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الدورة السابعة عشرة

البند ٣ من جدول الأعمال

تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

تقرير مقدم من المقررة الخاصة المعنية بالاتجار بالأشخاص، لا سيما النساء والأطفال، جوي نغوزي إيزيلو

إضافة

مشاورة الخبراء المتعلقة بحق الأشخاص المتجر بهم في الانتصاف الفعال*

موجز

عقدت المقررة الخاصة المعنية بالاتجار بالأشخاص، لا سيما النساء والأطفال، جوي نغوزي إيزيلو، يومي ٢٢ و٢٣ تشرين الثاني/نوفمبر ٢٠١٠ في براتيسلافا، مشاورة خبراء تتعلق بحق الأشخاص المتجر بهم في الانتصاف الفعال. ويتضمن هذا التقرير معلومات أساسية، وملخصاً للمناقشات التي دارت في المشاورة وللاستنتاجات التي خلصت إليها، والتوصيات التي قدمها المشاركون.

ونُظمت المشاركة التماساً لآراء كبار العلماء والأخصائيين في هذا الميدان في إطار التحضير للتقرير المواضيعي السنوي الذي ستقدمه المقررة الخاصة إلى مجلس حقوق الإنسان في دورته السابعة عشرة المعقودة في حزيران/يونيه ٢٠١١. وفي هذا الاجتماع، ناقش

* يُعمّم الموجز بجميع اللغات الرسمية. أما التقرير نفسه، الوارد في مرفق الموجز، فيُعمّم باللغة التي قُدّم بها فقط.

الخبراء المتمون إلى قطاعات شتى وسبل ووسائل إعمال حق الأشخاص المتحر بهم في الانتصاف الفعال، بالتركيز على الإطار المعياري لهذا الحق ومضمونه ونطاقه، وعلى استجابات الدول واستراتيجياتها الملموسة من أجل إعماله على الصعيد الوطني. واتفق المشاركون في أمور منها أن حصول هؤلاء الأشخاص على المعلومات وعلى المساعدة القانونية، بما فيها المعونة القانونية المجانية، وتسوية أوضاعهم من حيث الإقامة في أثناء سعيهم إلى الانتصاف، هي شروط أساسية ليمارسوا حقهم في الانتصاف الفعال. زد على أن تسوية وضعهم في الإقامة يمكن أن يمثل في حد ذاته شكلاً من أشكال الانتصاف في بعض الظروف. وأكد المشاركون أيضاً أهمية القيام على النحو السليم بتحديد الأشخاص المتحر بهم على أنهم كذلك منذ بدء معاناتهم، وتطبيق مبدأ عدم تجريم الأشخاص المتحر بهم وعدم مقاضاتهم كخطوة أساسية أولى نحو توفير سبل انتصاف لهم.

Annex

Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, on the expert consultation on the right to an effective remedy for trafficked persons

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I. Introduction

1. On 22 and 23 November 2010, the Special Rapporteur convened a consultation¹ on the right to an effective remedy for trafficked persons with leading scholars and practitioners in this field to solicit their views and experiences in preparation of her report to the Human Rights Council in June 2011 on the same theme.
2. The consultation brought together 20 anti-trafficking experts from academia, civil society, regional and international organizations and United Nations agencies² to: build thematic expertise on issues related to the right to an effective remedy for trafficked persons; identify key concerns, protection gaps, good practices and lessons learned from experiences and case studies; and formulate recommendations to States and other actors aimed at full implementation of this right.
3. This initiative of the Special Rapporteur was well-received by the participants, who agreed that enhanced efforts to realize the right to an effective remedy were of crucial importance to the protection and promotion of the human rights of trafficked persons. In addition, participants qualified it as necessary and timely in so far as there had to date been limited research and discussion on the right to an effective remedy as it pertained to trafficked persons in theory and practice.

II. Context

4. In the exercise of her mandate, the Special Rapporteur has found that, despite the fundamental nature of the right to an effective remedy, in practice there remains a large gap between legal provisions and their implementation in relation to trafficked persons. She has received reports that trafficked persons are frequently left without either substantive remedies or the support necessary to access such remedies and, as a result, are often exposed to further human rights violations and the risk of being re-trafficked.
5. In response, the Special Rapporteur intends to focus her subsequent report to the Human Rights Council in 2011 on the right to an effective remedy for trafficked persons – an issue on which she considers further conceptual clarification and recommendations could be of added value to States in implementing their response to trafficking in persons. It is further her hope that the report will also be able to provide support and guidance to non-State practitioners working on issues related to effective remedies in the context of trafficking in persons, including lawyers, human rights defenders, academics and representatives of organizations implementing programmes and projects in this field.
6. To maximize the range of inputs and provide a solid basis for formulating practical recommendations, invited experts were drawn from a range of organizations, regions and subsectors within the anti-trafficking movement. Two background papers were circulated among participants ahead of the consultation: the first paper consisted of an overview and analysis of international law relating to the right to an effective remedy for victims of

¹ The consultation was organized by the Office of the United Nations High Commissioner for Human Rights in collaboration with the United Nations Development Programme Regional Centre for Europe and the Commonwealth of Independent States in Bratislava.

² See list of participants at www2.ohchr.org/english/issues/trafficking/docs/Bratislava_Participantslist.pdf.

trafficking in persons;³ the second background paper was designed to complement the first by providing an overview of States' responses aimed at implementing this right, as well as information on concrete strategies and interventions that have demonstrated or promise to demonstrate measurable results. The participants were also asked to comment on a set of draft basic principles on the right to a remedy for victims of trafficking annexed to the first background paper. All the background documents for the consultation, including the draft basic principles which reflect the participants' comments received at the consultation, are available at:

http://www2.ohchr.org/english/issues/trafficking/Bratislava_consultation_nov2010.htm.

