the first half of 2011. Information on sentencing handed down under Art. 149 obtained from the State Register of Court Decisions search engine states that 40 sentences were handed down in 2009, 48 in 2010, and 47 over a 6 month period in 2011.

2.1. An overview of sentencing under Article 149 of the Criminal Code of Ukraine.

Statistical data and extracts from the rulings clearly illustrate the attitudes of State representatives to the serious problem of trafficking in human beings. Thus, while 279 cases were opened under Article 149 of the CCU in 2009, only 105 of those made it to court for the same year. In 2010, 117 cases, from a total of 257, made it to court. In addition to the cases which were dropped at the beginning of each corresponding year, the courts dealt with 176 cases in 2009 and 212 in 2010. 70 sentences were handed down out of the 176 cases that were dealt with in 2009, and 85 sentences out of the 212 cases dealt with in 2010. 110 individuals were convicted in 2009 (26 from one group) and 120 in 2010 (23 from one group). There was one acquittal in each year. In 2009, 10 cases were referred back for further investigation (5.68% of those which made it to court), and 22 cases were referred back for further investigation in 2010 (10.37%).

308 defendants were identified in 2009 (including 74 who were part of an organized criminal organization), and 371 in 2010 (99 of whom were part of an organized criminal organization). Almost a third of defendants were accused of involvement in organized crime. The very nature of organized crime means that different criminal acts are organized and committed at various levels, which is why it is so dangerous for society as a whole.

It worth mentioning that 73 persons from a total of 110 (66.36%) were convicted in 2009 under Parts 2 and 3 of Article 149 of the Criminal Code of Ukraine (Part 2 - see 48, Part 3 - see 25) for aggravated offences.

In 2010, an even higher percentage of offenders were convicted of aggravated offences under Parts 2 and 3 of Article 149 of the Criminal Code of Ukraine: 94 persons from a total of 120 (78,33%), of which 61 were convicted under Part 2, and 33 under Part 3. Sanctions outlined in Parts 2 and 3 of Article 149 of the Criminal Code of Ukraine state that punishment must take the form of imprisonment only. The information below shows that barely over half of those convicted under Parts 2 and 3 of Article 149 of the CCU actually went on to serve prison sentences.

In 2009 prison sentences were served by almost half (45%) of those convicted under Parts 2

and 3 of Article 149 of the Criminal Code of Ukraine (a total of 73 persons were convicted; 48 persons under Part 2 and 25 persons under Part 3). In 2010, 64 % of those convicted served prison sentences (94 convictions in total: 61 convictions under Part 2, and 33 convictions under Part 3).

Numbers of prisoners released on probation

2009: 40 from a total of 73 (54.79%) were released under Paragraphs 2 and 3 of Article 149 of the Criminal Code of Ukraine.

2010: 33 from a total of 94 (35.1%) were released under Paragraphs 2 and 3 of Article 149 of the Criminal Code of Ukraine.

Court statistics were examined and research carried out into court sentencing practices. Statistical data was collected for 2009 and statistical data as well as full sentencing reports taken from the Registry of Court decisions were collected for 2010 and 2011. Based on this information, we can conclude that human trafficking is a relatively safe criminal business to engage in Ukraine today. The chances of being convicted and of serving a sentence for trafficking human beings for forced sexual exploitation are roughly 50%.

Most examples of sentencing involve circumstances similar to the following:

‘Person 1, who was interrogated in court, pleaded fully guilty and showed clear signs of remorse. Person 1 described to the court that in May 2010, he had agreed with his friends, Person 3 and Person 7, to recruit women to work as prostitutes in Germany, and that he could receive 500 Euros for each woman.

In July 23 2010, Person 1 called his friend, Person 6, and made arrangements to take Person 4, Person 5, Person 9 and Person 10 to Person 3, without telling Person 6 that Person 4 and Person 5 would be going abroad to work as prostitutes.’ (Khmelnitsky district court, Khmelnitsky region, January 24 2011).

Such stories are common; offences committed by groups of individuals involved in the initial recruitment of victims, with the clear intent to make criminal gains, and who are then often released without punishment.

‘Sentencing:

Person 13 was found guilty under Art. 149 Part 2, 332 Part 1 of the Criminal Code of Ukraine and was sentenced to:

- 5 years imprisonment, without confiscation of property under Art. 149 Part 2 of the Criminal Code of Ukraine;
- 2 years imprisonment with confiscation of a ML 430 Mercedes Benz vehicle, registration number DW261FY, № 4JGAB72E8YA150620, issued in 2000, under Art. 332 Part 1 of the Criminal Code of Ukraine.

The final sentence, in accordance with Art. 70 of the Criminal Code of Ukraine, which allows for the absorption of the less severe punishment by the more severe, was therefore 5 years imprisonment.

According to Art. 75 of the Criminal Code of Ukraine, he is to be released from prison and set a probationary period of 3 years under Art. 76 parts 2, 3, 4 of Criminal Code of Ukraine ...' (Khmelnitsky district court sentence, Khmelnitsky region, January 24, 2011).

In many cases, the court initially applies Art. 69 of the Criminal Code, which provides for sentencing below the minimum limit, then additionally applies Art. 75, which provides for exemption from punishment with the appointment of probation. Thus, persons dealt with under Part 3 of Art. 149 of the Criminal Code who were sentenced from between 8 to 15 years imprisonment saw their sentencing reduced by 2 to 3 years.

Reduced sentencing procedures as provided by law

1. In drawing up the various articles which constitute the Criminal Code, legislators wished to offer courts maximum opportunity to individualize sentencing.

However, the wide variety of different situations and possible exceptional or mitigating circumstances which might require reduced sentencing could lead one to conclude that even the minimum sentence or the least severe punishment may be too severe and therefore neither commensurate with the crime nor in keeping with the aims established in Art. 50.

In reference to this, Part 1 Art. 69 states: 'Where there are mitigating circumstances which may reduce sentencing and the severity of the offence, including consideration given to the personal circumstances of the offender, the court may either pass sentencing below the minimum limit prescribed by the sanctions guidelines outlined in this Code, or they may make use of less severe forms of punishment which are not included in sentencing guidelines for serious crimes. Where this is applied, the court shall not pass a sentence below the minimum limit prescribed by the General Part of this Code.'

Firstly, we should note that this article is not applied to prescribe punishment for lesser offences. According to Art. 12, punishment can be either imprisonment for a term not exceeding 2 years, or another less severe form of punishment. This provision is easy to understand: firstly, because the sanctions for these crimes are alternative sanctions and are designed to afford the court the option to be more lenient in sentencing, and secondly, because the sanctions which include imprisonment may not exceed a period of 2 years, and also afford courts the option to hand down sentences from between 1 to 2 years imprisonment, irrespective of provisions made in Art. 69. Finally, for lesser offences, rules on exemption from punishment according to Articles 44 and 74 of the CCU are widely used.

2. Art. 69 foresees two types of leniency in sentencing where sentencing may be less severe than that provided for by the law: 1) Sentencing below the statutory minimum. 2) Use of less severe forms of punishment.

3. Where sentencing is below the minimum statutory minimum, it is handed down in keeping with alternative sanctions which allow for leniency in sentencing, regardless of the article under which the offender has been found criminally liable. For example, while Part 2 Art. 186 states that those found guilty of theft should be sentenced to between four and six years imprisonment, Art. 69 allows the court to sentence offenders to less than four years. However, Art. 69 may not undermine the General Criminal Code which, in this example, sets the minimum sentence at one year imprisonment.

