

The right to an effective remedy for victims of trafficking in persons:  
A Survey of International Law and Policy

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## Introduction

The redress of wrongs is a fundamental legal principle that has been recognized as constituting both a general principle of law and a customary rule of law accepted and applied in all legal systems.<sup>1</sup> Provision of remedies to victims of crimes is similarly entrenched in history and reflected in different legal systems.

In international law, the obligation to provide remedies is a *consequence* of an internationally wrongful act. A state will be held legally responsible for violations of international law if it was actually involved in the commission of the violation or if it did not follow the required standard of care in preventing or responding to the violation. In either case, the State owes a duty of reparation (or “remedies”) for the resulting harm. That duty may be owed to another State or, under certain circumstances, to an individual. An obligation to provide remedies can also arise directly through a treaty. In the context of trafficking for example, relevant legal instruments require States Parties to facilitate the involvement of victims in criminal proceedings or provide for the possibility of compensation. These obligations exist independently of any finding regarding the responsibility of the State for the original harm.

Traditional international law doctrine requires that reparation for an internationally wrongful act: “must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed.”<sup>2</sup> The accepted forms of reparation attached to that traditional doctrine are: (i) restitution; (ii) compensation, and (iii) satisfaction and guarantees of non-repetition. In the context of remedies for human rights violations, slightly different categories are sometimes identified, for example: the right to equal and effective access to justice and the right to truth.<sup>3</sup> These characterizations serve to underline the breadth of the concept of remedy in international law and practice.

Remedies are a critical aspect of the international legal response to trafficking, confirming the status of trafficked persons as victims of crime and victims of human rights abuse. Over the past decade, States and the international community have come to better understand the true consequences of trafficking – an essential prerequisite to consensus on what constitutes ‘effective’ and ‘appropriate’ remedies for trafficking-related harm. There have also been great improvements in the articulation and acceptance of legal obligations owed by States to prevent and respond to such harm. Unfortunately, and despite this important progress, victims of trafficking very rarely receive the justice to which they are entitled. Many are never identified correctly, a situation that assures their right to a remedy cannot be acknowledged or respected. Routine detention and deportation of trafficked persons are similarly obstructive of the right to a remedy, as is the failure to provide victims with legal assistance, information and support. Other factors contributing to the widespread non-fulfillment of the right to a remedy include inadequate legal frameworks; persistently low rates of prosecutions for trafficking related exploitation (particularly in situations

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<sup>1</sup> M.C. Bassiouni, *International Recognition of Victims Rights*, 6 *Human Rights Law Review* (2006) at 206-207. (Hereafter: Bassiouni, “International Recognition of Victims’ Rights”).

<sup>2</sup> *Factory at Chorzow (Germany v. Poland), Merits*, [1928] PCIJ Rep, Series A, No. 17, at 47. For a more recent re-statement of that doctrine see International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session*, UN GAOR 56<sup>th</sup> Sess., Supp No.10, at 43, UN Doc. A/56/10 (2001).

<sup>3</sup> Bassiouni, “International Recognition of Victims’ Rights”.

where offender identification and prosecution conviction is a prerequisite for certain remedies); lack of protection to victims and victim-witnesses; discrimination on the basis of nationality and citizenship; absence of effective international legal cooperation; and low rates of success in tracing and seizing profits of trafficking related crimes.

This paper sets out the international legal and policy framework that relates to remedies for victims of trafficking with a view to promoting greater clarity as to what is required of States in this area. Clarity about obligations and responsibility is important because it is on this foundation that strategies for improving access to justice for victims of trafficking can be developed, implemented, monitored and evaluated.

Part One considers the right to a remedy in the specific context of trafficking, examining the law and policy that underpin the obligation on States to provide remedies for trafficking. Part Two outlines the appropriate standard of remedies for trafficking-related violations and the various forms that such remedies may take. This Part confirms the necessary breadth of the concept of remedies. While victims of trafficking may well desire or require financial compensation for the harm inflicted upon them, that is only one form of possible remedy. Securing justice for victims also means ensuring that perpetrators are identified, prosecuted and sanctioned; that trafficked persons are able to play a role in the criminal justice process; that they are repatriated safely and humanely; and that serious efforts are made to address the discrimination or other human rights violations that contributed to trafficking-related harm. In Part Three, the question of accessing remedies is discussed. What are the major obstacles to effective realization of the right to a remedy and what is required of States with regard to removing or addressing these obstacles? An annex uses the legal authorities cited in this paper to propose a set of draft basic principles on remedies for victims of trafficking.

## **1. Remedies in the context of trafficking: rights and obligations**

As noted above, the obligation to provide remedies and the right to access remedies in the context of trafficking can arise in several different ways.<sup>4</sup> In the first case, the obligation will be a consequence of the State being found to be directly responsible for the violation of a human right or other obligation that is protected under international law through either custom or treaty. (For example, direct engagement in trafficking by officials acting “under color of authority”, violation of the prohibition on sex-based discrimination through an executive act prohibiting women from emigrating in search of work). It is important to note that States will generally not be held legally responsible for conduct of private entities (e.g. private traffickers and exploiters) unless there are indications of control or approval sufficient to link that conduct to the State.

In the second case, legal responsibility can arise when the State is not directly implicated in the initial harm, but has failed to discharge its obligation to prevent the harm and/or to respond appropriately. For example, a State may be held responsible for failing to investigate and prosecute trafficking to the required standard of due diligence. It is in relation to this subsequent failure, not the original act, that the State incurs an obligation to provide remedies. In deciding whether there has been a failure of legal obligation it is always necessary to examine the primary rule: the treaty

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<sup>4</sup> These issues are explored in much greater detail in Anne T. Gallagher, *The International Law of Human Trafficking* (2010), Chapter 4. (Hereafter: Gallagher: *The International Law of Human Trafficking*).

or customary norm that specifies the required standard of prevention or response. A full consideration of the legal obligations on States with respect to trafficking is beyond the scope of the present paper. However, the following extract summarizes an important finding of such an analysis:

“In relation to trafficking, States will generally not be able to avoid responsibility for the acts of private persons when their ability to influence an alternative more positive outcome, (judged against the primary rule) can be established. In such cases, the source of responsibility is not the act itself but the failure of States to take measures of prevention or response in accordance with the required standard”.<sup>5</sup>

Finally, the primary rule may itself require the State to provide specific remedies. As explored below, many human rights treaties and some trafficking-specific legal instruments require States parties to ensure remedies are made available to victims. Once a treaty-based remedy can be found to apply to a particular situation, then failure of the State to provide such remedies itself becomes an independent breach of that instrument.

