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Possibilities to Obtain Compensation for
Trafficked Persons in Austria

COMP.ACT EUROPE

European Action for Compensation for
Trafficked Persons



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List of Abbreviations

| | |
|----------|--|
| CC | Criminal Code |
| CCP | Code of Criminal Procedures |
| e.g | exempli gratia, for example |
| EC | European Commission |
| EEA | European Economic Area |
| EU | European Union |
| LEFÖ-IBF | Intervention Centre for Trafficked Women |
| UN | United Nations |

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Introduction

The intended purpose of trafficking in human beings is to profit as much as possible from the exploitation of trafficked persons. Trafficking in human beings is defined as follows:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

The Austrian legislation also refers to this definition.

To get hold of the money gained through the exploitation has to be part of the measures against trafficking in human beings.

Further, the caused damages have to be compensated. This means to facilitate trafficked persons the access to their rights which includes the payment of adequate compensation. The fact is that only few trafficked persons have actually received compensation. The main reason for this is that in most European countries, measures against trafficking in human beings have been developed in the context of criminal law. The perspective of the criminal law does not pay sufficient attention to human rights. At best, the needs and rights of trafficked persons are considered subordinate.

Research conducted by the *Organization for Security and Cooperation in Europe (OSCE/Office for Democratic Institutions and Human Rights)*,¹ the *Global Alliance Against Traffic in Women (GAATW)*² and *Anti-Slavery International*³ revealed that trafficked persons rarely receive compensation, although a right to compensation as well as a variety of compensation mechanisms do exist. Even though there are legal options for victims of crime to be granted access to compensation for material and immaterial damages in most European countries, the right to compensation in practice remains one of the weakest rights of trafficked persons.

¹ OSCE/ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region (2008).

² GAATW, Material Justice, Seeking Compensation in Trafficking Cases, Alliance News, Issue 27 (2007).

³ Lam/Skrivankova, Opportunities and Obstacles: Ensuring Access to Compensation for Trafficked Persons in the UK, Anti-Slavery International (2009).

The published study concerning the access of trafficked persons to compensation in Austria was conducted within the framework of the project COMP.ACT EUROPE – European Action for Compensation for Trafficked Persons.

COMP.ACT EUROPE is a European network and three-year project coordinated by La Strada International and Anti-Slavery International concerning the compensation for trafficked persons throughout Europe. The aim of the network and current project is to integrate claims for compensation in national measures to fight trafficking as well as in international policies against human trafficking. Another main goal is the development of instruments for the incorporation of these measures helping to secure access to compensation for trafficked persons.

Within the European network, representatives from different interest groups such as NGOs, legal experts, federations of trade unions, organizations in the field of migration, academics and international umbrella organizations come and work together on a national as well as on a European level towards systematic change. In addition to a leadership committee and an advisory board, 13 European countries participate in the network. The authors who conducted this study are members of the Austrian working group coordinated by the organization LEFÖ Intervention Centre for Trafficked Women (LEFÖ-IBF). The working group consists of individuals with complementary expertise in the field of women or human trafficking, providing the group with expertise in the field of counselling and support of trafficked persons, legal expertise with an emphasis on human rights and the practical legal experience of a female lawyer. Hence, the group constitutes an adequate basis for exchange and mutual action.

The study continuously touches on how to receive compensation as a trafficked person in Austria. It has to be pointed out though, that most trafficked persons mentioned in the study are women. The study refers to 'human trafficking' because this is the official legal term to be used for this phenomenon. However, we are aware of the fact that this term generalizes and hides a possible cause of human trafficking, namely the discrimination of women.

The term 'trafficking in women' on the other hand is sometimes associated with certain attributes and is often used when referring to trafficking for purposes of sexual exploitation while ignoring the fact that there are also other forms of exploitation of women such as exploitation in households or in the food service industry. At the same time, it is often ignored that boys, men or transgender people can also become victims of human trafficking for purposes of sexual exploitation. Therefore, even if the term 'human trafficking' does not reflect our position clearly, it is used for reasons of legal clarity.

The fact that the group included in the study contains almost only trafficked women reflects the current overall situation in Austria, where those identified as trafficked are

mostly women. The majority of trafficked women received psychosocial counselling in court cases provided by LEFÖ-IBF.

Primarily, this study comprehensively reviews compensation of damages claimed in criminal and civil court cases and reveals legal options according to the Labour Law (Arbeitsrecht) and the Victims of Crime Act (Verbrechensopfergesetz). Following a presentation of the legal options, case analyses will demonstrate the practice of receiving compensation. The latter closes with conclusions and recommendations for further steps to be taken in the future.

The main results are as follows:

Compensation has only been granted effectively in those cases where victims of human trafficking were able to receive psychosocial victim assistance services. An actual payment of compensation was only obtained if the perpetrators' assets had been seized during criminal proceedings. At present only individual cases have been taken to the Labour and Social Court in Order to claim unpaid wages so that there is only little experience to draw from. The analysis of the legal situation according to the Victims of Crime Act in Austria revealed that third country nationals only have an access to filing this legal claim if they legally resided in Austria at the time of the offense. Furthermore, such a great effort is required in order to actually receive compensation in transnational cases that it turns out to be impossible in many individual cases.

1. Methodology

This study aims at gathering different aspects of the legal situation concerning compensation for trafficked persons in Austria in order to highlight and elaborate possible gaps between theory and practice. Research was based on a methodological approach of qualitative investigation and data analysis due to the fact that the study was less focused on statistic data than on gathering common practices and relating them to theory. In order to include both the level of theory as well as the level of practice, various sets of data had to be collected and gathered. Relevant legal texts were reviewed and theoretically summarized providing a set of data with which to comprehend the level of theory. In order to relate to the practice, legal files were reviewed and documents were analyzed. Documents such as these legal files present a set of data which makes it possible to draw conclusions on how people think and act (Mayring 1999). For the purpose of this study it was expected that an analysis of legal files would answer questions of how payments of compensation for trafficked persons could be claimed in court proceedings. Based on Mayring (1999), this data can be considered especially valuable due to the fact that it does not have to be produced first by scientists, but is non-reactive data and therefore contains less subjective sources of mistakes.

Through the analysis of this data, a system of categories was developed similar to the approach of a qualitative content analysis. "Qualitative content analysis is useful for systematic, theory-based work on texts" (Mayring 1999, p. 98). The theory-based approach was used in this study to analyze the legal situation concerning payments of compensation for trafficked persons. The researchers applied this approach for analyzing the legal files in order to be able to organize certain aspects of data content using the aforementioned system of categories (Mayring 1999). As is common in qualitative social research, the system of categories was adapted once new results of analysis appeared. Following the first analysis of legal files, additional data was collected through conducting expert interviews in order to provide for a comprehensive analysis of practice. Collecting data by conducting "problem-centred interviews" (Mayring 1999) proved to be highly valuable for the purpose of this study because the relevant interview partners provided input which added to the main theoretical findings. The problem-centred interview proved to be particularly useful in this context with the previously developed guidelines helping to maintain focus while allowing space for detailed answers. The knowledge and daily experiences of the interviewed persons therefore added to the analysis of legal files.

Interview partners were selected following a reflection period at the end of the first round of document analysis based on the principle of "theoretical sampling" (Glaser/Strauss 1998). Once the interviews had been analyzed, more legal files were collected to add to the system of categories.

This cyclic approach of analysis and research is based on the following qualitative paradigm: "Research periods represent the typical form of organization in qualitative social sciences and establish the core of scientific field work by structuring the process of data collection and analysis." (Lueger 2000, p. 53)

1.1 Practical Approach

1.1.1 Sample and Access to the Field

Relevant Legal Texts on the Issue of Compensation:

The first step was to analyze and theoretically summarize relevant legal texts concerning the situation of trafficked persons in regards to receiving compensation payments. Relevant legal texts from the Victims of Crime Act were selected and structurally summarized based on a focus on trafficked persons.

Analysis of Legal Files:

Initial access to files was facilitated by the victim protection facility LEFÖ-IBF which is granted access to exemplary cases concerning their work in the course of providing victim protection services. Based on these 20 files an initial system of categories was developed. Secondly, a letter of support from the Austrian Ministry of Justice provided access to legal files at the Regional Courts in Vienna and in Styria, so that additional relevant files were systematically retrieved in a subsequent step. The purpose of this study sample was to create groups for comparison which had been determined beforehand:

Several comparison groups:

Several comparison groups were to be analyzed in regards to differences between cases involving compensation claims in order to recognize procedures of court cases in practice. The comparison groups were selected according to the principle of 'theoretical sampling' (Glaser/Strauss 1998). The findings of the first round of research during which data was collected that provided information about the situation of compensation payments in Austria therefore served as the theoretical

basis for the selection of groups. Comparison groups were created according to the different legal proceedings. The following types of cases were to be analyzed:

- 1 Criminal and
- 2 Civil proceedings
- 3 As well as cases involving benefits according to the Victims of Crime Act

According to criminal law, victims can receive psychosocial and legal victim assistance services. Additional comparison groups were created based on this law:

- 4 Cases with trafficked persons who received psychosocial and legal victim assistance services (especially cases supported through services provided by LEFÖ-IBF)
- 5 Cases with trafficked persons who did not receive psychosocial and legal victim assistance services

The number of samples had to be reduced since there was no possibility to obtain access to files of civil court cases. Because of the court's administration of files, it is not possible to specifically search for and retrieve files of civil court cases on the issue of human trafficking.

A total of 76 criminal cases were analyzed. In 41 of these cases victim assistance services were provided by LEFÖ-IBF. In 65 cases the affected person had been trafficked for purposes of labour exploitation in prostitution. Two more cases involved exploitation in prostitution as well as in other forms. There were three cases with male victims in the whole sample. Other cases involved trafficking for purposes of labour exploitation, exploitation in households or for begging. Another case involved rape in the course of being trafficked. The rape was reported.

28 of the trafficked persons that had received victim assistance services were citizens of other EU member states. 13 third country nationals that were trafficked exercised their right to receive victim assistance services. 32 of the trafficked persons who are citizens of other EU member states and two trafficked persons who are third country nationals did not receive psychosocial victim assistance services. The sample included eight cases of trafficking that involved female minors. Three of these minors received victim assistance services. Six of them had been trafficked into prostitution and two of them had been exploited for begging.

- Interviews with Experts:

The next step after having analyzed the legal files was conducting interviews with experts in order to add their knowledge of the field to the findings of the first research period.

The analysis of legal files provided the basis for choosing interview partners who would add to the findings by offering their knowledge and daily experience in legal proceedings with the purpose of obtaining compensation for trafficked persons.

The following persons were interviewed:

Two judges with experience in legal proceedings on the crime of human trafficking;

Two public prosecutors who had been engaged in criminal proceedings on the crime of human trafficking;

Two police officers from Vienna and Styria who were asked about their expertise concerning criminal proceedings with trafficked persons (both were chosen because of their competence in this field);

One representative of the Austrian Ministry of Justice;

And: one expert in the legal field of the Victims of Crime Act.

After the first results were presented it became clear that interviews would also have to be conducted with trafficked persons in order to include their perspective as victims of human trafficking involved in criminal proceedings in Austria and their experiences of trying to obtain compensation. These interviews were mainly intended to demonstrate how important trafficked persons considered receiving compensation. In order to find an answer to this question, women supported by the victim protection facility LEFÖ-IBF were asked casually without exerting pressure if they would like to participate in an interview and speak about their experiences as victims of trafficking involved in criminal proceedings in Austria.

In the end only two interviews were conducted with two women who participated in legal proceedings concerning the payment of compensation.

One reason for this small number of interviews was that LEFÖ-IBF hesitated to ask some trafficked women who they thought might be re-traumatized by conducting such an interview. Furthermore, the women did not see any specific reason or

incentive for participating in an interview since they would not personally profit from it, but would have had to invest their time and emotions.

LEFÖ-IBF evaluated this reaction of the women as a demonstration of professionalism. They were able to directly communicate to the organization that they did not want to participate and did not feel obligated to do it. The two women who were willing to answer questions had already been successful in receiving part of their compensation, which might have been a reason why they were ready to talk about their experiences while others were not.

1.2 Interviews and Analysis

The team of researchers established the theoretical framework by analyzing legal texts which provided the basis for further steps in the analysis of the practice of trafficked persons receiving compensation in Austria.

First the researchers analyzed 20 files provided by the victim protection facility LEFÖ-IBF. On the basis of these files the team was able to develop a temporary system of categories according to the 'qualitative content analysis' by Mayring (1995). Other legal files that followed were analyzed based on this grid.

The investigation of legal files was planned in terms of the so-called 'theoretical sampling' (Glaser/Strauss 1998). On one hand, legal files were investigated following the researchers' discovery that many criminal proceedings on the crime of human trafficking were conducted in Vienna and Styria. On the other hand, the findings of the first round of analysis had an impact on the choice of additional data to be analyzed. Glaser and Strauss call this the theory-guided process of data collection (1998). Based on the first analysis, researchers planned which experts from the field should be interviewed in order to obtain a complete picture of the practical side of obtaining compensation for trafficked persons in Austria.

The following periodic outline should illustrate the actual approach to collecting and analyzing data:

1st period: Developing an initial system of categories based on the sample of files provided by the victim protection facility LEFÖ-IBF.

2nd period: Collecting cases which were pending with the public prosecutor and regional court of Vienna.

Researchers chose those cases in which trafficked persons had received legal victim assistance services since it was expected that the provision of legal aid would facilitate and encourage claiming compensation. In the following step these chosen cases were analyzed.

3rd period: Interviewing experts. The grid of categories was revised based on the findings of the analysis of the expert interviews.

4th period: Collection of additional cases pending with the public prosecution departments and regional courts of Vienna, Graz and Leoben since most cases concerning human trafficking have been filed at these courts over the past years. Carinthia was also chosen in order to compare present findings with the quality of legal proceedings on the crime of human trafficking in provinces of Austria where fewer cases were brought to court. Cases conducted in the province of Lower Austria were only selected randomly.

5th period: Conduction and analysis of additional interviews with experts.

6th period: Summary of the findings of the previous analysis periods.

After having analyzed the first legal files, the researchers developed guidelines for conducting the interviews. The analysis of legal files showed e.g. that different guidelines had to be developed depending on the focus of expertise of each person to be interviewed.

The interviews were later analyzed based on the 'thematic analysis' according to Froschauer and Lueger (2003). Contrary to the originally planned methodological approach of qualitative content analysis, specific topics that came up in the interviews turned out to be more relevant for the researchers. This is why the method of analysis had to be changed in the process of research.

Based on thematic analysis according to Froschauer and Lueger (2003), the researchers were able to encode the relevant topics of the interviews and later compare the thematic codes. This method proved to be of great value due to the fact that it allowed including an analysis of the context of an interview out of which a relevant topic developed. Using the method of contrast as part of the analysis made it possible to compare and explicitly address thematic codes of similar interviews.

2. Possibilities to Obtain Compensation in Austria

2.1 Compensation Claims in Criminal Proceedings

2.1.1 Point of Departure

2.1.1.1 Material and Legal Basics for Criminal Liability for the Acts of Human Trafficking according to the Austrian Penal Code

The Criminal Law Amendment Act 2004 (Federal Law Gazette (BGBl) I 14/2004) amended the Austrian Criminal Code including the offence of 'human trafficking' according to CC s. 104a following international standards set by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Trafficking in Women and Children.⁴ The original regulation only covered human trafficking for purposes of prostitution,⁵ which was renamed 'transnational prostitution trade'.⁶ By signing and ratifying the UN-Protocol, as well as the Council of Europe Convention on Action against Trafficking in Human Beings, Austria agreed to implement measures for the criminalization of such crimes as well as for the protection of victims. The Council of Europe Convention focuses especially on strengthening victim protection and states, for example, that victims of human trafficking are to receive special protection and material support regardless of their willingness to act as a witness in criminal proceedings against traffickers.⁷

Whoever uses illicit means to recruit a person for purposes of sexual exploitation, removal of organs or exploitation of the person's labour, accommodates, or otherwise receives, transports, offers or transfers this person to a third party incurs a penalty pursuant to CC s. 104a. In the case of minors the use of illicit means is not a requirement.

