

COMMENTARY

RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING

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COMMENTARY
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OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS



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FOREWORD

Over the past decade, human trafficking has moved from the margins to the mainstream of international concern. During this period we have witnessed the rapid development of a comprehensive legal framework that comprises international and regional treaties, as well as a broad range of soft-law instruments relating to trafficking. These changes confirm that a fundamental shift has taken place in how the international community thinks about human exploitation. It also confirms a change in our expectations of what Governments and others should be doing to deal with trafficking and to prevent it.

My Office has been at the forefront of efforts to promote a human rights-based approach to trafficking. As this *Commentary* makes clear, such an approach requires understanding of the ways in which human rights violations arise throughout the trafficking cycle and of the ways in which States' obligations arise under international human rights law. This approach seeks to both identify and redress the discriminatory practices and the unequal distribution of power that underlie trafficking, which maintain impunity for traffickers and deny justice to their victims.

On a very practical level, a human rights-based approach to trafficking requires an

acknowledgement that trafficking is, first and foremost, a violation of human rights. Trafficking and the practices with which it is associated, including slavery, sexual exploitation, child labour, forced labour, debt bondage and forced marriage, are themselves violations of the basic human rights to which all persons are entitled. Trafficking disproportionately affects those whose rights may already be seriously compromised, including women, children, migrants, refugees and persons with disabilities. A human rights approach to trafficking also demands that we acknowledge the responsibility of Governments to protect and promote the rights of all persons within their jurisdiction, including non-citizens. This responsibility translates into a legal obligation on Governments to work towards eliminating trafficking and related exploitation.

A human rights approach to trafficking means that all those involved in anti-trafficking efforts should integrate human rights into their analysis of the problem and into their responses. This approach requires us to consider, at each and every stage, the impact that a law, policy, practice or measure may have on persons who have been trafficked and persons who are vulnerable to being trafficked. It means rejecting responses that compromise rights and freedoms.

This is the only way to retain a focus on the trafficked persons: to ensure that trafficking is not simply reduced to a problem of migration, a problem of public order or a problem of organized crime.

It was on the basis of such convictions that my predecessor, Mary Robinson, led the development of the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* and transmitted them to the United Nations Economic and Social Council in 2002. She explained that their development was her Office's response to the clear need for practical, human rights-based policy guidance, and encouraged States and intergovernmental organizations to make use of them in their own efforts to prevent trafficking and to protect the rights of trafficked persons. The response to this call has been impressive. Since then they have been integrated into numerous policy documents and interpretive texts attached to international and regional treaties, including both the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and the Council of Europe's Convention on Action against Trafficking in Human Beings. They have been extensively cited by various international human rights bodies and adopted by the Special Rapporteur on Trafficking in Persons as a major reference point for the work of that mandate. Many non-governmental organizations have used them in their efforts to advocate a stronger and more rights-protective response to trafficking.

It is this very positive response that has paved the way for the present *Commentary*, a comprehensive analysis of the *Principles and Guidelines* in the light of both general principles of international law and the specific rules that relate directly to trafficking. The need for such a publication has been repeatedly drawn to the attention of OHCHR. Despite the impressive achievements of the past decade, the rights of individuals and the obligations of States in this area are not yet widely or well understood. As a result, the potential of international law to guide and direct positive change is only partially being fulfilled. The *Commentary* seeks to remedy this situation. It uses the *Principles and Guidelines* to structure a detailed overview of the legal aspects of trafficking, focusing particularly but not exclusively on international human rights law.

I commend the *Principles and Guidelines* and the present *Commentary* to States, the international human rights system, intergovernmental agencies, civil society groups and all others involved in preventing trafficking, securing justice for those who have been trafficked and ending impunity for those who benefit from the criminal exploitation of their fellow human beings.



Navanethem Pillay
United Nations High Commissioner
for Human Rights



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PART 1





INTRODUCTION TO THE TRAFFICKING PRINCIPLES AND GUIDELINES

This section provides an introduction to the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (Trafficking Principles and Guidelines), commencing with a short overview of their development and purpose and outlining their scope and structure. This is followed by a brief analysis of their legal status, an issue that is revisited at various points throughout the Commentary.

1.1. DEVELOPMENT AND PURPOSE

In July 2002 the United Nations High Commissioner for Human Rights presented a set of Trafficking Principles and Guidelines to the United Nations Economic and Social Council. In her report accompanying this document, the High Commissioner explained that the development of the Trafficking Principles and Guidelines was her Office's response to the clear need for practical, rights-based policy guidance on the trafficking issue.

