

**REFERENCE GUIDE FOR
ANTI-TRAFFICKING LEGISLATIVE REVIEW**
WITH PARTICULAR EMPHASIS ON SOUTH EASTERN EUROPE

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Foreword

When the Stability Pact Task Force on Trafficking in Human Beings was formally established in September 2000 we took the momentum to launch a project to develop this *Reference Guide for Anti-Trafficking Legislative Review*.

We identified the urgent need for harmonisation of relevant anti-trafficking legislation in order to guarantee effective prosecution and protection efforts. Such harmonisation should however not be restricted to the sole approximation of existing laws, but should take place with full consideration of international and regional human rights standards.

In order to promote a more comprehensive approach towards the fight against trafficking in human beings and the protection of the rights of trafficked persons, this reference guide is structured according to three main areas of action where legislative review is necessary, namely prevention, prosecution and protection. It also includes a set of recommendations for legislative review and reform efforts. These recommendations are not only based on legally binding standards, but also take into account political commitments, as well as examples of existing initiatives and activities at the national level. The recommendations offer a starting point for legislative review and clearly need to be tailored to the specific national context.

The *Reference Guide for Anti-Trafficking Legislative Review* aims at setting up a framework for comprehensive anti-trafficking legislation in order to assist law and policy makers in the entire OSCE region in their efforts to adopt or review anti-trafficking legislation. Furthermore, this reference guide is a valuable tool for non-governmental organisations in their advocacy work seeking to improve anti-trafficking legislation.

We look forward to supporting you in your efforts to review and reform anti-trafficking legislation.

Helga Konrad
Chair of the Stability Pact Task Force
on Trafficking in Human Beings

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1 Introduction

1.1 Background

Trafficking in human beings is a global phenomenon. It strongly affects countries undergoing political and economic transition or post-conflict stress, which are the main countries of origin. It also affects the more economically developed countries of destination, as well as countries of transit. Persons living in difficult situations are attracted by the possibility of improving their living conditions in more affluent countries while, at the same time, a growing demand exists in countries of destination for cheaply paid workers in the informal labour sectors and in low-wage sectors of the formal labour economy. Whereas, in the 1970s and 80s, Western European countries have been destinations for traffickers bringing women and men mainly from Asia and Latin America, the situation has changed since the breakdown of communist regimes in the early 1990s. Increasingly, women from Eastern European countries have become the major group on the “trafficking market” in Western Europe and also within the region of Central and South Eastern Europe.

Trafficking in human beings affects everyone, women, men, girls and boys. Nonetheless, according to available evidence, the majority of trafficked persons are women and girls.¹ The gender-dimension of the crime and human-rights violation named “trafficking in human beings” is, to a great extent, facilitated by the feminization of poverty and other violations of the economic and social rights of women and girls. This is especially true in countries of transition and post-conflict areas.

Since the early 1990s, trafficking in human beings has also emerged as a visible and serious problem in the region of the Stability Pact for South Eastern Europe.² Although the issue has received increasing attention in the political arena, the problem is still far from being solved. The cross-border nature of this crime, its complex root causes and an insufficient degree of awareness of the problem, combined with a lack of legal harmonization in the criminal laws of the respective states make it a very difficult criminal activity to combat. Another factor contributing to the low level of effective response to the problem is the restrictive government approach to combating “illegal migration”, organized crime and (illegal) prostitution, whereas the need for prevention programmes and victims’ rights protection does not receive adequate

¹ The majority of research in this field has focused exclusively upon the trafficking of women and children, so there is very little data on the trafficking of men into Western Europe. However, experience in the United States for instance reveals that a large number of men are also being trafficked into forced labour. See *Amy O’Neill Richard*, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime*, 1999, available at www.cia.gov/csi/monograph/women/trafficking.pdf.

² The Stability Pact for South Eastern Europe is a framework agreement on international co-operation for stability and growth in South Eastern Europe. It aims at strengthening the countries of South Eastern Europe ‘in their efforts to foster peace, democracy, respect for human rights and economic prosperity in order to achieve stability in the whole region.’” The Stability Pact was adopted in 1999 by more than 40 partner countries and organizations, including the countries of the region and their neighbours (Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Former Yugoslav Republic (FYR) of Macedonia, Hungary, Republic of Moldova, Romania, Slovenia, and Federal Republic (FR) of Yugoslavia, which will be referred to in the following as “the Stability Pact countries”), the European Union (EU) member states, USA, Canada, Russia, United Nations (UN), Organization for Security and Co-operation in Europe (OSCE), Council of Europe, World Bank, and the International Monetary Fund (IMF). For more information, please refer to <http://www.stabilitypact.org/>. In September 2000, a Task Force on Trafficking in Human Beings was created under Working Table III (Security Issues) of the Stability Pact. It aims at enhancing international co-ordination efforts and intensifying concrete joint action which should lead to the prevention of trafficking, the protection of victims and the prosecution of traffickers. Further information about the Task Force is available at <http://www.osce.org/odihr/attf/>. See also chapter 3.3.

attention. This narrow approach deprives trafficked persons of their basic human rights. Moreover, authorities tend to treat trafficked persons as criminals rather than as victims, because of their irregular residence and employment status, or because they work in prostitution. These actions lead victims to mistrust authorities and to refuse to co-operate with investigations, thereby decreasing the chance that traffickers will be successfully prosecuted. Finally, efforts to combat trafficking are impeded by corruption and the failure of governments to prosecute public officials involved in trafficking.

1.2 Purpose of the reference guide

The purpose of this reference guide is to set up a framework for comprehensive anti-trafficking legislation. It aims at assisting law and policy makers mainly in the Stability Pact region, but also in other participating States of the Organization for Security and Co-operation in Europe (OSCE), in their efforts to adopt or review anti-trafficking legislation. It also aims at supporting NGOs in their lobbying efforts seeking to improve anti-trafficking legislation.

The reference guide provides an overview of relevant international and regional standards that are supplemented by a selection of examples of initiatives and activities at the national level, as well as recommendations for adopting and reviewing anti-trafficking legislation.

The analysis of standards can be used as a reference guide for lawmakers, providing them with necessary background information. The recommendations set out in the reference guide are intended to be a starting point for legislative review. Clearly, the transformation of such recommendations into national laws requires recommendations that are specifically tailored for the particular situation and the specific legal regime of the respective country. Such an analysis of the Stability Pact countries can not be provided however in the course of this reference guide, but could be undertaken in the course of further research.

- **Need for legislative harmonization**

The impetus for this project is the urgent need for harmonization of relevant legislation in the Stability Pact region (and worldwide), taking into account the trans-border nature of trafficking movements. On several occasions, the lack of legislative harmonization has been identified as a major obstacle towards effective prosecution and protection efforts, impeding any efforts of trans-border co-operation between the respective national authorities in the states of origin, transit and destination.³ Such harmonization should however not be restricted to the sole approximation of existing laws, but should take place in the light of international and regional human rights standards. This need for a human rights approach was recently recognized by the South Eastern European Ministerial Declaration of 13 December 2000, where Ministers from the Stability Pact region have declared their political commitment to

³ In its Decision No. 1 on Enhancing the OSCE's Efforts to Combat Trafficking in Human Beings of 28 November 2000, the OSCE Ministerial Council stresses the need for a "more comprehensive and co-ordinated response" from participating States and the international community and a "more coherent and co-operative approach among countries of origin, transit and destination" (Art 1). The Council of Europe's Committee of Ministers has recommended to member states a co-ordinated strategy which should be realized on the basis of a harmonization of the relevant legislation of member states in the civil, social and penal domains (Explanatory Memorandum to the Committee of Ministers Recommendation R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, 19 May 2000, p 8). At the EU level, the European Commission has identified the "absence of commonly adopted definitions, incriminations and sanctions in the Member States' penal legislation" as a main reason for the failure to implement the Council Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children (97/154/JHA), an instrument providing guidelines for the harmonization of anti-trafficking legislation of member states, mainly focusing on the prosecution aspect (Proposal for a Council Framework Decision on Trafficking in Human Beings, COM (2000) 854 final, 21 December 2001, p 4).

recognize trafficking as a human rights issue.⁴ Also, the OSCE Ministerial Council committed OSCE participating States “to take necessary measures, including by adopting and implementing legislation” in order to criminalize trafficking in human beings and to guarantee and protect the rights of victims.⁵

- **Responsible actors**

The effectiveness of anti-trafficking measures strongly depends on the co-ordination and co-operation between all relevant actors, namely states, non-governmental organizations (NGOs) and intergovernmental organizations. Nonetheless, while “international institutions and NGOs have an important role to play, only governments have the authority and means to significantly limit the scope of trafficking.”⁶ Similarly, the OSCE Ministerial Council Decision No. 1 of 28 November 2000 affirmed that the primary responsibility for anti-trafficking action lies with the individual States.

1.3 Scope of the reference guide

The scope of this reference guide is neither restricted to addressing trafficking in women⁷ nor to a specific form of forced labour, slavery or servitude, but rather focuses on trafficking in human beings as defined by the United Nations (UN) Trafficking Protocol.⁸

It is also important to note that this reference guide concentrates on the rights and needs of adults and does not take the specific situation of children into consideration. Children have distinct rights and needs that should be protected especially by the UN Convention on the Rights of the Child (CRC),⁹ the Optional Protocol thereto¹⁰ and the International Labour Organisation (ILO) Convention No. 182 on the Elimination of the Worst Forms of Child

⁴ Stability Pact South Eastern European Anti-Trafficking Ministerial Declaration of 13 December 2000. The Declaration was signed by Ministers from Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia (FYROM), Moldova, Romania, Slovenia, Turkey, the Federal Republic of Yugoslavia, and representatives from Kosovo/FRY and Montenegro/FRY.

⁵ OSCE Ministerial Council Decision No. 1, 28 November 2000 (Art 9).

⁶ *OSCE/ODIHR, Proposed Action Plan 2000 for Activities to Combat Trafficking in Human Beings*, 1999, p 8f.

⁷ Most known trafficking cases in countries of the Stability Pact and the OSCE region affect women and girls. Trafficking in men and boys has so far only to a limited extent been covered by research efforts. This paper will focus on trafficking in human beings in general, and if necessary, take the situation of women into specific consideration. This is particularly relevant with regard to prevention, where gender discrimination and the feminization of poverty in the Stability Pact region have been identified as two main root problems of trafficking which must be addressed by legislative reform and other efforts.

⁸ This report adopts the definition contained in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons: “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 or organs.” Consequently, the guidelines are not restricted to any specific purpose of trafficking (such as into forced prostitution) but are intended to apply to all of its forms. For the purpose of this document, “force” is interpreted as referring to either the recruitment process or the working/living conditions to which the trafficked person is subjected. “Force” also includes the many forms of psychological coercion commonly used by traffickers to ensure submission by their victims.

⁹ CRC, UN GA Res 44/25, 20 November 1989.

¹⁰ Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography, UN GA Res 54/263, 25 May 2000 (not yet in force).

Labour.¹¹ The Convention on the Rights of the Child defines children as all persons under the age of 18.

The main part of this reference guide focuses on analytical tools for legislative review. An effective legal framework is undoubtedly an important foundation for any successful anti-trafficking policy, but a more comprehensive approach is required. In order to have a truly effective response, trafficking laws need to be enforced against all traffickers, including corrupt government officials, and they need to be applied in a non-discriminatory manner and be interpreted in such a way as to afford the best protection of the rights of trafficked persons. Further, effective implementation of anti-trafficking laws requires the establishment of additional measures of a non-legal nature, such as training for law enforcement officials and judges, the establishment of bodies co-ordinating anti-trafficking activities, economic and educational assistance for persons vulnerable to trafficking and for the reintegration of trafficked persons, information campaigns for potential victims, financial support of relevant NGOs, and research activities. These activities will also be briefly taken into consideration as far as allowed by timeframe and resources available for this reference guide.

1.4 Structure and methodology

In order to promote a more comprehensive approach towards the fight against trafficking and the protection of the rights of trafficked persons, this reference guide is structured according to three main areas of action where legislative review is necessary, namely prevention, prosecution and protection.¹²

The reference guide consists of a background paper, a list of guidelines/recommendations for model legislation and an annex.

- The background paper is structured according to the prevention, prosecution and protection approach and includes an analysis of the areas of concern that must be addressed by effective anti-trafficking legislation, as well as relevant international and regional standards. It also builds upon selected examples of existing initiatives and practices at the national level.
- The recommendations are derived from the analysis of these standards and examples of national practices.
- The annex of the reference guide includes a checklist of areas of concern that need to be reviewed when improving anti-trafficking legislation, as well as a list of all relevant international and regional documents which are referred to in the background paper.

The aim of the paper is to go beyond the status of existing legally binding standards and to develop guidelines that also take into account political commitments, as well as examples of existing initiatives and activities at the national level. The results are guidelines for the prevention and prosecution of trafficking and the protection of the victims.

¹¹ ILO Convention No. 182, 17 June 1996. See also the International Covenant on Civil and Political Rights (ICCPR), UN GA Res 2200A (XXI), 16 December 1966 (Art 24), the International Covenant on Economic, Social and Cultural Rights (ICESCR), UN GA Res 2200A (XXI), 16 December 1966, (Art 13) and the Platform of Action of the Fourth World Conference on Women, Beijing, 15 September 1995 (Chapter L).

¹² Prevention, prosecution and protection were also addressed in the above mentioned OSCE Ministerial Council Decision of 13 December 2000.

- **International and regional standards**

The starting point for the development of guidelines is the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol), which was opened for signatures in December 2000.¹³ This Protocol is important because it is the first internationally legally binding anti-trafficking instrument that includes a definition of trafficking and covers a broad field of state obligations, mainly regarding international co-operation in the field of investigation and prosecution, but also prevention and protection. State obligations under the Protocol will be supplemented by other legally binding, as well as non-binding (“soft law”) standards,¹⁴ that are derived from universal and regional documents adopted by the UN, the OSCE, the Council of Europe and the European Union (EU).

The Stability Pact countries are members of the UN and the OSCE, and most countries in the region, except for Bosnia and Herzegovina¹⁵ and Yugoslavia, are Council of Europe members. Although they are not EU member states, this reference guide will take EU standards into consideration for several reasons. First, a number of SP countries are applying for EU membership¹⁶ or are expected to do so in the near future. Secondly, SP countries are not only countries of destination, but also of transit and origin for women being trafficked to EU countries among others. Therefore, taking into account the need for a multilateral and co-ordinated strategy involving countries of origin, transit and destination, EU countries have to be involved in the development of effective anti-trafficking strategies in the Stability Pact region as well. Finally, the guidelines are broad enough to provide a general framework for anti-trafficking legislation to be implemented not exclusively in the SP region, but in other countries and regions as well.

This reference guide will also build on existing plans for comprehensive and regionally harmonized anti-trafficking measures, such the “Elements for a Regional Plan of Action” that were elaborated at the Council of Europe Seminar “Co-ordinated Action against Trafficking in Human Beings in South-Eastern Europe” that took place in Athens from 29 June to 1 July 2000.¹⁷

Not all of these documents however apply to all categories of trafficked persons. Consequently, it is virtually impossible to derive (legally or politically) binding standards that are equally applicable to all forms of trafficking. The UN Trafficking Protocol for instance includes a broad definition, but is applicable only to such trafficking cases that are covered by the Convention against Transnational Organized Crime, namely crimes that are “transnational in nature” and involve an organized criminal group. Even if the majority of trafficking cases might fall under the scope of the Protocol and the Convention, these documents do not apply to cases remaining under this threshold. Other relevant documents adopt definitions of

¹³ Trafficking Protocol, UN GA Res A/5/383, 2 November 2000.

¹⁴ States are obliged to implement the human rights standards contained in legally binding international and regional conventions, such as the ICCPR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). At the EU level, Council Joint Actions and Framework Decisions are also of a legally binding nature. Declarations and recommendations do not create legally but politically binding obligations upon states (“soft law”), because they are typically statements of principles or goals relating to particular issues.

¹⁵ According to the Dayton Peace Agreement, Bosnia-Herzegovina is however bound by the ECHR.

¹⁶ Bulgaria, Hungary, Romania, Slovenia, and Turkey are applying for EU membership. Further information on the EU enlargement process can be obtained at <http://europa.eu.int/comm/enlargement/index.htm>.

¹⁷ EG/ATH (2000) 3.

different scopes. For instance, the 1996 European Parliament Resolution,¹⁸ the 2000 OSCE Ministerial Council Decision or the 2000 South Eastern European Ministerial Declaration refer to *trafficking in human beings*, whereas the Council of Europe Committee of Ministers Recommendation R (2000) 11, the EU Council Joint Action 97/154/JHA and the Hague Ministerial Declaration¹⁹ apply solely to trafficking for the purpose of *sexual exploitation* (the latter being additionally restricted to trafficking in *women*). Consequently, the recommendations issued for instance in the Hague Ministerial Declaration are valid only for women trafficked for sexual exploitation, but not for other instances such as women trafficked for domestic labour or men trafficked for the purpose of agricultural work. This results in different standards for different categories of trafficking cases.

In order to enhance the readability of this reference guide, no reference will be made to the scope of application of the respective document when discussing the relevant standards. As mentioned above, the guidelines elaborated in the course of this project will go beyond existing binding standards, being based on the assumption that the same level of protection and the same standards for prosecution should be applicable to all trafficking cases, irrespective of the gender of the victim or the nature of exploitation. The UN Trafficking Protocol that adopts a comprehensive definition of trafficking in human beings, covering a broad range of exploitative labour relationships also reflects this argument. A list of all international and regional documents from where their scope of applicability as well as their legally or politically binding nature is included in the annex of this paper.

To some extent, documents that do not contain standards relevant for the Stability Pact region or Europe will also be taken into consideration, such as the Statute of the International Criminal Court (ICC).²⁰ The ICC Statute could be used to supplement international standards, because it shows a manifestation of state consensus on crucial aspects related to anti-trafficking action such as victim and witness protection.

Examples of practices at the national level

The enumeration of selected examples of national level practices and initiatives focusing on anti-trafficking legislation in Europe and also the US²¹ is not meant to be exhaustive. It is mainly based upon the collection of national legislation edited by the Council of Europe for the June 2000 Athens seminar on trafficking in human beings in South Eastern Europe,²² information provided by the “Stability Pact Legislation Online” Web site,²³ as well as selected country reports edited by regional and international organizations and NGOs.

¹⁸ European Parliament Resolution on trafficking in human beings, 16 January 1996.

¹⁹ The Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation, 26 April 1997.

²⁰ Rome Statute of the International Criminal Court, A/CONF. 183/9, 17 July 1998 (not yet in force). The ICC Statute establishes the world’s first permanent criminal court. Under certain circumstances, trafficking in human beings may fall within the jurisdiction of the ICC. The relevant provisions are Art 7 para 1 (c) - enslavement, which explicitly includes trafficking (para 2 (c)) - as well as Art 7 para 1 (g) - rape, sexual slavery, enforced prostitution. The Statute has been signed by all Stability Pact countries except Turkey, and ratified by Croatia.

²¹ The new US law on trafficking that was adopted in 2000 covers a broad range of measures in the fields of prevention, protection and prosecution.

²² Compilation of the main legal instruments and analytical reports dealing with trafficking in human beings at international, regional and national levels, EG (2000) 2, 6 June 2000. Volume II: National texts.

²³ <http://www.legislationline.org/>

2 States' obligations under international human rights law

2.1 Introduction

The crime of trafficking in human beings can be tackled from different angles, depending on the respective interest of the actors and institutions involved. Trafficking as a problem of organized crime, irregular migration or prostitution has captured the leading roles in the debate over the development of anti-trafficking policies. An important perspective that has largely been neglected - unless the trafficked person agrees to act as a witness for the prosecution - is the recognition and protection of the human rights of trafficked persons. Regional organizations and initiatives, such as the OSCE and the Stability Pact have recently expressed their commitment to a human rights approach towards the issue of trafficking.²⁴

Victims suffer human rights violations at all stages of the trafficking process. The precondition of trafficking is found in violations of the political, civil, economic and/or social human rights of certain groups or classes of persons in their countries of origin. In many developing countries or countries undergoing political and economic transitions, women are affected by discrimination in the economic, social, political and legal field. Women also suffer from discriminatory access to the labour market and to vocational training; they often receive lower wages than men and suffer disproportionately from unemployment. People belonging to lower classes or castes, or religious or ethnic minorities also suffer from similar discriminatory practices, which renders women from those communities doubly vulnerable. Further, the number of single mothers has increased in countries suffering from the stresses of transition, civil wars or natural disasters, and this group is especially negatively affected by the cutbacks in social security systems. Women and children also suffer from domestic violence or violence in the workplace. Moreover, women's participation in decision-making processes in the private and public spheres is low, creating another obstacle towards the improvement of their economic and social position. All these factors contribute to the decision to migrate in search of a better life and consequently make women and children vulnerable to being trafficked.

During the trafficking process, traffickers violate an extensive array of laws in their treatment of their victims. They subject them to physical, psychological and sexual violence, hold them in captivity and deny them the right to control over their own bodies, fail to provide a safe and healthy working environment and confiscate their wages and generally subject them to inhuman and degrading treatment, forced labour, slavery-like practices or slavery. While the individual traffickers violate a wide array of domestic laws, states violate the human rights of the victims by not enacting and/or enforcing those laws.

Post-trafficking, the state often further violates the rights of trafficked persons, for example, when it arrests, detains and punishes the victims, deports them back into the hands of traffickers, and fails to provide means for victims to receive compensation from the assets of the traffickers. Many governments, in fact, re-victimize the victim.

2.2 State obligation to protect individuals from private human rights violations

States are not only obliged, according to international human rights standards, to refrain from violating the human rights of individuals, but also to take positive steps to ensure that individuals are able to enjoy these rights. This includes the duty to take appropriate measures

²⁴ South Eastern European Anti-Trafficking Ministerial Declaration of 13 December 2000, OSCE Ministerial Council Decision of 28 November 2000 (Art 9).

to protect individuals against human rights infringements by private persons.²⁵ In order to fulfil this obligation, the mere enactment of formal legal prohibitions is not sufficient. States are moreover obliged to act with due diligence to prevent, investigate and punish human rights violations and to provide compensation.²⁶

The state's legal obligation to protect all persons, even irregular migrants, against violence by public officials or private individuals, groups or institutions has been reiterated in the *Migrant Workers Convention*, which has not yet entered into force.²⁷ This obligation is of particular importance to persons who are trafficked cross-border, rather than intrastate.

In conclusion, states have the obligation under international human rights law to act with due diligence in order to prevent, investigate and prosecute cases of trafficking in human beings and to afford remedies and reparation to trafficking victims. Measures to be taken are not only of legal, but also of a political and administrative character. The following section provides a brief description of the relevant human rights framework.

2.3 Relevant human rights instruments

The most important international declaration of the world's commitment to unify against the trafficking of human beings is the recently adopted UN Trafficking Protocol.²⁸ It is primarily a law enforcement tool obligating state parties to prosecute traffickers, extradite suspects and share information, but it also takes some aspects of prevention and protection into consideration. The Protocol is beyond a doubt an important step towards the harmonization of national anti-trafficking laws and, moreover, the first international legally binding instrument explicitly addressing preventive anti-trafficking measures, as well as action in the field of protection for and assistance of trafficked persons. At the same time however the language of the Protocol leaves wide discretion to states concerning the implementation of its protection and assistance provisions. The Trafficking Protocol and the important explanations of the text are discussed in greater detail in later chapters.²⁹

The elements of the human rights abuse of trafficking in human beings which are contained in the Trafficking Protocol are also addressed by a wide number of international human rights instruments condemning slavery, slavery-like practices or forced labour. States have

²⁵ Andrew Byrnes, Women, Feminism and International Human Rights Law - Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation, in: Australian Yearbook of International Law (1992), pp 228, 231.

²⁶ Inter-American Court of Human Rights, *Velásquez-Rodríguez* case, Judgement of 29 July 1988, Ser. C, No. 4, para 167. 1988. European Court of Human Rights, *Airey vs. Ireland*, Application No 6289/73, Judgement of 9 October 1979, and *X and Y vs. Netherlands*, Application No. 8978/80, Judgement of 26 March 1985. See also CEDAW Committee, General Comment No. 19 on violence against women, eleventh session, 1992 (Sec. 9).

²⁷ Convention on the Rights of Migrant Workers and their Families, UN GA Res 45/158, 18 December 1990 (Art 16 para 2). The Convention has been ratified by Bosnia-Herzegovina and signed by Turkey.

²⁸ The Protocol has been signed by all Stability Pact countries except Slovenia. It has not yet entered into force. The relevant sections of the Convention against Transnational Organized Crime, which has been signed by all Stability Pact countries, also apply to the Protocol. The Protocol and the Convention can be found at www.odccp.org/crime_cicp_convention.html#final. The Commentaries (*travaux préparatoires*) are available at www.odccp.org/crime_cicp_convention_documents.html.

²⁹ The new Protocol has superseded the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (UN GA Res 17 (IV), 2 December 1949). The 1949 Convention has been widely criticized because it restricts the concept of trafficking to prostitution and does not address other forms of labour exploitation. It neither includes a definition of trafficking nor does it distinguish between voluntary and forced prostitution, being an anti-prostitution treaty rather than an anti-trafficking treaty. The Convention has been ratified only by 73 states.

undertaken to abolish slavery, slave-trade and servitude,³⁰ slavery-like practices, such as debt bondage and forced marriages,³¹ forced labour³² and inhuman or degrading treatment.³³

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) includes a number of provisions obliging states to protect the rights of trafficked persons. The Covenant states that everyone has the right to work, including the right to the opportunity to gain her/his living by work which she/he freely chooses or accepts; the right to just and favourable conditions of work, including fair wages, safe and healthy working conditions and reasonable limitation of working hours; the right to social security, including social insurance; the right to an adequate standard of living, including adequate food and housing; the right to enjoy the highest attainable standard of physical and mental health; and the right to education.³⁴

Other binding documents include an explicit reference to trafficking in women or children. The *Convention against the Elimination of All Forms of Discrimination against Women* (CEDAW) is legally binding and has been ratified by most countries. State parties to CEDAW are obliged to “take all appropriate measures, including legislation, to suppress all forms of traffic in women”.³⁵ The *Convention on the Rights of the Child* (CRC) requires state parties to combat trafficking in children.³⁶ Similar obligations are delineated in a recently adopted Optional Protocol to the CRC, which requires state parties to combat the sale of children,³⁷ as well as the *ILO Convention No. 182 on the Worst Forms of Child Labour*, that entails the obligation to eliminate “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.”³⁸ These treaties define “children” as persons under the age of 18.

While not legally binding on states, there are several more documents that express an international consensus to combat trafficking in human beings. The *UN Declaration on the Elimination of Violence Against Women* (DEVAW) asserts that trafficking in women is a

³⁰ Universal Declaration of Human Rights, UN GA Res 217A (III), 10 December 1948 (Art 4), Slavery Convention, 25 September 1926 (Art 2). The Convention has been ratified by Albania, Bosnia-Herzegovina, Croatia and signed by Hungary, Romania and Turkey. ICCPR (Art 8). The ICCPR has been ratified by all Stability Pact countries except Turkey which has only signed it. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No. 5, 4 November 1950 (Art 4). The ECHR was ratified by all Stability Pact countries except Bosnia-Herzegovina, which is however bound by the Convention according to the Dayton Peace Agreement, and Yugoslavia.

³¹ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956 (Art 1). The Convention has been ratified by all Stability Pact countries except Moldova.

³² ILO Convention No. 29 concerning Forced Labour, 28 June 1930 (Art 1 and 4), ILO Convention No. 105 concerning the Abolition of Forced Labour, 25 June 1959 (Art 1 and 2). The ILO Convention No. 29 has been ratified by all Stability Pact countries, the Convention No. 105 by all except FYROM and Yugoslavia (no information about signatures available).

³³ ECHR (Art 3), ICCPR (Art 7).

³⁴ ICESCR (Art 6, 7, 9, 11-13). The ICESCR has been ratified by all Stability Pact countries except Turkey, which has only signed the Covenant.

³⁵ CEDAW, UN GA Res 34/180, 18 December 1979 (Art 6). CEDAW has been ratified by all Stability Pact countries. The Optional Protocol to CEDAW establishing a complaint and an inquiry procedure has been ratified by Croatia and Hungary and signed by Bosnia-Herzegovina, Bulgaria, FYROM, Romania, Slovenia and Turkey.

³⁶ CRC (Art 34 and 35). The CRC has been ratified by all Stability Pact countries.

³⁷ 2000 Optional Protocol to the CRC, Art 3 para 1, (not yet in force). The Protocol has been signed by Bosnia-Herzegovina, Croatia, FYROM, Romania, Slovenia and Turkey

³⁸ ILO Convention No 182 (Art 3 (a)). The Convention has been ratified by Bulgaria, Croatia, Hungary, Romania (no information is available regarding the status of signatures).

form of violence against women and also that states must adopt “by all appropriate means and without delay a policy of eliminating violence against women”.³⁹

In the 1995 *Beijing Platform of Action*, states define trafficking in women as a form of gender-based violence and took on the commitment to “eliminate trafficking in women and assist victims of violence due to [...] trafficking”. The document further stresses that “[t]he effective suppression of trafficking is a matter of pressing international concern“ and that relevant international instruments should be “reviewed and strengthened.” A detailed action plan for governments of countries of origin, transit and destination identifies the need to “address the root factors that encourage trafficking in women and girls.”⁴⁰ At the *Beijing+5* session of the General Assembly in June 2000, governments reaffirmed their commitments to the Beijing Platform of Action to address violence against women and took a step forward with regard to the issues of trafficking in women and girls and the associated forms of violence by addressing them in a holistic manner.⁴¹

Governments have also committed themselves to eliminate violence against women and trafficking in women in a number of OSCE documents, such as the 1991 Moscow Document, the 1999 Istanbul Document, and the 2000 Ministerial Council Decision.⁴²

³⁹ DEVAW, UN GA Res 48/104, 20 December 1993(Art 2 para .2 and 4).

⁴⁰ Platform for Action (Sec. 113, 122, 130).

⁴¹ The General Assembly Resolution on Beijing+5 suggests measures to combat trafficking in women and girls ranging from addressing the root factors of the phenomenon, to a comprehensive anti-trafficking strategy which includes legislative and preventive measures, exchange of information, assistance, protection and reintegration of victims, and prosecution of offenders. The document further suggests to set up a national rapporteur or an interagency body with the participation of civil society, including NGOs, to collect and exchange information and to report on data, root causes, factors and trends in violence against women, in particular trafficking. The document also introduces the idea of not prosecuting women and girl victims of trafficking for illegal entry or residence in the country. General Assembly, Further Actions and Initiatives to implement Beijing Platform for Action, A/RES/S-23/3, 16 November 2000 (Sec. 70 a-d, 131a-c).

⁴² Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991 (Sec. 40.7), Istanbul Charter for European Security, 19 November 1999 (Sec. 24), Ministerial Council Decision of 28 November 2000 (Sec. 1, 3).

3 Prevention

Taking into account the complex and multi-faceted nature of trafficking and its root causes, effective anti-trafficking strategies should never be restricted to post-trafficking criminal prosecutions. States are also obliged to take adequate measures for the prevention of trafficking. The need for a balanced and multi-disciplinary anti-trafficking policy has been recognized by states, as well as by regional and international organizations. The use of an integrated and co-ordinated approach including the namely prevention, protection and prosecution has been recently stressed by the world community in the preamble of the UN Trafficking Protocol as well as by the OSCE and the Council of Europe.⁴³

Preventive strategies should include short and medium-term measures such as awareness raising and information campaigns for potential victims. From a long-term perspective, such strategies should also aim to improve the economic and social position of groups of persons in the countries of origin that are especially vulnerable to becoming trafficked.⁴⁴ Finally, restrictive immigration laws and policies in the destination countries also contribute to the growth of irregular migration and trafficking in human beings, increasing possibilities for persons to migrate legally for work or vocational training might have a preventive effect towards trafficking.

3.1 Awareness raising

Persons who migrate are often disadvantaged by a lack of information, which forces them to turn to third parties who help them to migrate and to find job opportunities abroad. Those third parties may be smugglers who simply help them across the borders, but they could also turn out to be traffickers. Therefore, awareness raising campaigns are important in order to provide potential victims of trafficking with sufficient information to make informed decisions about migration. This includes information about the phenomenon of trafficking, about existing possibilities and requirements for legal migration and employment in destination countries, as well as information about earning possibilities in order to give potential migrants a basis upon which to evaluate job offers. Traffickers promise extraordinary sums and their victims have no independent means by which to determine whether the offers are realistic. Awareness raising campaigns should also address the risk of HIV/AIDS associated with working in the sex industry.

School children are also an important target group for information on the risks of trafficking, as well as more general information on gender equality issues, with the purpose of eliminating traditional stereotypes that lead to the subordination of women.

Besides potential victims, information campaigns should also address the general public as well as law enforcement authorities and other professionals likely to be in contact with potential victims of trafficking (see chapter 6.2).

The identification of target groups in the countries of origin vulnerable to trafficking has to be achieved by research (see chapter 6.1).

⁴³ OSCE Ministerial Council Decision No. 1 of 28 November 2000 (Art 3), Council of Europe Committee of Ministers Recommendation R (2000) 11.

⁴⁴ The Council of Europe Committee of Ministers Recommendation R (2000) 11 includes a detailed catalogue of long-, medium- and short term preventive measures.

- **International and European standards**

United Nations

CEDAW deals with trafficking in women as a form of gender-based violence (see chapter 3.4.2). In order to fulfil their obligation under the Convention to eliminate all forms of violence against women, the CEDAW Committee in its General Recommendation No. 19 recommends state parties to take effective measures “to ensure that media respect and promote respect for women” and to “introduce public information programmes to help eliminate prejudices that hinder women’s equality.”⁴⁵ Further, Art 10 CEDAW obliges state parties to eliminate “any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation (...) and, in particular, by the revision of textbooks and school programmes and the adaption of teaching methods.”