4. It is more common for courts to use less severe forms of punishment as part of their sentencing than to use sentencing below the statutory minimum, because the majority of the sanctions outlined in the Criminal Code uphold only the most severe sentencing guidelines. Use of less severe forms of punishment means that courts may introduce penalties which are not included in the Criminal Code sanctions but which are more lenient and which reflect the severity of the offences as outlined in Art. 51. Thus, an offender who could initially have been sentenced to imprisonment might have his punishment reduced to community service and from there, further reduced to payment of a fine.

5. The law clearly defines the circumstances under which Art. 69 may be applied, which may justify greater leniency in sentencing and which can reduce the perceived severity of the offence committed as well as the guilt of the offender. They are outlined in Art. 66, and include the following: harm prevention, cases where the offender has offered to pay compensation, mitigating circumstances such as difficult circumstances for the offender at the time of the offence, a lack of serious negative consequences as a result of the offence, a guilty plea from the offender, active cooperation in the investigation from the offender, whether or not the offender played a primary or secondary role in committing the offence, whether the offender has dependants such as children or elderly parents, ill health of the offender or of the offender's family members, unfavorable working conditions, wrongful behavior or provocation on the part of the victim etc.

The offender's behavior, personality, employment history and other positive characteristics are all taken into account. The sentencing ruling should be applied in accordance with Art. 69. Justification for the sentencing handed down must be provided in the final sentencing stages which should conclude by outlining the nature of the punishment, and the fact that it is being applied in accordance with Art. 69.

The most severe sentence to have been set for pimping was seven years imprisonment, set by Pyatyhatskiy district court in Dnipropetrovsk on June 30, 2011. The offender in this case sold at least 4 persons into sexual exploitation. On April 26 2011, another individual was sentenced to 6 years imprisonment by Krasnodon district court in the Lugansk region, for attempting to illegally transport and sell a teenager for sexual exploitation in Russia. A further individual, involved in trafficking human beings to Turkey, was sentenced to 5 years imprisonment under Part 2 of Art. 149 of the Criminal Code. Sentencing was handed down by Pechersk district court in Kyiv, June 21, 2011.

In the Lugansk case mentioned above, (in which the court applied the minimum sentence) a group of 4 persons who organized the sale of at least 7 women for sexual exploitation were also involved. On February 21, 2011, these individuals were sentenced under Art. 69 of the Criminal

Code of Ukraine to less than the minimum limit set by Lutsk district court in the Volyn region. Their offences were dealt with under Part 3 of Art. 149 of the Criminal Code of Ukraine, which provides for 8 to 15 years imprisonment and for property to be confiscated where possible. However, the court found grounds to apply Art. 69 of the CCU and sentenced the pimps to 3 years and the organizer to 6 months.

2.2. An overview of sentencing for compensation for moral and material damages

Only 9 of the 45 sentences recorded in the registry in 2010 involved cases of moral damages. The records lack detail and fail to explain the reasoning behind the amounts of compensation awarded or why courts felt that compensation should not be awarded.

Extract from sentencing by Yalta City Court, Crimea, 02/08/2010, case № 1-309/2010.

Court motives: ‘The civil claim presented by Person 5 shall not be satisfied, due to lack of any sufficient substantiation which would give grounds for the claim to be satisfied.’

Resolution: The court did not consider it necessary to include its ruling on the civil claim in the final section of the procedural document for this case.

Regarding practically all the remaining sentences reviewed, it was stated that ‘a civil claim was not filed.’ The courts were therefore unable to address the issue of compensation. It is not known whether victims were informed of their rights to file civil claims during criminal investigations and once court proceedings were underway. In two cases, offenders offered to pay compensation to their victims, which resulted in greater leniency in sentencing.

In our opinion, the sums requested in the claims (which courts cannot exceed) and awarded in sentencing are not commensurate with the severity of the offences committed and do not reflect the circumstances surrounding cases. In the majority of those cases which we reviewed, courts decided to only partially satisfy victims’ claims, even when they had requested only a few thousand UAH.

Cases registered in 2011 in which victims had their compensation claims for moral damages fully satisfied made up less than 10% of the total number (in only 4 out of a total of 47 cases.) Here are some of them:

Case 1: Unsuccessful suicide attempt / № 1-214/11, Sentencing by Konotop district court, Sumy region, 30.06.2011/.

In a small town in the north of the country with a high unemployment rate, the defendants in question decided to engage in criminal activity in order to earn money, with no regard for the possible negative impact that their activities might have on the welfare of others. ‘Person 3, taking advantage of their own personal relationship with the family of the victim as well as the emotional and psychological characteristics of the victim and the victim’s precarious financial situation, lied and convinced the victim, Person 8, to travel to Moscow. Person 3 assured the victim that she would find work as a cleaner earning a daily wage of 500 rubles a day, with a monthly wage of 8,000 UAH. Person 3 lied to Person 8 about the true nature of the work, which involved prostitution. The

victim had no choice over which customers she could see, her rights and freedom of movement were denied, she could not choose where she lived, and she was prevented from returning to Ukraine.’ As a result of her exploitation and the violence that she suffered, she attempted to commit suicide upon her return to Ukraine.

Among the evidence cited in court were signs of physical and psychological trauma:

- Forensic medical examination № 111, carried out on 08/02/2011, during which the victim, known as Person 8, was examined, found her to have a physical injury in the form of scar on her left leg. (T. 1. sheets. 233-234);
- Outpatient comprehensive forensic psychological and psychiatric examination number 57, carried out on 24/02/2011, found that the victim (Person 8) had no mental illness; one month after her return, Person 8 was found to be suffering from serious stress and a failure to recover and readapt; she attempted suicide because of the criminal acts (sexual exploitation) committed against her person. (T.1 sheets 202-205);

Person 3 was found guilty of the offence under Part 3 of Art. 149 of the Criminal Code of Ukraine, and sentenced to 5 years imprisonment, with confiscation of property (not including residence) by the court, in accordance with Art. 69 of the Criminal Code of Ukraine. The civil action was completely satisfied. The 40 000 UAN awarded for moral damages was collected.

Case 2. Job placement advertised through an ‘official’ licensed intermediary company. № 1-28/11. Sentencing took place on 29/04/2011, by the Central Municipal District Court in Krivyi Rig, Dnipropetrovsk region.

The following could be said to be a typical example. A private entrepreneur obtained a license from the Ministry for Mediation Services in employing persons abroad. The individual conspired with other unknown persons to place advertisements in newspapers for jobs abroad. At least seven victims of sexual exploitation were identified.

The court made the following rulings on the existence of material and moral damages:

‘The victims (Persons 18, 4, 5 and 20) all filed civil claims. They claimed material and moral damages from the defendant. The Court found the claims to be partly substantiated. due to the fact that no evidence was provided in court to substantiate claims that wages had been withheld, what the exact sum of money which the offender had withheld was, and whether the offender (Person 9) was obliged to reimburse these wages. Compensation for material damages are therefore not included in sentencing, and the claims must be refused. Claims for moral damages will be partially satisfied.

The court found that the victims had suffered emotional distress due to the illegal actions of the defendant (who had transported them abroad without disclosing to them the real nature of their work). The court took into account the extent and degree of anguish suffered by the victims, the guilt of the defendant, and the defendant's personal actions of not using any physical violence against the victims to force them into prostitution, and found that each of the victims should be awarded 2000 UAH for moral damages.

The court found the defendant guilty of the offence under Part 2 Art. 149 of the Criminal Code of Ukraine and sentenced her to a minimum of 5 years imprisonment. Art.75 of the Criminal Code of Ukraine was then applied, and the defendant was freed with a probationary period of two years.

Case 3. A group of 5 pimps operating within Ukraine. № 1-26/2011, dated 12.05.2011, sentencing by Dovhyntsiivskiy District Court, Kryvyi Rig, Dnipropetrovsk region.

Unlike in the previous cases, the well-organized group of pimps operated within the country.

