

Realization of right for compensation among human trafficking victims in Ukraine: analysis of existing situation

Summary of study results

Methodology

The study was conducted in Ukraine in the beginning of 2011. Report is based on secondary data analysis. Study authors took into account efforts done previously to enlighten compensation issue: analysis of national law and its compliance to international standards has been undertaken, court practice of giving response to appeals for compensation of victims have been explored, barriers for compensation have also been studied. Separate publications have been done on these topics. This summary aims to accumulate all findings in area of compensation for victims and elaborate effective framework to ensure proper compensation for human trafficking victims on basis of complex analysis.

Ukrainian human rights experts are experienced in providing assistance to victims in ensuring their right to compensation, in particular in compensation for moral harm among other groups of victims, suffered from other crimes. This paper provides an effort to adapt existing experience to group of human trafficking victims, and specifies harm identification methodology, which gives this paper possibility to be applied in counter trafficking practice.

Separate section in this paper is dedicated to court practice and investigation of appeals for compensation in cases of human trafficking. Survey has been conducted to identify barriers for compensation according to actors involved in investigation and trial.

Obtained information is consolidated in sections, their summaries are provided below.

Section 1. Right for compensation: brief summary of national and international regulatory and legal forms

Procedural status of victims of human trafficking

Procedural status of victims of human trafficking is an important part in compensation process. Barriers for compensation at this stage can be divided for convenience into *subjective* (those are depending on actors involved in investigation and trial) and *objective* (mainly concerning defective legislation). First group includes denial in starting the investigation, late legal

acknowledgement of victim status, when victim is acknowledged only as witness and does not have victim status, inadequate informing of the victim about his/her rights and commitments. Low awareness of victims belongs also to this category.

To group of objective barriers belongs defective legislation which ensures more rights for the accused person than for the victim. For instance, victim cannot learn the decision on the expertise, cannot offer experts, cannot be present with approval of investigator at expertise and provide explanation to expert; finalized case is open to insight only by written or oral appeal; existing legislation does not provide any procedural rights for the victim when the case is closed.

Legal framework for compensation

In national legislation there are only declared norms of State responsibility, and the framework of governmental compensation in case of abuse following crime are absent. In addition, corresponding national law on compensation of victims of violent crime is also absent, which makes the situation even more vague, it should be passed after Ukraine ratifies European Convention on the Compensation of Victims of Violent Crimes (1983).

Nevertheless, even corresponding law cannot grant compensation accessibility, as State has to compensate only for material abuse. Contrary to international norms national legislation does not approaches compensation holistically but draws a defined line between material and moral abuse which cannot be clearly separated during obtaining abuse evidence.

To draw this line in cases of minors is particularly difficult. Human trafficking causes mainly moral harm to minors as they usually cannot own any property.

Practice of moral (non-material) compensation is regulated by number of legal documents. The big amount of legal documents belonging to different levels and branches of law, of non-systematical and fragmented nature interfere with effective regulation of court practice in Ukraine.

Though there are many legal documents regulating compensation none of them grants accessibility of compensation for minors. First, national legislation lacks imperative norm concerning obligation of Department of Juvenile Services to represent interests of minors –victims of violent crimes in court. Second, national legislation lacks norm ensuring accessibility of free juridical services to minors. Third, legislation (thereafter, also practice) lacks training of experts able to represent minors-victims in court. All mentioned means that minors face the same

challenges as full-age victims. Therefore, national legislation is not adapted to special needs of minors concerning compensation.

Section 2. Methodological issues of compensation for human trafficking victims

For measure of material equivalent of moral harm *individualized* approach should be applied. It is based on fact that different people who experienced abuse from similar illegal acts and their consequences make sense of this experience differently and resulting negative feelings have different depth, strength and duration; thus, “value” of moral abuse is individual and gives the base for potential compensation.

Thereby, degree of compensation could not be identified using general rates and recommended as minimum or maximum. It depends on individual factors of victim; therefore, identification of individual factors influencing suffering from moral abuse should be the basis for evidence.

Evidence contains restitutional and compensational parts of material equivalent of moral harm. The first part implies that estimate is based on burden of forced changes in victim’s life taking into account duration of rehabilitation period and measures needed to restore pre-abusal quality of life. In some cases restoring of previous physical and psychological well-being of human trafficking victim is really possible.

In most cases of human trafficking changes are irreversible, and restitutional methodology could not be applied to measure equivalent of moral harm, as pre-abusal quality of life cannot be reached by any means. To these cases compensational part of material equivalent or moral harm should be applied. The main focus of evidence should be on individual features of victim which influenced progressivity of irreversible changes and consequences, and prove of its psychological nature. This approach should be applied to minors.

