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**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

## Trafficking in persons, especially women and children

### Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, submitted pursuant to Human Rights Council resolution [35/5](#).

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\* [A/75/150](#).



## Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro

### *Summary*

In the present report, submitted pursuant to Human Rights Council resolution [35/5](#), the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, further develops her findings and recommendations made in her report to the Human Rights Council at its forty-fourth session ([A/HRC/44/45](#)). She calls for alternative approaches in the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, shifting from a law enforcement approach to an approach that is centred on human rights and victims, whether through a rights-oriented interpretation of existing provisions of the Protocol together with the jurisprudence of regional human rights courts and soft law instruments or, potentially, through a new international instrument. She develops an interpretation of due diligence obligations of States in relation to, for example, the implementation of the rights of trafficked persons to effective remedies and the non-punishment principle. She also reflects on the negative impact of restrictive migration policies on the protection of trafficked and exploited persons and on the negative implications of the current model of victim identification, which is shaped from a criminal proceedings perspective, is made conditional on the collaboration of victims with the law enforcement authorities in many countries and is not focused on the vulnerability of trafficked persons based on personal circumstances. Consequently, she proposes a new methodology to ensure the provision of early support to trafficked persons and those vulnerable to trafficking and exploitation. The Special Rapporteur also takes the discussion on businesses' due diligence obligations further, analysing how Governments and businesses should comply with their own obligations to eradicate trafficking and exploitation, especially from supply chains, through a combination of binding legislation and voluntary initiatives. Her recommendations offer a guide to States in adopting a genuinely human rights-based approach, placing at its centre the protection of the rights of victims and potential victims. The recommendations are also intended to move the anti-trafficking agenda from the criminal paradigm into a more comprehensive approach, tackling the systemic nature of exploitation and treating trafficking and exploitation as a social justice issue.

## I. Introduction

1. In the present report, the Special Rapporteur further develops her findings and recommendations made in her report to the Human Rights Council (A/HRC/44/45) following an exchange with a group of experts in the context of a two-day international webinar held on 29 and 30 June 2020. The webinar was originally foreseen as an event marking the twentieth anniversary of the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol) which would have been held in Palermo, Italy. The webinar brought together prominent experts and constituted a collective reflection on both the achievements since the adoption of the Protocol and the significant gaps in relation to effective action aimed at preventing and combating trafficking in persons based on a human rights approach. During the webinar, innovative ideas pertaining to the interpretation and implementation of existing international binding instruments and soft law were discussed, including the implementation of the non-punishment principle. Participants also reflected on the impact of restrictive migration policies on the protection of trafficked and exploited persons. Alternatives regarding the implementation of the Protocol, specifically a shift from a law enforcement approach towards an approach centred on human rights, were discussed, as was the content of a potential new international instrument. The Special Rapporteur's concluding remarks at the webinar were opened for endorsement by civil society. A second webinar was organized on 13 and 14 July to discuss the same issues with a target audience of African and Asian activists, who had been less well represented at the first webinar owing to its timing.

2. The Special Rapporteur wishes to thank On the Road, the municipality of Palermo and the Global Alliance against Traffic in Women for the invaluable support and expertise provided in organizing the two consultations. She also wishes to thank all the experts who participated and those who generously shared their experiences and expertise, which form the backbone of the present report.

3. Once again, the Special Rapporteur hopes that the recommendations put forward herein can guide not only State policies, but also the private sector, civil society organizations, United Nations agencies and the international community as a whole, with the aim of ensuring the protection of the rights of trafficked persons, including through early and effective support, and the empowerment and social inclusion of such persons as the ultimate goal of anti-trafficking action.

## II. Obligation of due diligence under international human rights law

4. One of the flaws recognized in the application of the Trafficking in Persons Protocol has been the lack of binding provisions, especially in relation to article 6, on assistance to and protection of victims of trafficking in persons. Nevertheless, States do have protective obligations stemming from the requirement to exercise due diligence under international human rights law.

5. In that regard, States have a positive obligation to protect individuals from human rights abuses by private actors. Due diligence obligations have been articulated in areas applicable to trafficking in persons, including the right to life, violence against women and sex-based discrimination, alongside a series of specific obligations that pertain to trafficking. Furthermore, that obligation has been recognized in international human rights case law, the clearest example being the decision of the Inter-American Court of Human Rights in *Trabajadores de la*

*Hacienda Brasil Verde v. Brazil*. In 2016, the Court explicitly held that, to comply with the obligations under article 6 of the American Convention on Human Rights, States were obliged to take positive measures, the exact nature and extent of which were to be determined on the basis of the specific protection needs of the right holders. To comply with article 6, States are required to adopt all appropriate measures to end and prevent slavery, which means having an adequate legal framework that is effectively applied. The framework must be comprehensive, address risk factors and enhance the institutional response. In addition, States must adopt preventive measures in specific cases in which particular groups are vulnerable to trafficking.

6. Regarding State obligations in respect of individual non-State perpetrators, the Special Rapporteur has focused also on measures that States have taken concerning corporations, and she has reflected in particular, notably in her previous report to the General Assembly ([A/74/189](#)) and to the Human Rights Council, on examples of legislation regarding transparency in supply chains adopted by several States. That area was also of particular interest to States during the interactive dialogue held during the forty-fourth session of the Council, with requests made for its further development. The issue, in particular the relationship and dynamics between State legislation and corporate voluntary regimes, was discussed during her consultations with experts.

7. Both the consultations and the interactive dialogue with States before the Human Rights Council were focused on the form that a legal framework imposing due diligence obligations on businesses to tackle trafficking in persons should take and the minimum obligations that States should impose on businesses by law. The Special Rapporteur, in her final remarks to the Council, commended those States that had adopted such legislation, in particular France, which had gone a step further. Its legislation not only includes reporting obligations but also requires plans to address risks and establishes the civil liability of companies for damages incurred when they fail to demonstrate that the risks had been taken into consideration in their diligence plan.