7. 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 recognized 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 crime⁴ apply alongside those relating to victims of human rights violations.

III. Overview of discussions

8. The consultation was officially opened by the Deputy Director of the United Nations Development Programme (UNDP) Regional Centre for Europe and the Commonwealth of Independent States, Annie Demirjan, who provided an overview of UNDP efforts to address trafficking in persons within the region, notably with regard to root causes related to social exclusion.

9. The Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, then delivered an opening remark focused on the objectives, structure and modalities of the consultation.

10. The agenda⁵ of the consultation was divided into three main sessions, namely: (1) framework, content and scope; (2) State responses; and (3) Concrete strategies and implementation.

11. As set out in the background paper, the right to an effective remedy entails both substantive and procedural obligations for States. International human rights standards make clear that the substantive obligations to provide for an effective remedy to victims of gross violations of international human rights law and serious violations of international humanitarian law include ensuring equal and effective access to justice and prompt and adequate reparation for harm suffered. According to these standards, reparation covers: restitution, including rehabilitation; compensation; satisfaction and guarantees of non-

³ This background paper was kindly prepared as a contribution to the consultation by Dr Anne T. Gallagher. Both papers can be found at www2.ohchr.org/english/issues/trafficking/Bratislava_consultation_nov2010.htm.

⁴ The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines "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".

⁵ See agenda in the annex to the present document.

repetition.⁶ The procedural obligations on States may be conceived as the range of measures needed to guarantee access to an effective remedy. For practical purposes, meanwhile, the agenda was structured so as to address the identified issues in each of the main sessions under the following subheadings: Restitution; rehabilitation/recovery; compensation; and cross-cutting issues, including access to information, legal and other assistance and possibilities of residence.

A. Session 1: Framework, content and scope

12. At this session, presentations were made on: the normative framework of the right to an effective remedy under international law; what this right entails as it pertains to trafficking in persons in particular; and cross-cutting issues in this regard.⁷

13. The first presentation provided an overview of the normative framework under international human rights treaties and soft law instruments. The second presentation sought to identify the integral components of the right to an effective remedy as it pertains to trafficked persons, by addressing the following three overarching questions: when and how does the right to a remedy arise; who is responsible for providing remedies; and what should be provided by way of remedy. The third presentation explored a number of issues arising out of the procedural obligations to guarantee access to an effective remedy, including: access to information; access to legal and other assistance; and possibilities of residence.

14. The participants were then asked to share their views regarding the content and scope of this right in the context of trafficking in persons, with a particular focus on its application in practice and the respective responsibilities and roles of duty bearers and other stakeholders.

15. It emerged from these discussions that there has been, and continues to be, a lack of clarity regarding the content and scope of the right to an effective remedy in the context of trafficking in persons. This appeared to be related to a number of factors, including wide differences in legal frameworks both within and across regions and confusion over the terminology. It was noted that the concept of restitution, for example, had been interpreted in some domestic legal systems as pertaining specifically and exclusively to “offender-based compensation”. Whereas, in some municipal legal systems and in international law, it refers to all measures aimed at restoring the situation that existed prior to the violation, as far as this is possible, and includes the concept of rehabilitation in so far as it seeks to restore the status and position of a person who has suffered a violation of human rights. It was also noted that the latter conceptualization of “restitution” was somewhat problematic when applied to trafficked persons. For many, if not most, trafficked persons, the status quo ante was itself characterized by serious human rights violations and “restitution” might put them at risk of being re-trafficked. A strong need was therefore expressed for further analysis of how that concept had been translated and applied in different legal systems, and for further clarification on how it could be invoked in domestic contexts to strengthen the implementation of effective remedies for trafficked persons.

⁶ See 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.

⁷ See presentations at www2.ohchr.org/english/issues/trafficking/Bratislava_consultation_nov2010.htm. See also the agenda in the annex hereto for details of the presenters.

16. Discussing the content of the right to an effective remedy, a number of participants expressed the view that focusing on the “compensation” aspect of the right could have a number of practical advantages, including the fact that this aspect appeared to be the one that was the least contentious and enjoyed the greatest degree of recognition by States. Other participants argued that compensation should rather be seen as an ancillary form of remedy, designed to provide redress for damages suffered where such damages could not be remedied by restitution.

17. Another conceptual issue that was seen as contributing to the lack of clarity was the relationship between remedies and access to justice, with some participants arguing that the former was subsumed into the latter. By comparison, there were views that access to justice was one of key elements of the right to an effective remedy, along with fair court proceedings, compensation and enforcement.⁸ It was noted in that regard that, while the two concepts clearly overlapped in some respects (for example, common procedural obligations to enable access to both justice and remedies), the promotion of justice through redress of human rights violations should rather be seen as the purpose of reparation,⁹ which in turn constitutes the substantive content of an effective remedy.

18. Some participants also highlighted a number of limitations in approaching the right to an effective remedy solely from the point of view of access to justice, particularly with reference to specific categories such as children. These limitations included both weaknesses in existing legal frameworks (such as statutes of limitations and prescriptions) and a series of practical obstacles such as: the unavailability of free legal aid provided by professionals trained both in trafficking-related law and in working with children; the absence of procedural provisions – such as in camera testimony or dedicated case workers – enabling children to obtain remedies through judicial or non-judicial/administrative proceedings. It was noted that these obstacles were commonly experienced by trafficked persons in general. In some cases, certain measures such as in camera testimony are only available to children, although they may be equally important for adult victims of trafficking.

B. Session 2: State responses

19. In this session, panellists analysed the practical implementation at the national level of the right to an effective remedy for trafficked persons, using illustrative examples from different contexts.