The premeditation of the perpetrator is a necessary element to constitute the offence of 'human trafficking' according to CC s. 104a. If there is no proof of premeditated exploitation, other elements of the crime might constitute the offence of 'transnational prostitution trade' mentioned above.

2.1.1.2 Victims' Rights in Criminal Proceedings

⁴ In the fall of 2005 Austria ratified the UN-Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

⁵ Federal Law Gazette. No. 60/1974.

⁶ See CC s. 217.

⁷ The Council of Europe Convention came into effect on February 1, 2008. Further, Austria ratified the UN-Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which also includes protection measures for children who were trafficked, forced into prostitution or pornography.

Generally, criminal proceedings serve to investigate and sentence acts which are considered liable to prosecution according to the Austrian Penal Code.⁸ CCP s. 10 establishes the 'Victim's Participation' as a basic principle in criminal proceedings. While the right to punish perpetrators was traditionally seen as an issue of the State, with victims only being entitled to civil claims, this view has changed in that nowadays victims' interest in the punishment of the perpetrator is legally recognized.⁹ Additionally, when deciding on concluding criminal proceedings, the public prosecutor and the court have to closely examine and advocate the victim's interests in reparation to a maximum extent. The law differentiates between victims who were or continue to be exposed to particular emotional stress due to the committed crime (CCP s. 65 (1a) and (1b) and those who suffered damages or were otherwise harmed concerning their legally protected interests and might therefore have an interest in reparation (CCP s. 65 (1 item c)).

The group of victims mentioned first – persons who might have been exposed to violence or threat or had their sexual integrity violated by a premeditated criminal offence – have an additional right to psychosocial and legal victim assistance services (CCP s. 66 (2) and to be interviewed indirectly and in a very considerate manner during investigations and main proceedings (CCP s. 165 and 250 (3)).¹⁰ Psychosocial and legal victim assistance services not only guarantee comprehensive preparation for court procedures along with the stress involved for victims who were or continue to be exposed to particular emotional stress by the suffered criminal offence, but also protect their procedural rights in regards to the victim's personal shock.¹¹ Psychosocial victim assistance services cover the comprehensive preparation of the trafficked person as well accompanying him/her to police and court hearings. Interviews that have to be conducted indirectly and in a very considerate manner according to CCP s. 165 (Federal Law Gazette 1 19/2004), also referred to as 'Adversary Examination' ('kontradiktorische Vernehmung'), are an anticipated part of the main proceedings. They are considered in those cases where there is reason to expect that the witness might not be available for the main proceedings, e.g. because he/she will not be in Austria anymore or exercise their right to decline a statement during the main trial. These kinds of hearings are conducted in order to protect trafficked persons as much as possible from stress caused by the confrontation with the perpetrator/s and by repeated statements. In these cases the witness can be interviewed in a separate room by an examining magistrate, or – in

⁸ Bertel/Venier, Strafprozessrecht (2008), 5.

⁹ Bertel/Venier, Strafprozessrecht (2008), 16.

¹⁰ Jesionek, Die Stellung des Verbrechensopfers im neuen österreichischen Strafprozess (2009).

¹¹ Seiler, Strafprozessrecht (2009), 85.

cases of minors under 14 years of age who had their sexual integrity violated – by an official expert. A confidant is allowed to be present during the interrogation.

The testimony is videotaped and can be shown in the courtroom, where the perpetrator, his/her lawyer, the public prosecutor and the victim's lawyer can follow the interview on a screen and exercise their right to ask questions. During the main trial the protocols of the witness's testimony are read and the video is presented. The witness has to be informed about this procedure prior to testifying. The CCP does not include specific regulations that are relevant for trafficked persons. This group of victims and their procedural rights are covered by the existing regulations according to CCP s. 65 (1a-c).

Procedural rights of the victim according to CCP s. 65 (1a-c) are:

Right to Information¹²

Information about the progress of proceedings

- a) Victims of domestic violence (Security Police Act s. 38a) and victims according to CCP s. 65 (1a) have to be informed ex officio about the release of the offender from custody immediately without exception – other victims have to be informed if they requested so (CCP s. 177 (5);
- b) Victims have to be informed by the public prosecutor if proceedings are going to be dropped or continued (CCP s. 194) and about the possibility to request continuation of proceedings according to CCP s. 195;
- c) They have to be informed prior to proceedings against unknown perpetrators being dropped and prior to proceedings being continued or opened following interrogations (CCP s. 197 (3);
- d) They have to be informed if the public prosecutor decides to follow diversion procedures (CCP s. 206), and if diversion procedures are cancelled (CCP s. 208 (3));
- e) They have to be informed prior to their hearing concerning the subject of proceedings and about their basic rights during proceedings as well as about the possibility to receive compensation and support (CCP s. 66 (1) subpar 3) and s. 70 (1);
- f) According to CCP s. 70 (2), victims who might have had their sexual integrity violated have to be informed at the latest prior to their first hearing about the following rights:
 3. Interrogation by a person of the same sex;

¹² Jesionek, Die Stellung des Verbrechensopfers im neuen österreichischen Strafprozess (2009).

3.1.1 Option to refuse to answer questions which concern the most private sphere and details of the crime if the trafficked person considers such questions unacceptable (CCP s. 158 (1) subpar 2);

4. Interviews conducted in a very considerate manner ('Adversary Examination') during investigations and main proceedings (CCP s. 165 and 250 (3));¹³

5. Option to request a non-public trial (CCP s. 229 (1) subpar 2).

Right to Legal Representation

- a) Victims have the right to receive legal representation by lawyers, specialised victim protection facilities or any other qualified person (CCP s. 66 (1) and 73);¹⁴
- b) Civil claimants have a right to receive legal representation by a lawyer free of charge based on the provision of legal aid (CCP s. 67 (7)) if they cannot be granted victim assistance services according to CCP s. 66 (2)¹⁵.

Right to Participation and Control

a) Participation in adversary examinations of other witnesses and perpetrators (CCP s. 165 (2));

b) Participation in Crime Scene Reconstruction (CCP s. 150 (1));

Right to be present at the main trial and to question perpetrators, witnesses and official experts (CCP s. 66 (1) subpar 7);

d) Access to files (CCP s. 68);

e) Free translation (CCP s. 66 (1) subpar 5).

Right to Special Protection¹⁶

a) Considerate treatment:¹⁷

- Right to be accompanied by a confidant in investigation and court hearings (CCP s. 160 (2) and (3))
- Right to testify anonymously (CCP s. 162)
- Right to be interrogated in a considerate manner (CCP s. 165 (4) and s. 250)

¹³ See above.

¹⁴ There are currently 46 victim protection facilities in Austria which provide victim assistance services to different groups of victims (Status: November 2010). Lefö-IBF is the only organization which offers victim assistance services specifically for trafficked women. In cases of trafficked children/teenagers or men, local victim protection facilities have to provide victim assistance services (if need be with the authorization of the Youth Welfare Office). Services are financed by the Ministry of Justice.

¹⁵ It needs to be pointed out that those persons who waive their right to receive legal victim assistance services consequently cannot claim legal representation as part of receiving legal aid.

¹⁶ Jesionek, Die Stellung des Verbrechensopfers im neuen österreichischen Strafprozess (2009).

¹⁷ This again refers to CCP s. 10.

- No body search or personal search without approval (CCP s. 123 (5))
 - Exemption of parts of a file from other participants' right of access in order to protect witnesses (CCP s. 51 (2))
- b) If possible, the victim has to be informed about seized objects of value to guarantee that he/she can decide about making civil claims. (CCP s. 111 (4)).
- c) The public prosecutor is obliged to mandate seized objects to be returned to the victim if these objects are not needed anymore for reasons of evidence and if the rights of third parties are not affected (CCP s. 69 (3)).

Right to Appeal

- a) Appealing to the court during investigations if certain rights have been violated by the police or the public prosecutor according to CCP s. 106 in case a victim claims a subjective right has been violated, because he/she was hindered to exercise a certain right or compulsory measures were conducted which violated legal regulations;
- b) Appealing against court decisions according to CCP s. 88 if a decision violated the rights of a victim or imposed obligations or if the victim is affected by coercive measures or if the victim claims a subjective right has been violated by the court's collection of evidence.

2.1.2 Adhesive Procedure – Reparation of Damages in Criminal Proceedings

Through adhesive or subsequent procedures a victim can claim and enforce his/her right to become a civil claimant¹⁸ during criminal proceedings.¹⁹

Based on the evidence collected during criminal proceedings the court should make a quick decision on a civil claimant's claims to guarantee cost-effectiveness and avoid subsequent civil court proceedings.

2.1.2.1 The Civil Claimant

Conducting an adhesive procedure requires that a person harmed by criminal acts is able to file a civil claim (CCP s. 69) and can submit a declaration to join criminal proceedings as a civil claimant (CCP s. 67). If a victim submits an informal declaration and joins criminal proceedings as a civil claimant, he/she can make use of additional rights.

In addition to the rights of every victim, civil claimants have the right to

- a) Request the collection of evidence (CCP s. 67 (6) item 1 in conjunction with s. 55);

¹⁸ See chapter 2.2, Compensation Claims in Civil Proceedings.

¹⁹ Spelling, Das Anschluss- oder Adhäsionsverfahren, ZVR 2003/98.

- b) Request continuation of proceedings as a subsidiary prosecutor if the public prosecutor drops proceedings. (CCP s. 72);
- c) Appeal against the court's decision to close the case (CCP s. 87 (1));
- d) Apply for legal representation free of charge if victim assistance services are not granted;
- e) To be present during the main proceedings, make use of every victim's right to ask questions, and to have the opportunity to make and explain claims following the public prosecutor's closing speech;²⁰
- f) Appeal for nullity according to CCP s. 281 (1 Z 4) (CCP s. 282 (2))²¹;
- g) Appeal against the court's decision on the civil claim according to CCP s. 366.

The victim can submit his/her declaration to become a civil claimant to the police or to the public prosecutor during preliminary proceedings after the case is brought to court. The declaration has to be submitted before the procedure of collecting evidence is closed, and the amount of reparation of damages or compensation has to be determined (CCP s. 67 (3)). The victim can withdraw from this declaration at any time.

Generally, the police, the public prosecutor and the court are obliged to inform victims about their basic rights in trial, including the possibility to join as a civil claimant and claim compensation (CCP s. 10 (2)).

There is no need for the court to formally allow for civil claimants to join.²² The public prosecutor or – after the case is brought to court – the court itself is obliged to reject the declaration if it is obviously unjustified, submitted too late (after the procedure of collecting evidence has been closed), or if the amount of reparation of damages or compensation was not determined correctly (CCP s. 67 (4)).

A subsequent civil court case regarding the same claims for reparation of damages or compensation does not conflict with joining criminal proceedings as a civil claimant as long as the civil court has not issued a final judgement.²³

2.1.2.2 Civil Claims Proceedings

Civil Claimants are allowed to make claims deriving from the criminal act against the defendant for payment, assessment or the formation of law (CCP s. 69 (1)). Trafficked persons can claim e.g. to receive goods, compensation for pain and suffering and reimbursement of medical costs in payments from the defendant. A declaratory judgement is an assessment of the liability of the accused person for

²⁰ Jesionek, Die Stellung des Verbrechensopfers im neuen österreichischen Strafprozess (2009).

²¹ Erläuterungen Strafprozessbegleitgesetz 2008, 87/ME XXIII. GP, 2.

²² Spelling, Das Anschluss- oder Adhäsionsverfahren, ZVR 2003/98.

²³ Civil proceedings on obtaining compensation can in practice also be discontinued on the basis of s. 191 of the Code of Civil Procedures.

harm that may result from the criminal acts at a later time and cause a need for psychotherapy²⁴ or other additional costs. The civil claimant only has a conditional right to a court's decision.²⁵ If legal proceedings are dropped or the defendant is declared not guilty, the civil claimant's claims are forwarded to a civil court (CCP s. 366 (1)). The civil court's decision is not bound to an acquittal by the criminal court and can independently decide on civil claims.²⁶ If the defendant is convicted, the criminal court has to decide on the civil claimant's claims (CCP s. 366 (2)). Still the possibility exists for the criminal court to forward the civil claims to a civil court, namely if the results of criminal proceedings do not present a sufficient basis for a decision on civil claims without leading to a significant time delay concerning the decision on the question of guilt and punishment. In practice, the victim often only joins criminal proceedings as a civil claimant with claims for small symbolic amounts, due to the fact that an assessment of the real amount of damages is not possible yet.²⁷ Exercising his/her procedural rights, the victim supports the defendant's conviction and is able to obtain declarations from the criminal judgment which might support claims in a subsequent civil court case.²⁸

At any point during main proceedings the criminal court can record a settlement concerning civil claimant's claims (CCP s. 69 (2)).²⁹ A settlement represents an executory title according to the Act on Enforcement Procedures s. 1 subpar 5 and the civil claimant loses his/her position as such for the remaining time of proceedings.³⁰ The validity of the settlement does not depend on the outcome of criminal proceedings.³¹ As mentioned above, the civil claimant (or his/her beneficiary) can appeal against the court during criminal proceedings (CCP s. 366 (3), s. 283 (4) and s. 344³²), provided that he/she thinks that the court should have decided on the presented civil claims already due to the fact that enough clarification for an assessment of the amount of compensation claims to be made has been accomplished.³³ Additionally, the civil claimant is free to file a civil claim once criminal proceedings have ended if he/she feels that the amount of compensation granted by the criminal court was not enough.

²⁴ An example of an assessment of the liability of the accused person for harm that may result from the criminal acts at a later time, Austrian Supreme Court (OGH) 7Ob160/09v.

²⁵ Eder-Rieder, *Die Stellung des Opfers im Strafverfahren* (2008), III. B. 1.

²⁶ Bollenberger, *Zivilrechtliche Folgen einer Strafrechtlichen Verurteilung* (2008), A4.

²⁷ Because it is e.g. still not clear how much medical treatments of injuries is going to cost and if permanent effects may result.

²⁸ Seiler, *Strafprozessrecht* (2009), 89.

²⁹ The articles s. 204 et seqq. are to be applied in such settlements.

³⁰ It has to be considered as well that compensation constitutes an extenuating cause for determining a sentence according to CC s. 34 (1) subpar 14 and s. 15.

³¹ Spelling, *Das Anschluss- oder Adhäsionsverfahren*, ZVR 2003/98, F4.

³² These regulations are valid according to regular judicature of appeals against judgments of courts of lay assessors and jury courts.

³³ Seiler, *Strafprozessrecht* (2009), 89.

2.1.2.3 Seizure/ Sequestration and Return of Objects

Sequestration, temporary grounds for power of disposition over assets and the temporary ban on surrendering physical assets or other property assets to third parties (third-party prohibition), as well as the temporary ban on disposal of or pledging those assets and their value (CCP s. 109 subpar 1 item a) are permitted for purposes of evidence and may serve to secure civil claimant's claims (CCP s. 367), the skimming off of enrichment (CC s. 20), forfeiture (CC s. 20b), assertion (CCP s. 26) or any other legally intended regulation of property law.³⁴ A seizure has to be ordered by the public prosecutor and conducted by the police. The police is authorized to confiscate assets if nobody has the power of disposition over these assets or if they have been removed from the victim as a result of the criminal act (CCP s. 109 (3) subpar 1 item a and b)). The court can confiscate assets for the same reason if these assets could serve as evidence in criminal proceedings (CCP s. 115 (1 subpar 1 and 2)). An order of the public prosecutor or of the court following a claim of the trafficked person leads to a sequestration. A victim is to be informed about a seizure – if possible – if this might secure a decision concerning civil claimant's claims (CCP s. 111 (4 last phrase)). Once assets have been seized, the public prosecutor has to order the return of assets to the victim if sequestration is not necessary for purposes of evidence and if the rights of third parties are not affected by the return (CCP s. 69 (3)). The return of confiscated assets has to be ordered by the criminal court if requirements for sequestration are no longer fulfilled and if the court is certain that assets “belong to the victim” (CCP s. 367).³⁵

2.1.2.4 Damage assessment

If seized assets cannot be returned to the victim or if the case does not involve a return of removed assets, the criminal court has to decide on compensation claims in an adhesive procedure in terms of the Austrian Civil Code s. 1323 (e.g. replacement of suffered damages or loss of earnings or redemption payment for a caused offence).