The *Trafficking Protocol* obliges states to endeavor to undertake information and mass media campaigns in order to prevent trafficking in persons. These measures shall, “as appropriate, include co-operation with NGOs (...) and other elements of civil society”.⁴⁶

Council of Europe

The *Committee of Ministers’ Recommendation R 2000 (11)*, dealing exclusively with trafficking in women, elaborates specific recommendations on information campaigns for certain target groups. In order to increase public awareness of trafficking, states should organize information campaigns with a gender perspective. Such campaigns should be directed particularly at female immigration applicants and women refugees. Women in the countries of origin should also be provided with information on the possibilities of legal migration in order to make them aware of the conditions and procedures for obtaining visas and residence permits. They should also obtain information on health risks associated with “sexual exploitation”, such as unwanted pregnancies and sexually transmitted diseases including HIV/AIDS. States should also encourage and organize activities to make media professionals more aware of trafficking and the influence of media in this field.⁴⁷

Information on trafficking should also be provided to children and young people. States should ensure that school curricula include information on the risks of “exploitation, sexual abuse and trafficking” and ways to protect themselves. Further, that such information should also be circulated to young people outside the education system, as well as to parents. States should also introduce sex education programmes in schools “with particular emphasis on equality between women and men and on respect for human rights and individual dignity”. More generally, states should provide boys and girls with an “education that avoids gender stereotypes” and enhance training for school teachers in order to ensure that a gender dimension is incorporated into their teaching.⁴⁸

Besides awareness raising campaigns for potential victims, the Council of Europe further recommends member states to “introduce training programmes for immigration officials and frontier police so that they can contribute to prevention by making sure that persons travelling abroad, particularly young persons not accompanied by a parent or guardian, are not involved in trafficking.” These state authorities should be enabled to recognize trafficked persons and

⁴⁵ CEDAW Committee, General Recommendation No. 19 (Sec. 24 (d), (f)).

⁴⁶ Trafficking Protocol (Art 9 paras 2, 3).

⁴⁷ Committee of Ministers Recommendation R (2000) 11 (Art 11-12, 14-15, 25), Explanatory Memorandum to the Recommendation, p 14.

⁴⁸ Committee of Ministers Recommendation R (2000) 11 (Art 16-18).

to take all necessary steps, “where appropriate, in co-operation with specialist NGOs.”⁴⁹ Such trainings should however primarily aim to assist trafficked persons rather than to prevent migrants from leaving their home country.

European Union

At the EU level, similar recommendations were adopted, encouraging member states to support and organize prevention campaigns in the countries of origin.⁵⁰ In the *Hague Ministerial Declaration*, EU member states expressed their commitment to support information and prevention campaigns in the countries of origin “aimed at clarifying the opportunities, limitations and rights in the event of migration, such as to enable women to make informed decisions and to seek help in the case of trafficking.” States should also promote the involvement of embassies and consulates in such activities. Information campaigns should be developed in co-operation with NGOs, both in the countries of origin and destination. Therefore, NGOs should be provided with effective support, inter alia through development co-operation.⁵¹

• **Examples of practices at the national level**

Public awareness raising campaigns

The *Italian* government has funded television information campaigns in Albania and training projects for Albanian girls.⁵²

The new *US* law on trafficking obliges US authorities to establish and carry out programmes to increase public awareness, particularly among potential victims of trafficking, of the dangers of trafficking and protection mechanisms available to assist trafficked persons.⁵³

Information provided by the government on employment agencies

Several countries in the former Soviet Union (FSU), such as *Moldova* and *Ukraine*, have set up ministerial committees responsible for issuing licenses to firms who arrange employment for people abroad and may also suspend licences if they find violations of the law. Potential migrants have the possibility to check via these committees if a company offering work abroad is registered and licensed according to the law.⁵⁴ Similarly, in Belarus there is a Committee on External Labour Migration under the Ministry of Labour and in Russia there is a Committee on External Labour Migration under the Ministry of Federation, Nationalities and Migration Policy of the Russian Federation. These committees have local offices throughout both countries and they are responsible for issuing licenses to firms who arrange employment for their citizens abroad. Therefore, in info campaigns carried out by NGOs in

⁴⁹ Committee of Ministers Recommendation Council of Europe R (2000) 11 (Art 22), Explanatory Memorandum to the Recommendation, p 16.

⁵⁰ See for instance the European Parliament 1996 Resolution (Sec. 10, 13, 22), the European Parliament Resolution on the Communication from the Commission to the Council and the European Parliament “For further actions in the fight against trafficking in women” COM (1998) 726, 19 May 2000 (Sec. 12), Tampere European Council, 15 and 16 October 1999, Presidency Conclusions (Sec. 10).

⁵¹ Hague Ministerial Declaration (Chapter III.1.1).

⁵² Information provided by the Italian government in a questionnaire for the Council of Europe June 2000 Athens seminar on trafficking in human beings in South Eastern Europe.

⁵³ Trafficking Victims Protection Act of 2000, H.R. 3244 ENR (Sec. 106 (b)).

⁵⁴ These agencies are a potentially useful tool to prevent trafficking by regulating the recruiting firms operating in the countries of origin. However, they have so far not been very effective in shutting down businesses involved in trafficking. In Ukraine for instance, the committees may only inspect employment agencies, whereas trafficking is however rather conducted through tourist agencies. (*Minnesota Advocates of Human Rights*, Trafficking in Women: Moldova and Ukraine, December 2000, p 43f, available at www.mnadvocates.org.)

Russia and Belarus, citizens are urged to check that a company offering work abroad is registered. Citizens can do this by checking the registration or documentation of the firm or by calling their local committee on external labour migration.⁵⁵

- **Recommendations**

- States should fund and organize awareness raising and information campaigns in the countries of origin, in order to prevent trafficking in human beings. Such campaigns should be developed and undertaken by countries of origin in co-operation with NGOs, which should be adequately financially supported. Countries of transit and destination should support governments and NGOs in the countries of origin in their efforts to conduct such campaigns.
- Information campaigns should raise the awareness of the general public and especially of potential victims about the phenomenon of trafficking. High risk groups should be provided with information on recruitment methods used by traffickers, on legal requirements for migration to countries and the earning possibilities in such countries, on sexually transmitted diseases, including HIV/AIDS, associated with sex work, as well as on organizations to contact for more information.
- Preventive efforts should also target school children by including information on trafficking, and more general, on gender equality, into school curricula and textbooks.

3.2 Addressing the economic and social position of women in countries of origin

Trafficking starts with migration, and the root causes for migration lie in the economic and social inequalities between countries and regions of countries. Persons living in developing countries or countries in transition who wish to migrate for work in order to improve their absolutely or comparatively low living standards or to migrate for marriage frequently become victims of trafficking. The inferior status of women before the law and in society often leads to women, as a group, being more affected by general poverty and unemployment. This leads to the feminization of labour migration and consequently to the circumstances under which trafficking disproportionately affects women and girls. Therefore, a gender perspective should be taken into account when drawing up strategies to improve the economic and social situation in the countries of origin in order to prevention trafficking.

The intersection of economic dislocation and gender discrimination is of particular relevance to an analysis of the situation in Central and South Eastern Europe and the FSU. Since the early 1990s, transition countries in Central, Eastern and South Eastern Europe and the FSU have become main countries of origin, but also countries of transit and destination for trafficking. Available data suggests that trafficking to, through or from this region mainly involves women and girls.⁵⁶

Despite some progress made in economic development in the region, poverty and unemployment rates have significantly increased during the transition and the impact has been borne disproportionately by women. States are spending less money on family allowances, have reduced the number of available public child care facilities, and increased childcare fees.

⁵⁵ Information provided by the OSCE/ODIHR, July 2001.

⁵⁶ Recent research also reveals patterns of trafficking in boys. See for instance Save the Children, Report on Trafficking in Children in Albania, 2001. An IOM report of 2000 even argued that the largest numbers of trafficked persons in Europe were men, estimating for instance that 80 per cent of all persons trafficked to Ukraine were male. However, “the authors admit that the data are not exactly comparable, since for some countries they may relate to illegal border crossing rather than specifically to trafficked migrants.” (quoted from *ILO*, Stopping Forced Labour. Global Report under the Follow-up to the ILO Declaration on Fundamental Rights and Principles at Work, 2001, p 50f, available at <http://www.ilo.org/declaration>).

At the same time, divorces and single parenthood are becoming more common. This places women and children at a greater risk of poverty.⁵⁷ However, the root causes of trafficking, particularly in women, cannot be reduced to poverty and poor economic conditions. Other serious problems include domestic violence and violence in the workplace. Moreover, the representation of women in decision-making processes is generally low and has dramatically decreased in the region of Central and South Eastern Europe and the FSU since the fall of communism.

In order to be effective, preventive anti-trafficking strategies need also take into account that members of certain groups in society are especially vulnerable to discrimination and therefore at a higher risk of becoming victims of trafficking. For instance, minority women face additional barriers because of their gender *and* because of belonging to a minority group (“intersectional discrimination”).⁵⁸ Therefore, strategies addressing the root causes of trafficking should also take into account the situation of women and girls belonging to minority groups. Their vulnerability to trafficking would require further analysis in order to develop adequate strategies for the elimination of this form of intersectional discrimination. However, this aspect exceeds the resources available for this research project and can therefore not be further developed in the course of this reference guide.

Prevention of human rights violations is a very complex issue, and therefore it is difficult to indicate the most effective preventive measures. Similarly, the improvement of the status of women in the countries of origin can not guarantee that trafficking will be prevented in the future. Yet, the link between the status of high-risk groups in their country of origin on the one hand, and their vulnerability to become victims of trafficking on the other, is evident and has been highlighted by NGOs and international organizations on many different occasions.⁵⁹ The aim of this reference guide is to build on this general evidence and to develop as a starting point some concrete recommendations (such as the introduction of effective anti-discrimination legislation or the training of police officers and the judiciary in the field of domestic violence) in order to improve the status of women in the countries of origin.

Strategies for the effective prevention of trafficking in human beings require measures addressing the root causes which make persons vulnerable to being trafficked. Improving the position of the groups most often targeted by traffickers, namely women and children, in both the social and legal systems, requires a broad, multidisciplinary approach. A sound analysis of the entire range of factors implicated in this complex problem should be produced. However, this chapter is confined to selected problem areas and general principles for legislation

⁵⁷ UNICEF, Women in Transition, The MONEE Report, Regional Monitoring Report No. 6, 1999, Summary, p 11f (available at <http://www.unicef-icdc.org/publications/index.html>).

⁵⁸ As an example, the Roma population in Romania faces discrimination in many aspects of life, including education. Because of traditionally defined gender roles, women and girls are even more affected by existing patterns of discrimination. The percentage of Roma children who did not complete basic school education rose from 36 per cent in 1994 to 44 per cent in 1998. Roma girls tend to drop out of school earlier than boys, due to child-bearing, sometimes before the age of 15, and substantial family and household responsibilities. Source: *International Helsinki Federation for Human Rights*, Women 2000, An investigation into the status of women in Central and South Eastern Europe and the Newly Independent States, 2000, p 367f (available at <http://www.ihf-hr.org/publicat.htm>).

⁵⁹ See for instance *International Helsinki Federation of Human Rights*, A Form of Slavery: Trafficking in Women in the OSCE members states. report to the OSCE Supplementary Human Dimension Meeting on Trafficking in Human Beings, Vienna, 19 June 2000; *Minnesota Advocates*, Trafficking. The Council of Europe in its Committee of Ministers Recommendation R (2000) 11 also recognized that the long-term causes of trafficking should be addressed by improving the social status and economic conditions of women in the countries of origin (Sec. 23).

addressing some of the root causes in the economic and social field.⁶⁰ The following sections provide an overview of selected aspects of the situation of women in Central and South Eastern European countries and the FSU,⁶¹ as well as on relevant international standards and examples of selected national best practice with regard to prevention.

3.2.1 Violence against women

Countries in which poverty and violence against women are common are prone to trafficking as women who are desperate to leave their abusive situations often flee abroad. According to a recent report by the Minnesota Advocates for Human Rights on trafficking in women in Moldova and Ukraine, domestic violence was one of the root factors causing women to migrate abroad for work.⁶²

An investigation on the status of women in 28 countries in Central and South Eastern Europe and the FSU (including all member states of the Stability Pact) conducted by the International Helsinki Federation of Human Rights (IHF) found that domestic violence is a widespread problem in all the surveyed countries.⁶³

Domestic violence is not only related to the absence of adequate legal provisions, the lack of knowledge about the nature of such violence and the absence of a support network,⁶⁴ but also to women's low social and economic status relative to men as financial dependence prevents them from leaving abusive relationships.⁶⁵

The IHF concluded in the above mentioned survey that domestic violence is not properly addressed by most legal systems in the region, which neither include any specific provisions relating to the problem nor the possibility of restraining orders, as for instance in Bulgaria.⁶⁶ Society does not recognize domestic violence as such, and women refrain from reporting because of shame, traditions or because they are "used to" this kind of life, therefore not considering themselves as victims of violence.⁶⁷ Research conducted by the Minnesota Advocates for Human Rights in Moldova identified a number of factors that keep Moldovan women from seeking assistance in cases of domestic violence: "the lack of alternative housing; the knowledge that most abusers are not punished unless the injuries are severe; the fear that, without any meaningful punishment, men will return and beat the women more severely; the high costs of legal assistance; and the difficult economic situation."⁶⁸

⁶⁰ For an overview on the status of women in Central and South Eastern Europe and the Newly Independent States see *International Helsinki Federation for Human Rights*, Women 2000, and *UNICEF*, Women in Transition.

⁶¹ The following chapter does not exclusively focus on the status of women in the countries of origin in the Stability Pact region, but will also discuss examples from other Central and South East European countries, because first, women are also trafficked from these other countries to the Stability Pact region (such as Belarus and Ukraine), and secondly, because this paper aims at providing a framework on legislative review that could be relevant for legislative review efforts in countries outside of the Stability Pact Region.

⁶² *Minnesota Advocates*, Trafficking, p 18f

⁶³ *IHF*, Women 2000, p 14.

⁶⁴ *IHF*, Women 2000, p 14.

⁶⁵ *Special Rapporteur on Violence Against Women*, Economic and social policy and its impact on violence against women, E/CN.4/2000/68/Add.5, 24 February 2000 (Sec. 8), available at <http://www.unhchr.ch/html/menu2/7/b/mwom.htm>.

⁶⁶ *IHF*, Women 2000, p 116.

⁶⁷ *IHF*, Women 2000, pp 14, 15.

⁶⁸ Interview with a prosecutor in Chisinau, in *Minnesota Advocates for Human Rights*, Domestic Violence in Moldova, December 2000, p 12 (available at www.mnadvocates.org).

Society's refusal to acknowledge violence against women as a serious problem is underlined by the fact that e.g. in Moldova or Romania, a perpetrator of rape may avoid punishment if he marries the victim.⁶⁹

Out of 652 cases of Moldovan women who reported being subjected to domestic violence by their partners in 1997, 60 per cent were from rural areas.⁷⁰ Women are reluctant to report cases to the police and have little confidence in obtaining legal redress, because police officers, most of them men, often accept the excuse by the perpetrator that his wife's attitude "provoked" him. Only 30 per cent of all abused women share the information with a family member or friend, and only 9 per cent visit a doctor.⁷¹ In Ukraine, police tend not to consider domestic violence as a serious crime and, therefore, give such cases "low priority". Often, they do not respond to women's calls for help. "The formal police-training curriculum does not include instruction on the appropriate response to domestic violence calls. A police officer told...he was instructed to view domestic violence as a private family matter, not appropriate for police."⁷²

In Romania, the police usually do not arrest perpetrators of domestic violence. No official and accurate statistics on the frequency or incidence of domestic violence are available.⁷³

Finally it is significant to note that a high number of women are sexually abused and harassed at work. In 1996, the number of sexual incidents involving women at work per 1000 women was reportedly 108 in Romania and 58 in the FR Yugoslavia.⁷⁴

- **International and European standards**

United Nations

The *UDHR* and the *ICCPR* state the right of everyone to life, liberty and security of person (Art 3 UDHR, Art 6 and 9 ICCPR), the right to be free from torture or inhuman or degrading treatment or punishment (Art 5 UDHR, Art 7 ICCPR) as well as the right to an effective remedy for violations of any rights under the Declaration/Covenant (Art 8 UDHR, Art 2 ICCPR).

CEDAW does not explicitly enumerate violence against women as a form of gender-based discrimination prohibited under the Convention. The CEDAW Committee's General Recommendation No. 12 however specifies that "articles 2, 5, 11, 12 and 16 of the Convention require the State parties to act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life."⁷⁵ According to the General Recommendation No. 19,

⁶⁹ *IHF*, Women 2000, pp 318, 364.

⁷⁰ *IHF*, Women 2000, p 317.

⁷¹ *IHF*, Women 2000, p 318.

⁷² *Minnesota Advocates*, Domestic Violence in Ukraine, December 2000, p 33f, available at www.mnadvocates.org.

⁷³ *IHF*, Women 2000, pp 360, 363.

⁷⁴ *UNICEF*, *Women in Transition*, p 85. The report does not specify what type of violence "sexual incident" means.

⁷⁵ CEDAW Committee, General Comment No. 12 on violence against women, eighth session, 1989. Art 2 contains a general obligation to eliminate all forms of discrimination against women. Art 5 CEDAW obliges state parties to missing verb traditional stereotyped roles for men and women and to the recognition of a common responsibility of men and women in the upbringing and development of their children. State obligation to eliminate gender-based violence further derive from their duties to eliminate discrimination of women in the field of employment (Art 11), health care (Art 12), and marriage and family matters (Art 16).

“the definition of discrimination [in Art 1 CEDAW] includes gender-based violence, that is violence that is directed against a woman because she is a woman, or that 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.”⁷⁶

CEDAW requires state parties to take positive measures to eliminate all forms of violence against women. This obligation is not restricted to violence by state actors: “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.” The Committee recommends a number of measures to state parties, including

- the compilation of statistics and research on the extent, causes and effects of violence;
- the establishment of preventive measures, including public information campaigns and education programmes to change attitudes concerning the roles and status of men and women;
- the establishment of effective legal measures, including penal sanctions, civil remedies and compensation to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;
- the establishment or support of services for victims of gender-based violence, including shelter, specially trained health workers, rehabilitation and counselling, and to ensure that such services are accessible to rural women;
- the organization of gender-sensitive training of judicial and law enforcement officers and other public officials.⁷⁷

The *Platform for Action* adopted at the 1995 *Fourth UN World Conference on Women in Beijing* identifies two major forms of violence against women: violence occurring in the family and violence within the community including abuse and sexual harassment at work, trafficking in women and forced prostitution.⁷⁸ The Platform for Action recommends a number of measures to states to prevent and combat trafficking in women, including:

- to create, improve or develop and fund training programmes for judicial, legal, medical, social, educational and police and immigrant personnel in order to sensitize them to the nature of acts and threats of gender-based violence;
- to create or strengthen institutional mechanisms for women and girls to report acts of violence;
- to provide “well-funded shelters and relief support (...), as well as medical, psychological and other counselling services and free or low-cost legal aid, where it is needed, as well as appropriate assistance to enable them to find a means of subsistence;
- to support NGO initiatives and fund community-based education and training campaigns to raise awareness about violence against women.”⁷⁹

The *Beijing+5 Review Conference Resolution* proposes to set up a “national co-ordination mechanism, for example, a national rapporteur or an inter-agency body, with the participation of civil society, including non-governmental organizations, to encourage the exchange of information and to report on data, root causes, factors and trends in violence against women, in particular trafficking.”⁸⁰

⁷⁶ CEDAW Committee, General Recommendation No. 19 (Sec. 6).

⁷⁷ CEDAW Committee, General Recommendation No. 19 (Sec. 1, 4, 9, 24).

⁷⁸ Platform for Action (Sec. 113). Similar definitions can be found in DEVAW (Art 2).

⁷⁹ Platform for Action (Sec. 124 (l), (n), 125 (a), (d), (e)).

⁸⁰ General Assembly Resolution A/RES/S-23/3, 16 November 2000 (Sec. 70(d)).

Council of Europe

The *ECHR* grants a number of rights relevant to the protection of women from domestic violence: the right to life (Art 2), the right to be free from torture and inhuman or degrading treatment or punishment (Art 3) the right to liberty and security of person (Art 5), the right to respect for her/his private and family life (Art 8),⁸¹ as well as the right to an effective remedy for violations of any rights granted by the Convention (Art 13). The enjoyment of all rights under the Convention shall be secured without discrimination on any ground, including gender (Art 14).

Within the framework of the Council of Europe, a comprehensive *Plan of Action to combat violence against women* was elaborated in 1997. This Plan of Action recommends to governments a detailed catalogue of measures to prevent and combat violence against women and to protect the victims concerned, including the introduction of specific legislation and a clear definition of violence against women and all its forms.⁸²

- **Examples of legislation and practices at the national level**

Legal protection against domestic violence

Austria's Protection against Violence Act⁸³ authorizes police to send away perpetrators of domestic violence from their homes for a maximum duration of 3 months in order to prevent further violent acts.⁸⁴ This protection is granted to spouses, (heterosexual) partners, their children and certain relatives. The connecting institution between the police and a longer-term protection by a temporary injunction of the civil court is the intervention center, a state-approved NGO. The center, in close co-operation with women's shelters, supports and assists the victim in legal matters, aiming to end violence by the perpetrator. In addition, the center provides detailed reports to assess the potential of the perpetrator for more violence and their ability to co-operate. These reports are the basis for the civil court's subsequent proceedings.

Penal legislation

The Criminal Code of the Federation of *Bosnia and Herzegovina* was revised in 1998 and now allows for the possibility of prosecuting marital rape, as well as domestic violence within a non-marital relationship.⁸⁵

⁸¹ In the case *X and Y versus The Netherlands* for example, the European Court of Human Rights ruled that the concept of "private life" according to Art 8 covers the "physical and moral integrity of the person, including his or her sexual life." Under this provision, states are obliged not only to abstain from interfering in an individual's private or family life, but are also to undertake positive measures. This obligation "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves" and may also include measures from criminal law. *X and Y versus The Netherlands*, Application No. 8978/80, Judgement of 26 March 1985, paras 22f, 27.

⁸² Plan of Action to combat violence against women, EG-S-VL (97) 1. A summary of the Plan of Action is included in the Council of Europe document EG (99) 14, Violence against Women. Compilation of the main texts of the Council of Europe since 1995, 15 December 1999 (available at <http://www.humanrights.coe.int/equality/Eng/WordDocs/Document%20list.htm>). The Plan of Action recommends further action in the fields of education and awareness raising programmes, victim support, as well as research and monitoring.

⁸³ Family Violence Protection Act, Federal Gazette No. 759/1996.

⁸⁴ Execution Order, Federal Gazette No 79/1896, as amended by Federal Gazette No. 519/1995,(Sec. 381 para 2).

⁸⁵ *IHF*, Women 2000, p 95.

Police training

Slovenia has given much attention to police training to change traditional attitudes toward domestic violence.⁸⁶

- Recommendations
- States should take all necessary measures to eliminate violence against women in all areas of social life and to provide support and assistance to victims.
- States should establish a legal definition of violence and ensure that all forms of gender-based violence, including violence within the family, constitute offences punishable under criminal law and are effectively prosecuted by its authorities. Besides criminal sanctions, states should also provide civil remedies for victims. This includes claims for compensation and application for temporary injunctions. In cases of domestic violence, states should adopt legislation allowing the police to send the perpetrators away in order to prevent further violent acts.
- States should establish and finance support mechanisms for women victims of violence, including medical, psychological and legal counselling free of charge, accommodation, and, if necessary, free legal aid.
- In order to overcome monetary obstacles preventing female victims of domestic violence from leaving their abusive partners, states should make financial assistance, as well as education and training programmes available to women to help them become independent.
- States should develop, fund and implement training programmes for judicial, legal, medical, social services, police and immigration personnel in order to sensitize them to the serious nature of gender-based violence. These professionals should be enabled to identify situations of gender-based violence and to treat the victims adequately and respectfully. Such training programmes should be carried out together with NGOs specialised in the field of violence against women, in order to improve the co-operation between NGOs and authorities.
- States should collect accurate statistics on gender-based violence and carry out research on its extent, causes and consequences. For this purpose, a co-ordinating mechanism should be set up and provided with sufficient personal and financial infrastructure.
- States should carry out preventive measures to change the attitudes concerning the roles of men and women. This should include media campaigns aiming at the general public as well as mainstreaming the issue of gender-based equality and especially violence against women in school curricula.

3.2.2 Women and the labour market

Employment has declined during the 1990s in almost all transition countries in Central and South Eastern Europe and the FSU. More than half of the estimated 26 million jobs lost in the region were held by women (14 million). About six million women of a total number of 10 million people were registered unemployed in 1999.⁸⁷ In 1997, female unemployment rates were higher than those of their male counterparts in the Czech Republic, Poland, Romania, the Slovak Republic and the Federal Republic of Yugoslavia. The share of long-term unemployment among women increased remarkably between 1993 and 1997 in and Bulgaria (from 52 to 62 per cent), the Czech Republic (from 18 to 31 per cent) and the Slovak

⁸⁶ *IHF*, Women 2000, p 15.

⁸⁷ *UNICEF*, Women in Transition, p 27. Many women registered unemployed in transition countries do not receive unemployment benefits, either because they are not officially registered unemployed, or because they have exhausted their entitlements (*UNICEF*, Women in Transition, Summary, p 7)

Republic (from 39 to 55 per cent).⁸⁸ Official statistics on unemployment in Belarus indicate that women are most vulnerable to unemployment between the ages of 25-40 years.⁸⁹ 80 per cent of workers made redundant in Ukraine between 1994 and 1998 and 79.4 per cent of all public administration personnel laid off in Belarus were women. Industry sectors in Moldova such as light industry, where traditionally about 80-85 per cent of employees were women, dramatically reduced their work force by 50-66 per cent of the total number of employees.⁹⁰

Furthermore, existing gender gaps in wages have risen during the period of transition in a number of countries: in Bulgaria, the average monthly earning for women as a share of male earnings in 1997 (compared to 1990) was 69 per cent (-5 percentage points), in Russia 70 per cent (-1 percentage point), in Romania 76 per cent (-2 percentage points) and in Ukraine 78 per cent (in 1996, no other data available).⁹¹ Women's salaries are lower because they are disproportionately represented in sectors with lower salary systems, such as education, medical services, and social activities. In Romania for instance, women form the majority within the textile industry and state-financed sectors, where earnings are one third lower than the average salary in the economy as a whole. But even when women work in the same area as men, they earn between 60 and 85 per cent of the earnings of their male colleagues.⁹² The over-representation of women in less prestigious and lower-paid jobs contributes to the feminization of poverty. In Belarus, 82 per cent of persons receiving salaries that fall below the poverty level are women.⁹³

It can also be noted that women are discriminated against in terms of access to the labour market, vocational training and re-training. Access to the labour market is impeded by questions about women's private lives in job interviews (such as family obligations, marital status or children), as well as protective legislation which may have an "overprotective" effect (such as laws prohibiting women from night work or foreseeing maternity leave, instead of parental leave).⁹⁴ Research conducted in Romania, for instance, revealed that many women reported being refused jobs because they were too young (implying that childbearing and child raising would negatively affect their economic efficiency) or because they were too old (and therefore untrainable and unattractive as work potential).⁹⁵ In post-war Bosnia, most available vocational training courses focus on professions related to the construction industry, aiming especially at demobilized soldiers (among whom less than 10 per cent are women), whereas "training programmes that are expressly offered for women, often run by Bosnian NGOs with international donor assistance, include typing, knitting and sewing among the skills they are expected to work towards. [... These are however not] the kind of professional skills that enable women to enter today's competitive labour market."⁹⁶

With very few exceptions, most legal systems in the region of Central and South Eastern Europe and the FSU have no formal legal definition of discrimination, nor is there an

⁸⁸ "Long-term unemployment" means being out of work for more than one year. *UNICEF, Women in Transition*, p 28f.

⁸⁹ *IHF, Women 2000*, p 67. It should also be noted that even where women's unemployment rates are relatively low compared to men's, this does not necessarily reflect better work opportunities, but rather a massive withdrawal of women from the formal labour market: *Ewa Ruminska-Zimny, Women in the world of work. Notes on trade, sustainable development and gender, Pre-UNCTAD Expert Workshop 1999*.

⁹⁰ *Special Rapporteur on violence against women, E/CN.4/2000/68/Add.5, Sec. 44; IHF, Women 2000*, p 67, 313.

⁹¹ *UNICEF, Women in Transition*, p 33.

⁹² *IHF, Women 2000*, p 11, 350f.

⁹³ *IHF, Women 2000*, p 67.

⁹⁴ *IHF, Women 2000*, p 11.

⁹⁵ *IHF, Women 2000*, p 351.

⁹⁶ *IHF, Women 2000*, p 90.

understanding of indirect and structural discrimination or a commitment to temporary special measures reflected by the law. Moreover, the concepts of “institutional responsibility” or a “civil remedy” for victims of discrimination do not exist in most countries’ legal system or jurisprudence.⁹⁷

Besides discriminatory practices in the labour market that are often not adequately addressed by the law, there are also other factors responsible for the segregation within the labour market, such as traditional role models of women and men.⁹⁸ Such gender-stereotypes perpetuate the over-representation of women in lower-paid and less secure, traditionally “female” jobs. They also determine the distribution of responsibilities for paid and unpaid labour and leave the main responsibility for domestic labour and caring work to women. As a consequence, women often have to bear the double burden of paid labour and domestic work. This is especially true for women in the former communist countries in Central and South Eastern Europe and the FSU, where the high rate of female employment under communism was not accompanied by changes in the division of paid and domestic labour. Women in Central and Eastern Europe face almost twice the weekly paid workload compared to women in Western Europe. The total female workload of paid and unpaid (domestic) work in Central and Eastern Europe averages 70 hours per week, about 15 hours more than in Western Europe.⁹⁹ In Moldova for instance, the amount of housework performed by women in addition to full time job is approximately 30 hours a week. This double burden not only prevents women from equal access to the labour market, but also seriously affects their general health.

Such gender stereotypes are deeply rooted in society. Once more, it is important to stress that school education plays an important role in this respect. At a very early age, children are confronted with gender stereotypes in school books and teaching materials: women are often viewed as mothers, nurses or school teachers, whereas men are presented as policemen, industrial workers or physicians.¹⁰⁰

- **International and European standards**

Art 7 *ICESCR*, which has also been ratified by all Stability Pact countries, encompasses the right to equal remuneration and equal opportunities. In its General Recommendation No. 3, the Committee on Economic, Social and Cultural Rights states that the right to equal remuneration “would be capable of immediate application“ and the argument that this right is non-self-executable “would seem to be difficult to sustain.“¹⁰¹ Thus, any suggestion that the right to equal remuneration can not be adjudicated due to economic restraints would, according to the Committee, not be acceptable.

The ILO has adopted two conventions that are particularly relevant to the situation of women in the workplace: *Convention No. 100 on Equal Remuneration* and *Convention No. 111 on*

⁹⁷ *IHF*, Women 2000, p 7, *UNICEF*, Women in Transition, p 17.

⁹⁸ The over-representation of women in less paid and low-level positions is very often also connected to their access to school education. Research suggests however that this is not a significant problem in the region of Central and South Eastern Europe and the Newly Independent States, where the level of women’s education is relatively high. See *IHF*, Women 2000, and *UNICEF*; Women in Transition.

⁹⁹ *UNICEF*, Women in Transition, p 25.

¹⁰⁰ The *IHF* identified gender stereotypes in school books as problems for instance in Bosnia, FYROM and Romania: *IHF*; Women 2000, p 85, 300, 349.

¹⁰¹ *Committee on Economic, Social and Cultural Rights*, General Comment No. 3 (1990), UN Doc. E/1991/23, Annex III.

Discrimination in Employment.¹⁰² Although their scope is reasonably broad to encompass access to vocational training, access to employment and to particular occupations, they limit state obligations to “methods appropriate to national conditions and practice.”¹⁰³

Art 11 *CEDAW* requires state parties to “take appropriate measures to eliminate discrimination in the field of employment” in order to ensure women’s equal rights to work, to equal employment opportunities (including the application of the same criteria for selection in matters of employment), to free choice of employment, promotion, job security and vocational training, to equal remuneration and equal treatment for work of equal value, and to social security. In order to prevent discrimination on the grounds of marriage or maternity, states shall provide maternity leave and the possibility of parental care “to combine family obligations with work responsibilities.” Protective legislation with regard to maternity shall be reviewed periodically and revised as necessary. Art 5 *CEDAW* aims at the elimination of gender stereotypes and inter alia requires states to take all appropriate measures to ensure “the recognition of the common responsibility of men and women in the upbringing and development of their children”. Further, Art 10 *CEDAW* obliges state parties to eliminate “any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation (...) and, in particular, by the revision of textbooks and school programmes and the adaption of teaching methods.”

Art 4 *CEDAW* specifies that “temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination.” In its General Recommendation No. 5, the *CEDAW* Committee recommends state parties to “make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women’s integration into education, the economy, politics and employment.”¹⁰⁴

In the *Beijing Platform of Action*, governments committed themselves to a number of measures in order to promote women’s economic rights and eliminate all forms of discrimination related to employment, including

- to enact and enforce legislation to guarantee the rights of men and women to equal pay or equal value,
- to “enact and enforce equal opportunity laws, to take positive action and ensure its compliance by the public and private sectors through various means,”
- to promote and support women’s self-employment and micro-enterprises,
- to ensure equal access for women to effective job training and retraining “not limited to traditional employment areas”,
- to ensure that part-time and temporary workers are appropriately protected by labour laws and social security laws,
- to promote the equal sharing of family responsibilities through legislation and education policies.¹⁰⁵

The *Trafficking Protocol* deals with prevention and requires state parties to take measures, including through bilateral and multilateral co-operation, to “alleviate“ factors such as

¹⁰² ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 29 June 1951, ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, 25 June 1958. Both Conventions have been ratified by all Stability Pact countries.

¹⁰³ ILO Convention No. 111 (Art 2).

¹⁰⁴ *CEDAW Committee*, General Recommendation No. 5 on temporary special measures, seventh session, 1988.