The Trafficking Principles and Guidelines are the result of a wide-ranging, informal consultation involving individual experts and practitioners as well as representatives of United Nations agencies and programmes and other intergovernmental organizations working on

trafficking and related issues. Their purpose is to promote and facilitate the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions. In presenting the Trafficking Principles and Guidelines to the Economic and Social Council, the High Commissioner noted that her Office had adopted the Trafficking Principles and Guidelines as a framework and reference point for its own work on this issue. She encouraged States and intergovernmental organizations to make use of the Trafficking Principles and Guidelines in their own efforts to prevent trafficking and to protect the rights of trafficked persons.¹

1.2. SCOPE AND STRUCTURE

As the title suggests, the Trafficking Principles and Guidelines are divided into two parts. The first part contains 17 Principles which, taken together, are intended to provide a foundation for the development, implementation and evaluation of a rights-based response to trafficking. The Principles have been designed for

¹ "Report of the High Commissioner for Human Rights, Mary Robinson, to the Economic and Social Council" (E/2002/68, para. 62).

use as a checklist against which laws, policies and interventions can be measured.

The Principles are organized under four headings:

1. The primacy of human rights
2. Preventing trafficking
3. Protection and assistance
4. Criminalization, punishment and redress

The Principles included under the first heading are applicable to interventions at all stages of the trafficking cycle: recruitment, transport and subjection to exploitation. The Principles included under the three subsequent headings identify the object and parameters of intervention at different times in the cycle of trafficking: preventive measures before a person becomes trafficked; measures for the protection of and assistance to persons who have become trafficked; and criminal and civil proceedings.

The second part of the document contains a series of 11 Guidelines, most of which relate back to and expand upon one or more of the Trafficking Principles. Unlike the Trafficking Principles, the Guidelines are not intended to be prescriptive but rather to provide practical direction to States, intergovernmental organizations, NGOs and others on the steps that can be taken to ensure that the key Principles are translated into effective and realistic responses.

1.3. LEGAL STATUS

The Trafficking Principles and Guidelines are not contained in a treaty or similar instrument that is capable of giving rise to immediate legal obligation. As such, this instrument does not enjoy the force of law and cannot, on its own, be identified as or become a source of obligation for States. However, this does not mean that the Trafficking Principles and Guidelines are without legal significance. As the Commentary will demonstrate, certain aspects of the Trafficking Principles and Guidelines: (i) are based upon established customary rules of public international law to which all States are bound, including those relating to State responsibility and fundamental human rights; and/or (ii) reiterate, or make specific to the context of trafficking, norms contained in existing international agreements. To the extent that parts of the Trafficking Principles and Guidelines embody an existing rule of international law, then those parts are themselves a source of legal obligation for States. It is also important to note that the Trafficking Principles and Guidelines establish a framework for State practice that may itself provide the basis for emergent customary international law.

The Commentary seeks to provide clear direction on the issue of legal status by identifying those aspects of the Trafficking Principles and Guidelines that can be tied to established international legal rights and obligations.



THE INTERNATIONAL LEGAL FRAMEWORK AROUND TRAFFICKING IN PERSONS

This section places the Trafficking Principles and Guidelines within the broader context of the international legal framework around trafficking. It also serves to introduce and clarify the relative position and significance of the various legal concepts, principles and instruments that will be referred to throughout this Commentary. The section commences with a short explanation of the various sources of international law. It then considers, in more detail, the major sources of international legal obligation relating to trafficking.

2.1. SOURCES OF INTERNATIONAL LEGAL OBLIGATION

International law is the body of rules and principles that governs the relations and dealings of States with each other. International law imposes specific obligations on States and grants them specific rights, just as domestic law does with individuals. In some instances, international law has developed to cover relations between States and individuals, for example in international criminal law and international human rights law.

There are several accepted “types” or sources of international law. The primary sources are treaties,

custom and general principles of law.² Subsidiary sources include the decisions of international tribunals. Each of these sources is defined and considered below in the specific context of the international legal framework around trafficking in persons. Treaties are dealt with first and most extensively because they are the main source of international legal obligation on this issue.

