**Procedural pre-conditions in realizing the right to an effective remedy for Trafficked Persons: Policy and Practice in Africa**

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# Introduction

Like so many other parts of the world today, Africa is confronted with the phenomenon of trafficking in persons. Trafficking in persons in Africa is quite widespread and follows historical migration routes to and from countries within the region and beyond. The desperate movement of people is accelerated by the need to escape from poverty, war or general insecurity, persecution, harmful traditional practices and gender discrimination, violence, natural disasters (e.g. famine) etc. Although reliable data on the scale of the problem is difficult to obtain, available records indicate that hundreds of thousands of people are trafficked every year within and through the sub-region and about 80% of these are women and girls[[1]](#footnote-1). Responses to trafficking in persons in African vary from regional, inter-continental and sub-regional frameworks for action to national law reforms and direct interventions in prevention, protection, prosecution and rehabilitation. Counter-trafficking interventions are heavily law enforcement focused perhaps driven by the desire of states to gain a good ranking in the US Annual TIP Report[[2]](#footnote-2) but also by the fact that the UN TIP Protocol 2000[[3]](#footnote-3) from which most legislations in the region draw inspiration is primarily a law enforcement tool. Thus most efforts ignore the agency and rights of the trafficked persons for example, in non-consultation in policies and programmes and in lack of concrete mechanisms for ensuring effective remedies.

# An Overview of Responses to Trafficking in Persons in Africa

A coordinated, continent-wide response to trafficking in persons is still in its infancy. The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children was adopted in 2006 as part of the AU Commission Initiative against Trafficking Campaign (AU.COMMIT)[[4]](#footnote-4). The Ouagadougou Action Plan is a declaration of the joint intent of the AU and the European Union (EU) to enhance their efforts to fight trafficking. It provides specific recommendations to be implemented by the Regional Economic Communities (RECs) and Member States based on the legal and political basis at regional, continental and global level. It further upholds and reinforces the international and regional legal instruments on human rights particularly the conventions on trafficking in person, elimination of discrimination of women, and protection of the rights of the child. Implementation of the Ouagadougou Action Plan has been stilted at best.

Human rights instruments of the African Union such as the African Charter on Human and Peoples’ Rights (1986)[[5]](#footnote-5), the protocol to the African Charter on the Rights of Women in Africa (2003)[[6]](#footnote-6) (aka the Maputo Protocol) and the African Charter on the Rights and Welfare of the Child (1990)[[7]](#footnote-7) all contain excellent provisions guaranteeing individuals and peoples’ rights, and imposing correlating duties with specific protections for women and children from forced labour, sexual exploitation and abuse, sale, trafficking and abduction and provision of remedies for redress in the event of human rights violations. Expanding on African Charter on Human and Peoples Rights’ guarantee of the right to effective remedy[[8]](#footnote-8) - the Maputo Protocol for example provides at Article 25, ‘*States Parties shall undertake to: a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.’* These Charters apply to the entire continent but the recent rise in publicity of trafficking in persons as a trans-national crime and the involvement of some West African states in the most sensational forms of trafficking[[9]](#footnote-9) has seen the West African sub-region make even greater advancements than any other part of the continent in addressing the issue.

In December 2001 an ECOWAS Declaration and Plan of Action on Trafficking in Persons especially Women and Children[[10]](#footnote-10) was adopted by Ministers of Foreign Affairs of member states. This marked the definitive origin of a coordinated sub-regional effort to address the problem. The Plan of Action[[11]](#footnote-11) commits ECOWAS countries to urgent action against trafficking in persons in 2002 – 2003, setting achievable goals and objectives. It calls for countries to ratify and fully implement crucial international instruments of ECOWAS and the United Nations that strengthen laws against human trafficking and protect victims of trafficking especially women and children. It takes into account human rights and child and gender – sensitive issues, and encourages cooperation with non – governmental organizations and other elements of civil society. Implementation of the ECOWAS Plan of Action has been slow and resonates at the policy levels. Due to limited resources occasioned by the varied economic strengths of member states, there are different levels of achievement. Nigeria stands out as one of the most progressive countries in this implementation[[12]](#footnote-12); many countries in the sub-region are more focused on addressing other pressing issues like conflict management and poverty reduction. In 2005 an anti-trafficking unit was established under the Directorate of Humanitarian and Social Affairs of the ECOWAS Commission. This unit is designed to provide member states with technical support in their counter-trafficking efforts; mobilize resources for member states and monitor overall implementation of related activities of the Region. It also implements the ECOWAS Plan of Action and the Joint ECOWAS/ECCAS Plan of Action on Trafficking in Persons. Through the efforts of the unit nine member countries of ECOWAS now have national action plans and task forces on combating trafficking in persons and 13[[13]](#footnote-13) out of 16 member states now have anti-trafficking legislation.[[14]](#footnote-14) Further efforts by ECOWAS to address trafficking in the sub-region include the ECOWAS/ECCAS[[15]](#footnote-15) Joint Plan of Action and Multilateral Cooperation Agreement (2006) in which governments of both sub-regions agreed to develop concrete strategies for mutual assistance in the investigation, arrest and prosecution of offenders. The agreement imposes special obligations on origin, destination and transit countries with regard to rescue, protection, and access to information, repatriation and reintegration of victims. Member countries resolved to set up a Joint Permanent Monitoring Commission to monitor implementation of the agreement. To date this Commission has not been set up and the role of monitoring implementation is left to the ECOWAS anti-TIP unit.

