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Trafficking in Persons, Witness Protection and the Legislative Framework of the Republic of Moldova: An Assessment

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1. Introduction

1.1. Aims and objectives

This study aims to examine the legislative framework of the Republic of Moldova ("Moldova") in the light of relevant international legal and political standards relating to trafficking in persons in order to *assess whether there is sufficient basis for comprehensive victim-witness protection within the law* from the identification of a suspected victim of trafficking in persons through the investigation of the offence, the criminal proceedings and the post-trial phase. The study is commissioned by the *OSCE Mission to Moldova* within the framework of the Project "Strengthening Protection and Assistance to Victims of Trafficking, especially Women and Children". The study constitutes one element of a strategy to devise and contribute to the development of a comprehensive plan to victim-witness protection in Moldova in partnership with the national authorities and non-governmental organisations (NGOs) in compliance with international human rights standards. The aim being to take practical measures like strengthening the capacity of existing local service providers, enhancing the development of referral mechanisms and establishing standard operating procedures for treatment of victims, adults and children. Weak legislation, corruption, limited law enforcement capacities and absence of resources contribute to the impunity of traffickers. Because of poor implementation of anti-trafficking and victim-witness protection measures very few victims have so far been willing to testify against suspected traffickers. Victims are often unwilling to cooperate with the law enforcement because of lack of confidence in the police and in the judiciary system, and fear of reprisals.

The report gives brief details of the trafficking situation and the international obligations, which Moldova is under to combat the phenomenon and protect its victims. It then focuses on selected prerequisites for protection to be guaranteed to any trafficked victim. Thereafter the report focuses on protection mechanisms for those participating or being requested to participate in criminal proceedings as witnesses. Firstly the report deals with the domestic criminal proceedings protections and then goes on to discuss the implications for victim-witness protection where trans-border legal cooperation is needed. This is a particular issue for Moldova as it is a country of origin for trafficked victims and therefore they often become involved in legal proceedings in other states. Recommendations are made at the end of each section and then grouped by their scope of application at the end of the document.

Throughout it is assumed that a graduated system of "protection" is required in trafficking cases so that victim-witnesses can access different levels and types of procedural and non-procedural rights from identification to post-proceedings. Such protections are required in such a way as to meet their personal specificities and the changing nature of the risk over time.

1.2. Methodology and scope

This work is mainly the product of desk research by the two consultants based on the analysis of relevant Moldovan laws translated into English by *OSCE, Council of Europe and*

ABA CEELI. We have also analysed the international standards, which are applicable to Moldova. These standards consist of international human rights treaties, bilateral and multilateral conventions, soft law standards and obligations which arise from political declarations and obligations of international and regional governmental organizations such as the *United Nations, Council of Europe, OSCE* and the *Stability Pact for South Eastern Europe*.

We have not been able to consistently analyse each obligation in turn and to evaluate whether the Moldovan authorities fulfil it so the report should not be viewed as a conclusive evaluation of whether or not the legislative framework meets all relevant international standards. Where it is apparent that the law is in compliance with a particular standard this has been highlighted but our primary focus remains throughout an evaluation of whether the law can deliver victim-witness protection. Clearly the question of whether Moldova has the capacity to deliver upon these commitments is dependent on a variety of factors such as financial support, infrastructure, levels of public corruption and the straightforward effectiveness and professionalism of all the relevant agencies. It has not been possible to assess or make recommendations, which deal with all of these institutional, financial and capacity factors, however where appropriate we have strayed into these areas.

Additionally two visits to Moldova augmented this work by focusing on interviews with governmental and NGO representatives and officers of international organizations. Most recommendations made in these sessions by our interlocutors have been considered in the drafting of this report. Where the recommendations have not been followed we have endeavoured to provide a rationale in the report, however where we have failed we hope the rationale is evident from the overall conclusions or recommendations. Extensive contributions were made by the *OSCE* Mission Anti Trafficking Unit and some of the findings and recommendations are oriented towards programme planning for the *OSCE* Mission in the light of its ongoing commitments to implement the anti-trafficking programme and to complement other activities.

The work has been the product of intensive work during the period October-December 2003 and given the exigencies produced by the situation in Moldova (rapid law reform processes, policy developments and political commitments to respond to the problem of trafficking in persons) it was felt appropriate to produce the analysis at a time when it would still be useful. As a result the analysis may lack a depth, which could only have been achieved through time and other activities such as the attendance at court and trial monitoring of relevant cases. However, we consider that we have managed to highlight a number of specific law reform recommendations as well as systemic changes, which should be undertaken. Finally, in general we have shied away from making very specific drafting (wording) recommendations because it is felt that in many cases the reforms require a process of consideration of the domestic authorities in the light of Moldovan laws, administrative and non-governmental structures before such wording could be elucidated.

1.3. Terminology

The Criminal Procedure Code of Moldova (CPC)[1] defines "*victims*" as persons who were caused moral, physical or pecuniary damage following an offence (Art. 58). Victims may be recognized by the court or the criminal prosecution bodies as an "*injured party*" (Art. 59). This is a special procedural status, which gives them additional rights, but also obligations, such as the obligation to make statements before the police, prosecutor or court (Art. 60 (2) no. 2).[2] Victims or injured parties may also become a "*civil party*" after filing an application before the court to decide upon her/his claim during criminal proceedings (Art. 61). This status only relates to the part of the proceedings dealing with the civil claim. The CPC qualifies injured parties and civil parties as parties of prosecution (Art. 6 no. 31).

Victims or injured parties who testify before the court also have the status as witnesses. Art. 90 CPC defines "*witnesses*" as persons possessing information regarding a certain circumstance that needs to be established, who are either summoned as witness by the criminal prosecution bodies or the court or who give statements as a witness. Seen in the context of the overall criminal law framework, this definition lacks clarity. It is questionable if cases which appear to be encompassed by Art. 90 CPC (the victim provides intelligence to the police but does not want to testify in open court) can exist at all, taking into account the provision of Art. 313 CC, which criminalises the refusal of witnesses and injured parties to give testimony and thus pressures all victims to give testimony in court.

Thus, a victim is not necessarily a witness, and a witness is not necessarily a victim. Some persons are both, and are therefore in a particularly vulnerable situation. As victims of crime, they have for example the right to compensation and sensitive treatment, whereas their status as witness additionally creates a special situation in terms of security. The present report mainly deals with the question of protection of victims of trafficking and those who also become witnesses in criminal proceedings against traffickers ***("victim-witnesses")***.

"*Protection*" of victim-witnesses in the context of the present report is defined in a broad sense, encompassing not only the protection of the victim-witness's physical security, but also other aspects of protecting their rights, such as the right to information or privacy.

Depending on the stage of a criminal case, the suspected trafficker may be a suspect, accused or defendant. Art. 63 (1) CPC defines the *suspect* as the person against whom certain evidence on the commission of the crime exists, before pressing charges. The *accused* is a suspect against whom an indictment ordinance was issued (Art. 65 (1)). Once her/his case was sent to court, the accused is called defendant (Art. 65 (2)).

When referring to provisions of the CPC dealing with "criminal prosecution bodies", this report uses this term accordingly. Wherever more specific terminology is appropriate, the

[1] Codul de Procedura Penala al Republicii Moldova, adopted 14 March 2003, last amended May 29 2003.
[2] The provisions dealing with hearing of witnesses are also applicable to the hearing of injured parties (Art. 111 (2), Art. 369 (1) CPC).

terms “police”, “border guards” or, more broadly, “law enforcement officials” (the latter including, but not being limited to, police and border guards) are used.

In accordance with Art. 6 (47) CPC (where the term “juvenile” is used) and Art. 1 of the UN Convention on the Rights of the Child, *“children”* are defined as persons who have not yet reached the age of 18.

Despite the fact that the majority of identified victims of trafficking in persons are women and girls, the present report uses gender-neutral language (e.g. s/he, her/his). This approach is in line with the UN Trafficking Protocol, which applies to trafficking in women, girls, men and boys equally. Further, research on trafficking cases abroad as well as in Moldova (e.g. trafficking in organs) established that cases of trafficking in men and boys also exist, and these as well as future cases should not be excluded from the scope of the report.

Finally, it should be noted that the terms throughout the report are taken from English translations of the relevant laws and therefore should be checked with original Romanian version. This limitation should be taken into account when considering the language of the laws quoted in the present report, as in their authoritative form are in Romanian.

2. Trafficking in persons in Moldova – an overview

Moldova is one of the poorest states in Europe in terms of income per capita and, unsurprisingly therefore, a major country of origin of victims of trafficking. The root causes of trafficking lie in the poor socio-economic conditions, which include high levels of unemployment of women and youth, gender discrimination and domestic violence. Reliable data on the total number of trafficked persons from Moldova is not available mainly because there are no standard identification procedures in countries of origin, transit or destination. It is estimated that between 600,000 and 1,000,000 Moldovans are living/working abroad under a variety of auspices and circumstances.

In the period from January 2000 to September 2003 the International Organisation for Migration (IOM) and NGOs assisted approximately 1130 victims to return to Moldova, out of which 46 are minors. The text boxes below outline victims' sociological profile and data on the trafficking process.

Victims' profile:

58% aged between 18-24 years old
10% trafficked when minors
9% under 18 years old
49% come from rural areas
74% come form poor families
10% come from orphanages
60% are single, divorced/separated

Source: IOM CTU Chisinau, 2003

Main recruiting methods:

65% recruited through false job promises
16% through false travel arrangements
5% kidnapped

Main destination countries:
31% Macedonia
22% Bosnia Herzegovina
17% Kosovo
9% Albania
4% Turkey

Source: IOM CTU Chisinau, 2003

Child trafficking:

Adolescent girls trafficked for sexual exploitation
Children below 13 years of age trafficked for forced labour, begging, sale of organs, illegal adoption
30% of identified victims trafficked when they were minors
20% of trafficked women return home pregnant or with a child
70% of returned victims have 2-3 children who were left behind while they were abroad

Source: IOM CTU Chisinau, 2003, UNICEF Chisinau 2003

Vulnerable groups, who are especially at risk of trafficking like women escaping from abuse and family violence and children leaving institutional care. Many victims are trafficked from Moldova for the purpose of sexual exploitation however there is a dearth of information on trafficking for other purposes, i.e. forced labour, organ removal, etc.

Over the last three years Moldova has undertaken a host of anti-trafficking efforts. The Government has undertaken several important initiatives including the establishment of an

ad hoc National Committee and the adoption of a National Plan of Action;[3] the institution of a specialized police unit; anti-trafficking focal points in the central General Prosecutor's Office and the regional sections; and criminal law reform led to a new criminal code and criminal procedure. The building of a sustainable system of identification, assistance and protection of trafficked persons, both adults and minors is in an early stage of development and the prosecution of traffickers and access to justice of their victims has, so far, been limited.

[3] National Plan of Action to Combat Trafficking in Human Beings adopted by the National Committee to Combat Trafficking in Human Beings in November 2001, Monitorul Oficial no. 136-138/1274 from 15 November 2001 ("National Plan of Action").

3. International obligations of the Republic of Moldova

Under a series of international and regional conventions and declarations, Moldova has legally and politically binding obligations to take measures to protect victim-witnesses of trafficking from threats and retaliation. Some of these documents are human rights instruments, such as the European Convention on Human Rights ("*ECHR*") or the UN Convention on the Rights of the Child ("*CRC*") and its Optional Protocols, or the UN Declaration of Basic Principles of Justice for Victims of Crime ("*Declaration of Basic Principles")*. Others create obligations in the field of criminal law, such as the UN Convention against Transnational Organised Crime ("*TOC Convention*") and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ("*UN Trafficking Protocol*"), or the European Convention on Mutual Assistance in Criminal Matters.

Legally binding treaties are binding only upon their "Parties" that is the states that have signed and ratified them. Treaties that have been signed by Moldova but not yet ratified are not binding but nevertheless create some obligations. (According to Art. 18 of the Vienna Convention on the Law of Treaties, its objects and purpose bind states that have signed but not yet ratified a Convention.) Further, it is usual that in order to prepare for ratification certain basic procedures have to be put in place and legal preconditions created. The present report will therefore take into account standards created by documents that were signed, but not yet ratified by Moldova, such as the *UN Trafficking Protocol* or the *European Convention on Transfer of Proceedings in Criminal Matters* on the basis that the state of Moldova wishes to take steps to enable it to ratify them.

Moldova has also made a series of political commitments to take steps to protect trafficked victims, to protect witnesses and to establish the rule of law nationally and regionally through its membership of regional inter-governmental organisations such as the *OSCE, Council of Europe* and the *Stability Pact for South-Eastern Europe*. These commitments are referred to throughout the document.

Finally there are a series of "soft law" standards which have emanated from various inter-governmental organizations (IGOs) bodies such as *UNICEF, UNHCHR* and *OSCE-ODIHR*. These are based on authoritative interpretations of treaty obligations and have been cited in political commitments. In many cases they therefore have significant force although are not legally binding.

4. Prerequisites for the protection of trafficked victims

4.1. Introduction

In order to secure the participation of victims in criminal investigations and especially in public proceedings there are certain legal and procedural preconditions which need to be in place for the victim to be empowered to do so. These preconditions derive from general obligations under international law to protect all victims of trafficking but also there are others, which derive simply from a common-sense approach to victim protection and law enforcement. Such matters may not be related strictly to criminal procedure but may be contained in other laws, which can provide or guarantee protection and assistance to the victim before, after or parallel to such procedures (e.g. immigration laws, social welfare laws). These prerequisites are different or expanded in relation to children. Obviously there are also non-legal preconditions for protection, which relate to the availability of infrastructure, finance etc. Some of these are highlighted where appropriate in this report but are not the main focuses of this study.

In this section the following pre-conditions for victim-witness protection are considered in the context of Moldova: the definition and criminalisation of trafficking in persons, the necessity for effective identification procedures, the availability of protection and assistance, the availability of information and advice about legal proceedings, the non-imposition of a sanction upon the victim and the availability of residence permits for foreign victims. Each section contains an analysis of international standards, their applicability in Moldova and a summary of recommendations.

4.2. Definition/criminalisation of trafficking in persons

In order for a victim of trafficking in persons to be identified and for a prosecution to be taken against the perpetrator the act must be specified in national law ideally in line with the requirements of the *Trafficking Protocol*. Trafficking in persons was criminalized in Moldovan law on 18th August 2001 but this definition was amended in a new Criminal Code adopted on April 18, 2002, in force since 12 June 2003. Offences arising before this time should be prosecuted using the old definition, however this study focuses on the currently applicable provisions and penalties.

4.2.1. International standards

The universally accepted definition of trafficking in persons is encapsulated in Art. 3 of the *Trafficking Protocol*.[4] Although Moldova has not, at the current time, ratified this Protocol

[4] Art 3 (a) *Trafficking Protocol* "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;

we understand that as a signatory the measure required to ensure compliance are currently being taken in order to enable ratification. This definition is therefore applied below. Art. 5 of the *Trafficking Protocol* obliges states to criminalise the offence in domestic law.

4.2.2. Application in Moldovan law and practice

Art. 165 Criminal Code[5] establishes a distinct offence of trafficking in human beings. The definition follows the model of the *Trafficking Protocol* and consists of *acts*, *means* and *purposes*. Art. 206 criminalises trafficking in children and has a similar structure although the scope and penalties differ. (For the full texts of the definitions please see Appendix 2). These elements are examined below.

Acts

The *acts* of the basic offence established by Art 165 (1) (i.e. recruitment, transportation, transfer, harbouring or receipt) are as enumerated by the *Trafficking Protocol*. In relation to children the act of *"giving or receiving of payments or benefits to achieve the consent of a person having control over a child"* is added to Art. 206 whereas in the Protocol this is included only as means. The effect is that "trafficking in children" can occur where none of the acts listed in the *Trafficking Protocol* are present thus expanding the meaning of trafficking where children are the victims. In our view this is not problematic in the sense that it does not undermine the meaning of trafficking as intended by the drafters.

Purposes

Art. 165 establishes the following *purposes* of trafficking: commercial or non-commercial sexual exploitation, forced labour or services, slavery or forms similar to slavery, using a person in armed conflicts or in criminal activities, the removal of human organs or tissues for transplantation.

- This list therefore enumerates most purposes established by the *Trafficking Protocol*, except for servitude, which is, instead, included as a *means* ("servitude for the repayment of a debt"). There is no problem with this approach as the term "slavery-like practices" may be interpreted to include "servitude".[6] Also in reality servitude for the repayment of debts often serves as a means to keep the victim in conditions of slavery or forced labour, and is not a purpose in itself.
- The specification of the Protocol term "sexual exploitation" to include both, commercial and non-commercial exploitation is positive. Art. 165 thus includes for

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
(d) "Child" shall mean any person under eighteen years of age.

[5] Criminal Code (Codul Penal) adopted on April 18, 2002, amended July 31 2003.

[6] Cf. 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, according to which slavery-like practice includes, i.e., serfdom and debt bondage (Art. 1 (a), (b)).

example trafficking in "mail-order brides", who are being sexually abused by their "husbands".

- The purposes of "using in armed conflicts or in criminal activities" go beyond the Protocol definition. As the Protocol list of exploitative purposes is however a minimum standard only, states are allowed to add further purposes.
- Art 206 (1) (a) adds "exploitation in prostitution and in the pornographic industry". Again this is not a requirement of the *Trafficking Protocol* but simply adds other specified types of exploitation. The confusion created by this approach is the implication that these acts somehow differ from sexual exploitation and are thus required to be enumerated separately. This implication is of concern.
- Art. 206 (1) (b) and (c) add the words "exploitation in" to forced labour and slavery, which seems to imply that "exploitation" would need to be proved additionally rather than being regarded as inherent to the forced labour or slavery situation.
- In Art 206 (1) (c) "slavery like conditions" encompasses "illegal adoption". It is appropriate to include illegal adoption as a purpose but it would probably be more appropriate to separate it from slavery in order not to "over-expand" the definition of slavery.
- In Art. 206 (1) (g) "Abandonment abroad" is added as a purpose. Again this is an expansion of the *Trafficking Protocol* and apparently not necessary for the first *Optional Protocol to CRC* but presumably it is regarded as appropriate in the Moldovan context.

Means

The list of *means* reflect to a great extent the Protocol standard*:*

a) threat of use or use of physical or psychological violence without endangering a person's life and health (including kidnapping, confiscation of documents and servitude for the purpose of paying off a debt whose limits and amounts are not reasonably defined);
b) deception;
c) abuse of vulnerability or abuse of power by giving or receiving some payments or benefits for the purpose of obtaining the consent of a person who controls another person.

Furthermore, Art. 206 does not require "means" which is exactly as required by the *Trafficking Protocol* in relation to offences involving children.

However, Art. 165 differs to some extent from the Protocol standard:

Art. 165 (1) (b) provides for deception, but does not include the Protocol element of fraud. This would be unproblematic if deception were interpreted as encompassing fraud – then both Protocol means would be encompassed by the term "deception" in Art. 165.

The Protocol does not define the terms deception or fraud. According to the definitions applied in most jurisdictions, fraud is the more narrow or special term and may be subsumed within deception. Fraud requires that an act of deception cause a monetary damage to a third

person, whereas deception does not necessarily require such a monetary damage. It may be assumed that the Protocol definition can be interpreted accordingly.[7]

Art. 190 CC defines fraud as "illegal taking into possession of another person's goods by deception or the abuse of trust." Thus, the more general term "deception" might be interpreted to include the more narrow term of "fraud". However, as there exists no distinct criminal offence of deception under the CC, it is not clear if such an interpretation would be applied in judicial practice.

Therefore, in order to bring Art. 165 fully in line with the Protocol definition, it is recommended that the term fraud be added or clarity given to the interpretation of the term "deception" in line with the Protocol definition in a commentary or interpretative notes for Art. 165.

Consent

The OSCE Mission received opinions that this revised definition of trafficking has led to acquittals in trafficking cases due to the deletion of a clause relating to the *consent* of the victim to the intended exploitation as provided for in Art. 3 (b) *Trafficking Protocol*.[8] Some practitioners have interpreted the deletion of the clause as an indication that where "consent" has been given to the intended form of exploitation it has undermined the case against the suspect (e.g. where a victim had originally known and agreed to work as a prostitute). This is seen to be exacerbated by the difficulties encountered in obtaining evidence to prove that coercion and/or deception occurred to achieve trafficking (e.g. where individuals have consented to sell their organs). It has been argued therefore that the consent clause should be reintroduced to solve these problems.

In the view of the authors the inclusion of such a clause has no effect on the definition's compatibility with international standards. However, it is important to note that the authors do not consider that the inclusion of such a clause would solve the issues raised above.

Firstly, the victim's knowledge that s/he would be engaged in, for example, prostitution does not prevent her/him becoming a victim of trafficking. Whilst being aware of the *nature* of the work s/he may well be misled (deceived, coerced etc) as to the *conditions* of the work. The consent clause would provide clarification here but its absence does not alter the definition.

Secondly, the prosecuting authorities are still required to prove every element of the offence including the *coercive means.* Art. 3 (d) *Trafficking Protocol* states that consent is irrelevant only where *"any of the [coercive] means set forth in subparagraph (a) have been used"* so it is still necessary to prove threats or use of force, deception or other abuses of power or vulnerability.

[7] Such an interpretation of the Protocol terms was for example suggested by the Kosovo Judicial Institute's commentary on the definition of trafficking established by UNMIK Regulation 2001. This Regulation adopts the Protocol definition of trafficking word for word.

[8] See Art 113 previous Criminal Code.

Otherwise trafficking (within the meaning of the *Trafficking Protocol*) has not occurred. For example, if a person agreed to sell a kidney and their consent was irrelevant to prove the crime, it would still be necessary to prove that the person was deceived into giving consent or that the consent was a result of an abuse of power or vulnerability. If this cannot be proved then trafficking did not take place.

It would be inappropriate to delete the requirement to prove these coercive means as it would create a wholly different interpretation of the internationally defined offence and in any event these acts (carried out without the specified means) amount to crimes such as pimping, forced labour or slavery.[9] Rather than altering the definition to include a consent clause it may therefore be more desirable to develop a commentary or interpretative note which contains clarification of the legal issues raised by a "consenting" victim for use by a courts and or prosecutors.

Children

Art. 206 creates a specific offence where the victims of crime are children however it is of concern that the term "children" is not defined in the Criminal Code. Art. 3 (b) *Trafficking Protocol* indicates that children are defined as those under 18. In the Criminal Procedure Code the term juvenile is used to refer to under 18 which indicates that Moldova regards those under 18 as having special protections but could also imply that "children" are different from "juveniles." Additionally the Civil Code defines legal capacity as occurring at the age of 18.[10] We are further assisted by the Law on the Rights of the Child, which stipulates in its basic principles (Art 1. (2)) that "According to the present law a person is considered as a child when s/he is below the age of 18."[11] However, evidently this definition is restricted to the application of only this law.

Given that this criminal offence was created to enable Moldova to ratify the Trafficking Protocol we assume that the term refers to under 18. However it would be appropriate to clarify this in the Criminal Code.

Penalties

The basic offence of trafficking as defined in Art. 165 (1) is punished with imprisonment between seven and fifteen years and for trafficking in children Art. 206 (1) imprisonment of between ten and fifteen years. Neither the *Trafficking Protocol* nor the *TOC Convention* provide for guidelines on the severity of punishment. As a general principle of criminal law, penal sanctions should be deterrent and proportionate to the gravity of the offence. These penalties are severe enough to be deterrent. However, it is questionable, if this severe degree of punishment is proportionate to the gravity of the basic offence in all cases. One single act of recruiting one person into prostitution by using minor deception (e.g. s/he finally earns 800 €, whereas 1.000 € were initially promised) or by using slight physical violence not endangering the victim's health would be punishable with at least seven years

[9] Art. 220 and Art. 167 CC.

[10] Art.20 Civil Code 6 June 2002 (No. 1107 – XV din 06.06.2002. Monitorul Oficial al R.Moldova nr.82-86 din 22.06.2002).

[11] Law on Rights of the Child 15th Dec 1996 (Nr.338-XIII din 15.12.96, Monitorul Oficial al Republicii Moldova nr.13 din 02.03.1995).

imprisonment. (By way of comparison the crime of slavery (Art. 167 CC) commands a fine or jail sentence of between 3 and 10 years.)

This high minimum threshold may cause prosecutors and criminal judges to be reluctant to prosecute and punish cases of trafficking under Art. 165. It is therefore recommended to consider lowering the minimum threshold of penalty provided by Art. 165 (1). Such amendments might also require corresponding adaptations of the penalties provided in Art. 165 (2) and (3).

Art. 165 (2) and (3) establish a series of aggravating circumstances, allowing for a more severe punishment (10-20 years and 15-25 years/life detention) if the offence was committed against a pregnant woman, has caused especially severe consequences or was committed repeatedly or by an organized criminal group. These provisions are important. But at the same time, a few inconsistencies require clarification:

- The means *"threat of disclosure of confidential information to the person's family"* (Art. 165 (2) (f)) is of practical importance. Often the fact that a woman is working in prostitution is not known to her family and this fact is used to force her into an exploitative situation. However, the gravity of this kind of threat does not compare in seriousness to the other means enumerated in the same subparagraph, such as torture, rape or use of weapons. Consequently it does not seem proportionate to impose a punishment of 10-20 years for such a threat. Therefore it is recommended to delete this element or to integrate it into the basic offence (e.g. Art. 165 (1) a)).
- Art. 165 (2)(f), which specifies the use of e.g. torture, rape, weapons and 165 (3) (b) ("*…causing serious bodily injury*") overlap. However as (3) leads to a significantly more serious penalty than (2), it is crucial to clarify the areas of application of both provisions.
- The circumstances enumerated in Art.165 (2) (f) include the vague expression *"through other means*". The principle of the rule of law requires that legal provisions are formulated as precisely as possible, in order to make state action foreseeable to the individuals. It may be doubted that this expression of an aggravating circumstance is sufficiently precise. This is of special concern given that this paragraph leads to 10-20 years imprisonment. It is therefore recommended to delete or otherwise specify this term.
- Arts 206 (2) (b), (d), (e) and (f) provide for aggravated penalties where the exploitative purposes specified have actually been achieved. This does not seem to be problematic however consideration could be given to a similar provision being included for adults. Also the specified purposes of illegal adoption and abandonment are not included in this list, which seems contradictory. (Unless it is considered that *"illegal adoption"* is included within the definition of *"slavery"* in which case this should be made clear in any commentary or interpretive notes).

Other related criminal offences

As mentioned briefly above there are other offences in the Criminal Code, which can be used against suspected criminals when all elements of the trafficking offence cannot be proven. It is entirely appropriate for this to happen where the police and prosecutors have made every effort to investigate the circumstances and facts of the case and to obtain all

available evidence. However, where the facts do not amount to trafficking or the elements of the offence cannot be proved then trafficking cannot be prosecuted. In particular the Moldovan authorities may find it helpful to incorporate a provision relating to the smuggling of migrants in the Criminal Code as per the *2nd Protocol to TOC Convention against Smuggling of Migrants by Land, Sea and Air*[12]. The existence of such a provision will assist prosecutors and law enforcement officials to conceptualise the difference between trafficking in persons and smuggling of migrants. This will make the task of identification of victims and prosecution of the relevant crimes more straightforward.

4.2.3. Conclusion and recommendations: definition/criminalisation of trafficking in persons

Legal analysis is no substitute for judicial practice and interpretation according to different facts arising in different cases. These provisions are new and hardly used and their interpretation is yet to benefit from creative prosecution arguments or a detailed commentary. The definition of trafficking in persons in Moldovan law is satisfactory on its face and meets the requirements of the *Trafficking Protocol.* There are some amendments, which should be considered to improve its logic and application so the authors recommend that consideration is given to the following:

⇒ **Criminal Code amendments:**

Art. 165 Criminal Code:

- Art. 165 (1) (b) It is recommended that the term fraud be added or the interpretation of the term "deception" is clarified to include fraud.
- Art. 165 (2) (f) Consider deleting the element *"threat of disclosure of confidential information to the person's family"* or integrating it into Art. 165 (1)(a).
- Art. 165 (2)(f) specifies the use of e.g. torture, rape, weapons and 165 (3) (b) ("*…causing serious bodily injury"*) overlap. Clarify the areas of application of both provisions.
- Art.165 (2) (f) include the vague expression "*through other means*". Delete or otherwise specify this term.
- Penalties: Consider provide for aggravated penalties where the exploitative purposes specified have actually been achieved (as in Art. 206) & consider reducing the minimum threshold penalty for this offence.

Art. 206 Criminal Code:

- Art. 206 (1) (a) Consider deleting "exploitation in prostitution and in the pornographic industry" and adding the concepts into an interpretive note/commentary defining the meaning of "sexual exploitation".
- Art. 206 (1) (b) and (c) Consider deletion of the words "exploitation in" as it is inherent to the forced labour or slavery situation.
- Art. 206 (1) (c) Separate "slavery like conditions" from "illegal adoption" in order not to "over-expand" the definition of slavery.

[12] Art. 3 2nd Protocol to TOC Convention On Smuggling of Migrants ("Migrant Smuggling Protocol").

- Arts 206 (2) (b), (d), (e) and (f) Consider including illegal adoption and abandonment in the list of aggravated outcomes (unless it is considered that "*illegal adoption*" is included within the definition of "*slavery*" in which case this should be made clear in any commentary or interpretive notes).
- Clarification should be provided that children are defined as being all those under 18. This clarification should be within Art. 206 or in a general definitions section.

⇒ Insert a provision regarding the Smuggling of Migrants in line with the *Migrant Smuggling Protocol*.

⇒ Draft interpretive guidance and/or a commentary on the interpretation of Arts 165 and 206 Criminal Code to assist law enforcement, lawyers, prosecutors and judges in its application. This should include an analysis of Moldovan case-law, jurisprudence from other jurisdictions and the explanatory notes of the *Trafficking Protocol*. It should pay particular attention to explain the implications of a "consenting victim" and definitions of exploitation, sexual exploitation and slavery.

4.3. Identification of a victim of trafficking in persons

In order for there to be successful procedures for protecting all trafficked persons and enabling them to access justice it is fundamental that effective identification methods and procedures are in place. These should be appropriately applied by the authorities in practice. This is an obligation arising from international standards and is also the natural result of the necessity to locate victims (potential witnesses) in order to protect them and obtain evidence to prosecute the perpetrators.

4.3.1. International standards

The *Trafficking Protocol* does not refer expressly to the requirement to identify victims of trafficking in persons however the necessity to do so can be extrapolated from the obligations to protect victims and prevent trafficking. Art. 6 (3) refers to the necessity to "consider implementing measures to provide for the physical, psychological and social recovery of victims" and Art.10 (2) obliges states to "provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons." It further specifies that this training should focus on prevention, prosecution and protection of the victim's rights.[13] It would logically follow that in order to achieve such aims it is necessary for such officials to be capable of identifying a trafficked person.
The *Stability Pact Task Force* reinforces this approach: "Victim protection starts with the identification and recognition of victims."[14] Participating States of the OSCE decided to adopt an Action Plan obliging themselves to establish a National Referral Mechanism for victims of trafficking in persons, to provide guidance to:

[13] Art. 10 (2) *Trafficking Protocol*
[14] "Special Protection Measures for Trafficking Victims Acting as Witnesses" Portoroz, 26-27 March 2003 ("*Stability Pact Portoroz document*"), p2. Suggestion: use quotation from Annex chart.

> "facilitate the accurate identification and appropriate treatment of victims of trafficking, in ways which respect the views and dignity of the person concerned"

and to work co-operatively with NGOs in this respect.[15] This National Referral Mechanism is the subject of extensive substantive explanation by the Anti-Trafficking Unit in the OSCE-ODIHR and these are due to be published in a practical handbook in 2004 to assist implementation at the national level.

Guideline 2 of the *UNHCHR Recommendations*[16] specifies in some detail this requirement, which includes the development of guidelines and procedures for state officials, the provision of training, encourage formalised co-operation with NGOs. The *Council of Europe* Committee of Ministers recommends "*special training*" for state officials to "*identify cases of trafficking for the purpose of sexual exploitation.*" The necessity to take steps to appropriately identify victims of crime also stems from general obligations relating to victim's rights, according to the *Declaration of Basic Principles* those persons likely to be in contact with trafficked victims should receive training in order to identify trafficked victims and to sensitise them to their needs.[17]

From the perspective of children's rights the *UNICEF Guidelines* emphasise the need for "effectiveness, speed and coordination between agencies for the appropriate identification of child victims."[18] Importantly they state that where age is uncertain and there are reasons to believe the victim is a child, the presumption shall be that the victim is a child and should be accorded special protection measures required for children.

