Consultation of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo

on

THE RIGHT TO AN EFFECTIVE REMEDY FOR TRAFFICKED PERSONS

Background Paper on

State Practices, Concrete Strategies and Implementation of the Right to an Effective Remedy for Trafficked Persons

TABLE OF CONTENTS

1. Introduction ........................................................................................................................................... 1
2. Content, scope and terminology ........................................................................................................ 1
5. State Practices: Compensation ........................................................................................................... 5
   5.1. Legal proceedings ........................................................................................................................... 5
   5.2. State compensation funds (General or dedicated) ....................................................................... 7
   5.3. Non-judicial methods ...................................................................................................................... 8
   5.4. Asset forfeiture and recovery of proceeds ..................................................................................... 9
7. State Practices: Accessing remedies .................................................................................................. 11
8. Concrete strategies and implementation of the right to an effective remedy for trafficked persons ............................................................................................................................................. 13
1. Introduction

This background paper provides a brief overview of States’ responses aimed at implementing the right to an effective remedy for trafficked persons, as well as information on concrete strategies and interventions that have demonstrated, or hold the promise of demonstrating, measurable results. The objective of this paper is not to draw any conclusions on the effectiveness of States’ responses, but rather to outline illustrative examples, where available, that have come to the Special Rapporteur’s attention in discharging her mandate.

The right to an effective remedy is a fundamental human right widely recognized in major international and regional human rights instruments. It is often described as one of the most essential rights for the effective protection of all other human rights, and its critical importance is demonstrated by States’ obligations to provide an effective remedy even in times of emergency.

Given the complex and highly interrelated nature of the different dimensions of this right, and its corresponding obligations on States, it is clear that only a comprehensive and rights-based approach can have any hope of achieving the realization of this right. It is a premise of this paper that it is only by placing trafficked persons at the centre of efforts and through genuine cooperation that States can arrive at solutions that are both effective and sustainable. Recognizing the trafficked person as a holder of rights, notably the right to an effective remedy for the grave human rights violations committed against him or her, may be seen as absolutely fundamental to the adoption of a rights-based approach to trafficking in persons.

2. Content, scope and terminology

An overview and analysis of international law and policy relating to the right to an effective remedy may be found in the paper “The right to an effective remedy for victims of trafficking in persons: A survey of international law and policy”, kindly developed for this consultation by Dr. Anne Gallagher. Below is a brief summary of the main points addressed in that paper.

Its formulation under various human rights instruments makes it clear that “an effective remedy” entails both procedural and substantive obligations on States. ‘Reparation’ may be conceptualized as the concrete content of the right to an effective remedy for a trafficked person, and a corresponding set of substantive obligations on States. In other words, it is that which is being sought in the pursuit by the trafficked person of remedy. The term: ‘reparation’ covers the accepted range of remedial elements: restitution, including rehabilitation; and compensation. Satisfaction and guarantees of non-repetition is an additional important element. The procedural obligations on States may be conceived of as the range of measures needed to guarantee access to an effective remedy. For practical purposes, meanwhile, this paper and the agenda for the consultation are structured so as to address the issue of effective remedies for

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1 Article 2 (3) ICCPR; Article 13 CAT; Article 6 CERD; Article 8 UDHR; Articles 9 and 13 Declaration on the Protection of All Persons from Enforced Disappearance; Principles 4 and 16 of the UN Principles on Extra-judicial Executions; Principles 4-7 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Article 27 of the Vienna Declaration and Programme of Action; Articles 13, 160-162, 165 of the Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; Article 9 of the Declaration on Human Right s Defenders; Article 13 ECHR; Article 47 of the Charter of Fundamental Right s of the European Union; Articles 7 (1) (a) and 25 ACHR; Article XVIII of the American Declaration of the Rights and Duties of Man; Article III (1) of the Inter-American Convent ion on Forced Disappearance of Persons; Article 8 (1) of the Inter-American Convent ion to Prevent and Punish Torture; Article 7 (1) (a) AfrCHPR; and Article 9 Arab Charter on Human Rights.
2 ICJ, Reparation for Gross Human Rights Violations, at 44
3 Human Rights Committee, General Comment No. 29, para. 14
trafficked persons under the following sub-headings: restitution; rehabilitation/ recovery; compensation; and accessing remedies.

On a terminological note, the term ‘trafficked person(s)’ is used throughout this report to reflect the fact that the right to an effective remedy is held inherently by all such persons regardless of whether they have been identified/ formally recognised as such. When referring to criminal proceedings, however, the term ‘victim(s) of trafficking in persons’ is used to reflect that when involved in such proceedings, the definition and principles relating to victims of crime apply alongside those relating to victims of human rights violations.

Restitution consists of measures aimed at restoring the individual to his/her original situation prior to the violation, as far as this is possible. This may include the restoration of: liberty; enjoyment of human rights; identity; family life; citizenship; employment; property; and return to the individual’s place of residence. In the context of complex violations such as trafficking, however, the latter measure may be inconsistent with the individual’s general enjoyment of human rights, for example in cases where return to the pre-violation situation is itself dangerous and could place them at risk of re-trafficking or other violations of their rights. In the case of trafficked persons, therefore, restitution may involve reintegration of the individual into the host community or resettlement in a third country in the absence of the possibility of safe and voluntary return to their original place of residence.

Rehabilitation/ Recovery may be seen as a form of restitution insofar as it seeks to ensure that an individual who has suffered a human rights violation has his or her status and position ‘restored’ in the eyes of the law as well as of the wider community. In the case of trafficked persons, this may involve provision of the assistance and support necessary to: recover; make a decision on how to proceed in the pursuit of any remedies that is not unduly tainted by physical and psychological scars and/ or by fear of the trafficker(s); enable social integration in either the host-, home- or third country society; and prevent re-trafficking. Specific measures to these ends include: appropriate medical- and psychological care; legal services; and social services such as housing and educational- and employment services.