In April 2009, Ministers of Justice and Gender from ECOWAS member states adopted a Policy on Protection and Assistance to Victims of Human trafficking in West Africa. The preamble of the policy states that it is developed in recognition of the fact that victims of trafficking are further traumatized by the absence of appropriate interventions to provide remedy to their negative experiences and further that there are no uniform operational standards for assistance to trafficked persons in the sub region. The Policy which is designed to serve as a guiding framework for all actors (law enforcement, social services, NGOs etc.) in providing effective protection and care to victims has 12 components, including strategies for reception, identification, sheltering, health, counselling, family tracing, return/repatriation, integration, empowerment, follow-up, after care and disengagement of victims. It also incorporates preventive measures, rights and responsibilities of victims and the role of the various stakeholders, including governments, civil society organizations, the organized private sector, foreign governments, donors, local communities, the media and individuals.

In addition to these, many Member States of AU such as Togo, Mali, Cameroon, Benin, Burkina Faso, Ethiopia, Mozambique and South Africa have reformed their criminal laws and established joint inter-ministerial taskforces in charge of combating trafficking in persons. In some cases, South-Africa/Mozambique MOU (Memorandum of Understanding) for extradition of perpetrators have been developed and implemented.

# Securing effective remedies in practice in Africa

In her report to the UN General Assembly in April 2011[[16]](#footnote-16), the UN Special Rapporteur on trafficking in persons especially women and children rightly found that, ‘*despite the fundamental guarantee of the right to an effective remedy under international law, there remains a large gap in practice between legal provisions and their implementation in relation to trafficked persons.’* She further noted that the content of such remedies *‘encompasses not only a substantive right to reparations, but also a set of procedural rights necessary to facilitate access to reparations.’* By a reading of the existing international human rights instruments and guidelines the key elements that make up the procedural preconditions for access the right to an effective remedy include: adequate legal framework and enforcement mechanisms, the right to information, effective identification, legal assistance, reflection period, immigration/residency status of the victim, and protection.

While regional, sub-regional or inter-continental frameworks provide guidance and inspiration for action, it is only at the national levels that effectiveness of these actions can be tested. Some countries in the continent are more advanced than others. Nigeria for instance has legislation in place since 2003, a specialised anti-trafficking agency (National Agency for the Prohibition of Trafficking in Persons and related matter – NAPTIP) and several guidelines and policy documents for the provision of support and assistance to trafficked persons. Other countries examined here hold strategic positions in relation to trade and migration in the continent or have been identified as major sources or destinations for trafficked persons. They are Kenya, South Africa and Ghana. Furthermore, the sheer size of the continent and the limitations with information gathering due to a yet evolving technology era means that a thorough state by state analysis will be impossible to accomplish within the short timeframe I have to prepare this presentation. I will therefore now examine the practice in the selected countries in relation to the following procedural pre-conditions for the right to an effective remedy.

## *Existence of adequate legal frameworks and administrative mechanisms for implementation*

Article 1 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[[17]](#footnote-17) (hereafter the Basic Principles and Guidelines on the Right to a Remedy (2005)) provide that State parties shall amongst other things, incorporate norms of international human rights law in their domestic legal system or otherwise implement them in their domestic legal system and make available adequate, effective, prompt and appropriate remedies, including reparation.