4.3.2. Application in Moldovan national law and practice

A victim of trafficking in persons can be found in Moldova by various routes and means depending on their location in the trafficking chain. Here are some of the possibilities:

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[15] OSCE Permanent Council Decision No.557 (PC DEC/557), OSCE Action Plan to Combat Trafficking in Human Beings, 24th July 2003 ("*OSCE Action Plan*"). Section V, paras 3.1-3.6. Definition of National Referral Mechanism: "creates a cooperative framework through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons, coordinating their efforts in a strategic partnership with civil society and other actors dealing with trafficked victims…An NRM should include: guidance enabling the accurate identification and appropriate treatment of trafficked persons, which respects the views and autonomy of the trafficked person themselves; the referral of trafficked persons to specialised agencies offering shelter and maximum protection from physical and psychological harm…; the establishment of appropriate, officially binding mechanisms designed to harmonise victim assistance with investigative and crime prosecution efforts… Responsibilities and competencies should be defined in such a way as to ensure protection and promotion of the human rights of all trafficked persons regardless of their willingness to cooperate with law enforcement authorities".
OSCE/ODIHR Handbook: National Referral Mechanism. Joining the efforts to protect the rights of trafficked persons. Forthcoming publication.

[16] "UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking"E/2002/68/Add.1, 20 May 2002 ("*UNHCHR Recommendations*") Paras 1-3 of Guideline 2

[17] Art. 16 and *OSCE ODIHR* Reference Guide for Anti-trafficking Legislative Review with particular Emphasis on South Eastern Europe, 2001 ("*ODIHR Reference Guide*") p.68

[18] UNICEF Guidelines for Protection of the Rights of Children Victims of Trafficking in South Eastern Europe, May 2003 ("*UNICEF Guidelines*") Para 3.1

- Repatriation scheme for Moldovan citizens found abroad (e.g. through IOM)
- Moldovan citizens voluntarily arriving at the border having managed to escape a trafficking situation and finding their own way back.
- Moldovan citizens deported from elsewhere: arriving at the airport or at border crossing or in transit legally from Odessa (Ukraine) to where they may have been deported by other national authorities.
- As a trafficked victim from another state being trafficked to a third country arriving at the border or coming into contact with state authorities through law enforcement activity or self-reporting.
- Any trafficked victims may come into contact with health or social service professionals.

Therefore numerous state officials, in particular border services, police, judges, prosecutors, Ministry of Foreign Affairs and social and health workers can come into contact with the victim at these points. Whilst it was not within the remit of this study to analyse in-depth the operational methods of all of these state agencies it has not been difficult to conclude that more focus needs to be given to the development of effective identification methods. This would enable Moldova to meet the international requirements, which demand that a victim can access her/his rights especially protection. The OSCE has identified an absence of standardised identification procedures or involving checklists of indicators, specialised training, a multi-agency response or a referral system involving state and non-governmental groups.

As mentioned previously there is a specialised anti-trafficking policing unit under the Organised Crime Directorate of the Ministry of Internal Affairs but this is not the first point of contact for all trafficked victims. When this unit comes across victims it appears to have an informal practice of making referrals of individuals to the Centre for Prevention of Trafficking in Women (an NGO), which provides legal services or to the IOM, which provides shelter for victims of trafficking. However, it is not clear whether this referral is made as a matter of routine. It seems to be more the result of the exercise of the goodwill and specialised knowledge of a limited number of police officers. As this system of referrals is neither automatic nor formalised in guidelines and training, then the non-specialised police and border guards in the field are insufficiently sensitised to the identification of trafficked persons. In some cases they may not even be aware of the existence of a specialised policing unit. Sources also indicate that even when a referral of a potential victim is made to the specialised police unit the suspected victim is immediately interviewed with a view to establishing whether or not they have intelligence. The interview does not simply focus on identifying whether or not the person has been trafficked.

OSCE has received anecdotal accounts of mistreatment of women/girls arriving at the borders which indicate the need for sensitisation and guidance for border guards. These should be backed up by clear disciplinary and/or criminal sanctions in the event of failure to follow procedures and/or of serious misconduct in the course of duty e.g. sexual assault of the person.

The Ministry of External Affairs is notified of deportees who will be arriving back but there are no routine enquiries to check the need to offer such persons assistance or protection. On the contrary the OSCE Mission is aware that the Ministry of Foreign Affairs charges a fee to the victims of trafficking to issue them with the temporary travel documents necessary for their repatriation. Additionally there is no indication that social workers become involved routinely in identification even where there are suspected child victims.

4.3.3. Conclusion and recommendations: identification of a victim of trafficking in persons

The Moldovan authorities have a number of steps to take in improving the mechanisms for the accurate identification of all trafficked victims. These are essential to enable the state to fulfil its international obligations to prosecute and prevent trafficking and protect all trafficked victims. Identification techniques will vary depending on the case but state officials should have sufficient skills and tools available to identify a potential or suspected victim. Additionally there should be adequate procedures to enable such a person to be referred for further assessment of this status. Procedures, which prevent the accessing of protection services such as charging fees for repatriation, should be ended forthwith. Adequate identification techniques will require an understanding of the factual background of the personal history of the victim-witness. S/he should be able to give such an account in circumstances, which do not create a pressure to become a witness in criminal proceedings. This should be done in a non-coercive environment protecting her/his identity by an independent person qualified to support victims of trafficking e.g. a social worker employed by an independent NGO. It could also involve an initial risk assessment carried out by the specialised personnel.

⇒ National Referral Mechanism.
A national referral system of relevant state agencies and other service providers (NGOs) should be established and recognised by all state authorities dealing with trafficked persons. Inter-agency relationships and terms of reference should be formalised through memoranda of understanding. This mechanism should, through a coordinated inter-agency response, be able to manage the processes of identification, referral and initial risk assessment of the suspected trafficked victim from the moment of her/him first being located. Specific agencies should have clear terms of reference in this process. Within the mechanism the following should be provided at minimum: a facility for the suspected victims to receive independent advice about their legal rights and options and the consequences of cooperating with law enforcement agencies, safe shelter, access to medical and psychological counselling and the institution of a "reflection delay" period following the initial identification of a suspected victim; specific provisions for the identification of children in order to ensure they receive specialist assistance and protection should be developed.

⇒ Guidance should be drafted for front-line State officials such as police, border guards, immigration officials, social workers, doctors etc on how to identify a suspected victim of trafficking and to whom they should be referred. Measures should be taken to further facilitate the identification process through the drafting of relevant by-laws and/or

instructions for the services involved (e.g. listing sets of indicators for police or border guards and giving them the contact coordinates of the relevant agencies in the referral system or of a specialised police officer who can make onward referrals).

⇒ Training for all relevant state officials on the application of these identification guidelines should be provided. They should be sensitised to understand the guidelines and to ensure that the suspected victim is referred to the appropriate agency for this initial identification and for the appropriate advice and assistance to be accessed.

⇒ The scale, nature and geographical spread of the specialised police should be examined to ensure that there are sufficient women officers, that they are located in all areas of the country.

⇒ Specialised social workers should be trained and available to assist with identification procedures.

⇒ There should be active measures to investigate, prosecute and/or take disciplinary measures against officials who use their public office to further exploit or abuse victims of trafficking.[19] The institution of disciplinary and/or criminal sanctions when state officials act unprofessionally or criminally in relation to trafficked victims should be mandatory.

4.4. Protection and assistance

From the moment of the location and identification of a suspected victim there should be sufficient resources and facilities available to offer assistance, to secure their physical and psychological integrity, and to prevent further trauma. Such facilities and the right to access them has the positive by-product of putting the victim in the best psychological and physical position to participate in criminal investigations, should they choose to do so. These pre-conditions are highlighted by Paul Holmes, a law enforcement and trafficking expert:

> "it is necessary to create the trust and conditions within which the victim can feel able to cooperate with the criminal justice system"[20].

These include shelter, medical care, food and eventually income to meet basic needs and access to psychological counselling. The context in which the suspected victim is operating is that of urgent needs for: regularization of documentation for her/himself and possibly her/his children, family reunification after a long period of separation, medical treatment and psychological care following traumatic events. S/he is possibly also facing family cases such as separation, divorce and ancillary matters such as finance, children, need for advice about access to social welfare and employment opportunities, accessing vocational and educational opportunities.

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[19] Arts 327, 328, 329 CC: Abuse of office, exceeding authority and negligence in office prosecuted together with a crime against a person e.g. assault, rape, indecent assault can apply. Also note that the aggravating circumstances of an offence should lead to greater punishment (Article 77(a) and (f)).

[20] Holmes, Paul, Best Practice Counter-Trafficking Manual for Law Enforcement Officers in the Republic of Moldova, IOM 2003 p19 English version.

A thorough evaluation of the nature, quality and mode of provision for protection services currently available in Moldova are beyond the scope of this report. The aspects of protection and assistance, which are examined in this section are the *legal rights* to access such protection regardless of participation in criminal proceedings. This section examines also, the existence of legal provisions, which relate directly to the protection of a victim whilst deciding whether to become a witness in criminal proceedings (e.g. the need to protect anonymity from the moment a potential victim is identified and referred or the availability of a reflection delay.)

4.4.1. International standards

International obligations to protect all victims of trafficking aim to ensure certain basic minimum standards of protection and these are not related to the securing of a victim's involvement in proceedings or investigations. The *TOC Convention* obliges states parties to take appropriate measures to provide assistance and protection to victims of trafficking, in particular in cases of threat of retaliation or intimidation.[21] The *Trafficking Protocol* obliges States Parties to endeavour to provide for the safety of trafficked persons, while they are within their territory.[22] Thus, the responsibility to protect the victim's safety rests upon the country on whose territory the victim is currently situated. Also according to the Council of Europe Member States should

> "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"[23]

The *Trafficking Protocol* further obliges states to consider implementing measures for the physical, psychological and social recovery of victims, in particular appropriate shelter, medical, psychological and material assistance, as well as employment, educational and training opportunities.[24] The Interpretative Notes clarify that this obligation is applicable to the receiving state until the victim has returned to her/his state of origin and to the state of origin thereinafter.[25] It emphasises the specific need to take particular care of the special needs of children and other vulnerable groups.[26] The *UNHCHR Recommendations* also recommends states to provide trafficked persons with access to safe and adequate shelter and health care. Trafficked persons who return to their country of origin should be provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking, for example by ensuring the provision of appropriate physical and psychological health care, housing, educational and employment services.[27]

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[21] TOC Convention Art. 25(1).
[22] Trafficking Protocol Art. 6(5).
[23] CoE Recommendation R (2000) 11, Art.3
[24] Trafficking Protocol Art. 6 (3).
[25] Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, A/55/383/Add.1, § 71.
[26] Art. 6(4)
[27] UNHCHR Recommended Guidelines no. 6.1, 6.2, 6.8.

The *UN Declaration of Basic Principles* goes further in terms of the scope of protected persons by calling upon states to ensure the safety not only of victims, but also of their families.[28] Similarly, the *Council of Europe Recommendations R (85) 11 and R (2000) 11* provide for measures to 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. The latter Recommendation also calls upon Member States to extend protection mechanisms to members of NGOs assisting the victims during penal and civil proceedings.[29]

The *UNICEF Guidelines* outline in detail special protection measures required protecting all child victims such as a functioning guardianship system[30], inter-agency co-operation for protection[31], availability of services to provide care and protection,[32] implementation and identification of a durable solution for the child.[33]
All of these provisions refer to the protection of victims. Thus, there is no requirement of a victim to cooperate as witness in order for the state obligation to protection to arise. This approach is confirmed by the *UNHCHR Recommendations*, according to which the duty of States Parties to protect trafficked persons from further exploitation and harm shall not be made conditional upon the capacity or willingness of the trafficked persons to cooperate in legal proceedings.[34] They further state that in order to protect trafficked persons from harm, threats or intimidation

> "there should be no public disclosure of the identity of the trafficking victims and their privacy should be respected and protected to the extent possible..."[35]

General protection obligations are dealt with above however there are specific obligations existing which relate to protection and physical security of the victim who is considering becoming a witness. These include the right to a period of reflection or recovery before making the decision about participation in criminal proceedings.[36]

Therefore regardless of a victim's status in relation to legal proceedings there should be sufficient legal and practical possibilities to protect her/him from the first point of contact with the authorities onwards. Different protections should exist for victims who are considering becoming witnesses or participating in legal proceedings. Finally if the person decides to participate in legal proceedings the level of threat to her/his safety may increase and the nature of the required protection responses may differ (as may the agencies providing the protection and assistance).[37]

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[28] UN Declaration of Basic Principles Art. 6 para(d).
[29] CoE Recommendations R (85) 11 Art. 16, R (2000) 11 Art. 29, 30, 32.
[30] Para 3.2
[31] Para 3.4
[32] Para 3.5
[33] Paras 3.7 and 3.8
[34] UNHCHR Recommended Principle no. 1.
[35] UNHCHR Recommended Guideline 6 Para 6.
[36] Para 3.9.1 UNICEF Guidelines and OSCE Action Plan Section V Para 8.1
[37] For example, an IOM shelter may protect victims but extra security such as a panic alarm may be required from the police if a victim becomes a witness and should s/he become a protected witness then a separate

4.4.2. Application in Moldovan national law and practice

There is no law, which guarantees a legal basis for protection or entitlement to access the services and assistance, which would, for example, exist within a National Referral Mechanism. In terms of assistance services there is an active IOM shelter and an NGO network in Moldova, which provides a variety of services and/or referrals for THB victims. However, the extent to which they meet these diverse obligations is not further examined here, as it involves an evaluation of the quality and content of their work. However, it is important to point out that the need for such services for victims (regardless of their participation in investigations) is acknowledged in the National Plan of Action to Combat Trafficking in Human Beings. This Plan envisages certain state level Ministries being responsible for implementation but, in general, NGOs funded by independent donors are making efforts to meet these needs. However, there is no law, which regulates the availability of services to all victims of trafficking or the right of victims to access such services. Each trafficked victim's needs for physical security, housing, medical care or counselling are dealt with according to his/her particular circumstances and his/her (limited) rights under other laws rather than his/her rights as a trafficked victim.

The legal right to protection is available where a victim has decided to assist the police and/or become a witness in criminal proceedings. However, the Law on State Protection of Victims and Witnesses[38] caters only for the physical security needs of a trafficked victim who becomes a witness in a *limited number of cases* depending on the type of crime, the quality of his/her evidence and the nature of the danger to the witness[39] However, the law does extend to police protection for those who have simply provided information to the law enforcement agencies about crimes[40]. And it does appear that theoretically protection can be extended extremely early in the criminal investigation.

From the information made available to the OSCE it seems that, in any event the implementation of the provisions envisaged by this law is left to an under-resourced police department. Therefore NGOs and IOM have assisted in providing for protection measures for witnesses. Only in a very few cases when protection was granted under this law was physical security provided by the police. This law is further discussed in Section 5.

It is important to note that there does not appear to be routinely adopted "good practice" guidelines for state institutions nor government or NGO assistance services regarding the way in which assistance and services are provided to the trafficking victim. These should enable her/him to assist to cope with the consequences of the crime should ensure that s/he is protected in the process e.g. that details of his/her name and other identifying details should not be circulated especially in the case of children. Additionally other aspects of good practice in protection should be routinely adhered to, like e.g. giving the victim a "reflection delay" after identification during which time s/he can decide whether or not s/he

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specialised witness protection unit of the police may be required for example to provide separate accommodation and/or an armed guard.

[38] Law on State Protection of the Victim, Witnesses and Other Persons who provide Assistance in the Criminal Proceedings ("*Law on State Protection*") adopted 28 January 1998, last amended May 29 2003.

[39] Art.1 "Law on State Protection". For discussion in greater detail see section 5.

[40] Art 2 (a) Law on State Protection

wishes to pursue legal proceedings. It is not clear whether either of these practices are consistently prevalent in Moldova.

Children (including foreign children) who are *"suffering from or likely to suffer from trafficking"* are amongst those defined as being a "child in difficulty" according to Art. 3(e) of the draft Law on the Protection of the Child in Difficulty. Therefore they are entitled to access basic protections and services such as shelter and a family environment provided by the state. The draft law envisages the incorporation into domestic law of the general principles as set out in the *CRC* and intends the decisions regarding each individual child to be made by a series of child protection bodies. However, at the time of writing the draft law is undergoing substantial amendment, thus this aspect of legal guarantees for protection of children cannot be fully assessed. Currently, UNICEF is funding a child-friendly wing within the IOM shelter for trafficked persons to which child victims and the children of victims are referred when identified.

4.4.3. Conclusions and recommendations: protection and assistance

Whilst there is no absence of political commitment to improving the protections available to trafficked victims there is currently no legal framework to ensure that referral for protection and assistance is guaranteed to all trafficked victims regardless of their participation in proceedings nor that protection is provided in a regulated setting. Therefore there is no legal guarantee to ensure that there is consistent nature and level of protection for all trafficked identified persons or that s/he can access basic services provided by the state and access such services without facing discrimination or danger.

Where the victims do decide to give evidence to the police or to become witnesses there is a legal framework under the Law on State Protection, however, its scope is very limited and it is under-resources and applied by the authorities. As a result in some cases NGOs or IOM are taking on a role, which would otherwise be that of the state authorities regarding physical protection for such victim-witnesses.

The absence of a coherent system of identification and referral for trafficked victims means there are no common standards for agencies who deal with the victims e.g. to ensure anonymity is guaranteed. Additionally the absence of standardised procedures means that good practices like reflection periods in a shelter do not automatically take place before the police questions the victim.

The legal protections available for children are currently inadequate and fall short of international standards. This may remain the case depending on the progress of the Law on Child in Difficulties.

⇒ National Referral Mechanism

In order to ensure that the victim's need for physical protection is assessed and provided then the authors suggest that, within the framework of a national referral mechanism, a coherent and integrated risk assessment system is established.

- This should be applied from the moment of identification of a possible trafficked victim onwards.

- It should commence with guaranteeing anonymity, protection of identifying details and confidentiality about his/her case.
- It should ensure that qualified officials (usually police officers) assess the risk to a particular victim (with other relevant actors as identified within the NRM) and the state provides the necessary physical protection regardless of a victim's involvement in investigations.
- This system should cater for graduated levels of physical protection depending on the specific case and circumstances.
- It should be reviewed regularly over time and according to changes in circumstances. E.g. if a victim decides to give evidence to the police or to become a witness then the risk assessment should respond.
- The system should ideally be entrenched in law and in the by-laws and books of rules operated by the participating agencies.
- The number of individuals who come into contact with the victim and know his/her details and case should be as limited as possible.

⇒ Access to victim protection should be enshrined in law. Consideration should be given to establishing a legal right to access protection and assistance for all trafficked victims with special rights for children.

⇒ There should be a formal commitment by the Government to state funded protection and assistance in access to shelter, medical care, counselling, and specialist care in the case of children for all victims including foreign citizens.

⇒ An audit of the protection and assistance services currently available should take place, including: the nature of the service, service provider and recipient to identify any gaps in provision or shortfalls of funding.

⇒ State agencies and NGOs should develop: vetting procedures for all staff who work with trafficked victims (especially children) to check their backgrounds including criminal convictions; codes of conduct and practices for those who work with trafficked victims to protect anonymity, confidentiality and prevent abuse of power. They should also develop codes of conduct and disciplinary sanctions within service contracts (for outsourcing of state responsibilities to NGOs or private concerns) or memoranda of understanding with service providers (state, private or NGOs).

⇒ All agencies concerned with trafficked victims should lobby Parliament to pass a Law on Children in Difficulties, which is in line with international standards on child protection and anti-trafficking. The contents of the Law on Children in Difficulties, when adopted, should be closely monitored by all agencies working against trafficking in persons. This includes supporting and promoting measures to improve the general system and regulation of child protection.

4.5. Informed consent

Victims of human trafficking have the right to autonomously decide whether they would like to be witnesses in criminal proceedings and to understand the full implications of their decision in terms of anonymity and safety. The exercise of this right is sensible for law enforcement officials and prosecutors as it means the witness will not suddenly surprise them with his/her reluctance to testify at an inconvenient moment late in the proceedings. The standards, relating to the right to give informed consent as to whether to *cooperate* with police, are examined here and applied in the Moldovan context. The reader should note that some of this section overlaps with section 6.5 below however to lend coherence some of the standards are repeated.

4.5.1. International standards

The *Trafficking Protocol* obliges States Parties to provide victims of trafficking, in appropriate cases, with information on relevant court and administrative proceedings and with counselling and information in particular about their legal rights, in a language they can understand.[41] Additionally, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* and the *UNICEF Guidelines set* standards on the provision of information to child victims which generally refer to general information standards, stressing that children, notwithstanding their age, also have a right to make an informed decision through access to accessible and understandable information. The provision of legal information and assistance in a language the victim understands should not be discretionary, but should be available as a right to all victims of trafficking, as stated in the *UNHCHR Recommendations*.[42] This document also stresses the importance of information with regard to protection measures: victims should be given

> "full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard."[43]

According to the *CoE Committee of Ministers Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure (R (85) 11)*, police should, even at the investigation stage, inform the victim about possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation. In the *OSCE Action Plan to Combat Trafficking in Human Beings*, Participating States have committed themselves to provide legal counselling for victims when they are in the process of deciding whether or not to testify in court and, if it is not inconsistent with national legislation, to permit NGOs to support victims in court hearings.[44]

[41] Article 6 (2) (a), (3) (b).
[42] UNHCHR Recommended Guideline No. 5.8.
[43] UNHCHR Recommended Guideline no. 6.6.
[44] Articles III.4.6, III.4.5.

4.5.2. Application in Moldovan national law and practice

The standards relating to informed consent fall into several different categories: the requirement for the victim to have full information, independent advice, and the right to make an autonomous decision regarding their participation in criminal proceedings. The coercive elements of the Moldovan Criminal Code (Arts 165 (4) and 206 (4)) in this respect are dealt with in section 5.6 below. The Criminal Procedure Code provides for the victim to be represented and this is dealt with in section 6.5 below.

Information obtained from OSCE and other interlocutors led the authors to conclude that often suspected victims of trafficking are interviewed by the police with a view to obtaining information about their case very soon after they were located without the opportunity of a reflection delay. Also that the main group of legal advisors for victims were not always acting only as independent victim advocates but have other interests or goals which may impede their ability to advise their clients without a conflict of interests. For example, some advisors work in their capacity as NGO representatives for an NGO whose stated goal is to "prevent and prosecute trafficking in human beings."[45] This is because the NGO sector in Moldova is relatively youthful and work in the field of independent legal counselling to victims is a developing vocation for lawyers.

Finally the authors note some inherent problems in the CPC and CC with respect to the right to exercise informed consent. The legal term "witness" encompasses persons who testify in court as well as persons who provide intelligence to the police, but do not wish to testify in open court. In the context of the overall criminal law framework, this definition lacks clarity as it is questionable if cases which appear to be encompassed by Art. 90 CPC (where the victim provides intelligence to the police but does not want to testify in open court) can exist at all given the provision of Art. 313 CC, which criminalises the refusal of witnesses to give testimony and thus compels all victims to give testimony in court *and* "during the criminal prosecution" (which in our understanding includes speaking to the police *in any circumstances*).

4.5.3. Conclusion and recommendations: informed consent

Potential witnesses who are trafficked victims should be in the position to exercise fully informed consent in relation to their participation in criminal proceedings. They should be aware of and have the possibility to review their decision in the light of ongoing developments and decisions in the case. Much of the good practice in implementation of this obligation by the police is set out in the Best Practice Manual for Moldova by Paul Holmes.[46] This emphasises that the responsibility for ensuring the victim is fully aware of the implications of becoming a witness remains with the state authorities even where the victim is advised by an NGO or an independent advocate.

[45] Publicity leaflet of the Center for the Prevention of Trafficking in Women
[46] Section 2 "The Victim led approach".

Whilst there is advice services for victims of trafficking in Moldova these are not consistently working as independent advocates solely in the victim's interests so the authors are not reassured that international standards are met in this regard.

Additionally the law does not clearly create a point at which the victim can make an informed decision about his/her role in criminal investigations and proceedings. The legal and practical circumstances which prevail mean that a victim can unintentionally become a witness who is subject to possible criminal sanction if s/he subsequently resists giving intelligence or testimony regardless of whether s/he has a reasonable excuse for this.

⇒ National Referral Mechanism
Risk assessment procedures for potential witnesses should incorporate working methods which ensure the victim is fully informed and understands the nature and scale of any threat, of the available protections and of the conditions of accessing those protections. This can be done by the presence of the victim and/or their advocate at the risk assessment meetings to make representations on their own behalf.

⇒ Best practice guidelines for the information given to victims by the police and prosecutors should be developed. The information, which should be passed to the victim should be clearly laid out in checklists (using the Best Practice Manual). These should be implemented forthwith through their incorporation into the standard operating procedures of the police and prosecutors. Guidance should ensure that victims are not misled by any representatives of state authorities (police or prosecutors) about the consequences of giving or failing to give information on a case. (E.g. by being given inaccurate information or unfounded reassurances about the nature of criminal proceedings, the nature and scale of the potential dangers and/or available protections.)

⇒ Police procedures should ensure that victims are given a "reflection delay" before deciding about "cooperation" and should be able to access legal counselling before making the decision to do so.

⇒ Victim advocates and advisors should develop codes of conduct explicitly incorporating principles such as: confidentiality; the paramount and best interests of the victim (their client); the avoidance of conflicts of interests with other individuals or agencies (e.g. with another client of the advocate, or the prosecutor). The victims should be made aware of the code of conduct and ideally should be able to register a formal complaint against the advocate or advisor if it is not followed. The advocates should familiarise themselves with the available in-court and out of court protections and ensure that the victims are fully informed of their nature.

⇒ Easy to read checklists or pre-printed information sheets about criminal proceedings and other legal remedies can be drafted and given to trafficked victims.

⇒ The CPC and CC need to be harmonised to enable a legal and temporal moment to arise where a victim can choose whether to become involved in criminal proceedings and the

extent to which they will assist in a particular case. An identifiable moment when a victim becomes a witness needs to exist so there is a legal possibility to choose whether to give intelligence to the police without the concern of possible criminal charges (under Art.313).

4.6. Non-imposition of criminal liability, penalty or sanction

In the course of being trafficked it is possible that trafficked victims will commit acts, with or without guilty intent, which can amount to crimes or administrative offences e.g. crossing a state border without documents, possession of forged documents, begging or prostitution. Indeed a victim may be identified as such in the course of being engaged in one of these acts. The attempt to prosecute or criminalise a victim of trafficking in persons for these acts can be counterproductive because it deters victims from reporting crimes particularly trafficking and from accessing protection and assistance services. Ultimately therefore it also prevents them from having the option to become witnesses or giving information to the police. Additionally the effect can be to re-traumatise and decrease protection for the victim. This is especially if s/he is required to give evidence regarding the experience of being trafficked in order to explain his/her defence or mitigate the penalty and the offence. Finally, prosecution has the impact of undermining all other protection measures, as any trial against a victim would be public so anonymity is breached and then s/he is more endangered if s/he later chooses to cooperate with the police.

4.6.1. International standards

Unlike the *Migrant Smuggling Protocol*[47], the *Trafficking Protocol* does not specifically provide the obligation to refrain from rendering the victims of trafficking criminally liable. However, this can be read in the general obligation to create a protective environment otherwise guaranteed by the law and in the general obligation to protect victims and prevent victimisation.[48] These general obligations are underpinned in the *Trafficking Protocol* and by the *Council of Europe* in relation to victims of trafficking for sexual exploitation[49] and are antithetical to the prosecution of a trafficked person for acts arising from his/her trafficked situation. Based on these international commitments and international human rights standards *UNHCHR* have elucidated Recommended Principles relating to protection and assistance for trafficked persons which state that:

> "Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked person."[50]

They also give guidance that states should consider:

[47] Migrant Smuggling Protocol Art.5

[48] See generally the UN Declaration of Basic Principles and CoE Recommendation R (87) 21 on Assistance to Victims and the Prevention of Victimisation.

[49] Paras 26-41 CoE Recommendation R (2000) 11

[50] UNHCHR Recommended Principle 7.

> "Ensuring that trafficked persons are not, in an circumstances, held in immigration detention or other forms of custody"[51]

Additionally the *OSCE Permanent Council* have reached a similar conclusion in the light of the OSCE role in combating trafficking, previous Ministerial Decisions on trafficking[52] and the principles emanating from the *Trafficking Protocol*. Participating States have recently developed and adopted an Action Plan which commits them to:

> "Ensuring that victims of trafficking are not subject to criminal proceedings solely as a direct result of them having been trafficked."[53]

Finally the *Stability Pact Task Force* goes further stating that:

> "As a matter of clear priorities (and justice) victims of trafficking must not be treated as offenders with regard to prostitution, migration and labour laws"[54]

The *UNHCHR* and *Stability Pact* commitments are helpful as they recognize that "offences" may fall under different categories, for example, *administrative offences* as well as criminal offences. This may not always be obvious to domestic authorities who have a tendency to view administrative offences as a different and less serious matter than criminal proceedings. They may therefore fail to provide the necessary protections in such proceedings and may see them as irrelevant when considering their impact on trafficked victims. In fact administrative offences can be so serious that they can be judged to amount to "criminal proceedings" for the purposes of the application of Art.6 *ECHR* (fair trial). The European Court judges can consider that the nature and effect of the imposition of an administrative procedure has such a serious impact on individual rights that it warrants the procedural protections envisaged in the *ECHR*. They base their decision on the scope of the violated norm, the purpose of the penalty and the nature and severity of the penalty.[55]

In relation to children the international standard derives from the application of the general principles of the *CRC*, which states that the best interests of the child should be protected in all decisions made by state authorities including courts.[56] Additionally the *CRC* obliges states to:

> "take all appropriate measures to promote physical and *psychological recovery and social reintegration* of a child victim of…any form of …exploitation or abuse."[57]

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[51] UNHCHR Recommended Guideline 2 (6)

[52] Vienna Ministerial Council Decision on enhancing the OSCE's Efforts to Combat Trafficking in Human Beings No. 1 of 2000, Bucharest Ministerial Decision No.6 of 2001, Porto Ministerial Declaration on Trafficking in Human Beings of 2002.

[53] OSCE Action Plan Section III Para.1.8

[54] Portoroz document Para 1. Principles p,2

[55] Engel & others v Netherlands, 8 June 1976, Weber v Switzerland, 22 May 1990, para 33, Ozturk v FRG21 Feb 1984, Benham v UK, 10 June 1996. See discussion and analysis in Mole, N. & Harby, C. *The Right to a Fair Trial*, Human Rights Handbook, no.3, Council of Europe 2001.pp15-17.

[56] Art. 3 (1) CRC

[57] Art. 39 CRC. Emphasis added.

These obligations strongly support the view that states should take positive steps to divert child victims of trafficking from criminal and administrative procedures and sanctions. This is elucidated in the *UNICEF Guidelines* which states that law enforcement authorities should:

> "ensure that child victims are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons…. And ensure that child victims are never detained for reasons related to their status as a victim."[58]

4.6.2. Application in Moldova national law and practice

Within Moldovan law there have been significant attempts to ensure victims of trafficking are not subject to criminal liability. The main way in which this is addressed is via Arts 165 (4) and 206 (4) Criminal Code, which state that:

> "the victim of trafficking in human beings shall be exempted from criminal liability for the offences committed by him/her in connection to this status *provided that he/she accepts to cooperate with the law enforcement body on the relevant case.*[59]"

Whilst this attempt to prevent the victim from being criminally liable is laudable there are several problems with this approach:

- The victim is obliged *"to co-operate…on the relevant case"* in order to avoid criminal liability. This requirement is not in line with international standards to protect and promote recovery of a trafficked victim as it coerces a victim into agreeing to *cooperate.* Additionally, this could lead to inferior or deficient evidence being given in order to "please" the authorities and may well therefore undermine successful prosecutions. It is unnecessarily unclear and restrictive to state that s/he should "*cooperate… on the relevant case"*. Neither term is defined and therefore an extremely broad discretion is left to the police, prosecutor and judge leaving the provision open to being interpreted inconsistently.
- The provision applies to children.[60] There are limits on its application in the light of Art. 21 Criminal Code which fixes the overall age of criminal responsibility at 14 and 16 respectively depending on the seriousness of the offence and Arts 54 and 94 which release under 18 from criminal responsibility and/or alleviate the punishment in certain circumstances. However, in any event, the provision is a breach of international children's rights obligations as described above as it allows for the criminalisation of children in certain circumstances. It explicitly provides that they are forced to *cooperate* which is incompatible with the obligation to promote the psychological

[58] UNICEF Guidelines Para 3.3.4. See also UNHCHR Recommended Guideline 6 Para 3 *"children who are victims of trafficking are not subjected to criminal procedure or sanctions for offences related to their situation as trafficked persons."*
[59] Emphasis added.
[60] Art 206 (4) CC

recovery of a child victim *"in an environment which fosters the health, self-respect and dignity of the child."*[61]

- The nexus with co-operation is of particular concern in the light of Arts 312 and 313 Criminal Code, which criminalise the giving of false testimony and witnesses who fail to testify in prosecution proceedings and court.
- The provision to exempt from criminal liability appears in the article, which criminalises trafficking and not as a stand-alone general provision or attached to *all* of those administrative and criminal offences, which a victim is most likely to be charged with. As a result, it may escape the attention of the police, prosecutor or defence or victim advocate and in particular of the victim her/himself.
- There is no exemption from liability for administrative offences such as prostitution (Art. 171 (1) Administrative Offences Code), which may amount to an offence, which could be given "criminal" classification applying ECHR principles.
- In reality the provision has very limited and unclear application. It does not clearly refer to administrative offences and it is not clear what the connection is with the defence contained in Art 362(4) illegal border crossing, where the nexus with cooperation is *not* required.
- The provision prevents a victim exercising informed consent as to whether or not s/he should give information to the police. It is likely to override all other factors and choices, which are open to a victim as to whether or not to give evidence (including concerns about his/her own physical safety. Children are especially vulnerable. Victims may be forced to choose between inadequate protection or being prosecuted. This violates the general obligations to protect trafficked victims.