### 1.1. State obligations to remedy violations of human rights

Human rights law is a particularly important source of primary obligation in the present context because trafficking invariably involves multiple violations of human rights that are protected in treaties and, in some cases, through customary international law. It is a well-established rule of international law that States have a duty to provide a domestic legal remedy to victims of human rights violations (and violations of international humanitarian law) committed in their territory.<sup>6</sup> In human rights law, the first formal articulation of this obligation was in the Universal Declaration of Human Rights. (Article 2). Most international and regional human rights treaties explicitly recognize a *substantive* right to remedy for violations as well as a *procedural* right of access to remedies. The ICCPR, for example, requires States Parties to ensure “that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.” Similar provisions are found in the European Convention on Human Rights (Article 13); and the American Convention on Human Rights (Article 25). The African Charter provides every individual with “the right to appeal to competent national organs against acts violating his fundamental rights.” (Article 7). The Convention on the Elimination of All Forms of Racial Discrimination requires States to provide effective remedies and upholds the right of all persons to seek from national tribunals “just and adequate reparation or satisfaction for any damage suffered as a result of ... discrimination.” (Article 6). The Convention against Torture is also explicit in providing victims with an “enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.” (Article 14). The Convention on the Rights of the Child includes a similar provision (Article 39). The Migrant Workers Convention’s provision on remedies, (Article 83), is identical to that of the ICCPR. The Rome Statute of the International Criminal Court grants the Court broad powers to order convicted persons to make symbolic or financial reparations to victims (Article 73).<sup>7</sup>

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<sup>5</sup> *Ibid*, p. 274.

<sup>6</sup> See generally, D. Shelton, *Remedies in International Human Rights Law* (1999), and Bassiouni, “International Recognition of Victims’ Rights”.

<sup>7</sup> See note 74, below and accompanying text.

Two of the major international human rights treaties, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), do not explicitly provide for a right of remedy. The relevant ILO Conventions on forced labour and migrant workers are similarly silent on this point. However, it has been argued that the obligation to provide a remedy for human rights violations may be present even when not specifically articulated in a treaty: either because it is implicit in such treaties which require national implementation to be effective, or because the obligation to provide remedies for such violations is itself a norm of customary international law.<sup>8</sup>

As noted above, the existence of a treaty-based right to a remedy means that failure of the State to provide remedies becomes an independent breach of that instrument. In the human rights context, this can mean that the State will be held responsible for a series of violations including the individual violation that gives rise to the right to a remedy as well as the breach of that right.

The international community has developed several important instruments that help to flesh out the substantive content of the right to a remedy for human rights violations. The first of these was the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>9</sup> The Declaration, which focuses on the victims of *domestic* crimes committed by *individuals*, affirms that such persons are to be treated with compassion and with respect for their dignity and are entitled to access to justice and fair treatment, including judicial and administrative processes that are responsive to the needs of victims.<sup>10</sup> In respect of remedies, the Declaration affirms that those responsible for the harm (including the State where it can be deemed responsible for the harm inflicted) should make fair restitution to the victims, their families or their dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.<sup>11</sup> Where compensation is not fully available from the offender or other sources, the State should endeavor to provide compensation to victims and their families.<sup>12</sup> The establishment of national funds for compensation to victims is encouraged.<sup>13</sup> While these provisions are identified as applying only to victims of crime, they would be relevant to victims of violations of international norms (for example, the prohibition on trafficking or the prohibition on sex-based discrimination) to the extent that these have been incorporated into national criminal law.

The rules on remedies and reparation applicable to human rights violations committed by or implicating States have been clarified with the adoption, by the General Assembly in 2005, 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 (Principles and Guidelines on the Right to a Remedy and Reparation).<sup>14</sup> This instrument has

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<sup>8</sup> See Bassiouni, "International Recognition of Victims' Rights," at 218. See also references at Gallagher 2010, p. 357.

<sup>9</sup> UN General Assembly, "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power," UN Doc. A/40/53, Nov. 29, 1985 ("Basic Principles for Victims of Crime and Abuse of Power").

<sup>10</sup> *Ibid.* at paras. 4-6.

<sup>11</sup> *Ibid.* at paras. 8-11.

<sup>12</sup> *Ibid.* at para. 12.

<sup>13</sup> *Ibid.* at para. 13.

<sup>14</sup> UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law," UN Doc.

been described as an international bill of rights for victims of international crimes.<sup>15</sup> It does not create new obligations for States – rather, it seeks to “identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law.”<sup>16</sup>

While applicable only to the worst human rights and humanitarian law violations, the Principles and Guidelines on the Right to a Remedy and Reparation is a key document in the present context - serving to clarify some of the most important principles relating to remedies for all violations. For example, it confirms that the general obligation on States to ensure respect for and to implement human rights law includes an obligation to ensure equal and effective access to justice and the availability of remedies.<sup>17</sup> It also confirms that the right to a remedy for gross violations of human rights, a term that would incorporate egregious cases of trafficking,<sup>18</sup> includes the rights of access to justice, reparation for harm suffered, and access to information concerning violations and reparation mechanisms.<sup>19</sup> Access to justice is seen as including protection of victims’ privacy and safety in the course of any legal proceedings as well as measures to ensure that victims can actually exercise their rights to a remedy.<sup>20</sup>

The Principles and Guidelines on the Right to a Remedy and Reparation identify the purpose of reparations as being to promote justice by redressing violations.<sup>21</sup> Reparations are, as noted above, linked to responsibility: a State is required to provide reparation for those acts or omissions that can be attributed to it. In relation to acts that cannot be attributed to the State, the responsibility for reparation falls on the perpetrator and judgments to this effect should be effectively enforced by the State.<sup>22</sup> If it is not possible to secure reparations for victims in this way, then the State itself should endeavor to ensure the provision of reparations and other assistance.<sup>23</sup> This instrument confirms that reparation for victims of gross violations of human rights should be full and effective while respecting the principles of appropriateness and proportionality.<sup>24</sup> Reparation covers the accepted range of remedial elements including restitution, compensation and rehabilitation.<sup>25</sup> Guarantees of non-repetition are also highlighted as an additional, important

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A/RES/60/147, Dec. 16, 2005 (“Principles and Guidelines on the Right to a Remedy and Reparation”). For a detailed analysis of the drafting history and substantive provisions of this instrument, see Bassiouni, “International Recognition of Victims’ Rights,” at 247-278 and Redress Trust, “Implementing Victims’ Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparations” (2006).

