



ICMPD

International Centre for
Migration Policy Development

Anti-Trafficking Training Material for Judges and Prosecutors

Handbook

in EU Member States and Accession and Candidate Countries



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Anti-Trafficking Training Material for Judges and Prosecutors

Handbook

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Introduction

This Anti-Trafficking Training for Judges and Prosecutors aims at providing a modern training package for practitioners who may be exposed to human trafficking in the course of their duties.

It was elaborated in the framework of the project "Elaboration and Implementation of Anti-Trafficking Training Modules for Judges and Prosecutors in EU Member States and Accession and Candidate Countries", implemented by the International Centre for Migration Policy Development (ICMPD) in partnership with the Academy of European Law (ERA), the Central Department for Investigation and Penal Action (DCIAP) of Portugal, the Ministry of Justice of Bulgaria, the Ministry of Justice of Poland and the non-governmental organization (NGO) Solwodi (Germany).

The project was based on the premise that well-trained judges and prosecutors are an indispensable part of the response to anti-trafficking and have a pivotal role in countering human trafficking. Yet the responsibilities of criminal justice systems do not lie exclusively in punishing offenders, but above all and primarily in respecting and restoring the human rights and needs of victims of trafficking. Taking the rights of victims seriously encourages them to participate in proceedings, thus enhancing effective criminal investigations.

This training package was developed with the objective of raising awareness about the crime of human trafficking as a serious crime and a violation of human rights, and of enhancing the capability and skills of judges and prosecutors to adequately detect trafficking cases and implement anti-trafficking legislation in line with agreed European and international standards.

The approach proposed was elaborated with the active participation of multi-disciplinary teams from nine European countries, comprising judges, prosecutors, representatives from judicial training institutes, and representatives of NGOs providing assistance services to victims of human trafficking. The multi-disciplinary teams were invited to validate the training material in the course of two seminars and an in-country test run, where the proposed training material was assessed, reviewed and finalised for proposal as a good practice standard for anti-trafficking training for judges and prosecutors within the European Union.

The training package comprises a **Background Reader**, a **Handbook** and a **Curriculum - Training Guide** and is fully in line with the latest international and European standards and policy developments in this field. It takes into consideration the latest trends in terms of forms of exploitation practised by human traffickers as well as good practices adopted by European countries to combat the crime.

A multi-disciplinary approach is the key underlining principle at the basis of this training. In order to be effective, anti-trafficking training has to be developed and carried out by multi-disciplinary teams composed of judges and prosecutors with experience in anti-trafficking cases, law enforcement trainers and trainers with knowledge and experience in the field of assistance to victims (NGOs or state service providers). Whenever possible, the involvement of additional expertise coming from other professional areas, such as labour inspectorates, physicians and immigration services, should also be envisaged.

Apart from its proven effectiveness, multi-disciplinary training is key to fostering multi-agency cooperation at the operational level and to improving the overall efficiency of institutional responses. For this reason, this project, in parallel with other projects implemented by ICMPD, actively promotes the institutionalisation of regular anti-trafficking training in the judicial training institutes of participating countries and beyond.

How to use the Handbook

The present Handbook is part of a training package comprising a Background Reader and a Curriculum - Training Guide. The training package was reviewed and validated by participating countries¹ during a validation seminar at the Academy of European Law in Trier, Germany (23-25 May 2005), and an in-country test run. It was then revised and finalised during a final seminar also held at the Academy of European Law (8-9 February 2006).

The **Background Reader** incorporates most of the topics relating to trafficking of relevance for judges and prosecutors. The document follows a so-called modular approach and is divided into six chapters. Each chapter is introduced by objectives indicating what trainees should have learnt at the end of the chapter. In this way all users, both trainees and trainers, can choose the topic that is most relevant and interesting for their work.

The **Handbook** follows the same structure, reproduces a summary and the key points of the Background Reader. The Handbook, being considerably shorter, could supplement the Background Reader to be handed out to target groups/trainees.

A so-called **Curriculum-Training Guide** accompanies the Background Reader and the Handbook. The Curriculum is designed for trainers. An overview in table form outlines the sequence, content, suggested teaching/learning activities, time frame and reference material needed.

The Background Reader and the Handbook have the following structure:

- Chapter 1** describes the phenomenon of trafficking in human beings, including the trafficking process, international definitions of trafficking, the difference between trafficking and smuggling, the root causes of trafficking, the different forms of exploitation and manifestations of trafficking, and gives an idea of the global extent of trafficking.
- Chapter 2** provides the most basic background on traumatic events and their impact upon affected individuals, especially with regard to victims of trafficking.
- Chapter 3** describes the international instruments that can be used to investigate, prosecute and adjudicate trafficking in human beings. Furthermore, specific national anti-trafficking laws or provisions that criminalize trafficking in the respective penal codes are outlined for each country.
- Chapter 4** describes the core aim of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. It outlines the comprehensive approach to fighting trafficking, which should entail at the least the following four main components: identification; residence permit/ reflection period; victim support and redress/access to justice..
- Chapter 5** describes the criminal proceedings and in this context the rights of victims that must be respected throughout.
- Chapter 6** is structured according to the relevant instruments for international co-operation to be used by the judiciary in the fight against trafficking in human beings, with an emphasis on co-operation within the European Union. The emphasis is on judicial co-operation in criminal matters. However, since police co-operation cannot be completely independent from judicial co-operation, instruments of police co-operation are also included in this chapter.

At the end of the Background Reader there is a comprehensive Reference Material. It is meant as a selection of reading material and resources for those who would like to find out more about certain aspects of the subject matter.

Furthermore, information containing an overview of the legislative framework on trafficking in human beings and a list of key contact persons (e.g. service providers, national members of Eurojust, etc.) in the countries participating in the project is available in the annexes to the Background Reader.

¹ Participating countries in the EU AGIS Project "Elaboration and Implementation of Anti-Trafficking Training Modules for Judges and Prosecutors in EU Member States and Accession and Candidate Countries" were Austria, Belgium, Bulgaria, Estonia, Germany, Italy, Poland and Portugal.






Note on the contents of the training package

The present training package targets practising judges and prosecutors in EU Member States and Accession and Candidate countries. The problem of trafficking in human beings as a crime and the measures used to combat it cover a vast area. Because of the diversity of legislation, procedures, investigative and prosecutorial practices in the regions concerned, the subject matter is on many occasions limited to broad principles and general points of best practice.

While the sequence, content and methodology were tested and validated by a number of national teams, trainers and national teams are encouraged to adapt the materials provided to their own circumstances. Situations obviously vary from country to country, hence the need to adapt the content, exercises, cases and examples.

Icons

Icons have been introduced to help users to:

-  to make references to other sections of the training material
-  to stress the importance of the subject
-  to refer to other sources that should be consulted/background reading
-  to refer to case studies
-  to refer to law

List of Abbreviations

CCEM	French Committee against Modern Slavery
Cf.	See, refer to
CoE	Council of Europe
DESNOS	disorders of extreme stress not otherwise specified
EC	European Commission
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EHRC	European Convention on Human Rights and Fundamental Freedoms (European Human Rights Convention)
ERA	Europäische Rechtsakademie (Academy of European Law)
EU	European Union
FD	Framework Decision
GRETA	Group of Experts against Trafficking in Human Beings
ICMPD	International Centre for Migration Policy Development
ILO	International Labour Organization
IO	international organisation
IOM	International Organization for Migration
LEFÖ/IBF	Beratung, Bildung und Begleitung für Migrantinnen/Interventionsstelle für Betroffene von Frauenhandel (Counselling, Education and Support for Migrant Women/Intervention Centre for Migrant Women Affected by Trafficking)
MLA	mutual legal assistance in criminal matters
MoU	memorandum of understanding
NGO	non-governmental organisation
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
PJCC	police and judicial co-operation in criminal matters
PTSD	post-traumatic stress syndrome
TOC	transnational organised crime
UN	United Nations

UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UNHCHR	Office of the United Nations High Commissioner for Human Rights
UNODC	United Nations Office on Drugs and Crime

Glossary of Terms

Trafficking in human beings	<p>According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime (2000), "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" (article 3 (a)).</p> <p>"The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking persons' even if this does not involve any of the means set forth in subparagraph (a) of this article" (article 3 (c)).</p> <p>"Child" shall mean any person less than eighteen years of age". (article 3 (d)).</p>
Smuggling	<p>According to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime (2000), " 'smuggling of migrants' shall mean 'the procurement to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident' " (article 3 (a)).</p>
Victim of crime	<p>According to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), "victims" means "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power" (para. 1).</p> <p>"A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" (para. 2).</p>
Forced labour	<p>According to the ILO Forced Labour Convention No. 29 (1930), the term "forced or compulsory labour" shall mean "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" (article 2.1).</p>

Slavery

According to article 1 of the UN Slavery Convention (1926), "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".

According to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, no. 226 (1956), institutions and practices, such as debt bondage, serfdom, forced marriage, exploitation of children, should be abolished, whether or not covered by the definition of slavery contained in article 1 of the Slavery Convention (1926).

Debt bondage

According to article 1(a) of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956), "the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined".

Please note that for reasons of simplification, the term "victim" is used throughout the manual regardless of whether the person concerned would normally be more accurately referred to as the "presumed victim". The same applies to the term "offender", which is used indiscriminately also for "presumed offenders".

1

Trafficking in Human Beings – Description of a Phenomenon

1. Trafficking in Human Beings - Description of a Phenomenon

1.1 Abstract - Learning Objectives

The crime of trafficking in human beings is a prime example of 21st century globalisation and undoubtedly a major concern all over Europe. This chapter explains the differences between smuggling and trafficking, outlines the root causes behind trafficking in human beings and describes the trafficking process and forms of exploitation. The chapter also provides additional information on crimes related to and consequences of trafficking, as well as information on the extent of the crime.

At the end of this section the trainee will:

- Understand the trafficking process
- Know the international definition of trafficking
- Be able to distinguish between trafficking in persons and smuggling of migrants
- Understand the root causes behind human trafficking
- Be familiar with different forms of exploitation and manifestations of trafficking
- Gain an idea of the global extent of trafficking and the difficulties of obtaining accurate statistics on the crime

1.2 Introduction of the Phenomenon

Due to a growing migratory pressure towards the EU and the adoption of restrictive migration policies, an illegal market for the transnational people transfer has developed. The facilitation of a journey towards the West, and the possibility of settling in a destination country are paid at a high price, even if it includes the necessity to undergo forms of subjection or abuses similar to slavery. Organised criminal networks are especially able to provide various services aimed at shifting thousands of people to their new destinations. Not only have criminal networks specialised in sexual exploitation of women but also in more complex forms of forced labour exploitation of adults and children. Victims of trafficking are usually unaware of their rights, and are cut off from family and other surrounding. Many are illegal migrants who fear reprisal if they lodge a complaint against their employer.

1.3 Definition of Human Trafficking

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, states, in art. 3, subparagraph (a):

"**Trafficking in persons**' shall mean the **recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force** or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. **Exploitation** shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."



Subparagraph (b) of art. 3 of the Trafficking Protocol states:

"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."

The Protocol provides further in art. 3 subparagraphs (c) and (d):

"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."

"'Child' shall mean any person under eighteen years of age."

1.4 Distinguishing between Trafficking in Human Beings and Smuggling of Migrants

The Trafficking Protocol and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both supplementing the UN Convention against Transnational Organized Crime distinguish between human trafficking and smuggling of migrants.

According to the Migrants Protocol, art. 3 subparagraph (a):

"**Smuggling of migrants**' shall mean the procurement to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."

Whereas according to art. 3 of the Trafficking Protocol:

"**Trafficking in persons**' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons by [improper] means **for the purpose of exploitation**."



The following scheme illustrates the differences between smuggling and trafficking:

Element	Smuggling	Trafficking
Type of crime	Crime against the state - no victim Violation of immigration laws/ public order; the crime of smuggling of itself does not include crimes that may be committed against the smuggled migrants	Crime against the person - victim Violation of human rights; victim of coercion and exploitation that incur duties by the state to treat the individual as a victim of a crime and human rights violation
Why do we fight it?	To protect the sovereignty of the state	To protect the human rights of individuals Obligation of the state to provide adequate protection to its citizens ²

² As regards the positive obligation of the state, see the case of the European Court of Human Rights, Siliadin v. France, application n°. 73316/01, 26/07/2005: "The Court considered that Article 4 [No one shall be held in slavery or servitude] of the Convention enshrined one of the fundamental values of the democratic societies which make up the Council of Europe. It was one of those Convention provisions with regard to which the fact that a State had refrained from infringing the guaranteed rights did not suffice to conclude that it had complied with its obligations; it gave rise to positive obligations on States, consisting in the adoption and effective implementation of criminal-law provisions making the practices set out in Article 4 a punishable offence."

Element	Smuggling	Trafficking
Relationship smuggler/ smuggled migrant and trafficker/victim	Commercial; relationship between smuggler and migrant ends after the illegal border crossing has been completed and the fee paid	Exploitative; the relationship between trafficker and victim continues in order to maximise economic and/or other gains from exploitation
Rationale	Organised movement of persons for profit	Organised recruitment/ transport and (continuous) exploitation of the victim for profit
Illegal border crossing	Illegal border crossing is a defining element	The purpose of exploitation is the defining element, (illegal) border crossing is not an element of the crime
Consent	Migrant's consent to illegal border crossing	Either no consent or initial consent made irrelevant because of the use of force or coercion at any stage of the process

- **Breach of public order - victim of crime**

Smuggling: to facilitate a person's illegal border crossing/entry into a country; not necessarily that the smuggled person is harmed. **Trafficking:** to force or trick etc. a person into recruitment and transport and to exploit her/him; crime against an individual; a trafficked, unlike a smuggled person is automatically a victim.

- **Illegal crossing of international boundaries**

Smuggling of migrants by definition requires the illegal crossing of international borders. Trafficking can occur either within national borders or after a legal border crossing.

- **Nature and duration of the relationship smuggler/migrant and trafficker/victim**

A smuggler and a migrant are partners, albeit disparate, in a commercial operation. The relationship ends after the facilitation of the border crossing; smuggling fees are paid up front or upon arrival. The relation between **a trafficker and a trafficked person** is continuous and exploitative. A **possible initial consent** of a victim is **meaningless if any improper means (see definition) is used**, with the intent to exploit a victim.

- **Profit**

A smuggler gets **smuggling fees**, **a trafficker**- additional profits through **exploitation** of a victim.

Importance of the distinction

Both smuggled migrants and victims of trafficking may be moved from one country to another by organised criminal groups for the purpose of generating illicit profits. Many trafficked persons might have agreed to being smuggled, but later on find themselves deceived or forced into an exploitative situation. It is crucial for criminal justice officials to distinguish trafficking from smuggling, as a trafficked person is automatically a victim of crime, with the right to protection and assistance. Non-identification of victims undermines evidence against the perpetrators and the chance to break up the trafficking cycle, and to confiscate traffickers' assets.



1.5 Root Causes of Human Trafficking

Human trafficking is caused and fuelled by so-called push and pull factors:

- Within **countries of origin**: grinding poverty or at least little prospect for sustained economic opportunities (compared with more affluent countries) provides for a persistent supply of potential victims among the people who are willing to migrate; existence of other social and environmental factors;
- Within **countries of destination**: constantly growing sex markets and demand for cheap migrant labour or other forms of exploitative services cause an increasing need for the services of the victims;
- Concerning **both countries of origin and of destination**: restrictive legal migration and labour opportunities, corruption;

Plus:

- Lack of awareness in countries of destination regarding the problems that migrants face;
- Migrants are often unaware of their rights in the countries of destination and their fear of state authorities makes them vulnerable to abuse and exploitation;
- Possibility for traffickers to generate huge profits by taking advantage of this "supply and demand" situation.