A more progressive approach to non-criminalisation can be inferred from Art. 362 (4) Criminal Code, which states that the crime of *"Illegal crossing of a state border"* has no effect on *"persons who are victims of trafficking"*. (It is not clear whether this is intended to mean only foreign citizens trafficked into Moldova as the paragraph also refers to foreign asylum-seekers.) However, it is possible that one reading could be that this exemption also applies to Moldovan citizens arriving back without the requisite documents. It is important to note that this exemption is not dependent on the "co-operation of the victim" although the connection with Arts. 165 (4) and 206 (4) is very unclear.

Another possibility for a trafficked victim is the fact that criminal acts[62] may be subject to liability but their criminal character is *"annulled"* by defences set out in Chapter III Criminal Code e.g. legal defence, extreme necessity. Clearly the success of such a defence will depend on the facts of each specific case but its success would not be dependent on the *co-operation* of the defendant/victim. However, in general relying upon this approach is also not desirable as it involves a victim-witness having to give evidence in order to successfully convince the court of their defence.

All proceedings against a trafficked victim would, in principle, be carried out in a public court, which reduces anonymity, safety and increases levels of traumatisation experienced

[61] Art. 39 CRC
[62] And possibly also administrative offences.

by the victim. Having to give evidence about the trafficking event in order to evade criminal responsibility or provide a defence exacerbates this problem.

4.6.3. Conclusion and recommendations: non-imposition of criminal liability, penalty or sanction

In summary the international obligations point to the necessity for states to ensure victim-witness protection is respected in proceedings against the trafficked person as well as those against a suspected trafficker. Moldova should therefore ensure victims of trafficking are not subject to criminal or administrative liability and sanction for acts arising from the trafficking situation. This is in order to prevent trauma and to promote recovery and social re-integration and extends to preventing the initiation of proceedings against a victim. This is in order to avoid him/her being obliged to give full oral testimony of his/her account of the trafficking event simply to support his/her defense to any charge in court.

If a trafficked victim was charged as a defendant then s/he would have to give his/her explanation of being trafficked as a defence in open court, most likely in a public hearing. The failure to divert a victim from such a hearing would seriously compromise victim-witness protection. These conclusions are particularly emphasized in the case of child victims (under 18).

The Moldovan authorities have made an attempt to ensure victims of trafficking are not subject to proceedings but the approach is currently unsatisfactory from the perspective of international standards and amendments should urgently be considered. Additionally, the authorities should be aware that the aim of such a provision is not only to provide a defence for a victim once they find themselves charged with an offence and giving testimony before a judge or prosecutor in court but also the objective is to divert the victim from such proceedings altogether. This ensures that they are not repeating a traumatic history several times and thereby inhibiting their prospects of recovery and reducing their protection by appearing in open court. For this reason it is crucial that identification procedures are functioning to ensure the police divert victims from the criminal justice process.

⇒ Arts 165 and 206: The non-criminalisation (exemption from liability) provision should be detached from its nexus with "co-operation" by deleting the words *"provided that he/she accepts to cooperate with the law enforcement body on the relevant case."* The provision should be inserted as a stand-alone, general provision in both the Criminal Code and Administrative Offences Code. If considered appropriate it should also be inserted into all relevant articles of the Criminal Code and Administrative Offences Code.

⇒ Art. 362 (4) Criminal Code *Illegal crossing of a state border* should be clarified by way of interpretive note or commentary as to whether it applies to only foreign citizens or all victims of trafficking.

⇒ Art. 313 Criminal Code *The refusal of a witness… to perform duties or evasion of duties* would benefit from a commentary or interpretive note clarifying its terms and

scope and should be amended to include the words an "unjustified refusal" to prevent liability for fearful, traumatised and /or unprotected victim-witnesses.

⇒ Prosecution of children for criminal and administrative offences arising from their trafficked status should be specifically prohibited.

⇒ National referral mechanism.
Ensure identification procedures function to divert victims from the criminal and administrative justice system *as early as possible* in proceedings through training and awareness raising of law enforcement officials, border guards, prosecutors, judges, administrative proceedings clerks, defence lawyers and victim advocates. Insert guidance into the by-laws, books of rules or operating procedures as appropriate for each agency.

4.7. Regulation of status of foreign victims

The regularization of the status of foreign victims of trafficking through the granting of a temporary stay or humanitarian stay permit enhances the protection of the victims and the prosecution of the traffickers. Foreign victims who are found in Moldova in transit or as a destination are unlikely to have regular documentation or have the legal right to stay in the country. It is desirable for victims of trafficking to have regularized status so they can access protection and assistance services. All victims of serious crime would need a regularised status in order to provide the necessary reflection delay to enable them to consider the option of "cooperating" with the police and giving evidence in criminal proceedings. Securing the victim's presence in the country and improving the stability of the victim also improves his/her ability to cooperate with the law enforcement officials. S/he must be able to stay legally in the country for the duration of the proceedings in order to act as a witness. It is therefore an essential tool for effective law enforcement and prosecution.

4.7.1. International standards

The *Trafficking Protocol* obliges each party to

> "consider adopting legislative or other appropriate measures that permit trafficked persons to remain on the territory, temporarily or permanently in appropriate cases..." giving "consideration to humanitarian and compassionate factors."[63]

State Parties, countries of origin, are also obliged to respond without delay to enquiries as to the legal residence status of the identified victim carried out by the country of destination and to provide legal travel documents, However repatriation of the victim to their country of legal residence should only be undertaken with

> "due regard for safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking."[64]

[63] Art.7
[64] Art.8(2)

Therefore it follows that States Parties should ensure that trafficked victims are enabled to participate in legal proceedings and additionally should consider instituting legal rights for a temporary or permanent residence permit in order to do so and/or a permit granted on humanitarian or compassionate grounds. UNHCHR connects the right to protection to the right to a temporary residence permit for victims and witnesses during legal proceedings[65] and the OSCE Action Plan's interpretation of this right covers the state's obligation to ensure provision of documents to clarify a victim's status and identity[66] and to consider on a case by case basis:

> "the provision of temporary or permanent residence permits, taking into account such factors as potential dangers to victim's safety [and to consider] is appropriate, the provision of work permits to victims during their stay in the receiving country".[67]

Of particular significance is the Stability Pact Statement of Commitment on Temporary Resident Permits, signed in Tirana, Albania on 12 December 2002 where the signatory states agreed to the following:

> "that a temporary residence permit forms a crucial element of any effective victim and witness protection strategy and will contribute to assist a greater number of trafficked persons who would otherwise not dare to seek refuge at a shelter or with the police for fear of deportation and rather stay in the country illegally;
>
> that the provision of a temporary residence permit to trafficked persons will contribute to better prepare reintegration measures and prevent the re-trafficking of these persons who are often contacted and threatened again by traffickers".

The Signatories agreed as follows, inter alia:

> "- to refrain from immediately expelling possible victims of trafficking, due to their unlawful entry into the country and to irregular residence and/or labour status;
>
> - to entitle possible victims of trafficking to remain on the state's territory and to grant them a recuperation period of up to 3 months during which they can stabilize and re-orientate themselves;
>
> - to request the responsible authorities to investigate and establish the facts without delay in order to legalise the status of trafficked persons;
>
> - to issue a temporary residence permit for victims of trafficking until the completion of legal proceedings, in the event the victim of trafficking is willing to testify, or whenever appropriate."

In relation to trafficked victims of sexual exploitation the Council of Europe recommends that its Member States:

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[65] UNHCHR Recommended Principle 10
[66] OSCE Action Plan Section V Para 5.1
[67] OSCE Action Plan Section V Para 8.2 and 8.3

> "34. Grant victims, if necessary and in accordance with the national legislation temporary residence status in the country of destination, in order to enable them to act as witnesses during judicial proceedings against offenders.
>
> 35. Consider providing, if necessary, a temporary residence status on humanitarian grounds".[68]

In general states should respect laws relating to refugee status and the principle of *non-refoulement*. People who because of their race, religion, nationality, membership of a particular social group or political opinion would have a well-founded fear of persecution if returned to their country of origin should not be deported or otherwise returned.[69] Some national legislation has found trafficked victims to be entitled to asylum on this basis.[70] Additionally, case law under Art. 3 ECHR (right to be free from torture, inhuman and degrading treatment) prevents deportation where there are substantial grounds for believing a person would be at risk of treatment contrary to Art. 3 and cannot be protected by the state to which s/he would be returned.[71]

4.7.2. Application in Moldovan national law and practice

Moldova is predominantly a country of source for trafficked victims so this issue is not at the forefront of legal reform or policy making however it is pertinent given the suspected preponderance of trafficking of humans through the country and levels of organised crime. The Law on Migration envisages the Department of Migration to be responsible for Migration Policy and numerous other competencies.[72] This law does not contain a provision for the granting of a visa, temporary or permanent, for humanitarian reasons or for the purposes of giving evidence.

According to the OSCE and its interlocutors such a right does not exist elsewhere in Moldovan law. This means that in the event of a foreign victim if THB being found on Moldovan territory there are no provisions to provide his/her with a, temporary or permanent, legal status.

4.7.3. Conclusion and recommendations: regulation of status of foreign victims

Whilst leaving some room for discretion as to the criteria for granting residence permits at a minimum Moldova should ensure it has legal provision for the granting of residence permits for victims who would be in danger if they were to be returned and victims who are

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[68] CoE Recommendation R (2000) 11

[69] Art 1 (2) Geneva Convention relating to the status of refugees 28th July 1951.

[70] For a summary of selected case-law see ODIHR Reference Guide pp66-68.

[71] See for example Ahmed v Austria, Judgment of 17 Dec 1996 (para 39) as discussed in ODIHR Reference Guide p 59, Soering v. United Kingdom, 7 July 1989 (para 91), Nsona v. The Netherlands, 28 Nov 1996 (para 39), H.L.R. v. France, 29 April 1997 (para 44) as discussed by *Franz Matscher*, Bemerkungen zur extraterritorialen oder indirekten Wirkung der EMRK, in: Andreas Donatsch/Marc Forster/Christian Schwarzenegger (eds) Strafrecht, Strafprozessrecht und Menschenrechte, Festschrift für Stefan Trechsel, 2002, pp 28ff.

[72] as outlined in Art. 8

participating in legal proceedings related to their trafficked status. The length of the permit should be as appropriate in the circumstances. According to political commitments the stay should be at least three months for all trafficked victims and for the length of legal proceedings where the victim has chosen to testify. This obligation should be balanced with the need to ensure that a victim can access the best conditions for her/his rehabilitation and reintegration, which s/he may choose to do in her/his home country.

The availability of such a law or procedure would enable foreign victim-witnesses to be given the opportunity to be stabilised and improve their "well being" before considering whether to cooperate with the law enforcement services. Therefore such a measure could only be beneficial in terms of strengthening law enforcement. Rapid repatriation of foreign victims without concern for their safety should be avoided. Legal provisions balancing these concerns should be adopted:

⇒ Establish a fast and effective procedure for the verification of the identity of foreign victims and the obtaining documents from their country of origin taking all measures to protect the victim's safety.

⇒ Establish a legal regime for the issuance of temporary residence permits. Residence permits should be available to cater for all of the following eventualities:
- permits for a minimum 3 month period for recovery and reflection which would apply to all victims of trafficking
- permits for stay for those participating in legal proceedings (civil and criminal) and/or claiming compensation
- temporary and permanent stay permits on humanitarian grounds (e.g. risks to personal integrity or survival upon return to country of origin.)[73]
- permits should include access to all protection and assistance: medical and psychological advice, legal advice, physical protection, shelter and the right to work during those periods.

⇒ In order to extend protection for Moldovan citizens abroad the Ministry of Foreign Affairs may wish to use diplomatic channels with the main countries of destination of victims from Moldova to reciprocate by ensuring visas for citizens trafficked abroad.

4.8. A human and victim's rights centred response to trafficking.

At the time of writing the national authorities of the Republic of Moldova has begun preparations for an anti-trafficking law. The authors view such a law not as an essential requirement imposed by international legal or political commitments but as a useful way of building a coherent and comprehensive commitment to anti-trafficking strategies and meeting those commitments. The law can be used to create new obligations and rights, some of which may be highlighted in this report, and can oblige the state and the relevant Ministries to take on specific tasks within their competencies.

[73] For an overview and discussion of the legal options adopted by different nationalities see ODIHR Reference Guide pp58-66 and also www.legislationline.org

It could thereby establish a stronger framework for the government's approach to the suppression of trafficking which is based on human rights, children's rights and the protection of victims. This could include a recognised and delineated "National Referral Mechanism" for suspected and actual victims. Additionally it may concretise state support and financing for the National Coordination Committee's work on the practical implementation of the National Plan of Action and if necessary the revision, refinement and updating of the plan itself.

However, it is crucial not to take retrogressive steps. Related legislation should be examined and amended simultaneously to ensure the laws are practical (e.g. witness protection measures within criminal proceedings should be contained within the Criminal Procedure Code) and workable. Where related laws required amendment it would also be essential to do so simultaneously to ensure harmonisation of all relevant legislation.

5. Protection of the rights of victim-witnesses in Moldovan criminal proceedings

5.1. Introduction

Victims of trafficking who act as witnesses are in a special position, compared to mere victims or mere witnesses.

> "Trafficking victims acting as witnesses are a group distinct from both witnesses who are not trafficking victims and trafficking victims who are not witnesses. This distinct status means that such victim-witnesses have unique characteristics and are subject to unusual risks which require special protective measures. In particular, the potential of a victim to give evidence and his/her decision to co-operate with law enforcement authorities and to testify as a witness in court proceedings can have a strong impact on the level of risk and can call for additional measures of protection."[74]

Victim-witnesses should not be reduced to their function as witnesses, but recognised and protected as victims of crime. Also, trafficked persons should not lose their special status as victims in case they do not give a witness statement:

> "The special rights and status which should be accorded to trafficking victims must be preserved whether or not they act as witnesses."[75]

The present section addresses the rights and interests of victim-witnesses during criminal proceedings. First of all, victim-witnesses are in need of protection of their physical security (section 5.2). Additionally, their status as victim of a crime requires additional safeguards to protect their right to privacy (section 5.3), the right to sensitive treatment and non-retraumatisation (section 5.4), the right to information and legal assistance (section 5.5) and the right to compensation (section 5.6). The analysis contained in this section should be read together with section 4 which defines the necessary preconditions of protection.

Section 5 analyses Moldovan legislation against the background of relevant international standards regarding these rights. It concludes with recommendations aiming at full implementation of existing international commitments to comprehensive and adequate victim-witness protection. Taking into account the overall context of the present report, the emphasis of this section is on the aspect of protection of physical security.

5.2. Right to physical security in and out of court

Traffickers often use intimidation, threats or violence to prevent victim-witnesses from testifying. Therefore, measures aiming to protect the physical security of victim-witnesses are of crucial importance. A failure by the state to provide such protection to victim-witnesses is not only contrary to international standards, as elaborated in section 5.2.1, but also diminishes the likelihood that trafficked persons are willing to cooperate as witnesses.

[74] Stability Pact Portoroz document, pp 1-2.
[75] Stability Pact Portoroz document, p 2.

Protection measures may be taken in-court as well as out of court. In-court or procedural protection measures are being applied by the courts and include testimonies via teleconference which may be combined with the anonymity of the testifying witness or the possibility to remove the accused from the court room. Out-of-court or non-procedural protection measures include police escorts, relocation or the change of identity. Such measures are carried out by the police or other law enforcement authorities. Out-of-court protection measures may be applied already at an early stage, when the case has not yet been brought to court, but also while a case is being tried at court and after the termination of proceedings. They may supplement, but not replace in-court protection measures.

Some protection measures require a specific justification, because they are likely to conflict with the rights of the defense (such as anonymous witnesses) or because they are very costly and also have a strong impact on the witness' every day life (such as relocation, change of identity or cosmetic surgery). Usually, only witnesses whose life or physical security is seriously threatened as a consequence of participating in criminal proceedings and/or witnesses in organised crime cases are eligible for such protection. Other measures, such as the temporary removal of the accused from the court room, police escorts or the distribution of panic alarms usually require a lower threshold of threat.

This section analyses relevant Moldovan legislation with particular focus on the selection of available measures, the scope of protected circle of persons eligible for protection, requirements and obstacles, as well as necessary preconditions for the proper implementation of existing laws.

5.2.1. International standards

General obligation to provide protection

The *TOC Convention* obliges States Parties to take appropriate measures to provide assistance and protection to victims of trafficking, in particular in cases of threat of retaliation or intimidation.[76] The *Trafficking Protocol* obliges States Parties to endeavour to provide for the safety of trafficked persons, while they are within their territory.[77] Thus, the responsibility to protect the victim-witness' safety rests upon the country on whose territory the victim is currently situated. Depending on the stage of the trafficking process, this may be the country of origin, the country of transit, as well as the country of destination. The Protocol also obliges States Parties to train law enforcement officials on anti-trafficking issues, including methods to protect victims from traffickers. Such trainings should take into account human rights, child- and gender-sensitive issues and encourage cooperation with NGOs.[78]

Several documents establish standards for the protection of child victim-witnesses. According to the *Trafficking Protocol*, States are obliged to take into account the gender,

[76] TOC Convention Art. 25 (1).
[77] Trafficking Protocol Art. 6 (5).
[78] Trafficking Protocol, Art. 10 (2).

age and special needs of victims, in particular the special needs of children, when applying protection and assistance measures, in particular appropriate housing, education and care.[79] The *CRC* states that:

> "[in] all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being […] and, to this end, shall take all appropriate legislative and administrative measures."[80]

States Parties to the *CRC Optional Protocol* shall:

> "recognize the vulnerability of child victims and adapt procedures to recognize their special needs, including their special needs as witnesses" and provide, "in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation."[81]

The *UNHCHR* has recommended states to provide for appropriate and specialized programs and policies for the protection of child victims, whereby full account shall be taken of their special vulnerabilities, rights and needs.[82] The *UNICEF Guidelines* stress the duty of states to protect and assist child victims and to ensure their safety, and state that all decisions regarding child victims must be taken expeditiously. Information about a child victim that could endanger the child or the child's family members must not be disclosed. Child victims who agree to testify should be accorded special protection measures to ensure their safety and that of their family members in both countries of destination, transit and origin.[83]

International standards also establish a state duty to provide victim-witnesses with appropriate housing, health care, psychological and material assistance, as well as employment, educational and training opportunities (see section 4.4).

Persons eligible for and duration of protection

The *Trafficking Protocol*, the *TOC Convention* and *CoE Recommendations* refer to the protection of "victims" and thus to not require a victim to cooperate as witness in order for the state obligation to protection to arise. This approach is confirmed by the *UNHCHR Recommendations*, according to which the duty of states to protect trafficked persons from further exploitation and harm shall not be made conditional upon the capacity or willingness of the trafficked persons to cooperate in legal proceedings.[84] For further relevant standards, please refer to section 4.3.1.

Other standards explicitly refer to the protection of "witnesses". The *TOC Convention* obliges States Parties to take appropriate measures to protect witnesses from potential

[79] Trafficking Protocol, Art 6 (4).
[80] CRC, Art. 3 (1), (2).
[81] CRC Optional Protocol, Art. 8 (1) (a), (f).
[82] UNHCHR Recommendations, Principle No. 10, Guidelines No. 8, No. 8.7. See also UNICEF Guidelines, Art. 2.2, Stability Pact Portoroz document, p 3.
[83] UNICEF Guidelines, Art. 2.6, 2.7, 3.10.
[84] UNHCHR Recommendations, Principle no. 1.

intimidation and retaliation, including the establishment of procedures for the witness' physical protection (such as witness relocation or non-disclosure or limited disclosure of information concerning the witness' identity and whereabouts) and the permission of 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, States Parties must consider entering into agreements with other States Parties.[85] In the *OSCE Action Plan*, Participating States have committed themselves to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony.[86]

The *UN Declaration of Basic Principles* and the *OSCE Action Plan* call upon states to ensure the safety not only of victims, but also of their families.[87] Similarly, the *Council of Europe* recommends to its Member States to 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. Member States should also call upon Member States to extend protection mechanisms to members of NGOs assisting the victims during penal and civil proceedings.[88]

Neither the Trafficking Protocol nor the TOC Convention limits the obligations of States Parties to protect victim-witnesses to certain procedural phases. Thus, it may be concluded that such an obligation exists not only during police investigation and court proceedings, but as soon as the victim is recognized as such, and extends beyond the duration of proceedings. A corresponding recommendation was issued by the *Council of Europe:* the life and personal security of witnesses and persons close to them should be protected *before, during and after trial*.[89] The *UNHCHR* recommends that protection should also be granted during the repatriation process, thus confirming that protection may not be limited to the territory of the destination country or the duration of criminal proceedings.[90]

An international expert group convened by the Stability Pact Task Force on Trafficking in Human Beings (hereinafter: *Stability Pact Portoroz Working Group)* in Portorož, Slovenia in March 2003[91] drafted a set of recommendations on victim-witness protection. The Working Group has recommended, among others, that the police should protect the whereabouts and identity of the victim already during the investigation stage, if possible and unless the criminals know the identity of the victim from the beginning.[92]

Protection obligations thus exist throughout from the moment a suspected victim is identified to the period following a criminal trial. Additional provisions and obligations exist in relation to victim-witnesses to deal with special risks associated with that activity.

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[85] TOC Convention Art. 24, OSCE Action Plan Art. III.4.1.
[86] OSCE Action Plan Art. III.4.1.
[87] UN Declaration of Basic Principles, Art. 6 (d).
[88] CoE Recommendations R (85) 11 Art. 16, R (2000) 11, Art. 29, 30, 32.
[89] CoE Recommendation R (97) 13, Art. 2.
[90] UNHCHR Recommendations, Guideline no. 6.7.
[91] The Expert Group Meeting was preceding the 5th Task Force Meeting which took place in Portorož on 28 March 2003.
[92] Stability Pact Portoroz document, p 4.

Nature of protection measures

In-court protection measures

The *Trafficking Protocol* obliges States Parties to protect the identity of trafficked persons, for example by making legal proceedings confidential.[93] This provision may be interpreted to provide for anonymous witness statements. Art. 6 *ECHR* guarantees the right of the accused to a fair trial, but does not guarantee a right of victim-witnesses to protection. On the contrary: as trafficked victim-witnesses are likely to be providing evidence in support of the prosecution's case, protection measures such as anonymous statements are likely to violate the right of the defense to a fair trial. The European Court of Human Rights has however stated that witnesses' rights may be protected under Art. 2 (right to life) or Art. 8 (right to privacy) ECHR.[94] The Court has further recognized that, even if Art. 6 ECHR does not create an obligation to protect witnesses, the interests of witnesses may justify restrictions of the right of the defense under Art. 6. Criteria for the admissibility of anonymous witness can be derived from the Court's case-law on Art. 6 ECHR as well as from *CoE Recommendation R (97) 13*.

- As a general principle, the "handicaps" faced by the defense as a consequence of the anonymity of prosecution witnesses "must be sufficiently counterbalanced by the procedures followed by the judicial authorities." In particular, there should be a possibility for the defense to test the witness' reliability and credibility and the need for anonymity.[95]
- There must be sufficient reasons for maintaining anonymity. (For instance in the *Doorson* case, it was regarded sufficient that drug dealers frequently used threats or actual violence against persons who gave evidence against them, and that one witness already suffered violence and another had been threatened.) These reasons must also be considered and assessed by the courts in each individual case.[96]
- The anonymous testimony should be an exceptional measure and strictly necessary. If a less restrictive measure can suffice than that measure should be applied.[97]
- Convictions may not be based either solely or to a decisive extent on anonymous statements.[98] Additional means of evidence that should be taken into consideration,

[93] Trafficking Protocol Art. 6 (1).
[94] European Court of Human Rights (ECHR) Judgments *Doorson v. The Netherlands*, 26 March 1996, § 70, *Van Mechelen and Others v. The Netherlands*, 23 April 1997, § 53, *Visser v. The Netherlands*, 14 February 2002, § 43.
[95] ECHR Judgments *Birutis and Others v. Lithuania*, 28 March 2002, § 29, *Kostovski v. The Netherlands*, 20 November 1989, § 42, *Visser* § 43, *Van Mechelen and Others*, §§ 52, 54, *Doorson* §§ 70, 73, 75, CoE Recommendation R (97) 13, Art. 9, 10.
[96] ECHR Judgments *Doorson* § 71, *Van Mechelen* § 61, *Visser* § 47, CoE Recommendation R (97) 13, Art. 10, 11.
[97] ECHR Judgments *Doorson* § 76, *Van Mechelen* §§ 55, 60, *Visser* § 43. In the *Van Mechelen* case, for example, the Court did not find the handicaps faced by the defense counterbalanced, because "extreme limitations" on the right of the accused were used (communication via sound link, the defense was unaware of the witnesses' identity and had no possibility to observe their demeanour and test their reliability), whereas neither the necessity of such limitations was explained, nor less far-reaching available measures (e.g. using make-up or disguise, prevention of eye contact) were considered. See also CoE Recommendation R (97) 13, Art. 10.

including other statements and indirect evidence, such as on-site inspection records, material evidence, or expert examinations, which can be challenged by the applicant.[99]

- If necessary, anonymous statements should be supplemented by additional protection measures, for example by using screens, disguising the image- or voice altering device in order to prevent the identification of the witness by the defense.[100]

The *Council of Europe* recommends Member States to provide for in-court protection measures. States should use alternative measures of evidence which spare the witness to face confrontation with the accused, such as allowing for evidence to be given in a separate room. In organized crime cases, the following measures are recommended: audio-visual recording of pre-trial statements - which should be admitted as evidence when it is impossible for the witness to appear before court or if appearance in court might "result in great and actual danger to the life or security of witnesses or persons close to them", revealing the witness' identity at the latest possible stage of proceedings and/or releasing only selected details, as well as the exclusion of the public and the media from all or part of the trial. Use should also be made of screens or image- or voice-altering devices. All measures should be applied with due regard to the rights of the defense.[101]

The *Stability Pact Portoroz Working Group* has recommended several in-court protection measures: hearings in camera, audio-video recording of statements, video-conferencing, relocation of the trial venue, legal representation of victim-witnesses, allowing proper protection of witness during examination, temporary exclusion of defendant during court proceedings, limitations on media during court proceedings, protection of the identity of the victim-witness, and the use of contempt provisions which enable judges to prevent threatening behaviour in the courtroom. The prosecution of the intimidation of victim-witnesses as a distinct offence is also recommended.[102]

OSCE Participating States have committed themselves to explore alternative investigative strategies to preclude the need for victims to be required to testify in court.[103]

Out-of-court protection measures

The Council of Europe recommends its Member States to apply out-of court police protection measures, including identity change, relocation, assistance in job finding and physical protection.[104] *UNICEF* recommends resettlement to a third country, when victim/witness protection cannot be ensured in neither the country of destination nor the country of origin.[105]

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[98] ECHR Judgements *Van Mechelen* § 55, *Doorson* § 76, *Birutis* § 29, *Visser* § 43, CoE Recommendation R (97) 13, Art. 13.
[99] ECHR Judgement *Birutis*, § 32.
[100] CoE Recommendation R (97) 13, Art. 12.
[101] CoE Recommendation R (97) 13, Art. 6, 9-13.
[102] Stability Pact Portoroz document, p 5.
[103] OSCE Action Plan, Art. III.2.7. See also Stability Pact Portoroz document, p 4.
[104] CoE Recommendation R (97) 13, Art. 14, 15. The OSCE Action Plan also provides for witness relocation in order to facilitate the victim's participation as a witness in the investigation and court hearings or other criminal proceedings (Art. III.4.4).
[105] UNICEF Guidelines, Art. 3.10.

Victim-witness programs are very costly and may have serious impact on the victim-witness' life. Thus, not every victim-witness is suited for participation in a witness protection program, and not every program is suited for trafficked persons who are witnesses. The *Stability Pact Portoroz Working Group* drafted the following criteria for the participation of victim-witnesses in specific out-of court protection programs:[106]

- The victim-witness is in danger.
- The victim-witness should be able to make a relevant witness statement and repeat this testimony in court.
- The testimony should be necessary for the proceedings.
- The victim-witness should be suitable for participation in the witness protection program.
- Participation in the protection measure should be voluntary. Protection measures should be based on the informed consent of victim/witnesses. They should be discussed and agreed with her/him and formalized in an agreement specifying her/his rights and obligations.
- Protection measures should be tailored to the individual circumstances of the victim-witness. The application of protection measures should be based on a risk assessment, which should be undertaken already at a very early stage and revised throughout the criminal process. The assessment should be carried out by the criminal justice system in cooperation with IGOs and NGOs.

Last but not least the effectiveness of witness protection measures strongly depends on resources and the capacity of those in charge to provide protection. *OSCE* Participating States have committed themselves to provide resources, training and equipment necessary for law enforcement bodies to carry out their anti-trafficking tasks.[107]

International standards also require states to provide victim-witness with information about their rights and status in legal proceedings, including information about available protection facilities. For relevant standards, please refer to sections 4.5.1 and 5.5.1.

5.2.2. Application in Moldovan national law and practice

5.2.2.1 In-court protection under the Criminal Procedure Code

Available protection measures

Art. 215 (1) CPC establishes a general obligation of police and courts to ensure the safety of trial participants. If there is sufficient ground to consider that among others, the injured party, the witness or their family members may be threatened with death, violence, deterioration or destruction of assets or other illegal acts, police and courts are obliged to take measures proscribed by law in order to protect these persons' life, health, honour, dignity and assets, as well as to identify the responsible persons and hold them liable. Para

[106] Stability Pact Portoroz document, pp 4, 7.
[107] OSCE Action Plan, Art. III.2.6.

(2) links this obligation to the Law on State Protection. Requests for protection under this law shall be lodged with and examined confidentially by the prosecution bodies or the court, whose decision to grant protection shall be transmitted immediately to the body responsible according to the Law on State Protection (see below sections 5.2.2.2, 5.2.3.2, 5.2.3.4).

Teleconferences

Art. 110 CPC provides for *teleconferences* as special means of hearing and protecting witnesses.[108] This provision allows for a witness to be heard in a different place than the court room with the help of technical facilities, if there exists sound evidence that her/his or a close relative's life, physical integrity or liberty is in danger in connection with her/his statements during a criminal case and provided that the relevant equipment is in place. Such measures shall be based on a well-founded decision of the instruction judge, ordered by the court ex officio, or based on a well founded request from the prosecutor, lawyer, witness or any interested person (para 2). The witness may refuse to give her/his real identity. In this case, data on her/his real identity must be kept separately and stored in a sealed envelope under "conditions of maximum confidentiality security" (para 3). During the teleconference, the witness shall be interviewed in the presence of the instruction judge, who also provides assistance to her/him (para 4). Witnesses may be heard in a way that their image and voice are distorted so that s/he may not be recognized. The defense has the right to ask questions to the witness (paras 5, 6).

