



**Office of the High Commissioner for Human Rights**

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

**Preliminary Report**

**Consultation on the right to an effective  
remedy for trafficked persons**

**Vienna, 7 November 2013**

## Context

On 7 November 2013, the Special Rapporteur convened a consultation on the Right to Effective Remedies for Trafficked Persons on the margins of the Fifth Session of the Open-ended Interim Working Group on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. The event was intended to provide an opportunity to engage in deeper discussions on the content of the on the draft Basic Principles on the right to an effective remedy for trafficked persons (hereinafter referred to as draft Basic Principles) with State's representatives from around the world, experts and relevant stakeholders, and to solicit comments in preparation of her report to the twenty-sixth session of the Human Rights Council pursuant to the Human Rights Council resolution 20/1<sup>1</sup>.

Since March 2013, the Special Rapporteur in cooperation with Office of the United Nations High Commissioner for Human Rights (OHCHR) has convened regional consultations in Geneva, Santiago and Bangkok, and a global consultation in New York. This was the second global consultation which was attended by representatives of thirty States from various regions and UN, international and regional organizations and mechanisms.

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 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 for trafficked victims and put forward recommendations to States on how they could fulfil their obligations to provide effective remedies to trafficked victims<sup>2</sup>. 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 level<sup>3</sup>. 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 2011<sup>4</sup>.

Taking note of the report of the Special Rapporteur, the Human Rights Council adopted Resolution 20/1<sup>5</sup> in June 2012, which among others, requests the Office of the

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<sup>1</sup> A/HRC/RES/20/1

<sup>2</sup> A/HRC/17/35

<sup>3</sup> A/HRC/17/35/Add.6

<sup>4</sup> A/66/283

<sup>5</sup> A/HRC/RES/20/1

High Commissioner to organize, in close cooperation with the Special Rapporteur on trafficking in persons, especially women and children, consultations with States, regional intergovernmental organizations and civil society on the draft basic principles on the right to effective remedy for trafficked persons, and to submit a summary thereon to the Human Rights Council for its twenty-sixth session in June 2014.

## Introduction

The consultation was opened by Ms. Youla A. Haddadin, OHCHR Trafficking Advisor. She underscored the importance of the work and activities undertaken by the Special Rapporteur with regard to the issue of the provision of effective remedies to trafficked person. She mentioned the Special Rapporteur's 2011 report to the Human Rights Council which examined the legal framework on the right to an effective remedy, good practices and main challenges in ensuring its effective implementation at the national level. She also presented some of the recent activities of OHCHR related to effective remedies for trafficked persons.

The Special Rapporteur on trafficking in persons, especially women and children, Ms. Joy Ngozi Ezeilo, explained the objective of this consultation on the right to an effective remedy, the structure and modalities of the meeting, and presented the key components of the draft Basic Principles on the right to an effective remedy for trafficked persons. She noted that the draft guidance attempts to specify the substantive components of the right to effective remedy, which include restitution, compensation, recovery, satisfaction, and guarantees of non-repetition, as well as the procedural rights necessary to access reparations.

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 recovery (rehabilitation); compensation; satisfaction and guarantees of non-repetition.<sup>6</sup> The procedural obligations may be conceived as the range of measures needed to guarantee access to an effective remedy.

In her presentation, Ms. Rahel Gershuni, Crime Prevention and Criminal Justice Officer, United Nations Office on Drugs and Crime (UNODC), provided an overview of the international legal framework on the right to effective remedies, with particular focus on the perspective of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (United Nations Trafficking Protocol). She underlined that the importance of the Draft Basic Principles on Effective Remedies lies in their holistic view of what it means to assist effectively victims to overcome the manifold ills of trafficking. The Draft Basic Principles take the view that monetary compensation is not enough, but rather restitution in the wide meaning of that concept – to return the victim, as far as possible, to the situation before he/she was trafficked or to make him/her whole again should be the ultimate aim. A whole array of steps is reflected in Article 7 of the Draft

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<sup>6</sup> 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.

Basic Principles, such as restitution, recovery or rehabilitation, compensation, satisfaction and guarantees of non-repetition.

