



Joint UN Commentary on the
EU Directive – A Human Rights-Based Approach

PREVENT
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HUMAN TRAFFICKING



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combating trafficking in human beings and protecting its victims, replacing the Council Framework Decision 2002/629/JHA	

FOREWORD

Over the past decade, the European Union has stepped up its efforts to fight human trafficking strengthening its focus on prevention and victim protection of victims. The adoption of the 2011 Directive on preventing and combating trafficking in human beings and protecting its victims (hereinafter the Directive), replacing Council Framework Decision 2002/629/JHA, is the most recent sign of the continued commitment of the European Union in this field. The Directive represents a critical step in addressing human trafficking comprehensively.


The six United Nations agencies responsible for this report; the UN Office on Drugs and Crime (UNODC), the UN Office of the High Commissioner for Human Rights (OHCHR), the UN High Commissioner for Refugees (UNHCR), the UN Children's Fund (UNICEF), the International Labour Organisation (ILO), and the UN Entity for Gender Equality and the Empowerment of Women (UN Women), value the efforts and the interest of the European Union and its Member States to end trafficking in persons and the renewed emphasis on the protection of victims. We also welcome the appointment of an Anti-Trafficking Coordinator, whose responsibilities will be critical to the coordination and consolidation of the anti-trafficking efforts of the European Union and its Member States.

At a time when the Member States are embarking on the transposition of the Directive into national legislation, this joint UN Commentary on the Directive (hereinafter the Commentary) is meant to support these efforts, by providing practical guidance on the application of a human rights-based approach to the transposition and implementation of the Directive, in line with Recital 7 of the Directive.



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The Commentary is grounded in a human rights-based approach, acknowledging that trafficking is both a crime and a human rights violation and that the State has primary responsibility to respect, protect and promote the rights of all trafficked persons regardless of their country of origin. It puts human rights at the centre of all the efforts, including when dealing with criminal matters. This Commentary therefore provides guidance as to how State obligations arise under international human rights law, and how these can most effectively be reflected and translated in legislation.

In preparing this Commentary, special attention has been paid to a gender- and an age-sensitive reading of the Directive. We believe that human trafficking does not impact women, men, girls and boys in the same way, and that gender imbalances contribute to special vulnerability to abusive recruitment and exploitation. Additionally, trafficking disproportionately affects persons whose rights may already be compromised, including victims of sexual and gender-based violence, refugees, migrants, and sexual minorities.

We very much hope that this Commentary will be of help to policy makers and legislators in EU Member States as they engage in the transposition of the EU Directive, and we trust this is a further testimony of our continued engagement with the European Union, its institutions and its Member States in this field.

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RECOMMENDATIONS

Recital 1:

When transposing the Directive into national legislation, Member States are encouraged to define human trafficking as a violation of human rights as well as a crime.

Recital 3:

When transposing the Directive into national legislation, Member States are encouraged to reflect the nature of trafficking as a form of gender-based violence and sex-based discrimination.

Recital 33:

When transposing the Directive, Member States are encouraged to incorporate the standard of due diligence along with the principle of State responsibility in their national legislation.

Recital 7:

When transposing the Directive, Member States are encouraged to use the human-rights based-approach methodology, affirming the centrality of victims as rights-holders.

When transposing the Directive, Member States are encouraged to ensure the respect for the principle of non-discrimination anchored in EU and international law. Member States are encouraged to ensure interpretation of the provisions in the Directive in a way that is not discriminatory on any ground, including the status of victim of trafficking.

Member States may also wish to reaffirm the contribution of their anti-trafficking legislative and other measures to the elimination of all forms of discrimination on grounds of sex, gender, ethnicity, immigration or other status, including through women empowerment, and ensure that these are implemented in a way that will not affect victims negatively.

When transposing the Directive, Member States are encouraged to consider ways to include the views and experiences of victims of trafficking and other groups that are or may be affected by trafficking or anti-trafficking policies, in the development of legislative responses.

When transposing the Directive, Member States may wish to specify the accountability framework for *inter alia* the oversight of the establishment and enhancement of national referral mechanisms, the cooperation between State agencies and between these and civil society, the reporting and monitoring on (the impact of) anti-trafficking measures, and the training of state officials likely to come into contact with victims of trafficking.

When transposing the Directive, Member States are encouraged to take into account the different impact trafficking and anti-trafficking responses may have on women, men, girls and boys, and to ensure that anti-trafficking responses are gender-sensitive, promote gender equality and are based on women's empowerment.

When transposing the Directive, Member States are encouraged to ensure that all actions in relation to children are guided by the principles of protection and respect for children's rights.

Article 1:

When transposing the Directive, Member States are encouraged to mention the gender-specific nature of trafficking in human beings, and thus the need for gender-sensitive provisions.

When implementing the Directive and other legislative and non-legislative anti-trafficking measures, Member States are encouraged to adopt a gender-specific and gender-sensitive approach.

Article 2:

When transposing the Directive, Member States may wish to consider adopting a “low-threshold approach” to the identification of victims, including those subject to forced labour, servitude or slavery-like practices, and as such should be clearly defined in national law.

Article 8:

When transposing the Directive, States may wish to consider including a provision to ensure that (potential) victims of trafficking are not detained, charged or prosecuted or otherwise held responsible for acts and offences, committed by them as part of the crime of trafficking. Such offences should include *inter alia* illegal entry, exit or stay, working without documentation, use of fraudulent travel or identity documents, lack of identity documents, or involvement in unlawful acts, including prostitution where this is illegal. Such provision should apply regardless of the ability or willingness of victims to cooperate with the authorities, and include the non-penalization of persons in need of international protection on account of their illegal entry or stay in the European Union. In legal systems that have prosecutorial discretion, a similar provision could be included in guidelines for prosecutors.

When transposing the Directive into national law, Member States are encouraged to ensure that the non-application of ‘penalties’ applies to both criminal sanctions and administrative penalties.

States may also wish to consider including provisions to ensure that (potential) victims of trafficking are not detained in closed shelters or other welfare institutions beyond the requirements of necessity, legality and proportionality, and if detention is administered as a last resort, that the required legal safeguards are upheld. The treatment of children should follow a determination of their best interests.

Article 11:

When transposing the Directive, Member States are encouraged to include the provision of protection as well as assistance and support.

Article 11(1):

When transposing the Directive, Member States are encouraged to include in their national legislation a reflection period of a minimum of 90 days for all victims of trafficking. For suspected child victims, such decisions should reflect consideration of their best interests.

When transposing the Directive, Member States are encouraged to lift existing restrictions to the delivery of assistance and protection beyond criminal proceedings, where currently required by national legislation and policies.

Article 11(2):

When transposing the Directive, Member States are encouraged to clarify that this provision also includes persons in relation to whom there is a reasonable-grounds indication that they might be at risk of trafficking.

Article 11(3):

When transposing the Directive into national legislation, Member States are strongly encouraged to omit the last part of Article 11(3), and make access to assistance, support and protection entirely unconditional.

Article 11(4):

When transposing Article 11(4) of the Directive, Member States may wish to reflect the importance of a human rights-based approach by establishing age- and gender-sensitive victim-centred cooperation mechanisms for the early identification and referral of (potential) victims of trafficking.

When implementing the Directive, States are encouraged to consider flexible ways to ensure a multi-disciplinary and cross-sector approach, involving all relevant actors from government and civil society.

When transposing the Directive, Member States are encouraged to include a saving clause in line with UN Trafficking Protocol Article 14.

When implementing the Directive, Member States are encouraged to ensure that their national referral mechanisms include close cooperation and established protocols with their national asylum authorities for the age- and gender-sensitive protection and assistance of victims of trafficking who are also in need of international protection.

Article 11(5):

When transposing the Directive, Member States are encouraged to clarify the legal nature of the counselling provided to victims of trafficking under this article, in addition to any health-related counselling.

Member States may also wish to reflect the necessary gender-specific nature of the assistance and support measures provided by Article 11(5).

Article 11(6):

When transposing the Directive, Member States are encouraged to reflect the principle of *non-refoulement* in their national legislation as is the case in the UN Trafficking Protocol and the CoE Trafficking Convention and in accordance with States obligations under international refugee law and international human rights law.

When implementing the Directive, Member States are encouraged to ensure close cooperation between the asylum and anti-trafficking authorities in the development of the information on ‘the possibility of granting international protection’.

When transposing the Directive, Member States are encouraged to include a provision on the safe return of victims of trafficking, in line with international and regional safeguards, and including the establishment of pre-return risk assessments.

When implementing the Directive, Member States are encouraged to establish, in cooperation with countries of origin and in close partnership with non-governmental organizations, voluntary and safe return programmes to ensure that trafficked persons who return to their home country have access to immediate and long term social assistance programmes.

Article 11(7)

When transposing the Directive, Member States are encouraged to ensure that the definition of ‘particularly vulnerable persons’ includes *inter alia* age, gender, health, disability, mental and psychological disorder, as well as persons who have been subjected to torture, rape or other forms of sexual and gender based violence.

Member States are encouraged to ensure that the above definition is consistently reflected throughout the transposition of the Directive, in particular in Articles 4(2)(a), 11, 12 and 18.

Article 12(2):

When transposing the Directive, Member States may wish to consider providing legal counselling and assistance free of charge as a rule.

Likewise, Member States are encouraged to ensure that access to free legal aid is not restricted to criminal proceedings but covers all legal proceedings related to the person’s victim status, including criminal, civil or labour procedures for the purpose of compensation, as well as proceedings in relation to immigration status or asylum.

When implementing the Directive, Member States are encouraged to develop lawyers’ and legal counsellors’ capacity, in association with the national bar associations.

Article 12(3):

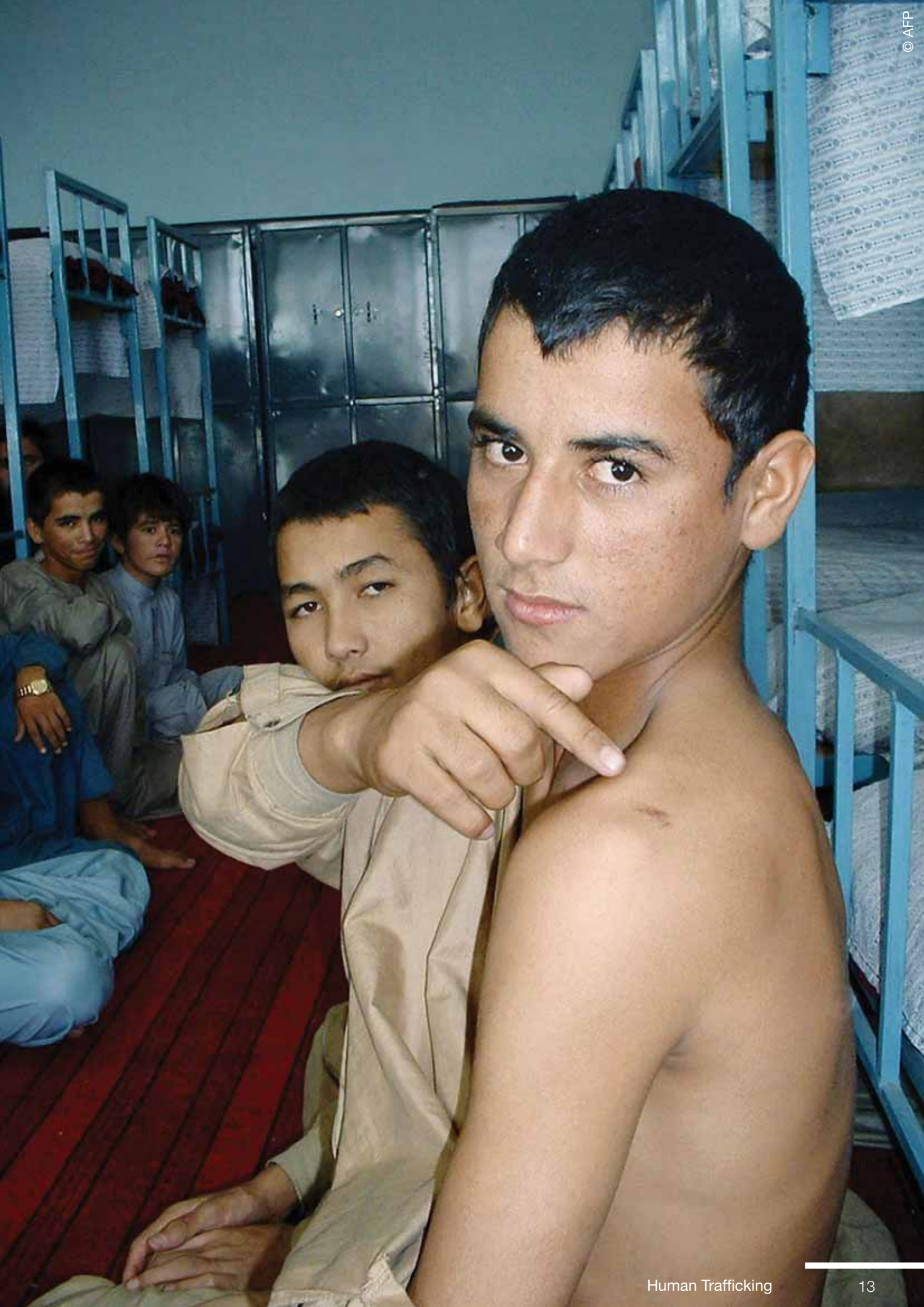
When implementing the Directive, Member States are encouraged to develop guidelines for the criminal justice system on the establishment of individual risk assessments and the methods available to protect the safety of victim-witnesses.

Article 12(4):

When implementing the Directive, Member States are encouraged to develop guidelines for the criminal justice system on the treatment of victims of trafficking, taking into account *inter alia* age, gender, health, disability, mental and psychological disorder, as well as abuse and violations such as torture, rape or other forms of sexual and gender based violence.

Article 13(1):

When implementing the Directive Member States are encouraged to provide for a formal Best Interests Determination procedure for decisions having a long-term impact on a trafficked child’s future, such as the determination of a durable solution.



Article 13(2):

When implementing the Directive, Member States are encouraged to provide for a multidisciplinary approach to age assessment, where such assessment is strictly necessary, and accompanied by the necessary procedural safeguards.

Article 14:

When transposing the Directive, Member States may wish to note the relevance of the provisions of the Optional Protocol on the sale of children, child prostitution and child pornography.

Article 14(1):

When implementing the Directive, Member States are encouraged to ensure a multidisciplinary approach in the assessment of the individual needs of a child victim for both short-term and long-term care and support, followed by periodic updates of the assessment.

Article 14(2) and 16(3):

When transposing the Directive, Member States are encouraged to assign guardians or representatives a specific duty to advocate for the best interest of the child on a regular basis, to act as an advocate for the child as well as a bridge and focal point for the child's interaction with other authorities and actors. The guardian or representative should also be provided with a role in ensuring that the child is able to participate in decisions.

Article 17:

When transposing the Directive, Member States are encouraged to take into account not only the substantive components of the right to an effective remedy, but also ancillary rights.

Where no schemes for compensation to victims of violent crime exist, Member States are encouraged to establish such schemes and to ensure that these are accessible to victims of trafficking regardless of nationality, residence status or the form of trafficking they have suffered.

Member States may also wish to consider establishing legal provisions, where these do not already exist, to allow the use of

confiscated criminal assets to compensate victims, and fund programmes for the assistance, support and protection of victims.

Article 18:

When transposing the Directive, Member States are encouraged to note the relevance of the provisions of the recently adopted ILO Convention Concerning Decent Work for Domestic Workers, ILO Conventions on migrant workers No. 97 and 143 as well as the International Convention on the Protection of Migrant Workers and Members of Their Families.

When implementing the Directive, Member States are encouraged to carry out impact assessments of existing and proposed legislation *inter alia* in the sectors of employment, migration and asylum on the prevention of trafficking in human beings, with a gender- and age-sensitive approach.

Article 18(1):

Member States are encouraged to develop comprehensive and human rights-based policies to address the demand for unprotected and exploitable labour, involving businesses, trade unions, consumers, clients and the general public. Respect for and the protection of the human rights of potential victims should be at the core of all measures taken or policies adopted.

Article 18(2):

When implementing the Directive, Member States are encouraged to first evaluate the effects of existing campaigns carried out by States, international organizations and non-governmental organizations.

Article 18(3):

When transposing the Directive, Member States may wish to promote regular training for *all* officials likely to come into contact with victims or potential victims of trafficking, in cooperation with civil society, including non-governmental organizations, and other relevant organizations.

When implementing the Directive, Member States are encouraged to ensure that training is human rights-based, multi-disciplinary, and gender- and age-sensitive.

Article 18(4):

When transposing the Directive, Member States are encouraged to refer to and reflect the provisions in EU legislation criminalizing demand, namely: Directive 2009/52/EC on sanctions and measures against employers of illegally staying third-country nationals, and the forthcoming EU legislation criminalizing the demand for child prostitution and pornography.

Article 19:

When transposing the Directive, Member States are encouraged to provide for clear accountability processes for their National Rapporteurs or equivalent mechanisms.

When implementing the Directive, Member States are encouraged to ensure that data collection, monitoring and reporting are gender- and age-sensitive, and include the monitoring of the human rights impact of anti-trafficking efforts.

INTRODUCTION

On 5 April 2011, the European Parliament and the Council adopted the European Union Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (hereinafter the Directive), repealing the 2002 Council Framework Decision (hereinafter the Framework Decision)¹ and setting minimum standards for EU Member States. The six United Nations (UN) agencies – UN Office on Drugs and Crime (UNODC), UN Office of the High Commissioner for Human Rights (OHCHR), UN High Commissioner for Refugees (UNHCR), UN Children’s Fund (UNICEF), International Labour Organisation (ILO), and UN Entity for Gender Equality and the Empowerment of Women (UN Women) – welcome the comprehensive approach the Directive takes, the recognition of trafficking in human beings as both a crime and a violation of human rights, and the placement of the human rights of trafficked persons at the centre of the actions to prevent and combat trafficking and to protect its victims. Recognizing the importance of the Directive as part of the European Union’s overall set of norms and legal instruments to address trafficking, the agencies particularly value the objective of the Directive to strengthen the standards for victim protection and its focus on prevention.

It is very difficult to assess the real magnitude of human trafficking and related forced labour practices because these crimes often take place in the informal economy and are not necessarily identified as gross human rights violations. According to ILO estimates there are 12.3 million forced labour victims worldwide, of whom around 2.4 million were trafficked.² Based on data gathered by UNODC,³ the total number of victims detected in West and Central Europe was 7,300 in 2006.⁴ If about one victim in 20 were detected, the number of trafficking victims in Europe would be around 140,000.⁵

Under general European Union law, the Treaty on the Functioning of the European Union establishes that Directives are binding as to the result to be achieved, but Member States have the discretion to establish the means to obtain that result.⁶ Thus while the Directive sets common standards, through their legislative process Member States are able to introduce or maintain more favourable standards in so far as those standards are compatible with the Directive. As per Article 22 of the Directive, Member States are now required to transpose this instrument into national legislation by 6 April 2013.

This joint UN Commentary on selected provisions of the Directive (hereinafter the Commentary) has been prepared by the six UN agencies in the framework of their respective mandates and builds on their June 2010 joint UN submission on the European Commission Proposal for a Directive,⁷ and their engagement with the European Institutions in this field. The Commentary aims to support Member States in the transposition process by providing guidance from a human rights-based perspective in a manner consistent with State obligations under regional and international law, particularly the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter the UN Trafficking Protocol)⁸ and well-established international human rights law.

¹ Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA).

² ILO, *Action against trafficking in human beings*, 2008, p. 1.

³ UNODC, *Trafficking in Persons to Europe for Sexual Exploitation*, Chapter extracted from *The Globalization of Crime – A Transnational Organized Crime Threat Assessment Report*, 2010, p.7.

⁴ The year 2006 was used in this case because more countries reported data in 2006 than in the other years covered in United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) research.

⁵ Transcrime suggests a multiplier of 20 for every victim detected. See *A Pilot Study on Three European Union Key Immigration Points for Monitoring the Trafficking of Human Beings for the Purpose of Sexual Exploitation across the European Union*, Transcrime Reports No. 3, 2002.

⁶ European Union, Treaty on the Functioning of the European Union, OJ 2010/C 83/01, Art. 288.

⁷ UNODC, OHCHR, UNHCR, UNICEF, ILO, UNIFEM, Joint Letter on the European Commission proposal for a European Union Directive on Prevention and combating trafficking in human beings and protecting victims, released by the European Commission on 29 March 2010, COM(2010)095, 9 June 2010.

⁸ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.



The Commentary has also been developed to recommend a reflection of a fuller scope taking into account human rights considerations for the implementation of the Directive. The Commentary also provides recommendations with background explanations and existing good practices to support such an endeavour.

The Commentary is anchored in the international legal definition of trafficking in human beings, as contained in the UN Trafficking Protocol and incorporated in Article 2 of the Directive. Since the adoption and entry into force of the UN Trafficking Protocol, a comprehensive international and regional legal framework has developed that combines a criminal justice response to trafficking with a victim-centred and human rights-based approach. These efforts have furthered the responsibility of the State to act with due diligence to prevent trafficking through investigation and prosecution while providing protection to the victims. It is in this spirit that this Commentary adopts a gender- and age-sensitive approach. The Commentary provides guidance for some recitals and articles of the Directive only, the selection of which has been driven by this gender- and age-sensitive human rights-based approach. A crucial reference across the Commentary is the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (hereinafter the OHCHR Recommended Principles).⁹

The Commentary first reflects upon the phenomenon of trafficking as a human rights violation (Recital 1), its gender-specific aspects (Recital 3), and the required respect for fundamental rights (Recital 33), before elaborating on the need for an integrated, holistic and human rights-based approach (Recital 7).

The Commentary then discusses key articles of the Directive focusing on:

- the gender perspective (Article 1),
- the definition of trafficking (Article 2),
- the non-application of penalties to victims (Article 8),
- the protection of and assistance to victims, examining the concept of due diligence and the principles of *non-refoulement* and non-revictimization, and the role of national referral mechanisms (Articles 11),
- the protection of victims in criminal proceedings (Article 12),
- child victims of trafficking (Articles 13 to 16),
- the concepts of remedy and redress (Article 17),
- prevention (Article 18), and
- the establishment of a monitoring mechanism (Article 19).

Recommendations accompany each section; they are also compiled at the beginning of the Commentary for ease of reference. Boxes further expound upon existing international standards, and illustrate specific issues with examples of good practices. Key definitions are provided in Annex 1. The full text of the Directive is copied at the end of this publication for ease of reference.

⁹ UN OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking – Commentary* (hereinafter the OHCHR Commentary on the Recommended Principles), November 2010.

PART I - PREAMBLE

RECITAL 1: TRAFFICKING IN PERSONS AS A GROSS VIOLATION OF FUNDAMENTAL RIGHTS

Recital 1 of the Directive states that trafficking in persons is a serious crime, a gross violation of fundamental rights, and explicitly prohibited by the Charter of Fundamental Rights of the European Union (hereinafter the EU Charter).

Defining human trafficking as a human rights violation in the first recital of the Directive is a clear indication by the European Union institutions and the Member States of their intention to adopt a rights-based legislative response to the crime of trafficking. This approach refers to the normative framework of already existing regional and international human rights law obligations, as well as developing jurisprudence in this field.

The European Court of Human Rights (hereinafter the ECtHR) in its 2010 judgment in the case *Rantsev v. Cyprus and Russia*¹⁰ ruled that trafficking in human beings, as defined in the UN Trafficking Protocol and the Council of Europe Convention on Action against Trafficking (hereinafter the CoE Trafficking Convention),¹¹ is prohibited by Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) without the need to determine whether it should be qualified as slavery, servitude or forced labour:

*[Like slavery,] “trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements were often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions”.*¹²

In addition, the exploitation of the prostitution of others or other forms of sexual exploitation,¹³ forced labour or services,¹⁴ slavery or practices similar to slavery, servitude, debt bondage, forced marriage, forced begging, (sexual) exploitation of children and the worst forms of child labour¹⁵ are human rights violations in themselves, and unambiguously prohibited under international human rights law.¹⁶

¹⁰ ECtHR, *Rantsev v. Cyprus and Russia*, Application No. 25965/04, 7 January 2010.

¹¹ Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197.

¹² ECtHR, *Rantsev v. Cyprus and Russia*, para. 281.

¹³ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, A/RES/34/180 UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations No. 19*, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/3, Art. 6, para. 14.

¹⁴ Since the coming into force of the ILO Forced Labour Convention No. C29, 28 June 1930, the ILO Committee of Experts on the Application of Conventions and Recommendations has treated forced prostitution as a form of forced labour. See also: ILO, *Eradication of forced labour, General Survey concerning the Forced Labour Convention*, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), International Labour Conference, 96th Session, 2007, p. 42, para. 78.

¹⁵ As defined by ILO's Worst Forms of Child Labour Convention, No. C182, 17 June 1999.

¹⁶ For a definition of these concepts, see “Key definitions from relevant international standards” in Annex 1.



The prohibition of torture, identified as a rule of customary international law,¹⁷ is another relevant standard in the context of trafficking. As noted by the UN Special Rapporteur on Torture, victims of trafficking are often confined, forced to work long periods of time and subjected to severe forms of physical and mental violence “that may amount to torture or at least cruel, inhuman and degrading treatment or punishment”.¹⁸ The Committee against Torture has also recognised the link between trafficking and torture.¹⁹ In the same line, the ECtHR has held that the expulsion of a person to a State where he or she would be subjected to slavery or forced labour might raise issues under the obligation to prohibit torture.²⁰

Recommendation

When transposing the Directive into national legislation, Member States are encouraged to define human trafficking as a violation of human rights and a crime.

¹⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para. 10.

¹⁸ UN General Assembly, Human Rights Council, UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/7/3), 15 January 2008, para. 53.

¹⁹ UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture: Russian Federation* (CAT/C/RUS/CO/1, para. 11) and *Austria* (CAT/C/AUT/CO/3, para. 4).

²⁰ ECtHR, *Ould Barar v. Sweden*, Application No. 42367/98, 19 January 1999.

RECITAL 3: TRAFFICKING IN PERSONS AS A GENDER-SPECIFIC PHENOMENON

Recital 3 notes the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes. For this reason, assistance and support measures should be gender-specific, taking into account the different needs of male and female victims.

Trafficking in human beings can be seen as both a violation of human rights and a form of gender-based discrimination and violence against women and girls. General Recommendation No. 19 of the Committee on the Elimination of All Forms of Discrimination Against Women (hereinafter the CEDAW Committee)²¹ makes a specific reference to trafficking, identifying it as a form of gender-based violence “*incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity.*” Likewise, the Vienna Declaration and Programme of Action²² and the Beijing Platform for Action²³ – identify trafficking as a form of gender-based violence, as do the 2006 UN Secretary General’s in-depth study on all forms of violence against women,²⁴ and the UN Resolution on trafficking in women and girls, which acknowledges the trafficking of women and girls on account of their gender.²⁵ The Special Rapporteur on Violence Against Women has consistently dealt with trafficking and forced prostitution as a form of violence against women in their reports.²⁶ At the European level, the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter the CoE Convention on violence against women)²⁷ refers in its preamble to the CoE Trafficking Convention, and as such brings human trafficking within the scope of violence against women and that of the CoE Convention on violence against women.

Equal treatment of women and non-discrimination on the basis of sex is a fundamental right, enshrined in all major human rights instruments. Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW) defines such discrimination as:

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or other field.”

CEDAW Committee General Recommendation No. 19 identifies gender-based violence as “*a form of discrimination against women that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.*”²⁸ Gender-based violence is defined as “*violence directed against a woman because she is a woman or which affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.*”²⁹ The CEDAW definitions of discrimination and gender-based violence together provide

²¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations No. 19*, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/3, Art. 6, para. 14.

²² UN General Assembly, World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, 14-25 June 1993 (A/CONF.157/24), para. 18.

²³ UN, *Beijing Declaration and Platform for Action*, adopted at the Fourth World Conference on Women, 27 October 1995 (A/CONF.177/20/Rev.1), para. 100.

²⁴ UN General Assembly, *In-depth study on all forms of violence against women*, Report of the Secretary General, 61st Session (A/61/122/Add.1), para. 5.

²⁵ UN General Assembly, Resolution adopted by the General Assembly [on the report of the Third Committee (A/59/496)] 59/166, *Trafficking in women and girls*, Fifty-ninth session, (A/RES/59/166).

²⁶ See e.g. *15 Years of the United Nations Special Rapporteur on Violence Against Women (1994-2009) - A critical review*, p. 5 and pp. 13-15.

²⁷ Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence* (hereinafter the CoE Convention on violence against women), 11 May 2011.

²⁸ UN CEDAW Committee, *General Recommendation No. 19* (Eleventh session, 1992), para. 1.

²⁹ UN CEDAW Committee, *General Recommendation No. 19* (Eleventh session, 1992), para. 6.

a framework to address the often disproportionate discrimination and violence against trafficked women, whether they are third country nationals or EU citizens.

In addition to prohibiting discrimination, CEDAW requires States to take “*appropriate measures to eliminate discrimination against women, including gender-based violence, whether by public or private acts*”.³⁰ In relation to Article 6, General Recommendation No. 19 notes that prostitutes are especially vulnerable to violence “*because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence*”.³¹

Much trafficking occurs in the context of cross-border migration, including within the European Union, by manipulating legal migration channels and the vulnerabilities of persons, including women migrating in search of work and sustainable employment. CEDAW General Recommendation No. 26 on women migrant workers is therefore particularly relevant in the context of policies and programmes to protect the rights of women migrant workers and prevent trafficking.³²

When transposing and implementing the Directive, it should be recalled that gender refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women, and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context- and time-specific, and changeable. Gender determines what is expected, allowed and valued in a woman or a man, a girl or a boy, in a given context. Gender is part of the broader socio-cultural context. Men and boys are also victims and survivors of gender-based violence. As such, the analysis of roles in and vulnerabilities to trafficking, as well as responses to this phenomenon, will need to take into account the gender perspective.

Recommendation

When transposing the Directive into national legislation, Member States are encouraged to reflect the nature of trafficking as a form of gender-based violence and sex-based discrimination.

RECITAL 33: RESPECT FOR FUNDAMENTAL RIGHTS

Further to Recital 1, Recital 33 reaffirms the respect by the Directive for fundamental rights and its observance of the principles recognized by the EU Charter of Fundamental Rights.

State obligations under international human rights law

The recognition of trafficking as a human rights violation invokes responsibilities for States. Under international human rights law States have a legal responsibility to respect, protect and fulfill the rights of all persons within their territory. The recognition that trafficking in human beings constitutes both a cause and a consequence of human rights violations renders the promotion and protection of human rights particularly relevant. As stated by the former UN High Commissioner for Human Rights, Mary Robinson, “*trafficking is a cause of human rights violations because it violates fundamental human rights, such as the right to life, the right to dignity and security, the right to just and favourable*

³⁰ UN CEDAW Art. 2(e); UN CEDAW Committee, *General Recommendation No. 19* (Eleventh session, 1992), para.s 8 & 9.

³¹ UN CEDAW Committee, *General Recommendation No. 19* (Eleventh session, 1992), para 15.

³² UN CEDAW Committee, *General recommendation No. 26 on women migrant workers*, 5 December 2008, CEDAW/C/2009/WP.1/R.

*conditions of work, the right to health, the right to equality and the right to be recognised as a person before the law. It is a consequence because it is rooted in poverty, inequality and discrimination”.*³³

Key rights engaged in human trafficking are listed in Box A.

In setting out rights and obligations, international human rights law is relevant in that it shapes appropriate State responses. For example, the law relating to the treatment of non-citizens requires States to extend important human rights protections to non-citizen victims of trafficking within their borders.³⁴ These include the protection of core human rights, such as the right to life, liberty and security of person; liberty of movement, including the right to return to one’s own country; protection from *refoulement*; protection from arbitrary expulsion; the right to privacy; the right to recognition before the law; and the right to health, education and housing. It also confirms that States cannot violate non-discrimination principles or norms protecting political, civil, economic, social and cultural rights when developing or implementing human rights responses. Furthermore, individual trafficked persons may also be entitled to comprehensive protections delivered in a gender- and age-sensitive way, taking into account their particular vulnerabilities as women, children, migrants, migrant workers, refugees, or stateless persons under the relevant international instruments.³⁵

The standard of “due diligence”

The recognition of trafficking in persons as a human rights violation and a form of gender-based violence entails specific responsibilities for States, including the duty to act with due diligence. “Due diligence” is the standard applied in determining a breach of State obligations. Under international law a State is responsible for the perpetration of an internationally wrongful act which is attributable to it through the conduct of its agents such as the police, immigration and border officials, prison officers or other public officials. This standard is set out in the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, which are widely accepted as customary international law.³⁶

The duty of due diligence extends to violations by both State and non State actors.³⁷ States are obliged to exercise due diligence in preventing and responding to acts by private entities that interfere with established rights. Although States are not responsible for the acts of others, they can be held responsible for their own failure to prevent, investigate, prosecute or compensate for the commission of the wrongful act. The requirement of due diligence is referred to in the OHCHR Recommended Principles: “States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons”.³⁸

A requirement of due diligence has been adopted in a number of international human rights instruments, including CEDAW, which asserts that “[...] States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”³⁹ The CoE Convention on preventing and combating violence against women and domestic violence incorporates the standard of due diligence by providing that “Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act

³³ OHCHR, *Trafficking and the Global Sex Industry: The need for a human rights framework*, in: *Women’s Rights are Human Rights*, Special issue on Women’s rights, A. Gallagher, Spring 2000.

³⁴ OHCHR, *Commentary on the Recommended Principles*, pp. 57- 60.

³⁵ OHCHR, *Commentary on the Recommended Principles*, p. 38.

³⁶ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chap. IV.E.1.

³⁷ *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women*, Commission on Human Rights, Fifty-sixth session, 29 February 2000 (E/CN.4/2000/68), p. 5.

³⁸ OHCHR, *Commentary on the Recommended Principles*, 2010, Principle 2. For more on the due diligence standard, refer to OHCHR, *Commentary on the Recommended Principles*, pp. 78-81.

³⁹ CEDAW Committee, *General Recommendation No. 19* (Eleventh session, 1992), para. 9.