However, statements given according to Art. 110 may be used as evidence only to the extent that they can be confirmed by other means of evidence (para 8).

Teleconferences may be used only when the crime in question constitutes a "serious, extremely serious or exceptionally serious offence." According to Art. 16 CC, a serious crime is a crime charged with a maximum penalty of at least six years. This criterion is fulfilled by Article 165 CC (trafficking in persons): para (1) provides for a maximum penalty of 15 years.[109] This example demonstrates the importance of clear distinctions between different types of offences: if a case of trafficking was not recognized as trafficking, but prosecuted as pandering (Art. 220 CC), the victim-witness could not be interviewed according to Art. 110 CPC, because pandering, if not committed by an organized criminal group, is punishable with imprisonment of two to five years and thus does not reach the threshold of a "serious crime". A positive aspect of Art. 110 is that the witness her/himself has the right to request the use of audio- or video-link testimonies and is thus not dependent on the court's decision.

The use of this right, as well as of other protection measures under CPC, implies that the victim-witness has been informed about her/his rights. However, Art. 90 CPC which defines the rights of witnesses does not provide for such a right to information about protection available according to Art. 110 or according to the Law on State Protection. This gap should be closed.

[108] Art. 111 (2) CPC clarifies that this provision also applies to the hearing of injured parties.

[109] Cf. Art. 16, 165 CC. The qualifications of the offence of trafficking may also constitute extremely serious (Art 165 (2) CC) or exceptionally serious (Art 165 (3) CC) offences.

Anonymous witness statements

Art. 110 CPC allows for anonymous witness statements, which are an important means to protect victim-witnesses, especially in cases of organized crime, when the identity of the victim-witness is not known to the defendant. While protecting the identity of the endangered victim-witness, Art. 110 also provides for safeguards to protect the rights of the defense, as foreseen by Art. 6 ECHR and CoE Recommendation R (97) 13, including the following:

- These safeguards include the requirement of sound evidence of a threat to the witness' life, physical integrity or liberty,
- the offence in question must be of a serious, extremely serious or exceptionally serious nature,
- the instruction judge is obliged to give a well-founded decision in the individual case on the application of anonymous witness statements, measures under Art. 110,
- the defendant has the right to ask questions to the witness,
- the instruction judge is present at the witness' place during the testimony, and
- the requirement that the witness statement must be confirmed by other means of evidence.

Even if these safeguards primarily concern the rights of the defense, rather than the rights of the victim-witness, they are of importance for the latter, as materials obtained in violation of the rights of the defense may not be admitted as evidence (Art. 94 (1) no. 2 CPC).

However, it should also be noted that from the mere analysis of isolated provisions it is hard to assess compliance or non-compliance with Art. 6 ECHR, taking into account the fact that the European Court always makes an overall assessment if the proceedings as a whole were fair.

The anonymity of victim-witnesses can only be effectively preserved during the main trial if her/his name was withheld from the file already from the very beginning. For instance, if the suspect inspects the file and learns about the identity of an existing victim-witness, it makes no sense to start preserving her/his identity at a later stage, because s/he is already known to the suspect. This aim could be achieved by introducing a presumption of anonymity of the victim-witness from the very beginning.

The effective preservation of the victim's anonymity also depends on the skills of all law enforcement officials, prosecutors and judges involved to keep her/his identity secret, who should be adequately trained in this respect. This is of particular importance for border guards, who are in the position to identify Moldovan victims of trafficking who are deported back to Moldova.

Use of video-taped statements

Art. 109 (3) CPC enables the prosecutor to request the hearing of the witness by the instruction judge if her/his presence during the trial is impossible due to her/his departure or other grounded reasons. According to judicial practice, "grounded reasons" include the refusal of the victim-witness to be confronted with the trafficker due to security concerns or

fear of re-traumatization. During the hearing, the accused and defense counsel are present and have the right to ask questions to the witness. Such statements, as witness statements in general, may be recorded on audio or video tapes (Art. 115). According to Art. 371, audio- or video-recordings of witness statements may be played during the trial, if the witness in question is absent, because it is absolutely impossible for her/him to attend the trial or due to impossibility to ensure her/his safety.

From the perspective of the victim-witness, these provisions primarily serve to prevent her/his retraumatisation by avoiding further confrontation with the accused. The reduced number of confrontations however may also have a positive impact upon her/his security. For example, if it turns out in the pre-trial phase that the security of the victim-witness cannot be guaranteed during the main trial, s/he may be questioned only in the pre-trial phase by the investigation judge.

Contrary to the procedures mentioned in the previous section (teleconferences), the victim-witness whose testimony is being video-taped faces the accused and the defense counsel who take part in her/his cross-examination in the pre-trial phase. Thus, her/his anonymity is not protected. However, this method can be useful to improve her/his security if the identity of the victim-witness is already known to the accused or if the facts do not reach the threshold of the requirement as defined in Art. 110. Furthermore, video-taped statements can be applied as an interim solution, as long as the necessary infrastructure to interview victim-witnesses via teleconference has not been put in place in Moldova.

None of the previously mentioned provisions (Arts 109, 115 and 371) deals with the question if video-taped statements that are played in court may be used as a main evidence to convict the defendant (unlike in Art. 110 on anonymous statements, which explicitly prohibits such practice). However, from the general principles laid down in Arts 27 and 389 CPC,[110] it can be derived that this principle is also valid for statements obtained and used according to Arts 109, 115 and 371. Therefore, victim-witnesses in practice may only benefit from these provisions if police and prosecutors establish additional intelligence to be used as basis for the conviction of traffickers. This interpretation is in line with the case law of the European Court of Human Rights which suggests that it would be contrary to Art. 6 ECHR base convictions exclusively in recorded witness statements played in court.[111]

Other protection measures

Art. 18 CPC stipulates the principle of publicity of hearings, but allows the court to exclude the press and the public from the court room, when required for the protection of morality, public order, national security, the interests of juveniles, the protection of the parties'

[110] Art. 27 (1) The judge and the representative of the criminal prosecution bodies appreciate the evidence according to their own conviction formed after the examination of all administered evidence. (2) No evidence has a substantiation power established in advance.
Art. 389 (1) The conviction sentence shall be adopted with the condition that as a result of the judicial investigation, the overall evidence examined by the court confirmed the guiltiness of the defendant in the crime commission. (2) The conviction sentence may not be based on assumptions or exclusively or mainly on the depositions of the witnesses made during the criminal prosecution or read in the court in their absence.

[111] *Marianne Holdgaard*, The Right to Cross-Examine Witnesses – Case Law under the European Convention on Human Rights, in: Nordic Journal of International Law, Vol 71/2002, pp 92ff.

privacy or the interests of justice. This provision primarily serves to protect the privacy of the victim-witness - provided that s/he has the status of injured or civil party -, but also has a security dimension: the less known her/his identity is to the media and the general public, the lower the risk of intimidation.

According to Art. 333 and 334 CPC, the presiding judge is responsible to ensure the order in the court room and the security of all participants in the main trial. Participants are obliged to abide by the judge's dispositions regarding the maintenance of order. If the defendant repeatedly violates these orders, s/he shall be removed form the court room and the trial shall continue in her/his absence. If a crime is committed in the court room, the court shall establish the facts, identify the perpetrator, register the incident in the minutes and, if necessary, decide upon the apprehension of the perpetrator (Art. 335).

Persons eligible for protection measures and duration of protection

The in-court protection measures provided by the CPC by their very nature apply to persons who have already come in contact with the criminal justice system. In the context of the present report, these are trafficked persons who were summoned to give testimony as witnesses (such as teleconferences or anonymous witness statements) and/or have the procedural status of an injured party.

Consequently, such measures are not applicable to the victim-witness' family members, contrary to out of court protection measures. It should be noted however that threats to family members of victim-witnesses may also give rise to their protection under Art. 110 CPC (testimonies via teleconference, anonymous witness statements).

As a logical consequence, protection is further limited to the period when the victim or victim-witness is physically present in court, thus the duration of criminal proceedings. Nevertheless, some aspects of in-court protection also extend beyond this period, such as anonymity of witnesses, which, in order to be effective, should start from the earliest possible investigation stage (see 5.2.2.2.)

5.2.2.2 Out-of court protection measures under the Law on State Protection

Out of court protection measures are regulated in the Law on State Protection. It should be noted that, according to the knowledge of the OSCE Mission, there has been only limited practical application of this law so far, nor are there any official commentaries on it. This makes it difficult for the authors to draw conclusions about its breadth and application in practice.

Prerequisites for the application of protection measures

Measures applied according to the Law on State Protection aim to "protect the life, health, property, as well as other legal rights and interests" of, among others, witnesses and injured parties, who took part in the discovery, prevention, combating, investigation and in solving of crimes, as well as in the prosecution in court of criminal cases, against "illegal actions and infringements" (Art. 1 (1), Art. 2 (1)). Art. 1 (2) considers protection adequate in cases when the person to be protected "is found to be in a position of direct dependency on the prospect of discovery, prevention, combating, investigation and solving of crimes, as well as

of prosecution in court of criminal cases involving organized crime". It defines the responsible law enforcement and judicial bodies competent to decide upon the application of protection measures and to carry out such measures (Art. 3). It also provides for prosecutorial supervision of the legality of execution of protection measures (Art. 4).

The basis for the application of protection measures is the declaration of the victim-witness and operational information received by the competent bodies about threats to the victim-witness' safety (Art. 5 (1)). The application of such protection measures requires the existence of a "real threat of death, violence, destruction or damaging of property or other illegal actions linked to the fact that the respective person has provided assistance in the criminal proceedings" (Art. 5 (2)). Upon receiving such information according to Art. 5 (2), the police officer, judge or prosecutor is obliged to verify this information and to decide within three days, or immediately in case of emergency, about the acceptance or rejection of the victim-witness' request. There is the possibility of an appeal against this decision (Art. 6 (1)). Protection may be cancelled when the grounds for protection no longer exist or when the protected person has violated her/his obligations (Art. 7).

These preconditions for a person to be eligible for protection under the Law on State Protection lack sufficient clarity.

- Art. 1 (1) requires that, in order to be protected, the person must have "taken part" in the discovery, investigation, etc. of crimes. It is not clear which degree of participation is required. The national experts consulted by the authors could not provide a uniform interpretation on the question if this term requires a certain procedural status (e.g. as injured party or witness) or that a statement has already been given. Thus, even if the scope of the law seems broad at a first glance, encompassing not only witnesses, but also mere victims, it seems to be limited in fact to witnesses. This is not a problem in itself – and many countries actually have specific witness protection law practices –- as long as this gap is closed. This could be best done by an additional law, as for example in a generic anti-trafficking law. In any case, we regard it crucial that this ambiguity in the State Protection Law is clarified.
- It is not clear if Art. 1 (2) ("protection shall be adequate in cases (…)") establishes *necessary preconditions* for the application of measures or if it creates *one possible situation* where the Law can be applied, while it can also be applied in others.

This lack of clarity is exacerbated by the fact that the preconditions themselves established in Art. 1 (2) are ambiguous:

- First, Art. 1 (2) states that the protected person must be in a position of direct dependency on the prospect of discovery, prevention etc. of a crime. This wording does not make sense. If this provision means that the protected person must be crucial for the investigation, prosecution, etc., as it is common in many witness protection laws, the wording needs to be changed: not the witness should be dependent on the outcome, but the outcome should be dependent on the witness.
- Second, it is not clear from the wording if Art. 1 (2) (and thus, possibly the whole Law on State Protection) applies to organized crime cases only.

As a conclusion, it is not clear if a trafficked person is eligible for protection before s/he decides to cooperate with the authorities, or after s/he has made this decision, but before the actual interview by the police or in court has taken place. Additionally, even when the trafficked person has already given testimony in court, it is not clear if s/he is eligible for protection in cases where no organized crime is involved.

According to international standards, states shall provide protection from threats and assault to *all trafficked persons before, during and after criminal proceedings.* However, it is doubted that the Law on State Protection fulfils this standard. Protection should not be regarded as a reward, but as a necessary precondition for cooperation.

In order to overcome these and other weaknesses identified in the following subsections, it is recommended to introduce substantial amendments into the Law on State Protection or alternatively, taking into account the number and gravity of shortcomings, to draft a new law on Witness Protection. Consequently, the following recommendations referring to the State Law on Protection should be seen as relating either to reviewing the existing law or to drafting a new Witness Protection Law, which replaces the present Law on State Protection. For specific recommendations, please refer to section 5.2.3.

Persons eligible for protection and duration of protection

According to of the Law on State Protection, protection shall also be provided to close relatives of protected persons and to victims' legal representatives (Art. 2 (1) d), e)).

On a positive note, protection is not restricted to victim-witnesses. The Law on State Protection is also applicable to the family members and legal representatives of protected persons.

However, the crucial question when protection starts is unclear. The provisions of the State Protection Law regulating the law's scope of application are ambiguous, as explained in the previous section on prerequisites for protection (see section 5.2.3.3). Related to this is the lack of a precise definition of a witness and of the moment at which one becomes a witness under the CPC. It is recommended that these issues are clarified.

Finally, according to Art. 7 of the Law on State Protection, protection measures may be cancelled when the grounds for protection no longer exist or when the protected person has violated the agreement. This provision is important because it does not limit protection to a certain period, such as the duration of criminal proceedings, but implies that protection must be provided as long as the risk exists. A necessary precondition in order to determine if grounds for protection (still) exist is risk assessment (see this section below).

Available protection measures

The Law on State Protection provides for a broad range of protection measures (Art. 8–14) among which:

- personal protection by police escorts, protection of the residence and personal property,

- special means of individual protection, connection and information (such as e.g. panic alarms or mobile phones),
- temporary relocation of the protected person,
- non-disclosure of information regarding the protected person, including the change of her/his personal data in the file, her/his interrogation in conditions which ensure her/his safety, and her/his exemption from the duty to be present during trial, while the judge reads out her/his previously made depositions or reproduces audio or video recorded testimonies,[112]
- change of the place of work or studies or of place of residence,
- change of identity and of appearance,
- examination of the case in a closed court hearing.

Furthermore, Art. 16 on "social protection" provides for life, health and property insurance funded from the state budget[113] and enables the state to demand back the paid insurance sum from the person who killed or injured the protected person or damaged her/his property.

This list reflects relevant international witness-protection standards to a great extent. Another aspect which is however missing in the present Law on State Protection is the component of social and financial assistance. Although Art. 16 is titled "social protection", its content is limited to state insurance. Social and financial assistance is however crucial for victim-witnesses of trafficking, who, as a consequence of trauma, change of location and the psychologically stressful situation of being a protected witness, often have difficulties in finding employment in order to earn their living. It is also an important contribution towards the protection of the protected person's rights, freedoms and personal dignity, as stipulated in Art. 8 (3), and should therefore be included into the Law on State Protection or any replacement Witness Protection Law.

The question, if the existing measures are suitable for the needs of victims and witnesses of trafficking has to be answered in light of the previous section dealing with the persons eligible for protection. Measures such as permanent relocation or change of identity are very costly and have a high impact upon the victim-witness' life. They might be appropriate for some, but not for all victim-witnesses, and, as classical "witness protection measures", will not be neither suitable nor affordable for mere victims. At the same time, other measures under the State Protection Law with a less severe impact, such as personal protection, panic alarms or temporary relocation are appropriate for the protection also of mere victims or potential witnesses. However, the preconditions of the present law are too strict to enable victims and many victim-witnesses to access these protection measures. This is a serious shortcoming and should be addressed because safety concerns will often prevent the victim from entering the criminal justice system as a witness. Again, this should be done by improving the Law on State Protection (or creating a replacement Witness Protection Law), and by introducing relevant provisions into the generic anti-trafficking law.

[112] According to Art. 371 CPC, such audio or video recordings may be played during the trial when the witness in question is absent due to absolutely impossible to attend the trial or due to impossibility to ensure her/his safety.
[113] See also the Draft Law on Mandatory State Insurance of the Persons Subjected to State Protection.

Risk assessment

Risk assessment serves to determine the appropriate duration of out-of-court protection measures - both in terms of starting and stopping their application - and to select appropriate and tailor-made protection measures. The Law on State Protection does not explicitly require the competent bodies to carry out risk assessment; neither is, according to information available to the OSCE Mission, adequate risk assessment being undertaken in practice by the Anti-Trafficking Department or the Witness Protection Unit of the Ministry of Internal Affairs. This fact is mainly due to the limited ability of law enforcement authorities, both in terms of knowledge and resources.

Effective risk assessment within witness protection programmes needs to be carried out in the very beginning, when the request for witness protection is being filed, and consequently be repeated on a regular basis. In order to ensure that adequate protection measures are chosen and applied towards trafficking victim-witnesses, the assessment should take the nature and seriousness of the threat as well as the individual situation of the victim-witness into consideration. It also needs to be clearly defined who is in charge of carrying out risk assessment. In practice, it has often been proved useful if a separate police unit, different from the investigation unit, is tasked with risk assessment.

The capacity of law enforcement authorities to undertake risk assessment requires intelligence gathering skills and sufficient resources, including personnel and financial resources as well as an adequate office and operational infrastructure. The success of risk assessment benefits from the consultation with relevant international and non-governmental organizations who provide assistance and counseling to victim-witnesses and are familiar with their situation and needs.

Rights and duties of the protected person and the state

Positive aspects of the Law on State Protection from the perspective of the victim-witness' rights include the requirement of her/his consent to the applied protection measures and the stipulation that measures must be without prejudice to the protected person's rights, freedoms and personal dignity (Art. 8 (3)). Another good provision is Art. 19 which states that expenditures arising from protection measures must be paid from the state budget, and not by the protected person. However, according to the available information there has not been any budgetary allocation to implement such provision.

The Law on State Protection bases state protection on an agreement between the protected person and the state, which defines the conditions of protection and the rights and obligation of parties (Art. 17) and includes a catalogue of rights and duties of protected persons (Art. 18). The law establishes the following rights and obligations of the protected person and the state, respectively:

- The protected person has, for example, the right to be informed about the protection measures applied, to request additional protection and to remedy state acts in violation of the law. S/he has the duty to cooperate with law enforcement in the investigation and prosecution of the case, to observe the rules of application of protection measures and orders issued by the competent bodies, to inform the bodies of any threat to her/his

personal safety, not to disclose any data regarding protection measures applied to her/him. She/he must be informed about these rights and duties (Art. 18 (1)-(3)).

- The body responsible to decide on the application of the protection measures has the right to receive necessary information relating to the application of the measures from the protected person and other bodies. It also has the right to request the competent body to apply additional protection measures, to decide on annulling the application of such measures if the protected person has breached the agreement and to establish, change or supplement protection measures. This latter body has the obligation to react immediately to any case of threat to the safety of the protected person and to ensure her/his personal protection, and the protection of her/his residence and property.
- The body responsible to carry out protection measures is obliged to execute the orders of the body responsible to decide on the application of such measures (Art. 18 (4)-(6)).

However, there is no right to protection as such, which would correspond to the protected person's duty to cooperate with the authorities and to abide by the conditions for protection as defined in the agreement. The decision of a victim-witness to cooperate with the authorities and to sign a protection agreement may have a grave impact upon her/his life and well-being. Therefore, the best possible protection should be provided to the victim-witness in order to make sure that the decision to cooperate does not put her/his life at risk. This implies granting a cooperative victim-witness the right to protection.

The written agreement between the protected person and the body granting protection (Art. 17) and the obligation of the competent bodies to inform the protected person about her/his rights and duties (Art. 18 (3)) provide a basis to improve the victim-witness' knowledge about her/his role, rights and obligations as a protected person. However, additional information will be necessary in order to enable her/him to fully understand the consequences of participating in the protection programme, as well as of non-compliance with the rules of protection. The law should provide for such information to be given to the protected person.

Coordination of involved actors

According to the Law on State Protection, several bodies are competent to decide about the application of protection measures and to carry out these measures, for example, the Ministry of Interior, the Center for Organized Crime and Corruption, the Service of Information and Security, and the Customs Department. If the case is already in court, judges and prosecutors are also involved. According to information available to the OSCE Mission, in practice there are two units under the responsibility of the Ministry of Interior providing protection to victim-witnesses of trafficking: the Anti-Trafficking Unit and the Witness Protection Department. The division of responsibilities between these two units is not clear. It is suggested that the complex structure of institutions involved would benefit from a coordination mechanism, which is at present not foreseen by the law. This mechanism should cooperate and coordinate with the National Committee and the yet to be established National Referral Mechanism.

5.2.2.3 Resources necessary to implement in-court and out-of court victim-witness protection

Successful victim-witness protection depends on the ability of the law enforcement to identify trafficked persons. This is especially relevant for border guards, taking into account information available to the OSCE Mission that Moldovan victims of trafficking who were deported back home are less likely to have access to protection and assistance facilities in Moldova than trafficked persons who were repatriated through IOM or other NGOs. Therefore, the skills of law enforcement officials, in particular border guards, to identify victims of trafficking should be improved.

The effective application of laws to protect victim-witnesses also requires the capacity of law enforcement officials, prosecutors and judges to gather and evaluate evidence, to undertake risk assessment and to recognize the needs of victim-witnesses. Such capacity mainly depends on adequate training and funding. This is of particular relevance in the context of Moldova, where, according to the experience of the OSCE Mission, existing protection provisions (such as Art. 110 CPC on witness statements via teleconference, or the Law on State Protection) have never or only very rarely been applied in practice, due to lack of training, financial and personnel resources and the necessary technical equipment. Some experts have qualified the Law on State Protection even as "dead law". Experts have also confirmed to the OSCE Mission that there is no state funding available for renting accommodation for witnesses relocated under the Law on State Protection or for the subsistence of police officers providing personal protection to victim-witnesses. In practice, these gaps often have to be filled by IGOs or NGOs.

At present, there is pressure by the state upon victims of trafficking to testify, because the testimony of the victim is usually the most important means of evidence. At the same time, there are legal gaps and practical problems preventing victim-witnesses from getting appropriate protection. This situation is unsatisfactory for both, the victim-witness who is either too afraid to testify and thus might not see the perpetrators held responsible or who is likely to endanger her/his life by cooperating, and for the prosecution authorities, who are not able to collect sufficient evidence. In order to bridge this gap, law enforcement officials and prosecutors should increasingly apply alternative means of evidence to reduce the dependency of the outcome of criminal investigation and prosecution upon the testimony of the victim-witness.

5.2.2.4 Offences under the Criminal Code

As suggested by several international standards, substantial criminal law provisions of the CC provide the legal basis for prosecuting cases of threatening or intimidating victim-witnesses: Art. 303 (interference with criminal investigation or prosecution), Art. 314 (coercion to make false statement or to refuse statements), Art. 315 (disclosure of information on criminal prosecution) and Art. 316 (disclosure of information on security measures by public officials). For shortcomings of Art. 315 CC, please refer to section 5.3.

Another relevant CC provision is Art. 313. Contrary to the previously mentioned articles, however, this provision does not protect victim-witnesses from intimidation, but

criminalises witnesses and injured parties who refuse to give testimony (for further analysis, please refer to section 4.6).

According to the information provided to the OSCE Mission, the majority of victims who are regarded not crucial for the investigation (approximately 70% of all victims) are therefore excluded from protection under the Law on State Protection. Nevertheless, these persons are under a legal duty to testify: the refusal of a witness or an injured party to make a statement even constitutes a criminal offence (Art. 313 CC). This leads to a situation where victim-witnesses are under an obligation to testify, however without being protected from the risks resulting from cooperation. For further analysis of the problem of criminalisation of victims and victim-witnesses, please see also section 4.6).

5.2.3. Recommendations: right to physical security

Moldovan legislation regulating the physical protection of victim-witnesses to some extent reflects international and European standards. Positive elements include the variety of protection measures available, the existence of a special law regulating the protection of, among others, victims and witnesses (Law on State Protection), the possibility to extend protection measures to family members of the victim-witness, and the possibility of the victim-witness to testify via video-link in a location different than the court room or to make an anonymous statement. At the same time, several shortcomings exist, both in terms of the legal framework and the application of the laws.

In-court protection under the Criminal Procedure Code

⇒ As long as the necessary infrastructure to interview victim-witnesses via teleconference has not been put in place in Moldova, video-taped witness statements (Art. 109, 115, Art. 371 CPC) should be used as interim solution in cases where the identity of the victims is already known to the accused or where the facts do not reach the threshold of the requirement as defined in Art. 110.

⇒ As video-taped witness statements according to Art. 109 taken alone cannot be a sufficient basis for conviction, police and prosecutors should establish additional means of evidence in order to enable victim-witnesses to benefit from the protection provided by this provision.[114]

⇒ In all suspected cases of trafficking in persons, a presumption of anonymity of the victim-witness should be applied. From the beginning, the criminal file should be produced without disclosing the identity of the victim-witness. Appropriate procedures should be established within the Ministry of Interior to preserve the victim-witness' real identity in a safe and secure setting. Procedures and criteria should also be defined to allow the defense to demand the court to disclose the victim-witness' identity and to enable the court to decide if it is in the interest of justice to lift the individual victim-witness' anonymity.

[114] For guidelines on this issue, see *Holmes*, Law Enforcement Manual, Section Three, pp 89ff.

⇒ An obligation of the court to inform witnesses on its own motion about all available protection measures under the CPC and the Law on State Protection should be inserted into Art. 90 CPC.

⇒ Police officers, border guards, prosecutors and judges should be adequately trained on preserving the anonymity of victim-witnesses of trafficking.

Out of court protection under the Law on State Protection

The existing gaps of the Law on State Protection as outlined in section 5.2.2.2 should be closed by two steps:

⇒ The Law on State Protection should be amended substantially or replaced by a new Witness Protection Law, in order to establish an effective witness protection programme. The following national laws could be used as model legislation:

- Portugal: Act n.º 93/99 governing the enforcement of measures on the protection of witnesses in criminal proceedings, 14 July 1999.[115]
- Serbia and Montenegro/Kosovo: UNMIK Regulation No. 2001/20 on the Protection of Injured Parties and Witnesses in Criminal Proceedings, 20 September 2001[116].

⇒ Additionally, a section on protection should be inserted into the generic anti-trafficking law currently discussed in Moldova, which should provide for protection of trafficked persons who do not qualify for protection.

In particular, the following amendments are recommended:

⇒ The wording of Art. 1 and 2 of the Law on State Protection should be clarified. These provisions, or any replacement Witness Protection Law, should define unambiguously and precisely, which persons are under which conditions eligible for state protection. As a result, this law should cover "classical" witness protection measures in cases of substantial threats and organised crime. However, it should not be limited to such "high level" cases, but also provide protection to witnesses of other forms of crime who face albeit less serious threats, but are still at risk. These categories should be precisely defined in the law. The forms of protection provided should vary according to the degree of danger.

⇒ Further, the legal basis should be created to ensure that adequate protection is provided to victims and victim-witnesses of trafficking who are endangered but do not presently qualify for protection under the Law on State Protection or a new Witness Protection Law. This could be done within the presently discussed draft generic anti-trafficking law which was drafted by the Ministry of Justice, where a chapter on protection of victims could be introduced. This law should provide protection to all trafficked persons, including mere victims, victims who are in the process of deciding whether to

[115] Download at www.legislationline.org.
[116] Download at www.legislationline.org.

cooperate with the authorities and victim-witnesses of trafficking who are in danger, but do not reach the threshold of the Law on State Protection, e.g. because no organized crime is involved or where the existence of an organized criminal group cannot be proven.

⇒ The generic anti-trafficking law should provide appropriate protection to victims or victim-witnesses of trafficking who do not qualify for protection under the present State Protection Law (or any replacement Witness Protection Law). This law should provide for lower levels of protection, such as individual protection, police escorts to the court room, panic alarms or mobile phones.

⇒ All protection measures under the Law on State Protection, or any replacement Witness Protection Law, should be selected and based on proper risk assessment. It should be undertaken at the earliest possible stage and repeated on a regular basis. Protection should be tailored to the individual circumstances of the case. The assessment should take into account the nature of the threat, the criminal offence involved and the individual situation of the protected person, especially her/his state of health and psychological constitution. The degree of threat required should be flexible according to the nature and intensity of the protection measure. The law should also define the actors responsible to undertake the risk assessment. This could be a specialised unit within the Ministry of Interior, which should not be identical with the unit responsible for investigating trafficking cases. Relevant international and non-governmental organizations should be consulted in the process.

⇒ In order to strengthen the capacity of responsible law enforcement officials to do risk assessment, legislative changes should be accompanied by training and an increase of personnel and financial resources for the implementation of the Law on State Protection and the CC and CPC provisions.

⇒ The protection measures available in the State Protection Act (or any replacement Witness Protection Law) should be completed by introducing social and financial assistance measures, access to medical treatment assistance in job finding and access to vocational training, and, as long as the protected victim-witness is not gainfully employed, financial support for her/himself and family members living with her/him. Such measures should be funded from assets confiscated from the traffickers.

⇒ An explicit right of the protected person to protection should be inserted into Art. 18 (1) of the Law on State Protection or any replacement Witness Protection Law.

⇒ Art. 18 (3) of the Law on State Protection or any replacement Witness Protection Law should be amended to include an explicit obligation of the competent bodies to provide protected persons with comprehensible information on their rights and duties as protected persons as well as on possible consequences of being a witness, of participating in the protection programme and of non-compliance with the protection agreement. Such information should be provided both, orally and in written.

Resources necessary to implement in-court and out-of court victim-witness protection

⇒ Law enforcement officials, in particular border guards, should be trained in order to improve the process of identifying victims of trafficking and consequently the access of victims to protection facilities.

⇒ Judges, prosecutors and law enforcement officials should receive training on evidence gathering, undertaking risk assessment, and recognizing and protecting the rights and needs of victim-witnesses of trafficking.

⇒ The government should provide courts and law enforcement authorities with sufficient personnel resources and adequate operational and office infrastructure, including phones, faxes, panic alarms, or equipment for videotaping testimonies and teleconferencing. International donors should also give priority to fund such expenses.

⇒ Confiscated assets should be used to fund the application of protection measures.

⇒ In order to reduce the dependency of the outcome of criminal investigation and prosecution upon the testimony of the victim-witness, law enforcement officials and prosecutors should increasingly use additional means of evidence.

Coordination of involved actors

⇒ The Law on State Protection should introduce a mechanism within the Ministry of Interior to coordinate the witness protection services foreseen by the law and to improve country-wide cooperation among the bodies involved. This coordination body should cooperate closely with the National Committee to Combat Trafficking in Human Beings.

⇒ The National Committee should include victim-witness protection among its tasks. This issue should become a component of the National Plan of Action as well as the topic on the agenda of the sub-working groups on legislation and on protection/assistance. The Committee and the working group should coordinate the activities of different law enforcement organizations, non-governmental and international organizations working in the field of victim-witness protection. In particular, the Committee should aim to establish and recognise the National Referral Mechanism and coordinate with the above recommended witness protection coordination mechanism, once they have been established. The success of the working groups under the National Committee will depend on the definition of concrete actions and clear responsibilities, the setting of clear and realistic timelines, and the allocation of funding for its work.

5.3. Right to privacy

The right of the accused to a public trial is a fundamental principle of criminal procedural law, as for example enshrined in Art. 6 ECHR. The presence of the general public, including the media, in the court room not only serves the interests of the accused, but also informs the public about the criminal justice system. This legitimate principle however conflicts, on the other hand, with the interests of the victim-witness' to privacy, who has to share details

which may be very personal and intimate in front of a large audience. For many victim-witnesses, the process of telling her/his story in front of a large audience in the court room is not only painful but it may also be a humiliating experience. This negative experience may be worsened by the presence of media in the court room which are often eager to spread sensationalist victim-witnesses' stories among an ever larger audience, s/he might also find her/his name and picture in a sensationalist newspaper story. These concerns become even more problematic when the witness is a victim of violence and/or violations of her/his sexual sphere, as often is the case for victim-witnesses of trafficking. Besides privacy concerns, the unrestricted access of the public to the trial may also have an impact of the victim-witness' security, lead to further traumsatisation. S/he might also refuse to tell the whole story, which has a negative impact on the prosecution of the case.

Consequently, measures to balance the interests of having a publicly accessibly trial on the one hand and protecting the victim-witness' interests to privacy on the other hand are of utmost importance. This can be achieved by measures such as restricting the access of the public from the whole or parts of the trial (hearings *in camera*), prohibiting filming and picture taking during trial and putting certain restrictions on media conduct, which can be achieved by law or media self regulation, such as Codes of Conduct for media professionals.