1. Restitution

20. In the area of restitution, the case of the repatriation in 2005 of 1,000 former child camel jockeys originally trafficked to the United Arab Emirates from Pakistan was presented. In this case, the political will of the countries of destination and origin to address the demand, facilitate and cooperate with each other in the reintegration of the children was qualified as a good practice. Yet, several challenges were highlighted in terms of the practical implementation of the rehabilitation and reintegration of the children in a way that was sustainable and respected their human rights. The United Nations Children’s Fund

⁸ See the presentation of Dr. Mohamed Mattar, available from www2.ohchr.org/english/issues/trafficking/Bratislava_consultation_nov2010.htm.

⁹ See 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, art. 15.

(UNICEF), which coordinated measures taken by the numerous actors involved in this programme, identified a number of lessons learned. These included that implementing the comprehensive measures of restitution for these children was extremely complex, firstly in terms of the factors to be taken into account at the level of the individual children, their families and communities and of society. This had required continuous research, monitoring and adjustment of the programme, including widening its scope to reinforce social safety nets for children more generally. Secondly, the programme was found to be extremely intricate and resource-intensive in terms of coordination between the numerous institutions involved in providing the services needed to meet the needs of the children. Thirdly, it was noted that in some cases, resettlement to a third country had been found to be in the best interests of the child and the most viable avenue to restitution of a given trafficked child.

21. The question of sustainability was also identified as a crucial one in the context of the youngest of the children concerned not being due to reach majority until the year 2023. While the monetary grant component of the programme had been addressed through the creation of a fund managed by provincial governments and transferred into an endowment fund for each child, other aspects such as training and assistance to set up businesses were likely to prove more challenging in terms of sustainability. Serious challenges had also been encountered in terms of disbursing the compensation due to the trafficked children as per the Memorandum of Understanding between the United Arab Emirates and Pakistan. As a result of various factors including a lack of inter-ministerial coordination, the majority of the children had been unable to access the compensation to which they were entitled.

2. Rehabilitation

22. In the area of rehabilitation, the case of the United Kingdom of Great Britain and Northern Ireland was presented and revealed similar challenges in terms of delivery of services to meet the needs of trafficked persons in the absence of adequate resource allocation and coordination structures. The case of the United Kingdom was also said to be illustrative of the trend among States to set up structures and mechanisms to assist identified victims of trafficking in persons but to pay insufficient attention to ensuring their effective operation in practice.

23. Inadequate procedures for correctly identifying victims of trafficking in persons in the first place were highlighted as a fundamental obstacle preventing many trafficked persons from receiving any assistance to enable them to recover and seek remedies. One particular challenge raised in that regard was that, in the United Kingdom, the responsibility for identifying a trafficked person and assessing any asylum claim that this person might have lay with the border agency.

24. While measures taken with regard to persons trafficked for domestic servitude had proven fairly comprehensive and effective, decentralized service provision and the inadequate allocation of funds and resources by the Central Government to actors charged with service provision had left many trafficked persons without the support they needed. By way of illustration, it was noted that funding for non-governmental organizations' (NGO) services to trafficked persons was limited to cases of women trafficked for sexual exploitation or domestic servitude, and that no specific arrangements had been put in place for trafficked men.

3. Compensation

25. In the area of compensation, it was noted that State Parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, are

required under article 6, paragraph 6, to make measures available that offer victims of trafficking in persons the possibility of obtaining compensation. The Protocol does not specify any potential source, which means that compensation may be provided through one or more of the following three means: civil proceedings, criminal proceedings and a State-administered fund or scheme. As noted in the background paper to this consultation,¹⁰ States had a range of different procedures in place through which trafficked persons could in principle seek compensation, but cases of compensation actually being obtained through these procedures were extremely rare in practice. It was noted that, at the level of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, increased attention had been given recently to the possibilities of strengthening provisions and practices, including compensation funds. The cautious language surrounding this issue in the Protocol had begun to be somewhat strengthened within the open-ended interim working group on trafficking in persons set up by the Conference of the State Parties. At its second meeting in January 2010, the group had adopted a recommendation stating that States parties should also “endeavour to ensure the availability of a compensation fund or similar mechanism for victims of crimes, including trafficking in persons”.¹¹ At its third meeting in October 2010, the open-ended interim working group had discussed the topic of national approaches to compensation of victims of trafficking, although time constraints did not allow for adoption of recommendations.¹² The work and the recommendations of the open-ended interim working group were welcomed, although not explicitly endorsed by the Conference of the Parties at its fifth session in October 2010.

26. A presentation was also made looking at the case of Belarus which, it was noted, had given increased attention to compensation in its new action plan and whose courts had made compensation awards which, though small in monetary terms, had been relatively numerous. These small awards highlighted the challenges posed in compensation cases in many countries whereby the majority of those being prosecuted for trafficking tend to be lower-level agents such as recruiters or transporters who have limited assets against which to claim. The experience of Belarus also exemplified other trends found in some countries, such as the large proportion of compensation cases brought through criminal proceedings and the difficulty for civil society groups to obtain disaggregated trafficking-related data and statistics for use in advocating for more effective remedies. This was a trend that appeared common in several countries, as indicated, for example, by the findings of an evaluation of the implementation of a legal instrument on compensation adopted by the European Union in 2004. An exception noted in that regard was the case of the Netherlands, where an independent national rapporteur was endowed with statutory powers to request information from authorities and other actors, and published yearly and disaggregated statistics, including on compensation awarded.

4. Discussion

27. Presentations were followed by a discussion focused on good practices and possible ways in which these could be replicated, as well as on gaps and challenges in realizing the right to an effective remedy for trafficked persons at the national level.

¹⁰ See the background paper to the consultation on State practices, concrete strategies and implementation of the right to an effective remedy for trafficked persons, pp. 4–10. Available from www2.ohchr.org/english/issues/trafficking/Bratislava_consultation_nov2010.htm.