KEY RIGHTS ENGAGED IN TRAFFICKING IN HUMAN BEINGS

- **Right to life, liberty and security** (Art. 2 & 6 EU Charter; Art. 2 & 5 ECHR; Art. 6 & 9 ICCPR; Art. 6 & 37 CRC; Art. 5 CERD; Art. 9 & 16 ICRMW).
- **Right to freedom from slavery, servitude, forced labour, or bonded labour** (Art. 5 EU Charter; Art. 4 ECHR; Art. 8 ICCPR; Art. 10 ICESCR; Art. 11 ICRMW; Slavery & Forced Labour Conv.).
- **Right not to be sold, traded, promised or forced into marriage** (Art. 16 CEDAW; Art. 1 Conv. on slavery-like practices; Art. 37 CoE Trafficking Conv.).
- **Right not to be subjected to torture, cruel, inhumane, and degrading treatment or punishment** (Art. 4 EU Charter; Art. 3 ECHR; Art. 7 ICCPR; Art. 3 CAT; Art. 37 CRC; Art. 10 ICRMW).
- **Right to be free from gender-based violence** (Art. 2 CEDAW).
- **Right to freely choose one's work and to just and favourable conditions of work** (Art. 15 & 31 EU Charter; Art. 6 & 7 ICESCR; Art. 11 CEDAW; Art. 32 CRC; Art. 25 ICRMW, Art. 9 ILO Conv. No. 143 concerning migrations in abusive conditions).
- **Right to freedom of expression and information** (Art. 11 EU Charter; Art. 10 ECHR; Art. 19 ICCPR; Art. 13 ICRMW).
- **Right to property** (Art. 17 EU Charter; Art. 15 ICRMW).
- **Right to keep one's own identity documents** (Art. 21 ICRMW).
- **Right to health** (Art. 12 ICESCR; Art. 5 CERD; Art. 14 CEDAW; Art. 24 & 39 CRC, Art. 28 ICRMW).
- **Right to freedom of movement** (Art. 45 EU Charter; Art. 12 ICCPR; Art. 15(4) CEDAW; Art. 5 CERD; Art. 8 ICRMW).
- **Right to privacy and protection of family life** (Art. 7 EU Charter; Art. 8 ECHR; Art. 17 ICCPR; Art. 9 & 10 CRC; Art. 14 ICRMW).
- **Right to protection of personal data** (Art. 8 EU Charter).
- **Right to Non-discrimination, Equality before the Law and Equal Protection by the Law** (Art. 20 & 21 EU Charter; Art. 14 ECHR; Art. 2, 14 & 26 ICCPR; Art. 2 & 3 ICESCR; Art. 2 CEDAW; Art. 2 CRC; Art. 2 & 5 CERD; Art. 1 & 24 ICRMW).
- **Right to an effective remedy** (Art. 47 EU Charter; Art. 13 ECHR; Art. 2 ICCPR; Art. 6 CERD).
- **Right to be protected from *non-refoulement*** (Art. 4 & 19 EU Charter; Art. 3 ECHR; Art. 33 1951 Refugee Conv.; Art. II(3) OAU Refugee Conv.; Art. 22(8) ACHR; Art. 3 CAT; 1984 Cartagena Declaration; 1967 Declaration on Territorial Asylum; Art. 7 ICCPR; Art. 22 CRC; Art. 14 UN Trafficking Protocol; Art. 40 CoE Trafficking Conv.; Art. 3(2) of the Eur. Conv. on Extradition; Preamble 2 EU Directives 2004/83/EC, 2005/85/EC and 2003/9/EC; Preamble 8 EU Directive 2008/115/EC; Preamble 2 Council Regulation (EC) No. 343/2003; Preamble 10 EU Directive 2011/36/EU).
- **Right to seek asylum** (Art. 14 UDHR; 1967 Declaration on Territorial Asylum; Art. 18 EU Charter; Art. 14 UN Trafficking Protocol; Art. 40 CoE Trafficking Conv.; 1951 Refugee Conv.; UNHCR's Executive Committee Conclusions on Asylum).

in conformity with this obligation”,⁴⁰ respectively that “Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors”.⁴¹

Furthermore, the ECtHR has adopted the obligation of due diligence in its judgment on *Rantsev v. Cyprus and Russia*, where it ordered Cyprus and Russia respectively to pay compensation to the family of a victim of trafficking for the failure to provide for an appropriate legal and administrative framework to combat trafficking and to properly investigate how and where the victim was recruited.⁴²

States should therefore take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts relating to human trafficking, including when these are perpetrated by non-State actors.

Recommendation

When transposing the Directive, Member States are encouraged to acknowledge the standard of due diligence along with the principle of State responsibility in their national legislation.

RECITAL 7: ADOPTION OF AN INTEGRATED, HOLISTIC AND HUMAN RIGHTS APPROACH

The Preamble of the Directive further recites that the Directive adopts an integrated, holistic and human rights approach to the fight against trafficking in human beings.

This new approach constitutes an important step forward, which will contribute to more coherence at the level of the European Union and its Member States, and less siloed responses. As outlined in Recital 7, “more rigorous prevention, prosecution and protection of victims’ rights” are sought by the Directive. Also of note is the call by Recital 7 for States to take into consideration the 2004 Directive residence permits issued to third-country nationals who are victims of trafficking in human beings (hereinafter the Directive on residence permits), when implementing the Directive.⁴³ In line with the spirit of the Directive and Recital 7, States should apply the existing provisions of the Directive on residence permits in the most favourable manner to the victim. An integrated holistic and human rights-based approach would also require the EU institutions and its Member States to revise the Directive on residence permits for victims of trafficking to ensure access to temporary and long-term residence is granted outside and beyond criminal proceedings.

An integrated and holistic approach

An integrated and holistic approach gives equal attention to prevention, prosecution, protection and the need for partnership to effectively addressing human trafficking, and is guided by a number of interacting principles.⁴⁴ Please refer to Box B for more details.

⁴⁰ CoE, Convention on violence against women, Art. 5 (1).

⁴¹ CoE, Convention on violence against women, Art. 5 (2).

⁴² ECtHR, *Rantsev v. Cyprus and Russia*, Application No. 25965/04, 7 January 2010.

⁴³ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (hereinafter the Directive on residence permits).

⁴⁴ UNODC, *International Framework for Action To Implement the Trafficking in Persons Protocol*, 2009, p. 9.

AN INTEGRATED AND HOLISTIC APPROACH

- **Interdisciplinary, coordinated and integrated approach:** As a multidisciplinary problem, trafficking in persons requires that policies on a variety of issues be coordinated and consistent with the objective of preventing and combating trafficking in persons. Member States must ensure coordination amongst the various governmental agencies involved in anti-trafficking activities, those agencies and NGOs, and the agencies in one Member State and those in others.
- **Comprehensive international approach:** Effective action to prevent and combat trafficking in persons requires a comprehensive international approach that attacks the problem in countries of origin, transit, and destination. Measures to prevent trafficking should punish the traffickers and protect its victims, including by protecting their internationally recognised human rights. These principles require coordination and synergy between European Commission-led initiatives and initiatives underway in other fora at the international and regional level, in particular through the work of the Council of Europe. Likewise, coherence is required between the EU internal actions and policies, and those addressing external action and policy engagement with third countries.
- **Evidence based:** Policies and measures to prevent and combat trafficking in persons should be developed and implemented based on data collection and research and should be subject to regular monitoring and evaluation.
- **Sustainability:** A sustainable anti-trafficking response is one that endures over time, and is able to adapt creatively to changing conditions. Sustainability refers to coherence of practices in both time and efficiency.

From: UNODC, *International Framework for Action To Implement the Trafficking in Persons Protocol*, 2009, p. 9.

CORE PRINCIPLES OF NON-DISCRIMINATION, PARTICIPATION AND ACCOUNTABILITY

- **Respect for the principle of non-discrimination:** On the one hand, persons most likely to be trafficked are often victims of discrimination. On the other hand, victims of trafficking are especially susceptible to further discrimination and intolerance based on their race, ethnicity, religion or other status, such as working or having worked in the sex industry. Special care should be taken to ensure that anti-trafficking measures do not directly or indirectly discriminate on grounds of gender, ethnicity, or immigration status. Protection for trafficked persons should be interpreted and applied without discrimination (See Art. 14 UN Trafficking Protocol).
- **Participation:** One of the core values of human rights-based programming is the participation of rights holders in the development and implementation of policies and programs that affect their interests as an essential condition for effective change strategies. The importance of the participation of rights holders is recognized in a number of international instruments, including CEDAW and CRC. The participation of rights holders should be active, free, and meaningful, going beyond mere consultation and empowering rights holders to reflect their views and expectations in the relevant policies and programmes (Report of the Special Rapporteur on Trafficking, 9 August 2010 (UN General Assembly, A/65/288)). Through participation, rights-holders are better able to claim and enjoy their rights while improving the ability of duty-bearers to meet their obligations. People are seen as active actors seeking to change their situation rather than as powerless pawns or victims 'in need of rescue'. Interventions aim at giving people the power, capacities, capabilities and access needed to change their situation, to speak up for their own rights and, in the case of trafficked persons, to take back control of their lives (empowerment). Self-organization and representation of the affected groups and their participation in finding solutions are encouraged. Likewise, measures should ensure that the voices of victims are heard and mechanisms are put in place to ensure their full participation in the search for durable solutions, including their right to reparation and compensation.
- **Accountability:** A human rights-based approach addresses the root causes of a violation based on rights rather than needs. It identifies rights-holders, in this case trafficked persons, their entitlements, and the corresponding duty-bearers (usually States), their obligations and the actions needed to address the human rights violation in question.

A human rights-based approach

A human rights-based approach is a methodology that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.⁴⁵ It ensures compliance with existing State obligations under international and regional human rights treaties; it guarantees that anti-trafficking responses do not undermine or otherwise negatively impact on the human rights of trafficked persons or other groups affected by trafficking or anti-trafficking responses, or discriminate against women, migrants, refugees or other groups in a vulnerable situation. It aims to strengthen the participation of victims of trafficking and other affected groups in anti-trafficking responses, as well as their ability to determine the policies that govern their lives.⁴⁶ This methodology also provides a framework to monitor and evaluate anti-trafficking responses from a rights-based perspective.

A human rights-based approach is anchored in the principles of non-discrimination, participation and accountability, with particular focus on the gender implications and the implications for the child victim.⁴⁷ These core principles should drive the integrated and holistic anti-trafficking responses of the European Union and its Member States. Please refer to Box C for more details on the core principles of non-discrimination, participation and accountability.

A human rights-based approach puts the human rights of trafficked persons at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.⁴⁸ This includes that trafficked persons should first and foremost be seen as rights holders, and not as merely instrumental to investigations or prosecutions.⁴⁹ Whereas the prosecution of perpetrators is vital, a human rights-based approach puts equal emphasis on addressing the protection needs of trafficking victims, outside and beyond criminal investigation, by recognizing the right to an adequate and effective remedy. Recital 17 calls upon Member States to establish “specific protective measures for any victim of trafficking in human beings” [emphasis added], and Recital 18 reasserts that “it is necessary for victims of trafficking to be able to exercise their rights.”

A human rights based approach also ensures that anti-trafficking measures do not adversely affect *inter alia* the right to international protection⁵⁰ of refugees and asylum-seekers, the special rights of children, in particular unaccompanied and separated children, the rights of stateless persons, or the rights of persons with disabilities and other vulnerable groups.⁵¹ This principle is implicitly recognized in Article 14 of the UN Trafficking Protocol, which states that nothing in the Protocol shall affect the responsibilities of States under international law, including international humanitarian law and international human rights law. A similar provision is set out in Article 40 of the CoE Trafficking Convention. For more on examples of anti-trafficking measures that may adversely affect established rights, please refer to Box D.

⁴⁵ OHCHR, *Commentary on the Recommended Principles*, p. 49.

⁴⁶ OHCHR, *Recommended Principles*, 2002, Principles 1 to 3.

⁴⁷ *Ibid.*, p. 50.

⁴⁸ OHCHR, *Recommended Principles*. Principle 1.

⁴⁹ S. Craggs and R. Martens, *Rights, residence, rehabilitation: Findings of a comparative study assessing residence options for trafficked persons*, 2010, p. 49.

⁵⁰ The EU Asylum *acquis* defines ‘international protection’ to mean the refugee and subsidiary protection status as defined by Art. 2 of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: Art. 2 (c): “ ‘refugee’ means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it.” Art. 2 (e): “ ‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but [...] if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Art. 15, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.”

⁵¹ OHCHR, *Recommended Principles*, Guideline 1.

EXAMPLES OF ANTI-TRAFFICKING MEASURES THAT MAY ADVERSELY AFFECT ESTABLISHED RIGHTS

- Detention of trafficked persons in immigration or shelter facilities;
- Prosecution of trafficked persons for status-related offences including illegal entry, illegal stay and illegal work;
- Denial of exit or entry visas or permits – whether generally applicable or only in relation to a group of persons identified as being especially vulnerable to trafficking;
- Denial of the right of all persons, including those who have been trafficked, to seek asylum from persecution;
- Denial of basic rights to migrants, including migrant workers and those not lawfully within the territory of the State;
- Raids, rescues and “crack-downs” that do not include full consideration of and protection for the rights of the individuals involved;
- Forced repatriation of victims in danger of reprisals or re-trafficking;
- Denial of a right to a remedy;
- Violations of the rights of persons suspected of or convicted of involvement in trafficking and related offences, including unfair trials and inappropriate sentencing; and
- Laws or procedures that authorize any of the above.

From: OHCHR, *Commentary on the Recommended Principles and Guidelines*, p. 85

A HUMAN RIGHTS BASED APPROACH

A human rights-based approach ensures that anti-trafficking responses:

- aim to change the conditions that give rise to trafficking and the (sexual) exploitation of human beings under forced labour or slavery-like conditions;
- stop the abuse and investigate, prosecute & punish the perpetrators;
- provide adequate and effective remedies to trafficked persons.

Moreover, anti-trafficking responses should:

- comply with existing obligations of States under international human rights law, as set forth in the core human rights treaties and other standards setting instruments;
- not undermine or otherwise negatively impact on the human rights of trafficked persons and other groups affected by trafficking or anti-trafficking responses;
- not be used to directly or indirectly discriminate against women, migrants, refugees, sex workers or other groups in a vulnerable situation;
- ensure participation of the most affected in their development, implementation and evaluation;
- be gender-sensitive;
- take a child rights approach.

A human rights-based approach also helps ensure that anti-trafficking responses do not create or exacerbate existing situations that cause or contribute to trafficking through policies or practices that further undermine the rights of persons vulnerable to trafficking, in particular women. As stated by the former UN High Commissioner for Human Rights:

*“That [...] is the only way to retain a focus on the trafficked person: to ensure that trafficking is not simply reduced to a problem of migration, a problem of public order or a problem of organized crime. It is also the only way to ensure that well-intentioned anti-trafficking initiatives do not compound discrimination against female migrants or further endanger the precariously held rights of individuals working in prostitution”.*⁵²

Policies to prevent trafficking should address the root causes which increase people’s vulnerability to trafficking, like inequality, poverty, discrimination, stigma and prejudice. Measures which add to marginalization or stigmatization must be avoided as they can easily be at odds with the protection of human rights. Rather, measures should strive to strengthen the ability of vulnerable groups to claim their human rights and support their self-organization and self-representation (For more details, please refer to the commentary on Article 18 - prevention).

A human rights-based approach thus implies considering, at each and every stage, the impact that a law, policy, practice or measure may have on the human rights of trafficked persons and other groups who may be affected by trafficking or anti-trafficking policies. Please refer to Box E for an overview of a human rights-based approach.

Recommendations

When transposing the Directive, Member States are encouraged to use the human-rights based-approach methodology, affirming the centrality of victims as rights-holders.

When transposing the Directive, Member States are encouraged to ensure the respect for the principle of non-discrimination anchored in EU and international law. Member States are encouraged to ensure interpretation of the provisions in the Directive in a way that is not discriminatory on any ground, including the status of victim of trafficking.

Member States may also wish to reaffirm the contribution of their anti-trafficking legislative and other measures to the elimination of all forms of discrimination on grounds of sex, gender, ethnicity, immigration or other status, including through women empowerment, and ensure that these are implemented in a way that will not affect victims negatively.

When transposing the Directive, Member States are encouraged to consider ways to include the views and experiences of victims of trafficking and other groups that are or may be affected by trafficking or anti-trafficking policies, in the development of legislative responses.

When transposing the Directive, Member States may wish to specify the accountability framework for *inter alia* the oversight of the establishment and enhancement of national referral mechanisms, the cooperation between State agencies and between these and civil society, the reporting and monitoring on (the impact of) anti-trafficking measures, and the training of State officials likely to come into contact with victims of trafficking.

⁵² Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention Against Organised Crime, Fourth session, Vienna, 28 June-9 July 1999.

A Gender-sensitive approach

Finally, anti-trafficking responses should be gender-sensitive and take a child rights approach. As discussed above (Commentary on Recital 3), trafficking in both men and women should be acknowledged, and the similarities and differences in the experiences of women and men in relation to vulnerabilities and violations should be addressed. A gender-sensitive approach takes into account the different impacts of policies and programmes on men and women, and empowers potential and actual victims to access information and remedies, and to claim their human rights in a gender-specific manner.⁵³ Despite growing awareness of the need to empower women through measures to achieve social, economic and political equity, much more remains to be done to increase women's economic and political participation, their educational attainment, and their health and well-being. A gender-sensitive approach therefore also ensures that anti-trafficking strategies address gender-based discrimination and violence, promote gender equality and the realization of human rights for both women and men, based on women's empowerment.⁵⁴

Recommendation

When transposing the Directive, Member States are encouraged to take into account the different impact trafficking and anti-trafficking responses may have on women, men, girls and boys, and to ensure that anti-trafficking responses are gender-sensitive, promote gender equality and are based on women's empowerment.

A child rights approach

All actions undertaken in relation to child victims and children at risk should be guided by the applicable human rights standards, in particular the principles of protection and respect for children's rights as set out in the 1989 UN Convention on the Rights of the Child (hereinafter CRC) and in its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (hereinafter OPSC). Child victims are entitled to special protection measures, irrespective of their legal status both as victims and as children, in accordance with their special rights and needs. In all actions concerning children at risk and child victims, the best interest of the child shall be a primary consideration.⁵⁵ General Comment No. 5 of the Committee on the Rights of the Child (hereinafter the CRC Committee) on general measures of implementation of the Convention on the Rights of the Child forms the foundation for efforts to protect the rights and principles stipulated in the CRC.⁵⁶

Recommendation

When transposing the Directive, Member States are encouraged to ensure that all actions in relation to children are guided by the principles of protection and respect for children's rights.

⁵³ UNIFEM, *Gender Equality, Human Rights and Trafficking: A Framework of analysis and Action*, Concept paper prepared by Jean D'Cunha, ASEM Seminar co-organized by the Ministry for Foreign Affairs, Sweden and UNIFEM in co-operation with UNESCAP, 7-9 October 2002, p. 3.

⁵⁴ UNODC, *International Framework for Action To Implement the Trafficking in Persons Protocol*, 2009, p. 8.

⁵⁵ UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, 2006, General Principles, p. 10.

⁵⁶ CRC Committee, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (art.s 4, 42 & 44; para. 6), U.N. Doc. CRC/GC/2003/5 (2003).

PART II - ARTICLES

ARTICLE 1: SUBJECT MATTER - TAKING INTO ACCOUNT A GENDER PERSPECTIVE

Article 1 of the Directive deals with the subject matter of this instrument, and explains that “*it also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof.*”

While Recital 3 recognizes the gender-specific aspects of trafficking and encourages the inclusion of gender-specific measures of assistance and support, Article 1 reaffirms that a gender perspective is necessary to strengthen the prevention of the crime of trafficking and the protection of victims. By referring to the gender-specific nature of human trafficking in the first article of the Directive, the EU institutions and its Member States have clearly indicated the importance of a gendered response to human trafficking.

Although trafficking affects both men and women, women are affected in different ways than men with respect to the types of trafficking they are subjected to, the forms of abuse they suffer and the consequences thereof.⁵⁷ Women are, for instance, more likely to end up as domestic workers, au-pairs or in the entertainment and sex industry, while men are more often trafficked into the construction sector or agricultural work. At times of armed conflict, women and girls are particularly at risk of sexual violence, forced prostitution, and trafficking. According to the June 2010 UNODC Report on the Globalization of Crime,⁵⁸ two thirds of the victims detected by State authorities are women, and data gathered on offenders also suggests that women play an increasingly key role as perpetrators in Europe.⁵⁹

Women tend to be particularly vulnerable to trafficking in human beings due to their economic and social position and the gendered nature of the labour market. Women are largely relegated to the informal and unprotected economic sectors where their labour is not or only partially recognized as work. Formal migration channels are also often more limited for women. Social exclusion, racial and ethnic discrimination, class, age, and gender roles and identities further contribute to the increased vulnerability of women and girls to trafficking. Rights-based gender-sensitive anti-trafficking measures address these factors in order to facilitate the access of women migrant workers to work opportunities abroad, eliminate bans on women’s migration, promote safe migration and ensure the protection of the rights of women migrant workers. They also seek the active involvement of women migrant workers and relevant non-governmental organizations in policy formulation, implementation, monitoring and evaluation.⁶⁰ Please refer to Box F for more details on how restrictions on women’s migration and inadequate rights protections increase vulnerability to trafficking.

A gender-responsive approach takes inequalities and differences in experiences between women and men into account without viewing these as natural and unchangeable. Gender-sensitive responses avoid reinforcing discriminatory gender stereotypes that would seek to ban or restrict women’s actions and choices, control, morally reform or dis-empower them. An example is the use of bans on women’s migration as a ‘safeguard’ against trafficking.⁶¹ A gender-sensitive and rights-based

⁵⁷ EU Experts Group on Trafficking in Human Beings, Report, 2004, p. 60.

⁵⁸ UNODC, Report on the Globalization of Crime – A transnational Organized Crime Threat Assessment, June 2010.

⁵⁹ UNODC, *Global Report on Trafficking in Persons*, February 2009, p. 10.

⁶⁰ CEDAW Committee, General Recommendation No. 26 on women migrant workers (CEDAW/C/2009/WP.1/R), 2008, p. 8.

⁶¹ *Trafficking in Persons: a gender and rights perspective*, prepared by Jean D’Cunha, Expert Group Meeting on Trafficking in women and girls, 18-22 November 2002, New York (EGM/TRAF/2002/EP.8), p.8.



BOX F:

RESTRICTIONS ON WOMEN'S MIGRATION AND INADEQUATE RIGHTS PROTECTIONS INCREASE VULNERABILITY TO TRAFFICKING

Many believe that men migrate and women are trafficked - although men are also trafficked and increasing numbers of women are migrating independently. A consequence of such perceptions is to obviously protect women against trafficking, often in the form of restrictions or bans on women's migration. While the intent is well-meaning, evidence suggests that women who must migrate for work to survive resort to dangerous alternatives and may fall prey to traffickers. Of note, restrictions fail to target oppressive environments or build women's capacity to avoid or confront potential exploitation in empowering ways. Clarity on the links and differences between migration, trafficking and smuggling enables action that substantively promotes and protects women's human rights.

From: UNIFEM, *Migration and Trafficking: Links and Differences*, p. 4.

approach addresses unsafe and discriminatory contexts, and equips women, men, girls and boys to deal with potential exploitation.

A gender perspective also takes into account the different assistance and protection needs of women and men, girls and boys. Most assistance services, for example, tend to be tailored to the needs of women trafficked into the sex industry, while trafficked men find it difficult to access existing protection schemes. Gender-sensitive and human rights-centred assistance and protection services should adequately address the needs of all victims of trafficking, women, men, girls and boys.

Recommendations

When transposing the Directive, Member States are encouraged to mention the gender-specific nature of trafficking in human beings, and thus the need for gender-sensitive provisions.

When implementing the Directive and other legislative and non-legislative anti-trafficking measures, Member States are encouraged to adopt a gender-specific and gender-sensitive approach.

ARTICLE 2: OFFENCES CONCERNING TRAFFICKING IN HUMAN BEINGS

Article 2 provides a definition of trafficking, explains what a position of vulnerability means, expounds upon the concept of exploitation, and provides further explanation regarding the issue of consent and child victims.

The definition of trafficking in persons as contained in the UN Protocol provides the common ground for the international community to prevent, combat and punish trafficking, as well as to identify, protect and assist its victims. The definition provided in Article 2 of the Directive aligns with that of the UN Trafficking Protocol. For more on the definition of trafficking in human beings, please refer to Box G.

Trafficking in persons, forced labour and slavery

A crucial element of the definition of trafficking is its purpose, namely exploitation, which is specifically defined to include, at a minimum, sexual exploitation, forced labour or services, slavery or similar practices, servitude, the exploitation of criminal activities or the removal of organs.

The notion of exploitation of labour or services inherent in this definition allows for a link to be established between the UN Trafficking Protocol and ILO Convention No. 29. According to Article 2, paragraph 1 of Convention 29, forced labour is defined as “*all work or services exacted from any persons under the menace of any penalty and for which the said person has not offered himself voluntarily*”. This conjecture facilitates the task of implementing both instruments at the national level in a complementary manner.⁶²

Without any prejudice to the criminal justice part of the comprehensive response to trafficking in persons, from a gender-sensitive human and labour rights perspective, the primary concern is to stop the exploitation of human beings, and ensure that all victims receive assistance and support. In order to effectively combat trafficking, the logical course of action would be not to address trafficking in persons only as a way into an exploitative situation, but in its entirety, taking into account the

⁶² ILO, Eradication of forced labour, General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), International Labour Conference, 96th Session, 2007.

DEFINITION OF TRAFFICKING IN HUMAN BEINGS

The definition of trafficking in persons in the UN Trafficking Protocol has three constituent elements:

- **The Act** (What is done) Recruitment, transportation, transfer, harbouring or receipt of persons.
- **The Means** (How it is done) Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim.
- **The Purpose** (Why it is done) For the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

To ascertain whether a particular circumstance constitutes trafficking in persons, consider the definition of trafficking in the Trafficking in Persons Protocol and the constituent elements of the offense, as defined by relevant domestic legislation.

TRAFFICKING		
ACT	MEANS	PURPOSE
Recruitment	Threat or use of force	Exploitation including
Transport	Coercion	Prostitution of others
Transfer	Abduction	Sexual exploitation
Harbouring	Fraud	Forced labour
Receipt of persons	Deception	Slavery or similar practices
	Abuse of power or vulnerability	Removal of organs
	Giving payments or benefits	Other types of exploitation

From: UNODC, *Toolkit to Combat Trafficking in Persons*, Global Programme Against Trafficking in Human Beings, 2008.

three elements of the definition, including the related forced labour and slavery-like practices, which are crimes and violations of human rights in themselves, and as such should be clearly defined in national law.

As the identification of victims by the criminal justice system may be a lengthy and difficult process, a human rights-based approach would encourage States to overcome the multiple challenges of victim identification through procedures that foster the referral of persons for whom there are reasonable grounds to believe that they have been trafficked to specialized services as soon as indicators or a suspicion of trafficking are noted. Irrespective of official and judicial identification procedures, service

providers and other first responders may activate a request for immediate support in the presence of a reasonable suspicion that a person may have been trafficked. This ensures that access to basic support and assistance can be provided to individuals who are thought to have been trafficked. This approach is referred to as a “low-threshold approach” to identification of victims of trafficking.⁶³ This “low-threshold approach” is a step towards addressing the assistance and protection needs of exploited persons, without prejudice to the criminal justice system process, in cases where trafficking cannot be proven by the criminal justice system.

As such, legislative and judicial action against forced labour and against human trafficking can serve the same goals and be mutually supportive, in the same way as historically combating the slave trade went hand in hand with combating slavery itself. Such an approach is in accordance with the core human rights treaties, including the ILO Forced Labour Conventions and Article 4 of the ECHR, which prohibits forced labour, slavery and servitude as human rights violations. Slavery is also prohibited *jus cogens*. Consequently, State Parties are required to criminalize these practices and provide adequate remedies to its victims.

The ECtHR has confirmed this approach in its ruling in the case of *Siliadin v. France*, in which it found that France had violated its positive obligation to adopt and effectively implement criminal-law provisions making the practices set out in Article 4 a punishable offence, and to afford victims specific and effective protection against these practices.⁶⁴ The approach is also in line with the recent ECtHR judgement in *Rantsev v. Cyprus and Russia*,⁶⁵ which places trafficking within the scope of Article 4 ECHR “without the need to identify whether the situation in question had to be defined as slavery, servitude or forced labour”. Observing that Cyprus and Russia had failed their obligation to provide for an adequate legal framework and to duly investigate the case at hand, the ECtHR ordered these two countries to pay compensation to the family of the victim. A comparable approach can be found in the forthcoming Directive of the European Parliament and the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA.

Recommendation

When transposing the Directive, Member States may wish to consider adopting a “low-threshold approach” to the identification of victims, including those subject to forced labour, servitude or slavery-like practices, and as such should be clearly defined in national law.

⁶³ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, Victims of trafficking in persons, with particular emphasis on identification, Background paper, Vienna, 10-12 October 2011, (CTOC/COP/WG.4/2011/4).

⁶⁴ ECtHR, *Siliadin v. France*, Application No. 73316/01, 26 July 2005.

⁶⁵ ECtHR, *Rantsev v. Cyprus and Russia*, Application No. 25965/04, 7 January 2010.

ARTICLE 8: NON-PROSECUTION OR NON-APPLICATION OF PENALTIES TO THE VICTIM

Article 8 of the Directive calls upon Member States to take the necessary measures to ensure that the competent authorities are entitled not to prosecute or impose penalties on victims of trafficking for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being trafficked.

The OHCHR Commentary on the Recommended Principles and Guidelines notes:

*“The criminalization of trafficked persons is commonplace, even in situations where it would appear obvious that the victim was an unwilling participant in the illegal act. Such criminalization is often tied to a related failure to identify the victim correctly. In other words, trafficked persons are detained and subsequently charged, not as victims of trafficking, but as smuggled or irregular migrants, or undocumented migrant workers”.*⁶⁶

In today’s world of large population movements, including forced displacements and migration for work, especially involving circular and temporary migration, the distinction between smuggling and human trafficking may be blurred. In some respects, human trafficking resembles the smuggling of migrants. Smuggling rings and trafficking rings are often closely related, with both preying on the vulnerabilities of people seeking access to labour markets abroad and international protection. Irregular migrants relying on the services of smugglers, whom they have willingly contracted, may end up as victims of trafficking if the services they originally sought become abusive and exploitative trafficking scenarios. In this context, determining if the use of false documents or illegal entry into the territory of the European Union was compelled as a direct consequence of being subject to human trafficking, as noted in Article 8, becomes a challenging exercise. This raises the question of whether a person, who knowingly used a false passport to travel to a Member State where he or she became a victim of trafficking, should be prosecuted or penalized. Such an approach departs from the victim-centered human rights-based approach invoked by the Directive.

Prosecution, the imposition of penalties and/or detention deny trafficked persons the rights to which they are entitled, such as access to justice and redress or the right to protection against secondary victimization and further trauma. Non-prosecution and non-application of penalties as well as a prohibition on the detention of trafficked persons are equally in the interest of the prosecution, as victims will refrain from seeking help from the authorities, when they risk or fear being arrested and detained. Please refer to Box I for the key standards on non-prosecution and non-penalization of trafficked persons.

Non-prosecution of trafficked persons

Article 8 of the Directive requires States to take the necessary measures not to prosecute victims of trafficking for criminal activities they have been involved in as a direct consequence of being trafficked.

The provision in Article 8 of the Directive is further developed in Recital 14 which reiterates that victims of trafficking should *“be protected from prosecution or punishment for criminal activities [...] they have been compelled to commit as a direct consequence of being subject to trafficking”*. However, the Directive leaves it to Member States, in accordance with the basic principles of their legal systems, to ensure that their respective authorities are entitled not to prosecute or impose penalties. Such an approach is unlikely to foster a harmonized implementation of the Directive, and more importantly will continue to allow the prosecution of victims of trafficking in some Member States, as well as the denial of their rights, against the purpose outlined in Recital 14 *“to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators.”*

⁶⁶ OHCHR, *Commentary on the Recommended Principles*, Principle 7, p. 129.

KEY INTERNATIONAL STANDARDS ON NON-PROSECUTION AND NON-PUNISHMENT OF TRAFFICKED PERSONS

- Trafficked persons are not detained, charged or prosecuted for violations of immigration law or for the activities they have been involved in as a direct consequence of their being trafficked (Art. 26 CoE Trafficking Conv.; OHCHR Rec. Principles, Principle 7, Guideline 2(5) & 4(5)).
- States provide for a possibility of not imposing penalties on victims of trafficking (Art. 26, CoE Trafficking Conv.).
- Child victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons (OHCHR Rec. Principles, Guideline 8).
- Trafficked persons are considered victims regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the family relationship between the perpetrator and the victim (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law).
- As a general principle, asylum-seekers and refugees, including those who have been (re-)trafficked, should not be detained in view of their protection needs. Detention should be resorted to in exceptional situations after all alternatives have been exhausted and only in accordance with the general norms and principles of international human rights law and only for reasons prescribed by law. (UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the detention of Asylum-seekers* (February 1999); Article 31 of the 1951 Refugee Conv. exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, *provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

It is a widely accepted principle that one should not be held responsible for a crime he or she was compelled to commit. In some systems this could be considered under a “defence of duress.” Whereas the UN Trafficking in Persons Protocol does not specifically address the issue, the Working Group on Trafficking in Persons, the body established to make recommendations on the effective implementation of the Protocol, notes that States Parties should consider “*not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts.*”⁶⁷

This is confirmed by Principle 7 of the OHCHR Recommended Principles and Guidelines, which states that “*Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons*”.

Both the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁶⁸ and the 2006 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

⁶⁷ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, (CTOC/COP/WG.4/2009/2, para. 12).

⁶⁸ UN General Assembly, Declaration of *Basic Principles of Justice for Victims of Crime and Abuse of Power*, Resolution 40/34 of 29 November 1985, para. 1.

(hereinafter Principles and Guidelines on the Right to a Remedy),⁶⁹ which may include serious cases of trafficking, underline that a person is to be considered a victim irrespective of whether the perpetrator of the violation is apprehended, prosecuted or convicted, and irrespective of family relationships between the victim and the perpetrator.⁷⁰ Paragraph 10 of the Principles and Guidelines on the Right to a Remedy furthermore states that measures should be taken to ensure the well-being of victims and avoid their re-victimization, a likely consequence of criminalization and detention.

Non-punishment & non-application of penalties to trafficked persons

The UN Special Rapporteur on Trafficking has noted with satisfaction the important added value of the CoE Convention on Trafficking by providing in its Article 26 for the possibility of not imposing penalties on victims for their involvement in unlawful activities if they were compelled to do so by their situation.⁷¹ This article, titled the “Non-punishment provision”, is further explained in the Explanatory Report.⁷² As is the case in Article 8 of the Directive, the concepts of ‘non-punishment’ and ‘non-application of penalties’ are used inter-changeably.

In addition, it is noteworthy that for those victims of trafficking who also have international protection needs, the 1951 Refugee Convention relating to the Status of Refugees (hereinafter 1951 Refugee Convention) requires States not to impose penalties on refugees on account of their illegal entry or presence in a country.⁷³ ‘Penalties’ in Article 31 of the 1951 Refugee Convention are sometimes interpreted as ‘criminal penalties’ by relying on the French term *‘sanctions pénales’* but the broader view of penalties takes into account the object and purpose of the treaty, as well as the interpretation of the term ‘penalties’ incorporated in other human rights treaties, and therefore also includes administrative penalties (for example, administrative detention).⁷⁴ Depriving asylum-seekers and refugees of their liberty for the mere reason of having entered or stayed illegally would amount to a penalty under Article 31(1). Article 31(1) should also be interpreted to mean that the act of entering a country for the purpose of seeking asylum should not be considered an unlawful act.⁷⁵

This Commentary therefore takes the view that the distinction between criminal and administrative sanctions is irrelevant in the context of Article 8 of the Directive, and that it is necessary to look beyond the notion of criminal sanction to examine whether the penalty is in breach of international human rights law.