<sup>15</sup> Bassiouni, “International Recognition of Victims’ Rights,” at 203.

<sup>16</sup> “Principles and Guidelines on the Right to a Remedy and Reparation,” at Preambular para. 7.

<sup>17</sup> *Ibid.* at Art. 3.

<sup>18</sup> The term “gross violations of human rights” is not defined in the “Principles and Guidelines on the Right to a Remedy and Reparation.” Late in the drafting process it was proposed to be defined as meaning: “unlawful deprivation of the right to life, torture, or other cruel, inhuman treatment or punishment, enforced disappearance, slavery, slave trade and related practices, deprivation of the rights of persons before the law and similar serious violations of fundamental rights and freedoms and norms guaranteed under applicable international law.” Bassiouni, “International Recognition of Victims’ Rights,” at 251.

<sup>19</sup> “Principles and Guidelines on the Right to a Remedy and Reparation,” at Arts. 12, 15, 24.

<sup>20</sup> *Ibid.* at Arts. 12-14.

<sup>21</sup> *Ibid.* at Art. 15.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at Art. 16.

<sup>24</sup> *Ibid.* at Art. 18.

<sup>25</sup> *Ibid.*

element that aims above and beyond the individual victim and focus, in particular by ensuring prevention of future violations.<sup>26</sup>

## 1.2. Trafficking-specific law and policy

This section considers the ways in which the general international legal right to a remedy has been affirmed and, in some cases expanded, through treaties and other legal and non-legal instruments that relate specifically to trafficking.

The 2000 United Nations Convention against Transnational Organized Crime (Organized Crime Convention) and its Trafficking Protocol, are central to the modern international legal framework around trafficking. While the Convention's ambit is wider, its provisions apply, *mutatis mutandis* to the Protocol and the two instruments must be interpreted together.<sup>27</sup> Article 25 of the Convention requires States Parties to "establish appropriate procedures to provide access to **compensation** and **restitution** for victims of offences covered by the Convention."<sup>28</sup> While this provision does not *require* that victims of trafficking be guaranteed compensation or restitution, it is clear that the State's legislative or other measures must provide procedures whereby it can be sought or claimed by victims of serious transnational crimes.<sup>29</sup>

The Trafficking Protocol, considered to be "the principle legally binding global instrument to combat trafficking in persons",<sup>30</sup> is more equivocal than its parent instrument on the point of remedies. In one of its very few mandatory victim support provisions, the Protocol requires States Parties to ensure that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.<sup>31</sup> Crucially, this provision does not amount to an obligation to provide remedies. To discharge their obligation under the Protocol, States Parties need only offer the *legal possibility* of compensation.<sup>32</sup> The ways in which this obligation can be discharged are discussed further at Part 2, below. Significantly, the Trafficking Protocol is silent on other forms of remedy such as restitution and also on the issue of *access* to remedies. It does not, for example, require States to provide victims with information on their legal rights including their right to seek and receive compensation for injuries and loss. While States Parties have, on several occasions, reaffirmed the importance of remedies including

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<sup>26</sup> *Ibid*, at Art. 23.

<sup>27</sup> Organized Crime Convention, Article 37(4), Trafficking Protocol, Article 1(1), 1(2).

<sup>28</sup> Organized Crime Convention, at Art. 25(2). Note that there is no explanation of the term "restitution" in the Convention or any of the available interpretative materials.

<sup>29</sup> UN Office on Drugs and crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, (2004), at Part 1, at 170, (Hereafter: "Legislative Guide").

<sup>30</sup> Conference of the Parties to the United Nations Convention on Transnational Organized Crime, Decision 4/4, "Trafficking in Human Beings", reproduced in UN Doc. CTOC/COP/2008/19, Dec 1, 2008.

<sup>31</sup> Trafficking Protocol, at Art. 6(6). Note that this provision represents a retreat from earlier drafts in which the obligation was formulated in more precise terms as follows: "States Parties shall ensure that their legislative frameworks contain measures that provide victims of trafficking in persons with access to adequate procedures for seeking: (a) Compensation for damages, including compensation coming from fines, penalties or, where possible, forfeited proceeds or instrumentalities of perpetrators of trafficking in persons; and (b) Restitution from the offenders." See *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2006) at 365-373. (Hereafter: "Travaux Préparatoires to the Organized Crime Convention and Protocols").

<sup>32</sup> *Legislative Guide*, at Part 1, para. 368.

compensation,<sup>33</sup> they are yet to provide additional clarity on the substantive content of this particular treaty obligation.

The Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention) takes a much more comprehensive approach than the Trafficking Protocol to the issue of victim compensation and legal redress. The provision on remedies commences with a requirement that victims be provided with information on relevant judicial and administrative proceedings<sup>34</sup> (relating, *inter alia*, to possibilities for obtaining compensation and regularization of immigration status)<sup>35</sup> as well as access to legal assistance.<sup>36</sup> The Explanatory Report to the Convention highlights the crucial link between legal status and remedies, noting that: “it would be very difficult for [victims] to obtain compensation if they were unable to remain in the country where the proceedings take place.”<sup>37</sup> The Convention confirms that victims have a right to monetary compensation from convicted traffickers in respect of both material injury (such as the cost of medical treatment) and non-material injury (such as emotional suffering).<sup>38</sup> The Explanatory Report notes that a victim’s right to compensation consists in a claim against the perpetrator of harm. If criminal courts are not empowered to determine civil liability towards victims, “it must be possible for victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.”<sup>39</sup> The Convention confronts the reality that the State will not always be able to enforce compensation orders against traffickers. It thereby requires States Parties to take steps to guarantee the compensation of victims. The means of guaranteeing compensation are not mandated, although the Convention suggests several examples including the establishment of a special fund or initiatives aimed at social assistance or reintegration of victims.<sup>40</sup> The possibility of State compensation schemes being funded by the seized proceeds of trafficking is specifically noted.<sup>41</sup>