Existing national legislation provide variety of tools for victim(s) to estimate degree of harm and raise a claim to defendant. It often depends on victims themselves, their insistence and level of control, how they use this framework. Although law enforcement bodies are obliged to prove the rate of compensation for moral harm, they are not obliged to ensure this compensation and usually do not initiate and are not particularly active in the process.

For effective control and victim’s right protection following components can be included into evidence for abuse and degree of harm: testimonies of witnesses,

testimony of the victim, testimony of suspect, testimony of accused, expertise results, real evidence, protocols of investigation and court procedures, protocols with corresponding annexes compiled by authorized bodies by results of investigation, and other documents.

Forensic psychological expertise provides possibilities for effective restoring of victim's rights by providing evidence of moral abuse. It can be undertaken both in pre-trial phase and in trial assize. On pre-trial stage the expertise can be initiated by investigator, in assize – by trial decision in response to victim/demandant appeal.

Forensic psychological expertise is more well-timed on pre-trial phase, as estimate of moral harm is based on strength and depth of negative emotions which can be eased as time passes.

Following general research questions can be advised to expert, conducting forensic psychological expertise:

- If victim's moral suffering and negative feelings are connected with violent crime experienced and its negative consequences?
- In case moral suffering and negative feelings are connected with violent crime experienced and its negative consequences, what is material equivalent of this moral harm?

Trial practice allows forensic psychological expertise to be conducted by psychologists. For our study important issue is the fact that to this category of experts belong experts of rehabilitation centers, psychologists-consultants, psychologists-lecturers, psychologists-researchers, etc. Involving of these experts can speed up consideration of the case, timely and adequately compensate for moral harm for the victim, avoid dependence on geographical accessibility of specialized bodies, on workload on national experts, and other barriers towards effective compensation.

Section 3. Shortcomings in compensation for human trafficking victims for material, physical and moral harm

This study points out the key role of victims themselves in ensuring right for compensation. Key barriers for compensation are low awareness among victims, passivity and unclear positioning of victims in trial as result of their low awareness; will to forget the abuse experienced; threats from traffickers, etc. Important measure in these cases is effective rehabilitation which provides to the

victim better understanding of abuse s/he experienced and empowerment to restore the rights and dignity through compensation. Involvement into rehabilitation programs should come prior to initiation of investigation.

Not all the victims can afford to use services of advocates representing their interests because of poverty. Victims can obtain services of advocates for free in case they are informed by law enforcing bodies about possibility to get these services through NGOs active in this field, in some regions there are organization assisting victims of human trafficking. Funds for advocate services are coming from several international and non-governmental organizations.

Inadequate argumentation of appeal and inadequate estimate of harm ends up in dismissal. The possible reason for it could be the fact that appeals are mostly done by investigators on pre-trial stage not representing victims, are not supported by any evidence, and are over- or underestimated. Often appeals even do not comply with rules about application form and content.

Estimate of potential compensation rate included into appeal is mostly put in responsibility of victims themselves; as they lack skills in most cases to do it objectively and properly, and involved lawyers lack skill of conducting psychological expertise, it is impossible for victims to reflect independently on variety of their feelings and separate those which are in causal relationship with their experience of violate crime. All these factors contribute to appeal dismissal or inadequate satisfaction.

Inadequate argumentation of appeal and inadequate estimate of harm lead investigation the false way: for evidence trial demands medical decision from hospital. Nevertheless, consequences of abuse are not exclusively physical traumas or mental disorders, but negative emotions and suffering which cannot be identified properly by medical doctor or psychiatrist. Adequate expert to produce such a decision is expert-psychologist, as specified in national law. Still, investigators or trials often direct victims only to expert centers or bodies certified by Ministry of Justice of Ukraine, which is a source for a number of barriers: these centers are mainly present only in several region capitals; number of certified experts is limited, thus they are overloaded, which makes the decision-making process superficial and disinterested, and also long-lasting.

Sadly, personality of victim is still taken into account by trial decision making. For instance, pensionable ages, disability, existence of depending persons are often barriers towards satisfaction of appeal for compensation. Experience of sexual exploitation can be source of stigma in trial, and decision will be made

taking into account “amorality” of victim. In general, bias and prejudice among investigators, prosecutors, judges towards victims of trafficking is present and can influence the decision for compensation.

Case studies have shown that appeals for compensation are satisfied in most cases, but degrees of compensation are low. There is an association between length of period of detention and sum of compensation paid to victim. In cases accused persons pay compensation to victims, they are more likely to get suspended sentence with no property confiscation.