The UN TIP Protocol on the other hand while having no guarantees to the right to a remedy for victims of trafficking, contains provisions that recognize trafficked persons as victims and therefore entitled to specific human rights protections while ensuring that they are not treated as criminals. These protections include temporary resident status, temporary shel­ter, medical and psychological services, access to justice as well as compensation or restitution.[[18]](#footnote-18)

By these provisions, it is important that national laws should recognize trafficking in persons not just as a serious crime but also as a violation of human rights; and alongside a criminal justice response, provide remedies for this violation. To this end, a victim-centered approach is recommended by the UN via the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking[[19]](#footnote-19) (hereafter OHCHR Guidelines), built around four pillars: 1) The primacy of human rights, 2) the prevention of trafficking by addressing root causes, 3) the extension of protection and assistance to all victims (instead of criminalization), and 4) the punishment of perpetrators and redress of victims.[[20]](#footnote-20) Guideline 9 recommends, *‘legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies.’*

In Nigeria, the *Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003*, (the TIP Act) (amended in 2005) defines trafficking in persons in conformity with the UN TIP Protocol and proscribes several sets of crimes which constitute human trafficking and imposing severe penalties ranging from two years to life imprisonment. However, the TIP Act does not go so far as to stipulate that human trafficking is a violation of human rights. Certain components of the right to a remedy are recognized by section 52 of the TIP Act which declares, *‘A trafficked person, irrespective of his immigration status- (a) has the right to institute civil action against a trafficker and any other person including a public officer who have exploited or abused him; and (b) is entitled to compensation restitution and recovery for economic, physical and psychological damages to be met from the assets [if any][[21]](#footnote-21) of the convicted trafficker [forfeited and paid to the Victims of Trafficking Trust Fund][[22]](#footnote-22).*’ The TIP Act at section 1 establishes NAPTIP which has the responsibility to enforce laws against trafficking in persons, investigate and prosecute persons suspected to be engaged in traffic in persons. By provision of the same law NAPTIP also assumes primary responsibility for care and support to all returned and internal victims of trafficking in Nigeria. Systems for investigation and prosecution of traffickers have been put in place and are more advanced than anywhere else in the continent. From its establishment in 2004 to date NAPTIP has secured 206 convictions for trafficking and related offences. However, in terms of promoting and protecting the rights of trafficked persons there is much scope for adjustment and improvement. Criminal procedures take precedence over civil remedies. In November 2008, the Nigerian government adopted a National Policy on Protection and Assistance to Trafficked Persons in Nigeria (NPPATPN). While the Protection Policy addresses various issues in the rehabilitation and reintegration of victims, it is not founded on a rights based approach; the implementation strategies proposed are weak and in many cases not explicit, while there is no concrete system in place for its implementation. The NPPATPN provides the rights of victims[[23]](#footnote-23) in consonance with the OHCHR Principles and Guidelines on Human Trafficking and Human Rights but also provides corresponding obligations, some of which fly directly in the face of the rights provided. For example, *‘a victim who has consented to rehabilitation shall complete the rehabilitation programmes designed for him or her; A victim shall disclose relevant information concerning his or her health status to counsellors to enhance the quality of care.’* In 2011 a Strategic Implementation Framework (SIF) for the NPPATPN was adopted addressing these limitations. The SIF lists as one of its guiding principles, *‘promotion and protection of the fundamental rights of Trafficked Persons’* and prescribes actions to, *‘protect the rights of trafficked persons ... the provision of free and qualitative legal assistance to trafficked persons; non pursuit of prosecution of victims; respect for the rights of victims; none forcible return to countries of origin; provision of a broad definition of vulnerable persons; focusing on child victims’ of trafficking and the demand for gender sensitive responses to trafficking.’* The extent of implementation of the Protection Policy based on the SIF is not documented.

In South Africa in May 2013, the Parliament passed comprehensive anti-trafficking legislation, the Combating and Prevention of Trafficking in Persons Bill, which now awaits presidential signature.[[24]](#footnote-24) Lack of a single anti-TIP legislation means fragmented efforts and sometimes limited, inconsistent (or contradictory) laws may be applied in any one situation. It also means that other administrative mechanisms for law enforcement and coordination on anti-trafficking response are adhoc. For example, the US TIP Report for 2013 has found that, *‘The government convicted one offender during the year and began prosecution of two suspects for alleged forced child labor offenses; however, challenges remained in the identification and investigation of trafficking cases. Despite its almost exclusive focus on sex trafficking, the government has not yet successfully prosecuted any major international syndicates reportedly responsible for much of the sex trade in the country and did not systematically address labor trafficking offenses in the country. The Department of Justice and Constitutional Development (DOJCD) took over duties from the National Prosecuting Authority (NPA) for inter-departmental coordination on the national level after the NPA scaled down its Inter-Sectoral Task Team (ISTT). Task teams in six provinces continued operations and made efforts to train officials and raise awareness, but the lack of a trafficking statute and a coordinating entity stymied progress.’*