Though root causes of trafficking partly correspond to root causes of migration, **trafficking** must be regarded as a serious **crime** rather than a mere migration issue.

1.5.1 Push Factors

Poverty, lack of opportunities on the labour market, discrimination, difficult and challenging family circumstances, political instability, conflicts, post-conflict situations and political transition, etc.

Gender dimension: legal and social inequality of women and girls; unemployment, underdevelopment and poverty tend to have more effect on women, most legal migration schemes also appear less favourable to women; trafficking for the purpose of sexual exploitation in Europe seems to almost exclusively affect women.

Children: often seen as additional breadwinners, sent by their families to dangerous and exploitative workplaces and to work abroad. Many children from poor(er) countries grow up without parents, who might have lost their life in armed conflicts or as a result of severe disease, or who might have gone abroad for work. These children may have to live with remote relatives that have weaker family ties or in orphanages, which leaves them more vulnerable to being trafficked. Some countries do not even have a register of births, making newborns an easy prey for traffickers.

Men: also at risk due to economic, discriminatory, political and other reasons.

1.5.2 Pull Factors

Attractive living conditions in the destination countries; ever growing demand for exploitative, undeclared labour and services in the destination countries resulting in forced labour and sexual exploitation, forced or arranged marriages, exploitation of small-time criminals, slavery and slavery like practices, etc.; enormous demand for workers in the unskilled and often unregulated sector; great demand for sexually exploitable women needed to fill the needs of a growing sex market.

1.5.3 Restrictive Migration and Labour Regulations

EU Commission recommendation: realistic approach to facilitate legal and fair migration possibilities for third country-nationals needed, considering economic and demographic necessities within the EU.³ Restrictive migration rules leave migrants more vulnerable to trafficking and labour exploitation, providing greater opportunities for traffickers. Until now governments have been reluctant to publicly recognise their dependency on both skilled and unskilled migrant labour.

1.6 Organised Crime⁴

Trafficking is largely controlled by organised crime that makes use of 'supply and demand' situation and generates huge profits. Different criminal groups:

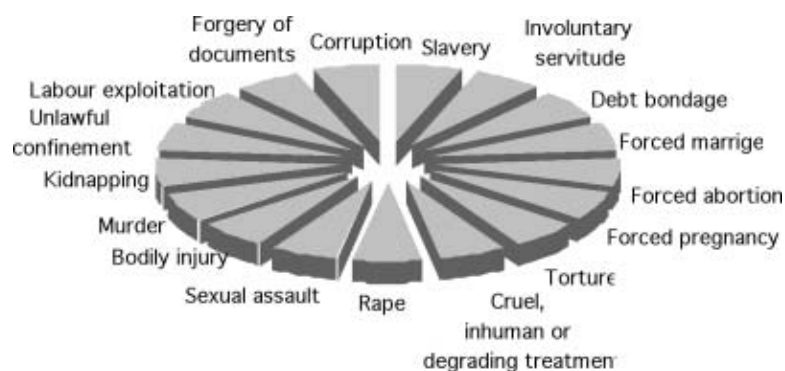
³ European Commission, Report of the Experts Group on Trafficking in Human Beings (Brussels, 22 December 2004).

⁴ Based on ICMPD, Regional Standard for Anti-trafficking Training for Judges and Prosecutors in SEE (Vienna, November 2004).

- **Informal networks (amateurs/low-level)**
- **Large-scale organised criminal networks**
- **Criminal distribution networks**

However, much about the traffickers remains unknown. The presumption that the "typical" trafficker is male is out-dated. Female perpetrators are often former victims. Offenders' nationalities vary; 'antagonised' nationalities and ethnicities can even act in collusion. Irregular private employment and marriage bureaux are also involved in illegal arrangements in the trafficking process.

Crimes Related to Trafficking



Source: United Nations Office on Drugs and Crime

1.7 The Trafficking Process

1.7.1 Recruitment

First phase of the trafficking process-"recruitment". Common recruitment methods include: :

- Recruitment via informal networks of families, friends or acquaintances;
- Advertisements (Internet, newspapers, etc.) offering work or study abroad;
- Agencies offering work, study, marriage or travel abroad;
- False or arranged marriages;
- Purchasing of children from parents;
- Individual recruiters searching bars, cafes, clubs and discotheques for targeted persons and so on.

Criminal methods of recruitment include:

- Coercion through abduction or kidnapping;
- Selling a person, typically a child, to the traffickers by someone having control over him or her, typically the parents or an orphanage;
- Deception by promises of legitimate employment/entry;
- Deception through half-truths;
- Deception about the exploitative, controlled and coercive working conditions.

In the case of trafficking in children, it is not necessarily organised crime that is involved in the recruitment. Very often parents themselves hand over their children to exploiters, although often enough in the belief that they will improve their children's lives.

It frequently occurs that even former victims act as recruiters and at times turn into traffickers themselves.

1.7.2 Transportation

This phase can involve the harbouring and reception of victims at a number of stages in the process, including initial receipt and transfer within their country. Many victims never left their countries before and thus completely depend on the traffickers. Some might leave their home country without an international passport; if they do hold a passport, it is often taken from them and held by the traffickers as a way of securing the compliance of the victim. Often, recruits agree to depend on traffickers for procurement of documents and for transportation, which gives the traffickers a high degree of control during the transit phase.

Regarding child trafficking, it is very common that minors travel with adults who pose as their parents or close relatives.

Many victims of trafficking leave their homes voluntarily in search of a better life. However, the voluntary nature of their travel does not preclude the occurrence of human trafficking, depending on the methods used for the recruitment and the traffickers' real intentions.

Means of transport: trucks, private cars or coaches, long-distance, high-volume carriers such as airlines, shipping-lines and long-distance coach companies.

During the transport phase trafficked victims may not be aware that traffickers have ensnared them. This is a very important point, especially with a view to recognising the limitations of law enforcement's, including border control, ability to identify and intervene in trafficking cases during this phase.

The entry into the final country of destination can basically occur as follows:

- Covert: smuggled entry in vehicles, containers, trains, ferries or on foot;
- Overt: by presentation of stolen or forged documents;
- Overt: by the presentation of bona fide documents that provide visa entitlements to enter the country, e.g. employment, tourist or student visas.

1.7.3 Exploitation


Exploitation includes, 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.

Adults and children are trafficked for manifold exploitative purposes, among which just recently the issue of forced labour exploitation has come to the forefront. However, in times of high unemployment, exploited trafficked labourers are likely to be seen as perpetrators on the local labour market rather than as victims of traffickers.

a) Forced labour or services

● Definition of "forced labour"

The **ILO Convention No. 29** Concerning Forced Labour (1930) - ratified by over 160 States - defines forced or compulsory labour as "**all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily**". Thus forced labour occurs when people are subjected to some form of coercion, either physical or psychological, and which they would not otherwise have agreed to perform under the prevailing conditions.

 **The UN Convention on the Rights of the Child** provides more specifically in its art. 32: "States Parties recognise the right of the child to be protected from economic exploitation and from performing **any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development**". (On **ILO Convention No.182 on the Worst Forms of Child Labour**, see chapter 3.)

● Forms of forced labour

Labour exploitation often occurs within the **agricultural, catering** and **construction** sectors and also in the **textile** industry, where adult and child victims of both genders are coerced into working under ruthless and exploitative conditions. Children and young adults are also forced into **street begging**, recruited and trafficked to earn money for others by begging or selling goods on the street. In some cases, beggars are maimed in order to arouse pity and increase charity. Victims of forced labour may be subjected to sexual abuse as well.

Trafficked victims have to work compulsory overtime without pay or in, further jobs that they have not consented to or to accept very lengthy delays in the payment of wages.

Children and young adults are especially vulnerable to trafficking for exploitation as criminal agents. The "**criminal agency**" traditionally means activities such as pickpocketing and other forms of low-level crime. Cases are known, for example, of Roma children from Bulgaria, who are circulated within Europe and forced to steal considerable amounts of money per day. Boys and young men are also trafficked to act as criminal oper-

atives who carry out minor functions associated with the trafficking crime itself, acting as "look-outs" or "runners". Additionally, boys and young men are appointed as **street runners** for drug trafficking.

Trafficking in human beings is also not unknown in the **sports** sector.⁵ Adolescents in particular may be prepared to leave their countries of origin in order to become rich and famous and depend on "helpers" in order to achieve those dreams. Sports is often a very profitable business for many clubs, federations, players, private companies and individuals. The "right" athlete - one that is cheap to "buy" and profitable to "sell" or "lease" - is recruited by means of deception, fraud, exploitation of the young person's position of vulnerability and then treated like a commodity.

Domestic servitude is a special case of forced labour. Servitude in itself represents a broader concept, covering conditions of work or service that the individual cannot change or escape from - implying that one person dominates another person. In European countries there are also informal markets in the housekeeping and cleaning sector for trafficked women from Africa, Asia, Latin America and Eastern Europe. Those women and girls have to work under exploitative and degrading conditions as domestic workers, as cleaning ladies, nursemaids or au pairs in private homes.

Domestic workers are kept without residence and work permits and thus in total dependence. Thousands of domestic servants in Europe are subjected to long working hours with no holidays or decent living accommodation: many of them have to work between 15 and 18 hours a day, without ever being allowed a day off, they do not have their own rooms and often get only their "employers" leftovers to eat. Among the perpetrators are many diplomats who enjoy immunity from prosecution.

The work of domestic servants is accompanied by abuse, humiliation and confinement. Possibly existing work contracts are ignored completely. As domestic workers work in the privacy of the home, the abuse is usually invisible and difficult to tackle.

So called "mail-order brides" can also end up in domestic servitude. The international mail-order bride industry has been proliferating in recent years, using the Internet as a high-powered engine to reach an unprecedented number of clients. International marriage or mail-order bride agencies capitalise on increasing disparities between women in economically distressed countries and men in the wealthiest nations of the world.

b) Slavery or practices similar to slavery (and servitude)

Art. 1 of the **1926 Slavery Convention** specifies the **term slavery** as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. The Convention distinguishes between forced labour and slavery - "it is necessary to prevent forced labour from developing into conditions analogous to slavery".

Four slavery-like conditions are defined in art. 1 of the Supplementary Convention on the Abolition of Slavery, the Slave-Trade, and Institutions and Practices similar to Slavery:

- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
- (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
- (c) Any institution or practice whereby:
 - (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

⁵ Taken from: "Sports and trafficking in human beings", presentation by Prof. Dr. T.Vander Beken, at the 12th EASM European Sport Management Congress Innovation in Co-operation" - Sport & Law, held in Ghent, Belgium, in September 2004.)

- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
 - (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

Slavery and similar practices may include illegal adoption in some circumstances.

c) Sexual exploitation

Victims, who are trafficked into the sex industry, are forced to prostitute themselves in 'red-light areas', in hostess bars, escort agencies or in apartments being used as brothels. They are obliged to work extremely long hours and to provide unprotected and dangerous sexual services to many clients every day. In many cases they cannot speak the native language and communicate with their clients by the use of a written 'menu' of sexual services. The women are frequently moved from city to city and country to country, so as to disorientate them and to prevent them from developing friendships and becoming familiar with their surroundings. This prevents both police detection and intelligence-gathering.

- **Special Case: Marriages**

Trafficking in human beings in the context of marriage is often a **combination of several forms of exploitation**: sexual exploitation, forced labour and domestic servitude.

d) Removal of organs

Trafficking in organs according to the Trafficking Protocol is a form of human trafficking. Also here, traffickers take advantage of the demand - supply situation.

e) Sexual and labour exploitation of children

There is little information about the mechanisms of trafficking in young children between 1 and 5 or 6 years old.⁶ For children's psycho-physical vulnerability the deceit, the trick and the fraud assume a wider dimension. Once they arrive at their destination, trafficked children are usually exploited in one of the following ways: **sexual exploitation**, begging, black labour or fictitious illegal adoption. The sexual exploitation of girls is most alarming, because of the conditions of violence, abuse and harsh exploitation of victims. Girls are fully subjected to their traffickers and exploiters and are "trained" by violence and abuse. Just as women are trained what to do if they are arrested by the police, so are young girls told to deny their (under) age, making it very difficult to identify minors. After the training phase, the victims have to become prostitutes and to work on the street or in private houses. There are also cases in which this activity is conducted in nightclubs, beauty or massage centres, where the girls work as dancers, escorts or masseuses. Child prostitution has gradually moved to closed places, making it difficult for the police or for social workers to discover victims.

Victims without documents, under age and without any possibility to negotiate with their exploiters are frequently moved from one place to another with the aim to avoid any contact with the police or with social workers.⁷

1.7.4 Methods of Controlling the Victims

Debt bondage,⁸ removal of identification/travel documents - threats of deportation, linguistic and social isolation, use of physical and psychological violence and intimidation, use and threat of reprisals against the victims' families.

1.7.5 The Issue of Consent

Some trafficked persons might have agreed to being smuggled, work for little salary, do clandestine work,

⁶ Mechtild (ECPAT Germany e.V.), "The specific needs of trafficked children during criminal proceedings", presentation at the validation seminar held in Trier, Germany, on 23-25 May 2005.

⁷ Francesco Carchedi, *Piccoli Schiavi senza Frontiere: Traffico dei Minori Stranieri in Italia* (Rome, Ediesse, 2004).

⁸ Victims are required to repay the exaggerated costs allegedly incurred for bringing a person into a destination country. Exorbitant and cumulative interest rates are often attached which are then supplemented by the requirement to pay vastly inflated prices for accommodation and transportation costs, all of which adds to an ever-mounting debt bond that becomes effectively impossible to pay off.

work as a prostitute, etc. In line with the Trafficking Protocol the consent of a victim to the intended exploitation is irrelevant where improper means (coercion, deception, etc.) have been used. The interpretive notes to the Trafficking Protocol add that there should be no restrictions on the right of the defendants to a full defence and the presumption of innocence, but consent requires the knowledge of all relevant facts and conditions, which will hardly be the case. Slavery, slavery-like practices and forced labour rule out any consent.

1.8 Consequences and Risks of Trafficking in Human Beings

Consequences and Risks for the Victim

Violation of human rights, shame, stigmatisation, trauma, complicity, secondary victimisation.

Consequences and Risks for the State and Society

Destabilisation of existing labour markets, growth and diversification of organised crime, growth of money-laundering, growth of corruption, undermining governmental action and the rule of law, growing number of socially excluded persons, growth of social problems that are weakening the society.

Consequences and Risks for the Traffickers

"Low risk high profit" crime: risk of detection, arrest and punishment remains low.

Consequences and Risks for the "End User"

Little to no consequences for having exploited a trafficked human being.

1.9 The Scale of Trafficking in Human Beings

The UN estimates that around 4 million persons are trafficked each year in the world,⁹ representing around 6.7 per cent of the 27 million slaves estimated by Bales¹⁰ as involved in forced labour. The Government of the United States has estimated for the year 2004 that between 600,000 to 800,000 persons in the world are trafficked each year with purposes of exploitation; among these, women represent around 80 per cent of the total and are in the majority of cases involved in the sexual market,¹¹ while the remaining 20 per cent - consisting of men - are involved in forced working activities, among them around 6 per cent of the total are male minors (i.e. between 36,000 and 48,000 per year).¹²

According to ILO research, a total of 2.45 million people are trafficked annually for purposes of forced labour, considering also prostitution as a form of forced labour.¹³ Based on estimates done by the EU, women in the EU forced into prostitution under strong repression number around 500,000, of whom fewer than half - around 200,000 - come from Eastern European countries.¹⁴ In particular these countries are most involved in trafficking, followed by Africans, especially Nigerian women.¹⁵

However, the actual scope of human trafficking is very difficult to determine, as reliable statistical figures are lacking. The clandestine nature of the crime, the confusion of trafficking in human beings with smuggling of migrants, the frequent lack of proper legal and criminal justice responses, the difficulty of access to the victims and other factors result in the lack of reliable data on the crime and widely varying estimates.