The extent of damages or the damnification has to be assessed ex officio if this is possible based on the outcome of criminal proceedings or further simple inquiry (CCP s. 67 (1)). The person harmed is not responsible for proving the extent of damages by her/himself, which demonstrates the advantages of an adhesive procedure. Compensation which can be granted in connection with the offence of human trafficking also depends on the basic regulations of the Austrian Civil Code.

³⁴ CC s. 110 (2).

³⁵ Lukas, Schnittstelle zwischen Straf- und Zivilrecht – Plädoyer für eine verstärkte interdisziplinäre Forschung (2010).

This includes e.g. the delivery of assets, compensation for pain and suffering, reimbursement of medical costs and loss of earnings according to the regulations in regards to battery (Austrian Civil Code s. 1325), disfigurement (Austrian Civil Code s. 1326), murder (Austrian Civil Code s. 1327), violation of sexual integrity (Austrian Civil Code s. 1328), deprivation of liberty (Austrian Civil Code s. 1329) or damage to property (Austrian Civil Code s. 1331).³⁶

2.1.2.5 Compensation for Pain and Suffering

Compensation is practically the most important kind of payment for non-material damages³⁷ and can be considered as especially important in criminal proceedings in regards to cases involving physical and mental violence. Compensation for non-material damages through non-material means is not possible but has to be supplied through material means, meaning through a payment, according to the tort law. Such payment is supposed to cover all types of pain, be it physical or mental.³⁸ If an official expert is consulted during criminal proceedings in order to make an assessment regarding battery or damages to health (CCP s. 67), he/she is also assigned to assess the suffered pain over certain periods of time in order to estimate the amount compensation to be paid. In the administrative district of the Higher Regional Court of Vienna compensation rates are currently set as follows: €100.00 per day for mild pain suffered, €200.00 per day for moderate pain and €300.00 for serious pain.³⁹ These rates reflect the common practice of Austrian courts.

2.1.3 Judicial Decision as Executory Title

The granted compensation has to be included in the final judgment if it comes to a conviction (CCP s. 260 subpar 5). Owed payment for damages caused has to be defined concerning object, type and amount.⁴⁰ The person obliged to the provision of payment for damages must be identified. In the case of various convicts or civil claimants, the court has to clarify which person is obliged to provide which payment for damages. The payment is usually due once the judgment becomes legally binding and is enforceable for a period of 30 years.⁴¹

³⁶ See also Chapter on Civil Law.

³⁷ Karner, *Der Ersatz ideeller Schäden bei Körperverletzung* (1999), 1.

³⁸ Barta, *Online Lehrbuch Zivilrecht*, http://www.uibk.ac.at/zivilrecht/buch/kap9_0.xml?section-view=true;section=1#DieSchadenersatzvoraussetzungen (10.11.2010).

³⁹ Hartl, *Schmerzensgeldsätze in Österreich in Euro*, Stand Februar 2009. These rates conform to the majority of Higher Regional Courts and Regional Courts of administrative districts in Austria.

⁴⁰ Spelling, *Das Anschluss- oder Adhäsionsverfahren ZVR 2003/98*, G3.

⁴¹ Eder-Rieder, *Die Sicherung des Opferanspruchs*, JSt 2005, 54 I.

2.1.3.1 Payment in Advance According to CCP s. 373a

CCP s. 373a offers another possibility to obtain compensation. If civil claimants have been granted compensation for damages such as murder, battery or material damages by the court, the state can grant a payment in advance to the civil claimant or to his/her beneficiary. The requirement to be granted a payment in advance from the state is that a rapid payment of compensation or part of it by the perpetrator cannot be expected due to the fact that he/she is sentenced to imprisonment or penalty. A payment in advance is only possible subsidiary to claims according to the Victims of Crime Act, meaning that one excludes the other (CCP s. 373a (6) subpar 1).⁴² As is the case with payment for damages according to the Victims of Crime Act, claims according to CCP s. 373a are forwarded to the state (*cessio legis*), which can later claim recourse from the convict (CCP s. 373a (9)).⁴³

2.1.4 Forfeiture (*Verfall*)⁴⁴

Forfeiture (CC s. 20) is supposed to prevent perpetrators from being left with any property gain resulting from the criminal act.

According to CCP s. 373b the state is obliged to satisfying the victim's claims if enrichments have been forfeited , if the victim has not received any of the granted compensation that the convict was legally bound to pay.

2.1.5 Procedural Costs

Although there is a strict liability regarding the procedural costs in criminal proceedings as well as in civil proceedings, civil claimants do not carry a cost risk in criminal court cases.⁴⁵ Hence, the state covers the costs when a defendant is acquitted by the court, while in the case of a conviction, costs are to be covered by the convict him/herself (CCP s. 389 (1)).

2.2 Compensation Claims in Civil Proceedings

2.2.1 Trafficked Persons and Basic Requirements of Civil Proceedings

Generally, it is recommendable for trafficked persons to become a civil claimant during criminal proceedings. This not only supports procedural economy and limits the risk of costs, but also saves trafficked persons from having to endure the stress of legal proceedings a second time. The enactment of the Second Protection Against Violence Act⁴⁶ made it possible for victims to receive victim assistance services in civil court cases according to item a of CCP s. 65 subpar 1 if a connection to the

⁴² See Chapter 2.4 State Compensation: Victims of Crime Act.

⁴³ Eder-Rieder, Die Sicherung des Opferanspruchs, JSt 2005, 54, I.

⁴⁴ BGBl 2010/108 seit 1.1.2011 in Kraft.

⁴⁵ However, private prosecutors or subsidiary prosecutors do carry a cost risk when proceedings do not lead to a conviction (CCP s. 390 (1)).

⁴⁶ Federal Law Gazette I 40/2009 in effect since 1.6.2009.

content of the previous criminal court case is given.⁴⁷ Further, provisions were made in order to permit hearings in separate rooms in the form of adversary examinations (Code of Civil Procedures s. 289a) upon request or ex officio in the case of minors. If certain requirements are met, minors can even be released completely from a hearing or can be interviewed in a separate room by an official expert (Code of Civil Procedures s. 289b).

Legal aid in civil proceedings can still only be granted if a party is not able to cover procedural costs without this endangering his/her subsistence (Code of Civil Procedures s. 63) and mainly encompasses the release of the payment of cash expenditures (allowances to the court, to witnesses, official experts, etc.), reimbursement of travelling costs of parties and the provision of free legal representation.⁴⁸

2.2.2 Principles of the Right to Compensation

2.2.2.1 General

Compensation is part of the legal contractual obligations which arise directly by operation of law.⁴⁹ The principle of liability of negligence is generally applied under the Austrian Civil Code, meaning that whoever unlawfully and culpably harms another person becomes liable to pay compensation.⁵⁰ Generally, the Austrian Civil Code demands four criteria of attribution to be met in order for a person to make compensation claims: presentation of damages, causality, guilt and unlawfulness. These requirements are examined in detail during civil proceedings and must have a cumulative impact.

Types of Compensation for Pain and Suffering

The Austrian Civil Code s. 1323 formulates compensation to be restitution in kind, meaning the remediation of real damage (e.g. return of a certain payment). If restitution in kind is impossible or inadvisable, the wrongdoer is liable to

⁴⁷ Psychosocial victim assistance services include providing information about the rights and possibilities of trafficked persons during legal proceedings, preparation and escort to hearings and trials and post-care in civil court proceedings as well as cash expenditure for costs of translations and transportation. These benefits are provided by the state up to maximum amount of €800; in case a victim receives legal aid, the maximum amount is €1,200.00. If a person who receives psychosocial victim assistance services wins a lawsuit, the court must oblige the opponent to refund psychosocial victim assistance services that were paid for by the state, insofar as the cost of legal proceedings have been imposed on the opponent or have been assumed by the opponent in a settlement (cf. Code of Civil Procedures s.73b (2)).

⁴⁸ Cf. Code of Civil Procedures s. 64. The court decides on assigning a lawyer (Neumayr, Matthias, Zivilprozessrecht, Erkenntnisverfahren 1, 4. Auflage, 2008, Seite 111). The costs of legal aid are covered by the state and - if the trial is won - by the opponent.

⁴⁹ Schwimann, Bürgerliches Recht (2007), 80.

⁵⁰ Graf/Gruber, Gesetzliche Schuldverhältnisse (2008), 6.

reimbursement of money.⁵¹ In the case of loss of assets the positive damage or the interest (positive damage and loss of profit) must be recovered depending on the wrongdoer's level of fault. Reimbursement of money for non-material damage is not covered by article 1323 of the Austrian Civil Code and has only been mentioned in cases clearly ordered by law. Non-material damages include any damages that do not involve assets, e.g. pain as a result of battery or sorrow as a result of the death of close relatives.

The liability to the pay compensation is heritable. According to article 1337 of the Austrian Civil Code such liabilities are connected to assets (not persons) and are therefore passed on to beneficiaries.⁵²

Time Limits for Compensation Claims

In order to obtain compensation for pain and suffering the injured person has to file a legal claim. Claims must be filed within three years of knowledge of the injured party and of the party liable for damages, otherwise claims become time-barred (Austrian Civil Code s. 1489 clause 1). Claims for compensation become time-barred after 30 years (Austrian Civil Code s. 1489 clause 2)⁵³ if damages result from one or repeated criminal offences committed with intent and can be sentenced to imprisonment of more than one year.⁵⁴ The same applies if the identity of the injured person or the liable person or the damage remains unknown.

2.2.2.2 Particular Elements for Liability

The Austrian Civil Code as well as some special laws mention elements for liability which require certain regulations. A person is liable not only to pay compensation for damage to assets but also for personal injuries. In the following more attention is paid to those elements for liability which may occur in connection with the phenomenon of human trafficking.

Battery (Austrian Civil Code s.1325)

Battery refers to the damnification of physical and mental health and integrity.⁵⁵ Further, battery refers to any physical interference in a person's physical integrity regardless of whether a resulting damage to health constitutes a diagnosable illness or not.⁵⁶

⁵¹ Graf/Gruber, Gesetzliche Schuldverhältnisse (2008), 14.

⁵² Barta, Online Lehrbuch Zivilrecht, I. 1.

⁵³ However, determinative questions will be difficult to explain until claims become time-barred.

⁵⁴ Graf/Gruber, Gesetzliche Schuldverhältnisse (2008), 34.

⁵⁵ Karner, Der Ersatz ideeller Schäden bei Körperverletzung (1999), 68.

⁵⁶ According to Koziol (1984), it is not necessary to present external physical injuries or injuries that caused pain in order to prove that battery occurred; on the other hand the mere causation of pain already constitutes the offence of battery even if a person's body did not

In case of battery, compensation is granted for:

1. Medical Costs
2. Loss of Earnings
3. Compensation for Pain and Suffering

Further special elements for liability in connection with human trafficking which require not only positive damages but also compensation for non-material damages are:

1. Disfigurement (Austrian Civil Code s. 1326)
2. Murder (Austrian Civil Code s. 1327)
3. Violation of a Person's Sexual Integrity (Austrian Civil Code s. 1328)
4. Invasion of Privacy (Austrian Civil Code s. 1328a)
5. Deprivation of Liberty (Austrian Civil Code s. 1329)

2.2.3 Procedural Rights

Apart from the amendments which were added to the Austrian Civil Code with the Second Protection Against Violence Act,⁵⁷ there are no special regulations for civil court proceedings concerning the offence of human trafficking or concerning the possibility to obtain compensation. Other than criminal proceedings, civil proceedings follow the adversarial system which states that only one party can initiate legal proceedings ("No claimant, no judge", although there are offences prosecuted by complaint ('Antragsdelikte') and charges laid by private claimants ('Privatanklagedelikte') in criminal law).⁵⁸ Legal proceedings are initiated once a claim is filed.⁵⁹

Civil proceedings are also very different to criminal proceedings in regards to the procedural costs (Austrian Civil Code s. 41). Following the principle of liability regarding the procedural costs, the party who wins in civil proceedings has a right to receive reparation for the total amount of procedural costs.⁶⁰ If a party wins only in some actions – depending on the extent to which he/she wins or loses – costs are to be offset against each other, meaning that neither side pays the costs of the other party or costs are to be split proportionally.⁶¹ Thus, the claimant carries a

suffer any harmful damages. Therefore internal injuries, mental illness, nerve damage, as well as insomnia are included. Cf. Danzl, Karl Heinz, Die (psychische) Gesundheit als geschütztes Rechtsgut des § 1325 ABGB, ZVR 1990. The regular judicature of the Supreme Court matches this notion; cf. Supreme Court RS 00307/92.

⁵⁷ See above 2.2.1 Trafficked persons and Basic Requirements in Civil Proceedings.

⁵⁸ The adversarial system also applies to appeal proceedings.

⁵⁹ Neumayr, Zivilprozessrecht, Erkenntnisverfahren 1 (2008), 8.

⁶⁰ Barta, Online Lehrbuch Zivilrecht, Kapitel 19, IX., 1.

Neumayr, Matthias, Zivilprozessrecht, Erkenntnisverfahren 2, 5. Ausgabe. Wien: Orac-Rechtsskripten, 2010, 107f.

considerable cost risk since the right to reparation for the total amount of procedural costs ultimately depends on the success of argumentation. An exception to the principle of liability regarding the procedural costs, where the party who only wins some actions still receives the total amount of reparation of procedural costs, occurs, for example, in proceedings involving compensation for pain and suffering, because compensation claims depend on an assessment based on the judge's discretion or on the assessment of official experts making it impossible for the claimant to accurately assess his/her claim. Also there is a possibility to receive legal aid for the main court proceedings as well as for the subsequent enforcement proceedings (Austrian Civil Code s. 63 f).⁶² Attention has to be paid to the fact, though, that legal aid does not include the obligation to pay the procedural costs of the opposing party if proceedings are lost.

In conclusion, the assertion of claims for compensation for pain and suffering in civil court proceedings proves to be disadvantageous compared to an adhesive procedure in criminal proceedings. Firstly, if the claim is forwarded to the civil court, trafficked persons have to endure the stress of legal proceedings a second time and – if the court considers this necessary – repeat their statement; secondly, they carry the sole burden of proof; thirdly, they cannot receive victim assistance services; and fourthly, they carry the complete cost risk.

2.3 Labour Law

2.3.1 Point of Departure

Examining the situation of sexual exploitation, e.g. in prostitution, and the situation of labour exploitation separately, they can be reviewed as employment relationships or situations similar to employment relationships. Information regarding other forms of human trafficking apart from sexual exploitation is rare. Information that is provided usually refers to cases of women who are exploited in Austrian households.⁶³ Currently, there is hardly any record of cases involving human trafficking for purposes such as work in the construction sector, in the care sector or in the agriculture sector. In the following the requirements will be pointed out that have to be met in order for trafficked persons to make claims regarding employment relationships or situations similar to employment relationships. Cases can be taken to ordinary Labour and Social Courts if situations are presented that concern Labour Law according to the

⁶² It is to be expected that the institute of legal aid is approached many times when it comes to cases of human trafficking since most victims do not possess the necessary financial resources due to the fact that they previously found themselves in a situation of exploitation and still find themselves outside of their home country with its social networks.

⁶³ Cf. Hilfe für ausländische „Hausklavinnen“ in diestandard.at, 2. Dezember 2009, <http://diestandard.at/1259281071941/Hilfe-fuer-auslaendische-Hausklavinnen> (13. Mai 2010).