¹¹ See paragraph 56 in the report of that meeting, CTOC/COP/WG.4/2010/6.

¹² See conference room paper prepared by the secretariat for the meeting of the Working Group, CTOC/COP/WG.4/2010/CRP.1.

5. Good practices

28. Regarding good practices, the Act to Strengthen the Position of Victims of Crimes in the Netherlands, which came into force in December 2010, allows victims of violent crimes and sexual offences, including trafficking, to seek an advance payment from the State, if the offender: (a) was convicted and ordered to pay damages to the victim as part of the criminal sentence; and (b) fails to pay these damages for a period of eight months after the sentencing. This was noted as a good practice, as it was often difficult for victims of trafficking to receive compensation even if the offender was convicted and ordered to pay damages. This approach shifted the onus of enforcing the compensation order from the victim of trafficking to the State. Under this law, victims of violent crimes and sexual offences, including victims of trafficking, were also entitled to free legal aid. It was also noted that the State-administered compensation fund set up in the United Kingdom had been fairly effective in awarding compensation (of between GBP 18–30,000), although the administrative barriers had proved insurmountable for most trafficked persons. In particular, the absence of free legal aid effectively precludes trafficked persons from accessing compensation funds, as legal aid was crucial in seeking to regularize the victims' residency status, one of the prerequisites to claiming from the compensation funds. In that regard, it was noted as a promising development that funding for legal aid as well as other assistance could be awarded by the State funds, such as the one set up in Argentina in 2008 (out of 10 cases processed to date, one had resulted in an award being granted). As regarded trafficked children, mention was made of the cases of Cyprus, where child victims of trafficking had an unconditional right to legal and other assistance, and of South Africa, where all children had a right to legal aid. In response to the absence of financial assets of offenders from which to award monetary compensation to victims, it was also noted that an Argentinean court had ordered the offender's material assets (in this case, sewing machines) to be put at the disposal of victims for the purposes of starting a business.

29. It was also noted that, in the Netherlands, victims of trafficking could submit a civil claim attached to criminal proceedings for lost earnings, provided that calculation of claims was not complicated. This had been successfully applied in practice by victims of trafficking in the sex industry. In addition, the Act on Migrant Labour allowed the awarding of lost earnings to irregular migrant workers through a formula based on the minimum salary and a presumed period of six months worked, although it was noted that the provision had not been used in practice yet. Similarly, courts in the United States of America had on several occasions awarded compensation to sex workers despite the legal prohibition to engage in such work.

6. Challenges

30. A number of challenges were also noted with regard to State practices. It was noted, for example, that in which the way many States had translated their international obligations into domestic legal frameworks had had the effect of impairing many trafficked persons' right to an effective remedy, including by excluding entire categories of trafficked persons from even the possibility of being recognized as such. This was the case, for example, for victims of internal trafficking in the United Kingdom and for trafficked infants in the United States.

31. Aside from any such weaknesses that might exist in legal frameworks, it was noted that countless trafficked persons were prevented from the possibility of claiming any type of remedy by the policies and procedures adopted by many States. In that regard, it was noted that many States seemed to have conflated the obligation to provide assistance to trafficked persons with the need to issue residence permits, which appeared to have contributed to the introduction of increasingly restrictive criteria both for identification and the provision of assistance. As an illustrative example of this, the need in the United States

to prove a “severe form of trafficking” to qualify for a T-visa¹³ was raised. Also highlighted as problematic were policies that gave priority to certain categories of trafficked persons, while in the case of other categories there was virtually no detection, investigation or prosecution. In the case of the United Kingdom, it was noted that such categories included trafficked men and children trafficked for begging. It was further noted that the sheer intricacies of procedures for claiming remedies operated (in the great majority of cases) to effectively deter trafficked persons from their pursuit due to the perception that procedures would be exceedingly lengthy and cumbersome and unlikely to yield a positive outcome. The above-mentioned obstacles, it was emphasized, were severely aggravated in cases where the victim was a stateless person, a child or both.

32. It was further noted that, even where adequate policies and procedures existed on paper, they were often not implemented in practice as intended. Failure to correctly identify victims of trafficking was noted as a fundamental challenge, as was the widespread practice of misidentifying them as irregular migrants. Illustrative cases of how a lack of adequate information flows and training could lead to implementation errors were raised and included those of Sweden and Norway. In the former’s case, it was noted that responsibility for identification rested with officers of municipal police forces, none of whom had been provided with any training on the characteristics and specificities of trafficked persons. In the latter’s case, it was noted that, although the national action plan included extensive provisions for protection and assistance for victims of trafficking, law enforcement officials were not familiar with this plan and reportedly often misidentified trafficked persons as irregular migrants. Such lack of specialized knowledge and training, it was noted, was not limited to law enforcement officials but was often found in all institutions responsible for dealing with trafficked persons.

33. Lack of coordination among those institutions was highlighted as another common challenge. While system-wide responses might exist on paper, it was noted that they were rarely implemented effectively in practice. Even where provisions existed for the involvement of multiple stakeholders, many relevant stakeholders were in practice left out and those who were included were not sufficiently informed (or even aware) of their intended role. In many cases, inadequate resources and/or their inadequate allocation exacerbated these challenges. In that context, it was noted that, even where adequate resources were available, the mechanisms for effective access to such resources did not exist or were inadequate. For instance, even where proceeds of organized crime were seized, compensation orders in criminal proceedings based on the proceeds were rare and the enforcement of such orders was extremely difficult. Failings in coordination often meant that resources, including those for compensation, ended up being lost or diverted, thus never reaching trafficked persons. In that connection, the provision of psychological therapy consistent with rehabilitative needs was identified as a specific gap that had had a particularly detrimental effect on trafficked persons’ ability to seek and obtain remedies.