Trafficked persons are furthermore entitled to seek compensation for any economically assessable damage suffered, including physical or mental harm, lost opportunities including employment, education and social benefits, as well as for material and moral damages. The main methods of obtaining compensation for trafficked persons are: (a) legal proceedings (in criminal, civil or labour courts) to claim compensation against traffickers’ assets; (b) State-funded compensation schemes (general or dedicated); and (c) non-judicial methods of obtaining compensation (such as mediations and negotiations).

Satisfaction/ guarantees of non-repetition, meanwhile, is a remedy for injuries which are not necessarily financially assessable, but which can be addressed by ensuring that the violations of

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4 The agenda addresses ‘accessing remedies’ under the heading ‘cross-cutting issues’ so as to allow room for other pertinent topics also to also be addressed.
5 The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (A/RES/40/34) define ‘victims of crime’ as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States … regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted …”
6 To avoid confusion, it is noted here that the term ‘restitution’ is interpreted by some States as referring to offender-based compensation as opposed to State-funded compensation
7 Article 19, Basic Precipices 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.
8 See, for example, Palermo Protocol Articles 6 and 9 and the OHCHR Recommended Principles and Guidelines at Principle 21.
the victim’s rights are properly acknowledged and dealt with which would extend, at minimum, to judicial and administrative sanctions being pursued against perpetrators with due regard to the right to a fair trial and the need for witness protection and the protection of privacy.

Finally, measures aimed at guaranteeing access to remedies include: the provision of information (about available remedies and related assistance and the procedures for obtaining these); legal assistance (to be able to obtain compensation and/or satisfaction); and, where relevant, regularization (on a temporary or permanent basis) of the trafficked person’s immigration status to allow for the above-mentioned rehabilitation/recovery and for the trafficked person to remain within the jurisdiction of the State in which remedies are being sought for the duration of any criminal, civil or administrative proceedings.

3. State Practices: Restitution

The first element of a State’s obligation to provide restitution to trafficked persons within its jurisdiction is to restore the person’s liberty as a first step towards their full renewed enjoyment of human rights. Where relevant, this would involve the release of the trafficked person from detention (whether such detention is imposed by traffickers, the State, or any other entity). A review of state practices in this regard reveals that in many cases, trafficked persons are identified by the State as violators of national laws rather than being recognized as victims of human rights violations. This results in various forms of deprivation of liberty ranging from incarceration on criminal charges through involuntary ‘protective confinement’ to forced removals or confinement in centres for persons awaiting deportation. In some cases this is due to a failure to correctly identify cases of trafficking in persons while in others it may be out of an absence of structures to deal appropriately with identified trafficked persons. It should also be noted that in cases where it is the trafficker(s) who are depriving the victim of liberty, it is generally the responsibility of law enforcement to restore such liberty, although other agents (governmental and non-governmental) sometimes perform this function, whether by accident or by design.

Restoration of citizenship is also a highly relevant element in the case of many trafficked persons, and this may include the involvement of, and cooperation between, States’ consular authorities. Some States have, in cooperation with other actors such as regional mechanisms, tried to address this important element by instituting training programmes for consular staff, such as that initiated by the Organization of American States Commission.

As mentioned above, restitution may also involve, for instance: safe and voluntary repatriation to the country of origin; provision of the assistance and support necessary to facilitate social integration in either the host-, home- or third country society; and measures to prevent re-trafficking. The exact policies and procedures adopted and implemented by States in this regard vary significantly, for example between legal systems and between countries of origin, transit or destination. From a human rights perspective, there are challenges and opportunities involved in each of the different approaches adopted by States in this regard, since none of them can be said to be fully victim-centered and human rights-based.


Victims of different crimes may well have different needs. For example, it is now widely recognized that victims of trafficking constitute a particular group for which special provision should be made in respect of support and protection. In practice, this means that States must consider the needs of trafficked persons including how their right to a remedy can be realized, and tailor their response accordingly.
It has been recommended that rehabilitation include “immediate assistance [consisting] of a preliminary medical assessment and first aid if needed, as well as general information on assistance available to victims ... and ... in the medium term, a contact person able to understand and respond to the victim’s emotional needs should be appointed in order to coordinate the range of services proposed, which could include educational, vocational and self-confidence training ... and ... in the longer term perspective, services should remain available as long as needed.”\(^{10}\)

State responses in this regard may be broadly divided into those that put resources and/or procedures in place specifically for trafficked persons and those that seek to integrate trafficked persons into broader support structures intended for victims of any crime or for members of society identified as vulnerable. Examples of the former include the community-based monitoring committees established in several States in West Africa to identify and return presumed victims of child trafficking and shelters set up in several States specifically for trafficked persons\(^{11}\). In this regard, State practices also vary with regard to the level of age- and gender considerations taken into account in running such shelters. Regarding the referral to support- and protection services, it has been noted that while this should in all cases be voluntary, the “negative consent” of the victim (also referred to as “opt-out”) should be the principle to follow: referral to services should be made unless the victim expressly refuses.\(^{12}\)