The draft basic principles on the right to an effective remedy for trafficked persons derive from an array of international sources. The first is international human rights treaties or customary law which by and large accord the right to a remedy when the State, either intentionally, or by violating its duty of due care and diligence violates the human rights of a victim. In the context of trafficking, these obligations might arise from complicity of State officials or from State failure to prevent trafficking or respond adequately to it. The second source is specific treaties dealing with trafficking in persons and which provide the right to remedies, although mandatory provisions are few in them. With regard to 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 (“The Protocol”), she underlined that it sets forth a series of rights. It differs from the other international instruments mentioned above in that it imposes obligations and recommendations not based on an act of State agents, but are rather viewed as steps necessary to combat the phenomenon. The Protocol devotes an entire section to the protection of victims of trafficking. Moreover, the protection of victims appears in the statement of purpose of the Protocol along with preventing and combating trafficking and promoting cooperation among States Parties. Thus, victim protection is one of the three pillars of this treaty. It was highlighted that in the Protocol the protection of victims is as important as law enforcement or prevention measures, and should be implemented “with full respect for their human rights”. Ms Gershuni noted that the Protocol’s message is clear, i.e. the protection of victims is central to the battle against trafficking. The sections dealing with specific rights are somewhat skeletal, in that they are silent regarding central issues and in most cases, use the language of soft law – recommending, rather than obligating. The most obligatory language appears in Article 6(6) 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. Similar language is used in Article 8 dealing with the repatriation of victims. However, even physical protection of victims is not absolutely obligatory, though “States shall endeavour to provide” for it, while victims are in their territory. Least obligatory are Article 6(3) dealing with the recovery of victims of trafficking and Article 7 dealing with their residence status. In regard to recovery, the Protocol recommends that “Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking...” Thus services like appropriate housing, counseling and provision of information and in particular as regards legal rights, medical, psychological and material assistance, and employment, educational and training opportunities are recommended, but not mandatory. In regard to the status of victims of trafficking in receiving states, the Protocol states that “each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking to remain in its territory, temporarily or permanently, in appropriate cases.”

At the conclusion of her presentation, Ms Gershuni posed two questions for discussion with regard to the Draft Basic Principles: Firstly, whether the Draft Principles should allow for different domestic systems. She noted that the variation among domestic legal systems should be considered in formulating the Basic Principles in order to recognize that goals may be achieved by various systems, rather than by mandating any one such system. For example, when dealing with compensation, the goal should be to assure a victim’s right to compensation, whether in the framework of a court proceeding or outside. The second question she proposed for further discussion was what would be the value of an encompassing in the Draft Basic Principles a large set of recommended steps or specific measures given the low resources of some States.

In her presentation, 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), gave an overview of the procedural preconditions for realizing the right to an effective remedy, and discussed also about the substantive components such as restitution, recovery and compensation. She underlined that the victims' access to justice and to compensation is at the core of the mandate of the Office of the OSCE Special Representative and Coordinator on combating trafficking in human beings. She stressed that justice for victims of trafficking must be measured, not only by the numbers of victims identified, the amount of police officers and border guards trained, or the numbers of perpetrators convicted, but also by answering the important question, namely to what extent the lives of victims have been improved, not only through material compensation, but in terms of ameliorating the quality of their lives.

Concerning the procedural requirements without which victims of trafficking cannot access remedies, she noted that victims can be denied justice in two ways – directly, and indirectly. In the direct way, a victim of human trafficking may be identified as such but cannot in fact access remedies for a host of possible reasons: a failure to investigate a case of trafficking, a lack of sufficient evidence for conviction, an inability to seize or confiscate assets of the perpetrator or to award compensation to the victim, and also where a victim is tried and punished for acts directly linked to his or her status as a victim. It was noted that probably one of the most serious obstacles to justice lies within the indirect form – and one could plausibly argue that the majority of victims of human trafficking are not identified in the first place - they may be detained for immigration irregularities, deported, fined for labour violations, placed in child custody centres, or tried and convicted for offences related to their trafficking. As she emphasized, it is in this latter category that the procedural aspects of effective remedies are revealed to be critical. As such, some of the procedural aspects contained in the Draft Basic Principles include: a) Ensuring the quick and accurate identification of trafficked persons, including providing adequate training to law enforcement and other agencies that might come into contact with victims; b) Ensuring that victims are not subject to discriminatory treatment in law or in practice on any ground, including race, colour, sex, national or social origin, their status as victims of trafficking, their occupation or types of exploitation to which they have been subjected; c) Ensuring that the individual circumstances of victims are given due consideration and are centered on the full empowerment of victims and respect for their human rights, including that at a minimum, states should 'do no harm'.

The 'Draft Basic Principles' lists three core remedies: restitution, recovery and compensation. Traditionally, in criminal and tort law, restitution seeks to restore the victim to the situation that would have existed had the crime not happened. In the case of victims of human trafficking, restitution may raise some unique challenges such as "What does it mean to return to one's position prior to the crime in the case of trafficking?, How do you restore what was lost?, How do you account for varying cultural or other norms which reflect the diversity of backgrounds and experiences of victims when restoring a person to their former state?" In this sense, she noted that it is important that Article 7.a. of the Draft Basic Principles stresses that the "best interests of trafficked persons must be placed at the centre in providing measures of restitution".