5.3.1. International standards

The UN Trafficking Protocol obliges States Parties to protect the privacy and identity of victims of trafficking in appropriate cases.[117]

Art. 8 ECHR protects the right of every person to privacy. According to the European Court of Human Rights, the right of victims and witnesses to privacy falls within the scope of Art. 8 ECHR.[118] However, so far, the Court has not defined any precise procedural rights of victim-witnesses with respect to privacy.

According to *CoE Recommendation R (85) 11*, Member States should give due consideration to the need to protect the victim from any publicity which will unduly affect her/his 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, judgments should be held in camera and personal information should be disclosed or published only to the extent appropriate.[119]

In the *OSCE Action Plan*, Participating States have committed themselves to ensuring data protection and the victim's right to privacy, also in the course of data collection and analysis.[120]

With regard to minor victims, the *CRC Optional Protocol* obliges States Parties to protect, as appropriate, the privacy and identity of child victims and to take measures in accordance

[117] Trafficking Protocol Art. 6 (1).
[118] ECHR Judgments *Doorson* § 70, *Van Mechelen* § 53, *Visser* § 43.
[119] CoE Recommendation R (85) 11 Art. 15.
[120] OSCE Action Plan Art. III.4.3.

with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims.[121] The *UNICEF Guidelines* specify that the name, address or other information that could lead to the identification of child victims or their family members shall not be revealed to the public or media. Prior to the disclosure of sensitive information, the permission of the child victim must be sought in an age appropriate manner.[122]

The *Stability Pact Portoroz Working Group* addressed in its report the role of the media in connection with the victim's right to privacy and recommended capacity building for journalists regarding ethical and legal obligations of media to preserve confidentiality of information and privacy of victim-witnesses, and the development of codes of conduct for all professional groups assisting victim/witnesses when dealing with the media.[123]

5.3.2. Application in Moldovan law and practice

Restrictions on the access of the public to the court room

Art. 18 CPC stipulates the principle of publicity of hearings, but allows the court to *exclude the press and the public* from the court room, when required for the protection of morality, public order or national security, the interests of juveniles, the privacy of parties including, among others, injured parties,' or the interests of justice. This Article provides a useful tool to protect the privacy of victim-witnesses. The fact that the publicity of hearings is not mandatory, but remains within the discretion of the judge, is in line with the general principle of the publicity of trials, as provided by Art. 6 ECHR. The exercise of this discretion for the benefit of victim-witnesses of trafficking strongly depends on the sensitization of trial judges towards the victims' need for privacy and the negative impact that publicity and the presence of media may have upon their situation.

Restrictions on media coverage

Art. 316 (2) CPC enables the presiding judge to allow mass-media representatives to make audio and video recordings and to take photos at the beginning of the trial, if the case to be tried is in the interest of the public and to the extent these actions do not interrupt the normal procedure and do not infringe upon the interests of the parties. A literal interpretation of this provision implies that, as a general rule, without explicit leave granted from the judge, mass media representatives are not allowed to take pictures and make audio or video recording during the trial. However, this is not explicit stated anywhere in the CPC. This ambiguity should be clarified.

Additionally, media should refrain from publishing names, pictures and interviews of victims of crime, unless with the victim's consent, as well from publishing stories or pictures that are likely to cause embarrassment to the victim or otherwise unduly interfere with her/his private sphere. This could be regulated by a law or be part of a media code of

[121] CRC Optional Protocol Art. 8 (1) (e). On the protection of privacy and identity of child victims see also UNHCHR Recommendations, Guideline no. 8.9.
[122] UNICEF Guidelines, Art. 2.6.
[123] Stability Pact Portoroz document, p 3.

conduct. In order to be truly effective, such regulations should be accompanied by training for journalists on the rights of victims of crime, in particular trafficking in human beings.

Restrictions on the publication of confidential information

Art. 212 (1) CPC states that criminal prosecution materials may be published only with the authorisation of the person performing the criminal prosecution. Publication is allowed only to the extent this person finds it possible, respecting the presumption of innocence principle and without affecting the interests of other persons and the development of the criminal prosecution. If this person regards it necessary to uphold confidentiality, the witnesses, the injured party, the civil party, the civilly accountable party, and their representatives, the defense attorney, the expert, the specialist, interpreter, translator and other persons assisting the actions of the prosecution may be held accountable for disclosing any information on criminal prosecution under Art. 315 (1) CC. The person performing the criminal prosecution is obliged to notify the enumerated persons of this consequence, who have to confirm by a written statement that they have been notified about this consequence (para 2).

Art. 315 CC establishes the disclosure of information related to the criminal proceedings as a distinct criminal offence. Para (1) punishes the disclosure of such information against the interdiction of persons carrying on the criminal prosecution with a fine of up to 300 conventional units. Para (2) establishes as an aggravating form of the basic offence, if it 1) was committed by criminal prosecution bodies or persons in charge with their supervision and 2) caused moral or material damages to witnesses, injured parties or their representatives or made the guilty party evade her/his responsibility.

Art. 212 CPC and Art. 315 CC are important provisions to protect the victim's privacy, but there is still room for improvement. In particular, in Art. 212 CPC, which enumerates a number of potential perpetrators, including the defense counsel, disclosure of information by the suspect/accused/defendant is missing. Clearly, such a prohibition is not going to be effective, if the defense counsel is prohibited to publish secret information, whereas the defendant is free to do so. This gap should be closed.

For provisions dealing with the anonymity of witnesses, which has mainly a security impact, please refer to section 5.2.

5.3.3. Recommendations: right to privacy

⇒ Judges should be trained on rights and interests of victims in criminal proceedings, in particular the need to protect their privacy.

⇒ Art. 316 (1) CPC should be clarified. Ideally, it should be amended to explicitly prohibit media representatives (encompassing both, mass media and other media) from taking pictures, making audio or video recording and filming during the trial, unless otherwise provided in the law.

⇒ Alternatively, the planned generic anti-trafficking law should include a provision preventing the judge from allowing media representatives to take pictures, make audio or video recording and film during the trial (Art. 316 CPC) in cases of trafficking in

persons (Art. 165, 206 CC). As second best option, the Law should state that Art. 316 CPC does not apply in cases of trafficking in children and that, in cases of trafficking in adults according to Art. 165 CC, the judge is explicitly obliged to balance the interests of the public and the interests of the victim, in particular to privacy and protection of their security.

⇒ Media should be obliged to refrain from publishing names, pictures and interviews of victims of crime, unless with the victim's consent, as well to publish stories or pictures that are likely to cause embarrassment to the victim or otherwise unduly interfere with her/his private sphere. This could be regulated by a law or be part of a media code of conduct.

⇒ Such regulations should be combined with training seminars for journalists. These seminars should aim at raising their awareness towards the rights of victim-witnesses and discuss methods of reporting court cases while at the same time duly respecting the right of victim-witnesses to privacy.

⇒ Art. 212 CPC should be amended to include the unauthorized disclosure of information by the suspect, accused or defendant.

5.4. Right to sensitive treatment and prevention of re-traumatisation

Ideally, criminal proceedings may have an empowering impact upon the victim: s/he is able to actively participate in the trial, receives all necessary information, is treated respectfully and sensitively by the criminal justice system and finally, if allowed by the facts and the law, sees the perpetrator convicted. Reality, however, is mostly different. Victims of crime in general, and of trafficking in particular, experience their participation in criminal proceedings as witnesses as a stressful situation. They have to face the defendant several times and are confronted with disrespectful and humiliating questions by the defendant and the defense counsel. They also have to undergo repeated questioning by the police and the court in the different stages of proceedings, whereas many officials carrying out the questioning are not trained on victims' needs and trafficking-related issues. All this taken together leads to a situation where victim-witnesses experience their participation in criminal proceedings as painful and re-traumatising. Consequently, they might give contradictory statements or refuse to give testimony at all, which also has a negative impact upon the state's prosecution efforts.

In order to counteract this problem, measures are necessary to create an appropriate environment for questioning victim-witnesses, including the skills of those carrying out the questioning, to reduce the number of interviews and to prevent the defendant from asking humiliating questions.

5.4.1. International standards

Neither the *Trafficking Protocol* nor the *TOC Convention* establishes State obligations to provide for procedural safeguards to ensure that trafficked victim-witnesses are treated sensitively and do not experience further re-traumatisation. State Parties to the Protocol are

obliged to train law enforcement officials on anti-trafficking issues, including methods to protect the rights of victims. Such trainings should take into account human rights, child- and gender-sensitive issues and encourage cooperation with NGOs.[124]

With regard to child victim-witnesses, the *CRC Optional Protocol* established a general obligation of States Parties to adopt appropriate measures to protect the rights and interests of child victims at all stages of the criminal process. The State Parties must recognize their vulnerability and adapt procedures to recognize their special needs, including their special needs as witnesses. States shall further ensure that the best interest of the child shall be a primary consideration in the treatment by the criminal justice system of child victims of trafficking.[125] The *UNICEF Guidelines* similarly stress the primacy of the best interest of the child in all actions concerning child victims, undertaken, among others by police, courts of law or administrative authorities. The Guidelines also deal with verification of the child's age: where the age of the victim is uncertain and there are reasons to believe that the victim is a child, there should be a presumption that the victim is a child. Pending verification of the victim's age, the victim should be treated as a child and accorded all special protection measures stipulated in the Guidelines. This document also provides for the appointment of a guardian to safeguard the rights and interests of child victims participating in criminal proceedings.[126]

In the *Declaration of Basic Principles,* UN Member States have expressed a general commitment to treat victims of crime with compassion and respect for their dignity and undertake efforts to minimize inconvenience to victims.[127] Even though not a legally binding instrument, this Declaration was adopted unanimously by the UN General Assembly 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."[128]

A number of international and European documents of a legally or politically binding nature establish several measures aiming at sensitive treatment of victims of crime by criminal justice authorities, including the following:

- Protection of the victim from re-traumatization during police investigation, e.g. by avoiding confrontation with the offenders and too early or too extensive interviews,[129]
- Establishment of special anti-trafficking police units comprising both women and men with advanced training in investigating offences involving sexual assault or involving children,[130]

[124] Trafficking Protocol, Art. 10 (2).
[125] CRC Optional Protocol, Art. 8 (1), (3).
[126] UNICEF Guidelines, Art. 2.2, 3.1.2, 3.2.
[127] Declaration of Basic Principles, Art. 4, 6 (d).
[128] *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, New York 1999, p 1.
[129] Stability Pact Portoroz Document, p 4.
[130] OSCE Action Plan, Art. III.2.2.

- Using audio and video facilities in court to record or transmit victim-witness testimonies in order to reduce the number and traumatizing effect of interviews and confrontations with the accused and to avoid intimidation,[131]
- Avoiding direct contact between the child victim and the suspect during the process of investigation and prosecution as well as during trial hearings as much as possible. For this purpose, testimonies of minor victim-witnesses should be videotaped and presented in court as evidence,[132]
- Training of law enforcement officials, judges, prosecutors in order to raise awareness on the needs of victims and to their responsibility for ensuring the victim's safety and immediate well-being of victims of THB. In such training programs, consideration should be given to human rights and gender issues.[133] States should also ensure that all persons who work with child victims and are responsible for their protection understand their rights and needs, and possess the necessary skills to assist children.[134]
- Questioning victims in a manner which gives due consideration to their personal situation, rights and dignity, at all stages of the procedure.[135] In particular, child victims should be questioned in a child-sensitive manner.[136]

With regard to the treatment of child victims of trafficking, the *UNICEF Guidelines* provide a set of special recommendations:[137]

- As soon as a child is identified as a victim of trafficking, a guardian should be appointed to accompany her/him throughout the entire process. The guardian must be independent, have expertise regarding childcare, children's rights and needs and gender issues. The guardian's responsibilities relating to criminal proceedings include: ensuring that all decisions are taken in the child's best interest, ensuring that the victim has access to legal representation, when necessary, and informing and advising the child about her/his rights. The guardian should have the right to refuse to give testimony and to attend all police interviews conducted with the child. The responsibility of the guardian ends when the child is placed in the custody of IOM, the Ministry of the Interior or another organisation responsible for repatriation or returned to her/his parents or legal guardian.
- Child victims should only be questioned by specially trained law enforcement officers and, wherever possible, by officers of the same sex.
- Initial questioning of a child victim should only seek to collect biographical and social history information (i.e. age, nationality, languages spoken). Information regarding the experience of the child whilst trafficked, and any knowledge they may have of illegal activities etc. should not be sought at this point. Length and scope of questioning should be minimised in order to minimise further trauma and psychological stress.

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[131] TOC Convention, Art. 24 (2), CoE Recommendation R (2000) 11, Art. 28.
[132] UNICEF Guidelines, Art. 3.9.1.
[133] OSCE Action Plan Art. III 4.2, III.5.1, III.5.2, CRC Optional Protocol Art. 8 (4), Declaration of Basic Principles Art. 16.
[134] CRC Optional Protocol Art 8 (4), UNICEF Guidelines Art. 3.11.
[135] CoE Recommendation R (85) 11, Art. 8.
[136] UNICEF Guidelines, Art. 3.3.2.
[137] UNICEF Guidelines, Art. 3.2, 3.3.2, 3.3.4.

- Law enforcement authorities should avoid questioning a child victim at their premises or in the location where the child has been exploited and/or in the presence or physical proximity of any suspected trafficker. Whenever possible, initial questioning should be delayed until the child has been relocated to a safe place.
- Child victims should only be questioned in the presence of the guardian. For information that does not legally require the fist person testimony of the child, law enforcement authorities should defer to the guardian for information.

5.4.2. Application in Moldovan national law and practice

General safeguards

Art. 10 (3) CPC prohibits to submit anybody during criminal proceedings to cruel, inhuman or degrading treatment or force anybody to participate in procedural actions that harm her/his human dignity.

Art. 333 and 334 CPC oblige the court to ensure the order and solemnity in the court room. In case the defendant repeatedly violates the court orders, s/he shall be removed form the court room and the trial shall continue in her/his absence (Art. 335, see section 5.2).

Company of a trusted person

Art. 58 (4) no. 3 CPC gives victims of particularly serious or exceptionally serious crimes, regardless of the fact if they were recognized as injured or civil party, the right to be accompanied by a reliable person besides their lawyer, during all examinations, even when the public is excluded. This provision contributes to strengthen the position of victims in criminal proceedings. However, its scope is very limited: only victims of particularly serious or exceptionally serious crimes (more than fifteen years imprisonment) have this right. Contrary to a similar provision relating to state-paid legal assistance (see section 5.5), this restriction cannot be justified with financial arguments: allowing all victims to be accompanied by a trusted person has no financial implications, but, on the other hand, would have the positive effect to make the interview situation less stressful for victims and thereby increase the likelihood of getting consistent witness statements. Therefore it is recommended to give all victims of crime the right to be accompanied by a trusted person.

This recommendation seems especially relevant, taking into account that it is unclear if and under which circumstances *injured parties* have an unconditional right to be accompanied by a trustee. The wording of Art. 59 (4) no. 3, which grants the right to be accompanied by a trusted person to victims of a particularly serious or exceptionally serious offence, *regardless of the fact if they were recognized as injured party or as civil party.* This provision could be interpreted in a way to give this right to be accompanied by a trusted person to *all* victims who are *injured or civil parties*, regardless of the seriousness of the offence (whereas if they are mere *victims*, they have this right only for certain serious offences). However, the wording is not clear enough and thus it cannot be said if this interpretation is correct. However, contrary to a similar provision on pro bono legal assistance (see section 5.5), the right to be accompanied by a trustee is not explicitly mentioned among the rights of an injured party according to Art. 60.

Restrictions of the rights of the defense to ask questions to victim-witnesses
Art. 105 (8) CPC prohibits to ask questions to witnesses during hearings which obviously aim at insulting and humiliating them. A related provision is Art. 109 (2) CPC, which prohibits to ask to witnesses suggestive questions or questions which have no relevance to the evidence and obviously aim at insulting and humiliating them.

Both provision have some potential to protect the victim from retraumatisation. However, their relationship is unclear, as Art. 109 (2) provides lesser protection by prohibiting only such questions which *obviously* aim at insulting *and* humiliating witnesses *and* have *no relevance* to the evidence. From the perspective of avoiding re-traumatisation of the victim-witness, this article is too narrow. First, because the threshold of *obviously* insulting *and* humiliating questions is quite high. Second, the additional requirement of non-relevance is problematic. Insulting and humiliating questions should never be allowed, even if they might be relevant: it may be assumed that the defendant can be expected to formulate relevant questions in a non-insulting and non-humiliating way.

Art. 111 (3) CPC prohibits the defendant and the defense lawyer from submitting evidence of the alleged character or personal history of the victim, if this may violate the injured party's private life and if the defendant is charged with a "sexual offence". The presiding judge may exceptionally grant leave to introduce such evidence, if the evidence is so relevant that a prohibition to introduce it would be so prejudicial to the defendant as to affect her/his acquittal. This provision may contribute to protect victim-witnesses of trafficking from re-traumatisation. However, as it applies only to "sexual offences" (such as rape or other offences as defined in Chapter IV of the Special Section of the CC, which does not in itself include trafficking), it is relevant for trafficked persons only, if the trafficker has in addition been charged with a "sexual offence". However, even in cases where there is no such additional charge, it would be useful for trafficked victim-witnesses, especially in cases of trafficking for prostitution, to be able to benefit from such protection. Therefore, the scope of application of Art. 111 (3) should be extended accordingly.

Frequency and location of interviewing victim-witnesses
As a rule, witnesses are under an obligation to testify. Refusing or avoiding testimony leads to her/his criminal liability under Art. 313 CC (Art. 90 (10) CPC). There is one exception from this principle: if the suspect/accused/defendant/ is the husband, wife, fiancée or a close relative of the witness, s/he is not obliged to testify (Art. 90 (11), Art. 90 (12) no. 1).

Art. 109 (3) enables the prosecutor to request the instruction judge to interview the witness before the main trial if her/his presence during the trial is impossible due to her/his departure or other grounded reasons. During this hearing, the defendant and defense counsel shall be present and have the right to ask questions to the witness. According to Art. 115, such witness statements may be audio- or video-recorded and played during the trial, if the witness is absent because of absolute impossibility to attend the trial or because of the impossibility of ensuring her/his safety (Art. 371 (1), see also section 5.2.2.1). Statements of witnesses who are released from making depositions against family members according to Art. 90 (11), may not be read nor played (Art. 371 (2)).

This possibility to record victim-witness statements and to play them in court is important because it helps to reduce the number of confrontations of the victim-witness and the defendant and thus may contribute to lower the risk of re-traumatization. Also the use of teleconferences according to Art. 110 CPC may protect the victim-witness's psychological constitution (see also section 5.2.2.1). At present however, according to information available to the OSCE Mission, these measures are not applied in practice due to lack of funding and infrastructure.

Therefore, less-cost-intensive and technically complex measures should be introduced to reduce the risk of secondary traumatization of victim-witnesses and to create more distance between them and the defendant, while at the same time respecting the latter's right to question the witness. This could, for example, be achieved by using screens during interviewing victim-witnesses. Such screens would will be especially helpful in cases where the victim-witness wants to avoid the immediate confrontation with the offender, but where teleconferences according to Art. 110 cannot be applied, for example because the necessary threshold in terms of level of danger was not reached.

A provision which may counteract the aim of avoiding an unnecessarily high number of confrontations is Art. 369 (3), which allows the court to hear the injured party "as many times as necessary during judicial investigation" (see also Art. 111 (3)). On the one hand it is undisputed, that the defendant, as part of her/his right to a fair trial, must have an adequate and proper opportunity to challenge the witness.[138] On the other hand, in cases of victim-witnesses, it might be appropriate to achieve a balance between the rights of the defendant and the rights and interests of the victim-witness, who might be heavily traumatized as a consequence of the offence in question and suffer further harm from being questioned again and again. This seems especially relevant with regard to the fact that victim-witnesses are usually heard not once, but several times at different stages of proceedings: by the police, the prosecutor, the instruction judge, the trial judge, the defendant and her/his defense counsel. Therefore, Art. 369 (3) should be amended to limit the number of hearings of victims and injured parties to the extent absolutely necessary.

Art. 106 states that witnesses shall be heard in the place of carrying out criminal prosecution or judicial examination. However, "[i]n case of necessity", the witness may also be heard in the place of her/his location. This provision has potential to protect victim-witnesses of trafficking from re-traumatisation, because it enables them to be questioned in a familiar environment. However, the law does not sufficiently specify the preconditions of this interviewing method ("in case of necessity"). Therefore it is not possible to say if this provision is of practical relevance for trafficking cases. Neither does Art. 106 define the procedures: Who is interviewing the witness at her/his place? Are the defendant and the defense counsel present? In which way will the statement be used – will it be video-recorded and played in the main trial? These points should be clarified.

Child victim-witnesses

The only child-specific provision of the CPC is Art. 91, which establishes certain procedural rights of the legal representative of child witnesses, including among others the right to

[138] For an analysis of the relevant case-law, see *Holdgaard* 2002.

accompany the child and to attend the criminal proceedings involving her/his participation. Art. 6 no. 39 CPC defines legal representatives as

> "parents, adoptive parents, tutors, trustees, spouse of the accused, of the defendant, of the convicted and of the damaged party, as well as representatives of the institutions entrusted with their supervision."

Read together, these provisions reveal some gaps:

- Art. 6 no. 39 refers only to representatives of the suspect/accused/defendant and injured party. Thus, it seems that a child victim-witness who does not have the status as an injured party is excluded from legal representation according to Art. 91.
- The category of persons capable of acting as legal representative is limited. The category of spouses is not relevant for child victims. Tutors or representatives of supervising state institutions will be responsible only in few cases. Finally, especially in cases of trafficking, where the parents might not have known that their daughter was trafficked to prostitution or where the parents themselves gave away their children, parents or adoptive parents might not always be appropriate as persons accompanying child victim-witnesses throughout the proceedings.

This gap could be closed by introducing the position of a social guardian for all child victim-witnesses into the CPC.

Additionally, child-sensitive provisions should be inserted into the CPC. For example, procedural protection measures, such as the use of video-taped testimonies according to Art. 115 CPC or the use of screens should be made mandatory when interviewing child victim-witnesses.

Police officers, prosecutors and judges should be trained on the special needs of child victim-witnesses of trafficking. At police stations, children should only be questioned by specially trained police officers.

5.4.3. Recommendations: right to sensitive treatment and prevention of re-traumatisation

Company of a trusted person

⇒ The right to be accompanied by a trusted person (Art. 58 (4) no. 3 CPC) should be extended to victims of all crimes.

Restrictions of the rights of the defense to ask questions to victim-witnesses

⇒ The relationship between Art. 105 (8) and Art. 109 (2) CPC should be clarified. As a result, the judge should be obliged to intervene and stop the defendant or defense counsel from asking questions, which obviously aim at insulting *or* humiliating the witness such questions should be prohibited, no matter if they are relevant with regard to the evidence or not.

⇒ The scope of Art. 111 (3) CPC should be extended in order to encompass, in adequate cases, victim-witnesses of trafficking, even in cases where no charges for sexual offence were brought forward. This could be done by explicitly including the relevant offences, such as Art. 165 and 206 CC or by adding the term "or with any other offences in the course of which the witness' has suffered violations of her/his sexual sphere".

⇒ It is recommended to introduce a provision into the CPC to allow for the victim-witness to testify behind a shield, while the defendant has the possibility to watch the witness and ask questions. It is recommended to define particular vulnerable groups of witnesses for whom this way of questioning should be mandatory, such as minor victims of crime or victims who have suffered psychological, physical or sexual violence.

Frequency and location of interviewing victim-witnesses

⇒ Art. 369 (3) CPC should be amended, without prejudice to the rights of the defense, to limit the number of hearings of victims and injured parties to the absolutely necessary extent, especially in cases where the victim or injured party is a minor and/or has suffered psychological, physical or sexual violence.

⇒ Art. 106 CPC, which allows to hear witnesses in other places than the courtroom, should be specified. In particular, the preconditions for the application of this provision and necessary framework (e.g. who is interviewing the witness? Are the defendant and her/his counsel present?) should be clarified.

Child victim-witnesses

⇒ It is recommended to introduce a social guardian for all child victim-witnesses into the CPC. The guardian should be a social worker with legal background and expertise on child protection issues, in particular on the rights and needs of child victim-witnesses in the criminal process. S/he should be responsible to prepare the child for the criminal process, to counsel and assist her/him in exercising her/his procedural rights in a child-sensitive manner and to help ensuring that the child's best interests are respected throughout the criminal process. The guardian should also coordinate and cooperate with the child's legal representatives (e.g. parents) and her/his lawyer.

⇒ Additional child-sensitive provisions should be inserted into the CPC. For example, procedural protection measures, such as the use of video-taped testimonies according to Art. 115 CPC or the use of screens, should be made mandatory when interviewing child victim-witnesses.

⇒ Police officers, prosecutors and judges should be trained on the special needs of child victim-witnesses of trafficking. At police stations, children should only be questioned by specially trained police officers.

Other recommendations relating to the implementation of the law

The effective application of existing criminal procedural safeguards to protect victim-witness from retraumatisation depends on the capacity of law enforcement officials, prosecutors and judges to apply such measures and to recognize the needs of victim-witnesses and to respond to these needs appropriately. This capacity mainly depends on adequate training of police officers, prosecutors and judges, as well as on adequate funding.

⇒ Judges, prosecutors and law enforcement officials, including the Anti-Trafficking Unit, should receive training on the rights and needs of victim-witnesses of crime in general, and of victim-witnesses of trafficking, in particular, in criminal proceedings. Training should focus on existing human rights standards, the special needs of victims of sexual, physical or psychological violence as well as on child- and gender-sensitive aspects. These persons should also be trained on existing safeguards under Moldovan criminal procedural law and how to apply these safeguards in practice, as well as on victim-sensitive interviewing techniques.

⇒ Guidelines for sensitive questioning of victims should be developed and used by police, prosecutors and judges. Such guidelines could be based on the recently issued WHO Ethical and Safety Recommendations for Interviewing Trafficked Women.

According to information available to the OSCE Mission, courts do not have the necessary infrastructure to apply technologies provided by the CPC, such as video equipment.

⇒ The government should provide courts with an adequate infrastructure, such as equipment for videotaping testimonies and teleconferencing. International donors should also give priority to fund such expenses.

⇒ The court infrastructure should be adapted in order to make the atmosphere more victim-friendly. For example, special waiting rooms should be dedicated for victim-witnesses who are waiting to give testimony, in order to avoid contact with the defendant before the trial.

⇒ In order to reduce the number of interviews of victim-witnesses to the lowest possible amount and to reduce the burden resting upon the victim-witnesses, law enforcement officials and prosecutors should increasingly apply alternative means of evidence to reduce the dependency of the outcome of criminal investigation and prosecution upon the testimony of the victim-witness.

The OSCE Mission was informed that there are only very few, if any, women among police officers responsible for investigating trafficking cases. It was also communicated to the Mission that it would be difficult to find women police officers speaking the language of the victim, and that some female victims would prefer to talk to a male police officer. According to the authors' opinion, it is accurate that not each female victim might automatically wish to be interviewed by a female police officer. Nevertheless, some victims, especially in cases where gender-based violence was involved, might experience the police interview less stressful when talking with another woman.

⇒ Victim-witnesses of trafficking should have the right, upon request, to be interviewed by a police officer of the same sex.

In order to ensure that (female or male) police officers are able to properly communicate with trafficked persons, the Ministry of Interior should provide them with training and/or translators.

5.5. Right to information and legal assistance

The access of victims to information is an important starting point for their participation in criminal proceedings as witnesses. Information helps to familiarise them with the functioning of and their role in the criminal process. It also provides them with the necessary preconditions to exercise their rights: the most extensive catalogue of rights, available assistance and protection measures is practically useless if the victim-witness has not been informed about these rights and measures.

The scope of the victim's right to information often varies according to her/his procedural status, e.g. as injured party, civil party or witness. In some jurisdictions, the victim as such does not have any explicit right to information, unless s/he has such a specific procedural status.

The task to inform victims and witnesses may be not be legally regulated at all, it may be within the discretion of the acting official or constitute a mandatory obligation. Form the point of view of the victim, the last option is the most desirable, because it does not depend on the sensitivity or goodwill of the official. In order to be practically useful, a duty to provide information should also design responsibilities among the relevant actors and start on the earliest possible time (i.e. during police investigation).

Related to information is legal assistance and representation of victim-witnesses in court through lawyers. Lawyers may provide additional information to victim-witnesses and moreover, accompany them throughout the legal process and assist them to exercise their procedural rights. A study published by Anti-Slavery International highlights the importance of legal representation for the successful outcome of the case in terms of prosecution and victim's rights protection.[139] Taking into account that trafficked victim-witnesses usually cannot afford paying for legal representation, it is crucial that pro bono legal assistance is available.

5.5.1. International standards

The *UN Trafficking Protocol* obliges State Parties to provide victims of trafficking, in appropriate cases, with information on relevant court and administrative proceedings and with counselling and information in particular about their legal rights, in a language they can understand. It also obliges States Parties, in appropriate cases, to assist victims to enable

[139] *Anti-Slavery International*, Human traffic, human rights: redefining victim protection, 2002, p 4.

their views and concerns to be presented and considered at appropriate stages of criminal proceedings.[140]

There exists no explicit obligation in the Protocol to provide free legal representation or translation services to trafficked persons. However, taking into account, that qualified legal representation and translation free of charge often constitutes a precondition for the victim's access to adequate information and to actively participate in criminal proceedings, such measures constitute adequate means to fulfil the Protocol obligations enumerated in the previous paragraph.

The *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* and the *UNICEF Guidelines for Protection of the Rights of Children Victims of Trafficking in South Eastern Europe* set standards on the provision of information to child victims. To a great extent these documents do not establish special standards, but refer to generally accepted information standards, thereby seeming to stress that children, notwithstanding their minor age, also have a right to information and that this information must be accessible and understandable. The CRC Optional Protocol for instance obliges States Parties to inform child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases.[141]

The provision of legal information and assistance in a language the victim understands should not be discretionary, but should be available as a right to all victims of trafficking, as stated in the *UNHCHR Recommendations*.[142]

Two non-binding instruments offer guidance on the question concerning which kind of information should be provided to victims of crime. According to the *UN Declaration of Basic Principles*, states should inform victims of crime of their rights in seeking redress, "of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and when they have requested such information", and of the availability of health and social services and other relevant assistance.[143] The Declaration does not refer to victims with a certain procedural status, but encompasses all victims of trafficking.

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[140] UN Trafficking Protocol Art. 6 (2) (a), (2) (b), (3) (b).

[141] CRC Optional Protocol Art. 8 (1) (b). See also the UNICEF Guidelines: Child victims must be provided with accessible information about, for example, their situation, their entitlements, services available and the family reunification and/or repatriation process (Art. 2.5) as well as regarding their right to initiate civil proceedings against traffickers and other persons involved in their exploitation (Art. 3.9.2). Information shall be provided in a language, which the child victim is able to understand. Suitable interpreters shall be provided whenever child victims are questioned/interviewed or require access to services (Art. 2.5). Child victims have the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings against persons who are suspected of involvement in the exploitation and/or trafficking in children. Law enforcement authorities, in cooperation with social services and non-governmental organizations, should make available necessary legal representation, as well as interpretation into the native language of the child, if necessary (Art. 3.9.1).

[142] UNHCHR Recommendations, Guideline No. 5.8.

[143] UN Declaration of Basic Principles, Art. 5, 6 (a), 15.

The *CoE Recommendation R (85) 11* establishes relevant recommendations for the pre-trial investigation as well as the court proceedings phase. Already at the investigation stage, police should inform the victim about possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation. Victims of crime should also be able to obtain information on the outcome of the police investigation. 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.[144]

5.5.2. Application in Moldovan Law and Practice

5.5.2.1 Legal assistance

According to Art. 58 CPC, *victims* have the right to be assisted by a lawyer[145] of her/his own choice (para. 3 no. 11) and may exercise their procedural rights through a legal counsel (para. 9). In cases involving particularly serious or exceptionally serious offences (which includes trafficking in persons if committed under aggravating circumstances according to Art. 165 (2), (3) and Art. 206 (2), (3) CC), the victim has additional rights, regardless of her/his recognition as injured or civil party (Art 58 (4)): for example, the right to be counselled by a lawyer throughout the criminal procedure to the same extent as a party of a trial and to be assisted by a pro bono "ex officio" lawyer, if s/he cannot afford to pay for a lawyer.

