Mandate of the Special Rapporteur on trafficking in persons, especially women and children

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25 January 2024

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on trafficking in persons, especially women and children, pursuant to Human Rights Council resolution 53/9.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the signing of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Agreement to Strengthen Shared International Commitments on the Protection of Refugees and Migrants (Kigali, 5 December 2023) (UK-Rwanda Agreement). Specifically, I wish to highlight issues arising in relation to its compatibility with the State's obligations under international human rights and refugee law, and customary international law.

Comments regarding draft legislation and legal provisions affecting the human rights of trafficked persons and persons at risk of trafficking were previously addressed through OL GBR 11/2021, OL GBR 3/2022, OL GBR 9/2022, and OL GBR 12/2022, sent to your Excellency's Government on 5 November 2021, 11 February 2022, 1 July 2022 and 17 August 2022, respectively. These letters commented on provisions of the Nationality and Borders Bill 2021, to the Memorandum of Understanding (the MoU) concluded between the Government of the United Kingdom of Great Britain and Northern Ireland (referred to hereinafter as "the United Kingdom") and the Government of the Republic of Rwanda. Further comments were made in relation to the Illegal Migration Bill (OL GBR 9/2023).

The signing of the UK-Rwanda Agreement, in itself, does not address the international human rights and refugee law issues previously raised in my submission to the Court of Appeal in the case of in CA-2023-000189: R (Asylum Aid) v Secretary of State for the Home Department. Further the adoption of a legally binding treaty does not address the conclusions of the Supreme Court of the United Kingdom in AAA (Syria) & Ors, R (on the application of) v Secretary of State for the Home Department [2023] UKSC 42 (15 November 2023). Specifically issues of compatibility with international law remain in relation to the following areas affecting trafficked persons and persons at risk of trafficking: positive obligations of identification, assistance and protection of victims of trafficking; the obligation of non-refoulement and its application to victims of trafficking; the principle of non-punishment; the rights of the child and child victims of trafficking; persons with disabilities who are victims of trafficking.

The UK-Rwanda Agreement provides for relocation to Rwanda of victims of modern slavery or human trafficking and includes victims of modern slavery and trafficking within the definition of 'Relocated individual.' According to article 13(1) of the Agreement, "Rwanda shall have regard to information provided about a Relocated Individual relating to any special needs that may arise as a result of their

being a victim of modern slavery or human trafficking, and shall take all necessary steps to ensure that these needs are accommodated." In addition, article 13(2), provides that "Rwanda agrees to treat as a victim of modern slavery and human trafficking a Relocated Individual who has received a positive reasonable grounds decision made by the United Kingdom (in those cases where the United Kingdom is not obliged to make a conclusive grounds decision prior to removal)."

The signing of the Agreement, in itself, does not ensure that in the short or medium term, identification, assistance and protection measures that meet the State's legal obligations towards victims of trafficking, will be implemented effectively and consistently, prior to, during or after the relocation procedure. As the Supreme Court stated, "intentions and aspirations do not necessarily correspond to reality: the question is whether they are achievable in practice." (at para. 102) The assessment published by UN High Commissioner for Refugees on 15 January 2024, notes the "detailed, legally-binding commitments now set out in the treaty". (para. 19) However, full implementation in practice, they noted, "would require sustained, long-term efforts, the results of which may only be assessed over time." As such, the necessary safeguards to ensure the rights of victims of trafficking, including effective protection against real risks of refoulement, are not in place. The transferring State, here the United Kingdom, is required to ensure that its obligations towards victims of trafficking seeking asylum, are met, not only *de jure* but also *de facto.* These include obligations of assistance and protection arising under the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), (articles 10-13), article 4 of the European Convention on Human Rights, and under The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("the Palermo Protocol") ratified by your Excellency's Government on 9 February 2006, as well as other international human rights treaties.

