



Office of the High Commissioner for Human Rights

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

Preliminary Report

**Regional consultation on the right to an effective
remedy for trafficked persons**

Geneva, 1 March 2013

Context

On 01 March 2013, the Special Rapporteur convened the first regional consultation on the right to an effective remedy for trafficked persons with representatives of States from the Eastern European Group and the Western European and Other States Group, experts and relevant stakeholders to solicit comments on the draft Basic Principles on the right to an effective remedy for trafficked persons (hereinafter referred to as draft Basic Principles) in preparation of her report to the twenty-sixth session of the Human Rights Council pursuant to the Human Rights Council resolution 20/1¹.

This regional consultation, which brought together the representatives of seventeen States of the Eastern European Group and the Western European and Other States Group, was one of the series of regional consultations, planned by the Special Rapporteur to have a deeper discussion on the content of the draft Basic Principles with States, experts and relevant stakeholders.

In the exercise of her mandate, the Special Rapporteur has consistently advocated for the importance of the right to effective remedies for trafficked victims, given its crucial role in ensuring the victims' recovery and reintegration, as well as the prevention of re-victimisation.

In her report to the Human Rights Council in 2011, the Special Rapporteur examined the conceptual basis of the right to an effective remedy in the context of trafficked victims and put forward recommendations to States on how they could fulfil their obligations to provide effective remedies to trafficked victims². In the same report, the Special Rapporteur presented to the Human Rights Council the "Draft Basic Principles on the Right to an Effective Remedy for Trafficked Persons", intended to provide States with useful guidance in operationalizing the right to an effective remedy. The above-mentioned report was informed by an expert consultation held in November 2010 in Bratislava, which brought together experts from academia, civil society, regional and international organizations and UN agencies to discuss possible ways and means of realizing the right to an effective remedy, focusing on the normative framework, content and scope of this right, as well as States' responses and concrete strategies to implement it at the national level³. During the development of the thematic report the Special Rapporteur also sought stakeholders' views through an online discussion forum in February 2011. The Special Rapporteur presented her thematic analysis on the realization of the right to effective remedies for trafficked victims and the draft Basic Principles also to the UN General Assembly in 2011⁴.

Taking note of the report of the Special Rapporteur, the Human Rights Council adopted Resolution 20/1⁵ in June 2012, which among others, requests the Office of the High Commissioner to organize, in close cooperation with the Special Rapporteur on trafficking in persons, especially women and children, consultations with States, regional intergovernmental bodies and organizations and the civil society on the draft basic

¹ A/HRC/RES/20/1

² A/HRC/17/35

³ A/HRC/17/35/Add.6

⁴ A/66/283

⁵ A/HRC/RES/20/1

principles on the right to effective remedy for trafficked persons, and to submit a summary thereon to the Human Rights Council at its twenty-sixth session in June 2014.

Introduction

The consultation was opened by Ms. Kyung-wha Kang, Deputy High Commissioner, the Office of the High Commissioner for Human Rights, and His Excellency Ambassador Mr. Hanns Heinrich Schumacher, Permanent Representative of the Federal Republic of Germany to the UN Office at Geneva. The Deputy High Commissioner underlined the timely nature of the consultation and the importance of effective remedies for trafficked persons, and highlighted the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, which address the issue of effective remedies. Ambassador Schumacher noted the current trend of growing incidents of trafficking in persons which involves millions of victims, and emphasized the significance of international, regional and national mechanisms to prevent, combat trafficking and protect victims from re-victimization. He also underlined the role that OHCHR has played in this regard, including by developing the first comprehensive guideline document, OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, as well as the strong engagement of the Special Rapporteur on trafficking in persons, especially women and children, in particular on developing the draft Basic Principles.

The Special Rapporteur on trafficking in persons, especially women and children, Ms. Joy Ngozi Ezeilo, then explained the objectives, structure and modalities of the consultation.