The Nigerian Protection and Participation Programme – Child Protection Services Project, has been identified in a donor-funded evaluation\(^{13}\) as an approach that is potentially significantly more effective in allowing for the rehabilitation of trafficked children than more traditional rescue-and-rehabilitation programs due to its comprehensive, generally preventive approach to child vulnerability. A survey by the Council of Europe of responses of some of its member states to victims of violent crime\(^{14}\) found that several of them had experience in providing immediate support and assistance to victims of serious crimes. Examples that are particularly relevant in the present context include: the French example of intervention of medico-psychological emergency units; the German experience of trauma clinics set up in North Rhine-Westphalia to avoid or reduce the psychological trauma suffered by a victim through psychological and psychotherapeutic assistance. As for long- and medium term services, the survey highlighted the comprehensive and wide view of rehabilitation underpinning support services: in Estonia (victim support centres throughout the country, liaising with a network of local organizations offering assistance and services to victims, run by victim support coordinators who have all undergone systematic training); in Sweden (provision of assistance by local social services, police, support centres and specialized organizations); and in Norway (twelve counselling offices for victims of crime supplementing the public services and NGOs, as well as specialized services).\(^{15}\)

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\(^{10}\) Non-criminal remedies for crime victims, Council of Europe, 2009, p. 49

\(^{11}\) See, e.g. presentations made at the Consultation of the Special Rapporteur with regional mechanisms in Dakar on October 4-5 2010 and ‘UNICEF's Sida-funded child protection / trafficking program in West Africa’, Fafo, 2008


\(^{13}\) In ‘Non-criminal remedies for crime victims, Council of Europe’ (2009) a Group of Specialists on remedies for crime victims seek to identify good practices from the responses to a questionnaire received by 26 CoE member states

\(^{15}\) Ibid, p. 50
5. State Practices: Compensation

5.1. Legal proceedings

(i) Criminal courts

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 the procedures followed in this regard vary between legal systems. In the UK, Ireland, Cyprus and Malta, for example, the court may make an order for compensation at the conclusion of a criminal trial. In the U.S., it is mandatory for the court to make a so-called ‘restitution order’ to compensate the victim if the defendant is found guilty of the crime of trafficking in persons. In other countries, a civil claim for compensation may be appended to a criminal proceeding, so that criminal and civil proceedings are combined together. This so-called ‘adhesion procedure’ is the most widespread model in Europe and has the advantage of allowing one person - the prosecutor - to be in charge of presenting evidence of both the crime and of any damages caused.

There are some cases in which trafficked persons have successfully obtained compensation of varying amounts through criminal proceedings. For example, in the U.S., four young women who were lured to the country by false promises of education and employment opportunities, but instead were forced to work under arduous conditions and sexually abused, successfully obtained compensation of US$2 million from the defendants. 16 Further, between January 2008 and May 2009, the courts in Belarus awarded compensation ranging from approximately US$ 176 to 724 to victims of trafficking in 23 cases. 17

Experience shows, however, that the awarding of compensation for trafficked persons through criminal proceedings is the exception rather than the rule. In the UK, for instance, a study of 41 cases resulting in convictions of 95 individual traffickers did not reveal a single case of the court ordering the trafficker to pay compensation to the victim. 18 In Japan, the Special Rapporteur found during her country visit in July 2009 that no trafficked persons had received compensation through criminal proceedings, although it is provided for in law 19. In some countries, compensation for trafficked persons may not even be considered by the courts, as it is not common practice for victims of any crime to be awarded compensation through criminal proceedings. 20 In Germany, where an adhesion procedure is available in law, it is hardly ever pursued in practice due to a variety of factors, including a lack of knowledge and experience on the part of courts and lawyers of using this provision. 21 Other obstacles identified from several recent surveys of state practices 22 include: the low proportion of trafficked persons who are

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19 Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, Mission to Japan, A/HRC/14/32/Add.4.
20 A study of the Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the EU found that many EU Member States do not consider the question of compensation to the victim in the decision to prosecute the offender and considered their compensation procedures to be inadequate. ‘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’. See also the situations in Nigeria (GAATW, Collateral Damage), and Albania (Side event report, Compensation for trafficked persons: Law and practice in the OSCE region, 1 October 2009, Warsaw).
21 German Institute for Human Rights, Human Trafficking in Germany: Strengthening Victim’s Human Rights, 66-70.
22 See Anti-Slavery International, Opportunities and Obstacles: Ensuring access to compensation for trafficked persons in the UK (2009), 17; OSCE and ODHIR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 26-27.
identified as such; a lack of knowledge of legal options available on the part of trafficked persons and their lawyers; difficulties experienced by trafficked persons in relating their experiences due to the associated trauma; and fears trafficked persons may have of harm to themselves or their families as a result of bringing a criminal case against traffickers. In addition, this form of remedy is by definition available to a trafficked person only if and when one or more perpetrators have been identified, arrested, charged, tried and convicted.

(ii) Civil courts

Trafficked persons may also pursue civil claims on the basis of a wrongdoing that has caused them loss or other causes of action as defined in national law. Civil claims may be pursued within the criminal procedures in some countries, or separately and independently from criminal proceedings. Examples of successful civil claims include:

- In the recent case of AT v Dulghieru\(^23\), the High Court of England and Wales in the UK awarded a total of £601,000 in damages for pain and suffering and loss of amenity, aggravated damages and exemplary damages to four women from Moldova who were trafficked to the UK and sexually enslaved for one to two months.
- In the U.S., a woman trafficked for forced labour was awarded $825,000 in a civil suit which followed a criminal conviction of her trafficker.\(^24\)

Despite these promising examples, it is extremely rare for trafficked persons to receive compensation through civil proceedings. In many countries, civil litigation is effectively “an illusory option” for the majority of trafficked persons because, in addition to the difficulties noted above in relation to criminal proceedings, high legal fees and limited options for legal aid present often insurmountable obstacles. Civil proceedings are also said to be time-consuming, expensive and complicated.\(^25\) Other obstacles encountered by trafficked persons in seeking compensation through civil proceedings may include complications in calculating the basis of damages. In a number of States, non-material damages such as pain and suffering are still new concepts and legal practitioners may not have experience in calculating such damages.\(^26\)