8. As to the minimum obligations that States should impose on businesses by law, both the Special Rapporteur and the experts consulted agree that reform of current transparency laws is needed. Those laws, now centred on a reporting requirement in relation to processes and policies, should instead be focused on impact and results. The experience gained since the passing of the California Transparency in Supply Chains Act of 2010 has shown the weaknesses of a system in which companies have succeeded in attaining compliance merely by reporting on relatively meaningless matters such as whether they have a code of conduct or undertake some auditing. Indeed, the limits of social auditing, as it is commonly performed today, were analysed by the Special Rapporteur in her report to the Human Rights Council in 2017 ([A/HRC/35/37](#)). Experts agree that the content of transparency compliance reports, replete with information on policies, training and audits, leaves little, if any, room for information on actual changes made to working conditions, overtime frequency, proof of payment of recruitment fees, higher salaries or factual improvements in living conditions at the workplace. It should be noted that those companies that generally report, even if only on policies and processes rather than on impact, are also those that are most exposed to public opinion and consumer demand by the nature of the product or services that they offer. As experience has been acquired, so too has reporting become more sophisticated. Without information that can be measured both quantitatively and qualitatively to determine improvements in specific areas, thus demonstrating compliance with labour rights, it becomes increasingly complex to determine who is performing genuine work and who is not.

9. In addition, Governments (at the local, state and national levels) have enormous power to wield in regulating markets through their own procurement policies.

Governments need to enact regulations so that bidders for public procurement contracts meet clear obligations regarding respect for labour law and ethical recruitment practices and demonstrate genuine results, whether by paying fair wages or requiring employers to bear all costs of recruitment. The Special Rapporteur, on numerous occasions, has called upon States to regulate recruitment intermediaries more effectively. Enacting and implementing legislation and policies on recruitment must also mean enabling an enforcement mechanism that can adequately assess intermediaries' compliance with ethical recruitment practices through checks on paperwork and numbers that can demonstrate that employers bore all recruitment costs.

10. The Special Rapporteur has always encouraged Governments and businesses to tackle exploitation on the basis of a smart mix of binding and voluntary measures. During her consultations, the complex system of voluntary standards and approaches that has developed over the past few decades was discussed. She underlined the weaknesses of a purely voluntary approach in her previous reports and in her previous intervention before the Human Rights Council. When there is a systematic lack of enforcement of basic labour laws and international standards, a voluntary approach alone does not suffice. However, as discussed in the consultations, the line between voluntary and compulsory action by companies around labour exploitation is blurred. Advocates, also among businesses in various sectors and social auditing mechanisms, have developed other positions and are demanding more and better corporate compliance with basic standards. While some industry leaders advocate and demand stronger enforcement of labour legislation and respect for labour rights by the States in which their operations and those of their supply chains are based, companies cannot always rely on Governments to meaningfully enforce labour protection laws, establish and maintain ethical business norms and practices or manage migration for labour into and out of their countries. The experience of the numerous social compliance programmes established by companies over past decades, often navigating in a sea of weak national legislative labour frameworks void of enforcement, shows that both businesses and Governments are still searching for the right combination of compulsory and voluntary efforts that can promote a shift from today's market that encourages inaction and rewards the status quo to a market in which companies can be rewarded for ensuring decent work in supply chains and punished for profiting from exploitation.

11. As regards the nature and organization of voluntary schemes, the consultations revealed that they could be more effective when part of binding agreements between brands and companies in their supply chains, as demonstrated by the model put forward by the Fair Food Program. Experts consulted also highlighted that a focus needed to be put on headquarters-level action. As pointed out, that is where the real change can be found and where regulation and legislation are unlikely to reach, meaning that action will be voluntary. As underlined by the Special Rapporteur in previous reports, such a systemic change can be achieved only if companies' social compliance programmes are translated into profound change in corporate policies and practices regarding sourcing and procurement. While, on the one hand, companies continue to report on initiatives, which allows them to comply with current transparency legislation, on the other they continue to practise a business model in which labour exploitation is ignored. A company social compliance programme cannot exist independently in a silo, isolated from other company decisions. Instead, it must be embedded in each and every one of them, and respect for basic labour standards must be a key component in decision-making. The current coronavirus disease (COVID-19) pandemic has also raised many questions as to the origin of the sourcing and procurement of goods. Experts advocated taking the opportunity offered by rethinking the post-COVID-19 scenario in supply chains to examine and design sourcing policies that are consistent with decent work. Such work must, of course, be

extended not only to the sourcing of goods, but also to the procurement of services, from transportation to warehousing. During a field visit in 2019, the Special Rapporteur herself discovered, through interviews with workers in the transport sector, cases of trafficking, severe exploitation and widespread disregard for basic labour rights in the heart of Europe.

12. Lastly, the Special Rapporteur has also highlighted that a key element in a national plan towards the elimination of trafficking, in particular trafficking as a form of severe exploitation in the context of business operations, is respect for and enforcement of the fundamental principles and rights at work, in particular of freedom of association and effective recognition of the right to collective bargaining. In that context, specialists have also underlined that many government policies explicitly and implicitly encourage police and security forces to cooperate with or generally assist businesses in policing migrants and workers.

