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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo\* \*\***

### *Summary*

The present report is submitted in accordance with Human Rights Council decision 8/12. It covers the period from 1 March 2010 to 1 March 2011.

Chapter II of the report provides an overview of the activities undertaken by the Special Rapporteur on trafficking in persons, especially women and children, during the period under review.

Chapter III of the report contains a thematic analysis of the right to an effective remedy for trafficked persons. In it, the Special Rapporteur outlines the international legal framework of this right and what it entails in the specific context of trafficked persons. She analyses key components of this right, including restitution, recovery, compensation, satisfaction and guarantees of non-repetition, access to information, legal assistance, and regularization of residence status. Further, she sets out special factors to be considered in realizing the right to an effective remedy for trafficked children. Chapter IV of the report contains the Special Rapporteur's conclusions and recommendations. Further to the conclusions and recommendations, the Special Rapporteur submits the draft basic principles on the right to an effective remedy for trafficked persons, contained in annex I to the present report.

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\* Annex II to the present report is reproduced, as received, in the language of submission only.

\*\* Late submission.

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## **I. Introduction**

1. The present report is submitted pursuant to Human Rights Council resolution 8/12. It briefly outlines the activities of the Special Rapporteur on trafficking in persons, especially women and children, from 1 March 2010 to 1 March 2011 and contains a thematic analysis on the right to an effective remedy for trafficked persons.

## **II. Activities carried out by the Special Rapporteur**

2. With regard to the activities carried out from 1 March to 31 August 2010, the Special Rapporteur makes reference to her latest report to the General Assembly (A/65/288). Her activities from 1 September 2010 to 1 March 2011 are briefly outlined below.

3. The Special Rapporteur visited Argentina and Uruguay from 6 to 12 September 2010 and from 13 to 17 September 2010, respectively, at the invitation of the Governments. The reports of these visits are presented as addenda to the present report.

4. On 4 and 5 October 2010, the Special Rapporteur convened a consultation with anti-trafficking experts from nine regional organizations in Dakar. Further, on 22 and 23 November 2010, the Special Rapporteur convened an expert consultation on the right to an effective remedy for trafficked persons, in Bratislava, in preparation of the present report. The summary reports of these consultations are provided as addenda to the present report.

5. On 19 October 2010, the Special Rapporteur delivered a keynote speech at the fifth session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, held in Vienna.

6. On 25 October 2010, the Special Rapporteur presented her annual report to the General Assembly, which focused on the prevention of trafficking in persons.

7. On 2 December 2010, the Special Rapporteur addressed the press conference organized by anti trafficking action (ASTRA) in Belgrade, on the occasion of the tenth anniversary of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ("Palermo Protocol").

8. On 3 December 2010, the Special Rapporteur delivered a keynote speech at the interparliamentary conference, entitled "Parliaments united against human trafficking", held by the Parliamentary Assembly of the Council of Europe in Paris.

## **III. Thematic analysis: the right to an effective remedy for trafficked persons**

### **A. Introduction**

9. In the exercise of her mandate, the Special Rapporteur received a number of reports that trafficked persons are frequently left without remedies or the support necessary to access them, which often gives rise to risks of further human rights violations and re-trafficking. The Special Rapporteur found that despite the fundamental guarantee of the right to an effective remedy under international law, there remains a large gap in practice between legal provisions and their implementation in relation to trafficked persons.

10. Recognizing this gap, the Special Rapporteur considers that conceptual clarification of this right and analysis of good practices and main challenges may benefit States in ensuring the effective implementation of the right at the national level. It is further her hope that the report will provide guidance to practitioners working in this field, including lawyers, human rights defenders, academics, and international and non-governmental organizations.

11. The Special Rapporteur expresses gratitude to experts and stakeholders who provided valuable inputs to the development of the present report. In particular, she wishes to thank those who participated in the expert consultation held in Bratislava on 22 and 23 November 2010, and in the online discussion forum at the United Nations Global Initiative to Fight Human Trafficking website (UN.GIFT.HUB) from 2 to 21 February 2011. The summary note of the online discussion is included in the present report as annex II.

12. In this chapter, the Special Rapporteur sets out the legal framework of the right to an effective remedy for trafficked persons under international law and discusses when and how the obligation of States to provide remedies arises. She then analyses essential components of this right in the context of trafficked persons and discusses fundamental principles to be taken into account in the case of trafficked children. In chapter IV of the report, the Special Rapporteur offers conclusions and recommendations for States' consideration. Annex I of the report contains the draft basic principles on the right to an effective remedy for trafficked persons.

## **B. Legal framework of the right to an effective remedy for trafficked persons**

13. It is a well-established doctrine of international law that a State has an obligation to redress wrongs where an act or omission is attributable to it and constitutes a breach of an international obligation of the State.<sup>1</sup> While this doctrine of State responsibility has traditionally applied between States, it also extends to wrongs committed against individuals.<sup>2</sup>

14. The first requirement of State responsibility is that the relevant act or omission is attributable to the State. The conduct of any State organs and agents acting under the direction, instigation or control of those organs is clearly attributed to the State.<sup>3</sup> In general, the conduct of private persons is not as such attributable to the State.<sup>4</sup> The second requirement is that the relevant act or omission attributed to a State constitutes a breach of an international obligation of that State.

15. On face value, State responsibility may seem difficult to establish in cases of trafficking, as trafficking is often committed by private individuals, criminal groups and networks acting without instructions from, the direction of or control by a State. However, the fact that the relevant act or omission was conducted by private persons does not necessarily absolve the State of its responsibility, as State responsibility may arise "if it

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<sup>1</sup> See General Assembly resolution 56/83 on the responsibility of States for internationally wrongful acts, annex, arts. 2 and 31.

<sup>2</sup> M. Cherif Bassiouni, "International recognition of victims' rights", *Human Rights Law Review*, vol. 6, No. 2 (2006), p. 211.

<sup>3</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, chap. IV, para. 77 (Draft articles on responsibility of States for internationally wrongful acts, general commentary, part one, chap. II, para. 2).

<sup>4</sup> General Assembly resolution 56/83, annex, art. 8.

failed to take necessary measures to prevent the effects of the conduct of private parties”.<sup>5</sup> Importantly, whether or not such failure is attributed to a State would depend on the existence of relevant international obligations of that State to take such measures. In the context of human rights and trafficking in persons, obligations to prevent and punish acts of private persons clearly exist, as seen in the obligations under the Palermo Protocol to “prevent and combat” trafficking in persons, and under international human rights law to prevent human rights violations by non-State actors. The standard applied in determining a breach of these obligations is that of “due diligence”, so that States may be responsible for providing remedies where they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of such violations.<sup>6</sup> An example of the application of these principles at the regional level is the case of *Rantsev v. Cyprus and Russia*<sup>7</sup> in which the European Court of Human Rights ordered Cyprus and Russia respectively to pay compensation to the family of the victim of trafficking for the failure to provide for an appropriate legal and administrative framework to combat trafficking and to properly investigate how and where the victim was recruited, pursuant to article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

16. In addition to the doctrine of State responsibility, States may have obligations under specific treaties to provide remedies. As trafficking involves multiple violations of human rights, international human rights law is of direct relevance. It is well-grounded in international human rights law that a State has a duty to provide a remedy to victims of human rights violations committed within its territory and subject to its jurisdiction. The right to a remedy is a human rights norm widely recognized in major international and regional human rights instruments.<sup>8</sup> While international instruments specifically applicable to the crime of trafficking, namely the United Nations Convention against Transnational Organized Crime and the Palermo Protocol, do not expressly guarantee the right to a remedy to trafficked persons, they do require States to establish procedures to provide access to compensation, and to provide for measures that may form part of the right to an effective remedy, as discussed in sections C and D below. Despite this lack of holistic reference to the right of trafficked persons to a remedy under the Palermo Protocol, the international community clearly recognizes that trafficked persons, as victims of human rights violations, have the right to adequate and appropriate remedies, which goes beyond the right to the possibility of obtaining compensation.<sup>9</sup>

<sup>5</sup> A/56/10, para. 77 (Draft articles on responsibility of States for internationally wrongful acts, general commentary, part one, chap. II, para. 4).