(iii) Labour courts or tribunals

In many legal systems, trafficked persons may also have the in-principle option of claiming compensation based on labour law violations, such as breach of contract, unfair dismissal, discrimination, breach of national minimum wage, and unreasonable overtime. In Ireland, for example, a migrant worker from Pakistan was awarded €116,000 by the Labour Relations Commission in February 2008 as compensation for abusive labour practices.\(^27\) A young woman from Myanmar who was abused as a domestic worker in Thailand for six years was awarded compensation of 30,000 baht (US$921) by the Thai Labour Court.\(^28\)

In practice, however, the possibility for trafficked persons to seek and obtain compensation through labour courts is in many cases restricted by a number of eligibility criteria which may vary between countries. In some countries, for example, labour proceedings are not an option for trafficked persons engaging in sexual services, as the provision of sexual services itself is

\(^{23}\) [2009] EWHC 225 (QB) (AT)
\(^{24}\) Anti-Slavery International, Opportunities and Obstacles: Ensuring access to compensation for trafficked persons in the UK (2009), 17.
\(^{25}\) USAID, Best Practices for Programming to Protect and Assist Victims of Trafficking in Europe and Eurasia, 31.
\(^{26}\) USAID, Best Practices for Programming to Protect and Assist Victims of Trafficking in Europe and Eurasia, 32.
\(^{27}\) Anti-Slavery International, Opportunities and Obstacles: Ensuring access to compensation for trafficked persons in the UK (2009), 20
\(^{28}\) GAATW, Collateral Damage, 190.
illegal and thus not recognized as a form of employment to which labour protection applies. Irregular migrant workers form another category of trafficked persons who are excluded from the use of labour courts to seek compensation in many countries. This is the case, for example, in Romania, Russia, Ukraine and the UK, where an irregular immigration status renders a person’s employment contract illegal and unenforceable. Other limitations of labour courts include the type of compensation available. Unlike civil courts, labour courts are generally unable to award compensation for non-material damages, such as pain and suffering.

5.2. State compensation funds (General or dedicated)

Compensation may be also paid to trafficked persons through a state-administered scheme. It has been observed that State-funded compensation schemes have the significant advantage of providing a guaranteed payment of compensation to the victim, since they do not involve as a pre-requisite the apprehension and conviction of a specific perpetrator. Further, these schemes may be relatively streamlined, less bureaucratic and quicker than criminal or civil proceedings.

Several States have compensation schemes for victims of violent crime and in some of them trafficked persons have been able to obtain compensation through such schemes. For example, in the UK, the State-funded Criminal Injuries Compensation Scheme (“CICS”) made the first compensation awards in July 2007 to two young Romanian women who were trafficked to the UK for sexual exploitation. The first woman, who was trafficked at the age of 16, received £22,000 for sexual abuse and £40,000 for lost earnings and opportunity. The second woman, who was trafficked at the age of 13, received £16,500 for sexual abuse and £20,000 for lost opportunity. In Australia, the New South Wales Victims Compensation Tribunal awarded in 2007 an undisclosed sum to a young Thai woman who had been trafficked from Thailand to Australia at the age of 13 for sexual exploitation upon finding that she had suffered post-traumatic stress and depression as a result of her experience of being trafficked. In other countries, however, access to state-funded compensation schemes may be restricted by eligibility criteria such as nationality. In Romania, for example, claimants must be Romanian nationals, persons lawfully within the territory, or nationals of countries to which Romania has obligations under relevant international conventions. Similarly, in Japan, victims of crime must hold Japanese nationality or be long-term residents in order to claim compensation. Further, trafficked persons may in some cases not be considered as “victims of crime” for the purposes of eligibility for compensation. In Germany, for example, persons are not eligible for compensation unless they have been subjected to “an unlawful violence attack” which caused an injury to health. Such a criterion would appear to exclude those trafficked persons unable to show that such violence was committed against them as well as those who may have been threatened with, but not subjected to, such violence.

29 OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 27.
30 Anti-Slavery International, Opportunities and Obstacles: Ensuring access to compensation for trafficked persons in the UK (2009), 20.
33 Anti-Slavery International, Opportunities and Obstacles: Ensuring access to compensation for trafficked persons in the UK (2009), 15
35 OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 33.
36 German Institute for Human Rights, Human Trafficking in Germany: Strengthening Victim’s Human Rights, 76.
An increasing number of States has introduced compensation schemes specifically for trafficked persons, or have announced that they are contemplating establishing such a scheme. Nigeria, for example, amended its trafficking law in 2005 to provide for the creation of a dedicated trust fund for trafficked persons. In Kenya, a newly enacted anti-trafficking law provides for the establishment of a National Assistance Trust Fund for Victims of Trafficking in Persons. This fund is intended to cater primarily for trafficked persons and is to be administered by a Board of Trustees. The Fund is to receive its funding from Parliament, any confiscated and forfeited proceeds of crime, income generated by investments made by the Board of Trustees, and any donation received by the Board of Trustees for the purposes of the Fund. The Fund is intended to provide for the expenses arising out of assistance to victims of trafficking in persons, the balance of damages awarded to victims, and such other purposes as the Advisory Committee may recommend. In Georgia, the State Foundation for the Support and Defense of the Victims of Trafficking provides for the possibility for trafficked persons to claim once-off payments of approximately US$650, and in 2008 five trafficked persons benefited from payments from this foundation of US$600 each. Similarly, Azerbaijan’s Assistance Fund and Shelter for victims of trafficking, established in 2006, also reportedly offers once-off payment to trafficked persons.