### **III. Early support for trafficked persons, including in the context of mixed migration movements and long-term social inclusion**

13. The Special Rapporteur has advocated a shift from traditional identification methods based on the search for specific indicia to provide evidence of the existence of trafficking, as defined in the Trafficking in Persons Protocol, to a model that is centred on detecting the vulnerabilities of a person to trafficking and exploitation, based on personal circumstances and with the purpose of determining access to early support. That new model would fundamentally change current approaches that, even if they claim not to, still take the form of an identification technique that is modelled for use in criminal proceedings. Experts consulted further elaborated on the weaknesses of the traditional model, which has proved ineffective and is in contradiction with a human rights-based approach. In their opinion, the failure of the system is rooted in the fact that it is based on the singling out of those who are perceived as “real” victims deserving of protection. However, that model, based on the exceptionality of trafficked persons’ circumstances, has proved ineffective, given that other, more common, stereotypes easily apply to trafficked persons, who are often classified and treated as irregular migrants, even when clear indications of trafficking and exploitation exist, and are therefore constantly at risk of detention and deportation.

14. A new model is needed, organized around the detection of vulnerabilities to trafficking and exploitation, which is founded on the recognition that exploitation has structural features that should be detected at an early stage and on the understanding of vulnerability as shaped by discrimination and by the inability of a person to gain access to social protection and effective remedies. Those two elements have a great impact on the power imbalance that may be used by recruiters and employers to impose exploitative conditions and take unfair advantage of the work or services of a person. That power imbalance, which fosters exploitation, has a strong gender component, as women and girls are subject to intersecting discrimination as a consequence of patriarchal social norms.

15. Lastly, such a new approach would be more in line with actual experiences among service providers, who are often assisting a wider range of persons in vulnerable groups who have not been specifically determined to be victims of trafficking. Detecting vulnerabilities and adapting an assistance plan to those persons is indeed how many organizations operate, and synchronizing public policies and identification protocols with reality could in fact greatly facilitate not only their work but also their access to public and private funding if they do not need to prove the

existence of and organize their funding proposals only around formally identified victims.

16. The need for a new model becomes even more evident when reviewing the current migratory context. The Special Rapporteur has often noted the general lack of dedicated procedures to promptly and proactively identify and protect victims and potential victims of trafficking, especially in mixed migration flows and with regard to labour exploitation. In addition, there is an increasing tendency to place migration within the law enforcement paradigm. In that scenario, restrictive migration-related measures are presented as part of efforts to combat organized crime, including trafficking in persons, regardless of how the measures may affect the human rights of migrants and trafficked persons.

17. The impact of restrictive migration policies on trafficking in persons and how it exacerbates migrants' vulnerabilities to trafficking and exploitation was the subject of discussion during the Special Rapporteur's consultations. Many experts agreed that enabling regular migration paths was essential to combat trafficking effectively. Both identification and access to remedies are often challenged by workers' reluctance to report exploitation for fear of deportation. The Special Rapporteur has repeatedly called upon Governments to establish clear firewalls between labour inspectors, immigration control and law enforcement. In fact, workers' reluctance to report exploitation, owing to the temporary nature of their permits and the precariousness of their circumstances, has been recorded even when they have already been identified as victims of trafficking.

18. It can be concluded from the foregoing that victims of trafficking must be granted residence status unconditionally, which means that such status should never be made conditional on their willingness or ability to collaborate with law enforcement and/or the prosecutorial authorities. That has been a constant recommendation of the Special Rapporteur. Under article 7 of the Trafficking in Persons Protocol, States parties are to "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in [their] territory, temporarily or permanently, in appropriate cases" and "shall give appropriate consideration to humanitarian and compassionate factors". In the Council of Europe Convention on Action against Trafficking in Human Beings, States parties are called upon to "issue a renewable residence permit to victims, in one or other of the two following situations or in both: (a) the competent authority considers that their stay is necessary owing to their personal situation; (b) the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings". The use of the preposition "or" is clear evidence that the purpose of the legislation was not to necessarily link the issuance of a residence permit to a victim's participation in criminal proceedings.

19. However, many States have made assistance and residence status conditional on a victim's collaboration in criminal proceedings. As one expert has put it, that type of reward dynamics is used when dealing with criminals in exchange for information in criminal proceedings. Access to support as a reward cannot be justifiable when, in accordance with the due diligence principle, States have the primary responsibility to support and assist victims of trafficking.

20. On the other hand, discussions with experts showed a need to revise existing regular migration paths. Current opportunities for regular migration establish limits on the number of migrants from certain countries or for specific activities, as well as, in many countries, tying workers to their employers, thereby creating risks of trafficking even within regular migratory options, not to mention the risk of trafficking that unethical practices, by even legally established labour recruiters, pose

to migrant workers. A revision of migratory policies, according to experts, needs to be based on the following aspects:

- (a) Mobility, by choice and not by coercion (as may be the case when only short-term permits are available);
- (b) Independence from employers, allowing individuals to change employer or sector of activity or to have ability to work for more than one employer, together with unemployment benefits to facilitate the transition to a new employer;
- (c) Allowing in-country applications for residence permits by migrant workers themselves and establishment of clear criteria to be implemented in collaboration with local civil society organizations;
- (d) Equal treatment in terms of labour rights; work permit schemes should be accompanied by labour market measures to ensure that labour standards are respected for all workers, regardless of their status;
- (e) Achievement of social inclusion, including by lifting restrictions on family reunification for all types of workers.

### **From victimhood to agency, the basis for long-term social inclusion policies**

21. In 2019, the Special Rapporteur devoted a report to the need for long-term social inclusion policies ([A/HRC/41/46](#)). As she noted then, protection is not accomplished through identification and referral and cannot be limited to short-term assistance. Protection, as concluded in previous reports, means that States must take measures that allow trafficked persons to be free from fear and exploitation and to rebuild their lives beyond the recovery and rehabilitation phase. Many of the protection systems analysed by the Special Rapporteur in her consultations or during her country visits suffer from a lack of a long-term approach and often place trafficked persons at risk of revictimization. Early support is intended to ensure the empowerment and independence of trafficked persons in the long term. The notion of social inclusion, which is linked to States' due diligence obligations and the right to an effective remedy, conveys the idea of a process, in which recovery is the first step, the ultimate goal being the full and permanent restoration of all rights that have been violated before and during the trafficking cycle.