The agenda⁶ of the consultation was divided into two main sessions, namely: (1) substantive components of the right to an effective remedy; (2) procedural components of the right to a remedy - restitution, recovery and compensation.

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-repetition.⁷ The procedural obligations may be conceived as the range of measures needed to guarantee access to an effective remedy.

Substantive components of the right to an effective remedy

At this session, presentations were made by experts on the existing international legal framework on the right to an effective remedy; rights and obligations in relation to effective remedies from the perspective of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (United Nations

⁶ See agenda in the annex to the present document.

⁷ 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.

Trafficking in Persons Protocol), as well as on the Council of Europe Convention on Action against Trafficking in Human Beings as a regional framework that also addresses the issue of effective remedies.

International and regional legal frameworks related to the rights to an effective remedy

The Special Rapporteur highlighted that the right to an effective remedy is a human rights broadly recognized under the major international human rights instruments. State responsibility in cases of trafficking in persons, often committed by private individuals, criminal groups and networks, may arise “if the Government failed to take necessary measures to prevent the effects of the conduct of private parties”.⁸ It was noted that under the international human rights, States are obliged to provide a remedy to victims of human rights violations committed within its territory and jurisdiction. While the international legal instruments specifically applicable to the crime of human trafficking, that is the United Nations Convention against Transnational Organized Crime and the United Nations Trafficking in Persons Protocol, do not expressly guarantee the right to a remedy to trafficked persons, they do require States to establish procedures to provide access to compensation, and take measures that may form part of effective remedies. While most human rights treaties do not explicitly spell out the content of reparations, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Basic Principles and Guidelines on Remedy and Reparation”) elaborate on the various forms of reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The OHCHR Recommended Principles on Human Rights and Human Trafficking highlights that trafficked persons, as victims of human rights violations, have an international right to adequate and appropriate remedies, which is often not available to trafficked persons as they frequently lack information on the possibilities and procedures for obtaining remedies, including compensation.

Ms. Rahel Gershuni, Crime prevention and criminal justice officer of the United Nations Office on Drugs and Crime, underlined that the protection of victims of trafficking is one of the main three pillars of United Nations Trafficking in Persons Protocol as important as law enforcement or prevention. Article 2 of the Protocol provides that protection of victims should be implemented “with full respect for their human rights”. Its article 6(6) states that “each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered. The Protocol also contains specific obligations on the provision of information and support to victims during court and administrative proceedings. It also contains non-mandatory provisions on physical protection of the victim, recovery and status of victims of trafficking. For instance, concerning recovery, the Protocol recommends taking measures to provide for the physical, psychological and social recovery of victims of trafficking. On the status of victims of trafficking in receiving States, it recommends adopting legislative or other appropriate measures that permit victims of trafficking to remain in its territory, temporarily or permanently, in appropriate cases. However, the Protocol does not stand alone; it is complemented by a constellation of other tools. For example, the Conference of the Parties to the United Nations Convention on Transnational Organized Crime decided to establish an open-ended interim Working Group

⁸ A/56/10, para. 77 (Draft articles on responsibility of States for internationally wrongful acts, general commentary, part one, chap. II, para. 4).

to advise and assist the Conference to implement its mandate according to the Trafficking Protocol. The recommendations of the Working Group go beyond the bare skeleton of the Protocol, and cover important aspects of protection and remedies for trafficked persons such as non-criminalization, non-conditional provision of immediate support and protection, on identification indicators.

In addition, UNODC has developed a body of tools which include recommendations as to victim protection and remedies. An example of such a tool is the Model Law against Trafficking in Persons which includes recommendations anchored in best practices of Member States and in principles of international law. Distinctions are drawn between mandatory and optional provisions and alternatives supplied from national legislations. Examples of protections which appear in the Model Law and are not spelled out in the Protocol include: recovery and reflection period; types of information to be supplied to victims, basic assistance non-contingent upon immigration status or cooperation with law enforcement; recommendation not to hold victims in detention facilities; establishment of victim funds; and temporary or permanent residence permits for victims.