As regards to the financial extent of the crime, the US Department of State refers to profits of 9.5 billion US Dollars annually¹⁶ that are generated through trafficking.

⁹ United Nations (2000), Report of the Special Rapporteur on Violence Against Women, submitted to the Commission on Human Rights at its fifty-sixth session (E/CN.4/2000/68), para. 72.

¹⁰ Kevin Bales estimates that in the world there are at present around 27 million people living under slavery conditions, of whom around 20 million are in bonded labour due to indebtedness of the worker towards the employer. For this reason "the worker surrenders in slavery as warranty for a received or inherited loan granted to a relative". See Kevin Bales, *I Nuovi Schiavi: la Merce Umana nell'Economia Globale* (Milan, Feltrinelli, 2000), pp.14-15. (Originally published as *Disposable People: New Slavery in the Global Economy* (University of California Press, 1999).)

¹¹ U.S. Government, *Assessment of U.S. Government Activities to Combat Trafficking in Persons* (June 2004), p. 9.

¹² These data, as it can be inferred, are inconsistent, both because they are provided by different organisations and because the territory to which they refer is too broad. Their usefulness lies in the fact that they give an approximate idea of the dimension of the phenomenon, almost as a "political fact" signaling the recognition of the importance of the phenomenon itself.

¹³ Beate Andrees, "Human trafficking for forced labour exploitation", presentation at the validation seminar, held in Trier, Germany, (23-25 May 2005).

¹⁴ Francois Londe, "La tratta delle donne dell'est in Europa occidentale, *Le Monde diplomatique - Il Manifesto*, no. 11, vol. VIII (November 2001), pp. 18-19.

¹⁵ Estimates on forced labour have not yet been calculated, because this aspect of the new slavery has not yet been included in the political-institutional agenda of the European Union.

¹⁶ See www.state.gov/documents/organization/47255.pdf.

2

The Trauma and the Needs of Victims

2 The Trauma and the Needs of Victims¹⁷

2.1 Abstract - Learning Objectives

Prosecutors and judges need to understand how and why victims who suffer from severe or long-lasting trauma may, until they receive adequate treatment, deny that they have been a victim of trafficking and have trouble reconstructing or remembering what happened to them, and may not be able to testify against the traffickers.

At the end of this section the participant of the training will:

- Understand the impact of traumatisation in order to promote understanding of the need for assistance
- Know the symptoms of post-traumatic stress disorder
- Be able to comprehend the range of victims' reactions, such as hostility, apathy, defending the offender, etc.
- Know why it takes time to stabilise traumatised victims
- Be able to balance law enforcement interests with promoting the human rights of the victims

2.2 Definition of "Trauma"

Trauma is the experience of a vital discrepancy between a threatening situation and the personal ability to cope with it, accompanied by feelings of helplessness and defenceless abandonment, resulting in a lasting crisis in the understanding of oneself and others.¹⁸ Traumatic events can include natural disasters, serious accidents, physical or sexual assault, rape, robbery, mugging, witnessed violence, torture, imprisonment, threats of harm to self or loved ones, domestic violence and physical abuse, psychological force and violence, perilous illnesses and treatments and other circumstances that can cause overwhelming feelings of threat, danger to life and so on.



2.3 The Impact of Violence and Long-term Exploitation¹⁹

The experience of violence impairs the victim's basic concept of the "other", especially with regard to trust and confidence.²⁰ Victims therefore withdraw from social relations, which adds to the process of isolation and "disempowerment".

Trafficked victims are coerced into a long-term exploitative relationship with their traffickers, that is, they suffer systematic violence or abuse over a period of time. Victims thus have time to develop survival strategies and to adapt their behaviour in order to reduce the risk of further incidences of abuse.

Survival strategies in prolonged and severe interpersonal abuse include "avoidance", "identification with the offender" and "numbing".

2.4 Reactions to Traumatic Events

Adjustment disorder (symptoms can be depressed mood, anxiety, disturbance of emotions and conduct), post-traumatic stress syndrome (PTSD), complex post-traumatic stress syndrome, dissociation, depression, anxiety, addiction.

¹⁷ This chapter is based largely on the presentation by Heike Gerhardt (Psychiatrist), at the validation seminar held in Trier, Germany (23-25 May 2005).
¹⁸ Definition by Prof. Fischer, see Gottfried Fischer und Peter Riedesser, Lehrbuch der Psychotraumatologie. 1st ed. (Munich, Ernst Reinhard, UTB, 1998).
¹⁹ Sub-chapter 2.3 is based on ICMPD, Regional Standard for Anti-Trafficking Training for Judges and Prosecutors in SEE, 2.2.1.
²⁰ G. Fischer, M. Becker-Fischer and C. DÜchting, Neue Wege in der Opferhilfe. Ergebnisse und Verfahrensvorschläge aus dem Kölner Opferhilfe Modell (Köln, 1998), p.42.

● PTSD

Posttraumatic Stress Syndrome: The Diagnostic and Statistical Manual of Mental Disorders²¹ requires the traumatic event to have taken place at least **four weeks ago before the diagnosis of PTSD is legitimate.**²²

Epidemiology of PTSD:²³ The prevalence of PTSD depends on the nature of the trauma: 50 per cent prevalence in the case of rape; 25 per cent prevalence in the case of violent criminal assault; 20 per cent prevalence in the case of victims of war; 15 per cent prevalence in victims of traffic accidents. The lifetime prevalence of PTSD in the general population is between 1 and 7 per cent.



Criteria for the diagnosis of PTSD:²⁴

- (a) The person has been exposed to a traumatic event in which both of the following have been present: the person experienced, witnessed or was confronted with an event or events that involved actual or threatened death or serious injury or a threat to the physical integrity of self or others. The person's response involved intense fear, helplessness or horror. In the case of children, this may be expressed instead by disorganised or agitated behaviour;
- (b) The traumatic event is persistently re-experienced in one (or more) of the following ways:
 - Recurrent and intrusive distressing recollections of the event, including images, thoughts or perceptions. In young children, repetitive play may occur in which themes or aspects of the trauma are expressed;
 - Recurrent distressing dreams of the event. In children, there may be frightening dreams without recognisable content;
 - Acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations and dissociative flashback episodes, including those which occur upon awakening or when intoxicated). In young children, trauma-specific re-enactment may occur;
 - Intense psychological distress at exposure to internal or external cues that symbolise or resemble an aspect of the traumatic event;
 - Physiological reactivity on exposure to internal or external cues that symbolise or resemble an aspect of the traumatic event;
- (c) Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
 - Efforts to avoid thoughts, feelings or conversations associated with the trauma; efforts to avoid activities, places or people that arouse recollections of the trauma; inability to recall an important aspect of the trauma; markedly diminished interest or participation in significant activities; feelings of detachment or estrangement from others; restricted range of affection (e.g. unable to have loving feelings);
 - Sense of a foreshortened future (e.g. does not expect to have a career, marriage, children or a normal life span);
- (d) Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
 - Difficulty falling or staying asleep;
 - Irritability or outbursts of anger;
 - Difficulty concentrating;
 - Hyper-vigilance;
 - Exaggerated startle response;
- (e) Duration of the disturbance (symptoms in criteria (b), (c) and (d)) is more than one month;
- (f) The disturbance causes clinically significant distress or impairment in social, occupational or other important areas of functioning.

²¹ 4th ed., 1994, published by the American Psychiatric Association.

²² This further corroborates the view that victims should be given a temporary residency permit, see chapters 4.2.3 and 5.11.

²³ Flatten, Gast, Hofmann, Liebermann, Reddemann, Siol, Wöller, Posttraumatische Belastungsstörung- Leitlinie und Quellentext, eds. Rudolf and Eich, 2nd ed. (Stuttgart, Schattauer, 2004), p.4.

²⁴ Frances, First and Pincus, DSM- IV Guidebook, 4th ed., (Washington, American Psychiatric Press), pp. 260-261.

Specify if:

- Acute: if the duration of symptoms is less than 3 months;
- Chronic: if the duration of symptoms is 3 months or more;
- With delayed onset: if the onset of symptoms is at least 6 months after the stressor.

Complex PTSD (or disorders of extreme stress not otherwise specified (DESNOS))

Definition:

Complex PTSD is a syndrome associated with histories of prolonged and severe interpersonal abuse, also called '**disorders of extreme stress not otherwise specified**' (DESNOS), according to the American Psychiatric Association.


The diagnosis of DESNOS covers **six different problems**:²⁵ alterations in the regulation of affective impulses, alterations in attention and consciousness, alterations in self-perception, alterations in relationship to others, somatisation and alterations in systems of meaning.

2.5 Dissociation

In the **traumatic situation**, the elementary senses of the victim are not able to process the experience as an entirety and a reality of her/his life. The experience cannot be transferred into a structured piece of memory. Thus the victim of a traumatic event cannot deliberately recall what has happened.

The so-called effect of "dissociation" means a fragmentation of

- Behaviour
 - Affect
 - Sensation and
 - Knowledge
- BASK Model of Dissociation**²⁶

During questioning, this can be one of the reasons why a victim may at times only recall one or perhaps two of the components of a normally integrated piece of memory (for example, telling about the traumatic event without showing emotions). At this moment the victim may not have access to the emotional part (affect) of the trauma, but to facts and details (knowledge). 

One form of dissociation is "**depersonalisation**": the victim feels as if she/he was another person or as if she/he would leave her/his body and watch what happened from a distance.²⁷ This is why victims of severe violence may appear to be astonishingly indifferent or apathetic.

Another form is "**derealisation**", which means that an alteration in the perception or experience of the external world so that it seems strange or unreal.²⁸

2.6 The Need to Stabilise the Victims in the Context of PTSD

According to evidence-based guidelines, stabilisation has the highest and first priority,²⁹ which has to include:

- Establishing a physically and emotionally safe environment for the victim;
- Organising a psycho-social support system;
- Contact with a therapist specialised in the treatment of PTSD;
- Providing information for the victim to understand the nature of trauma and post-traumatic mental responses and how to deal with them.

²⁵ Bessel A. van der Kolk, "The assessment and treatment of complex PTSD", Rachel Yehuda, Traumatic Stress (American Psychiatric Press, 2001).

²⁶ Braun, "Psychotherapy of the survivor of incest with a dissociative disorder", Psychiatric Clinic North America, vol. 12, No. 2, pp. 307-324.

²⁷ Bessel A. van der Kolk, Onno van der Hart and Charles R. Marmar, "Dissoziation und Informations-verarbeitung beim posttraumatischen Belastungssyndrom", Bessel A. van der Kolk and others, Traumatic Stress: Grundlagen und Behandlungsansätze (Paderborn, 2000), pp. 250-252.

²⁸ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th ed., (Washington D.C., 1994).

²⁹ Flatten, Gast, Hofmann, Liebermann, Reddemann, Siol, op. cit., p.6.

Stabilisation:

- Shelter for the victims of trafficking;
- Victim witness protection;
- Counselling centres for trafficked persons;
- Good co-ordination of support for the victims; collaboration at different levels (NGO, police, prosecutors, government and others).

As regards criminal proceedings and questioning, the need for stabilisation entails:

- Law enforcement and judicial authorities need to be aware of possible responses related to the traumatic experience;
- Need for psychosocial support during questioning (potential triggers);
- Need for psychosocial support when confronted with the perpetrator during the trial (potential trigger);
- Explanation of expected procedures during the trial will enhance the victims' sense of control.

These fundamental principals of stabilisation and treatment also apply to victims who suffer from complex PTSD.

2.7 Interrogation of Traumatized Victims

(a) Avoid secondary victimization

- Law enforcement officers as well as judges and prosecutors should acknowledge the impact of trauma on trafficked victims and recognise that symptoms such as lack of co-operation or overt hostility, an impaired ability to recall events in detail, errors or subsequent corrections in accounts or fabrications concerning specific events are likely to occur as a consequence of the trauma, rather than resulting from a deliberate decision not to co-operate or to give a false statement.
- **An early interrogation of the victim will in many cases overstrain the victim's capacity to remember and to cope with the overwhelming memories.** It is likely to be only after the traumatised victim has received specialist assistance and a degree of autonomy over a period of time that she/he will be in a position to make fully informed decisions or to provide a detailed history of what she/he has gone through.
- Victims do not understand themselves and why they cannot remember and might be tempted to make up the details that are missing in their recollection in order to "fill in the holes" in their memory. Yet, at a later stage of the proceedings, when the victim remembers more, as she/he may be able to cope better with the memory, it will be difficult for her/him to change her/his account. Under normal circumstances we remember events that have just occurred much better than experiences long past - the opposite is true for victims of violence.³⁰ Prosecutors and judges must recognise that every attempt to force the victim to remember will not contribute to the investigation, but rather create an imminent danger of re-traumatisation.

(b) Interrogation of the victim should start only after she/he has been stabilised.

- Law enforcement authorities that are corrupt or not sufficiently committed to their tasks and therefore fail to respect the rights of victims to security and justice can lead to the most severe forms of re-traumatisation. Victims may have difficulties in acknowledging that an offence has occurred, where the state, which is supposed to be protective, in fact mistreats victims. Fighting corruption and fostering the commitment of law enforcement authorities is an important element of anti-trafficking strategies.

³⁰ G. Fischer, M. Becker-Fischer and C. DÜchting, op. cit., p.62.

2.8 Traumatized Children³¹

A child with PTSD may also re-experience the traumatic event by:

- Having frequent memories of the event or, in young children, play in which some or all of the trauma is repeated over and over;
- Having upsetting and frightening dreams;
- Acting or feeling as if the experience is happening again;
- Developing repeated physical or emotional symptoms when she/he is reminded of the event.

Children with PTSD may also show the following symptoms:

- Worry about dying at an early age;
- Losing interest in activities;
- Having physical symptoms such as headaches and stomach aches;
- Showing more sudden and extreme emotional reactions;
- Having problems falling or staying asleep;
- Showing irritability or angry outbursts;
- Having problems concentrating;
- Acting younger than their age (for example, clingy or whiny behaviour, thumb sucking);
- Showing increased alertness to the environment;
- Repeating behaviour that reminds them of the trauma.

³¹ World Health Organisation, Regional Office for South-East Asia, List of Guidelines for Health Emergency, Nr. 70, 10/99.

3

The Normative Framework

3 The Normative Framework

3.1 Abstract - Learning Objectives

All EU Member States and candidate and accession countries are to have specific anti-trafficking laws or provisions that criminalise trafficking in their penal codes. Lack of specific anti-trafficking legislation, however, cannot justify lack of action. Until specific domestic legislation on trafficking is passed, existing UN treaties and EU legislation provisions as well as national provisions concerning slavery and work under slavery-like conditions, forced labour exploitation, violation of a person's liberty, facilitation of illegal border crossing, violation of public order, the prohibition of the formation of criminal association, the exploitation of prostitution and other provisions can be used to investigate, prosecute and adjudicate trafficking in human beings.

Judges and prosecutors can avail themselves of international standards as a means of interpreting national law, even if these standards are not directly applicable or legally binding. And though the EU Framework Decision is "closer" to EU and candidate countries, the UN Trafficking Protocol contains more comprehensive provisions.