34. In addition to training of State actors, it was noted that effective implementation of the right to a remedy for trafficked persons required a reinforcement of the capacities of other actors to understand and respond to their particular needs. It was noted, in that regard, that very few institutions for the training of lawyers included specialized training on law and practice in relation to trafficking in persons. Legal aid clinics, including those attached to universities, were identified as other relevant actors in that regard. At the wider level of society, the need for nuanced sensitization to the situation and needs of trafficked persons

¹³ T-visa is a non-immigrant status visa which allows a victim of a “severe form of trafficking in persons” to remain in the United States of America on the basis that, inter alia, he or she has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking.

was noted, if programmes such as those aimed at rehabilitation and reintegration were to be effective.

35. Another challenge highlighted was that, while compensation was a form of remedy for which many States had opted and one or more avenues for obtaining compensation existed in many systems, experiences around the world demonstrated that it was extremely rare for trafficked persons to actually receive compensation through any of these means. A variety of related challenges identified from State practices in that regard were raised, including: the absence of State funding for legal aid; inadequate relevant training of the judiciary; the practice of tying compensation to conviction; failures to enforce judgments and awards, immunity enjoyed by certain categories of perpetrators such as diplomats. It was also noted that the use of the proceeds of the crime of trafficking for compensation and assistance to trafficked persons was an available option in principle, but it was almost never implemented in practice. A study by the Organization for Security and Co-operation in Europe (OSCE)¹⁴ had found, for example, that, in addition to a lack of inter-State cooperation in the confiscation of assets, it was the practice of many States to put the confiscated proceeds back into State coffers and allocate them to law enforcement, rather than to use them to compensate or assist trafficked persons. This was the case, for example, in the Netherlands, Sweden and the United Kingdom. It was noted that this practice tended to further frustrate the ability of trafficked persons to claim compensation, for example, through civil lawsuits.

C. Session 3: Concrete strategies and implementation

36. At this session, presentations and discussions focused on concrete strategies and interventions that had yielded measurable results, with a view to distilling lessons learned from past and ongoing experiences in the implementation of the right to an effective remedy for trafficked persons.

1. Restitution

37. In the area of restitution, the experience of a human rights organization seeking remedies on behalf of a Kenyan woman who had been trafficked to Rwanda at the age of 10 for domestic work was presented, demonstrating the complexities of translating restitution into practice in cases where the trafficking experience had been ongoing for decades and the trafficked person had literally lost his or her identity. It also demonstrated the importance of regularizing residence status, not only for the purpose of seeking remedies, but in some cases as a remedy in itself. The regularization of the woman's Rwandan citizenship and/or return of her Kenyan citizenship had been identified by the organization as an essential precondition for her ability to regain control of her life and be able to access any form of remedy.

2. Rehabilitation

38. In the area of rehabilitation, a pilot project aimed at the economic rehabilitation of trafficked persons¹⁵ implemented by the International Organization for Migration (IOM) in India and subsequently replicated in Bangladesh was presented as a model whose flexibility and relatively low resource-intensiveness made it one that held promise for successful

¹⁴ OSCE and Office for Democratic Institutions and Human Rights, *Compensation for Trafficked and Exploited Persons in the OSCE Region* (Warsaw, 2008).

¹⁵ For information on the project, see: www.iomindia.in/resources.html.

replication in several contexts. The model was built on the three pillars of: a multi-stakeholder approach including public-private partnerships; flexible business models; and sustainability. It had been implemented, for example, through the establishment in Goa of a laundry service employing former trafficked women. For that project, the local authority provided premises free of charge and a hotel chain provided extensive training and a commitment to giving the project an increasing percentage of its laundry business. Sustainability was ensured as beneficiaries gradually took over the running of the business, and stigma reportedly faded gradually as the women were recognized as income-earning members of the community. Buy-in and involvement of community actors, including a competing laundry service, were considered vital factors to the success of the project.

39. In addition, the findings of a study conducted by the London School of Hygiene and Tropical Medicine in collaboration with IOM and others and involving interviews with over 200 trafficked women¹⁶ was presented. The findings indicated that the psychological effects of trafficking made it impossible for the vast majority of trafficked persons to make rational decisions within 90 days and that, even after 90 days, 20 per cent had still not recovered sufficiently to do so. The study had therefore recommended that 90 days should be the absolute minimum length for a reflection period.

40. A presentation on rehabilitation work conducted by Save the Children involving trafficked children in the Greater Mekong region¹⁷ demonstrated the importance of child participation, and understanding child psychology and the particular vulnerabilities and needs of former trafficked children. Echoing the experiences with former child camel jockeys in Pakistan, work in this subregion confirmed the need to develop holistic and integrated child protection systems to achieve sustainable solutions for trafficked children. By the same token, it was noted that wider interventions involving migrant communities had in many cases proved more effective than narrowly trafficking-focused interventions.

3. Compensation

41. In the area of compensation, a presentation was made on a pan-European campaign the European Action for Compensation for Trafficked Persons (COMP.ACT),¹⁸ based on a two-pronged approach aimed at the identification through research of practices and obstacles encountered in seeking compensation while at the same time testing the system by identifying or bringing test cases. Such cases were currently under way in several countries, including Austria, the Czech Republic and Poland.

42. A presentation on using labour tribunals and promoting collective action through labour unions in the OSCE subregion showed that such a strategy had proved relatively effective both in obtaining compensation and protecting trafficked persons from being exposed or re-victimized through the ordeal of criminal proceedings. It was also pointed out that bringing a case to an employment tribunal did not exclude subsequent instigation of criminal proceedings, and in that regard it was noted that a successful judgment or award, even if not enforced, could have a significant psychologically rehabilitative effect on trafficked persons, which could contribute to empowering them to seek further remedies. The participants also noted that, while the general inability of labour tribunals to award compensation for non-material damages such as pain and suffering could be seen as a

¹⁶ Cathy Zimmerman et al., "Stolen Smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe" (London, London School of Hygiene and Tropical Medicine, 2006). Available from www.lshtm.ac.uk/php/ghd/docs/stolensmiles.pdf.