Non-detention of trafficked persons

The issue of detention of trafficked persons is also relevant in this context. Whereby detention is defined as *“the condition of any person deprived of personal liberty except as a result of conviction for an offence”*.⁷⁶ Detention, which can occur in a wide range of circumstances, could amount to a penalty.

⁶⁹ 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 Violations of International Humanitarian Law*, Resolution 60/147 of 21 March 2006, para. 8.

⁷⁰ According to Art. 2 of the forthcoming Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of Crime, ‘victim’ means “(i) a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss directly caused by a criminal offence; (ii) the family members of a person whose death has been caused by a criminal offence”.

⁷¹ UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, *Including the Right to Development*, Report submitted by the UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, (A/HRC/14/32), Fourteenth session, 4 May 2010, para. 84.

⁷² CoE, *Explanatory Report – Action against Trafficking in Human Beings*, 16.V.2005, para.s 272-274.

⁷³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951 (hereinafter 1951 Refugee Convention), Art. 31 - Refugees unlawfully in the country of refuge.

⁷⁴ For a discussion on the term ‘penalties’, refer to UNHCR, *Refugee Protection in International Law – UNHCR’s Global Consultations on International Protection*, Edited by E. Feller, V. Turk and F. Nicholson, Cambridge University Press, 2003, pp.194-196.

⁷⁵ UNHCR, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants (Back to Basics)*, April 2011, PPLA/2011/01.Rev.1, p. 11.

⁷⁶ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly Resolution 43/173, annex, 9 December 1988, A/RES/43/173.

Detention measures against victims of trafficking take various forms. They may be detained in police lock-ups or prisons or be subjected to administrative detention for migration violations. Victims may also be detained – even if correctly identified as victims - as a result of their engagement in illegal activities, such as prostitution or unauthorized work, because they are unwilling or unable to cooperate in criminal investigations or because their cooperation is not considered useful.

In the name of protection, trafficked persons may also be placed in closed shelters, rehabilitation centres or other welfare facilities in conditions akin to detention, sometimes for extended periods. Common justifications for this form of detention include the need to provide shelter and support, protect victims from further harm or secure victim cooperation in the investigation and prosecution of traffickers.⁷⁷ The practice of victim detention in shelters and other welfare institutions is often highly gendered. The majority of trafficked persons detained in closed shelters are women and girls: women and girls are more likely to be identified as victims of trafficking than men, and female victims are often perceived as being more in need of protection and safety.⁷⁸

The OHCHR Recommended Principles and Guidelines are explicit on the point that the detention of victims of trafficking is inappropriate and (implicitly) illegal. They call upon States to ensure that trafficked persons are not, under any circumstances, held in immigration detention centres or other forms of custody.⁷⁹

The UN Trafficking Protocol, the CoE Convention and the EU Directive do not refer specifically to the detention of victims of trafficking. Guidance from international human rights law on *inter alia* the right to freedom of movement, the right to liberty and the prohibition on arbitrary detention, and the prohibition of discrimination on ground of sex, is therefore relevant.⁸⁰

On a case-by-case basis detention of trafficking victims may only be justified if it meets the requirements of the internationally accepted principles of *necessity, legality, and proportionality*.⁸¹ This implies that victims cannot be detained, either in law enforcement or welfare institutions, for any reason other than their immediate safety and only for the shortest period possible. They can never be detained for reasons of collecting evidence. International human rights law also requires the application of safeguards in case detention is indeed administered as a last resort and in response to specific threats to a victim's safety. Please refer to Box H for the key international standards on non-detention of trafficked persons, including children.

In the case of child victims of trafficking, the CRC Article 37(b) states that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”. In its General Comment No. 6 on unaccompanied and separated children, the Committee says that “... unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof”.⁸² This means that the authorities must be able to demonstrate that the detention is in the best interest of the child and that there is no other reasonable option.

⁷⁷ A. Gallagher and E. Pearson, *Detention of Trafficked Persons in shelters. A legal and policy analysis*, 2008, pp. 20-25.

⁷⁸ A. Gallagher and E. Pearson, *Detention of Trafficked Persons in shelters. A legal and policy analysis*, 2008, pp. 15-16.

⁷⁹ OHCHR, *Recommended Principles and Guidelines*, Guidelines 2.6, 6.1.

⁸⁰ For more details, please refer to OHCHR, *Commentary on the Recommended Principles and Guidelines*, pp.133-139 and A. Gallagher and E. Pearson, *Detention of Trafficked Persons in shelters. A legal and policy analysis*, 2008.

⁸¹ Human Rights Committee, *Van Alphen v. Netherlands*, Communication No. 305/1988, para. 5.8; *A. v. Australia*, Human Rights Committee, Communication No. 560/1993, para. 9.2.

⁸² UN CRC, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 61.

KEY INTERNATIONAL STANDARDS ON NON-DETENTION OF TRAFFICKED PERSONS, INCLUDING CHILDREN

- Trafficked persons should not be held in immigration detention centres, other forms of custody or vagrant houses (OHCHR Rec., Guideline 2(6) and 6(1).
- Trafficked persons should not be detained by law enforcement authorities for any reason other than their immediate physical protection. They are never detained for reasons of collecting evidence including statements (Art. 9 & 12 ICCPR).
- Trafficked persons should not be detained by welfare authorities, unless they are in agreement (in which case they are not detained) or unless i) the detention is for a specific purpose directly related to the immediate needs of that victim and ii) for the shortest possible period of time (Art. 9 & 12 ICCPR; Art. 5 ECHR).
- Trafficked children should not be placed in closed facilities unless it can be demonstrated that it is in their best interest and there is no reasonable alternative for protection, it is for the shortest possible period of time and is subject to periodic review (Art. 25 and 37(b) CRC).

Specific protections, including judicial or administrative oversight, the right to periodic review of placement and the right of challenging the detention, must be upheld in all situations where the fact of detention can be legally justified.⁸³ As noted by the European Union Fundamental Rights Agency (hereinafter FRA): *“The placement of separated, asylum-seeking children in closed facilities should only be considered, if deemed essential for child protection in response to the child’s best interests requirements, determined and reviewed in the same way as for citizens of the host State”*.⁸⁴ Decisions affecting the welfare and wellbeing of children must be made on a case-by-case basis and with a view to protecting the best interests of each individual child. The detention of children in need of protection has been explicitly rejected by the Committee on the Rights of the Child:

“Such deprivation of liberty for children who have been abandoned or abused equates to punishment for children who are victims of crimes, not the offenders”.⁸⁵

The disappearance of asylum-seeking children from care centres is an increasingly worrying phenomenon, which requires better adjusted approaches to outreach services for these children, in particular those who are resisting self-identification as refugees and/or victims of trafficking, accompanied by strengthened child protection measures such as guardianship and closer supervision, rather than using detention to try to prevent disappearance.⁸⁶

Failure by the State to prevent unlawful victim detention by public or private agencies invokes the international legal responsibility of that State. Victims may be eligible for remedies, including compensation, for such unlawful detention.⁸⁷

⁸³ CRC, Art. 25.

⁸⁴ European Union Agency for Fundamental Rights, *Separated, asylum-seeking children in European Union Member States Summary Report*, 2010, p. 15.

⁸⁵ Committee on the Rights of the Child, General Comment No. 10 on children’s rights in juvenile justice.

⁸⁶ UNICEF-Innocenti Research Centre, *Child Trafficking in Europe - A Broad Vision to Put Children First*, 2008.

⁸⁷ OHCHR, *Commentary on the Recommended Principles*, p. 139.

Recommendations

When transposing the Directive, States may wish to consider including a provision to ensure that (potential) victims of trafficking are not detained, charged or prosecuted, imposed penalties or otherwise held responsible for acts and offences, committed by them as part of the crime of trafficking. Such offences should include *inter alia* illegal entry, exit or stay, working without documentation, use of fraudulent travel or identity documents, lack of identity documents, or involvement in unlawful acts, including prostitution where this is illegal. Such provision should apply regardless of the ability or willingness of victims to cooperate with the authorities, and include the non-penalization of persons in need of international protection⁸⁸ on account of their illegal entry or stay in the European Union. In legal systems that have prosecutorial discretion, a similar provision could be included in guidelines for prosecutors (refer to Box J for model guidelines for prosecutors).

When transposing the Directive into national law, Member States are encouraged to ensure that the non-application of ‘penalties’ applies to both criminal sanctions and administrative penalties.

States may also wish to consider including provisions to ensure that (potential) victims of trafficking are not detained in closed shelters or other welfare institutions beyond the requirements of necessity, legality and proportionality, and if detention is administered as a last resort, that the required legal safeguards are upheld. The treatment of children should follow a determination of their best interests.

BOX J:

MODEL GUIDELINES FOR PROSECUTORS ON THE NON-PROSECUTION OF TRAFFICKED PERSONS:

A victim of trafficking should not be detained, imprisoned or held liable for criminal prosecution or administrative sanctions for offences committed by him or her as a direct result of the crime of trafficking in persons, including:

- (a) The person’s illegal entry into, exit out of or stay in [State];
- (b) The person’s procurement or possession of any fraudulent travel or identity documents that he or she obtained, or with which he or she was supplied, for the purpose of entering or leaving the country in connection with the act of trafficking in persons;
- (c) The person’s involvement in unlawful activities to the extent that he or she was compelled to do so.

From: UNODC, *Model Law on Trafficking in Persons*, p. 41.

⁸⁸ For a definition of ‘international protection’, please refer to the section on A Human Rights-Based Approach in the commentary on Recital 7.

⁸⁹ OHCHR, *Commentary on the Recommended Principles*, Commentary on Principle 8, pp. 141-151.

ARTICLE 11: ASSISTANCE AND SUPPORT FOR VICTIMS OF TRAFFICKING IN HUMAN BEINGS

Article 11 provides for a series of measures to assist and support victims of trafficking, as well as specific conditions at times for the provision of these measures.

On the one hand, victims who break free from their traffickers often find themselves in a situation of great insecurity and vulnerability, and the harm experienced does not cease when they come to the attention of the authorities. State obligation to provide assistance and support to victims of trafficking stems from State duty to provide for effective remedies in cases of human rights violations, and protect from further harm.⁸⁹ As noted in Recital 18, assistance and support are crucial for trafficked persons to be able to effectively exercise their rights.

On the other hand, a critical component in the effective detection, investigation and prosecution of trafficking is the willingness of trafficked persons to assist in prosecutions. This willingness is strongly related to the protection of their safety and privacy, the availability of assistance, legal aid and interpretation, their general treatment by the police and other authorities, and ultimately the risk of being deported and subjected to reprisals and re-victimization. In contrast, if protected and assisted, victims are less likely to abscond with the risk of being re-victimized and re-trafficked. If they have little to gain but much to lose, it is likely that they will be reluctant to denounce their exploiters and cooperate in the investigation and prosecution. It is only by putting their human rights at the centre of all assistance and support responses that victims' trust and confidence in the authorities can be established. Please refer to Box K for the key international standards on assistance and protection of trafficked persons.

BOX K:

KEY INTERNATIONAL STANDARDS ON ASSISTANCE & PROTECTION OF TRAFFICKED PERSONS

- Measures are taken to protect trafficked persons from further harm and to protect their safety (Art. 6(1) & 6(5) UN Trafficking Prot.; Art. 12 & 28 CoE Trafficking Conv. Art. 7 EU Dir 2004/81/EC; OHCHR Rec. Principles, Guideline 8).
- Trafficked persons have access to (emergency) shelter/ adequate housing, counselling and information, medical, psychological and material assistance, legal advice, and employment, educational and training opportunities in accordance with the age, gender and special needs of victims, in particular the special needs of children (Art. 6(3) & 6(4) UN Trafficking Prot.; Art. 10, 12 & 28 CoE Trafficking Conv.; Art. 20 CRC; OHCHR Rec. Principles, Guideline 8).
- Assistance is provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care, and in cooperation with NGOs engaged in providing assistance to victims (Art. 12(7) & 35 CoE Trafficking Conv.; Art. 3 & 20 CRC).
- Basic assistance, including appropriate and secure housing, material, medical and psychological assistance, is given irrespective of whether the victim agrees to cooperation in the prosecution of the traffickers (Art. 10, 12 & 28 CoE Trafficking Conv.; OHCHR Rec. Principles, Principle 8.).
- Measures to protect and assist trafficked persons are interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons, consistent with internationally recognised principles of non-discrimination (Art. 14 UN Trafficking Prot.; Art. 3 CoE Trafficking Conv.).

The Directive legislates under Article 11 on the provision of assistance and support, whereas protection measures envisaged in this instrument are only provided in the framework of criminal investigations and proceedings (Article 12).

However, victims of trafficking may be in need of protection before, beyond and outside the criminal justice process. Trafficked persons in need of international protection⁹⁰ for instance, need to access protection irrespective of the trafficking investigation and its outcome. Victims may also need protection from further harm; unlike with other crimes, the threat to a victim does not end once the victim has escaped or been rescued. Due to this threat, victims may not want to or dare get involved in criminal procedures against their traffickers. Likewise, the need for protection does not cease with the end of the criminal procedure; victims may still fear retaliation and/or re-victimization in their country of origin and may need to continued protection. In all these situations, States are under the obligation to “*protect trafficked persons from further exploitation or further harm*”.⁹¹

Though the UN Trafficking Protocol does not make a specific reference to the issue of protection outside the realm of criminal justice, the body established to make recommendations on the effective implementation of the Protocol has affirmed that “States parties should ... [e]nsure victims are provided with immediate support and protection, irrespective of their involvement in the criminal justice process”.⁹² The UN General Assembly has also passed a resolution “Recognizing [...] that Member States have an obligation to provide protection for the victims”.⁹³

In *Rantsev v. Cyprus and Russia*, the ECtHR held that “*in order for a positive obligation to take operational measures [such as to protect] to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of article 3 (a) of the Palermo Protocol and article 4 (a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk*”.⁹⁴

The precise content of the obligation to protect will depend on the circumstances of each individual, and the aim of protection will also change depending on the stage at which protection needs arise.⁹⁵

Recommendation

When transposing the Directive into national legislation, Member States are encouraged to include the provision of protection as well as assistance and support.

⁹⁰ For a definition of ‘international protection’, please refer to the section on A Human Rights-Based Approach in the commentary on Recital 7.

⁹¹ OHCHR, *Recommended Principles and Guidelines*, Principle 8.

⁹² UN, *Improving the coordination of efforts against trafficking in persons*, Background paper of the Secretary-General, p. 29.

⁹³ UN General Assembly, Resolution adopted by the General Assembly [on the report of the Third Committee (A/61/444)], 61/180. *Improving the coordination of efforts against trafficking in persons*, 8 March 2007.

⁹⁴ ECtHR, *Rantsev v. Cyprus and Russia*, Application No. 25965/04, 7 January 2010, para. 286.

⁹⁵ For further details on protection from further harm, please refer to OHCHR, *Commentary on the Recommended Principles and Guidelines*, pp. 143-146.

ARTICLE 11(1): ASSISTANCE AND SUPPORT BEFORE, DURING AND AFTER THE CONCLUSION OF CRIMINAL PROCEEDINGS

According to Article 11(1), assistance and support are to be provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable trafficked persons to exercise the rights set out in Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings and this Directive. Of particular importance is the fact that the rights afforded under Article 11(1) apply to all victims of trafficking, whether they are third country nationals or EU citizens.

Reflection and recovery period

Recital 18, which further elaborates on the content of Article 11, first notes the need for victims of trafficking “*to be able to exercise their rights effectively*”. The spirit behind Article 11 is therefore to ensure victims’ effective exercise of their human rights. Later, Recital 18 explains that “*the assistance and support provided should include at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers*” [emphasis added].

The reference in Article 11(1) to assistance and support *before* criminal proceedings is indeed an acknowledgement of the need for a reflection and recovery period. Such period allows trafficked persons to start recovering and make informed and thoughtful decisions about the options available to them. It should be noted that a reflection period is by definition not tied to cooperation with the authorities and should by no means be used to compel victims to cooperate. The provision of a reflection and recovery period is equally important for victims of internal trafficking as for EU citizen and third country national victims. For an example of good practice on the reflection period, please refer to Box L.

Despite the mention of the need for the victim to “recover” and the unconditional provision of assistance and support “at least during the reflection period” in Recital 18, the Directive does not legislate on this recovery period. Likewise, the Directive remains silent on the duration of the reflection period though minimum regional and national legislative standards already exist in this regard. The duration of the reflection period varies between Member States, but should be, according to Article 13 of the CoE Trafficking Convention, at least 30 days when there are reasonable grounds to believe that the person concerned is a victim.

BOX L:

REFLECTION PERIOD IN THE NETHERLANDS: AN EXAMPLE OF GOOD PRACTICE

In the Netherlands, under the “B9 procedure”, (presumed) victims of trafficking are granted a reflection period of three months “at the slightest indication” that he or she might be a victim of trafficking. The reflection period is meant to allow the (presumed) victim to start recovering and to make an informed decision about cooperation with the authorities. During the reflection period the (presumed) victim has access to safe housing, psychological, medical, material and legal aid. It is the responsibility of the police to inform the victim about the B9 procedure. If, after this period, the victim decides to cooperate in the prosecution of the traffickers, he or she is granted a temporary residence permit for the duration of the criminal proceedings until the end of the trial, to be renewed each year. The statement of the victim with the police is automatically considered to be an application for such temporary residence permit, on which the IND has to decide within 24 hours. The temporary residence permit provides access to the labour market and to social welfare, legal, medical and psychological assistance on the same footing as Dutch nationals.

The concept of a reflection and recovery period is relatively recent and post-dates, for example, the OHCHR Recommended Principles and Guidelines. In the absence of well-developed international standards, it is necessary to turn to existing national legislation and policy guidance. In its Toolkit to Combat Trafficking in Persons, UNODC has compiled national legislation on the reflection period, existing guidelines, and discussions in various fora.⁹⁶ As for empirical evidence, it suggests that a minimum period of 90 days is required for the cognitive functioning and emotional strength of a trafficked person to increase to a level at which they are able to make well-considered decisions about their safety and cooperation with the authorities against the traffickers, as well as to offer detailed evidence about past events.⁹⁷ The EU Experts Group on Trafficking also recommended that access to a reflection delay of no less than three months be granted.⁹⁸

Recommendation

When transposing the Directive into national legislation, Member States are encouraged to include in their national legislation a period of reflection and recovery of a minimum of 90 days for all victims of trafficking. For child victims, such decisions should reflect consideration of their best interests.

Assistance and support after the conclusion of criminal proceedings

As discussed previously in this Commentary, victims of trafficking have a legal entitlement to receive assistance as victims of a crime and of human rights violations. As such, of equal importance to the reflection and recovery period is the provision of assistance, support and protection after the conclusion of the criminal proceedings, as the needs of trafficked persons for assistance and protection may still be valid when the criminal case ends. Assistance, support and protection should not be limited to the duration of the criminal proceedings, but be based on the actual needs of individual victims, separate and apart from their role in criminal proceedings, as required in Article 11(3).

In cases where the trafficking experience was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects, which would render return to the country of origin intolerable, the grant of a residence permit is particularly recommended.

Recital 7 acknowledges the role of the Directive on residence permits issued to third-country nationals who are victims of trafficking in human beings. Although in need of revision, the Directive clearly sets minimum standards.⁹⁹ The recent report by the European Commission on the implementation of the Directive on residence permits, however, shows that while the number of identified victims in some Member States may amount to several hundreds or even upwards to two thousand per year, the number of residence permits issued on the basis of this Directive is rarely higher than twenty per year. The report also shows that a considerable number of EU Member States have granted no residence permit at all on this basis.¹⁰⁰

Of relevance to the discussion on protection beyond the period of criminal proceedings, is Article 14 of the CoE Trafficking Convention on residence permits, which requires States parties to issue residence permits to victims when their stay is necessary owing to their personal situation.

⁹⁶ UNODC, *Toolkit to Combat Trafficking in Persons*, Second Edition, May 2010, Tool 7.1, pp. 326-334.

⁹⁷ Cathy Zimmerman et. al., *Stolen Smiles. The physical and psychological health consequences of women and adolescents trafficked into Europe* (hereinafter *Stolen Smiles*), the London School of Hygiene and Tropical Medicine, 2006, p. 3.

⁹⁸ Experts Group on Trafficking in Human Beings of the European Commission, Opinion of 18 May 2004 on reflection period and residence permit for victims of trafficking in human beings, paras. 3, 5.

⁹⁹ Op. Cit., Directive on residence permits.

¹⁰⁰ Report from the Commission to the European Parliament and the Council on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (hereinafter EC Study on the application of the EU Directive on residence permits to victims of trafficking), COM(2010) 493, 15 October 2010, p. 10.

For a discussion on the granting of international protection and the principle of *non-refoulement* in relation to victims of trafficking as well as a discussion on supported reintegration, safe and voluntary return, and the need for pre-return risk assessments, please refer to the commentary on Article 11(6).

Recommendation

When transposing the Directive, Member States are encouraged to lift existing restrictions to the delivery of assistance and protection beyond criminal proceedings, where currently required by national legislation and policies.

ARTICLE 11(2): NO DELAY IN THE PROVISION OF ASSISTANCE

Article 11(2) affirms State's obligation to ensure that a person is provided with assistance and support, as soon as there is a "reasonable-grounds indication" for believing that a person might have been subjected to trafficking.

Recital 18 further expounds upon this point: "*A person should be provided with assistance and support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness*".

Law enforcement officials, labour inspectors, or other officials may have reasonable grounds to suspect that a person might be a (potential) victim of trafficking or at risk of trafficking, when the presence of indicators of trafficking in persons is found.¹⁰¹ Although the presence or absence of indicators in itself neither proves nor disproves that human trafficking is taking place or may take place, their presence should always lead to further investigation. Indicators can be related to the person as well as to the circumstances in which a person is found. Victims of trafficking may also directly approach police officials or be referred to law enforcement agencies by non-governmental organizations or clients. In these cases too, should there be a "reasonable grounds-indication", these should be further investigated. Article 11(2) requires States to trigger access to assistance and protection at this stage and without delay.

States should not wait for the conclusions of investigations or prosecution to grant access to assistance and protection. Of importance in the context of this article, is the fact that only few victims of trafficking self-identify as victims. Trafficked persons may have a variety of reasons for not wanting to reveal their status or experiences to State authorities. They may harbour deep feelings of mistrust towards the authorities stemming from previous experiences; they may fear retaliation by the traffickers against themselves or family members; they may be afraid of arrest and deportation because of their illegal status; or they may suffer from the Stockholm syndrome, which may lead victims to express empathy and have positive feelings towards their traffickers, sometimes to the point of defending them. The effect of traumatization on trafficking victims may be such that they may not disclose their situation for weeks or even months or may not be able to reveal detailed information.

It is also important to note that a "reasonable-grounds indication" may exist even if the person has not already been subjected to exploitation. The mere attempt to subject a person to exploitation constitutes a crime, and Article 3 of the Directive requires States to ensure that an attempt to commit the crime of trafficking be punishable. As such, persons in relation to whom there is a "reasonable-grounds indication" that they might be at risk of being trafficked, for instance at the time of entering the territory of the European Union, should also be provided with assistance and support. They may

¹⁰¹ For a list of indicators, see UNODC, *Anti-human trafficking manual for criminal justice practitioners*, Module 2: Indicators of trafficking in Persons, 2009, and ILO and European Commission, *Operational indicators of trafficking in human beings*, Results from a Delphi survey implemented by the ILO and the European Commission, *Revised version of September 2009*.

have similar needs for assistance (for example shelter) or protection (for example from reprisal), and their cooperation with criminal investigations and proceedings could be key to further preventing trafficking in human beings in Member States. This is in line with the above commentary on the “low-threshold approach” (for more on this point, please refer to the commentary on Article 2).

Recommendation

When transposing the Directive, Member States are encouraged to clarify that this provision also includes persons in relation to whom there is a reasonable-grounds indication that they might be at risk of trafficking.

ARTICLE 11(3): UNCONDITIONAL ACCESS TO PROTECTION AND ASSISTANCE

Article 11(3) provides that assistance and support should not be made conditional on the victim’s willingness to cooperate in the criminal investigation, prosecution or trial, without prejudice to the Directive on residence permits for victims of trafficking.

The linking of assistance and protection to cooperation with national criminal justice agencies is prevalent in many countries. Most Member States make access to assistance and protection beyond the reflection period conditional upon the capacity or willingness of trafficked persons to cooperate with the competent authorities,¹⁰² which does not support a human rights-based approach to anti-trafficking, as noted in the OHCHR Recommended Principles (Principle 8),¹⁰³ and stressed by the CEDAW Committee in its recent Concluding Observations on the Netherlands:

*“The Committee [...] reiterates its concern that victims of trafficking who do not cooperate with the police in the investigation and prosecution of traffickers are excluded from the protection of the so-called B9 regulation. The Committee considers that by imposing this requirement, the Government of the Netherlands seriously hampers its capacity to reach and support victims of trafficking with adequate help.”*¹⁰⁴

The Legislative guide for the implementation of the UN Trafficking Protocol also reaffirms, in relation to Social assistance and protection of victims (Article 6, paragraph 3) that “Such support and protection shall, however, not be made conditional upon the victim’s capacity or willingness to cooperate in legal proceedings”.¹⁰⁵

Despite its intention to provide for unconditional access to assistance and support, Article 11(3) introduces a condition, that of cooperation with the authorities (as required by the last limb of the article “without prejudice to the Directive 2004/81/EC or similar national rules”) as this Directive makes access to temporary residence – and thus to assistance and protection - dependent on the victim’s cooperation with the authorities. Conditionality of residence permits on cooperation with law enforcement authorities may not only compromise trafficked persons’ rights, including to full recovery,

¹⁰² E-Notes, Report on the implementation of anti-trafficking policies and interventions in the 27 EU Member States from a human rights perspective (2008 and 2009), Associazione On the Road; OHCHR, Commentary on the Recommended Principles, p. 142.

¹⁰³ OHCHR, Commentary on the Recommended Principles, p. 142.

¹⁰⁴ CEDAW Committee, Concluding Observations Netherlands, February 2010 (CEDAW/C/NLD/CO/5).

¹⁰⁵ UNODC, Legislative guide for 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, 2004, para. 62.

¹⁰⁶ For a more extensive discussion of the problems attached to linking protection and support to victim cooperation, see OHCHR, Commentary on the Recommended Principles, pp. 142-143.

but may also be counterproductive from a law enforcement perspective, especially since it is often unclear what “cooperation” is expected from trafficked persons. The existing provisions in Directive 2004/81/EC may also negatively affect those trafficked persons who do wish to testify and cooperate, but who are not required as witnesses because they possess no relevant information or because the perpetrators do not reside in the country, but who may equally require protection and assistance.

The link between assistance and cooperation introduced by the last limb of Article 13 also seems to indicate that unconditional assistance is only foreseen in the Directive for third-country national victims of trafficking as Framework Decision 200/81/EC solely refer to this category of victims, thus excluding EU citizens and national victims of trafficking.

Such conditions are not compatible with a victim-centred and rights-based approach, and foster discrimination on grounds of immigration status.¹⁰⁶

Recommendation

When transposing the Directive into national legislation, Member States are strongly encouraged to omit the last part of Article 11(3), and make access to assistance, support and protection entirely unconditional.

ARTICLE 11(4): MECHANISMS FOR EARLY IDENTIFICATION, ASSISTANCE AND SUPPORT

Article 11(4) requires States to establish appropriate mechanisms, aimed at the early identification of, assistance to and support for victims in cooperation with relevant support organizations. Please refer to Box M for the key standards on identification of trafficked persons.

Article 11(4) contains no conditions or restrictions. It unequivocally applies to all victims of trafficking, regardless of sex, immigration status, ethnic origin, citizenship or country of origin or any other status. Unlike Article 11(2), its scope is not limited to those victims who have already been subjected to the crime of trafficking. Article 11(4) should therefore be read to encompass all victims, including persons at risk of being trafficked, victims of an attempt to commit the crime of trafficking, and potential or presumed victims.

BOX M:

KEY INTERNATIONAL STANDARDS ON IDENTIFICATION OF TRAFFICKED PERSONS

- Guidelines and procedures for the relevant state authorities and others involved in the detection, detention, reception and processing of irregular migrants, are in place to permit the rapid and accurate identification of trafficked persons, including child victims (Art. 10 & 14 CoE Trafficking Conv.; OHCHR Rec. Principles, Guidelines 2(1) & 8(2)).
- The relevant authorities and officials work together with each other and with the relevant support organisations to facilitate identification and assistance of trafficked persons, while taking account of the special situation of both women and children (Art. 10(1) & 14 CoE Trafficking Conv. ; OHCHR Re. Principles, Guideline 2(3)).
- Migrants and other groups that might be vulnerable for trafficking receive information that enables them to seek assistance when needed (OHCHR Rec. Principles, Guideline 2(4)).

Early identification

The early identification of (potential) victims of trafficking and persons at risk of being trafficked is a cornerstone of the prevention of and fight against human trafficking and protection of victims. However, the number of victims identified by State authorities remains extremely low. In particular, identification of men and boys remains low, though the number of identified cases involving men trafficked into forced labour is growing. In addition, it has become increasingly clear that undocumented migrants as well as EU nationals and regular migrants in Europe are exposed to trafficking, exploitation and forced labour.¹⁰⁷

Identification of (potential) victims of trafficking and persons at risk of being trafficked may be a complicated and time consuming process due to the complexity of the crime. The interaction between the trafficker and the victim may be multi-faceted, since the perpetrator is often also “protecting” the victim’s illegal status from the authorities. The victim can feel dependent on, and bound to, the traffickers, for instance by debts. Moreover, individual members of the criminal network can adopt different roles in relation to the victim, varying from abuse and control to support and “protection”. Therefore, severing ties with the criminal circuit often takes the form of a process rather than that of an immediate action”.¹⁰⁸

The timely identification of (potential) victims and persons at risk of being trafficked, their referral to assistance services and protection as well as their access to adequate legal assistance beyond criminal investigation and proceedings relies on the multi-disciplinary skills and cooperation of those officials and non-governmental actors likely to come into contact with (potential) victims. The establishment of cooperation mechanisms amongst the various actors, including civil society actors, capacity building and strengthening, and training are key to improving the identification of trafficked persons.

The CoE Trafficking Convention refers to a ‘procedure’ for the identification of victims which takes into account the special situation of women and children.¹⁰⁹ The Explanatory Report of the CoE Convention adds that *“through the identification process, competent authorities seek and evaluate different circumstances, according to which they can consider a person to be a victim of trafficking”*.¹¹⁰ Operational, situation-specific and tailored indicators for victim identification such as the UNODC and the European Commission-ILO Delphi indicators, need to be more widely disseminated, tailored and adjusted, and systematically used.¹¹¹ In addition, the establishment of National Referral Mechanisms (NRMs) has proven to be a successful way of ensuring cooperation and coordination (please refer below).

Identification of children

Article 11(4) needs to be read in a gender- and child-sensitive manner, given that Articles 13 to 16 of the Directive, which specifically address the situation of child victims of trafficking, do not cover the identification of (potential) child victims of trafficking or children at risk of being trafficked. Failure to identify child victims quickly and accurately renders any rights granted to children “purely theoretical and illusory”.¹¹² Whereas the identification of trafficked persons in general is a complicated process, identifying children is often even more challenging. The UNICEF Reference guide on protecting the rights of child victims in Europe provides guidance in this respect (see Box N).¹¹³ For a discussion

¹⁰⁷ ILO, *The Cost of Coercion*, Report of the Director General, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 98th Session 2009, Report I(B), p. 21.

¹⁰⁸ EU Experts Group on Trafficking in Human Beings, Report, 2004, p. 102.

¹⁰⁹ CoE Trafficking Convention, Art.10(1).

¹¹⁰ CoE Trafficking Convention, Explanatory Report, para. 127.

¹¹¹ ILO and European Commission, *Operational indicators of trafficking in human beings. Results from a Delphi Survey implemented by the ILO and the European Commission*, 2009.

¹¹² CoE, Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings, para. 131.

¹¹³ UNICEF, *Reference Guide on protecting the rights of child victims in Europe*, p. 43.

GENERAL PRINCIPLES FOR THE PRO-ACTIVE IDENTIFICATION OF CHILD VICTIMS

- States shall take all necessary measures to establish effective procedures for the rapid identification of child victims.
- Efforts should be made to coordinate information sharing between agencies and individuals (including law enforcement, health, education, social welfare agencies and NGOs) so that child victims are identified and assisted as early as possible.
- Immigration, border and law enforcement authorities shall put in place procedures to identify child victims at ports of entry and in other locations.
- Social service, health or education authorities should contact the relevant law enforcement authority where there is knowledge or suspicion that a child is exploited or trafficked or is at risk of exploitation and trafficking.
- NGOs and civil society organizations should contact relevant law enforcement authorities and/or social service authorities where there is knowledge or suspicion that a child is exploited or trafficked or is at risk of exploitation and trafficking.

From: UNICEF, *Reference Guide on protecting the rights of child victims in Europe*.

on age assessment, please refer to the commentary on Article 13(2). A recent FRA study on child trafficking, for example, has highlighted victim identification as a serious challenge, and noted that as a consequence only four Member States had reported convictions of child traffickers for the period 2000-2007.¹¹⁴

The CRC makes clear that children are entitled to special protection from exploitation, whatever the form. The focus should be on identifying children in or at risk of exploitation and promptly referring them to appropriate services. Delay may be caused by the perceived need to categorize victims according to one legal definition or another. If evidence exists that the child is in a situation of exploitation he or she should have the same rights to protection as trafficked victims.¹¹⁵

National Referral Mechanisms (NRMs)

According to Article 11(4) Member States shall take the necessary measures to establish appropriate mechanisms, aimed at victim identification, assistance and support in cooperation with relevant support organizations.

An example of a good practice to support the early identification of, assistance to and protection of (potential) victims of trafficking and persons at risk of being trafficked is the establishment of National Referral Mechanisms (NRMs), as developed by the OSCE and recommended by the Experts Group on Trafficking in Human Beings.

¹¹⁴ Press release FRA: *EU must do more to fight child trafficking: FRA presents report on child trafficking in the EU*, 7 July 2009.

¹¹⁵ Experts Group on Trafficking in Human Beings, Report, 2004, p. 72.

A NRM can be defined as “a cooperative framework through which State actors fulfil their obligations to protect and promote the human rights of trafficked persons, coordinating their efforts in a strategic partnership with civil society”.¹¹⁶ Establishing NRMs can help ensure a comprehensive, integrated and pro-active system of support targeted at and accessible to all trafficked persons through their referral to relevant assistance services and protection. In addition, NRMs can help improve national legislation, policies and procedures on a broad range of victim-related issues, such as residence and repatriation regulations, victim compensation and witness protection, through their training and capacity building measures as well as in-built review and monitoring systems and by setting benchmarks to check whether goals are met.