Ghana’s Human Trafficking Act, 2005 (amended in 2009 to align its definition of human trafficking with that of the 2000 UN TIP Protocol) prohibits all forms of trafficking and prescribes penalties of five to 20 years’ imprisonment for all trafficking crimes.[[25]](#footnote-25) The Anti-human Trafficking Unit (AHTU) of the Ghana Police Service is responsible for investigations and prosecutions while the Human Trafficking Management Board, chaired by the Minister for Women and Children’s Affairs oversees other efforts such as prevention and victim rehabilitation in collaboration with NGOs. Since the enactment of the Act, the Ghanaian government’s response has focused on investigations and prosecution; implementation of the law in other areas is lacking due to lack of funding, low capacity and insufficient coordination amongst all actors. A legislative instrument to facilitate implementation of the Act is still awaiting Ministerial action before moving to Parliament for approval.

Kenya’s Counter-Trafficking in Persons Act signed by the President in October 2012 prescribes a 30 year jail term or a fine of 30 million Kenyan Shillings (approximately USD 370,000) on convicted traffickers.[[26]](#footnote-26) However, the US TIP Report 2013 found that, *‘the government did not launch and implement its national plan of action, convene the Counter-Trafficking in Persons Advisory Committee, take tangible action against trafficking complicity among law enforcement officials, provide shelter and other protective services for adult victims, monitor the work of overseas labor recruitment agencies, or provide wide scale anti-trafficking training to its officials, including police, labor inspectors, and children’s officers. It held few traffickers accountable for their crimes in comparison to the significant number of child trafficking victims identified.’* The anti-trafficking ‘sector’ in Kenya is severely underfunded and understaffed. According to the US TIP Report 2013, *‘Neither the Ministry of Gender nor any other ministry received a specific budget allocation for anti-trafficking activities.’*

Even where adequate laws and implementation mechanisms exist, corruption can impede their effective implementation. According to the US TIP Report 2013, in Kenya, tourists have been found to pay off victims or their parents to avoid prosecution. Law enforcement officials in South Africa have been implicated in facilitating trafficking while the government has failed to prosecute them and has gone after low level sex trafficking cases rather than larger international syndicates. In Nigeria three of the pending prosecutions at the time of the report involved government officials alleged to have committed child labor trafficking offences. In Ghana, government did not report any investigations or prosecutions of public officials for alleged complicity in trafficking-related offenses during the reporting period. It will be beneficial to draft basic principles on the right to an effective remedy to include content addressing the question of corruption.

## *Information*

The Basic Principles and Guidelines on the Right to a Remedy (2005) at Article 11 declares the right to information as a remedy in itself by stating that the victim shall have the right to, *‘Access to relevant information concerning violations and reparation mechanisms.*’ Article 24 requires states to *‘develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.’*

Article 6 (2) (a) of the Palermo Protocol re-echoes this provision by requiring states parties (amongst other things) to, *‘ensure that their domestic legal or administrative system contains measures that provide to victims of trafficking in persons ... information on relevant court and administrative proceedings; and assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against traffickers.’*

OHCHR Guideline 9 (2) requires that information be provided to trafficked persons in a language that the trafficked person understands.

Many victims of trafficking are not aware that their rights have been violated, or for those who are aware, that they have remedies to these violations or the means to secure them. Information to trafficked persons of their situation, their rights, remedies available to them, how to access remedies and relevant institutions that provide support or services is not systematized in much of Africa; there is no information on a systematic and comprehensive provision of information to trafficked persons in any of the countries examined here. In this regard, the NPPATPN is silent on provision of information to victims, rather is states that one of the objectives of counselling is to obtain information from the victim that could lead to identification of traffickers. The Access to Justice Handbook (2009) recommends the provision of relevant and comprehensible information to the trafficked person from the point of contact throughout the process of providing services, through any legal proceedings and eventually disengagement. The handbook recommends[[27]](#footnote-27),

*‘Types of information that must be given tothe victim:*

* *All of his/her legal rights, including possible requests for repair damages and compensation, cases of labour violations, and immigration issues if relevant.*
* *The whereabouts of the victim’s property and when it will be returned*
* *All information about the cases that she/he is involved in, including cases in the court and administrative matters such as visa applications; This should include the scope of the case (what is being sought), how long it is expected that the case/matter will take and what steps will happen along the way, the progress so far, and her/his role in the case*
* *All court dates and any changes to the dates*
* *The court’s decision about the case and any sentence given to the trafficker*
* *The whereabouts of the trafficker, including the prison that the trafficker will be held in, the date that the trafficker is scheduled for release, and the date that the trafficker actually is released*
* *The health, education, counselling or other services that the victim could access’*

## *Effective identification*

Proper identification is key to engaging the process of providing access to effective remedies. Failing to properly identify trafficked persons from amongst other migrants mean that they could be prosecuted for crimes; including for immigration related offences, detained or deported without being offered opportunities for proper care, redress and recovery. Failure to properly identify victims also means that they may suffer further human rights violations rather than obtain access to mechanisms for seeking redress.