Labour and Social Courts Act s. 50.⁶⁴ This mainly includes legal disputes between employer and employee which arise in connection with existing employment relationships or initiation of such.⁶⁵ Employment relationships usually begin with the formation of a labour contract which is not subject to any formal requirements⁶⁶ so that contracts can be agreed upon verbally or in writing. In certain cases an agreement may exist as a result of an implied contract.⁶⁷

Even cases of persons who work by order of a third party and issue invoices for their work but are not self-employed may apply to the jurisdiction of the Labour and Social Courts. These persons can be considered as similar to employees⁶⁸ without finding themselves in a formal employment relationship and are to be treated as employees according to the Labour and Social Courts Act s. 51 (3) subpar 2. If a person is economically dependent there is reason to consider his/her position as being similar to that of an employee. A person is economically dependent if he/she works in an economically subordinated position by the order of a third party.⁶⁹ The question is to what extent cases of human trafficking for purposes of labour exploitation, e.g. in households, in the construction sector or in prostitution can be considered labour relationships or situations similar to labour relationships. In the case of non-Austrian citizens the Foreign Labour Act⁷⁰ is applied. According to the Foreign Labour Act, labour relationships as well as situations similar to labour relationships are defined as employment.⁷¹ S. 29 of the Foreign Labour Act states that labour contracts with persons who do not hold a work permit are invalid by law. It is specified, though, that persons who do not hold a work permit are entitled to the same benefits as persons with valid labour contracts. A person who works without holding a work permit and therefore has a labour contract which is legally invalid can still claim the same benefits as a person in a valid labour relationship for the length of his/her actual employment.⁷² If the proprietor is responsible for the fact that a work permit is missing, the affected person can also make claims in regards to the termination of his/her labour relationship.⁷³ Labour contracts concerning the provision of sexual services or the gaining of profits through the management of commercial sexual services are considered invalid due to the fact that such behaviour is considered

⁶⁴ Labour and Social Courts Act, Federal Law Gazette. No. 104/1985 as amended in Federal Law Gazette. I No. 116/2009.

⁶⁵ Labour and Social Courts Act s. 5 (1) subpar 1.

⁶⁶ Krejci in Rummel³, Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch, § 1151 ABGB [153].

⁶⁷ Krejci in Rummel³, Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch, § 1151 ABGB [154].

⁶⁸ Brodil/Risak/Wolf, Arbeitsrecht in Grundzügen⁴ [58].

⁶⁹ Dittrich/Tades, Arbeitsrecht, § 51 ASGG [E5].

⁷⁰ Foreign Labour Act, Federal Law Gazette. No. 218/1975 as amended in Federal Law Gazette. I No. 135/2009.

⁷¹ Foreign Labour Act s. 2 (2) item a and b.

⁷² Dittrich/Tades, Arbeitsrecht, § 29 AuslBG [E8].

⁷³ Foreign Labour Act s. 29 (2).

'deviant' or 'contra bonos mores'.⁷⁴ The Constitutional Court of Austria decided in regards to s. 2 (2) of the Foreign Labour Act that a sex worker's occupation in a brothel is similar to a labour relationship concerning his/her economic and personal dependence. In cases like this, public authorities can therefore act on the assumption that such an employment relationship or a situation similar to an employment relationship as defined in s. 2 (2) of the Foreign Labour Act is present.⁷⁵ Based on this decision, public authorities regularly conclude that such types of work are to be considered employment.⁷⁶

Legal disputes arise out of the obligations established by a labour contract. The main obligation of an employer is his/her liability for payment. This includes all payments an employee is supposed to receive for the labour which was provided.⁷⁷ If a contract did not establish that labour would be provided free of charge but did at the same time not define any amount, an 'adequate' payment is considered stipulated. S. 1152⁷⁸ of the Austrian Civil Code considers a payment 'adequate' if it takes into account all circumstances or circumstances that are similar. Wages set by collective agreements constitute a guideline for the adequacy of payments.⁷⁹ Since Austria does not have a statutory minimum wage, minimum wages laid down in collective agreements, which are relatively binding, prevent wages from dropping below a certain level.⁸⁰

2.3.2 Legal Proceedings

2.3.2.1 General Overview of Legal Proceedings Regarding Labour and Social Security Matters

In Labour Law cases a distinction is made between legal disputes concerning individual employment relationships and disputes concerning collective agreements. As mentioned above, legal disputes concerning individual employment relationships are civil legal disputes between employers and employees or e.g. between employees who are working together. The relevant courts responsible for labour and social security matters are Regional Courts acting as 'Labour and Social Courts'. Only Vienna has its own Labour and Social Court.

⁷⁴ ExpertInnenkreis „Prostitution“, Prostitution in Österreich (2008), 17.

⁷⁵ Higher Administrative Court, findings of November 29th of 2007, GZ 2007/09/0231.

⁷⁶ ExpertInnenkreis „Prostitution“, Prostitution in Österreich (2008), 45.

⁷⁷ Schrammel, Arbeitsrecht 2⁶ (2008), 67 f.

⁷⁸ Austrian Civil Code, JGS No. 946/1811 as amended in Federal Law Gazette. I No. 135/2009.

⁷⁹ Krejci in Rummel³, Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch, § 1152 ABGB [24].

⁸⁰ Brodil/Risak/Wolf, Arbeitsrecht in Grundzügen⁴ (2006) [248].

During first instance proceedings there is no need to be represented by a lawyer,⁸¹ although parties may be represented by qualified persons in terms of s. 40 (1) of the Labour and Social Courts Act. Besides lawyers, also functionaries and employees of the relevant legal lobby (board) or of a voluntary association licensed to bargain collective agreements such as the Austrian Federation of Trade Unions (ÖGB) can be considered qualified. If a party is not represented by any qualified person, the judge has to instruct the party concerning his/her legal steps etc.⁸²

2.3.2.2 Legal Dunning Procedure

The dunning procedure is of major importance in Austrian legal practice. Since 2007 about 84% of all legal proceedings at district courts have been treated in legal dunning procedures.⁸³ The Austrian legal dunning procedure is a mandatory procedure for all cases involving claims for payment of up to €75,000.00. Generally, this procedure provides a basis for gaining an executory title for compensation claims that are expected to be indisputable.⁸⁴

In labour law cases regulations for legal dunning procedures in district courts are to be applied.⁸⁵ Due to the major importance of such procedures, standard forms to file 'claims for payment' are easily accessible e.g. on the website of the Austrian Ministry of Justice. The form is not only available in German, but also in Croatian, Slovenian and Hungarian.⁸⁶

Once a claim has been filed, the validity of the claim is examined.⁸⁷ If requirements are met, the court releases a limited payment order without further examination of the content. The debtor can object to this limited order within four weeks after delivery. If an objection is filed, the case will be transferred to a normal court procedure. If no objection is filed, the limited payment order becomes valid as a final payment order.⁸⁸

Requirements for the Enactment of a Payment Order:

A payment order cannot be issued if the payment claims exceed the total amount of € 75,000.00. Further, it cannot be issued if the claim involves anything else besides payments. Other reasons are: The claim is clearly not actionable or not yet due. The

⁸¹ See Labour and Social Courts Act s. 39 (3).

⁸² Rechberger/Simotta, Grundriss des österreichischen Zivilprozessrechts (2009), [1193].

⁸³ Mayr, Neue Rechtstatsachen aus der Zivilgerichtsbarkeit (2009), 61.

⁸⁴ Rechberger/Simotta, Grundriss des österreichischen Zivilprozessrechts, [691].

⁸⁵ See Labour and Social Courts Act s. 56.

⁸⁶ Cf.

<http://www.bmj.gv.at/internet/html/default/2c9484852308c2a60123e62a7eea0550.de.html> (15.5.2010).

⁸⁷ Cf. Code of Civil Procedures s. 244.

⁸⁸ Executory title in terms of the Act on Enforcement Procedures s. 1 subpar 3.

address of the debtor is unknown or he/she is domiciled or habitually resident abroad.⁸⁹

Once a legal dunning procedure is initiated, it is examined, as mentioned above, if the claim is valid and if the requirements are met. A claim may be rejected based on the fact that a court is not competent in the matter and territory concerned.⁹⁰ However, if the requirements for an enactment of a payment order are met, a payment order becomes valid without court proceedings or questioning of a debtor.⁹¹

2.3.2.3 European Legal Dunning Procedure

The European dunning procedure⁹² is a simplified and accelerated procedure for filing indisputable payment claims in transnational legal matters within the EU. The procedure aims at facilitating and accelerating transnational legal proceedings and lowering their costs.

The European dunning procedure is in certain aspects similar to the Austrian dunning procedure. European dunning procedures can, like Austrian dunning procedures, be initiated by filling out a standard form. This standard form can also be found on the website of the Austrian Ministry of Justice.⁹³ If all requirements are met and the filed claim is valid, a European payment order can be issued. The debtor can object to this order within 30 days.⁹⁴ The claimant does not need to be represented by a lawyer in order to apply for a European court order for payment of a debt.⁹⁵

2.3.3 Levels of Compensation

In legal proceedings regarding labour law, claims can be made to obtain payments and special payments such as vacation or Christmas allowances and extra hours.

2.4 State Compensation: Victims of Crime Act

2.4.1 Point of Departure

In Austria, victims of crime have the possibility to receive compensation from the state according to the federal law from July 9, 1972, about granting assistance

⁸⁹ Rechberger/Simotta, Grundriss des österreichischen Zivilprozessrechts (2009), [694].

⁹⁰ Code of Civil Procedures s. 244 (2) subpar 1.

⁹¹ Rechberger/Simotta, Grundriss des österreichischen Zivilprozessrechts (2009), [695].

⁹² Order NR 1896/2006 on the introduction of an European legal dunning procedure (EUMahnVO) (came into effect on 12.12. 2008).

⁹³ Cf. <http://www.bmj.gv.at/internet/file/2c9484852308c2a60123e629b6fc0548.de.0/eu-mvformausf.pdf> (16.5.2010).

⁹⁴ Mair, Neuerungen im Zivilverfahrensrecht durch das 2. GeSchG und die ZVN 2009 (2009), 46.

⁹⁵ Mair, Neuerungen im Zivilverfahrensrecht durch das 2. GeSchG und die ZVN 2009 (2009), 46.

services to victims of crime, in short: Victims of Crime Act.⁹⁶ Basic requirements are that an offence was committed, battery or damages to health were suffered as a result of that offence, the victim is a citizen of Austria or – if not – other special requirements concerning the person's residence status in Austria are met. Access to assistance services is granted to those persons who became victims of an offence punishable by more than six months imprisonment and suffered battery or damages to their health as a result of that crime.⁹⁷ This regulation includes most intentional criminal acts against life and body (CC s. 75 et seq.) as well as against a person's sexual integrity and self-determination (CC s. 201 et seq.).⁹⁸ Based on its punishment,⁹⁹ the offence of human trafficking (CC s. 104a) is included as well as the offence of transnational prostitution trade (CC s. 217), which is punishable by imprisonment for six months to five years.¹⁰⁰ If it is considered 'probable'¹⁰¹ that one of the offences mentioned above results in battery and damages to health, reparation of costs could be received based on the Victims of Crime Act. If a victim suffered from battery or damage to health, he/she had to pay for medical treatment and his/her earning capacity is limited. Included are also any devices such as eyeglasses or dental prosthesis, which are needed as a result of criminal acts.¹⁰² If it is considered 'probable' that an injury or damage resulted from a criminal offence, it is possible to apply for compensation based on the Victims of Crime Act during police investigations or criminal proceedings. There is no need to file a civil claim against the perpetrator first. State compensation can even be granted if a perpetrator is unknown.¹⁰³

Still, the relevant Federal Social Welfare Office has to establish whether criminal proceedings have been initiated in relation to the case which is the subject of an application and how they are developing.¹⁰⁴ Victims can be excluded from receiving compensation according to s. 8 (1) subpar 4 of the Victims of Crime Act if they culpably fail to support the clarification of an offence, the disclosure of facts for the conviction of a perpetrator or the assessment of damages. Basically, Austrian citizens have a right to receive assistance services based on the Victims of Crime Act

⁹⁶ Federal Law Gazette. No. 288/1972 as amended in Federal Law Gazette. I No. 40/2009.

⁹⁷ Victims of Crime Act s. 1 (1) subpar 1.

⁹⁸ Sicka, Entschädigung für Opfer, in Öffentliche Sicherheit (2006), 148.

⁹⁹ The punishment for basic elements of the offense according to CC s. 104a is a sentence of up to three years of imprisonment, in the case of elements according to CC s. 104a (3) six months to five years and according to (4) legl cit. one to ten years of imprisonment.

¹⁰⁰ The punishment for elements of the offense according to CC s. 217 (1) and (2) is a sentence of one to ten years of imprisonment.

¹⁰¹ Cf. Victims of Crime Act s. 1 (1).

¹⁰² Cf. Victims of Crime Act s. 1 (8).

¹⁰³ Cf. European Judicial Network in Civil and Commercial Matters, Compensation to Crime Victims, Austria:

http://ec.europa.eu/civiljustice/comp_crime_victim/comp_crime_victim_aus_de.htm (16.4.2010).

¹⁰⁴ Cf. Victims of Crime Act s. 9 (3).

if an offence was committed within the country or abroad.¹⁰⁵ EU nationals and EEA nationals have a right to receive services according to the Victims of Crime Act only if crimes were committed in Austria. If a crime was committed abroad, EU and EEA nationals have a right to receive services if they legally and habitually resided in Austria prior to the offence.¹⁰⁶

Third country nationals have a right to receive services if an offence was committed in Austria before June 30, 2005, and if they were staying in Austria legally at the time of the offence.

2.4.2 Court Procedures

2.4.2.1 General Overview of Legal Proceedings

The enforcement of the Victims of Crime Act is part of the responsibility of the Federal Social Welfare Office. If a person becomes a victim of crime, security authorities are obliged to inform the person about his/her possibilities according to the Victims of Crime Act (Obligation to instruct). According to s. 14 of the Victims of Crime Act, also the criminal courts of first instance and – in case a claim has been put aside – the public prosecutor has the obligation to inform. Compensation according to the Victims of Crime Act has to be claimed at the Federal Social Welfare Office.¹⁰⁷ The Federal Social Welfare Office decides on the claim in first instance. In order to decide the Federal Social Welfare Office can obtain information from the criminal courts of first instance and from the public prosecutor. These and other institutions, such as finance offices, municipalities and hospitals, are obliged to provide the Federal Social Welfare Office with information.¹⁰⁸

2.4.2.2 Transnational Cases

According to the Council Directive 2004/80/EC,¹⁰⁹ a special procedure is intended in the case of victims of crimes in cross-border situations within the EU. In transnational cases, a violent intentional crime is committed in an EU member state other than the EU member state where the victim of the crime is habitually resident. For example, an Austrian becomes the victim of an intentional criminal act in Spain. In such cases, as of June 30, 2005, the affected person has the right to submit an application for compensation to an authority or any other body in the member state where he/she is habitually resident. In the example mentioned above the Austrian would return to

¹⁰⁵ Sicka, *Entschädigung für Opfer* (2006), 149.

¹⁰⁶ Cf. Victims of Crime Act s. 1 (6).

¹⁰⁷ Subordinate agency of the Federal Ministry of Labour, Social Affairs and Consumer Protection.

¹⁰⁸ Cf. Victims of Crime Act s. 9 (3).

¹⁰⁹ Directive 2004/80/EC of the Council from April 29, 2004, relating to compensation for crime victims.

Austria and submit an application to receive compensation in Austria. The Austrian Federal Social Welfare Office is designated to act as an 'assisting authority'. It has to provide the applicant with the required application forms and provide him/her with general guidance and information on how the application should be completed. It then transmits the application and any supporting documentation to the so-called 'deciding authority'.¹¹⁰ The 'deciding authority' in the example mentioned above would be located in Spain. Conversely, the Austrian Federal Social Welfare Office would act as the 'deciding authority' according to s. 9a (2) of the Victims of Crime Act if a violent intentional crime is committed in Austria against a person who is habitually resident in another EU member state who then submits an application in his/her country of origin. If trafficked persons are identified while in Austria, the intentional crime was committed in Austria. Trafficked persons who are EU citizens or habitually reside in the EU can submit their application to receive compensation in their country of origin and the Austrian Federal Social Welfare Office decides on it.