<sup>6</sup> See generally the Velásquez Rodríguez Case, Judgement of 29 July, 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988); see the Palermo Protocol, arts. 2 (a) and 9, para. 1 (a).

<sup>7</sup> See *Rantsev v. Cyprus and Russia*, Dec. No. 25965/04 (European Court of Human Rights, 7 January 2010). See also *Hadijatou Mani Koraou v. The Republic of Niger* (ECOWAS Community of Justice, No. ECW/CCJ/JUD/06/08 of 27 October 2008).

<sup>8</sup> Universal Declaration of Human Rights, art. 8; International Covenant on Civil and Political Rights, art. 2, para. 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 13; International Convention on the Elimination of All Forms of Racial Discrimination, art. 6; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 4-7; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13; American Convention on Human Rights, art. 25; African Charter on Human and Peoples' Rights, art. 7, para. 1 (a); Arab Charter on Human Rights, art. 9.

<sup>9</sup> See, for example, the United Nations Global Plan of Action to Combat Trafficking in Persons (General Assembly resolution 64/293, annex), para. 3; Human Rights Council resolution 11/3, para. 1.

17. Once State responsibility to provide trafficked persons with remedies is established, the next question is the content of such remedies. In this regard, the formulation of the right to a remedy under various treaties and soft international law makes clear that it encompasses not only a substantive right to reparations, but also a set of procedural rights necessary to facilitate access to reparations.

18. In substance, victims of human rights violations must be provided with adequate reparations for the harms suffered. While most human rights treaties do not explicitly spell out the content of reparations, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Basic Principles and Guidelines on Remedy and Reparation”) elaborate various forms of reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Clearly, the form of reparations that should be provided to the victim would depend on the nature and circumstances of the violation. While not all forms of reparation are necessary in all cases, adequate reparation may only be achieved in particular cases by the combination of different forms of reparation.

19. At the procedural level, victims of human rights violations must be guaranteed access to a competent and independent authority in order to successfully obtain reparations. Such an authority must have the power to investigate and decide whether a human rights violation has taken place, and if so, to enforce reparations.<sup>10</sup> If the victims are to be provided with meaningful access to such an authority, they must be guaranteed of a set of ancillary rights. First, the victims should be provided with relevant information concerning the right that has been violated, and on the existence of, and modalities for gaining access to, reparation mechanisms. Secondly, they should be provided with legal, medical, psychological, social, administrative and any other assistance that they may require in order to exercise the right to an effective remedy in a meaningful manner.<sup>11</sup>

## C. Substantive components

### 1. Restitution

20. As restitution is aimed at restoring the situation that existed prior to the violation, measures of restitution in the context of trafficked persons may include, for example: the release of the trafficked person from detention (whether such detention is imposed by traffickers, the State or any other entity);<sup>12</sup> return of property such as identity and travel documents and other personal belongings; recognition of legal identity and citizenship; safe and voluntary repatriation to the country of origin; and assistance and support necessary to facilitate social integration.

21. Measures of restitution warrant a cautious approach in the context of trafficking in persons, as simply returning the trafficked person to the pre-existing situation may place him or her at the risk of further human rights violations and being re-trafficked. From this perspective, restitution implies States’ obligations to undertake broader measures to address root causes of trafficking and to provide necessary reintegration support to trafficked persons, so as to address any risk of re-trafficking. The repatriation in 2005 of about 1,000 Pakistani children who were trafficked to the United Arab Emirates as camel jockeys, provides an illustration. In this case, the factors which caused the children to be trafficked

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<sup>10</sup> See Human Rights Committee, general comment No. 20 (1992), para. 14.

<sup>11</sup> See Basic Principles and Guidelines on Remedy and Reparation, arts. 11 and 12.

<sup>12</sup> Anne T. Gallagher, *The International Law of Human Trafficking* (New York, Cambridge University Press, 2010), p. 366.

in the first place, such as poverty, the lack of economic opportunities and the absence of a comprehensive child protection system, still persisted at the time of repatriation. Therefore, repatriation and reintegration of the children inevitably entailed tackling the root causes of trafficking and strengthening the child protection system, including providing basic education and health services in a sustainable manner.

22. Measures to address the root causes of trafficking, such as gender discrimination and inequality, also play a crucial role in ensuring effective restitution of trafficked women and girls. Where trafficked women and girls have been subjected to sexual and gender-based violence, they may face discrimination, social stigma, communal and family ostracism upon return to their families and communities, thereby resulting in their re-victimization. In these cases, “restitution of identity, family life and citizenship for them may require measures that target their wider communities – including attempts to subvert cultural understandings around the value of women’s purity and sexuality”.<sup>13</sup>

23. Further, returning a trafficked person to his or her country of origin may not be an appropriate form of remedy where he or she has lost legal, cultural or social ties with the country of origin and it is no longer in his or her best interest to return to it. For instance, it is conceivable that a child who is trafficked to another country and perpetuated in this situation over decades may lose his or her social and cultural identity in the country of origin. In this case, it would be difficult to justify that “restitution” in a traditional sense alone would be an appropriate, victim-centred remedy. Where these factors exist, restitution may involve reintegration of the trafficked person into the host community or resettlement in a third country.

## 2. Recovery (rehabilitation)<sup>14</sup>

24. Recovery is a crucial form of reparation for trafficked persons, which includes medical and psychological care, as well as legal and social services. By definition, trafficking often involves physical and sexual violence, physical and emotional coercion, threats and intimidation, which has severe physical and psychological consequences on the victims. The Recommended Principles and Guidelines on Human Rights and Human Trafficking are thus explicit in acknowledging that the right to fair and adequate remedies includes “the means for as full a rehabilitation as possible”.<sup>15</sup>

25. Article 6, paragraph 3, of the Palermo Protocol requires States to “consider implementing measures to provide for the physical, psychological and social recovery” of trafficked persons and sets out some such measures, including: “(a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities”. While according to the legislative guide for the implementation of the Palermo Protocol (“the Legislative Guide”), this provision was not rendered mandatory due to the varying level of socio-economic development or availability of resources in different States,<sup>16</sup> it should be read in conjunction with the purposes of the Palermo Protocol, which include “to protect

<sup>13</sup> Report of the Special Rapporteur on violence against women, its causes and consequences (A/HRC/14/22), para. 50.

<sup>14</sup> In the present report, the word “recovery” is used in the context of trafficked persons in order to avoid re-victimizing trafficked persons by labelling them as individuals requiring “rehabilitation”.

<sup>15</sup> Guideline 9, para. 1.

<sup>16</sup> United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York, 2004), part two, para. 62.

and assist the victims of such trafficking, with full respect for their human rights” (art. 2) to imply obligations of States parties to implement these measures to the maximum of their available resources.

26. While many States have made positive progress in establishing and providing services to support recovery of trafficked persons, a number of challenges remain in ensuring that these services are provided in a manner that is non-discriminatory and enhances the human rights of trafficked persons. In some States, recovery services are only available to certain categories of trafficked persons at the exclusion of others, such as men and children who are internally trafficked. It appears that the distribution of services often seems to be skewed towards foreign adult women trafficked for sexual exploitation. Furthermore, many States make access to recovery services conditional upon the capacity or willingness of trafficked persons to cooperate with law enforcement authorities, which is contrary to “the fundamental tenet of the human rights approach to trafficking”.<sup>17</sup>

27. A related concern is the absence in many States of a “reflection and recovery period”, during which trafficked persons may escape the influence of traffickers, recover psychological stability to consider their options, and make an informed decision as to whether to cooperate with law enforcement authorities without the risk of being removed from the country. This period is not only an integral element of recovery, but also the fundamental first step in seeking other forms of reparations, such as compensation. The security and well-being of trafficked persons, which may be facilitated by the reflection and recovery period, is an essential prerequisite for trafficked persons in seeking compensation. Given the high degree of trauma experienced by trafficked persons, empirical evidence suggests that a minimum period of 90 days is required in order to ensure that the cognitive functioning of trafficked persons improves to a level at which they are able to make informed and thoughtful decisions about their safety and well-being, and provide more reliable information about trafficking-related events.<sup>18</sup> This issue of a “reflection and recovery period” will be explored further in section D, subsection 3.