Moreover, the General Assembly Resolution 40/34 includes a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which broadens the scope of victim protection, by expressly mentioning remedies which do not appear in the Protocol and by using the language of obligation to a greater extent than that of the Protocol and addresses victims' rights during the judicial process, restitution and compensation for victims and assistance to victims. Thus, though the Protocol itself is spare and lean, surrounding it there are various instruments which enrich the fabric of protection, and allow Member States to make informed decisions regarding victim protection steps.

With regard to the regional legal frameworks, a presentation was made by Mr Nicolas Le Coz, President of the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA), on the relevant provisions concerning effective remedies contained in the Council of Europe Convention on Action against Trafficking in Human Beings. It was noted that the instrument was opened to signature by non-member States of the Council of Europe and the European Union, and that GRETA had been given the mandate to monitor its implementation. It was underlined that article 10 of the Council of Europe Convention provides for the right of victims to be identified and consequently an obligation for States Parties to carry out identification through well-trained personnel, including law enforcement officials. He underlined that the Convention was the single international legally-binding instrument which contains an obligation to grant a reflection and recovery period of a minimum of 30 days, a period which may be extended by the national authorities taking into consideration the personal situation of the victim. Regarding the protection of victims under threat, it was noted that article 28 of the Convention could be considered as the most advanced international legal provision on protection of victims since it places an obligation on States to grant victims protection measures against intimidations and reprisals. Concerning recovery, article 12 of the Convention provides that States Parties shall guarantee victims' access to a secure accommodation, medical and material assistance, counselling, information and protection. Furthermore, article 15 of the Convention prescribes that States Parties shall provide for the right of victims to legal assistance and free legal aid, as well as to compensation. In addition to envisaging compensation from the perpetrators, the Convention also creates an obligation for the States to guarantee compensation for victims, for example by establishing specific funds. It was also emphasized that the Council of Europe Convention obliges the States Parties to create a co-ordination mechanism which involves all relevant public bodies and civil society actors. Such co-ordination is crucial for ensuring that trafficking victims, once identified, are assisted, protected, reintegrated and rehabilitated so that to avoid repeated violations of their rights.

Procedural components of the right to a remedy - restitution, recovery and compensation

At this session, the panellists made presentations on the national level implementation of the right to an effective remedy for trafficked persons, focusing on the procedural components of the right to a remedy. It was highlighted that the right to a remedy encompasses not only a substantive right to reparations, but also a set of procedural rights necessary to facilitate access to reparations.⁹

Procedural rights

The Special Rapporteur underlined that to have access to remedies, victims of trafficking must be guaranteed a set of ancillary rights which include provision of information about their rights and the ways for obtaining remedies, legal, medical, psychological, social, administrative and any other assistance to exercise the right to an effective remedy in a meaningful manner.¹⁰ It was noted that the provision of information to trafficked persons in a manner that is appropriate in terms of language, content, form and timing remains a challenge. As judicial and administrative proceedings are often complex in many jurisdictions, legal assistance is essential to enable trafficked persons to claim compensation. It was mentioned that free legal assistance is not available in many countries. Despite legal provisions on legal assistance to trafficked persons, the system may not exist or be effectively implemented. Often, legal assistance may only be available from non-governmental or international organizations.¹¹ Further, some States impose eligibility criteria for legal aid, which may be difficult for trafficked persons without required residence status. She also touched upon issue of regularization of residence status noting that the ability of trafficked persons to claim remedies hinges upon the possibility to remain in countries where remedies are sought. It was mentioned that in many instances, however, trafficked persons are misidentified as irregular migrants and detained in immigration detention centres, or immediately deported without being given any opportunity to seek compensation. The Special Rapporteur recommended 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.¹² Secondly, 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.