The obligation to provide effective and appropriate remedies to victims of trafficking is confirmed, albeit in a limited way, by key UN organs including the General Assembly and the Human Rights Council. The relevant resolution of the Human Rights Council from 2010, for example, more or less repeats previous pronouncements in “urg[ing]” Governments to incorporate a human rights-based approach into measures taken to prevent and end trafficking in persons and to protect, assist and provide access to adequate redress to victims, including the possibility of obtaining compensation

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<sup>33</sup> See, for example, Report of the Open-ended Interim Working Group on Trafficking in Persons established by the Conference of Parties to the United Nations Convention on Transnational Organized Crime, UN Doc. CTOC/COP/WG.4/2009/2 at para 14 (“With regard to the compensation for victims of trafficking, States parties should consider the possibility of establishing appropriate procedures to allow victims to obtain compensation and restitution” and Report of the Open-ended Interim Working Group on Trafficking in Persons established by the Conference of Parties to the United Nations Convention on Transnational Organized Crime, UN Doc. CTOC/COP/WG.4/20010/2 at para 6 (“States parties should endeavour to ensure the availability of a compensation fund or similar mechanism for victims of crimes, including trafficking in persons”).

<sup>34</sup> European Trafficking Convention, at Art. 15(1).

<sup>35</sup> European Trafficking Convention Explanatory Report, at para. 192.

<sup>36</sup> European Trafficking Convention, at Art. 15(2). On the extent of required assistance and whether it includes a right to free legal aid, see European Trafficking Convention Explanatory Report, at para. 196.

<sup>37</sup> European Trafficking Convention Explanatory Report, at para. 192.

<sup>38</sup> European Trafficking Convention, at Art. 15(3).

<sup>39</sup> European Trafficking Convention Explanatory Report, at para. 197.

<sup>40</sup> European Trafficking Convention, at Art. 15(4).

<sup>41</sup> *Ibid.*

from the perpetrators.<sup>42</sup> Reference to this obligation in the context of trafficking has also been affirmed by several human rights treaty bodies<sup>43</sup> and through a range of regional and international policy instruments.<sup>44</sup> The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (Trafficking Principles and Guidelines) are particularly strong on this point, declaring unequivocally that: “States should ensure that trafficked persons are given access to effective and appropriate remedies.”<sup>45</sup> Most recently, the United Nations Global Plan of Action against Trafficking in Persons urged States to: “adopt measures to ensure that victims of trafficking in persons can seek compensation for the damage suffered, consistent with the UNTOC and Trafficking Protocol.”<sup>46</sup>

## 2. Standards and forms of remedies for trafficking-related violations

Once the right to a remedy has been established it is necessary to consider the appropriate standard of remedy as well the various forms that reparation could or should take.

### 2.1. Standards of remedy

The substantive content of the obligation to provide “effective remedies” for human rights violations has been extensively considered by international and regional treaty bodies. It is generally accepted that remedies or reparation should be proportionate to the gravity of harm suffered<sup>47</sup> as well as “accessible, affordable, timely and effective.”<sup>48</sup> Other terms that have been used in the context of remedies for trafficking include “adequate” and “appropriate.” The Trafficking Principles and Guidelines provide some direction on what this standard actually entails, referring to “fair and adequate remedies”, that may be criminal, civil or administrative, and that “include the means for as full rehabilitation as possible.”<sup>49</sup>

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<sup>42</sup> UN Human Rights Council, “Trafficking in Persons, Especially Women and Children: regional and sub-regional cooperation in promoting a human rights based approach to combating trafficking in persons,” UN Doc. A/HRC/RES/14/2, June 23, 2010, at para. 2. See also UN General Assembly, “Trafficking in Women and Girls,” UN Doc. A/RES/63/156, Jan. 30, 2009, at para. 19, referring (in the context of support and assistance measures for trafficked women and girls) to “the possibility the possibility of obtaining compensation for damages suffered”.

<sup>43</sup> See, for example, UN Human Rights Committee, “Concluding Observations: Japan,” UN Doc. CCPR/C/JPN/CO/5, Dec. 18, 2008, at para. 23; UN Committee on Economic, Social and Cultural Rights, “Concluding Observations: Latvia,” UN Doc. E/C.12/LVA/CO/1, Jan. 7, 2008, at para. 47; UN Committee against Torture, “Concluding Observations: Serbia,” UN Doc. CAT/C/SRB/CO/1, Jan. 19, 2009, at para. 21; UN Committee on the Elimination of Discrimination against Women, “Concluding Observations: Singapore,” UN Doc. CEDAW/C/SGP/CO/3, Aug. 10, 2007, at para. 22.

<sup>44</sup> See, for example, Association of South East Asian Nations (ASEAN), *Criminal Justice Responses to Trafficking in Persons – ASEAN Practitioner Guidelines* (Jakarta, 2007), at Part 1.A.6: “[t]o the extent possible, the legal framework should enable victims to seek and receive remedies including compensation from appropriate sources including those convicted guilty of trafficking and related offences.” See also the Brussels Declaration, at para. 16; ECOWAS Initial Plan of Action, at 3, para. 6; OAS Recommendations on Trafficking in Persons, at Section IV(8).

<sup>45</sup> UN Trafficking Principles and Guidelines, at Principle 17. See also Guideline 9: “[t]rafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies.”

<sup>46</sup> United Nations General Assembly, Global Plan of Action against Trafficking in Persons (2010), para 39.

<sup>47</sup> “Principles and Guidelines on the Right to a Remedy and Reparation,” at Principle 15.

<sup>48</sup> UN Committee on Economic, Social and Cultural Rights, “General Comment No. 9: The Domestic Application of the Covenant,” UN Doc. E/C.12/1998/24, Dec. 3, 1998 (CESCR General Comment No. 9), at para. 9.

<sup>49</sup> UN Trafficking Principles and Guidelines, at Guideline 9.