### 3. Compensation

28. Compensation should be provided for economic assessable damage to the extent that such damage cannot be made good by restitution. It may be provided as payment for a wide range of injury, loss or damage caused by the offender, including, for example: costs of medical, physical, psychological or psychiatric treatment required by the victim; lost income and due wages; legal fees and other similar costs; and payment for non-material damages, resulting from moral, physical or psychological injury, emotional distress, pain and suffering.<sup>19</sup>

29. Reparation in the form of compensation appears to be most widely recognized among States in the context of trafficking in persons. The Palermo Protocol specifically requires States Parties to ensure that victims of trafficking have “the possibility of obtaining compensation for damage suffered” (art. 6, para. 6). Notably, however, the provision under the Palermo Protocol falls short of requiring States Parties to ensure that trafficked persons actually receive compensation. The obligation of States under the Palermo Protocol is discharged if States establish: (a) provisions allowing victims to sue offenders or others for

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<sup>17</sup> Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary (United Nations publication, Sales No. E.10.XIV.1), p. 142.

<sup>18</sup> The London School of Hygiene & Tropical Medicine, “Stolen smiles: a summary report on the physical and psychological consequences of women and adolescents trafficked in Europe” (London, 2006), p. 3.

<sup>19</sup> UNODC Model Law on Trafficking in Persons, art. 28, para. 3.

civil damages; (b) provisions allowing criminal courts to award criminal damages to be paid by offenders to victims or to impose orders for compensation or restitution against persons convicted of offences; or (c) provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages.<sup>20</sup> The requirement under the Palermo Protocol to merely provide for the possibility to seek compensation effectively creates a gap between the right to an effective remedy in law and its implementation. A number of obstacles exist in practice for trafficked persons to obtain compensation through either of these avenues, rendering such possibility simply illusory.

30. The ensuing subsections discuss different methods through which trafficked persons may seek compensation and associated challenges, while also highlighting some positive developments.

(a) *Legal proceedings (criminal, civil or labour)*

31. Compensation through criminal proceedings may be awarded to victims as part of the penalties imposed upon finding the accused persons guilty of the offence as charged. While some successful cases have been reported, experience shows that the awarding of compensation for trafficked persons through criminal proceedings is the exception rather than the rule. In some countries, courts may not even consider compensation for trafficked persons, as it is not common practice for victims of any crime to be awarded compensation through criminal proceedings.<sup>21</sup> The possibility of compensation through criminal proceedings also hinges upon identification, arrest, trial and conviction of traffickers, which remains difficult in trafficking cases.

32. Trafficked persons may also pursue civil claims on the basis of loss caused by the crime of trafficking pursuant to relevant national law. Although there are recent cases which resulted in a substantive amount of compensation for trafficked persons,<sup>22</sup> it is still extremely difficult for them to receive compensation through civil proceedings. Some of the difficulties associated with civil proceedings include the tendency to be time-consuming, expensive and complicated. Other obstacles include complications in calculating the basis of damages and the relative novelty of non-material damages such as pain and suffering in some States.<sup>23</sup>

33. Trafficked persons may also have options of claiming compensation based on labour law violations, such as discrimination, breach of national minimum wage, and unreasonable overtime. While there are some promising practices,<sup>24</sup> the possibility for trafficked persons to obtain compensation through labour proceedings may be restricted by a number of eligibility criteria in practice. In some countries, labour proceedings are not available for trafficked persons engaging in sexual services, as the provision of sexual services itself is illegal and thus not a recognized form of employment to which labour protection applies.<sup>25</sup>

<sup>20</sup> UNDOC, *Legislative Guides*, part two, chap. 2, para. 60.

<sup>21</sup> See Project Victims in Europe, *Implementation of the EU Framework Decision on the Standing of Victims in the Criminal Proceedings in the Member States of the European Union* (Lisbon, 2009).

<sup>22</sup> See, for example, *Jane Doe v. Alexander Lifshin and Armen Ben* (Case No. CC2003/08), Tel Aviv Yafo District Court (25 January 2010); *AT v Dulghieru* [2009] EWHC 225 (QB) (AT).

<sup>23</sup> United States Agency for International Development (USAID), “Best practices for programming to protect and assist victims of trafficking in Europe and Eurasia”, p. 32.

<sup>24</sup> Anti-Slavery International, *Opportunities and Obstacles: Ensuring Access to Compensation for Trafficked Persons in the UK* (2008), p. 20.

<sup>25</sup> Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), *Compensation for Trafficked and Exploited Persons in the OSCE Region* (Warsaw, 2008), p. 27. See also *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC).

Trafficked persons with irregular immigration status may be also excluded from the use of labour proceedings to seek compensation.

34. While different factors affect the efficacy of criminal, civil and labour proceedings, common obstacles for trafficked persons to seek compensation through legal proceedings include: failure to identify trafficked persons and accord them regular residence status; lack of adequate support in recovery of trafficked persons; lack of information and knowledge on the part of trafficked persons; lack of free legal aid available; lack of capacities, knowledge and experience on the part of the judiciary and lawyers in seeking compensation for trafficked persons; and inadequate witness protection programmes to guarantee the safety and security of trafficked persons and their family members. Further, trafficked women who are also victims of sexual and gender-based violence may also face additional obstacles in pursuing legal proceedings, as participation in such proceedings may expose them to re-victimization in the form of psychological harm, stigma and communal and family ostracism.

35. An additional obstacle for trafficked persons to receive compensation is that even when compensation orders are made against traffickers, it is extremely difficult to enforce such orders and actually receive compensation. One of the main contributing factors is that identified traffickers often do not have adequate assets to satisfy an award of compensation. In some cases, traffickers may genuinely not have any assets, as they may be “lower level” offenders such as intermediaries or recruiters. In other cases, law enforcement authorities may lack the expertise, training and resources to conduct financial investigations to freeze and confiscate such assets.<sup>26</sup> Traffickers may thus swiftly transfer their assets to another country or take other steps to conceal them before compensation orders are executed. Even where assets are successfully confiscated, such assets may be automatically transferred into State coffers or otherwise not used to compensate trafficked persons.<sup>27</sup>

(b) *State-funded compensation funds*

36. Trafficked persons may also seek compensation through a State-administered scheme, which has been perceived as more favourable than legal proceedings, given that its processes are relatively streamlined, less bureaucratic and quicker; and compensation may be made without having to apprehend and convict a trafficker.

37. In some States, trafficked persons have been able to obtain compensation through general compensation schemes for victims of crime.<sup>28</sup> In many other States, however, access to State-funded compensation schemes may be restricted by certain eligibility criteria, such as nationality, residence status, or types of crimes that the victim suffered.

38. An increasing number of States have introduced compensation schemes specifically for trafficked persons, or have announced that they are contemplating the establishment of one. The Special Rapporteur recognizes, however, that where a general compensation scheme for victims of crime including trafficked persons exists, the creation of a separate compensation scheme dedicated only to trafficked persons may result in further diversion of resources and hierarchical categorization of rights holders. From this perspective, it may be considered a more concrete strategy to seek to enable trafficked persons to obtain compensation within the existing scheme and, where it is inadequate, to strengthen it to allow all victims of human rights violations to claim compensation.

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<sup>26</sup> OSCE/ODIHR, *Compensation*, pp. 40-42.

<sup>27</sup> Anti-Slavery International, *Opportunities and Obstacles*, p. 33.

<sup>28</sup> *Ibid.*, p. 15.

*(c) Non-judicial methods*

39. In the light of the limitations associated with legal proceedings, it is noteworthy that a number of cases in which trafficked persons have successfully obtained compensation resulted from out-of-court settlements negotiated by various governmental and non-governmental bodies.<sup>29</sup> In some States, trade unions have played a crucial role in settling claims for unpaid or underpaid wages, or work-related injuries following negotiations with employers. These non-judicial methods may play an instrumental role in seeking compensation particularly for certain groups of trafficked persons, such as trafficked women and girls, who may face a variety of procedural challenges in judicial proceedings, such as psychological harms, stigma and fears of reprisals.