In early 2007, Persons 4 and 6 decided to recruit and provide women for sexual services in Kyiv. The pimps used babysitting, dancing and waitressing jobs to lure prospective victims. In some cases, victims were openly informed of the true nature of the work; however, the defendants lied about income and working conditions etc. Sentencing referred to twenty victims in total, half of whom were minors. The five defendants were made to pay 150,000 UAN to four of their victims. Three of the defendants paid an additional 10,000 UAN, one paid 5000 and another 2500 to respective victims. The amount of compensation paid was requested by the victims.

Note: There was initially another claimant seeking compensation for moral damages caused by this group. However, the claimant dropped their claim during the course of the trial.

The courts awarded compensation for moral damages in only 5 of a total of 47 sentences handed down. Given the degree of trauma suffered by victims of human trafficking, this is not commensurate with the crime. In the vast majority of cases, the issue of compensation was not discussed at trial, and was therefore not reflected in the sentencing. Courts are under no obligation to raise and resolve such issues. This is indicative of low levels of awareness amongst victims of their legal rights, a lack of funding for high-quality legal assistance, and an unwillingness among law enforcement officers to explain to victims that they are entitled to file civil claims as part of criminal proceedings. Without full understanding of their rights, the majority of victims are reluctant to initiate such claims.

An important factor to note is that in cases where claims for material and moral compensation were filed and examined in court, courts viewed these claims as being of secondary importance. Priority was given to issues related to proof of guilt and proof that a criminal offence has been committed. We examined all the arguments put forward by the State prosecution and by the defense teams, as well as the evidence put forward during the trials, such as witness testimonies, material evidence etc.

The existence or absence of moral damages, any corresponding evidence and the quality of such evidence where it existed, was summed up by the courts in a cursory couple of concluding sentences, which made it difficult to analyze the process by which courts determined what amount of compensation should be awarded.

In most cases, claims were only partially satisfied, even when claimants requested no more than a few thousand UAH. The financial circumstances of offenders were also taken into account by the courts, except in cases where conclusive evidence was provided of the degree of moral damages suffered by victims of human trafficking.

Several claims to recover compensation for material damages were 100% unsuccessful. The courts explained their decision by saying simply that ‘it was not proven.’ It was therefore impossible to examine in more detail the reasons why the courts felt compensation should not be awarded.

Unfortunately, there is no system in place to monitor compensation payments in Ukraine. It is therefore impossible to fully understand how compensation claims in proceedings in cases related to trafficking in human beings are implemented and concluded.

Public authority rulings on compensation payments for moral and material damages under specific articles of the Criminal Code of Ukraine are not recorded by the State Treasury Service of Ukraine.

Chapter 3. Obstacles to obtaining successful compensation claims for material, moral and personal injury for victims of human trafficking

The process by which compensation is awarded to victims who have suffered material, moral and personal injury can be divided into three stages:

Stage 1 – A civil claim is filed, either pre-trial for criminal proceedings or separately as part of civil proceedings. In other words, if the civil claim is not filed as part of a pending criminal case, it has to be filed as a separate action;

Stage 2 – The civil claim is considered in court;

Stage 3 – If the court rules in favor of awarding compensation to the victim, the process of recovering funds begins.

3.1. Obstacles to obtaining compensation at the preliminary stages of investigation

The following issues were identified:

- Lack of awareness amongst victims of their rights to claim and obtain compensation;
- The right to claim compensation is explained to victims formally, using legal terminology which they may not understand;
- The behavior of victims in court;
- Trauma suffered by victims as a result of legal proceedings;
- Unsubstantiated claims;
- The need to prove psychological and emotional suffering;
- The lack of access to expert centers and the lack of certified mental health experts

Lack of awareness amongst victims of their rights to claim and obtain compensation.

The fact that victims so rarely file claims on their own initiative is indicative of the low levels of awareness amongst them of their rights and what they are entitled to receive. The authorities tend to inform victims of the option of filing civil actions and claiming compensation by reading them the regulatory act, without going into detail about what this actually means, using non-legal language, so that victims have a clear understanding of what is being read to them. They are then asked to sign the document. Unsurprisingly, the majority do not understand their rights and are not in a position to claim compensation.

Once a victim is allocated a lawyer, claims can be legally and professionally presented. The lawyer will help determine the degree of moral and material damages suffered and how they can best be proven. However, due to lack of funds, many victims are denied access to legal representation, although free legal representation is available in some regions. Legal support for

victims is provided by the International Organization for Migration in Kherson, Mykolayiv, Odessa, Dnipropetrovsk, Zhytomyr, Khmelnytsky, Luhansk, Ivano-Frankivsk, Lviv, Transcarpathian, Chernivtsi, Kharkiv, Poltava and Crimea.

An analysis of selected cases from the Kherson region, under Art.149 of the Criminal Code of Ukraine entitled ‘Trafficking in human being or other illegal recruitment/transportation/transfer/harboring or receipt of persons’ for 2009 – 2010, shows that 40% of victims did not go on to file a civil action. Some of these victims did not have access to legal representation during preliminary investigations and were not properly informed of their rights to claim and receive compensation.

According to data from the NGO "Successful Woman", in only three of the six cases opened in the Kherson region where victims appealed to NGOs for assistance was there a lawyer offering legal assistance.

Not enough is being done to ensure and promote victims’ rights to claim compensation. In some cases, investigating authorities failed to seize offenders’ property as part of their pre-trial investigation. Very rarely did the investigating authorities offer defendants the option to voluntarily pay compensation to their victims (circumstances which would reduce sentencing, see S.2, Part 1, Art. 66 CCU).

The behavior of victims in court

A successful outcome for the victim in court depends to a large degree on the perseverance of the victim. Practice has shown that it is in the best interests of the victims to actively and independently justify the amount claimed for in court. If the victim is unable to prove and justify their claim, the court will not award the claim. However, most victims are not in a position to explain and substantiate their claims, since they lack the expertise and skills necessary to do so, as well as the correct documentation confirming damages suffered. In most cases, it is the psychological and emotional condition of the victims which prevent them actively pursuing their claims. In ideal conditions, investigations would be initiated on behalf of the trafficked person immediately after the crime has been detected, or immediately upon their return to Ukraine (if the exploitation took place outside of Ukraine). However, the reality is that a successful outcome and fair judicial investigation depends excessively on the victims themselves, and the degree to which they believe that their abusers should be punished and that they should be compensated for their injuries. Involving trafficked persons in investigations immediately after their return is risky; due to the trauma suffered, it can often take time for victims of human trafficking to feel able and confident enough to appear in open court. Various socio-demographic factors, the psychological and emotional state of the victims, and the circumstances of their exploitation can all influence their ability to do so. Based on the observations of different NGOs working with victims, as well as research carried out in Ukraine, the following factors which could influence how victims were viewed and how they were able to handle the court experience were identified:

- In cases involving sexual exploitation, the levels of awareness amongst victims as to the true purpose of their travel and nature of their work;

- The nature and consequences of the exploitation (degree of physical injury suffered);
- Fear of experiencing further trauma during the investigation and court proceedings. Some victims were afraid to appear in court, saying that they had already said everything they wanted to say in their written statements to the police;
- A lack of confidence in being protected from possible harassment or retaliation from the accused (including the fear of retaliation once the offender had served his sentence and been released from prison);
- Compensation being paid by the trafficker to their victim in an out-of-court settlement;
- A lack of faith in the judicial system and in the possibility of a successful outcome;
- A subjective attitude to their experiences and difficulty in acknowledging that they had suffered as victims of human trafficking, which in turn meant that they might not feel entitled to claim compensation from their traffickers;
- A lack of understanding of what they have suffered;

Objective factors include:

- The degree to which they have recovered and reintegrated after their ordeal;
- Access to qualified legal assistance;
- The reality of successfully obtaining compensation;
- The possibility of retaliation (offenders often know the personal details of their victims, including their address, family circumstances, financial status, etc.);
- The professional competence of NGOs providing assistance;

A summary of the information regarding the role of victims in asserting their rights to compensation should focus on important factors such as the extent to which they are able to successfully reintegrate into society. As mentioned above, during the pre-trial investigation stage, investigating authorities often fail to inform victims of the option of filing a claim, and even when the victim is informed, investigating authorities may make subjective appraisals of the victim's circumstances, with little concern for whether the case will be proved in court, and despite the fact that the vast majority of those involved in investigating the offences are not in a position to competently evaluate the degree of moral damages suffered by the victim. The responsibility for proof of damages lies with the victim. Thus, a favourable outcome in court is only really possible if the victim is actively involved and determined to reclaim their rights and obtain redress. To be in such a strong position, the victim must already feel stable and safe; only then will they be able to fully understand why it is so necessary protect and reinstate their rights. For these reasons, we disagree with the practice of involving victims in the investigation immediately after they have been released from their exploitation.