The precise nature of the required remedy will depend on the primary obligation and the nature of the violation. In relation to violations of the ICCPR, for example, the UN Human Rights Committee has referred to the need to take account of the special vulnerability of certain categories of persons; the importance of States Parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law; the key role of the judiciary in assuring rights and remedies; and the importance of administrative mechanisms giving effect to the remedies-related obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.<sup>50</sup> In relation to violations of the ICESCR, the relevant treaty body has noted that the right to an effective remedy may require administrative action as well as – or instead of – judicial remedies. The selection of appropriate remedies must depend on what kind of action is required to make the relevant Convention right fully effective.<sup>51</sup>

Other human rights treaty bodies have affirmed the need for adequate and appropriate remedies that take into account the circumstances of the breach as well as the status or position of the victim. The Committee on the Rights of the Child for example, has noted that: “[c]hildren’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives ... Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.”<sup>52</sup> The CEDAW Committee has clarified that reparation for violence against women should be proportionate to the physical and mental harm undergone and to the gravity of the violations suffered.<sup>53</sup>

## 2.2. Restitution including rehabilitation

Restitution involves material, judicial or other measures aimed at restoring the situation that existed prior to the violation, as far as this is possible. To that extent, restitution should be considered the primary form of remedy. Restitution can be especially important in relation to violations of a continuing character. Effective, adequate and appropriate actions to secure restitution in a case of trafficking may include release of the victim from detention (whether such detention is imposed by traffickers, the State or any other entity); recognition of legal identity and citizenship; return of property; and safe repatriation to the individual’s place of residence. While monetary payments to victims of trafficking generally fall under the remedial head of compensation, they may also be considered as restitution to the extent that they seek to restore the *status quo ante*.<sup>54</sup> It is important

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<sup>50</sup> HRC General Comment No. 31.

<sup>51</sup> CESCR General Comment No. 9, at para. 9.

<sup>52</sup> UN Committee on the Rights of the Child, “General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child,” UN Doc. CRC/GC/2003/5, Oct. 3, 2003, at para. 24. Further on special measures for ensuring remedies for child victims of trafficking, see: United Nations Children’s Fund, *Guidelines for the Protection of Child Victims of Trafficking* (2006).

<sup>53</sup> *AT v. Hungary*, CEDAW Comm. No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003, decided Jan. 26, 2005, at para. 9.6(II)(vi).

<sup>54</sup> This understanding of restitution is reflected in para. 8 of the Basic Principles for Victims of Crime and Abuse of Power (*supra* note 9): “Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services

to note that in the context of a complex violation such as trafficking, full restitution will often be problematic. For example, the pre-violation situation of many victims could itself be dangerous and restoring that situation could conceivably place the individual at risk of re-trafficking or other violations of his or her rights.

Rehabilitation is a victim-centered concept that is a form of restitution insofar as it seeks to restore the situation that existed prior to the violation. Rehabilitation recognizes a need to ensure that the person who has suffered a violation of human rights has his or her status and position “restored” in the eyes of the law as well as of the wider community. Rehabilitation should include the provision of medical and psychological care as well as legal and social services.<sup>55</sup> Victims of serious violations of human rights such as trafficking will inevitably require a range of support services. The rehabilitation element of reparation would operate to impose an obligation on the responsible State to provide such services.

### 2.3. Compensation

Reparation by way of compensation<sup>56</sup> is a common form of remedy and is payable for damage caused by an internationally wrongful act to the extent that such damage is economically assessable and “not made good by restitution.”<sup>57</sup> In other words, monetary compensation should be intended to remedy the damage caused by the breach to the extent that this is possible.<sup>58</sup>

In the context of trafficking and related exploitation, compensation may be either offender-funded or state-funded and payable to the victim, his or her family or dependents. In terms of the appropriate standard, compensation should generally be “appropriate and proportional to the gravity of the violation and the circumstances of each case.”<sup>59</sup> It can, as acknowledged in the relevant provision of the European Trafficking Convention, cover both material losses and non-material or so-called moral suffering.<sup>60</sup>

An effective, adequate and appropriate remedy for trafficking could include compensation payable (by the offender or by the State) under a range of heads identified by the Principles and Guidelines

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and the restoration of rights.” For a consideration of the distinction between restitution and compensation in the context of trafficking through the lens of British law (as well as a useful analysis of the various heads under which victims of trafficking could seek financial restitution / compensation) see Tsachi Keren-Paz, “AT v Dulghieru—Compensation for victims of trafficking, but where is the restitution?”, 18 *Torts Law Journal*, 87 (2010).

<sup>55</sup> Ibid. at Principle 21.

<sup>56</sup> The term ‘compensation’ has been usefully defined in the trafficking context to refer to: “the overall concept of payment to a person, regardless of the source of payment or the mechanism used or the types of losses to be compensated. Compensation thus includes awards made by state-funded schemes as well as awards made in criminal, civil or labour law proceedings”. Organization for Security and Cooperation in Europe, *Compensation for Trafficked and Exploited Persons in the OSCE* (2008) (Hereafter: “OSCE Compensation Report”).

<sup>57</sup> International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), at Art. 36(1).

<sup>58</sup> In *Godínez Cruz*, the Inter-American Court of Human Rights held that “it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered”: *Godínez Cruz v. Honduras, Interpretation of the Compensatory Damages*, Inter-Am Ct. H.R. (ser. C) No. 10, Aug. 17, 1990, at para. 27.

<sup>59</sup> “Principles and Guidelines on the Right to a Remedy and Reparation,” at para. 20.

<sup>60</sup> European Trafficking Convention, Article 15(3).

on the Right to a Remedy and Reparation, including physical and psychological harm, lost opportunities, loss of earnings, moral damage, and medical, legal or other costs incurred as a result of the violation. The UNODC Model Law on Trafficking extends this generic list by noting that court-ordered compensation could include payment for or towards:

- Costs of medical, physical, psychological or psychiatric treatment required by the victim;
- Costs of physical and occupational therapy or rehabilitation required by the victim;
- Costs of necessary transportation, temporary childcare, temporary housing or the movement of the victim to a place of temporary safe residence;
- Lost income and due wages according to national law and regulations regarding wages;
- Legal fees and other costs or expenses incurred, including costs incurred related to the participation of the victim in the criminal investigation and prosecution process;
- Payment for non-material damages, resulting from moral, physical or psychological injury, emotional distress, pain and suffering suffered by the victim as a result of the crime committed against him or her; and (
- Any other costs or losses incurred by the victim as a direct result of being trafficked and reasonably assessed by a court.<sup>61</sup>