¹⁰⁵ Platform for Action (Sec. 165 (a), (c), 166 (a), (d), (j), 179 (a), (c), (d)).

poverty, underdevelopment and lack of equal opportunities.¹⁰⁶ This provision remains very general and does not specify any concrete preventive measures to be taken by state parties. The Protocol further requires states to co-operate with NGOs in the field of prevention.¹⁰⁷

Council of Europe

The *European Social Charter*¹⁰⁸ sets out a wide range of economic and social rights. Art 20 ensures the right to equal opportunities, thus ensuring a broad scope of the right to work. Art 26 contains the right to dignity at work. According to this article, states should “undertake, in consultation with employers’ and workers’ organizations to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct”.

The *Elements for a Regional Plan of Action* recommend countries in the region to “ensure co-ordinated efforts to foster the economic development of the region, in particular promote gender mainstreaming and the status of women in order to better combat the root causes of trafficking.” In this context, it identifies rural women as a special vulnerable group and contains recommendations to “develop skills training and job opportunities for women in rural areas.”¹⁰⁹

Organization for Security and Co-operation in Europe

The OSCE’s *Parliamentary Assembly Bucharest Declaration* urges participating States to combat trafficking in women by eliminating the obstacles to equal economic opportunity for women in the countries of origin. It further recommends the adoption of anti-discrimination laws that would enable women to seek effective legal redress if they suffer gender-based discrimination with regard to employment.¹¹⁰

- **Activities at the national level:**

Anti-discrimination laws and institutions

In *Austria*, the Federal Equal Treatment Act prohibits gender-based discrimination in the public administration at the federal level, including discrimination with regard to access to employment, determination of wages, access to vocational training, promotion, termination of employment. The law also states that sexual harassment is a form of discrimination. A person, who claims to be discriminated against, is entitled to raise a claim before the Federal Commission on Equal Treatment. The claimant is not obliged to *prove*, but only to make a *credible* statement that she or he suffered discrimination. If the Commission decides that the employer discriminated against the claimant in violation of the Act, the claimant is entitled to equal treatment or compensation by the government. The Act further requires a 40 per cent female quota for all posts in public administration. A similar legal regime against discrimination, but without a quota system, is provided for the private employment sector.¹¹¹

¹⁰⁶ Trafficking Protocol (Art 9 para 4).

¹⁰⁷ Trafficking Protocol (Art 9 para 3).

¹⁰⁸ Revised European Social Charter, ETS No. 163, 3 May 1996. The Charter has been ratified by Bulgaria, Romania, Slovenia and signed by Albania and Moldova.

¹⁰⁹ Elements for a Regional Plan of Action (Sec 24, 25).

¹¹⁰ OSCE Parliamentary Assembly, Bucharest Declaration, 10 July 2000 (Art 107).

¹¹¹ The Federal Equal Treatment Act (Bundes-Gleichbehandlungsgesetz, Federal Gazette No. 100/1993, as amended by Federal Gazette No. I 142/2000) applies to federal public administration; the Equal Treatment Act (Gleichbehandlungsgesetz, Equal Treatment Act, Federal Gazette No. 108/79, as amended by Federal Gazette No. 44/1998) applies to the private employment sector.

Sweden's Equal Opportunities Act of 1991 requires employers to “ensure that working conditions are appropriate for men and women” and to facilitate “for male and female employees (...) the combination of employment and parenthood.” In uncompromising language, it obliges employers to execute “zero-tolerance” with regard to sexual harassment. Finally, the Act contains a detailed definition of gender discrimination and its application in cases of recruitment, promotion and termination of work. In cases of alleged discrimination, the burden of proof also lies with the employer.¹¹²

In the *Czech Republic* and in *Hungary*, the burden of proof in cases of discrimination lies with the employer.¹¹³

In 1999, *Lithuania* established an Equal Opportunities Ombudsperson's Office that deals with gender discrimination cases alleged by individuals and legal entities and cases of sexual harassment. Apart from the usual complaint procedure, the ombudsperson is mandated to carry out independent investigations as a result of information from the media and other sources. The ombudsperson is directly accountable to the Lithuanian Parliament.¹¹⁴

Programmes to create jobs and training programmes for women

Bulgaria has implemented a project to promote economic empowerment of women and to create jobs in a region with a high number of unemployed (mainly women). This project was funded by the UN Development Funds (UNDP) and lasted from November 1997 to December 2000. As a result, a Business Support Centre was set up by local community leaders, which contributed to the creation of 160 new jobs, 131 of which were taken by women. The centre provided vocational training free of charge and retraining programmes on topics including tourism development, English language and computer skills. Among the 374 persons trained, 263 were women. Further, a loan guarantee scheme was established in order to facilitate women or family owned businesses in accessing commercial credits from banks. The centre also organized a workshop for national and local decision-makers on developing gender-sensitive skills and knowledge.¹¹⁵

• **Recommendations**

- States should introduce anti-discrimination legislation, granting women and others an effective remedy against all forms of discrimination related to employment, including discrimination with regard to access to employment or vocational training, determination of wages or termination of employment. States should ensure that the burden of proof lies not with the victim but with the alleged perpetrator (as in the *Czech Republic* and *Hungary*) or at least that the victim does not need to prove, but only make a credible statement that she/he suffered from discrimination.
- States should take measures to ensure that women are not marginalized into low-paid, insecure employment sectors. This could be achieved for example by introducing affirmative action including quota systems, promoting vocational training for women in non-traditional employment areas and mainstreaming gender-sensitive education in school curricula.

¹¹² Source: ILO database e.quality@work, <http://www.ilo.org/public/english/employment/gems/eoo/index.htm>.

¹¹³ Albeit an important legal step forward, judges have been reluctant to apply these provisions. This reluctance underlines the requirement for adequate legal provisions to be complimented by gender-sensitive training for the judiciary to ensure effective application of the law. *IHF*, Women 2000, p 9.

¹¹⁴ *IHF*, Women 2000, p 8.

¹¹⁵ For further information on the project “Economic Empowerment of Women in the Devin Region”, see <http://www.undp.bg/indexx.html> and <http://www.un.org/womenwatch/resources/goodpractices/>.

- States should take measures to facilitate the equal sharing of family responsibilities between women and men. For example by extending the concept of “maternity leave” to “parental leave”, making available affordable child-care facilities and adequately protecting part-time workers under labour and social law.
- States should establish programmes to promote access to employment, vocational training and micro-credit lending to women, particularly in rural areas.

3.2.3 *Women and decision-making*

Another aspect of the complex picture of women’s status is their lack of access to political and economic decision-making that can be seen as both the reason and the consequence of women’s inferior legal and societal position. As long as stereotypes about traditional gender roles and gender-based discrimination in terms of access to resources, education and the labour market persist, women have little chance to equally participate in economic, political and judicial decision-making processes. At the same time, without women’s equal representation in decision-making, “it is highly unlikely that a real integration of the equality dimension in government policy-making is feasible.”¹¹⁶ Therefore, the equal representation of women and men in decision-making processes is one important prerequisite for the elimination of the inequalities that make women particularly vulnerable to being trafficked.

Since the beginning of the transition process, the representation of women in political bodies has decreased dramatically. The share of female politicians dropped significantly across the whole region, from 30 per cent under communism to a level as low as between 4 and 14 per cent in most countries in transition.¹¹⁷ For example, as of 25 April 2001, the percentage of female members of parliament (MPs) in Moldova was 8.9 per cent and in Ukraine 7.8 per cent. The share of female MPs in the Romanian Upper House was 5.7 per cent (Lower House: 10.7 per cent).¹¹⁸ Reasons for this general drop of the percentage of female politicians in Central, Eastern and South-Eastern Europe include the following: lack of positive measures,¹¹⁹ reluctance of political parties to place women on the electoral lists, reluctance of women to run for office in “male dominated ‘high’ level politics”, stereotypes regarding the electorate’s attitudes towards women politicians, a lower success rate discouraging women from participating and political parties from supporting them, lack of political experience among women, re-emergence of patriarchal values and relegation of women to the private sphere, and the belief that women’s issues are not pressing enough, as well as the lack of networks and informal ties providing women with necessary support systems.¹²⁰

The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life. Research demonstrates that “if women's participation reaches 30 to 35 per cent (generally termed a "critical mass"), there is a real impact on political style and the content of decisions, and political life is revitalized.”¹²¹

¹¹⁶ Platform for Action (Sec. 181).

¹¹⁷ *UNICEF, Women in Transition, Summary*, p 19.

¹¹⁸ Inter-Parliamentary Union, <http://www.ipu.org>, visited at 1 May 2001.

¹¹⁹ Under communism, quota systems existed, which ensured a higher degree of women’s participation in political bodies, but in fact rendered little power to them. At the beginning of transition, these quota systems were abolished in former communist countries (*UNICEF, Women in Transition*, p 94).

¹²⁰ *Economic Commission for Europe, Women in Power and Decision-making*, E/ECE/RW.2/2000/5, 17 January 2000, pp 7, 8 (available at <http://www.unece.org/women/beijing+5/meetdoc/doclist.htm>).

¹²¹ *CEDAW Committee, General Recommendation No. 23 on women in political and public life*, 16th session, 1997 (Sec. 16).

- **International Standards**

United Nations

According to Art 25 *ICCPR*, every citizen shall have the right and the opportunity to vote and be elected “without any of the distinctions mentioned in Article 2“ (including distinction based on sex).¹²²

Art 7 *CEDAW* requires states to “ensure to women, on equal terms with men, the right” to vote, to hold public office and to participate in non-governmental organizations. Art 8 demands equal representation on the international level. In this context, the *CEDAW* Committee in its *General Recommendation No. 23* emphasizes that the removal of legal barriers is necessary but not sufficient. The Convention encourages the use of temporary special measures according to Art 4, in order to give full effect to Art 7 and 8.¹²³

The *Beijing Platform of Action* identifies gender stereotyping as one of the major causes of the under-representation of women in decision-making institutions.¹²⁴ It proposes

- to implement gender balance through specific measures such as positive action,
- to encourage political parties to integrate women in elective and non-elective public positions, to review the differential impact of electoral systems on the political representation of women,
- to take appropriate measures to reconcile work and household responsibilities;
- to create mentoring systems for inexperienced women and to offer them “training in leadership and decision-making, public speaking and self-assertion, as well as in political campaigning”.¹²⁵

- **Examples of national practice**

Affirmative action to enhance women’s representation

In *Kosovo/FRY*, a new election regulation requires a 30 per cent quota of female candidates for public office. This quota is required of political parties, citizens’ initiatives, coalitions and independent candidates and applies to lists of at least 3 candidates. Each candidate list shall include at least 30 per cent women among the first fifteen candidates, and at least one woman in each set of three candidates thereafter.¹²⁶

France has recently introduced a law requiring a 50 per cent quota for candidates during municipal elections.¹²⁷ To encourage implementation by political parties, the introduction of the quota will be linked with financial assistance.¹²⁸

¹²² Similar provisions can be found in the Convention on the Political Rights of Women, UN GA Res 640 (VII), 20 December 1952, which has been ratified by all Stability Pact countries.

¹²³ *CEDAW Committee*, General Recommendation No. 23 (Sec. 16).

¹²⁴ Platform for Action (Sec. 182f).

¹²⁵ Platform for Action (Sec.190(a), (b)).

¹²⁶ Regulation No. 2000/39 on municipal elections. See also *IHF*, Women 2000, p 514.

¹²⁷ Loi tendant à favoriser l’égal accès des femmes et des hommes aux mandats électoraux et fonctions électives (Loi 2000-493 of 6 June 2000). For more information see <http://www.observatoire-parite.gouv.fr>.

¹²⁸ Art 16. Although a remarkable step forward, the law will only affect communities of more than 3.500 inhabitants (thus 2000 out of 3600 communities) and does not indicate an order of female and male candidates like the regulation in Kosovo.

The number of women in the Parliament of *Sweden* has almost tripled since 1971. Conditions in the municipal (41 per cent) and county councils (48 per cent) are similar to those prevailing in the Parliament. Among all political parties is a firm conviction about the need to increase the number of women candidates. In 1994 the Social Democratic Women initiated the idea of the so-called "sandwich nomination lists". This means that every second name on the party's nomination list must be a woman's name. Since the general election in 1994, the largest political Party, the Social Democrats, and later on other political parties e.g. the Green Party and the Christian Democrats, systematically alternated between women and men in their lists of constituency candidates for the elections and the European Parliament.¹²⁹

- **Recommendations**

- States should take measures to ensure that the level of participation of women in political decision making processes reaches a "critical mass" of 30-35 per cent.
- To achieve this aim, states should introduce positive measures, such as quota systems for political parties. Parties should be required to nominate at least 30 per cent of women on their lists and to ensure that they are listed in places with good prospects to be elected. This could be achieved, for instance, by systems like those practised in Kosovo/FRY (minimum percentage of women at the top of the candidate lists) or Sweden ("sandwich lists").
- States should establish a mechanism to ensure political parties' compliance with quota requirements, for instance by linking financial benefits, such as state subsidies for political parties to the fulfilment of quota targets.

3.2.4 *Gender equality machineries*

Apart from the establishment of substantive legal guarantees and effective remedies in order to enjoy these guarantees, the realization of women's human rights also requires the establishment of national machineries, such as co-ordinating bodies responsible for the supervision of the gender-sensitive and effective implementation of these laws and for the development and co-ordination of policies aiming to integrate a gender perspective in national laws, policies and programmes. The efficiency of such national machineries depends on their level of authority, as well as on the amount of available resources.

Almost all countries in Central and South Eastern Europe and the FSU have set up national gender equality machineries. Most of them are located in units or departments within ministries of labour and/or social affairs. This fact often reflects "governments' welfare approach to women. They are seen as vulnerable groups in need of protection as mothers." Experience which such machineries reveals that because of their location they are isolated and prevented from "integrating women's interests in the country's main development programmes."¹³⁰

¹²⁹ These voluntary initiatives are complemented by the legal entitlement to parental leave such as the "Parental Leave Act" and certain provisions of the "National Insurance Act" and the existence of municipal child and elder care systems. Thus, responsibilities for the home and children are shared equally which is one of the necessary preconditions for equal participation in institutional decision-making of women and men. Source: <http://www.db-decision.de/CoRe/Sweden.htm>

¹³⁰ *Economic Commission for Europe*, Report on National Machineries for Gender Equality and the Advancement of Women in Transition Countries (Central and Eastern Europe and the CIS), E/ECE/RW.2/2000/BP.1, 22 December 1999, pp 4, 5, available at <http://www.unecce.org/women/beijing+5/meetdoc/doclist.htm>.

- **International Standards**

In its General Recommendation No. 6, the CEDAW Committee recommended state parties to *CEDAW* to

“establish and/or strengthen effective national machinery, institutions and procedures, at a high level of Government, and with adequate resources, commitment and authority to: (a) Advise on the impact on women of all government policies; (b) Monitor the situation of women comprehensively; (c) Help formulate new policies and effectively carry out strategies and measures to eliminate discrimination.”¹³¹

The *Beijing Platform for Action* proposes to establish responsibility for the advancement of women at the “highest possible level of government“ on the basis of “strong political commitment“ with “clearly defined mandates, adequate resources and the ability and the competence to influence policy.“¹³²

- **Recommendations**

- States should set up high-level co-ordinating bodies on gender issues responsible for formulation and supervision of policies and strategies aiming at the elimination of gender discrimination and for the supervision of gender mainstreaming into all areas of the government’s policy.
- States should ensure that such bodies have a clear mandate as well as sufficient personal and financial resources and are established at a level allowing them to influence policies.

3.2.5 *International and regional co-operation*

In addition to activities at the national level, measures for the improvement of the status of women in the countries of origin can also be undertaken or supported by bilateral or multilateral arrangements.

- **International and European standards**

United Nations

The *Trafficking Protocol* deals with prevention and requires state parties to take measures, including through bilateral and multilateral co-operation, to “alleviate“ factors such as poverty, low economic development and lack of equal opportunities.¹³³

European level

The EU and the OSCE have addressed the problem of inadequate cross-border co-operation in the prevention of trafficking, recommending member states to conclude bilateral and multilateral agreements with the countries of origin, as well as to provide support to government agencies and NGOs that work towards the empowerment of women.¹³⁴

The *European Parliament* in its *1996 and 2000 Resolutions* on trafficking has identified international development co-operation as a means to support and strengthen preventive anti-trafficking efforts. Objectives of development aid policy should include aid for victims or

¹³¹ *CEDAW Committee*, General Recommendation No. 6 on effective national machinery and publicity, seventh session, 1988 (Sec. 1).

¹³² Platform for Action (Sec.203 (a), (b)).

¹³³ Trafficking Protocol (Art 9 para 4).

¹³⁴ Hague Ministerial Declaration (Chapter III.1.3.), OSCE Supplementary Human Dimension Meeting on Trafficking in Human Beings, Vienna, 19 June 2000, Final Report, ODIHR.GAL/36/00, 12 July 2000, p 9.

potential victims of trafficking, whereby the specific position of women and children in the countries of origin should be taken into account.¹³⁵ In this respect, gender-specific poverty alleviation programmes and development co-operation instruments ensuring sustainable and community-based development in order to address the underlying causes of trafficking are recommended to states.¹³⁶

- **Examples of initiatives at the national and regional levels**

International and regional initiatives to enhance economic opportunity for potential victims

The US Trafficking Victims Protection Act has created a legal basis for international initiatives by the US government to enhance economic opportunity for potential victims of trafficking. It states an obligation of the government to establish such initiatives, including micro-credit lending programmes, skills training, job counselling, the promotion of women's participation in economic decision making, the development of international curricula and grants to NGOs.¹³⁷

Two Task Forces of the Stability Pact for South Eastern Europe aim at fostering regional co-operation towards the elimination of factors that make women vulnerable to trafficking. The *Stability Pact Gender Task Force* is a forum for regional co-operation between governments, international organizations and NGOs to promote gender equality and women's political participation in South Eastern Europe. The *Stability Pact Anti Trafficking Task Force*: also aims to promote regional and international co-operation on prevention and awareness raising of trafficking, including addressing social and economic causes. Both Task Forces have signed a co-operation agreement, in which they identified possible areas of co-operation, including lobbying with legislators and policymakers to improve existing anti-trafficking policies and their implementation or to adopt strong anti-trafficking policies where they do not exist and supporting networks of elected women politicians working on improving gender equality to advance a strong anti-trafficking agenda in their respective legislatures.¹³⁸

- **Recommendations**

- States should make use of bilateral, regional and international co-operation, including development co-operation, to eliminate the root causes of trafficking in human beings, especially women. For this purpose, states should also make use of and support existing regional co-operation initiatives, such as the Stability Pact and its Task Forces on Gender and Trafficking in Human Beings.
- States should support NGOs in the countries of origin working towards the empowerment of women.

3.3 Immigration policies of destination countries

Restrictive immigration laws and policies in countries of destination contribute to the growth of irregular migration and trafficking in human beings. Persons willing to migrate and work abroad in order to look for a better life, but who have no legal possibility to do so, tend to rely

¹³⁵ European Parliament 1996 Resolution (Sec. 8f).

¹³⁶ European Parliament 2000 Resolution (Sec. 28).

¹³⁷ Trafficking Victims Protection Act (Sec. 106 (a)).

¹³⁸ The task forces further agreed upon regular information exchange and on the co-operation of their respective national focal points in the region of South Eastern Europe. For further information, please refer to the web sites of the Gender Task Force (http://www.stabilitypact.org/stabilitypactcgi/catalog/cat_descr.cgi?subcat=1&prod_id=4) and the Anti-Trafficking Task Force (<http://www.osce.org/odihr/attf/>).

on persons who provide them with false documents, arrange the journey and find them employment. As restrictive immigration policies do not allow for enough legal immigration to fill the jobs that exist, migrants are forced to use illegal means to get to those available jobs. Once they arrive, migrants might find themselves forced to work and live under slavery-like conditions.

- **International Standards**

Art 64 *Migrant Workers Convention* obliges state parties to consult and co-operate with each other in order to promote sound, equitable and humane conditions for the international migration of workers and their families, while paying attention not only to labour needs and resources, but also to the social, economic, cultural and other needs.

- **Examples for national practice**

Bilateral agreements to allow migrants to work

Italy has signed an agreement with the International Organization for Migration (IOM) allowing 5,000 Albanians to work in Italy for one year in order to manage labour migration flows from Albania and the Balkans. Applicants are being interviewed by the IOM office in Tirana and have to undergo professional and linguistic tests. If they pass, they are registered in an IOM database which is periodically sent to Italian authorities and is available on the Internet for consultation by Italian employers. With the help of this database that matches their skills to existing vacancies, successful applicants are allowed to leave with a labour contract in their hands, which enables them to start work immediately. Before leaving Albania, IOM provides participants with counselling and an orientation course. Upon arrival in Italy, they may receive orientation and vocational training courses. Since May 2000, when the agreement was signed, more than 1.500 Albanian job seekers have left for Italy. IOM Tirana has so far interviewed more than 9.400 applicants, of whom about 4.400 have been accepted. "Most applicants were men aged between 18 and 39, with secondary education and experience in the construction, agriculture, hospitality and para-medical sectors."¹³⁹

Such agreements allowing persons originating from states with less developed countries to migrate for work and to improve their professional qualifications are likely to contribute to the prevention of trafficking in human beings. If persons have such legal possibilities to migrate for work, they might be less likely to rely on traffickers promising to arrange their travel and work abroad. At the same time, in order to effectively prevent trafficking in women, additional efforts are necessary to ensure equal participation of women in such programmes, because, as mentioned above, mainly men have benefited from the agreement between Italy and IOM. This aim could be achieved by designing and implementing information campaigns specifically targeting women and encouraging their involvement in such programmes.

- **Recommendations**

- Governments in destination countries should consider increasing opportunities for persons, in particular for women and girls, to immigrate legally for work, education and vocational training. For this purpose, destination countries should enter into agreements

¹³⁹ IOM press release of 13 July 2001, available at <http://www.iom.int>. For further information, see also <http://www.dgimpiego.aile.it>.

and set up programmes in co-operation with countries of origin and/or regional and international organizations such as IOM.

- States and organizations implementing such initiatives should ensure that women and men have equal access to such employment and training programmes. Countries of origin should encourage women and girls to participate and provide them with adequate information on the existence and requirements for participation in such programmes. Participating states and organizations should ensure that the jobs offered in the course of such programmes do not exclusively focus on traditionally “male” skills but are also accessible for women.
- Countries of origin should provide women and girls with education and vocational training possibilities in order to ensure that they possess the necessary qualifications in order to successfully participate in such programmes and to secure employment (see chapter 3.4).

4 Prosecution

4.1 Distinct offence and definition of trafficking in human beings

An important starting point for any anti-trafficking measures is a clear definition of the crime. If the crime is not clearly defined, research on the scale of the problem and the elaboration of solutions how to tackle it are impossible. Solutions will also vary according to how the problem is defined. Without a clear definition, it is also impossible to engage in cross-border co-operation. Until everyone, government and NGOs, are focusing on the same crime and identifying the same set of victims, proposed solutions will lack co-ordination and effectiveness.

The criminal law in a considerable number of countries does not include the distinct offence of trafficking in human beings. Trafficking is prosecuted under other existing laws or not prosecuted at all. For example, trafficking in women for the purpose of forced prostitution is often prosecuted under provisions on smuggling and prostitution-related crimes, such as pimping or the promotion of prostitution. The limited scope of these laws allows traffickers to receive a relatively low penalty that does not reflect the serious and brutal nature of trafficking.¹⁴⁰ Sometimes, the victims are also prosecuted for illegal entry or working illegally because laws are applied in a mechanical fashion. Moreover, efforts to combat trafficking by using tools for prosecuting prostitution-related crimes mean that governments equate trafficking with all forms of work in the sex industry, whether non-coerced or coerced participation is involved. Trafficking encompasses all forms of forced labour, slavery and servitude in all industries, including, for example, the sex industry, manufacturing and agriculture. Trafficking should not be conflated with smuggling or prostitution. It is a distinct crime involving severe human rights violations.

Many states that have a distinct crime of trafficking only penalize trafficking into prostitution, leaving out other areas of work or activities where persons are held in forced labour, slavery or servitude. This means that persons trafficked into forced domestic labour or factory labour or into other sexual services, such as pornography, striptease or massage, are not protected by the law, and their traffickers are not punished.

- **International and European standards**

Until recently, a universal and legally binding definition of trafficking was lacking at the regional and international level, and different actors and instruments used different, partly overlapping, definitions.

United Nations

The only legally binding international definition of trafficking¹⁴¹ is included in the Trafficking Protocol, which was adopted in December 2000. Art 3 defines trafficking as follows:

¹⁴⁰ OSCE/ODIHR, Trafficking in Human Beings: Implications for the OSCE, ODIHR Background Paper 1999/3, p 37.

¹⁴¹ Several other documents use the term “trafficking”, but do not include any definition. The 1949 Trafficking Convention even includes the term “trafficking” in its title, without however providing for a definition. Art 6 CEDAW obliges states to take measures to suppress “all forms of traffic in women”, but does not include a definition, either. However, a broad definition not restricted to trafficking for prostitution can be concluded from the wording of Art 6 itself (“*all forms of traffic*”) as well as from the CEDAW Committee General Comment No. 19 on violence against women, which enumerates domestic labour as possible purpose of trafficking.

“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.”¹⁴²

The progressive, modern definition contained in the Trafficking Protocol has several positive aspects reflecting the reality of modern-day trafficking. First, it recognizes all forms of trafficking and does not restrict trafficking to sexual services. It focuses on the conditions of forced labour, servitude, slavery-like practices and slavery, which are defined in international law. Secondly, it does not focus on women and girls exclusively, but recognizes that women, men, girls and boys can all be victims. Thirdly, it does not require that the victim crosses an internationally recognized border, taking into account that persons are also being trafficked from one region to another, within one country.¹⁴³ Fourthly, the Protocol requires some form of distortion of the victim’s free will, e.g. by means of force, deception or the abuse of power, thus respecting the ability of adult persons to make self-determined decisions about their lives, specifically regarding labour and migration choices.

However, it is necessary to note that the terms “exploitation of prostitution” and “sexual exploitation” are not defined in international law and, furthermore, that the Protocol intentionally leaves them undefined. A government may choose to limit its interpretation of these terms to forced participation in the sex-industry (which is consistent with forced labour, slavery, servitude) or rather to interpret these terms to apply to any and all participation in the sex industry.¹⁴⁴ Therefore, while the Protocol can be seen as a step towards the harmonization of definitions, it does not solve the problem entirely.

The UN Special Rapporteur on violence against women had earlier adopted a definition containing essentially the same elements:

“the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons: i) by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority) or debt bondage, for the purpose of: (ii) placing or holding such person, whether for pay or not, in

¹⁴² The text of the protocol and the preparatory documents are available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents/index.htm.

¹⁴³ The UN Convention against Transnational Organized Crime (Crime Convention, UN GA Res A/55/383, 2 November 2000) applies only to crimes that are “transnational in nature” (Art 3) and involve an organized criminal group (three or more persons, Art 4). Therefore, both elements are also a necessary requirement for the application of the Protocol, which supplements the Convention. However “transnational nature of the crime” does not necessarily mean that the border-crossing of the victim is required: a crime is transnational, if it is committed 1) in more than one state, 2) in one state, but a substantial part of its preparation, planning, direction or control takes place in another state, 3) in one state, but it involves an organized criminal group that engages in criminal activities in more than one state, or 4) in one state, but it has substantial effects in another state (Art 3 para 2).

¹⁴⁴ The delegates to the Protocol negotiations expressly agreed not to define “sexual exploitation” and “exploitation of the prostitution of others” and included the following explanation in the *travaux préparatoires* (Sec. 64): “The *travaux préparatoires* should indicate that this Protocol addresses the exploitation of prostitution and other forms of sexual exploitation only in the context of trafficking in persons. The terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the Protocol. The Protocol is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.”

forced labour or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i).”¹⁴⁵

In contrary to the Protocol definition, however, the Special Rapporteur does not use vague terms such as “sexual exploitation” but instead uses terms such as forced-labour or slavery-like practices, which are defined in international human rights instruments.¹⁴⁶

Regional initiatives

A number of anti-trafficking documents that were adopted by the OSCE, the Council of Europe and the EU used narrow definitions of trafficking compared to the new Protocol. Most of them focus only on trafficking in *women* and/or solely for the purpose of *forced prostitution/sexual exploitation*. More recently, they have adopted broader definitions.

The *OSCE 2000 Ministerial Decision of 28 November 2000* addresses the notion of trafficking in *human beings*. In welcoming the UN Protocol’s definition of trafficking, it adopts a broad approach, restricting its scope neither to female victims nor to a specific form of exploitation.

The Council of Europe’s Committee of Ministers in its *Recommendation R (2000) 11* also addresses the problem of trafficking in *human beings*, but restricts its scope to trafficking for the purpose of (undefined) sexual exploitation.

Recent efforts by the EU Commission to introduce a new definition sufficiently broad enough to cover all forms of trafficking resulted in the proposal of a set of two definitions on trafficking, distinguishing between the purpose of (undefined) sexual exploitation and labour exploitation.¹⁴⁷

The proposal of such a broad definition, addressing all forms of trafficking in human beings not only trafficking in *women* for the purpose of “*sexual exploitation*”, is a positive step in the right direction. However, the Commission’s approach nevertheless leaves room for criticism. Instead of adopting the definition of the new UN Trafficking Protocol (which was opened for signatures a few weeks before the Commission adopted its new definition), another pair of definitions was introduced into the debate. Instead of contributing to the necessary aim of harmonization of anti-trafficking legislation, this approach might rather perpetuate the lack of harmonized definitions among EU member states and non-member states. The EU Council has recognized these deficiencies and uses a definition modelled after the UN Protocol in its current draft decision.¹⁴⁸

¹⁴⁵ *Special Rapporteur on violence against women*, Report on trafficking in women, women’s migration and violence against women, E/CN.4/2000/68, 29 February 2000 (Sec. 13), available at <http://www.unhchr.ch/html/menu2/7/b/mwom.htm>. A similar definition, derived from international human rights standards, was elaborated by the *Global Alliance Against Traffic in Women, International Human Rights Law Group* and *Foundation Against Trafficking in Women* and was published in a paper on Human Rights Standards for the Treatment of Trafficked Persons in 1999. The Human Rights Standards provide a useful guideline for a human-rights based approach towards anti-trafficking legislation and policies and are available at <http://www.inet.co.th/org/gaatw/HRSIndex.html> or <http://www.hrlawgroup.org/site/-programs.html>.

¹⁴⁶ See chapter 2.3.

¹⁴⁷ Proposal for a Council Framework Decision on combating trafficking in human beings, COM(2000) 854 final.

¹⁴⁸ Council of the European Union, Proposal for a Council Framework Decision on combating trafficking in human beings, 599/1/01 REV 1 DROIPEN 43 MIGR 41, 21 May 2001 (Art 1).

- **Examples of definitions at the national level**

Some countries, such as *Austria, Cyprus, Germany, Lithuania, the Netherlands, and Poland* have established a distinct offence of trafficking, but restrict the definition to the purpose of prostitution or (undefined) sexual exploitation.

Some countries have established a distinct offence of trafficking in human beings covering all forms of trafficking. The *Belgian Alien Act* for instance defines trafficking as follows:

“whoever contributes, be it directly or through an intermediary, to allowing a foreign national to enter Belgium or reside there and, in so doing,

1. subjects the foreigner, either directly or indirectly, to acts of fraud, violence, threat or any form of coercion,
2. or takes advantage of the foreigner's particularly vulnerable position, occasioned by illegal or provisional status or by pregnancy, illness, infirmity or physical or mental disability.”¹⁴⁹

A new piece of anti-trafficking legislation has been put in place in *Kosovo/FRY* in January 2001. The new law has adopted the definition of the UN Trafficking Protocol.¹⁵⁰

The *US* law also penalizes all forms of trafficking. Although the *US* law distinguishes between the criminal offences of “sex trafficking” and other forms of trafficking, it nevertheless can be mentioned as an example of good practice, because it recognizes that human beings are not only trafficked into forced labour in the sex sector, but also into other forms of labour or services.

Trafficking with respect to peonage, slavery, involuntary servitude, or forced labour: “Whoever knowingly recruits, harbors, transports, provides or obtains by any means, a person for labor or services in violation of this chapter [peonage, slavery, involuntary servitude, or forced labour] (...)”¹⁵¹

Sex trafficking of children or by force, fraud or coercion: “Whoever knowingly

(1) in or affecting interstate commerce, recruits, entices, harbors, transports, provides or obtains by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph 1,

knowing that force, fraud or coercion described in subsection (c) (2) will be used to cause the person to engage in a commercial sex act (...)”¹⁵²

- **Recommendations**

States should establish a distinct offence of trafficking in human beings sufficiently broad to cover all forms of trafficking. The definition of trafficking should include at least the following elements:

- acts: recruitment, transportation, transfer, harbouring or receipt of a person;

¹⁴⁹ Art 77bis Alien Act, introduced by the Law containing provisions to combat trafficking in human beings and child pornography of 13 April 1995. Source: *Council of Europe* Compilation, Volume II, National texts, p 10.

¹⁵⁰ Regulation No. 2001/4 on the Prohibition of Trafficking in Persons in Kosovo, UNMIK/REG/2001/4, 12 January 2001 (Art 1).

¹⁵¹ United States Code (Sec. 1590), as amended by Victims of Trafficking and Violence Protection Act 2000 (Sec. 112).

¹⁵² United States Code (Sec. 1591), as amended by H.R. 3244 ENR (Sec. 112).

- means: threat or use of force or other forms of coercion, of abduction, fraud, deception, abuse of power or a position of vulnerability;
- purpose: forced labour or services, slavery, slavery-like practices or servitude.

4.2 Sanctions

At present, sanctions for trafficking in human beings available in many countries have no deterrent effect upon traffickers because they are too weak. In many instances, the punishment for carrying drugs is much more severe than those for the buying and selling of human beings. The nature and severity of the sentences imposed may influence prosecution efforts, as certain countries, before complying with international requests for information, assistance or extradition, require that the sentence faced by a suspect should be above a threshold set by their domestic law.¹⁵³

- **International and European standards**

United Nations

The *Trafficking Protocol* obliges state parties to establish trafficking in human beings as a criminal offence, but does not provide guidelines for the severity of sanctions.