**4. Satisfaction and guarantees of non-repetition**

40. Satisfaction is a non-financial form of reparation designed to compensate moral damage or damage to the dignity or reputation of the victim. It includes measures such as the verification of the facts and full and public disclosure of the truth, an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons close to the victim, and judicial and administrative sanctions against perpetrators.<sup>30</sup> These measures translate into the obligations of States to conduct a prompt, effective, independent and impartial investigation into human rights violations.<sup>31</sup> Guarantees of non-repetition are geared towards the prevention of human rights violations and include measures such as strengthening the independence of the judiciary, providing human rights education to all sectors of society and training for law enforcement officials, and promoting the observance of codes of conduct and ethical norms by public servants.<sup>32</sup>

41. It is beyond the scope of the present report to discuss in detail these aspects of the right to an effective remedy, which raise broader issues such as the efficacy of the judicial system and the obligations of States to prevent trafficking in persons. However, the Special Rapporteur emphasizes that they are essential elements of the right to an effective remedy, without which the ultimate objective of enabling trafficked persons to recover from the harms and rebuild their lives with the full enjoyment of human rights, may not be realized. In particular, guarantees of non-repetition, which include measures to prevent trafficking, constitute an important form of remedy in view of the risks of re-trafficking that trafficked persons may be exposed to. To this end, the Palermo Protocol imposes an obligation on States to undertake various measures aimed at prevention of trafficking, ranging from tackling the root causes to providing or strengthening training of law enforcement officers, immigration and other relevant officials in the prevention of trafficking in persons.

**D. Procedural components**

42. Some of the obstacles in seeking compensation as identified above clearly show that procedural rights of access to remedies are critical pre-conditions in realizing the substantive right to reparations for trafficked persons.

<sup>29</sup> See for example the case instigated by the Department of Labor and the Equal Employment Opportunity Commission in the United States of America. Global Alliance Against Traffic in Women (GAATW), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (Bangkok, 2007), p. 195.

<sup>30</sup> Basic Principles and Guidelines on Remedy and Reparation, art. 22.

<sup>31</sup> Bassiouni, "International recognition" (note 2 above), p. 271 (footnote 340).

<sup>32</sup> Basic Principles and Guidelines on Remedy and Reparation, art. 23.

## 1. Access to information

43. First and foremost, information relating to trafficked persons' rights and mechanisms available to seek remedies is critical in ensuring their access to remedies. Trafficked persons can only seek remedies if they are aware of their rights and how to access such remedies. The importance of providing information is stressed in the Palermo Protocol, which requires States Parties to establish measures that provide trafficked persons with "information on relevant court and administrative proceedings".<sup>33</sup> Experience indicates, however, that there is very little evidence of State practices in informing trafficked persons about their right to remedies, and the provision of information to trafficked persons in a manner that is appropriate in terms of language, content, form and timing remains a challenge.

44. In terms of the language to be used, it is crucial that information about trafficked persons' rights and the procedures for obtaining remedies is clearly explained in a language that the trafficked person understands.<sup>34</sup> In this regard, interpreters have a crucial role to play, as many trafficked persons may not understand the language spoken in the country in which they wish to seek remedies. While the Palermo Protocol does not expressly require States to provide for interpretation or translation assistance, it is one of the essential requirements to effectively guarantee the right of trafficked persons to seek remedies, and the availability of such assistance should not be limited to judicial proceedings. Furthermore, the language used to explain the rights and procedures to seek remedies must be easily understood by trafficked persons of all educational and socio-economic backgrounds. In a number of States, law enforcement authorities such as police and prosecutors are obliged by law to inform victims of crime of their rights, including the right to claim compensation.<sup>35</sup> While the Special Rapporteur recognizes this legal requirement as a good practice, it has been reported that it is not well implemented in practice or the information often does not effectively reach the victims due to the complexity of the language used by the law enforcement authorities.<sup>36</sup>

45. Equally important is the content and form of information to be provided to trafficked persons. Trafficked persons should be provided with full and accurate information about their legal rights, how and where to obtain necessary assistance, different legal options and procedural steps involved in seeking remedies, and consequences of exercising such legal options. Information may be provided in writing such as in leaflets so that trafficked persons may reflect on the information at any time, and/or through hotlines and the Internet to increase accessibility to appropriate information.<sup>37</sup> If the trafficked person wishes to pursue judicial proceedings, the provision of information may also take the form of familiarizing him or her with trial processes through observation of another court proceeding, if possible.<sup>38</sup>

46. Furthermore, it is crucial that actors who are likely to come into first contact with trafficked persons, such as the police and health professionals, provide relevant information to trafficked persons as early as possible. Given that psychological recovery of trafficked

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<sup>33</sup> Art. 6, para. 2 (a).

<sup>34</sup> Palermo Protocol, art. 6, para. 3 (b); Recommended Principles and Guidelines on Human Rights and Human Trafficking, guideline 9, para. 2.

<sup>35</sup> See for example France, the Republic of Moldova, Romania, the Russian Federation, Thailand and Ukraine.

<sup>36</sup> OSCE/ODIHR, *Compensation* (note 25 above), p. 35.

<sup>37</sup> Council of Europe, *Non-criminal Remedies for Crime Victims* (Strasbourg, 2009), pp. 17-18.

<sup>38</sup> Aye Olatunde et al. (eds), *Access to Justice for Trafficked Persons in Nigeria: A Handbook for Legal Actors and Service Providers* (GAATW et al., 2010), p. 36.

persons may take some time, it may be also beneficial to provide information on a regular basis, both orally and in writing in a language they understand.

## 2. Access to legal assistance

47. As judicial and administrative proceedings are often complex in many jurisdictions, legal assistance is essential to enable trafficked persons to claim compensation, especially where they are not familiar with the legal system of the country concerned. While not specifically referring to “legal” assistance, article 6, paragraph 2 (b), of the Palermo Protocol mandates States to provide “assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence”. More specifically, paragraph 9 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking provides that “legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers”. Furthermore, trafficked persons should be provided with legal assistance free of charge. Trafficked persons who have just escaped from their traffickers often have no financial means to afford legal assistance, given their financial dependence on their traffickers who use debt bondage as a control tool.

48. While some States provide for free legal assistance to victims of crime, including trafficked persons,<sup>39</sup> many States reportedly do not have a system in place to provide for such assistance. Even where the law expressly provides that trafficked persons should be provided with legal assistance, the system may not exist or be effectively implemented in practice, so that legal assistance may only be available from non-governmental or international organizations in reality.<sup>40</sup> Further, some States impose eligibility criteria for legal aid, which may be difficult for trafficked persons to fulfil, such as being nationals of the country or long-term residents with legal status and a domicile.

## 3. Regularization of residence status

49. The ability of trafficked persons to claim remedies hinges upon possibilities to remain in countries where remedies are sought, as it would be difficult for them to obtain remedies if they were at risk of expulsion or had already been expelled from the countries. In many instances, however, trafficked persons are misidentified as irregular migrants and detained in immigration detention centres, or immediately deported without being given any opportunities to seek compensation.

50. Article 7 of the Palermo Protocol requires each State to consider adopting measures that permit trafficked persons “to remain in its territory, temporarily or permanently, in appropriate cases” and to “give appropriate consideration to humanitarian and compassionate factors” in doing so. At a very minimum, this should entail the provision of a reflection and recovery period to allow trafficked persons to regain physical and psychological stability and to reflect on available options. While an increasing number of States, particularly those in Europe, provide for a reflection and recovery period of varying duration, the majority of States still do not yet establish a reflection and recovery period as a legal right of trafficked persons. Even where it is established by law, trafficked persons often do not benefit from such a period, due to a number of obstacles such as the misidentification of trafficked persons, which results in immediate detention and deportation, and the uncertainty regarding the procedures to be followed in granting the

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<sup>39</sup> Council of Europe, *Non-criminal Remedies*, p. 19.