According to the Legislative Guide to the Trafficking Protocol, the compensation requirement under both the Organized Crime Convention and the Trafficking Protocol (that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered)<sup>62</sup> would be satisfied by the State establishing one or more of three options: provisions allowing victims to sue offenders for civil damages; provisions allowing criminal courts to award criminal damages (paid by offenders) or to impose orders for compensation or restitution against persons convicted of trafficking offenses; or provisions establishing dedicated funds or schemes to allow victims to claim compensation from the State for injuries or damages.<sup>63</sup> The offense of trafficking should be capable of forming the basis of a claim under at least one of these options.<sup>64</sup> Other interpretative materials, such as the UNODC Model Law on Trafficking, support this position.<sup>65</sup>

International law generally supports the linking of criminal justice measures, such as confiscation of proceeds to victim compensation and support. While the Organized Crime Convention does not contain any mandatory provisions with respect to disposal of confiscated proceeds or property, States Parties are required to consider specific disposal options. The priority option relates to victim compensation. Under the terms of the Convention, when a State Party has responded to a request from another State Party with regard to asset confiscation, then the requested State shall, if requested and legally able, "give priority to returning the confiscated proceeds or property to the requesting State Party so that it can give compensation to the victim of the crime or return such

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<sup>61</sup> UNODC Model Law on Trafficking in Persons (2009), at 55.

<sup>62</sup> Trafficking Protocol, at Art. 6(6).

<sup>63</sup> Legislative Guide, at Part 1, at 170, and Part 2, at 285-286.

<sup>64</sup> Ibid. at Part 1, at 170.

<sup>65</sup> UNODC Model Law, at 53-58.

proceeds of crime or property to their legitimate owners.<sup>66</sup> The European Trafficking Convention's provisions on this point are also advisory rather than mandatory. States Parties are required to guarantee pecuniary compensation for victims "for instance through the establishment of a fund for victim compensation or measures or programs aimed at social assistance and social integration of victims, *which could be funded by the assets resulting from the application of [confiscation] measures.*"<sup>67</sup>

International and regional policy instruments and the pronouncements of human rights bodies provide some indication that States are beginning to accept the notion that confiscated proceeds of trafficking crimes should be returned, in some form or another, to the victims whose exploitation has made such profits possible.<sup>68</sup> Importantly, it has been noted that these measures are usually unsustainable and should only ever be considered an adjunct to an institutionalized, adequately funded victim support and protection program.<sup>69</sup>

#### 2.4. Satisfaction and guarantees of non-repetition

Satisfaction is a remedy for injuries which are not necessarily financially assessable, but which can be addressed by ensuring that the violations of the victim's rights are properly acknowledged and dealt with. Measures aimed at cessation of violations, verification of the facts and full and public disclosure of the truth, (to the extent that this will not cause further harm), are examples of remedies aimed at providing satisfaction to the victim.<sup>70</sup> In the context of trafficking, the remedy of satisfaction would also extend to ensuring the safety of victims and their families and imposition of judicial and administrative sanctions against perpetrators. It has been argued that the right of access to justice for victims of serious human rights violations includes a "right to criminal prosecution" that falls within the remedial category of satisfaction.<sup>71</sup> Failure of the State to effectively investigate, prosecute and punish trafficking may therefore constitute a violation of victims' right to a remedy (in addition to violating any other substantive obligation to so respond).

Guarantees of non-repetition are a similarly important component of the right to a remedy in the case of trafficking due to the danger of and harm caused by re-trafficking. Measures to prevent future trafficking would be relevant to a discharge of this aspect of the remedies obligation, as would the effective investigation, prosecution and sanctioning of traffickers.<sup>72</sup> In relation to

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<sup>66</sup> Organized Crime Convention, at Art. 14(2). Other options proposed under Article 14 include contributing proceeds or property to a special UN fund for use against organized crime and sharing confiscated funds with other States Parties in order to encourage enhanced cooperation among law enforcement agencies.

<sup>67</sup> European Trafficking Convention, at Art. 15(4) (emphasis added).

<sup>68</sup> UN Trafficking Principles and Guidelines, at Principle 16 and Guideline 4.4; ASEAN Practitioner Guidelines, at Part 1.A.4 ("[a]s far as possible, confiscated assets should be used to fund both victim compensation claims and, where appropriate, other forms of counter-trafficking initiatives"); OSCE Action Plan, at Recommendation III(1.5). See also, UN General Assembly, "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power," UN Doc. A/RES/40/34, Nov. 29, 1985, at para. 4(h), encouraging States "to co-operate with other States, through mutual judicial and administrative assistance, in such matters as the detection and pursuit of offenders, their extradition and the seizure of their assets, to be used for restitution to the victims." See also UNODC Model Law, at 58.

<sup>69</sup> Anne Gallagher and Paul Holmes, "Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line," 18 *International Criminal Justice Review* (2008) at 330.

<sup>70</sup> "Principles and Guidelines on the Right to a Remedy and Reparation," at Principles 22(a) and 22(b).

<sup>71</sup> Bassiouni, "International Recognition of Victims' Rights," at 263-264.

<sup>72</sup> Bassiouni, "International Recognition of Victims' Rights," at 271.

trafficking that affects women and girls, measures aimed at modifying legal, social and cultural practices that sustain or promote tolerance of such violence would be another important aspect of a guarantee of non-repetition.<sup>73</sup> These examples make clear that guarantees of non-repetition are aimed above and beyond the individual victim and focus, in particular, on ensuring prevention of future violations.

### 3. Accessing remedies

In theory at least, remedies for violations of international legal obligations may be sought and secured at international, regional and national levels. For example, in some circumstances, trafficking may be considered a crime against humanity within the Statute of the International Criminal Court, thereby triggering the important remedial provisions of that instrument.<sup>74</sup> The strong link between trafficking and violations of human rights means that the individual complaints procedure available under several of the major human rights treaty bodies is potentially available to victims of trafficking. To date however, only one complaint lodged under an international human rights treaty has related directly to trafficking.<sup>75</sup> In the recent case *Rantsev v Cyprus*, the European Court of Human Rights awarded compensation for non-pecuniary damage, costs and expenses to the family of a trafficking victim whose harm was attributed to the actions and failures of both Russia and Cyprus.<sup>76</sup> In practice however, the human rights treaty bodies have almost never considered cases of trafficking under their individual complaints procedure and *Rantsev* is one of a very small number of cases brought before the regional human rights courts.<sup>77</sup> The recently launched United Nations Voluntary Trust Fund for Victims of Trafficking in persons, especially women and children<sup>78</sup> is an important symbolic development, but not one that is expected to provide redress or support to more than a handful of victims.