European Union

The *1997 Council Joint Action* provides for effective, proportionate and dissuasive criminal penalties for trafficking in human beings, which may involve extradition. It also enumerates further penalties and administrative measures such as the confiscation and forfeiture of proceeds and property of the trafficker¹⁵⁴ and the closure of establishments.¹⁵⁵ The necessity of “legislation foreseeing severe sanctions against the serious crime” of trafficking was also addressed by the *Tampere European Council* in October 1999.¹⁵⁶

Currently, a draft *Council Framework Decision on Trafficking in Human Beings* is being discussed at the EU level, which, once adopted, will replace the above-mentioned 1997 Joint Action. The draft Framework Decision includes harmonized maximum custodial penalties for trafficking. As in the Joint Action, the current draft obliges member states to establish “effective, proportionate and dissuasive criminal penalties, which may involve extradition.” Under certain aggravating circumstances, namely if the offence has endangered the victim’s life, has involved particular inhuman or degrading treatment of the victim or has been committed by a criminal organization, the draft provides for a maximum penalty of at least six years (“maximum minimum penalty”).¹⁵⁷

Council of Europe

According to the *Committee of Ministers Recommendation R (2000) 11*, member states should “introduce or increase penal sanctions that are in proportion to the gravity of the offences, including dissuasive custodial sentences [...]”¹⁵⁸

¹⁵³ Committee of Ministers Recommendation R (2000) 11, Explanatory Memorandum, p 21.

¹⁵⁴ See also Committee of Ministers Recommendation R (2000) 11 (Sec. 44).

¹⁵⁵ Joint Action 97/154/JHA (Title II Sec. A (b), (d)).

¹⁵⁶ Tampere European Council, Presidency Conclusions (Sec. 25).

¹⁵⁷ Proposal for a Council Framework Decision, 21 May 2001 (Art 3). The original proposal by the Commission had adopted a two-tier approach: a minimum maximum penalty of six years for normal years and 10 years for aggravated cases (COM (2000) 854 final, 21 December 2000 (Art 4). The Council has not yet reached final agreement on this provision.

¹⁵⁸ Committee of Ministers Recommendation R (2000) 11, Sec. 43.

Organization for Security and Co-operation in Europe

At its 2000 *Supplementary Human Dimension Meeting*, the OSCE also recommended to participating States to introduce legislation allowing for the confiscation of traffickers' earnings and to use confiscated assets to supplement the funding of programmes addressing the needs of victims.¹⁵⁹

• **Examples for criminal sanctions at the national level**

Imprisonment

The recently adopted *Kosovo/FRY* anti-trafficking law provides for a penalty of two to twelve years imprisonment for persons who engage or attempt to engage in trafficking. Under aggravating circumstances, the penalty is two to fifteen years (if the victim is under the age of 18) or five to twenty years (if the perpetrator has organized a group of persons for the purpose of committing trafficking).¹⁶⁰

US legislation sanctions trafficking in human beings with up to 20 years of imprisonment. Under aggravating circumstances, namely if death results from trafficking, if the act includes kidnapping or aggravated sexual abuse or was committed under use of force, fraud or coercion, or if the victim is under the age of 14, imprisonment can be up to life.¹⁶¹

Closure of establishments

In *Belgium*, establishments in which the offence was committed may be closed already during proceedings, if there is evidence that welfare laws were violated on the premises and reasonable grounds to believe that trafficking occurred.¹⁶²

In *Kosovo/FRY*, the investigating judge may order the closure of establishments that are suspected to be involved in or knowingly associated with trafficking.¹⁶³

Confiscation

In *Albania*, criminal law provides for the confiscation of objects used or determined to be used for the commission of a criminal offence, as well as objects, money and other property deriving from the criminal offence or reward provided or promised for its commission.¹⁶⁴

Belgian criminal law allows for the confiscation of objects resulting from trafficking that are in the property of the convicted person.¹⁶⁵ In trafficking cases, confiscation may be enforced even if the objects in question are not within the property of the convicted.¹⁶⁶

According to *German* law, all gains of the accused acquired through illegal actions (or the equivalent sum, if the gain is no longer available) may be confiscated. If the trafficker earned money from or for his criminal action, this money becomes the property of the state, as soon as the judgement is final. This state claim can however not be applied if there are victims of the offence. In such a case, the assets can be secured in the preliminary proceedings to the

¹⁵⁹ OSCE 2000 Supplementary Human Dimension Meeting, Final Report, p 8..

¹⁶⁰ UNMIK/REG/2001/4 (Sec. 2).

¹⁶¹ United States Code (Sec. 1591f), as amended by Trafficking Victims Protection Act 2000 (Sec. 112).

¹⁶² Law of 13 April 1995 (Art 9).

¹⁶³ UNMIK/REG/2001/4 (Sec. 6 para 2).

¹⁶⁴ Criminal Code (Art 36). Source: *OSCE Presence in Albania*, Review of Albanian Legislation on Trafficking, 2 March 2001.

¹⁶⁵ Criminal Code (Art 42).

¹⁶⁶ Criminal Code (Art 382 bis), as amended by the Law of 13 April 1995 (Art 6).

benefit of the victim, as if they were for the state. This means that persons trafficked for forced prostitution may raise a civil law claim against the trafficker for their wages that were forcibly taken away.¹⁶⁷

According to *Kosovo/FRY* law, property used in or resulting from trafficking may be confiscated. The confiscated assets shall be used to contribute to a reparation fund for victims.¹⁶⁸

Loss of rights

Belgian law states that persons who are found guilty of trafficking constituting a habitual activity or an activity by a criminal association shall be sentenced to loss of certain rights, such as, the right to give testimony or the right to hold public offices.¹⁶⁹

Payments to the victims

According to *Cyprus* law, the court may order, in addition to any other sentence, that the accused pays all or part of the expenses which the state has incurred, incurs or can reasonably anticipate to be incurring during the discharge of the state's duty to provide protection and support the victim.¹⁷⁰

• Recommendations

- States should establish and apply sanctions for trafficking in human beings that have a deterrent effect and reflect the serious nature of the crime and the human rights violations involved.
- States should consider the following sanctions: imprisonment, fines, confiscation of assets resulting from trafficking and closure of establishments associated with trafficking.
- Confiscated assets should be used to compensate trafficked persons and then to pay for services to trafficked persons. States should also consider supporting reintegration programmes in the countries of origin with the money derived from confiscation.

4.3 Criminal liability of legal entities

Traffickers sometimes act through legal entities (also called “legal persons”), such as travel agencies, marriage brokers, sex shops, bars, brothels or employment agencies. If there exists no criminal liability of such legal persons, their activities remain without punishment. At the same time, the prosecution of the individual persons involved is not sufficient in order to

¹⁶⁷ Criminal Code (Sec. 73 CC), Code of Criminal Procedure (Sec. 111b para 5). Source: *Johann Podolsky, Karl Zimmermann*, Options in Confiscating Profits of Traffickers in Women, in: *Senatsverwaltung für Arbeit, Berufliche Bildung und Frauen* (ed.), *European Strategies to Prevent and Combat Trafficking in Women*, Proceedings of the International Conference on 25 and 26 November 1998 in Berlin (in the following: *European Strategies*), p 206ff.

¹⁶⁸ UNMIK/REG/2001/4 (Sec. 6 paras 1, 3)

¹⁶⁹ Alien Act (Art 77 bis para 4), as amended by 1 of the Law of 13 April 1995 (Art 1), Criminal Code (Art 31). The Brussels court of first instance has at several occasions sentenced the offenders (even if the association consisted of only two persons) to loss of any civil rights and of the right to run job agencies and massage parlours: *Elvira Niesner, Christina Jones-Pauly*, *Strafverfolgung und Opferschutz bei Menschenhandel, Eine vergleichende Studie der rechtlichen, sozialpolitischen und administrativen Bedingungen bei der Bekämpfung des Menschenhandels in sechs europäischen Staaten*, March 2000, p 32.

¹⁷⁰ Law 3 (1) of 2000 Providing for the special protection of persons being victims of sexual exploitation and related matters (Art 7 para 2). Source: Council of Europe Compilation, Volume II, National texts, p 16ff.

reach the main perpetrators. In such cases these businesses may continue to operate with other persons running them, whereas the individuals are sent to prison. In many cases, it might also be difficult to prove the involvement of individual persons acting for such entities. Further, these entities, and not the individuals acting in their name or collaborating with them, realize the main profits from trafficking. Therefore, the criminal, as well as the civil, liability of such legal entities is important to ensure effective sanctions, including the confiscation of proceeds and just compensation for trafficked persons.

- **International and European standards**

United Nations

The Trafficking Protocol does not provide for the criminal liability of legal persons. The Convention against Transnational Organized Crime (*Crime Convention*) obliges state parties to establish (criminal, civil or administrative) liability of legal persons such as businesses, organizations and associations that are involved in trafficking. In addition, state parties shall also ensure that the physical persons who have committed the offence are liable under criminal law. States are obliged to establish “effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.”¹⁷¹

European Union

The 1997 Council Joint Action obliges EU member states to establish administrative or criminal responsibility for offences committed on behalf of legal entities, without prejudice to the criminal liability of physical persons who have been accomplices or instigators of such offences.¹⁷² The current draft of the Council Framework Decision further provides for the following sanctions on legal persons: fines, exclusion of the entitlement to public benefits or aid, disqualification from the practice of commercial activities, placement under judicial supervision, a judicial winding-up or the closure of establishments which have been used for committing the offence.¹⁷³

Council of Europe

According to the *Committee of Ministers Recommendation R (2000) 11*, member states should provide for the civil and criminal liability of legal persons and establish specific penalties.¹⁷⁴

- **Recommendations**

- States should establish criminal and civil liability of legal entities involved in trafficking in human beings. This should be without prejudice to the liability of the individual persons involved.
- Sanctions against legal entities should include fines, confiscation of assets, closure of establishments, exclusion of the entitlement to public aid or tax benefits, placement under judicial supervision and disqualification from the practice of commercial activities.

¹⁷¹ Crime Convention (Art 10). The Convention is applicable to certain criminal offences (“serious crimes” punishable by a maximum deprivation of liberty; participation in an organized criminal group; laundering of proceeds of crime; corruption; obstruction of justice), if they are transnational in nature and involve an organized criminal group (Art 2, 3, 5, 6, 8, 23).

¹⁷² Joint Action 97/154/JHA (Title II A. (c)).

¹⁷³ Proposal for a Council Framework Decision, 21 May 2001 (Art 6).

¹⁷⁴ Committee of Ministers Recommendation R (2000) 11 (Sec. 46), Explanatory Memorandum to the Recommendation, p 22.

4.4 Criminalization of all activities related to trafficking

To a significant extent, trafficking involves activities of organized groups carrying out different parts of the activities of trafficking, such as recruitment, transportation, accommodation or escort of trafficked persons, or the arrangement of their travel, employment or other formalities. Whereas some of these activities may be punished as trafficking or as acts of organized crime,¹⁷⁵ other acts, such as the arrangement of employment possibilities or the occasional escorting of victims between their accommodation and their work place, may themselves not be sufficient to establish criminal liability for trafficking. This raises the question of criminalizing aiding, abetting, and instigating trafficking, in order to ensure that all actors involved in the process of trafficking are prosecuted.

Further, the criminalization of attempting is crucial in order to ensure that traffickers will be prosecuted, even if the trafficking cycle was not completed. This could be, for instance, the case when the person supposed to receive the victims in the destination country finally does not receive them because they managed to escape or he was arrested by the police in the meantime.

Trafficking can also be committed by the omission to act (or default) by persons who are not actually part of the criminal group, such as a border guard who turns a blind eye to the traffickers passing the border. Criminalization of such acts also needs to be taken into consideration.

Finally, anti-trafficking legislation needs to establish special provisions of criminal laws as necessary to prosecute activities of organized criminal groups.

- **International and European standards**

United Nations

The *Trafficking Protocol* obliges states to establish as criminal offences attempting and participating in acts of trafficking, as well as organizing and directing other persons to commit trafficking in human beings.¹⁷⁶

The *Crime Convention*, as well as the *Trafficking Protocol*, requires state parties to penalize activities of organized criminal groups.¹⁷⁷

European Union

The *1997 Council Joint Action*, as well as the *proposed Council Framework Decision*, obliges states to penalize attempts to commit trafficking as well as several forms of participation (instigation, aiding, abetting).¹⁷⁸

- **Examples of national practice**

A number of countries have established higher penalties in cases where trafficking is committed by an organized criminal group including *Belgium*¹⁷⁹ or *Kosovo/FRY*.¹⁸⁰

¹⁷⁵ See the definition of the *Trafficking Protocol* that encompasses “the recruitment, transportation, transfer, harbouring or receipt of persons.”

¹⁷⁶ *Trafficking Protocol* (Art 5 para 2).

¹⁷⁷ *Crime Convention* (Art 5), *Trafficking Protocol* (Art 5).

¹⁷⁸ 97/154/JHA *Joint Action* (Title II A (b)); See also *Proposal for a Council Framework Decision*, 21 May 2001 (Art 2).

Austria has established conspiracy with, the organization of and participation of organized criminal groups with regard to (among others) trafficking as distinct criminal offences. These provisions can be invoked additionally to the criminal offence of trafficking in human beings.¹⁸¹

- **Recommendations**

- States should establish all activities related to trafficking as criminal offences, such as instigating, aiding, abetting, attempting, omission to act against and conspiracy to traffic.
- States should specifically establish the activities of organized criminal groups involved in trafficking as a criminal offence.
- States should further ensure that trafficking cases involving public officials are prosecuted and involve not only disciplinary consequences, but also sanctions under criminal law.

4.5 Establishment of other criminal offences related to trafficking

Trafficking is often only one of the crimes committed against trafficked persons. Often, they are be subjected to threats, physical and sexual violence or being locked up; their passports are confiscated; they are forced to work without any payment; or they are forced to undergo abortions. Further, in a number of cases, corrupt state officials are involved in trafficking. These acts constitute criminal offences in most countries and could be invoked to address certain elements of the full range of crimes. This could be useful in countries where: a distinct criminal offence of trafficking does not yet exist; where penalties for trafficking do not sufficiently reflect the nature of the crime and do not have any deterrent effect; or in cases where the existing evidence is not sufficient in order to prosecute the suspect for trafficking, but may be sufficient enough to prosecute such cases as bodily injury or rape. It is important to stress, however, that such offences should not replace prosecution for trafficking, but should be invoked additionally or subsidiarily.

- **International and European standards**

United Nations

In appropriate cases, in addition to charging defendants with the crime of trafficking, states should consider to bring charges, which are based on international human rights standards. For example, for the following offences:¹⁸²

- slavery or slavery-like practices, servitude, forced labour,¹⁸³
- debt bondage,¹⁸⁴

¹⁷⁹ Law of 15 December 1980 (Art 77 bis), Art 381 bis Criminal Code, as amended by the by the Law of 13 April 1995. Source: *Council of Europe*, Compilation of the main legal instruments and analytical reports dealing with trafficking in human beings at international, regional and national levels, Volume II, National texts, 2000, p 10.

¹⁸⁰ UNMIK/REG/2001/4 (Sec. 2 para 3).

¹⁸¹ Criminal Code (Sec. 277, 278, 278a), Federal Gazette No. 60/1974, as amended by No. I 112/1997 and No. 34/2000.

¹⁸² This list is taken from the Human Rights Standards for the Treatment of Trafficked Persons by *Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women and International Human Rights Law Group*, 1999, available at <http://www.inet.co.th/org/gaatw/>.

¹⁸³ UDHR (Art 4), ICCPR (Art 8), Slavery Convention (Art 1, 2), Supplementary Slavery Convention (Art 1), ILO Forced Labour Convention No. 29 (Art 1, Art 2 para 1, Art 4 para 1), ILO Abolition of Forced Labour Convention No 105 (Art 1, 2), CRC (Art 32), Migrant Workers Convention (Art 11). See also European Parliament 2000 Resolution (Sec. 6, 8).

- forced marriage, forced abortion, forced pregnancy.¹⁸⁵
- torture, cruel, inhuman or degrading treatment,¹⁸⁶
- rape, sexual and other forms of assault (including bodily injury and murder) and kidnapping.¹⁸⁷

The *Crime Convention* also provides for the incrimination of corruption.¹⁸⁸

Council of Europe

The *ECHR* also contains prohibitions of slavery, servitude, forced labour, torture, cruel, inhuman or degrading treatment.¹⁸⁹

Organization for Security and Co-operation in Europe

The OSCE in its *Proposed Action Plan* also enumerates a number of criminal offences that states should use for the prosecution on traffickers. Besides a number of offences already enumerated in the above-mentioned list, it recommends participating states to prosecute traffickers under laws against unlawful confinement and worker exploitation.¹⁹⁰

• **Examples of national practice**

Establishment of criminal offences

In a number of countries, provisions in the criminal law exist that could be additionally invoked to prosecute trafficking cases:

- forced marriage, e.g. in *Armenia*,¹⁹¹
- forced labour, e.g. in the *United States*,¹⁹²
- withholding of identification papers, e.g. in *Kosovo/FRY*¹⁹³ or the *United States*,¹⁹⁴
- labour exploitation of irregular migrants, e.g. *Austria*.¹⁹⁵

Prosecution of trafficking under all applicable laws

In a case before the *Austrian Provincial Court of Vienna*, a trafficker was sentenced to eight years imprisonment. The court found him not only guilty of trafficking, but also of other criminal offences, including bodily injury, rape, forced abortion, forgery of documents and damage to property. The witness statements by the victims contributed to the result of the proceedings. The two women had been expelled first, but then travelled back to Austria in order to testify at the main hearing. This was made possible because of the co-operation

¹⁸⁴ Supplementary Slavery Convention (Art 1 (a)).

¹⁸⁵ UDHR (Art 16 paras 1, 2), ICESCR (Art 10 para 1), ICCPR (Art 23), CEDAW (Art 16), Supplementary Slavery Convention (Art 1 (c)).

¹⁸⁶ UDHR (Art 5), ICCPR (Art 7), Convention Against Torture (CAT, Art 2, 4), CRC (Art 37a), Migrant Workers Convention (Art 10).

¹⁸⁷ UDHR (Art 3), ICCPR (Art 6), CEDAW (Art 2 (f), 6), CEDAW Committee General Recommendation No 19.

¹⁸⁸ Crime Convention (Art 8).

¹⁸⁹ ECHR (Art 3, 4).

¹⁹⁰ OSCE/ODIHR, Proposed Action Plan 2000, p 10.

¹⁹¹ Criminal Code (Art 118), Source: information provided by the OSCE/ODIHR.

¹⁹² United States Code (Sec. 1591), as amended by Trafficking Victims Protection Act (Sec. 112).

¹⁹³ UNMIK/REG/2001/4 (Sec. 3).

¹⁹⁴ United States Code (Sec. 1592), as amended by Trafficking Victims Protection Act (Sec. 112).

¹⁹⁵ Alien Act (Sec. 105), Federal Gazette No. I 75/1997, as amended by Federal Gazette No. I 34/2000.

between the court and the involved victim support NGOs in Austria (Intervention Centre for Trafficked Women) and in the country of origin.¹⁹⁶

- **Recommendation**

In order to ensure that the penalties applied reflect the gravity of the harm inflicted upon the trafficked person, states should, additionally to prosecuting traffickers under the offence of trafficking in human beings, invoke other applicable provisions of criminal law. Such offences include, but are not limited to the following: slavery, slavery-like practices, involuntary servitude, forced or compulsory labour, debt bondage, forced marriage, forced abortion, forced pregnancy, torture, cruel, inhuman or degrading treatment, rape, sexual assault, bodily injury, murder, kidnapping, unlawful confinement, labour exploitation, withholding of identity papers and corruption.

4.6 Establishment of specialized investigation units

The effectiveness of efforts to investigate and prosecute trafficking cases may be enhanced by the establishment of specially equipped and well-trained units within national police or prosecutor's offices.

- **International and European standards**

Neither the UN Trafficking Protocol nor the Crime Convention oblige states to set up such specialized bodies. At the regional level however, several political documents include relevant recommendations.

European Union

The *European Parliament* in its *1989 Resolution* on trafficking in women recommended member states to create a special police division within their national police forces, if possible to be staffed by women, which should receive the victims complaints and make the initial arrangements for their protection.¹⁹⁷ According to its *2000 Resolution*, member states should also set up or reinforce special anti-trafficking police units.¹⁹⁸

Organization for Security and Co-operation in Europe

The Proposed Action Plan 2000 by the OSCE/ODIHR recommends participating States to develop specialized police and prosecutor units for dealing with suspected trafficking cases. For this purpose, "special training and techniques for identifying and questioning potential victims, investigating and prosecuting criminal networks, and confiscating criminal proceeds should be developed and utilized."¹⁹⁹ At the 2000 Supplementary Human Dimension Meeting on Trafficking in Human Beings, the OSCE stressed the importance of such bodies for the adequate treatment of trafficked persons. Participating States should set up "specialized police and prosecutorial units that are trained to deal with the complexities, gender issues and victim sensitivities involved," and, as a first step, establish specific curricula for police academies.²⁰⁰

¹⁹⁶ Judgement Hv 6306/98, 25 June 1999, quoted from *Angelika Kartusch/Katharina Knaus/Gabriele Reiter, Bekämpfung des Frauenhandels nach internationalem und österreichischem Recht*, December 2000, pp 225-227. The case was also mentioned in *United Nations, Bringing International Human Rights Law Home. Judicial Colloquium on the Domestic Application of the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 2000, pp 186-190.

¹⁹⁷ European Parliament Resolution on the exploitation of prostitution and the traffic in human beings, 14 April 1989 (Sec. 8.2 (h)).

¹⁹⁸ European Parliament 2000 Resolution (Sec. 8).

¹⁹⁹ *OSCE/ODIHR, Proposed Action Plan 2000*, p 10.

²⁰⁰ *OSCE 2000 Supplementary Human Dimension Meeting, Final Report*, p 8.

- **Examples of initiatives at national level**

*Albania*²⁰¹ and *Lithuania*²⁰² have set up specialized police divisions to combat trafficking in human beings.

Belgium has also established a specialized police unit for investigating alleged cases of trafficking.²⁰³

In *Bulgaria*, a special trafficking unit has been established within the directorate of National Border Police Service (NBPS). The tasks of this unit include investigation, gathering of documentary evidence, joint actions and exchange of information with other national and international law enforcement agencies. The NBPS has signed agreements on operative co-operation and information exchange with Romania, Germany and FYROM.²⁰⁴

In the *UK*, a unit within the London Metropolitan Police (Club and Vice Unit, CO 14) conducts investigations on, among others, forced prostitution, trafficking in women and organized crime. The primary concern of the unit's investigation is to ensure the safety of the victims. Its activities are based on a pro-active approach. Investigations are mainly intelligence-led and do not rely on the victim's testimony.²⁰⁵

The *US* established a Worker Exploitation Task Force (WETF) to prevent worker exploitation and to investigate and prosecute cases, many of which are the result of trafficking. The WETF is chaired by the Assistant Attorney General for Civil Rights and the Solicitor of Labor. There are fifteen regional task forces working under the WETF throughout the United States. The WETF operates a toll-free Complaint Line and offers foreign language translation services in most languages.²⁰⁶

- **Recommendations**

- In order to ensure the effective investigation and prosecution of trafficking cases, states should set up specially equipped and trained units within their national police and prosecutor's offices.
- The tasks of such units should include the development and use of effective investigation and prosecution methods, as well as the co-ordination of anti-trafficking activities in co-operation with other national authorities. They should also establish or strengthen co-operation with their counterparts in other countries, as well as relevant regional and international organizations, including Europol and Interpol.
- States should provide these units with sufficient personnel and financial resources, as well as adequate train in order to identify victims of trafficking and to treat them with respect to their special needs.

²⁰¹ Albanian Presentation for the Stability Pact Trafficking Task Force Meeting on 27 April 2001.

²⁰² <http://www.un.org/womenwatch/daw/followup/session/presskit/fs4.htm>.

²⁰³ *Niesner/ Jones-Pauly*, p 29.

²⁰⁴ *Council of Europe*, Proceedings of the International Seminar "Co-ordinated Action Against Trafficking in Human Beings in South Eastern Europe, Athens, 29 June-1 July 2000, EG/ATH (2000) 5, pp 107f, available at <http://www.humanrights.coe.int/equality/Eng/WordDocs/Document%20list.htm>.

²⁰⁵ *Liz Kelly, Linda Regan*, Stopping Traffic: Exploring the extent of, and responses to, trafficking in women for sexual exploitation in the UK, Home Office Policy Research Series Paper 125, 2000, pp 32, 33, 431.

²⁰⁶ More information is available at: <http://www.usdoj.gov/crt/crim/wetf.htm>.

4.7 Extraterritorial jurisdiction

Trafficking in human beings often extends beyond national frontiers. Therefore, extraterritorial jurisdiction (i.e. the possibility of a state to prosecute and try alleged offences that did not take place within its territory) is crucial in order to enable the authorities to prosecute traffickers, as well as to prohibit perpetrators from escaping criminal prosecution in one country by moving their activities to another country.

- **International standards**

United Nations

The *Crime Convention* obliges each state party to establish jurisdiction when the offence is committed in its territory (territoriality principle). Besides, state parties may also establish jurisdiction over offences not committed in their territory (extraterritorial jurisdiction) when the offence is:

- committed against a national of that state party (passive personality principle),
- committed by a national of that state party (active nationality principle),
- a serious crime²⁰⁷ involving an organized criminal group, committed outside its territory with the view to the commission of a serious crime within its territory,
- participation in or attempt to laundering of proceeds of a crime committed outside its territory, with a view to the commission of laundering of proceeds of crime within its territory.²⁰⁸

Regional initiatives by the Council of Europe and the European Union

The Council of Europe Committee of Ministers in its *Recommendation R (2000) 11* also recommended states to establish extraterritorial jurisdiction, irrespective of the country where the offences of trafficking were committed, and including cases where the offences took place in more than one country.²⁰⁹ A similar obligation of EU member states is included in the 1997 Council Joint Action.²¹⁰

- **Examples of national legislation**

According to the *Austrian* Criminal Code, trafficking acts committed abroad can be prosecuted in Austria, if the act has violated Austrian interests (e.g. because the victim is Austrian) or the perpetrator can not be extradited, irrespective of the criminal law of the foreign state where the criminal act was committed.²¹¹

Citizens or non-residents found in *Belgium* who have committed the offence of trafficking outside Belgian territory may be prosecuted in Belgium, even if the Belgian authorities have received no complaint or official note from the foreign authority.²¹²

The criminal law of *Cyprus* states that acts of trafficking committed by any person in any country outside the Republic fall under the jurisdiction of Cyprus criminal courts.²¹³

²⁰⁷ “Serious crimes” are criminal offences punishable by a maximum penalty of at least four years imprisonment (Crime Convention, Art 2 (b)).

²⁰⁸ Crime Convention (Art 15).

²⁰⁹ Committee of Ministers Recommendation R (2000)11 (Sec. 48).

²¹⁰ Council Joint Action 97/154/JHA (Sect. II A (f)).

²¹¹ Criminal Code (Art 64), Federal Gazette No.

²¹² Code of Criminal Procedure (Art 10ter), as amended by the Law of 13 April 1995 (Art 8). Source: Council of Europe Compilation, Volume II, National texts, p 13.

²¹³ Law 3 (1) 2000 (Sec. 15). Source: Council of Europe Compilation, Volume II, National texts, p 42.

- **Recommendations**

- States should exercise jurisdiction over offences of trafficking that are committed in their territory.
- States should also establish jurisdiction if the offence was committed outside their territory, at least in cases, where the offence was committed by or against one of their nationals and in cases of transnational crime, when the act was committed outside the territory, but has effects on their territory.

4.8 Extradition

Due to the transnational nature of the crime, prosecution of trafficking cases is difficult in practice if the suspect is within the jurisdiction of a foreign country. In order to avoid the possibility that traffickers will escape prosecution and operate with impunity by moving their activities to other countries, extradition is an absolute necessity.

- **International and European standards**

States are only obliged to extradite persons within their jurisdiction if an extradition treaty (bilateral or multilateral) exists.²¹⁴ For the European region, the most relevant treaty is the Council of Europe European Convention on Extradition (1957).²¹⁵ Many state parties have additionally concluded bilateral or multilateral agreements, which may supplement the provision of the Convention or facilitate its application, but not restrict the obligations resulting thereof.²¹⁶ Consequently, the extent of a state's obligation under international law to extradite differs from state to state or groups of states, depending on the existence of such additional bilateral agreements.

It is not possible to enumerate and discuss all bilateral extradition treaties between member states of the Stability Pact or of the Council of Europe in the course of this reference guide. The present paper will therefore only provide a brief overview on existing multilateral treaties at the level of UN, Council of Europe and EU. The following section starts with the Council of Europe Convention, which constitutes the main legal basis for states' obligations to extradite within the European region.²¹⁷

Council of Europe

The *European Convention on Extradition* obliges state parties to extradite to each other "all persons against whom the competent authorities of the requesting parties are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order." This obligation applies to offences that are punishable by imprisonment for a maximum period of at least one year under the laws of both, the requesting and the requested state (principle of dual criminality). Extradition is thus not restricted to a list of

²¹⁴ A "Model Treaty on Extradition" can be found at the homepage of the UN Crime and Justice Information Network: <http://www.uncjin.org/Standards/Rules/r17/r17/html>.

²¹⁵ European Convention on Extradition, ETS No. 24, 13 December 1957 (Art 1, Art 2 paras 1, 3, 4). The Convention, which is open also for signature and ratification by non-Council of Europe member states, has been ratified by 41 states, including all Stability Pact countries except Bosnia and Herzegovina and Yugoslavia.

²¹⁶ European Convention on Extradition (Art 28).

²¹⁷ For an analysis of the legal framework of extradition in Europe, including Council of Europe and EU as well as bilateral and other multilateral treaties see *Dominique Poncet, Paul Gully-Hart, The European Approach*, in: *M. Cherif Bassiouni* (ed.), *International Criminal Law. Procedural and Enforcement Mechanisms*, 1999 (277).

offences but encompasses all offences that have exceeded a certain minimum threshold of penalty.²¹⁸

The Convention permits the extradition of nationals. State parties may however refuse extradition of their own nationals, provided they submit the case, at the request of the requesting party, to their competent authorities (obligation *aut dedere, aut iudicare*).²¹⁹

A requested state party may refuse extradition for the following reasons:

- if the offence has been committed in its territory,
- if the offence was committed outside its territory and if its law does not allow for extradition for the offence concerned or for the category of offences if committed outside its territory,
- if its competent authorities are proceeding against the person claimed,
- if its competent authorities have decided either not to institute or to terminate proceedings in respect of the same offence or offences or if, under certain circumstances, a third state has rendered a final judgement against the person concerned (*ne bis in idem*), or
- when the person claimed became immune from prosecution or punishment by lapse of time, according to the law of either the requested or the requesting party.²²⁰

If the requested state party refuses extradition, it has to give reasons for such refusal.²²¹ Requests for extradition shall be in writing and shall be transmitted through the diplomatic channel or the respective Ministries of Justice.²²²

In its *Recommendation R (2000)11*, the Council of Europe Committee of Ministers recommends member states to extradite traffickers in accordance with international standards to the country where evidence of offences has been uncovered.²²³

United Nations

According to Art 16 of the *Crime Convention*, offences covered by the Convention shall deemed to be included in any existing extradition treaty between state parties and shall also be included as extraditable offences in any future extradition treaties between state parties.²²⁴

State parties that make extradition conditional on the existence of an extradition treaty and receive a request from a state with which they have no extradition treaty may consider the convention as legal basis for extradition. If they declare their intention not to consider the Convention as a legal basis for extradition, they shall seek to enter conclude treaties with other State Parties to this Convention in order to implement this Article.”²²⁵ State parties that

²¹⁸ European Convention on Extradition (Art 1, Art 2 para 1). States whose laws do not allow extradition for certain of these offences, may exclude such offences from the application of the Convention if they submit a list of offences to the Council of Europe Secretary General. (Art 2 paras 3, 4). The Convention excludes extradition for political offences and military offences (Art 3, 4). The restriction on fiscal offences was lifted by the Second Additional Protocol to the European Convention on Extradition, ETS No. 98, 17 March 1978 (Art 2). The Protocol has been ratified by all Stability Pact countries except Bosnia-Herzegovina and Yugoslavia.

²¹⁹ European Convention on Extradition (Art 4).

²²⁰ European Convention on Extradition (Art 7 -10).

²²¹ European Convention on Extradition (Art 18 para 2).

²²² European Convention on Extradition (Art 12) as amended by the Second Additional Protocol (Art 5).

²²³ Committee of Ministers Recommendation R (2000)11 (Sec. 47).

²²⁴ Crime Convention (Art 16 para 3).

²²⁵ Crime Convention (Art 16 paras 4, 5)

do not make extradition conditional on the existence of an extradition treaty shall recognize the offences covered as extraditable offences between themselves.²²⁶

The Convention further obliges state parties to expedite extradition procedures and to simplify evidentiary requirements.²²⁷

The Convention also deals with the extradition of a state's own nationals. If states do not extradite an alleged offender solely because she/he is one of their nationals, they shall, upon request of the party seeking extradition, begin an immediate investigation for the purpose of prosecution. In this situation, state parties shall co-operate in particular on procedural and evidentiary aspects to ensure the efficiency of the prosecution.²²⁸

Before a state party refuses a request for extradition, it shall in appropriate cases consult with the requesting state party and provide it with opportunity to present its opinions and to provide relevant information. The *travaux préparatoires* stress that this provision is to be interpreted "in the spirit of full co-operation" and should not affect the obligatory nature of the paragraph.²²⁹

The Convention further states that state parties shall "seek to conclude bilateral and multilateral agreements (...) to carry out or to enhance the effectiveness of extradition."²³⁰

European Union

In 1996, EU member states adopted the *Convention Relating to Extradition between the Member States of the European Union*, which has not yet entered into force.²³¹ It supplements the Council of Europe Convention and lowers the threshold for extraditable offences. Extradition shall be granted for acts punishable under the law of the requesting state by imprisonment of at least one year, whereas it is sufficient for the law of the requested state to provide for imprisonment of at least six months. Further, it provides an exception of the principle of dual criminality because if extradition is requested for an offence classified as conspiracy or activities of an association to commit offences of a sufficiently serious nature, extradition may not be refused by the requested states on grounds that these offences are not punishable under its laws. This requires that "the intention of the conspiracy or association must be to commit terrorist acts (...) or offences which are considered to be particularly serious, such as offences directed against the life, physical integrity or liberty of a person, or creating a collective danger for persons (for instance, drug trafficking and other forms of organized crime or other acts of violence)."²³² Once entered into force, this provision will be relevant for extradition for trafficking in human beings between EU member states, as such cases fall under the scope of this exception. The Convention further states that extradition may not be refused on grounds that the person claimed is a national of the requested state party. States may however declare reservations to this rule. Finally, the Convention obliges

²²⁶ Crime Convention (Art 16 para 6).