Restitution/recovery

Ms. Aimée Comrie, Advisor to the Special Representative and Co-ordinator on combating trafficking in human beings of the Organization for Security and Co-operation in Europe (OSCE), made a presentation on restitution and recovery. It was highlighted that in taking measures of restitution the best interest of trafficked persons should be placed at the centre; they should be provided with appropriate residence status as a form of remedy where a safe return to the country of origin cannot be guaranteed and may place them at risk of persecution or further human rights violations, or is otherwise not in their best interests. In relation to the principle of non-punishment, it was recommended that States

⁹ See Human Rights Committee, general comment No. 20 (1992), para. 14.

¹⁰ See Basic Principles and Guidelines on Remedy and Reparation, arts. 11 and 12.

¹¹ OSCE/ODIHR, *Compensation*, p. 82.

¹² Recommended Principles and Guidelines on Human Rights and Human Trafficking, para. 9 and guideline 9, para. 3.

should adopt adequate legislation to ensure that victims of trafficking are not detained, prosecuted or punished for offences relating to their having been trafficked; reinforce their efforts to identify victims promptly through increased training of public officials likely to first come into contact with victims, including immigration and labour officials; enhance partnership with civil society and NGOs, and safeguard the rights of victims of trafficking. In addition, convictions for trafficking-related offences should not restrict their access to residency and labour law remedies. It was emphasized that States should effectively address the root causes of trafficking to avoid the risk of being re-trafficked or being subject to further human rights violations. On recovery, she provided a list of recommendations such as to provide a non-conditional reflection and recovery period, during which trafficked persons are assisted in their physical, psychological and social recovery, including, but not limited to appropriate housing, counselling and information about their situations and legal rights; medical, psychological and material assistance; and employment, educational and training opportunities.

Compensation

In her presentation on this topic, Ms. Klara Skrivankova, Coordinator of trafficking program of the Anti-Slavery International, noted that the issues of access to justice and effective remedies including compensation are rarely discussed and addressed. She emphasized that compensation needs to be seen as an important means of combating trafficking which serves restorative, punitive and preventive purposes. It was suggested that compensation has to be considered at an early stage as a key element of protection and combatting trafficking and not as a secondary element. There are non-material (physical and mental health damages) and material harms (health service costs, lost opportunities, lost job revenue) caused to victims of human trafficking. She noted that compensation could contribute to financial autonomy that would prevent further re-victimization and address the vulnerability of victims. Regarding possible ways of providing compensation, she noted that creating compensation funds through redirecting criminal assets of traffickers has not yielded results. There is a need for strengthening the link between financial investigation of trafficking-related cases and law enforcement investigation in order to be able to seize the assets of traffickers to pay for victim compensation and other services. On the use of employment tribunals, it was noted that many victims of trafficking were left unsatisfied, because people with illegal residence status could not access such tribunals. She underlined that despite the remaining challenges there have been several cases in Europe where victims of trafficking received compensation.

Overview of discussion

Many delegates expressed their support for the Special Rapporteur's initiative on the draft Basic Principles and underlined that the draft principles provide a good basis for further developing the framework for protection of and assistance to victims of trafficking.

On the international legal framework, it was noted that although the UN Trafficking in Persons Protocol provides an important basis for combating human trafficking, it needs further interpretation and development. Concerning the obligations of States with regard to effective remedies, it was noted that such obligations come from human rights law and the United Nations Trafficking in Persons Protocol which requires States to ensure that their domestic legal system provides mechanism for compensation for victims of trafficking. It was also pointed out that it would be important not to overemphasize the responsibility of States for acts committed by non-State actors, and that some of the elements of effective remedies contained in the draft Basic Principles are beyond the well-established and recognized obligation of States and should be recast as best practices.

Several delegates stressed the need for more human rights-based and victim-oriented approach in addressing trafficking in persons and ensuring that victims are not treated as criminals, and expressed support for various steps mentioned in the draft Basic Principles on identification and provision of information to victims. It was noted that linking the granting of residence or immigration status to victim's willingness to engage with law enforcement processes could be instrumental for avoiding misuse of public benefits and providing incentives to bring perpetrators to justice. It was recommended that immigration relief should be extended to immediate family members of victims of trafficking to facilitate family reunion which is important for recovery, and that longer reflection periods could be considered especially in case of children victims. A suggestion was made to pay further attention to balancing in the draft Basic Principles the needs of victims and the need of ensuring that perpetrators of human trafficking are subjected to robust investigation and prosecution.