2.2. TREATIES RELEVANT TO TRAFFICKING

Human trafficking is a complex issue that can be considered from a number of different perspectives including: human rights; crime control and criminal justice; migration; sexual exploitation and labour. This complexity is reflected in the wide range of relevant treaties that together comprise the codified (treaty-based) legal framework around trafficking. A small number of treaties, including several that have been concluded recently, deal exclusively with the issue of trafficking. Many more address one narrow aspect, an especially vulnerable group, or a particular manifestation of trafficking.

² The generally recognized sources of international law are set out in Article 38 (1) of the Statute of the International Court of Justice.

A treaty is an agreement, between two or more States, that creates binding rights and obligations in international law. Treaties can be universal (open to as many States as want to join) or restricted to a smaller group of two or more States (for example, those in a particular geographical region). A treaty may be called by different names, such as “convention”, “covenant” or “protocol”. The obligations contained in a treaty are based on consent. States are bound because they agree to be bound. States that have agreed to be bound by a treaty are known as “States parties” to the treaty. A State becomes a party to a treaty through a process of ratification or accession. States may often “sign” a treaty before this happens – signalling their intention to be bound in the future.

By becoming party to a treaty, States undertake binding obligations in international law. In the case of most treaties relevant to trafficking, this means that States parties undertake to ensure that their own national legislation, policies or practices meet the requirements of the treaty and are consistent with its standards. These obligations are enforceable in international courts and tribunals with appropriate jurisdiction, such as the International Court of Justice, the International Criminal Court, or the European Court of Human Rights. Whether the obligations are enforceable in courts at a national level is a separate question, to be determined by domestic law. In some States legislation is required to incorporate treaties into domestic law, while in other States the Constitution provides that treaties automatically have the status of domestic law.

In order to determine what obligations a particular State has undertaken by ratifying a treaty, it is necessary to consider the following:

- The text of the treaty: what are the obligations? Are there any limits or exceptions? How are States required to implement these obligations?

- Interpretations of the treaty: in the case of human rights treaties, usually by a treaty-monitoring body but also by national, regional or international decision makers, including courts or tribunals.
- Reservations to the treaty: has the State entered in any reservations to the treaty? If so, to what articles and with what effect?

Most multilateral treaties (involving a large number of countries) are concluded under the auspices of an international organization such as the United Nations or a regional organization such as the Organization of American States (OAS) or the African Union (AU). Bilateral treaties or those developed between a smaller group of States are generally negotiated through the relevant foreign ministries with no outside help. Bilateral treaties are common in technical areas relevant to trafficking, such as extradition and mutual legal assistance.

The following paragraphs identify (and categorize according to their primary focus or orientation) the international legal agreements that are relevant to trafficking. It is very important to acknowledge that not all treaties noted below are equal in terms of their relevance or their contribution to the international legal framework around trafficking. Some of the early labour rights agreements, for example, apply only to one form of trafficking and their major obligations are, in any event, included in later treaties that often have more detailed provisions and a greater number of States parties. The early human rights agreements on trafficking and related subjects, such as forced marriage, have largely been supplanted by subsequent, more precise and more widely ratified instruments. However, some of these old treaties remain very important, often because they contain the legal definitions of practices subject to later regulation by treaty. For example, the legal definition of debt bondage – identified as part of the definition of trafficking in persons adopted in 2000 – can only be found in a treaty concluded in 1956.



Further information on how different treaties are used in this Commentary can be found in section 2.7 of this chapter.

Box 1: Treaties most often cited in this Commentary

2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol)

2005 Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention)

1979 Convention on the Elimination of All Forms of Discrimination against Women

1989 Convention on the Rights of the Child

2000 United Nations Convention against Transnational Organized Crime (Organized Crime Convention)

1966 International Covenant on Civil and Political Rights

Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic;

- 1921 International Convention for the Suppression of Traffic in Women and Children;
- 1933 International Convention for the Suppression of Traffic in Women of Full Age;
- 1947 Protocol Amending the International Convention for the Suppression of Traffic in Women and Children and the International Convention for the Suppression of Traffic in Women of Full Age.

In 1949, most of these agreements were consolidated into the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. This treaty remained the major international agreement on the subject of trafficking for the next five decades.

In December 2000, representatives from more than 80 countries met at Palermo, Italy, to sign a new international legal framework to fight transnational organized crime that had been adopted by the General Assembly the previous month. One of the key platforms of that regime was a detailed agreement on combating trafficking in persons. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol), is currently the single most important and influential international legal agreement on trafficking. It entered into force in 2003 and by 10 October 2009 had 133 States parties.