Trauma suffered by victims as a result of legal proceedings

As mentioned above, civil litigation is conducted on the basis of equality and competitiveness. Thus, it is the responsibility of the victim to prove the degree of moral damages suffered in monetary terms. This can be particularly traumatic for the victim, as they must prove that they were the victim of a criminal offence, that they experienced humiliation, insult, violation, and further criminal offences, and that this did all indeed take place. The court may fail to accept as proven that the victim suffered as claimed, which in turn may add further to the victim's trauma. This can be so overwhelming for the victim that they may withdraw their case entirely.

Unsubstantiated claims

According to Art. 29 of the Criminal Code of Ukraine, if there is information that a crime caused material damages or incurred costs, the investigating authorities, prosecutors and courts must take steps to ensure a civil lawsuit is filed. Prosecutors should file a civil claim for damages caused by a criminal offence if it is in the best interests of the State and of any citizens who are unable to do so for themselves, due to health problems or for other valid reasons.

In practice, most claims are filed by investigating authorities at the pre-trial investigation stage. The best interests of the victims are often ignored, the claims unsupported by the relevant documentation, and often inaccurate. As a result, the claims are rejected in court.

According to Paragraph 4 of Art. 64 of the Criminal Code of Ukraine, the nature and degree of the damages caused by the criminal offence are to be proved at the pre-trial investigation stage and during court proceedings. All claims made of damages suffered by the victim must be substantiated.

An added problem is that many victims of human trafficking do not seek help from the police until considerable time has elapsed after escaping from their exploitative situation. This occurs for many reasons. In many cases, over a year will have passed before law-enforcement agencies make contact with victims, which significantly hinders any attempts to gather evidence of damages suffered.

However, the authorities involved in pre-trial investigation do not always attempt to verify the extent and validity of the claims filed. Rarely do they impose any statutory requirements on form and content of the claim statements. Some investigators have been known to persuade victims to file their civil claims only once legal proceedings have already started, rather than to do so pre-trial. Given the fact that victims are usually unaware of the full provisions of the law and may not be in a position to employ legal representation in court, their rights and interests, particularly in terms of compensation, may often go unprotected.

The process of proving moral damages can be particularly complex. The compensation requirements for moral damages must be specified and properly substantiated in the claim statement. The amount of compensation claimed must also be specified. It is typically at this stage that victims and their representatives face particular difficulties in ensuring the victim's right to claim compensation for moral damages.

Lawyers are rarely qualified to accurately identify the psychological and emotional state of victims, and so are unable to provide the necessary proof in writing to substantiate claims that the victim's emotional and psychological well-being may have suffered as a result of their traumatic experiences. What's more, many victims are themselves unable to identify the full extent to which their mental and emotional health may have suffered, and are thus unable to protect their own rights.

Victims will often describe their experiences and emotions using subjective language which lawyers may find difficult to use in the legal process. Victims may also be unable to describe the true extent of their ordeal and how it has made them feel, and to distinguish between the various factors which might have contributed to their ordeal. This is particularly true in cases involving victims who are minors or female victims who suffered extreme psychological abuse and, as a result, underwent severe trauma. They may not feel capable of revisiting the circumstances of their exploitation and trauma.

In cases such as these, lawyers tend to resort to detailed descriptions of the event or offence as a means of substantiating claims made by victims of human trafficking. They will use certain emotive terms to emphasize their point, such as describing the offence as a 'cynical crime,' or that the victim has suffered 'irreparable harm,' in an attempt to appeal to the more general human sympathies of the court and to argue that it would be impossible for a victim of human trafficking to *not* have suffered moral damages. Often, standard passages taken from articles under the relevant laws are simply rewritten into the claim statement, or a uniform list of possible types of harm, taken from the Resolution of the Supreme Court of Ukraine mentioned above, is provided - which may or may not include moral damages.

As for determining the amount of compensation to be specified in the claim statement, this is usually dependent on the victim, who may not be in a position to accurately assess the degree of damages suffered.

Claims are filed by investigators without taking into consideration the interests of victims, and often lack the required supporting documents. In some cases they may also exaggerate or under-represent the true extent of the situation;

Damages suffered must be substantiated in court. However, the authorities involved in pre-trial investigation often fail to fully investigate the validity and nature of claims;

Certain representatives from investigating authorities have been known to persuade victims to file civil claims once legal proceedings are already underway, instead of doing so during the pre-trial investigation stage;

It is required of victims that they specify the amount of compensation being claimed for, in order to substantiate their demands. This can be difficult for victims and their representatives to do;

It is difficult in and of itself to prove the extent to which the victim has suffered. Lawyers representing the claimants are unlikely to possess the necessary expertise to accurately assess the mental health of their clients, and may also struggle to accurately portray the true extent of their client's suffering using legal terminology.

"Provide a certificate of moral damages!"

There is a false assumption amongst many law-enforcement and legal professionals that moral damages can be proved with a medical certificate. This has serious implications for victims, who are misled into believing that they can obtain the appropriate documentation by visiting local hospital psychiatrists and psycho-neurologists.

Psychiatrists may well be able to identify the presence of certain negative conditions amongst patients, but there is an important difference between psychiatry and psychology. Psychiatry is a branch of clinical medicine which studies mental health disorders, and is engaged in the treatment of such disorders through the prevention and relief of mental health problems. People suffering from mental health problems who are potentially dangerous to themselves or to those around them are committed to facilities for their treatment⁶.

A psychiatrist is therefore an expert in the field of mental illness and psychopathology, and not an expert in the field of normal psychology. This is the domain of psychologists. While a psychiatrist treats mental illness, a psychologist treats the normal negative mental symptoms of mentally healthy individuals who may be dealing with stress, trauma and other negative influencing factors.

As a result, even if the victim undergoes a full psychiatric examination at the appropriate medical facility and obtains documentation from a psychiatrist as to the nature and degree of their psychological and emotional state, this can not be accepted as evidence, since psychiatrists are not legally considered to be competent authorities on people not suffering from mental illness.

The professional best qualified to identify the suffering undergone by the victim, as well as understanding the causal relationship between the psychological profile of a mentally healthy person suffering from trauma caused by a criminal offence such as human trafficking and their normal adverse reactions to traumatic experiences, is an expert psychologist. Their field of professional expertise is to identify individual psychological profiles and the psychological patterns of individual reactions to specific psychologically traumatic events.

Under such circumstances, law-enforcement and legal professionals should be informed that moral damages are not limited to physical suffering or damage to one's health. It is not a medical certificate but a psychological examination which should be used as proof of suffering.