In some States, compensation schemes for specific categories of trafficked persons have been established. For instance, the United Arab Emirates (UAE) and Pakistan have jointly established a Claims Settlement Facility to hear and determine individual claims of physical and non-physical injury by Pakistani former child camel jockeys and to provide them with compensation to assist their recovery and reintegration following their repatriation from the UAE. A number of challenges have been reported, however, from the experiences of children and their representatives in attempting to obtain such compensation.

5.3. Non-judicial methods

It is noteworthy that among the few reported cases in which trafficked persons have successfully obtained compensation, a significant proportion resulted from out-of-court settlements. In Germany, for example, a specialized counselling centre advising a domestic worker and the embassy of Yemen successfully negotiated a payment of €22,500 to the domestic worker as compensation for back wages of two years. In the U.S., the Department of Labor and the Equal Employment Opportunity Commission (EEOC) have been successful in securing compensation for persons trafficked for labour exploitation. In 2006, 48 migrant workers who were recruited from Thailand through an employment agency initially as welders and then forced to work in a restaurant under highly exploitative conditions, obtained a US$1.4 million settlement negotiated by EEOC. Each of the workers was awarded and paid between US$5,000 and US$7,500 by the original employer.

In some States, trade unions have played a crucial role in assisting trafficked workers to claim compensation. In the Russian Federation, for example, trade unions are reportedly frequently

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37 eg Ghana, Kenya
38 eg. Belarus, Egypt, Moldova.
39 US Department of State, Trafficking in Persons report, 155.
41 As of February 2010, there were at least 988 Pakistani child camel jockeys who had not received any compensation through the Claims Settlement Facility. Further, it has been reported in the media that while the former child camel jockeys were entitled to $1,000 each by cheque, the cheques were not disbursed by the Ministry of Interior or the cheques bounced back. See http://www.dailymail.co.ukMBER2010%5Cstory-6766545.html and http://tribune.com.pk/story/66747/compensation-cheques-for-camel-jockeys-bounce/.
42 German Institute for Human Rights, Human Trafficking in Germany: Strengthening Victim’s Human Rights, 73
43 GAATW, Collateral Damage, 195
successful in settling claims for unpaid or underpaid wages, or work-related injuries following simple telephone negotiations, as employers are often scared by the prospect of court appearances.\textsuperscript{44}

### 5.4. Asset forfeiture and recovery of proceeds

Even when compensation orders are made against traffickers, it is extremely difficult for trafficked persons to enforce such orders and actually receive compensation. One of the main factors contributing to this difficulty is that identified traffickers often do not have adequate assets to satisfy an award of compensation.\textsuperscript{45} 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, the lack of adequate assets is often attributed to an inadequate capacity to identify and confiscate assets and proceeds of trafficking. Traffickers may swiftly transfer their assets to another country or take other steps to conceal them before compensation orders are executed. This point is illustrated by the case brought in a labour court by 30 women and children from Myanmar who had been forced to work in a garment factory in Samut Prakan province, Thailand, for no remuneration. The labour court ordered the employer to pay a total of 2,129,622 baht (approximately US$53,240) at the end of the proceedings which spanned over 5 years. By the time authorities sought to seize the assets, however, the employer had already moved away and hidden some valuable equipment. While the employer did pay compensation of 382,783 baht (approximately US$9,570), this was only 18 percent of the total amount ordered by the court.\textsuperscript{46}

In many countries, legislation governing asset freezing, seizure and confiscation is often complex, and it is reported that law enforcement authorities often lack the expertise, training and resources to conduct financial investigations to freeze and confiscate such assets.\textsuperscript{47} A study of eight countries in the OSCE region revealed that none of these had yet managed to ensure asset tracing, seizure and confiscation practices that allowed trafficked persons to receive compensation payments.\textsuperscript{48} Even where assets are successfully confiscated, they may never be awarded to trafficked persons, and when they are, compensation payments are often delayed, inter alia due to the absence of legislation providing for a clear and explicit linkage between the confiscated assets and the payment of compensation orders.\textsuperscript{49} In the UK, for instance, the Powers of Criminal Court (Sentencing) Act 2000 provides that courts have the power to deprive an offender of any property and the proceeds arising from the disposal of this property can be awarded to the victim “where the offence resulted in personal injury, loss or damage”,\textsuperscript{50} and where the court feels that the offender’s means are too inadequate to justify a compensation order.\textsuperscript{51} Thus, while the use of confiscated assets to compensate trafficked persons is possible in theory, the linkage is often unclear and law enforcement authorities generally tend to focus on the confiscation of assets \textit{per se}, rather than on the need to ensure that the victim receives compensation from the assets seized.\textsuperscript{52} In fact, reports suggest that while the authorities in the UK seized a significant amount of assets from traffickers, they were

\[\text{\textsuperscript{44} OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 95}\]

\[\text{\textsuperscript{45} See examples in the US and Italy, where trafficked persons were awarded substantial amounts of compensation and yet the orders could not be enforced as the traffickers had no assets. Anti-Slavery International, Human trafficking, human rights: redefining victim protection, 133 and 152.}\]

\[\text{\textsuperscript{46} GAATW, Alliance News (Material Justice: Seeking Compensation in Trafficking Cases), Issues 27. July 2007, at 24.}\]

\[\text{\textsuperscript{47} OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 40; Side Event Report, Compensation of trafficked persons: Law and practice in the OSCE region (1 October 2009, Warsaw).}\]

\[\text{\textsuperscript{48} OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 42.}\]

\[\text{\textsuperscript{49} UNODC, Anti-human trafficking manual for criminal justice practitioners, Module 13: Compensation for victims of trafficking in persons, 9.}\]

\[\text{\textsuperscript{50} Section 145 (1)(a), Powers of Criminal Court (Sentencing) Act 2000.}\]

\[\text{\textsuperscript{51} Section 145 (2), Powers of Criminal Court (Sentencing) Act 2000.}\]

\[\text{\textsuperscript{52} OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 124.}\]
not used to compensate trafficked persons.\textsuperscript{53} In other countries seized proceeds and assets are automatically transferred into State coffers, usually into law enforcement budgets.