At the end of this section the trainee will:

- Be familiar with relevant international and European legal instruments with regard to human trafficking
- Know which international/European instruments can be applied directly, having the same status as national law
- Be able to interpret domestic legislation with the help of international instruments
- Know which domestic laws exist on trafficking
- Be able to compare national legislation with the existing international/European framework and identify the main gaps between the two

3.2 United Nations Treaties and other International Instruments

3.2.1 Convention against Transnational Organized Crime and its Supplementing Trafficking Protocol³²

The Trafficking Protocol is **primarily a law enforcement instrument**, but **also** requires states that ratify it to take steps to **protect and assist trafficked persons**.

Relationship of the UN Trafficking Protocol and Convention³³

The Protocol supplements the Convention and to become a party to the Protocol, states must be a party to the Convention. The Protocol and the Convention form one large instrument, with general powers against transnational organised crime assigned in the Convention and specific powers/provisions dealing with specific problems concerning human trafficking in the Protocol. States Parties to the Convention are required to establish in their domestic laws four criminal offences: participation in an organised criminal group, money-laundering, corruption and obstruction of justice. The Convention also deals with co-operation through extradition, mutual legal assistance, transfer of proceedings and joint investigations and with victim and witness protection and the protection of legal markets from infiltration by organised criminal groups.

Trafficking Protocol, art. 3: definition of trafficking

Trafficking in persons means 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 vulnerability³⁴ or of the giving or receiving of payments or bene-

³² The Convention was adopted by the UN General Assembly in its resolution 55/25 of 15 November 2000 and entered into force on 29 September 2003; the Protocol was adopted together with the Convention and entered into force on 25 December 2003. See www.unodc.org/unodc/en/crime_cicp_convention.html for more information.

³³ Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, New York, 2004).

³⁴ The abuse of a position of vulnerability refers to any situation in which a person has no real and acceptable alternative but to submit to abuse.

fits 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 prostitution³⁵ of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. [Subparagraph (a)]

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. [Subparagraph (b)]

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; [Subparagraph (b) and (c)]

Child shall mean any person under eighteen years of age. [Subparagraph (d)]

The Trafficking Protocol lays down rules on the following issues:

- Mandatory criminalisation of trafficking in human beings, art. 5;
- Protection of and assistance to victims, arts. 6 - 8;
- Prevention of trafficking in human beings, art. 9;
- Co-operation measures, arts. 9 - 11.



3.2.2 Other Treaties

- The 1948 Universal Declaration of Human Rights acknowledges the equality, liberty, security and freedom, also from slavery or servitude, of all human beings.
- **The International Covenant on Civil and Political Rights (1966) forbids slavery and slave-like conditions.**
- **The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)** deals with the slave trade and the so-called "white" traffic, as well as with traffic in women and children, and determines the obligation to punish traffickers, even if the person being exploited has consented to the trafficking.
- **The Slavery Convention (1926) and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956)** criminalise the act of "enslaving another person" and requires states to co-operate in combating slavery.
- **The Convention on the Elimination of all Forms of Discrimination against Women states in art. 6:** "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".
- **The Convention on the Rights of the Child (1989) and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000) .**
- **The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.**

3.2.3. International Labour Organization³⁶

- **ILO Convention No. 29 concerning Forced or Compulsory Labour (1930)** defines the term **forced or compulsory labour** in art. 2 as "all work or service which is exacted from any person under the menace of any penalty, and for which the said person has not offered himself voluntarily".
- **ILO Convention No. 105 concerning the Abolition of Forced Labour (1957)**
- **ILO Convention No. 138 concerning the Minimum Age for Admission to Employment (1973)**

³⁵ Dealing with prostitution and related matters outside of the scope of trafficking in persons is specifically reserved for the laws and policies of individual State Parties (see the interpretative notes (A/55/383/Add.1, para. 64)).

³⁶ Information in this subchapter is based largely on International Labour Organization/Office, "Human Trafficking and Forced Labour Exploitation - Guidance for Legislation and Law Enforcement", 2005; "Trafficking for Forced Labour: How to Monitor the Recruitment of Migrant Workers", 2004; and Forced Labour, Child Labour, and Human Trafficking in Europe: An ILO Perspective, Technical paper for the EU/IOM STOP European Conference on Preventing and Combating Trafficking in Human Beings, 18-20 September 2002, Brussels.

- **ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination on the Worst Forms of Child Labour (1999)**
- **ILO Convention No. 143 (1975) on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers**
- **ILO Recommendation No.190 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)**

3.2.4 The Statute of the International Criminal Court

Art. 7, paragraph 1, of the Statute includes the crime of **enslavement**, which is defined in paragraph 2 (c) of this article as “the exercise of any or all of the powers attaching to the right of ownership over a person”, **including** “the exercise of such power in the course of **trafficking in persons, in particular women and children**”. The Statute of the International Criminal Court adopts the concept of slavery to the present situation by explicitly mentioning trafficking in the same provision as slavery and forced labour. In the same context, the crimes of “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other forms of sexual violence of comparable gravity” are mentioned.

3.2.5 Council of Europe

European Convention on Human Rights and Fundamental Freedoms

Art. 4 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) prohibits slavery and servitude, forced or compulsory labour, stating:

- 1) No one shall be held in slavery or servitude.
- 2) No one shall be required to perform forced or compulsory labour.

The European Court of Human Rights stated, under art. 8 ECHR, as regards to the right for private life, that the rights in the Convention create obligations for states including the adoption of measures to secure respect for private life even in the sphere of relations between individuals themselves.³⁷ This is very important concerning trafficking, which constitutes a violation typically committed by private individuals, even though in some cases public officials are involved.

Council of Europe Convention on Action against Trafficking in Human Beings³⁸

Adopted on 3 May 2005 by the Committee of Ministers.³⁹ The main added values:

- Recognition of trafficking in human beings as a **violation of human rights**;
 - A special focus on **assistance to victims** and on **protection of their human rights**;
- Comprehensive scope of application:
- **All forms of trafficking**: national/transnational linked/non-linked with organised crime;
 - **All trafficked persons**: the Convention applies to all persons who are victims of trafficking whether they are women, children or men;
 - Setting up a comprehensive **legal framework** for the **protection of victims and witnesses** with specific and binding measures to be adopted;
 - Setting up an efficient and independent **monitoring mechanism**;
 - A **Council of Europe Convention** benefits from the more limited and uniform context of the Council of Europe, contains more precise provisions and goes beyond the minimum standards agreed upon in other international instruments.

Chapter I of the Convention deals with its purposes and scope, the principle of non-discrimination and definitions; **chapter II** deals with prevention, co-operation and other measures; **chapter III** deals with measures to protect and promote the rights of victims, guaranteeing gender equality; **chapter IV** deals with substantive criminal law; **chapter V** deals with investigation, prosecution and procedural law; **chapter VI** deals with international co-operation and co-operation with civil society; **chapter VII** describes the monitoring mechanism; and lastly **chapters VIII, IX and X** deal with the relationship between the Convention and other international

³⁷ Case X and Y v. The Netherlands (1985), Series A, para. 23.

³⁸ Ministers' Deputies, CM Documents, CM (2005) 32 Addendum 1 final, 3 May 2005, 925 Meeting, 3 and 4 May 2005, Human Rights, Council of Europe Convention on action against trafficking in human beings: www.coe.int/T/E/human_rights/trafficking/PDF_CM_2005_32_add1final_E.pdf.

³⁹ www.coe.int/T/E/Human_Rights/Trafficking, accessed in May 2005.



instruments, amendments to the Convention and final clauses. The **preamble** states that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being.

Recommendations

- Recommendation of the Committee of Ministers No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure
- Recommendation No. R (2000) 11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation
- Recommendation No. R (2001) 16 of the Committee of Ministers to Member States on protection of children against sexual exploitation
- Recommendation 1545 (2002) of the Parliamentary Assembly of the Council of Europe on a campaign against trafficking in women
- Recommendation R (2002) 5 on the Protection of Women against Violence
- Recommendation R (97) 13 concerning Intimidation of Witnesses and the Rights of the Defence

3.2.6 Organization for Security and Co-operation in Europe

In December 2003, at the Maastricht Ministerial Council the 55 OSCE Foreign Ministers endorsed the Action Plan on Combating Trafficking in Human Beings, which intends to provide the participating States with a comprehensive toolkit to help them implement their commitments to reduce this horrendous crime.

The Action Plan covers a number of commitments and recommendations for national action: the establishment of national referral mechanisms, appointing national co-ordinators and national rapporteurs, the elaboration of national anti-trafficking plans of action, making trafficking a criminal offence, providing protection and establishment of shelter for victims, and establishing special police anti-trafficking units to fight trafficking in both countries of origin and destination and the like.

3.3 European Union Regulations and Policy Documents

3.3.1 European Union Legislation - Introduction⁴⁰

EU law is composed of three different - but interdependent - types of legislation:

- **Primary legislation**
- **Secondary legislation, based on the Treaties:**
 - **Regulations: directly applicable and binding;**
 - **Directives: to be implemented** within a certain time; bind Member States to the objectives to be achieved while leaving the national authorities the choice of form and means to be used;
 - **Decisions:** binding in all their aspects for those to whom they are addressed (Member States, but also enterprises or individuals); **do not require national implementing legislation;**
 - **Recommendations and opinions: not binding.**
- **Case-law**

3.3.2 The Three Pillars⁴¹

- **First pillar** – (Treaty establishing European Communities) - economic, social and environmental policies.
- **Second pillar** - common foreign and security policy.
- **Third pillar** - Police and Judicial Co-operation in Criminal Matters (PJCC) - combating trafficking in human beings falls mainly within the third pillar.

Legal instruments in the third pillar:

- **Common Positions:** defining the approach of the Union to a particular matter;
- **Framework Decisions:** binding as to the result to be achieved but leaving to the national authorities the choice of form and methods; no direct effect;
- **Decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States;** binding, no direct effect;
- **Conventions:** for adoption of Member States.

⁴⁰ Eur-Lex: http://europa.eu.int/eur-lex/en/about/pap/process_and_players2.html, accessed in May 2005.

⁴¹ Eur-Lex: http://europa.eu.int/eur-lex/en/about/abc/abc_12.html, accessed in May 2005.

3.3.3 Charter of Fundamental Rights of the European Union

According to art. 5 of the Charter of Fundamental Rights of the European Union:

- No one shall be held in slavery or servitude;
- No one shall be required to perform forced or compulsory labour;
- Trafficking in human beings is prohibited.

3.3.4 Framework Decision of the Council of the European Union on Combating Trafficking in Human Beings

EU Member States were obliged to incorporate the provisions of the decision into their national legislation by 1 August 2004. Pursuant to the “Pupino Case”, all national courts of the EU Member States are required to take into consideration all the rules of national law and interpret them, as far as possible, in the light of the wording and the purpose of the Framework Decision.⁴²

The definition of trafficking in human beings, according to art. 1:

“1. Each Member State shall take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:

- (a) use is made of coercion, force or threat, including abduction, or
 - (b) use is made of deceit or fraud, or
 - (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
 - (d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.
2. The consent of a victim of trafficking in human beings to the exploitation, intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 have been used.
3. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable trafficking offence even if none of the means set forth in paragraph 1 have been used.
4. For the purpose of this Framework Decision, ‘child’ shall mean any person below 18 years of age.”



The framework decision is **legally binding** for EU Member States, but does **not** entail **direct effect**.

Articles 4 and 5 of the decision concern the liability of and sanctions on legal persons. Art. 6 stipulates that each Member State shall take the necessary measures to establish its jurisdiction over an offence referred to in articles 1 and 2 where: the offence is committed in whole or in part within its territory; or the offender is one of its nationals; or the offence is committed for the benefit of a legal person established in the territory of that Member State.

The protection of and assistance to victims is dealt with less comprehensively. The Framework Decision only requires “adequate legal protection and standing in judicial proceedings”. Also the framework decision stipulates the **criminalisation of human trafficking** (arts. 1 and 2). Furthermore the decision requires that **investigations and prosecution shall not depend upon victim's report or accusation** (art. 7, para. 1).

3.3.5 Directive 2004/81/EC of the Council of the European Union on the Residence Permit for Victims of Trafficking

First stage: granting victims a **reflection period**, allowing them to recover and escape the influence of the perpetrators and to consider whether they want to co-operate with the competent authorities; the duration is to be determined by national law, during this period the victim may not be deported. During the reflection period the victim has to be granted basic means of subsistence, medical treatment, safety and protection, and

⁴² <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0105:EN:HTML>, Criminal proceedings against Maria Pupino - Reference for a preliminary ruling: Tribunale di Firenze - Italy. - Police and judicial co-operation in criminal matters - Articles 34 EU and 35 EU - Framework Decision 2001/220/JHA - Standing of victims in criminal proceedings - Protection of vulnerable persons - Hearing of minors as witnesses - Effects of a framework decision - Case C-105/03.

where applicable under national law, also free legal aid.

Second stage: issuance of a **residence permit, if** the **victim** has shown a **clear intention to co-operate** with competent authorities; to be valid for at least six months and to be renewable; providing access to education and the labour market.

- Criticism: Instrumentalisation of victims; residence permit depends on the duration of the criminal proceedings; victims who are afraid of returning home may not want to file a complaint; nationals of other EU Member States cannot refer to this directive.
- States should preferably exceed the system of the directive and issue residence permits on humanitarian grounds, independent of their willingness to testify. Under certain conditions, victims should be granted a permanent residence permit.

3.3.6 Framework Decision 2001/220/JHA of the Council of the European Union on the Standing of Victims in Criminal Proceedings⁴³

It aims to improve access to justice for victims of crime in the EU and to protect their rights; it also provides rules on the prevention of victimisation, assistance to victims, standing of victims in criminal procedures and on compensation issues.

On 16 June 2005, the European Court of Justice decided that a Council Framework Decision concerning police and judicial co-operation in criminal matters must be respected in a national criminal court case,⁴⁴ as framework decisions are "binding" with regard to the **interpretation** of national law. In the respective case the Court went on to say that, "the Italian court is required to interpret (national law) as far as possible in a way that conforms to the wording and purpose of the framework decision". This meant allowing vulnerable victims to be protected when giving testimony.⁴⁵

3.4 National Legislation⁴⁶

By now all EU countries, including the new Member States, should have legislation on the crime of trafficking in human beings.⁴⁷ Even the absence of specific anti-trafficking legislation cannot justify lack of action. Until specific domestic legislation on trafficking is passed, existing penal provisions in different contexts can be used to investigate, prosecute and adjudicate trafficking in human beings:

- **Trafficking in the context of the crime of slavery⁴⁸**
- **Trafficking in the context of exploitation of labour⁴⁹**
- **Trafficking in the context of the crime of exploitation of prostitution⁵⁰**
- **Trafficking in the context of the crime of facilitating illegal border crossing**
- **Trafficking in the context of the crime of criminal association**
- **Illegal conduct of the victim - exemption of punishment**
- **Other crimes linked to trafficking**

⁴³ http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_082/l_08220010322en00010004.pdf.

⁴⁴ [Khttp://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0105:EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0105:EN:HTML): Criminal proceedings against Maria Pupino - Reference for a preliminary ruling: Tribunale di Firenze - Italy. - Police and judicial co-operation in criminal matters - Articles 34 EU and 35 EU - Framework Decision 2001/220/JHA - Standing of victims in criminal proceedings - Protection of vulnerable persons - Hearing of minors as witnesses - Effects of a framework decision - Case C-105/03.

⁴⁵ <http://www.euractiv.com/Article?tcaturi=tcu:29-141124-16&type=News>.

⁴⁶ This section will contain relevant national legislation on trafficking of persons or comparable offences such as slavery-related definitions. The national team will elaborate it.

⁴⁷ See COUNCIL FRAMEWORK DECISION of 19 July 2002 on combating trafficking in human beings (2002/629/JHA): Article 10: "Implementation" 1. Member States shall take the necessary measures to comply with this Framework Decision before 1 August 2004.