National Referral Mechanisms exist and operate at various levels of development in the European Union Member States. Exchange of good practices on a multi-disciplinary and victim-centred approach, as well as regional and sub-regional linkages between these mechanisms would further support prevention and protection.

However, evaluation of existing NRMs shows that they often fail to place the victims and their rights at the centre. Victims of trafficking are seen and treated as mere instruments to support investigation and achieve prosecution. In its paper prepared to the OSCE Special Representative’s annual report on trafficking in the OSCE region, the OSCE Office of Democratic Institutions and Human Rights (hereinafter ODIHR) provides an analysis and brief overview of developments and achievements in the establishment of national anti-trafficking structures:

*“Structures and systems in place to identify trafficked persons are not always concerned with securing protection of trafficked persons’ human rights, as the NRM concept requires. Instead they are sometimes aimed at only facilitating investigation of the crime, generating statistics or data on victims of trafficking or securing funding for a service provider that is dependent on funds ear-marked for assisting trafficked persons. Although these aims are not incompatible with ensuring protection of the person identified, in certain cases protection of the trafficked person is secondary or overlooked”.*¹¹⁷

Likewise, most existing NRMs tend to be gender neutral and as such lack the ability to develop a gender-sensitive response capacity as well as gender-specific mechanisms and tools to address effectively what is now acknowledged to be a highly gendered phenomenon. In some States, for example, assistance services are only available to certain categories of trafficked persons at the exclusion of others, such as men, internally trafficked persons, or EU citizens. Moreover, whereas over the last years support services for women and girls who are trafficked and exploited in the sex industry have developed, there is yet little experience in the assistance to and support for trafficked boys, men and victims of the new and developing forms of trafficking such as forced removal of organs, forced begging or the exploitation of criminal activities. It is therefore important to ensure that NRMs strike a good balance between coordination, monitoring and follow-up through *inter alia* established methodology, processes, and indicators, and flexibility to meet the needs of all victims taking into consideration gender, age, and all the forms of exploitation victims may be subjected to.¹¹⁸

Over the years, it has also become obvious that mechanisms for victim identification, assistance and protection need more effective coordination amongst anti-trafficking agencies and non-governmental actors likely to come into contact with victims at the local, national and trans-national level. As a result, the International Centre for Migration Policy Development (hereinafter ICMPD) has developed guidelines for trans-national referral mechanisms in Europe.¹¹⁹

¹¹⁶ OSCE/ODIHR, *National Referral Mechanisms, Joining Efforts to protect the Rights of Trafficked persons. A Practical Handbook*, 2004, p. 15.

¹¹⁷ ODIHR, *Current NRM Developments in the OSCE Region*, Warsaw, October 2008.

¹¹⁸ UNODC, *An Assessment of Referral Practices to Assist and Protect the Rights of Trafficked Persons in Moldova*, Chisinau, Moldova February 2007, p. 37.

¹¹⁹ ICMPD, *Cooperation beyond Borders. Development of Transnational Referral Mechanisms for Trafficked Persons*, 2009.

Article 11(4) also requires States to work “in cooperation with relevant support organizations”. A full recital (Recital 6) is dedicated to cooperation with civil society organizations, including non-governmental organizations. Cooperation between the State and civil society is indeed one of the keys to a successful national referral mechanism:

*“The establishment of multidisciplinary teams on a national level can prevent the confrontation of these two models [repressive strategies and empowering strategies] and avoid the supposed conflict between “the human-rights approach” and the “law-enforcement approach”. The participation of civil society allows anti-trafficking measures to be scrutinized for the degree to which they protect human rights. In addition, multidisciplinary teams are more likely to have the expertise necessary to draw up measures to counter human trafficking across the various fields”.*¹²⁰

Recommendations

When transposing Article 11(4) of the Directive, Member States may wish to reflect the importance of a human rights-based approach by establishing age- and gender-sensitive victim-centred cooperation mechanisms for the early identification and referral of (potential) victims of trafficking.

When implementing the Directive, States are encouraged to consider flexible ways to ensure a multi-disciplinary and cross-sector approach, involving all relevant actors from government and civil society.

NRMs - Cooperation between anti-trafficking, migration and asylum authorities

To reach a safe haven, refugees may become victims of trafficking or be at risk of trafficking when resorting to smugglers, whose networks may be linked to those of traffickers. Likewise, persons who have been or are at risk of being trafficked may fall within the definition of a refugee contained in Article 1A(2) of the 1951 Refugee Convention or within the wider definition of persons eligible for subsidiary protection.¹²¹ The potential need for international protection of these persons must be taken into account.¹²²

The possibility that some victims or potential victims of trafficking may be entitled to international protection is explicitly recognized in Article 14 of the UN Trafficking Protocol:

“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 and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein”.

Article 40 of the CoE Trafficking Convention also re-affirms this principle and the Explanatory Report on this instrument expounds that *“The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have access to appropriate and fair asylum procedures”.*¹²³

¹²⁰ OSCE/ODIHR, *National Referral Mechanisms, Joining Efforts to protect the Rights of Trafficked persons. A Practical Handbook*, 2004, p. 27.

¹²¹ For a definition of subsidiary protection, refer to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who need international protection and the content of the protection granted (hereinafter EU Qualification Directive), Art.s 2 & 15.

¹²² UNHCR, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07, 7 April 2006, para. 13.

¹²³ CoE Trafficking Convention, Explanatory Report, CETS No.197, para. 377.

An integral element of the ‘appropriate mechanisms’ referred to in Article 11(4) of the Directive should therefore be the close cooperation between the authorities involved in anti-trafficking activities, including at the borders, and those responsible for granting international protection to ensure that anti-trafficking measures do not adversely affect the human rights of refugees or asylum-seekers.

However, asylum systems remain a weak link in the process of identifying, referring and protecting trafficked persons, including under the protection regime for refugees and other persons in need of international protection. Gender and age-vulnerable asylum-seekers may also fall prey to traffickers. A study commissioned by UNHCR and published in October 2009 revealed various gaps in State practices in relation to ensuring complementarity between international protection systems and procedures for the protection of victims of trafficking.¹²⁴ Please refer to Box O for an example of cooperation between asylum and anti-trafficking authorities.

Appropriate and effective referral mechanisms should be in place to ensure that persons who give any indication that they could be at risk of persecution or serious harm are identified and referred to the competent national asylum authorities while retaining their right to the protection and assistance provided by the anti-trafficking system. Likewise, persons in the asylum systems who show ‘reasonable-ground indications’ that they may have been trafficked or be at risk of being trafficked should be referred to the anti-trafficking systems while their claim for international protection continues to be examined. Please refer to Box P for more on strengthening cooperation between law enforcement and asylum authorities.

Likewise, response mechanisms should include provisions for the early identification of child victims who are also in need of international protection in order to ensure that any child who gives an indication that they could be at risk of persecution are identified and referred to the competent national asylum authorities.¹²⁵

Recommendations

When transposing the Directive, Member States are encouraged to include a saving clause in line with UN Trafficking Protocol Article 14.

When implementing the Directive, Member States are encouraged to ensure that their national referral mechanisms include close cooperation and established protocols with their national asylum authorities for the age- and gender-sensitive protection and assistance of victims of trafficking who are also in need of international protection.

¹²⁴ UNHCR, *The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs*, October 2009, PPLAS/2009/03.

¹²⁵ UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08.

NORWAY – COOPERATION BETWEEN ASYLUM AND ANTI-TRAFFICKING AUTHORITIES: AN EXAMPLE OF GOOD PRACTICE.

Norway has established both an asylum and a trafficking protection system. The 1988 Immigration Act established a legal framework for the granting of asylum and the 2008 Immigration Act stipulated that a trafficked person is considered a member of a particular social group, one of the grounds for persecution outlined in the refugee definition of the 1951 Refugee Convention. If the trafficked person is ineligible for refugee status for one reason or another, he or she may still qualify for a form of “subsidiary” protection. The second distinct system of protection relevant to trafficking protection and parallel to the international protection system is the domestic framework for protecting all people who are trafficked persons. The trafficking protection system is founded both on sections of the General Civil Penal Code and on a National Action Plan highlighting trafficked persons’ specific need for protection. Norway also has a Child Welfare Act that addresses child protection measures regarding trafficked children. This Act is supplemented by a government circular for relevant organizations and institutions drawing attention to the specific needs (including international protection needs) of trafficked children.

From: UNHCR, *The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs*, 2009, p. 14.

STRENGTHENING COOPERATION BETWEEN LAW ENFORCEMENT AND ASYLUM AUTHORITIES

- (Potential and presumed) victims of trafficking identified within the asylum system are referred through established NRM protocols to relevant assistance, support and protection mechanisms, without affecting the course of their asylum claim or their rights under the EU asylum Directives, including the right to a fair and efficient asylum procedure and to legal remedies.
- Asylum authorities make clear that any information or allegation related to criminal activity will be passed on to law enforcement and may result in an investigation while ensuring that confidentiality as per Article 22 of the Asylum Procedures Directive 2005/85/EC is fully ensured. The possible consequences of giving such a statement to the asylum authorities should be made clear to the applicant by the interviewer and the legal representative.
- (Potential) victims of trafficking identified outside the asylum system are provided information on their right to seek asylum, contact UNHCR and consult a legal adviser as soon as possible. The decision whether to apply for asylum should be an informed decision taken following consultation with legal representation.
- Any applications for asylum of (potential) victims of trafficking are not “fast-tracked”. In view of the complexities of asylum claims presented by victims or potential victims of trafficking, such claims normally require an examination on their merits in regular procedures (UNHCR, Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, para. 45).
- Any measures are gender sensitive and ensure full compliance with the principle of non-refoulement.

From: UNHCR, *Agenda for Protection*, Goal 2, Objective 2, adopted by UNHCR Executive Committee; UNHCR 2006 Guidelines on Trafficking, para. 45; UN Special Rapporteur report (A/HRC/17/35)

ARTICLE 11(5): PROVISION OF SUPPORT SERVICES ON A VOLUNTARY AND CONSENSUAL BASIS

Article 11(5) lists a set of minimum assistance and support services to be provided on a consensual and informed basis to victims of trafficking. These include *inter alia* counselling and information, and the availability of translation and interpretation services.

Of note in Article 11(5) is the importance of providing any support measures on “a consensual and informed basis”. Recital 21 further explains that “Assistance and support measures should be provided to victims on a consensual and informed basis. Victims should therefore be informed of the important aspects of those measures and they should not be imposed on the victims”. A human rights-based approach requires the provision of care and support to be both informed and non-coercive.¹²⁶ For more on the discussion on imposed detention conditions in shelters and other welfare institutions, please refer to the commentary on the non-detention of trafficked persons under Article 8.

Article 11(5) addresses the obligation for States to ensure that victims of trafficking, including persons provisionally identified as victims of trafficking or at risk of being trafficked, have access to adequate physical and psychological care in line with State duty to protect “*the right of everyone to an adequate standard of living [...], including adequate food, clothing and housing*”.¹²⁷ Victims of trafficking may have special status-related rights; specific and additional obligations of care and support are owed by States to victims of sexual and gender-based violence for instance, and child victims of trafficking. The requirement under Article 11(5) echoes that of the CoE Trafficking Convention,¹²⁸ as well as the OHCHR Recommended Principles and Guidelines.¹²⁹ The provision of these services should also be culturally appropriate as well as gender-specific and sensitive.

Article 11(5) includes the provision of “counselling and information”. Counselling is often read in the context of health care and the protection of the right to the highest attainable standard of mental health.¹³⁰ As mentioned above, the provision of counselling should also be both culturally appropriate and gender-sensitive. Counselling should however also be read to mean legal counselling, in line with the UN Trafficking Protocol which specifically refers to “*counselling and information in particular as regards their legal rights in a language that the victims ... can understand*”.¹³¹ Without legal counselling on the content of the information provided, States would not discharge their obligation to inform victims of trafficking of their rights. In this respect the importance should be stressed of having this information explained by a professional legal counsellor; European anti-trafficking systems are complex and victims of trafficking may not be able to fully comprehend on their own the extent of the information and its implications. Please refer to Box Q on the key international standards on the provision of information to victims of trafficking.

Lastly, the end of Article 11(5): “and translation and interpretation services where appropriate”, should be read as applying to the provision in its entirety. Translation and interpretation services should be available for (potential) victims of trafficking and persons at risk of being trafficked throughout the entire assistance process, starting at the initial identification of victims and including any immigration, criminal, civil, labour, or other proceedings.

¹²⁶ For more on the discussion on non-coercive provision of care, please refer to the OHCHR *Commentary on Recommended Principles and Guidelines*, p. 150.

¹²⁷ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 11.

¹²⁸ CoE Trafficking Convention, Art. 12 – Assistance to victims.

¹²⁹ OHCHR, *Commentary on the Recommended Principles and Guidelines*, pp. 147-149.

¹³⁰ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 12.

¹³¹ UN Trafficking Protocol, Art. 6(3)(b).

KEY INTERNATIONAL STANDARDS ON THE PROVISION OF INFORMATION TO VICTIMS OF TRAFFICKING

- Trafficked persons are given information from the first contact with a competent authority, without unnecessary delay, where and how they can make a complaint; the services or organisations to which they can turn for support and the type of support they can obtain; procedures following the making of a complaint and their role in connection with such procedures; how and under what conditions they can obtain protection; to what extent and on what terms they are entitled to receive legal advice, legal aid or any other sort of advice; to what extent and on what terms they are entitled to compensation, including time limits for making any application; if they are resident in another Member State, any special arrangements available to them in order to protect their interests; any procedures for making complaints where their rights are not respected; contact details for communications about their case (Art. 3 Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime.).
- Trafficked persons are given information on relevant court and administrative proceedings, including information on any decision that ends criminal proceedings and the reasons for that decision. This may include a decision not to proceed with or to end an investigation or prosecution, the final judgment in a trial including any sentence, information about the progress the proceedings, or the time and place of the trial (Art. 6 Trafficking Protocol; Art. 12 CoE Trafficking Conv.; Art. 4 Proposal Victim Directive; OHCHR Rec. Principles, Guideline 6(5)).
- Trafficked persons are provided with counselling and information, in particular as to their legal rights, in a language that the victim can understand (Art. 6(3)(b) UN Trafficking Prot.).
- Trafficked persons are provided with information on available remedies and with access to legal assistance (Art. 6 UN Trafficking Prot.; Art. 15 CoE Trafficking Conv.; OHCHR Rec. Principles, Principle 9 & Guideline 4(8)).

Recommendations

When transposing the Directive, Member States are encouraged to clarify the legal nature of the counselling provided to victims of trafficking under this article, in addition to any health-related counselling.

Member States may also wish to reflect the necessary gender-specific nature of the assistance and support measures provided by Article 11(5).

ARTICLE 11(6): PROVISION OF INFORMATION ON THE REFLECTION PERIOD AND THE POSSIBILITY OF GRANTING INTERNATIONAL PROTECTION

Article 11(6) further expands on the nature of the information provided under Article 11(5) by obligating States to supply victims with information on a reflection and recovery period and on the possibility of granting international protection.

The provision of information in itself, as well as the recovery period, have already been discussed above. The commentary will therefore focus on ‘the possibility of granting international protection’.

Human trafficking and international protection

As discussed in the commentary on National Referral Mechanisms under Article 11(4), while not all victims or potential victims of trafficking are refugees, some victims of trafficking and persons at risk of being trafficked may be in need of international protection. States have a duty to identify the protection needs of victims of trafficking, including their needs for international protection, at the earliest opportunity in order to effectively protect these rights. Failure to accurately identify the international protection needs of victims may lead to the further denial of their rights and their possible return or *refoulement* to persecution or serious harm. The UNHCR 10-Point Plan of Action is especially relevant to situations of mixed migration, where the identification of victims of trafficking and refugees is very complex.¹³²

Victims of trafficking may have suffered from severe forms of exploitation, including sexual and gender-based violence, which constitute serious violations of human rights and will generally amount to persecution. Apart from the persecution they may have faced as part of their trafficking experience, they may also be unable to return to their countries of origin for fear of re-victimization at the hands of traffickers or re-trafficking. They may also fear ostracism, stigmatization and punishment at the hands of their family, the community or, in some instances, the authorities. This is particularly the case for those victims who were trafficked and exploited in the sex industry and who come from countries where prostitution is criminalized. This future fear may be well-founded and may amount to persecution triggering international protection under refugee law.

The UNHCR Guidelines on victims of trafficking and persons at risk of being trafficked provide guidance on the adjudication of asylum applications presented by victims or potential victims of trafficking as well as procedural guidance, which is relevant to the implementation of the Directive.¹³³ In addition, the UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs¹³⁴ clarifies that, in the absence of effective State protection, victims of gang violence – who may include victims of trafficking – may also qualify for international protection.

The obligation of Member States to provide protection, including where relevant protection against *refoulement* and the granting of refugee status or subsidiary protection, is enshrined in several international and regional treaties, including the UN Trafficking Protocol and the CoE Trafficking Convention. The latter in addition explicitly refers to the the right to seek and enjoy asylum, which is relevant to Article 11(6) of the Directive.¹³⁵ Please refer to Box R on the key international standards on trafficking, *non-refoulement* and the right to seek asylum.

¹³² UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, 2007.

¹³³ UNHCR, *Guidelines on International Protection No.7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006.

¹³⁴ UNHCR, *Guidance on Refugee Claims Relating to Victims of Organized Gangs*, 2010.

¹³⁵ CoE Trafficking Convention, Art. 14(5).

KEY INTERNATIONAL STANDARDS ON TRAFFICKING, NON-REFOULEMENT AND THE RIGHT TO SEEK ASYLUM

- Trafficked persons are not returned to another state where there is a serious risk they will be subjected to persecution, torture or other forms of ill treatment (Art. 4 & 19(2) EU Charter; Art. 3 ECHR; Art. 40(4) CoE Trafficking Conv.; Art. 14 UN Trafficking Prot.; Art. 33 1951 Refugee Conv.; Art. 3(1) CAT; Art. 7 ICCPR, Art. 22 CRC; Art. 11(3) OAU Refugee Conv. Art. 22(8) ACHR; 1984 Cartagena Declaration; 1967 Declaration on Territorial Asylum; Art. 7 ICCPR; Art. 22 CRC; Art. 3(2) of the European Conv. On Extradition; OPHCHR Rec. Guidelines 1.6 *ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement*; OPHCHR Rec. Guideline 2.7: *Ensuring that procedures and processes are in place to receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.*)
- Trafficked persons have the right to seek and enjoy asylum and have access to fair and efficient asylum procedures, no matter their means of entry, the use of fraudulent travel documents, or their willingness to give evidence against their exploiters (Art. 18 EU Charter; Art. 40(4) CoE Trafficking Conv.; Explanatory Report accompanying the CoE Trafficking Conv. Art. 40: “The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures.”; Art. 14 UN Trafficking Prot.; Art. 31 & 33 1951 Refugee Conv.; Art. 14 CAT; OHCHR Rec. Principles, Guideline 1(6) & 2(7); UNHCR Trafficking Guidelines, para. 45-50; UNHCR 2003 Agenda for Protection).
- States should ensure that procedures are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers. (OHCHR Guidelines 1.6 and 2.7); Art. 40 CoE Trafficking Conv. and para. 377 of the Explanatory Report on the European Conv. on Action against Trafficking in Human Beings; Article 14 of the Palermo Trafficking Protocol.
- Trafficked persons are informed about the possibility of receiving international protection in a language they understand and in an age and gender sensitive manner. Art. 11(5) EU Directive: Assistance provided shall include “*translation and interpretation services where appropriate*”; Article 12(1) of the CoE Trafficking Conv.; Article 6(3) Trafficking Prot.; OHCHR Guideline 6.5.
- Trafficked persons may qualify for international refugee protection if acts inflicted on them by their traffickers would amount to persecution on a 1951 Refugee Conv. ground and in the absence of effective national protection (UNHCR Trafficking Guidelines); Art.s 2 and 15 EU Qualification Directive); OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking – Guidelines 1.6 and 2.
- States use a gender sensitive interpretation of the 1951 Refugee Conv., in particular the recognition of gender and sex based violence. Women and children trafficked for the purpose of forced prostitution or sexual exploitation are considered refugees when their state is unable or unwilling to provide protection against such harm or threats of such harm (UNHCR 2002 Guidelines on Gender-related persecution); CEDAW General Recommendation 19 on violence against women; Art. 6 CEDAW: “States Parties shall take all appropriate measures, including legislation; to suppress all forms of traffic in women and exploitation of prostitution of women”. Preamble 3 EU Directive: “This Directive recognises the gender-specific phenomenon of trafficking, and that women and men are often trafficked for different purposes.”

The principle of *non-refoulement*

The Directive re-affirms in Recital 10 of the Preamble that “this Directive is without prejudice to the principle of *non-refoulement*”.

The principle of *non-refoulement* is the cornerstone of international refugee law. It prohibits States from returning a person to a territory where there is a risk that his or her life or freedom would be threatened and the person would be subjected to persecution. It is enshrined in the 1951 Refugee Convention¹³⁶ and complemented by *non-refoulement* obligations under human rights law, notably the 1966 International Covenant on Civil and Political Rights (hereinafter the ICCPR)¹³⁷ and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Convention against Torture).¹³⁸ This principle has become a rule of international customary law supported by the recognition on the part of States that the principle has a normative character. It has been incorporated in international and regional treaties to which a very large number of States have now become parties, including in the 1951 Refugee Convention and the EU Charter.¹³⁹

The principle of *non-refoulement* is central to the realization of the right to seek and enjoy asylum embodied in Article 14 of the Universal Declaration of Human Rights, which is the most basic mechanism for the international protection of refugees.¹⁴⁰ Although the principle of *non-refoulement* does not as such, entail a right of the individual to be granted asylum in a particular State,¹⁴¹ it does mean however, that for the removal of the individual to be lawful, States need to examine whether such removal would result in a breach of the States’ *non-refoulement* obligations.¹⁴² The principle of *non-refoulement* thus reflects the commitment of the international community to ensure the enjoyment of human rights for all persons, including the right to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person.

The responsibility of a State to protect a person from *refoulement* is thus engaged under international law wherever there is conduct exposing the individual to a risk of being subjected to persecution, torture or inhuman or degrading treatment. The absence of an explicit and articulated request for asylum does not absolve States of their *non-refoulement* obligations, which is of importance to border guards and immigration officials in relation to their handling of trafficking victims.

Recommendation

When transposing the Directive, Member States are encouraged to reflect the principle of *non-refoulement* in their national legislation as is the case in the UN Trafficking Protocol and the CoE Trafficking Convention and in accordance with States obligations under international refugee law and international human rights law.

¹³⁶ UN General Assembly, 1951 Refugee Convention, Art. 33(1).

¹³⁷ UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, Art.s 6 & 7.

¹³⁸ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), 10 December 1984, Art. 3.

¹³⁹ See UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para.s 14-16; UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, 10 August 2006, para. 15; UNHCR, *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001*, HCR/MMSP/2001/09, 16 January 2002, at preamble para. 4; and E. Lauterpacht and D. Bethlehem, “The scope and content of the principle of *non-refoulement*: Opinion”, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), pp. 149-164.

¹⁴⁰ Executive Committee of the Programme of the UN High Commissioner for Refugees, *Note on International Protection*, Fifty-second session, A/AC.96/951, 13 September 2001, para.16.

¹⁴¹ P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, Cambridge (1995), at p. 342.

¹⁴² UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 8.

Provision of information on the right to asylum

Article 11(5) specifically requires States to provide, where relevant, information on the possibility of granting international protection to victims of trafficking.

The mere possibility that victims of trafficking could be granted a residence permit does not constitute a ground to deny victims who are also in need of international protection the right to seek and enjoy asylum. Respect for this right is all the more important as the recent report by the European Commission on the implementation of the EU Directive on residence permits to third country national victims of trafficking shows that only a very low number of residence permits have effectively been granted to victims of trafficking.¹⁴³ In addition, the residence permit for victims of trafficking is often granted on conditions of cooperation with prosecution, and as such does not constitute an adequate substitute to international protection.

In order for the right to asylum to be effective, the victims should be provided with relevant information concerning this right, and on the existence and modalities to seek asylum. The provision of information on ‘the possibility of granting international protection’ must therefore be ensured for those victims who show indications that they could be at risk of persecution or serious harm, because they have either self-identified or been identified as such by officials. In order for a Member State to discharge its obligation, information on asylum must be provided in a language, and in an age- and gender-sensitive manner to ensure that the information is received and understood.

In line with the provision under Article 11(5), the provision of information on ‘the possibility of granting asylum’ must be accompanied by legal counselling. The right to legal assistance is an essential safeguard, especially in light of the complex European asylum and migration procedures. Victims of trafficking are often unable to articulate cogently the elements relevant to their account without the assistance of a qualified legal counsellor. Quality legal assistance is, moreover, in the interest of States, as it can help to ensure that international protection needs are identified early and accurately.

Recommendation

When implementing the Directive, Member States are encouraged to ensure close cooperation between the asylum and anti-trafficking authorities in the development of the information on ‘the possibility of granting international protection’.

Guarantees of non-repetition and the need for a pre-return risk assessment

It is now an established doctrine of international law that States have a responsibility to provide trafficked persons with remedies. While most human rights treaties do not explicitly spell out the content of remedies, 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 (hereinafter the Basic Principles and Guidelines on Remedy and Reparation)¹⁴⁴ elaborate various forms of reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. For more on compensation, please refer to the commentary on Article 17.

The UN Special Rapporteur on trafficking has emphasized the essential nature of the elements of the right to an effective remedy, “without which the ultimate objective of enabling trafficked persons to recover from the harms and rebuild their lives with the full enjoyment of human rights, may not be realized. In particular, guarantees of non-repetition, which include measures to prevent trafficking,

¹⁴³ Op. Cit., EC Study on the application of the EU Directive on residence permits to victims of trafficking, 2010.

¹⁴⁴ UN General Assembly, Resolution adopted by the General Assembly [on the report of the Third Committee (A/60/509/Add.1)] 60/147. *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*, Sixtieth session, A/RES/60/147, 21 March 2006.

KEY INTERNATIONAL STANDARDS ON THE RETURN OF TRAFFICKED PERSONS

- Trafficked persons are protected from summary deportation when there are reasonable grounds that this would constitute a risk for the person or his or her family (Art. 16 CoE Trafficking Conv.; OHCHR Rec. Principles, Principle 11 & Guideline 4(6)).
- The safety of the trafficked person and their family, including the risk of re-trafficking, is taken into account in any decision on repatriation (Art. 8(2) UN Trafficking Prot.; Art. 16(2) CoE Trafficking Conv.; OHCHR Rec. Principles, Guideline 6(7)).
- The return of a trafficked person is, where possible, voluntarily and takes place with due regard for the rights, safety and dignity of the trafficked person and the status of legal proceedings (Art. 8(2) UN Trafficking Prot.; Art. 16(2) CoE Trafficking Conv.; OHCHR Rec. Principles, Principle 11 & Guideline 6(7)).

constitute an important form of remedy in view of the risks of re-trafficking that trafficked persons may be exposed to”.¹⁴⁵ The guarantee of non-repetition encompasses the right to be protected from re-victimization by not being sent back to a place of trafficking or where traffickers operate. The UN Trafficking Protocol requires all States parties “to protect victims of trafficking [...] especially women and children, from revictimization”.¹⁴⁶

Of relevance to the guarantee of non-repetition is the issue of State protection available upon return to the country of origin. Although mounting efforts are made by countries of origin to tackle trafficking, a gap between these efforts and actual State capacity to effectively protect returned victims of trafficking remains. Of importance to this issue, shelter and assistance provided by non-governmental or international organizations do not equate with State protection. Clearly, the form of non-repetition would depend on the nature and circumstances of the violation. Guaranteeing non-repetition therefore requires an individual assessment of the circumstances surrounding each case.

In practice this means that victims and potential victims of trafficking shall not be turned back at the border. The CoE Trafficking Convention requires that States do not remove a person from their territory until the identification process as victim has been concluded,¹⁴⁷ as the rights afforded by the Convention would be theoretical and illusory if such persons were removed before their identification as victims was completed. For more on the recovery period, please refer to the commentary on Article 11(1). The guarantee of non-repetition involves a guarantee of safe return. The standard of safe return is well-established in international law¹⁴⁸ and international and regional policy documents.¹⁴⁹ An individual risk assessment should therefore be carried out before any decision on return, deportation or repatriation is made.¹⁵⁰ Please refer to Box S for the key international standards on the return of trafficked persons.

In the context of the European Union, guarantees of non-repetition would also require due consideration of the individual circumstances for third country national victims of trafficking in need

¹⁴⁵ Report of the UN Special Rapporteur on trafficking in persons, especially women and children, 13 April 2011 (A/HRC/17/35), para. 41.

¹⁴⁶ UN Trafficking Protocol, Art. 9(1)(b).

¹⁴⁷ CoE Trafficking Convention, Art. 10(2).

¹⁴⁸ E.g., UN Trafficking Protocol, Art. 8(2); CoE Trafficking Convention, Art. 16(2).

¹⁴⁹ E.g., EU Plan on Best Practices, para. 5(iii).

¹⁵⁰ Experts Group on Trafficking in Human Beings of the European Commission, Opinion of 11 October 2005 in connection with the conference *Tackling Human Trafficking: Policy and best practices in Europe*, p.2.

FACTORS TO BE TAKEN INTO ACCOUNT IN A RISK ASSESSMENT

- The way the person was trafficked.
- The way the recruiter and/or trafficker may be part of a wider trafficking ring or network, and the workings of the ring.
- The risk of reprisals on the part of the traffickers, including whether or not the victims owe money to the traffickers.
- The risk of being harassed, arrested, detained or prosecuted by the authorities, e.g. for immigration violations or for involvement in prostitution.
- The risk of social exclusion, taking into account the age, gender, social position and family situation of the trafficked person.
- Access to assistance, education and sustainable means of existence, including in the country of return.

From: 2004 Report of the EU Experts Group on Trafficking in Human Beings, p. 200-202.

of international protection, who also find themselves affected by the Dublin Regulation.¹⁵¹ A State may conclude, based on the application of the Dublin Regulation, that a person should be subject to return to another EU Member State where they may have been previously trafficked.

The Dublin Regulation determines which State is responsible for examining an asylum application – normally the State where the asylum-seeker first entered the EU – and to make sure that each claim gets a fair examination in one Member State. The Dublin system operates on the assumption that, as the asylum laws and practices of the EU States are based on the same common standards, they allow asylum-seekers to enjoy similar levels of protection in all EU Member States. In reality, however, asylum legislation and practice still vary widely from country to country, causing asylum-seekers to receive different treatment across Europe.¹⁵²

Third country national victims of trafficking may find themselves trafficked from one Member State to another. As such, the Member State where these persons manage to escape to or where the authorities rescue them may not be the first point of entry into the European Union. If the victim seeks asylum in the former State, under the Dublin system, this person is likely to be sent back to the latter State. An assessment of the personal circumstances is therefore necessary before the “Dublin” return is effected to ensure that guarantees of non-repetition are indeed in place. Please refer to Box T for factors to be taken into account in a risk assessment.

The ECtHR ruling in the case of *M.S.S. v Belgium and Greece*¹⁵³ on “Dublin” returns to Greece addresses the treatment of asylum-seekers by Greece and further clarifies State obligations under Article 3 ECHR in this context. It can also be argued that the Court’s ruling also carries consequences for the treatment of (potential) victims of trafficking subject to “Dublin” returns, in particular the obligation to assess the risk they may face on return.

¹⁵¹ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereinafter Dublin Regulation).

¹⁵² UNHCR, *Comments on the European Commission’s Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (“Dublin II”)* (COM(2008) 820, 3 December 2008) and the European Commission’s Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008), 18 March 2009.

¹⁵³ ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/0, 21 January 2011.

In the case of *M.S.S. v. Cyprus and Russia*, the Court held that, under certain circumstances, the Transferring State cannot rely on the presumption that the Responsible State will comply with its international obligations in asylum matters and must verify whether the latter complies with such obligations, including in practice.¹⁵⁴ In addition, the Court ruled that this presumption (of compliance with obligations) can be rebutted.¹⁵⁵ In such circumstances, the burden of proof is shared between the asylum-seeker and the authorities of the Transferring State, which must conduct a detailed risk assessment, looking beyond the mere existence of domestic laws and international human rights treaties.¹⁵⁶

A risk assessment of whether a victim of trafficking could be at risk of re-trafficking, re-victimization and/or further harm in the Responsibility State should therefore be carried out by the Transferring State before any “Dublin” return is affected.

The *M.S.S.* judgment did not address this point specifically. However, it is submitted that the purpose of such risk assessments should be to assess the safety of the trafficked person upon his or her return, the perspectives of his or her social and professional inclusion and the risks of re-trafficking. In case the trafficked person has children, the best interest of each child should be taken into account, and whether they will have the opportunity to go to school and to receive medical, social and other necessary care and protection. Likewise, in the case of child victims, any decision to return the child should be based on a formal Best Interests Determination (see Article 16(1)).

Recommendation

When transposing the Directive, Member States are encouraged to include a provision on the safe return of victims of trafficking, in line with international and regional safeguards, and including the establishment of pre-return risk assessments.

Durable solutions for victims of trafficking

Unlike the provisions for child victims of trafficking, the Directive does not legislate on the longer term assistance and protection needs of adult victims of trafficking, including the search for durable solutions, either in the country to which the victim was trafficked when return is not possible, or in the country of origin of the victim. The granting of residence permits was already discussed in the commentary on assistance beyond the conclusion of criminal proceedings in relation to Article 11(1). This section focuses on return and reintegration. Please refer to Box U on the key international standards on the durable return of trafficked persons.

The obligation to provide safe and, as far as possible, voluntary return is stipulated in both Article 8(2) of the UN Trafficking Protocol and Article 16(2) of the CoE Trafficking Convention. A critical aspect of safe repatriation is supported reintegration. Victims who are provided with assistance and support on their return are less likely to be re-trafficked and are less vulnerable to intimidation, retaliation, social isolation and stigmatization.¹⁵⁷ Return and reintegration programmes should respect the right to privacy of the victim and take due consideration of the safety, dignity and health of the trafficked person. They should also seek to secure the safety and well-being of returned victims, enable them to find viable means of existence, prevent re-victimization and reduce the risk of re-trafficking.

The right to return also implies the obligation to permit victims who wish to return to do so without undue or unreasonable delay. Detention of trafficked persons in shelters, prisons or immigration detention centres or compelling victims to remain for the duration of criminal proceedings is clearly in contradiction with this right.¹⁵⁸

¹⁵⁴ Op. Cit., para. 359.

¹⁵⁵ Op. Cit., para. 352.

¹⁵⁶ Op. Cit., para. 353.

¹⁵⁷ OHCHR, *Commentary on the Recommended Principles*, pp. 181-182.

¹⁵⁸ Op. Cit., p. 178.