²²⁷ Crime Convention (Art 16 para 8).

²²⁸ Crime Convention (Art 16 para 10).

²²⁹ Crime Convention (Art 16 para 16), *travaux préparatoires* (Sec. 35).

²³⁰ Crime Convention (Art 16 para 17).

²³¹ Convention Relating to Extradition between the Member States of the European Union, 27 September 1996, Official Journal C 313, 23 October 1996. Another EU Convention which was signed on 10 March 1996 relates to extradition procedures and establishes a simplified procedure if the person concerned consents to her/his surrender. The Schengen Convention of 19 June 1990 also contains provisions on extradition. Source: *Ponce, Gully-Hart*, p 281f.

²³² *Poncet, Gully-Hart*, p 280.

member states to designate authorities responsible for transmitting and receiving extradition requests.²³³

The *1997 Council Joint Action* obliges member states to establish criminal sanctions for trafficking, “which may include extradition.”²³⁴ The current draft of the *Council Framework Decision on trafficking in human beings* obliges each member state who does not extradite its own nationals, to establish jurisdiction and prosecute, “where appropriate”, cases of trafficking committed by its own nationals outside its own territory.²³⁵

- **Recommendations**

- If they have not yet done so, states should ratify the European Convention on Extradition and the UN Crime Convention. Additionally, they should conclude bilateral agreements in order to facilitate extradition in cases of trafficking in human beings.
- States should ensure that its competent authorities apply such extradition treaties in practice and that suspected traffickers are extradited to the country where evidence of an alleged offence has been uncovered. They should undertake measures to expedite extradition procedures, including the establishment or designation of authorities responsible for transmitting and receiving extradition requests.
- States should also consider extradition of their own nationals. When a state refuses extradition of its own nationals, it should immediately submit the case to its competent authorities for investigation and prosecution.

4.9 International co-operation

Due to the trans-border nature of trafficking, criminal prosecution of traffickers can not solely take place at the national level, but requires bi- and multilateral co-operation among relevant national law enforcement authorities and also between national authorities and international organizations such as Europol or Interpol. Law enforcement co-operation covers several aspects, such as information exchange, training of law enforcement authorities, mutual legal assistance (e.g. by taking evidence or statements from persons or providing copies of relevant documents), and joint investigations. Such activities are based on multilateral or bilateral treaties. As the main focus of this reference guide lies however with national legislative review, the present will not provide guidelines for this kind of international co-operation. Nevertheless, cross-border co-operation is a crucial aspect of anti-trafficking measures that deserves further elaboration.

²³³ Source: <http://europa.eu.int/scadplus/leg/en/lvb/14015b.htm>.

²³⁴ Joint Action 97/154/JHA (Sect. II A (d)).

²³⁵ Proposal for a Council Framework Decision, 21 May 2001 (Art 6 para 3).

5 Protection and assistance

In order to be effective, anti-trafficking policies must not be restricted to criminal prosecution of traffickers, but should be based on a comprehensive approach that includes protecting the rights of trafficked persons. This involves a broad range of measures that are interrelated.

During their stay in countries of destination, victims of trafficking need basic assistance including medical care, safe accommodation, psychological and legal counselling. They can however access such mechanisms only provided they have a legal residence status for a certain period of time and are not criminalized because of their irregular residence and employment status. Both, assistance mechanisms and a regular residence status, contribute to the psychological and physical stabilization of trafficked persons. This process is supported if they have access to employment and education in the destination country that also reduces their risks of being re-trafficked. Such stabilization enables trafficked persons to regain control over their lives and to decide on whether to testify against the traffickers and, therefore, is also an important prerequisite for their access to legal redress. Their readiness to co-operate with the authorities further depends on their sense of well being, including their physical safety. Adequate assistance to and protection of trafficked persons also involves their status in legal proceedings. Trafficked persons need to receive assistance and information about their rights, including the right to claim compensation. They need adequate treatment and support in order to avoid re-traumatization. In case victims of trafficking themselves are criminally prosecuted in the country of destination or in their country of origin upon return home, mechanisms are necessary to ensure that their right to a fair trial is protected.

Finally, protection of rights and assistance are important not only while victims are staying in the country of destination, but also as they may transit other countries during repatriation and upon return to their country of origin. The provision of medical care, psychological and legal counselling, as well as vocational training programmes not only facilitates their reintegration but also prevents them from taking the same risks to find work again.

Governments have committed themselves to undertake measures for the effective protection of and assistance to victims of crimes in general and victims of trafficking in particular involving all the aspects mentioned above. These commitments will be discussed in the following sections 5.1 to 5.9.

5.1 General principles for assistance to and protection of trafficked persons

According to Art 2 *ICCPR*, states are obliged to respect and ensure to all individuals within their territories the rights recognized in the Covenant. States have to comply with this obligation without any distinction based on race, gender, language, national or social origin or other status. With regard to trafficking, states are, in particular, obliged to guarantee the right of persons to be free from cruel, inhuman or degrading treatment under Art 7 and the right to be free from slavery, slave-trade, servitude and forced labour under Art 8 *ICCPR*. This duty encompasses human rights violations by both state and private actors.

States are further required to adopt such legislative or other measures that are necessary to give effect to the rights recognized in the *ICCPR*. States shall ensure that any person whose rights under the *ICCPR* are violated have an “effective remedy” and that such remedies are

enforced. The term “effective remedy” includes criminal investigations and prosecution, as well as compensation and other civil remedies.²³⁶

This legally binding provision requires states to respect, ensure and give effect to the rights of trafficked persons to be free from cruel, inhuman or degrading treatment, as well as from slavery, slave-trade, servitude and forced labour. States are obliged to investigate and prosecute cases of trafficking and to provide trafficked persons with access to compensation.

The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* outlines a catalogue of basic principles for victims of crime regarding access to justice and fair treatment, restitution, compensation and assistance (see below, sections 5.5, 5.6 and 5.8).²³⁷ This Declaration “was adopted by consensus in the General Assembly in 1985, and thus reflects the collective will of the international community to restore the balance between the fundamental rights of suspects and offenders, and the rights and interests of victims. ... [It] is based on the philosophy that victims should be adequately recognized and treated with respect for their dignity.”²³⁸ The Declaration defines victims as:

“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”

This definition also includes trafficked persons who often suffer all of the consequences mentioned above.²³⁹

A person may be considered a victim according to this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted. Where appropriate, the term “victim” also includes immediate family members or dependants of the victim as well as “persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”, such as NGOs. The provisions contained shall be applicable to all persons, without distinction of any kind, such as race, colour, gender, language, nationality, birth or family status, ethnic or social origin.²⁴⁰

According to these internationally recognized principles, the provision of adequate support to the victim should not depend on the identification or prosecution of the perpetrator. This indicates that trafficked persons should receive assistance because of their status as victims, and not only as a reward for contributing to the prosecution of the traffickers. Trafficked persons should be treated as victims of crime and should not be deprived of their rights because of their irregular status. Further, assistance protection mechanisms should also protect close family members and staff of victim support NGOs.

²³⁶ *Manfred Nowak*, UNO-Pakt über bürgerliche und politische Rechte. CCPR Kommentar, 1989, p 69.

²³⁷ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34, 29 November 1985.

²³⁸ *UN Office for Drug Control and Crime Prevention/Centre for International Crime Prevention*, Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1999, p 1, available at <http://www.uncjin.org/Standards/standards.html>.

²³⁹ This is also valid, if a state has not established trafficking as a separate offence (arg.: “in violation of criminal laws”) because the violations trafficked persons suffer are usually punishable under a number of offences of criminal law, such as bodily injury, illegal confinement or rape (see chapter 4.5).

²⁴⁰ Declaration of Basic Principles (Sec. 2, 3).

Council of Europe

Similarly to the ICCPR, Art 13 *ECHR* states that persons whose rights under the Convention are violated shall have “an effective remedy before a national authority.” Trafficking may involve violations of the right of persons to be free from inhuman or degrading treatment under Art 3 and to be free from slavery, servitude and forced labour under Art 4 *ECHR*. According to Art 14 *ECHR*, the rights set forth in the Convention shall be secured without discrimination on any grounds, such as sex, race, language, national or social origin, or other status.

The Committee of Ministers in its *Recommendation R (2000) 11* calls upon member states to

“take appropriate legislative and practical measures to ensure the protection of the rights and interests of the victims of trafficking, in particular the most vulnerable and most affected groups: women, adolescents and children” and to “give absolute priority to assisting the victims of trafficking through rehabilitation programmes, where applicable, and to protecting from traffickers.”²⁴¹

5.2 Residence status of trafficked persons

Trafficked persons very often do not have a regular residence status in the country of destination, either because they arrived without a residence permit, or because their residence permit has expired. Therefore, they are likely to be expelled if they report cases to the police or, if in the course of an investigation, they are found by the police. As a consequence, trafficked persons are prevented from having access to assistance and protection, as well as from access to justice, including civil compensation. The expulsion of trafficked persons also means that there are no witnesses available for the prosecution of the traffickers. Therefore, the regular residence status of trafficked persons not only enables them to have their rights protected but may also serve the states’ interest in effective criminal prosecution.²⁴²

Destination countries are often unwilling to provide trafficked persons with a legal residence status. At the same time, a regular residence status is a necessary precondition of any effective victim protection strategy. Therefore, this section extensively deals with the preconditions and elements of a regular residence status for trafficked persons in the countries of destination.

Residence permits for trafficked persons, often referred to as “humanitarian residence permits,” may be issued either on a temporary or permanent basis. In adequate cases, the granting of asylum should also be taken into consideration.

5.2.1 Residence permits

- **International and European standards**

United Nations

Art 7 *ICCPR* prohibits the expulsion of a person to a country where she/he faces a real risk of being subjected to torture or to inhuman or degrading treatment (principle of non-refoulement).²⁴³ This Article does not apply solely to acts that can be attributed to state actors, but also to acts committed by private individuals (“horizontal effect”). If a state expels a

²⁴¹ Committee of Ministers Recommendation R (2000) 11 (Art 3, 4).

²⁴² Nevertheless, trafficked persons should not be generally excluded from receiving residence permits solely because they are not willing or not able to testify. This was also recognized by the UN Trafficking Protocol and a number of regional politically binding documents.

²⁴³ See also CAT (Art 3), Convention on the Status of Refugees (Art 33).

person who faces the risk of being subjected to torture or to inhuman or degrading treatment, the state itself violates Art 7.²⁴⁴ Consequently, states are obliged not to expel a trafficked person if there is evidence that upon return to their home country their life might be endangered by violent acts.

Art 7 *Trafficking Protocol* mentions, but does not oblige state parties to provide, a regular residence status of trafficked persons in the countries of destination. It merely obliges each party to “consider adopting legislative or other appropriate measures” that permit trafficked persons “to remain in its territory, temporarily or permanently, in appropriate cases.” When considering whether to provide lawful status, states shall give “appropriate consideration to humanitarian and compassionate factors.”²⁴⁵

This provision applies to “victims of trafficking in persons” and does not explicitly require a witness’ statement from the person concerned. However, the clause “in appropriate cases” leaves discretion up to the state to make the protection of a trafficked person dependent on their willingness or ability to *testify*, rather than on their *need* for protection. It also recognizes that humanitarian factors may require a permanent residence status for a trafficked person, but does not determine the criteria for when states should provide trafficked persons with a permanent residence status or what should be understood by “humanitarian and compassionate factors”.

The *Migrant Workers Convention* obliges states parties, if there are undocumented migrant workers within their territories, to take appropriate measures “to ensure that such a situation does not persist” (Art 69 para 1). Paragraph 2 states that:

“whenever State Parties consider the possibility to legalize the situation of such persons in accordance with national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.”

Read together with paragraph 2, the obligation entailed in Art 69 para 1 could be interpreted as not only including expulsions as means to ensure that the irregular status of migrants do not persist, but also providing for the legalization of the status of irregular migrant workers through the provision of a humanitarian residence permit. This provision is therefore also relevant for trafficked persons.

These documents provide a basis for the prohibition of expulsion of trafficked persons and for the issuing of residence permits. They neither specify the length of the legal residence status in the country of destination nor do they determine under which circumstances states should provide trafficked persons with a permanent residence status. The following overview on politically binding documents by the Council of Europe, the EU and the OSCE will further address these open questions.

Council of Europe

The non-refoulement principle is also established in Art 3 *ECHR* (right to be free from torture, inhuman or degrading treatment). In the case *Ahmed v Austria*, for example, the European Court of Human Rights held that state parties to the Convention are obliged not to expel an alien, “where substantial grounds have been shown for believing that the person in

²⁴⁴ Nowak, p 137.

²⁴⁵ Trafficking Protocol (Art 7).

question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.”²⁴⁶ This obligation is valid irrespective of the person’s conduct, “however undesirable or dangerous” the activities of the individual in question are (in the *Ahmed* case, the applicant had lost his refugee status granted by Austria because of criminal activities and therefore should have been expelled).²⁴⁷ The court further stated that “in order to assess the risks in the case of an expulsion that has not yet taken place, the material point in time must be that of the Court’s consideration of the case” and affirmed the existence of such risks, because at the time of its judgement, “there was no indication that the dangers to which the applicant would have been exposed in 1992 had ceased to exist or that any public authority would be able to protect him.”²⁴⁸

As Art 7 ICCPR, Art 3 ECHR obliges states not to expel trafficked person if there is evidence that upon return to their home country their life might be endangered by violent acts by the traffickers.

In its *Recommendation R (2000) 11*, the Council of Europe recommends member states to grant victims “a temporary residence status in the country of destination (...) in order to enable them to act as witnesses during judicial proceedings against offenders.” The Council of Europe also stresses that during this period of residence, victims should have access to social and medical assistance (see chapter 5.4).²⁴⁹ This provision establishes a link between the residence status of the victim and her/his readiness to provide a witness statement. Because of the wording “enable”, one could however interpret the residence status as a precondition to encourage trafficked persons to co-operate with the authorities, rather than as a kind of “reward” for their readiness to do so. This implies that states should provide victims with a legal residence status in order to ensure them some degree of stability and safety that could be the basis for their decision to give a witness statement, instead of making the residence status dependent on their willingness or readiness to testify.

This provision only deals with the residence status of victims “during legal proceedings”.²⁵⁰ Therefore, trafficked persons will lose this protection when legal proceedings are finished. The term “legal proceedings” is however not restricted to the criminal proceedings against the trafficker, but may encompass also administrative or civil proceedings connected with the trafficking case.

Member states should further consider providing the “more protective status” of a temporary residence status on humanitarian grounds, if necessary:

“This may be necessary for example in cases when the victim has been threatened by the offenders (before, during or after the criminal proceedings) and when her/his life or her/his family’s are in danger in case of return in the country of origin.”²⁵¹

²⁴⁶ *Ahmed versus Austria*, Judgement of 17 December 1996, Application no. 25964/94 (para 39).

²⁴⁷ *Ahmed versus Austria* (paras 40f).

²⁴⁸ *Ahmed versus Austria* (para 44)

²⁴⁹ Committee of Ministers Recommendation R (2000) 11 (Art 34). The recommendation is formulated vaguely, restricting the recommendation to grant such permits by the phrase “if necessary, and in accordance with national legislation”. It is not difficult to argue that a legal residence status is in fact “necessary” in order to enable the victim to access justice and assistance facilities. However, the second part of the phrase referring to national legislation leaves it up to the states’ discretion if they wish to change their legislation or not, therefore can not be regarded as encouraging states to enact the necessary legal amendments.

²⁵⁰ Committee of Ministers Recommendation R (2000) 11, Explanatory Memorandum to the Recommendation, p 19.

²⁵¹ Committee of Ministers Recommendation R (2000) 11 (Art 35), Explanatory Memorandum to the Recommendation, p 19.

This humanitarian residence permit does not depend on a witness testimony, but reflects the victim's need for protection which indeed should be regarded independently from her/his willingness or ability to testify.

European Union

The *1997 Council Joint Action* obliges member states to ensure that for the purpose of witness protection and victim assistance, "victims are available where required by the member states criminal justice system to give evidence in any criminal action, which may entail provisional residence status in appropriate cases."²⁵² This provision reduces the residence status and protection of the victim to her/his testimony in the proceedings against the trafficker. It also gives discretion to states to choose the means to ensure the availability of witnesses. Such means may, but need not include a regular residence status. States could for instance also provide a stay of deportation, which however means a lower level of protection and stability for the trafficked persons.

Several resolutions by the *European Parliament* deal with the residence status of trafficked persons in the countries of destination. In its *1989 Resolution*, the Parliament recommends member states to legalize the residence situation of victims within their national territory, especially if they have no relatives or if there is evidence that repatriation could endanger their personal safety or that they might become re-trafficked.²⁵³ The 1993 Resolution states that witnesses should have the right to protection and residence, but also that victims should be allowed to remain in the territory of the destination country, especially when their repatriation might pose a threat to their personal safety or expose them to renewed exploitation.²⁵⁴ In its *1996 Resolution*, the Parliament calls upon members states to grant victims temporary residence permits for humanitarian reasons in cases where the traffickers are reported to the police. If repatriation could seriously endanger the lives of victims and make them vulnerable to further exploitation, member states are urged to allow the victims to remain on their territory.²⁵⁵ According to the *2000 Resolution*, member states should introduce temporary residence permits regardless of whether or not the victims wish to testify, as well as special permanent residence permits on humanitarian grounds. Approved NGOs assisting victims of trafficking should be authorized to give their opinion on whether or not residence permits should be issued.²⁵⁶

Contrary to the Council's Joint Action, most European Parliament Resolutions recommend a legal residence status for trafficked persons independently from their readiness to testify. Further, the residence status should be extended if the victim would face security risks upon return to her/his home country. Another important element addressed by the most recent Resolution is the inclusion of NGOs in the decision-making process with regard to issuing residence permits.

The *Hague Ministerial Declaration* also recommends the introduction of a temporary residence status for victims during criminal proceedings. During this time, they should have access to social, medical, financial and legal assistance. This provision is included in the chapter "Measures to encourage and assist victims to report to the police and to act as witnesses." From this title, as well as from the wording "provide (...) a *residence status in*

²⁵² Joint Action 97/154JHA (Sect. II F. (b) (ii)).

²⁵³ 1989 European Parliament Resolution (Sec. 8.2. (g)).

²⁵⁴ European Parliament Resolution on trade in women, 16 September 1993 (Sect. 10 (a)).

²⁵⁵ European Parliament 1996 Resolution (Art 25, 27).

²⁵⁶ European Parliament 2000 Resolution (Sec. 21).

order to enable women to make a complaint to the police and to be available [as witnesses],” one may conclude that the Declaration regards the residence status as a necessary precondition to encourage victims to co-operate with the authorities, and not as a kind of reward for their readiness to do so. This means that trafficked persons should be granted legal residence status in order to enable them to consider giving testimony, instead of having to testify in order to be granted a legal residence status.²⁵⁷ EU member states also committed themselves to provide legal residence status on humanitarian grounds.²⁵⁸

Organization for Security and Co-operation in Europe

The OSCE *Ministerial Council* declared in its *Decision of 28 November 2000* that it “will consider adopting legislative and other measures, such as shelters, which permit victims to remain in their territories, temporarily or permanently, in appropriate cases.”²⁵⁹ This provision opts for a residence status for trafficked persons because of their status as victims and does not require a witness statement by the person concerned.

Other OSCE documents entail more detailed recommendations on the residence status of trafficked persons. The ODIHR’s *Proposed Action Plan 2000* recommends to OSCE participating states that are transit or destination countries to provide a residence permit or stay of deportation to all victims of trafficking to enable them to receive appropriate assistance and care. “Permits should be extended if the trafficked person co-operates with law enforcement or if she would be endangered by repatriation.”²⁶⁰ This recommendation suggests a basic level of protection for all trafficked persons, regardless of their readiness to testify. Whereas this recommendation recognizes the victim’s need of protection as the main factor relevant for her/his residence status, it also grants extra benefits to persons who co-operate with the authorities (this does not necessarily mean testimony) or who could face security risks upon their return home.

- **Examples of legislation at the national level**

Some countries have introduced residence permits for trafficked persons using different approaches. Selected approaches will be presented in the following examples from national practice.

However, not all countries that have introduced residence permits provide adequate protections to all persons who are trafficked. If the country restricts its definition of trafficking to the purpose of forced prostitution or to a crime to which only women are victims, females trafficked for other purposes or males who are trafficked are excluded from the residence permit provision, as well as all other legal protection and assistance. This example shows the practical relevance of the scope of definitions of trafficking (see chapter 3.1).

²⁵⁷ At the same time this recommendation is weakened by the phrase “if compatible with national law”. The Hague Ministerial Declaration (Chapter III.2.1).

²⁵⁸ Hague Ministerial Declaration (Chapter III.3.3)

²⁵⁹ Ministerial Decision of 28 November 2000 (Art 10).

²⁶⁰ *OSCE/ODIHR, Proposed Action Plan 2000*, p 10. A similar recommendation was issued to member states at the 2000 Supplementary Human Dimension Meeting. Regardless of the victim’s willingness to testify, states should provide temporary or permanent residence permits, at least at the first stage of the criminal proceedings. The victim should have access to the labour market during her/his stay in the destination country (Final Report, p.8). See also chapter 5.4.

In *Germany*, trafficked persons²⁶¹ have four weeks time to consider whether to press charges against traffickers. If they decide to do so, they are granted a stay of deportation for the length of the criminal proceedings against the trafficker and may participate in an assistance and protection programme. They also have access to the labour market. If law enforcement officials suspect that they are dealing with a victim of trafficking, they have to refer her/him to a specialized victim support organization. Witnesses who participate in such a programme receive police protection. Victim support NGOs provide them with accommodation and psychological counselling, they arrange access to medical treatment and vocational training programmes. They may accompany the victim during interrogations. The decision whether the person is accepted for the programme is made by the police, which shall consult with the relevant NGOs.²⁶²

In the *Netherlands*, persons who are suspected of being trafficked have three months time to consider whether they want to press charges against the trafficker.²⁶³ If they do, they are entitled to stay in the Netherlands as long as the proceedings last. Otherwise, they are obliged to leave the country. During their stay in the Netherlands, they are offered financial, legal and psychosocial assistance by social service institutions. Further, victims have to leave the country after the criminal proceedings are terminated. In theory it would be possible to obtain a long-term residence permit, but in practice this is very rarely applied.²⁶⁴

The *Belgian* law provides for residence permits for trafficked persons who are willing to co-operate with the Belgian authorities.²⁶⁵ The procedure consists of three stages. If police or social inspection services who have good reason to believe that they are dealing with a victim of trafficking, they shall ensure that the person is taken in by a victim support centre. If they are not certain if the person concerned is a victim of trafficking, they are obliged to consult with a victim support centre and to give it the opportunity to establish contact with the person. Authorities are further obliged to give a suspected trafficked person an information leaflet about the support centres.

In the first stage, the person concerned is granted a legal residence status for 45 days to consider whether s/he wants to press charges against the trafficker. Within this period, she/he should be enabled to receive counselling from the victim support centre and to recover mental stability. If the person refuses to co-operate with the authorities, she/he is obliged to leave the country after the 45 days. In case she/he reports to the authorities, she/he receives another permit for 3 months that may be renewed (stage 2). If the prosecutor's office during stage 2 decides to uphold the complaint, the person receives another permit for 6 months, which is

²⁶¹ German law restricts its definition of trafficking to the purpose of prostitution (Criminal Code, Sec. 180f).

²⁶² Alien Act (Sec. 55 para 3); *Bundesministerium für Arbeit und Sozialordnung*, Decree No.Iia7-51/45, 29 May 2001.

²⁶³ As Dutch criminal law restricts the definition of trafficking to the purpose of prostitution, persons trafficked for other purposes do not have the possibility to obtain a residence permit (Art 250 of the Criminal Code. Source: The Stability Pact legislation online, <http://www.legislationline.org/>.

²⁶⁴ *Hanka Mongard*, Legislation in the Netherlands Concerning Prostitution and Trafficking in Women. Development of Professional Strategies to Combat Trafficking in Women, in: *European Strategies*, p 31ff.

²⁶⁵ Belgian law has a broad definition of trafficking which is not restricted to a specific purpose of trafficking (see chapter 4.1). The information on Belgium in this chapter is based on *Ministry of Justice, Ministry of the Interior, Ministry of Employment, and Ministry of Social Affairs, Health and Environment*, Instructions to the Foreigners Department, the prosecuting authorities, the police and the social law inspection services concerning assistance to victims of human trafficking, January 1997 (Council of Europe Compilation, Volume II, National texts, p 19ff).

renewable (stage 3).²⁶⁶ Trafficked persons may receive a permanent residence permit, if the information provided to the authorities was significant in bringing the case to court.²⁶⁷

Trafficked persons may only receive a residence permit if they are assisted by an approved victim support organization. In Belgium, there exist three approved NGOs that are funded by the government (Pag-asa, Payoke and Sürya) and the activities of which are co-ordinated by the Centre for Equal Opportunities and Action against Racism. These organizations are entitled to request the permit for the person concerned. Payoke is authorized to pay social support to trafficked women and is then reimbursed by the Ministry for Health.²⁶⁸

From stage 1 on, trafficked persons are entitled to social benefits. During stages 2 and 3, they may also be granted a working permit.²⁶⁹

In *Italy*, a residence permit for the purpose of social protection may be granted to trafficked persons if during police operations, criminal proceedings or aid interventions of public social services it becomes clear that the person concerned live under conditions of violence or in a situation of severe exploitation and that her/his life is endangered because she/he has tried to escape from these conditions or because she/he has made declarations during preliminary inquiries or during the proceeding. The Public Prosecutor, public social services or and NGO may apply for the permit on the victim's behalf. It is issued for a period of six months and can be renewed for one year or longer if required by justice reasons. During this period, trafficked persons have access to social reintegration programmes (including Italian language courses, psychological aid, vocational and professional training), health insurance, unemployment benefits, as well as access to the labour market. The government has also established a toll-free telephone line providing information to trafficked persons. The Italian law also allows for a longer-term residence perspective. If trafficked persons have a job at the time the residence permit expires, this permit will be extended for the duration of the labour relationship. The

²⁶⁶ The permit issued in stage 3 depends on the decision by the prosecutor handling the complaint. In practice, this process is very slow, and trafficked persons have to renew their stage 2 permit every 2 months. This results in instability for the victim, but also insecurity for the organization providing support (*Veronique Grossi, Measures to prevent and combat trafficking in Belgium, European Strategies, p 108*). See also *Niesner/Jones-Pauly, p 38ff*.

²⁶⁷ In practice, permanent residence permit are issued only, if the trial ends with a conviction of the accused. If the proceedings are abandoned, such a permit is only issued in exceptional cases. Another critical point is that the person (*Niesner/Jones-Pauly, p 47f*).

²⁶⁸ Such social support may be granted to trafficked persons who have no means of support and receive no financial assistance from elsewhere. Payoke refers such cases to the Health Ministry and after approval, pays the money directly to the victim. According to Payoke, applications for support to the Ministry are mostly successful. In 1996 however the reimbursement process was so slow and caused Payoke financial difficulties. (*Grossi, European Strategies, p 102*).

²⁶⁹ According to Payoke, the legal regime for residence permits negatively affects the possibilities of trafficked persons to work. Stage 2 residence permits can be issued for a period of maximum three months (in practice, they are issued for 2 months). Consequently, the work permit is also restricted to this period of time. Although the permits can be renewed, many employers are scared of by this short-term perspective. (*Grossi, European Strategies, p 108ff, Niesner/Jones-Pauly, p 42.*)

residence permit may be withdrawn if the person breaks off the social integration programme.²⁷⁰

Unlike the Belgian and the Dutch systems, the Italian law does not make the residence permit dependent upon the victim's readiness to testify, but upon her/his need for protection. Another advantage is that it is possible to extend the residence status if the person finds a job.

Under the new US anti-trafficking law, victims of trafficking²⁷¹ may receive a so-called T visa, if they (1) comply with any reasonable request for assistance in the investigation or prosecution of the traffickers (this is not required if the person is younger than 15 years) and (2) would suffer extreme hardship involving unusual and severe harm upon removal from the US. The length of the visa will be set by regulations but will probably be for at least three years, when T visa holders could then apply for permanent residence. If the Attorney General considers it necessary to avoid extreme hardship, such a visa may also be granted to the victim's children and spouse and, if the victim is younger than 21, to her/his parents. T visa holders may apply for permanent residence status, if they (1) have been physically present in the US for a continuous period of at least three years (since the date of receiving the T visa), (2) have been a person of "good moral character" during that period, and (3) have complied with any reasonable request for assistance in the investigation or prosecution or would suffer extreme hardship involving unusual and severe harm upon removal from the US.²⁷² The number of both, T visas and permanent visas, are both limited to 5000 per year (this numerical limitation does not apply to family members).

The T visa requires both, compliance with a "reasonable request for assistance" and extreme hardship, whereas permanent residence requires only one or the other. This reflects the dual nature of the visa. Its purpose is not just to aid the prosecution, but also to protect the trafficked victim. A request for assistance would, in all probability, not be "reasonable" if the government did not protect the victim's physical security. In such a case, the trafficked person would not need to co-operate with the authorities in order to receive a T-visa, because the request would be "unreasonable".²⁷³

The law obliges law enforcement officials to refer trafficked persons to an NGO advising the alien regarding her/his options within the US and resources available to her/him. Trafficked persons shall be detained in facilities appropriate to their status as crime victims and shall receive necessary medical care and other assistance. T visa holders get work authorization and assistance on the same basis as refugees.²⁷⁴

²⁷⁰ Alien Act (Art 18), as amended by Law No. 40, 6 March 1998 (Art 16), Memorandum on traffic in human beings, in: Council of Europe Compilation, Volume II, National texts, p 68. Italian law does not have a distinct crime of trafficking in human beings (trafficking cases may be prosecuted under provisions on slavery and pimping). Consequently, the law on residence permits applies not to victims of "trafficking" as such, but to victims of 1) a) crimes under the law of the exploitation of the prostitution of others or b) certain crimes under the criminal procedural code, if during police operations or court proceedings in such cases it becomes clear that a foreign citizen is subjected to a violence or exploitation and that her/his life is endangered, or 2) without reference to a specific crime, cases where social services come across a foreign citizen who lives in such a situation. Therefore, the humanitarian residence permit encompasses, but is not restricted to cases of trafficking according to the Trafficking Protocol. Persons who were trafficked into other forms of forced labour than forced prostitution may also receive such a residence permit (they would be in the second category mentioned above).

²⁷¹ The US law has a broad definition of trafficking which is not restricted to a specific purpose of trafficking.

²⁷² Immigration and Nationality Act (Sec. 101 (a) (15) (T)), as amended by the Trafficking Victims Protection Act (Sec. 107 (e) (1)) Trafficking Victims Protection Act (Sect. 107 (f)).

²⁷³ According to the *Initiative Against Trafficking in Persons* at the *International Human Rights Law Group*, a US-based NGO.

²⁷⁴ Trafficking Victims Protection Act (Sec. 107 (b) (1), 107 (e) (4), 107 (c) (1)).

The *Kosovo/FRY* trafficking regulation does not introduce a residence permit for trafficked persons. It states however that a “conviction for prostitution or a conviction for illegal entry, presence or work in Kosovo/FRY shall not be the basis for deportation if the person who is to be deported is a victim of trafficking.”²⁷⁵

A temporary right to residence is a crucial element of any effective victim and witness protection strategy. Some countries providing trafficked persons with a regular residence status require a witness statement of the person concerned, such as Germany, the Netherlands, Belgium or the US, whereas Italy grants protection to victims independently from their readiness to testify. The first group of countries makes the assistance and protection of victims, as well as the exercise of their right to claim compensation (see chapter 5.9), dependent upon their willingness to co-operate with the authorities. In contrast the Italian regime pursues an approach based on the victim’s need for protection, rather than on the victim’s contribution to the state’s prosecution efforts. From a human rights perspective, this approach, which also includes the right of trafficked persons to work and to reintegrate into society, is the most effective and humanitarian response.

If the right to residence is linked to the ability of the victim to testify, “rest periods”, as provided in Germany (4 weeks), Belgium (45 days) and the Netherlands (3 months) are of crucial importance to enable trafficked persons to recover mentally and physically. This allows them to achieve a level of stability and, therefore, to consider prospects for their future including whether they want to testify in court. Such stabilization can not be achieved solely by a regular residence status, but also requires access to safe accommodation, medical and social services, financial assistance, psychological and legal counselling, physical protection and is further supported by access to employment and vocational training. These services should be granted to trafficked persons during their entire stay in the destination country (see chapter 5.3).

Finally, the right to stay in the country of destination should not be limited to the length of criminal proceedings but rather should enable a longer term perspective of residence, such as practised in Belgium (when the trafficker was convicted), Italy (when the trafficked person is integrated into the labour market) or the USA (when it would be too dangerous for the victim to return home).