2.4.2.3 Time Limits

The time limit to submitting an application depends on the desired type of compensation. In the case of ongoing payments such as loss of earnings or alimony as well as care allowance or blind welfare allowance (Victims of Crime Act s. 2 (1), (7) and (9)), applications have to be submitted within six months after criminal acts which caused battery or damages to health have been committed. In many cases this time limit has been considered too short, especially in the case of criminal acts committed abroad or that resulted in a longer period of hospitalization. It is therefore recommended to extend the time limit to a period of up to one year after criminal acts were committed.¹¹¹

In regards to all other types of payments (Victims of Crime act s. 2 (2)–(6) and s. 8), there is a time limit of two years. There is no time limit for claiming the transfer of costs for psychotherapy according to s. 4 (5) of the Victims of Crime Act. Also, there is no time limit for claiming lump sum compensation for pain and suffering.¹¹²

2.4.3 Payment of Damages and Levels of Compensation

2.4.3.1 Types of Assistance

The types of assistance¹¹³ available to victims of intentional criminal acts can be summarized in seven groups. These seven groups are:

1. Compensation for Loss of Earnings
2. Income-Dependant Additional Payments

¹¹⁰ Cf. Victims of Crime Act s. 9a (1).

¹¹¹ Weißer Ring, Forderungsprogramm vom 17. Oktober 2009 (2009).

¹¹² Cf. Victims of Crime Act s. 10 (1).

¹¹³ Victims of Crime Act s. 2.

3. Medical Care
4. Orthopaedic Care
5. Rehabilitation (Medical, Vocational and Social Rehabilitation)
6. Care Allowance and Blind Welfare Allowance
7. Lump Sum Compensation for Pain and Suffering

In case of the death of a victim, the following payments of damages are available for bereaved relatives:

1. Compensation for the Loss of Alimony
2. Medical Care
3. Orthopaedic Care

According to the Victim Protection Act, restitution of funeral expenses in case of the death of a victim is to be provided.

Ongoing Payments:

A payment to cover the loss of earnings is paid on a monthly basis with the total amount being determined according to the loss of earnings a trafficked person has suffered or will suffer due to physical damages or damages to health.¹¹⁴ The monthly payment must not exceed the amount of €2,069.00.

Additional Payments/Benefits:

Payments for medical care can include medicine, medical attendance or dental treatment, as well as the costs of psychotherapy. According to the Victims of Crime Act s. 1 (1), restitution of costs is only granted if psychotherapy is considered necessary as a result of international criminal acts. Also, an official document has to be presented proving that the insurance company approves of psychotherapy. The maximum amount of restitution for original costs is an amount equal to three times the amount of the allowance granted by the insurance company.

As of June 1, 2009, there is a possibility to receive a one-time payment of €1,000.00 for serious battery resulting from intentional criminal acts. This lump sum compensation for pain and suffering is raised to an amount of € 5,000.00 if the victim suffered battery with serious permanent damage as a result.¹¹⁵ Compensation for non-material damages was therefore added to the list of services covered by the Victims of Crime Act. The situation of victims of crime has often been criticized as not being adequate due to the fact that chances to receive even a small amount of compensation for suffered damages were limited if perpetrators could not be caught, were found destitute or considered untraceable.¹¹⁶ The lump sum compensation for pain and suffering is supposed to guarantee and facilitate access to receiving compensation.

¹¹⁴ Victims of Crime Act s. 3 (1).

¹¹⁵ Cf. Victims of Crime Act s. 6a.

¹¹⁶ Volksanwaltschaft, 32. Bericht der VA (2008), 43.

2.4.3.2 Reasons for Exclusion

Persons who suffered battery or serious damages to health as a result of intentional criminal acts can be excluded from receiving payments according to the Victims of Crime Act s. 8. Reasons for exclusion include the participation in the criminal act, the intentional inducement or provocation of the criminal act, as well as the voluntary failure to support seeking the disclosure of facts for the conviction of a perpetrator. Two more relevant reasons for exclusion are the following: If a person waives claims for compensation against the perpetrator, payments covered by the Victims of Crime Act cannot be secured either. A person can also be excluded from receiving allowances from the state if there are possibilities to obtain similar allowances in another country.

2.5 Right to residence

Austria foresees¹¹⁷ a recovery and reflection period encompassing 30 days which is implemented by an internal decree¹¹⁸. An analysis of the implementation of DIR 2004/81/EC shows that an internal decree does not fulfill the criteria of the directive, a legal provision would be necessary.¹¹⁹

The main regulation regarding residence for trafficked persons is Settlement and Residence Act (SRA) s. 69a, the residence permit for special protection.¹²⁰ This residence permit is possible for different groups of persons, but also for witnesses or victims of THB (CC s. 104a) or of transnational prostitution trade (CC s. 217). Victims have to receive a residence permit, in order to ensure criminal investigations. In addition it has to be issued in order to ensure the enforcement of civil law claims linked to trafficking in human beings. The residence permit is not granted in case the criminal investigation did not start or is not ongoing and in case no civil claims are filed. The residence is permitted for at least 6 months. The authority has to decide within 6 weeks. Practice shows, that issuing the permit can last between 5 and 8 months.¹²¹

Trafficked persons from the EU do not need a residence permit, but need to have a confirmation of registration (*Anmeldebescheinigung*)¹²². Requirements for this registration are inter alia a valid identification card, a passport or the proof of enough earnings and a comprehensive health insurance.

After the residence permit expires, trafficked persons have the possibility of an unlimited authorization to settlement (*Niederlassungsbewilligung-unbeschränkt*).¹²³ Next to the initial requirements for the permit for special protection, also the integration agreement (*Integrationsvereinbarung*)¹²⁴ has to be fulfilled. Next to the initial requirements, which encompass an on-going criminal procedure and filing civil law claims, the person had to receive residence for special protection since 12 months.

¹¹⁷ ErlRV 1565 BgNR XXII. GP14 (Explanatory notes regarding the government bill regarding the Council of Europe Convention on Action against Trafficking in Human Beings).

¹¹⁸ Internal Decree of the Ministry of Interior BMI-FW1700/0090-III/4/05, see ErlRV 1565 BgNR XXII. GP. 13.

¹¹⁹ Academic Network for Legal Studies on Immigration and Asylum in Europe, Directive 2004/81 Victims of Trafficking Synthesis Report (2010) 31.

¹²⁰ Settlement and Residence Act, Federal Law Gazette I Nr. 100/2005 as amended by Federal Law Gazette I Nr. 135/2009.

¹²¹ Information of LEFÖ-IBF received per email, 16 December 2010.

¹²² See SRA s. 53.

¹²³ See SRA s. 43 (3).

¹²⁴ See SRA s. 14 (5) Nr. 2-5 or 7.

2.6 Overview

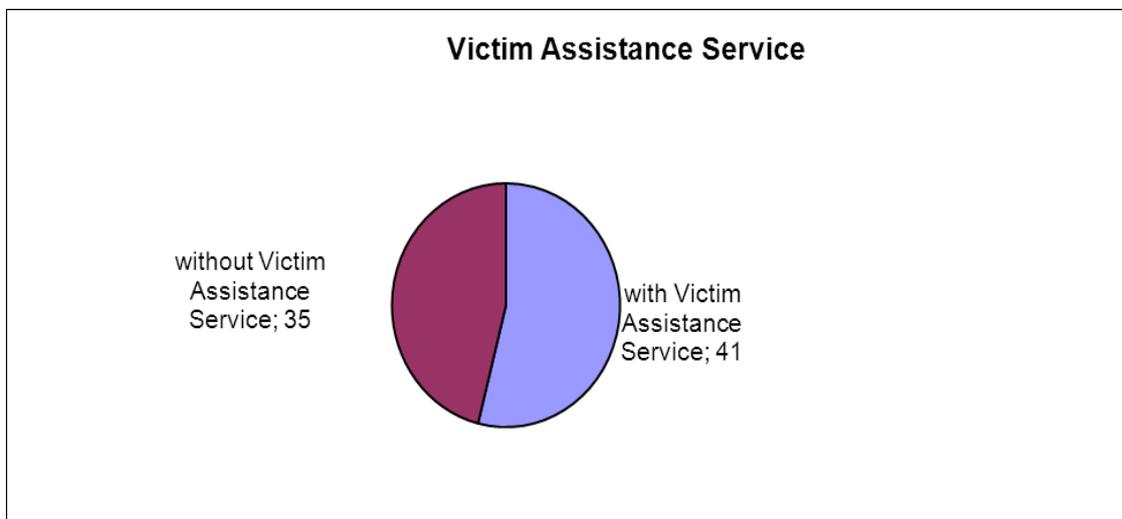
| | Compensation Claims in Criminal Proceedings | Compensation Claims in Civil Proceedings | Labour Law | Victims of Crime Act |
|-------------------|--|--|--|---|
| Legal Proceedings | Regional Court or District Court (depending on the penal threat) | Up to €10,000.00 District Court; Regional Court for Civil Matters for more than that | Labour and Social Court | Federal Social Welfare Office (notice) |
| Benefits | e.g. damages to property, costs of medical care, compensation for pain and suffering | e.g. damages to property, costs of medical care, compensation for pain and suffering | Payments and special payments such as vacation or Christmas allowances and extra hours; payments in connection with the termination of employment. | Assistance (medical care and lump sum compensation) |

3. Possibilities to Obtain Compensation in Practice

3.1 Compensation Claims in Criminal Proceedings

The case analysis was based on 76 cases which were pending with the public prosecutor and Regional Courts of Vienna, Graz, Leoben, Klagenfurt and Krems. In 41 of these cases psychosocial and legal victim assistance services were provided by LEFÖ-IBF.

One of the most important findings of the study is the fact that the outcomes of legal proceedings are significantly different depending on whether trafficked persons received victim assistance services or not.



In the case of Vienna, Graz and Leoben all files were analyzed in which a complaint was filed or charges were pressed.¹²⁵ The study was conducted between 01.01.2008 and 30.09.2010. Cases involving the offence of 'human trafficking' as defined in CC s. 104a and cases involving the offence of 'transnational prostitution trade' as defined in CC s. 217 were analyzed. Other offences such as battery (CC s. 83), deprivation of liberty (CC s. 99), coercion (CC s. 105), serious threat (CC s. 107), rape (CC s. 201) or the suppression of documents (CC s. 229) occur in connection with human trafficking.

There were no case studies of civil proceedings included, because civil law cases are not marked separately in court administration and can therefore not be identified.

¹²⁵

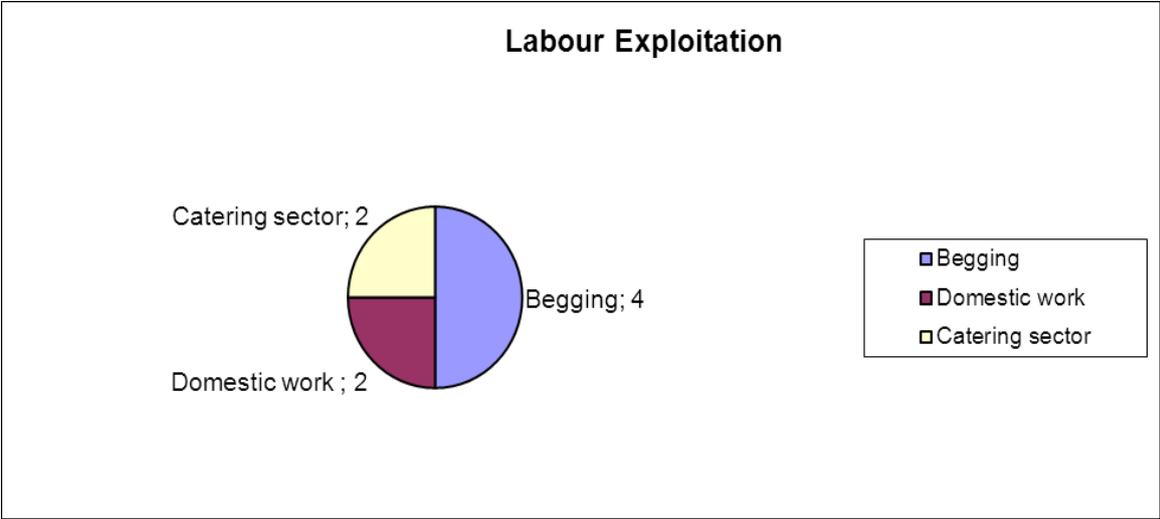
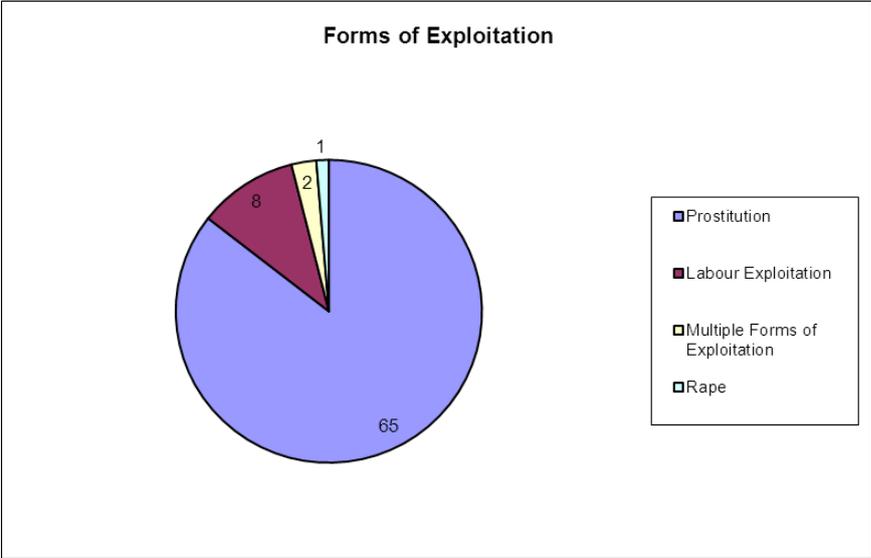
At the court of lay assessors and the jury court a 'claim' is filed, at the Regional Court as single judge, and at the district court a 'complaint' is filed, cf. CCP s. 210. The punishment by law determines which court is responsible.

Forms of Exploitation

It was researched which different forms of exploitation exist. The results revealed a striking difference between the amount of cases of trafficking for purposes of sexual exploitation and those of trafficking for purposes of labour exploitation. The different forms of exploitation are listed in detail below:

In 65 cases exploitation only involved prostitution. In 38 of these cases victim assistance services were received; in 29 cases they were not received.

Eight persons were exploited for their labour. Two of them worked in households, four were exploited for begging, and in two cases the form of labour exploitation was not further explained. The two persons exploited in households received victim assistance services; in the six remaining cases victim assistance services were not offered.



In two cases persons were exploited in two different forms; one was exploited in prostitution as well as in the household, the other one in prostitution and begging. In both cases the trafficked person was able to receive victim assistance services.

Another case involved rape in the situation of being trafficked. The rape was reported.

Striking is also the percentage of men compared to the percentage of women.

62 women but only three men were exploited in prostitution. Three trafficked men were exploited for their labour. That means that out of 76 cases, only six trafficked persons were male. Attention should be paid to the fact that none of the trafficked men received victim assistance services.

Countries of Origin of Trafficked Persons

Another attribute analyzed in regards to the possibility of obtaining compensation was the country of origin of trafficked persons. Due to the low amount of cases analyzed, the study only differentiates between EU member states and third countries instead of naming each person's country of origin. This is supposed to prevent the determination of a person's identity in any of the cases involved.

The analysis resulted in the following:

60 out of 76 trafficked persons were EU nationals, with 28 persons having received victim assistance services and 32 not having received any.

15 trafficked persons were third country nationals, with 13 having received victim assistance services and two not having received any.

In one of the cases the country of origin was unknown and no victim assistance services were received.