22. Obviously, a key and first element in any social inclusion policy must be access to residence status for trafficked persons that is not conditional and not based on short-term permits. As experts recognized, to be free from fear can be translated in legal terms to access to residence permits or international protection.

23. The Special Rapporteur has also advocated a cultural shift in the perception of trafficked persons. Often, vulnerability is understood as weakness; consequently, trafficked persons are viewed not as right holders with the capacity to carry forward their own life projects, but rather as objects of protection. Many Governments have adopted a paternalistic approach and, while they may offer a wide set of assistance measures, they fail to recognize the agency of victims. Through her research and consultations in past years, the Special Rapporteur has underlined that, if adequately supported in the recovery phase and correctly informed, trafficked persons have the ability to regain control of their lives and make decisions based on their own interests and life projects. Moreover, many cases of trafficking are identified only when victims are first empowered. For example, in the field of labour exploitation, cases have been uncovered through the unionization of workers or other forms of worker action. The Fair Food Program stands as a good example. A worker-led initiative designed by workers themselves and informed by their own experience, it is also largely based on a worker education component, which ensures that informed workers become front-line monitors of their own rights, who are better empowered to interact

with the formal monitoring mechanisms of the Program and to use the complaint mechanism. Giving workers a voice proves to be a win-win solution also for social compliance schemes and in general in the monitoring and identification of abuse in the workplace. No other agency, whether governmental or an auditing company, can always be present and be as effective as workers themselves at detecting abuse.

24. In order to value the agency of trafficked persons, the Special Rapporteur has highlighted the importance of engaging directly with survivors, through an inclusive and participatory process, in the design, implementation and evaluation of anti-trafficking policies.

25. The Special Rapporteur has specifically researched that agency throughout her work on trafficking in conflict and post-conflict settings. In her reports, she has found that trafficking not only is linked to conflict, but also is a systematic consequence of it. In that regard, she has also underlined the need to pay special consideration to the gender dimension of trafficking, as women and girls are disproportionately affected in conflict and post-conflict settings, owing to pre-existing marginalization and economic dependency and gender-based violence stemming from patriarchal social norms, including limited access to resources and education, gender discrimination and sexual and domestic violence. The Special Rapporteur has highlighted in particular the important role of women, including survivors of trafficking, in prevention, protection, participation and relief and recovery, which are also the four main pillars of the women and peace and security agenda of the Security Council.

#### **IV. Full recognition of victims' rights in criminal proceedings and implementation of the non-punishment principle**

26. Article 6 of the Trafficking in Persons Protocol provides for specific obligations regarding the protection of victims in relation to their rights during criminal proceedings. That includes the protection of the privacy and identity of victims and their physical safety and the right of victims to information on relevant court and administrative proceedings, and to receive the assistance needed to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence. In doing so, State parties must implement measures that take into account the age, gender and special needs of victims, in particular the special needs of children.

27. While there is no express reference in the Trafficking in Persons Protocol to the non-punishment principle, other binding international and regional instruments contain non-punishment provisions. The principle was included in the Council of Europe Convention on Action against Trafficking in Human Beings and in the Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29), of the International Labour Organization. Regarding soft law guidance, both the Office of the United Nations High Commissioner for Human Rights and the Organization for Security and Cooperation in Europe have recognized the importance of the principle in the former's Recommended Principles and Guidelines on Human Rights and Human Trafficking and in the latter's policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking. In addition, the international community has formally discussed it on several occasions. In the United Nations Global Plan of Action to Combat Trafficking in Persons and in resolution [55/67](#), Governments were invited to consider preventing, within the legal framework and in accordance with national policies, victims of trafficking, in particular women and girls, from being prosecuted for their illegal entry or residence, involvement in sex work/prostitution, illegally crossing of borders, use of fraudulent documents and so on, taking into account that they are victims of

exploitation. Furthermore, the Working Group on Trafficking in Persons of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime viewed in 2010 the non-punishment of victims of trafficking as an extension of the principle to protect and assist such victims, with full respect for their human rights, as set out in article 2 (b) of the Trafficking in Persons Protocol (see [CTOC/COP/WG.4/2010/4](#), para. 9).

28. The Special Rapporteur stresses, first, that a non-punishment provision must cover all cases in which a person has committed an unlawful activity without free will, including if abuse of a position of vulnerability has been used to subjugate that person, and must be applied to any illicit activities, including all kinds of crime. Second, the principle must be correctly implemented, in a way that is consistent with the aim of avoiding treating trafficked persons as criminals and preventing them from claiming their rights and gaining access to remedies. That implies that a non-punishment provision must be applied at an early stage and not only as a defence at trial, which means that criminal proceedings should not be initiated, or should be immediately discontinued, as soon as there are grounds to believe that the person has been trafficked. Third, the principle must be applied irrespective of a previous formal identification of the person as a trafficking victim. The Special Rapporteur intends to offer guidance to legislators and policymakers through a dedicated paper on the subject.

## **V. Human rights of trafficked and exploited persons beyond the Trafficking in Persons Protocol**

29. In her consultations with experts, the Special Rapporteur explored to what extent a better implementation of the Trafficking in Persons Protocol could ensure a human rights-based approach to combating trafficking and whether a new instrument was necessary and what it should look like if so. During the consultations, experts also reflected on the current implementation of the Protocol and its inherent weaknesses.