KEY INTERNATIONAL STANDARDS ON THE DURABLE RETURN OF TRAFFICKED PERSONS

- States ensure, in partnership with non-governmental organisations, that trafficked persons who return to their country of origin are provided with assistance and support necessary to ensure their well-being, facilitate their social reintegration and prevent their re-trafficking (Art. 16(5) CoE Trafficking Conv.; OHCHR Rec. Principles, Guideline 6(8)).
- Repatriation programmes avoid re-victimisation and respect the right to privacy of the victim (Art. 16(5) CoE Trafficking Conv.).
- Victims who wish to return are permitted to do so without undue or unreasonable delay (Art.8(3)-(4) and Art.9(1)(b) UN Trafficking Prot.; Art.16(1) and (3) CoE Trafficking Conv.).

Recommendation

When implementing the Directive, Member States are encouraged to establish, in co-operation with countries of origin and in close partnership with non-governmental organizations, voluntary and safe return programmes to ensure that trafficked persons who return to their home country have access to immediate and long term social assistance programmes.

ARTICLE 11(7): VICTIMS WITH SPECIAL NEEDS

Article 11(7) requires that States attend to the needs of victims of trafficking with special needs deriving from being pregnant, their health, a mental or physical disability, or serious forms of psychological or sexual violence they have suffered.

Given the horrendous treatment victims of trafficking may be subjected to, the provision under Article 11(7) is especially important. According to Recital 12, ‘particularly vulnerable persons’ should encompass at least children. Other factors listed to be taken into account when assessing the vulnerability of a victim comprise gender, pregnancy, state of health and disability. Article 11(7) in turn mentions mental or psychological disorder as a source of vulnerability as well as having been suffered a serious form of psychological, physical or sexual violence.

By including gender, the Directive acknowledges that social vulnerability is one of the principal root causes of trafficking in human beings and that social vulnerability derives from, *inter alia*, gender discrimination. Assistance and support measures should be sensitive to the specific needs of women and girls, and be based on equality and women’s empowerment principles, as discussed in the commentary on Recital 3 and Article 1.

In regard to trafficked persons with disabilities the Convention on the Rights of Persons with Disabilities should be taken into account, in particular Article 16 on freedom from exploitation, violence and abuse.¹⁵⁹ Despite a general lack of attention there is some anecdotal evidence emerging that disability, both mental and physical, can increase vulnerability to trafficking and related exploitation.

Trafficking may include particularly severe forms of violence, such as incarceration, rape, torture, sexual enslavement, enforced prostitution, removal of organs, physical beatings, starvation and the deprivation of medical treatment. These are to be considered as additional factors of vulnerability.

¹⁵⁹ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106.*

When transposing the Directive, Member States are encouraged to ensure that the definition of ‘particularly vulnerable persons’ includes *inter alia* age, gender, health, disability, mental and psychological disorder, as well as persons who have been subjected to torture, rape or other forms of sexual and gender based violence.

Member States are encouraged to ensure that the above definition is consistently reflected throughout the transposition of the Directive, in particular in Articles 4(2)(a), 11, 12 and 18.

ARTICLE 12: PROTECTION OF VICTIMS OF TRAFFICKING IN CRIMINAL INVESTIGATIONS AND PROCEEDINGS

The harm a trafficked person has suffered does not necessarily end when the victim comes into contact with the authorities. Intimidation and threats towards the victim or his or her family may continue. The decision to cooperate with law enforcement and/or act as a witness may have severe consequences for the safety and privacy of both the victim and his or her children and other family members; this needs to be fully understood and considered. It is particularly important that the victim be able to make an informed decision. Victims of trafficking may be traumatized and need time before they can fully consider their position and options. If the victim needs more time to make an informed decision about pressing charges and/or acting as a witness, this time should be granted. This lessens the likelihood of re-victimization of the victim, and it is likely to lead to better evidence and a stronger witness.

As noted by the EU Experts Group, because of their particular situation and vulnerabilities, trafficked persons may not always be treated with respect and accorded the rights they are due as victims of crime; some victims may be treated as criminals or illegal migrants.¹⁶⁰ Particular attention therefore needs to be given to the rights of trafficked persons as victims of crime and the prevention of their re-victimization, taking into account the age and gender of the victim. Care for and attention to the interests of the victim are an important element of the proper administration of justice, where the appropriate treatment of victims is paramount.

ARTICLE 12(1): RIGHTS SET IN COUNCIL FRAMEWORK DECISION ON THE STANDING OF CRIME VICTIMS

Article 12(1) requires States to take the rights set out in Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings into account.

When transposing this provision, legislators may wish to take into account the new Victim Package and the European Commission Proposal for a Directive establishing minimum standards on the rights, support and protection of Victims of Crime, which will replace Framework Decision 2001/220/JHA (hereinafter the Proposal for a Directive on the rights of crime Victims).¹⁶¹ Member States will also need to take into account the relevant provisions under Article 28 of the CoE Trafficking Convention, as well as the standards established by the newly adopted CoE Convention on violence against women.

¹⁶⁰ Experts Group on Trafficking in Human Beings, Report, 2004, p. 111.

¹⁶¹ Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, 18.5.2011, COM(2011) 275 final.

KEY INTERNATIONAL STANDARDS ON PROTECTION OF TRAFFICKED PERSONS DURING CRIMINAL INVESTIGATIONS AND PROCEEDINGS

- The privacy and identity of trafficked persons is protected (Art. 6(1) UN Trafficking Prot.; Art. 11 CoE Trafficking Conv.; Art. 17 ICCPR; OHCHR Rec. Principles, Guideline 6 & 5(8). This includes setting standards for the storage of personal data and encouraging the media to protect the private life and identity of victims (Art. 11 CoE Trafficking Conv.).
- The identity of trafficking victims is not publicly disclosed and their privacy is respected and protected to the greatest extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons are given advance warning of the difficulties inherent in protecting identities and are not given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard (OHCHR Rec. Principles, Guideline 6.6).
- Trafficked persons are provided with counselling and information on their legal rights and relevant court and administrative proceedings in a language they understand and assistance to enable their views and concerns to be presented and considered during criminal proceedings (Art. 6(2) UN Trafficking Prot.; Art. 12 CoE Trafficking Conv.; OHCHR Rec. Principles, Guideline 6(5); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 8).
- Trafficked persons are provided with legal and other assistance in relation to any criminal, civil or other actions against traffickers (OHCHR Rec. Principles, Guideline 6(5)).
- Trafficked persons who act as witnesses (and where appropriate their family and others close to them) are provided with effective protection from harm, threats, potential retaliation or intimidation by traffickers and associated persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. This may include giving testimony in a way that ensures their safety (e.g. through video links), identification of a safe place in the country of destination; protection of identity during legal proceedings; and identification of options for continued stay, resettlement or repatriation, (Art. 25 UN TOC; Art. 28 CoE Trafficking Conv.; OHCHR Rec. Principles, Guidelines 6, 4.10 & 5.8).
- The status of any legal proceedings related to that person being a victim of trafficking is taken into account in any decision on repatriation (Art. 8(2) UN Trafficking Prot.; Art. 16 CoE Trafficking Conv.).
- Legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being (OHCHR Rec. Principles, Guideline 6.4).
- Measures take into account the age, gender, and special needs of victims of trafficking (Art. 6(4) UN Trafficking Prot.). Child victims are given special protection taking into account the best interests of the child (Art. 28 CoE Trafficking Conv.).

ARTICLE 12(2): ACCESS TO FREE LEGAL COUNSELLING AND REPRESENTATION

Article 12(2) requires States to ensure that victims have access without delay to legal counselling and legal representation, including for claiming compensation. Legal counselling and representation should be free of charge if the victim does not have sufficient financial resources.

The need to provide legal and other assistance to trafficked persons for the duration of any criminal, civil or other actions against their exploiters is stressed in Principle 9 of the OHCHR Recommended Principles. An underlying assumption is that trafficked persons have an important role to play – and a legitimate interest – in legal proceedings against their exploiters. This provision also recognizes that victims of trafficking involved in criminal investigations and proceedings have special needs and vulnerabilities. On this basis, all efforts should be made to ensure that victims are able to participate in legal proceedings freely, safely and on the basis of full information.¹⁶²

Free quality legal assistance provided as soon as there are reasonable grounds for believing that the person might be a victim of trafficking is in the interest of Member States, as it can help ensure that protection needs are identified early and accurately, and may help secure voluntary participation in criminal investigation and proceedings. Trafficked persons are likely to have few, if any, means of subsistence due to the nature of the crime itself and therefore legal aid should be free of charge.

A second important element of the provision under Article 11(2) is the requirement for States to grant access *without delay* to legal counselling [emphasis added]. For States where existing legislation requires means-testing to access free legal aid, the Directive introduces a safeguard against undue delays: legal aid and legal counselling are to be granted without delay, including before a decision is reached regarding the financial means of the victim.

Legal assistance should be provided by qualified lawyers in a language that the victim understands. If necessary, this may require the services of a professional interpreter. In the context of trafficking related procedures, where so much depends on the testimony of an individual, effective communication with the victim, in a language he or she understands, is essential.

Recommendations

When transposing the Directive, Member States may wish to consider providing legal counselling and assistance free of charge as a rule.

Likewise, Member States are encouraged to ensure that access to free legal aid is not restricted to criminal proceedings but covers all legal proceedings related to the person's victim status, including criminal, civil or labour procedures, for the purpose of compensation, as well as proceedings in relation to immigration status or asylum.

When implementing the Directive, Member States are encouraged to develop lawyers' and legal counsellors' capacity, in association with the national bar associations.

¹⁶² OHCHR, *Commentary on the Recommended Principles*, p. 153.

ARTICLE 12(3): PROTECTION ON THE BASIS OF AN INDIVIDUAL RISK ASSESSMENT

Article 12(3) requires States to ensure that trafficked persons receive appropriate protection on the basis of an individual risk assessment *inter alia* through witness protection programmes or similar measures.

Trafficked victims have a right, through their status as victims of crime, to measures that ensure their safety from intimidation and retaliation.¹⁶³ It is essential for national criminal justice systems to find ways to assist victims of trafficking to participate safely and meaningfully in court processes. The Directive recommends *inter alia* that victim-witnesses should have access to witness protection programs. The CoE Trafficking Convention provides some guidance as to the kind of witness protection required by States parties: physical protection, relocation, identity change and assistance in obtaining jobs.¹⁶⁴

Other measures can also contribute to the safety of the victim-witness, such as identification of a safe place in the country of destination, protection of identity during legal proceedings, keeping the address of the victim as well as all documentation relating to the criminal proceedings confidential during the trial, the provision of a mobile phone with direct connection to the police, housing in a safe and secret accommodation, escorting victim-witnesses to and from court hearings by the police, identification of options for continued stay, resettlement or repatriation.

The protection of victim-witnesses often has a strong gender component. Women victims may need to be protected to a different level and in a different manner than male victim-witnesses.

Recommendation

When implementing the Directive, Member States are encouraged to develop guidelines for the criminal justice system on the establishment of individual risk assessments and the methods available to protect the safety of victim-witnesses.

ARTICLE 12(4): AVOIDING SECONDARY VICTIMIZATION

Article 12(4) requires States to take measures aimed at preventing secondary victimization of victims of trafficking. These include avoiding unnecessary repetition of interviews, visual contact between victims and defendants, the giving of evidence in open court and unnecessary questioning of the victim about her or his private life.

The need to protect victims from secondary victimization and further trauma, based on an individual assessment of their needs, is underlined in Recital 20. As discussed in the commentary on Article 11(7) on vulnerable victims, such assessment should take into consideration the personal circumstances of the victim, including factors like age, gender, health, disability, mental and psychological disorder, as well as the abuse and violations suffered such as torture, rape or other forms of sexual and gender based violence.

Secondary victimization can be defined as the aggravation of the suffering or harm caused to the victim by the initial crime as a result of the criminal process.¹⁶⁵ Research commissioned by the Scientific Research and Documentation Centre of the Dutch Ministry of Justice (WODC) shows four

¹⁶³ UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, resolution 40/34 of 29 November 1985, para. 6(d).

¹⁶⁴ CoE Trafficking Convention, Art. 28(2).

¹⁶⁵ For more on 'secondary victimization', see M. Wijers & M. de Boer, *One time is enough. An explorative study into secondary victimisation of victims as witnesses in the criminal process*, The Hague, Ministry of Justice/WODC, 2010.

different forms of secondary victimization: negative psychological effects on the victim's self-esteem and their faith in the future, the legal system and a just world; increase in the frequency of post-traumatic stress reactions to the original trauma caused by the crime; obstruction of the process of recovery; and the experience of a second, new trauma, resulting from the trial. Secondary victimization may not solely be experienced by the victim when giving of evidence. Other factors may also play a role, such as the lack of information provided to the victim, the interaction between criminal justice officials and the victim, the long duration of the trial and discontent about the outcomes of the trial.

An important factor in preventing secondary victimization is transparency of procedures and honesty of information. Trafficked persons have been frequently deceived and abused. The provision of full and accurate information to the victim is paramount. Other factors are protection of the victims' privacy and safety, including protection from intimidation and (threats of) reprisals from the suspect(s) or their associates before, during and after criminal proceedings,¹⁶⁶ and the presence of legal assistance and psychological support during interviews and court proceedings, for example from a social worker or other trusted person, as discussed above. If there is evidence that the presence of the accused may influence the testimony of the victim-witness or may harm his or her mental wellbeing, the victim-witness should be heard in absence of the suspect. Thereby it should be kept in mind that talking about traumatic experiences can be especially difficult for victims of sexual and other forms of gender-based violence at the hands of their exploiters.

As stipulated in Article 12(4)(d), questions relating to the personal history, previous sexual behaviour, the alleged 'character' or the current or previous occupation of the victim must, in general, be deemed irrelevant as evidence of whether or not the crime of trafficking has been committed. In interviewing the victim no questions should be asked that might suggest that the integrity of the victim is put into doubt, that call the victim to account or blame the victim for the crime committed to them. In cases involving trafficking for prostitution or other forms of sexual exploitation questions regarding the victim's sexual history which are not immediately relevant to the allegations should not be asked.

Secondary victimization is related to the insecurity of trafficked persons about their residence status and long term perspectives too. Preventing secondary victimization would therefore also call for a review of current policies on returning victims to their home country, which may expose them to the risk of re-trafficking or re-victimization. This is especially true for women trafficked and exploited in the sex industry who often face social exclusion and gender discrimination by their families and/or community. For a discussion of this issue, please refer to the commentary on Article 11(6).

When implementing the Directive, Member States are encouraged to develop guidelines for the criminal justice system on the treatment of victims of trafficking, taking into account *inter alia* age, gender, health, disability, mental and psychological disorder, as well as abuse and violations such as torture, rape or other forms of sexual and gender based violence.

¹⁶⁶ This may include protection of the family or children of the victim-witness, especially in cases of international trafficking.

ARTICLE 13: GENERAL PROVISIONS ON ASSISTANCE, SUPPORT AND PROTECTION MEASURES FOR CHILD VICTIMS

Article 13 is the first in a set of four articles under the Directive that provide specific assistance, support and protection to child victims of trafficking.

All actions concerning children at risk and child victims, whether undertaken by public or private welfare institutions, courts of law, administrative authorities, or legislative bodies should be guided by the applicable human rights standards and by the principles of protection and respect for children's rights as set out in the CRC. Especially relevant is the CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (hereinafter OPSC). Article 3 OPSC requires ratifying States to prohibit forms of abuse associated with trafficking, whether they are "committed domestically or trans-nationally or on an individual or organised basis."

Box W:

RELEVANT INTERNATIONAL INSTRUMENTS ON CHILDREN

- CRC and its Optional Protocol on the sale of children, child prostitution and child pornography.
- Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention No. 182).
- Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention No. 33).
- EU Action Plan on Unaccompanied Minors.

The involvement of a child victim in criminal activities or administrative offences as a consequence of their being trafficked, including immigration violations, should not undermine their status as both a child and a victim and their related rights to special protection. States need to take the best interests of the child into account and ensure that they can exercise their rights fully, irrespective of their immigration or any other status.

Increasing evidence suggests that children have become victims of trafficking as a result of their own migration, where they may expose themselves to new dangers and exploitation while "on the move."¹⁶⁷ Evidence further suggests that not only unaccompanied and separated children, sometimes referred to as independent child migrants, but also accompanied child migrants, including EU citizens, are vulnerable to trafficking. Trafficked boys, including those exploited in criminal activities, are particularly vulnerable because of gaps in legal provisions, since existing legal and policy measures tend to focus on the protection of girls and women. Girls are vulnerable because of gender discrimination and the sectors of work in which they may be engaged. Children who are victims of trafficking are therefore a highly heterogeneous group requiring careful analysis, particularly of gender-related issues.

¹⁶⁷ For more on the vulnerability to trafficking and exploitation for children on the move, see M. Dottridge, *Kids Abroad: Ignore them, Abuse Them or Protect Them?* Lessons on how to protect children on the move from being exploited, Terre des Hommes International Federation, 2008.

Little concrete evidence is as yet available on the exploitation of children in criminal activities or administrative offences, including drug smuggling and trade, petty crime and burglary, and forced begging or as street vendors, but there is growing research showing that children are exploited in these ways.¹⁶⁸ These children are particularly vulnerable to being mis-identified as children in conflict with the law, and to being sanctioned, prosecuted and/or returned without access to assistance and justice. The complexity and diversity of the issue has to be taken into account when prevention and assistance measures are being developed.

ARTICLE 13(1): THE PRINCIPLE OF BEST INTERESTS OF THE CHILD

As stipulated in Article 13(1) and Recital 8, “the best interests of the child must be a primary consideration” in the application of the Directive. This principle is also enshrined in international law in Article 3(1) of the CRC and incorporated into domestic law in many countries. This core principle of the CRC states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child must be a primary consideration in making decisions that may affect them.

Although the UN Trafficking Protocol does not directly refer to this principle, it is identified as the appropriate standard in the Legislative Guide in relation to decisions concerning family tracing and reunification and repatriation of children.¹⁶⁹ According to the body established to make recommendations on the effective implementation of the Protocol, “*States parties should [...] ensure that responses to child trafficking at all levels are always based on the best interests of the child*”.¹⁷⁰ The best interests principle is referenced throughout the CoE Trafficking Convention.

The Directive requires that a durable solution is found for child victims of trafficking, whether that child is accompanied (Article 14) or unaccompanied and separated (Article 16). In either case, a durable solution is one that seeks to provide a long-term and sustainable solution for the child. As this is a decision that clearly has a significant impact on the child’s life, it should be based on a formal “Best Interests Determination” designed to determine the child’s best interests. Please refer to Box X for more on the best interests assessments and best interests determination.

Despite the fact that every country in the world has signed the CRC and all but two have ratified it, child protection authorities may not be clearly given the lead mandate when it comes to dealing with foreign child victims, including those from other European Union Member States, and may have no role in determining the best interests of and durable solutions for these children. A law enforcement approach to criminal or status offences by children may also prevail, and migrant children may be first treated as foreigners and irregular migrants rather than children.¹⁷¹ For instance, migrant children may fall under the care or responsibility of immigration authorities, rather than that of child protection or child welfare authorities.

A Best Interest Determination should be carried out for particularly important decisions affecting the child and as such, should be a formal process accompanied by procedural safeguards that includes a written record of the assessment and the possibility to appeal. The process should involve decision-makers with relevant areas of expertise (such as child protection authorities, health experts or child psychologists) and the child’s guardian, balancing relevant factors in order to assess the best option for the child victim of trafficking. The right of the child to express their views and to have them taken into account are especially important where decisions are made by a range of agencies, both in the child’s country of origin and in any other country to which a child is trafficked.

¹⁶⁸ See e.g. *ECPAT UK Briefing – Child Trafficking: begging and organised crime*, 2010.

¹⁶⁹ UNODC, *Legislative Guide to the UN Trafficking Protocol*, Part 2, para.s 66 & 67.

¹⁷⁰ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, CTOC/COP/WG.4/2009/2, 21 April 2009, para. 13(h).

¹⁷¹ UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006.

BEST INTERESTS ASSESSMENTS AND BEST INTERESTS DETERMINATION

The following guidelines from UNHCR, though used in the context of asylum seeking children, provide relevant guidance on the process and form of best interest assessments and best interests determination that is useful in designing similar, appropriate processes aimed at determining the best interest of trafficked children.

Best Interests Assessment

A best interests assessment is **an assessment made of a particular action affecting an individual child**, with that child's participation, to ensure that such action gives a primary consideration to the child's best interests, except when a Best Interests Determination (BID) procedure is required.

Best Interests Determination (BID)

A BID describes the **formal process** with strict procedural safeguards designed to determine the child's best interests for **particularly important decisions** affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and **balance all relevant factors** in order to assess the best option.

BID and unaccompanied and separated children - preconditions

There are a number of pre-conditions that are essential for an effective determination of the best interests of unaccompanied and separated children. These preconditions include: proper identification; an adequate registration process, including documentation; tracing; the appointment of a guardian; provision of temporary care arrangements and the monitoring thereof; and the opening of an individual case file.

From: UNHCR, *Guidelines on Determining the Best Interests of the Child*, 2008 and UNHCR *Best Interests Determination Children - Protection and Care Information Sheet*, 2008

Such a determination requires “a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs [...] The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age- and gender-sensitive interviewing techniques”.¹⁷²

Recommendation

When implementing the Directive Member States are encouraged to provide for a formal Best Interests Determination procedure for decisions having a long-term impact on a trafficked child's future, such as the determination of a durable solution.

¹⁷² UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 20.

ARTICLE 13(2): PRESUMPTION OF THE PERSON BEING A CHILD IN CASE OF UNCERTAINTY ABOUT AGE

Article 13(2) stipulates that in case of uncertainty about the age of the trafficked person, he or she should be presumed to be a child in order to receive immediate assistance, support and protection in accordance with Articles 14 and 15.

Children are entitled to additional protections under the Directive, given their specific rights, vulnerabilities and needs. This makes the identification of child victims of trafficking crucial. However, it is not always apparent what the age of a trafficked person is. For example they may be travelling under fraudulent travel and identification documents that misstate their date of birth. For this reason, the provision under Article 13(2) is important in as it grants the person immediate access to assistance, support and protection in accordance with Articles 14 and 15.

Whereas immigration officials may be familiar with cases of adults who pretend to be children in order to benefit from the protection available to children, in trafficking cases the opposite may occur as well: people under the age of 18 are given identity documents which have been forged or altered to indicate that they are adults. This enables them to cross borders without immigration officials checking whether they are accompanied by a parent or if they have their parent's permission to be travelling abroad. It also enables them to engage in certain forms of work which are not legally open to children, for example, activities which are considered likely to harm the health, safety or morals of children.¹⁷³ Child victims of trafficking may lie about their age too because this is what they have been told to do by their exploiters or because they are afraid of being taken into care or sent back home. In much the same way that failure to correctly identify any victim of trafficking leads to a violation of that person's rights, treating a child victim of trafficking as an adult prevents that child from exercising the rights to which he or she is entitled under international and national law and under the Directive.¹⁷⁴

The presumption that a (potential) victim should be treated as a child in case of uncertainty is supported by the Legislative Guide to the Trafficking Protocol¹⁷⁵ and Article 10(3) of the CoE Trafficking Convention. Both require States Parties to presume that a victim is a child where his or her age is uncertain and there are reasons to believe that the victim is a child. Until their age is verified, these victims must be given special protection in accordance with their rights as defined, in particular, in the CRC.¹⁷⁶ The same principle is found in the UNICEF Guidelines on the Protection of Child Victims of Trafficking (hereinafter the UNICEF Guidelines)¹⁷⁷ and the relevant best practice guidance for law enforcement officials in the European Union.¹⁷⁸

Before proceeding with any age assessment, a guardian should be appointed for the young person involved on the presumption that they are a child and thus entitled to the presence of an adult whose responsibility it is to ensure that the best interests of the child are upheld (for a discussion on the appointment of a guardian, please refer to the commentary on Articles 14(2) and 16(3)).

General Comment No. 6 of the Committee on the Rights of the Child and the 2009 UNHCR Guidelines on Child Asylum Claims¹⁷⁹ provide further guidance on age assessment. The guiding standard is whether an individual demonstrates an 'immaturity' and vulnerability that may require more sensitive treatment.¹⁸⁰ According to these Guidelines such an assessment should take into account not only the physical appearance of the child but also their psychological maturity. Other initial indicators

¹⁷³ UNICEF, *Reference Guide on Protecting the Rights of Child Victims in Europe*, 2006, p. 44.

¹⁷⁴ OHCHR, *Commentary on the Recommended Principles*, pp. 162-163.

¹⁷⁵ UNODC, *Legislative guide to the UN Trafficking Protocol*, 2004, para. 65.

¹⁷⁶ CoE Trafficking Convention, Explanatory Report, para. 136.

¹⁷⁷ UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, 2006, p. 44.

¹⁷⁸ IOM, *Identification and Protection Schemes for Victims of Trafficking in Persons in Europe: Tools and Best Practices*, 2005, p. 30.

¹⁷⁹ UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08.

¹⁸⁰ See also: Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter Asylum Procedures Directive).

include the young person's statements and the documentation they carry, or lack of a passport or other documentation. Medical procedures to assess age should only be undertaken as a measure of last resort and only with informed consent. Such procedures should take place in the least intrusive way and in an age, sex, and culturally sensitive manner. Age assessment procedures are not an exact science and considerable uncertainty will remain inherent to these procedures. This margin of error should be recognized and the benefit of the doubt given in favour of the individual.¹⁸¹ Moreover, such methods must be safe, used ethically, and respect human dignity.

When carrying out an age assessment, the following safeguards should be taken into account:

- Suspensive effect: When an individual's stated age is disputed he or she should be exempt from removal (including from Dublin II transfers) until after the initial decision regarding the age and any subsequent appeal of this decision has been considered.
- Possibility to appeal the decision and provision of legal aid: The individual should be informed of the decision in writing and in a language he or she understands. If documentation has not been accepted as proof of identification, it should be explained why this is the case. The margin of error applied for any medical exams should be clearly noted. The possibility to appeal the decision should be available and legal aid provided when necessary.

Recommendation

When implementing the Directive, Member States are encouraged to provide for a multidisciplinary approach to age assessment, where such assessment is strictly necessary, and accompanied by the necessary procedural safeguards.

ARTICLE 14: ASSISTANCE AND SUPPORT TO CHILD VICTIMS

Article 14 contains a number of specific provisions for child victims to ensure that assistance and support are based on an individual assessment of the special circumstances of the child; that a guardian or a representative is appointed; and that assistance and support for the family of the child victim are provided.

Article 14 should be read in light of Article 11(3) on the unconditional assistance and support for a victim. Thus the assistance and support referred to under Article 14 is not conditional on the child victim's participation in or cooperation with criminal investigations, prosecution, or trial. Please refer to Box Y for the key international standards on assistance and protection of child victims of trafficking.

The physical and psychological harm trafficking inflicts on children can occur at each stage of the trafficking process, and may differ for boys and girls, depending on their trafficking experience. Children who are subjected to sexual violence or who are exploited in the sex industry may suffer from sexually transmitted infections, including HIV/AIDS, unwanted pregnancy and early motherhood. The behavioural effects of sexual abuse may include fear, depression, low self-esteem, poor social skills, anger and hostility, sexualized behaviour, shame, substance mis-use, and self-harm (including suicide). In addition all child victims suffer the effects of leaving home prematurely and being put to work in an exploitative situation. In the case of younger children, both their socialization and education are halted prematurely, leaving a permanent mark. Even after children are identified by

¹⁸¹ See also: UNICEF, *Age assessment practices: a literature review & annotated bibliography*, T. Smith & L. Brownlees, Discussion paper, 2011.

KEY INTERNATIONAL STANDARDS ON ASSISTANCE AND PROTECTION OF CHILD VICTIMS OF TRAFFICKING

- Evidence of deception, force, coercion, etc. do not form part of the definition of trafficking where the person involved is a child (Art. 3 UN Trafficking Prot.).
- Procedures are in place for the rapid identification of child victims of trafficking (OHCHR Rec. Principles, Guideline 8).
- In the case of absence of a parent or a conflict of interest between the child and the parent(s), a legal guardian is appointed who can act in the child's best interest as soon as a child is identified (Commentary UN Trafficking Prot.; Art. 10(4)(a) CoE Trafficking Conv.; CRC General Comment No. 6).
- Any actions concerning child victims of trafficking are guided by the best interests of the child, the right of children to exercise their rights without discrimination of any kind, the right to express their views and to have these taken into account, and the right to life, survival and development (CRC).
- In providing protection and assistance, the special needs and rights of children in terms of accommodation, education, and appropriate health care are taken into account (Art. 6(4) UN Trafficking Prot.; Art. 12(7) CoE Trafficking Conv.).
- The identity or details allowing the identification, of a child victim of trafficking are not made publicly known, through the media or by any other means, except, in exceptional circumstances, in order to facilitate the tracing of family members or otherwise secure the well-being and protection of the child (Art. 11(2) CoE Trafficking Conv).
- Persons working with child victims are adequately trained, are gender-sensitive, and possess the necessary skills both to assist children and to ensure that their rights are safeguarded (OHCHR Rec. Principles, Guideline 8).
- In the case of unaccompanied children steps are taken to identify and locate family members. Following a risk assessment and consultation with the child, measures are taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest. (OHCHR Rec. Principles, Guideline 8).
- If the safe return of the child to his or her family is not possible, or when such return is not in the child's best interests, adequate care arrangements are established that respect the rights and dignity of the trafficked child (OHCHR Rec. Principles, Guideline 8).
- Specialised policies and programmes are adopted to protect and support child victims of trafficking, including appropriate physical, psychosocial, legal, educational, housing, and health-care assistance (OHCHR Rec. Principles, Guideline 8).

law enforcement officials and withdrawn from exploitation, they may still experience further abuse. Traffickers may try to regain control over them or to intimidate them so they dare not talk to police. Children may be ill treated in police custody or in a residential centre. When trafficked children return home, some experience abuse from members of their own family or home community, particularly if they are suspected of having been subjected to sexual exploitation.¹⁸²

¹⁸² UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006, pp.17-19.

¹⁸³ UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006, pp.18-19.

¹⁸⁴ UNICEF *Guidelines*, 2006, Guideline 8, pp. 25-27; CRC, General Comment No. 6.

When transposing the Directive, Member States may wish to note the relevance of the provisions of the Optional Protocol on the sale of children, child prostitution and child pornography.

ARTICLE 14(1): INDIVIDUAL ASSESSMENT OF THE NEEDS OF THE CHILD

Article 14(1) stipulates the need for an individual assessment, taking due account of the child's views, needs, and concerns with a view to providing assistance and support and finding a durable solution. Special attention is paid to the right to education.

The physical, psychological and behavioural consequences of trafficking and exploitation may include physical health problems, effects of captivity and powerlessness, and emotional and behavioural problems.¹⁸³ These different types of harm inflicted on trafficked children mean that a careful individual, multidisciplinary assessment is required drawing on relevant disciplines - such as health, psychological and child welfare professionals - to determine the appropriate forms of treatment and assistance that might be needed for each child. Such assessments should start with the initial identification of a potential victim and be updated regularly until a durable solution is established.¹⁸⁴ This type of individual best interest assessment can be a less formal process than a Best Interest Determination, which is aimed at making important decisions about a child (for more on the Best Interests Determination, please refer to the commentary on Article 13(1)). The assessment should be reviewed and updated periodically to take account of the changing circumstances of the child. In addressing the above mentioned problems, the right of children to express their views and to have these taken into account are especially important.

The services provided should be appropriate for the child's age and any special needs, as well as for their gender and ethnic or cultural identity. All assistance and support given to children should be delivered by competent, trained professionals and coordinated with the child's parent or guardian.

Box Z:

GUIDING PRINCIPLES FOR THE ASSISTANCE AND SUPPORT TO CHILD VICTIMS

- Trafficked children should never be placed in a juvenile justice detention facility, including a police cell, prison or special detention centre for children. Any decision relating to the detention of children should be made case-by-case, and with full consideration of the best interests principle. Any detention of a child victim of trafficking should, in all cases, be for the shortest possible time and subject to independent oversight and review.
- Care and support for trafficked children should be made available as a right and should never be conditional on the child's cooperation with criminal justice authorities.
- Children should not be coerced into receiving care and protection, including medical assistance or testing, unless it can be demonstrated that it is in the best interests of the individual child.
- Every child under the jurisdiction of a State is entitled to care and protection on an equal basis. This means that non-national child victims should enjoy the same rights as national or resident children.
- Children should be given information about their situation, their entitlements, services available and the possibilities for family tracing and contact, as well as reunification and/or the repatriation process.
- The privacy of children should be protected.

From: OHCHR, *Commentary on the Recommended Principles*, p. 166-169.

Trafficked children, as well as the children of adult trafficking victims, should have access to the same statutory education as national children. If it is compulsory for national children of their age to attend school, so should they if this is assessed to be in their best interests, with the provision of any necessary supports.¹⁸⁵ It is important that efforts to address the education needs of children are not postponed until a durable solution is implemented, in part to take advantage of any spare time the child has while awaiting decisions about a durable solution and in part to enhance their life chances later on. The child's parent(s) or guardian should work with education professionals to determine the most appropriate timing and manner of entry into the education system.

For further discussion on individual assessment and durable solution for unaccompanied and separated child victims of trafficking, please refer to Commentary on Articles 16(1) and 16(2).

Recommendation

When implementing the Directive, Member States are encouraged to ensure a multidisciplinary approach in the assessment of the individual needs of a child victim for both short-term and long-term care and support, followed by periodic updates of the assessment.

ARTICLES 14(2) & 16(3): APPOINTMENT OF A GUARDIAN

Article 14(2) provides for the appointment of a guardian or representative for child victims where the parents are precluded from ensuring the child's best interest as a result of a conflict of interest between them and the child. Under Article 16(3), a guardian should be appointed for unaccompanied and separated children.

The relevance of a guardian is confirmed by the UNODC Legislative Guide to the UN Trafficking Protocol, which encourages State parties to consider

*“appointing, as soon as the child victim is identified, a guardian to accompany the child throughout the entire process until a durable solution in the best interest of the child has been identified and implemented. To the extent possible, the same person should be assigned to the child victim throughout the entire process”.*¹⁸⁶

A similar requirement can be found in Article 10(4)(a) of the CoE Trafficking Convention and General Comment No. 6 of the Committee on the Rights of the Child.

Children are more vulnerable than adults, particularly if they are without a parent or guardian who can advocate for the child's best interests. In some cases, parents may be involved, or suspected to be involved, in the trafficking of their child, in which case they should no longer be involved in decisions regarding their child. A parent or guardian may also be absent for other reasons, for example in the case of unaccompanied asylum-seekers.

A legal guardian – one who is appointed for a child as a result of provisions in the law - should be distinguished from a legal representative. The guardian is a key assistance and support to the child victim under Articles 14 and 16, helps coordinate other assistance and support for the child, and has a role as well under Article 15(1) in accompanying the child during criminal proceedings. The role of a guardian is to be an advocate for the child in a wide range of discussions and decisions about what should happen to the child, in particular to ensure that the decision-making process makes the best interests of the child a primary consideration. His or her role is also to be a link between the child and the various agencies the child comes into contact with, to ensure the child is kept informed of any relevant developments with respect to him or her, and to physically accompany the child, in

¹⁸⁵ UNICEF Guidelines, 2006, p. 28.