Some delegates informed about their national efforts undertaken to enhance access to effective remedies for trafficked persons, in particular on victim support and rehabilitation, and about the relevant changes made to their national regulatory frameworks. In this context, it was noted that the draft Basic Principles could be helpful in developing national policy responses or regulations on assistance and remedies to victims of trafficking in persons. The issue of capacity building and trainings for all relevant State actors as well as private actors such as lawyers dealing with cases of human trafficking was addressed as well.

A number of delegations suggested emphasizing in the draft Basic Principles the importance of cooperation among countries of origin, transit and destination on protection of victims and provision of effective remedies. It was also proposed to add a separate section on a gender perspective.

Participants suggested that an invitation for inputs be sent to States so as to enable broader consultation and involvement of relevant actors at the national level in this work.

In response to questions and comments made by State representatives, the panellists noted that a reflection period is meant to provide first aid to help victims overcome psychological and physical trauma, after which applications for immigration status could be pursued. It was suggested that States' positive obligations under international law to prevent human trafficking and conduct investigations should be taken into account in further refining the Basic Principles. Furthermore, it was noted that States may be responsible for providing remedies where they fail to act with due diligence to prevent violations of rights committed by non-State actors, protect victims or investigate and punish alleged perpetrators.

In her closing remarks, the Special Rapporteur informed that the summary report of the regional consultations would be submitted to the twentieth-sixth session of the Human Rights Council, and underlined the importance of receiving inputs and suggestions from States on the draft Basic Principles.

Agenda

**First Regional Consultation on the Right to an Effective Remedy
for Trafficked Persons**

01, March, Friday, 2013, 12.00-15.00
Geneva, Palais des Nations, Room XXI

Friday, 01 March 2013

12.00 – 12.30

Opening remarks

Ms. Kyung-wha Kang, Deputy High Commissioner, Office of the High Commissioner for Human Rights

Welcoming remarks

His Excellency Ambassador Mr. Hanns Heinrich Schumacher, Permanent Representative of Federal Republic of Germany to the UN Office at Geneva

Introduction and objectives to the consultation

Chair:

Ms. Joy Ngozi Ezeilo, Special Rapporteur on trafficking in persons, especially women and children

12.30–13.30

Draft Basic Principles on the right to an effective remedy for trafficked persons: - Substantive components of the right to an effective remedy

Overview of the international legal framework on the right to an effective remedy

Ms. Joy Ngozi Ezeilo, Special Rapporteur on trafficking in persons, especially women and children

Rights and obligations in relation to effective remedies: The United Nations Trafficking Protocol's Perspective

Ms. Rahel Gershuni, United Nations Office on Drugs and Crime

Regional frameworks - Council of Europe Convention on Action against Trafficking in Human Beings

Mr. Nicolas Le Coz, Council of Europe's Group of Experts on Action against Trafficking in Human Beings

Questions and answers session

13.30 – 14.30

Draft Basic Principles on the right to an effective remedy for trafficked persons: - Procedural components of the right to a remedy - restitution, recovery and compensation

Procedural preconditions in realizing the right to effective remedies

Ms. Joy Ngozi Ezeilo, Special Rapporteur on trafficking in persons, especially women and children

Restitution/recovery

Ms. Aimée Comrie, Office of Special Representative and Coordinator for Combating Trafficking in Human Beings, OSCE

Reparation/Compensation

Ms. Klara Skrivankova , Anti-Slavery International

Questions and answers session

14.30 – 15.00

Conclusions and recommendations

Closing remarks, Ms. Joy Ngozi Ezeilo, Special Rapporteur on trafficking in persons, especially women and children

The working language of the meeting will be English with simultaneous interpretation in Russian.