Victims who are *injured parties* have the right to be represented by a lawyer of her/his own choice and to have an "ex officio" counsel lawyer if they cannot afford to pay for a lawyer (Art. 60 (1) no. 19). Contrary to mere victims, they always have the right to a state-paid lawyer, no matter how serious the offence is.[146]

Civil parties have the right to have a representative and to withdraw her/his power of representation (Art. 62 (1) no. 19), as well as to receive compensation of the expenses they had in the criminal case, which includes the costs for legal representation (Art. 227 (2) no. 3).

According to Art. 79 (1), lawyers of victims, injured parties and civil parties have the right to represent the interests of their clients during criminal proceedings. Victims, injured parties and civil parties may have more than one representative, but the criminal prosecution bodies or the court have the right to limit the number of representatives (para. 4). Art. 80 regulates the rights and obligations of these representatives.

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[144] CoE Recommendation R (85) 11, Art. 2, 3, 9.

[145] The English translation of the law uses the term "defense counsel" for the victim's lawyer. This terminology seems confusing to the authors.

[146] For witnesses, Art. 90 (12) no. 7 also provides for the right to be assisted by a lawyer. However, this provision is not relevant in the context of the present report, as all victim-witnesses have anyway the status as victim and/or injured party and/or civil party.

The fact that the victim and the injured party have the right to be assisted by a lawyer is positive. However, the scope of this right is ambiguous. Four paragraphs in Art. 58 deal with the rights of "victims" to legal assistance: All victims have the right to be *assisted* by a lawyer when performing procedural actions (para. 3 no. 11) and to be legally *represented*, which includes representation by a lawyer, in the exercise of their rights and obligations (para. 9). Victims of particularly or exceptionally serious crimes have special rights, namely the right to be *counselled* by a lawyer to the same extent as parties to the trial (para 4 no. 1) and to be *assisted* by a pro bono state-paid lawyer (para. 4 no. 2). It is not clear, what is the difference between "assistance" and "counselling", and between "representation" and "counselling to the same extent as parties". These ambiguities should be clarified.

It is also positive that certain victim-witnesses have the right to a lawyer *funded by the state*, if they are victims of a serious offence or have been recognized as injured parties. This is important from the perspective of victim-witnesses who usually cannot afford to pay for legal representation. The restriction of the state obligation to pay for the lawyer only for certain groups of victims (injured parties, victims of certain serious crimes) seems justified, taking into account the financial implications of this obligation. However, the threshold of the crime which must be at least "particularly serious" (more than 15 years of imprisonment) in case the victim is not an injured party seems relatively high. This means that victims of the basic offence of trafficking (Art. 165 (1) CC: 7–15 years) who do not have the status of an injured party do not have a right to state-paid legal assistance. In the eyes of the authors, it would not be an appropriate solution to raise the penalty of Art. 165 (1) CC in order to make it an "exceptionally serious" offence" (see also section 4.2). Instead, the category of "serious offences" should be included in Art. 58 (4) so that all trafficked persons have the right to free of charge legal representation.

Regarding pro-bono lawyers, it is however not clear from the wording of Art. 58 (4) and Art. 60 (1) no. 19, if victims/injured parties have the right to a *freely chosen* or *court appointed lawyer*. The language "ex officio" suggests the latter alternative, but this is not entirely clear, as "ex officio" (which means "on the court's own motion", thus not depending on the victim's request) seems to be used interchangeably with "pro bono" (meaning free of charge for the victim). It is recommended to clarify these provisions.

Whatever option exists, victim-witnesses of trafficking should always be represented by lawyers who are appropriately trained on how to represent the needs and rights of victims of crime. This aim could be achieved by setting up a pool of victims' lawyers, including lawyers from relevant NGOs, such as the Center for the Prevention of Trafficking in Women. All lawyers participating in the pool should receive training on victim advocacy. For all lawyers, codes of conduct and disciplinary regimes should be applied and enforced in order to make sure that inappropriate behaviour can be effectively dealt with.

A potentially problematic provision is Art. 79 (3) CPC, which allows the police or the court to suspend the participation of the victim's legal representative if there are no grounds to maintain the representative in her/his capacity. The legitimacy of this provision can, in principle, be derived from the victim's status. Nevertheless, it constitutes an interference with the victim's rights to legal assistance. Therefore, the absence of any criteria of the

police/court's power to suspend the victim's lawyer is problematic. It is recommended that such criteria are introduced into Art. 79.

5.5.2.2 Information

Similar to legal assistance, the rights of victim-witnesses to information vary according to their procedural status. *Victims* have the right to be informed on the results of criminal prosecution undertaken following her/his complaint and to request such information (Art. 58 (2), (3) no. 4). Victims must also be informed about their right to become a civil party (Art. 219 (9)).

Victims who are *injured parties* or *civil parties* also have the right to be informed on the minutes of the procedural actions in which they participated, on the materials of the criminal case at the moment the criminal prosecution was closed and on adopted decisions regarding her/his rights and interests (Art. 60 (6), (7), (10), Art. 62 (6), (7), (10). Once a victim has been recognized as civil party, s/he must receive written information about her/his rights as defined in Art. 62 (Art. 222 (1)).

As *witnesses*, trafficked persons have the right to know regarding what case they were summoned (Art. 90 (12) no.1) and to be informed by the person carrying out the criminal procedural action about their rights and duties as witnesses according to Art. 90 and about their criminal responsibility in case of refusal to testify (Art.105 (6)). The person who takes the witnesses statement is also obliged to ask the witness if she/he is a relative, husband/wife or fiancé of the suspect, accused or defendant. If this question is answered to the affirmative, the witness must be informed about her/his right to refuse testimony (Art. 90 (11), (12) no.4, Art. 105 (7)).

Art. 18 (3) of the Law on State Protection establishes an obligation to provide information to victim-witnesses on their rights and duties as protected persons (see section 5.2.2.2).

These provisions are a good basis. In particular, it is positive, that not only victims who have the procedural status of an injured party or civil party, but all victims of crimes have a right to receive certain basic information.

However, the list of obligations to provide information is not comprehensive enough, as several issues of concern for victims, injured parties and witnesses are missing. This list should be supplemented, for example, by introducing an obligation of the court to inform victims about the possibility to become an injured party (Art. 58), to inform victims and injured parties about their right to be represented by a lawyer and the preconditions for pro bono legal assistance (Art. 58, 62) and to inform witnesses about existing procedural or non-procedural protection measures, such as video taping of statements, teleconferences or measures under the Law on State Protection (Art. 90). Such information should be provided orally and in written, for example by using comprehensible information leaflets.

5.5.3. Recommendations: right to information and legal assistance

Legal assistance

⇒ Art. 58 CPC should be amended in order to clarify the scope of the victim's right to legal assistance.

⇒ Criteria for the decision of the police or the court to suspend the victim's lawyer should be elucidated in a commentary on Art. 79 (3) CPC.

⇒ The scope of Art. 58 (4) CPC should be extended to provide pro bono state-paid legal assistance for victims of "serious, particularly serious and exceptionally serious offences," in order to ensure that victims of trafficking in human beings are encompassed by this provision.

⇒ The wording of Art. 58 (4) and Art. 60 (1) no. 19 CPC should be improved to make clear if victims have a right to a "pro bono" or a "pro bono" and "ex officio" lawyer.

⇒ The government should establish a pool of specialised lawyers to represent victim-witnesses of trafficking in court. This pool could also include lawyers from existing relevant NGOs, such as the Chisinau-based Center for the Prevention of Trafficking in Women. All lawyers belonging to this pool should receive appropriate training on victim advocacy, which should be funded by international donors.

⇒ If the state provides victim-witnesses of trafficking with a pro-bono lawyer, a lawyer from this pool should be chosen. If the victim-witness chooses the lawyer her-/himself, s/he should receive a list of trained lawyers. This pool of specialised lawyers could be set up for trafficking cases only, or, alternatively, more broadly for victims of violent crimes.

⇒ In order to ensure the best possible representation of the victim and to avoid any abuse of power, a code of conduct should be drafted for lawyers participating in this pool. Disciplinary regimes should be set up within Bar Associations to ensure that any arising cases of inappropriate behaviour can be effectively dealt with.

Information

⇒ The CPC should be amended to provide for an obligation, depending in the stage of proceedings, of the state prosecution authorities, police, prosecutors and judges, to provide victims, including victims who have the procedural status of injured parties and witnesses, on their own motion with comprehensive information about all their rights and their status in criminal proceedings. For example, there should be an obligation to inform victims about the possibility to become an injured party (Art. 58), to inform victims and injured parties about their right to be represented by a lawyer and the preconditions for pro bono legal assistance (Art. 58, 62) and to inform witnesses about existing procedural or non-procedural protection measures, such as video taping of statements, teleconferences or measures under the Law on State Protection (Art. 90).

⇒ Information should be given both, orally and in written. For the latter purpose, comprehensible information leaflets should be published and distributed to all victims of crime who come in contact with the criminal justice system.

5.6. Right to compensation

As a general principle, victims who have suffered damage as a consequence of a crime have the right to compensation for material and moral damages suffered from the perpetrator. Compensation is important for victims not only because of the financial component. It is also psychologically important as a symbolic gesture of official recognition that injustice has been done to her/him.

The right to compensation from the perpetrator can be enforced in separate civil proceedings, or, as provided by several jurisdictions, in the course of criminal proceedings against her/him. Another source of compensation is payment from a state compensation fund which is awarded to victims subsidiary in case no or not enough compensation payments could be achieved from the perpetrator.

The effective exercise of the right to compensation is strongly connected to the victim's access to information and legal assistance (see section 5.5).

5.6.1. International standards

According to the International Covenant on Civil and Political Rights (CCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR), individuals have the right to an "effective remedy" against violations of rights guaranteed under these Conventions,[147] including financial compensation for the material and immaterial damage suffered. Both instruments also establish the right of individuals to access to an independent tribunal to determine their civil rights and obligations, including the right to compensation.[148]

The *Trafficking Protocol* and the *TOC Convention* oblige States Parties to establish appropriate procedures to provide victims with access to compensation and restitution.[149]

The *Trafficking Protocol* obliges States Parties to consider providing victims of trafficking with counselling and information about their legal rights in a language they understand,[150] which may be interpreted to include counselling and information about the right to compensation. Similarly, according to the *Declaration of Basic Principles*, States should

[147] With regard to trafficking in persons, relevant rights include the prohibition of torture, inhuman or degrading treatment (Art. 7 CCPR, Art. 3 ECHR) and the prohibition of slavery and forced labor (Art. 8 CCPR, Art. 4 ECHR).
[148] CCPR Art. 2 (3), 14, ECHR, Art. 6 (1). *Manfred Nowak*, Introduction to the International Human Rights Regime, Leiden 2003, pp 63, 64.
[149] TOC Convention Art. 25 (2), Trafficking Protocol Art. 6 (6).
[150] Trafficking Protocol, Art. 6 (3) (b).

provide victims with appropriate assistance and information in order to enable them to achieve compensation before court.[151]

The *Declaration of Basic Principles* specifies that 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. States should also encourage the establishment, strengthening and expansion of national funds for compensation to victims of crime.[152] In the *OSCE Action Plan,* Participating States have committed themselves to consider the establishment of such compensation funds and to use confiscated profits to finance these funds and, more generally, for the benefits of victims.[153] The establishment of subsidiary state compensation funds is also provided by the *European Convention on the Compensation of Victims of Violent Crimes,* to which, however, Moldova is not a party.

In order to spare victims separate civil proceedings which are costly and time-consuming, *CoE Recommendation R (85) 11* recommends member states to enable criminal courts to order the offender to pay compensation to the victim. Depending on the respective legal system, legislation should provide that compensation may either be a penal sanction, a substitute for a penal sanction or awarded in addition to a penal sanction. If compensation is not a penal sanction, the victim should be assisted in collecting 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.[154]

5.6.2. Application in Moldovan law and practice

According to Moldovan criminal procedure law, victim-witnesses may raise claims for compensation before criminal courts. This right is important from the victim's perspective: compared to the initiation of separate civil proceedings for compensation this option is less costly and time consuming and allows her/him to rely on the evidence established by the prosecution.

For this purpose, Art. 61 CPC establishes the status of a "*civil party*": if there is sufficient grounds to believe that moral or material damage was caused to a natural person or legal entity as a consequence of a crime which is being prosecuted before a court, this person or entity (the "civil party") may file an application before this court, which decides upon her/his claim for compensation during criminal proceedings (para 1). The criminal court is obliged to try the civil case (and may thus not refer it to a civil court) if the amount of the claim is indisputable (para 1, part 2).

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[151] UN Declaration of Basic Principles, Art. 5. See also the UNHCHR Recommendations, Guideline No. 9.2, according to which states should consider providing information and legal assistance to enable trafficked person to access remedies and explain the procedures in a language the victim understands.
[152] UN Declaration of Basic Principles, Art. 8, 13.
[153] OSCE Action Plan, Art. III.1.5.
[154] CoE Recommendation R (85) 11, Art. 9-11, 14.

The *rights and obligations* of civil parties are dealt with in Art. 62. Civil parties have further reaching procedural rights than mere victims, for example the right to submit information to support her/his application, to be informed on the minutes of actions in which she/he participated and to participate in the court hearing. They also have the right to legal assistance and representation and to be compensated for all expenses in the criminal case, including costs for legal representation. Depending on their procedural status as victim or injured party, they also have the right to a state-paid lawyer (see section 5.5). Civil parties are for example obliged to, i.e., appear before the criminal prosecution body or the court when she/he has been summoned and, upon request, to submit means of evidence to the criminal prosecution body or to the court.

Art. 219-226 deal with the *procedure* regarding civil claims in criminal proceedings. Civil claims may be started "upon the request of natural persons or legal entities who suffered material, moral or, if applicable, professional reputation damage directly from the deed (action or omission) prohibited under the criminal law or related to its perpetration."

Comparing Art. 219 with Art. 61 CPC (see above) reveals that the criteria for deciding if a person has the right to file a civil claim in criminal proceedings are ambiguous: Whereas according to Art. 61, "*sufficient grounds to believe* that moral or material damage was caused" are regarded sufficient, Art. 219 requires that the person, in order to be allowed to raise a civil claim, has actually *suffered* such damage. Comparing both provisions, the wording of Art. 61 sounds more plausible, taking into account that the clarification of the question if the victim has suffered damages is the very subject of the procedure before the criminal court. Establishing the actual suffering of damages as necessary requirement would therefore not only be illogical, but also inhibit the access of victims to compensation. Unless this is only due to a translation problem, the relationship between Art. 61 and Art. 219 CPC should be clarified. The conditions established in Art. 61 ("sufficient grounds to believe that moral or material damage was caused") should be regarded sufficient for a person to become a civil party.

The victim may claim compensation for both, *material and moral damage*. When assessing the amount of immaterial damages, the court shall take "the physical suffering of the victim, the aesthetic damage, loss of hope in life, loss of trust for conjugal faithfulness, loss of honor by slander, psychological suffering determined by the decease of close relatives, etc." into consideration (Art. 219 (4)).

The criminal prosecution body and the court are obliged to *inform* victims about their right to initiate a civil claim. Once she/he has been recognized as civil party by the court or the criminal prosecution bodies, she/he must receive written information about her/his rights as civil party (Art. 62, Art. 219 (9), Art. 222 (1)). These provisions are positive because they provide victims with the necessary basis to use their rights as civil parties.

Civil claims may be submitted any time from the start of criminal proceedings until the end of the judicial investigation and must have the form of a written request (Art. 221 (1)). The criminal court shall examine the civil claim notwithstanding its value (Art. 225 (1)). After

the court has issued a final judgment on the claim issued, the victim may not file a new claim based on the same grounds (Art. 226).

An important provision is Art. 51 CPC, which enables the *prosecutor to initiate a civil case* against the person responsible for the damage, if this is in the interest of an injured person who cannot exercise her/his right to initiate a civil case, for example because she/he is incapable to act or dependent on the accused, or in the interest of the state.[155]

The initiation of a civil claim before the criminal court does not deprive the victim of her/his right to institute separate *civil proceedings*. S/he may pursue her/his case before a civil court if she/he did not file a civil claim before the criminal court at all or if her/his claim was left unsettled (Art. 221 (5)), if she/he was refused recognition as civil party (Art. 222 (3)), or if the criminal proceedings were ceased or an acquittal judgment was delivered due to the lack of criminal elements (Art. 225 (4)). Of course, the victim may also opt not to claim compensation before a criminal court, but to start civil proceedings right away (Art. 221(5)).

The criminal court is obliged to try the civil case if the amount of the claim is indisputable (Art. 61 (1)). If it turns out during criminal proceedings that additional evidence has to be administered for the purpose of determining the amount of reparations, the court may "in exceptional cases" accept the claim in principle and, for the purpose of determining the amount of reparations, refer the civil party to a civil court (Art. 225 (3)). The latter provision is important because it "forces" the criminal court to decide about the victim's claim instead of referring it to the civil court, which would be less advantageous for the victim. However, its practical usefulness for the victim might be limited by the requirement that any necessity to gather additional evidence would justify the referral of the case to a civil court (even if only minor evidence collection is required). This would reduce the likelihood that victim receives compensation from the criminal court, without having to institute separate civil proceedings. It should therefore be considered to introduce provisions limiting the discretion of criminal courts to refer claims to civil courts.

Art. 202 empowers criminal prosecution bodies (ex officio) and the court (upon request of the parties, including the injured party and the civil party) to take measures to *secure* the reparation of damages inflicted by the crime, as defined in Art. 203-210. These provisions provide for the sequestration of material values, including bank accounts and deposits, combined with the prohibition of the owner to dispose of them and, if necessary, to use them.

It should be noted however, that, despite of the existence of a legal basis to secure assets to be used to compensate civil parties, only limited use is made of this possibility in practice. According to information available to the OSCE, this is due to the fact that police officers do not investigate in finding assets belonging to traffickers. In order to overcome this shortcoming, police should increasingly investigate in assets of traffickers. This should be supported by providing them with adequate training, resources and equipment.

[155] This is also stated in Art. 221 (4) CPC, which specifies, that for moral damages, the prosecutor may do so only upon the request of the injured party who is unable to defend her/his interests.

Art. 202 is supplemented by Art. 219 (8), which states that civil claims have *priority over state claims* addressed to the perpetrator. State claims according to this provision may be interpreted to include for example fines to be paid by the convicted. This provision is in principle positive. However its usefulness for victims is limited because it is not clear if this provision gives civil claims also priority over special seizure of goods resulting from crimes under Art. 106 CC. If the traffickers' assets become state property, this reduces the likelihood for victim-witnesses to receive compensation from the trafficker. Therefore, if the present provision does not intend such an interpretation, it should be amended accordingly.

In Moldova, there exists no state compensation fund, from which victims of trafficking could receive subsidiary compensation in case no compensation could be sought from other sources. With the help of such funds, which were for example recommended by the UN Declaration of Basic Principles and the OSCE Action Plan, compensation payments could be made to victims whose claims for compensation from the perpetrator could not be satisfied, for example because there were no assets found or because the perpetrator was not able to pay. It is recommended that Moldova should establish such a state compensation scheme, either for victims of crime in general or for victims of trafficking only. Moldova should also consider ratifying the European Convention on the Compensation of Victims of Violent Crimes.

5.6.3. Recommendations: right to compensation

⇒ The relationship between Art. 61 and Art. 219 CPC should be clarified. Unless there is only a translation problem, it is recommend bringing Art. 219 in line with Art. 61 in order to require "sufficient grounds to believe that moral or material damage was caused" for a person to file a civil claim.

⇒ In order to increase the likelihood of victims to receive compensation, police should focus their investigation efforts on searching for assets belonging to traffickers, which should subsequently be secured in accordance to the provisions of the CPC. These efforts should be combined with providing the responsible police units with sufficient personnel resources, necessary equipment and training on investigation skills.

⇒ Art. 219 (8) CPC should be amended in order to ensure that civil claims have priority over special seizure of goods according to Art. 106 CC.

⇒ Art. 225 (3), and correspondingly Art. 61 (5) CPC, should be amended to limit the possibility of the criminal court to refer compensation claims to a civil court to instances where the decision on the claim would considerably prolong proceedings or to claims that are particularly complex to determine. When referring the claim to a civil court, the criminal judge should be obliged to give substantial reasoning for her/his decision.

⇒ Moldova should establish a subsidiary state compensation scheme, which should be funded from the state-budget, collected fines or confiscated property. Moldova should also consider ratifying the European Convention on the Compensation of Victims of Violent Crimes.

6. Cooperation in criminal matters with other jurisdictions

6.1. Introduction

As Moldova is predominantly a country of origin for trafficked persons many are identified in the countries of destination or transit and become involved in criminal proceedings led by the authorities in those jurisdictions. For this reason the procedures, which relate to trans-border co-operation in relation to judicial and investigative procedures are particularly important and impact on the protection afforded to the victim-witness. In this section the international and Moldovan laws and procedure are examined *with a view to analysing their impact on victim-witness protection* but not to make a comprehensive assessment whether all obligations regarding such cooperation are met. There are numerous scenarios where trans-border co-operation is necessary and impacts on victims of trafficking and these are discussed in turn.

Most of the legal standards in this domain are multilateral treaties (conventions), which deal with criminal matters and create binding agreements between the parties to the Convention. Thus when the state making a request for cooperation is a party to the Convention it is bound by the same principles. Such Conventions have mainly been developed by the *Council of Europe* and are discussed below. These can be supplemented but not contradicted by bilateral agreements between the parties.[156] Such agreements can also implement the provisions by setting out procedures to be followed. There are also bilateral agreements with non-party states or between non-parties, which contain principles and procedures for co-operation. Where there is no agreement different procedures apply depending on the nature of the request but generally, in these cases, cooperation occurs on the basis of reciprocity between states. If the standards prescribed in the Convention or the bilateral agreements are not met by the requesting state then the request should be refused by the appropriate Moldovan authority.

The other main treaty dealing with these issues is the *TOC Convention* itself[157] and the *Trafficking Protocol*[158] All the international standards discussed in this report which contain provisions on protection and assistance to trafficked victims apply when the victim is on the territory of the state. However many of these standards will also be applicable in the countries with whom Moldova is attempting to co-operate, so similar levels of victim-witness protection can be commanded from them. However, this depends on whether a state is a member of the relevant international organisation and/or whether it is a party to the particular treaty requiring such protection. It should be noted that in any event *CRC* obligations to protect child victims of exploitation and to act in the best interests of all children are applicable in almost all states with whom Moldova will deal, as it is ratified by every state in the world except for the USA and Somalia.[159] It is obviously beyond the scope of this study to analyse all the obligations and procedures of the states with whom

[156] OSCE understands that bilateral agreements exist between Moldova and the CIS countries and Romania.
[157] Art 15 Jurisdiction, Art 16 Extradition, Art 17 Transfer of sentenced persons, Art 18 Mutual Legal Assistance
[158] Art 10, Art 11 (6)
[159] http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm.

Moldova cooperates, however it should always be borne in mind that such obligations do not necessarily guarantee that measures are implemented in practice.

6.2. Extradition and Transfer of Proceedings

Extradition relates to the transfer of persons between states for trial, sentencing or detention. Transfer of proceedings relates to both the institution and continuance of proceedings which have been commenced in or are requested by another state. Requests should be carried out applying Moldovan legal provisions including the protection for trafficked victims contained therein. Extradition and transfer of proceedings laws are explored briefly here to highlight procedures and principles in Moldovan law which impact on victim protection but not with a view to examining whether Moldova meets all its international obligations in this respect.

The relevance of these procedures to victim-witness protection are that a foreign state may request Moldova to extradite or prosecute a victim of trafficking for an alleged criminal offence, which occurred during the trafficking event in that state. Alternatively a foreign state may be requesting the transfer of a case or indictment against an alleged trafficker to Moldova for the purposes of a prosecution. The requesting state may have instigated or failed to instigate measures for victim-witness protection and the consequences of this would then fall to Moldova.

6.2.1. International standards

Of foremost significance in relation to extradition procedural obligations is the *European Convention on Extradition*[160] under which parties agree to surrender persons to another party where there are criminal proceedings outstanding and for the carrying out of sentencing or detention. The Convention dictates various conditions and requirements to enable this to take place but we highlight only those issues relevant to this report. States can refuse to extradite their own nationals provided they enter the appropriate declaration defining a "national" upon ratification.[161] A further condition for extradition is that the crime for which a person is being extradited should also be a crime in the territory of the requested state (the "double criminality" requirement). However, following a refusal to extradite, a requesting state may request the requested state to submit the case to "*its competent authorities in order that proceedings may be taken if they are considered appropriate*" and the requested state is obliged to do so.[162] This constitutes a transfer of proceedings.[163]

Legal proceedings can be transferred in two different ways. Firstly, a request for the institution of criminal proceedings and secondly, a request for transfer of proceedings which have already been instituted. Both are envisaged and regulated by the *European Convention*

[160] European Convention on Extradition, ETS No.24 adopted 13/12/1957, entry into force 18/4/60. Ratified by Republic of Moldova 2 October 1997 and entered into force 31 December 1997.
[161] Art. 6(1)
[162] Art. 6(2)
[163] Art 2(1)

on the Transfer of Proceedings in Criminal Matters[164].Moldova is not yet a party to this Convention although it is a signatory and we understand therefore that it is currently preparing laws to enable the state to ratify. This sets out principles and procedures including the double criminality requirement[165] (i.e. that Moldova will only prosecute transferred cases if the acts constitute a crime in Moldovan law) and also a set of exceptions under which states may refuse a transfer (e.g. if statutes of limitations are exhausted, if there are substantial grounds for believing the case was motivated by discriminatory considerations, or if the proceedings are "contrary to the fundamental principles of the legal system of the requested state")[166].

The *TOC Convention* obliges parties to establish the legal ability to conclude extradition in relation to organised crime[167] and generally to conclude bilateral and multilateral agreements to carry out or enhance the effectiveness of extradition[168] and transfer of proceedings.[169] Importantly, States Parties to the *Trafficking Protocol* also have the obligation to protect any trafficked victim who arrives on their territory as a result of such proceedings.

6.2.2. Application in Moldovan national law and practice

In Moldovan law a citizen of Moldova (or a recognised political asylum-seeker) cannot be extradited to another state.[170] A foreign citizen on Moldovan territory can be extradited where the appropriate multilateral and/or bilateral treaties are in place or on the basis of reciprocity[171]. (In both cases the Prosecutor's Office-International Affairs Department or Ministry of Justice deal with the requests and the case is sent to court for a decision, Art.544 CPC.) Therefore neither a trafficked person nor an alleged trafficker who is a Moldovan citizen can be extradited for offences committed abroad regardless of their nature. Based on this principle no person should be transferred abroad by the Moldovan authorities for any other reason e.g. to participate as a witness in an investigation when, in fact, s/he is to be prosecuted. This would effectively constitute "disguised extradition" i.e. extradition outside the prescribed procedures and would be illegal.

In national law Moldovan courts would be able to exercise jurisdiction as delineated in Art. 11(2) Criminal Code to prosecute a citizen (or a person with permanent domicile in Moldova) for crimes committed abroad. This could happen so long as the facts constituted an offence in Moldovan law[172]. This means that if an act is not subject to criminal liability in Moldovan law then it cannot be prosecuted in a Moldovan court regardless of whether it was actually a crime in the requesting state. *For this reason it is especially important that*

[164] ETS 073 Signed by Moldova 27th June 2001 but not yet ratified
[165] Art. 7(1)
[166] Art. 11
[167] Ar. 16 (1)
[168] Art .16 (17)
[169] Art. 16 (10)
[170] Art. 13 (1) Criminal Code
[171] Art. 13 (2)
[172] Art. 11 (2)

Moldova clarifies its criminal definitions as discussed in section 4.6 to ensure trafficked victims are not prosecuted.

Moldova has in the past received a number of requests from other states for institution or continuation of proceedings against citizens of Moldova. One of the common requests for prosecution is for illegal border crossing. However, as this is not a crime in Moldova in cases where the suspect is a trafficked victim such cases should not be proceeded with.[173] However, given poor identification procedures a trafficking victim may not become known to the Moldovan authorities until such prosecutions commence and in the process of taking her/his statement it may become apparent that s/he is not liable because s/he was trafficked. In such situations proceedings for illegal state border crossings of the Moldovan border would have to be terminated under the powers given to the prosecutor under Art 53 (3) of the Criminal Procedure Code. Judges and prosecutors should be particularly sensitised to the possibility of such cases and to the use of in court protection measures in such circumstances to protect the victim.

The procedure governing extradition in Moldovan Law is contained in Art 541 – 550 CPC. Also according to the submissions to the Council of Europe PACO Project "Cooperation Manual" the Prosecutor General's office will consider a criminal case file in order for proceedings to be transferred *"upon explicit request"* of a state to which extradition has been refused on the basis of nationality.[174] However, the recently adopted criminal procedure provisions appear to provide no clear procedure for any form of transfer of proceedings to Moldova. This is an absence which is presumably an error, however it seems to make such a transfer of proceedings legally impossible.[175] Should a transfer be regulated in the CPC and subsequently implemented the authors expect that the Moldovan CPC would be applied to those transferred proceedings.

6.2.3. Conclusion and recommendations: extradition and Transfer of Proceedings

The current provisions within Moldovan CPC are incomplete which creates significant barriers to their implementation. Once completed, the protection of trafficked victim-witnesses within such proceedings will be dependent on Moldovan law being amended so that trafficked victims are not criminalised for acts arising from the trafficking situation.

⇒ Revised and additional provisions to the CPC regulating International Legal Assistance (specifically transfer of proceedings) should be adopted as a matter of urgency. This should clarify, inter alia, that cases transferred to Moldova are processed under the Moldovan law i.e. that the witness protection measures

[173] See Art 362(4) CC Illegal Border Crossing definition

[174] *PACO Programme of Economic Crime Division, Legal Affairs Department, Council of Europe,* Judicial Cooperation Against Corruption and Organised Crime in South-Eastern Europe Cooperation Manual (22/9/03 for update and revision), TP 27 rev & 31, 2003, p 61.

[175] We understand these provisions will be contained in extensive redrafts of Chapter IX International Legal Assistance CPC which is about to be put before Parliament which should rectify this problem. Unfortunately therefore we are unable to review the availability of cooperation mechanisms within Moldovan law.

contained therein will apply, that proceedings can be transferred to Moldova where appropriate.

⇒ Ratify the European Convention on the Transfer of Proceedings in Criminal Matters.

⇒ Specific guidance should be developed for prosecutors and judges dealing with international legal co-operation requests for extradition and transfer. This should deal with cases where it is likely trafficked victims may be involved to ensure that foreign victims of trafficking are not extradited for offences for which they would not be criminally liable in Moldovan law (because it arose from his/her situation as a trafficked victim: e.g. illegal crossing of a state border) and further to protect Moldovan victims who are the subject of states' requests for transfer of proceedings.

⇒ Moldova should take steps to encourage neighbouring states to improve measures for the identification of trafficked victims and to implement protection measures including the non-criminalisation of trafficked victims. This would enhance regional legal cooperation and prevent requests for legal assistance being refused.

6.3. Mutual legal assistance

The type of assistance which falls under the heading of mutual legal assistance covers assistance such as the taking of witness testimony and summoning of witnesses for cases in other jurisdictions. Scenarios vary but examples are the following:

- Proceedings are taking place in another state whilst the victim has returned to Moldova. The victim is asked to give evidence in Moldova for transfer back to the requesting state to be entered in proceedings there (e.g. s/he is in Moldova following repatriation but Italy request her/his testimony be taken in Moldova for consideration in the Italian proceedings against the trafficker).
- Proceedings against a trafficker are taking place abroad and the victim-witness is requested to travel from Moldova to attend the court and give evidence (e.g. criminal trial in Macedonia and the victim-witness is requested to travel there from Moldova in order to give evidence in person in court).

In these types of situations the victim-witness can potentially be put at risk through hazard, inadequate or insensitive application of procedures by the actors involved. The risks are heightened because physical distance from the actual case and suspect creates a lack of sensitivity to the implications of the request. The relevant officers are more likely to be indifferent to the impact of their work on the particular victim-witness. An additional risk is the number of actors who can become aware of a victim-witness' identity and details of the case. This can be excessively high due to the procedures which are followed. Here are just a few practical examples of how the victim-witness protection situation can be compromised:

- police knocking on the door of the home of the parents of a reintegrated victim and informing them of a summons to court in Macedonia.

- victim-witness' family being asked to come to court and give evidence when the victim is still abroad without her/his knowledge or consent of what is happening or what they may be told abut her/his situation.
- lack of confidentiality around such in-court proceedings alerting the traffickers about an investigation with the collaboration of the victim-witness thereby increasing risks to her/his security upon her/his return.