Psychological examinations of victims of trafficking, and testimonies from specialists at the rehabilitation centre for victims of human trafficking 'Successful Woman' are now being used as evidence as part of compensation claims for moral damages in the Kherson region. This is also the case in other regions of Ukraine, where civil society organizations are working to protect the rights of victims of human trafficking.

⁶ Cited by

<http://ru.wikipedia.org/wiki/%D0%9F%D1%81%D0%B8%D1%85%D0%B8%D0%B0%D1%82%D1%80%D0%B8%D1%8F>

The lack of access to expert centers and the lack of certified mental health experts

Lack of access to forensic psychologists is yet another barrier to receiving fair compensation, especially for moral damages. As already mentioned, expertise in the field of psychology is required by professionals in order to substantiate compensation claims regarding moral damages. Providing adequate evidence of mental suffering is the responsibility of a forensic psychologist.

There are, however, many obstacles which hinder this process. The first is the basic shortage of such experts. As of 12/06/2011, there were 20 specialized scientific research institutes in judicial investigation operating in Ukraine. Officially, most regions in the country have a scientific research institute in judicial investigation. However, according to experts, forensic psychologists are not always available in these institutions, and even where such a department exists, it does not always employ such a specialist. There are very few scientific research institutes with the relevant research capabilities and which employ the relevant experts capable of assessing moral damages in Ukraine. Those that do exist are located in regional centers in the North, South, East and West of the country (in Odessa, Lviv, Kharkiv, Donetsk, and Kyiv.) Thus, even if such an institute existed in Mykolaiv, you would have to apply to the institute in Odessa to be able to receive the appropriate examination.

Another difficulty in accessing legal experts, which links back to the point made above, is that there are too few certified forensic psychologists to meet demand. There have been many cases identified where, due to excessive workload associated with criminal cases, forensic experts have had to significantly delay offering their expertise in civil cases.

According to the Supreme Court of Ukraine, a total of 6.9 million cases, statements, claims, complaints, submissions, petitions, etc. were examined by courts throughout the country in 2010⁷. Assuming that only 10% of these were cases in which victims or plaintiffs filed for compensation for moral damages, this would mean 690,000 cases. If only 10% of these were to require forensic examinations, (which, in actual fact, is necessary in every case), at least 69,000 forensic investigations would be necessary.

Forensic psychiatric examinations to determine moral injury is a complicated process. According to guidelines on conducting forensic examinations and methodological recommendations on forensic examinations, the process can take anywhere from three weeks in simple cases to one and a half months in more complex cases. A figure of more than 5,000 forensic psychologists, employed full-time, would be necessary to meet the demand of 69,000 such cases.

A further problem is the difficulty associated with identifying and locating professionals who have been certified by the public register of court experts. The Ministry of Justice of Ukraine website provides information on the regulatory acts that govern the work of the State Register, as well as procedures for including forensic experts as court experts, but there is no list of individuals available⁸. Victims and legal representatives looking for experts to contact face the most basic problem of simple access to contact information.

⁷ Analysis of the administration of justice by courts of general jurisdiction in 2010 (according to court statistics) <http://www.scourt.gov.ua/clients/vs.nsf/0/4034B350D7EB0B50C22578AF00236E6D?OpenDocument&CollapseView&RestrictToCategory=4034B350D7EB0B50C22578AF00236E6D&Count=500&>

⁸ http://www.informjust.ua/section/registers_9

The opinions of qualified psychologists on the presence of negative psychological and emotional states, and the involvement of such specialists as court experts, appointed by the investigating authorities and the courts, is of fundamental importance to this issue.

Thus, at the initial stage of claiming compensation, the role of the authorities involved in the pre-trial investigation process and of the victims themselves is of paramount importance. The actions of the victims and their decision to pursue a claim depends on how successfully they have recovered from their experiences. Rehabilitation and recovery should precede their involvement in the investigation process, which is why it is extremely important to involve NGOs in the rehabilitation of victims as soon as they have been identified as victims of human trafficking. Proving moral damages and obtaining financial compensation is one of the biggest hurdles faced by victims and their representatives. Input from expert psychologists is essential, and they do not have to obtain certification to appear as court experts in order to be able to provide opinions on the extent of the claimant's trauma. The regulatory and legal framework in place allows for any specialist with the proper psychological qualifications to act as an expert in court.

3.2. Obstacles to receiving compensation at the trial investigation stage

Difficulties in obtaining compensation, such as those mentioned above, are closely tied to the problems which may arise during court proceedings. These include:

- Delays and complications in proceedings and in substantiating claims;
- The subjective prejudice of investigators, prosecutors, and judges;
- Organizational problems;
- The distance of the court from victims' homes;
- Danger or discomfort of appearing in open court;
- Partial satisfaction of claims.

Analysis of the difficulties

Delays and complications in proceeding and in substantiating claims

Complications and obstacles related to the compensation claim, even if the claim itself is reasonable and fully supported with the relevant documentation, can be a major problem. Reasons for this may often involve the defendants, who are likely to dispute every word, theory and document presented in court. Another tactic often seen amongst defendants is to admit causing moral damages, but to then concentrate on disputing the validity of the amount of compensation being claimed by the victim. The defendant may insist that there is insufficient evidence of moral damages suffered or of the negative consequences for the victim of trafficking. Defendants may also state that the compensation amount requested is excessive and disproportionate to the victim's circumstances and experiences etc.

The negative outcome of all this is that some lawyers are extremely unwilling to work on

cases involving compensation claims for moral damages, since they feel that their professional reputations may suffer as a result of unsuccessful outcomes in court. The fact that compensation claims for moral damages as part of civil proceedings require additional proceedings greatly complicates the work of lawyers and can prolong court hearings, which requires further time and resources from lawyers, which can in turn have negative implications for the lawyer's involved in such cases.

If criminal cases, including cases under Article 149 entitled "Trafficking in human beings or the recruitment, transportation, transfer, harboring or receipt of persons" of the Criminal Code of Ukraine, are considered in accordance with current procedural time limits, civil proceedings could take several years.

The subjective prejudice of investigators, prosecutors, and judges

Despite the fact that non-governmental and international organizations have been working for years with law enforcement officers and judges in eliminating the stigmatization of victims of human trafficking, prejudice from the side of the authorities still exists. In some cases, investigators fail to fully and effectively investigate cases, following only the most basic formal investigative procedures before closing cases. In our opinion, this is due to the prevalence of ideas such as the notion that victims are almost accomplices in their own recruitment process. etc., as well as attitudes amongst the authorities towards certain legal approaches, in particular concerning the rule of law and human rights. An absence of professional knowledge in these fields is unfortunately common amongst law enforcement officers and judges.

During court proceedings involving one case tried under Art. 149 in the Kherson region, the judge intentionally caused the nervous breakdown of the 23 year old victim, O, who had been forced into prostitution. The victim felt additional contempt in the intonation and questions of the judge, and broke into tears, before running out of the courtroom. The judge had shouted at the victim when questioning her.

From the experience of NGO "Successful Woman", Kherson

Subjective components of prejudice include the fact that the victim may herself be perceived in a negative light. This is not a problem of prejudice against the individual, but of commonly-held stereotypes regarding victims of human trafficking in general. The media perpetuates negative stereotypes, such as notions of voluntary agreements to sell oneself for use in labor or sexual slavery, and that victims gain a significant profit from these activities, etc. It should also be noted that the legal mechanism for compensation for moral damages in Ukraine does not currently contain the necessary content to fulfill its human rights function.

Organizational problems

There have been many cases where it is the lawyers of the accused who invite victims to appear in court. This type of communication between lawyer and court may suggest complicity and can cause fear for the victim, who may feel under pressure to drop their case or change their

testimony.

The distance of the court from victims' homes

Failure of the victims to appear at court may be due to them being physically unable to make it to court. Firstly, victims from remote areas and villages are not always financially able to travel to regional courts. Secondly, transport in the winter is irregular and can make it difficult to arrive and leave court on time.