\section*{6. State Practices: Satisfaction and guarantees of non-repetition}

An important element of this in the present context is the investigation and prosecution of perpetrators of trafficking with due regard to the right to a fair and public hearing within a reasonable time before and independent and impartial tribunal. Such tribunals may therefore be seen as the cornerstone of effective remedies. It has been noted, however, that national tribunals are not always in a position to exercise their functions with regard to providing satisfaction and guarantees of non-repetition for reasons that may include a lack of independence or of powers under national law, or the inability of the judiciary to recognize and deal with trafficking-related violations of human rights.\textsuperscript{54} Other challenges relate to the proper enforcement of remedies that are granted by tribunals.

Promising practices in this area include initiatives to allow impartial national and international trial monitors to observe court proceedings and for the judiciary to implement fully any resulting recommendations\textsuperscript{55} as well as efforts to train judicial staff in international standards, such as those initiated by regional mechanisms like the Association of Southeast Asian Nations (ASEAN) and the Organization of American States (OAS). The Royal Academy of Judicial Professionals in Cambodia, for example, has incorporated ASEAN training modules into its in-service and induction training programmes for judges and prosecutors, while the Prosecutor’s School in Laos dedicates two days of its induction course to the familiarisation of trafficking-related laws and the Office of the Attorney General (OAG) of Thailand trained 550 prosecutors on its new trafficking law in 2009. Notably, the resulting increase in knowledge of the national law among prosecutors has reportedly resulted in greater cooperation between the OAG and the Ministry of Social Development and Human Security, which is responsible for victim support.\textsuperscript{56}

Effective implementation of State obligations with regard to satisfaction and guarantees of non-repetition also require attention to the need for witness protection, including protection of privacy. Victims and/or the prosecution are often unaware that they can request judges to consider a whole range of options designed to protect victims in court, including: erecting temporary screens in court to prevent the witness from having to testify in full view of the accused; allowing the victim to testify from a remote location via video link; and conducting court proceedings \textit{in-camera}.\textsuperscript{57} Good practices in this regard may be found in British courts, such as special measures to ensure the confidentiality of trafficked persons. Kenya has also recently introduced such confidentiality measures, along with a Witness Protection Act. In Thailand, child victims are routinely permitted to testify via video link from a child-friendly room outside the courtroom, while in some cases, screens are being used in courts in Thailand and Cambodia to protect the privacy of the victim.\textsuperscript{58}

\textsuperscript{53} Anti-Slavery International, Opportunities and Obstacles: Ensuring access to compensation for trafficked persons in the UK (2009), 33. For instance, although £5.5 million of criminal assets were seized by a multi-agency task force, Reflex, between 2004 and 2005, there was no indication that the assets were used to compensate trafficked persons.
\textsuperscript{54} Ibid
\textsuperscript{55} Protection and Promotion of Human Rights: Responsibilities and Effective Remedies, Annotated Agenda, OSCE Supplementary Human Dimension Meeting 12-13 July 2001
\textsuperscript{56} ‘The criminal justice response to human trafficking: recent developments in the Greater Mekong Sub-Region’ in SIREN, GMS-08, May 2010, pp 8-9 \url{www.no-trafficking.org/siren/}.
\textsuperscript{57} Ibid, p. 11
\textsuperscript{58} Ibid
7. State Practices: Accessing remedies

The first of the measures essential for ensuring effective access to remedies and protecting the victim is the provision of information, which may be done for example through law enforcement agents, dedicated help-lines or support centres. A lesson learned from state practice and raised by several stakeholders is that in order to fulfil its potential to contribute to the effectiveness of remedies, provision of information has to be timely and appropriate both in terms of content and form, notably language. It has been reported, for instance, that in Russia and Moldova, the language used by the police to explain victims’ rights is too complex and the time devoted to the task is too short. In this regard, Austria has developed and shared, in cooperation with UN.GIFT and the NGO LEFOE-IBF, a tool for use by law enforcement containing audio recordings in 40 languages designed to facilitate identification of trafficked persons, make the initial contact less threatening and facilitate the launch of a criminal investigation.

Equally important is that trafficked persons be provided with full and accurate information about their rights, including how and where to obtain support and protection (referral) and what options are available to them in terms of accessing remedies. In many countries, judicial authorities, (such as police, prosecutors and judiciary) are obliged to inform victims of crime of their rights, including the right to obtain compensation.

It has also been noted that written materials containing information about the rights of trafficked persons, such as leaflets (to be handed or read to victims depending on the context and situation), are in many cases preferable as they may allow them to reflect on the information received at any time. Even where it may not be feasible for the victim to either receive or read such written materials, enough copies for those likely to be the first point of contact of the victim would appear to be a worthy investment in terms of guaranteeing accuracy and consistency. A complementary measure to in-person provision of information adopted by many States is the setting up of free national telephone help-lines and the provision of information via the Internet. Such measures may in many cases have the added value of being ‘anonymous’, non-legally binding and therefore easier for many trafficked persons to use. As with all information provision, however, the form and content of messages conveyed through such channels may have either an encouraging or discouraging effect on the recipient.

As for the particular assistance measure of free legal aid for criminal, civil and administrative proceedings, it has been observed that while not provided for in all jurisdictions, this may properly be seen as a sine qua non for the realization of the right to an effective remedy for the great majority of trafficked persons. The reason for this is that a person having just escaped from a situation of trafficking is almost by definition destitute, since his or her financial dependence on the trafficker is almost invariable one of the tools of ‘control’.