As highlighted in the *Best Practice Manual* things can go "radically wrong"[176] in the processing and execution of such requests so it is crucial that the proceedings are regulated properly and that the procedures are followed preferably with additional protections for trafficked victims.

6.3.1. International standards

The *TOC Convention* obliges States Parties to:

> "afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings… and to reciprocally extend to one another similar assistance"

in cases involving organised crime and sets out a number of purposes which such assistance should aim to achieve.[177] It then sets out procedural guidelines and protections which are to be adopted by states who have not concluded bilateral or multilateral treaties regarding mutual legal assistance. However Moldova has ratified the *European Convention on Mutual Legal Assistance in Criminal Matters*[178] which regulates several mutual types of requests. The Convention delimits its scope as follows:

> "1. ..the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.
>
> 2. This Convention does not apply to arrests, enforcement of verdicts or offences under military law…"

It then goes on to regulate procedures and principles for: letters rogatory for the purpose of procuring evidence or transmitting evidence,[179] the service of writs and judicial verdicts for the appearance of witnesses, experts or prosecuted persons in a court of the requesting state,[180] judicial records[181] and the relevant procedures[182].

Here we focus on those mutual procedures which impact on witness protection.

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[176] P.114 English version
[177] Art. 18 TOC Convention
[178] ETS No. 30. 20/4/1959. Ratified by Moldova, 4 Feb. 1998, entry into force 5 May 1998.
[179] Art. 3-6 ibid
[180] Art. 7-12
[181] Art. 13
[182] Art. 14-20

6.3.1.1 Victim-witnesses requested to give testimony abroad

Contracting State Parties are obliged to effect the *service of witness summons* by a simple transmission to the person or in a manner outlined in the requested state's law (if specifically requested by the requesting state.)[183] The service of a witness summons relating to a case in the requesting jurisdiction should be accompanied by certain material and personal guarantees for the witness specifically that:

- the witness should not be subject to a penalty for failure to answer the summons,[184]
- subsistence and travel expenses should be payable to the witness by the requesting party,[185]
- when the witness is present in the territory of the requesting party to give evidence then s/he should not be prosecuted for acts which took place before his/her departure from Moldova (requested party).[186]

Requests for mutual assistance "*particularly*" those which relate to investigation *preliminary to prosecution* can, according to the Convention, be dealt with by way of direct communication between judicial authorities.[187] However Art. 18 stipulates that where a national authority receiving the request has no jurisdiction to deal with it then it should, *ex officio,* transmit the request to the competent authority and inform the requesting party that it has done so.

The *Council of Europe* recommends that Member States "adopt appropriate measures to ensure, both within and outside the country of trial, the protection of witnesses prior to, during or after criminal proceedings." This is a persuasive tool for Moldova to request such protection for its own citizens travelling to other Member States to give evidence, especially if it can offer guarantees of reciprocity. Also the 2nd Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters[188] contains obligations on the conduct of hearings by video and/or telephone in trans-border cases[189]. Although this Protocol has not yet been signed by Moldova similar recommendations have already been made to all Council of Europe states to:

> "use modern means of telecommunications, such as video links, to facilitate simultaneous examination of protected witnesses or witnesses whose appearance in court in the requesting state is otherwise impossible, difficult or costly…"[190]

The *TOC Convention* also requires "permitting testimony to be given through use of communication technology such as video links..." in order to enhance the physical protection of witnesses.

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[183] Art..7
[184] Art. 8
[185] Arts 9 & 10
[186] Art. 12. This provision is echoed in Art 18 (27) TOC Convention.
[187] Art.15 (4)
[188] ETS No. 182 8th November 2001
[189] Arts 9 & 10 ibid.
[190] CoE Recommendation R (97)13 Para 30

6.3.1.2 Victim-witnesses requested to give evidence in Moldova for trials abroad

Requests for witnesses to be heard on oath in the requested state for trials occurring abroad should be dealt with by *rogatory commissions* relating to a criminal matter and in accordance with the law in the requested state party.[191] State parties are obliged to hear witnesses giving evidence on oath where specifically requested to do so by another State Party if its law does not prohibit it[192] and officials and interested persons from the requesting state can be present provided that the requested state consents.[193]

The procedure for these requests is laid out in Arts. 14 and 15 where it states that requests for letters rogatory should be addressed through the Ministries of Justice of both parties except in urgent cases when they should be dealt with by the judicial authorities of both parties[194] or in cases where other manners of communication have been specified in a declaration made by the state upon ratification (although even in these cases the request should be copied to the Ministry of Justice).[195] Additionally the Convention allows for bilateral agreements on communications, but all bilateral and multilateral agreements between parties should only supplement the provisions of this Convention.[196]

6.3.2. Application in Moldovan national law and practice

6.3.2.1 Victim-witnesses requested to give testimony abroad

According to Art 532 CPC the International Legal Cooperation section of the General Prosecutor's Office and the Ministry of Justice are the central authorities for authorising requests for mutual legal assistance,[197] including requests for Moldovan victim-witnesses to be summonsed to give evidence in cases abroad. The requests can, only after that, be executed by other bodies e.g. the police.

As Moldova is a State Party to the Convention on Mutual Legal Assistance then the OSCE understands that the Prosecutor's Office requires that the material and legal guarantees described above should be made for any witness being requested to travel abroad to give evidence. If a requesting state is not a party then we understand that Moldova, as requested state, would usually aim to comply with the same obligations in any event and would therefore require those same standards from the requesting state.

However, although these requirements are clear in the international Convention obligation, these procedures and requirements are not clearly laid out in the domestic law as the CPC Chapter IX dealing with International Legal Assistance appears to be incomplete.[198] Art 533

[191] Art. 3(1)
[192] Art. 3(2)
[193] Art. 4
[194] Art. 15(1)&(2)
[195] Art.15(6)
[196] Art 15(7) & art.26
[197] Except for cases where, "on the basis of mutuality", another channel is provided. We are not aware of any other agreements.
[198] Art. 531 1 CPC states that relationships with foreign courts are governed by Chapter IX and that relevant international treaties shall have "Priority".

delineates the extent of (mutual) legal assistance but does not specifically mention the procedure for summoning of witnesses to foreign courts as set out in Arts 7-12 Convention on Mutual Legal Assistance. So although it is clear that these guarantees are requested in practice by the Moldovan competent authorities their domestic legal basis should be reinforced.

We understand that in cases where Moldovan trafficked victim-witnesses are involved, then the competent authorities of Moldova ask that the requesting states apply special witness protection provisions during the proceedings[199] so long as they are not in contravention with the procedures of the requesting state. If the state cannot provide these guarantees then we are informed that the victim-witness is told that procedural protections cannot be guaranteed by the foreign state. S/he is always free to choose not to attend the hearing. The authors applaud this attempt to ensure victim-witnesses benefit from procedural protection in cases abroad, however we consider it may be useful to solidify these requests by concluding bilateral agreements with the main requesting states on the provision of in court and out of court protection procedures in trafficking cases.

Also, there are no special procedures for the victim-witnesses of trafficking to be found for service of the witness summons or to have their anonymity or confidentiality protected if they are located. The service of the proceedings is carried out by a local police officer in the area of his/her residence and sometimes s/he is requested to attend a police station or prosecutor's office. In these circumstances a large number of officials become aware of his/her identity at central and local levels. In addition, little care is taken by the authorities to maintain privacy for the victim-witness which can have profound implications for his/her safety.[200] Clearly the procedure by which victim-witnesses are served with such summons could be improved. This would assist the victim-witness being able to exercise informed consent and to have his/her anonymity guaranteed. As the procedures are not clearly laid out in law there is no requirement for the victim-witness to be given independent legal advice about the meaning of the summons. On the face of the summons s/he should be guaranteed expenses and freedom from prosecution however it will contain little detail about the nature of protections which would be available to her/him should s/he choose to testify. Hence s/he needs to be offered pro-actively free independent legal advice regarding these matters and the consequences of refusing to testify.

An additional concern is that the authors became aware of a number of cases of transfer of victim-witnesses abroad which had bypassed all of these legal obligations and procedures by using direct communication between the Moldovan Ministry of Internal Affairs and their counterparts abroad. These cases were not subject to the application of the basic material and personal guarantees required by the *Convention on Mutual Assistance* and definitely not to the request for procedural protections to be applied. Of greater concern is the fact that the

[199] As laid out in Art. 110 CPC

[200] Replies to the Council of Europe PACO conference questionnaire circulated at the Sarajevo conference, 25-27 Sept 2003 PC-TC-P-030-d-add 18th September 2003. Moldova reports that "Letters rogatory were served to the recipient's mother" and "..the parents… refused to take the documents addressed to their daughter." NB: the victim-witnesses' names were also published in this document which demonstrates lack of awareness about the need for anonymity and protection.

transfer of witnesses in these cases were initiated, encouraged and funded by international organisations (South-eastern Europe Cooperation Initiative (SECI) and the International Organisation for Migration (IOM). It is also unclear whether in these cases the victim-witnesses were able to exercise informed consent or whether they were coerced into agreement under threat of arrest or prosecution. This activity is a tremendous cause for concern as it is apparent that Moldovan citizens are transferred abroad completely outside of legal procedures and international obligations. The practice should be halted forthwith and the cases channelled through the appropriate authorities.

Even where a victim is able to exercise informed consent with the assistance of independent counsel there remains the challenge of enabling the victim to know and understand his/her rights and the implications of participation in proceedings abroad. Some protection guarantees could be required by the Moldovan authorities when agreeing a request for legal cooperation. Additionally victims' advocates and the state authorities considering the request for cooperation can gain some understanding of the security implications of that decision by careful research on the requesting state and/or contacts with international and non-governmental organizations who are based in those states. However, without specific guarantees provided by the requesting state in each specific case then the limitations upon any advice given to a trafficked victim should be acknowledged and made clear by all authorities who have responsibility for advising the victim of his/her rights and his/her security.

In order to minimise risks for witnesses who would be put in greater danger through travel and appearance in court in another state then consideration should be given to the possibilities for video and telephone conferences with courts abroad as a safer alternative. Such provisions exist in the Moldovan CPC however we understand infrastructure is lacking. However, procedural possibilities for using such evidence and infrastructural needs must be mirrored in the main requesting states for their availability to be useful and successful. The possibility to use these methods could be concretised in bilateral agreements with requesting foreign states.

6.3.2.2 Victim-witnesses requested to give evidence in Moldova for trials abroad

Where Moldova is addressed with a rogatory commission and asked to take evidence from a victim-witness in a Moldovan court for transfer to a foreign court then the procedures governing the request are Arts 531-559 CPC. These state that the applicable procedure in the execution of the requested acts is the Moldovan CPC. The Moldovan courts can apply provisions specified by the requesting state so long as they are not in contravention with the Moldovan CPC and in line with international treaty obligations.[201] Additionally representatives of the foreign state can be present at the hearings.

Similar safeguards to those mentioned in section 6.3.2.1 need to be considered here. This includes ensuring that only a limited number of officials are involved with such requests and that specially trained police officers with clear guidance as to confidentiality and anonymity execute the requests/summons. It is crucial that the International Legal Cooperation Office

[201] Art. 540(4) CPC

of the General Prosecutor is aware when a request potentially involves a victim of trafficking and should consider special procedures for referring such cases to a specialised police and prosecutor's service. The victim-witness will be subject to all protections available within Moldovan law and therefore the provision of advice by independent lawyer should be easier. Some caution should obviously be expressed here in that the limitations of the protections in Moldovan law will also exist in a case transferred from abroad. If Moldova were to have numerous cases against alleged traffickers transferred from abroad, which it would be obliged to take up because of its international obligations then it would be particularly crucial to improve the application of these measures.

Given the special nature of such cases, lawyers should take the time to ensure that the victim-witness can exercise informed consent about his/her participation in such proceedings. A primary task of such an adviser should also be to ensure that the victim-witness is aware of protection and assistance services available for victims of trafficking as these cases may have led to the victim being identified as a victim of trafficking for the first time.

6.3.3. Conclusion and recommendations: mutual legal assistance

In practice in Moldova most authorities are making every effort to implement obligations relating to mutual legal assistance, however there is a need for further legal clarity on the conditions applied to such requests and the procedures which should be followed in order to enhance victim-witness protection. There have been serious problems regarding national authorities supported by international organisations dealing with requests which are outside of their competencies which fail to ensure basic guarantees for trafficked victims. There is a particular need to ensure that the victim-witness has access to independent and informed legal advice in these cases.

⇒ Clarify and amend the CPC regarding International Legal Assistance with specific regard to the material and legal guarantees and the procedure for summons of witnesses to appear in foreign courts as set out in Arts 7-12 European Convention on Mutual Legal Assistance.

⇒ Develop bilateral agreements in relation to mutual legal assistance with other states which provide for the material and personal guarantees contained in the European Convention on Mutual Legal Assistance and which request additional guarantees for procedural and non-procedural protections for all victims who need protection, especially victims of trafficking. These agreements should provide absolute clarity on which body is the competent authority to receive such requests. Additionally they could develop agreements regarding the use of telephone and video conferencing to prevent a victim-witness having to travel abroad and/or give live testimony in court.

⇒ All relevant authorities, particularly the Ministry of Internal Affairs, IOM and SECI should be made aware of the international and national provisions and procedures regarding the exercise of international legal assistance. The practice of summonsing and transferring witnesses outside of these procedures should be halted.

⇒ Ensure that laws and procedures are developed to clarify the victim-witnesses rights in the execution of mutual legal assistance requests e.g. the service of summons to court. Ensure that anonymity, confidentiality and a high regard for physical security are guaranteed throughout the procedures. This can be done by developing guidance for the prosecutors and courts who deal with requests, and the use of only specialised, trained police officers for the service of the summons.

⇒ Ensure that the victim-witness receives independent legal advice about the meaning of the summons to a court abroad and the realistic consequences of his/her decision to attend or not. An inventory of basic protection provisions and facilities in other states (main requesting countries) should be compiled by research on legal provisions and/or contacts with international and non-governmental organizations that are based in those states.

⇒ Consider signing and ratifying the 2nd Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

6.4. Inter-country witness protection co-operation

6.4.1. International obligations

The *TOC Convention* requires States Parties to consider entering into agreements or arrangements with other states for the relocation of witnesses, relatives and other persons close to them and applies to victims insofar as they are witnesses[202] in cases involving organised crime. The *Council of Europe* requests its Member States to make their "domestic witness protection schemes/programmes available to foreign witnesses… by entering into bilateral and multilateral agreements…" also in cases involving organised crime [203] and to provide "assistance in relocating protected witnesses abroad and ensuring their protection"[204] in relation to all cases.

The *Stability Pact* states are about to enter an agreement to "institutionalise cooperation between governmental authorities and local NGOs in victim/witness protection" and to "seek enactment of regional/international agreements for temporary and/or permanent relocation of victim-witnesses". [205] In order to implement a durable solution for children for whom it is not in their best interests to stay in countries of origin or destination *UNICEF* requires states in South Eastern Europe to "ensure the child's resettlement in a third country" favouring a family or community based arrangement.[206] They echo this requirement where victim-witness protection cannot be ensured.[207] *OSCE* Participating States committed themselves to facilitating the victim of trafficking to participate as a

[202] TOC Convention Art 24
[203] CoE Recommendation R (2001) 11, 19 September 2001 Para 24
[204] CoE Recommendation R (97) 13, 10 September 1997 Para 30
[205] "Sofia" draft Statement on Commitments Part 1
[206] UNICEF Guidelines Para 3.8.4
[207] UNICEF Guidelines Para 3.10

witness in the investigation "by providing the possibility of relocation as a form of witness protection".[208]

6.4.2. Application in Moldovan Law and practice

An assessment of the domestic witness protection mechanisms was provided above. It is certainly the case that the law should be extensively amended or replaced in order to clarify its application and scope. It should be available to witnesses from cases abroad in order to encourage other states to offer reciprocity for witnesses from Moldova who need relocation. There are no known cases of protected witnesses being transferred to a third country and there is no bilateral or multilateral scheme which would meet the requirements of the international obligations discussed above.

6.4.3. Conclusion and recommendations: inter-country witness protection co-operation

Being a relatively small country with a high incidence of organised crime and human trafficking it is essential that Moldova has provision for a sophisticated witness protection scheme allowing a limited number of highly endangered witnesses to relocate abroad where safety and anonymity would not be guaranteed within the country. In return this may require offering similar assistance to other jurisdictions.

⇒ A revised State Protection Law should include a provision enabling witnesses from cases abroad to be able to participate in it.

⇒ Moldova should conclude agreements with third countries for the relocation of witnesses, their relatives and others close to them together with entry into that country's witness protection scheme.

[208] OSCE Action Plan Section 3 Para 4.4

7. Summary of conclusions and recommendations

Adequate victim-witness protection is predicated on the rule of law. The recently implemented criminal code and criminal procedural provisions of Moldova have gone a long way towards building a legal basis for victim-witness protection. Judicial and prosecutorial practice will further elucidate how these provisions work in practice and a close monitoring of these developments should take place in case they work against the interests of victim-witnesses. The Law on State Protection, however, shows significant need for reform in order to ensure that a graduated system of "protection" is available. Together with the establishment and functioning of an inter-agency National Referral Mechanism this law should enable victim-witnesses to access different levels and types of procedural and non-procedural rights from identification to post-proceedings. Such protections should be developed in such a way as to meet the personal specificities of the victim-witness and the changing nature of the risk over time.

Additionally, legal reform must be complemented by significant institutional coordination and the development of good procedural practice in order to ensure victims are properly identified, protected and provided with access to justice in ways which respect their human rights, their legal rights and their right to make autonomous and informed decisions. The establishment of a National Referral Mechanism for the identification and protection of trafficked persons would greatly assist this coordination. The National Committee should focus its efforts in this regard and the good offices of donors and international and regional organisations should be directed to the establishment of such an institutional mechanism. All agencies involved in such processes - the state, non-governmental, international and regional organisations should ensure they themselves promote good practice through practices and codes of conduct, which are victim-friendly and respect the rule of law.

There is a sound basis for victim-witness protection in Moldova but which does require some essential legal, procedural and institutional reform and in particular a focus needs to be placed on channelling adequate resources to these processes in order for them to have substantive effect. Together with the material protection needs of the victim-witnesses themselves then the efforts to combat trafficking in persons and to ameliorate its outcomes cost very dearly. The international community should assist the state authorities and civil society in Moldova in this regard.

Based on the analysis contained in the previous sections, the report concludes with the following recommendations.

7.1. Legal Reform needs

7.1.1. International law

7.1.1.1 Ratification of international treaties

The Moldovan government should ratify the following international conventions:

⇒ Convention against Transnational Organized Crime;

⇒ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;
⇒ Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime;
⇒ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography;
⇒ European Convention on the Transfer of Proceedings in Criminal Matters.

Further, the Moldovan government should consider signing and ratifying the following documents:

⇒ Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters;
⇒ European Convention on the Compensation of Victims of Violent Crimes.

7.1.1.2 Bilateral agreements: protections in trans-border cases

Bilateral agreements in relation to mutual legal assistance should be developed with other states which contain at minimum the following:

⇒ Clear procedures and definitions of all matters relating to international legal co-operation (including specificity as to contact points);
⇒ Material and personal guarantees contained in the European Convention on Mutual Legal Assistance;
⇒ Additional guarantees for procedural and non-procedural protections for all victim-witnesses who need protection, especially victims of trafficking. This should include agreements that, in the carrying out of a rogatory commission, countries can use the reciprocating state's procedural protections, where they are not in contravention with their own procedural laws;
⇒ Agreements regarding the use of telephone and video conferencing to prevent a victim-witness having to travel abroad and/or give live testimony in court;
⇒ Separate agreements delineating the nature, procedure and limits of police co-operation should be developed to complement these agreements;
⇒ All agreements should provide absolute clarity on which body is the competent authority to receive and make decisions on such requests;
⇒ All agreements should include explicit references to applicable international obligations on human rights and victim's rights as well as on transborder legal cooperation.

7.1.1.3 International agreements on witness protection programmes

⇒ Moldova should conclude agreements with third countries for the relocation of witnesses who are seriously endangered. This should extend to the witness's relatives and be coupled with protection from that country's own witness protection scheme.

7.1.2. Domestic law amendments

7.1.2.1 Criminal Procedure Code amendments:

⇒ The CPC should create an identifiable moment when a victim becomes a witness so there is a legal possibility for a victim to exercise informed consent about his/her decision to give information to the police with a view to becoming a witness without pressure of possible criminal charges (under Art. 313 CC).

⇒ Art. 58 CPC should be amended in order to clarify the scope of the victim's right to legal assistance.

⇒ The right to be accompanied by a trusted person (Art. 58 (4) no. 3) should be extended to victims of all crimes.

⇒ The scope of Art. 58 (4) CPC should be extended to provide ***state paid*** legal assistance for victims of "serious, particularly serious and exceptionally serious offences".

⇒ The wording of Art. 58 (4) and Art. 60 (1) no. 19 CPC should be clarified to make clear if victims have a right to a "pro bono" or a "pro bono" and "ex officio" lawyer.

⇒ Criteria for the decision of the police or the court to suspend the victim's lawyer should be elucidated in a commentary on Art. 79 (3) CPC.

⇒ Art. 90 CPC. An obligation of the court to inform witnesses on its own motion about all available protection measures under the CPC and the Law on State Protection should be inserted.

⇒ The relationship between Art. 105 (8) and Art. 109 (2) CPC should be clarified. As a result, the judge should be obliged to intervene and stop the defendant or defense counsel from asking questions, which obviously aim at insulting or humiliating the witness, no matter if they are relevant with regard to the evidence.

⇒ Art 106 CPC, which allows hearing witnesses in other places than the courtroom, should be specified. In particular, the preconditions for the application of this provision and necessary framework (e.g. who is interviewing the witness? Are the defendant and her/his counsel present?) should be clarified.

⇒ The scope of Art. 111 (3) CPC, which applies to "sexual offences" should be extended in order to encompass victim-witnesses of trafficking, even in cases where no charges for sexual offence were brought forward. This could be done by explicitly including the relevant offences, such as art. 165 and 206 CC.

⇒ As long as the necessary infrastructure to interview victim-witnesses via teleconference has not been put in place in Moldova, video-taped witness statements (Art. 109, 115, Art. 371 CPC) should be used as interim solution in cases where the identity of the victims is already known to the accused or where the facts do not reach the threshold of the requirement as defined in Art. 110.

⇒ Certain procedural protection measures, such as the use of video-taped testimonies according to Art. 115 CPC or the use of screens should be made mandatory for interviewing child victim-witnesses.

⇒ Art. 212 CPC should be amended to include the unauthorized disclosure of information by the suspect, accused or defendant.

⇒ Unless this is only a translation problem, the relationship between Art. 61 and Art. 219 CPC should be clarified. It is recommend bringing Art. 219 in line with Art. 61 in order to require "sufficient grounds to believe that moral or material damage was caused" for a person to file a civil claim.

⇒ Art. 219 (8) CPC should be amended in order to ensure that civil claims have priority over special seizure of goods according to Art. 106 CC.

⇒ Art. 225 (3), and correspondingly Art. 61 (5) CPC, should be amended to limit the possibility for the criminal court to refer compensation claims to a civil court. This should be limited to instances where the decision on the claim would considerably prolong proceedings or to claims that are particularly complex to determine. When referring the claim to a civil court, the criminal judge should be obliged to give substantial reasoning for her/his decision.

⇒ Art. 316 (1) CPC should be clarified. Ideally, it should be amended to explicitly prohibit media representatives (encompassing both, mass media and other media) to take pictures, make audio or video recording or to film during the trial, unless otherwise provided in the law.

⇒ Alternatively, the planned generic anti-trafficking law should include a provision preventing the judge from allowing media representatives to take pictures, make audio or video recording or to film during the trial (Art. 316 CPC) in cases of trafficking in persons (Art. 165, 206 CC). As second best option, the Law should state that Art. 316 CPC does not apply in cases of trafficking in children and that, in cases of trafficking in adults according to Art. 165 CC, the judge is explicitly obliged to balance the interests of the public and the interests of the victim, in particular to privacy and protection of their security.

⇒ Art. 369 (3) CPC should be amended, without prejudice to the rights of the defense, to limit hearings of victims and injured parties to the absolutely necessary amount, especially in cases where the victim or injured party is a minor or has suffered psychological, physical or sexual violence.

⇒ It is recommended to introduce a provision into the CPC to allow for the witness to testify behind a shield, while the defendant has the possibility to watch the witness and ask questions. It is recommended to define particular vulnerable groups of witnesses for whom this way of questioning should be mandatory, such as minor victims of crime or victims who have suffered psychological, physical or sexual violence.

⇒ A guardian for all child victim-witnesses should be introduced into the CPC. The guardian should ideally be a social worker with a legal background and expertise on child protection issues, in particular the rights and needs of child victim-witnesses in the criminal process. The guardian should be responsible for preparing the child for the criminal proceedings, to counsel and assist her/him in exercising her/his procedural rights in a child-sensitive manner and to help ensuring that the child's best interests are respected throughout the criminal process. The guardian should also coordinate and cooperate with the child's legal representatives (e.g. parents) and her/his lawyer.

⇒ Revised and additional provisions to the Chapter IX CPC regulating International Legal Assistance should be adopted as a matter of urgency. This should clarify, inter alia: the procedure for transfer of proceedings; clarify that cases transferred to Moldova are processed under the Moldovan law (i.e. that the witness protection measures contained therein will apply); the material and legal guarantees are required for a witness summons from abroad to be accepted and served by the Moldovan authorities as set out in Arts 7-12 European Convention on Mutual Legal Assistance.

⇒ The CPC should be amended to provide an obligation for ***police*** on their own motion to provide to victims comprehensive information about their rights and status in criminal proceedings. For example, there should be an obligation to inform victims about the possibility to become an injured party (Art. 58), to inform victims and injured parties about their right to be represented by a lawyer and the preconditions for pro bono legal assistance (Art. 58, 62) and to inform witnesses about existing procedural or non-procedural protection measures, such as video taping of statements, teleconferences or measures under the Law on State Protection (Art. 90).

7.1.2.2 Criminal Code amendments:

Art. 165 Criminal Code – Definition of trafficking:

⇒ Art. 165 (b) It is recommended that the term fraud be added or the interpretation of the term "deception" is clarified to include fraud.

⇒ Art. 165 (2) (f) Consider deleting the element "threat of disclosure of confidential information to the person's family" or integrating it into Art. 165 (1)(a).

⇒ Art. 165 (2) (f) specifies the use of e.g. torture, rape, weapons and 165 (3) (b) ("…causing serious bodily injury") overlap. Clarify the areas of application of both provisions.

⇒ Art. 165 (2) (f) include the vague expression "through other means". Delete or otherwise specify this term.

⇒ Penalties: Consider providing for aggravated penalties where the exploitative purposes specified have actually been achieved (as in Art. 206) and consider reducing the minimum threshold penalty for this offence.

Art. 206 Criminal Code – Trafficking in children:

⇒ Art. 206 (a) Consider deleting "exploitation in prostitution and in the pornographic industry" and adding the concepts into an interpretive note/commentary defining the meaning of "sexual exploitation".

⇒ Art. 206 (b) and (c) Consider deletion of the words "exploitation in" as it is inherent to the forced labour or slavery situation.

⇒ Art. 206 (c) Separate "slavery like conditions" from "illegal adoption" in order not to "over-expand" the definition of slavery.

⇒ Arts 206 (2) (b), (d), (e) and (f) Consider including illegal adoption and abandonment in the list of aggravated outcomes (unless it is considered that "illegal adoption" is included within the definition of "slavery" in which case this should be made clear in any commentary or interpretive notes).

⇒ A definition confirming that "children" are those persons under 18 should be provided either within Art. 206 or in a general definitions section.

Non-Criminalisation of trafficked victims:

⇒ Arts 165 (4) and 206 (4): The non-criminalisation (exemption from liability) provision should be detached from its nexus with "co-operation" by deleting the words "provided that s/he accepts to cooperate with the law enforcement body on the relevant case." The provision should be inserted as a stand-alone, general provision in both the Criminal Code and Administrative Offences Code. If considered appropriate it should also be

inserted into all relevant articles of the Criminal Code and Administrative Offences Code.

⇒ The Prosecution of children for criminal and administrative offences arising from their trafficked status should be specifically prohibited.

Miscellaneous provisions:

⇒ Art. 362 (4) Criminal Code (illegal crossing of a state border) should be clarified by way of interpretive note or commentary as to whether it applies to only foreign citizens or all victims of trafficking.

⇒ Art. 313 Criminal Code (the refusal of a witness… to perform duties or evasion of duties) would benefit from a commentary or interpretive note clarifying its terms and scope and should be amended to include the words an "unjustified refusal" to prevent liability for fearful, traumatised and /or unprotected victim-witnesses.

⇒ A provision should be inserted in the Criminal Code regarding the Smuggling of Migrants in line with the Migrant Smuggling Protocol.

7.1.2.3 Commentary/Interpretive guidance on the Criminal Codes and Criminal Procedure Code.

⇒ Interpretive guidance and/or a commentary should be drafted on the interpretation of Arts 165 and 206 Criminal Code to assist law enforcement, lawyers, prosecutors and judges in its application. This should include an analysis of Moldovan case-law, jurisprudence from other jurisdictions and the explanatory notes of the *Trafficking Protocol*. It should pay particular attention to explain the implications of a "consenting victim" and definitions of exploitation, sexual exploitation and slavery.

⇒ Additionally, such interpretive guidance and/or a commentary should be drafted on the Criminal Procedure Code, in particular on provisions regarding the rights of victims and witnesses in criminal proceedings.

7.1.2.4 Witness Protection Laws

⇒ Consideration should be given to either significantly altering the Law on State Protection or replacing it with a new **general law on witness protection**. As a result, the law should cover "classical" witness protection measures in cases of substantial threats and organised crime. It should also provide for protection to witnesses of "lesser" forms of crime and/or who face less serious threats, but are still at risk. The forms of protection provided can then vary according to the degree of threat involved, the status of the person being protected and the nature of the crime being investigated in each case. The law should also establish a witness protection programme or a dedicated unit with specific power to develop and delineate the nature of the protections with its own operating procedures. Usually such units are within the Ministry for Internal Affairs but separate from the main investigation unit. However, for lower levels of protection it may be considered that the police unit responsible for the investigation can deliver protection. Therefore it should have absolute clear and unambiguous clarity as to:

- the types of investigated crimes are within the ambit,
- the categories of persons eligible for state protection,

- the levels of protection available,
- the nature of protections within these levels,
- the tests applied to the risk being faced by the person needing protection for each level,
- the competent bodies for authorising protection,
- the bodies responsible for deciding on the specific level and types of protection and for executing the protection measures,
- the obligations of the protected person (including whether breaches lead to the withdrawal or "reclassification" to a different level of protection),
- the procedures for referral of a person to the competent bodies and executing bodies (including urgent procedures),
- the procedure for decision making on eligibility and levels of protection in an individual case (including urgent procedures),
- funding for the witness protection bodies and the protection services.

The following national laws could be used as model legislation:

- Portugal: Act n.º 93/99 governing the enforcement of measures on the protection of witnesses in criminal proceedings, 14 July 1999[209]
- Serbia and Montenegro/Kosovo: UNMIK Regulation No. 2001/20 on the Protection of Injured Parties and Witnesses in Criminal Proceedings, 20 September 2001[210]

⇒ Art. 18 (3) of the Law on State Protection (or any replacement law) should be amended to include an explicit obligation of the competent bodies to provide protected persons with comprehensible information on their rights and duties as protected persons as well as on possible consequences of being a witness, of participating in the protection programme and of non-compliance with the protection agreement. Such information should be provided both, orally and in written.

⇒ The Law on State Protection (or any replacement law) should include a provision enabling foreign witnesses and witnesses transferred from abroad to be able to participate in it.

⇒ The Law on State Protection (or any replacement law) should provide for a clear process of risk assessment to be carried out when deciding about the application and the cancellation of protection measures. It should be undertaken at the earliest stage possible and repeated on a regular basis. The assessment should take into account the nature of the threat, the criminal offence involved and the individual situation of the protected person, especially her/his state of health and psychological constitution. The law should also define the actors responsible to undertake the risk assessment. This risk assessment would be separate to that provided within the NRM for all trafficked victims and would apply only to those eligible for protection under this law. It would be carried within a specialised witness protection unit (as stated above).

[209] Download at www.legislationline.org.
[210] Download at www.legislationline.org.