2.2.1. SPECIALIST TRAFFICKING TREATIES: INTERNATIONAL

A series of treaties dealing specifically with the issue of trafficking (then understood as the sexual exploitation of women and girls in foreign countries) was concluded during the first half of the twentieth century:

- 1904 International Agreement for the Suppression of the White Slave Traffic;
- 1910 International Convention for the Suppression of the White Slave Traffic;
- 1949 Protocol Amending the International

2.2.2. SPECIALIST TRAFFICKING TREATIES: REGIONAL

The international legal framework around trafficking includes specialist treaties that have

been concluded between regional groupings of States. One very significant example is the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention), which entered into force in February 2008 with the potential to bind more than 40 countries of Western, Central and Eastern Europe to a much higher level of obligation, particularly with regard to victim protection, than that laid down in the Trafficking Protocol. The European Trafficking Convention builds on previous legal instruments developed by European institutions including the EU Council Framework Decision of 19 July 2002³ on combating trafficking in human beings. That framework Decision is expected to be repealed shortly and replaced with a stronger instrument that follows, much more closely, the letter and spirit of the European Trafficking Convention.⁴

Another, narrower, regional example is provided by the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Convention) concluded in 2002 by the member countries of the South Asian Association for Regional Cooperation. As its title implies, the scope of this Convention is limited to the trafficking of women and children for prostitution. The first-ever regional treaty to deal with trafficking was the Inter-

American Convention on International Traffic in Minors, developed under the auspices of the Organization of American States, which was adopted in 1994 and entered into force on 15 August 1997. It seeks to prevent and punish international trafficking in minors and to regulate its civil and penal aspects.

While only those States located within a particular geographical region can generally become parties to regional treaties, these instruments can provide all countries with a useful insight into evolving standards. They can also contribute to the development of customary international law on a particular issue or in a particular area.

2.2.3. TREATIES PROHIBITING SLAVERY AND THE SLAVE TRADE

The major slavery treaties are listed below and continue to be important, not least because they define key concepts that have been used in later instruments such as the Trafficking Protocol:

- 1926 Convention on Slavery;
- 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Supplementary Convention on Slavery).

Note that all major international and regional human rights treaties also prohibit slavery, servitude and a range of related practices.

While trafficking is often referred to as a form of slavery, the precise contours of that relationship are far from settled. Certainly, “slavery” is one of the end purposes for which individuals are trafficked. However, the situation of many trafficked persons may not fall within the international legal definition of slavery or, therefore, within the scope of the international legal prohibition. This issue has recently been

³ Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings, [2002] OJ L 203 [Hereinafter: EU Council Decision of 19 July 2002]. While not considered a “treaty” in the usual sense, the adoption of a framework decision imposes specific obligations on member States of the European Union, and also on applicant countries, to ensure that their laws and practices conform to its substantive provisions. Framework decisions enter into force quickly, without the requirement of formal ratification. They generally set a restricted period for implementation.

⁴ Commission of the European Communities, Proposal for a Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM(2009) 136 final.



subject to intense debate.⁵ It is further considered below (part 1, section 4.3) in the specific context of international humanitarian law and international criminal law.

2.2.4. TREATIES PROHIBITING FORCED LABOUR AND CHILD LABOUR

While a number of the human rights treaties cited below also cover forced labour and child labour, these issues have primarily been dealt with through the following conventions, developed under the auspices of the International Labour Organization (ILO):

- 1930 Convention Concerning Forced and Compulsory Labour (ILO Convention 29);
- 1957 Convention Concerning the Abolition of Forced Labour (ILO Convention 105);
- 1999 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention 182) (identifies trafficking as one of several “worst forms of child labour”).

2.2.5. RELEVANT HUMAN RIGHTS TREATIES: INTERNATIONAL

International human rights treaties form an important part of the applicable legal framework around trafficking. Two of the “core” international human rights treaties contain **substantial and specific** references to trafficking and related exploitation:

- 1979 Convention on the Elimination of All Forms of Discrimination against Women: article 6 requires States parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women; and
- 1989 Convention on the Rights of the Child: prohibits trafficking in children for any purpose as well as the sexual exploitation of children and forced or exploitative labour. This Convention also contains important protections for children who have been trafficked.

Other human rights treaties prohibit certain behaviours or practices that have been linked to trafficking, including: ethnic, racial and sex-based discrimination; discrimination on the basis of disability; slavery; forced labour and servitude; exploitation of prostitution; sale of children and sexual exploitation of children; forced marriage; torture and inhuman treatment and punishment; and arbitrary detention.