30. Some experts highlighted that, its flaws notwithstanding, the Protocol filled critical gaps in pre-existing international instruments against the various forms of slavery, including forced labour, slavery and slavery-like practices. In the late 1990s, States chose to develop new international anti-trafficking legislation under a framework that was already developing, namely, the Organized Crime Convention. Some experts also underlined that, while the Protocol suffered from many shortcomings, notably the lack of a monitoring mechanism, it provided a boost of political will behind anti-trafficking action and served to drive regional and subregional processes that succeeded in implementing a human rights approach, such as the Council of Europe Convention on Action against Trafficking in Human Beings and its monitoring mechanism, the Group of Experts on Action against Trafficking in Human Beings.

31. Some experts stressed that a human rights lens was critical to the success of the Protocol. However, in moving forward, the human rights elements recognizable in the Protocol must be sustained through the full incorporation of human rights tools, such as better reporting and monitoring through the empowerment of ombudsmen, rapporteurs, national human rights institutions and other independent bodies. It also means reinforcing protection provisions by maintaining immigration programmes and social services that are long term and guaranteed, together with mechanisms to challenge denial of access. It further entails revising the application of those provisions in the Protocol that are difficult to pair with a social inclusion agenda, namely the deportation of migrants through so-called “voluntary return” programmes.

According to some experts, by amplifying the protection and victim-centred rights aspects of the Protocol, it can become the human rights and victim-centred instrument that was envisaged 20 years ago.

32. However, other experts have been less optimistic about the potential of the Protocol. In their view, it is fundamentally flawed and remains a crime-fighting instrument that was not designed to tackle all aspects of the forms of exploitation targeted therein, such as prevention and protection. Given the definition of due diligence provided by the Inter-American Court of Human Rights in *Hacienda Brasil Verde*, the provisions of the Protocol fall too short compared with the extension and complexities of States' due diligence obligations. Furthermore, the Protocol was designed to deal with individuals trafficked in the context of criminal activities and cannot cope with the systemic nature of exploitation.

33. In addition, to support their point of view, experts noted that the Protocol did not reflect the international human rights standards in force when it was adopted in 2000. It undermined some existing internationally recognized standards, especially in relation to children's rights. In their opinion, in terms of protecting both adults and children who had been trafficked and subjected to abuse and exploitation by criminals, the provisions of the Protocol were extraordinarily weak. It was silent on a key protection issue – the non-punishment principle – and failed to make binding the protection-related measures (art. 6), in particular those aimed at ensuring the physical, psychological and social recovery of victims. Other key principles that are not taken into account in the Protocol, but were already known to be vital by 1999, are those of the best interests of the child and of doing no harm. A similar issue arises from the weakness of the Protocol in relation to prevention measures. Consequently, many of the prevention measures put forward over the past 20 years are limited to awareness-raising campaigns. States parties were called upon “to endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives” (art. 9), but not instructed to put in place vulnerability reduction strategies or to review their own policies or practices that increased vulnerability to trafficking, such as restrictive migration policies. The requirement to tackle demand was formulated in a way that fostered a divisive debate, but little appropriate action. Lastly, nowhere in the Protocol is the principle of proportionality discussed, nor does the need to measure the impact of the policies and practices enacted under the Protocol feature.

34. Even if it may be argued that such weaknesses are compensated for by the purpose of the Protocol being “to protect and assist the victims of ... trafficking, with full respect for their human rights” (art. 2) or by the provision in article 14 that asserts that “nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law”, the reality is that, when national legislators and policymakers translated the Protocol into national laws, policies and practice, they did not pay attention to those provisions.

35. The role of the Security Council was also discussed with experts, in particular how the Council's agenda has an impact on a human rights-based approach to combating trafficking and the extent to which integration between the Council's anti-trafficking agenda and the women and peace and security agenda is desirable. Experts recognized that the Council had tackled trafficking on various occasions. It did so in resolution 2331 (2016), but that resolution fundamentally pertains to trafficking in conflict-affected areas, its association with sexual violence in armed conflict and its use for recruitment and increasing the power and finances of terrorist groups and those using extreme violence. The context of the resolution being the gross, systematic and widespread abuses of human rights and violations of international humanitarian law by Islamic State in Iraq and the Levant (ISIL), the

issue of trafficking therein was primarily one of security. Generally, the Council has avoided the use of human rights language in its resolutions on trafficking: for example, in resolution 2331 (2016), the Council refers to ensuring that attention is paid to victims' needs, "including the provision of or access to medical, psychosocial assistance and legal aid", and that victims are treated as victims of crime but not as victims of human rights violations, triggering the full array of State obligations as just mentioned, but does not state that such services are entitlements to economic and social rights under both the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Economic, Social and Cultural Rights. By failing to incorporate the standards and language of existing human rights instruments and by omitting States' commitment to ensure "the promotion and protection of human rights for all" and that "effective measures to respond to trafficking in persons are complementary and mutually reinforcing", as set out in the Global Plan of Action, the Council's anti-trafficking resolutions contribute to the fragmentation of legal regimes.

36. Lastly, experts were consulted about the feasibility of and potential for a new international instrument that would fully embrace a human rights and victim-centred approach. Opinions were divided. For some, opening debate on a new instrument could mean backsliding in terms of the progress, however minimal, already made in combating trafficking. They were also sceptical that some countries would not use the opportunity to simply dismantle the system of protection already in place without providing better alternatives. In addition, the current human rights climate, or rather the utter disregard for respect for human rights that many Governments have made a fulcrum of their political discourse, would not lend itself to a positive outcome. Other experts called for a human rights-based interpretation of the Protocol, led by the jurisprudence of human rights courts and by human rights soft law documents. Such an approach could also be used or viewed as a transitional phase to help in shaping the content of a new instrument and making it more mature, while awaiting a more favourable political environment.