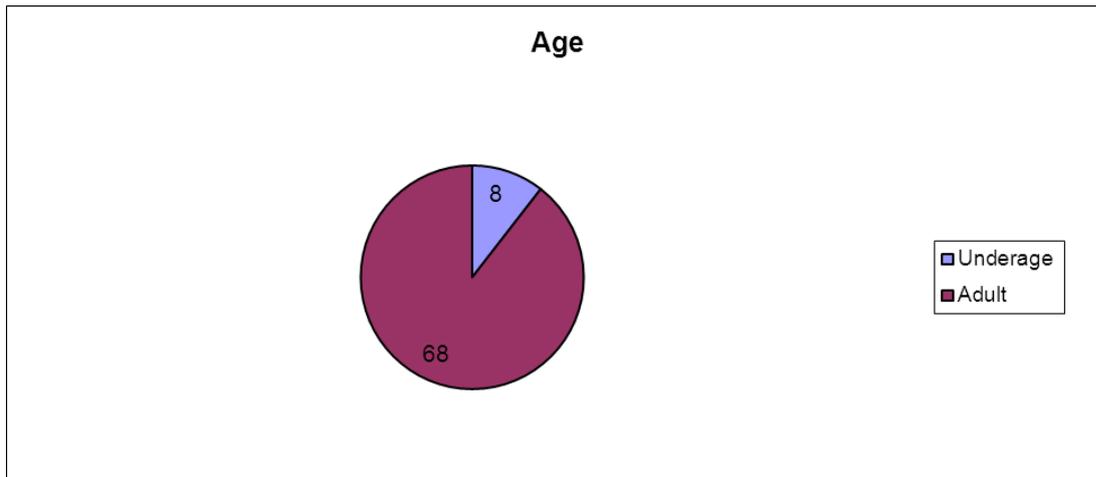
Out of the six trafficked men, four came from EU member states and two came from third countries. As mentioned above, victim assistance services were not received in any of these cases.

Generally, there are far more cases involving EU nationals than third country nationals, but this number of known cases probably does not reflect the ratio in dark figures. The analysis was not able to provide an explanation for why the numbers of EU nationals and third country nationals are so different.

Trafficked Persons who were Minors at the Time of the Offence

Cases were also analyzed regarding the age of a trafficked person at the time the offence in Austria began. Eight persons were identified who these criteria applied to; all of them were female. Three of the women received victim assistance services; two of them were EU nationals and the other one was not.

Five minors did not receive victim assistance services; all of them were EU nationals.



In eight cases it was impossible to identify whether the trafficked person was a minor at the time of the offence or not, since it could not be determined exactly when the offence began. Hence only eight out of 76 persons were identified as minors at the time the offence they were affected by began in Austria.

The analysis regarding the exploitation of labour resulted in the following:

Six minors were forced into prostitution, two were forced into labour exploitation and two into begging. These findings demonstrate that the ratio of exploitation for purposes of prostitution to other forms of exploitation is the same in the case of minors and adults.

Duration of an Offence

The duration of the offence was another criterion that was analyzed, expecting that it might have an influence on whether compensation would be obtained or not.

However, this analysis did not reveal any connection between the level of compensation and the duration of the offence, because compensation is generally received in the form of a lump sum without further explanation of details.

In five of the analyzed cases, the offence lasted one week, and in two of these cases trafficked persons received victim assistance services.

There were ten cases involving an offence that lasted up to one month, out of which six cases were identified where the trafficked person received victim assistance services.

25 cases were identified involving offences that lasted up to six months with 15 cases in which victim assistance services were received. Another eleven cases were identified involving offences that lasted up to one year with seven cases in which victim assistance services were received.

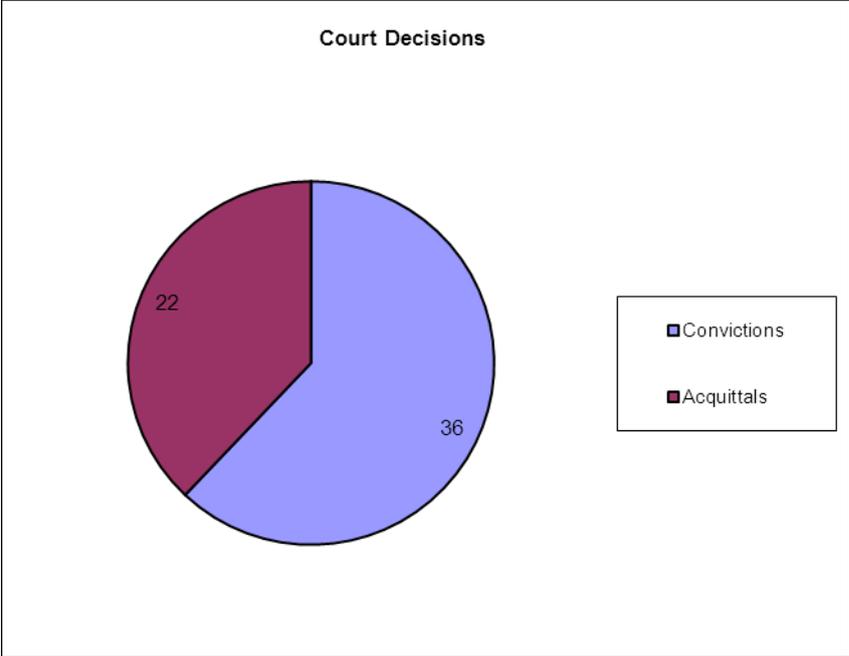
Offences that lasted longer than one year were identified 14 times. Eight trafficked persons affected by these offences received victim assistance services.

In eleven cases it was impossible to extract information concerning the duration of the offence from the file.

Numbers reveal that situations of exploitation generally last for longer periods of time. The majority of the cases analyzed in the study lasted more than one month.

Closing a Court Case

Altogether, it came to a court decision in 58 cases, while in the remaining cases proceedings were either suspended or dropped.



Since courts often have to decide on multiple issues, it may come to several judgments, suspensions or cancellations in a court case if, for example, one offence is partly dropped, but a claim is filed regarding another offence, and the perpetrator is later acquitted of one offence but convicted of another.

In 28 of the cases in which a defendant was convicted, trafficked persons received victim assistance services. In five of the cases the defendant was acquitted by the court.

In 30 court cases trafficked persons did not receive victim assistance services. In 17 out of these cases the defendant was acquitted by the court, and in seven cases proceedings were suspended.

Five cases were dropped, and in three out of these five cases trafficked persons received victim assistance services.

It becomes clear that court proceedings more likely end with the conviction of a defendant if victim assistance services were provided. Thus 82% of all court cases in which such services were provided ended with a conviction compared to only 43% of the court cases in which no such services were provided. The question whether or not psychosocial and legal victim assistance services are provided has a significant influence on the outcome of proceedings. But even if proceedings do not end with a conviction, victim assistance services seem to have an effect, as the statement of one of the judges interviewed in the context of the study proves. According to the interviewed judge, victims who receive victim assistance services in criminal proceedings are perceived as more credible.

Due to a lack of resources it was not possible to analyze all cases in which proceedings were suspended or dropped. Therefore no conclusions can be drawn regarding a connection between the provision of victim assistance services and the suspension of a trial. For trafficked persons both the suspension of a trial as well as the acquittal of the defendant imply that compensation cannot be obtained in criminal proceedings.

Due to time constraints it was impossible to conduct a comprehensive collection of data, which is why no conclusions could be drawn regarding the suspension or cancellation of a trial.

Duration of Proceedings before the Final Judgement

The duration of the analyzed legal proceedings are equal to the average duration of legal proceedings concerning other areas, meaning that there are no irregularities regarding the aspect of time.

In 16 cases proceedings lasted up to six months. In 30 cases they lasted up to one year, and 15 cases lasted over one year.

Regarding the remaining 25 cases – a little less than half of all the proceedings – the duration of legal proceedings was unknown.

Level of Civil Claimant Claims

First it is important to mention that a conviction is the necessary requirement for being granted civil claimant claims for compensation. Numbers are as follows: Out of 36 convictions, seven civil claimants were not granted compensation. Altogether there were 20 claims granted, all of them being cases in which victim assistance services had been received. Two claims involved compensation for serious threat and battery. In both cases perpetrators were charged with serious threat and battery and both accusations lead to the conviction of the perpetrator(s).

Level of Compensation

Eight civil claimants were granted compensation of €500.00; four received compensation of €1,000.00. One person received between €1,000.00 and €2,500.00. Four claimants received up to €5,000.00 of compensation, three received up to €10,000.00. There were no claims for compensation of more than €10,000.00. Based on the available data, it is not possible to draw any conclusions in regards to any connection between the amount that was claimed originally and the actual amount of granted compensation. Taking a few cases as examples, the following picture unfolds:

In the first exemplary case an amount of €3,500.00 of compensation for pain and suffering and € 5,000.00 of compensation for damages was claimed. The offence was committed for three months. The court granted €1,000.00 of compensation, explaining that this amount was considered adequate and that evidence needed to be able to grant the remaining amount of compensation was missing. In this case no expert opinion had been presented to prove how long the affected person had suffered pain.

Perpetrators were convicted on the basis of the following sections:

Transnational prostitution trade: CC s. 217 (2), 1st and 5th case; Coercion: CC s. 105 (1), serious coercion: CC s. 106 (1) subpar 3, 2nd case; Extortion: CC s. 144 (1), serious extortion: CC s. 145 (2) subpar 1 and 2; Procurement: CC s. 216 (2) 1st and 2nd case; Rape: CC s. 201 (1) 2nd case: CC s. 201 (1) 1st and 2nd case; Deprivation of liberty: CC s. 99 (1) 1st case; Battery: CC s. 83 (1).

In the second exemplary case an amount of €169,000.00 was claimed by the civil claimant and an additional amount of €64,500.00 of compensation for pain and suffering. The time period of the offence was four years. No expert opinion was presented to prove how long the affected person had suffered pain. The court granted an amount of €10,000.00 compensation, explaining that this amount was considered adequate and that further evidence was missing.

The court decided, however, that perpetrators would have to pay for possible further damages in the future.

Three perpetrators were convicted on the basis of the following sections of the Austrian Criminal Code: s. 217 (1) 2nd case, s. 216 (2) and (3), s. 278 (1), (2) and (3), s. 178, s. 145 (1) subpar 1.

In the third exemplary case €30,000.00 was claimed. No expert opinion was presented; the time period of the offence was six months. The trafficked person was granted €5,000.00. The perpetrator was convicted on the basis of CC s. 216 and s. 217.

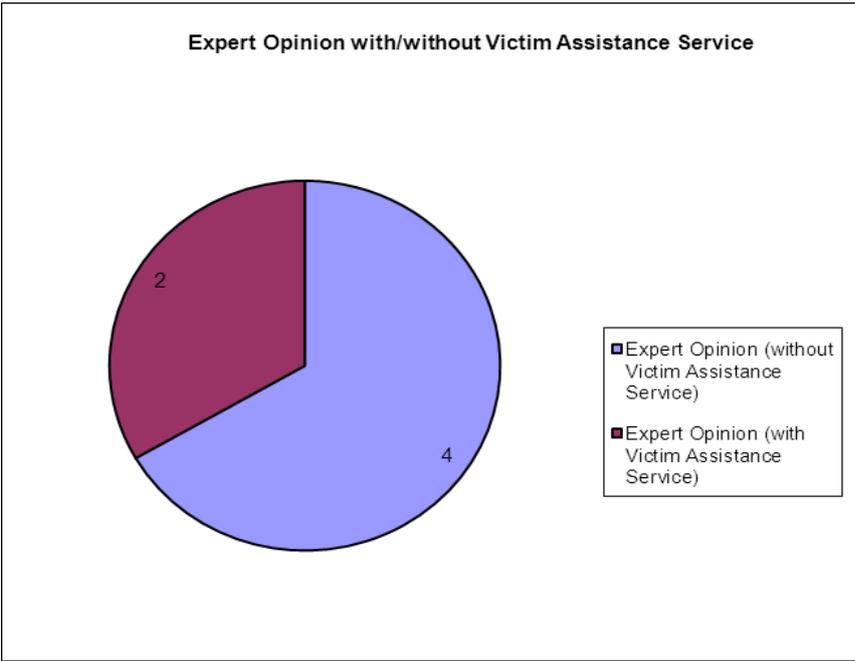
In the fourth exemplary case €25,000.00 was claimed. An expert opinion proving how long the trafficked person had suffered pain as a result of battery was presented. The time period of the offence was six months. The court granted €7,600.00 of compensation. The perpetrators were convicted on the basis of CC s. 216 and 217.

Based on this data it can be recorded that courts grant lump sums of compensation which they consider adequate, while in reality these amounts turn out to be rather low compared to the submitted claims.

If submitted claims are very high, comparatively higher compensation is granted. If expert opinions can be presented, granted compensation tends to be higher as well.

Expert Opinion

Six expert opinions were presented proving how long a person had suffered pain. In two of these cases the person received victim assistance services. In two of the remaining four cases in which victim assistance services had not been received, the court acquitted the perpetrators. In the third case the perpetrator was convicted, but the victim did not receive compensation, because he/she had not presented herself in court and was not legally represented due to not having received victim assistance services. In the fourth case the perpetrator was convicted as well, but compensation was not granted.



Conclusion

Overall, only five trafficked persons out of a total of 76 cases actually received compensation. In four of these cases compensation was paid to the victim because assets had been seized and confiscated during police investigations. In only one case the convict himself paid a – very small – amount of €100.00. This is due to the fact that even if compensation is granted by the court and perpetrators are obliged to

pay, the amount may turn out to be uncollectible. This means that perpetrators were unwilling or unable to pay and an executory title could not be enforced. And even if compensation is paid, it may not be equal to the amount that was claimed. In order to obtain the remaining amount of compensation, civil proceedings may need to be initiated.

Interviews with two trafficked persons revealed that long legal proceedings had strained them mentally. During this period of time they had not been able to come to terms with their experiences. This usually deters trafficked persons from even asking if there is any possibility to obtain the complete amount if they have only received part of the amount of compensation that was granted to them. It is more important for them that the perpetrators were convicted and that criminal proceedings have finally come to an end. One reason for this way of thinking is the person's feeling of resignation; they feel that they do not have any chance to ever receive the complete compensation that was granted to them. On the other hand, they want to be able to forget about their experiences of having been exploited.

As demonstrated in the legal overview, public prosecutors as well as the police and courts are obliged to pay adequate attention to the rights and interests of victims and to always examine and support their interests for obtaining compensation in any decisions being taken (CCP s. 10).¹²⁶ The interviews revealed, however, that public prosecutors do not consider it their responsibility to investigate supporting civil claimant's claims¹²⁷ and therefore do not treat the issue as a priority in their investigation efforts.¹²⁸ At the same time, it is considered necessary that victims obtain compensation. The case analysis demonstrated that civil claimants receive compensation payments if public prosecutors order the seizure and sequestration of assets and other objects of value and the court then allows the proposal. Although public prosecutors do not consider it their responsibility to investigate supporting civil claimant's claims, in reality it highly depends on them if victims can receive compensation in the end.

Public prosecutors agreed that legal victim assistance services have a positive impact on the level of civil claimant's claims, because victims receive better support and legal advice which facilitates acceptance of their claims. On the other hand, public prosecutors considered it difficult for trafficked persons to actually receive compensation after legal proceedings have ended since, according to their experience, perpetrators can either not be found or are found insolvent.

¹²⁶ Cf. Chapter 2.1.1.2 Victims Rights in Civil Proceedings.

¹²⁷ Interview with the department of public prosecution Leoben, November 2010.

¹²⁸ Interview with the department of public prosecution Vienna, November 2010.

Receiving a reimbursement of procedural costs from the convict usually proves to be a problematic and confusing procedure in criminal proceedings. There is a liability for reimbursement of costs according to CCP s. 381 (1) subpar 9 based on which victim protection facilities in terms of the sponsorship contract on victim assistance services are obliged to announce the costs of victim assistance services to the court. The maximum amount cannot exceed €1,000.00 per case. An interview with an employee of the Austrian Ministry of Justice revealed that it is unknown how much procedural costs victim protection facilities claim and how much is actually paid by the convict to the Ministry of Justice.¹²⁹ It can be estimated that reimbursement generally does not exceed 10% of the total amount. Courts are responsible for proceedings on the reimbursement of costs; they decide on the amount of costs and require the convict to pay for procedural costs. Though convicts have to transfer a payment to the court's account, the payment is collected directly by the federal budget. The Austrian Ministry of Justice does not have any possibility to trace the cash flow since it would be necessary to question each court separately constituting an unbearable effort. Even the Ministry itself considers the situation as dissatisfactory.