International human rights treaties also identify and protect certain rights that are particularly important in the context of trafficking, such as: the right to own and inherit property; the right to education; the right of opportunity to gain a living through work freely chosen or accepted; the right to a fair trial; and the right to a remedy. The following **additional** human rights treaties include provisions or protections that are relevant to trafficking:

- 1966 International Covenant on Civil and Political Rights;
- 1966 First Optional Protocol to the International Covenant on Civil and Political Rights (provides right of individual complaint);
- 1966 International Covenant on Economic, Social and Cultural Rights;
- 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (not yet in force);

⁵ See, for example, James C. Hathaway, “The human rights quagmire of human trafficking”, *Virginia Journal of International Law*, vol. 49, No. 1, p. 1 and Anne Gallagher, “Human rights and human trafficking: quagmire or firm ground? A response to James Hathaway”, *Virginia Journal of International Law*, vol. 49, No. 4, p. 789 (hereinafter referred to as Gallagher, “Human rights and human trafficking: quagmire or firm ground?”).

- 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (provides right of individual complaint and inquiry);
- 1966 International Convention on the Elimination of All Forms of Racial Discrimination;
- 1984 Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture);
- 2002 Optional Protocol to the Convention against Torture (provides for a system of independent visits);
- 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;
- 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention);
- 1951 Convention Relating to the Status of Refugees (Refugee Convention);
- 1967 Protocol Relating to the Status of Refugees (Refugee Protocol);
- 2006 Convention on the Rights of Persons with Disabilities and its 2006 Optional Protocol (provides right of individual and group complaint).
- 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa;
- 1969 American Convention on Human Rights;
- 1994 Inter-American Convention on International Traffic in Minors (deals additionally with inter-country adoption);
- 1950 European Convention for the Protection of Fundamental Rights and Fundamental Freedoms (European Convention on Human Rights);
- 1961 European Social Charter;
- 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women;
- SAARC 2002 Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia.

2.2.6. RELEVANT HUMAN RIGHTS TREATIES: REGIONAL

Regional human rights agreements concluded in Africa, Europe and the Americas affirm and sometimes extend the rights contained in the international treaties, including rights that are directly and indirectly relevant to trafficking. The most significant regional human rights treaties in this context are:

- 1981 African Charter on Human and Peoples' Rights (African Charter);
- 1990 African Charter on the Rights and Welfare of the Child;
- United Nations Convention against Transnational Organized Crime;

2.2.7. INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL CRIME CONTROL TREATIES

International criminal law is a branch of international law that deals with international crimes and the individual criminal responsibility of the perpetrators of such crimes. The Rome Statute of the International Criminal Court is the key legal instrument of international criminal law and, as explained further in part 1, section 4.3, it references trafficking both directly and indirectly.

Over the past several years the international community has developed a number of crime control treaties, thereby developing a new area of international legal regulation that is sometimes referred to as "transnational criminal law". Transnational criminal law is directly relevant to trafficking. The most important treaties include the following:



- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;
- Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime;
- United Nations Convention against Corruption.

2.3. CUSTOMARY INTERNATIONAL LAW RELEVANT TO TRAFFICKING

International customary law is defined as “evidence of a general practice accepted as law”.⁶ Customary international law does not need to be written. A rule will be considered to be customary if: (i) it reflects general and uniform State practice; and (ii) such practice is accompanied by a subjective sense of legal obligation (*opinio juris*).⁷ It is not necessary that all countries recognize a rule of customary international law for the norm to exist and to bind them. All that is required is a general consensus that the rule in question is in fact an obligation and a sufficient level of conforming State practice.⁸ In principle, custom and treaty law are equal in value. If there is a conflict between a customary and a treaty-based rule then the one

that emerged later in time or is intended as a specialized rule will generally prevail.

In the context of trafficking, customary international law is important for several reasons. First, not all States have become parties to all relevant instruments. The characterization of a rule as part of customary international law elevates that rule (and any resulting obligation) to one of universal applicability. For example, the prohibitions on torture and discrimination are widely considered to be norms of customary international law operating to constrain all States, not just those that are party to the relevant international and regional conventions. The conclusions of the Commentary on how such prohibitions relate to trafficking would therefore apply to all States. Another example is provided by the customary rules relating to the formation and interpretation of treaties. These rules operate to bind all States, not just those that are party to the Vienna Convention on the Law of Treaties.