¹⁸⁶ UNODC, Legislative guide to the UN Trafficking Protocol, 2010, para. 65.

particular when they are moved between various places,¹⁸⁷ and facilitating referral to appropriate services. As children generally lack legal capacity under national law due to their age, the guardian is vital to support the child in accessing justice. Children will in many cases not have the ability to make arrangements for legal assistance as national law may not consider them competent to contract for services until they reach the age of majority. The guardian will also assist in the identification and implementation of a durable solution.¹⁸⁸

The role of the guardian and the legal representative are different. If it is appropriate for a child to initiate or take part in legal proceedings, he or she will also need a legal representative in the form of a qualified lawyer, which is explicitly provided for under Article 15(2) of the Directive.

Recommendation

When transposing the Directive, Member States are encouraged to assign guardians or representatives a specific duty to advocate for the best interest of the child on a regular basis, to act as an advocate for the child as well as a bridge and focal point for the child's interaction with other authorities and actors. The guardian or representative should also be provided with a role in ensuring that the child is able to participate in decisions.

ARTICLE 15: PROTECTION OF CHILD VICTIMS IN CRIMINAL INVESTIGATIONS AND PROCEEDINGS

Article 15 lists a set of protections for child victims in criminal investigations and proceedings relating to legal representation and counselling, the conduct of interviews, the use of video recorded interviews as evidence and court hearings.

Children have the right to play a role in proceedings against their exploiters, the right to be heard, to information, and the right to be kept informed. The Legislative Guide to the UN Trafficking Protocol calls upon States Parties to:

*“ensure that, during investigation, as well as prosecution and trial hearings where possible, direct contact between the child victim and the suspected offender be avoided. Unless it is against the best interest of the child, the child victim has the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings. During legal proceedings, the right to legal safeguards and effective protection of child witnesses needs to be strongly emphasized. Child victims who agree to testify should be accorded special protection measures to ensure their safety”.*¹⁸⁹

Similarly Article 28(3) of the CoE Trafficking Convention provides that *“a child victim shall be afforded special protection measures taking into account the best interests of the child”*, whereas the Explanatory Report lists a number of specific means to protect the privacy and safety of children in court proceedings. Article 8 of the Optional Protocol to the CRC obliges States to protect the rights and interests of child victims of the practices prohibited under the Protocol at all stages of the criminal justice process, listing a number of specific measures.¹⁹⁰

¹⁸⁷ UNICEF, *Reference guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006, p. 109.

¹⁸⁸ OHCHR, *Commentary on the Recommended Principles*, 2010, p. 137; Separated Children in Europe Programme, SCEP Statement of Good Practice, 2010, p. 21; *UNICEF Guidelines*, 2006, pp. 16-17.

¹⁸⁹ UNODC, *Legislative Guide to the UN Trafficking in Persons Protocol*, 2004, para 65(b).

¹⁹⁰ UN Economic and Social Council (ECOSOC), *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, 2005, ECOSOC Resolution 2005/20. See also: UNODC/UNICEF *Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime*, 2009.

Making criminal justice proceedings child friendly includes devising practical solutions to explain the proceedings to the child, conducting interviews and proceedings in a manner adapted to children, and reducing stress and trauma through child-sensitive questioning and through preventing intimidation. The UNICEF Guidelines and the Guidelines on Justice for Child Victims and Witnesses of Crime more fully address problems of children in legal proceedings.

BOX AA:

MEASURES FOR CHILD VICTIMS AND WITNESSES TO SAFELY AND MEANINGFULLY PARTICIPATE IN COURT PROCEEDINGS

- The child victim is fully informed by the guardian about security issues and criminal procedures before he or she decides whether or not to testify.
- Trafficked children are granted a recovery time before involving them in criminal proceedings against the trafficker.
- Care for a child victim of trafficking is not conditional on the child's willingness to act as a witness.
- Criminal procedures do not inhibit or delay family reunification or the return of the child victim to the country of origin if it is in the best interests of the child. Speedy trials are ensured, unless delays are in the best interests of the child.
- Direct contact between the child victim and the suspect is avoided.
- Law enforcement authorities, in cooperation with social services and NGOs, provide necessary legal assistance in a language that is understandable to the child.
- Child victims and witnesses have their privacy protected as a matter of primary importance. Measures are taken to exclude the public and the media from the courtroom when a child is giving testimony.
- Efforts are made to reduce secondary trauma by applying child friendly practices, including interview rooms designed for children, interdisciplinary services for child victims integrated under one roof, modified court environments that take child witnesses into consideration, use of recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, and on-call systems to ensure the child goes to court only when necessary, allowing the presentation of the videotaped testimony of the child in court as an official piece of evidence.

From: UNICEF, *Guidelines on the Protection of Child Victims and Witnesses of Trafficking*, 2006, p. 32.

Participation in criminal proceeding and the best interests of the child

Before deciding the course of action for trafficked children, the best interests of the child need to be carefully considered, particularly where the child is involved in criminal proceedings. The benefits of involvement in criminal proceedings should be carefully weighed against any negative consequences taking into consideration the views of the child while also considering his or her abilities, age, intellectual maturity, and evolving capacity.¹⁹¹

In general, the child's guardian and legal representative have to assess what is in the child's best interests and advise the child accordingly. This includes the decision of whether to participate in criminal proceedings and if so, under what conditions must consider possible threats to the child and their relatives from a trafficker and his or her associates, the risks to the child's privacy through public exposure of personal details, risk that the legal proceedings will aggravate existing trauma, or any risk to the child's safety after the trial, especially if the traffickers are not successfully prosecuted. Assessing risks from traffickers and taking action to counter these risks is more difficult when legal proceedings are occurring in one country while a threat to safety is perceived in a different country. This requires law enforcement agencies in two (or more) countries to cooperate to meet the threat, assuming the informed consent of the victim and his or her guardian. These issues should be considered as part of a formal assessment process before the child participates in any proceedings.

If the threats involved are due principally to the child testifying against a trafficker in legal proceedings, both the prosecuting authority and the child's guardian have an obligation to consider the child's best interest, and the child's guardian should have the right to refuse a request to testify. Protection, assistance and care for a child victim of trafficking shall not, under any circumstances, be conditional on the child's willingness to act as a witness.

Additionally, police, prosecutors, and any others involved in collecting evidence for a prosecution should always avoid causing additional trauma to the child victim, by, for example, avoiding multiple interviews. Alternative methods of giving testimony as set out in Article 15(3) to (5) should always be considered.

Protection of child victims and witnesses before, during and after criminal proceedings

Children who participate in criminal proceedings as victim-witnesses require protection before a trial (either while waiting for a trial to take place or while giving pre-trial testimony), *during* a trial (including special in-court protection and child-friendly procedures) and *after* a trial (for example in receiving appropriate care and treatment).¹⁹² Particularly important is the protection of the privacy of the child. As part of the protection for a victim-witness, authorities should not publicly disclose the identity of children who have been trafficked, even during a trial.

At the same time, the CRC clearly provides that children have the right to testify in proceedings that affect them and be given the opportunity to express their personal views and concerns on matters related to the case. A child victim or witness should be deemed to be a capable witness unless proven otherwise through a competency examination. His or her testimony should not be presumed invalid or untrustworthy by reason of his or her age alone provided that his or her age and maturity allow the giving of intelligible and credible testimony. The weight given to the testimony of a child shall be in accordance with his or her age and maturity. On the other hand, a child should not be required to testify in a judicial process against his or her will or without the knowledge of his or her parents or guardian.¹⁹³

¹⁹¹ UN Commission on Human Rights, Report of the UN Special Rapporteur on Trafficking in Persons, 2011, p. 15, para.s 53 & 55; Guidelines in Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20, para. 8(d).

¹⁹² See e.g.: UNICEF/UNODC, *Justice in Matters involving Child Victims and Witnesses of Crime. Model Law and Related Commentary*, 2009.

¹⁹³ UNICEF/UNODC, *Justice in Matters involving Child Victims and Witnesses of Crime. Model Law and Related Commentary*, 2009, Art. 20(5).

The focus by authorities on securing successful prosecutions of traffickers in many cases has inhibited them from paying attention to the longer-term needs of their witnesses. For example, some EU Member States only permit willing witnesses to remain in their country until the trial or appeal process is completed.¹⁹⁴ However, the fact that one or two offenders are in prison may not eliminate the threat posed by their associates who remain at large. Consequently, after a trial or appeal, law enforcement officials retain a responsibility for actively protecting a child witness by assessing the risks to them and their family members and working with law enforcement partners in the child's country of origin to ensure the risk is contained. If the safety of a trafficked child cannot be guaranteed in either the country of origin or destination, measures should be taken to allow for travel to a third country.¹⁹⁵

ARTICLE 15(1): APPOINTMENT OF A LEGAL REPRESENTATIVE

For a discussion of the different roles of the guardian and the legal representative, please refer to the commentary on Articles 14(2) and 16(3).

For a discussion on the appointment of a legal representative to act for the child in criminal investigations and proceedings, please refer to Article 15(2).

ARTICLE 15(2): ACCESS TO FREE LEGAL COUNSELLING & LEGAL REPRESENTATION

Article 15(2) requires Member States to ensure that children have access to legal counselling and representation without delay. Unless the child has sufficient financial means, this counsel must be free.

Lawyers working with children should be specifically trained in children's rights and the issues of child trafficking. Children should not participate in any criminal proceedings without such assistance. Legal assistance should be given in a language that the child understands, in cooperation with social services and non-governmental organizations, and be culturally appropriate.¹⁹⁶ For girls who are victims of trafficking, this may involve access to female counsellors and legal representatives.

See also the commentary on Article 12(2) concerning free legal assistance without delay.

ARTICLE 15(3): INTERVIEWS WITH THE CHILD

Article 15(3) requires States to take measures to ensure that interviews with child victims take place without unjustified delay, in child friendly premises, by trained professionals, as much as possible by the same person, not more than strictly necessary, and in the company of a representative of the child or an adult of the child's choice.

Interviewing children takes special care and expertise. The UNICEF Guidelines and the UN Guidelines on Justice in matters involving child victims and witnesses of crime and the accompanying Handbook for Professionals and Policymakers provide more detailed guidance.¹⁹⁷

¹⁹⁴ European Union Agency for Fundamental Rights (FRA), *Child Trafficking in the European Union: Challenges, perspectives and good practices*, 2009, pp. 85-86.

¹⁹⁵ UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006, p. 111.

¹⁹⁶ UNICEF, *Guidelines*, 2006, p. 32; CRC Art.40; CRC General Comment No. 6, p. 11.

¹⁹⁷ UNODC/UNICEF, *Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime*, 2009.

¹⁹⁸ See e.g. *Guidelines on Justice for Child Victims and Witnesses of Crime*, 2003; Anti Slavery International, *Human Traffic, Human Rights: redefining victim protection*, 2002, p. 4.

GUIDELINES ON INTERVIEWING CHILD VICTIMS

- Before conducting an interview with a trafficked child, the express consent of the child and his or her parent, guardian, or social welfare service provider should be acquired.
- Prior to the interview with the trafficked child, the investigator/officer should inquire whether prior interviews have already been conducted by any person or agency. Double questioning must be avoided and information obtained in one interview shall be made available (as appropriate and if applicable) to other responsible actors who need this information with due regard to principles of privacy and confidentiality.
- As much as possible, the investigator/officer and interpreter/translator, should be of the same gender as the trafficked child, dressed in civilian clothes, trained in child friendly/sensitive interview methods, and knowledgeable about the issue of child trafficking. The confidentiality of proceedings and the protection of the trafficked child's right to privacy should at all times be respected.
- Law enforcement authorities shall only question child victims about their trafficking experience in the presence of the appointed guardian.
- The interview should be conducted in a language understood by the trafficked child. Where this is not possible, a qualified translator/interpreter should be provided.
- Law enforcement authorities shall be trained in interviewing children and shall limit the length and scope of questioning so as to minimize further trauma or psychological distress to the child victim.
- As consent of the child to being trafficked is not relevant for legal purposes, law enforcement authorities should not ask questions about the child's consent to the exploitation. Information gathered while questioning the child victim can under no circumstances be used against the child for criminal liability. The child's consent cannot remove the child's status as a victim. (Art. 3 UN Trafficking Prot.; Report of the UN Special Rapporteur on trafficking in persons, *"Integration of the Human Rights of Women and a Gender Perspective"* (E/CN.4/2006/62), 20 February 2006, para. 37–43).

From: UNICEF, *Guidelines on the Protection of Child Victims and Witnesses of Trafficking*, 2006, p. 19-20.

ARTICLE 15(4) & (5): CLOSED HEARING AND THE USE OF VIDEO RECORDING

Articles 15(4) and 15(5) require Member States to take measures to ensure that interviews with child victims or witnesses may be video recorded and that these recordings may be used as evidence in criminal court proceedings, that hearings may take place without the presence of the public and that children can be heard without being present through the use of communication technologies.

The protection of the safety and privacy of child victims and witnesses is paramount.¹⁹⁸ Hearings of children should always be closed, without the presence of the public and the media, and the identity of the child should be protected. Measures should be taken to avoid direct contact between the child and the suspected trafficker during the process of investigation and prosecution as well as during trial hearings. Moreover, action should be taken to ensure that victims or witnesses do not encounter either the people accused of trafficking them or any of their relatives or associates outside a courtroom. This may require different categories of witnesses have separate waiting rooms or separate entrances into the court building.

ARTICLE 16: ASSISTANCE, SUPPORT AND PROTECTION FOR UNACCOMPANIED CHILD VICTIMS OF TRAFFICKING

Article 16 contains a set of specific measures for assistance, support and protection of unaccompanied child victims of trafficking.

All the measures that apply to children, as set out in Article 14, also apply to unaccompanied children. Recognizing the particularly vulnerable situation of these children an additional number of specific measures are necessary, in particular with an eye to finding a durable solution, based on a Best Interest Determination for each child.¹⁹⁹

Children may enter the territory as unaccompanied or separated or become so under a variety of different circumstances. Many categories of unaccompanied child are overlapping, with children moving between neatly defined categories as their situation changes. For example, unaccompanied and separated asylum-seeking children who rely on smugglers to reach their destination are particularly vulnerable to recruitment by traffickers.²⁰⁰

Coordination and cooperation

To address the above issues, the establishment of effective coordination between national and local agencies is imperative, including between the asylum authorities and child protection services, with National Referral Mechanisms that support the early identification of (potential) victims and their referral to assistance and protection, and if necessary, to asylum proceedings. Officials should be trained to identify among unaccompanied children those children who may be in need of international protection. In all cases, there should be a clear and swift process for referring (potential) child victims of trafficking by those who may first come into contact with them – border guards, police, health workers – to the child protection system (sometimes also referred to as child welfare or child care authorities), so that these children have immediate access to a guardian as well as appropriate services and protection.

ARTICLE 16(1): TAKING ACCOUNT OF THE PERSONAL AND SPECIFIC CIRCUMSTANCES OF THE CHILD

Article 16(1) ensures that all actions to assist and support unaccompanied child victims take due account of their personal and special circumstances.

In line with the CRC, ‘taking due account of the personal and special circumstances of the unaccompanied child victim’ as required by Article 16(1) should be read to mean that any action in regard to unaccompanied children should be guided by the best interests of the child. For a discussion on the best interests of the child, please refer to the commentary on Article 13(1).

Recital 23 notes that Member States should apply “reception measures appropriate to the needs of the child” with relevant procedural safeguards. Article 25 CRC requires that, where the authorities have placed a child in care, “the State recognizes the right of [that] child to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.”²⁰¹ Reference should be made to the EU Action Plan on Unaccompanied Minors which also addresses unaccompanied children who are victims of trafficking.²⁰²

¹⁹⁹ See Box on Best Interests Assessment and Determination, Art. 13(1).

²⁰⁰ Communication from the Commission to the European Parliament and the Council, *Action Plan on Unaccompanied Minors* (2010 – 2014), (COM(2010) 213/final).

²⁰¹ CRC General Comment No. 6, para.s 19-22.

²⁰² Communication from the Commission to the European Parliament and the Council, *Action Plan on Unaccompanied Minors* (2010 – 2014), COM(2010) 213/final.

ARTICLE 16(2): DURABLE SOLUTION

Article 16(2) requires states to take the necessary measures to find a durable solution, based on the best interests of the child.

Whether a child victim of trafficking is accompanied (Article 14) or unaccompanied and separated (Article 16), the Directive requires that a durable solution be found. A durable solution is one that seeks to provide a long-term and sustainable solution for the child. This should be a concrete and secure solution that is based on the child's best interests. As this is a decision that clearly has a significant impact on the child's life, it should be based on a formal "Best Interests Determination" designed to determine the child's best interests while taking account of the views of the child and involving the child's parents or guardian. The process should be initiated and implemented without undue delay and should include a security and risk assessment associated with each possible durable solution.²⁰³ If it is apparent that it will not be possible to protect a child from threat either in the country of origin or destination, the authorities responsible for finding a durable solution for the child should consider a solution in a third country.²⁰⁴

In finding durable solutions, several options are possible: local integration; granting of international protection status or other status, voluntary repatriation and re-integration to the country or place of origin; or a solution in a third country. Following a rights-based approach, the search for a durable solution should start with analysing the possibility of family reunification.

Family reunification

Family reunification starts with the tracing of family members and re-establishing contact. The Legislative Guide to the UN Trafficking Protocol requests the relevant authorities to

"take all necessary steps to trace, identify and locate family members and facilitate the reunion of the child victim with his or her family where that is in the best interest of the child".²⁰⁵

The CoE Trafficking Convention similarly requires States parties, following the identification of an unaccompanied child as a (potential) victim of trafficking, to "make every effort to locate his or her family when this is in the best interests of the child".²⁰⁶ However, caution is needed where such tracing may be contrary to the best interests of the child (for example, when family members are involved in the exploitation or in cases involving abuse or neglect) or if it would otherwise jeopardize the child's rights or endanger their family.

In accordance with the CRC, decisions about family reunification should give due weight to the views of the child in accordance with that child's age and level of maturity. Especially for younger children, family reunification is often an important element in securing their best interests. International law, therefore, requires States to deal with family reunification requests "in a positive, humane and expeditious manner".²⁰⁷ Long delays in family tracing can lead to children being held in shelters or detention facilities for unacceptable periods of time.

Where such reunification would happen in the country of origin, the formal Best Interest Determination must take account of the circumstances in the country of origin, as set out below. Risks to the child must be balanced against the consequences of further separation, bearing in mind that under the CRC, States are obliged to give the survival of the child paramount consideration.²⁰⁸

²⁰³ CRC General Comment No. 6; *UNICEF Reference Guide*, 2006, p. 81.

²⁰⁴ UNICEF, *Guidelines* (2006); UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe* (2006); OHCHR, *Commentary on the Recommended Principles* (2010), pp. 171-173.

²⁰⁵ UNODC, *Legislative guide to the Trafficking Protocol*, 2004, para. 66.

²⁰⁶ CoE, Trafficking Convention, Art. 10 (4)(c).

²⁰⁷ CRC, Art. 10(1).

²⁰⁸ CRC General Comment No. 6, para. 82; UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 2007, p. 83.

Repatriation

In the case of child victims, special care should be taken in relation to decisions about their repatriation. The Legislative Guide to the Trafficking Protocol stresses the need for special care in the repatriation of child victims:

“In cases where child victims are involved, legislators may also wish to consider not returning those child victims unless doing so is in their best interest and, prior to the return, a suitable caregiver such as a parent, another relative, another adult caregiver, a government agency or a child-care agency in the country of origin has agreed and is able to take responsibility for the child and to provide him or her with appropriate care and protection. Relevant ... authorities ... should be responsible for establishing whether or not the repatriation of a child victim is safe and should ensure that the process takes place in a dignified manner and is in the best interest of the child... In those cases where the return is voluntary or in the best interest of the child, each State party is encouraged to ensure that the child returns to his or her home country in a speedy and safe manner”²⁰⁹

Article 16(7) of the CoE Trafficking Convention states that *“child victims shall not be returned to a State, if there is an indication, following a risk and security assessment, that such return would not be in the best interests of the child”*. The purpose of such a risk assessment should be to ensure that no decision is taken which places a child in a situation of foreseeable risk.²¹⁰

In its General Comment No. 6, the Committee on the Rights of the Child lists the following factors that should be taken into account in carrying out a best interest determination to decide whether the repatriation of an unaccompanied or separated child is in that child’s best interest:

- The safety, security and other conditions, including socio-economic conditions, awaiting the child upon return;
- The availability of care arrangements for that particular child;
- The views of the child expressed in exercise of his or her right to do so under Article 12 CRC and those of the caretakers;
- The child’s level of integration in the host country and the duration of absence from the home country;
- The child’s right “to preserve his or her identity, including nationality, name and family relations” (Article 8 CRC); and
- The “desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background” (Article 20 CRC).²¹¹

An important part of the decision-making process on durable solutions is the determination of a suitable care option upon return that covers the child’s long-term care and protection, with return to families being the preferred option. Both the Legislative Guide to the Trafficking Protocol and the UNICEF Guidelines note the importance of cooperation and collaboration between countries of origin and destination in relation to safe repatriation of child victims of trafficking, including a formal transfer of care. These protections should be specifically provided for in any readmission agreements and processes.

Integration

In its General Comment No. 6, the Committee on the Rights of the Child identifies local integration, inter-country adoption and relocation to and integration in a third-country (which may be necessary because of security considerations) as alternatives to repatriation, and outlines the considerations that should be taken into account in those cases.²¹²

²⁰⁹ UNODC, *Legislative guide to the Trafficking Protocol*, para.s 66 & 67.

²¹⁰ UNICEF, *Guidelines*, section 8.2.

²¹¹ CRC, General comment No. 6, para. 84.

²¹² CRC, General Comment No. 6, para.s 89-94.

While the UN Trafficking Protocol does not address the issue directly, the Legislative Guide to the Trafficking Protocol notes that in situations where the safe return of the child to his or her family and/or country of origin is not possible or return would not be in the child's best interests, *"the social welfare authorities should make adequate [...] arrangements to ensure the effective protection of the child and the safeguarding of his or her human rights"*,²¹³ such as access to education, vocational training, and employment on the same basis as national children. A trafficked child's need for support does not come to an end because a durable solution is found. Continuing to provide support and monitoring, especially to prevent re-trafficking, is an important dimension of protection. Recital 23 highlights the option of international protection status or other status to allow child victims to remain in the country on a legal status. However, the 2009 FRA research on child trafficking in the EU shows that temporary stay or international protection are only rarely granted to child victims of trafficking.²¹⁴

The UNICEF Guidelines provide important information on the key elements of a long term integration plan whether in the child's home country, the country of destination or a third country, including a regularization of their immigration status and long-term care arrangements, highlighting access to health care, psycho-social support, social services and education.²¹⁵

ARTICLE 16(3) & (4): APPOINTMENT OF A GUARDIAN AND LEGAL REPRESENTATIVE

Please refer to the commentary on Articles 14(2) and 15(1).

ARTICLE 17: COMPENSATION

Article 17 requires Member States to ensure that trafficked persons have access to existing schemes of compensation to victims of violent crimes.

Redress of wrongs is a fundamental legal principle that constitutes both a general principle of law and a customary rule of law.²¹⁶ As stated in the OHCHR Recommended Principles:

"Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies".²¹⁷

The right to a remedy is widely recognized in the major human rights instruments, including the ECHR, the International Covenant on Civil and Political Rights²¹⁸ and the Forced Labour Conventions.²¹⁹ The UN Trafficking Protocol and the UN Convention against Transnational Organized Crime, as well as the CoE Trafficking Convention contain provisions on the compensation of victims, among others on

²¹³ UNODC, *Legislative guide to the Trafficking Protocol*, 2004, Part 2, para. 67.

²¹⁴ European Union Agency for Fundamental Rights (FRA), *Child Trafficking in the European Union: Challenges, perspectives and good practices*, 2009, pp. 91-92.

²¹⁵ *UNICEF Guidelines*, pp. 28-31.

²¹⁶ OHCHR, *Commentary on the Recommended Principles*, p. 223.

²¹⁷ OHCHR, *Recommended Principles*, Guideline 9.

²¹⁸ UN General Assembly, International Covenant on Civil and Political Rights, Resolution of 2200A (XXI) of 16 December 1966, Art. 2.

²¹⁹ According to the ILO Committee of Experts victims of forced labour must have access to justice and obtain compensation for the harm they have suffered, Commentary Committee of Experts on Article 25, *ILO Forced Labour Survey 2007*, p. 75 at para. 139.

access to information and (free) legal aid,²²⁰ and the provision of state compensation, for example through the establishment of a Victim Fund. Other key international instruments are the 2005 Basic Principles and Guidelines on Remedy and Reparation,²²¹ the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,²²² and, for children, the 2005 Guidelines on Justice for Child Victims and Witnesses of Crime.²²³ Further, the ILO Conventions on migrant workers No. 97 and 143 as well as the International Convention on the Protection of Migrant Workers and Members of Their Families (ICRMW) set standards to ensure that migrants are not deprived of their right to be paid for work they have performed. In the European context the current 2001 Framework Decision on the standing of victims in criminal proceedings,²²⁴ the Proposal for a Victim Directive,²²⁵ the 2004 Directive on (cross border) compensation to crime victims,²²⁶ and the 2009 Directive on minimum standards on sanctions and measures against employers of illegally staying third-country nationals²²⁷ are relevant. Please refer to Box AC on the key international standards on access to remedies.

In case of violation by a non-State actor, that actor will in principle be individually liable for reparation to the victim. However, under certain conditions, State responsibility can arise²²⁸ for instance when State actors are complicit to trafficking or where a State has failed to duly prevent, investigate and punish trafficking and/or its forced labour outcomes, as confirmed by the ECtHR ruling in *Rantsev v. Russia and Cyprus*²²⁹ and *Siliadin v. France*.²³⁰

The provision of adequate remedies serves multiple purposes. It offers the victim payment or reparation for injury, loss or harm and is an essential element of access to justice. It helps to empower the victim, contributes to their recovery and reduces the risk of re-trafficking. At the same time it serves as punishment and deterrence of traffickers.

However, research shows that the actual receipt of a compensation payment by trafficked persons is in practice extremely rare, due to a range of obstacles trafficked persons face when seeking compensation through legal proceedings. These include lack of access to information, assistance and legal aid on the part of the victim, as well as lack of capacities, knowledge and experience in seeking compensation for trafficked persons on the part of the judiciary, lawyers, service providers, non-governmental organizations and trade unions. Moreover, fear and intimidation, language barriers and insecurity about their immigration status may act as barrier. Even when compensation orders are made against traffickers, in practice it appears to be extremely difficult to enforce such orders and actually receive compensation. Where State compensation funds exist, they are often limited and may exclude groups on the basis of nationality, residence status, or types of crimes that the victim suffered.²³¹

²²⁰ In relation to the latter, the Explanatory Memorandum of the European Trafficking Convention refers to the ECtHR, which held that in certain circumstances there is a right to free legal assistance under Art. 6(1) ECHR (*Airey v. Ireland*, 9 October 1979). Effective access to a court may necessitate free legal assistance if someone is not in a position to present her or his case properly and satisfactorily without the assistance of a lawyer (*Golder v. UK*, 21 February 1975).

²²¹ *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* (hereinafter: Basic Principles and Guidelines on Remedy and Reparation), UN General Assembly, 16 December 2005.

²²² *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN General Assembly, 29 November 1985.

²²³ Guidelines on Justice for Child Victims and Witnesses of Crime (*ECOSOC Res. 2005/20*).

²²⁴ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).

²²⁵ Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime. 18.5.2011, COM(2011) 275 final.

²²⁶ Council Directive relating to (cross border) compensation to crime victims (2004/80/EC).

²²⁷ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

²²⁸ For a more extensive discussion on State responsibility, please refer to the OHCHR *Commentary on the Recommended Principles and Guidelines*, pp. 224-225; Report of the UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, 13 April 2011 (A/HRC/17/35), pp. 4-5.

²²⁹ ECtHR, *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010.

²³⁰ ECtHR, *Siliadin v. France*, no. 73316/01, 26 July 2005.

²³¹ Report of the UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo (A/HRC/17/35), 13 April 2011, p. 10 (hereinafter: Report of the UN Special Rapporteur on Trafficking, 2011); OSCE/ODIHR, *Compensation for trafficked and exploited persons in the OSCE region*, Warsaw, 2008; J. Lam, K. Skrivankova, *Opportunities and Obstacles: Ensuring access to compensation for trafficked persons in the UK*, Anti-Slavery International, London, 2008.

KEY INTERNATIONAL STANDARDS ON ACCESS TO REMEDIES

- Adequate remedies include compensation, rehabilitation, satisfaction and guarantees of non-repetition (Basic Principles and Guidelines on Remedy and Reparation).
- Trafficked persons have an enforceable right to effective and appropriate remedies. Remedies may be criminal, civil or administrative in nature (Art. 47 EU Charter; Art. 13 ECHR; Art. 2 ICCPR; Art. 6 CERD; CEDAW General Recommendation No. 19; Basic Principles and Guidelines on Remedy and Reparation, para. 12; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; OHCHR Rec. Principles, Principle 17 & Guideline 9(1)).
- There is a legislative and practical possibility for trafficked persons to obtain compensation for damages suffered. This includes both material and non-material damages (Art. 14(2) & 25(2) UN TOC; Art. 6(6) UN Trafficking Prot.; Art. 15(3) CoE Trafficking Conv.; EU Dir on Compensation; Art. 25(3) ICRMW; ILO C 97 & 143; OHCHR Rec. Principles Principle 17 & Guideline 4(9)).
- Trafficked persons have a right to be paid for the work they have performed, independent of the lawfulness of their stay (EU Directive on sanctions against employers of illegally staying 3rd country nationals; ILO C 97 & 143; Art. 25(3) ICRMW).
- Trafficked persons are given information on available remedies, including compensation, in a language they understand (Art. 6 UN Trafficking Prot.; Art. 15(1) CoE Trafficking Conv.; Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 12; OHCHR Rec. Principles, Guidelines 4(8) & 9(2)).
- Trafficked persons have access to legal assistance and free legal aid for the duration of any criminal, civil or other actions against the traffickers, including for obtaining compensation (Art. 15(2) CoE Trafficking Conv.; Case law ECtHR- *Airey v. Ireland*, 9 October 1979; *Golder v. the United Kingdom*, 21 February 1975; Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 12; OHCHR Rec. Principles, Principle 9 & Guideline 9(3)).
- Trafficked persons have a right to safely remain in the country pending the completion of proceedings for compensation (Art. 15(1) CoE Trafficking Conv./ Expl. Report para. 192; OHCHR Rec. Principles, Principle 9 & Guideline 4(7)).
- Trafficked persons, as well as their families, are protected against unlawful interference with their privacy and from intimidation and retaliation before, during and after judicial, administrative, or other proceedings that affect their interests (Basic Principles and Guidelines on Remedy and Reparation, para. 12).
- There are provisions for confiscation of the proceeds of trafficking. A priority option is to use confiscated assets to compensate victims (Art. 25(2) UN TOC; OHCHR Rec. Principles, Principle 16 & Guideline 4(4)).
- Trafficked persons are enabled to present their views and concerns at appropriate stages of the criminal proceedings (Art. 25 UNTOC; Art. 6 UN Trafficking Prot.).
- There is a provision for payment of compensation from the State where such compensation cannot be obtained from the trafficker such as through a Victim Fund. Such a fund may be financed through the use of confiscated assets (Art. 15(4) CoE Trafficking Conv.; OHCHR Rec. Principles, Guideline 4(4)).

The right to an effective and appropriate remedy

The right to an effective remedy encompasses not only a substantive right to reparations for the harm suffered, but also a set of procedural rights necessary to facilitate access to reparations.²³² In substance, adequate reparations include restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.²³³

Restitution may include restoration of liberty (including release from detention),²³⁴ return of property, such as identity and travel documents and other personal belongings, (where appropriate) safe and voluntary repatriation to one's place of residence, recognition of legal identity and citizenship, and assistance and support to facilitate social integration.

Recovery (rehabilitation)²³⁵ includes medical and psychological care, as well as legal and social assistance. In accordance with Article 11(3) of the Directive, access to recovery services should not be conditional upon the capacity or willingness of trafficked persons to cooperate with law enforcement. The latter would be, in the words of the Commentary on the Recommended Principles, "contrary to the fundamental tenet of a human rights approach to trafficking".²³⁶

Compensation is the form of reparation that is most commonly studied and claimed,²³⁷ and is payable for economically assessable damage to the extent that such damage cannot be made good by restitution. It can cover a wide range of injury, loss or damage caused by the offender. According to the UNODC Model Law on Trafficking in Persons,²³⁸ compensation may include payment for or towards:

- a) Costs of medical, physical, psychological or psychiatric treatment;
- b) Costs of physical and occupational therapy or rehabilitation;
- c) Costs of necessary transportation, temporary childcare, temporary housing or the movement of the victim to a place of temporary safe residence;
- d) Lost income and due wages according to national law and regulations regarding wages;
- e) 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;
- f) 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;
- g) Any other costs or losses incurred by the victim as a direct result.

Mere difficulty in quantifying damage must not be used as a reason to deny compensation.²³⁹ In the Netherlands, for example, lawyers have successfully claimed compensation for the money victims of trafficking in the sex industry earned for their traffickers by calculating the number of days the victim had worked and the average amount of money they earned per day.²⁴⁰

Satisfaction can be addressed by ensuring that the violations of the victim's rights are properly acknowledged and that "justice is done".

²³² Report of the UN Special Rapporteur on Trafficking, 2011, p. 6.

²³³ 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 Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147.*

²³⁴ See for a discussion of non-detention of trafficked persons, commentary on Art. 8.

²³⁵ The term recovery should be preferred to rehabilitation to avoid re-victimization of trafficked persons by labelling them as persons in need of 'rehabilitation', Report of the UN Special Rapporteur on Trafficking in persons, 2011.

²³⁶ OHCHR, *Commentary on the Recommended Principles*, p. 142; see also commentary on Art. 11(3).

²³⁷ See OSCE/ODIHR, *Compensation for Trafficked and Exploited Persons in the OSCE Region*, 2008.

²³⁸ UNODC, *Model Law on Trafficking in Persons*, Art. 28, para. 3.

²³⁹ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 53rd session, 2001.

²⁴⁰ A. Koopsen, *A model for claiming compensation*, Training of Serbian Lawyers, Astra 2011.