In short, international and regional machinery is not designed – and cannot in practice - deliver justice to the many individuals who are entitled to seek and receive remedies for the harms caused by trafficking. That job is, first and foremost, one for individual states, with whom the obligation to remedy violations ultimately rests. Unfortunately, in most, if not all States, the right to a remedy is

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<sup>73</sup> This obligation to work towards modification of discriminatory or otherwise harmful practices and traditions is contained in the CEDAW, at Arts. 2(f), 5(a); Inter-American Convention on Violence against Women, at Art. 7(e); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, OAU Doc. CAB/LEG/66.6, done July 11, 2003, entered into force Nov. 25, 2005, at Arts. 2(2), 5.

<sup>74</sup> The Statute of the International Criminal Court grants the Court broad powers to order convicted persons to make symbolic or financial reparations to victims. Rome Statute of the International Criminal Court, 2187 UNTS 90, done July 17, 1998, entered into force July 1, 2002, at Art. 73. The Court itself may establish principles related to reparations and, in certain cases may award reparations to, or in respect of, victims including restitution, compensation and rehabilitation (Art. 75). Note that the Statute contains a range of other provisions designed to secure justice for victims including measures to facilitate their protection as well as their participation in proceedings (Arts. 43, 68). Further on the ICC Statute provisions concerning victim compensation, see Bassiouni "International Recognition of Victims' Rights," at pp 243-246.

<sup>75</sup> *Zheng v. the Netherlands*, CEDAW Comm. No. 15/2007, UN Doc. CEDAW/C/42/D/15/2007, decided October 27, 2008.

<sup>76</sup> *Rantsev v. Cyprus and Russia*, Dec. No. 25965/04 (not yet reported), ECHR Jan 7, 2010).

<sup>77</sup> Other recent examples of trafficking-related practices being considered by international courts and tribunals include *Korau v. Republic of Niger*, Judgement No. ECW/CC/JUD/06/08 (ECOWAS Community Court of Justice, October 27, 2008) and *Siliadin v. France*, 43 EHRR16 (ECHR, July 26, 2005).

<sup>78</sup> The Trust Fund was launched in November 2010 in accordance with Article 38 of United Nations General Assembly resolution A/RES/64/293, 2010, United Nations Global Plan of Action to Combat Trafficking in Persons.

often not effectively available to trafficked persons. Sometimes national laws prevent aliens, including those unlawfully present, from accessing certain forms of remedies such as criminal compensation. In many cases, access to remedies is compromised because victims are incorrectly identified, arrested and deported. Even when identified as such, trafficked persons are often removed from the country of destination before they have a chance to seek remedies for the harm they have suffered. As noted by the UN Human Rights Committee, such a failure by the State "effectively prevents women [and equally all trafficked persons] from pursuing a remedy for the violation of their rights."<sup>79</sup>

The existence of laws and procedures that guarantee the right to a remedy for victims of trafficking is important. However, it will rarely be enough. As noted in a recent OSCE study, even a functioning state-funded compensation scheme may be next to useless without the guarantee that certain "ancillary rights" (such as the right to information, legal advice and support) are respected and protected.<sup>80</sup> This section highlights just some of the issues that affect the ability of victims to access remedies. The legal obligation on States to provide remedies for trafficking requires that these and other obstacles to effective access are acknowledged and addressed.

### 3.1. Right to remain

In most situations, the presence of the victim in the country where the remedy is being sought is an important co-requisite for realizing the right to a remedy. While the legal and political issues around victim repatriation are complex and not yet fully resolved, it is clear that international law upholds the right of victims to remain during legal proceedings. The Trafficking Protocol places an obligation on countries of destination to conduct return "with due regard for ... the status of any related legal proceedings."<sup>81</sup> This obligation should be read in light of the requirement, set out in both the Organized Crime Convention and Trafficking Protocol, that participation by victims in criminal justice proceedings against their exploiters be facilitated.<sup>82</sup> The European Trafficking Convention also obliges States Parties that are countries of destination to conduct return "with due regard for ... the status of any related legal proceedings":<sup>83</sup> "in order not to affect the rights that the victim could exercise in the course of the proceedings as well as in the proceedings themselves."<sup>84</sup> It can be convincingly argued that involuntary return that operates to deprive a victim of the opportunity to participate effectively in legal proceedings (including actions related to remedies) violates the obligations of States Parties to these two instruments

The need for specific provisions enabling 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 is explicitly noted in the Explanatory Report to the European Trafficking Convention as a natural

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<sup>79</sup> Human Rights Committee, "Concluding Observations: Israel," UN Doc. CCPR/C/79/Add.93, Aug. 18, 1998, at para. 16.

<sup>80</sup> See generally, OSCE Compensation Report, *supra*. Another study, of compensation for victims of trafficking in the UK, supports the contention that the *possibility* of compensation is largely illusory without the relevant mechanism being complemented by a range of additional entitlements. See Anti-Slavery International, *Opportunities and Obstacles: Ensuring Access to Compensation for Trafficked persons in the UK* (2009).

<sup>81</sup> Trafficking Protocol, at Art. 8(2).

<sup>82</sup> Organized Crime Convention, at Art. 25(3); Trafficking Protocol, at Art. 6(2)(b).

<sup>83</sup> European Trafficking Convention, at Art. 16(2).