In Finland victims of violent crime are granted up to 100 hours of free legal advice even outside the judicial proceedings context, for conflicts not brought to court, and eligibility criteria are reportedly limited to notification to the police and submission of an application. In the U.S., the Trafficking Victims Protection Act specifically requires the Legal Services

59 E.g. Anti Slavery International, CoE Group of Specialists on remedies for crime victims
60 OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 35.
61 For information on the VITA tool, see: http://www.ungift.org/knowledgehub/en/tools/vita.html
62 See for e.g. France, Moldova, Romania, Russian Federation, Ukraine. OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region. See also the Thai Anti-Trafficking in Persons Law requiring prosecutors to inform victims of trafficking of both their right to legal aid and of the right to claim compensation.
63 Non-criminal remedies for crime victims, Council of Europe, 2009, p. 17
64 Ibid, p. 19
Corporation, a private, non-profit corporation established by Congress, to make legal assistance available to trafficked persons, regardless of immigrant status.  

However, it has been found that in practice it is rare for free legal aid to be provided to trafficked persons and that many States do not have a system in place to provide such aid. As a result, trafficked persons must either seek to claim their rights without such aid or rely on any legal assistance that may be available from NGOs or international organizations.  

Even where the law expressly provides that trafficked persons should be provided with legal assistance, such services may be provided by NGOs or international organizations in reality. In Moldova, while the Law on Preventing and Combating Trafficking in Human Beings provides that victims who are foreign citizens or stateless persons are entitled to free legal assistance during all stages of criminal proceedings as well as civil proceedings related to trafficking, such assistance is usually provided by NGOs or the IOM.

Further, in some States, trafficked persons may simply not meet eligibility criteria for legal aid. In Japan, for example, legal aid is available to a foreign nationals who have both legal status and a domicile in Japan as per the Legal Aid Act, but hardly any trafficked person is in practice able to meet these criteria.

Equally, **regularization (on a temporary or permanent basis) of the trafficked person’s immigration status** is in many cases essential to allow for the above-mentioned rehabilitation and recovery and for the trafficked person to be able to access remedies in practice as, it has been noted, “it would be very difficult for [victims] to obtain compensation if they were unable to remain in the country where the proceedings take place.” Several States, particularly in Europe, provide a recovery and reflection period intended to allow trafficked persons to access necessary assistance to begin to recover from the harms suffered. Provisions in this regard range from a single fixed duration of 30 days or more (e.g. Belgium, Greece, Slovakia and the UK), through a period of at least 4 weeks (Germany) to 30 days to 6 months (Finland). Some States, including Italy, provide for immediate obtainment of a temporary residence permit of 6 months on the basis of either cooperation with law enforcement or participation in a rehabilitation and social assistance programme.

Other States also provide for the possibility of temporary residence permits ranging from 30 days (e.g. Australia) through one year (e.g. UK) to up to four years (U.S.). In the majority of States, such permits are conditional on the trafficked person’s willingness to cooperate with in the prosecution of the perpetrator, and in many (such as the U.S.) they are subject to stringent and complex eligibility criteria. There are no known cases to date of a State granting a trafficked person with a temporary residence permit specifically to claim remedies, such as compensation from traffickers.

It has often been observed in this regard that trafficked persons are rarely seen as the holder of rights, but rather as “instruments” in investigations or prosecution.

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65 OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 159.  
66 In Albania, for instance, at least one NGO and IOM are known to be providing free legal assistance to trafficked persons, in the absence of a state-sanctioned system. OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 59.  
67 OSCE and ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region, 82.  
69 Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention)  
70 To qualify for a so-called ‘T-visa’ in the U.S., for example, it is necessary to prove one has been the victim of a “severe form of trafficking”  
71 See e.g. the UK (Anti-trafficking monitoring group, 45).  
72 IOM, Global Eye on Human Trafficking, Rights, residence, rehabilitation – Findings from a comparative study assessing residence options for trafficked persons.
At the expiry of a temporary residence permit, trafficked persons may qualify for a permanent residence permit on the grounds of employment, humanitarian grounds or asylum, as is the case in Italy. States have adopted varied criteria for permanent residence status, such as the significance of information provided by trafficked persons in the prosecution of traffickers, and the degree to which trafficked persons have adapted to the host society. In practice, it is reportedly extremely rare for trafficked persons to obtain permanent residence status.

Another factor that should be taken into account by authorities responsible for identifying trafficked persons is their right, in some cases, to seek asylum. As stated by the UN High Commissioner for Refugees (UNHCR), 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. UNHCR clearly states that serious human rights violations to which trafficked persons may be subjected upon return to their countries of residence, such as reprisals, severe ostracism, discrimination or punishment, and risks of re-trafficking, may amount to persecution as defined under the 1951 Convention.

In addition to the above-mentioned measures, another precondition for many trafficked persons to enjoy equal and effective access to remedies is full implementation of the prohibition of discrimination on grounds including sex, age, nationality and ethnic origin. The recent adoption by Kenya of an anti-trafficking law that provides significant protection measures for trafficked persons, and at the same time opens the jurisdiction of Kenyan courts to any victim (without attracting any court fees though not with the active provision of legal assistance) by immunizing victims of trafficking from prosecution for illegal presence in the country is an encouraging development in this regard.