OHCHR Guideline 2 requires states and intergovernmental organizations to develop guidelines for proper identification for relevant authorities, provide training as appropriate and ensure cooperation between relevant authorities on this.

Identification of trafficked persons remains basic and adhoc and even where guidelines exist, they are not properly publicized and so not often adhered to. The US TIP Report 2013 found that in Ghana, *‘the government did not employ formal procedures to identify victims among vulnerable groups, such as women in prostitution or children at work sites.’* In Kenya, ‘*As guidelines for implementing the victim protection provisions of the anti-trafficking statute have yet to be developed, the government continued to lack a formal mechanism for identifying victims of trafficking among vulnerable populations.’* In South Africa, the report notes challenges in the identification and prosecution of trafficked persons observing, *‘The absence of formal procedures for screening and identifying trafficking victims among vulnerable groups, including illegal migrants and women in prostitution, remained a significant gap. As a result, some foreign victims were repatriated without being identified as trafficking victims.’* However, a significant effort to address this is being made by the Department of Social Development (DSD) which the report found to be in the process of *‘drafting implementing regulations in preparation for the social services portions of the anti-trafficking bill and began development of formal procedures for the identification of trafficking victims and their referral to appropriate care, though these have not yet been put into effect. DSD rolled out its guidebook for service providers and first-line responders on the identification of trafficking victims, updated its shelter intake forms to capture trafficking victim data, and conducted a workshop for field social workers and supervisors that included review of these procedures.’*

A good practice in Nigeria, (based on the SIF) is that the government has formal written procedures to guide law enforcement, immigration, and social services personnel in proactive identification of victims of trafficking among high risk populations. Additionally, police, immigration, and social services personnel received specialized training on how to identify victims of trafficking and direct them to NAPTIP

## *Legal assistance*

OHCHR Guideline 6 (5) recommends, *‘Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters.’* Guideline 9 (2) requires state to provide, *‘information as well as legal and other assistance to enable trafficked persons to access remedies.’*

In African countries, there are in place some state institutionalized systems for access to justice through legal aid schemes, coverage are only for indigent persons and citizens against whom a crime is alleged. There is no information on provision of legal assistance to victims of human trafficking either as witnesses during criminal trials or in seeking civil litigations of their own to pursue compensation for damages, unpaid wages etc. In reality, many victims do not know they have these rights; neither are they provided adequate information on what their legal options are and how to access them. Nigeria is more advanced than the rest of the sub-region in articulating the essential elements to guarantee access to justice to victims of trafficking. In 2009, with the collaboration of UNIFEM, the Global Alliance against Traffic in Women, NGOs, the National Human Rights Commission and private legal practitioners NAPTIP published an Access to Justice Handbook. Titled, *Access to Justice for Trafficked Persons in Nigeria; a Handbook for Legal Actors and Assistance Providers* the handbook (amongst other things) provides information on the rights of trafficked persons (juxtaposing Nigerian constitutional provisions with international standards, information on the criminal and civil legal procedures and avenues for seeking redress and also explores the possibility of judges making an order for compensation as part of criminal pronouncements. The handbook is targeted at law enforcement officials, service providers, judges and private lawyers but it contains sections for reference by victims of the steps and processes involved in trial proceedings. The handbook is not widely publicized or issued to NAPTIP officials as a standard working document. There is no record in Nigeria to date of human rights based remedy such as compensation for a victim of trafficking obtained whether through a criminal proceeding or civil litigation.