• **Recommendations**

- States should refrain from the immediate expulsion of trafficked persons because of their irregular residence and/or labour status.
- Trafficked persons who decide to give testimony in criminal proceedings should be granted a residence status at least for the duration of such proceedings. Whether or not trafficked persons decide to testify, they should be entitled to remain in the state’s territory for an adequate period of time that allows them to recover and to receive just compensation from the traffickers. This period should be at least six months. The residence permit should include the right to medical, psychological, social and legal counselling and assistance, physical protection, as well as access to the labour market.
- If required by humanitarian reasons, such as dangers to personal safety or lack of means for survival in case of return, states should issue permanent residence permits, whether or not the victim has decided to act as a witness in the criminal proceedings.

²⁷⁵ UNMIK/REG/2001/4 (Sec. 11).

5.2.2 Asylum

Asylum law provides another basis for providing certain trafficked persons with legal residence status. The eligibility of trafficked persons for refugee status was recently recommended to EU member states by the European Parliament.²⁷⁶

A recent UNHCR working paper states that, although refugees are more likely to be smuggled than trafficked, three possible connections between trafficking and asylum may be defined:²⁷⁷

- Persons who have suffered persecution may have no other option for flight than engaging the services of a trafficker, whether knowingly or not. The trafficking process is used as a means for flight of persecution.
- Traffickers target refugees in camps, the majority of whom are women and children. Such cases were reported from Albanian refugee camps during the Kosovo/FRY conflict.
- The person suffers persecution inherent in trafficking. According to the UNICEF paper, this includes cases where a trafficked person upon return home would fall into the hands of organized criminal groups and would not be effectively protected thereof by her/his home country.²⁷⁸

Further, the latter category could also encompass cases where trafficked persons would, upon return to their country of origin, await criminal prosecution, because they have for example left the country without authorization or because they were trafficked for prostitution, which is a criminal offence under the law of their home country.

Cases falling under the first two categories involve persecution separate from the trafficking process itself and will therefore not be taken into account in the course of this reference guide. The following section will focus on cases where persons are being granted asylum because they were trafficked.

• International and European standards

A person claiming refugee status has to claim that she/he has fled persecution in the meaning of the *Geneva Convention relating to the Status of Refugees*. The Convention defines “refugees” as persons who have:

“well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”²⁷⁹

Claims of trafficked persons for asylum will most likely be determined under “membership of a particular social group”. As the following section shows, some states have started to recognize asylum claims of trafficked women claiming to be persecuted because of belonging to a particular social group.

²⁷⁶ European Parliament 2000 Resolution (Sec. 23).

²⁷⁷ John Morrison, Beth Crosland, The trafficking and smuggling of refugees: the end game in European asylum policy?, *UNHCR Working Paper No. 39*, 2001, p 54, available at <http://www.unhcr.ch/refworld/refworld/refpub/refpub.htm>.

²⁷⁸ The authors quote here the below mentioned decision by the Canadian Refugee Determination Division (V 95-02904), where asylum was granted to an Ukrainian women on the grounds that she would face abuse by organized criminal groups upon return home and that Ukraine was not expected to effectively protect her.

²⁷⁹ Convention relating to the Status of Refugees, 28 July 1951 (Art 1 para 2).

The Trafficking Protocol explicitly refers to the Refugee Convention, stating that it does not affect the rights, obligations and responsibilities of states and individuals under the Refugee Convention and the Protocol thereto.²⁸⁰

- **Examples of court practices at the national level**

Canada granted asylum to an Ukrainian woman trafficked into forced prostitution. The Refugee Division found that she was a member of a particular social group (“impoverished young women from the former Soviet Union recruited for exploitation in the international sex trade”). The Division further stated that upon the woman’s return to Ukraine, there was a “reasonable possibility that she would be subjected to abuse amounting to persecution at the hands of organized criminals.” It found reasonable that she would not be willing to seek state protection “given the ineffectualness of Ukraine’s attempts to combat organized crime, and the links between organized crime and government.”²⁸¹

The *UK* granted asylum to an Ukrainian women who was promised employment as a nurse in Hungary. When she arrived there, she was raped, sexually assaulted and forced to work as a prostitute. After escaping back to Ukraine, she fled to the UK where she learned that people believed to be involved with the Mafia had been looking for her and threatened her family. She feared that she would be killed. The Immigration Appeal Tribunal found that she belonged to the “particular social group that consists of women in Ukraine who are forced into prostitution against her will.” The tribunal also referred to a US State Department Report, according to which the Ukrainian authorities “rarely prosecute men for engaging women in the explosively growing sector of sexually exploitative work.” As the authorities could not sufficiently protect the woman, the tribunal accepted that she had a well-founded fear of persecution for a Convention reason.²⁸²

In the *United States*, asylum was granted to a Chinese woman who was forced into prostitution in China. The court found that she belonged to “a particular social group of women in China who oppose coerced involvement in government sanctioned prostitution” and that she had established a well-founded fear of persecution. In addition to her testimony, the court based its decision upon the U.S. State Department’s Country Report on Human Rights Practices for 2000²⁸³. The report claims that there has been an increase in the “commercialization of sex and related trafficking in women that has trapped thousands of women in a cycle of crime and exploitation”. Furthermore, it reports that “there have been numerous credible reports in the media of complicity in prostitution by local officials. Thus far, actions to crack down on this lucrative business have, which involves organized crime groups and business persons as well as the police and the military, have been largely ineffective.” The judge also found that the applicant was “unable to avail herself of the protection of authorities”.²⁸⁴

²⁸⁰ Trafficking Protocol (Art 14 para 1).

²⁸¹ Summary of the decision CRDD, V 95-02904, Neuenfeldt, November 26, 1997, available at http://www.cisr.gc.ca/cgi-bin/foioci.exe/Reflex_e?

²⁸² Immigration Appeal Tribunal, CC-50627-99(00TH00728), 17 May 2000.

²⁸³ The U.S. State Department’s Country Reports on Human Rights Practices are available on-line at: <http://www.state.gov/g/drl/rls/hrrpt/>

²⁸⁴ Board of Immigration Appeals, A74 206 787, 30 March 2001.

- **Recommendations**

- States should apply existing asylum laws to trafficked persons or, if necessary, introduce new legislation in order to ensure that trafficked persons who are subjected to persecution in the meaning of the Geneva Refugee Convention are being granted asylum.
- For this purpose, state authorities should consider trafficked persons as “members of a particular social group” according to the Geneva Refugee Convention. If there is evidence that trafficked persons who should be expelled to their countries of origin or other countries because of their irregular residence status would upon return not be sufficiently protected from organized trafficking groups by these countries, authorities in their country of residence should consider such situations as “well founded fear of persecution” in the meaning of the Geneva Refugee Convention.
- States should train judges and law enforcement officials dealing with asylum cases in order to ensure that existing asylum laws are being applied to trafficked persons and that officials are sensitized to the special needs of victims of trafficking and treat them respectfully.

5.3 Assistance to trafficked persons in the country of destination

Assistance to trafficked persons in the destination country includes several components, such as accommodation in safe shelters, access to health care, legal and psychological counselling. In most cases, these services are being offered by specialized NGOs.

The access of trafficked persons to such services depends on the ability of persons and agencies likely to come into contact with trafficked victims to identify them as such. Another necessary condition for the trafficked person’s ability to make use of these services and mechanisms is legal residency during his/her stay in the destination country (see chapter 5.2).

5.3.1 Identification of trafficked persons

The identification of trafficked persons is a prerequisite for their recognition as victims and, consequently, their access to assistance and protection.

- **International Standards**

According to the Declaration of Basic Principles, persons who are likely to be in contact with victims (such as police and justice officials, and staff from health and social services) and other personnel should receive training in order to enable them to identify trafficked persons as such and to sensitize them to their needs.²⁸⁵

- **Recommendations**

- States should undertake efforts in order to identify all persons and groups who would possibly come into contact with victims of trafficking, such as border guards, police and immigration officials, doctors, medical and social workers, housing inspectors, agricultural inspectors, staff of immigrant rights organizations, women organizations, refugee and asylum organizations, etc.
- States should ensure that these persons receive training in order to identify trafficked persons and to refer them to specialized victim support organizations. Such training should be carried out in co-operation with specialized NGOs.

²⁸⁵ Declaration of Basic Principles (Art 16).

- States should elaborate standardized questionnaires in order to facilitate the identification of trafficked persons and make them available to all actors identified above, who should ask these questions when they suspect a case of trafficking. Immigration and border officials should always ask these questions before deporting irregular migrants. Police officials should also make use of these questionnaires whenever they raid brothels or other establishments suspected of trafficking. Whenever police come across a suspected trafficking case, with the victim's consent, a NGO representative should be present during the interrogations of potential victims of trafficking.
- States should also take into account that clients of persons trafficked into forced prostitution are potential sources of information about trafficking cases. Therefore, states should organize awareness raising campaigns addressed to the general public in order to sensitize clients about the problem of trafficking in human beings and to enable them to recognize trafficking cases and to contact organizations for assistance.

5.3.2 *Accommodation, health care and counselling*

- **International and European standards**

United Nations

The *ICESCR* obliges state parties to recognize and safeguard a number of rights that are of particular relevance to assisting trafficked persons, namely:

- the right of everyone to work, including the right to the opportunity to gain her/his living by work which she/he freely chooses or accepts (in order to realize this right, state parties shall, among others, set up technical and vocational training programmes);
- the right to social security, including social insurance;
- the right to an adequate standard of living, including adequate food and housing;
- the right to enjoy the highest attainable standard of physical and mental health;
- and the right to education.²⁸⁶

CEDAW obliges states to take effective measures against gender-based violence and trafficking in women and to protect and assist victims of these human rights violations. In its General Recommendation No. 19, the *CEDAW* Committee recommends to state parties a number of measures that are significant for the protection of trafficked women, such as the establishment of support services including shelter, specially trained health workers, rehabilitation and counselling.²⁸⁷

The *Trafficking Protocol* obliges countries of origin and of destination to consider implementing measures to provide for the physical, psychological and social recovery of trafficking victims. Governments should, in co-operation with NGOs, provide appropriate housing, counselling and information, in particular about the victim's legal rights, in a language s/he understands, as well as medical, psychological and material assistance. States should also consider the provision of employment, education and training opportunities.²⁸⁸

This Article is important because it obliges states to provide necessary assistance to trafficked persons. However, its language is vague and leaves discretion to states, as they are not obliged

²⁸⁶ *ICESCR* (Art 6, 7, 9, 11-13).

²⁸⁷ *CEDAW Committee*, General Recommendation No. 19 (Sec. 24 (k), (t) (iii)).

²⁸⁸ *Trafficking Protocol* (Art 6 para 3), *travaux préparatoires* (Sec. 71). Regarding the obligation of countries of origin to provide for protection and assistance, please refer to chapter 5.9.

to *take*, but only to *consider* certain measures.²⁸⁹ This provision can however be supplemented by other legally and politically binding international and regional documents.

The *Migrant Workers Convention* guarantees migrant workers the right to receive any medical care that is urgently required for the preservation of their lives or the avoidance of irreparable harm to their health. Such emergency medical care shall be provided on the basis of equal treatment with nationals and may not be refused for any reason of irregularity with regard to their stay or employment.²⁹⁰

According to the *Declaration of Basic Principles*, victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, and community-based means. Thereby, attention should be given to those persons who have special needs because of the nature of the harm inflicted or because of factors such as gender, age, language, religion, cultural beliefs, ethnic or social origin.²⁹¹ Victims should be informed of the availability of health and social services and other relevant assistance.²⁹²

European Union

The *Hague Ministerial Declaration* recommends to member states to provide adequate victim support, including financial assistance.²⁹³ According to the *2000 European Parliament Resolution*, states should provide, free of charge and in co-operation with local/regional authorities and NGOs, the following services to victims of trafficking: suitable and safe housing, medical and psychological care, access to all social and health services, legal counselling and translation in case of administrative and legal proceedings, financial assistance, as well as assistance in finding employment and vocational training.²⁹⁴ In its *1996 Resolution*, the Parliament recommends member states to set up emergency phone services for trafficked persons providing for counselling in the person's mother tongue.²⁹⁵

The *1997 Council Joint Action* obliges member states to ensure "appropriate assistance for victims and their families", without however specifying this obligation.²⁹⁶

The *2001 Council Framework Decision on the standing of victims in criminal proceedings* requires member states to promote the involvement of victim support systems in the context of legal proceedings, either through the provision of specially trained personnel within its public services or through recognition and funding of victim support organizations.²⁹⁷

Council of Europe

The *Committee of Ministers Recommendation R (2000) 11* recommends states to establish reception centers, where "information on their rights as well as psychological, medical, social

²⁸⁹ Similar language is used by the OSCE Ministerial Council, where states declare to *consider* the adoption of legal and other appropriate measures, such as shelters, which permit victims to remain in their territories, temporarily or permanently, and the provision of economic and social benefits (OSCE 2000 Ministerial Council Decision, 28 November 2000, Art 10). See also the EU Hague Ministerial Declaration (Chapter III.2.1).

²⁹⁰ Migrant Workers Convention (Art 28).

²⁹¹ Declaration of Basic Principles (Art 14, 17). See also the Council of Europe Committee of Ministers Recommendation R 2000 (11) (Art 34).

²⁹² Declaration of Basic Principles (Art. 15). See also the EU Hague Ministerial Declaration (chapter III.3.)

²⁹³ Hague Ministerial Declaration (chapter II.2.1).

²⁹⁴ European Parliament 2000 Resolution (Sec. 17).

²⁹⁵ European Parliament 1996 Resolution (Sec. 26).

²⁹⁶ Council Joint Action 97/154/JHA (Sec. II F. (b)).

²⁹⁷ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA, Art 13).

and administrative support with a view to their reintegration into their country of origin or the host country” is provided to trafficked persons.²⁹⁸ This provision shows that the reintegration of trafficked persons into society is not only to be achieved for victims who have returned home to their country of origin, but also to trafficked persons staying in the destination country (“host country”).

*According to the Elements for a Regional Plan of Action, states should advertize nationally and in the region the means available for victim support such as hotlines or reception facilities through state institutions, consular sections, NGOs, police and international organizations.*²⁹⁹ *Organization for Security and Co-operation in Europe*

At the OSCE *Supplementary Human Dimension Meeting* in 2000, measures recommended to participating States included basic language training, skills training and access to the labour market.³⁰⁰

- **Examples of national legislation**

Government assistance and support mechanisms for trafficked persons exist for instance in *Belgium, Germany, Italy, the Netherlands and the US*. These examples were discussed in connection with the legal regimes for residence permits in these countries in section 5.2.1.

In *Kosovo/FRY*, persons who provide grounds to believe that they are victims of trafficking shall be provided “free interpreting services in the language of their choice, free legal counsel in relation to trafficking issues (criminal or civil), temporary safe housing, psychological, medical and social welfare assistance as may be necessary to provide for their needs, (...) regardless of any charges of prostitution or of illegal entry, presence or work in Kosovo/FRY that may be pending against them.” The provision of such services is “subject to availability of resources”. Law enforcement officials shall advise suspected victims of trafficking “at the earliest available opportunity” of their right to request these services and shall “contact the appropriate persons to arrange the requested assistance.”

The law further sets up a Victim Assistance Co-ordinator (see chapter 4.6.2), to whom trafficked persons have to direct a request to receive the above-mentioned services.³⁰¹

The *Cypriot* trafficking law provides that trafficked persons during their stay in the territory of Cyprus are entitled to receive “reasonable protection and support” from the state. The state has “the duty to provide them with any reasonable protection and support, including, to the extent this is feasible and reasonable, arrangements for maintenance, temporary shelter, medical care and psychiatric support until victims are considered having recovered from any traumatic experience.” Courts may order that a convicted trafficker has to pay all or parts of the expenses incurred to the state thereof (see chapter 4.2.).

The law further establishes a “guardian of victims” whose tasks include: to advise and counsel victims, to hear their first instance complaints, to ensure that the competent bodies investigate the case, to take measures for the “rehabilitation or re-employment or repatriation” of the

²⁹⁸ Committee of Ministers Recommendation R (2000)11 (Sec. 26).

²⁹⁹ Elements for a Regional Plan of Action (Sect. 26).

³⁰⁰ OSCE 2000 Human Dimension Implementation Meeting, Final Report, p 8.

³⁰¹ UNMIK/REG/2001/4 (Sec. 9f).

victims, to identify deficiencies of the trafficking law and to recommend amendments to the ministers.³⁰²

- **Recommendations**

- States should set up and advertize emergency telephone hotlines providing counselling to trafficked persons in a language they understand.
- States should provide trafficked persons, free of charge and in co-operation with NGOs, with the following services: adequate safe housing, medical treatment including confidential HIV testing, psychological care, access to health and social services, legal counselling in their native language, financial support, access to employment, education and training. These services should be provided to trafficked persons for the duration of their stay in the country of transit or destination, and regardless as to whether or not they decide to act as witnesses. Further, trafficked persons should have access to such facilities regardless of any charges for irregular entry, residence or employment.
- In order to enable trafficked persons to make use of any available assistance mechanisms, states should ensure that law enforcement and other state authorities dealing with victims of trafficking have the duty to inform them about existing facilities.

5.3.3 *The role of NGOs*

NGOs that specialize in the support of trafficked persons play an essential role in ensuring appropriate services and protection for trafficked persons. They are an important source of information on the phenomenon of trafficking and do an enormous amount of work to ensure that the basic needs of victims are met. This critical aspect has so far not been addressed in binding human rights documents, but was included in a number of regional political documents by several regional organizations. Effective and continuous victim assistance and protection requires that states provide relevant NGOs with sufficient resources and training opportunities.³⁰³

Effective victim assistance and protection also requires well-functioning co-operation between NGOs and state authorities. First, NGOs providing assistance to trafficked persons need to be informed by the police of potential trafficking cases in order to prepare services for their clients. Secondly, adequate assistance and counselling by a reception facility contributes to the recovery and stabilization of a trafficked person and might increase her/his ability and willingness to act as witness before court.

- **International and European standards**

United Nations

According to the *Trafficking Protocol*, state parties should co-operate with NGOs when providing services to trafficked persons.³⁰⁴

³⁰² Law 3 (1) of 2000 Providing for the special protection of persons who are victims of sexual exploitation and for related matters (Art 7 para 1, Art 10, 11). The law restricts the definition of trafficking to “sexual exploitation”, without however defining this term (Art 2). It grants victims a *right* (“entitled against the Republic”) and *obliges* the state to “reasonable protection and support”. This strong language is however weakened by the phrase “to the extent that is feasible and reasonable”. The law deals with a number of relevant aspects of anti-trafficking action, including the establishment of a criminal offence and a guardian of victims, but does not regulate the residence status of trafficked persons in Cyprus. It was not investigated in the course of this research if other laws of Cyprus deal with this aspect.

³⁰³ For further information on training, please refer to chapter 6.2.

³⁰⁴ Trafficking Protocol (Art 6 para 3). For the content of the obligation of this provision, especially its discretionary nature, please refer to section 5.5.1.

European Union

The 2001 Council Framework Decision on the standing of victims in criminal proceedings obliges member states to ensure victim support services either through trained state personnel or through the recognition and funding of victim support organizations. It defines “victim support organizations” as NGOs, “legally established in a Member State, whose support to victims of crime is provided free of charge and, conducted under appropriate conditions, complements the action of the State in this area.”³⁰⁵

In the *Hague Ministerial Declaration*, member states committed themselves to encourage and to support the development of co-operation between the victims, law enforcement agencies and NGOs who assist victims³⁰⁶

Council of Europe

Adequate funding and capacity building is required for these organizations to work efficiently and on a continuous basis. In response to this pressing need, the Council of Europe, in its *Elements for a Regional Plan of Action*, recommends to member states to build and to support NGO capacity in order to address the needs of victims, to encourage support for the creation of anti-trafficking NGO networks at the national, sub-regional and regional level, as well as to ensure long term, ongoing funding for all victim support measures.³⁰⁷

Organization for Security and Co-operation in Europe

The OSCE at its 2000 *Supplementary Human Dimension Meeting* recommended to participating States to provide sustained funding for victim protection programmes, including safe houses, as well as to use confiscated assets to support government funding for programmes that address the needs of victims of trafficking.³⁰⁸

• **Examples of initiatives at national level**

The *US Trafficking Victims Protection Act* enables the government to make grants to states, local government units and victims’ service NGOs in order to develop, expand or strengthen service programmes for trafficked persons.³⁰⁹

Several governments, such as *Austria, Belgium, Germany, Italy*, and the *Netherlands* provide funding to NGOs running reception centres that offer assistance and protection to trafficked persons (see also chapter 5.3).

• **Recommendations**

- States should provide adequate and sustained funding to NGOs specialised in providing services to trafficked persons. For this purpose, states should also use confiscated assets derived from trafficking cases.
- States should encourage and promote co-operation between law enforcement authorities and relevant NGOs.
- Furthermore, states should support the creation of national, sub-regional and regional NGO networks in order to improve and strengthen victim assistance mechanisms.

³⁰⁵ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA (Art 13, Art 1 (b)).

³⁰⁶ Hague Ministerial Declaration (Sec. III 2.1).

³⁰⁷ Elements for a Regional Plan of Action (Sec. 28 - 31).

³⁰⁸ OSCE 2000 Supplementary Human Dimension Meeting, Final Report, pp 6, 8.

³⁰⁹ Trafficking Victims Protection Act (Sec. 107 (b) (2)).

5.4 Non-criminalization of trafficked persons

Trafficked persons are very often treated as criminals rather than as victims, both in countries of destination and origin. In countries of destination, they may be prosecuted and detained because of irregular migration and/or labour status. Trafficked persons returning to their country of origin may also be subjected to prosecution for using false documents, having left the country illegally,³¹⁰ or for having worked in the sex industry.

Under legal systems prohibiting prostitution (e.g. Albania, Bosnia and Herzegovina and Romania), women trafficked into the sex industry may be prosecuted under anti-prostitution laws. Such prohibitive policies towards the sex industry culminating in the criminalization of prostitution, prevent trafficked persons from reporting to the police and drive the sex industry underground into the hands of organized crime. Furthermore, it can be asserted that clients are one of the only potential sources of information regarding trafficking cases in which victims have been forced into the sex industry. Bearing this in mind, the criminalization of clients (as practised in Sweden) virtually eliminates the possibility that clients will report cases of forced prostitution or under-aged prostitution to the police since they would then be risking prosecution themselves.

Criminalization not only prevents trafficked persons from receiving justice and enjoying their basic human rights but also prevents perpetrators from being prosecuted, because victims fear reporting cases to the police.

- **International and European standards**

United Nations

Neither the UN Trafficking Protocol nor the Crime Convention include an explicit state obligation to refrain from criminalising trafficked persons.

The *General Assembly Resolution on Beijing+5* recommended states to consider preventing trafficked persons from being prosecuted for their illegal entry or residence.³¹¹

European Union

This issue was however raised by a number of regional non-binding documents. The *Hague Ministerial Declaration* urges member states to ensure that no action, including detention, is taken for immigration reasons which might undermine the value of victims of trafficking in criminal proceedings.³¹² Contrary to the Hague Declaration that provides for the non-criminalization of trafficked persons solely with regard to their potential contribution for the prosecution of traffickers, the *2000 European Parliament Resolution* is based on a human rights approach. Without any reference to potential witness statements it calls upon the European Commission to provide for a framework for harmonization of national laws, including the principle of non-criminalization of trafficked persons, “including non-criminalization for the use of forged visa or documents made as a result of their ordeal, together with a ban on any form of internment of victims in detention centers.”³¹³

³¹⁰ OSCE/ODIHR, Background Paper, p 50.

³¹¹ General Assembly Resolution A/RES/S-23/3 (para 70 (c)).

³¹² Hague Ministerial Declaration (Sec. III 2.1).

³¹³ European Parliament 2000 Resolution (Sec. 9).

- **Examples of legislation at national level**

The *Kosovo/FRY* law enables trafficked persons to introduce trafficking as a defence: “A person is not criminally responsible for prostitution or illegal entry, presence or entry in Kosovo/FRY if that person provides evidence that supports a reasonable belief he or she was a victim of trafficking.”³¹⁴

Although the actual law is silent on the subject, the preamble of the *US* trafficking law states that trafficked persons should not be inappropriately incarcerated. This criterion is also applied by the U.S. Government in evaluating the progress made in other countries.³¹⁵ In practice, the US does not bring charges for document fraud, prostitution or undocumented labour against anyone who has been identified as a victim of trafficking.³¹⁶

- **Recommendations**

- States should not prosecute trafficked persons for trafficking-related offences such as holding false passports or working without authorization, even if they agreed to hold false documents or to work without authorization. Whether prostitution is legal or not, states should not prosecute persons for being trafficked into the sex industry, even if the person originally agreed to work in the sex industry.
- If trafficked persons are prosecuted for crimes committed during their period of victimhood, they must be able to raise the defence of having been subjected to psychological coercion, physical force or the threat of force when the crime was committed.

5.5 Standards for trafficked persons who are detained and/or criminally prosecuted

Trafficked persons should not be prosecuted for any offences related to trafficking. Many states however do prosecute trafficked persons for irregular residence and/or labour status, including illegal work in the sex industry. Therefore, it is of particular relevance that states respect the following minimum guarantees relating to the detention of and criminal proceedings against trafficked persons. The possibility of trafficked persons to raise the defence of coercion has already been addressed in chapter 5.4.

- **International and European standards**

United Nations

According to Art 10 *ICCPR*, all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Art 17 of the *Migrant Workers Convention* specifies that migrant workers who are deprived of their liberty shall also be treated with respect for their cultural identity.

³¹⁴ UNMIK/REG/2001/4 (Sec. 8).

³¹⁵ Victims of Trafficking and Violence Protection Act (Sec. 19 of the preamble, Sec. 108 (b) (2)). Sec. 108 sets up minimum standards for the elimination of trafficking. If foreign countries do not comply with these standards and do not make significant efforts to improve the status quo, the US may withhold foreign assistance granted to these countries (Sec. 110).

³¹⁶ Information provided by the *Initiative Against Trafficking in Persons* at the *International Human Rights Law Group*, June 2001.

The *Standard Minimum Rules for the Treatment of Prisoners* contain a catalogue of standards relevant for trafficked persons detained as a consequence of their illegal employment or residence status.³¹⁷ These include among others:

- access to adequate sanitary installations, access to water and toilet articles as are necessary for health and cleanliness,
- access to adequate food and drinking water,
- access to adequate medical services,
- prisoners who are foreign nationals are allowed to communicate with the diplomatic and consular representatives of the state to which they belong,
- prison staff shall receive regular training in their duties,
- staff shall include a sufficient number of psychologists and social workers,
- female prisoners shall be attended and supervised only by female officers.

According to the *Basic Principles for the Treatment of Prisoners*, prisoners shall have access to health services without discrimination on the grounds of their legal situation.³¹⁸

Art 14 *ICCPR* grants the right to equality before the law and to be presumed innocent until proven guilty according to the law.³¹⁹ The provision further enumerates, among others, the following minimum guarantees that everyone is equally entitled to in the determination of any criminal charge against her/him:

- the right to be informed promptly and in detail in a language which she/he understands of the nature and cause of the charge against her/him,³²⁰
- the right to have adequate time and facilities for the preparation of her/his defence and to communicate with counsel of her/his own choosing,
- the right to be tried without undue delay,
- the right to defend her-/himself in person or through legal assistance of her/his own choosing; to be informed, if she/he does not have legal assistance, of this right; and to have legal assistance assigned to her/him, in any case where the interests of justice so require, and without payment by her/him in any such case if she/he does not have sufficient means to pay for it,
- the right to have the free assistance of an interpreter if she/he cannot understand or speak the language used in court.

Council of Europe

Art 5 and 6 *ECHR* provide for the same standards as the quoted *ICCPR*-provisions.

• **Recommendations**

If states prosecute trafficked persons for any trafficking-related offences, including irregular residence or employment, they should respect the following minimum guarantees:

- States should provide trafficked persons that are imprisoned with access to adequate sanitary facilities, food, drinking water, health and medical services. They should be allowed to communicate with diplomatic or consular representatives of their home

³¹⁷ Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Resolution 663 C (XXIV), 31 July 1957 and 2076 (LXII), 13 May 1977 (Sect. 12, 15, 20, 38, 47, 49, 53).

³¹⁸ Basic Principles for the Treatment of Prisoners, UN GA Res 45/111, 14 December 1990 (Sec. 9).

³¹⁹ See also Migrant Workers Convention (Art 18 paras 1, 2).

³²⁰ See also Migrant Workers Convention (Art 16 para 5).

country. States should provide for training of prison staff in order to ensure that trafficked persons are treated with respect for their dignity and cultural identity.

- States should provide trafficked persons in case of criminal charges against them with information about their rights and counselling in a language they understand, adequate time and facilities to prepare their defence, free legal assistance if necessary, as well as free assistance of an interpreter.

5.6 Position of victims and witnesses in legal proceedings

Adequate victim assistance and protection is also connected to the status of trafficked persons in legal proceedings, both, criminal proceedings against the accused as well as civil proceedings for compensation. Necessary means to support trafficked persons in legal proceedings include the following mechanisms: provision of information, advice, translation services and legal representation free of charge; victim-sensitive methods for investigation and interrogation; measures to protect their privacy and physical security;³²¹ access to civil compensation, establishment of specialized and trained bodies. These aspects will be elaborated in the following sections 5.6.1 - 5.6.6.

5.6.1 Access to information and advice

- **International and regional standards**

United Nations

The *Trafficking Protocol* requires state parties to provide trafficked persons with information on relevant court and administrative proceedings and with assistance to enable their views and concerns to be presented and considered at appropriate stages of the criminal proceedings. This provision applies to “victims” and therefore does not require a witness statement from the person concerned.³²²

European Union

The *Council Framework Decision on the standing of victims in criminal proceedings* obliges EU member states to ensure that victims from their first contact with law enforcement agencies have access to information that is of relevance for the protection of their interests. This obligation, while legally binding, is restricted by phrases such “as *any means*” the state “*deems appropriate*” and “*as far as possible in languages commonly understood*”. At a minimum such information should include: the type of organizations to which they can turn for support, what kind of support they can obtain, where and how they can report an offence, procedures following a report, their role in connection with the procedures, how to obtain protection, access to legal aid and advice, as well as the requirements to be entitled to compensation.³²³ Upon request, victims should be kept informed about the outcome of their complaint, factors enabling them to know the conduct of the criminal proceedings and the court’s sentence. The obligation to notify the victim of the release of the person prosecuted or sentenced is formulated relatively weakly. It simply states that member states shall take the

³²¹ The need of victims and witnesses for physical protection is not necessarily related to the existence or length of legal proceedings. Traffickers often threaten their victims even if they do not act as witnesses, in order to prevent them from doing so. Therefore, protection of victims’ and witnesses’ physical security will not be discussed in relation to legal proceedings, but in an own section (5.7).

³²² Trafficking Protocol (Art 6 para 2), UN Declaration of Basic Principles, Art. 4, 6 (a), (c).

³²³ See also Recommendation R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985 (Sec. 2).

necessary measures to *ensure that*, at least in cases where there might be danger to the victims, a decision *may* be taken to notify the victim *if necessary*.³²⁴

This Framework Decision further obliges states to ensure that victims have access to advice concerning their role in the proceedings, provided free of charge where warranted, and legal aid, when they have the status of parties to criminal proceedings. Expenses resulting from “legitimate participation in criminal proceedings” should be reimbursed to victims who are parties or witnesses.³²⁵

Council of Europe

The *Committee of Ministers Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure (R (85) 11)* recommends that victims of crime should be able to obtain information on the outcome of the police investigation.³²⁶ During the course of criminal proceedings, victims should be informed about the date and place of the hearing against the accused, opportunities to obtain restitution and compensation within the criminal justice process, legal assistance and advice, as well as how they can find out about the outcome of the case.³²⁷

- **Examples of legislation at the national level**

The *US* trafficking law states that trafficked persons shall have access to information about their rights and translation services.³²⁸

- **Recommendations**

- States should provide trafficked persons with information and assistance to enable them to have their views and concerns presented and considered in the course of criminal proceedings. At a minimum, trafficked persons should receive the following information: contact information for support organizations and the type of support they can obtain; their role in connection with criminal proceedings, especially their rights and duties; date and place of the hearing against the alleged trafficker; requirements for obtaining protection, legal aid and compensation; the outcome of investigations and the release of the trafficker.
- States should reimburse to trafficked persons who are witnesses or parties any expenses resulting from legitimate participation in criminal proceedings against the trafficker.

5.6.2 Access to translation and legal assistance free of charge

- **International and European standards**

Council of Europe

Art 6 *ECHR* provides the rights to free translation and legal aid to persons charged with a criminal offence, but not to victims of such offences. Under certain circumstances however, parties to civil proceedings have a right to legal aid.

³²⁴ Council Framework Decision 2001/220/JHA (Art 4).

³²⁵ Council Framework Decision 2001/220/JHA (Art 6).

³²⁶ Committee of Ministers Recommendation R (85) 11 (Sec. 3). This provision is weak, as it does not specify who is supposed to act but only very broadly states that “the victim should be able to obtain information”.

³²⁷ Committee of Ministers Recommendation R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985 (Sec. 9).

³²⁸ Trafficking Victims Protection Act 2000 (Sec. 107 (c) (2)).

The European Court of Human Rights has held in its *Airey* judgement that in disputes relating to “civil rights” according to Art 6 para 1, this provision “may sometimes compel the state to provide for the [free] assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is compulsory, as it is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”³²⁹ This argumentation is relevant for cases where trafficked persons are parties in proceedings relating to civil rights, for instance in proceedings for compensation for damages resulting from trafficking.

United Nations

Neither the Trafficking Protocol nor the Crime Convention oblige state parties to provide trafficked persons with free translation and legal representation during criminal proceedings against the trafficker. One might however interpret Art 6 para 2 (b) of the *Trafficking Protocol*, which obligates state parties to provide trafficked persons with “assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings”, in such a way as to include also the provision of free translation and legal representation, if without such support it cannot be ensured that the victims is able to present her/his views and concerns.