The European Court of Human Rights (ECtHR) has recognised that, to effectively combat trafficking: "*member states are required [by Article 4 ECHR] to adopt a comprehensive approach… states must, firstly, assume responsibility for putting in place a legislative and administrative framework providing real and effective protection of the rights of victims of human trafficking…*": *Chowdury v Greece* App. No, 21884, 30 March 2017 §87. The state's positive obligations under article 4 of the ECHR include "*facilitating the identification of victims by qualified persons*": *VCL and AN v United Kingdom* (2021) 73 EHRR 9, §153. The "*early identification is of paramount importance*" *ibid* §160. This is in part because the duty to facilitate identification in article 4 must be interpreted and applied so as to make its safeguards practical and effective (*SM v Croatia* (2021) 72 EHRR 1, §295). Those safeguards may not become practical and effective by putting in place a transfer mechanism to a third state, Rwanda. I highlight the conclusion of the Supreme Court of the United Kingdom in AAA (Syria) & Ors, R (on the application of) v Secretary of State for the Home Department [2023] UKSC 42, "As matters stand, the evidence establishes substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will in consequence be at risk of being returned directly or indirectly to their country of origin. In that event, genuine refugees will face a real risk of ill-treatment in circumstances where they should not have been returned at all." (para. 105)

The duty to identify, assist and protect victims of trafficking and persons at risk of trafficking continues to apply to trafficked persons seeking asylum, and cannot be met by transferring trafficked persons to third states, where real and effective

protection is not ensured. The need to avoid 'undue delay' prior to relocation, as stated in the UK-Rwanda Agreement, may not allow for the complex process of identification of victims of trafficking. The ECtHR has emphasised that there "may be different reasons why victims of human trafficking … may be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma must be taken into account. There is thus a risk of overreliance on the victim's testimony alone, which leads to the necessity to clarify and – if appropriate – support the victim's statement with other evidence.": SM v Croatia, §344 (relying on the Council of Europe Group of Experts on Action Against Trafficking in Human Beings, GRETA). Another reason why the victim may be unable to disclose what happened, may be that a victim who has been detained may well remain under the influence of their traffickers: TDT, §82. Victims may "not be aware that they have been trafficked, or … may be too afraid to disclose this information to the authorities … Consequently, they cannot be required to self-identify or be penalised for failing to do so" (VCL and AN v United Kingdom, §199).

Article 10 ECAT states: "*(1) Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims."* These obligations would not be discharged by the conclusion of the UK-Rwanda treaty, and *de facto* compliance cannot be ensured given the structural problems identified within the asylum system in Rwanda, as found by the Supreme Court. Given these structural deficiencies, and the complex needs of victims of trafficking and persons at risk of trafficking, the UK-Rwanda Agreement as currently drafted does not seem to prohibit the transfer of trafficked persons, including potential victims of trafficking.

I note there appears not to have been any consideration of whether the transfer of trafficked persons, including potential victims of trafficking and other asylum seekers, to a third country in relation to which they have no connection, is compatible with the State's obligations under ECHR, including articles 3 and 4 ECHR.

Further issues arise in relation to the screening arrangements prior to the proposed relocation of asylum seekers. Article 5(1) of the Agreement states that *"The United Kingdom shall be responsible for the initial screening of Relocated Individuals, before relocation to Rwanda occurs in accordance with this Agreement."* It is not clear that victims of trafficking will have effective access to legal advice and representation, during the initial screening period, prior to commencement of the relocation process.

Further, victims of trafficking may not have a fair opportunity to provide all relevant information relating to their experiences of trafficking and the serious risks of trafficking for all purposes of exploitation, or to make representations about all of the relevant legal issues at stake. The difficulties arising for victims of trafficking in providing 'compelling evidence' of their status and protection needs, are well recognised.

Article 9(1) of the UK-Rwanda Agreement provides that asylum claims are to be determined in accordance with the 1951 Convention Relating to the Status of Refugees. No specific reference is made to other forms of international protection, such as subsidiary or other complementary forms of protection, that may be relevant to victims of trafficking, and may give rise to a right of residence and stay in a country of destination. While article 10 of the Agreement includes a reference to

humanitarian protection need, its mode of application to victims of trafficking is not clear, and neither is its compliance with obligations arising under ECAT, and other international human rights treaties.