## *Reflection period*

A reflection period has become common procedure in most countries in Europe. The Global Alliance against Traffic in Women (GAATW) e-Bulletin Issue 5 (2007) on Access to Justice explains the purpose of the reflection period thus*, ‘During this period, presumed trafficked persons are afforded legal status and protection from detention and deportation in destination countries. Trafficked persons, in this period, have access to certain support services, such as appropriate and secure housing, psychological counselling, social services and health care, as well as professional advice, including legal counselling. These measures are intended to help them recover from the trauma of having been trafficked and to remain safe from the traffickers. The reflection period is intended for trafficked persons to recover sufficiently from the trauma of their experience, so they might be willing and able to talk about it and to make informed decisions about whether to take legal action against the trafficker and to pursue legal proceedings for compensation claims.’*[[28]](#footnote-28) The reflection period may also be combined with the provision of psycho-social support, including shelter and medical services. These are necessary to stabilize the victim and address urgent and immediate medical and other concerns including safety. The International Centre for Migration Policy Development has provided guidelines for implementing a reflection period.[[29]](#footnote-29)

The reflection period is not common in Nigeria and much of Africa. Limited resources and capacities necessitate a speedy facilitation of trafficked persons through the system and imposition of activities to which they may or may not be acquiesced. Shelter provision is relatively advanced in Nigeria in comparison to the other countries, although inadequate to the scale of the phenomenon. NAPTIP runs 8 shelters in Nigeria with a combined capacity of 293 beds. Services offered at the shelter include feeding, clothing, provision of regular hygiene products, physical exercises, basic educational courses, vocational training and counselling.[[30]](#footnote-30) According to the NPPATPN, the maximum period of stay is six weeks and longer term stay will necessitate a referral to NGOs. The objective of shelter provision in Nigeria is not for reflection but for processing, transit short term care and referrals for victims until they can be returned to their families, communities or countries. In the NPPTPAN, a core requirement for access to NAPTIP shelters is that the victims commit to stay and finish the rehabilitation programme designed for them. Victims of trafficking cannot leave the shelter unless accompanied by a chaperone.

In South Africa, Ghana and Kenya shelter provision is not as systematized. Shelters are run by NGOs with referrals from government institutions on adhoc bases accompanied by minimal funding support. The average period of stay is between nine weeks and three months and the objective is for short term care. Inadequate funding in all three countries means the shelter services are inadequate compared to the volume of identified trafficked persons in need of their services. In Ghana, it was reported that some government officials use their personal funds to assist victims of trafficking.[[31]](#footnote-31)

## *Residence status of the trafficked person*

The residence status of the victim of trafficking is vital to accessing an effective remedy as the objective of prosecution or civil litigation may be frustrated if the victim is forced to leave the country. Furthermore, uncertainties or ambiguities as to their status could affect victims psychologically – especially when they fear some risks from the traffickers if returned home – and impair their full recovery.

The UN Special Rapporteur on Trafficking in Persons has recommended ( in these Draft Basic Principles) that, *‘following a reflection and recovery period, trafficked persons should be provided with temporary or permanent residence status in the country where remedies are sought for the duration of any criminal, civil or administrative proceedings. Further, that such residence status should be granted on social or humanitarian grounds, including when there is a lack of guarantees for safe and secure return, the fears of reprisals and retaliation by traffickers, the risk of being re-trafficked, or the return is otherwise not in the best interests of the trafficked person*.’ This is echoed in the OHCHR Guideline 9 (3) which stipulates that victims of trafficking should *‘remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings.*’ This requires *‘making arrangements to enable trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings.’* Furthermore, the TIP Protocol at Article 7 states that, *‘In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.*’

In Nigeria, The NPPATPN envisages return of trafficked victims to their home country outside Nigeria. One of the objectives is to ensure safe, secure and dignified repatriation of foreign victims to their own countries and to discourage internal and cross-border trafficking in persons. The Policy does not encapsulate residency for victims of trafficking in Nigeria however, it provides for the development of MOUs with other countries and embarking on social investigations of the home settings of victims to ensure effective return/repatriation.[[32]](#footnote-32) The US TIP Report 2013 found that, *‘the government provided a limited legal alternative – short term-residency that could not be extended – to the removal of foreign victims to countries where they may face hardship or retribution.’*

Good practice with respect to residency status emerges from Kenya and Ghana. The US TIP Report 2013, reports that in Ghana the government offers foreign victims of trafficking, temporary residency during the investigation and prosecution of their cases and, with the interior minister’s approval, permanent residency if deemed to be in the victim’s best interest. No victims sought temporary or permanent residency during the year. In Kenya on the other hand, the Counter-trafficking in Persons Act 2012 provides that the Minister of Gender may grant permission for foreign trafficking victims to remain indefinitely in Kenya if it is believed they would face hardship or retribution upon repatriation. However, there is no record of implementing this provision as yet.

## *Protection*

Adequate protection is also key at all stages of contact with the victim of trafficking. Where victims of crime fear retaliation, persecution or reprisals from the trafficker they will be unwilling to report the crime, cooperate with investigations prosecution or even seek personal/civil remedies. This is inimical to their enjoyment of their right to an effective remedy but also to the overall response to trafficking in persons at the institutional level.