Still, positive trial decision does not directly lead to accessibility of compensation. Barriers are following: most income and properties of trafficker is outside, in country of destination, where exploitation took place, and are inaccessible for Ukrainian law enforcing bodies; suspending or finishing regulatory procedure because of absence of income sources of convicted for real detention, challenges of confiscation process, lack of legal regulation of compensation provision.

Practical realization of trial decision depends to great extent also on activity and insistence of victims. They have to follow-up regulatory procedure, as they have to re-appeal in three days in case duration of procedure runs out. Thus, victims have to monitor work of law enforcing bodies at least once in 2-6 months for years, until debtor posses enough fund to cover compensation fully.

In such circumstances there is a need for alternative sources of compensation. So far in Ukraine there is no special governmental tool for ensuring compensation in cases when accused person is not able to cover it fully or is unknown, not taking into account crimes done by law enforcing bodies. This right towards property damage is granted in law of property according to Article 1177 of Civil Code of Ukraine: *Damage done to property of an individual as result of crime is compensated by State in case person who has committed the crime is unknown or insolvent.* Procedure for such compensation should be regulated by law, which is lacking today.

This study proved that there is no consensus in opinions of researchers and practitioners towards need to create compensation tool, its framework and aim. Study authors think that compensation fund should be created in Ukraine and its function should be supportive or stimulant to victims. Authors’ opinion is based on strong belief that dignity of victims can be fully restored only by means of full satisfaction – compensation from guilty person.

Key findings and recommendations

Numerous existing national legal documents do not ensure right of human trafficking victims for compensation. Concepts of material and moral harm are separated by law; still, they cannot be separated in practice while estimating the harm, and both are not easy to measure. Law ensures compensation from State for material harm in case guilty person is unknown or insolvent. Nevertheless, this guaranty is more declarative and cannot grant accessibility of compensation for minors, as they experience more moral harm.

Taking into account the fact that active position of victim during investigation and trial practice is the key element, initiation of investigation should start after rehabilitation period. Investigator should take into account if the victim is really ready to participate, if s/he is aware of rehabilitation programs; empower advocates to participate in investigation; inform victims about their rights and obligations – all these measure empower the victim, raise chances to get satisfaction, and facilitate effective cooperation between victim and investigator.

Low level of professionalism, disinterested and formal attitudes of law enforcing bodies and trial towards their obligations, stigmatization of victims on all stages can disempower even the most active victims. Therefore, one of the aims should be to raise level of professionalism and awareness of peculiarities of investigation in human trafficking cases.

When victims fail to obtain adequate compensation, it makes them question justice of investigation. This situation disempowers victims to cooperate, which is a big barrier for human trafficking counteraction.

Based on presented above results authors provide following *recommendations*:

1. Harmonization of national legislation with international norms requires ratification of European Convention on the Compensation of Victims of Violent Crimes (1983) and passing of corresponding law on Compensation of Victims of Violent Crimes, draft of which was compiled by inter-departmental group of Ministry of Justice in 2005.
2. Periods of ratification of international legal acts by Parliament of Ukraine must be speed up to ensure their timely implementation.

3. Corresponding legal and regulatory documents should be revised in order to unify legal definition of legal framework of moral harm compensation into “moral (non-material) harm”.
4. Corresponding legal and regulatory documents should be revised in order to unify legal definition of diminishing consequences of moral (non-material) abuse into “compensation for moral (non-material) harm”.
5. Legal definition of moral (non-material) harm should be shortened to “Moral harm is moral or/and physical suffering resulting from crime or its negative consequences”.
6. Develop guidelines for investigators containing information to provide for victims to empower them to cooperate.
7. Include to national training of prosecutors, judges, and investigators curriculum topic on Convention on the Compensation of Victims of Violent Crimes (1983).
8. Include into program of judges selection questions on legal content and separate sections of Convention on the Compensation of Victims of Violent Crimes (1983).
9. To recommend judges to avoid in their practice positivist approach and efforts to separate harm into material and non-material, but to lead investigation to holistic compensation of harm associated with crime, as later is both more convenient for investigation and just for victim.
10. To conduct trainings with judges and investigators according to Section 4 Article 7 “Subjects of court expertise activities” of Law of Ukraine “On court expertise” for ensuring opportunity to involve in expertise experts others than court experts.
11. To recommend judges to apply in several cases Article 69 of Criminal Code of Ukraine “Assignment of more lenient penalty compared to assigned by law” for persons convicted according to Article 149 of Criminal Code of Ukraine “on human trafficking” if appeal for compensation is fully satisfied during trial assize.
12. To create compensation foundation to grant basic compensation for victims of violent crimes. Apart from financial function the Foundation should carry out other functions – free law consultations, medical and/or psychological assistance, etc.