¹⁷ See <http://crossborderprogramme.wordpress.com/>.

¹⁸ See www.compactproject.org.

disadvantage, there had been several cases where trafficked persons had successfully obtained compensation for lost earnings.

4. Cross-cutting issues

43. Finally, under cross-cutting issues, a presentation was made on a tool developed by the NGO AIM for Human Rights for use by civil society organizations in exposing the gap between the theory and practice in addressing trafficking in persons by conducting step-by-step human rights impact assessments.¹⁹ The tool aimed to enable such organizations to better understand the human rights implications of State measures and practices and to work together from a common platform to advocate for more effective human rights-based responses. Examples of negative human rights impacts of anti-trafficking policies and practices that could be exposed by the tool included: measures used to justify limiting the freedoms of specific groups such as women; detention and deportation of trafficked persons; and arbitrary arrests of trafficked sex workers. The tool, which focuses on trafficked persons but is also intended to contribute to better protection of other groups, also included 15 fact sheets outlining human rights standards that should be met by States in their anti-trafficking responses, which meant that it could be used to measure compliance as well as impact. During the ensuing discussion, it was noted that in the absence of State-funded legal aid schemes to enable trafficked persons to seek remedies, civil society organizations had often taken action to fill this crucial gap.

44. Save the Children in Thailand, for example, had recently shifted its focus to invest in legal aid in response to the realization that this was a vital component that had been missing in its response to trafficking in persons and had undermined the effectiveness of programmes aimed at prevention and rehabilitation. In the United States where no law school could be accredited unless it had an attached law clinic, it was noted that Clarke University had set up a law clinic dedicated to assisting trafficked persons.

45. The participants also mentioned a number of cases in which legal aid groups had successfully challenged practices and decisions denying trafficked persons the right to an effective remedy. In South Africa, for example, the Women's Legal Centre had successfully appealed a decision by a labour tribunal which denied redress to a former sex worker on the basis that her work was illegal under national law. The Appeal Court had found that it was the very nature of the work that made labour laws necessary to protect them from being exploited by traffickers.²⁰ In Japan, a lawyer's group had successfully obtained compensation for lost wages for trafficked workers even after they had been returned to their country of origin. Even without going to court, the intervention of specialized lawyers had in some cases led to trafficked persons obtaining compensation through negotiation with employers. An example involving workers exploited by a transport company in Turkmenistan and Uzbekistan was mentioned as having been successful not only in terms of obtaining compensation, but also in terms of avoiding re-traumatization through the by-passing of court proceedings and reliance on the testimony of volunteers acting on behalf of the wider group.

¹⁹ See www.humanrightsimpact.org/trafficking.

²⁰ *Kylie v. CCMA and Others*, 2010 (4) SA 383 (LAC).

5. Cooperation between different stakeholders

46. *Access to Justice for Trafficked Persons in Nigeria – A Handbook for Legal Actors and Service Providers*²¹ was raised as an interesting example of cooperation between different stakeholders to obtain concrete results through partnerships. The handbook was the result of collaboration between the Global Alliance Against Traffic in Women (GAATW), the Nigerian National Agency for Prohibition of Trafficking in Persons and the United Nations Development Fund for Women (UNIFEM). Its development built on a series of national consultations held by GAATW in 2005 and 2006 and there were plans to replicate good practices emerging from its use in Nigeria in the wider West Africa region.

47. COMP.ACT had also experienced some progress in developing partnerships with trade unions, which reportedly had tended to be somewhat sceptical of addressing trafficking issues in general but appeared more open to cooperation on a concrete issue such as compensation. A key element in obtaining the buy-in of trade unions on this issue was that they recognized its potential to benefit their members through the maintenance of high labour standards. Such partnerships, it was hoped, could have more generalized benefits on workers including migrant workers and represented a concrete way to deter employers from exploitative practices. A number of high-profile cases had been brought in this regard, notably against companies providing services to governments as subcontractors.

48. In addition, several organizations (for example GAATW, Interights, Save the Children and COMP.ACT) have entered into partnerships with private law firms to promote strategic litigation and test cases. The above-mentioned handbook on access to justice in Nigeria, for example, included the involvement of a private law firm that had committed to take the handbook forward in its work.

6. Challenges and lessons learned

49. The discussion also raised a number of challenges and lessons learned identified from experiences in implementing the right to an effective remedy for trafficked persons, including the following.

50. Providing information to trafficked persons that is appropriate both in terms of content, form and timing continued to prove challenging in many contexts. The practice to simply print and distribute laws and procedures verbatim among populations with low literacy levels or who only speak minority languages persist, indicating a need for concerted efforts to “demystify” the remedies available and how to access them in different contexts. It also stresses the importance of informing victims at repeated moments over a longer period, both orally and in print in a language they understand.

51. Interpreters have a crucial role to play in the provision of remedies to trafficked persons, as it has been observed that they often have significant (positive or negative) impacts on outcomes for trafficked persons. To overcome certain challenges observed in this regard, Save the Children in Thailand has introduced a programme to train interpreters in issues relating to trafficking in persons and more general migration issues.

52. It was also pointed out that in order to successfully claim compensation, it is important that from the outset the police obtain information from the victim with respect to material and non-material damages suffered and includes this information in subsequent proceedings. This rarely happens in practice, as the police tend to focus on the prosecution

²¹ Ed. Aye Olatunde et al. (GAATW, the Nigerian National Agency for Prohibition of Trafficking in Persons and the United Nations Development Fund for Women, 2010).

of the perpetrator, which makes it difficult for the victim to claim compensation at a later stage.