3.2 Labour Law

Due to its simplified administration, the legal dunning procedure¹³⁰ seems to be an adequate measure for claiming the payment of, for example, reimbursement. The fact that forms are easily accessible in different languages should further facilitate the application of legal dunning procedures.

Although requirements necessary to make use of these simplified procedures are met, there is little experience concerning cases of human trafficking. According to LEFÖ-IBF, such dunning procedures have been enforced in cases of persons who have been trafficked for purposes of labour exploitation.

There are presumably a variety of reasons why the establishment of a practice of payments¹³¹ to trafficked persons advances only slowly and legal dunning procedures are rarely used in connection with human trafficking. It has to be expected that amongst the Austrian authorities involved as well as in public society there is a need to raise awareness of this form of human trafficking. Apart from cases involving trafficking of women into households, human trafficking for purposes of labour exploitation is still an area which is widely undocumented, and trafficked persons are only sporadically identified.

¹²⁹ Interview with a member of the Ministry of Justice, November 2010.

¹³⁰ Cf. Chapter 2.3.2.2.

¹³¹ Rabe, Entschädigung und Entlohnung für Betroffene von Menschenhandel in Deutschland, (2009), 78.

Apart from this lack of identification there is another problem that Austria shares with Germany,¹³² which is a lack of well-developed support mechanisms for identified trafficked persons. Shelters for trafficked men in Austria are currently non-existent. LEFO-IBF, for example, is not authorized to shelter trafficked men. The Austrian Task Force Human Trafficking has had plans to create a support structure for trafficked men and has included this consideration in the Action Plan against Human Trafficking.¹³³ So far considerations have been fruitless and shall be continued in the current Action Plan¹³⁴.

Similar to the situation of women who were trafficked for purposes of sexual exploitation, in the case of human trafficking for purposes of labour exploitation traffickers can take advantage of the trafficked persons' 'illegal' status in Austria and the fact that they are missing a work permit. If a person is not successfully identified as a victim of human trafficking, legal proceedings are initiated which may lead to measures that end a person's stay in Austria. This again may lead to trafficked persons avoiding getting in contact with public authorities.

Another possible reason is that a representation of the interests and needs of undocumented migrants is only partially existent. A study on the situation of undocumented migrants working in Austria demonstrates that the Austrian Chamber of Labour hesitates to support irregular migrants in legal proceedings against their employers. In particular cases support has even been denied arguing that no work permit could be presented.¹³⁵ The study also revealed that there is hardly any contact between irregular migrants and labour unions, which also do not respond to problems of migrants in Austria.¹³⁶

However, LEFÖ-IBF's work practice demonstrates that there have been legal proceedings at the Labour and Social Court that resulted in trafficked persons receiving payment. LEFÖ-IBF has gained experience with legal proceedings at the Labour and Social Court in six cases. In half of these cases trafficked persons were granted payments. In one case payment for the loss of earnings was received although at the same time criminal proceedings were dropped. In the legal proceedings that were taken to the Labour and Social Court and where trafficked

¹³² Cf. Rabe, *Entschädigung und Entlohnung für Betroffene von Menschenhandel in Deutschland* (2009), 79.

¹³³ Austrian Foreign Ministry, *Task Force Human Trafficking, National Action Plan against Human Trafficking 2007–2008*, Action 3.8.

¹³⁴ Austrian Foreign Ministry, *Task Force Human Trafficking, National Action Plan against Human Trafficking 2009–2011*, Action IV.5.

¹³⁵ Krenn/Haidinger, *Un(der)documented migrant labour – characteristics, conditions and labour market impacts* (2009), 35.

¹³⁶ Krenn/Haidinger, *Un(der)documented migrant labour – characteristics, conditions and labour market impacts* (2009), 60.

persons received the support of LEFÖ-IBF, the Austrian Chamber of Labour was also approached to some extent. The Austrian Chamber of Labour was, for example, able to direct intervention letters to former employers and to assume legal protection for legal proceedings at the Labour and Social Court, meaning that it took over the risk of litigation. In one case, however, it was not able to guarantee comprehensive legal protection, meaning that the trafficked persons had to pay cash expenditures beforehand and carried the risk of having to pay for the costs of the opposing party in case the trial was lost.

Although according to the Foreign Labour Act s. 29, a person without a work permit has the same right to make claims regarding employment relationships as regular employees; such regulations are not institutionally implemented. As demonstrated above, there are single cases in which cooperation with the Austrian Chamber of Labour was possible, but this cooperation or assumption of legal protection is based on the evaluation of single cases. There is no contact centre of any labour union which would support undocumented migrants in their efforts to make claims regarding employment relationships in Austria, as is the case in Germany.¹³⁷ There is no institutionalized cooperation with any organization which would support the enforcement of claims at the Labour and Social Court within the Austrian support mechanism for trafficked persons.

3.3 Application of the Victims of Crime Act in Cases of Human Trafficking

The Victims of Crime Act states that third country nationals have the right to make claims if they legally resided in Austria at the time of the offence (since June 30, 2005). In the case of victims of human trafficking, this regulation may constitute an obstacle. The largest group of women supported by LEFÖ-IBF in the year 2008 came from non-EU member states.¹³⁸ It can be assumed that some of these trafficked persons did not reside in Austria legally during the whole time of the offence. This is not due to their own decision, but because of the elements of the crime of human trafficking. Trafficked persons do not decide where they are staying and do not have any possibility to determine the duration of their stay. Therefore it constitutes an insuperable obstacle and serious disadvantage for trafficked persons if benefits according to the Victims of Crime Act are based on the legality of their presence in Austria, since they do not have any influence on their own residence status but were forced to stay. In the German 'Victim Compensation Act', which corresponds to the Austrian Victims of Crime Act, the same requirements are specified. However, in a

¹³⁷ See e.g. the facility MigrAr of the labour union ver.di in Hamburg, <http://besondere-dienste.hamburg.verdi.de/themen/migrar/themen/anlaufstelle2> (27.12.2010).

¹³⁸ LEFÖ-IBF, Tätigkeitsbericht 2008, 12.

newsletter from the German Federal Ministry of Labour and Social Affairs published in 2001 it is suggested that a trafficked person's legal residence status should be considered at the time of making a claim rather than their legal status at the time of the offence. But even this directive to interpretation does not constitute a satisfying solution to the problem since it does not clarify what happens if a perpetrator is suddenly charged with another offence besides human trafficking during criminal proceedings.¹³⁹ This objection could also prove to be relevant in the case of an implementation of the German newsletter in Austria. Although many criminal proceedings are conducted on the basis of CC s. 104a and s. 217 (human trafficking an transnational prostitution trade),¹⁴⁰ other offences can also turn out to be relevant. In connection with human trafficking, offences such as leading a person to prostitution (CC s. 215), pimping (CC s. 216) or rape (CC s. 201) may prove to be relevant.

Interesting in terms of the total amount of legal proceedings is the high amount of proceedings on the crime of human trafficking or transnational prostitution trade that are being dropped.¹⁴¹ In order to be granted access to assistance services it has to be considered as 'probable' that an offence was committed with intent. A conviction therefore does not guarantee that benefits are going to be granted. It can still be observed, though, that the Federal Social Welfare Office 'puts applicants off' until a court decision can be presented.¹⁴² In the course of one interview it is determined if it can be considered 'probable' that a crime was committed with intent if, according to the court, significantly more evidence can be presented that speaks for it than against it. In case of uncertainty, the office awaits the outcome of legal proceedings. It is emphasized that if a perpetrator is present, the outcome of legal proceedings has to be awaited. Once a perpetrator is acquitted there is no chance for the victim to receive any more benefits. However, benefits that have already been received according to the Victims of Crime Act up to that point do not have to be paid back by the victim.

The time period between an offence, criminal proceedings and a court decision can be very long and take several years, especially in the case of human trafficking. This is why there is a close link between criminal proceedings and receiving compensation

¹³⁹ Rabe, Entschädigung und Entlohnung für Betroffene von Menschenhandel in Deutschland (2009), 82.

¹⁴⁰ Austrian Foreign Ministry, Task Force Human Trafficking, First Austrian Report on Combating Human Trafficking, 27 et seq. In 2007 18 criminal proceedings were conducted on the basis of CC s. 104a and 524 on the basis of CC s. 217.

¹⁴¹ Austrian Foreign Ministry, Task Force Human Trafficking, First Austrian Report on Combating Human Trafficking, 27 et seq. Nine out of 18 criminal proceedings on the basis of CC s. 104a were discontinued and 232 out of 524 proceedings on the basis of CC s. 217.

¹⁴² Volksanwaltschaft, 33. Bericht der VA (2009), 110.

from the state based on the Victims of Crime Act, although based on the law, claims for compensation can be considered independent of criminal proceedings.

The Victims of Crime Act can prove to be highly important for victims of human trafficking who need medical treatment. Victims of human trafficking who need a residence permit do not have access to health insurance until their residence permit is issued. Until this point they can only receive emergency medical care. The discussion on better access to health care has not yet led to any results.¹⁴³ However the Austrian Task Force Human Trafficking aims at realizing changes in this area again in the current Action Plan against Human Trafficking.¹⁴⁴ Authorities have to decide within six weeks whether a 'special protection' residence permit can be issued or not,¹⁴⁵ therefore limiting the time period during which a trafficked persons remains without health insurance. During this time LEFÖ-IBF turns to charitable facilities or existing networks of LEFÖ-IBF in order to obtain free or low-cost medical treatment.¹⁴⁶ Apart from receiving other types of assistance services, it can therefore be very of great help for victims of human trafficking to make use of compensation for medical costs according to the Victims of Crime Act s. 2 subpar 2 during this period of time until a residence permit is issued. In the course of one interview it is emphasized that a victim does not have to present health insurance in order to receive medical care.

It can generally be assumed that applications to the Austrian Federal Social Welfare Office in connection with human trafficking are almost always of an international dimension. In the case of applications in connection with human trafficking, the Federal Social Welfare Office has the decision-making power provided that an offence was committed in Austria. If a victim of human trafficking returns to his/her country of origin within the EU, an application can still be submitted and the Federal Social Welfare Office is still the authority with decision-making power.

By implementing the EU directive 2004/80/EC, a EU-wide system was set up in order to facilitate the access to compensation for victims of transnational crime cases. The amount of applications involving transnational cases which Austria had to decide on is still low. Between 2006 and 2007 Austria only had to decide on a total of three cases.¹⁴⁷ The standard form to be applied for the implementation of the directive

¹⁴³ Austrian Foreign Ministry, Task Force Human Trafficking, First Austrian Report on Combating Human Trafficking, 16.

¹⁴⁴ Austrian Foreign Ministry, Task Force Human Trafficking, National Action Plan against Human Trafficking 2009–2011, Action IV.4.

¹⁴⁵ Settlement and Residence Act (SRA) s. 69a (3).

¹⁴⁶ LEFÖ-IBF, Tätigkeitsbericht 2008, 17.

¹⁴⁷ Cf. matrix insight, The application of Directive 2004/80/EC relating to compensation to crime victims. Empirical Report (2009), 30, as well as European Commission, Report of the

caused problems in only four EU member states, with Austria being one of them. It was not further defined, though, what kind of problems arose.¹⁴⁸ It is worth noting that according to the directive 2004/80/EC, the supporting authority cannot claim compensation of costs for actions such as the support or hearing of the applicant.¹⁴⁹ Furthermore, forms and other documents do not require certification.¹⁵⁰ However, it is not indicated who is responsible for covering costs of the translation of documents such as expert's opinions.

In addition to these problems which arise in the course of establishing a new system, there is another regulation of the Victims of Crime Act that may have a negative impact on victims of human trafficking. The Act excludes persons from receiving assistance services who “may receive similar benefits based on their home country's legal regulations“.¹⁵¹ This constitutes a reason for exclusion which results in administrative as well as time-consuming efforts on the side of the victim. The interview revealed that due to this, reason for exclusion it is always first examined if claims can be made in the country of origin. The extent that claims can be made in the country of origin also has to be examined. If claims can be made in the country of origin but to a lesser extent than in Austria on the basis of the Victims of Crime Act, claims to cover the difference can still be made in Austria according to the Victims of Crime Act. Only then are proceedings on transnational cases in terms of the directive 2004/80/EC initiated.

In order make it possible for relevant authorities to examine rights of trafficked persons in other countries, documents such as medical expert opinions have to be translated. As mentioned above, the directive 2004/80/EC does not provide information on who is supposed to cover costs. Covering costs of translation many times constitutes a major obstacle for trafficked persons as well for LEFÖ-IBF.

¹⁴⁸ Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of the directive 2004/80/EC relating to compensation to crime victims KOM(2009) 170 final, 6.
¹⁴⁹ matrix insight, The application of Directive 2004/80/EC relating to compensation to crime victims. Empirical Report (2009), 58.
¹⁵⁰ Cf. s. 11 (2) directive 2004/80/EC.
¹⁵¹ Cf. s. 11 (3) directive 2004/80/EC.
Cf. Victims of Crime Act s. 8 (3).

4. Conclusions and Recommendations

4.1 Conclusions

The comprehensive study on possibilities to obtain compensation for trafficked persons in Austria allows the following conclusions:

The hypothesis stated in the beginning, that trafficked persons rarely receive compensation, can be confirmed.

Astonishingly, no correlation between the duration of an offence and the level of compensation could be discovered.

Victim Assistance Services have proven to be fundamental for the receipt of compensation.

Interviews conducted by LEFÖ-IBF with two trafficked women revealed that receiving compensation is of very high importance for these women. Explaining her motivation for filing a claim for compensation, one interviewed woman said that she would consider it unjust if the perpetrators were not forced to pay compensation to her since they abused her and profited greatly from her body against her will.

This woman was not able to complete vocational training because she spent many years in a situation of exploitation. With the compensation she finally received she now plans to finance her education. For her, the compensation she received represents an opportunity to build her own life.

However, the trafficked woman was shocked when she found out how little the compensation was compared to the estimated amount of money the perpetrators had made.

Another interview was carried out with two police officers, who were asked, amongst other questions, how important they considered compensation for trafficked persons to be. Both concluded that it was very important for a trafficked person to actually receive compensation. It was assumed that trafficked women already lived in a destitute situation in their country of origin. If they did not receive compensation after being exploited and after testifying in court proceedings, they would end up in an even worse situation, not only financially but also psychologically.

For this reason, it is stressed that trafficked persons depend on receiving compensation both economically and as symbol of reparation.

The police stated that if actual payment of compensation in higher amounts became common practice, this would not only improve the situation of the trafficked person, but have a positive side effect for the police as well. If trafficked persons could be

confident about receiving compensation in the course of court procedures, more trafficked persons would probably agree to testify in the first place. And providing testimony is the requirement that allows police to actually conduct any legal act. A snowball-effect could possibly begin with more successful convictions and received compensation, leading to more testimonies from trafficked persons.

Lack of identification of trafficked men and other forms of human trafficking in the area of labour exploitation:

The findings demonstrated that there are only a few cases of trafficked men identified and that only a few proceedings concerning human trafficking for purposes of labour exploitation were conducted that did not involve prostitution. It should not be concluded, though, that those kinds of cases do not exist or that there are not many of them. The reason is more likely found in a lack of identification of these victims.

'Human trafficking' according to the Criminal Code (CC) s. 104a does not only refer to sexual exploitation, but also encompasses exploitation of labour or exploitation by the removal of organs. But numbers of identified trafficked men and identified cases of trafficking for purposes other than sexual exploitation are very low. Therefore, awareness needs to be raised amongst people in positions of legal authority regarding the fact that exploitation involves more than just sexual exploitation.

There is a lack of facilities for trafficked men. The low number of cases that have been registered should not lead to the conclusion that there are not a lot of trafficked men amongst the number of unreported cases.