European Union

The *Council Framework Decision on the standing of victims in criminal proceedings* obliges states to ensure that victims have access to legal aid, when they have the status of parties to criminal proceedings.³³⁰

- **Examples of legislation at national level**

The *Kosovo/FRY* trafficking regulation states that “a person who provides reasonable grounds for belief that she or he is a victim of trafficking,” shall be provided with “free interpreting services in the language of her or his choice” and “free legal counsel in relation to trafficking issues in relation to trafficking issues (criminal or civil).”³³¹

In *Germany*, an attorney can be assigned for witnesses who are questioned in connection with charges of trafficking in human beings, if it is evident that they cannot take proper advantage of their rights during the interrogation and their interests warranting protection will otherwise not be taken into account. This can be assumed in case of witnesses who are criminally prosecuted for violations of the Alien Act.³³²

According to *Albanian law*, victims of trafficking who do not know the Albanian language shall be provided with interpretation during criminal proceedings, the costs of which is to be covered by the government.³³³

- **Recommendations**

- States should provide trafficked persons with free legal representation and translation services during criminal proceedings against the trafficker, as well as during proceedings for civil compensation.

³²⁹ *Airey versus Ireland* (para 26).

³³⁰ Council Framework Decision 2001/220/JHA (Art 6).

³³¹ UNMIK/REG/2001/4, Sec. 10.1 (a), (b).

³³² Source: *Claudia Burgsmüller*, European Strategies, p 183ff.

³³³ Code of Criminal Procedure (Art 8, 485). This interpretation is taken from the *OSCE Presence in Albania* Report, March 2001.

5.6.3 Investigation and interrogation

- **International and regional standards**

United Nations

The *Crime Convention* obliges states to enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings.³³⁴ It also provides for testimony to be given by video link in order to protect witnesses from retaliation or intimidation.³³⁵

European Union

The *Council Framework Decision on the standing of victims in criminal proceedings* requires member states to safeguard the possibility of the victim to be heard during proceedings and to supply evidence.³³⁶ They shall ensure that victims are treated with due respect for the dignity of the individual during proceedings and that particularly vulnerable victims can benefit from specific treatment best suited to their situation.³³⁷ States shall take appropriate measures to ensure that authorities question victims only insofar as necessary for the purpose of criminal proceedings.³³⁸ States are also obliged to ensure that, if there is the need to protect victims from the effects of giving evidence in open court, victims may, at the court's discretion, be entitled to testify in a manner that enables these objectives to be achieved by any appropriate means compatible with its legal principles.³³⁹ The Decision does however not specify which measures should be taken in this respect. States are required to ensure that contact between victims and offenders in the court premises is avoided, unless required by criminal proceedings and, where appropriate, to establish separate waiting rooms for victims.³⁴⁰

EU member states must also ensure appropriate measures to minimize any difficulties taking testimony from victims residing abroad, in particular with regard to the organization of court proceedings. States shall recourse to the extent possible to the provisions on video conferencing and telephone conference calls laid down in the *Convention on Mutual Assistance in Criminal Matters* between the Member States of the European Union. Victims residing abroad shall be enabled to make complaints before the competent authorities of their state of residence under certain circumstances such as if they were unable to do so in the state where the offence was committed or, in the case of serious offence, if they did not wish to make a complaint there. Such a complaint shall be transmitted without delay to the competent authority in the territory where the offence was committed.³⁴¹

The *Hague Ministerial Declaration* recommended to member states to develop methods of investigation, detection and the gathering of evidence that are not gender-biased and do not overburden the victim. Further, the victim's personal history, her/his alleged character or

³³⁴ UN Crime Convention, Art 25 para 3.

³³⁵ UN Crime Convention (Art 25 para 2 (d)).

³³⁶ Council Framework Decision 2001/220/JHA (Art 2 para 1). See also UN Crime Convention (Art 25 para 3), Declaration of Basic Principles (Art 6 (b)), ICC Statute (Art 68 para 3).

³³⁷ Council Framework Decision 2001/220/JHA (Art 2). See also UN Declaration of Basic Principles (Art 4), Council of Europe Committee of Ministers Recommendation R (85) 11 (Sec. 8).

³³⁸ Council Framework Decision 2001/220/JHA (Art 3).

³³⁹ Council Framework Decision 2001/220/JHA (Art 8 para 4). The provision does not specify which concrete measures are to be taken. A number of such measures are for example enumerated in Council of Europe R (2000) 11 (Sec. 28, see below).

³⁴⁰ Council Framework Decision 2001/220/JHA (Art 8 para 3).

³⁴¹ Council Framework Decision 2001/220/JHA (Art 11).

current or previous occupation should not be used against her/him or serve as a reason to disqualify her/his complaint.³⁴²

Council of Europe

The Committee of Ministers in its *Recommendation R (2000) 11* encourages member states to provide trafficked persons, particularly children and witnesses, with “special audio or video facilities to report and file complaints which are designed to protect their private lives and their dignity and reduce the number of official procedures and their traumatising effects.”³⁴³

ICC Statute

The ICC Statute provides for the creation of a Victim and Witness Unit within the ICC which must include staff experienced in trauma-work, including trauma related to sexual violence.³⁴⁴

- **Examples of initiatives at the national level**

Some countries, such as *Austria* and *Germany*, allow for witness interrogations by video link, if the witness was subjected to sexual violence by the accused and if her/his well being would be seriously endangered by her/his confrontation with the accused. Whereas the witness is located in a separate room, the interrogation is simultaneously transmitted in picture and sound to the courtroom. The accused has the possibility to interfere into the interrogation and to ask questions to the witness.³⁴⁵ A similar provision is included in the *Kosovo/FRY* trafficking law.³⁴⁶

- **Recommendations**

- States should ensure that court staff treat trafficked persons respectfully and with special regard to their vulnerable position. For this purpose, states should establish obligatory training for judges to enable them to handle cases of trafficking and/or violence in an appropriate manner.
- States should ensure that judges question trafficked persons only insofar as necessary for the criminal proceedings and also consider other means of evidence, for example the identification and interrogation of other witnesses, including clients or neighbours.
- States should provide trafficked persons who give witness statements with the possibility to provide testimony by special audio or video facilities and without being personally confronted by the accused.

³⁴² Hague Ministerial Declaration (Chapter III.2.2). The Declaration applies to trafficking in women only.

³⁴³ Committee of Ministers Recommendation R (2000) 11 (Sec. 28). See also Committee of Ministers Recommendation R (85) 11 (Art 15). Such facilities have been introduced into criminal procedural systems in recent years by many states, in particular for victims of sexual assault. However, this is not the case for all Council of Europe member states yet, and even in countries where these methods are recognized by the national legal system, trafficked persons are far from benefiting from such protection measures: Committee of Ministers Recommendation R (2000) 11, Explanatory Memorandum to the Recommendation, p 18.

³⁴⁴ ICC Statute (Art 75).

³⁴⁵ Austrian Code of Criminal Procedure (Sec. 162 a para 3), Federal Gazette No. 631/1975, as amended by Federal Gazette I No. 153/1998; German Code of Criminal Procedure (Sec. 247 a), source: *Claudia Burgsmüller*, *European Strategies*, p 195. This method of interrogation allows victims to avoid the presence of the traffickers, At the same time it puts them under pressure because they cannot see the accused but themselves are being observed on a screen.

³⁴⁶ UNMIK/REG/2001/4 (Sec. 7.4).

5.7 Protection of the privacy and physical security of victims and witnesses

Measures for the protection of the privacy and physical security of trafficked persons before, during and after the criminal proceedings are of crucial importance. Victims and witnesses are at risk of being intimidated and threatened by traffickers. Therefore, measures guaranteeing their physical security, the security of NGO staff providing assistance to them, as well as measures for the protection of their family members in the country of origin are of top priority.³⁴⁷

- **International and European standards**

United Nations

The *Trafficking Protocol* obliges state parties to protect the privacy and identity of trafficked persons, inter alia by making proceedings related to trafficking confidential.³⁴⁸ The provision restricts state obligations to “appropriate cases” and “the extent possible under domestic law.” It does not specify what is meant with “confidential” proceedings. This could include for example the exclusion of the public from the trial or restrictions on the publishing of personal information concerning trafficked persons.

It further obliges state parties to “endeavour” to provide for the physical security of trafficked persons while they are within their territory.³⁴⁹ It is the obligation of countries of origin and destination to provide for the protection of trafficking victims while they are within their territory. The Protocol does not provide for the protection of the victim’s family members.

Art 24 of the *Crime Convention* obliges state parties to take appropriate steps to protect witnesses and their relatives and other persons close to them, from potential retaliation or intimidation. These measures include the establishment of procedures for the witness’ physical protection, such as relocating the witness or permitting the non-disclosure or limited disclosure of information concerning her/his identity and whereabouts, as well as permitting testimony to be given through the use of communications technologies such as video links or other evidentiary rules that ensure the safety of the witness. In order to ensure the relocation of witnesses, state parties should “consider” entering into agreements with other states.³⁵⁰

The wording of the *Crime Convention* does not restrict the obligation to protect to the length of criminal proceedings, so one can conclude that witnesses must be protected before, during and after criminal proceedings. However, state obligations are weakened by the language used (states shall take “appropriate steps within its means” to protect witnesses and protect relatives “as appropriate”).

In cases where the persons that are to be protected reside in a country other than that where the proceedings are taking place (such as family members of the victims or witnesses),

³⁴⁷ These two categories of victims and witnesses may overlap, namely if a trafficked person is testifying in the proceedings against the trafficker. This is however not necessarily the case: a person may also be a witness without at the same time being a victim, or a person may be a victim of trafficking, but not give evidence before court. Whereas some provisions include standards applicable to the protection of victims and witnesses, in other cases, a distinction is made between these two categories. If a victim of trafficking gives testimony, the provisions applicable to witnesses also apply to her/him. For the UN Crime Convention, this was explicitly stated in Art 24 para 4.

³⁴⁸ Trafficking Protocol (Art 6 para 1).

³⁴⁹ Trafficking Protocol (Art 6 para 5). Similarly, the Crime Convention obliges state parties to take appropriate measures within their means to protect and assist victims (Art 25 para 1).

³⁵⁰ Crime Convention (Art 24 paras 1, 2).

international co-operation plays a critical role.³⁵¹ The Crime Convention provides for international co-operation with regard to witness protection, which is however restricted to the relocation of witnesses. It does not mention co-operation for the protection of family members.

Neither the Trafficking Protocol nor the Crime Convention oblige state parties to provide protection to members of NGOs assisting the victims.

The *Declaration of Basic Principles* states that states should ensure the safety of victims and their families from intimidation and retaliation.³⁵²

European Union

The *Council Framework Decision on the standing of victims in criminal proceedings* obliges member states to ensure a “suitable level of protection” to victims (and where appropriate, also to family members or persons in a similar position) as regards protection of their safety or privacy, where the authorities consider “a serious risk of reprisal or firm evidence of serious intent to intrude upon their privacy”. Therefore, states shall “guarantee that it is possible to adopt, if necessary” appropriate measures to protect the privacy and photographic images of victims and their families.³⁵³

The *1997 Council Joint Action* obliges EU member states to protect witnesses who provide information about the offence.³⁵⁴

In the *Hague Ministerial Declaration*, EU member states committed themselves to grant “proper and effective protection” to witnesses and close family members before, during and after criminal proceedings.³⁵⁵ Further, victims should be assisted in the issuing of new identity papers and to notify them upon request of any release of the trafficker after being arrested or taken into custody.³⁵⁶

Council of Europe

The *Committee of Ministers Recommendation R (2000) 11* calls upon member states to extend protection mechanisms to members of NGOs assisting the victims during penal and civil proceedings.³⁵⁷

The Council of Europe addresses the protection of the victim’s family members in two non-binding recommendations. Member states should protect trafficked persons and their family members from intimidation and threats to their physical security by establishing victim protection systems both in the countries of origin and destination.³⁵⁸

International co-operation in order to improve the security of victims co-operating as witnesses and their families was also identified as part of the Elements of a Regional Plan of Action.³⁵⁹

³⁵¹ Council of Europe R (2000)11, Explanatory Memorandum, p 18.

³⁵² Declaration of Basic Principles (Art. 6 (d)).

³⁵³ Council Framework Decision 2001/220/JHA (Art 8 para 2).

³⁵⁴ Council Joint Action 97/154/JHA (Sect. II F (a)).

³⁵⁵ Hague Ministerial Declaration (Chapter III.3.2).

³⁵⁶ The Hague Ministerial Declaration (Chapters II.2.2, III.3.3).

³⁵⁷ Committee of Ministers Recommendation R (2000) 11 (Art 32).

³⁵⁸ Committee of Ministers Recommendations R (2000) 11 (Art. 29f), R (85) 11 (Art. 16).

³⁵⁹ Elements of a Regional Plan of Action (Sec. 27).

According to the *Committee of Ministers Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure*, member states should give due consideration to the need to protect the victim from any publicity which will unduly affect his/her private life or dignity with regard to information and public relation policies in connection with the investigation and trial. In case the type of the offence or the situation of the victim requires special protection, personal information should be disclosed or published only to “whatever extent is appropriate”.³⁶⁰

Organization for Security and Co-operation in Europe

The *OSCE Supplementary Human Dimension Meeting* recommended to participating States to bilaterally co-operate in the protection of the victim’s family in the country of origin.³⁶¹

- **Examples of national legislation**

Slovenian criminal law allows for anonymous testimony to be given by a witness by means of electronic equipment in exceptional cases (where the disclosure of the witness’ identity would seriously endanger his/her life or that of his/her relatives).³⁶²

Under *US* law, trafficked persons and their family members shall be protected from intimidation, threats of reprisals or reprisals, and their names shall not be disclosed to the public if their safety is at risk or of there is danger of additional harm by recapture of the victims by traffickers.³⁶³

The *US* witness protection program that allows for new identities, relocation to a new city, and training and employment assistance, may be applied in some trafficking cases.³⁶⁴

- **Recommendations**

- States should undertake adequate measures to protect the privacy and physical security of trafficked persons while they are within their territories. Trafficked persons should be protected from reprisals and intimidation whether or not they decide to give a witness statement. If the person decides to give testimony, protection should be granted before, during and after criminal proceedings, as necessary.
- States should provide for possibility to exclude the general public from the trial and not to disclose personal information about the victim or to publish such information only to the necessary extent.
- States should provide trafficked persons with police protection. Protection should be extended to their family members and staff of supporting NGOs.
- States should establish evidentiary rules that ensure the safety of witnesses, for example the possibility to testify by video link.
- States should provide witnesses with new identities and relocate them to other cities, if otherwise their life and security would be endangered.
- States should notify trafficked persons in case their trafficker is released.

³⁶⁰ Committee of Ministers Recommendation R (85) 11 (Sec. 15).

³⁶¹ OSCE 2000 Supplementary Human Dimension Meeting, Final Report, p 9.

³⁶² Information provided by the Slovenian government in a questionnaire for the Council of Europe June 2000 Athens seminar on trafficking in human beings in South Eastern Europe.

³⁶³ Trafficking Victims Protection Act (Sect. 107 (c) (1) (C)).

³⁶⁴ US Trafficking Victims Protection Act (Sec. 112).

- States should co-operate bilaterally and internationally in order to improve the protection of trafficked persons and their families, as well as other witnesses.

5.8 Civil claims of trafficked persons

Another important aspect of protection and assistance is the access of trafficked persons to civil compensation for physical or mental harm or material damages (including lost wages) resulting from trafficking. In many cases, trafficked persons do not receive any payment for their labour or services. In such cases, they should be entitled to raise claims for wages promised by their employer. Some countries allow claims for compensation according to civil law to be raised during criminal proceedings against the accused and to be decided by the criminal court, whereas according to the law of other countries, a civil court must decide about such claims in separate proceedings. The first option, which means that one single court pronounces on both the criminal and civil liability of the accused, is a more efficient use of time and would therefore be more preferable for trafficked victims. Often, victims have neither financial means nor a place to stay and therefore would benefit from a more expedient decision-making process. Further, as most destination countries do not allow trafficked persons to remain in their territory after the criminal proceedings against the trafficker are finalized, the possibility of the victim to obtain compensation during these proceedings would enhance their chance to receive any compensation at all.

- **International and European standards**

United Nations

Art 14 *ICCPR* states that “[i]n the determination of (...) his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The term “rights and obligations in a suit of law” means rights and obligations deriving from civil law (see also the German and French wordings “*zivilrechtliche Ansprüche und Verpflichtungen*”, “*des contestations sur ses droits et obligations de caractère civil*”) and encompasses claims for compensation for damages.³⁶⁵

According to Art 2 *ICCPR*, states shall ensure that any person whose rights under the *ICCPR* are violated have an “effective remedy” and that such remedies are enforced. Payments for compensation are included in the right to an “effective remedy”.³⁶⁶

From these provisions, it can be derived that states are obliged to grant trafficked persons access to civil compensation for damages and suffering resulting from trafficking.

The *Trafficking Protocol* obliges states to ensure that their domestic legal systems contain measures that offer trafficked persons the possibility to obtain compensation for the damage suffered. This provision does not guarantee an enforceable *right*, but only provides for the *possibility* to obtain compensation.³⁶⁷ The Protocol further requires states to provide trafficked persons with “information on relevant court and administrative proceedings”. This provision may be interpreted to include information assistance with respect to the access trafficked persons have to compensation.³⁶⁸ Neither the Protocol nor the Convention address the

³⁶⁵ Nowak, p 69.

³⁶⁶ Nowak, p 69.

³⁶⁷ Trafficking Protocol (Art 6 para 6). See also Art 25 para 2 *Crime Convention* which obliges state parties to establish appropriate procedures to provide access to compensation and restitution for victims.

³⁶⁸ Trafficking Protocol (Art 6 para 2). See also the Declaration of Basic Principles, which recommends states to provide victims with appropriate assistance and information in order to enable them to achieve compensation before court (Art 5).

question where the financial means for compensation should come from, whether from the property or assets of the trafficker or from state compensation funds. The Convention provides for government confiscation of the assets of crime, but without also providing that those assets should be used to compensate victims.

The *Migrant Workers Convention* stresses the right of migrant workers to receive compensation even in the case of their expulsion. Expulsion shall not prejudice any rights of a migrant worker acquired in accordance with the law of the state of employment, including the right to receive wages and other entitlements due to her/him. Before or after departure, the person concerned shall have reasonable opportunity to settle “any claims for wages and other entitlements due to him or her and any pending liabilities.” Measures to eliminate the employment of undocumented migrant workers shall not impair their rights with respect to the ability to bring civil claims against their employers.³⁶⁹

According to the *Declaration of Basic Principles*, compensation should include the return of property or payment for the harm or loss suffered, the reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.³⁷⁰ It further recommends states to encourage the establishment, strengthening and expansion of national funds for compensation to victims of crime.³⁷¹

Council of Europe

Art 6 para 1 *ECHR* grants everybody the right of access within reasonable time to a court for the determination of her/his civil rights and obligations.³⁷² Further, Art 13 *ECHR* grants persons whose rights under the Convention are violated “an effective remedy before a national authority.”

The *European Convention on the Compensation of Victims of Violent Crimes* obliges state parties to financially contribute to the compensation of victims who have suffered serious bodily injury or impairment of health directly attributable to an intentional crime of violence, even in cases where the offender cannot be prosecuted or punished. This obligation is only subsidiary. States will only contribute when compensation is not fully available from other sources, for example if the assets of the trafficker cannot be found. At a minimum compensation shall include ,among others, the loss of earnings, medical and hospitalization expenses. Compensation shall be paid by the state on whose territory the crime was committed, provided that the victim is a national of a state party to the Convention, or a national of a Council of Europe member state who is a permanent resident on the territory of the state where the crime was committed.³⁷³

In two non-binding recommendations, the Council of Europe Committee of Ministers addressed the question if compensation should be ordered in the course of criminal proceedings or in separate civil proceedings: According to *Recommendation R (2000) 11*, member states should enable the relevant courts to order offenders to pay compensation to the

³⁶⁹ Migrant Workers Convention (Art 22 paras 6, 9, Art 68 para 2).

³⁷⁰ Declaration of Basic Principles (Art 8). Art 8-11 of the Declaration use the term “restitution”. From the enumeration in Art 8 (see above) it can however be concluded, that “compensation” is meant.

³⁷¹ Declaration of Basic Principles (Art 13).

³⁷² See for instant the judgement of the European Court of Human Rights in the case *Golder versus United Kingdom*, Application No. 4451/70, 21 February 1975.

³⁷³ European Convention on the Compensation of Victims of Violent Crimes, ETS No.116, 24 November 1983, (Art 2-4). The Convention has been signed by Turkey. In most cases, trafficked persons may not fall under the term “permanent residents” in the meaning of Art 3. In such cases, states obligations to financially contribute to the compensation of trafficked persons exist only with regard to nationals of state parties to the convention.

victims. In cases where the criminal courts undertaking proceedings against traffickers do not have the power to also pronounce on the civil liability of the accused, states should ensure that victims can bring their claim to competent civil courts which can then consider awarding them compensatory damages.³⁷⁴ In the earlier *Recommendation R (85) 11*, the Committee of Ministers called upon member states to enable criminal courts to order compensation by the offender to the victim. Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction. If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money to the extent possible. Member states should further provide appropriate assistance and information to victims in order to enable them to achieve compensation before court and make available to the competent authorities all information relevant for the determination of claims for compensation.³⁷⁵

European Union

The *Council Framework Decision on the standing of victims in criminal proceedings* obliges member states to ensure that victims of criminal acts have access to information on “requirements for them to be entitled to compensation”.³⁷⁶ It further requires member states to ensure that victims of criminal acts are entitled to obtain a decision on compensation within “reasonable time limits”.³⁷⁷ This provision may be used to support the argument for the establishment of timesaving proceedings for trafficked persons to obtain compensation, such as the possibility to raise compensation claims within the criminal proceedings against the trafficker.

The *Hague Ministerial Declaration* encourages member states to acknowledge that the mobilization of public and private resources, including resources from “innovative sources of funding” may be necessary to compensate victims of trafficking.³⁷⁸

• **Examples of initiatives at national level**

According to *US* law, criminal courts may order convicted traffickers to pay restitution to the victim. The trafficker is obliged to pay the full amount of the victim’s losses. This includes the value of the victim’s labour as guaranteed under the Fair Standards Labour Act or, if their work is worth more to the trafficker, the value of the victim’s services or labour to the trafficker.³⁷⁹ This provision enables people forced into prostitution to claim the amount of money due for their services performed. As prostitution is not a legally recognized occupation, there exists no minimum wage or “market rate” to be claimed from the trafficker. In such a case the trafficked person has the right to receive whatever the value of their forced work was to the trafficker.³⁸⁰

³⁷⁴ Committee of Ministers Recommendation R (2000) 11 (Sec. 33), Explanatory Memorandum to the Recommendation, p 19.

³⁷⁵ Committee of Ministers Recommendation R (85) 11 (Sec. 2, 9-11, 14).

³⁷⁶ Council Framework Decision 2001/220/JHA (Art 4). See also Hague Ministerial Declaration (Chapter III.3.1).

³⁷⁷ Council Framework Decision 2001/220/JHA (Art 9 para 1).

³⁷⁸ Hague Ministerial Declaration (Chapters III.3.2, III.3.3).

³⁷⁹ United States Code (Sec. 1593), as amended by the Trafficking Victims Protection Act (Sec. 112 (a)).

³⁸⁰ According to information provided by the *International Human Rights Law Group*, June 2001.

In *Germany*, trafficked persons who have been granted a stay of deportation are entitled to compensation under the Act on the Compensation of Victims of Violent Crimes, even if they originally entered the territory illegally.³⁸¹

The *Kosovo/FRY* trafficking law provides for a reparation fund for victims that shall receive funds from, inter alia, the confiscated property of traffickers.³⁸²

According to *Austrian* criminal procedural law, civil claims of victims of crimes have to be dealt with before the criminal court, unless the case can only be decided before a civil court. In such cases, victims of crime may adhere to the criminal proceedings against the accused as private plaintiffs (“*Privatbeteiligung*”). Private plaintiffs have the right, among others, to inspect the files and to submit additional evidence to the court.³⁸³

In *Belgium*, claims for compensation by trafficked persons are usually raised within the criminal proceedings, and only in exceptional cases before a civil law court.³⁸⁴

• Recommendations

- States should enable trafficked persons to raise civil claims against their traffickers. This should be made possible irrespective of the trafficked persons’ residence or employment status. Such claims include compensation for physical, psychological and material damages, as well as overdue wages. States should inform trafficked persons about their right to bring a civil suit against the accused and about any procedural requirements thereof.
- States should primarily use confiscated assets in order to pay compensation and due wages to the victims. States should establish public funds as subsidiary compensation mechanisms in case the trafficker’s assets are not sufficient or if there were no assets found.
- Orders for payments resulting from such claims should be issued either in the course of criminal proceedings or in separate civil proceedings.

5.9 Return and reintegration assistance

Most destination countries do not provide trafficked persons with legal residence status. Consequently, trafficked persons are being deported or voluntarily returned to their country of origin. On route and upon return home, they may face several problems. Often, they have no travel or identity documents and therefore face complications in transit and also may be unable to re-enter their countries of origin. Travelling without an escort, they are especially vulnerable to being re-captured by traffickers. Many trafficked persons are heavily

³⁸¹ The Act actually excludes persons with irregular residence status from claiming compensation. Consequently, it used to be interpreted by authorities in a way to exclude trafficked persons from compensation because of their original irregular residence status in Germany, even if they have received a stay of deportation at the time of application (see *Niessner, Jones-Pauly*, p 152). A recent Ministerial Decree of the Federal Ministry of Labour and Social Order (VIa 2-62030 of 5 March 2001) however clarified that it would be sufficient for the person to have a legal residence status at the time when she/he raises the claim for compensation.

³⁸² UNMIK/REG/2001/4 (Sec. 6.3).

³⁸³ Code of Criminal Procedure (Sec. 4, 47), Federal Gazette No 631/1975.

³⁸⁴ In 1998, orders to pay compensation to the victims were issued in 8 of 15 convictions reported by the Center for Equal Opportunities. In practice however victims often do not receive any payments from the perpetrators because the money is no longer available. In such cases, the victim may apply for money from a public fund for victims of violent crimes, if she/he has a legal residence status; regardless whether the crime was committed in Belgium or abroad. *Niessner, Jones-Pauly*, p 43f.

traumatized because they were subjected to physical, psychological and/or sexual violence and are in need of medical treatment and psychological counselling. Especially women who worked in the sex industry fear stigmatization and rejection by their families and social environment. They have no place to stay and need accommodation and financial assistance. Further, in order to enable trafficked persons to integrate or re-integrate into the labour market, education and vocational training programmes, as well as assistance with finding employment are essential.

5.9.1 *Right to return*

- **International and European standards**

United Nations

The *ICCPR* prohibits state parties to expel trafficked persons if there is evidence that upon return to their home country their life might be endangered by violent acts by the traffickers (non-refoulement principle, see chapter 5.2.1)

According to the *Trafficking Protocol*, countries of origin are obliged to facilitate and accept the return of trafficked persons with due regard for their safety and without undue or unreasonable delay.³⁸⁵ Countries of transit or destination (“receiving countries”) returning trafficked persons to their country of origin shall ensure that such returns are “with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking.” The *Trafficking Protocol* further states that returns shall “preferably be voluntary”, but does not contain provisions regarding the case when trafficked person is expelled from the country of destination .

The *Trafficking Protocol* also obliges state parties to co-operate in the course of the return procedure. Upon request of the receiving state, states of origin shall verify whether the trafficked person is a national or had the right to permanent residence at the time of entering the receiving state and, if the person has no proper documentation, issue the necessary travel or other documents to enable the person to travel and to re-enter its territory.³⁸⁶

According to the *Migrant Workers Convention*, migrant workers may be expelled from the territory of a state party only in pursuance of a decision taken by the competent authority in accordance with the law. They are entitled to be informed about the decision in a language they understand and, upon request, to receive the decision in writing, including the reasons for the expulsion. States are obliged to inform them about these rights before or at latest at the time the decision is rendered. The person concerned has the right to submit the reason she/he should not be expelled and to have her/his case reviewed by a competent authority (unless the decision was a final decision pronounced by a judicial authority). Pending such review, the person concerned has the right to seek a stay of expulsion. Finally, states are obliged to give migrant workers reasonable opportunity (before or after departure) to settle any claims for wages or other entitlements due to her/him.³⁸⁷

³⁸⁵ Trafficking Protocol (Art 8 para 1). This provision applies not only to origin countries of which the trafficked person is a national, but also to countries in which she/he had the right of permanent residence at the time of entry into territory of the transit or destination country. “Permanent residence” means long-term residence, not necessarily indefinite residence (*travaux préparatoires*, Sec. 72).

³⁸⁶ Trafficking Protocol (Art 8). See also the Migrant Workers Convention (Art 67 para 1), providing for state co-operation regarding the orderly return of irregular migrant workers.

³⁸⁷ Migrant Workers Convention (Art 22 paras 2-4, 6).

Council of Europe

As the ICCPR, Art 3 *ECHR* establishes the non-refoulement principle.

The *Committee of Ministers Recommendation R (2000) 11* encourages countries of origin and countries of destination to conclude co-operation agreements in order to ensure the right to return to trafficked persons. The Recommendation further addresses the financial aspects of the right to return and recommends member states to establish, via bilateral agreements, a system of financing the returns of trafficked persons.³⁸⁸

The *Elements for a Regional Plan of Action* provide for cross border arrangements to ensure that victims have the right to safe repatriation to the country of origin and to receive all necessary support before, during and after their repatriation. Further, states should organize deportation procedures with respect for basic human rights standards and to ensure minimum safety conditions.³⁸⁹

OSCE Organization for Security and Co-operation in Europe

In the *OSCE Ministerial Declaration of 28 November 2000*, participating States committed themselves to establish “appropriate repatriation processes for the victims of trafficking, with due regard to their safety, including the provision of documents”.³⁹⁰

• **Recommendations**

- States should refrain from deporting trafficked persons if there is evidence of potential retaliation by traffickers. In such cases, states should provide them with a regular residence status (see chapter 5.2).
- States should establish appropriate mechanisms in order to ensure that deportations and voluntary repatriations are carried out with due regard for the safety of trafficked persons.
- The costs for repatriations should be borne by the states. For this purpose, states should co-operate in order to establish a system to finance repatriations.
- States of origin should provide trafficked persons with necessary travel and identity documents in order to enable them to travel to and re-enter their territories. When necessary, states of transit should also respond in an appropriate and timely manner in order to assist with repatriation efforts.
- Countries of origin, transit and destination should co-operate in order to facilitate the safe and orderly repatriation of trafficked persons. This co-operation should be closely coordinated with specialized victim support NGOs.

5.9.2 Reintegration assistance

• **International and European standards**

United Nations

State parties to the *ICESCR* and *CEDAW* are obliged to provide trafficked persons upon their return with reintegration assistance and support programmes, including access to counselling, medical care, education, vocational training and social security measures (see chapter 5.3.2).

³⁸⁸ Committee of Ministers Recommendation R (2000) 11 (Sec. 38f).

³⁸⁹ Elements for a Regional Plan of Action (Sec. 32f).

³⁹⁰ OSCE Ministerial Declaration, 28 November 2000 (Art 10).

The *Trafficking Protocol* obliges states of origin to provide trafficked persons with social support upon return, such as housing, information, medical, psychological and material assistance, employment and training opportunities. This obligation derives from Art 6 para 3 on victim assistance (see chapter 5.3.2). This provision is applicable to the receiving state until the trafficked person has returned to her/his state of origin, and to the state of origin thereafter.³⁹¹

Council of Europe

The *Committee of Ministers Recommendation R (2000) 11* addresses the financial aspects of the right to return and recommends member states to establish a system of financing returns of trafficked persons and to financially contribute towards their reintegration by concluding bilateral agreements.³⁹² Persons who have taken private loans in order to pay for the travel costs should be provided with means to settle their debts, in the form of a compensation scheme or any other suitable systems, that might be based on confiscation of the proceeds derived from trafficking.³⁹³

Further, member states should “organize a system of social support for returnees to ensure that victims are assisted by the medical and social services and/or their families” and “introduce special measures concerned with the victims’ occupational reintegration.”³⁹⁴

The Recommendation also acknowledges the unique role NGOs play in the field of reintegration. Member states should encourage and support the establishment of NGOs involved in the assistance of trafficked persons in the countries of origin. Furthermore, states should promote co-operation between reception facilities and NGOs in countries of origin to assist with the return and reintegration process of trafficked persons.³⁹⁵

European Union

The *Hague Ministerial Declaration* recommends member states to use the framework of development co-operation to assist countries of origin to organize support facilities for victims who have returned home. Such facilities should be confidential and include education and training in order to encourage the victim’s economic independence and social reintegration.³⁹⁶

• **Examples of national legislation**

According to *US* law, the government shall, in consultation with appropriate NGOs, establish and carry out programmes in countries of origin to assist in the safe integration, reintegration or resettlement of trafficked persons, as well as to take appropriate steps to enhance the co-operation among foreign countries, including countries of origin, in this respect.³⁹⁷

³⁹¹ *Travaux préparatoires*, Sec. 71.

³⁹² Committee of Ministers Recommendation R (2000) 11 (Sec. 39).

³⁹³ Committee of Ministers Recommendation R (2000) 11, Explanatory Memorandum to the Recommendation, p 20.

³⁹⁴ Committee of Ministers Recommendation R (2000) 11 (Sec. 40f).

³⁹⁵ Committee of Ministers Recommendation R (2000) 11 (Sec. 36f).

³⁹⁶ Hague Ministerial Declaration (Chapter III.3.4). See also the European Parliament 1996 Resolution (Sec. 8).

³⁹⁷ Trafficking Victims Protection Act (Sec. 107 (a)).

- **Recommendations**

- Upon return to their home countries, states should provide trafficked persons with shelter, counselling, medical and psychological care, material assistance, as well as skills training and job counselling.
- For this purpose, countries of origin, transit and destination should enter into co-operation agreements. Destination countries should support efforts by origin countries to assist and reintegrate trafficked persons by means of development co-operation. States should also increase co-operation with specialized victim support NGOs in the countries of origin and destination.

6 General measures

Comprehensive anti-trafficking strategies should further take into account a number of measures that are relevant for prevention, prosecution and protection, namely research activities, training programmes and co-ordination mechanisms.