⇒ A legal basis should be created to ensure that an adequate right to protection (and duty upon the state to provide it) is provided to victims and victim-witnesses of trafficking who are endangered but do not qualify for protection under the Law on State Protection (or any replacement Witness Protection Law.) This could be done within a generic anti-trafficking law under a chapter on the protection of victims. Accordingly, protection should be provided to trafficked persons from the moment of identification; those who are in the process of deciding whether to cooperate with the authorities; those who were summoned but have not yet made a witness statement, or victim-witnesses of trafficking who are in danger, but where the threshold of the Law on State Protection is not reached. (This right and duty should be implemented via the National Referral Mechanism (see below).

⇒ All protection measures available should be supplemented by introducing social and financial assistance measures, access to medical treatment, assistance in job finding and access to vocational training, and, whilst the protected victim-witness is not gainfully employed, financial support for her/himself and family members living with her/him. Such measures should be funded from assets confiscated from the traffickers.

7.1.2.5 Law on Children in Difficulties

⇒ All agencies concerned with trafficked victims should lobby Parliament to pass a Law on Children in Difficulties which is in line with international standards on child protection and anti-trafficking. The contents of the Law on Children in Difficulties, when adopted, should be closely monitored by all agencies working against trafficking in persons. This includes supporting and promoting measures to improve the general system and regulation of child protection.

7.1.2.6 Humanitarian visas and temporary residence permits

⇒ Establish a legal regime for the issuance of temporary and permanent residence permits within the Migration Law, a generic trafficking law or another appropriate law. Residence permits should be available to cater for all of the following eventualities:

- permits for a minimum 3 month period for recovery and reflection which would apply to all victims of trafficking
- permits for stay for those participating in legal proceedings (civil and criminal) and/or claiming compensation
- temporary and permanent stay permits on humanitarian grounds (e.g. risks to personal integrity or survival upon return to country of origin.)
- permits should include access to all protection and assistance: medical and psychological advice, legal advice, physical protection, shelter and the right to work during those periods.

7.1.2.7 Access to victim protection enshrined in law

⇒ Consideration should be given to establishing a legal right to access protection measures and assistance for all trafficked victims with special rights for children. This could be within a generic trafficking law.

7.1.2.8 Generic Law on Trafficking

⇒ The development of a general law regarding trafficking could be used to establish a stronger framework for the government's approach to the suppression of trafficking which is based on human rights, children's rights and the protection of victims. This could include a recognised and delineated "national referral mechanism" for suspected and actual victims, the right to protection, humanitarian visas for trafficked victims. Additionally it may concretise state support and financing for the National Coordination Committee's work on the practical implementation of the National Plan of Action and if necessary the revision, refinement and updating of the plan itself.

7.2. National authorities: police, judiciary, national referral mechanism

7.2.1. Training of judiciary and prosecutors.

⇒ Judges, prosecutors and law enforcement officials where appropriate should receive training on the following:

- Nature, scope and application of the trafficking provisions in the Criminal Code including an examination of international jurisprudence.
- Prosecutors should receive specialised training on evidence gathering and prosecution strategies in trafficking cases.
- Judges, prosecutors and law enforcement officials, including the Anti-Trafficking Unit, should receive training on the rights and needs of victim-witnesses of crime in general, and of victim-witnesses of trafficking, in particular, in criminal proceedings.
- Human rights standards.
- The special needs of victims of sexual, physical or psychological violence as well as on child- and gender-sensitive aspects.
- Victim-witness protection safeguards under Moldovan criminal procedural law and how to apply these safeguards in practice, as well as on victim-sensitive interviewing techniques.
- Sensitive questioning techniques for the interviewing of victims. For this purpose, guidelines for sensitive questioning of victims should be developed, based on the recently issued WHO Ethical and Safety Recommendations for Interviewing Trafficked Women[211].

7.2.2. National Plan of Action and victim-witness protection

The National Committee should include victim-witness protection among its tasks. This issue should become a component of the National Plan of Action as well as a topic on the agenda of the sub-working groups on legislation and on protection/assistance. The Committee should coordinate the activities of different law enforcement organizations, non-governmental and international organizations working in the field of victim-witness

[211] World Health Organization, Ethical and Safety Recommendations for Interviewing Trafficked Women 2003

protection. In particular, it should aim to establish and recognise the National Referral Mechanism and coordinate with the above recommended witness protection mechanism. In order to achieve this aim, the National Committee should define concrete actions, clear responsibilities and clear and realistic timelines.

7.2.3. Court room and law enforcement infrastructure

⇒ The government should provide courts and law enforcement authorities with sufficient personnel resources and adequate operational and office infrastructure, including phones, faxes, panic alarms, or equipment for videotaping testimonies and teleconferencing. The court infrastructure should be adapted in order to make the atmosphere more victim-friendly. For example, special waiting rooms should be dedicated for victim-witnesses who are waiting to give testimony, in order to avoid contact with the defendant before the trial. International donors should also give priority to fund such expenses.

7.2.4. Improvements in the area of law enforcement

⇒ Law enforcement officials and prosecutors should increasingly apply alternative means of evidence to reduce the dependency of the outcome of criminal investigation and prosecution upon the testimony of the victim-witness and to reduce the number of interviews of victim-witnesses to the lowest possible number. Also victim-witnesses of trafficking should have the right, upon request, to be interviewed by a police officer of the same sex. In order to ensure that (female or male) police officers are able to properly communicate with trafficked persons, the Ministry of Interior should provide them with translators.

⇒ Taking into account that witness' statements video-taped according to Art. 109 taken alone cannot be a sufficient basis for conviction, police and prosecutors should establish additional means of evidence in order to enable victim-witnesses to benefit from the protection provided by this provision.

7.2.5. National Referral Mechanism for victims of trafficking in persons

➢ A **national referral mechanism** of relevant state agencies and other service providers (NGOs) should be established and inter-agency relationships and terms of reference should be formalised through memoranda of understanding. Through a coordinated inter-agency response these agencies should manage the processes of identification, referral and initial risk assessment of the suspected trafficked victim from the moment of his/her first being located. Specific agencies should have clear terms of reference in this process. Within the mechanism the following should be provided at minimum: a facility for the suspected victims to receive independent advice about their legal rights and options and the consequences of cooperating with law enforcement agencies, safe shelter, access to medical and psychological counselling and the institution of a "reflection delay" period following the initial identification of a suspected victim to enhance identification. Specific provisions for the identification of children in order to ensure they receive specialist assistance and protection should be developed.

- In order to ensure that the victim's need for physical protection is assessed and provided, a **coherent and integrated risk assessment system** should be established. This should be applied from the moment of identification of a possible trafficked victim onwards. It would exist in addition to any risk assessment procedure within the application of a special law establishing a witness protection scheme (see above). It ensures that the state provides the necessary physical protection regardless of a victim's involvement in investigations. Prerequisites include:
    - Guarantees of anonymity, protection of identifying details and confidentiality about the case.
    - Availability of graduated levels of physical protection depending on the specific case and circumstances (up to the point where a victim-witness receives protections from a specialised witness protection scheme).
    - A victim's status should be reviewed regularly over time and according to changes in circumstances. E.g. if a victim decides to give evidence to the police or to become a witness then the risk assessment should respond.
    - The system should ideally be entrenched in law and in the by-laws and books of rules operated by the participating agencies.
    - The number of individuals who come into contact with the victim and know her/his details and case should be as limited as possible.

In order to ensure the NRM works the following would be prerequisites:

⇒ **Guidance for front-line state officials** such as police, border guards, immigration officials, social workers, doctors etc. on how to identify a suspected victim of trafficking and to whom they should be referred. Measures should be taken to further facilitate the identification process through the drafting of relevant by-laws and/or instructions for the services involved (e.g. listing sets of indicators for police or border guards and giving them contact coordinates of the relevant agencies in the referral system or of a specialised police officer who can make onward referrals).

⇒ **Training on identification**. There should be training for all relevant state officials on the application of these identification guidelines. They should be sensitised to understand the guidelines and to ensure that the suspected victim is referred to the appropriate advice and assistance to be accessed.

⇒ It is recommended that in all suspected cases of trafficking in persons, a **presumption of anonymity** of the victim-witness be applied. From the beginning, the file should be produced without disclosing the identity of the victim-witness. Appropriate procedures should be established within the Ministry of Interior, relevant NGOs, social workers and victim support agencies to preserve the victim-witness' real identity in a safe and secure setting. Procedures and criteria should also be defined to allow the defense to demand the disclosure of the victim-witness' identity from the court and to enable the court to decide if it is in the interest of justice to lift the individual victim-witness' anonymity. The government should ensure that police officers, border guards, prosecutors and judges are adequately trained on preserving the anonymity of victim-witnesses of trafficking.

⇒ **Female police officers.** The scale, nature and geographical spread of the specialised police should be examined to ensure that there are sufficient women officers, that they are located in all areas of the country.

⇒ **Specialised social workers** should be trained and available to assist with identification procedures.

⇒ Police procedures should ensure that victims are given a **reflection delay before decision to "cooperate"** and should be able to access counselling before making the decision to do so.

⇒ **Guidelines on enabling the victim to exercise informed consent.** Best practice guidelines on information given to victims by the police and prosecutors should be developed. The information which should be passed to the victim should be clearly laid out in checklists (using the Best Practice Manual). Guidance should ensure that victims are not misled by any representatives of state authorities (police or prosecutors) about the consequences of giving or failing to give information on a case by being given inaccurate information or unfounded reassurances about the nature of criminal proceedings, the nature and scale of the potential dangers and/or available protections. These should be implemented forthwith through their incorporation into the standard operating procedures of the police and prosecutors.

⇒ **Involvement of victim in risk assessment procedures**. All risk assessment procedures should incorporate working methods which ensure the victim is fully informed and understands the nature and scale of any threat, of the available protections and of the conditions of accessing those protections. This can be done by the presence of the victim and/or their advocate at the risk assessment meetings to make representations on their own behalf.

⇒ Establish a fast and effective procedure in Moldovan Ministry of External Affairs and consulates abroad for the verification of the identity of **Moldovan victims identified abroad** to enable them to obtain identity and travel documents free of charge. Also taking all measures to protect the victim's safety.

⇒ Establish a fast and effective procedure for the verification of the identity of **foreign victims** and the obtaining of documents from their country of origin taking all measures to protect the victim's safety.

⇒ **Evaluation of current protection services.** An audit of the protection and assistance services currently available should take place and should examine: the nature of the service, service provider and recipient to identify any gaps in provision or shortfalls of funding.

⇒ **State provision of protection and assistance**. There should be a formal commitment by the Government of Moldova to provide state funded protection and assistance to all victims of trafficking in human beings. This would include guaranteeing access to shelter, medical care, counselling, and specialist care in the case of children for all victims including foreign citizens.

7.2.6. Action against state officials

7.2.6.1 Vetting procedures and codes of conduct for agencies working with victims

⇒ State agencies should develop vetting procedures for all staff who work with trafficked victims especially children, dealing with criminal convictions and development of codes of conduct for those who work with trafficked victims to protect anonymity, confidentiality and prevent abuse of power.

7.2.6.2 Disciplinary action/prosecution

⇒ Active measures should be taken to investigate, prosecute and/or take disciplinary measures against officials who use their public office to further exploit or abuse victims of trafficking. The institution of disciplinary and/or criminal sanctions when state officials act unprofessionally or criminally should be automatic.

7.2.6.3 Aggravated Penalties

⇒ Consideration could be given to the institution of aggravated penalties in criminal law for public officials involved in trafficking or exploitation of victims of crime.

7.2.7. Informed consent

7.2.7.1 Information sheets about legal proceedings

⇒ Easy to read checklists or pre-printed information sheets about criminal proceedings, protection measures and other legal remedies can be drafted and given to victims of crime and trafficked victims.

7.2.7.2 Specialised lawyers

⇒ The government should establish a pool of specialised lawyers to represent victim-witnesses of trafficking in court. This pool could also include lawyers from existing relevant NGOs, such as the Chisinau-based Center for the Prevention of Trafficking in Women. All lawyers belonging to this pool should receive appropriate training on victim advocacy. If the state provides victim-witnesses of trafficking with a pro-bono lawyer, a lawyer from this pool should be chosen. If the victim-witness chooses the lawyer her-/himself, s/he should receive a list of trained lawyers. This pool of specialised lawyers could be set up for trafficking cases only, or, alternatively, more broadly for victims of violent crimes. In order to ensure the best possible representation of the victim and to avoid any abuse of power, a code of conduct should be drafted for lawyers participating in this pool.

7.2.8. Bilateral and international cooperation issues

7.2.8.1 International legal cooperation guidance

⇒ Specific guidance should be developed for prosecutors and judges dealing with international legal co-operation requests for extradition, transfer, rogatory commissions and the summonsing of witnesses for cases abroad. This should deal with cases where it

is likely that trafficked victims may be involved to ensure that foreign victims of trafficking are not extradited for offences for which they would not be criminally liable in Moldovan law, to protect Moldovan victims who are the subject of states' requests for transfer of proceedings to Moldova or the summonsing to be witnesses in cases abroad. The Prosecutor's Office should develop secure and confidential ways of delivering the summons or notices to the victims.

7.2.8.2 Awareness of international legal cooperation procedures

⇒ The Government should ensure that all relevant authorities, particularly the Ministry of Internal Affairs, international policing bodies, NGOs and IGOs – SECI and IOM should be made aware of the international and national provisions and procedures regarding the exercise of rogatory commissions, summonsing witnesses to appear abroad, and requests for international legal assistance. These procedures should be adhered to. *The practice of summonsing witnesses and transferring them to other states, outside of the legal obligations and procedures, to appear in court should be halted.*

7.2.8.3 Develop diplomatic relationships with transit and destination countries with a view to improve international legal cooperation

⇒ Moldova should take steps to encourage neighbouring states to improve measures for the identification of trafficked victims and to implement protection measures including the non-criminalisation of trafficked victims. This would enhance regional legal cooperation and prevent requests for legal assistance being refused.

7.2.8.4 Regularisation of status of Moldovans trafficked to other states

⇒ In order to extend protection for Moldovan citizens abroad the Ministry of Foreign Affairs may wish to use diplomatic channels with the main countries of destination of victims from Moldova to reciprocate by ensuring visas for citizens trafficked abroad.

7.2.8.5 Protection of trafficked victims in cases from abroad

⇒ Ensure that laws and procedures are developed to clarify the victim-witnesses rights in the execution of mutual legal assistance requests e.g. the service of summons to court. Ensure that anonymity, confidentiality and a high regard for physical security are guaranteed throughout the procedures. This can be done by developing guidance for the prosecutors and courts who deal with requests, and the use of only specialised, trained police officers for the service of the summons rather than local officers.

7.2.8.6 Advice to victim-witnesses about cases abroad

⇒ Ensure the victim-witness receives independent legal advice about the meaning of the summons to a court abroad and the realistic consequences of her/his decision to attend or not. An inventory of basic protection provisions and facilities in other states (main requesting countries) should be compiled by research on legal provisions and/or contacts with international and non-governmental organizations that are based in those states.

7.2.9. Confiscation of assets and compensation

7.2.9.1 Asset confiscation

⇒ Confiscated assets should also be used to fund the application of protection measures. In order to increase the likelihood of victims to receive compensation, police should focus their investigation efforts on searching for assets belonging to traffickers, which should subsequently be secured in accordance with the provisions of the CPC. These efforts should be combined with providing the responsible police units with sufficient personal resources, necessary equipment and training on investigation skills.

7.2.9.2 State compensation

⇒ Moldova should establish a subsidiary state compensation scheme, which should be funded from the state-budget, collected fines or confiscated property. Moldova should also consider ratifying the European Convention on the Compensation of Victims of Violent Crimes. Victim advocates/advisors & NGOs

7.2.10. Vetting procedures and codes of conduct for agencies working with victims

⇒ NGOs should develop vetting procedures and codes of conduct for all staff who work with trafficked victims especially children to protect anonymity, confidentiality and prevent abuse of power. They should also develop codes of conduct and disciplinary sanctions within service contracts or memoranda of understanding with service providers (state or NGOs).

7.2.11. Ethical codes of conduct for victim advocates

⇒ Victim's advocates and advisors should develop codes of conduct explicitly incorporating principles such as confidentiality, the interests of the victim as paramount to their work, the avoidance of conflicts of interests with other individuals or agencies (e.g. with another client of the advocate, with the prosecutor). The victims should be made aware of the code of conduct and ideally should be able to register a formal complaint against the advocate or advisor if it is not followed. Advisors should familiarise themselves with the available in-court and out of court protections available and ensure that the victims are fully informed of their nature and the realistic likelihood of their use and effectiveness.

7.2.12. Lawyer's disciplinary regimes

⇒ Disciplinary regimes should be set up within Bar Associations to ensure that any arising cases of inappropriate behaviour can be effectively dealt with.

7.2.13. Media

⇒ Media should develop **guidelines regarding the treatment of information about victims of crime especially trafficking** in persons. They should be obliged to refrain

from publishing names, pictures and interviews of victims of crime, unless with the victim's consent, as well to publish stories or pictures that are likely to cause embarrassment to the victim or otherwise unduly interfere with her/his private sphere. This could be regulated by a law or be part of a media code of conduct.

⇒ Consideration should be given to **training sensitisation** for journalists. These seminars should aim at sensitizing them towards the rights of victim-witnesses and discuss methods of reporting court cases while at the same time duly respecting the right of victim-witnesses to privacy.

7.3. International organisations and donors

⇒ All international and regional organisations and donors should improve their understanding of the international legal obligations of Moldova and domestic legal regime to ensure their anti-trafficking work is within the national legal framework.

⇒ International and regional organisations and donors should ensure that all interventions and activities relating to victims of trafficking respect their physical security, their need for special protections and their right to autonomous and informed decision-making.

⇒ In particular NGOs, SECI and IOM should make themselves aware of the international and national law and procedure on the exercise of rogatory commissions, summoning witnesses to appear abroad, and requests for international legal assistance. These procedures should be strictly adhered to. *The practice of summonsing witnesses and transferring them to other states, outside of the legal obligations and procedures, to appear in court should be halted.*

⇒ International donors should target their funding in ways which enable the state to meet the technical and material demands of victim-witness protection as detailed above.

8. Sources

8.1. National laws

Titles of National Laws	Titles of National Laws in Romanian	Date of adoption	Date of entrance into force and number of Official Gazette	Dates of Adopting the Amendments
Constitution of the Republic of Moldova	Constitutia Republicii Moldova	July 29, 1994	Nr.1 of 12.081994	November 21, 2002
Criminal Code, (old version)	Codul Penal al Republicii Moldova	March 24, 1961	March, 1961, Nr.10, art.41	April 18, 2002
Criminal Code, (new version)	Codul Penal al Republicii Moldova	April 18, 2002	Nr.128/129/1012 of September 13, 2002	July 31, 2003
Criminal Procedure Code	Codul de procedura penala al Republicii Moldova	March 14, 2003	Nr.104-110/447 of 07.06.2003	May 29, 2003
Civil Code	Codul civil al Republicii Moldova, Law Nr.1107–XV	6 June 2002	Nr.82-86/661 of 22.06.2002	May 29, 2003
Law on State Protection of the Victim, of Witnesses and Other Persons who provide Assistance in the Criminal Proceedings	Legea privind protectia de stat a partii vatamate, a martorilor si a altor personae care acorda ajutor in procesul penal	January 28, 1998	Nr.26-27/169 din 26.03.1998	May 29, 2003
Draft Law on State Insurance	Legea privind asigurarea de stat obligatorie a persoanelor supuse masurilor protectiei de stat	draft	-	-
Refugee Law, Nr.1286-XV	Legea cu privire la statutul refugiatilor	July 25, 2002	Nr.126-127/1003 of 12.09.2002	May 29, 2003
Migration Law	Legea cu privire la Migratiune, Nr.1518-XV	December 6, 2002	Nr.1-2/2 of 15.01.2003	-
Code on Administrative Offences	Codul Republicii Moldova cu privire la contraventiile administrative	March 29, 1985	RSSM Monitor, 1985, nr.3, art.47	October 30, 2003
Law on Operative Investigation Measures	Legea privind activitatea operativa de investigatii Nr.45-XIII	April 12, 1994	Nr.5/133 din 30.05.1994	November 7, 2002
Law on Rights of the Child	Legea privind drepturile copilului, Nr.338-XIII	December 15, 1994	Nr.13/127 din 02.03.1995	April 19, 2002
Draft Law on Child in	Proiectul Legii cu	draft	-	-

Difficulty	privire la copilul aflat în dificultate			
Draft Law on Certain Amendments	Proiectul Legii cu privire la adoptarea unor modificari	draft	-	-
Law on Conclusion, Application and Ratification of International Treaties	Legea privind modul de incheiere, aplicare, ratificare si denuntare a tratatelor, conventiilor si acordurilor internationale	August 4, 1992	Nr.8/197 din 30.08.1992	March 18, 1993
Decision of the Government of the Republic of Moldova on the approval of the nominal composition of the National Committee to Combat Trafficking of Human Beings and the National Plan of Action to Combat Trafficking in Human Beings, Nr. 1219	Hotarîrea Guvernului Republicii Moldova cu privire la aprobarea componentei nominale a Comitetului national pentru combaterea traficului de fiinte umane si Planului National de actiuni pentru combaterea traficului de fiinte umane, Nr.1219	November 9, 2001	Nr.136-138/1274 din 15.11.2001	September 9, 2003

8.2. International standards

UNITED NATIONS[212]

Legally binding documents	**Date of ratification (r) or signature (s) by Moldova**
Slavery Convention adopted 25 September 1926, entry into force 9 March 1927.	Not signed
ILO Convention No. 29 concerning Forced Labour, adopted 28 June 1930, entry into force 1 May 1932.	23 March 2000
Universal Declaration of Human Rights (UDHR), UN GA Res 217A (III), 10 Dec 1948[213]	
Convention relating to the Status of Refugees, adopted 28 July 1951, entry into force 22 April 1954.	31 Jan 2002
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted 7 Sept 1956, entry into force 30 April 1957.	Not signed
ILO Convention No. 105 concerning the Abolition of Forced Labour, adopted 25 June 1957, entry into force 17 Jan 1959.	
International Covenant on Civil and Political Rights (ICCPR), adopted UN GA Res 2200A (XXI) 16 Dec 1966, entry into force 23 March 1976	26 April 1993
International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted UN GA Res 2200A (XXI) 16 Dec 1966, entry into force 3 Jan 1976.	26 April 1993
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted UN GA Res 34/180 18 Dec 197, entry into force 3 Sept 1981.	31 July 1994
Convention on the Rights of the Child (CRC), adopted UN GA Res 44/25 20 Nov 1989, entry into force 2 Sept 1990.	25 Feb 1993
ILO Convention No. 182 on the Elimination of the Worst Forms of Child Labour, adopted 17 June 1996, entry into force 19 Nov 2000	14 June 2002
Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography, adopted UN GA Res 54/263 25 May 2000, entry into force 18 January 2002	Signed 8 Feb 2002
Convention against Transnational Organized Crime, adopted UN GA Res A/55/383 2 Nov 2000	14 Dec 2000
Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted UN GA Res A/55/383, 2 Nov 2000 (*will enter into force on 25 Dec 2003*)	14 Dec 2000
Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, adopted UN GA Res A/55/383, 2 November 2000 (*will enter into force on 28 Jan 2003*)	14 Dec 2000

[212] The texts of these documents can be found at http://www.unhchr.ch/html/intlinst.htm#status and http://www.unodc.org/unodc/en/crime_cicp_convention.html#final.

[213] Although the UDHR is a non-binding declaration, it has achieved the status of customary international law and is thus binding upon all UN Member States.

Politically binding documents
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34, 29 Nov 1985
Declaration on the Elimination of Violence Against Women (DEVAW), UN GA Res 48/104, 20 Dec 1993
Other relevant guidelines
UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1, 20 May 2002
UNICEF Guidelines for Protection of the Rights of Children Victims of Trafficking in South Eastern Europe, May 2003

COUNCIL OF EUROPE[214]

Legally binding documents	**Date of ratification (r) or signature (s) by Moldova**
European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No. 5, 4 Nov 1950	12 Sept 1997
European Convention on Extradition, ETS No. 24, 13 Dec 1957	31 Dec 1997
Additional Protocol to the European Convention on Extradition, ETS No.:086, 15 Oct 1975	25 Sept 2001
Second Additional Protocol to the European Convention on Extradition, ETS No. 98, 17 March 1978.	25 Sept 2001
European Convention on the Compensation of Victims of Violent Crimes, ETS No.116, 24 Nov 1983.	Not signed
European Convention on Mutual Assistance in Criminal Matters, ETS No. 030, 20 June 1959.	5 May 1998
First Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS No.99 17th March 1978	25 Sept 2001
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS No.182 , 8th March 2001	Not signed
European Convention on Transfer of Proceedings in Criminal Matters, ETS No.73, 15 May 1972	27 June 2001
Politically binding documents	
Committee of Ministers Recommendation R (85) 11 to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985.	
Committee of Ministers Recommendation R (87) 21 to Member States on Assistance to Victims and the Prevention of Victimisation, 17 Sept 1987.	
Committee of Ministers Recommendation R (97) 13 to Member States concerning Intimidation of Witnesses and the Rights of the Defense, 10 Sept 1997.	
Committee of Ministers Recommendation R (2000) 11 to Member States on action against trafficking in human beings for the purpose of sexual exploitation, 19 May 2000	
Committee of Ministers Recommendation rec (2001) 11 of the Committee of Ministers to Member States concerning guiding principles on the fight against organized crime, 19th September 2001	
Opinion No.188(1995) on the application by Moldova for membership of the Council of Europe adopted by the Assembly 27 June 1995	

[214] The texts of these documents can be found at http://conventions.coe.int/treaty/EN/Menuprincipal.htm and https://wcm.coe.int/rsi/cm/index.jsp.

ORGANISATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE)[215]

Politically binding documents
Vienna Ministerial Council Decision No.1 on enhancing the OSCE's Efforts to Combat Trafficking in Human Beings, November 2000.
Bucharest Ministerial Council Decision No.6, 4 December 2001
Permanent Council Decision No.426 Trafficking in Human Beings, 12 July 2001
Porto Ministerial Declaration on Trafficking in Human Beings, 7 December 2002
OSCE Permanent Council, Decision No. 557, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557/, 24 July 2003
Other relevant guidelines
OSCE Anti-trafficking Guidelines
OSCE ODIHR Reference Guide for Anti-Trafficking Legislative Review with a Particular Focus on South Eastern Europe, 2001
OSCE/ODIHR: National Referral Mechanism. Joining the efforts to protect the rights of trafficked persons. A practical Handbook. Forthcoming publication,

STABILITY PACT FOR SOUTH EASTERN EUROPE TASK FORCE ON TRAFFICKING IN HUMAN BEINGS[216]

Politically binding documents
Stability Pact Anti-Trafficking Declaration of South-Eastern Europe, Palermo 13 December 2000
Stability Pact Statement on Commitments on Information Exchange Mechanisms Concerning Trafficking in Human Beings in South Eastern Europe, Zagreb 27 November 2001
Stability Pact Statement of Commitment on Temporary Resident Permits, Tirana, Albania on 12 December 2002.
Stability Pact Draft Statement on Commitments on Victim/witness protection and trafficking in children, expected to be signed in Sofia 10 December 2003
Other relevant guidelines
Outcome document of the Working Group Meeting an "Victim/Witness Protection", Portoroz, Slovenia, 26-27 March 2003, "Special Protection Measures for Trafficking Victims Acting as Witnesses

[215] The texts of these documents can be found at http://www.osce.org/odihr/democratization/antitrafficking/.
[216] The texts of these documents can be found at http://www.osce.org/attf/.

8.3. References

ABA CEELI, Judicial Reform Index for Moldova, November 2002

Anti-Slavery International, Human traffic, human rights: redefining victim protection, 2002

Holdgaard, Marianne, the Right to Cross-Examine Witnesses - Case Law under the European Convention on Human Rights, in: Nordic Journal of International Law, Vol. 71/2002, 83-106

Holmes, Paul, Best Practice Counter-Trafficking Manual for Law Enforcement Officers in the Republic of Moldova, IOM, 2003

Matscher, Franz, Bemerkungen zur extraterritorialen oder indirekten Wirkung der EMRK, in: *Andreas Donatsch/Marc Forster/Christian Schwarzenegger* (eds) Strafrecht, Strafprozessrecht und Menschenrechte, Festschrift für Stefan Trechsel, 2002, pp 28ff.

Mole, N. & *Harby*, C. The Right to a Fair Trial, Human Rights Handbook, no.3, Council of Europe 2001.

Nowak, Manfred, Introduction to the International Human Rights Regime, Leiden 2003

OSCE ODIHR Reference Guide for Anti-trafficking Legislative Review with particular Emphasis on South Eastern Europe, 2001

PACO Programme of Economic Crime Division, Legal Affairs Department, Council of Europe, Judicial Cooperation Against Corruption and Organised Crime in South-Eastern Europe Cooperation Manual (22/9/03 for update and revision), TP 27 rev & 31, 2003

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, New York 1999

UNICEF/UNHCHR/OSCE ODIHR, Report on Trafficking in Human Beings in South-Eastern Europe, June 2002. Available www.osce.org/odihr/documents/at_traffse.php3

World Health Organization, Ethical and Safety Recommendations for Interviewing Trafficked Women 2003

9. Appendices

9.1. Text of Art 165 and 206 Criminal Code of Moldova

(Adopted April 18, 2002, entry into force June 12, 2003)

Article 165. Trafficking in human beings

1) The recruitment, transportation, transfer, harboring or receipt of a person for the purpose of commercial and non-commercial sexual exploitation, forced labor or services, slavery and slavery-like conditions, using a person in armed conflicts or in criminal activities, removal of organs or tissues for transplantation, by means of:

a) threat of use or use of physical or psychological violence non-dangerous for a person's life and health, including through abduction, confiscation of documents and servitude for the repayment of a debt whose limits are not reasonably defined;
b) deception;
c) abuse of a position of vulnerability or abuse of power, by giving or receiving payments or benefits to achieve the consent of a person having control over another person;

shall be punished with imprisonment between 7 and 15 years.

2) Actions provided by paragraph 1) of the present article committed:

a) repeatedly;
b) against two or more persons;
c) against a pregnant woman;
d) by two or more persons;
e) accompanied by dangerous violence for a person's life, physical or psychological health;
f) by the use of torture, inhuman or degrading treatments to ensure the person's compliance or through rape, physical bondage, use of a weapon or threat of disclosure of confidential information to the person's family and other persons as well as through other means;

shall be punished with imprisonment between 10 and 20 years.

3) Acts penalized in Par. 1 and 2:

a) committed by an organized criminal group or a criminal association;
b) if serious bodily injury or permanent psychological damage to the person or death resulted

shall be punished with imprisonment between 15 and 25 years or life detention.

4) the victim of trafficking in human beings shall be exempted from criminal liability for the offences committed by him/her in connection to this status provided that he/she accepts to cooperate with the law enforcement body on the relevant case.
(paragraph (4) adopted 29 May, 2003, entry into force June 13, 2003).

Article 206. Trafficking in children

The recruitment, transportation, transfer, harboring or receipt of a child, giving or receiving of payments or benefits to achieve the consent of a person having control over a child, for the purpose of:

a) commercial and non-commercial sexual exploitation, exploitation in prostitution and in the pornographic industry;
b) exploitation in forced labor or services;
c) exploitation in slavery and slavery-like conditions, including illegal adoption
d) using a child in armed conflicts;
e) using a child in criminal activity;
f) removal of organs or tissues for transplantation;
g) abandonment abroad;

shall be punished with imprisonment between 10 and 15 years.

2) Same acts, accompanied by:

a) physical and psychological violence against a child;
b) sexual abuse of the child, commercial and non-commercial sexual exploitation;
c) use of torture, inhuman or degrading treatment to assure the child's compliance or rape, physical bondage, use of a weapon or threat of disclosure of confidential information to the child's family and other persons;
d) exploitation in slavery and slavery-like conditions;
e) use of child in armed conflicts;
f) removal of organs or tissues for transplantation

shall be punished with imprisonment between 15 and 20 years.

3) Acts penalized in Par. 1 and 2:

a) committed repeatedly;
b) committed against two or more children;
c) committed within the framework of a criminal organization or criminal association;
d) if serious bodily injury or psychological damage or death of the child resulted,
e) shall be punished with imprisonment between 20 and 25 years or life imprisonment;

4) the victim of trafficking in children shall be exempted from criminal liability for the offences committed by him/her in connection to this status provided that he/she accepts to cooperate with the law enforcement body on the relevant case.
(paragraph (4) adopted 29 May, 2003, date of entry into force June 13, 2003).