The case analysis shows that 'human trafficking' according to CC s. 104a is only applied legally if forms of exploitation other than sexual exploitation have occurred. If a person was exploited sexually, 'transnational prostitution trade' is generally applied. It has to also be considered, that the application of CC s. 217 prevails over CC s. 104a ('human trafficking') if the perpetrator premeditated the exploitation of the victim.¹⁵² The case analysis reveals that 'transnational prostitution trade' is applied more often.

¹⁵² K Schwaighofer, in Frank Höpfel and Eckart Ratz (eds), (2nd edn Manz, Vienna 2006) CC s. 104 [19].

Limited application of seizure/sequestration of money and objects of value realized in practice:

In those cases in which the criminal offence of human trafficking or transnational prostitution trade can be presented in connection to the criminal offence of pimping, the perpetrators' premeditation is given if the perpetrators made their living (or more than that) by exploiting the victim. The element of crime is the exploitation which resulted in the enrichment of the perpetrator.

In practice, the public prosecutor, being the authority in charge of investigations, hardly takes this into account. As revealed in the interview, the public prosecutor does not consider it his or her responsibility to provide for victims' rights during the investigation stage. This is highly contradictory to one of the basic principles of the Austrian Code on Criminal Procedure (CCP). According to CCP s. 10 (2) and (3) there is an obligation for all judicial authorities to consider the victim's rights and interests in the course of criminal proceedings and to examine and advocate their interests for compensation. In the process of the investigation stage there is the possibility to order a house search or a personal search, even to search for money and/or objects of value, which are in the possession of the suspects because of the previous exploitation of the victim. Money and objects of value can be seized and confiscated and can serve to meet the civil claimant's claims after the perpetrator has been convicted.

Conclusions in relation to victim assistance services

The findings of the analysis reveal that victim assistance services have a considerable effect on the outcome of criminal proceedings. In many cases only the support of a victims' protection facility such as LEFÖ-IBF makes it possible for trafficked persons to stay in Austria until a court case comes to an end. At the same time, they are empowered and supported during the criminal proceedings. The protection and the trust relationship that is established during the counselling process facilitate a complete testimony before the court. Legal victim assistance services make it possible for trafficked persons to claim their rights and also to quantify their right to compensation appropriately. The fact that compensation was not granted in any of the examined cases carried out without legal victim assistance services proves that psychosocial and legal advice is a basic requirement for the protection of the interests of a trafficked person regarding compensation.

Few cases with legal victim assistance services for minors:

The case analyses included eight cases with minors involved. Of these eight cases none of the minors received victim assistance services. The reason for this low amount or complete lack of victim assistance services for minors has to do with the difficult legal situation a minor finds herself/himself in. For many legal actions minors in Austria need the approval from a legal guardian until they turn eighteen. This mainly refers to legal actions such as issuing the power of attorney to a lawyer of choice, who can then provide legal victim assistance services. Underage victims of human trafficking and transnational prostitution trade must therefore turn to the Austrian Child Protective Services or to the Guardianship Court to receive approval for legal victim assistance services. Such legal actions usually take a lot of time making it impossible to provide adequate counselling to a minor. Further, there are no other facilities for underage victims of human trafficking and transnational prostitution trade besides the 'Drehscheibe', a facility provided by the city of Vienna, where victims could be sheltered according to their age. Due to the unbalanced or lack of facilities for unaccompanied foreign children, it is practically impossible to grant this right to this group.¹⁵³

Like in cases of male victims, the lack of facilities with psychosocial and legal victim assistance services deprives underage victims of trafficking of their basic legal rights.

Lack of approval from the legal guardianship in order to carry out civil proceedings involving an underage victim:

If an underage victim of human trafficking or transnational prostitution trade decides to carry out civil proceedings to make use of her/his right to compensation or other claims, permission from the legal guardianship authority has to be obtained.

This means that minors have to prove that the conduct of the case is to their benefit and that cost risks are covered before they can file a lawsuit. Especially the second requirement can be considered virtually impossible in the case of minors who find themselves in Austria as a consequence of human trafficking or transnational prostitution trade without their families and basically destitute.

¹⁵³

Ecpat Austria, Alternative Report On The Implementation Of The Optional Protocol To The Convention On The Rights Of The Child On The Sale Of Children, Child Prostitution And Child Pornography, (OPSC) 2008, 32,
www.crin.org/docs/Austria_ECPAT_OPSC_NGO_Report.pdf accessed 22 March 2011.

For minors it is therefore even more important to join the criminal proceedings as civil claimants and to not be referred to the civil court with her/his compensation claim because of time constraints.

No legal victim assistance services for trafficked men:

The general lack of identification, as well as the lack of an efficient support system for trafficked men leads to further shortcomings.

The reason why men who are victims of human trafficking or transnational prostitution trade do not have access to victim assistance services is that specific victims' protection organizations providing psychosocial victim assistance services for this group of victims simply do not exist. Generally the number of victims' protection organizations for male victims of crime is lower than for women and minors. This is why it is so difficult to find other victims' protection organizations able to support and provide psychosocial victim assistance services to male victims of human trafficking. Since, according to the CCP, only those facilities which carry out psychosocial victim assistance services are allowed to offer legal counselling alongside, it becomes obvious that male victims of human trafficking and transnational prostitution trade are deprived of their legal rights.

Without victim assistance services, no provision of compensation

If compensation claims are submitted by the victim in the course of legal proceedings, the court has to decide on these claims, which then constitutes the basis for judgment. Within the legal victim assistance services the trafficked person is asked about her/his claims. Already in the process of preparing for the criminal proceedings, those claims are legally examined. Not until then does the trafficked person find out which claims can actually be submitted.

While bearing witness the trafficked person is also questioned concerning his/her compensation claims, e.g. for pain and suffering. Thus, the court obtains its basis for decision-making concerning the civil claimants' claims.

Unless a victim has access to legal victim assistance services already in the process of preparing for criminal proceedings, in-depth counselling about her/his rights to enforce compensation claims is not possible. Providing detailed advice normally takes a lot of time, since victims of trafficking – just as any other person who is confronted with court proceedings for the first time – usually have no legal expertise. If unprepared witnesses are then asked about compensation claims in the course of

having to tell the judge about traumatic experiences, they are completely overwhelmed by the situation and therefore not able to exercise their legal rights.

According to the law, criminal courts have to deal with and decide on civil claims of victims if this does not lead to a 'significant time delay' in the proceedings. The main proceedings usually last a few hours or a few days depending on the number of perpetrators and victims. Hearing a victim about compensation claims in the course of interrogating her/him about the facts is usually just a small part of the whole trial. Still, it seems that many courts are unable to decide on compensation claims, although the legal examination does not seem to be too difficult.

Lack of expert opinions in criminal cases:

The case analysis was able to emphasize that determining an appropriate amount of compensation for pain and suffering is essential for trafficked persons. Consulting an authorized expert to identify the extent of a possible traumatization is necessary to be able to determine the extent of civil claims. It is also inevitable for the intended purpose of criminal prosecutions.

In human trafficking cases, expert opinions are hardly ever obtained. The cause of this is that neither 'human trafficking' according to CC s. 104a nor 'transnational prostitution trade' according to CC s. 217 consider the existence of aggravated battery an element of offence. For this reason, only small symbolic amounts can be claimed within criminal proceedings, and, respectively, only small amounts are granted by the courts.

Lack of explanation for granted compensation

The amount of the granted compensation has to be included in the sentence (CCP s. 260 subpar 5). This constitutes a legally enforceable instrument (CCP s. 373 s. 1 subpar 8 Act on Enforcement Procedures) and has to be phrased according to the regulations of s. 7 Act on Enforcement Procedures, meaning the due debts have to be defined according to subject, nature and amount.

The case analysis shows that court sentences have usually granted standard amounts without further explanation. Assuming that damages are obviously about compensation for pain and suffering, courts seem to not consider it necessary to investigate and adjudge other forms of damage, such as the loss of earnings. The adjudged standard amounts are small compared to asserted claims. If the claims are very high, higher amounts are adjudged.

In order to achieve higher amounts of compensation, national legislation on loss of earnings in relation to prostitution and human trafficking is needed.

4.2 Recommendations

Recommendations:

As the case analysis demonstrated, the enforcement of compensation claims of trafficked persons who received victim assistance services is more successful than of those who did not receive assistance. The interviews revealed that trafficked persons who received victim assistance services were perceived as more credible by the court.¹⁵⁴ Therefore, judicial authorities should recognize their obligation to better inform about psychosocial and legal victim assistance services and explain it comprehensively, so that finally the trafficked person can decide if he/she would like to call upon victim assistance services or not.

1. In practice, more attention has to be paid to seizure and sequestration of objects of value from the suspected person. On the one hand, the CCP regulates the seizure and sequestration of objects of value to secure or cover possible claims of victims; on the other hand, seizing objects of value acquired through criminal acts is part of the judicial authorities' duties. De facto, in most preliminary proceedings not enough attention is paid to this obligation, which does not only lead to a limitation of victims' rights, but also to the unwanted outcome of perpetrators being able to keep the profit that they acquired from their criminal offences. Additionally, the case analysis reveals that the testimony of trafficked persons is still of high value in criminal cases. In order to not depend exclusively on the testimony of the trafficked person, it would be important to enhance seizure and sequestration also in cases of human trafficking. Therefore, greater efforts from the Austrian Federal Criminal Police Office (*Bundeskriminalamt*) and the Judicial System in this area, such as the implementation of a working group or the issuing of a decree, are highly welcomed.¹⁵⁵

2. The case analysis revealed that the present support system for trafficked persons is almost exclusively accessible to women. Men and children, first of all, hardly ever appear as victims of human trafficking in criminal cases, and in addition,

¹⁵⁴ Interview with Attorney, November 2010.

¹⁵⁵ Council of Europe, Group of states against corruption, 'Joint First and Second Round Evaluation Compliance Report on Austria' (Report) (11 June 2010) para 57, http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2%282010%291_Austria_EN.pdf accessed 22 March 2011.

they are mostly excluded from any possibility of receiving legal victim assistance services. Building a support structure including shelters for trafficked men is recommended. Shelters for children are available, although it is still necessary to guarantee access to victim assistance services in court cases as well, so that compensation can actually be made possible.

3. In most criminal proceedings against perpetrators of the offences 'human trafficking' or 'transnational prostitution trade', only lump sums for compensation are granted to victims. Although preliminary proceedings regularly reveal that victims suffered verifiable loss of earnings, since they were not paid any salary or their salary was taken away, there is a complete lack of precedents. It is therefore recommended that courts put more emphasis on loss of earnings and influence legislation in a way that victims are granted compensation for any proven loss of earnings. Further, it is recommended that the amount of compensation as well as the detailed composition of compensation be explained in the judgement. This would make court decisions more transparent and comprehensible for trafficked persons and their legal representatives. Even if no compensation is granted, an explanation would be desirable.

4. Victims of human trafficking and transnational prostitution trade need better and more detailed information about their rights in regards to claiming compensation for suffered damages in criminal cases and in regards to receiving support. According to CCP s. 10 (2), criminal investigators, the department of public prosecution and courts are obliged to consider the rights and interests of victims of criminal acts appropriately and to inform all victims about their basic rights in court proceedings, as well as about their possibility to receive compensation or any kind of assistance. However, interviews with experts revealed that this does not reflect common practice. Therefore, it should be ensured at each level of criminal proceedings that trafficked persons are informed comprehensively and understandably about their rights, that counselling facilities are contacted immediately, and that trafficked persons who cannot use any specific counselling facility are provided with free counselling.

5. Based on the outcome of the case analysis, amendments regarding the offences 'human trafficking' according to CC s. 104a, as well as 'transnational prostitution trade' according to CC s. 217 are recommended. Victims of these offences regularly suffer massive bodily harm or psychological secondary damages which leaves them defenceless against further abuses by the perpetrators who can hence gain even more profit from the victims. Due to the present legal situation, which does not foresee different levels of gravity of these offences, victims cannot

make claims regarding their suffered psychological damages. Since the offences do not require an assessment of the gravity, an expert opinion is not needed and therefore not requested by the criminal court. Victims can obtain such an expert opinion at their own expense only in a proceeding before civil court. Additionally, it should be ensured that victims of human trafficking for purposes of labour exploitation are in any case authorized to call upon victim assistance services, even if they were not exposed to physical violence or threat, because trafficked persons still suffer from massive psychological problems following exploitation.

6. For trafficked persons, additional civil court proceedings following the criminal proceedings constitute massive emotional and sometimes also financial burdens. To avoid these additional burdens on trafficked persons it is suggested that courts pay more attention to granting an appropriate amount of compensation during criminal proceedings for suffered pain and damages.

7. Even if the Institute of Psychosocial Counselling in Civil Cases since the implementation of the Second Protection against Violence Act (Federal Law Gazette (BGBl) I 40/2009) already presents mayor improvements for the situation of trafficked persons, it does not provide sufficient support for the enforcement of compensation claims. The psychosocial legal counsellor occupies the position of a person of trust in civil court cases and is therefore not authorized to give legal advice regarding the amount of compensation claims. Even if trafficked persons are usually granted at least legal aid due to their financial situation, they still carry the cost risk if they lose the case. Extending non-income based legal victim assistance services, as intended in the original draft of the Second Protection against Violence Act, would more likely serve to motivate the trafficked person to start a second court case and would increase his/her chance to receive compensation. This would also guarantee that respective victim protection facilities and specialized attorneys could be assigned with providing victim assistance services so that a trafficked person can be represented in the criminal, as well as in the civil court case, which would facilitate uninterrupted and smooth support of the trafficked person.

8. According to the law on migrant employment, migrants who are working but do not fulfil the requirements of the law are entitled to the same claims as persons with a regular employment contract. To actually realize claims it is recommended to establish a low-threshold institution in charge of helping migrants receive compensation if they had to work without appropriate payment or were exploited. Putting this possibility into practice would be very important also for trafficked persons, although the enforcement of their claims turns out to be rather difficult.

9. According to the Victims of Crime Act (Verbrechensopfergesetz), only third country nationals who were in Austria legally at the time of the offence have access to the benefits provided by this law. Many trafficked persons are therefore excluded. Due to the nature of human trafficking and the criminal acts related to it, it is recommended to include an exception to the rule for victims of human trafficking in the Victims of Crime Act. Trafficked persons are victims in terms of the criteria stated in the relevant act and should not suffer any disadvantages because of implications concerning the residence law which they could not influence due to their trafficking experience.

10. The examination of the possible existence and extent of comparable claims in the country of origin required by the Victims of Crime Act proves to be very difficult in the case of trafficked persons. To be able to carry out such an examination efficiently, an analysis should be conducted of the possibilities of realizing compensation claims across all those countries which are most relevant concerning human trafficking in Austria. An analysis of the main countries of origin could reveal whether and to what extent comparable claims can be filed by trafficked persons. It is further recommended to use possibilities of transnational cooperation between authorities to gather information required by the law about the possibility of realizing compensation claims in a country.

11. In transnational cases it is not defined which public authority has to cover possible costs of translation. Also in the course of examining claims in the country of origin costs of translation might occur, which cannot be borne by the trafficked persons due to a lack of means. It is therefore recommended that the involved national and foreign authorities decide that translation costs in transnational cases do not have to be borne by trafficked persons.

12. The Council of Europe Convention on Action against Trafficking in Human Beings obliges Austria to guarantee compensation for victims of human trafficking. Instruments such as psychosocial and legal advice prove to be essential for compensation to be granted. Still, the case analysis reveals that not every trafficked person receives compensation. The CCP allows for civil claimants who have been granted compensation to receive a payment in advance by the state if the convict is not able to pay for the compensation e.g. because of a custodial sentence.¹⁵⁶ The access requirements are manifold and therefore victims cannot receive a payment in advance easily. Access is denied, for example, if the Victims of Crime Act may cover

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See CCP s.343a.

these benefits. Barriers to access to payments in advance for reasons of compensation for trafficked persons must be removed.

To be able to grant compensation to all victims of trafficking, the recommendation of the Council of Europe should be followed and a compensation fund for victims of human trafficking should be established.

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