⁴⁸ ILO, Belgrade, 23 March 2004, Human Trafficking: The Forced Labour Dimensions, Roger Plant, Head, Special Action Programme to Combat Forced Labour.

⁴⁹ Elbid.

⁵⁰ ICMPD, Regional Standard for Anti Trafficking Training for Judges and Prosecutors in SEE (Vienna, 2004).

4

The Comprehensive Approach towards Combating Trafficking in Human Beings

4 The Comprehensive Approach towards Combating Trafficking in Human Beings

4.1 Abstract - Learning Objectives

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

The recovery, restoration, and rehabilitation of victims and the demonstration that justice is done are important elements of an overall anti-trafficking strategy. This requires an adequate legal and organisational framework. A comprehensive approach to fighting trafficking should entail at the least the four main components:

- Identification of victims
- Residence permit / reflection period
- Victim support
- Redress / access to justice

At the end of this section the trainee will:

- Be familiar with the elements of a comprehensive strategy to fight human trafficking
- Be familiar with international standards on human rights and human trafficking

4.2 Human Rights-based and Victims-centred Approach

Experience shows that countries that have protection schemes have a high success rate as regards the investigation of trafficking and the conviction of the traffickers.

4.2.1 Identification

The identification of victims is the basic requirement for the identification and prosecution of trafficking cases and the assistance and protection of victims. **Behind a case of smuggling a case of trafficking can be hidden.**



The identification of victims requires a **multi-agency approach**. The co-operation of all persons who come into contact with trafficked persons should be enlisted, such as **border guards, police and immigration officers, judges and prosecutors, doctors, medical and social workers, housing, agricultural and labour inspectors, staff of different NGOs**. Training of these persons is indispensable.

4.2.2 Reflection Period

Period of time in which presumed victims are referred for services and counselling, with no obligation to make an immediate statement to police on their status, allowing them to make informed decisions.⁵¹ A trafficked person having confidence in a state is even more likely to co-operate with authorities in the prosecution of traffickers.

4.2.3 Residence Status

Access to legal (temporary or permanent) residence status for trafficked victims serves to protect their rights and serves the interest of law enforcement agencies engaged in effective criminal prosecution of the traffickers. It should not be a discretionary decision to grant a residence permit. Victims should be reasonably sure that they could obtain a residence status, if certain legal requirements are met.

A person's residence permit could also be based on grounds of asylum, in line with the Geneva Convention on Refugees.⁵² The UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking

⁵¹ OSCE, National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook (OSCE - ODIHR, Warsaw 2004): http://www.osce.org/documents/odihr/2004/05/2903_en.pdf.

⁵² UNHCR: Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (HCR/GIP/06/07, 7 April 2006), www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=443b626b2.

suggest that states should effectively apply the principle of non-refoulement⁵³ and ensure that there are procedures in place for asylum claims from trafficked persons and smuggled asylum seekers.

4.2.4 The Victim's Exemption from Liability

There should be a special clause of exemption from punishment for the victims of trafficking in national legislation. As a matter of legislative drafting, setting precise legal requirements of the non-punishment clause is important.

4.2.5 Victims' Support Activities

The protection of victims, their right to physical, psychological and social recovery is of highest priority. Art. 6 of the Trafficking Protocol stipulates that age, gender and special needs of victims of trafficking in persons, including appropriate housing, education and care have to be taken into consideration. This includes in particular:

- Safe housing under conditions that meet the needs of traumatised victims;
- Legal counselling and information, in particular regarding their legal status, in a language that the victims can understand;
- Medical and psychological assistance;
- Material assistance;
- Employment, educational and training opportunities .

Experience has shown that victims, who are provided with shelter and who are protected and supported to some extent, are more willing to co-operate with authorities. States have to ensure the existence of **victim support organisations, health care, inclusion of the victim's family, compensation funds**. Confiscated proceeds of trafficking should be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund that could be part of a more general compensation system for victims of the crime.⁵⁴

Children⁵⁵

Art. 6, para. 4, of the Trafficking Protocol provides that each state party shall take into account the special needs of child victims. If the age of a victim is uncertain and there are reasons to believe that the victim is a child, states parties may treat the victim as a child in accordance with the Convention on the Rights of the Child⁵⁶ until his or her age is verified. In addition, a state party may also wish to consider:

- **Appointment of a guardian;**
- Special recruitment practices and training programmes concerning those responsible for care and protection of the child victims;
- Avoiding, during investigation, prosecution and trial hearings, where possible, direct contact between a child victim and a suspected offender;
- Special protection measures;
- Appropriate shelters for children victims taking into account their age and special needs.
- Returning child victims only if doing so is in their best interest and child is received safely in the country of origin; if the safe return is not possible or not in the child's best interest, the social welfare authorities should make adequate long-term care arrangements to ensure the effective protection of the child and the safeguarding of her/his human rights.

4.2.6 Prevention of Secondary Victimization

Secondary victimisation refers to the victimisation caused by responses of institutions and individuals to the victim.⁵⁷ Law enforcement authorities that are corrupt or not sufficiently committed to their tasks and that fail to respect the rights of victims to security and justice, can lead to the most severe forms of re-traumatisation and make the victims not recognise that they have been victimised.

4.3 Co-operation and Co-ordination Mechanisms⁵⁸

Co-operation and co-ordination structures between the main state and non-state actors involved in the fight against trafficking should consist of multidisciplinary and cross-sector participation and ensure an enduring institutional framework.

⁵⁵ The following information is based on the Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (United Nations, New York, 2004).

⁵⁶ General Assembly resolution 44/24.

⁵⁷ United Nations Office for Drug Control and Crime Prevention, Handbook on Justice for Victims (United Nations, New York, 1999).

⁵⁸ ICMPTD, Regional Best Practice Guidelines for the Development and Implementation of a Comprehensive National Anti-trafficking Response (Vienna, 2005).

4.3.1 Task Force

Main tasks: to develop methods for organising, monitoring and evaluating the implementation of the action plan against trafficking; to recommend to the government how to improve the action plan, the legal framework, and organisational measures; to co-operate with NGOs.

4.3.2 Independent Body - National Rapporteur⁵⁹

Main tasks: to **collect and analyse trafficking data**; to monitor the effects of the national action plan; should be able to report to government/ parliament and to make proposals on the development of national policies and action plans.

4.3.3 National Referral Mechanisms⁶⁰

A national referral mechanism (NRM) is a co-operative framework through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons and co-ordinate their efforts in a strategic partnership with civil society.

4.3.4 The Role of NGOs – Co-operation Concepts

A victim-oriented approach needs the development and implementation of co-operation concepts between police, prosecutors and specialised NGOs who counsel and support victims of trafficking. Comprehensive concepts include provision for the support and protection of victim-witnesses before, during and after trafficking trials.

- **Memorandum of understanding⁶¹**

Agreement between law enforcement agencies and IOs/NGOs to formalise a continuing co-operative relationship.

4.4 Prevention

Policies, programmes, and other measures taken should include co-operation with NGOs and other relevant organisations, as well as bilateral or multilateral co-operation - the prevention of trafficking requires multidisciplinary activities.

4.4.1 Addressing Root Causes, Including Demand

Prevention strategies should include, inter alia, reducing the vulnerability of potential victims through social and economic development; discouraging the demand for the services of trafficked persons; gender mainstreaming; public education; border controls; preventing the corruption of public officials.

4.4.2 Increase of Legal Migration Possibilities

Restrictive legal migration policies contribute to trafficking, in that the lack of admission of economic migrants presumably increases the number of third country citizens entering the EU illegally and without any guarantee of having a declared job.

4.4.3 Awareness-Raising Activities

Education and awareness-raising campaigns can be targeted at the general population, but also at different risk groups. Such campaigns should be non-patronizing and non-discriminatory, without re-enforcing gender discrimination and hindering the integration of returnees. Consular officials could also support awareness-raising campaigns.

4.5 Return, Reintegration and Social Inclusion

Without support - financial and psychosocial - returning to the home country often means returning to the same vicious circle; indeed, in some cases, trafficked women have been deported straight into the arms of the same traffickers. It can also happen however, that victims turn into traffickers themselves.

Return and reintegration programmes aim at supporting the trafficked person upon her/his return to and at the person's social inclusion in a home country.

⁵⁹ Report of the Experts Group on Trafficking in Human Beings, op. cit.

⁶⁰ OSCE, National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook, op. cit.

⁶¹ See Regional Standard for Anti-Trafficking Police Training in SEE (ICMPD, 2004).

5

Criminal Proceedings and Victim's Rights

5 Criminal Proceedings and Victims' Rights

5.1 Abstract – Learning Objectives

The judiciary has the power to put the victims - and human rights - centred approach into practice before and during criminal proceedings.

Acknowledging that different countries have different national legislation, the following chapter sets out to offer some good practice so as to promote a harmonised approach and to provide guidelines for the interpretation in national legislation.

In general, **good judicial practice** should include:

- Co -operation between the police, prosecutors' offices and NGOs. The trafficked person must be immediately **sheltered and assisted**, as soon as she/he decides to report, or to escape from traffickers, regardless of her/his readiness to testify. Similarly, the person must be sheltered and assisted as soon as the competent authorities assess that there are grounds to think that the person has been trafficked.
- The potential victim must have an **adequate period of time to recover** and take informed decisions about the participation in criminal proceedings. During this period, since the person could have been seriously traumatised, normally she/he should not be interviewed. Even after the expiration of the recovery and reflection period, any decision concerning the time for her/him to make a statement should be made in close co-operation between the police, the prosecutor and the NGO that shelters and assists the victim.
- During criminal proceedings, judicial authorities must make every effort to **avoid secondary victimisation**, that is, victimisation caused by the procedure itself.
- First of all, this implies that judicial authorities must treat victims with **compassion, fairness, recognition** of their essential role in criminal proceedings and **respect** for their **dignity**.
- Judicial authorities must ensure the **security** of the trafficked person before and during criminal proceedings. Protection is normally connected with sheltering the person. In addition, police protection must be ensured during criminal proceedings and even before if the person is in danger.
- All legal means must be used, in conformity with the criminal code of procedure, to protect the victim from further negative consequences, taking into account that she/he has been subjected to violence, abuse, and she/he can have suffered a trauma.
- As far as possible, prosecutors and judges should **avoid** further repetition of the victim's examination, and use in the trial a testimony obtained at an earlier stage of the procedure.
- During examination, **visual contact** with the **defendant** must be avoided, for instance through the use of audio-video facilities.
- During the pre-trial and the pre-trial phase the judge must play an active role in order to protect the victim's dignity. In particular, in legal systems that provide for cross examination, the judge must establish very clear and strict rules, **neither allowing questions concerning private and sexual life, victim's consent to prostitution or trafficking, nor questions merely aimed at discrediting the witness**.
- In addition, the testimony of a child victim should be obtained with the assistance of a **psychologist**, and through **audio-video facilities**.
- The **trafficked person** must **not** be **arrested**, or **prosecuted**, or sentenced, for crimes connected with the trafficking process, such as use of false documents or illegal border crossing.

At the end of this section the trainee will:

- Have learned how to efficiently investigate, prosecute and try trafficking cases, at the same time protecting the human rights of the victims.
- Understand the concept of the right to a fair trial, both for the defendant and the victim, and how to ensure the balance between the defendant's and the victim's rights.
- Understand the need for co-operation between judicial authorities and NGOs

5.2 Victim's Right to Effective Criminal Proceedings

The demonstration that justice is done is important for the recovery of the victim. It is owed to the victim that criminal justice officers make all possible efforts to effectively prosecute and sentence traffickers. The right to effective criminal proceedings has to be granted without regard to the immigration status of the victim.

Interpreting arts. 2, 3, 13 EHRC, the European Human Rights Convention (EHRC) held a right to adequate criminal proceedings for victims of crime, or their relatives in case of murder: **Aksoy v. Turkey - 18.12.1996 (under Art. 3), Kaya v. Turkey - 19.2.98.**



- **Balance of victims' and offenders' rights**⁶²

Various procedural rights, such as the right to confidentiality and protection, must be balanced against the rights of the defendant, such as the right to confront the accuser and to prepare her/his defence.

This training manual focuses on the rights of the victims of trafficking, proceeding on the assumption that the addressees have expertise regarding the offenders' rights in criminal cases. In a number of cases the European Court of Human Rights has ruled that the right to an adversarial trial is not absolute:

Doorson v. The Netherlands - 26.3.96 (under art. 6 EHRC) / Birutis and others v. Lithuania - 28.3.02 (under art. 6 EHRC) / S.N. v. Sweden - 2.7.02 (under art. 6 EHRC)

- **Prosecutors should, inter alia:** ⁶³

- Arrange for the information, translation and notification services;
- Explain the criminal proceedings in understandable terms to the victim;
- Co-ordinate, where applicable in the jurisdiction, the inclusion of victim impact information, such as written statements, allocutions or radio or video statements in court proceedings with the judiciary; and
- Provide a safe waiting area for victims and witnesses in the courthouse that separates them visually and audibly from the suspects.

- **Judges should, inter alia:** ⁶⁴

- Respect and value the victim;
- Provide the victim with information;
- Encourage and arrange for special services and support for the victim;
- Order restitution for the victim;
- Ensure the victim's participation in all stages of the judicial proceeding;
- Arrange for/allow for person's accompanying the victim;
- Use their judicial authority to protect the victim;
- Ensure adequate protection for particularly vulnerable victims such as children, disabled persons, victims of sexual abuse and so on; and
- Create separate facilities for victims and witnesses.

5.3 The Pre-Trial Phase

5.3.1 Identification of Victims

The first stage of investigation and support activities is the identification of victims. Trafficking has to be distinguished from smuggling: very often, trafficked persons are treated as illegal migrants, are arrested and deported, though they should be treated as victims. Competent authorities have to assess whether there are any indications of trafficking. The deportation process should be suspended, so as to identify a possible trafficking situation.

Most difficult to note is also the element of coercion. Coercion exists because women and other trafficked workers do not have the real capacity to avoid debt-bondage situations, to know and stand up for their rights, or to seek legal and other remedies without an ever-present threat of denunciation and deportation.

⁶² United Nations Office for Drug Control and Crime Prevention (now UNODC), Handbook on Justice for Victims (United Nations, New York, 1999).

⁶³ Ibid.

⁶⁴ Ibid.

Problems:

- Victims are usually totally unaware of a possible victim status;
- **Exploitation, violence and discrimination** are “normal” to some migrants;
- **Victims are threatened** by their perpetrators and fear to be deported;
- Victims are **afraid of state authorities**;
- Victims might be **traumatised**;
- Children are even more **alienated** than adults, feel inhibitions;
- Most difficult to note is also the element of coercion.

Solutions:

- To take up time to foster confidence and trust;
- List of indicators.

The indicators shown below do not form an exclusive list.

● **Forced Labour**

The failure to pay a worker the minimum wage, combined with other indicators, can be an evidence of forced labour. Thus, officials should focus on situations where work or service is extracted from workers by physical or sexual violence, through their confinement in the workplace, by debt bondage, by retention of passports or identity documents, or by threat of denunciation to the authorities. Indicators:

- The worker is prevented from leaving the workplace freely.
- Personal documents/passport are retained arbitrarily by the employer.
- The worker is or has been exposed to physical or sexual violence.
- She/he is kept under control through threats of denunciation to the authorities (frequently applied to illegal migrants or irregular workers).
- The person feels linked to the employer by debt bondage (often for an undefined amount).
- Threats of use of violence against her/his family have been made.
- Compensation provided for services is below minimum wage.
- Working hours are disproportionate with respect to compensation.