Danger or discomfort of appearing in an open court

The absence of a separate waiting room for victims and defendants in courts makes it difficult or impossible to maintain privacy and security for victims. In addition, participation in court proceedings is often dangerous for the victims, as courts divulge personal details such as their place of residence, etc.

Victim interrogation procedures are seriously flawed. The victim is required to describe in public the intimate details of the crimes committed against them. Given the fact that judges are mostly men, appearing in court can be extremely traumatic for the victims. This, in turn, provokes the 'wrong' behavior from victims, who may appear silent and unwilling to answer the judge's questions. This can have obviously detrimental consequences for their claim.

Some courts in Ukraine have specially equipped rooms in which victims and witnesses may be questioned without having to appear in an open courtroom. Individuals requiring specific security arrangements can also be taken here. The equipment in the room allows victims and witnesses to remain physically separated from other participants in legal proceedings related to trafficking and other serious crimes. The equipment was made available in 2010 with support from the International Organization for Migration and is present in courts in the Chernihiv, Khmelnytsky, Ivano-Frankivsk, Volyn, Lugansk, and Kherson regions. However, victims of human trafficking remain unprotected in the majority of courts operating in Ukraine, which makes it all the more difficult for victims to present successful compensation claims.

Partial satisfaction of claims

Most claims filed by victims of human trafficking remain unsatisfied. What often occurs is that courts choose to fully satisfy claims for moral damages but refuse claims for material damages on the grounds that they cannot be substantiated.

Another issue is the partial satisfaction of claims. Although most court decisions to award compensation settle in favor of the victims, the amount of compensation awarded is often reduced by the court. For example, Kherson courts considering claims during the period 2008-2011 made the following judgments: compensation claims starting at 50,000 UAH or more were partially satisfied, averaging about 20,000 UAH. Claims for small amounts (2,500 UAH – 5,000 UAH) were fully satisfied.

The connection between severity of sentencing and compensation received is also being monitored. Defendants who paid compensation received a suspended sentence without confiscation

of property. Voluntary settlement of the claims by defendants at the trial investigation stage meant that judges were more lenient with sentencing.

According to experts who work with victims of trafficking, reasons for court refusal to award compensation or to only partially satisfy claims include the reasons mentioned above, as well as lack of evidence, the behavior of the victims, the court's assessment of the defendant's ability to pay compensation etc. These points will be briefly examined below.

Reasons for court refusal to fully or partially satisfy claims:

- Lack of evidence;

The court may decide that there is insufficient proof to suggest that the victim suffered as a result of their experience of being trafficked. This is seen in particular in cases of human trafficking for sexual exploitation, where victims are believed to have deliberately chosen to become involved in prostitution but earned less than they expected or had their wages withheld. The court may feel that they therefore should not receive compensation. Prostitution was until recently illegal in Ukraine.

- Victims' 'incorrect' behavior in court;

Victims may become confused when being asked to give evidence in court, feel uncomfortable, embarrassed, show signs of emotional distress, memory loss and fear as a result of being made to appear before the defendant in an open court. In the face of pressure and demands to relive in intimate detail their experiences, and to provide proof of their ordeal, victims may become withdrawn and refuse or become unable to talk. This in turn means that their claims may be seen to be unsubstantiated.

- Claim withdrawals;

Case studies show that instances where victims decide to drop their claims in court are quite common. In most of these cases, victims withdrew claims when defendants voluntarily paid compensation. This voluntary payment of compensation can also result in victims refusing to file claims against their traffickers; examples exist of cases where victims changed their testimonies in court after relatives of the defendants offered to pay partial compensation. There have also been cases where victims have withdrawn claims because the defendant is a close relative or childhood friend.

- Personal circumstances of the defendant;

In deciding the amount of compensation to be awarded, the court will often take into consideration the personal circumstances of the defendant, i.e. whether they have co-dependants, their age, physical health, etc. For example, a case dealt with by Kherson regional court under Art. 149 reduced the compensation claim in view of the fact that the defendants supported between 3 and 5 children, with two of the defendants of retirement age, aged 60 to 65 years, and one of whom was disabled.

The main obstacle for victims in obtaining compensation remains the difficulty in proving

damages and the monetary equivalent of such damages, and the fact that this is often dependent on their behavior in court. Victims are often unable to adequately respond to the questions of judges because of their prejudice, indirect pressure from the defendants present in the courtroom during their testimony, and fear of reprisals from the traffickers after their personal information is disclosed in court. The most common scenario is that courts accept claims but that the amount awarded is reduced. Judges use information about the personal circumstances of defendants and the compensation amount requested to inform their final rulings. However, even when courts rule in favor of the victim, enforcing rulings remains complicated.

3.3. Obstacles to obtaining compensation in enforcement proceedings for recovery of funds

The responsibility of recovering funds in accordance with court rulings to award compensation lies with the State Executive Service of Ukraine, which operates under the mandate of the Constitution of Ukraine, the Law of Ukraine ‘On Enforcement Proceeding’ (№ 606-XIV), which was adopted by the Verkhovna Rada of Ukraine on 21/04/1999 (with amendments and additions to the present date) and the Law of Ukraine ‘On the State Executive Service’ (№ 202/98-VR) from 24/03/1998.

In accordance with Article 3 of Law № 60/5 of Ukraine ‘On the State Executive Service,’ passed by the Ministry of Justice of Ukraine on 19/11/1998, 27 regional and 743 district departments of the State Executive Service have been created.

Experience in trafficking cases shows that even when courts rule in favor of the victim, recovery of funds can be very complicated, for the following reasons:

- The lack of funds and property belonging to convicted offenders available for seizure in Ukraine;
- Criminal proceeds laundered abroad;
- A lack of international cooperation in protecting the overseas property of Ukrainian citizens;
- Flawed legislative mechanisms for the recovery of funds;
- Deficiencies in Article 1177 of the Civil Code of Ukraine concerning the State’s obligation to pay damages to victims.

These points will be examined in brief below.

The lack of funds and property belonging to convicted offenders available for seizure in Ukraine.

According to Article 29 of the Code of Criminal Procedure (CCP), investigating authorities have a duty to seize and hand over the funds or property awarded in compensation to victims. There is no legal time-limit set. In cases where there are no funds or property to seize, investigators will simply inform the court, without taking any measures to uphold the victim’s civil claim.

According to results observed from monitoring the outcomes of court cases, experts from the "Successful Woman" NGO in the Kherson region of Ukraine noted that the property of defendants

was seized in all cases, but that the value of the property seized and confiscated did not match the value of the claim awarded. In other cases, defendants had no property available for confiscation, which meant that there was no way of ensuring that victims would indeed be fully compensated. When property was seized, their value totaled a few hundred UAH, with mobile phones and other objects added, while the sums awarded by the court ranged from five to twenty thousand Ukrainian UAH.

In one case, 20 UAH and \$1 was seized and confiscated from the defendant.

Information taken from public monitoring of court hearings.

Criminal proceeds laundered abroad

Offenders may often not own property or assets in Ukraine if the criminal conduct generating their income took place abroad. It is often those involved in the recruitment and transportation of victims who remain in Ukraine; others involved in other aspects of the criminal group remain outside the country.

There is currently no effective and comprehensive work being carried out between countries of origin and destination to facilitate cooperation in cases involving criminal proceedings in more than one country. As a result, any property or assets belonging to accomplices who are citizens of another country cannot be seized as part of the claim.