The TIP Protocol at Article 6 states that in order to avoid intimidation and retaliation, governments to “endeavour to provide” for the safety of trafficking victims, while Article 9 requires protection from the risk of re-victimization. OHCHR Guideline 8 requires that protection should be provided for all trafficked persons without discrimination. This provision includes shelter, provision of adequate healthcare, consular services, legal assistance and protection from harm, threats or intimidation from traffickers and their associates. OHCHR Guideline 6 (4) recommends *‘Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.’* Furthermore, the UN Convention against Transnational Organized Crime (2004), Article 24 recognizes that even families of victims require protection.

In Nigeria, NAPTIP not being an armed force relies on the Police to provide protection to the Agency personnel and victims of trafficking. Given limited resources and human capacity such protection is not always available or adequate. The US TIP Report 2013 observed that Nigeria has made a slight improvement in victim protection through proper screening and identification of victims, provision of shelter services, referrals and rescue and evacuation of Nigerian victims from other countries. In Ghana, the report highlighted inadequate funding as a hindrance to victim protection and assistance; identification procedures were informal and adhoc while shelter provision was short term and inadequate. Similar challenges with funding compounded by an adequate legal framework in South Africa stymied shelter provision and coordination by different agencies with diverse responsibilities in responding to trafficking. Prosecution rates remain very low and due to lack of a systematic protection mechanism victims were often in fear of their safety. The US TIP Report 2013 cites a case in which convictions in a case involving a Thai sex trafficking operation were overturned on appeal because the court translator out of fear for her safety had covered her face during the proceedings. Finally, in Kenya protection is only available for children due to lack of guidelines, funding and poor capacity of responsible institutions.

**Comments on the Draft Basic Principles developed by the Special Rapporteur on TIP**

The draft basic principles on the right to an effective remedy for trafficked persons developed by the Special Rapporteur on TIP is a welcome development in the field of anti-trafficking work. Through her mandate and building on the observations of so many organizations around the world, the conclusion that anti-trafficking responses have not focused enough attention on effectively empowering victims to recover and live full lives after their trafficking experience is incontestable. The problem may arise from the fact that governments and other actors often lack the knowledge and capacity to translate their human rights commitments into action. When adopted, the final draft will be a solid contribution by the SRT to the body of recommendations and guidelines developed by the OHCHR to guide states and other actors in implementing their obligations under the diverse UN human rights conventions and treaties.

The draft is very comprehensive, has covered the scope of elements required to achieve an effective remedy for victims of crime and human rights violations but also addresses the context of trafficking specifically. Gender issues are effectively captured in the document and there is a specific section addressing the peculiarities of child victims. The following comments may enrich the document.

* It will be worthwhile to annotate the final text of the basic principles with definition of terms, clarifications on the relationship between these principles and other related ones, cross-reference from the guidelines to other relevant international covenants, principles and guidelines; and the underlying context behind different aspects of the guidelines. Even good practices can be included to enrich the document. Furthermore, consider developing detailed guidelines for implementing these principles! There is already very good content for this in the SRT's report of Feb 2011.
* The principles should specifically address the question of security/protection of trafficked persons in general but also as a pre-condition for accessing their rights to an effective remedy
* The principles should address the issue of immigrations/stay/asylum/residency status for trafficked persons; including content on non-forcible removal or deportations of trafficked persons and reference other relevant OHCHR Principles and Guidelines on this matter. Some judgments emerging from asylum claims by trafficked persons in Europe are beginning to establish trafficked persons as forming members of a ‘*particular social group’* who can be targets for persecution to fit into the definition of the Refugee Convention. This could be explored further.

# Conclusion

Access to effective remedies for trafficked persons in Africa is still a challenge. While legal frameworks and policies are developing rapidly, they are relegating the rights of the victim to law enforcement priorities. The Human rights instruments contain adequate normative framework for guaranteeing effective remedies to victims of crime and human rights violations (including trafficked persons). However, regional action plans and initiatives on trafficking in persons do not provide concrete standards on the issue. At the national levels, knowledge, capacities and infrastructure to provide the necessary procedural elements for effective remedies to trafficked persons will need a great boost. In this regard the UN Special Rapporteur’s Draft Basic Principles will be a welcome development.