37. The Special Rapporteur noted that a shift was needed in how to approach counter-trafficking action and that national legislation should be substantially revised and/or enriched so as to be brought into line with human rights standards. In that light, it is first essential to disconnect trafficking from the law enforcement paradigm and to think strategically about how a comprehensive protection framework could be applied to a wider group of persons in a situation of vulnerability to trafficking and exploitation. That shift is essential to deal with the systemic nature of exploitation, which is embedded in economies worldwide. The widespread reality of exploitation has been made even more evident by the COVID-19 pandemic, which has shown the extreme precariousness of millions of workers, who have been reduced to starvation in only a couple of weeks.<sup>1</sup> The Special Rapporteur also highlighted the weaknesses of the current framework in providing trafficked persons with effective remedies, which is paramount for the social inclusion of victims. Although the Protocol provides for a right to compensation, in practice that provision is the least implemented. As it stands now, it means, in most cases, that a perpetrator must have been identified and convicted and that a law enforcement agency has succeeded in identifying and seizing traffickers' assets, which can be used to compensate victims. Only a few countries have overcome such obstacles through the creation of compensation funds for victims of crimes. States have also failed to provide victims with access to remedies through channels other than criminal proceedings, such as civil or labour courts, which should be made more accessible and could prove more successful in recovering losses or

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<sup>1</sup> For more information, see the Special Rapporteur's position paper, entitled, "The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons", available at [www.ohchr.org/Documents/Issues/Trafficking/COVID-19-Impact-trafficking.pdf](http://www.ohchr.org/Documents/Issues/Trafficking/COVID-19-Impact-trafficking.pdf).

underpaid wages. The question of conditioning the provision of support to victims on their willingness to collaborate with law enforcement was highlighted by the Special Rapporteur, in the context of the discussion, as being at odds with a human rights-based approach. While not specifically set out in the Protocol, such a conditional model has been included in legislation at the European level, in particular Council Directive 2004/81/EC of 29 April 2004, on residence permits for trafficked persons, and national legislation adopting a strong law enforcement approach. Against that backdrop, while it is necessary to continue to push to reorient national legislation and its implementation in accordance with human rights standards, it is also necessary to have a strategic vision of a new global instrument that would tackle exploitation in more general terms, as well as its systemic nature, including exploitation not necessarily amounting to a crime. Such an instrument should be embedded with a human rights agenda and come under the auspices of an institution with a human rights mandate.

38. Despite the unwelcoming political climate, or rather because of it, the Special Rapporteur emphasized that the anti-trafficking community must begin to collect the good experiences identified, strategize on new models of early support and protection and trigger the movement that will be necessary for the negotiation of a new global instrument.

## VI. Conclusions and recommendations

### A. Conclusions

39. **The adoption of the Trafficking in Persons Protocol in 2000 mobilized enormous energy worldwide to eradicate trafficking in persons. The Protocol provided an internationally recognized definition of trafficking for the purpose of exploitation in all its forms and filled critical gaps in pre-existing international instruments against slavery, slavery-like practices and forced labour, especially by introducing the concept of abuse of a position of vulnerability, in order to overcome restrictive interpretations of the definitions of slavery and forced labour by courts. Since then, legislation has been passed - or revised - in most States to criminalize all forms of trafficking and establish identification and referral mechanisms. Importantly, civil society organizations have become even more active, undertaking outreach activities and providing support to and empowering trafficked and exploited persons, with or without government funding.**

40. **The Protocol includes among its main purposes “to protect and assist the victims of ... trafficking, with full respect for their human rights”. Nevertheless, weaknesses and inconsistencies concerning respect for human rights emerged during its implementation. Most of the provisions pertaining to victims are not binding, including all assistance and protection measures and residence status, the related decisions of the competent authorities are not subject to appeal and children’s rights are undermined compared with pre-existing international instruments.**

41. **Under that approach, focused primarily on the criminal justice response, the current identification model used worldwide depends mainly on police operations aimed at identifying indicators of the crime of trafficking, which is a precondition for acknowledging a person’s status as a victim. The approach has been applied mostly in the field of trafficking for sexual exploitation, while other forms of exploitation have been overlooked. In many countries, anti-trafficking laws have been used to repress prostitution and have resulted in further**

violations of women's rights, including restrictions on their freedom of movement and migration.

42. Furthermore, the decision-making process regarding victim identification is, in most countries, entirely in the hands of the immigration and law enforcement authorities. Consequently, trafficked persons are often denied assistance and residence status, even though they have been subject to severe exploitation, when the competent authorities have not identified a trafficking case and have not initiated criminal proceedings. Many States have made assistance conditional on the initiation or prolongation of criminal proceedings and on the cooperation of victims with law enforcement and/or the prosecutorial authorities. All of the foregoing is at odds with a human rights-based approach.

43. The non-punishment of victims for illicit activities in which they were involved as a direct consequence of their trafficking situation is not provided for in the Protocol, with the consequence that the vast majority of States have not included such a provision in their national legislation. Many victims, including children, are, therefore, still treated as criminals or as irregular migrants and consequently risk being detained or deported, a situation that occurs even when clear indications of trafficking are discovered.

44. The focus of the negotiators of the Protocol was mainly on the repression of international criminal networks and on migration control, rather than on the systemic nature of exploitation in the context of trafficking. Although forced labour is mentioned in the definition of trafficking among its illicit purposes, little attention was paid to the labour dimension of trafficking, which would have required another approach and specific provisions.