Ms. Aimée stressed that the non-punishment provision may be one of the most important elements of restitution available and that the principle of non-punishment of victims of trafficking is provided for in international and regional instruments as well as emerging case law, and was the subject of key recommendations by the OSCE Special Representative published in 2013. Many victims of trafficking not only fail to receive adequate assistance and protection as victims of a serious crime, but they are also often arrested, detained, deported, charged with immigration offences, for soliciting prostitution or engaging in illegal work, forgery of identity documents, amongst others. The exposure of

victims to the risk of criminal punishment is in fact often a deliberate strategy of traffickers. Therefore, she urged States to be aware of these developments and to adopt legislation to ensure that victims of trafficking are not punished – whether criminally or via administrative means – for offences related to their having been trafficked.

Restitution also calls for measures to effectively address root causes in order to ensure that trafficked persons are not returned to their pre-existing position, including the risk of being re-trafficked. As she noted, this is another critical remedy available and requires strategic planning and partnership in order to realize effective long-term prevention. Root causes are multiple, overlapping and complex. They may include poverty, discrimination, and the lack of the rule of law among others. Important initiatives in this vein have already included for instance addressing the demand for labour exploitation, sexual exploitation or the removal of organs; promotion of codes of conduct for businesses as well as in public procurement schemes; legal and economic empowerment projects among sectors of the population at risk of trafficking such as women, children, and ethnic minorities.

On recovery the Draft Basic Principles specify that States shall provide a non-conditional reflection and recovery period, during which trafficked persons are provided with measures necessary for the physical, psychological and social recovery. Following a reflection and recovery period, trafficked persons should be provided with temporary or permanent residence status on certain grounds. She welcomed that the issue of unconditional provision of assistance to victims of trafficking, regardless of their cooperation in legal proceedings, had been included in the category of remedies. It was noted that victims of trafficking should be entitled to full compensation for the harm and damages suffered. At the procedural level, victims of human rights violations must be guaranteed access to a competent and independent authority in order to successfully obtain reparations.

She concluded her presentation by emphasizing that compensation may take different forms according to the varying experiences and needs of victims, and that compensation should be envisaged for both material and immaterial damages suffered by victims.

During the discussion, delegates expressed their support for the Special Rapporteur's work and activities on addressing various issues related to trafficking in persons, including the Draft Basic Principles. It was noted that the Draft Basic Principles provide useful guidance and offer clarity about some key concepts of this right. Concern was expressed whether the issues of non-criminalization would be compatible with relevant national laws and regulations on immigration. In response to this question, it was noted by panelists that although the principle of non-criminalization is not reflected in the UN Protocol on Trafficking in Persons, it is an important issue. At the human level, if the person who underwent severe exploitation is criminalized, he/she will not be able to access remedies. It was also noted that immigration laws should take into account the situation of victims. In this context, it was also highlighted that victim identification is important as it helps to distinguish cases of victims of trafficking from those of irregular migrants.

In her closing remarks, the Special Rapporteur informed that the summary reports of the regional and global consultations will be submitted to the twentieth-sixth session of the Human Rights Council, and welcomed further comments and suggestions from States on the draft Basic Principles.

ANNEX I.

**Fifth Session of the Open-ended Interim Working Group on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime**

**Side Event  
The Right to Effective Remedies for Trafficked Persons**

07 November 2013, Thursday, 14.00-15.00 pm, Conference Room 4 (CR4), "C" Building, Vienna  
International Conference Centre, Vienna

**Agenda**

- *Opening statement*, Ms. Youla A. Haddadin, Advisor on Trafficking in Persons, Office of the United Nations High Commissioner for Human Rights
- *Introduction and objective of the global and regional consultations on the right to an effective remedy*, Ms Joy Ngozi Ezeilo, Special Rapporteur on trafficking in persons, especially women and children
- *Overview of the international legal framework on the right to effective remedies: The United Nations Trafficking Protocol's Perspective*, Ms. Rahel Gershuni, Crime Prevention and Criminal Justice Officer, United Nations Office on Drugs and Crime
- *Overview of procedural preconditions for realizing the right to an effective remedy. Issues of Restitution, Recovery and Compensation*, Ms. Aimée Comrie, Advisor, Office of Special Representative and Coordinator for Combating Trafficking in Human Beings, OSCE
- *Discussion*
- *Closing remarks*, Ms Joy Ngozi Ezeilo, Special Rapporteur on trafficking in persons, especially women and children