Guarantees of non-repetition include the obligation of states to take all necessary measures to protect the victim from re-trafficking, as well as the effective prosecution and sanctioning of the traffickers. Where, in the case of foreign victims, it is not possible to guarantee a safe and secure return, temporary or permanent residence status may in itself become a substantial form of remedy.²⁴¹

Ancillary rights

Procedural rights are critical pre-conditions necessary to ensure that victims can actually exercise their right to an adequate and effective remedy. These include:

- Access to information: counselling and information as per Art. 11(5) should include information about available remedies in a language and form the victim understands, bearing in mind the need for child friendly information for child victims.
- The appointment of a guardian for a trafficked child as necessary (refer to Art. 14(2) and 16(3)).
- The right to legal assistance to pursue compensation: as stipulated in Recital 19 and Art. 12(2), victims of trafficking should be given access without delay to legal counselling and legal representation, including for the purpose of claiming compensation either from the traffickers or the state. As court and administrative procedure is often very complex, legal assistance is necessary for victims to be able to claim their rights.²⁴² Lawyers should be adequately trained to deal with compensation claims of trafficked persons.
- The right to remain in the country during proceedings for claiming compensation: the ability of trafficked persons to claim remedies most often hinges upon possibilities to remain in the country where the proceedings take place. Assistance and support should include the provision of temporary residence status for the purpose of seeking remedies and should, as stipulated in Art. 11(3) not be made conditional on the victim's willingness to cooperate in criminal proceedings.
- Protection against unlawful interference with the victim's privacy and safety from intimidation and retaliation before, during and after criminal, civil, labour or other proceedings to seek compensation. This may include protection of the safety of the victim's family.

The use of confiscated criminal assets for compensation

Article 7 of the Directive deals with the seizure and confiscation of the proceeds from trafficking. Recital 13 encourages the use of seized and confiscated criminal assets to *inter alia* support victim's assistance and protection, including compensation.

The linking of a criminal justice measure, such as confiscation of proceeds, to victim support presents an important step forward in the integration of a human rights approach to trafficking.²⁴³ Such linking finds support in the UN Convention on Organized Crime, which identifies victim compensation as a priority option on the disposal of confiscated assets. In respect to international requests with regard to asset confiscation, Article 14(2) requires State Parties "to give priority consideration to returning confiscated proceeds of crime or property to a requesting State Party for compensation of (or return to) victims". Article 15(4) of the CoE Trafficking Convention mentions the possibility of using confiscated assets for funding the establishment of a victim fund.

²⁴¹ Report of the UN Special Rapporteur on Trafficking in persons, 2011, para.s 50 & 51.

²⁴² Explanatory Report to the Eur. Trafficking Convention, para. 195.

²⁴³ OHCHR, *Commentary on the Recommended Principles and Guidelines*, p. 222.

Mechanisms for reparation

Reparation may include restitution from the offender in the criminal court, aid from state administered victim compensation funds, and damage ordered to be paid in civil or administrative proceedings. Labour courts or other dispute settlement mechanisms can provide an important avenue for workers to contest abusive working conditions, including forced labour, independent from criminal proceedings. If States have a clear national policy on the employment relationship, this goes some way towards rooting out ambiguous situations where vulnerable persons' rights are not respected.²⁴⁴ Labour law violations may include discrimination, breach of national minimum wage regulations, and unreasonable overtime. Workers organisations have an important role in assisting victims to obtain compensation and/or restitution. Trade unions also play a crucial role in settling claims for unpaid or underpaid wages or work-related injuries in negotiations with employers.

While there are some promising practices in regard to compensation of victims through criminal or labour proceedings,²⁴⁵ compensation of victims still appears to be the exception rather than the rule.²⁴⁶ Criminal courts may, for example, not consider compensation claims as this is not a general practice for victims of crime and, when claims are awarded, it is generally up to the victim to actually recover the money. Similarly, labour proceedings may be restricted by eligibility criteria. In most countries, for example, they are not available for victims of trafficking in the sex industry, as sex work is illegal and thus not a recognized form of employment to which labour protection applies.²⁴⁷ Comparable problems may arise for domestic workers or au-pairs. Trafficked persons with an irregular immigration status may also be excluded from the use of labour proceedings to seek compensation.

A more secure way to ensure compensation to trafficked persons is the establishment of a victim fund, which may provide compensation, independent of the identification and conviction of the offender(s). Such fund can be established specifically for victims of trafficking or for victims of serious crimes in general. The latter option is preferable as it will be easier to administer a single fund than several different funds for different types of crime.²⁴⁸ Moreover, it avoids a hierarchical categorization of rights holders.

Children

Where all elements of the right to an effective remedy equally apply to trafficked children, responses vis-à-vis trafficked children require particular caution, especially when involving criminal procedures (refer to Art. 15). Child victims should equally be entitled to receive reparation irrespective of their immigration status, the legality or illegality of the work/activity they performed, or their cooperation with law enforcement or judicial authorities. Consideration of the best interests of the child also applies to the question of what form of reparation would be most appropriate for the child, taking into account the views of the child. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.²⁴⁹

Recommendations

When transposing the Directive, Member States are encouraged to take into account not only the substantive components of the right to an effective remedy, but also ancillary rights.

Where no schemes for compensation to victims of violent crime exist, Member States are encouraged to establish such schemes and to ensure that these are accessible to victims of trafficking regardless of nationality, residence status or the form of trafficking they have suffered.

Member States may also wish to consider establishing legal provisions, where these do not already exist, to allow the use of confiscated criminal assets to compensate victims, and fund programmes for the assistance, support and protection of victims.

²⁴⁴ ILO Action against trafficking in human beings, Geneva, 2008, p.8.

²⁴⁵ Anti-Slavery International, *Opportunities and Obstacles: Ensuring Access to Compensation for Trafficked Persons in the UK* (2008), p. 20.

KEY INTERNATIONAL STANDARDS ON ACCESS TO REMEDIES FOR CHILDREN

- Child victims and witnesses should receive reparation in order to achieve full redress, reintegration and recovery.
- Procedures for obtaining and enforcing reparation should be readily accessible and child sensitive and where possible should be conducted at the same time as the criminal case.
- Reparation may include restitution from the offender ordered in criminal court, aid from victim compensation programmes administered by the State and damage ordered to be paid in civil proceedings.
- Where possible, costs of social and educational reintegration, medical treatment, mental health care, and legal services should be addressed.
- Procedures should be instituted to ensure automatic enforcement of reparation orders and payment of reparation before fines.

From: UN, *Guidelines on Justice for Child Victims and Witnesses of Crime*, para. 36-38 (ECOSOC Res. 2005/20).

ARTICLE 18: PREVENTION

Article 18 addresses the complex issue of prevention through demand reduction, awareness raising and education, research, and training.

This stand-alone provision reflects the holistic and integrated approach adopted by the Directive, which seeks to address prevention, protection and prosecution, as well as partnership. This provision also creates positive obligations for Member States. In light of the fact that the Directive cannot legislate on external matters, the Commentary focuses on the responsibilities of EU Member States to prevent trafficking.

An obligation to prevent trafficking

Under international human rights law States have an obligation to take positive measures to prevent trafficking. Article 5 of the CoE Trafficking Convention also obligates States to promote a human rights-based approach and take a gender and child sensitive approach in the development, implementation and assessment of prevention policies and programmes. It also mandates States to take measures to enable migration to take place legally, including through the provision of adequate information.

²⁴⁶ Report of the UN Special Rapporteur on Trafficking in Persons, 2011; Summary report expert consultation on effective remedies, organized by the UN Special Rapporteur on Trafficking in Persons, Bratislava, 2010.

²⁴⁷ OSCE/ODIHR, *Compensation for Trafficked and Exploited Persons in the OSCE Region*, 2008, p. 27.

²⁴⁸ UNODC, *Model Law against Trafficking in Persons*, p. 70.

²⁴⁹ *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, ECOSOC Resolution 2005/20, para. 8(d); See also *UNICEF Guidelines*, 2006, p. 34.

KEY INTERNATIONAL STANDARDS ON PREVENTION OF TRAFFICKING

- Trafficked persons are protected from re-victimization (Art. 9(1) UN Trafficking Prot.).
- States undertake research, information, mass media campaigns, social and economic initiatives and training programmes to prevent and combat trafficking (Art. 9(2) UN Trafficking Prot.; Art. 5(2) CoE Trafficking Conv.; OHCHR Rec. Principles, Guidelines 7(4) & (5)).
- Policies and practices address the factors that increase vulnerability to trafficking, including poverty, underdevelopment, inequality and all forms of discrimination (Art. 9(4) UN Trafficking Prot.; OHCHR Rec. Principles, Guideline 7).
- Measures are taken to reduce children's vulnerability to trafficking, notably by creating a protective environment for them and improving children's access to educational opportunities (Art. 5(5) CoE Trafficking Conv.; OHCHR Rec. Principles, Guideline 7(3)).
- States take measures to discourage the demand that fosters all forms of exploitation that leads to trafficking, e.g through research, raising awareness, information campaigns, education, and legislation targeting those who knowingly use or take advantage of the labour and/or services produced through the exploitation of trafficked persons (Art. 9(5) & 19 UN Trafficking Prot.; Art. 6 CoE Trafficking Conv.; OHCHR Rec. Principles, Guideline 7(1)).
- Potential migrants are informed about the risks of migration; States take measures to prevent misleading information on employment abroad (ILO C. 97; OHCHR Rec. Principles, Guideline 7(4)).
- States review and modify policies that may compel people to resort to irregular and vulnerable labour migration, including examining the effects of repressive and/or discriminatory migration and labour policies, and examine ways of increasing opportunities for legal, gainful and non-exploitative labour migration (Art. 5 CoE Trafficking Conv.; OHCHR Rec. Principles, Guidelines 7(6) & (7)).
- Relevant officials are trained in the prevention of and fight against trafficking in human beings, including human rights training (Art. 29 CoE Trafficking Conv.).
- States take concrete steps to address public sector involvement or complicity in the trafficking process (Art. 8 UN TOC; OHCHR Rec. Principles, Principle 6).
- States take measures against abusive and fraudulent practices of private employment agencies and employers of illegally staying migrant workers, including criminal sanctions in the case of exploitative conditions, trafficking and the illegal employment of a minor (ILO Private Employment Agencies Conv. No. 181; Dir. on sanctions against employers of illegally staying third-country nationals).
- States cooperate with NGOs and other civil society organizations in the prevention of trafficking (Art. 9(3) UN Trafficking Protocol; Art. 5(6) CoE Trafficking Conv.).
- States promote a human rights-based approach, gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of prevention policies and programmes (Art. 5(3) CoE Trafficking Conv.).
- Prevention strategies are evidence based (OHCHR Rec. Principles, Guideline 7).
- States' responses to trafficking do not discriminate on prohibited grounds (Art. 14 UN Trafficking Prot.; Art. 3 CoE Trafficking Conv.; OHCHR Rec. Principles, Principle 3 & Guideline 1; all major human rights treaties).
- No aspect of States' responses to trafficking violates established rights (Art. 14 UN Trafficking Prot.; Art. 40 CoE Trafficking Conv.; OHCHR Rec. Principles, Principle 3 & Guideline 1).

A historic landmark is the recent adoption of the ILO Convention Concerning Decent Work for Domestic Workers which applies to all domestic workers, including migrant domestic workers, and may play a pivotal role in the prevention of trafficking for domestic service.²⁵⁰ Likewise the ILO Conventions on migrant workers No. 97 and 143 as well as the International Convention on the Protection of Migrant Workers and Members of Their Families²⁵¹ and the General Comment No. 1 on Migrant Domestic Workers of the Committee on Migrant Workers²⁵² provide important guidance for the protection of migrant workers against abusive practices, including trafficking.

Box AF:

ILO CONVENTION CONCERNING DECENT WORK FOR DOMESTIC WORKERS

The Convention applies to all domestic workers and requires States Parties, *inter alia*, to take measures to ensure that domestic workers:

- enjoy effective protection against all forms of abuse, harassment and violence (Art. 5),
- enjoy fair terms of employment as well as decent working conditions (Art. 6),
- are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner (Art. 7),
- are entitled to keep in their possession their travel and identity documents (Art. 9),
- are paid minimum wages (Art. 11),
- and are paid in cash and at regular intervals (Art. 12).

Moreover, State Parties are required to take measure to ensure equal treatment between domestic workers and workers generally (Art. 10) and to protect domestic workers, including migrant domestic workers, against abusive practices by recruitment agencies (Art. 15).

Women can be particularly vulnerable to abusive practices due to their marginalized economic status, ethnicity, nationality and the interaction of these with discriminatory gender stereotypes. Shrinking formal employment opportunities and restrictive migration policies have affected women disproportionately, where the legal migration channels for traditionally female dominated sectors, such as domestic work, care work and the entertainment industry, are limited. In addition, an ageing population, the increasing entry of women into the paid labour force, desire to maintain a certain lifestyle and social status, and a reluctance to take on domestic and care work-related jobs among citizens have created a huge demand in developed countries for the labour of women and children, particularly girls, in household and care work. Domestic workers are particularly vulnerable, since their work is confined to the employer's household, a private domain that is difficult to regulate.²⁵³

²⁵⁰ ILO, Convention Concerning Decent Work for Domestic Workers, 16 June 2011, PRNo.15A.

²⁵¹ UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, resolution 45/158 of 18 December 1990.

²⁵² Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, (CMW), General Comment No. 1 on Migrant Domestic Workers, 2011, CMW/C/GC/1.

²⁵³ Noeleen Heyzer, *Labour migration and Trafficking: A gender and Human Rights Approach*, UNIFEM, 2007, p. 2.

Anti-trafficking interventions, however, have to strike a careful balance between addressing the special vulnerabilities of women while at the same time recognizing their agency. Similar tensions exist in addressing vulnerabilities faced by children. A careful balance has to be sought between addressing the specific vulnerabilities of children and recognizing their agency, in accordance with their age and maturity. Moreover, anti-trafficking interventions have to be designed in a way that reaches both women and men, girls and boys, as each group may have different needs.

Prevention of child trafficking

Articles 13 to 16 of the Directive do not address the prevention of child trafficking. As research shows that trafficked children are more likely to have experienced abuse than other children before ever having been trafficked,²⁵⁴ focusing on strengthening child protection systems to protect children against abuse and identify and support children at high risk of trafficking is a cornerstone of prevention. The EU Action Plan on Unaccompanied Minors points to the importance of birth registration systems.²⁵⁵ With regard to the demand for children exploited in prostitution or through child abuse images, the Directive should be read in conjunction with the Proposal for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, which clearly criminalizes the demand for sexual services deriving from the exploitation of children.²⁵⁶ However, this still leaves unaddressed the demand for other exploitative services from children such as forced labour or inappropriate domestic or informal labour that may be exploitative.

Box AG:

RECOMMENDATIONS FOR THE PREVENTION OF CHILD TRAFFICKING

- Improve the collection and analysis of data about children who have been trafficked.
- Be ahead of trafficking: 'go to where the children are'.
- Make information campaigns more strategic.
- Teach life skills education in every classroom.
- Develop effective child protection systems.

From: UNICEF - Terre des Hommes, *Action to Prevent Child Trafficking in South Eastern Europe: A Preliminary Assessment*, 2006.

Despite growing recognition that human trafficking needs to be tackled through a holistic approach, anti-trafficking strategies often still remain isolated from other national policies. Better policy coherence is needed between anti-trafficking, employment, migration and asylum policies. Special attention should be paid to the impact of restrictive and gender-biased labour migration policies and practices that enhance the vulnerability of migrants to trafficking.

²⁵⁴ UNICEF/Innocenti Research Centre, *Child Trafficking in Europe. A broad vision to put children first*, 2008, p. 12.

²⁵⁵ Communication from the Commission to the European Parliament and the Council, *Action Plan on Unaccompanied Minors* (2010 – 2014), COM(2010) 213/final.

²⁵⁶ Proposal for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA.

When transposing the Directive, Member States are encouraged to note the relevance of the provisions of the recently adopted ILO Convention Concerning Decent Work for Domestic Workers, ILO Conventions on migrant workers No. 97 and 143 as well as the International Convention on the Protection of Migrant Workers and Members of Their Families.

When implementing the Directive, Member States are encouraged to carry out impact assessments of existing and proposed legislation *inter alia* in the sectors of employment, migration and asylum on the prevention of trafficking in human beings, with a gender- and age-sensitive approach.

ARTICLE 18(1): DISCOURAGING AND REDUCING DEMAND

Article 18(1) calls upon Member States to take measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking.

A human rights-based approach to addressing demand

In addition to the general obligation to prevent trafficking, the obligation to address demand has been recognized by the UN Trafficking Protocol which requires States parties to “*adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking*”.²⁵⁷ The OHCHR Commentary on the Recommended Principles and Guidelines also notes that

*“The Explanatory Report on the [CoE] Trafficking Convention confirms that [Article 5] places a positive obligation on States to adopt or reinforce measures for discouraging demand for all forms of trafficking. The Explanatory Report notes that by devoting a separate, freestanding article to this issue, the drafters sought to “underline the importance of tackling demand in order to prevent and combat the traffic itself”. The aim of the measures is to achieve “effective dissuasion” (paras. 108 and 109).”*²⁵⁸

The OHCHR Recommended Principles and Guidelines in turn state that “*strategies aimed at trafficking shall address demand as a root cause of trafficking*”.²⁵⁹ This Principle is reinforced by Guideline 7.1, which requires States and others to “*analys[e] the factors that generate demand for exploitative commercial sexual services and exploitative labour and tak[e] strong legislative, policy and other measures to address these issues.*” The OHCHR Commentary further notes that the obligation to address demand rests primarily with the country within which the exploitation takes place, because it is within these countries that both consumer and employer demand is principally generated.²⁶⁰ The OHCHR Commentary also expands upon some the relevant considerations in developing rights-based strategies to reduce demand, including issues around demand and discrimination, the role of the State, the importance of labour protection, non-violation of established rights and the importance of research.²⁶¹

While accepting the need to address demand, it is important to acknowledge the limits of a term that is not properly defined, is under-researched and is still subject to debate and confusion.

²⁵⁷ UN Trafficking Protocol, Art. 9(5).

²⁵⁸ OHCHR, *Commentary on the Recommended Principles and Guidelines*, p. 99.

²⁵⁹ OHCHR, *Recommended Principles and Guidelines*, Principle 4.

²⁶⁰ OHCHR, *Commentary on the Recommended Principles and Guidelines*, p. 101.

²⁶¹ OHCHR, *Commentary on the Recommended Principles and Guidelines*, p.100-102.

Strategies to reduce demand

Whereas on the supply side factors like inequality, poverty and discrimination, including gender-based discrimination and violence, act as push factors, on the demand side trafficking and forced labour are fuelled by the demand for cheap, low-skilled and easily disposable labour and services in combination with increasingly restrictive immigration policies and lack of labour protections for migrant workers.²⁶² Research shows that, next to the sex industry, industries that are labour intensive, rely on cheap and low-skilled migrant labour, and involve so-called dangerous, dirty and degrading jobs or complex sub-contracting chains, are most at risk of being affected by trafficking.²⁶³ Like the sex industry, the informal and unprotected sectors are dominated by low-wage women workers.

In the past much attention has been focused on the demand for trafficked persons' services in the sex industry. However, given the broad definition of trafficking, measures to discourage demand should reflect the breadth and seriousness of all purposes for which people are trafficked, including, for example, the construction industry, agriculture, food processing, domestic labour, care work and new forms of trafficking, such as forced begging and the exploitation of petty crime. Trafficking takes place in sectors that are legal and regulated, as well as in informal and unregulated sectors, and for activities that may be illegal.

Demand may include employers' requirements for cheap and vulnerable labour, as well as consumer demand for cheap goods and services, including for sexual services. Research so far indicates that the demand in activities and sectors prone to exploitation is predominantly for workers who are invisible, unprotected, excluded, vulnerable and disempowered.²⁶⁴ Moreover that such demand is likely to take place in settings where the State affords (migrant) workers and/or other categories of exploitable persons little or no protection,²⁶⁵ and workers and other exploited groups have little or no opportunity to organize collectively to protect themselves from abuse and exploitation. In this context, the reasons for social acceptance and tolerance of discrimination and exploitation also need to be examined, for example why consumers of products and services provided by exploitative labour, and more generally the public, tacitly accept this exploitation. Public awareness campaigns on products and services that are produced by exploitative labour are an effective means to dissuade demand, as is guidance to assist consumers in identifying goods or services that have not been produced through exploitation.²⁶⁶ Generally, the knowledge base on effective demand reduction strategies of all forms of human trafficking needs to be further developed, including on the role of States and the private sector.

In reducing demand companies and trade unions are important actors. An example of how businesses can take up their corporate social responsibility are the 2006 "Athens principles", which provide initial guidance as to what business leaders can do to prevent and eradicate human trafficking, focusing mainly on sexual exploitation²⁶⁷ and the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism which focuses on child sexual exploitation.²⁶⁸ Trade unions may play an important role in developing campaigns against human trafficking and abusive contract labour systems, pressure employers and employment agencies to respect the law and raise the awareness of migrant workers to better understand their rights. A successful example to address clients in the sex trade is the Dutch Crime Stoppers campaign "Appearances Deceive" to raise awareness about

²⁶² UNIFEM, *Labour migration and Trafficking: A gender and Human Rights Approach*, Noeleen Heyzer, 2007, p. 2; ILO, *Forced Labour and trafficking in Europe: how people are trapped in, live through and come out*, Beate Andrees, 2008; ILO, *Action against trafficking in human beings*, 2008.

²⁶³ ILO, *Forced Labour and trafficking in Europe: how people are trapped in, live through and come out*, ILO 2008; ILO *Action against trafficking in human beings*, Beate Andrees, 2008.

²⁶⁴ Save the Children Sweden, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*, Anderson, B. and J. O'Connell Davidson, 2002.

²⁶⁵ *Ibid.*, p. 54.

²⁶⁶ Alliance Expert Coordination Team, *Alliance Statement on Demand*, Human Dimension Implementation Meeting, Special day on trafficking, 3rd October 2006.

²⁶⁷ *Athens Principles, Trafficking in Human Beings, especially Women and Children*, the Athens Round Table of the Business Community against Trafficking of Human Beings, 2006.

²⁶⁸ The Code Org, *Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism*, an industry driven responsible tourism initiative in collaboration with ECPAT International.

trafficking and forced prostitution. The campaign educates clients, taxi drivers, shop-keepers, local residents and other people who are (in)directly involved, to recognize indicators of forced prostitution, and encourages them to report possible cases of trafficking to the police.²⁶⁹

Examples of measures to address the demand side are measures to broaden awareness; attention and gender-sensitive research into all forms of exploitation and forced labour and the factors that underpin its demand; to raise public awareness on products and services that are produced by exploitative and forced labour; to regulate, license and monitor private recruitment agencies; to sensitize employers not to engage victims of trafficking or forced labour in their supply chain, whether through subcontracting or directly in their production; to enforce labour standards through labour inspections and other relevant means; to support the organisation of workers; to increase the protection of the rights of migrant workers; and/or to criminalize the use of services of victims of trafficking or forced labour (see the commentary on Article 18(4)).²⁷⁰

Recommendation

Member States are encouraged to develop comprehensive and human-rights based policies to address the demand for unprotected and exploitable labour, involving businesses, trade unions, consumers, clients and the general public. Respect for and the protection of the human rights of the potential victims should be at the core of all measures taken or policies adopted.

ARTICLE 18(2): INFORMATION, RAISING AWARENESS, RESEARCH AND EDUCATION.

Article 18(2) calls upon States to take appropriate action, such as information and awareness raising campaigns, research and education, aimed at raising awareness and reducing the risk of people, especially children, becoming victims of trafficking.

Effective prevention strategies require a better and more thorough understanding of the factors that drive both the supply and demand side of trafficking. This applies to all forms of trafficking, including forms that may have been in existence for some time but are newly coming to the attention of policy makers, such as trafficking for exploitation in forced begging and petty crimes. In the area of labour exploitation, it is important to better understand the role of intermediaries and recruitment mechanisms, the global trend towards unregulated employment relationships, and increased international mobility of labour while legal migration remains highly restricted in most countries. Such research has only recently started to take place.

Gender-sensitive awareness raising activities, including the development of curricula, can play an important role in reducing the risk of trafficking by providing vulnerable groups, including (potential) migrants, with information on how to protect themselves against trafficking, as well as in improving the identification of (potential) victims, assumed they are clearly targeted and relevant. Lack of access to information, knowledge, contacts and networks is one of the factors that makes migrant workers vulnerable to trafficking and exploitation.²⁷¹ Such campaigns and education programmes, both in countries of origin and destination, should, however, avoid the use of stereotyped images and messages as these can have negative impacts on trafficked persons and other affected groups.

Before embarking on new campaigns, however, existing awareness raising campaigns carried out by Member States, international organizations and non-governmental organizations in EU Member States should be systematically evaluated, including the impact they have achieved. Awareness

²⁶⁹ Crime Stoppers, Human Trafficking Campaign “Appearances Deceive”.

²⁷⁰ UNODC, *Model Law Against Trafficking in Persons*, 2009; see also: ILO, *The cost of coercion*, 2009.

²⁷¹ Beate Andrees, *Forced Labour and trafficking in Europe: how people are trapped in, live through and come out*, ILO 2008.

raising campaigns have been widely used to date, but their impact on preventing trafficking is has not been measured.²⁷² In general, research on the impact and effectiveness of prevention measures is largely lacking. This is a gap that urgently needs to be addressed.

Recommendation

When implementing the Directive, Member States are encouraged to first evaluate the effects of existing campaigns carried out by States, international organisations and non-governmental organizations.

ARTICLE 18(3): TRAINING

Article 18(3) recognizes the importance of regular training for officials likely to come into contact with victims or potential victims of trafficking.

Article 9(3) addresses the need for training of officials involved in the investigation and prosecution of trafficking.

Training of officials likely to come into contact with victims of trafficking forms part of the assessment of whether or not a State is meeting the due diligence standard. The need for training of relevant authorities and officials is reflected in Article 10(2) of the UN Trafficking Protocol, Article 10(1) of the CoE Trafficking Convention, as well as in the OHCHR Recommended Principles.²⁷³

All officials who are likely to come into contact with potential victims should be trained in the identification of potential groups of trafficked persons, recognizing that criteria and techniques for identification will vary widely. Official training will need to address the correct application of guidelines and procedures for identification. Given the broad range of situations in which trafficked persons can be identified and the protection and assistance mechanisms which are required, such training should include a wide range of actors, including front line police officers as required by Article 18 (3), but also *inter alia* border and immigration officials, asylum authorities, child protection authorities, labour inspectors, consular staff, social and health care personnel, members of the judiciary and court officials as stated in Recital 25 of the Directive.

Guideline 7.8 of the OHCHR Recommended Principles and Guidelines recognize that building up the capacity of criminal justice agencies is an important preventive measure. “A skilled, empowered and adequately resourced law enforcement response is a powerful disincentive to traffickers as it increases, the risks and costs associated with their activities”.²⁷⁴

To support capacity building, on-going and regular training should aim at enhancing understanding of trafficking as a crime and human rights violation and equipping the relevant actors with the tools and the skills to adequately respond to it. Training must be rooted in human rights-based approach, and take into account the gender dimension of trafficking, including the different positions and assistance and protection needs of women, men, girls and boys. Where relevant, training should encompass the capacity to identify amongst victims those persons who may be in need of international protection, in order to refer them to the asylum authorities. Training also needs to address the particular circumstances of victims of trafficking who have suffered trauma; officials need to better understand how memory loss, unclear and confused recollections and/or the defensive, uncommunicative and erratic behaviour of victims may result from trauma or the fear of reprisals by traffickers.²⁷⁵

²⁷² See: P. Marshall and S. Thatun, *Miles Away: The Trouble with Prevention in the Greater Mekong Sub-region* in “Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex, Work and Human Rights” (Eds. Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik), 2005, which provides a detailed critique of several prevention approaches, including campaigns, with discussions of EU policies as well.

²⁷³ OHCHR, *Recommended Principles and Guidelines*, Guidelines 2.2, 5.2, 5.7, 6.3, 8.10, and 10.1.

²⁷⁴ OHCHR, *Commentary on the Recommended Principles and Guidelines*, p. 196.

²⁷⁵ C. Zimmermann, *Stolen Smiles*, 2006, p. 75-95.

The UN Trafficking Protocol also encourages States to cooperate “with non-governmental organizations, other relevant organizations and other elements of civil society.”²⁷⁶ Likewise, the CoE Trafficking Convention notes the importance of such close cooperation in its Article 5(6).

Recommendations

When transposing the Directive, Member States may wish to promote regular training for *all* officials likely to come into contact with victims or potential victims of trafficking, in cooperation with civil society, including non-governmental organizations, and other relevant organizations.

When implementing the Directive, Member States are encouraged to ensure that training is human rights-based, multi-disciplinary, and gender- and age-sensitive.

ARTICLE 18(4): CRIMINALIZING THE USE OF SERVICES WHICH ARE THE OBJECTS OF TRAFFICKING

In order to more effectively discourage demand, Article 18(4) requires Member States to consider criminalizing the use of services which are the objects of exploitation with the knowledge that the person is a victim of trafficking.

EU legislation already criminalizes in a number of cases, the use of services of trafficked persons. The Directive on sanctions and measures against employers of illegally staying third-country nationals²⁷⁷ for instance provides for criminal penalties in case of particularly exploitative working conditions, where the employer knows that the worker is a victim of human trafficking, and in case of the illegal employment of a minor. This Directive also requires Member States to ensure that employers are liable to make back payments to workers, such as outstanding remuneration. The forthcoming EU Directive on combating the sexual abuse, sexual exploitation of children and child pornography²⁷⁸ in turn criminalizes the demand for children involved in sexual exploitation through prostitution and pornography.

The UN Trafficking Protocol does not refer specifically to the criminalization of demand, but the Legislative Guide for the implementation of the Protocol notes that demand reduction “*could be achieved in part through legislative or other measures targeting those who knowingly use or take advantage of the services of victims of exploitation*”.²⁷⁹ Likewise, the CoE Trafficking Convention requires States to establish as criminal offences the use of services of a victim of trafficking with the knowledge that the person is a victim.²⁸⁰

The OHCHR Commentary on the Recommended Principles and Guidelines notes that while the Recommended Principles and Guidelines do not address the issue of criminalizing demand, “*criminalizing the use of the services of a trafficking victim – where the user knew or recklessly disregarded the fact that the individual involved was a victim of trafficking – is well within the spirit of the Principles and Guidelines*”.²⁸¹ Criminalization is seen as an important aspect of a comprehensive strategy to reduce the demand for the goods and services produced through the exploitation of trafficked persons.

²⁷⁶ UN Trafficking protocol, Art. 10(2).

²⁷⁷ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

²⁷⁸ Proposal for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA.

²⁷⁹ UNODC, *Legislative Guide for the Implementation of the UN Trafficking Protocol*, 2004, para. 74.

²⁸⁰ CoE, Trafficking Convention, Art. 19.

²⁸¹ OHCHR, Commentary on the Recommended Principles and Guidelines, p. 103.

The criminalization of clients who make use of the sexual services of trafficked persons requires closer investigation as this may have potentially unintended negative effects for the trafficked person. Whereas clients represent an important escape-route for victims, the risk of being held criminally liable may deter them from reporting trafficking or forced labour situations to the authorities. In case of client prosecution, victims will need to testify not only against their traffickers but also against their clients. This may lay an additional burden on their shoulders especially in light of the difficulties in proving that the client was aware of the fact that the person was trafficked. Moreover, the criminalization of clients may add to the already stigmatized and precarious position of victims, the overwhelming majority of whom are women, thus making them more vulnerable to violence and abuse. Currently, there is little reliable research on the impact of such laws; any such legislation should therefore be preceded by an in-depth impact assessment, including the human rights impact on victims of trafficking and other groups.

Recommendation

When transposing the Directive, Member States are encouraged to refer to and reflect the provisions in EU legislation criminalizing demand, namely: Directive 2009/52/EC on sanctions and measures against employers of illegally staying third-country nationals, and the forthcoming EU legislation criminalizing the demand for child prostitution and pornography.

ARTICLE 19: ESTABLISHMENT OF NATIONAL RAPPORTEURS OR EQUIVALENT MECHANISMS

Article 19 addresses the establishment of national rapporteurs or equivalent mechanisms to assess trends in human trafficking, measure the results of anti-trafficking actions and gather statistics in close cooperation with civil society actors, and report.

Recital 27 further expounds upon this provision by stressing “the need for a minimum structure with identified tasks” when establishing national rapporteurs or equivalent mechanisms, by referring to Council Conclusions on establishing an informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings of 4 June 2009.²⁸² Recital 7 also notes the role the EU Anti-Trafficking Coordinator would play in the work of the Network, and the fact that European Parliament should be entitled to play in the joint activities of the national rapporteurs or equivalent mechanisms.

The Directive foresees a role for National Rapporteurs in reporting on the implementation of this instrument, analysing trends and assessing progress on preventing and combating trafficking, including access to assistance and protection of victims. Data collection should cover harmonized sex and age-disaggregated data, based on common definitions and understanding of key concepts, and cover all forms of trafficking, while fully respecting the protection of the privacy of trafficked persons and in accordance with the Directive on the Protection of individuals with regard to the processing of personal data and on the free movement of such data.²⁸³ Systematic data gathering, analysis and monitoring are important as they help to set baselines against which Member States can assess progress in the implementation of national policies, strategies and programmes.²⁸⁴

²⁸² Council of the European Union, *Council conclusions on establishing an informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings*, 2946th Justice and Home Affairs Council meeting, Luxembourg, 4 June 2009.

²⁸³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

²⁸⁴ UNODC, *International Framework for Action To implement the Trafficking in Persons Protocol*, UNODC 2009, p. 7.

National Rapporteurs and equivalent mechanisms have an important role to play beyond. As discussed in the commentary on Recital 6, accountability processes and the establishment of mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions are an integral part of a gender-sensitive and human rights-based approach. The OHCHR Recommended Principles encourage States to consider:

*“Establishing mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions. Consideration should be given to assigning this role to independent national human rights institutions where such bodies exist. Non-governmental organizations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking”.*²⁸⁵

National Rapporteurs or equivalent mechanisms should be mandated to ensure that a human rights-based approach is used throughout: to formulate policy, legislation, plan for programmes and budgets, monitor and report on anti-trafficking efforts and responses. The establishment of National Rapporteurs or equivalent mechanisms should seek to achieve greater clarity and transparency on who is accountable, and ultimately ensure the conditions for improved accountability mechanisms and transparency.

The monitoring of the human rights impact of anti-trafficking responses and their effectiveness is a particularly important responsibility for National Rapporteurs and equivalent mechanisms. The systematic monitoring and evaluation of anti-trafficking policies, programmes and projects to assess their envisaged and real impact (including on vulnerable victims) would support evidence-based policies and contribute to a more effective overall approach. Such monitoring and evaluation should encompass a gender perspective.²⁸⁶ However, those governmental agencies most directly involved in the trafficking response should also monitor their own actions and performance from a human rights and gender perspective.

Civil society and non-governmental organizations working with victims of trafficking should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures. Such monitoring should not be limited to the actions of the State but could usefully be extended to encompass the activities of the non-governmental sector as well.

In this regard, National Rapporteurs or equivalent mechanisms and their Network have a role to play to enhance the cooperation between the European Union and its Member States on the one hand and the GRETA, the supervisory mechanism of the CoE Trafficking Convention. The OHCHR Recommended Guidelines also envisage a role for the United Nations human rights treaty bodies²⁸⁷ – all of which receive and consider periodic reports from States parties on a range of issues and rights that relate directly to trafficking.²⁸⁸

Recommendations

When transposing the Directive, Member States are encouraged to provide for clear accountability processes for their National Rapporteurs or equivalent mechanisms.