45. Since the adoption of the Protocol, many initiatives have been undertaken aimed at promoting human rights-based anti-trafficking action. The Council of Europe Convention on Action against Trafficking in Human Beings, which is a human rights instrument, was adopted in 2005 and its monitoring body, the Group of Experts on Action against Trafficking in Human Beings, has since regularly evaluated the States parties to the Convention. Important soft law instruments have been adopted, directly or indirectly dealing with trafficking, including the Recommended Principles and Guidelines on Human Rights and Human Trafficking, the related commitments of the Organization for Security and Cooperation in Europe and many general recommendations of the Committee on the Elimination of Discrimination against Women. The Committee is also drafting a general recommendation on trafficking in women and girls in the context of global migration.

46. Regional human rights courts have established a wide range of State obligations in the field of prevention and protection of victims' rights. In particular, the European Court of Human Rights, in its landmark judgment in *Rantsev v. Cyprus and Russia*, established extensive State obligations in the field of prevention. The Inter-American Court of Human Rights, in *Hacienda Brasil Verde*, stated that, to act with due diligence, States must have a legal framework for protection and a comprehensive prevention strategy.

47. In the same vein, the International Labour Organization adopted the Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29). Importantly, the binding provisions of that instrument are not limited to the obligation of criminalizing and prosecuting forced labour, but include prevention measures, provide victims with protection and access to remedies, including compensation, irrespective of their presence or legal status in the territory, and protect victims from punishment for unlawful activities that they were compelled to commit.

48. Since the statement by the President of the Security Council of 16 December 2015 (S/PRST/2015/25), the Council has adopted resolutions on trafficking, mostly in relation to a security approach and tackling trafficking in the context of terrorist organizations such as ISIL and Boko Haram. The Council has, however, paid little attention to the human rights dimension of anti-trafficking action in those resolutions. On the other hand, it has not established a clear link between its anti-trafficking and women and peace and security agendas.

49. Recent anti-slavery legislation in Australia, Canada and the United Kingdom of Great Britain and Northern Ireland, as well as at the state level in California, has had the merit of underlining the role of businesses in preventing and combating modern slavery and trafficking. However, criticism has been levelled at the weaknesses and ineffectiveness of the reporting obligations. The most recent and advanced legislation in the field is in France, Act No. 2017-399 of 27 March 2017 on corporate due diligence, under which further action is required, aimed not only at reporting but also at identifying and addressing risks and adopting a vigilance plan to minimize them. Under the law, companies are held liable for damages if they have not complied with the requirements.

50. Over the past two decades, many initiatives have been undertaken by the business community, in compliance with the Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework, to promote mechanisms addressing, among other things, forced labour, slavery and trafficking in supply chains, including through the establishment of multi-stakeholder or industry-based initiatives. Such initiatives have, however, been designed mainly as monitoring mechanisms aimed at identifying risks and are largely ineffective when situations of exploitation are found, taking into account that the mere termination of a contract implies the loss of employment and thus causes further harm to workers. As a whole, such voluntary social compliance initiatives have not changed business behaviour, with little attention paid to labour protection, especially in supply chains, where low wages, insecure employment and exploitative practices remain prevalent.

51. Trade unions or worker-led initiatives have proved more successful in establishing standards for fair recruitment, increased wages, safety, social protection and the elimination of gender-based violence and sometimes forging a consumer-worker alliance that is sufficiently powerful to reach the top of supply chains and oblige parent companies to sign legally binding agreements, as in the case of the Fair Food Program established by the Coalition of Immokalee Workers.

52. In conclusion, today’s landscape is much more developed and complex than when the Trafficking in Persons Protocol was adopted. In particular, regional and global instruments, soft law instruments, documents of the human rights treaty bodies, case law of regional human rights courts and practice of civil society organizations have paved the way for more comprehensive anti-trafficking action that is genuinely based on human rights.

53. However, national legislation and policies remain strongly rooted in the original approach of the Protocol, with little attention paid to the human rights dimension. In particular, victim support activities remain linked to criminal proceedings and their outcomes in most countries, resulting in assistance being made conditional on victims’ cooperation in criminal proceedings. Moreover, States tend to consider anti-trafficking action to be part of their immigration control policy; consequently, it is often used to justify restrictive migration policies, which in turn increases the vulnerability of migrants to being trafficked and exploited.

54. Civil society organizations have established worldwide innovative practices based on the empowerment of trafficked persons through health care, psychological counselling, legal counselling and representation, education, training and help in finding employment. Such activities have always struggled with the restrictions and inadequacies of national legal frameworks; they remain, however, the only practices that are genuinely based on human rights.

55. On the other hand, State-based activities have often caused further violations of the rights of trafficked persons, including detention in what are known as “closed shelters”, limitation of personal freedoms and inadequate services not offering long-term sustainable solutions and thus leading to re-trafficking. In general terms, the most successful government policies have been designed and implemented in cooperation between the State authorities and civil society organizations.

56. Over the past two decades, it has become ever more clear that trafficking, slavery, forced labour and other forms of exploitation are systemic components of economies and markets worldwide and should be addressed primarily as a human rights and social justice issue.

57. While government anti-trafficking action worldwide remains largely rooted in a criminal law model, addressing the labour dimension requires better and more effective action aimed at changing the business model, enforcing labour laws and empowering workers in order to prevent and eradicate exploitation.

58. The COVID-19 pandemic has the potential to exacerbate the trend of rampant exploitation of the most vulnerable, especially if those persons become even more vulnerable as a consequence of unemployment, lack of social protection and supply chain disruption. It may also exacerbate the feminization of poverty and gender discrimination and fuel the worst forms of child labour, as children become the primary source of income for their families in crisis situations.