As a result of the joint work carried out by law enforcement agencies in Ukraine and Turkey and with the support of the IOM, six victims of forced sexual exploitation were freed in Turkey. A Ukrainian citizen who recruited and organized the travel of Ukrainian women to Turkey was arrested in Ukraine. A Turkish citizen who earned criminal proceeds through his involvement in organizing the sexual exploitation of Ukrainian women in Turkey was also arrested. Property obtained through criminal proceeds earned as a result of the sexual exploitation of the victims was confiscated, including two new Mercedes vehicles and a three-storey house belonging to a Turkish citizen. In Ukraine, although the court ruled in favor of the civil claims, victims did not receive a penny because the defendant had no property in Ukraine. The defendant was sentenced to 6 years of imprisonment. The court case in Ukraine took almost 6 months. An accomplice who had been involved in the exploitation of victims in Turkey was freed after serving 3 months in prison, and the order to confiscate her property overturned.

Lack of international cooperation in protecting the overseas property of Ukrainian citizens

Responses to international requests and orders are often sent late, which means that courts rarely use them.

Flawed legislative mechanisms for the recovery of funds

The Executive Services are constrained by certain time and operational limitations. Firstly, if

property belonging to the offender is located abroad, the executive office in charge of seizing the property has no jurisdiction within which to act. Secondly, there are certain conditions for the enforcement of court rulings which are regulated according to the law 'State Executive Services.' If the Executive Services fail to complete the confiscation within 6 months of the order being made, it becomes invalid. The victim is entitled to resume confiscation proceedings within three days of the deadline prescribed by law for that type of sanction. Victims also have the right to renew the missed period in court. However, experience shows that victims are often unaware of the six month period in which the confiscation order must be executed (as a result of the investigating authorities failing in their obligation to inform victims of their rights) and so the repayment period usually takes longer than the prescribed 6 months. As a result, victims themselves have to monitor the Executive Services over the 6 month period, to ensure that their claim is being pursued. This can go on for years, or until the offender has been made to fully pay the compensation due.

Another issue can be the precarious financial situation of offenders. Offenders serving a sentence are unable to work while in prison, and may therefore be unable to pay the victim. In cases such as these, confiscation proceedings are often closed or suspended. Cases from the Kherson region which were examined showed that not a single offender paid back the money owed to their victims after serving their sentence.

Deficiencies in Article 1177 of the Civil Code of Ukraine concerning the State's obligation to pay damages to victims

The State guarantees compensation for damages to the victim, regardless of the financial circumstances of the offender. Specifically, Article 1177 of the Civil Code of Ukraine entitled 'Compensation for material damages to victims of crime,' declares that material damages suffered by an individual as the result of a criminal offence shall be reimbursed by the State if the offender has not been identified, or if the offender is insolvent. However, in practice, this article is purely declarative in nature, mainly due to lack of funding resources. The solution to this could be the creation of a compensation fund, which could be made up of confiscated property taken from criminal proceeds, which would be used to provide compensation to victims. There has as yet not been a single recorded case of compensation being paid to victims of human trafficking by the State.

Thus, even if victims and their representatives successfully prove their claims in court and the court rules in favor of paying compensation, in practice, obtaining compensation remains almost impossible. Offenders may transfer property ownership over to other individuals, or may not own property for reasons already explained above. Often, the only option that remains for victims is to accept payment from the accused in exchange for agreeing to change their testimonies so that court sentences may be commuted. Case histories show that even when a case successfully reaches the stage where property and assets are to be seized and confiscated, actual compensation for victims remains unlikely. As already explained, even if traffickers are sentenced to prison, they may not be in a position to pay damages to the victim. The prescribed 6 month confiscation period also requires monitoring, since many victims are unaware that proceedings require renewal every 6 months. It is under such circumstances that the State should step in to pay damages to victims. However, Article 1177 of the Civil Code remains declarative only, and there are currently no known cases of State-paid compensation having been provided to victims of human trafficking.

Chapter 4. The creation of a Compensation Fund for trafficked persons

4.1. Examples of compensation funds in other countries

Legal mechanisms providing compensation to victims of criminal offences from the State or from public funds exist in Austria, Australia, Great Britain, Mexico, Netherlands, New Zealand, Poland, USA, Finland, France, Germany, and Norway, amongst others. Below are some examples:

USA: The Victim and Witness Protection Act of 1982 and the Victims of Crime Act of 1984 exist in the USA. The Crime Victims Fund was established as a result of these Acts. The fund is sourced from annual legal fines handed down by federal judges as well as seized proceeds and assets, such as confiscated jewelry and other items. To implement the Victims of Crime Act, a special article in the USA State budget was included. The aim of the Fund is to ensure financial support programs for victims of crimes exist in every State. The Victims of Crime Act also states that each State must prioritize assistance to one particular category of victims: victims of rape and other sexual crimes, victims of domestic violence or child victims. The Act ensures that each State chooses one category to which to allocate funds taken from the Federal Fund.

Poland: In Poland, the Foundation for Assistance to Victims of Crime exists as a civil society institution and provides assistance to socially vulnerable victims of crime. The Fund was created in 1985 by a publishing house specializing in legal documents, in cooperation with the State Insurance Department, with the aim of carrying out preventive work. The Foundation is funded by court fines and charitable donations, and now assists both Polish citizens and citizens of other countries who have become victims of crime in Poland. To be eligible for assistance, individuals must be in a financially insecure position. Assistance can take the form of compensation to cover financial loss, or basic needs such as clothing, medical treatment while abroad, etc. The Foundation will also approach victims it has heard about in the media with offers of assistance.

France: Victim assistance was greatly improved in France with the passing of a new law on 8th of July 1983. The law ensured:

- simplification of the appeals procedure in court;
- possible compensation damages of up to 20,000 francs;
- special measures on protecting the property of victims;
- immediate court consideration of claims and timely rulings on compensation to be awarded immediately, regardless of the degree of guilt of the accused. Even in cases where the guilt of the defendant cannot be proved, or in cases where the offender cannot be identified and located, the victim still retains the right to be awarded compensation to be paid by a State fund.

The right to compensation from the fund is shared both by victims of violent crimes and their dependants, as well as foreigners and citizens of other EU countries. Costs covered by the fund include medical treatment due to physical injury or infection (e.g. HIV/AIDS), legal services used both by victims and family members, material damages (dependent on financial circumstances of the victim and State recourse) and harm caused by terrorist acts.

Great Britain and **Germany** also have compensation systems in place. The British system is considered the gold standard, as it covers a wide list of possible crimes for which victims are eligible to financial compensation. The amount of compensation is also significantly larger than in other countries. In Germany, victims of violent crimes and the dependants of murder victims are eligible to receive compensation. Foreigners have the right to claim compensation for crimes committed after June 30, 1990 and if the victim has resided in Germany for more than three years. Compensation will cover the costs of medical care and pension provision where the victim may have been left unable to work of not less than 25% for a period of more than 6 months, and will also be paid to dependants of murder victims.

Georgia: Georgia is the only former Soviet Union country to have a compensation fund in place for victims of human trafficking. In 2006 the law on combating trafficking in human beings was adopted in the country. Paragraph 1 of Article 16 of this law upholds the rights of victims to claim compensation for moral and material damages caused by the offence of human trafficking, according to current procedures in civil and criminal legislation. Paragraph 2 of Article 16 states that where it is impossible to provide compensation in accordance with procedures laid out in Paragraph 1, the compensation is to be paid from the specially established fund. This fund, called the ‘Fund for protection and assistance to victims of trafficking’, was created soon after the law was adopted. The fund is sourced from the State budget, and from international organizations and donations. Apart from a one-time fixed lump sum of around 650 USD in financial assistance, trafficked persons are also able to receive legal, psychological and medical assistance. The fund supports several shelters in the country where victims of trafficking can access extensive support and assistance.