<sup>40</sup> OSCE/ODIHR, *Compensation*, p. 82.

reflection and recovery period.<sup>41</sup> Further, a study on the application of the right to residence found that a reflection and recovery period is often confused with temporary residence status.<sup>42</sup> This confusion is highly problematic, as temporary residence status is often tied to the willingness of trafficked persons to cooperate with law enforcement and testify against traffickers, which defeats the very purpose of a reflection and recovery period.

51. Following a reflection and recovery period, trafficked persons should be provided with temporary or permanent residence status on certain grounds. Firstly, trafficked persons should be entitled to remain in the country where remedies are being sought for the duration of any criminal, civil or administrative proceedings.<sup>43</sup> In this regard, article 7 of the Palermo Protocol should be read in conjunction with the mandatory requirements under article 6, paragraphs 2(b) and 6. As it would be almost impossible for trafficked persons to seek compensation through legal proceedings if they are unable to lawfully remain in the country, article 7 should be interpreted to encourage States to provide trafficked persons with temporary residence status for the purpose of seeking remedies. Secondly, trafficked persons should be granted temporary or permanent residence status on social or humanitarian grounds. Such grounds may include, for instance, the inability to guarantee a safe and secure return, the fears of reprisals and retaliation by traffickers, the risk of being re-trafficked, or the return is otherwise not in the best interests of the trafficked person. Another factor that should be taken into account is the obligation of States not to return trafficked persons to States where they have a well-founded fear of persecution. Some victims or potential victims of trafficking may fall within the definition of a refugee contained in article 1(A)(2) of the 1951 Convention relating to the Status of Refugees and may therefore be entitled to international refugee protection.<sup>44</sup> In these circumstances, temporary or permanent residence status may in itself become a substantial form of remedy.

52. In many States, the grant of residence permits is exclusively tied to the willingness of trafficked persons to cooperate with law enforcement to investigate and prosecute traffickers. It has been observed that trafficked persons are rarely seen as the holders of rights, but as “instruments” in investigations or prosecution.<sup>45</sup> In the Special Rapporteur’s view, the conditionality of residence permits on cooperation with law enforcement authorities may not only compromise trafficked persons’ rights to full recovery, but may also be counterproductive from law enforcement perspectives. The requirement to cooperate with law enforcement authorities is of concern, particularly in the absence of a reflection and recovery period in many States, as such cooperation may result in re-traumatization of trafficked persons by forcing them to recount highly traumatic events when their psychological well-being has not yet been recovered. Further, this concern is heightened in view of the lack of definition as to what “cooperation” is expected from trafficked persons and the reports that it may, in some cases, entail direct contact with traffickers, which could be highly traumatizing for trafficked persons.<sup>46</sup> It is doubtful whether information obtained without respecting the right of trafficked persons to full

<sup>41</sup> See UNODC, *Human Trafficking in the Baltic Sea Region: State and Civil Society Cooperation on Victims’ Assistance and Protection* (New York, 2010).

<sup>42</sup> S. Craggs and R. Martens, “Rights, residence, rehabilitation: Findings of a comparative study assessing residence options for trafficked persons” (2010), p. 9.

<sup>43</sup> Recommended Principles and Guidelines on Human Rights and Human Trafficking, para. 9 and guideline 9, para. 3.

<sup>44</sup> Office of the United Nations High Commissioner for Refugees, “Guidelines on international protection: the application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked”, UNHCR document HCR/GIP/06/07 (7 April 2006), paras. 17-18.

<sup>45</sup> Craggs and Martens, “Rights”, p. 49.

<sup>46</sup> *Ibid.*, p. 81.

recovery can be used for the purpose of criminal investigation, as they are more likely to provide accurate and reliable information once they regain their psychological stability.

## **E. Special consideration for trafficked children**

53. While the elements of the right to an effective remedy equally apply to trafficked children, responses vis-à-vis trafficked children warrant special consideration, having regard to “the particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation”,<sup>47</sup> as well as their lack of full legal standing. Article 6, paragraph 4, of the Palermo Protocol also recognizes that in providing protection and assistance to trafficked persons, “the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children” should be taken into account.

54. At a minimum, the realization of the right to an effective remedy for trafficked children should be guided by the general principles of the Convention on the Rights of the Child. In particular, the principle that the best interests of the child shall be a primary consideration in all actions concerning children should be placed at the centre of all efforts to provide remedies for trafficked children. This principle entails respect for children’s rights and freedoms accorded to them under international human rights law, as well as for the children’s views on their best interests with due weight given in accordance with the age and maturity of the children concerned.

55. The best interests of the child need to be carefully considered before deciding the course of action for trafficked children, particularly where it involves criminal proceedings. In many cases, the child’s participation in criminal proceedings may not be in his or her best interest where, for example, he or she is interviewed repeatedly, required to provide testimony in court in the presence of the traffickers, subjected to hostile questioning by the traffickers or their legal representative, or effective witness protection is not in place to guarantee the privacy and security of the child and his or her family members. Thus, in determining whether a trafficked child should be involved in criminal proceedings, the benefits of such involvement should be carefully weighed against any negative consequences in order to ensure that it is indeed in the best interests of the particular child.

56. From States’ perspectives, these concerns translate into the obligation to implement child-sensitive court procedures which effectively protect the rights and interests of children. In particular, the Legislative Guide to the Palermo Protocol unequivocally stresses the importance of avoiding direct contact between the child victim and the suspected offender, and according child witnesses special protection measures to ensure their safety.<sup>48</sup> Thus, States should, for instance, allow procedural measures to obtain the child’s testimony without the presence of the trafficker, such as allowing video-recording of testimony, examination via videoconference, or written statements in lieu of in-court testimony. Child-sensitive court procedures may also require adequate training of relevant law enforcement officials, such as police officers, lawyers, prosecutors and judges, in the rights of trafficked children. In this regard, it has been noted that there are benefits in forming a multi-stakeholder group to allow law enforcement officials to work together with social workers and other service providers responsible for the care of exploited children, including

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<sup>47</sup> Recommended Principles and Guidelines on Human Rights and Human Trafficking, guideline 8, p. 10.

<sup>48</sup> UNODC, *Legislative Guides* (note 16 above), part two, para. 65 (b).

trafficked children, to ensure the provision of appropriate care and support, as well as the prosecution of the perpetrators.<sup>49</sup>

57. Consideration of the best interests of the child also extends to the question of what form of reparation would be most appropriate for the child. For example, while the right to compensation should be equally available to trafficked children and adult trafficked persons, many children do not have bank accounts and the capacity to manage money. Where the child's parents were complicit in the crime of trafficking, it may not be in the best interests of the child to transfer the compensation payment to the parents on trust for the child. From this perspective, there is a need to frame remedies for trafficked children more broadly and creatively. The best interests of the child formula suggests that reparative measures for trafficked children should be geared towards building a comprehensive child protection system which guarantees children's rights, such as the right to education, the right to health and the right to physical and psychological recovery and social reintegration in the case of child victims of exploitation. In this regard, the repatriation and reintegration programme for the Pakistani child camel jockeys mentioned in paragraph 21 above is a unique example of linking the entitlement to a monthly cash grant to the school attendance rate of 80 per cent by the children.

58. Another general principle of the Convention on the Rights of the Child that is specifically relevant in this context is that States are required to respect the rights of children to express their views freely in all matters affecting them and to provide them with the opportunity to be heard in any relevant judicial and administrative proceedings. In order to enable the child to enjoy such participation, it is crucial to guarantee that the child has effective access to information on all matters affecting his or her interests, such as his or her situation, entitlements, services available and the family reunification and/or repatriation processes.<sup>50</sup> A study of children's experiences of reparations programmes reveals that in many cases, children "lack access to adequate information presented in a child-friendly format, often because they are not explicitly considered...".<sup>51</sup> While the study did not particularly focus on trafficked children, it clearly points to the lacuna in the provision of relevant information to children who are entitled to seek reparations for the harms suffered.