## **B. Recommendations**

59. In the light of the foregoing, the Special Rapporteur invites States, United Nations agencies, the private sector, civil society organizations and the international community to consider adopting a human rights-centred approach to anti-trafficking action by:

(a) Acting to reorient the implementation of the Trafficking in Persons Protocol through an integrated interpretation of binding and soft law instruments adopted since 2000 and the case law of international human rights courts;

(b) Advocating thoroughgoing changes to national anti-trafficking legislation and implementation regulations, which should be brought into compliance with human rights standards;

(c) Considering the possibility of adopting a new international instrument that would tackle severe exploitation using a human rights-based approach.

60. In order to achieve a human rights and victim-centred approach, the Special Rapporteur offers the recommendations set out below.

61. The human rights of trafficked persons should be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.

62. States should demonstrate their political will and commitment, in specific and effective ways, to prevent and eradicate exploitation in all its forms. The advice of civil society organizations and survivors should always be taken into consideration when designing and implementing policies aimed at preventing and combating trafficking, slavery, forced labour and exploitation.

63. States should consider prevention to be a political priority and take specific action, including by funding civil society organizations, to address the root causes of trafficking and exploitation, including extreme poverty, gender discrimination, domestic and sexual violence, destitution in situations of conflicts, natural disasters and pandemics, and systemic injustice. Effective action should be taken regarding education about respectful relationships, including from a gender perspective, and respect for the rights of migrants and workers and should be aimed at eradicating corruption, racism and xenophobia and discrimination on any grounds, including gender, age, race or national origin, social and/or residence status, and creating a social and cultural environment that does not condone any kind of exploitation.

64. States should make profound changes to their migration policies, including by establishing significant channels for regular migration to allow people to come to work, abolishing any form of sponsorship that ties workers to a single employer, prohibiting administrative detention for children, establishing a firewall between access to social services and judicial proceedings and migration checks and fully complying with the principle of non-refoulement, including by conducting accurate risk assessments before taking any decision on return. Such policies should always include a gender- and child-sensitive perspective.

65. States should establish an innovative methodology to provide early support, based on confidential interviews with persons at risk, including migrants in places of first arrival, managed by trained staff, aimed not at identifying elements of a crime but rather personal and social vulnerabilities to trafficking and exploitation, on the basis of an individual assessment and taking into consideration complex gender-based and intersecting discrimination and marginalization factors. The decision about granting early support, and residence status if needed, should be made by interdisciplinary teams established by the competent civil authorities. Moreover, States should ensure full integration between asylum procedures and referrals of trafficked and exploited persons to appropriate and specialized services. Civil society organizations should be funded to provide early support to migrants, asylum seekers and trafficked and exploited persons, irrespective of their residence status or formal vulnerability determination.

66. States should establish legislation governing recruitment agencies and brokers, carry out regular checks, establish or strengthen regulatory mechanisms to oversee the implementation of legislation, criminalize recruitment and gangmaster activities associated with severe exploitation and ask companies to use only well-regulated labour recruitment firms and to fully cover recruitment costs.

67. States should strengthen legislation on labour rights and ensure its implementation, including by enhancing and adequately funding labour inspections. In particular, States should adopt or strengthen regulations protecting the rights of domestic workers. States should ensure that the implementation of labour regulations is always focused on the rights of workers, rather than on immigration enforcement, and establish a firewall between immigration checks and labour inspections. Moreover, States should ensure that companies that receive government contracts and benefit from government

procurement are able to demonstrate genuine results in terms of labour rights protection, including in their supply chains, such as obtaining evidence that their subcontractors and service providers pay fair wages and bear recruitment costs. States should exclude from procurement procedures those companies that fail to meet their obligations.

68. States should establish legislation on mandatory human rights due diligence, requiring companies to disclose not only the action taken to prevent and eradicate exploitation from their supply chains, but also the specific and verifiable results achieved. Companies should be legally obliged to identify risks and adopt plans to minimize them and should be held liable for damages if they have not complied with such requirements.

69. Businesses have a due diligence obligation to comply with human rights standards. Companies, especially parent companies with large supply chains, should change their business model and integrate the protection of labour standards into their ordinary business plans, including into their relationships with their suppliers and service providers. For that purpose, companies should establish monitoring mechanisms, plans to address risks and grievance mechanisms to enable workers to report exploitation, to solve disputes and to obtain unpaid or underpaid wages and compensation through speedy procedures.

70. States should introduce in their legislation a non-punishment provision to ensure that victims of trafficking, slavery and forced labour are not charged, detained or prosecuted for illicit activities in which they have been involved as a direct consequence of their situation as victims. Furthermore, States should decriminalize sexual services and all related behaviour not amounting to exploitation as defined in the Trafficking in Persons Protocol, together with irregular entry or irregular stay, where such behaviour currently constitutes a crime.

71. States must ensure that trafficked and exploited persons can appeal against decisions of the competent authorities regarding the denial of early support and residence permits and facilitate their access to justice and remedies. In accordance with the principle of due diligence, States must ensure that trafficked persons are entitled to claim the full spectrum of remedies for human rights violations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The right to claim remedies, including compensation, should be ensured to all exploited persons through criminal, civil, administrative or labour law proceedings, irrespective of their presence or legal status in the country, including by providing for free legal counselling and representation, speeding up related procedures and establishing public funds for compensation. An individual independent guardian must be promptly appointed in the best interests of the child, when that child is unaccompanied or separated from family members. Victims must be protected from secondary victimization; their rights, such as to privacy, must be respected at all times during judicial proceedings.

72. States should ensure funding for victim support that is not limited to short-term assistance, but includes long-term, sustainable measures aimed at promoting the full social inclusion of trafficked and exploited persons in both countries of destination and countries of origin. Such measures should protect exploited persons from stigma and re-trafficking and be of a transformative nature, based on education, training and skill acquisition, and help in seeking employment or establishing a business. They should not be based on traditional gender roles, but take into account the interests and aspirations of the person concerned and be designed in the best interests of children.