The international examples cited illustrate the full scope of compensation funds. Not only do they provide compensation to crime victims, but in certain countries have also been shown to take on the function of civil society organizations that are able to provide compensation payouts on their own initiative, whilst also providing a whole range of other social services. We would like to see a similar model used in Ukraine, which not only fulfils a financial role, but which also provides free legal advice, medical and psychological examinations etc.

4.2. Prospects for implementation of a compensation fund in Ukraine

Figures indicate a success rate of less than 60% for compensation claims in Ukraine. The most common reasons for this include low levels of involvement from victims, a formal and rigid approach from investigators and judges to the issues involved, and flaws in the claims process. However, the lack of property and funds available for seizure from offenders was also a significant contributing factor. Some victims also suffered additionally as a result of long delays caused by failure to identify and locate offenders.

In order to improve the situation for victims seeking compensation, a draft law entitled “Compensation for crime victims of material damage” was developed and submitted to the Verkhovna Rada of Ukraine as far back as 2001. In accordance with Articles 4-5 of this document, the creation of a State compensation fund, as a legal entity, was envisaged. The suggestion was that this fund would have independent assets and bank accounts, and would carry the stamp of the State emblem of Ukraine as well as its name. The creation of this fund, in accordance with Article 8 of

the draft, shall be funded by:

- State budget funds;
- Funds received from the sale of confiscated property;
- Funds received from offender enforcement orders;
- Charitable donations from legal entities and individual donors.

The draft law differentiates between compensation for solved and for unsolved crimes. For the former, the fund provides 30% of the total amount of compensation determined by the sentencing. Part of the unrecovered amount shall be paid during the year.

A possible solution to the problems outlined above would be to create a compensation fund in Ukraine which would provide financial support for law-enforcement agencies to improve their material and technical resources, and to assist victim support and victim compensation programs. Further important factors in favor of such a fund is that confiscated property retains its value long after initial seizure and throughout lengthy legal proceedings. A fund would also simplify procedures for effective sale of property after it has been confiscated, allowing for the disposal of funds and assets which would otherwise not earn interest and which would lead to additional costs associated with the upkeep and maintenance of property and other assets.

Victim compensation has been a problem in Ukraine for the last twenty years, and although a draft law on the creation of a compensation fund for victims was created in the early 2000's, it has yet to be implemented, with no clear sign of when this might take place. Details of how the fund would operate, who would be eligible for compensation and the crimes which would merit compensation from the fund would be decided upon by a panel of experts. It remains clear that without such a fund, current compensation practices and resources are inadequate.

Conclusions

The right to compensation for victims of human trafficking is currently not being upheld by national legislation. The law differentiates between the concept of moral and material damages, both of which can be difficult to assess and prove. The law provides for compensation for material damages to be covered by the State in cases where the guilty party or parties are unable to pay or where they remain unidentified. However, this is merely a formality and is not implemented in practice. What's more, victims who are minors are often denied compensation because the damages they suffer are predominantly moral rather than material in nature. .

Since a crucial factor in whether or not a compensation claim is successful is the degree of involvement of the victim, it is essential that the criminal proceedings be initiated only after the victim has recovered enough to fully take part. Investigators should be instructed to consider carefully the readiness of the victim to take part in court proceedings. Victims should be informed of rehabilitation programs which exist, any legal assistance they are entitled to, and their rights and responsibilities should be made clear to them. The stronger and more stable the victim feels, the better they will be able to cooperate with the investigation, which in turn increases the likelihood of a positive outcome in court.

A lack of professionalism and neglect of duty, as well as additional stigmatization of victims at all stages of the investigation and court proceedings, can prevent even the most determined victim from standing up for their rights. It is therefore essential that the authorities and professionals who come into contact with victims of human trafficking be trained to deal professionally and responsibly with such cases. This remains an unresolved issue.

Under such circumstances, victims have little faith in the criminal justice system. They are thus less likely to cooperate with investigations, which hinders efforts to fight human trafficking.

Recommendations

To improve the current system of access to compensation, the following measures have been identified:

Improvements to legislation

1. In order to bring national legislation in line with international law, the 1983 *European Convention on the Compensation of Victims of Violent Crimes* should be ratified and the relevant Law of Ukraine "On the compensation of victims of violent crimes" should be implemented.
2. International legal instruments signed by Ukraine should be ratified as soon as possible by the Verhovna Rada of Ukraine, to ensure that they are implemented in a timely manner.
3. The relevant legislation and regulations should be revised in order to establish a uniform legal definition of compensation for moral damages using the terms "moral/material damages".
4. The relevant legislation and regulations should be revised in order to establish a uniform legal definition of recovery of moral/material damages using the term "compensation of moral/material damages".
5. Revise the legal definition of moral/material damages to include the following: 'Moral damages are defined by moral or physical suffering that occurred as a result of an offence and any negative side-effects of the offence.'
6. Amend the Criminal Procedure Code (Article 28) and the new draft Criminal Procedure Code of Ukraine to include a provision to file a civil suit for personal injury and material and moral damages. Currently, a civil suit can only be filed for material damages.
7. Expand the rights of victims and their representatives in criminal proceedings.

Training for law enforcement and judges:

8. Include the 1983 *European Convention on the Compensation of Victims of Violent Crimes* in the current curriculum for investigators, prosecutors and judges.
9. Include knowledge and understanding of the 1983 *European Convention on the Compensation of Victims of Violent Crimes* as part of the selection criteria when selecting judges.
10. Make the recommendation to judges that Article 69 of the Criminal Code of Ukraine entitled 'Determination of a Lesser Punishment than the Punishment Provided for by Law' be applied in cases where offenders convicted under Article 149 of the Criminal Code of Ukraine entitled 'Trafficking in human beings and other illegal recruitment/transportation/transfer/harboring or receipt of persons' pay full compensation to their victims during court proceedings.
11. Emphasize amongst judges the importance of making reasoned and well-informed decisions when awarding compensation, as well as when refusing to award or awarding only partial satisfaction of claims.

12. Ensure that judges comply with international law and make full use of such legal instruments in their rulings.

13. Provide training for investigators on how to rightly identify evidence of moral suffering amongst victims of human trafficking, the different forms of injury that they suffer, and how to collect and record the relevant evidence.

14. Make the recommendation to judges that they refrain from any positivist or inflexible court practices which ignore common sense and which attempt to dissect the suffering of the victim into separate material or moral elements. They should instead direct the court to consider the suffering of the victim as a whole, since in some cases, the former approach can act as an obstacle to receiving fair compensation.

15. Provide training for investigators and judges on how to correctly apply provisions from Part 4 of Article 7 on ‘The use of expert testimonies in court’ and the ‘Court Examination’ law which applies to forms of legal expertise other than legal experts and other relevant specialists.

Investigations

16. Victims must be allowed to undergo a psychological examination by experts who can provide an expert opinion on the condition of the victim as part of the claim substantiation process. These experts should be qualified psychologists, able to conduct a psychological examination on victims of human trafficking, and to provide an expert opinion on the degree of harm suffered by the victim.

17. Psychologists acting as experts should also be called upon to give their opinion on any negative emotional conditions suffered by the victim as a result of the crimes committed against them.

Implementation of court rulings:

18. Create State and local compensation funds for victims of crime. Local government must be involved in the process.

Victim support during investigations:

19. In addition to investigating and prosecuting offenders, the welfare of the victims must also be prioritized. Legal advice and emotional and psychological support should be provided, and all attempts should be made to reassure and instill in the victim the belief that they are entitled to fair compensation and a restoration of their dignity and rights.

20. The creation of a hotline run by compensation experts to provide access and increase awareness amongst victims of human trafficking as to their rights to compensation.

21. The creation of an information booklet for victims, with detailed information on their rights and responsibilities, as well as recommendations and information on the necessary steps to be taken as part of the claims process.