When implementing the Directive, Member States are encouraged to ensure that data collection, monitoring and reporting are gender- and age-sensitive, and include the monitoring of the human rights impact of anti-trafficking efforts.

²⁸⁵ OHCHR, *Recommended Principles*, Guideline 1.7.

²⁸⁶ See CoE Trafficking Convention, Art. 6, which requires States to include a gender perspective in the evaluation of the impact of its provisions.

²⁸⁷ OHCHR, *Recommended Guidelines*, Guideline 1.8.

²⁸⁸ The human rights treaty-monitoring bodies include the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against Women; the Committee on the Elimination of Racial Discrimination; the Committee against Torture; and the Committee on the Rights of the Child.

ANNEX I: KEY DEFINITIONS FROM RELEVANT INTERNATIONAL STANDARDS

Trafficking in human beings: Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children defines trafficking in persons as follows:

- (a) *Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*
- (b) *The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;*
- (c) *The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a)*
- (d) *‘Child’ shall mean any person under eighteen years of age.*

Forced labour or services: means all work or services performed under the threat of any kind of penalty, including the loss of rights or privileges. Article 2 of the 1930 Forced Labour Convention (ILO C No. 29) defines forced labour as:

All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

“All work or service” encompasses all types of work, employment or occupation, irrespective the nature of the activity performed, its legality or illegality under national law or its recognition as an ‘economic activity’. Forced labour, thus, can apply as much to factory work as to prostitution or begging when performed under coerced conditions.²⁸⁹ Since the coming into force of the Forced Labour Convention, the ILO Committee of Experts has treated forced prostitution as a form of forced labour. While a worker may have entered an employment contract without any forms of deception or coercion, he or she must always be free to revoke a consensually made agreement, that is, any restriction on leaving a job owing to legal, physical or psychological coercion can be considered forced labour. If the employer or recruiter has used deception or coercion, consent becomes irrelevant.²⁹⁰ Child prostitution and pornography always constitute forced labour and fall under the worst forms of child labour under ILO Convention No.182, as does trafficking in children.

²⁸⁹ ILO, *The Cost of Coercion*, 2009, p. 6.

²⁹⁰ ILO, *Human Trafficking and Forced Labour Exploitation: Guidance for legislation and law enforcement*, Geneva, 2005.



The ILO identifies six major elements that indicate a forced labour situation: (threat of) physical or sexual violence; restriction of movement; debt bondage/bonded labour; withholding of wages or refusal of payment; retention of passports and identity documents; threat of denunciation to the authorities.²⁹¹

The ECtHR in *Siliadin v. France*²⁹² found that a girl from Togo had been subjected to forced labour as she had worked for years for a family that exploited her “without respite, against her will, and without being paid”, while residing illegally in the country, afraid of being arrested by the police.

Slavery: is defined in Article 1 of the 1926 Convention on Slavery as:

The status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised.

The definition in the Slavery Convention may cause difficulties today, as there could be no rights of ownership for one person over another. In order to solve this difficulty, an alternative definition would be “the status or condition of a person over whom control is exercised to the extent that the person is treated like property”, or “reducing a person to a status or condition in which any or all of the powers attaching to the right of property are exercised”.²⁹³

According to the ECtHR, relevant factors in assessing whether a situation amounts to a contemporary form of slavery include whether there is control of a person’s movement or physical environment, whether there is an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour.²⁹⁴

²⁹¹ ILO, *Human Trafficking and Forced Labour Exploitation*, 2005, pp. 20-21.

²⁹² ECtHR, *Siliadin v. France*, Application No. 73316/01, 26 July 2005.

²⁹³ UNODC Model law, p. 21.

²⁹⁴ ECtHR, *Siliadin v. France*, Application No. 73316/01, 26 July 2005, para. 280.

Slavery-like practices: include, according to the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery, debt bondage, serfdom, servile forms of marriage and the exploitation of children and adolescents. Debt bondage and servile forms of marriage are two practices of particular relevance in the context of trafficking.

Debt bondage: refers to the system by which workers are kept in bondage by making it impossible for them to pay off their (real, imposed or imagined) debts. Article 1(a) defines it as:

The status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Servile forms of marriage: include all forms of marriage whereby women have no right to refuse. Article 1(c) defines it is:

Any institution or practice by which (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; (iii) a woman on the death of her husband is liable to be inherited by another person.

In the Commentary the term “forced marriages” is used to indicate servile forms of marriage.

Servitude: is prohibited by the ICCPR and the ECHR and is non-derogable. Although it is not defined in either instrument, it is identified as a slavery-like practice, covering exploitative conditions of work or service, which one cannot change or from which one cannot escape.²⁹⁵

According to the ECtHR servitude can be defined as “*an obligation to provide one’s services that is imposed by the use of coercion, and is linked to the concept of slavery*”.²⁹⁶

Exploitation of prostitution of others and sexual exploitation are not defined in international law. The terms have been intentionally left undefined in the Protocol in order to allow all States, independent of their domestic policies on prostitution, to ratify the Protocol. While the Protocol draws a distinction between exploitation for forced labour or services and sexual exploitation, this should not lead to the conclusion that coercive sexual exploitation does not amount to forced labour or services, particularly in the context of trafficking. Coercive sexual exploitation and forced prostitution fall within the scope of the definition of forced labour.²⁹⁷ Sexual exploitation involving children, child prostitution and trafficking of children for sexual exploitation are all prohibited under international law (CRC and Optional Protocol).

New forms of trafficking

In addition to the more traditional forms of exploitation listed above, the definition in the Directive also covers newer types of human trafficking such as forced begging, illegal adoption, forced marriage, the exploitation of criminal activities or the removal of organs for the purpose of trafficking. This highlights the wish of the European Union institutions to keep abreast of the developing forms of trafficking.

²⁹⁵ Manfred Novak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2005. See also: Report of the UN Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences, Gulnara Shahanian (A/HRC/15/20), 28 June 2010.

²⁹⁶ ECtHR, *Siliadin v. France*, Application No. 73316/01, 26 July 2005.

²⁹⁷ ILO, *Eradication of Forced Labour*, International Labour Conference, 2007, p. 42.



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ANNEX III: LIST OF ACRONYMS AND ABBREVIATIONS

- Art.:** Article
- CAT:** Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- CEDAW:** Convention on the Elimination of All Forms of Discrimination Against Women
- CERD:** Convention on the Elimination of All Forms of Racial Discrimination
- CMW:** Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families
- CoE:** Council of Europe
- Conv.:** Convention
- CRC:** Convention on the Rights of the Child
- CRPD:** Convention on the Rights of Persons with Disabilities
- EC:** European Commission
- ECHR:** European Convention on Human Rights
- ECPAT:** End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
- ECrTHR:** European Court of Human Rights
- EU:** European Union
- FRA:** European Union Agency for Fundamental Rights,
- GRETA:** Group of Experts on Action against Trafficking in Human Beings, supervisory Committee European Trafficking Convention
- ICCPR:** International Covenant on Civil and Political Rights
- ICERD:** International Convention on the Elimination of All Forms of Racial Discrimination
- ICESCR:** International Covenant on Economic, Social and Cultural Rights
- ICMPD:** International Centre for Migration Policy Development
- ICRMW:** International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
- ILO:** International Labour Organisation

- IOM:** International Organisation for Migration
- NRM:** National Referral Mechanisms
- ODIHR:** Office for Democratic Institutions and Human Rights
- OHCHR:** Office of the High Commissioner for Human Rights
- OPSC:** Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Optional to the CRC)
- OSCE:** Organisation for Security and Cooperation in Europe
- Prot.:** Protocol
- SCEP:** Separated Children in Europe Programme
- UDHR:** Universal Declaration of Human Rights
- UN:** United Nations
- UN Women:** UN Entity for Gender Equality and the Empowerment of Women
- UN.GIFT:** United Nations Global Initiative to Fight Human Trafficking
- UNHCR:** UN High Commissioner for Refugees
- UNICEF:** UN Children's Fund
- UNIFEM:** United Nations Development Fund for Women
- UNODC:** UN Office for Drugs and Crime
- WHO:** World Health Organization

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ANNEX V: DIRECTIVE 2011/36/
EU OF 5 APRIL 2011 ON
PREVENTING AND COMBATING
TRAFFICKING IN HUMAN
BEINGS AND PROTECTING
ITS VICTIMS, REPLACING
THE COUNCIL FRAMEWORK
DECISION 2002/629/JHA



I

(Legislative acts)

DIRECTIVES

DIRECTIVE 2011/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 5 April 2011

on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2) and Article 83(1) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

After consulting the Committee of the Regions,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (1) Trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union. Preventing and combating trafficking in human beings is a priority for the Union and the Member States.
- (2) This Directive is part of global action against trafficking in human beings, which includes action involving third countries as stated in the 'Action-oriented Paper on

strengthening the Union external dimension on action against trafficking in human beings; Towards global EU action against trafficking in human beings' approved by the Council on 30 November 2009. In this context, action should be pursued in third countries of origin and transfer of victims, with a view to raising awareness, reducing vulnerability, supporting and assisting victims, fighting the root causes of trafficking and supporting those third countries in developing appropriate anti-trafficking legislation.

- (3) This Directive recognises the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes. For this reason, assistance and support measures should also be gender-specific where appropriate. The 'push' and 'pull' factors may be different depending on the sectors concerned, such as trafficking in human beings into the sex industry or for labour exploitation in, for example, construction work, the agricultural sector or domestic servitude.
- (4) The Union is committed to the prevention of and fight against trafficking in human beings, and to the protection of the rights of trafficked persons. For this purpose, Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings ⁽³⁾, and an EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings ⁽⁴⁾ were adopted. Moreover, the Stockholm Programme — An open and secure Europe serving and protecting citizens ⁽⁵⁾, adopted by the European Council, gives a clear priority to the fight against trafficking in human beings. Other measures should be envisaged, such as support for the development of general common indicators of the Union for the identification of victims of trafficking, through the exchange of best practices between all the relevant actors, particularly public and private social services.

⁽¹⁾ Opinion of 21 October 2010 (not yet published in the Official Journal).

⁽²⁾ Position of the European Parliament of 14 December 2010 (not yet published in the Official Journal) and decision of the Council of 21 March 2011.

⁽³⁾ OJ L 203, 1.8.2002, p. 1.

⁽⁴⁾ OJ C 311, 9.12.2005, p. 1.

⁽⁵⁾ OJ C 115, 4.5.2010, p. 1.

- (5) The law enforcement authorities of the Member States should continue to cooperate in order to strengthen the fight against trafficking in human beings. In this regard, close cross-border cooperation, including the sharing of information and the sharing of best practices, as well as a continued open dialogue between the police, judicial and financial authorities of the Member States, is essential. The coordination of investigations and prosecutions of cases of trafficking in human beings should be facilitated by enhanced cooperation with Europol and Eurojust, the setting-up of joint investigation teams, as well as by the implementation of Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflict of jurisdiction in criminal proceedings⁽¹⁾.
- (6) Member States should encourage and work closely with civil society organisations, including recognised and active non-governmental organisations in this field working with trafficked persons, in particular in policy-making initiatives, information and awareness-raising campaigns, research and education programmes and in training, as well as in monitoring and evaluating the impact of anti-trafficking measures.
- (7) This Directive adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings and when implementing it, Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities⁽²⁾ and Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals⁽³⁾ should be taken into consideration. More rigorous prevention, prosecution and protection of victims' rights, are major objectives of this Directive. This Directive also adopts contextual understandings of the different forms of trafficking and aims at ensuring that each form is tackled by means of the most efficient measures.
- (8) Children are more vulnerable than adults and therefore at greater risk of becoming victims of trafficking in human beings. In the application of this Directive, the child's best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the 1989 United Nations Convention on the Rights of the Child.
- (9) The 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings are crucial steps in the process of enhancing international cooperation against trafficking in human beings. It should be noted that the Council of Europe Convention contains an evaluation mechanism, composed of the Group of experts on action against trafficking in human beings (GRETA) and the Committee of the Parties. Coordination between international organisations with competence with regard to action against trafficking in human beings should be supported in order to avoid duplication of effort.
- (10) This Directive is without prejudice to the principle of non-refoulement in accordance with the 1951 Convention relating to the Status of Refugees (Geneva Convention), and is in accordance with Article 4 and Article 19(2) of the Charter of Fundamental Rights of the European Union.
- (11) In order to tackle recent developments in the phenomenon of trafficking in human beings, this Directive adopts a broader concept of what should be considered trafficking in human beings than under Framework Decision 2002/629/JHA and therefore includes additional forms of exploitation. Within the context of this Directive, forced begging should be understood as a form of forced labour or services as defined in the 1930 ILO Convention No 29 concerning Forced or Compulsory Labour. Therefore, the exploitation of begging, including the use of a trafficked dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur. In the light of the relevant case-law, the validity of any possible consent to perform such labour or services should be evaluated on a case-by-case basis. However, when a child is concerned, no possible consent should ever be considered valid. The expression 'exploitation of criminal activities' should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain. The definition also covers trafficking in human beings for the purpose of the removal of organs, which constitutes a serious violation of human dignity and physical integrity, as well as, for instance, other behaviour such as illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings.
- (12) The levels of penalties in this Directive reflect the growing concern among Member States regarding the development of the phenomenon of trafficking in human beings. For this reason this Directive uses as a basis levels 3 and 4 of the Council conclusions of 24-25 April 2002 on the approach to apply regarding

⁽¹⁾ OJ L 328, 15.12.2009, p. 42.

⁽²⁾ OJ L 261, 6.8.2004, p. 19.

⁽³⁾ OJ L 168, 30.6.2009, p. 24.

- approximation of penalties. When the offence is committed in certain circumstances, for example against a particularly vulnerable victim, the penalty should be more severe. In the context of this Directive, particularly vulnerable persons should include at least all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability. When the offence is particularly grave, for example when the life of the victim has been endangered or the offence has involved serious violence such as torture, forced drug/medication usage, rape or other serious forms of psychological, physical or sexual violence, or has otherwise caused particularly serious harm to the victim, this should also be reflected in a more severe penalty. When, under this Directive, a reference is made to surrender, such reference should be interpreted in accordance with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States⁽¹⁾. The gravity of the offence committed could be taken into account within the framework of the execution of the sentence.
- (13) In combating trafficking in human beings, full use should be made of existing instruments on the seizure and confiscation of the proceeds of crime, such as the United Nations Convention against Transnational Organised Crime and the Protocols thereto, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime⁽²⁾, and Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property⁽³⁾. The use of seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims' assistance and protection, including compensation of victims and Union trans-border law enforcement counter-trafficking activities, should be encouraged.
- (14) Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.
- (15) To ensure the success of investigations and prosecutions of human trafficking offences, their initiation should not depend, in principle, on reporting or accusation by the victim. Where the nature of the act calls for it, prosecution should be allowed for a sufficient period of time after the victim has reached the age of majority. The length of the sufficient period of time for prosecution should be determined in accordance with respective national law. Law enforcement officials and prosecutors should be adequately trained, in particular with a view to enhancing international law enforcement and judicial cooperation. Those responsible for investigating and prosecuting such offences should also have access to the investigative tools used in organised crime or other serious crime cases. Such tools could include the interception of communications, covert surveillance including electronic surveillance, the monitoring of bank accounts and other financial investigations.
- (16) In order to ensure effective prosecution of international criminal groups whose centre of activity is in a Member State and which carry out trafficking in human beings in third countries, jurisdiction should be established over the offence of trafficking in human beings where the offender is a national of that Member State, and the offence is committed outside the territory of that Member State. Similarly, jurisdiction could also be established where the offender is an habitual resident of a Member State, the victim is a national or an habitual resident of a Member State, or the offence is committed for the benefit of a legal person established in the territory of a Member State, and the offence is committed outside the territory of that Member State.
- (17) While Directive 2004/81/EC provides for the issue of a residence permit to victims of trafficking in human beings who are third-country nationals, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States⁽⁴⁾ regulates the exercise of the right to move and reside freely in the territory of the Member States by citizens of the Union and their families, including protection from expulsion, this Directive establishes specific protective measures for any victim of trafficking in human beings. Consequently, this Directive does not deal with the conditions of the residence of the victims of trafficking in human beings in the territory of the Member States.
- (18) It is necessary for victims of trafficking in human beings to be able to exercise their rights effectively. Therefore assistance and support should be available to them before, during and for an appropriate time after criminal proceedings. Member States should provide for resources to support victim assistance, support and protection. The assistance and support provided should

⁽¹⁾ OJ L 190, 18.7.2002, p. 1.

⁽²⁾ OJ L 182, 5.7.2001, p. 1.

⁽³⁾ OJ L 68, 15.3.2005, p. 49.

⁽⁴⁾ OJ L 158, 30.4.2004, p. 77.

include at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers. The practical implementation of such measures should, on the basis of an individual assessment carried out in accordance with national procedures, take into account the circumstances, cultural context and needs of the person concerned. A person should be provided with assistance and support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness. In cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period. If, after completion of the identification process or expiry of the reflection period, the victim is not considered eligible for a residence permit or does not otherwise have lawful residence in that Member State, or if the victim has left the territory of that Member State, the Member State concerned is not obliged to continue providing assistance and support to that person on the basis of this Directive. Where necessary, assistance and support should continue for an appropriate period after the criminal proceedings have ended, for example if medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim's statements in those criminal proceedings.

(19) Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings⁽¹⁾ establishes a set of victims' rights in criminal proceedings, including the right to protection and compensation. In addition, victims of trafficking in human beings should be given access without delay to legal counselling and, in accordance with the role of victims in the relevant justice systems, to legal representation, including for the purpose of claiming compensation. Such legal counselling and representation could also be provided by the competent authorities for the purpose of claiming compensation from the State. The purpose of legal counselling is to enable victims to be informed and receive advice about the various possibilities open to them. Legal counselling should be provided by a person having received appropriate legal training without necessarily being a lawyer. Legal counselling and, in accordance with the role of victims in the relevant justice systems, legal representation should be provided free of charge, at least when the victim does not have sufficient financial resources, in a manner consistent with the internal procedures of Member States. As child victims in particular are unlikely to have such resources, legal counselling and legal representation would in practice be free of charge for them. Furthermore, on the basis of an individual risk assessment carried out in accordance with national procedures, victims should be protected from retaliation, from intimidation, and from the risk of being re-trafficked.

(20) Victims of trafficking who have already suffered the abuse and degrading treatment which trafficking

commonly entails, such as sexual exploitation, sexual abuse, rape, slavery-like practices or the removal of organs, should be protected from secondary victimisation and further trauma during the criminal proceedings. Unnecessary repetition of interviews during investigation, prosecution and trial should be avoided, for instance, where appropriate, through the production, as soon as possible in the proceedings, of video recordings of those interviews. To this end victims of trafficking should during criminal investigations and proceedings receive treatment that is appropriate to their individual needs. The assessment of their individual needs should take into consideration circumstances such as their age, whether they are pregnant, their health, a disability they may have and other personal circumstances, as well as the physical and psychological consequences of the criminal activity to which the victim was subjected. Whether and how the treatment is applied is to be decided in accordance with grounds defined by national law, rules of judicial discretion, practice and guidance, on a case-by-case basis.

(21) Assistance and support measures should be provided to victims on a consensual and informed basis. Victims should therefore be informed of the important aspects of those measures and they should not be imposed on the victims. A victim's refusal of assistance or support measures should not entail obligations for the competent authorities of the Member State concerned to provide the victim with alternative measures.

(22) In addition to measures available to all victims of trafficking in human beings, Member States should ensure that specific assistance, support and protective measures are available to child victims. Those measures should be provided in the best interests of the child and in accordance with the 1989 United Nations Convention on the Rights of the Child. Where the age of a person subject to trafficking is uncertain, and there are reasons to believe it is less than 18 years, that person should be presumed to be a child and receive immediate assistance, support and protection. Assistance and support measures for child victims should focus on their physical and psycho-social recovery and on a durable solution for the person in question. Access to education would help children to be reintegrated into society. Given that child victims of trafficking are particularly vulnerable, additional protective measures should be available to protect them during interviews forming part of criminal investigations and proceedings.

(23) Particular attention should be paid to unaccompanied child victims of trafficking in human beings, as they need specific assistance and support due to their situation of particular vulnerability. From the moment an unaccompanied child victim of trafficking in human beings is identified and until a durable solution is found, Member States should apply reception measures appropriate to the needs of the child and should ensure that relevant procedural safeguards apply. The necessary measures should be taken to ensure that, where appropriate, a guardian and/or a representative are appointed

⁽¹⁾ OJ L 82, 22.3.2001, p. 1.

in order to safeguard the minor's best interests. A decision on the future of each unaccompanied child victim should be taken within the shortest possible period of time with a view to finding durable solutions based on an individual assessment of the best interests of the child, which should be a primary consideration. A durable solution could be return and reintegration into the country of origin or the country of return, integration into the host society, granting of international protection status or granting of other status in accordance with national law of the Member States.

- (24) When, in accordance with this Directive, a guardian and/or a representative are to be appointed for a child, those roles may be performed by the same person or by a legal person, an institution or an authority.
- (25) Member States should establish and/or strengthen policies to prevent trafficking in human beings, including measures to discourage and reduce the demand that fosters all forms of exploitation, and measures to reduce the risk of people becoming victims of trafficking in human beings, by means of research, including research into new forms of trafficking in human beings, information, awareness-raising, and education. In such initiatives, Member States should adopt a gender perspective and a child-rights approach. Officials likely to come into contact with victims or potential victims of trafficking in human beings should be adequately trained to identify and deal with such victims. That training obligation should be promoted for members of the following categories when they are likely to come into contact with victims: police officers, border guards, immigration officials, public prosecutors, lawyers, members of the judiciary and court officials, labour inspectors, social, child and health care personnel and consular staff, but could, depending on local circumstances, also involve other groups of public officials who are likely to encounter trafficking victims in their work.
- (26) Directive 2009/52/EC provides for sanctions for employers of illegally staying third-country nationals who, while not having been charged with or convicted of trafficking in human beings, use work or services exacted from a person with the knowledge that that person is a victim of such trafficking. In addition, Member States should take into consideration the possibility of imposing sanctions on the users of any service exacted from a victim, with the knowledge that the person has been trafficked. Such further criminalisation could cover the behaviour of employers of legally staying third-country nationals and Union citizens, as well as buyers of sexual services from any trafficked person, irrespective of their nationality.
- (27) National monitoring systems such as national rapporteurs or equivalent mechanisms should be established by Member States, in the way in which they consider appropriate according to their internal organisation, and taking into account the need for a minimum structure with identified tasks, in order to carry out assessments of trends in trafficking in human beings, gather statistics, measure the results of anti-trafficking actions, and regularly report. Such national rapporteurs or equivalent mechanisms are already constituted in an informal Union Network established by the Council Conclusions on establishing an informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings of 4 June 2009. An anti-trafficking coordinator would take part in the work of that Network, which provides the Union and the Member States with objective, reliable, comparable and up-to-date strategic information in the field of trafficking in human beings and exchanges experience and best practices in the field of preventing and combating trafficking in human beings at Union level. The European Parliament should be entitled to participate in the joint activities of the national rapporteurs or equivalent mechanisms.
- (28) In order to evaluate the results of anti-trafficking action, the Union should continue to develop its work on methodologies and data collection methods to produce comparable statistics.
- (29) In the light of the Stockholm Programme and with a view to developing a consolidated Union strategy against trafficking in human beings aimed at further strengthening the commitment of, and efforts made, by the Union and the Member States to prevent and combat such trafficking, Member States should facilitate the tasks of an anti-trafficking coordinator, which may include for example improving coordination and coherence, avoiding duplication of effort, between Union institutions and agencies as well as between Member States and international actors, contributing to the development of existing or new Union policies and strategies relevant to the fight against trafficking in human beings or reporting to the Union institutions.
- (30) This Directive aims to amend and expand the provisions of Framework Decision 2002/629/JHA. Since the amendments to be made are of substantial number and nature, the Framework Decision should in the interests of clarity be replaced in its entirety in relation to Member States participating in the adoption of this Directive.
- (31) In accordance with point 34 of the Interinstitutional Agreement on better law-making⁽¹⁾, Member States are encouraged to draw up, for themselves and in the interest of the Union, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures, and to make them public.

(1) OJ C 321, 31.12.2003, p. 1.

- (32) Since the objective of this Directive, namely to fight against trafficking in human beings, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (33) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and notably human dignity, the prohibition of slavery, forced labour and trafficking in human beings, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, the protection of personal data, the right to an effective remedy and to a fair trial and the principles of the legality and proportionality of criminal offences and penalties. In particular, this Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly.
- (34) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Ireland has notified its wish to take part in the adoption and application of this Directive.
- (35) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom is not taking part in the adoption of this Directive and is not bound by it or subject to its application.
- (36) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof.

Article 2

Offences concerning trafficking in human beings

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.

5. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.

6. For the purpose of this Directive, 'child' shall mean any person below 18 years of age.

Article 3

Incitement, aiding and abetting, and attempt

Member States shall take the necessary measures to ensure that inciting, aiding and abetting or attempting to commit an offence referred to in Article 2 is punishable.

Article 4

Penalties

1. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least five years of imprisonment.

2. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least 10 years of imprisonment where that offence:

- (a) was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims;

- (b) was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime ⁽¹⁾;
- (c) deliberately or by gross negligence endangered the life of the victim; or
- (d) was committed by use of serious violence or has caused particularly serious harm to the victim.

3. Member States shall take the necessary measures to ensure that the fact that an offence referred to in Article 2 was committed by public officials in the performance of their duties is regarded as an aggravating circumstance.

4. Member States shall take the necessary measures to ensure that an offence referred to in Article 3 is punishable by effective, proportionate and dissuasive penalties, which may entail surrender.

Article 5

Liability of legal persons

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for the offences referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person; or
- (c) an authority to exercise control within the legal person.

2. Member States shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of the offences referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 2 and 3.

4. For the purpose of this Directive, 'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

Article 6

Sanctions on legal persons

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) or (2) is subject to effective, proportionate and dissuasive sanctions,

which shall include criminal or non-criminal fines and may include other sanctions, such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) judicial winding-up;
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

Article 7

Seizure and confiscation

Member States shall take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences referred to in Articles 2 and 3.

Article 8

Non-prosecution or non-application of penalties to the victim

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

Article 9

Investigation and prosecution

1. Member States shall ensure that investigation into or prosecution of offences referred to in Articles 2 and 3 is not dependent on reporting or accusation by a victim and that criminal proceedings may continue even if the victim has withdrawn his or her statement.

2. Member States shall take the necessary measures to enable, where the nature of the act calls for it, the prosecution of an offence referred to in Articles 2 and 3 for a sufficient period of time after the victim has reached the age of majority.

3. Member States shall take the necessary measures to ensure that persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 2 and 3 are trained accordingly.

4. Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases are available to persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 2 and 3.

⁽¹⁾ OJ L 300, 11.11.2008, p. 42.

*Article 10***Jurisdiction**

1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 2 and 3 where:

(a) the offence is committed in whole or in part within their territory; or

(b) the offender is one of their nationals.

2. A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences referred to in Articles 2 and 3 committed outside its territory, *inter alia*, where:

(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;

(b) the offence is committed for the benefit of a legal person established in its territory; or

(c) the offender is an habitual resident in its territory.

3. For the prosecution of the offences referred to in Articles 2 and 3 committed outside the territory of the Member State concerned, each Member State shall, in those cases referred to in point (b) of paragraph 1, and may, in those cases referred to in paragraph 2, take the necessary measures to ensure that its jurisdiction is not subject to either of the following conditions:

(a) the acts are a criminal offence at the place where they were performed; or

(b) the prosecution can be initiated only following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.

*Article 11***Assistance and support for victims of trafficking in human beings**

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive.

2. Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.

3. Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial, without prejudice to Directive 2004/81/EC or similar national rules.

4. Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations.

5. The assistance and support measures referred to in paragraphs 1 and 2 shall be provided on a consensual and informed basis, and shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.

6. The information referred to in paragraph 5 shall cover, where relevant, information on a reflection and recovery period pursuant to Directive 2004/81/EC, and information on the possibility of granting international protection pursuant to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted⁽¹⁾ and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status⁽²⁾ or pursuant to other international instruments or other similar national rules.

7. Member States shall attend to victims with special needs, where those needs derive, in particular, from whether they are pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered.

*Article 12***Protection of victims of trafficking in human beings in criminal investigation and proceedings**

1. The protection measures referred to in this Article shall apply in addition to the rights set out in Framework Decision 2001/220/JHA.

2. Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.

⁽¹⁾ OJ L 304, 30.9.2004, p. 12.

⁽²⁾ OJ L 326, 13.12.2005, p. 13.

3. Member States shall ensure that victims of trafficking in human beings receive appropriate protection on the basis of an individual risk assessment, inter alia, by having access to witness protection programmes or other similar measures, if appropriate and in accordance with the grounds defined by national law or procedures.

4. Without prejudice to the rights of the defence, and according to an individual assessment by the competent authorities of the personal circumstances of the victim, Member States shall ensure that victims of trafficking in human beings receive specific treatment aimed at preventing secondary victimisation by avoiding, as far as possible and in accordance with the grounds defined by national law as well as with rules of judicial discretion, practice or guidance, the following:

- (a) unnecessary repetition of interviews during investigation, prosecution or trial;
- (b) visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;
- (c) the giving of evidence in open court; and
- (d) unnecessary questioning concerning the victim's private life.

Article 13

General provisions on assistance, support and protection measures for child victims of trafficking in human beings

1. Child victims of trafficking in human beings shall be provided with assistance, support and protection. In the application of this Directive the child's best interests shall be a primary consideration.

2. Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14 and 15.

Article 14

Assistance and support to child victims

1. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, in the short and long term, in their physical and psycho-social recovery, are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views,

needs and concerns with a view to finding a durable solution for the child. Within a reasonable time, Member States shall provide access to education for child victims and the children of victims who are given assistance and support in accordance with Article 11, in accordance with their national law.

2. Member States shall appoint a guardian or a representative for a child victim of trafficking in human beings from the moment the child is identified by the authorities where, by national law, the holders of parental responsibility are, as a result of a conflict of interest between them and the child victim, precluded from ensuring the child's best interest and/or from representing the child.

3. Member States shall take measures, where appropriate and possible, to provide assistance and support to the family of a child victim of trafficking in human beings when the family is in the territory of the Member States. In particular, Member States shall, where appropriate and possible, apply Article 4 of Framework Decision 2001/220/JHA to the family.

4. This Article shall apply without prejudice to Article 11.

Article 15

Protection of child victims of trafficking in human beings in criminal investigations and proceedings

1. Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, competent authorities appoint a representative for a child victim of trafficking in human beings where, by national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim.

2. Member States shall, in accordance with the role of victims in the relevant justice system, ensure that child victims have access without delay to free legal counselling and to free legal representation, including for the purpose of claiming compensation, unless they have sufficient financial resources.

3. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations and proceedings in respect of any of the offences referred to in Articles 2 and 3:

- (a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;
- (b) interviews with the child victim take place, where necessary, in premises designed or adapted for that purpose;

- (c) interviews with the child victim are carried out, where necessary, by or through professionals trained for that purpose;
- (d) the same persons, if possible and where appropriate, conduct all the interviews with the child victim;
- (e) the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purposes of criminal investigations and proceedings;
- (f) the child victim may be accompanied by a representative or, where appropriate, an adult of the child's choice, unless a reasoned decision has been made to the contrary in respect of that person.

4. Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 2 and 3 all interviews with a child victim or, where appropriate, with a child witness, may be video recorded and that such video recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law.

5. Member States shall take the necessary measures to ensure that in criminal court proceedings relating to any of the offences referred to in Articles 2 and 3, it may be ordered that:

- (a) the hearing take place without the presence of the public; and
- (b) the child victim be heard in the courtroom without being present, in particular, through the use of appropriate communication technologies.

6. This Article shall apply without prejudice to Article 12.

Article 16

Assistance, support and protection for unaccompanied child victims of trafficking in human beings

1. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, as referred to in Article 14(1), take due account of the personal and special circumstances of the unaccompanied child victim.
2. Member States shall take the necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the child.
3. Member States shall take the necessary measures to ensure that, where appropriate, a guardian is appointed to unaccompanied child victims of trafficking in human beings.
4. Member States shall take the necessary measures to ensure that, in criminal investigations and proceedings, in accordance

with the role of victims in the relevant justice system, competent authorities appoint a representative where the child is unaccompanied or separated from its family.

5. This Article shall apply without prejudice to Articles 14 and 15.

Article 17

Compensation to victims

Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.

Article 18

Prevention

1. Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings.

2. Member States shall take appropriate action, including through the Internet, such as information and awareness-raising campaigns, research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders, aimed at raising awareness and reducing the risk of people, especially children, becoming victims of trafficking in human beings.

3. Member States shall promote regular training for officials likely to come into contact with victims or potential victims of trafficking in human beings, including front-line police officers, aimed at enabling them to identify and deal with victims and potential victims of trafficking in human beings.

4. In order to make the preventing and combating of trafficking in human beings more effective by discouraging demand, Member States shall consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2, with the knowledge that the person is a victim of an offence referred to in Article 2.

Article 19

National rapporteurs or equivalent mechanisms

Member States shall take the necessary measures to establish national rapporteurs or equivalent mechanisms. The tasks of such mechanisms shall include the carrying out of assessments of trends in trafficking in human beings, the measuring of results of anti-trafficking actions, including the gathering of statistics in close cooperation with relevant civil society organisations active in this field, and reporting.

*Article 20***Coordination of the Union strategy against trafficking in human beings**

In order to contribute to a coordinated and consolidated Union strategy against trafficking in human beings, Member States shall facilitate the tasks of an anti-trafficking coordinator (ATC). In particular, Member States shall transmit to the ATC the information referred to in Article 19, on the basis of which the ATC shall contribute to reporting carried out by the Commission every two years on the progress made in the fight against trafficking in human beings.

*Article 21***Replacement of Framework Decision 2002/629/JHA**

Framework Decision 2002/629/JHA on combating trafficking in human beings is hereby replaced in relation to Member States participating in the adoption of this Directive, without prejudice to the obligations of the Member States relating to the time limit for transposition of the Framework Decision into national law.

In relation to Member States participating in the adoption of this Directive, references to the Framework Decision 2002/629/JHA shall be construed as references to this Directive.

*Article 22***Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 6 April 2013.
2. Member States shall transmit to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Directive.
3. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied

by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

*Article 23***Reporting**

1. The Commission shall, by 6 April 2015, submit a report to the European Parliament and the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, including a description of action taken under Article 18(4), accompanied, if necessary, by legislative proposals.

2. The Commission shall, by 6 April 2016, submit a report to the European Parliament and the Council, assessing the impact of existing national law, establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings, on the prevention of trafficking in human beings, accompanied, if necessary, by adequate proposals.

*Article 24***Entry into force**

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

*Article 25***Addressees**

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg, 5 April 2011.

For the European Parliament
The President
J. BUZEK

For the Council
The President
GYŐRI E.



OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

www.ohchr.org



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United Nations Entity for Gender Equality
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