● **Domestic Servitude**

Indicators are often similar or identical to the ones of forced labour. A personal relationship between the worker and the employer, which frequently implies cohabitation, is characteristic of domestic servitude. Indicators:

- Cohabitation;
- Lack of respect of working hours and of daily/weekly breaks on a regular basis;
- Perpetration of offensive acts or manifestation of racist attitudes against the domestic worker;
- She/he is exposed to physical or sexual abuse/violence;
- She/he is prevented from leaving the place of residence/work freely;
- No negotiation of work conditions is allowed;
- Remuneration or salary is not paid or is insufficient for the domestic worker to conduct an autonomous life; and
- The person feels linked to the employer by debt bondage - for instance to pay back travel expenses - often for an undefined amount.

● **Sexual Exploitation**

ECHR case concerning domestic servitude: Siliadin v. France - 26.7.05 (art. 4)

Indicators of sexual exploitation depend on whether prostitution is performed on the streets or in brothels in those countries where prostitution is legalised. Indicators used by the **Essen Police (Germany)**, among others, are as follows:

- Special mechanical locks on entrances and exits;
- Technical electronic monitoring;
- Guards at the entrances and exits;
- Protected and barred windows;



- Women without passports or identity cards or visas;
- Women whose personal data cannot be verified;
- Women speak only their native language;
- Women seem to be very anxious or in a helpless situation;
- Women are not able to explain how they entered the country;
- Women do not have their earnings at their free disposal;
- The price of sexual services is considerably lower than market prices;
- Women have to earn a minimum amount of money per day;
- Women are limited in their freedom of movement; and
- Women have a relatively high debt.

Indicators used by the **police in the Netherlands**:

- Travel, visa etc. was arranged by third party (8 points);
- Having no identity document at their disposal (10 points);
- Possesses forged or fake passports (10 points);
- Illegal residency or illegal working (10 points);
- Fear (10 points);
- Having no independent access to income (10 points);
- Disproportionately high part of income is handed over (6 points);
- Medical assistance is withheld (10 points);
- Debt bondage towards a third party (10 points);
- Under obligation to earn a minimum amount per day (10 points);
- Take-over price was paid (10 points);
- Subject has no freedom of movement (10 points);
- Blackmail or threats of family (10 points);
- Working under all circumstance and working disproportionate long hours (6 points);
- Coerced to perform (certain) sexual acts (10 points);
- Threatened with the actual use of violence, showing physical signs of abuse (10 points);
- Working on alternate locations (2 points);
- Indication smuggling single women (6 points);
- Combination: non-EU, marriage or residency with partner and shortly found working in brothel (6 points);
- Relation to persons with relevant antecedents or location associated with trafficking in human beings (6 points);
- Not having one's own accommodation (6 points);
- Sleeping in the premises (6 points);
- Unfamiliarity with working address (4 points);
- Originates from source countries (4 points);
- Marks that indicate dependency upon exploiters (tattoos, voodoo accessories)(10 points); tips from a reliable source (value depending upon kind of information) (- points);
- Servile attitude towards third party (10 points); and
- Social isolation by third party (10 points).

(Indication of trafficking for the police – The Netherlands, 14 October 2004, Source: IKPS – Annex 1)

Indicators concerning trafficking for the purpose of sexual exploitation on the streets, assessed according to the **Italian experience**:

- Women are subjected to sexual or other forms of violence.
- Passports are in the possession of exploiters.
- Women are controlled very often, normally through cellular phones.
- Exploiters are informed about the entire amount of women's earnings. Women get punished if they try to hide some parts of the earnings.
- Exploiters get 50 per cent or more of the earnings. In addition, women have to pay for their maintenance.
- Women cannot decide anything about their working conditions, working hours, etc.
- Women cannot refuse a client, or an unprotected sexual intercourse.
- They have asked the clients a fixed price decided by exploiters.
- They have to perform a certain minimum number of sexual intercourses, irrespective of their health condition.

- Women cannot freely decide to return to their country. Sometimes they are threatened if they want to leave.
- Temporary returns are arranged by traffickers, under their strict control.
- The exploiters use the criminal fame of the group to terrorize victims.
- Women's relatives are threatened in the country of origin.
- Women do not know the language of the country of destination, and are socially isolated.
- Women and their family are in a situation of extreme poverty.
- They have to give back a remarkable amount of money, which is supposed to have been spent by traffickers for the travel and/or illegal entry. Normally the amount is not precisely fixed, or the exploiters pretend that the debt increases.
- Traffickers use sub-cultural approaches or religious rites to reinforce the persuasion concerning the restitution of the debt.

In all cases of trafficking, concerning **both forced labour and sexual exploitation**, some **common indicators** of trafficking can be found:

- The documents of the person are in the hands of the employer;
- Contact with people other than employer or other people subjected to the same exploitation is forbidden or severely restricted;
- Threats are used, aimed at compelling the person not to leave and keep on performing the same work or services;
- There is a situation of isolation, no knowledge of the language, separation from friends and relatives;
- The exploiter is connected with organised crime.

● **Child Victims**

The identification of child victims requires pro-active identification measures, where the age of the victim is uncertain and there are reasons to believe that the victim is a child, the presumption shall be that the victim is a child:⁶⁵

- Unaccompanied children take up (illegal) work and other activities and deliver their proceeds to somebody else.
- Unaccompanied children leave shelters provided for them by the state or NGOs.
- Children are found with false identification documents.
- Children are found to be living at working places.
- Children work long working hours.
- (Unaccompanied) Children do not attend school regularly.

● **The role of prosecutors**

Especially in legal systems where the prosecutor is head of investigations from an early stage of the proceedings, it is advisable that the **prosecutor** is involved in **interviewing a person**, when there are grounds to believe that she/he has been trafficked. A procedure involving the prosecutor before the deportation of an illegal migrant should be adopted as a **general intervention** in cases where the person can be considered as a potential victim of trafficking.

5.3.2 Balanced Mix of Proactive and Reactive Investigation

According to concrete judicial practice, a successful prosecution must be based on a combination of proactive and reactive investigation.⁶⁶ The use of only one of these approaches can be detrimental for investigation and prosecution.⁶⁷

The use of **proactive** investigation is needed especially when trafficked persons are not ready to report or testify, and it is necessary to make an assessment based on indications deriving from searches, raids in brothels,

⁶⁵ UNICEF Guidelines for the Protection of Children Victims of Trafficking in Southeast Europe, op. cit., see annex.

⁶⁶ Proactive investigation is intelligence-led investigation, while reactive investigation depends more on evidence provided by the victim.

⁶⁷ Even the participation of child victims and witnesses in the criminal justice process may be necessary for effective prosecutions, especially where the child is the only witness: see the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime adopted by the Commission on Crime Prevention and Criminal Justice at its 14th session, held in Vienna from 23 to 27 May 2005 (<http://daccessdds.un.org/doc/UNDOC/GEN/V05/852/65/PDF/V0585265.pdf?OpenElement>).

labour inspections, or other means of investigation: phone tapping, electronic surveillance, undercover operations, especially in brothels and in cases of forced labour. All standard investigative techniques should be used, especially those tested in organised crime cases.⁶⁸

Also the testimony of a victim is essential, as the trafficked person can tell or confirm important details of the trafficking process, such as the use of threats, the abuse of a situation of extreme poverty, the existence of debt bondage, travel, the role played by criminal groups, etc.

However, the victim would be overburdened and normally more endangered if her/his testimony is the only source of evidence. The testimony of a victim may be stronger if the prosecution can prove facts also through other means. The victim's testimony may be the basis for further investigation aimed at identifying the whole trafficking network.

5.4 The Victim's Right to Recovery

5.4.1 Co-operation between Law Enforcement/Judiciary and Civil Society

Co-operation between law enforcement/judiciary and civil society is a cross-cutting issue, not only needed in the field of the victims' right to recovery, but also when it comes to the victims' right to safety, the victims' right to information, protecting the victims' dignity, the victims' right to privacy, and also as early as at the identification stage. Thus the following details apply accordingly to other topics.

Authorities rely on the expertise of NGOs. Specialised organisations can also provide an environment where victims are encouraged to testify against traffickers with the assurance of their safety, and that of their families. NGOs ensure a victim friendly and non-bureaucratic approach.

The earlier a counselling centre participates in a case, the more likely a victim is willing to give evidence. Counselling centres provide support⁶⁹ and become a stabilising factor for victims, who are thus more likely to be effective as witnesses. Furthermore, the quality of the evidence given improves when a victim-witness, whose trust a counsellor gained during the period leading up to the court proceedings, is accompanied to the trial by that same person of trust. Finally, counselling and support, and thus co-operation, must continue after the trial is over, as victims need to have realistic perspectives to re-gain the confidence and psychological stability required of credible witnesses. If trafficked persons believe they will be immediately deported and left to their own devices once they have given evidence, it is unlikely that they will be willing to go through the traumatic experience of giving evidence and reliving their experience.



5.4.2 Assistance to and Support of Victims

For victims to **recover** and **not be re-victimised** it is crucial that they receive all the necessary assistance and protection. It is important to **identify the concrete needs** of victims and the real possibilities for social integration. Support and assistance for victims of trafficking shall not depend on the trafficked person's ability and willingness to testify as a witness. There may be many good reasons why victims would be reluctant to testify, such as traumatisation (see chapter 2), caution towards authorities (maybe based on experiences in the countries of origin), fear of retaliation and that protection cannot be granted sufficiently, fear of mental overstrain, etc. This reluctance to testify has to be accepted, in order to avert any re-victimisation/ re-traumatisation and health damages for a victim.⁷⁰

⁶⁸ UNHCHR Recommended Principles and Guidelines, guideline 5 (3): "States and, where applicable, intergovernmental and non-governmental organisations should consider providing law enforcement authorities with adequate investigative powers and techniques to enable effective investigation and prosecution of suspected traffickers. States should encourage and support the development of proactive investigatory procedures that avoid over-reliance on victim testimony."

⁶⁹ NGO services may include social and psychological support, such as protected shelter, help in every day life, legal and financial help, help regarding the labour market, but also crisis intervention, confidence-building measures, establishing a recreation period, psychological preparation for and accompaniment to the trial

⁷⁰ E.g. the Italian system (art. 18 of the legislative decree n. 286/98 - the Immigration Consolidation Act), foresees besides the so-called "judicial path" also a "social path", through which the victim can benefit from a special residence permit and a social assistance and integration program. Within the "social path" the victims give information - through the appointed public or private body responsible for the program - about their trafficking and exploitation experience, contributing in such a way to the police investigations. Moreover, if required, the victims will testify in court. The Italian experience shows that many women, who began the "social path", after having been reassured and having gained new trust in institutions and legality, came to the decision to file a complaint against their traffickers. Source: On the Road: "Article 18: protection of victims of trafficking and fight against crime. Italy and the European scenarios". (Martinsicuro, On the Road Edizioni 2002).

5.4.3 Reflection Period

Ideally, criminal justice authorities are able to respect the victims' reflection period, irrespective of their capacity or willingness to co-operate with these authorities. During this period the victims should be given the opportunity to consider whether or not they want to testify or otherwise co-operate, which entails that victims are properly informed. A possible reflection period of 30 days may collide with limited time to collect and/or present evidence, or with time limits as regards remanding the suspect(s) in custody. In such cases the recovery of the victim has priority, taking evidence should therefore (initially) exclude the victim.

5.5 The Right to Safety

Victims of trafficking, and their families, are at risk of intimidation and retaliation, before, during and after the criminal case. To protect victims will enable and encourage them to testify and to foster effective prosecution of trafficking cases. **Children**, and among them especially girls, are extremely vulnerable and need special protection in line with their age, level of maturity and individual needs.⁷¹

The European Court of Human Rights has recognised the right of individuals to be protected against arbitrary use of force under different articles of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Leading cases: Mc Cann v. UK - 27.9.95 (under art. 2 EHRC) / Selmouni v. France - 28.7.99 (under art. 3 EHRC) / Mastromatteo v. Italy - 24.10.2002 (under art. 2 EHRC) / Y. v. United Kingdom - Report of 8.10.91, Res. DH (92)63 / X. and Y. v. The Netherlands - 1985 (under art. 8 EHRC) / Costello-Roberts v. United Kingdom - 25.3.1993 (under art. 8 EHRC)



5.5.1 Protection of the Victim from Intimidation

According to the Council of Europe **Recommendation R(97)13 concerning Protection from Intimidation of Witnesses and the Rights of the Defence**⁷²

“**Intimidation**’ means any direct, indirect or potential **threat** to a witness, which may lead to **interference** with his duty **to give testimony free from influence** of any kind whatsoever. This includes intimidation resulting either:

- from the **mere existence of a criminal organisation** having a strong reputation of violence and reprisal, or
- from the mere fact that the **witness belongs to a closed social group** and is in a position of weakness therein”.

While respecting the rights of the defence, the protection of witnesses and victims should be organised, when necessary, to include the protection of their life and personal security before, during and after the trial. This protection should be extended to their relatives and other persons close to them (para. 2).

While respecting the right of the defence, witnesses should be provided with alternative methods of giving evidence which protect them from intimidation resulting from face to face confrontation with the accused, for example, by allowing witnesses to give evidence in a separate room (para. 6).

While insuring that the defence has adequate opportunity to challenge the evidence given by a witness, the following measures should, inter alia, be considered:

- Recording by audio-visual means of statements made by witnesses during pre-trial examination;
- Using pre-trial statements given before a judicial authority as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the life and security of witnesses, their relatives or other persons close to them;
- Revealing the identity of witnesses at the latest possible stage of the proceedings and/or releasing only selected details; and
- Excluding the media and/or the public from all or part of the trial (para. 9).

Where available and in accordance to domestic law, **anonymity** of persons who might give evidence should be an exceptional measure (para. 10). However, in principle the possibility of not revealing the identity of the vic-

⁷¹ Commission on Crime Prevention and Criminal Justice, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, May 2005.

⁷² Also [http://cm.coe.int/stat/E/Public/1997/.%5C.%5C.%5C.%5Cta%5Crec%5C1997%5Cword/ExpRep\(97\)13.doc](http://cm.coe.int/stat/E/Public/1997/.%5C.%5C.%5C.%5Cta%5Crec%5C1997%5Cword/ExpRep(97)13.doc).

tim-witness is considered to be a solution, **while the defendant** should have the **possibility to challenge** the alleged need for anonymity in a special procedure. The recommendation envisages special measures to be taken in relation to vulnerable witnesses.

In general terms: victims' protection should seek to provide safe places for victims, separate from the accused and defence witnesses when they are present at hearings or interviews. During hearings the risk of intimidation may be at its greatest. Many jurisdictions have adopted laws and practices seeking to minimise this risk. For example, several jurisdictions allow the taking of evidence with video or closed-circuit television; this is commonly done in the case of child victims of abuse.⁷³

5.5.2 Protection of the Victim through NGOs

Offenders often convince victims that they will be arrested and deported if they approach authorities to ask for help. Thus, victims approach and trust shelters, counselling and other services offered by non-governmental organisations rather than state-based agencies. The addresses of such shelter must be kept secret. Trafficked victims should be released from any initial detention and referred to the appropriate service provider pending enquiries into their claims. It is thus imperative that such NGO services in this function stay as independent as possible from the state and to ensure that this is known to potential victims.

5.5.3 Police Protection

Victims of trafficking who have escaped or been rescued from the grasp of the traffickers are in danger of retaliation simply because their behaviour challenges the control of the traffickers. Therefore, victims are at risk of retaliation regardless of whether or not they testify - they are at risk long before the proceedings start and the question of the victim performing the role of a witness arises. It is thus very important that they are immediately protected.

The protection of victims of trafficking calls for tailor-made solutions that are implemented in the closest possible co-operation between the police, victim support agencies, prosecutors and judges. Initially these programmes will assess the risk to the physical safety of the victim (and his/her family) and dedicate protective resources to assure no harm comes to the individual (and her/his family).