59. The need to ensure active participation of children also implies that the child should be provided with legal representation without costs to the child, as well as with interpretation into the native language of the child, as necessary. In a number of States, children are entitled by law to access to legal assistance. It is not clear, however, to what extent this right has been implemented in practice, as many States do not keep track of the number of trafficked children receiving legal assistance.<sup>52</sup> It has also been reported by practitioners that trafficked children have limited access to lawyers who are specifically trained in children's rights and the issues of child trafficking, which is compounded by the lack of legal and interpretative assistance provided to trafficked persons in general.

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<sup>49</sup> ECPAT International, *Their Protection is in Our Hands* (Bangkok, 2009), p. 37.

<sup>50</sup> United Nations Children's Fund (UNICEF), *Guidelines on the Protection of Child Victims of Trafficking* (New York, 2006), guideline 2.5.

<sup>51</sup> Dyan Mazurana and Khristopher Carlson, "Children and reparation: past lessons and new directions", UNICEF Innocenti working paper (June 2010), p. 16.

<sup>52</sup> European Union Agency for Fundamental Rights, *Child Trafficking in the European Union: Challenges, Perspectives and Good Practices* (Luxembourg, 2009), p. 81.

## IV. Conclusions and recommendations

60. All States of origin, transit or destination have an international legal obligation to provide remedies for trafficked persons where an act or omission attributable to them breaches an international obligation. In the context of trafficking, which involves in most cases the conduct of private persons, it is important to recall that States are under an obligation to provide remedies for trafficked persons where they fail to exercise due diligence to prevent and combat trafficking in persons or to protect the human rights of trafficked persons. The right to an effective remedy is also a fundamental human right in itself and States have a duty to respect, protect and fulfil this right. While discussions on the right to an effective remedy for trafficked persons at the international level often focus on the right to compensation, it is stressed that other components, such as recovery, restitution, satisfaction and guarantees of non-repetition, are equally important aspects of a remedy. Viewed from this perspective, an effective remedy necessarily calls for individually tailored measures, based on a careful assessment of the best interests of that particular trafficked person.

61. The importance of implementing this right in a holistic manner has received peripheral attention by States, which instead tend to focus on criminal justice responses. Trafficked persons are often seen as “instruments” of criminal investigation, rather than as holders of rights. In many States, trafficked persons do not receive remedies in a holistic manner as a matter of right, but are only provided with ad hoc measures which are effectively by-products of criminal investigation, such as temporary residence permits contingent upon cooperation with law enforcement authorities and assistance in recovery which is in turn tied to temporary residence permits. Trafficked persons are rarely known to have received compensation, as they are often not provided with the information, legal and other assistance and residence status necessary to access it. At worst, many trafficked persons are wrongly identified as irregular migrants, detained and deported before they have an opportunity to even consider seeking remedies.

62. In the light of these challenges, the Special Rapporteur submits the draft basic principles on the right to an effective remedy for trafficked persons in annex I to the present document. These basic principles are a work in progress, as the Special Rapporteur intends to continue refining them on the basis of inputs she may receive. The Special Rapporteur hopes that the basic principles serve as a useful guidance for States and practitioners on the content and scope of the right to an effective remedy for trafficked persons and also as indicators of the minimum obligations of States in the realization of this right.

63. In the efforts to enhance the implementation of the right to an effective remedy for trafficked persons, the Special Rapporteur also makes the following recommendations.

### Accurate identification of trafficked persons

64. States should ensure that relevant authorities and officials, such as police, border guards, and immigration officials, are adequately trained in the identification of trafficked persons to allow rapid and accurate identification of trafficked persons. Proper identification of trafficked persons is the first step in ensuring that trafficked persons have the opportunity to seek remedies as victims of human rights violations.

### **Recovery**

65. States should provide trafficked persons with assistance in realizing their full recovery on a non-conditional basis, duly taking into account the individual circumstances and needs of each trafficked person.

66. States should provide trafficked persons with a reflection and recovery period of at least 90 days once they are identified as trafficked persons in order to ensure their full physical and psychological recovery and to make an informed decision about their course of action. This period should be provided separately and independently of temporary residence permits and trafficked persons should be given medical, psychological, legal, social and other assistance they may require for their recovery during this period on an unconditional basis.

### **Compensation**

67. As a strategy to enhance the right of trafficked persons to successfully seek compensation, States should ensure that trafficked persons are equipped with the means, assistance and status necessary to exercise this right, namely, access to information, free legal assistance and other assistance necessary to ensure their full recovery, and regular residence status.

68. Particular attention should be paid in legal proceedings involving trafficked persons to procedural guarantees such as the right to privacy, safety and witness protection.

69. Increased efforts should be made to train key stakeholders, in particular prosecutors and judges, on laws and issues pertaining to trafficking in persons. Training, education and sensitization aimed at other actors, and society at large, could also make a crucial contribution to the effective implementation of the right to an effective remedy for trafficked persons, including through the promotion of a victims' rights culture and measures to counter stigma.

70. States should establish legislative provisions for the confiscation of assets and proceeds of trafficking offences, and for the use of such assets and proceeds to compensate trafficked persons. States should also adequately train law enforcement officials in identifying, tracing, freezing and confiscating assets connected to the crime of trafficking.

71. Where State-funded compensation schemes for victims of crime exist, States should abolish eligibility criteria which have the effect of preventing trafficked persons from seeking compensation, such as nationality and long-term residence requirements. Where no compensation scheme exists, States should consider establishing one that provides compensation to trafficked persons and using confiscated assets and tax deductible voluntary donations to finance such a scheme. Compensation through such scheme should be available to all groups of trafficked persons on a non-discriminatory basis.

### **Provision of information**

72. States should establish and effectively implement obligations on the part of relevant authorities and officials who come into contact with trafficked persons to provide them with information on the right to a remedy, mechanisms and procedures available to exercise this right, and how and where to obtain necessary assistance.

73. States should develop guidelines on the appropriate form, content and language of the information to be provided to trafficked persons and ensure that they properly apply the guidelines. In such guidelines, States should ensure that information is easily

accessible in a variety of forms and available in a language that trafficked persons understand, not only from a linguistic perspective but also cultural and socio-economic perspectives.

#### **Provision of free legal assistance**

74. States should provide legal assistance to trafficked persons on a free-of-charge basis as an essential pre-condition for all trafficked persons to exercise their right to an effective remedy. States should ensure that lawyers providing such assistance have received adequate training in the rights of trafficked persons including children, and in effective communications with victims of human rights violations.

#### **Regularization of residence status**

75. States should provide trafficked persons with temporary residence permits during the duration of any legal proceedings on an unconditional basis. The conditionality of temporary residence permits on cooperation with law enforcement authorities is the antithesis of the human rights-based approach to combating trafficking in persons and should be abolished.

76. States should also provide trafficked persons with temporary or permanent residence permits on social and humanitarian grounds, where a safe return to the country of origin is not guaranteed or a return would not otherwise be in the best interests of the trafficked person for reasons related to his or her personal circumstances, such as the loss of citizenship or cultural and social identity in the country of origin. States should also independently consider trafficked persons' claims for asylum, giving due consideration to any risks of reprisals and retaliation by traffickers which could constitute persecution within the meaning of the 1951 Convention relating to the Status of Refugees.

#### **Special consideration for trafficked children:**

77. States should ensure that the best interests of the child are a primary consideration in all decisions or actions that affect trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

78. States should develop child-sensitive court procedures which effectively protect the rights and interests of children in order to enable them to exercise their right to an effective remedy in a meaningful manner. To this end, States should implement specific protective measures, such as a witness protection programme to preclude direct contact between the accused and the child, alternatives to direct testimony, and a multi-disciplinary team equipped with social workers to support the child throughout the court proceedings.

79. States should ensure that trafficked children are equipped with information on all matters affecting their interests, including their situation, legal options, entitlements and services available to them, and processes of family reunification or repatriation. States should encourage trafficked children to express their views and give them due consideration in accordance with their age and maturity.