1. UNODC, Global Report on Trafficking in Persons, 2009, Executive Summary, page 11 at

   <http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html> [↑](#footnote-ref-1)
2. Benjamin N. Lawrence and Ruby P. Andrew, ‘A “Neo-Abolitionist Trend” in Sub-Saharan Africa? Regional Anti-Trafficking Patterns and a Preliminary Legislative Taxonomy’ See <http://www.cihablog.com/understanding-anti-trafficking-programs-in-africa/> [↑](#footnote-ref-2)
3. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United

   Nations Convention Against Transnational Organized Crime, Palermo, Italy 2000 [↑](#footnote-ref-3)
4. And includes a migration policy framework for Africa. See <http://www.africa-eu-partnership.org/sites/default/files/documents/doc_au_commit_strat_1.pdf> [↑](#footnote-ref-4)
5. <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf> [↑](#footnote-ref-5)
6. <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf> [↑](#footnote-ref-6)
7. <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf> [↑](#footnote-ref-7)
8. Specifically, ***Article 7*** which provides amongst other things that, ‘Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; … (c) the right to defence, including the right to be defended by counsel of his choice’ and ***Article 9,*** ‘1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.’ [↑](#footnote-ref-8)
9. Nigeria is the most populous country in Africa and one of the main countries spearheading sub-regional integration in West Africa and so enjoys a great measure of leadership in ECOWAS and her institutions. It is also the most notorious country in the sub-region in the global wave of irregular migration and trafficking of persons to Europe for commercial sexual exploitation. The sub-region also has a significant problem of internal trafficking of persons (especially children) within member countries. [↑](#footnote-ref-9)
10. <http://www.unodc.org/pdf/crime/trafficking/Minimum_Plano_CEDEAO.pdf> [↑](#footnote-ref-10)
11. This plan was initially adopted to last for 2 years from 2002 – 2003, with plans for a more far-reaching and detailed plan to be developed in 2003 on the basis of in-depth evaluation of implementation of the current plan. A first review was held in 2002 and subsequently in 2008; the Plan was extended till 2011. [↑](#footnote-ref-11)
12. Nigeria was one of the first countries to enact anti-trafficking legislation in 2003, put in place a specialized anti-trafficking agency and a national task force to coordinate efforts of relevant stakeholders and institutions. To date Nigeria has secured 206 convictions for trafficking and related offences. See <http://www.naptip.gov.ng/databaseanalysis.html> [↑](#footnote-ref-12)
13. Senegal, the Gambia, Guinea, Sierra Leone, Liberia, Ghana, Nigeria and Mauritania all have legislation against all forms of trafficking while Mali, Togo, Benin, Burkina Faso and Gabon, Cape Verde have legislation against child trafficking only. [↑](#footnote-ref-13)
14. <http://www.ungift.org/ungift/en/stories/a-regional-response-to-trafficking-in-west-africa.html> [↑](#footnote-ref-14)
15. Economic Community of Central African States [↑](#footnote-ref-15)
16. A/HRC/17/35 at page 3 [↑](#footnote-ref-16)
17. adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 [↑](#footnote-ref-17)
18. GTZ, working paper of the Democracy and Governance Division, ‘Trafficking in Persons as a Human Rights Issue’ [↑](#footnote-ref-18)
19. <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf> [↑](#footnote-ref-19)
20. Navi Pillay, <http://www.ohchr.org/EN/NewsEvents/Pages/HumanRightsbasedapproachtotrafficking.aspx> [↑](#footnote-ref-20)
21. Inserted by 2005 amendment [↑](#footnote-ref-21)
22. Inserted by 2005 amendment [↑](#footnote-ref-22)
23. at pages 21 - 22 [↑](#footnote-ref-23)
24. US TIP Report 2013, available at [www.state.gov](http://www.state.gov) [↑](#footnote-ref-24)
25. ibid [↑](#footnote-ref-25)
26. See <http://www.allvoices.com/contributed-news/7182345-kenya-adopts-new-antitrafficking-legislation> [↑](#footnote-ref-26)
27. at pages 30, 36 and Annex 2 [↑](#footnote-ref-27)
28. available at <http://www.gaatw.org/e-bulletin/compilation/2007_GAATW_ATJ_eBulletin.pdf> See also <http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf> [↑](#footnote-ref-28)
29. See *ICMPD Guidelines for the Development of a Comprehensive National Anti-Trafficking Response* (Vienna, 2006), available at: [www.childtrafficking.com/Docs/icmpd2\_061106.pdf](http://www.childtrafficking.com/Docs/icmpd2_061106.pdf). [↑](#footnote-ref-29)
30. See <http://www.naptip.gov.ng/counselling.html> [↑](#footnote-ref-30)
31. See US TIP Report 2013 [↑](#footnote-ref-31)
32. at page 16 [↑](#footnote-ref-32)