<sup>84</sup> European Trafficking Convention Explanatory Report, at para. 202.

corollary to the right to a remedy.<sup>85</sup> Involuntary return that does not take account of a victim's right of access to remedies will inevitably obstruct the free and effective exercise of that right. At the very least, there should be a deferral of deportation, accompanied by a temporary regularization of legal status until the victim has been able to access the remedies to which she or he is entitled. States should also consider ensuring that the absence of the victim does not present an automatic barrier to securing of remedies such as court-ordered compensation.<sup>86</sup>

### 3.2. Access to information, support and protection

Often, victims of trafficking will be denied their right to a remedy simply because they lack information on the possibilities and processes for accessing remedies. A right of access to effective remedies means that in addition to making such remedies available under criminal or civil law, States should ensure that victims are provided with information and assistance that will enable them to actually secure the compensation or restitution to which they are entitled. As noted in the Explanatory Report to the European Trafficking Convention, "people cannot claim their rights if they do not know about them."<sup>87</sup> States Parties to that Convention are required to ensure that victims are provided with both information and legal assistance for the purpose of pursuing the remedies to which they are entitled.<sup>88</sup> A similar entitlement is proposed in the Trafficking Principles and Guidelines.<sup>89</sup>

The Principles and Guidelines on the Right to a Remedy are even more specific in identifying the steps to be taken by States towards ensuring access to justice for victims of serious human rights violations. Measures identified in Principle 12 of that instrument include the following:

- Dissemination of information about all available remedies;
- Development of measures to minimize inconvenience to victims and their representatives;
- Protection against unlawful interference with victims' privacy and ensuring their safety from intimidation and retaliation before, during, and after judicial, administrative, or other proceedings that affect their interests;
- Provision of proper assistance to victims seeking access to justice
- Ensuring availability of all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to a remedy.

This list provides a useful reminder that access to and availability of remedies is inevitably tied up with other rights and entitlements. For example, victims who are denied assistance and support on the basis of their inability or unwillingness to cooperate with legal authorities will generally find that

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<sup>85</sup> European Trafficking Convention Explanatory Report, at para. 192. See also UN Trafficking Principles and Guidelines, at Guideline 9.3.

<sup>86</sup> The UNODC Model Law proposes that: "[t]he immigration status or the return of the victim to his or her home country or other absence of the victim from the jurisdiction shall not prevent the court from ordering payment of compensation". UNODC Model Law on Trafficking in Persons (2009), at 53.

<sup>87</sup> European Trafficking Convention Explanatory Report, at para. 192. The report also notes that provision of information on the possibility of obtaining a residency permit will be very important for victims who are illegally in the country, as it would be very difficult for a victim to obtain compensation if she is unable to remain in the country.

<sup>88</sup> European Trafficking Convention, at Arts. 15(1), 15(2).

<sup>89</sup> UN Trafficking Principles and Guidelines, at Guideline 9.2.

they are also unable to access remedies.<sup>90</sup> Victims of trafficking who do not receive effective and appropriate protection from further harm, including from threats and intimidation by their exploiters, are unlikely to be in a position to access remedies that are, in theory available to them. Failure to respect and protect victim privacy is another way in which the right of access to remedies can be compromised.

## Conclusion

Remedies are an essential part of the national and international response to trafficking. International law is clear that if a State is directly or indirectly involved in the violation of an individual's right then that same State must make a genuine attempt to provide the injured person with some measure of reparation or redress. A number of treaties relevant to trafficking also uphold a separate right of victims to access fair and adequate remedies. States are afforded some measure of discretion when it comes to fulfilling their obligation to provide remedies. At the very least they are required to ensure the possibility of compensation and to support victims in pursuing claims for damages and/or lost earnings against an exploiter. The State itself may also be required to provide redress, particularly in situations where there has been direct involvement of its officials or agents or where its response to trafficking has fallen short of the required due diligence standard, thereby triggering its international legal responsibility for the resulting harm. Irrespective of its original source, the obligation to provide remedies to victims of trafficking requires a genuine effort, on the part of individual States, to address the legal, procedural and attitudinal obstacles that commonly thwart victims' efforts to secure reparation for the wrongs committed against them.

The international community, through laws and policies outlined in this paper, has affirmed the importance of securing redress and justice for individuals who have been subject to trafficking related exploitation. The recent focus on compensation for trafficked persons is both welcome and overdue. However, as this paper has made clear, the international legal concept of remedies is much broader and more nuanced. The obligation on States to remedy trafficking related violations requires attention to the full range of responses aimed at preventing trafficking, investigating and prosecuting perpetrators, and protecting victims.

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<sup>90</sup> Further on the legal aspects of linking protection and support to victim cooperation see Gallagher, 2010 at pp 298-301.

## Draft Basic Principles on the Right to a Remedy for Victims of Trafficking

### Rights and Obligations:

1. Individuals who have been trafficked or otherwise subject to the exploitative practices associated with trafficking have the right to seek and access remedies for the harms committed against them.
2. States are under an international legal obligation to provide remedies to victims of trafficking and related exploitation when they are legally responsible, directly or indirectly, for the harm caused.
3. States are also under an international legal obligation to provide or facilitate access to remedies when the treaties to which they are party mandate the provision of or access to such remedies.

### Realizing the right to a remedy:

4. Victim identification is an essential pre-requisite for the realization of the right to a remedy. States are under an international legal obligation to identify victims of trafficking and of related exploitation as quickly and accurately as possible.
5. At a minimum, States should ensure that laws, mechanisms and procedures are in place to enable victims of trafficking-related exploitation to:
  - Sue their exploiters for civil damages including unpaid wages;
  - Secure awards or orders from criminal courts for compensation or restitution from persons convicted of trafficking related offences;
  - Access compensation from the State for injuries and damages through a dedicated fund.
6. States should address the common obstacles to victims' accessing and receiving remedies for trafficking related violations. To this end, they should ensure that:
  - All victims of trafficking-related exploitation have a legally enforceable right to access remedies, irrespective of their immigration status;
  - Victim and presumed victims of trafficking-related exploitation are fully informed of their legal rights, including their rights to access remedies through judicial and administrative proceedings, promptly and in a language and form they understand;
  - Victims and presumed victims of trafficking-related exploitation seeking to access justice are provided with necessary assistance in pursuing civil and criminal claims against their exploiters;
  - Victims and presumed victims of trafficking-related exploitation are permitted and encouraged to participate in legal proceedings (criminal and civil) against their

exploiters including through the recognition of a right to remain for the duration of any such proceedings;

- Laws and procedures support the seizure of proceeds of trafficking-related exploitation and the use of confiscated assets in supporting and compensating victims;
- Effective measures are in place for the enforcement of reparation judgments including foreign judgments.