6.1 Research

Research and the collection of statistics on the phenomenon of trafficking in human beings, serve as a necessary foundation for successful strategies, policies and activities in the fields of prevention, prosecution, as well as protection and assistance. A comprehensive approach requires research on the causes of trafficking, the scale of the problem, the routes and methods used by traffickers, the needs of trafficked persons, as well as on the effectiveness of state anti-trafficking measures.

- **International and European standards**

United Nations

The *Trafficking Protocol* obliges state parties to “endeavour” to undertake research in order to prevent trafficking in human beings. These measures shall, “as appropriate, include co-operation with NGOs and other elements of civil society.”³⁹⁸

Council of Europe

The *Committee of Ministers Recommendation R (2000) 11* recommends member states to encourage national and international research concerning the influence of media, especially new information and communication technologies, on trafficking, the origin of the phenomenon and the methods used by traffickers. States should consider the establishment of specialized research units. They should also develop, both at the national and international levels, data and statistics on trafficking and compare the development of the phenomenon in the Council of Europe member states.³⁹⁹

European Union

Several recommendations at the EU level address research activities.⁴⁰⁰ The *European Parliament Resolution of 2000* called upon the Commission, in co-operation with member states and applicant countries, to address the underlying causes in countries of origin, most notably poverty, socio-economic conditions, the unequal status of women, the profile and motives of the actors, especially the victims.⁴⁰¹

- **Recommendations**

- States should conduct and support research efforts in the fields of prevention, prosecution and protection. Research activities should focus on the factual situation with regard to trafficking (including the root causes for trafficking, the scale of the problem, routes and methods used by the traffickers, needs of trafficked persons) as well as to evaluate the effectiveness of existing state responses of a legal or non-legal nature. For this purpose, states should fund NGOs conducting research on the phenomenon of trafficking and consider the establishment of specialized research units within the relevant ministries.

³⁹⁸ Trafficking Protocol (Art 9 paras 2, 3).

³⁹⁹ Committee of Ministers Recommendation R (2000) 11 (Sec. 8-10).

⁴⁰⁰ See for instance the European Parliament 1996 Resolution (Sec. 12), Hague Ministerial Declaration (Chapter III.1.5).

⁴⁰¹ European Parliament 2000 Resolution (Sec. 9).

- States should ensure that law enforcement authorities and courts collect statistics on all cases related to trafficking including: information about: reported trafficking cases and successful convictions; the number of trafficked persons as well as their countries of origin and gender; referrals of trafficked persons to victim support organizations; voluntary repatriations and deportations of trafficked persons. This information and relevant statistics should be exchanged and compared with other states on a multilateral basis.

6.2 Training and awareness raising

Training and awareness raising of persons who may come in contact with trafficked victims is a key component of effective anti-trafficking strategies. Trafficked persons are often in a vulnerable position because they may have suffered physical, psychological or sexual violence. Judges and law enforcement officials need to be sensitized in order to treat them appropriately and to avoid further traumatizing victims. Further, the access of trafficked persons to assistance and support facilities depends on the ability of persons who are in contact with them to identify them as victims. For instance, law enforcement officers need to be able to identify a victim of trafficking in order to refer her/him to a shelter or other assistance. Finally, the ability of law enforcement officials and NGOs to identify trafficking cases may also contribute to the successful criminal prosecution of the traffickers. International and European standards

United Nations

CEDAW obliges state parties to eliminate gender-based violence against women, including trafficking in women (see chapter 3.4.2). In its General Recommendation No. 19, the *CEDAW* Committee recommended state parties, in order to fulfil their obligations under the Convention to protect women against gender-based violence and to provide for gender-sensitization training for judicial and law enforcement officials. Further, states should establish or support services including those provided by specially trained health workers.⁴⁰²

The *Beijing Platform for Action* recommends governments to

“create, improve or develop, as appropriate, and fund the training programmes for judicial, legal, medical, social, educational and police and immigrant personnel, in order to avoid the abuse of power leading to violence against women and sensitize such personnel to the nature of gender-based acts and threats of violence, so that the fair treatment of female victims can be assured.”⁴⁰³

Council of Europe

The *Committee of Ministers Recommendation R (2000) 11* calls upon member states to organize “special training for social workers, as well as for medical, teaching, diplomatic, consular, judicial, customs and police personnel to enable them to identify cases of trafficking (...) and to respond immediately.” Member states should set up specific training programmes to improve the co-operation between NGOs and authorities and to enable them to exchange experience. Further, states should provide appropriate information (documentation, videos, leaflets) on trafficking to diplomatic representatives, public authorities, the media,

⁴⁰² *CEDAW* Committee General Recommendation No. 19, sec. 24 (b), (k).

⁴⁰³ Platform for Action (Sec. 124 (n)). The Platform of Action encompasses trafficking in women as a form of gender-based violence (see chapter 2.3).

humanitarian NGOs and other public and private bodies working in potential countries of origin.⁴⁰⁴

European Union

The EU 2001 Council Framework Decision obliges member states to encourage initiatives enabling personnel in contact with victims (in particular police officers and legal practitioners) to receive suitable training through public services or by funding victim support organizations.⁴⁰⁵ Such training programmes should also be made available for NGOs.

• **Recommendations**

- States should organize or fund training programmes for all persons likely to be in contact with trafficked persons. This would include social workers, medical, teaching, diplomatic, consular, judicial, customs and police personnel in order to enable these persons to identify cases of trafficking, to respond immediately and to treat trafficked persons in an appropriate manner. Such training programmes should also be made available for NGOs.
- States should set up specific training programmes to improve co-operation between NGOs and the authorities and to enable them to exchange experience.

6.3 Establishment of co-ordinating bodies

The establishment of national high level co-ordinating bodies on trafficking issues, such as inter-agency working groups and ministerial co-ordinators, are of crucial importance for the development of national and regional anti-trafficking policies and the co-ordination of all relevant actors, both at the national and international levels.

• **International and European standards**

United Nations

The *General Assembly Resolution on Beijing+5* recommends to states that they appoint a national rapporteur or set up an interagency body with the participation of civil society, including NGOs. Such mechanisms should collect and exchange information and report on data, root causes, factors and trends in violence against women, in particular trafficking.⁴⁰⁶

Council of Europe

The Council of Europe *Recommendation R (2000) 11* calls upon member states to set up a co-ordinating mechanism responsible for the development of multidisciplinary anti-trafficking policies. This mechanism should be used to encourage “the exchange of information, the compilation of statistics and the assessment of practical findings obtained in the field, trends in trafficking and the results of national policies” and to liaise with mechanisms of other countries and international organizations in order to co-ordinate anti-trafficking activities.⁴⁰⁷

Co-ordination bodies must also be equipped with adequate resources. This aspect was addressed by the *Elements for a Regional Plan of Action* that recommended governments to enhance resources of government bodies and law enforcement agencies in countries of origin and transit to investigate and prosecute cases and to provide them with technical assistance

⁴⁰⁴ Committee of Ministers Recommendation R (2000) 11 (Sec. 13, 19, 21).

⁴⁰⁵ 2001 Council Framework Decision 2001/220/JHA (Art 14).

⁴⁰⁶ General Assembly Resolution A/RES/S-23/2 (para 70 (d)).

⁴⁰⁷ Committee of Ministers Recommendation R (2000) 11 (Sec. 50-52).

and equipment.⁴⁰⁸ This is however not only valid for authorities in countries of origin and transit, but is also relevant for countries of destination.

Stability Pact for South Eastern Europe

In the *Anti-Trafficking Ministerial Declaration of South Eastern Europe*, ministers and representatives from the Stability Pact Region committed themselves to nominate government co-ordinators at a senior political level with competence to co-ordinate intra-governmental activities and to assure regional and international co-operation. These co-ordinators shall, “inter alia, co-ordinate national action and efforts on the issue, regularly exchange information with the other participating states of the ‘South Eastern Europe Anti-Trafficking Ministerial’ and follow-up the Ministerial decisions. They will prepare follow-up and progress reports as well as suggest further action in this field.”

The Organization for Security and Co-operation in Europe

In the Ministerial Decision of 28 November 2000, OSCE participating States committed themselves to encourage the nomination of governmental representatives to co-ordinate anti-trafficking activities at the national, regional and international levels.⁴⁰⁹

The *OSCE/ODIHR Background Paper* recommends to participating States to establish national co-ordinating mechanisms that should ensure effective co-ordination not only between different governmental authorities, but also between governments and NGOs.⁴¹⁰

European Union

In the *Hague Ministerial Declaration*, EU member states committed themselves to appoint national rapporteurs on trafficking “who report to Governments on the scale, the prevention and combating of trafficking in women” and to encourage the co-operation of such rapporteurs on a regular basis.⁴¹¹ This recommendation was repeated by the European Parliament in its 2000 Resolution on trafficking, where it called upon all member states “to appoint without delay a national rapporteur on trafficking in women.”⁴¹²

• **Examples of initiatives at national level**

Several members of the Stability Pact have established national co-ordination bodies on trafficking that are composed of governmental and NGO representatives, such as *Montenegro/FRY, Serbia/FRY, former Yugoslav Republic of Macedonia and Romania*.

Ukraine has created a “National Co-ordination Council for Prevention of Trafficking in Human Beings” under the Ombudsperson the Ukrainian Parliament.⁴¹³ Furthermore, the Cabinet of Ministers developed and approved⁴¹⁴ a national “Program for Prevention of Trafficking in Women and Children.” This program serves as Ukraine’s national action plan to combat trafficking outlining necessary activities and assigning responsibility to various ministries and state authorities, that are to work in co-operation with NGOs to achieve their aims.

⁴⁰⁸ Elements for a Regional Plan of Action (Sec. 43).

⁴⁰⁹ Ministerial Decision of 28 November 2000 (Art 11).

⁴¹⁰ *OSCE/ODIHR Background Paper*, p 67.

⁴¹¹ Hague Ministerial Declaration (Chapter III 1.4).

⁴¹² European Parliament 2000 Resolution (Sec. 14).

⁴¹³ *Minnesota Advocates for Human Rights, Trafficking*, p 30.

⁴¹⁴ This program was approved by Decree No.1768 of the Cabinet of Ministers on 25 September 1999.

The *Netherlands* has appointed a national rapporteur on trafficking in women whose task is to report to the government on trafficking-related data and on methods of prevention.⁴¹⁵

Within the *Belgian* Ministry of Justice, an attorney general has been established for the co-ordination of Belgium's national and international anti-trafficking policies.⁴¹⁶

In *Italy*, the "Interministerial Committee for the co-ordination of the government's action against trafficking in women and children" was established in 1998. The Committee co-ordinates the government's anti-trafficking policy at both the national and the international levels. It collects data on the phenomenon of trafficking and organizes the exchange of information between the relevant administrative authorities.⁴¹⁷

US legislation has set up an Interagency Task Force to Monitor and Combat Trafficking. This body performs the following tasks: co-ordination of the implementation of the recently adopted Trafficking Victims Protection Act; measuring and evaluating progress of US and other countries in the field of anti-trafficking action; collection and organization of data and research; facilitation of co-operation among countries of origin, transit and destination with a view to strengthening local and regional capacities to prevent trafficking, prosecute traffickers and assist trafficked persons; consultation and advocacy with governmental organizations and NGOs.⁴¹⁸

The new *Kosovo/FRY* trafficking regulation introduces a Victim Assistance Co-ordinator who is responsible for co-ordinating the implementation of the regulation, especially in the field of victim assistance. The co-ordinator shall co-operate with the relevant law enforcement authorities, international organizations and NGOs.⁴¹⁹

• Recommendations

- States should set up high-level inter-agency working groups and co-ordinators on trafficking issues. States should provide these bodies with sufficient personal and financial resources and adequate training and ensure that also NGO members are represented therein.
- Such working groups and co-ordinators should be competent to elaborate anti-trafficking policies and to monitor their implementation, to co-ordinate all relevant actors at the national level and to co-operate with other countries and international organizations. Their tasks should not be restricted to prosecution but should also encompass the development and co-ordination of measures to assist and protect trafficked persons.

⁴¹⁵ <http://www.un.org/womenwatch/daw/followup/session/presskit/fs4.htm>.

⁴¹⁶ *Niesner, Jones-Pauly*, p 29.

⁴¹⁷ Information provided by the Italian government in a questionnaire for the Council of Europe June 2000 Athens seminar on trafficking in human beings in South Eastern Europe.

⁴¹⁸ Trafficking Victims Protection Act (Sec. 105).

⁴¹⁹ UNMIK/REG/2001/4 (Sec. 9).

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List of documents

The following includes a chronological list of all documents referred to in the course of the present paper.

- **United Nations**

Legally binding documents

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ILO Convention No. 29 concerning Forced Labour, 28 June 1930.

Universal Declaration of Human Rights (UDHR), UN GA Res 217A (III), 10 December 1948.⁴²⁰

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⁴²⁰ The UDHR is a (non-binding) declaration, but has achieved the status of customary international law. Therefore it is binding upon all UN member states.

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⁴²¹ Once adopted, the Council Framework Decision will be legally binding upon EU member states.

- **Stability Pact for South Eastern Europe**

Politically binding documents

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List of frequently used acronyms

Countries

FRY	Federal Republic of Yugoslavia
FSU	former Soviet Union
FYROM	former Yugoslav Republic of Macedonia
US	United States of America

Documents

CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	UN Convention on the Rights of the Child
DEVAW	UN Declaration on the Elimination of Violence Against Women
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UN/REG	United Nations Regulation

International Organisations

CoE	Council of Europe
EU	European Union
IMF	International Monetary Fund
ILO	International Labour Organisation
IOM	International Organization for Migration
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
UNDP	United Nations Development Funds*
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNMIK	United Nations Mission in Kosovo
UNODCCP	United Nations Office for Drug Control and Crime Prevention
UNOHCHR	United Nations Office of the High Commissioner for Human Rights

Non-Governmental Organisations

GAATW	Global Alliance Against Trafficking in Women
IHF	International Helsinki Federation of Human Rights

Other

AIDS	Acquired Immune Deficiency Syndrome
GA	General Assembly
HIV	Human Immunodeficiency Virus
H.R.	House Resolution
JHA	Justice and Home Affairs
MPs	Members of Parliament
NGO	non-governmental organisation
Res	Resolution

Annex: Checklist of recommendations

The following list includes a compilation of all recommendations elaborated within the reference guide. It can serve as a checklist for identifying areas of concern that need to be addressed when adopting or reviewing anti-trafficking legislation.

A) PREVENTION

1) Awareness raising

- States should fund and organize awareness raising and information campaigns in the countries of origin, in order to prevent trafficking in human beings. Such campaigns should be developed and undertaken by countries of origin in co-operation with NGOs, which should be adequately financially supported. Countries of transit and destination should support governments and NGOs in the countries of origin in their efforts to conduct such campaigns.
- Information campaigns should raise the awareness of the general public and especially of potential victims about the phenomenon of trafficking. High risk groups should be provided with information on recruitment methods used by traffickers, on legal requirements for migration to countries and the earning possibilities in such countries, on sexually transmitted diseases, including HIV/AIDS, associated with sex work, as well as on organizations to contact for more information.
- Preventive efforts should also target school children by including information on trafficking, and more general, on gender equality, into school curricula and textbooks.

2) Addressing the economic and social background of women in the origin countries

Violence against women

- States should take all necessary measures to eliminate violence against women in all areas of social life and to provide support and assistance to victims.
- States should establish a legal definition of violence and ensure that all forms of gender-based violence, including violence within the family, constitute offences punishable under criminal law and are effectively prosecuted by its authorities. Besides criminal sanctions, states should also provide civil remedies for victims. This includes claims for compensation and application for temporary injunctions. In cases of domestic violence, states should adopt legislation allowing the police to send the perpetrators away in order to prevent further violent acts.
- States should establish and finance support mechanisms for women victims of violence, including medical, psychological and legal counselling free of charge, accommodation, and, if necessary, free legal aid.
- In order to overcome monetary obstacles preventing female victims of domestic violence from leaving their abusive partners, states should make financial assistance, as well as education and training programmes available to women to help them become independent.
- States should develop, fund and implement training programmes for judicial, legal, medical, social services, police and immigration personnel in order to sensitize them to the serious nature of gender-based violence. These professionals should be enabled to identify situations of gender-based violence and to treat the victims adequately and respectfully. Such training programmes should be carried out together with NGOs specialised in the field of violence against women, in order to improve the co-operation between NGOs and authorities.
- States should collect accurate statistics on gender-based violence and carry out research on its extent, causes and consequences. For this purpose, a co-ordinating mechanism should be set up and provided with sufficient personal and financial infrastructure.
- States should carry out preventive measures to change the attitudes concerning the roles of men and women. This should include media campaigns aiming at the general public as well as

mainstreaming the issue of gender-based equality and especially violence against women in school curricula.

Women and the labour market

- States should introduce anti-discrimination legislation, granting women and others an effective remedy against all forms of discrimination related to employment, including discrimination with regard to access to employment or vocational training, determination of wages or termination of employment. States should ensure that the burden of proof lies not with the victim but with the alleged perpetrator (as in the Czech Republic and Hungary) or at least that the victim does not need to prove, but only make a credible statement that she/he suffered from discrimination.
- States should take measures to ensure that women are not marginalized into low-paid, insecure employment sectors. This could be achieved for example by introducing affirmative action including quota systems, promoting vocational training for women in non-traditional employment areas and mainstreaming gender-sensitive education in school curricula.
- States should take measures to facilitate the equal sharing of family responsibilities between women and men. For example by extending the concept of “maternity leave” to “parental leave”, making available affordable child-care facilities and adequately protecting part-time workers under labour and social law.
- States should establish programmes to promote access to employment, vocational training and micro-credit lending to women, particularly in rural areas.

Women and decision-making

- States should take measures to ensure that the level of participation of women in political decision making processes reaches a “critical mass” of 30-35 per cent.
- To achieve this aim, states should introduce positive measures, such as quota systems for political parties. Parties should be required to nominate at least 30 per cent of women on their lists and to ensure that they are listed in places with good prospects to be elected. This could be achieved, for instance, by systems like those practised in Kosovo/FRY (minimum percentage of women at the top of the candidate lists) or Sweden (“sandwich lists”).
- States should establish a mechanism to ensure political parties’ compliance with quota requirements, for instance by linking financial benefits, such as state subsidies for political parties to the fulfilment of quota targets.

Gender equality machineries

- States should set up high-level co-ordinating bodies on gender issues responsible for formulation and supervision of policies and strategies aiming at the elimination of gender discrimination and for the supervision of gender mainstreaming into all areas of the government’s policy.
- States should ensure that such bodies have a clear mandate as well as sufficient personal and financial resources and are established at a level allowing them to influence policies.

International and regional co-operation

- States should make use of bilateral, regional and international co-operation, including development co-operation, to eliminate the root causes of trafficking in human beings, especially women. For this purpose, states should also make use of and support existing regional co-operation initiatives, such as the Stability Pact and its Task Forces on Gender and Trafficking in Human Beings.
- States should support NGOs in the countries of origin working towards the empowerment of women.

3) Immigration policies of destination countries

- Governments in destination countries should consider increasing opportunities for persons, in particular for women and girls, to immigrate legally for work, education and vocational training. For this purpose, destination countries should enter into agreements and set up programmes in co-operation with countries of origin and/or regional and international organizations such as IOM.

- States and organizations implementing such initiatives should ensure that women and men have equal access to such employment and training programmes. Countries of origin should encourage women and girls to participate and provide them with adequate information on the existence and requirements for participation in such programmes. Participating states and organizations should ensure that the jobs offered in the course of such programmes do not exclusively focus on traditionally “male” skills but are also accessible for women.
- Countries of origin should provide women and girls with education and vocational training possibilities in order to ensure that they possess the necessary qualifications in order to successfully participate in such programmes and to secure employment (see chapter 3.4).

B) PROSECUTION

1) Distinct offence and definition of trafficking in human beings

States should establish a distinct offence of trafficking in human beings sufficiently broad to cover all forms of trafficking. The definition of trafficking should include at least the following elements:

- acts: recruitment, transportation, transfer, harbouring or receipt of a person;
- means: threat or use of force or other forms of coercion, of abduction, fraud, deception, abuse of power or a position of vulnerability;
- purpose: forced labour or services, slavery, slavery-like practices or servitude.

2) Sanctions

- States should establish and apply sanctions for trafficking in human beings that have a deterrent effect and reflect the serious nature of the crime and the human rights violations involved.
- States should consider the following sanctions: imprisonment, fines, confiscation of assets resulting from trafficking and closure of establishments associated with trafficking.
- Confiscated assets should be used to compensate trafficked persons and then to pay for services to trafficked persons. States should also consider supporting reintegration programmes in the countries of origin with the money derived from confiscation.

3) Criminal liability of legal entities

- States should establish criminal and civil liability of legal entities involved in trafficking in human beings. This should be without prejudice to the liability of the individual persons involved.
- Sanctions against legal entities should include fines, confiscation of assets, closure of establishments, exclusion of the entitlement to public aid or tax benefits, placement under judicial supervision and disqualification from the practice of commercial activities.

4) Criminalization of all activities related to trafficking

- States should establish all activities related to trafficking as criminal offences, such as instigating, aiding, abetting, attempting, omission to act against and conspiracy to traffic.
- States should specifically establish the activities of organized criminal groups involved in trafficking as a criminal offence.
- States should further ensure that trafficking cases involving public officials are prosecuted and involve not only disciplinary consequences, but also sanctions under criminal law.

5) Establishment of other criminal offences related to trafficking

In order to ensure that the penalties applied reflect the gravity of the harm inflicted upon the trafficked person, states should, additionally to prosecuting traffickers under the offence of trafficking in human beings, invoke other applicable provisions of criminal law. Such offences include, but are not limited to the following: slavery, slavery-like practices, involuntary servitude, forced or compulsory labour, debt bondage, forced marriage, forced abortion, forced pregnancy, torture, cruel, inhuman or degrading treatment, rape, sexual assault, bodily injury, murder,

kidnapping, unlawful confinement, labour exploitation, withholding of identity papers and corruption.

6) Establishment of specialized investigation units

- In order to ensure the effective investigation and prosecution of trafficking cases, states should set up specially equipped and trained units within their national police and prosecutor's offices.
- The tasks of such units should include the development and use of effective investigation and prosecution methods, as well as the co-ordination of anti-trafficking activities in co-operation with other national authorities. They should also establish or strengthen co-operation with their counterparts in other countries, as well as relevant regional and international organizations, including Europol and Interpol.
- States should provide these units with sufficient personnel and financial resources, as well as adequate train in order to identify victims of trafficking and to treat them with respect to their special needs.

7) Extraterritorial jurisdiction

- States should exercise jurisdiction over offences of trafficking that are committed in their territory.
- States should also establish jurisdiction if the offence was committed outside their territory, at least in cases, where the offence was committed by or against one of their nationals and in cases of transnational crime, when the act was committed outside the territory, but has effects on their territory.

8) Extradition

- If they have not yet done so, states should ratify the European Convention on Extradition and the UN Crime Convention. Additionally, they should conclude bilateral agreements in order to facilitate extradition in cases of trafficking in human beings.
- States should ensure that its competent authorities apply such extradition treaties in practice and that suspected traffickers are extradited to the country where evidence of an alleged offence has been uncovered. They should undertake measures to expedite extradition procedures, including the establishment or designation of authorities responsible for transmitting and receiving extradition requests.
- States should also consider extradition of their own nationals. When a state refuses extradition of its own nationals, it should immediately submit the case to its competent authorities for investigation and prosecution.

C) PROTECTION AND ASSISTANCE

1) Residence status

Residence permits

- States should refrain from the immediate expulsion of trafficked persons because of their irregular residence and/or labour status.
- Trafficked persons who decide to give testimony in criminal proceedings should be granted a residence status at least for the duration of such proceedings. Whether or not trafficked persons decide to testify, they should be entitled to remain in the state's territory for an adequate period of time that allows them to recover and to receive just compensation from the traffickers. This period should be at least six months. The residence permit should include the right to medical, psychological, social and legal counselling and assistance, physical protection, as well as access to the labour market.
- If required by humanitarian reasons, such as dangers to personal safety or lack of means for survival in case of return, states should issue permanent residence permits, whether or not the victim has decided to act as a witness in the criminal proceedings.

Asylum

- States should apply existing asylum laws to trafficked persons or, if necessary, introduce new legislation in order to ensure that trafficked persons who are subjected to persecution in the meaning of the Geneva Refugee Convention are being granted asylum.
- For this purpose, state authorities should consider trafficked persons as “members of a particular social group” according to the Geneva Refugee Convention. If there is evidence that trafficked persons who should be expelled to their countries of origin or other countries because of their irregular residence status would upon return not be sufficiently protected from organized trafficking groups by these countries, authorities in their country of residence should consider such situations as “well founded fear of persecution” in the meaning of the Geneva Refugee Convention.
- States should train judges and law enforcement officials dealing with asylum cases in order to ensure that existing asylum laws are being applied to trafficked persons and that officials are sensitized to the special needs of victims of trafficking and treat them respectfully.

2) Assistance to trafficked persons in the destination country

Identification of trafficked persons

- States should undertake efforts in order to identify all persons and groups who would possibly come into contact with victims of trafficking, such as border guards, police and immigration officials, doctors, medical and social workers, housing inspectors, agricultural inspectors, staff of immigrant rights organizations, women organizations, refugee and asylum organizations, etc.
- States should ensure that these persons receive training in order to identify trafficked persons and to refer them to specialized victim support organizations. Such training should be carried out in co-operation with specialized NGOs.
- States should elaborate standardized questionnaires in order to facilitate the identification of trafficked persons and make them available to all actors identified above, who should ask these questions when they suspect a case of trafficking. Immigration and border officials should always ask these questions before deporting irregular migrants. Police officials should also make use of these questionnaires whenever they raid brothels or other establishments suspected of trafficking. Whenever police come across a suspected trafficking case, with the victim’s consent, a NGO representative should be present during the interrogations of potential victims of trafficking.
- States should also take into account that clients of persons trafficked into forced prostitution are potential sources of information about trafficking cases. Therefore, states should organize awareness raising campaigns addressed to the general public in order to sensitize clients about the problem of trafficking in human beings and to enable them to recognize trafficking cases and to contact organizations for assistance.

Accommodation, health care and counselling

- States should set up and advertize emergency telephone hotlines providing counselling to trafficked persons in a language they understand.
- States should provide trafficked persons, free of charge and in co-operation with NGOs, with the following services: adequate safe housing, medical treatment including confidential HIV testing, psychological care, access to health and social services, legal counselling in their native language, financial support, access to employment, education and training. These services should be provided to trafficked persons for the duration of their stay in the country of transit or destination, and regardless as to whether or not they decide to act as witnesses. Further, trafficked persons should have access to such facilities regardless of any charges for irregular entry, residence or employment.
- In order to enable trafficked persons to make use of any available assistance mechanisms, states should ensure that law enforcement and other state authorities dealing with victims of trafficking have the duty to inform them about existing facilities.

The role of NGOs

- States should provide adequate and sustained funding to NGOs specialised in providing services to trafficked persons. For this purpose, states should also use confiscated assets derived from trafficking cases.
- States should encourage and promote co-operation between law enforcement authorities and relevant NGOs.
- Furthermore, states should support the creation of national, sub-regional and regional NGO networks in order to improve and strengthen victim assistance mechanisms.

3) Non-criminalization of trafficked persons

- States should not prosecute trafficked persons for trafficking-related offences such as holding false passports or working without authorization, even if they agreed to hold false documents or to work without authorization. Whether prostitution is legal or not, states should not prosecute persons for being trafficked into the sex industry, even if the person originally agreed to work in the sex industry.
- If trafficked persons are prosecuted for crimes committed during their period of victimhood, they must be able to raise the defence of having been subjected to psychological coercion, physical force or the threat of force when the crime was committed.

4) Standards for trafficked persons who are detained and/or criminally prosecuted

If states prosecute trafficked persons for any trafficking-related offences, including irregular residence or employment, they should respect the following minimum guarantees:

- States should provide trafficked persons that are imprisoned with access to adequate sanitary facilities, food, drinking water, health and medical services. They should be allowed to communicate with diplomatic or consular representatives of their home country. States should provide for training of prison staff in order to ensure that trafficked persons are treated with respect for their dignity and cultural identity.
- States should provide trafficked persons in case of criminal charges against them with information about their rights and counselling in a language they understand, adequate time and facilities to prepare their defence, free legal assistance if necessary, as well as free assistance of an interpreter.

5) Position of victims and witnesses in legal proceedings

Access to information and advice

- States should provide trafficked persons with information and assistance to enable them to have their views and concerns presented and considered in the course of criminal proceedings. At a minimum, trafficked persons should receive the following information: contact information for support organizations and the type of support they can obtain; their role in connection with criminal proceedings, especially their rights and duties; date and place of the hearing against the alleged trafficker; requirements for obtaining protection, legal aid and compensation; the outcome of investigations and the release of the trafficker.
- States should reimburse to trafficked persons who are witnesses or parties any expenses resulting from legitimate participation in criminal proceedings against the trafficker.

Access to translation and legal assistance free of charge

- States should provide trafficked persons with free legal representation and translation services during criminal proceedings against the trafficker, as well as during proceedings for civil compensation.

Investigation and interrogation

- States should ensure that court staff treat trafficked persons respectfully and with special regard to their vulnerable position. For this purpose, states should establish obligatory training for judges to enable them to handle cases of trafficking and/or violence in an appropriate manner.

- States should ensure that judges question trafficked persons only insofar as necessary for the criminal proceedings and also consider other means of evidence, for example the identification and interrogation of other witnesses, including clients or neighbours.
- States should provide trafficked persons who give witness statements with the possibility to provide testimony by special audio or video facilities and without being personally confronted by the accused.

6) Protection of the privacy and physical security of victims and witnesses

- States should undertake adequate measures to protect the privacy and physical security of trafficked persons while they are within their territories. Trafficked persons should be protected from reprisals and intimidation whether or not they decide to give a witness statement. If the person decides to give testimony, protection should be granted before, during and after criminal proceedings, as necessary.
- States should provide for possibility to exclude the general public from the trial and not to disclose personal information about the victim or to publish such information only to the necessary extent.
- States should provide trafficked persons with police protection. Protection should be extended to their family members and staff of supporting NGOs.
- States should establish evidentiary rules that ensure the safety of witnesses, for example the possibility to testify by video link.
- States should provide witnesses with new identities and relocate them to other cities, if otherwise their life and security would be endangered.
- States should notify trafficked persons in case their trafficker is released.
- States should co-operate bilaterally and internationally in order to improve the protection of trafficked persons and their families, as well as other witnesses.

7) Civil claims of trafficked persons

- States should enable trafficked persons to raise civil claims against their traffickers. This should be made possible irrespective of the trafficked persons' residence or employment status. Such claims include compensation for physical, psychological and material damages, as well as overdue wages. States should inform trafficked persons about their right to bring a civil suit against the accused and about any procedural requirements thereof.
- States should primarily use confiscated assets in order to pay compensation and due wages to the victims. States should establish public funds as subsidiary compensation mechanisms in case the trafficker's assets are not sufficient or if there were no assets found.
- Orders for payments resulting from such claims should be issued either in the course of criminal proceedings or in separate civil proceedings.

8) Return and reintegration assistance

Right to return

- States should refrain from deporting trafficked persons if there is evidence of potential retaliation by traffickers. In such cases, states should provide them with a regular residence status (see chapter 5.2).
- States should establish appropriate mechanisms in order to ensure that deportations and voluntary repatriations are carried out with due regard for the safety of trafficked persons.
- The costs for repatriations should be borne by the states. For this purpose, states should co-operate in order to establish a system to finance repatriations.
- States of origin should provide trafficked persons with necessary travel and identity documents in order to enable them to travel to and re-enter their territories. When necessary, states of transit should also respond in an appropriate and timely manner in order to assist with repatriation efforts.

- Countries of origin, transit and destination should co-operate in order to facilitate the safe and orderly repatriation of trafficked persons. This co-operation should be closely co-ordinated with specialized victim support NGOs.

Reintegration assistance

- Upon return to their home countries, states should provide trafficked persons with shelter, counselling, medical and psychological care, material assistance, as well as skills training and job counselling.
- For this purpose, countries of origin, transit and destination should enter into co-operation agreements. Destination countries should support efforts by origin countries to assist and reintegrate trafficked persons by means of development co-operation. States should also increase co-operation with specialized victim support NGOs in the countries of origin and destination.

D) GENERAL MEASURES

1) Research

- States should conduct and support research efforts in the fields of prevention, prosecution and protection. Research activities should focus on the factual situation with regard to trafficking (including the root causes for trafficking, the scale of the problem, routes and methods used by the traffickers, needs of trafficked persons) as well as to evaluate the effectiveness of existing state responses of a legal or non-legal nature. For this purpose, states should fund NGOs conducting research on the phenomenon of trafficking and consider the establishment of specialized research units within the relevant ministries.
- States should ensure that law enforcement authorities and courts collect statistics on all cases related to trafficking including: information about: reported trafficking cases and successful convictions; the number of trafficked persons as well as their countries of origin and gender; referrals of trafficked persons to victim support organizations; voluntary repatriations and deportations of trafficked persons. This information and relevant statistics should be exchanged and compared with other states on a multilateral basis.

2) Training

- States should organize or fund training programmes for all persons likely to be in contact with trafficked persons. This would include social workers, medical, teaching, diplomatic, consular, judicial, customs and police personnel in order to enable these persons to identify cases of trafficking, to respond immediately and to treat trafficked persons in an appropriate manner. Such training programmes should also be made available for NGOs.
- States should set up specific training programmes to improve co-operation between NGOs and the authorities and to enable them to exchange experience.

3) Establishment of co-ordinating bodies

- States should set up high-level inter-agency working groups and co-ordinators on trafficking issues. States should provide these bodies with sufficient personal and financial resources and adequate training and ensure that also NGO members are represented therein.
- Such working groups and co-ordinators should be competent to elaborate anti-trafficking policies and to monitor their implementation, to co-ordinate all relevant actors at the national level and to co-operate with other countries and international organizations. Their tasks should not be restricted to prosecution but should also encompass the development and co-ordination of measures to assist and protect trafficked persons.
- Co-ordination of measures to assist and protect trafficked persons.