53. Monitoring progress and impact of rehabilitation projects is often difficult to reconcile with respect for privacy and free consent as it is frequently the wish of many former trafficked persons to simply get on with their lives and not to be visited by authorities.

54. The content and length of assistance required for an individual trafficked person to be considered sufficiently rehabilitated varies considerably from case to case. While difficult enough to determine retroactively, it is impossible to predict in advance and rigid limitations in terms of reflection periods or temporary residence permits and the duration of interventions have therefore proven highly problematic in practice.

55. In case of foreign victims, they may be deported before they can make a claim, the criminal case is completed, or they can actually recover a claim awarded. Moreover, in most countries which allow for a temporary residence permit, this permit is tied to the criminal case and does not allow the victim to stay in the country during any proceedings for compensation before civil or labour courts.

56. A particular challenge faced in implementing human rights-based rehabilitation and reintegration projects in contexts of generalized poverty is the issue of child labour and whether concepts such as “decent work for youth” could be either promoted or avoided.

57. Severe challenges in the enforcement of remedies risk having a demoralizing effect on both trafficked persons and practitioners, to the extent that it is sometimes considered that informing trafficked persons of available remedies amounts to instilling a false hope.

58. Delivery of compensation can be challenging where compensation awarded to a trafficked child is provided to family members who may have been implicated in the trafficking and/or have no intention of using the award for the child’s rehabilitation.

IV. Conclusions and recommendations

59. Regularization of trafficked persons’ residence status is not only a precondition for accessing remedies in many cases, but in some cases constitutes the remedy itself when it is the only viable and sustainable form of restitution. There is clearly a need for refinement of State responses in this regard, particularly in view of the tendency to conflate trafficking and irregular migration in a way that results in restricted access to remedies for trafficked persons, rather than provision of the protection to which they are entitled.

60. While legal aid and litigation by civil society groups had led to positive outcomes for a limited number of trafficked persons, this is not a sustainable solution that should be seen as an alternative to effective and comprehensive State responses. From a human rights perspective, States are not only responsible for investigating and prosecuting trafficking cases, but also to provide victims with an adequate remedy. In addition, progress should not be measured only in terms of the number of convictions and amounts of awards, and it is necessary to consider how certain decisions of courts in different jurisdictions tend to either support or undermine human rights standards. It was observed, for example, that the judgment in a case brought against Niger at the

Community Court of Justice of the Economic Community of West African States²² resulted in the swift awarding of compensation, but at the same disavowed human rights standards by negating any State responsibility in the violation. The practice by many judges in Nigeria to award small compensatory amounts sometimes not exceeding US\$ 100 was also mentioned as the risk of trivializing the gravity of the violation.

61. The use of labour courts to obtain remedies for trafficked persons has yielded concrete and promising results in many cases. In addition to non-material damages, however, the most common forms of exploitation, such as prostitution, are not recognized by labour courts in many countries. Similarly, enlisting the assistance of trade unions in most countries requires being a member, which is often not the case and may not even be a possibility, for trafficked persons.

62. The creation of dedicated mechanisms to cater for trafficked persons could in some cases be problematic by having a limiting effect on remedies for other human rights abuses and creating a distinct and hierarchical category of rights-holders. This may mean that advocacy should aim to enable victims of trafficking to obtain compensation within the existing schemes and, where they do not exist or are inadequate, to advocate for such schemes which allow all victims of human rights violations to claim compensation. Contexts exist in which there are no adequate structures or mechanisms capable of providing any form of remedy to trafficked persons, and in such cases specialized services may be the only option for meeting their particular needs.

63. Experience has shown that effective rehabilitation of trafficked persons requires system-wide approaches including close case management support and multidisciplinary teams in countries of both destination and origin. A multi-stakeholder approach that is truly responsive to the specific and individual needs of trafficked persons is also essential to ensuring the effectiveness and sustainability of interventions. Another risk involved is wastage of limited resources through duplication and the contribution to stigmatisation of trafficked persons.

64. States should adopt adequate legal frameworks which recognize trafficking in persons as a violation of human rights and a serious crime, and provide for the fulfilment of trafficked persons' human rights, including that of an effective remedy. In this regard, there is a need to recognize the integral nature of the elements constituting the right to an effective remedy in the specific context of trafficking in persons. There is also a need to refine the concept of restitution in relation to trafficking in persons, notably to reduce the risk of the concept being applied in a way that exposes trafficked persons to further human rights violations.

65. In accordance with international law, a person should be recognized as a victim of a human rights violation from the moment he or she suffers harm as a result of such violation, and not on the basis of the application of prohibitively high criteria for having such status "conferred" onto him or her. States also have related obligations to: exercise due diligence in the identification of trafficked persons; apply the principle of non-criminalization and non-prosecution of trafficked persons; and explicitly recognize that neither a trafficked person's immigration status nor their decision on whether or not to participate in criminal proceedings against alleged

²² *Hadijatou Mami Koraou v. The Republic of Niger*, ECW/CCJ/JUD/06/08, Economic Community of West African States (ECOWAS): Community Court of Justice, 27 October 2008. Available from www.unhcr.org/refworld/docid/496b41fa2.html.

perpetrators may be seen as in any way limiting their claim to human rights, including that of an effective remedy.

66. Legal provisions should include remedies that are comprehensive and tailored to meet the specific vulnerabilities of trafficked persons. In the case of trafficked children, provision should be made for obtaining remedies out of court, and for unconditional legal aid to be provided as a matter of course for all proceedings, whether criminal, civil or administrative. Consideration should also be given to abolishing statutes of limitations and prescriptions in cases involving child victims of trafficking.