If victims are asked to attend the court hearings, protection measures have to start as soon as they approach the court building. Victims should be accompanied by the police (preferably of the same sex), until they have left the courthouse and returned to a safe place.

Possible protection measures are the installation of panic alarms in the witnesses' whereabouts, provision of mobile phones, supplemented by daily contact by law enforcement officials, or police escorts may be considered appropriate.

5.5.4 Special Protection Programmes⁷⁴

Many countries have designed **witness-protection programmes** primarily targeted at securing persons who have insider-knowledge (typically obtained as criminal co-conspirators) that can contribute to the prosecution of members of criminal organisations, and are thus expected targets of criminal organisations. Witnesses might be provided with a new identity and transferred to another country. Usually these measures are also **extended to close family members** of the witness.

Relocation to safe third countries should only be used as a policy of **last resort** and with full discussion and consent of the trafficked person, as this practice is problematic and likely to have significant risks attached, as well as increase the trauma of the trafficked persons and their risk of being re-trafficked. Relocation would require a trafficked person to cut off links with their families and friends and support network. In a third country the trafficked person may not speak the language, may not have access to labour markets or lack appropriate skills and may not have access to social support networks. If relocation occurs, then it must be culturally and socially appropriate. Full support measures including language classes, vocational training, employment, accommoda-

⁷³ Handbook on Justice for Victims, op. cit.

⁷⁴ European Commission, Report of the Experts Group on Trafficking in Human Beings, op. cit.

tion, financial assistance and support networks, including contact with appropriate local NGO service providers should be provided. Relocation will also have to include the trafficked person's family. Again full support measures should be provided.

Full change of identity is even harder to achieve, as this requires the trafficked person to completely cut themselves off from their families, friends, community and previous life and often culture. Again this should **only be considered** in the **most extreme circumstances**, after full discussion and understanding of all options and consequences.

A **broader approach** may be needed to afford effective protection to witnesses and ensure their co-operation with investigations and prosecutions. Witness protection schemes should consider extending protection to all persons who co-operate with or assist in investigations until it becomes apparent that they will not be called upon to testify; and to persons who provide information which is relevant but not required as testimony or not used in court because of concerns for the safety of the informant or other persons.

5.5.5 Protection of the Victim's Identity

Judges and prosecutors should apply national provisions, which protect the identity of victims. Even if national rules of procedure do not allow any use of **anonymous testimony** or information as evidence, when the victim is seriously threatened, the prosecution could have the option to ensure the anonymity of the victim and use her/his anonymous information only as an input for the development of investigation.

The possibility of giving evidence anonymously will be irrelevant when, by what the victim reports, it is easy for the offenders to recognise them. In other cases, however, the possibility to conduct the interview only in the presence of the investigative judge, the public prosecutor, an interpreter, a woman from the victim support agency and the legal counsel of the victim should be considered.

Co-operation agreements between law enforcement authorities and counselling agencies/authorised NGOs must include provisions, which guarantee that the identity and other personal data of the trafficked person will not be forwarded without the consent of the trafficked person or the proper authority to do so.⁷⁵

The identity of a child victim should never be published, unless it is in the best interest of the child.

5.5.6 Protection of Other Personal Data

The Council of Europe **Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data**⁷⁶ requires that personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, and personal data relating to criminal convictions may not be processed automatically unless domestic law provides appropriate safeguards.

The victim-witness is regularly endangered and this calls for the principal observance of the following rules:

- Data such as the personal history, name and photograph of the affected person may not be published; and
- Media must not publish details that allow the identity of the trafficked person to be deduced and must avoid any reporting that endangers the trafficked person (such as information as to where the trafficked person is staying, etc.).⁷⁷

5.6 The Right to Privacy

5.6.1 Confidentiality of Proceedings

The victim's right to privacy requires appropriate measures aimed at not allowing the dissemination of information about their private life. Art. 6 of the UN Protocol suggests that in appropriate cases and to the extent possible under domestic law, the privacy and identity of victims of trafficking in persons should be protected by, inter alia, making legal proceedings relating to such trafficking confidential.

Denying information to the defence must be reconciled with any applicable constitutional or other rights,

⁷⁵ Ibid.

⁷⁶ European Treaty Series No. 108 (<http://conventions.coe.int/Treaty/en/Treaties/Word/108.doc>).

⁷⁷ Report of the Experts Group on Trafficking in Human Beings, op. cit.

including the right to confront witnesses or accusers and the right to disclose any information that might be exculpatory or assist the defence.

Measures adopted in some countries:

- Publication of details that may lead to the identification of a rape victim is prohibited;
- Addresses of victims and witnesses are not included in the depositions made available to the accused before or at committal proceedings. Victims are not required to state their addresses when being sworn as witnesses in court;
- Special locations for victims to report sexual crimes so that confidentiality and privacy can be maintained.

5.6.2 Closed-Door Hearings

Art. 6 EHRC - establishing the right to a fair trial - determines the principle of public hearings. However, to protect victim privacy and confidentiality by restricting reporting may include keeping the proceedings confidential by excluding members of the public or representatives of the media or by imposing limits on the publication of specific information, such as details that would permit identification of the victim.

Also art. 6 EHRC itself states that “the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

However, excluding the media or the public from legal proceedings limits the effectiveness of openness and transparency as a safeguard to ensure the propriety of the proceedings and may infringe the rights of the media to free expression. A careful evaluation of press freedom on the one hand and the right of the victim to control over their own personal data on the other is necessary. Definitely, the public should be excluded from the hearings if victims are asked to report on matters of intimacy or sexual violence. The right of victims to have their privacy respected by far outweighs the interest of the public to monitor court proceedings during the statements of victims. Of course, this is even more necessary when victims are present in court.

5.7 The Right to Information

Judges and prosecutors have to ensure that victims of trafficking receive information on relevant court proceedings and as the case may be get the chance to present their views. Judges and prosecutors shall not deny information or exclude participation on any basis other than prejudice to the rights of the defence.⁷⁸ In line with art. 4 of the EU Council Framework Decision of 15 March 2001 on Standing of Victims in Criminal Proceedings,⁷⁹ victims have a right to information from the first stage of the proceeding, as far as possible in languages commonly understood, on:

- Type of services or organisations to which they can turn for support;
- Type of support which they can obtain;
- Where and how they can report an offence;
- Procedures following such a report and their role in connection with such procedures;
- How and under what conditions they can obtain protection;
- To what extent and on what terms they have access to: legal advice or legal aid, or any other sort of advise, if they are entitled to receive it;
- Requirements for them to be entitled to compensation;
- If they are resident in another state, any special arrangements available to them in order to protect their interests;
- The outcome of their complaint;
- Relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected;
- The court's sentence;
- Release of the person prosecuted or sentenced.

⁷⁸ According to the United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (United Nations, New York, 2004), para. 56.

⁷⁹ europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_082/l_08220010322en00010004.pdf.

Victims also have to be told if they have to expect punishment and, if so, to which extent (minor/severe fine, prison sentence, youth custody, etc.).

In trafficking cases, it is particularly important that the person is correctly informed about the possibility of and conditions for obtaining a residence permit.

Before cross-examination, the judge should clarify whether the victim has to answer a question unless the judge does not allow her/him to, or, on the contrary, they have to answer questions only when the **judge** explicitly allows.

The Victim Advocacy Introductory Manual: Working with Victims of Crime (OSCE Office for Democratic Institutions and Human Rights, Warsaw, 2002) suggests that victims should obtain:

- **Information about the criminal justice process and victims role**
- **Information about the process, developments and status of the case includes:**
The status of the investigation in general terms (specifics may be imparted as long as the information will not interfere with the investigation); the arrest of the offender; the filing of charges; the schedule of court proceedings; the release of or detention status of the offender; the outcome of a trial and the sentence; parole possibilities; the release or escape of the offender.
- **Information about what victims can do and receive includes:**
Ways that the victim can participate or express their views in the procedure; ways to be protected and ensure safety; ways to receive victims' services (health, counselling, shelter etc.); ways to receive compensation or reimbursement; ways to receive further information, clarification and assistance.
- **Methods of providing this information vary widely and can include:**
Information material, such as brochures and leaflets; phone calls or letters for notification, in person from police, prosecutors, judges or victim advocates. For example, in the United States, in situations where communication is difficult and there are no phones, victim advocates travel to the victim's house driving for several hours for notification of court dates and to provide transportation as needed. Accompaniment of the victim can be quite extensive for isolated minorities, such as, for persons who live on Native American reservations.
- **In order to ensure that victims can seek clarifications about the information or be aware generally of victim information, some systems use:**
Hotlines for victims to call and ask questions; broadcasting of information through the media.



5.8 Protecting the Victims' Dignity

Treatment of victims with respect and recognition - protection from secondary victimisation

Prosecutors and judges have to treat victims with courtesy, respect and fairness. This not only reflects the core element of human rights but is also a precondition for the recovery of the victim and her/his ability to find a way back into a normal life. It also contributes to their willingness to assist in the investigation and judicial process. The protection of the victim's dignity also includes the right to be treated equally, regardless of the victim's social background, ethnicity, colour, gender, religion, and so on. The UNHCHR Principles and Guidelines express the need to take "particular care to ensure that the issue of gender-based discrimination is addressed systematically when anti-trafficking measures are proposed with a view to ensuring that such measures are not applied in a discriminatory manner" (Guideline 1 (4)). It is, therefore, important to avoid any statement in court procedures that could be experienced by the victims as discriminating against them. This is of particular relevance with regard to women who have worked in the sex industry.

The **Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime**⁸⁰ recognise that improved responses to child victims and witnesses of crime can make children and their families more willing to disclose instances of victimisation and more supportive of the justice process. As soon as a child victim is identified, a guardian should be appointed to accompany the child throughout the entire process until a durable solution in the best interests of the child has been identified and implemented. To the extent possible, the same person should be assigned to the child victim throughout the entire process.⁸¹ The guardian has to

⁸⁰ Economic and Social Council resolution 2005/20 of 22 July 2005 (www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf).

⁸¹ UNICEF Guidelines for the Protection of Children Victims of Trafficking in Southeast Europe, op. cit.

ensure that all decisions are taken in the child's best interest and thus advance the child's right to be treated with dignity.

Avoiding **secondary victimisation** means to eliminate security risks and to avoid moral stress of the victims.

Victims of trafficking should be accompanied in the courtroom by a supportive person of their own choice. If the victim of trafficking is a female, she will find it particularly encouraging to be accompanied by another woman. Usually this will be the woman who takes care of the victim within the support agency. In this context, the Council of Europe **Recommendation No. R (2000) 11 of the Committee of Ministers to Member States on action against trafficking in human beings for the purpose of sexual exploitation** in paragraph 28 also asks Member States to provide victims “with **special (audio or video) facilities** to report and file complaints, and which are designed to protect their private lives and their dignity and reduce the number of official procedures and their traumatising effects”.

5.8.1 Avoiding Repetition of the Testimony

Every time the victim is obliged to tell her/his story, the trauma repeats. According to the European Court of Human Rights, it does not necessarily violate the rights of the defence, to use statements that have been obtained **during the police and judicial investigation** as evidence. However, the defendant must be given an adequate and proper to challenge and question a witness against him. Also the **use of audio and video technology** for taking evidence and conducting and recording hearings helps to avoid that the victim has to repeat the testimony.

5.8.2 Avoiding Visual Contact with the Defendant

Equally, meeting the defendant face to face can overstrain victims-witnesses mentally, which may deter victims-witnesses from giving testimony. Visual contact between and simultaneous presence of victims and offenders in court should be avoided. This can be achieved, for example, through the use of **audio-video facilities** and is especially important with regard to child victims.



Art. 8 of the Council Framework Decision on the standing of victims in criminal proceedings⁸² lays down that the **contact** between victims and offenders **within the courts premises** should be **avoided**, “unless criminal proceedings require such contact” and, where appropriate, **special waiting areas** for the victims should be provided. Art. 8, paragraph 4, states that: “where there is a need to protect most vulnerable victims from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles”.

It is advisable that the **accused** be asked to **leave the courtroom** for the duration of the questioning of the victim and to allow the victim to testify in another room respectively. The questioning of the victim can be interrupted to allow the defence counsels to consult with their clients. In any case, the defence counsels will be allowed to inform their clients following the testimony of the victim.

To safeguard the interests of the victim, a very important tool is the taking of evidence with **closed-circuit television**. This allows the victim to be visually and acoustically present at court hearings **without entering the courthouse**, while staying in a friendly and comfortable atmosphere. That way the defendant's counsel can exercise the defendant's right to confront the victim, however, at a secure distance, limiting the risk of intimidation.

However, all efforts to protect the victim against confrontation with the defendant are limited by the adversarial nature of criminal proceedings. Indeed, according to the case law of the European Court of Human Rights, it is a fundamental aspect of a fair trial (guaranteed by art. 6 EHRC) that criminal proceedings should be adversarial.⁸³

⁸² Framework Decision of 15 March 2001 2001/220/JHA on the standing of victims in criminal proceedings, Official Journal L 082, p. 0001 - 0004.

⁸³ Inquisitorial - adversarial legal systems: the role of judges in trafficking cases depends on the respective national legal system. In inquisitorial systems the court plays an active role in determining the facts of the case, whereas in adversarial system the court neutrally decides based on the evidence produced and presented by the parties of the case. However, even in the adversarial system the judge may participate in the fact-finding phase by questioning witnesses and so on. The adversarial law system is usually applied in common-law countries.

This means that both prosecution and defence must be given the opportunity to comment on the evidence introduced by the other party.⁸⁴

With regard to witnesses, according to art. 6, paragraph 3(d) ECHR, everyone charged with a criminal offence has, as a minimum right, the right to “examine or have examined witnesses against him”. The Court has, however, in a number of cases, ruled that the right to an adversarial trial is not absolute. In any criminal proceeding there may be competing interests, such as the need to protect witnesses at risk of reprisals or to keep secret certain police methods of crime investigation. These interests must be weighed against the rights of the accused.

Doorson v. The Netherlands judgment (26 March 1996, Reports 1996-II)

Indeed, the necessity to take the rights of the victim into account and, moreover, to balance these rights against the rights of the defendant, such as the right to a fair trial, are relatively new issues for prosecutors and judges, which require special consideration and training, particularly when it comes to victims of violence, to severely traumatised or highly vulnerable victims.

On the one hand, art. 6 does allow a balancing against the interests of the victim. On the other hand, only those restrictions on the rights of the defence, which are strictly necessary, are permissible. Moreover, to ensure that the accused receives a fair trial, any difficulty caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.⁸⁵

In effect, no conviction may be based, either solely or to a decisive extent, on the statement of witnesses of which the defendant was not able to confront, either as a consequence of the absence or the anonymity of the witness.⁸⁶ Furthermore, even when the judgement is based on additional evidence which the defendant had the possibility to challenge, as long as the unchallenged statement of a witness is among the grounds on which the defendant's conviction is based, the court is obliged to strive to counterbalance the handicaps on the defence rights of the accused, particularly by examining the manner and the circumstances in which the unchallenged statement has been obtained.⁸⁷

The court does not stop at finding that one of the elements of art. 6 (fair trial) has been disregarded, but goes further to indicate a breach of the whole of art. 6. The requirements of art. 6 (3) are seen as particular aspects of the right to a fair trial guaranteed by art. 6 (1). Therefore, in the end the crucial question with regard to art. 6 is always whether or not “the proceedings as a whole, including the way in which the evidence was obtained, were fair”,⁸⁸ even including appeal procedures.⁸⁹

In the present context, the recent case of *S.N. v. Sweden*⁹⁰ is significant, dealing with sexual child abuse. M., a ten-year-old boy, had been questioned by the police and the interview was recorded on **videotape**. The defendant's counsel, on receiving a copy of the report of the preliminary investigation, requested that M. be interviewed again. This second interview was recorded on **audiotape**. The defendant's counsel, finding that the issues raised in his request had been covered, did not call for a further interview.