8. Concrete strategies and implementation of the right to an effective remedy for trafficked persons

NGOs have been recognized as having the potential to provide a crucial link between victims and the State, for example by representing victims in legal proceedings, publicizing cases where no effective remedy exists and assisting victims in the redress of violations through counseling, rehabilitation and reintegration schemes, and by providing psychosocial, medical, socio-economic and other assistance. In 2009, for example a pan-European consortium of Civil Society Organisations (CSOs) was formed to overcome the problems with the implementation of compensation measures for trafficked persons and to raise awareness and mainstream the issue of compensation within the international anti-trafficking agenda. Known as COMP.ACT (European Action for Compensation for Trafficked Persons) it consists of CSOs from 14 European countries representing countries of origin, transit and destination and works with implementing partners in several of these countries e.g. to identify and seek the removal of barriers standing in the way of trafficked persons’ effective access to compensation and identifying and bringing test cases.

Responding to the absence of a formal national monitoring mechanism to oversee the UK’s implementation of the Council of Europe Convention on Action against Trafficking in Human

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74 Guideline 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, HCR/GIP/06/07 (7 April 2006).
75 Ibid, paras 17-18.
76 Protection and Promotion of Human Rights: Responsibilities and Effective Remedies, Annotated Agenda, OSCE Supplementary Human Dimension Meeting 12-13 July 2001
Beings, a group of nine UK-based organizations in 2009 set up the Anti-Trafficking Monitoring Group to examine and share information about how the UK and its devolved administrations are meeting their obligations under the Convention. The negative impact on trafficked persons caused by institutional and procedural obstacles in the UK, for instance, has led to a call by this group for the appointment of an independent anti-trafficking watchdog, based on the model of the Dutch National Rapporteur on Trafficking in Human Beings, with statutory powers to request information from the police, the immigration authorities, social services and NGOs and to report to Parliament. Another important method to enhance the effectiveness of remedies, which has been adopted by some States, is the establishment and use of simplified procedures. In Norway and Portugal, for example, simplified procedures have been adopted to allow for compensation to be paid in advance of a conviction and in the Norwegian case sometimes also in the absence of a conviction.

As borne out by an evaluation of child trafficking initiatives in West Africa and numerous other studies, an additional measure needed to render access to remedies truly effective is a comprehensive multi-agency approach. In the absence of such an approach, extending at minimum to significant coordination efforts where it is not possible to establish ‘under-one-roof’ solutions and/or to allocate dedicated case managers, trafficked persons are invariably subjected to additional stress and difficulties by being sent from one agency to another in search for assistance. It has been noted in this regard that “a coherent strategy of victim support is required, involving either a single organisation as the unique contact point for victims (help-centres), which will guide and direct the victim through the maze of institutions, or relying instead on an existing network of several organizations to perform such duties”.

Examples of such coordination in practice may be found in Argentina and Estonia (where dedicated multi-disciplinary victim support centres have been established) and in Austria where comprehensive intervention centres have established extensive cooperation arrangement with the police. The system in place for protecting trafficked children in Mali has also been highlighted as a good example of coordination, although certain challenges remain.

In 2007 the Council of Europe (CoE) set up a Group of Specialists on Remedies for Crime Victims to analyse legislation and practices of CoE member states concerning civil, administrative and other remedies to victims of crime and to identify good practices. Though the primary focus was on compensation for damage inflicted on victims of terrorism offences, victims of trafficking in persons were also identified as “vulnerable victims” and the Group’s report contains a number of noteworthy practices among the 26 CoE member states that responded to the Group’s questionnaire. The Group also set out to agree on principles and guidelines to consider when dealing with non-criminal remedies for crime victims. It is also encouraging that the recently established monitoring body GRETA has included the issue

77 Amnesty International UK, Anti Slavery International, ECPAT, Helen Bamber Foundation, Immigration Law Practitioner’s Association, Kalayaan, POPPY Project (of Eaves), TARA (The Trafficking Awareness Raising Alliance, of Glasgow Community and Safety Services, UNICEF UK.
78 Wrong kind of victim? The Anti Trafficking Monitoring Group, 2010 (www.antislavery.org/anti-trafficking_monitoring_group/)
79 See, e.g. Presentations made at UNTOC, Vienna, October 2010
80 Evaluation of UNICEFs Sida-funded child protection/trafficking program in West Africa, Fafo, 2008
81 See, e.g. Wrong kind of victim? The Anti Trafficking Monitoring Group, 2010, which recommends that the UK’s National Referral Mechanism be restructured as a multi-agency identification and referral mechanism and in the cases of children embed it into the child protection system and give the services responsible for child protection the authority to make decisions concerning trafficked children.
82 Non-criminal remedies for crime victims, Council of Europe, 2009
83 The group adopted the following definition: “vulnerable victims” are considered vulnerable either through their personal characteristics (for example children or people with physical or learning disabilities) or through the circumstances of the crime (for example domestic violence, sexual violence or organized crime).
84 See http://www.coe.int/t/dghl/standardsetting/victims/victims%20final_en%20with%20cover.pdf
85 Ibid
of effective remedies in the questionnaire\textsuperscript{86} for the first round of its evaluation of practices of signatories to the CoE anti-trafficking Convention, which is the first international treaty obliging States to adopt minimum standards to assist trafficked persons and protect their rights.

At the international level, Member States of the United Nations have recently endorsed a global plan of action that mandates the creation of a \textit{United Nations Voluntary Fund for Victims of Trafficking in Persons, Especially Women and Children}. The fund was launched in November 2010.\textsuperscript{87} This is an important development, not least as a recognition by the international community of the importance of providing for the rehabilitation of victims of serious human rights violations such as trafficking in persons. It has been noted, meanwhile, that while this fund holds the promise of providing a form of remedy and support to many trafficked persons in need, the number of victims for whom any such fund is in practice able to assist is necessarily limited.

\textsuperscript{86} See, in particular, Section II.2 (Q. 32-45) and Section II.3 (Q. 46-55), http://www.coe.int/dghl/monitoring/trafficing/Source/GRETA(2010)1_en.pdf.