Further, the State has an obligation to provide a recovery and reflection period to trafficked persons, as provided for under article 13 ECAT, which states: "Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim." As stated in article 12, the purpose of the recovery and reflection period is twofold: "to ensure that a victim of trafficking may recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities."

It is important also to highlight the relevance of the principle of non-punishment in European and international human rights law, and the obligations imposed on the State. The principle of non-punishment is stated in the Council of Europe Convention on Action against Trafficking in Human Beings, (ECAT) article 26, and article 4 of the ECHR incorporates the non-punishment principle, as recognized in V.C.L. and A.N. v. United Kingdom. States have an obligation to ensure that victims of trafficking are given an effective opportunity to claim asylum, and that they are not penalized for their mode of entry into the State. The principle of non-punishment is included in the specific protection afforded under article 31 of the Convention relating to the Status of Refugees, which protects refugees from being penalized for illegal entry and presence in a country. In her Report to the Human Rights Council (2023), the Special Rapporteur highlights the purpose of article 31 (1) of the 1951 Convention, which is to ensure that refugees can gain access to international protection without being penalized for breaches of immigration and other laws, and further highlights its centrality to the object and purpose of the 1951 Convention. (A/HRC/53/28 paras. 41-42). The Special Rapporteur has stated: "article 31 (1) of the Convention should be interpreted as prohibiting any discriminatory treatment or procedural detriment to the refugee, including denial, obstruction, delay or limits on access to the territory or asylum procedure or applying limitations on due process guarantees and limiting duration of status, or a decision to declare an application for international protection inadmissible for the sole reason of the applicant's irregular entry or presence." (A/HRC/53/28 para. 43) In its general recommendation No. 38 (2020), the Committee on the Elimination of Discrimination against Women called upon States to ensure the non-punishment of victims for irregular entry or stay in countries of transit and destination, absence of documentation or for their involvement in unlawful activities to the extent that such involvement was a direct consequence of their situation as victims of trafficking.[1]

I remind your Excellency's Government that the obligation of non-refoulement arising under international human rights law is absolute and permits of no exceptions. Its application in relation to any proposed transfer to another state of a victim of trafficking is recognised in the Palermo Protocol, article 14(1) of which provides for the continuing application of the "rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained

[1] Committee on the Elimination of Discrimination against Women, general recommendation No. 38 (2020), para. 98

therein." There continues to be a real risk of refoulement arising from the planned relocation of trafficked persons under the UK-Rwanda Agreement. The concerns noted by the Supreme Court of the United Kingdom remain relevant, and are not addressed by the conclusion of a treaty, replacing the previously existing Memorandum of understanding between the UK and Rwanda (MoU). The Court highlighted the significant changes required, which they noted "may not be straightforward, as they require an appreciation that the current approach is inadequate, a change of attitudes, and effective training and monitoring." (para. 104) There remain "substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum will in consequence be at risk of being returned directly or indirectly to their country of origin." Although the Monitoring Committee established under the Treaty (part 5, article 15) is intended to ensure compliance with international human rights and refugee law, it remains untested. The effectiveness of the Committee, including in relation to its power to address breaches of the Treaty, cannot yet be assessed in practice. (See paras. 26-29, and para. 45 of the Scrutiny of international agreements: UK–Rwanda Agreement on an Asylum Partnership, 17 January 2024).

It appears that the special needs and rights of child victims of trafficking are not sufficiently recognised or protected by the Agreement. While article 10(6) refers to the primary consideration to the rights and best interests of the Child in accordance with international law (including maintenance of the family unit), it is specifically with respect to decision making concerning the status of the parent or guardian, and to the measures to be taken by Rwanda. The adoption of a legally binding treaty does not, in itself, ensure that such guarantees will be ensured both *je jure* and *de facto.* Article 9(3) provides that: "A Relocated Individual who is a Child shall be able to raise an asylum or Humanitarian Protection Claim in their own right". The possible relocation of a child, with their family or guardian, is permitted, contrary to the recommendation of the UN Committee on the Rights of the Child, urging the United Kingdom "to ensure that children and age-disputed children are not removed to a third country."

The Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) requires states to ensure that victims "can be identified in a procedure duly taking into account the special situation of women and child victims." The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("the Palermo Protocol") ratified by your Excellency's Government on 9 February 2006 aims to: (i) prevent and combat trafficking in persons, paying particular attention to women and children; (ii) protect and assist the victims of such trafficking, with full respect for their human rights; (iii) promote cooperation among States Parties in order to meet those objectives (article 2). State Parties are required to take into account, "the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children." The Convention on the Rights of the Child, ratified by your Excellency's Government on 16 December 1991, is applicable to child victims of trafficking. While the commitment in article 3(4) of the Agreement not to relocate unaccompanied children is welcome, the protections afforded under the Agreement are not sufficient to comply with the requirement to ensure the primacy of the best interests of all children (article 3 CRC), and the principle of non-discrimination (article 2 CRC), both of which apply to asylum seeking child victims of trafficking, whether accompanied by parents or guardians, or not. As currently drafted, the Agreement allows for age-disputed children to be relocated, leading to questions as to how such age disputes will be resolved in a

manner compliant with the obligations arising under the Convention on the Rights of the Child.

As is noted in the Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, States must ensure the, "primacy of the rights of the child in the context of international migration." (CMW/C/GC/3-CRC/C/GC/22, para. 13) States are required to ensure that the best interests of the child are taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases, and to undertake best interests assessments and determination procedures: "as part of, or to inform, migration related and other decisions that affect migrant children" (CMW/C/GC/3-CRC/C/GC/22, para. 31). Further, the OHCHR Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add. 1) specifically address the obligations of States concerning child victims of trafficking: "Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs." (principle 10) The obligations towards child victims of trafficking, including potential victims, cannot be transferred by international agreement or otherwise to another State. Further, they apply to all children subject to the jurisdiction of the State, including during any proposed transfer arrangements and are not abrogated by such.

The Special Rapporteur highlights the obligation on States to ensure that information and procedures for trafficked persons with disabilities are accessible, meet the obligations of reasonable accommodation and comply with international human rights law. Currently, the IMA 2023, does not make sufficient provision to ensure access to asylum and protection against refoulement of victims of trafficking with disabilities. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments. The Special Rapporteur highlights the obligation of States to ensure equality before the law, including taking measures to provide access by persons with disabilities to the support required in exercising legal capacity. This requires ensuring that specialized assistance is provided for persons with disabilities who are trafficked or at risk of trafficking, and who are presenting asylum claims or other claims for international protection.

Finally, I note that the Agreement refers to the commitment to promoting responsibility sharing, but it is respectfully submitted that the proposed relocations do not represent such a commitment. In this report, I note that the Agreement seeks to apply the principle of the partnership "to all individuals who enter or arrive in the United Kingdom illegally regardless of whether they have made a protection claim, human rights claim or claim to be a victim of modern slavery or human trafficking and have not come directly from a territory where their life and freedom was threatened."

As I have noted in my report to the Human Rights Council on *Refugee protection, internal displacement and statelessness*, "The Special Rapporteur is particularly concerned about the adoption by States of legislation and policy measures with the stated aim of preventing trafficking in persons, but which fail to comply with international law. The increasing use of accelerated refugee status determination

procedures, the transfer of refugee status determination to third countries […] undermine States' obligations to identify, assist and protect victims/survivors of trafficking and to comply with the principle of non-refoulement. Expanding safe, regular migration opportunities and providing resettlement opportunities and other complementary pathways for the admission of persons with international protection needs, as well as effective access to asylum and complementary forms of international protection, are essential to prevent trafficking in persons and to ensure protection of victims." - (A/HRC/53/28, para. 1)

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Siobhán Mullally
Special Rapporteur on trafficking in persons, especially women and children