In this area as in all others, customary international law can also play an important role in shedding light on the actual content of codified rules. For example, it has been frequently argued that the international prohibition on slavery, as codified in various human rights treaties, has been expanded (by *opinio juris* as well as by State practice) to include contemporary manifestations of slavery, such as trafficking. Such a conclusion, if proved,

should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.” *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*) (1986) ICJ Reports pp. 3, 98. Note also the well-established rule that States objecting to a norm of international customary law when it is being formed are not bound by it (the rule of the “persistent objector”). “[I]n principle, a State that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures”: American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1990), p. 102.

⁶ Statute of the International Court of Justice, Article 38 (1)(b).

⁷ “Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. ... The States concerned must feel that they are conforming to what amounts to a legal obligation.” (North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*) (1969) ICJ Reports 3, 44. See also Ian Brownlie, *Principles of Public International Law*, 4th ed. 1990, pp. 5-7.

⁸ In the *Nicaragua Case*, the International Court of Justice held that: “In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States

would impact on the nature of the international legal framework around trafficking.⁹ Custom is also an important constitutive element of the so-called “secondary rules” of international law – those rules that concern the circumstances under which a State is to be held responsible for a particular violation of international law, and the consequences of a finding of responsibility. It is therefore of particular relevance to the discussion of State responsibility as it relates to trafficking (see part 2.1, sections 2.1-2.4, below).

2.4. GENERAL PRINCIPLES OF LAW

General principles of law are rules or principles that are found across the major legal systems of the world. Once recognized as such, general principles operate to bind States, even if they are not part of a treaty or customary law. General principles are often of a procedural and administrative kind that relate to international law as a system of law. Examples include the principle of “*res judicata*” (once a matter has been definitely decided by a court, it cannot be decided again); good faith; judicial impartiality; and proportionality. General principles of law can also exist at the regional, rather than universal, level. For example, the right to remain silent when charged with a crime may well be a general principle of law in Europe and the Americas, as most countries in both regions recognize it in their legal system. However, it is unclear whether it would constitute a general principle of law internationally because many countries in other parts of the world do not specifically recognize it. Conversely, the principle that someone should not be held responsible for a crime they were compelled to commit is widely accepted. General Principles of Law are occasionally relevant to the issue of trafficking and are therefore referred to at several points in this Commentary.

⁹ See further Anne Gallagher, *International Law of Human Trafficking* (forthcoming), chap. 3.

2.5. SUBSIDIARY SOURCE: THE DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS

The decisions of international courts and tribunals are an increasingly important source of law (or source of evidence of law) as a greater number of such bodies are established to deal with a range of issues – from international criminal law (the International Criminal Court and the ad hoc and hybrid tribunals that preceded or have followed it) to the Law of the Sea (the International Tribunal for the Law of the Sea); to matters related to international trade (the World Trade Organization and its Appellate Body); to regional and human rights courts (the European Court of Human Rights).

The international law generating capacity of a particular court or tribunal will depend on a range of factors including the rules under which it operates, its jurisdiction and composition. In most cases, such bodies will have a less direct role: their proceedings and judgements might provide insight into or confirmation of the state of a particular customary rule, the existence of a general principle of law, or the substantive content of a particular treaty-based norm.

National courts will often make use of international law and their decisions can be helpful in the task of identifying the substantive content of particular rules. Such bodies can also be useful in identifying State practice. However, their determinations do not, of themselves, constitute a source of international law or binding international legal authority.

2.6. RELEVANT “SOFT LAW”

Not all international instruments relevant to trafficking are legally enforceable treaties. Declarations, guidelines, codes, memoranda of understanding, “agreements”, United Nations resolutions, interpretive texts, the pronouncements



Box 2: Court and tribunal decisions most often cited in this Commentary

Velásquez Rodríguez Case, Judgement of 29 July 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988)

Juridical Conditions and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of 17 September 2003, Inter-American Court of Human Rights (Ser. A) No. 18 (2003)

Prosecutor v. Kunarac et al. (Trial Chamber I) Case No. IT-96-23-T& IT-96-23/1-T (22 February 2001) (Judgement)

Prosecutor v. Kunarac et al. (Appeals Chamber) Case No. IT-96-23 & IT-96-23/1-A (12 June 2002) (Judgement)

Rantsev v. Cyprus and Russia (25965/04) [2009] ECHR 22 (7 January 2010)