67. Statutes governing any State-administered funds set up for trafficked persons should explicitly indicate that funding will be used to provide remedies, including compensation, to trafficked persons. Explicit provision should also be made for seized proceeds of trafficking and confiscated assets of traffickers to be used to compensate trafficked persons and for general provision of remedies to trafficked persons.

68. In recognition of the numerous practical obstacles facing trafficked persons in seeking and accessing compensation, States should make available as many options for claiming compensation as possible.

69. All types of trafficking in persons should be investigated with due diligence. Concerning prosecutions, measures should be taken to reduce the dependency on victim testimony, and the granting of remedies should not be made conditional on convictions.

70. Wherever available, measures to provide effective remedies to trafficked persons should, in the first instance, be integrated within existing structures without losing sight of the specificities and individual needs of trafficked persons. This may require enhanced efforts at effective coordination, the reinforcement of capacities and the allocation of dedicated case-workers.

71. Rehabilitation efforts should recognize experiences of individual trafficked persons and should avoid classifications or generalizations that ignore individual traumas to which a trafficked person may have been exposed. Particular attention should be given to the need for age and gender-appropriate provisions in this regard. The period allocated to trafficked persons during which to decide on a course of action, including the pursuit of remedies, should not be less than 90 days in the light of empirical evidence that few, if any, trafficked persons are in a position to make a rational decision before then. Trafficked persons should be allowed regular residence status during any procedures for compensation, be it for a criminal, civil or labour court.

72. Wherever possible, compensation should be granted directly to the trafficked person, failing which it should be extended to a member of his or her family.

73. Procedures for effective provision to trafficked persons of comprehensive and appropriate information, including that on how to obtain remedies, should be put in place and implemented as a matter of priority. The right to information in this regard may be seen as a vital gateway to claiming other rights including that to an effective remedy for human rights violations.

74. Timely and adequate legal aid should be recognized as a precondition for all trafficked persons to exercise their right to an effective remedy, and procedures in this regard should be formulated and applied accordingly.

75. Procedures for consulting trafficked persons should respect their right to free and informed consent, and empower them through assistance and information to

make choices, rather than pressure or intimidate them into choosing one course of action or another.

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

77. Mechanisms (for example, adhesion procedures) should be put in place allowing for a third party (such as a prosecutor) to claim and enforce compensation on behalf of trafficked persons, in recognition of the low likelihood of victims initiating and undertaking complicated proceedings of their own accord and without advice or assistance.

78. 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.

79. Regional mechanisms should gather information on and systematically monitor member States' anti-trafficking policies and the implementation of the obligation to provide an effective remedy to trafficked persons.

80. Civil society organizations should implement evidence-based action, starting with systematic and coordinated efforts to seek data and information from State institutions on the measures they are taking to protect and assist trafficked persons. Such information, if collated, could contribute to more effective access to remedies by allowing for a full picture to be formed and strategies and interventions to be advocated on an informed basis.

Appendix

Agenda of the expert consultation on the right to an effective remedy for trafficked persons

Monday, 22 November 2010

- 9.00 – 9.30 Opening remarks and meeting objectives
- Chair:*
Joy Ngozi Ezeilo, Special Rapporteur on trafficking in persons, especially women and children
- Welcoming remarks*
Annie Demirjian, UNDP
- 9.30–13.00 **Session 1:**
The right to an effective remedy – framework, content and scope
- Facilitator:*
Professor Mohamed Mattar, John Hopkins University
- Normative framework of the right to an effective remedy under international law –Joy Ngozi Ezeilo, Special Rapporteur*
- The right to an effective remedy in the context of trafficking –*
Wayne Huckerby, New York University
- *Restitution*
 - *Rehabilitation /Recovery*
 - *Compensation*
- 11.15 – 11.45 *Tea break*
- Cross-cutting issues, including access to information, legal aid and possibilities of residence –Victoria Nwogu, Global Alliance Against Traffic in Women*
- Wrap-up and general discussion*
- 13.00 – 14.30 *Lunch break*
- 14.30 – 18.00 **State responses**
- Facilitator:*
Gert Bogers, European Commission
- State responsibilities and responses with respect to:*
- *Restitution*
– Mannan Rana, UNICEF Pakistan
 - *Rehabilitation*
– Abigail Stepnitz, POPPY Project of Eaves
 - *Compensation*
– Simone Heri, United Nations Office on Drugs and Crime

- 16.00 – 16.30 *Tea break*
- Compensation (continued)*
 –Galla Tjurina, La Strada International
- Cross-cutting issues, including access to information, legal aid
and possibilities of residence*
 – Professor Mohamed Mattar, John Hopkins University
- Wrap-up and general discussion*

Tuesday, 23 November 2010

- 9.00 – 12.30 **Session 3: Concrete strategies and implementation**
- Facilitator*
 Victoria Nwogu, Global Alliance Against Traffic in Women
- Concrete strategies and interventions with respect to:*
- *Restitution*
 – Sibongile Ndashe, Interrights
 - *Rehabilitation/Recovery*
 – Jonathan Martens, IOM, and Edelweiss
 Silan, Save the Children
 - *Compensation*
 – Astrid Ganterer, OSCE/Office for
 Democratic Institutions and Human Rights
- 10.30 – 11.00 *Tea Break*
- Compensation (continued)*
 Klara Skrivankova, Anti-Slavery International
- Cross-cutting issues, including access to information, legal- and
other assistance, possibilities of residence*
 – Marjan Wijers, AIM for Human Rights
- Wrap-up and general discussion*
 (all)
- 13.00 – 14.30 *Lunch break*
- 14.30 – 16.00 **Session 4: Conclusions and recommendations**
- Chair:*
 Joy Ngozi Ezeilo, Special Rapporteur
- Overview of main conclusions & recommendations*
 – Session facilitators
- Closing remarks by Chair*
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