The ECHR observed that the two statements made by M. “were virtually the sole evidence on which the Court's findings of guilt were based. (...) It must therefore be examined whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of art. 6 of the Convention in respect of the evidence given by M.” The Court then remarks:

“The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwill-

⁸⁴ *Brandstetter v. Austria*, 28 August 1991, Series A no. 211, paras. 66-67; *case of Rowe and Davis v. The United Kingdom*, 16 February 2000, para. 60; P.G. and J.H. v. The United Kingdom, 25 September 2001, para. 67.

⁸⁵ *Doorson v. the Netherlands*, 26 March 1996, Reports of Judgements and Decisions 1996-II, para. 70; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, Reports of Judgements and Decisions 1997-III, paras. 54 and 58; *Rowe and Davis Case*, para. 61; P.G. & J.H. case, para. 68.

⁸⁶ *Case of Birutis and Others v. Lithuania*, 28 March 2002, para. 29.

⁸⁷ *Birutis Case*, para. 34.

⁸⁸ I.E.g. *case of Allen v. United Kingdom*, 5 November 2002, para. 42.

⁸⁹ *Case of Sipavicius v. Lithuania*, 21 February 2002, para. 30.

⁹⁰ *Case of S.N. v. Sweden*, 2 July 2002.

ingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question of whether or not in such proceedings an accused received a fair trial, **account must be taken of the right to respect for the private life of the perceived victim.**

Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence”.

Finally the Court reaches the conclusion that the criminal proceedings against the applicant, taken as a whole, cannot be regarded as unfair or in breach of art. 6 EHRC.

Following the testimony, the outcome has to be submitted in a written version to the defendant and his counsel in order to allow them to ask for additional questions. This gives effect to the right of the defendant under art. 6, paragraph 3 (d) EHRC (everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him) to confront the victim-witness. If such additional questions are proposed again, the victim will have to be asked to testify in-camera (e.g. in a private room).

The documentation can then be introduced in the court trial. If it is not necessary, or not possible, to render anonymity to the victim, then the best way to organise the testimony of the victim is by videotaping her or his statements. In this case, either the defence counsel may be allowed to be present at the hearing in-camera or, if this would pose a risk to the safety of the victim or to the process of her recovery, the defendant and his counsel can again be informed of the outcome of the interview (e.g. through audiotape) later on and ask for supplementary questions to be forwarded to the victim during a second hearing in-camera.

During the hearing, the risk of intimidation and of secondary victimisation will be at its greatest. Many jurisdictions have adopted laws and practices seeking to minimise this risk. In trafficking cases, it is indispensable to find, within the framework of national legislation and with the available technical equipment, a solution that allows the victim to testify without being confronted with the offender.

5.8.3 Questioning the Victim⁹¹

The questioning of the victim should be restricted to what is absolutely indispensable. Excessive questioning of the victim should be avoided. Questions on the previous private (and sexual) life of the victim should be forbidden, unless it is absolutely necessary to ascertain the facts, which are at the core of the indictment.

The World Health Organization has developed a set of recommendations based on a set of ten guiding principles to the ethical and safe conduct of interviews with women who have been trafficked.

- **Do no harm**

Treat each woman and the situation as if the potential for harm is extreme until there is evidence to the contrary. Do not undertake any interview that will make a woman's situation worse in the short term or longer term.

- **Know your subject and assess the risks**

Learn the risks associated with trafficking and each woman's case before undertaking an interview.

- **Prepare referral information - do not make promises that you cannot fulfil**

Be prepared to provide information in a woman's native language and the local language (if different) about appropriate legal, health, shelter, social support and security services, and to help with referral, if requested.

- **Adequately select and prepare interpreters and co-workers**

Weigh the risks and benefits associated with employing interpreters, co-workers or others, and develop adequate methods for screening and training.

⁹¹ Source: World Health Organization, WHO: Ethical and Safety Recommendations for Interviewing Trafficked Women (Geneva, WHO, (2003) (<http://www.who.int/gender/documents/en/final%20recommendations%2023%20oct.pdf>).

- **Ensure anonymity and confidentiality**

Protect a respondent's identity and confidentiality throughout the entire interview process - from the moment she is contacted through the time that details of her case are made public.

- **Get informed consent**

Make certain that each respondent clearly understands the content and purpose of the interview, the intended use of the information, her right not to answer questions, her right to terminate the interview at any time, and her right to put restrictions on how the information is used.

- **Listen to and respect each woman's assessment of her situation and risks to her safety**

Recognise that each woman will have different concerns, and that the way she views her concerns may be different from how others might assess them.

- **Do not re-traumatise**

Do not ask questions intended to provoke an emotionally charged response. Be prepared to respond to the person's distress and highlight her strengths.

- **Be prepared for emergency intervention**

Be prepared to respond if a person claims to be in imminent danger.

- **Put information collected to good use**

Use information in a way that benefits an individual or that advances the development of good policies and interventions for trafficked persons generally.

The testimony of a child victim should be obtained with the assistance of a psychologist, possibly using video facilities. Any further hardship has to be avoided.

Judges and prosecutors have to consider when questioning the victim that traumatised victims can be responsible for a credibility gap, as the victim may defend the offender, show indifference, numbness, dwell on irrelevant issues, have blackouts, avoid to talk about what happened, etc. (chapter 2.) It has to be respected that victims may often not be able to testify systematically.

Children have to be questioned in a child-sensitive manner,⁹² taking into account the child's individual needs and views.⁹³ Therefore child victims should only be questioned about their experience in the presence of their guardian.

5.8.4 Using Evidence Obtained in the Pre-Trial Phase

One strategy to avoid direct confrontation of the victim with the trafficker is to secure a well-documented, preferably videotaped statement of the victim before court hearings and to later introduce this statement into proceedings. Normally this is not possible in an adversarial system.

Therefore, other means must be used, enabling the victim to give evidence, possibly through cross-examination, at an early stage of the procedure. The record of the testimony should be used in the trial. Some national laws might include a special evidence pre-trial hearing, a closed hearing, generally used in cases where there is a danger that evidence may be interfered with; it may also be provided in cases where witnesses may be pressured not to testify, or if there are grounds to think that the person cannot be examined in the trial, for instance because she/he probably will return to the country of origin.

Pre-trial evidence also includes evidence obtained through proactive investigation means, such as phone tapping, electronic surveillance, undercover operations and so on.

5.9 The Right to Legal Stay

The issuance of a residence permit should not depend on the willingness (or ability) of the victim to co-operate with law enforcement authorities. If the residence permit is based on judicial co-operation, the following questions and notions have to be taken into consideration:

- Is a victim's statement really helpful? The person probably does not know too much about the criminal organisation, she/he is threatened, feels used by authorities and fears deportation after the trial;

⁹² UNICEF Guidelines for the Protection of Children Victims of Trafficking in Southeast Europe, op. cit.

⁹³ Commission on Crime Prevention and Criminal Justice, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, May 2005.

- In line with international human rights standards the right to safety of the person should be the first priority.

Not to permit the victim the legal right to stay gives the victim no other choice but to leave the country and accept repatriation respectively. **Supposed voluntary return** of victims could be due to the **lack of residence possibilities**. Once returned, they might easily fall back in the same vicious cycle or even become traffickers themselves.

In cases where the victim does not co-operate with authorities, and co-operation is an essential pre-condition for a residence permit, the principle of non-refoulement could also provide for a residence permit. This principle, according to art. 33 of the Geneva Refugee Convention, means that no state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a **particular social group**⁹⁴ or political opinion. Most countries have this principle entrenched not only in their asylum but also their immigration laws. In most if not all countries it is also illegal to deport a person to a country where there are cogent reasons to believe that the person's life or physical integrity will be in danger, due to inhuman and degrading treatment. It is necessary for judicial authorities to be very aware of this international standard, as their assessment of the situation might be very powerful.

5.9.1 Avoiding Deportation Following a Risk Assessment

It is highly desirable that this decision is taken by a court, or at least under strict scrutiny of a court. Decisions to repatriate victims of trafficking must be made "with due regard for the safety" of the victims (art. 8, para. 2, Trafficking Protocol).

Such decisions have to be taken in the light of art. 3 EHRC, prohibition of torture. The European Court of Human Rights decided in several cases,⁹⁵ that the deportation of persons who run the risk of being ill-treated in their home country would violate art. 3 EHRC. The Court also decided, owing to the absolute character of the right guaranteed, that it would not rule out the possibility that art. 3 may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it had to be shown that the risk was real and that the authorities of the receiving state were not able to obviate the risk by providing appropriate protection.⁹⁶

Therefore, a comprehensive risk assessment is needed, taking into account the behaviour of traffickers, to what extent the behaviour of a victim gives reason to fear acts of revenge and the security situation of the place where a victim would live in his/her home country, and to what degree authorities in a country of origin would be able and willing to safeguard the physical integrity of the victim.

5.9.2 Avoiding Deportation Considering Family Links in the Country of Destination

According to art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms "everyone has the right to respect for her/his private and family life, home and correspondence; there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This principle is presumably established in all EU Member States and accession and candidate countries. A decision of the European Court of Human Rights recognises a right of the person not to be deported, in connection with family relationship in the receiving country: *Jacupovic v. Austria* - 6.5.03 (art. 8).

5.9.3 Cases of the European Court of Human Rights

Cruz Varas v. Sweden - 20.3.91 (arts. 3 and 8 EHRC) / Chahal v. United Kingdom - Report of 15.11.96 / H.R.L. v. France - 29.4.97 (under art. 3 EHRC)

⁹⁴ Broad interpretation of the term "social group".

⁹⁵ *H.L.R. v. France*, 22 April 1997, <http://hudoc.echr.coe.int/hudoc/default.asp?Language=en&Advanced=1>.

⁹⁶ *Ibid.*

5.10 The Right to Compensation

A trafficked victim is entitled to receive an adequate compensation.⁹⁷ Although the right to compensation is provided by binding provision in the Trafficking Protocol, and now in the CoE Convention, very often victims do not have real access to compensation.

The Trafficking Protocol does not specify any potential source of compensation, which means that any or all of the following general options would suffice to meet the requirement of the Protocol:⁹⁸

- Provisions allowing victims to sue offenders or others under statutory or common-law torts for civil damages;
- Provisions allowing criminal courts to award criminal damages (that is, to order that compensation be paid by offenders to victims) or to impose orders for compensation or restitution against persons convicted of offences; and
- Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the state for injuries or damages suffered as a result of a criminal offence.

Prosecutors and judges should play a major role in ensuring that victims receive compensation for physical, psychological and financial harm suffered.

5.11 The Victim's Exemption from Prosecution

Where a non-punishment clause for trafficked persons is not yet included in national legislation, prosecutors and judges should apply, through an extended interpretation, the general clause of non-punishment, provided in every penal code, stating that nobody can be punished for an act committed under coercion (at least in the most serious cases, where there is a lack of self-determination as a consequence of a slavery-like practice). The application of the clause should be non-discretionary when the legal requirements are met. Typically, a nation's non-punishment clause applies at least to all crimes related to illegal border crossings, or to those that occur while the individual was under the influence of traffickers. If national legislation allows, prosecutors should consider the possibility of granting immunity to victims of trafficking under certain conditions. International standards recognise that trafficked persons should not be prosecuted for any offences connected to the condition of being a victim of trafficking; they should be treated as victims first and foremost.

5.12 Sentencing the Perpetrators

At the EU level, art. 3 of the Framework Decision of 19 of July 2002 (which is binding for the Member States and that should have been incorporated in the national legislation by August 2004 - chapter 3), states that each Member State shall take the necessary measures to ensure that an offence of trafficking as defined by the Trafficking Protocol is punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition. In case the offence has endangered the life of the victim, committed against a particularly vulnerable person, by use of serious violence or has caused particularly serious harm to the victim or the offence has been committed within the framework of a criminal organisation, the Framework Decision provides a penalty of not less than eight years.

5.13 Post-Trial Phase

Victim support activities have to continue after the trial. In the case that victims must return to their countries of origin, it is important that witness-protection, the aliens' office and the counselling centre co-operate to ensure victim and counsellor are given enough time to organise the return and plan re-integration measures.

⁹⁷ E.g. the assumed salaries, but not only, as e.g. in countries where prostitution is regarded as immoral, salaries cannot be assumed.

⁹⁸ United Nations Office on Drugs and Crime, Legislative Guide..., op. cit.

6

International Co-Operation in Criminal Matters

6 International Co-Operation in Criminal Matters

6.1 Abstract – Learning Objectives

This chapter is structured according to the relevant instruments for international co-operation to be used by the judiciary in the fight against trafficking in human beings, with an emphasis on co-operation within the **European Union**.

At the end of this section the participant of the training will:

- Have a general idea about issues related to international co-operation

6.2 Cross-border Co-operation and Co-ordination

6.2.1 General Rules regarding Requests for International Co-operation in Criminal Matters

- **United Nations**

TOC Convention: Art. 18

- **Council of Europe**

Mutual Legal Assistance Convention: arts. 2-6 and arts. 14-20, its Additional Protocol, and its Second Additional Protocol / Convention on laundering, search, seizure and confiscation of the proceeds from crime: arts. 18-20 and arts. 23-35.

- **European Union**

Schengen Implementation Convention: arts. 48-53 / Naples II Convention: arts. 8-14, and art. 19 / EU MLA Convention: arts. 4-6 / MLA Agreement EU-US: art. 7.

6.2.2 Specific Requests in the Fight against Trafficking in Human Beings

- **United Nations:**

Trafficking Protocol: art. 10; Smuggling Protocol: art. 8, 9 and 10.

6.3 Co-operation within the European Union

6.3.1 Europol⁹⁹

Through the national units, which second one or more **liaison officers** to Europol, Member States can supply Europol with information and intelligence necessary to fight trafficking in human beings. The liaison officers, working under the national legislation of their home country, represent the interests of their state with Europol.

6.3.2 Eurojust

Eurojust is an EU body established in 2002 and based in The Hague, it was set up in order to enhance the effectiveness of the competent investigating and prosecuting authorities within Member States when they are dealing with the investigation and prosecution of serious and organised cross border crime. Each of the 25 Member States is represented within Eurojust by a National Member being a prosecutor, investigator, or judge and Eurojust is the first organisation of its kind.

6.3.3 The European Judicial Network

The network consists of representatives of the Member States' judicial and administrative authorities and meets several times each year to exchange information and experience and boost co-operation between the Member States as regards civil and commercial law. The main objective is to make life easier for people facing litigation of whatever kind where there is a transnational element - i.e. where it involves more than one Member State.

The European Union currently has a wide variety of national legal systems, and this diversity often creates problems when litigation transcends national borders.

⁹⁹ Arts. 4 and 5 of the Europol Convention.

For legal professions it can be very useful to have access to knowledge about the various national systems of civil and commercial law and the legislative instruments of the European Union and other international organizations including the United Nations, the Hague Conference and the Council of Europe.¹⁰⁰

¹⁰⁰ http://europa.eu.int/comm/justice_home/ejn/index_en.htm, accessed May 2005



A

**Reference
Material**

ANNEX A: Reference Material

The following section contains a list of the recommended reference material to be used for the implementation of the training. The material is presented in two sections: Legal Instruments and References.

The complete reference material can be downloaded from the ICMPD Anti-Trafficking Website (www.anti-trafficking.net).

Legal Instruments

UN

- UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME; 2000
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OSCE

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Additional Legal Instruments

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