Siliadin v. France (73316/01) [2005] ECHR 545 (26 July 2005)

MC v. Bulgaria (39272/98) [2003] ECHR 651 (4 December 2003)

Osman v. the United Kingdom (23452/84) [1998] ECHR 101 (28 October 1998)

Akkoç v. Turkey (22947/93;22948/93) [2000] ECHR 458 (10 October 2000)

Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2002)

Maria Penha Maia Fernandes v. Brazil, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000)

of human rights treaty bodies and the reports of special procedures of the United Nations Human Rights Council (previously the Commission on Human Rights), are all important sources of guidance in identifying the nature of both rights and obligations. As "soft law" these instruments can also help to contribute to the development of new legal norms and standards, for example, in the case of United Nations General Assembly resolutions,¹⁰ by providing evidence of *opinio juris* and even State practice in the context of an emerging customary norm.

Soft law is especially important in several areas that directly touch upon the subject matter of this Commentary. For example, the United Nations has worked with States over many years to

develop non-treaty standards covering key aspects of the administration of criminal justice including detention and imprisonment. Some examples are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice; the Rules for the Protection of Juveniles Deprived of their Liberty; the Declaration of Basic Principles for Victims of Crime and Abuse of Power; and the Basic Principles and Guidelines on the Right to a Remedy. These soft law instruments build on treaty-based (and therefore legally enforceable) rules such as the prohibition on arbitrary detention, the rights of children and the right to a remedy for violations of human rights.

In the specific area of trafficking, the most important non-legal international instrument is the subject of the present commentary: the 2002 Trafficking Principles and Guidelines. As noted above, many aspects of the Trafficking Principles and Guidelines are based on

¹⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility (1984) ICJ Reports 392.

international treaty law. However, parts of this document go further by using accepted international legal standards to develop more specific and detailed guidance for States in areas such as legislation, criminal justice responses, victim detention and victim protection and support. Recently, the United Nations Children's Fund (UNICEF) released a set of Guidelines on the Protection of the Rights of Child Victims of Trafficking, which provide additional guidance on the specific issue of child victims. The United Nations High Commissioner for Refugees has also issued a set of guidelines that focus on the relationship between trafficking and asylum.

Important quasi-legal and non-legal instruments have also been developed at the regional level. As with their international equivalents, these instruments often reiterate and expand existing legal principles and sometimes go beyond what has been formally agreed between States. In the latter case, however, they can help to ascertain the direction in which international law is moving with respect to a particular issue.

Within Asia, relevant non-treaty instruments include: the 2004 ASEAN Declaration on Trafficking in Persons, Particularly Women and Children; the Memorandum of Understanding on Cooperation against Trafficking in Persons adopted in 2004 by the six countries of the Greater Mekong Subregion; the 2007 ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons; and the 2007 Recommendations on an Effective Criminal Justice Response to Trafficking in Persons of the United Nations Global Initiative to Fight Trafficking (UN.GIFT).

Non-treaty instruments on trafficking that have been adopted in and/or substantially involve Africa include: the ECOWAS Declaration on the Fight against Trafficking in Persons adopted by the Economic Community of West African States (ECOWAS) in 2001; the ECOWAS Initial Plan

of Action against Trafficking in Persons annexed thereto; and the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, adopted by the European Union and African States in 2006. Also in 2006, ECOWAS and the Economic Community of Central African States (EECAS) adopted a Multilateral Cooperation Agreement to Combat Trafficking in Persons, especially Women and Children, in West and Central Africa.

The European institutions have been particularly active on trafficking and related issues, and major non-treaty instruments include the Brussels Declaration on Preventing and Combating Trafficking in Human Beings, adopted by the European Conference on Preventing and Combating Trafficking in Human Beings in 2002; the Organization for Security and Co-operation in Europe's Action Plan to Combat Trafficking in Human Beings, agreed in 2003; the EU Council Directive of 29 April 2004 on residence permits issued to victims of trafficking who cooperate with authorities;¹¹ and the EU Plan on Best Practices, Standards and Procedures for Combating and Preventing Trafficking in Human Beings, adopted in 2005.

In the Americas, the Organization of American States (OAS) has adopted several soft-law instruments directly relevant to trafficking,¹² including the OAS Recommendations on

¹¹ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261 [Hereinafter: EU Council Directive of 29 April 2004].