80. States should ensure that trafficked children are provided with legal, interpretative and other assistance necessary in order for them to seek remedies. States should ensure that professionals providing such assistance are adequately trained in children's rights and the issues of child trafficking.

## Annex I

### **Draft basic principles on the right to an effective remedy for trafficked persons**

#### **1. Rights and obligations**

1. Trafficked persons as victims of human rights violations have the right to an effective remedy for harms committed against them.
2. All States, including countries of origin, transit and destination, are obliged to provide or facilitate access to remedies that are fair, adequate and appropriate to all trafficked persons within their respective territory and subject to their respective jurisdiction, including non-citizens, for harms committed against them.
3. The right to an effective remedy encompasses both a substantive right to reparations and procedural rights necessary to access reparations.
4. In substance, trafficked persons should be provided with adequate reparations for the harms suffered, which may include restitution, compensation, recovery, satisfaction, and guarantees of non-repetition.
5. Trafficked persons should also be provided with access to a competent and independent authority in order to successfully obtain reparations. This necessitates, at a minimum, the provision of:
  - (a) Information concerning their rights, the reparations available and the existence of and modalities for accessing reparation mechanisms;
  - (b) Legal, medical, psychological, social, administrative and other assistance necessary in seeking remedies;
  - (c) A reflection and recovery period, followed by residence status while trafficked persons seek remedies.

#### **2. Realizing the right to a remedy**

6. States shall:
  - (a) Ensure that adequate procedures are in place to enable quick and accurate identification of trafficked persons and provide adequate training to law enforcement and other agencies that might come in contact with trafficked persons;
  - (b) Ensure that trafficked persons are not subjected to discriminatory treatment in law or in practice on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including their age, their status as victims of trafficking, their occupation or types of exploitation to which they have been subjected;
  - (c) Give due consideration to individual circumstances of trafficked persons to ensure that remedies are centered on the empowerment of trafficked persons and full respect for their human rights. At a minimum, States should “do no harm” and ensure that remedial proceedings are not detrimental or prejudicial to the rights of trafficked persons and their psychological and physical safety.

(a) *Restitution*

7. States shall:

(a) Place the best interests of trafficked persons at the centre in providing measures of restitution;

(b) Provide trafficked persons with temporary or permanent residence status as a form of remedy where a safe return to the country of origin cannot be guaranteed, may place them at risk of persecution or further human rights violations, or is otherwise not in their best interests;

(c) Effectively address the root causes of trafficking in order to ensure that trafficked persons are not returned to the pre-existing situation which places them at risk of being re-trafficked or further human rights violations.

(b) *Recovery*

8. States shall:

(a) Provide a non-conditional reflection and recovery period, during which trafficked persons are provided with measures necessary for the physical, psychological and social recovery, including, but are not limited to: appropriate housing, counselling and information about their situations and legal rights; medical, psychological and material assistance; and employment, educational and training opportunities;

(b) Ensure that trafficked persons' access to assistance and other benefits are under no circumstances dependent upon their cooperation in legal proceedings.

(c) *Compensation*

9. States shall:

(a) Ensure that laws, mechanisms and procedures are in place to enable trafficked persons, if they desire, to:

(i) Obtain civil damages for trafficking-related offences, including breaches of labour laws;

(ii) Secure awards or orders from criminal courts for compensation from persons convicted of trafficking-related offences;

(iii) Gain access to compensation from the State for injuries and damages.

(b) Address the common obstacles for trafficked persons to obtain compensation for their material and non-material damage. To this end, they should ensure that:

(i) All trafficked persons have a legally enforceable right to obtain compensation, irrespective of their immigration status and of whether their perpetrators have been convicted;

(ii) Trafficked persons are fully informed of their legal rights, including their rights to have access to remedies through judicial, labour and administrative proceedings, promptly and in a language and form they understand;

(iii) Trafficked persons seeking to access remedies are provided with necessary assistance to this end, including social assistance, free and qualified legal aid and representation, and, where necessary, qualified interpreters, regardless of their immigration status;

(iv) Trafficked persons are allowed to lawfully remain in the country in which the remedy is being sought for the duration of any criminal, civil, labour or

administrative proceedings, without prejudice to any claim they may have to the right to remain on a more permanent basis as a remedy in itself;

- (v) Laws and procedures are in place to support the seizure of the proceeds of trafficking and confiscation of traffickers' assets, and explicitly indicate that such proceeds and assets are intended in the first instance to compensate trafficked persons and in the second instance for general provision of remedies to trafficked persons;
- (vi) Effective measures are in place for the enforcement of reparation judgements including foreign judgements.

10. In cases of trafficked women and girls who have been subjected to sexual and gender-based violence, States should take into account potential risks of psychological harm, stigma and communal and family ostracism that judicial proceedings may impose on them and provide measures to afford adequate protection to those women and girls affected, while creating opportunities to seek compensation through non-judicial avenues.

### **3. Trafficked children**

11. States shall:

(a) Ensure that the best interests of the child are a primary consideration in providing trafficked children with remedies, taking into account the individual circumstances of the child, including his or her age, upbringing, ethnic, cultural and linguistic background and protection needs;

(b) Respect the child's right to express his or her views freely in all matters affecting the child. To this end, States should provide trafficked children with effective access to information on all matters affecting their interests, such as their situation, entitlements, services available and the family reunification and/or repatriation process;

(c) Take measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with trafficked children on specific rights and obligations in cases involving children.

## Annex II

### Summary note of the online discussion on the draft basic principles on the right to an effective remedy for trafficked persons

#### 1. Introduction

1. From 2 to 21 February 2011, the Special Rapporteur on trafficking in persons, especially women and children, Ms. Joy Ngozi Ezeilo, launched an online discussion forum at the UN.GIFT.HUB website (<http://www.ungift.org/knowledgehub/>) to solicit inputs from experts and stakeholders on the “draft basic principles on the right to an effective remedy”. These principles are intended to serve as a useful guidance for States and practitioners on the content and scope of the right to an effective remedy for trafficked persons and also as indicators of the minimum obligations of States in the realization of this right.

#### 2. Summary of the discussion

2. The main topics discussed were:

- Content of the right to an effective remedy
- Integration of gender perspectives in ensuring remedies for trafficked persons
- Identification of trafficked persons
- Notion of restitution
- Regular residence status
- Rehabilitation, recovery and reintegration
- Remedies for trafficked children
- Compensation funds for trafficked persons
- Cooperation between States and civil society organizations
- Content and format of the draft basic principles

#### *Content of the right to an effective remedy*

3. Drawing on various international, regional and national instruments, one participant took the view that “the principles that should underlie all protection policy and remedies to protect the rights of trafficking victims” include “the right to: safety and protection; individual identity; privacy and confidentiality; dignity; information; services; justice; normality; participation; decision making; and, freedom of movement”. He cited “the Cambodian Policy and Minimum Standards for the Protection of the Rights of Victim of Human Trafficking” as a good example of upholding these rights through the various stages of the protection response, namely: victim identification; crisis intervention; referral; reception; case planning; assessment; recovery; reintegration; follow-up; and, case closure.

4. There was general consensus among the participants that the appropriate form of remedy may differ from individual to individual, as trafficked persons have “individual needs and require individually tailored responses”. A “one size fits all” approach is not applicable, as “individuals will be affected in very different ways and their recovery and reintegration will differ depending on their experiences, background, resilience, support network and environment. Some may just need access to universal/generic services while others will require specialist support”.

5. Asked whether “rehabilitation / recovery” should form part of the right to an effective remedy, there was general consensus that rehabilitation / recovery is one of the essential components. One participant commented that “for some victims in particular, the provision of medical, psychological and social services is critical to their recovery”. A number of participants expressed views that a remedy is more than just money. Thus, while monetary compensation may be an important remedy, it is by no means the only appropriate response.

*Integration of gender perspectives in ensuring remedies for trafficked persons*

6. One participant elaborated on how gender discrimination leads to extreme financial deprivation of women and girls, which in turn leaves them vulnerable to be exploited and abused. Women and girls often experience gender-based social exclusion and discrimination, which reduce their chance of obtaining education and prospects of adequate income generation. Further, “young girls and women who have received little, if any, education have no comprehension of their rights”. In her view, “all these dynamics play into the hands of traffickers who are able to easily deceive and control.”

7. One participant discussed barriers to access to justice for women and girls, which include “cost of litigation to seek remedies, proximity and complexity of the justice system and high potential to face stigma”. “Social expectations from women and family pressure” were also cited as an obstacle to women pursuing justice. The same participant stressed that remedies that will not compromise on protection for women should be provided, and “opportunities to secure monetary compensation should also be strengthened in view of oft financial dependency of victim on trafficker(s)”.

8. Another participant commented that in addition to gender, consideration of other factors such as cultural diversity, urban-rural divide, difference among generations, cultural and linguistic minorities, requires particular attention.

*Identification of trafficked persons*

9. In reference to the provision in the draft basic principle which provides that “the identification and formal recognition of trafficked persons as such, is an essential pre-requisite for the realization of the right to a remedy” (principle 5), one participant noted the difficulty in ensuring that the international definition of “trafficked person” is applied consistently to allow such identification and recognition. For example, she noted an example in New Zealand where an internal victim of trafficking is not recognized as a trafficked person. Further, she noted that trafficked persons are often misidentified, as it is often easier and less resource intensive for law enforcement authorities to treat them as irregular migrants and detain or deport them, rather than to recognize them as trafficked persons.

*Notion of restitution*

10. The participants recognised that the term “restitution” gives rise to interpretative difficulties in the context of trafficking. As one participant noted, “restitution typically refers to the return of something to its rightful owner, payment of compensation, and restoration”. Thus, if “restitution” is taken to mean “efforts aimed at the return of something (or someone) to its (their) previous condition”, then “restoration to such a point as preceding their last experience of human trafficking, will only render them vulnerable to further exploitation”. The participants agreed that simply sending a person who has survived trafficking back to his/her original state would not be a form of effective remedy. One participant described it as being “tantamount to placing them back to an ‘imprisonment’ of a different kind”.

11. In this context, the same participant noted wide dimensions of one's well-being, quoting Amartya Sen who described well-being as "the freedom of individuals to live a life that allows them to fulfil their capacities, to have sufficient available resources to be able to enjoy a healthy life, to have access to knowledge and the freedom to interact socially and contribute expression and thought".

*Regular residence status*

12. The participants agreed that trafficked persons should be provided with regular residence on a short- or long-term basis, as it is difficult to access remedies if they are at risk of deportation. The participants also seemed to agree that permanent residence in the destination region / country should be a remedy in itself, not dependent on legal proceedings. Where trafficked persons are at risk of being re-trafficked or do not wish to return to the country of origin, "having the option of staying would be a significant step in their healing".

*Rehabilitation, recovery and reintegration*

13. One participant commented that effective remedies with regard to rehabilitation/recovery and reintegration should primarily focus on building upon the strengths already present within the person; what he/she needs in order to rebuild his/her life to a point where he/she is able to re-enter and begin once more to actively participate in their community of choice. It is a process where the best interests of the survivor should be placed at the centre, and thus "any options explored with regard to rehabilitation and recovery will take into account the person's wishes, hopes and aspirations, and will also be fully aware of, and respect, differences of gender and cultural understandings".

14. To ensure rehabilitation/recovery, one participant took the view that as an absolute minimum, States should, without delay, provide access to: "secure shelter; food and clothing; access to supportive personnel who will assist and guide the person (ideally a locally based NGO); information and legal representation which takes into account the person's first language and cultural background; and access to health services, and monetary support".

15. In this connection, the same participant stressed the important role of "an appropriate reflection delay period" in ensuring recovery. She stated that "the length of this period should take into account the person's individual needs, such as access to health services/counselling, legal and professional advice, so as to ensure adequate time to fully support a return to health and wholeness".

16. In response to the question as to what the guiding principles should be in providing services to assist recovery of trafficked persons, one participant questioned whether there is a need for new guidelines or it is more appropriate to make better use of existing instruments and guidelines. In this connection, the participant made a reference to the UNICEF Guidelines on the Protection of Children from Trafficking and the ILO child-friendly standards and guidelines on the recovery and integration of trafficked children.

17. Another participant suggested the following guiding principles in providing services to assist recovery of trafficked persons:

- Placing people at the heart- Adopting a 'people centred' approach which consistently places the wellbeing and best interests of the person first.
- Respecting the sovereignty of the individual - Ensuring that all available rehabilitation/recovery services are both self directed and empowering. Whilst acknowledging some guidance may be initially necessary, nonetheless survivors of trafficking need to have some control over decisions made and be able to implement choices with regards to their rehabilitation.

- Celebrating the uniqueness of each person. An acknowledgment that each person's road to recovery is unique, whilst there may be similarities in trafficking, each person's experiences, set of circumstances arising from being a victim, and now a survivor, is distinctive.
- Respecting and treasuring each person's distinctiveness. Recognising and valuing a person's identity beyond being labelled as 'victim', including their cultural background, beliefs and current worldview, as a fundamental right.
- A focus on optimal health and wellbeing. Adopting a healing process that is deliberately holistic in approach and takes seriously the whole needs of a person, and not simply his/her physical requirements.
- Building community. Part of the journey towards recovery will necessitate a process of rebuilding life after being victimised. Survivors of trafficking need, above all, to have hope and real opportunities to re-engage in a community, to rebuild, in some cases, family relationships, whilst for others it may mean opportunities for education, employment and safe shelter that is not necessarily back in their home country, although for some, this well may be the case."

#### *Remedies for trafficked children*

18. One participant discussed the remedy of "reintegration assistance" for children, which "typically includes some or all of the following remedies: preventing stigmatisation; education; training and employment; legal support; medical/health care; social services, psychological services".

19. Drawing on the provision of reintegration and decision pertaining to placement of the child, the same participant quoted the following principles of Reimer et al (2007) which could guide the provision of remedies for trafficked persons:

- Do no harm' and 'the best interests of the child' as the primary principles (2007:40); and
- Additional seven principles: 1) Protection is paramount; 2) A child remains a family's responsibility; 3) Family is best for a child; 4) Individual case management that respects the rights and wishes of the child and allows for flexible use of resources; 5) In order to facilitate eventual reintegration to society, alternative care facilities should 'normalise' the life of children in care as much as possible; 6) Specialise and complement: do what you do well but don't try to do it all; 7) Expectations for success should be moderated by local realities' (2007:43-46).

20. Another participant echoed the view that the primary principles should be "do no harm" and "the best interests of the child", which require "individual responses that are culturally appropriate, working with family and community, not just the child, building children's resilience not just focussing on the harm caused".

#### *Compensation funds for trafficked persons*

21. One participant noted that a Trafficked Person Compensation Fund, financed by proceeds of the crime of trafficking, should be established. On the other hand, another participant questioned whether it may be appropriate to argue for a fund specifically dedicated to trafficked persons. In his view, "[i]n States that do not yet have such funds for any who have been harmed by crime, to isolate for special attention those who have been trafficked may backfire politically unless there is a very strong moral case for special treatment". Commenting specifically on the third point of Principle 6 of the draft basic principles, the participant suggested that for the time being, the following phrase should be deleted: "through a dedicated fund or, where appropriate, through effective and non-

discriminatory access to funds established to compensate persons for harms suffered under international human rights law”.

*Cooperation between States and civil society organizations*

22. Some participants commented on the important role of civil society organizations in providing assistance to trafficked persons in seeking redress. Further, they highlighted the need for close cooperation between States and civil society organizations.

*Content and format of the draft basic principles*

23. One participant recommended that the draft basic principles include:

- A preamble that restates the recognition of trafficking in persons as a crime and that victims are entitled to a remedy under international law;
  - References to other international conventions and guidelines which are relevant to the right to an effective remedy of trafficked persons;
  - A brief summary of the components of an effective remedy; and
  - Gender dimensions to access to remedies, such as non-discrimination on the basis of sex and specific gender-related barriers to access to justice.
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