¹² For example, Organization of American States (OAS), *Fighting the Crime of Trafficking in Persons*, adopted at the fourth plenary session, 7 June 2005, AG/RES. 2118 (XXXV-O/05); OAS, *Hemispheric Cooperation Efforts to Combat Trafficking in Persons and Second Meeting of National Authorities on Trafficking in Persons*, adopted at the fourth plenary session, 5 June 2007, AG/RES. 2348 (XXXVII O/07).



Box 3: “Soft law” instruments most often cited in this Commentary

Recommended Principles and Guidelines on Human Rights and Human Trafficking (Trafficking Principles and Guidelines)

Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women, 1995 (Beijing Platform for Action)

Further actions and initiatives to implement the Beijing Declaration and Platform for Action (Beijing+5 Outcome Document)

Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (Basic Principles and Guidelines on the Right to a Remedy)

UNICEF Guidelines on the Protection of Child Victims of Trafficking (UNICEF Guidelines)

Criminal Justice Responses to Trafficking in Persons – ASEAN Practitioner Guidelines (ASEAN Practitioner Guidelines)

Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Subregion, Yangon, 29 October 2004. Coordinated Mekong

Ministerial Initiative against Trafficking (COMMIT MOU)

The Brussels Declaration on Preventing and Combating Trafficking in Human Beings (Brussels Declaration)

OSCE Action Plan to Combat Trafficking in Human Beings (OSCE Action Plan)

EU Plan on Best Practices, Standards and Procedures for Combating and Preventing Trafficking in Human Beings (EU Plan on Best Practices)

Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (Ouagadougou Action Plan)

ECOWAS Initial Plan of Action against Trafficking in Persons (2002-2003) (ECOWAS Initial Plan of Action)

Organization of American States, Conclusions and Recommendations of the First Meeting of National Authorities on Trafficking in Persons (OAS Recommendations on Trafficking in Persons)

Trafficking in Persons, adopted in 2006.

The Inter-American Commission on Women has also produced several important resolutions in this area.¹³

Finally, bilateral (usually non-treaty) agreements on trafficking can provide another source of information on and insight into accepted or

evolving legal standards. One example of such an agreement is the memorandum of understanding concluded between Thailand and Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking. Other examples include a 2006 agreement between the Governments of Greece and Albania;¹⁴ a 2005 Memorandum of Understanding

¹³ For example, Inter-American Commission on Women, Fighting the Crime of Trafficking in Persons, Especially Women, Adolescents and Children, CIM/RES. 236 (XXXII-O/04).

¹⁴ *Agreement between the Government of Greece and the Government of Albania on the protection and assistance of children victims of trafficking* (February 2006).

between the Governments of Mexico and Guatemala;¹⁵ and a 2004 agreement between the Governments of Senegal and Mali.¹⁶

The term “soft law” can also be used to refer to principles contained in treaties that do not prescribe precise rights or obligations. A number of the treaty-based rules cited in this Commentary have been formulated as “soft” obligations. States parties to the Trafficking Protocol, for example, are variously required to “consider” certain measures; to “endeavour” to undertake or provide other measures; and to take action “in appropriate cases” or “to the extent possible”. Some of these already vague provisions are qualified even further through reference to measures being taken in accordance with the domestic law of the State party. The European Trafficking Convention also contains obligations that may be considered “soft”. States parties are, for example, required to “promote” a human rights approach; to “aim to promote” gender equality; to “consider adopting” certain measures; and to “take other measures” where appropriate and under conditions provided for by their domestic law.

Determining the weight of soft, treaty-based norms is, at least in the area of trafficking, a fairly straightforward process. In the majority of cases, such provisions are not completely devoid of legal substance and it will generally be possible to determine the required behaviour objectively. In the case of the major instruments cited above, and the Organized Crime Convention, such a determination can

be made with reference to an extensive body of interpretive material that includes *travaux préparatoires*,¹⁷ legislative guides¹⁸ and commentaries.¹⁹

2.7. HOW DIFFERENT SOURCES OF LAW AND OTHER AUTHORITIES ARE USED IN THIS COMMENTARY

The Commentary seeks to explore the different legal and policy aspects of trafficking that are addressed in the Trafficking Principles and Guidelines. One of the objectives of the Commentary is to determine the extent to which certain principles and concepts articulated in the Trafficking Principles and Guidelines have been accepted as law or otherwise incorporated into international or regional policy. The specific questions that are being asked include the following:

- Is a particular position taken by the Trafficking Principles and Guidelines supported by international law?
- Is a particular position taken by the Trafficking Principles and Guidelines in line with confirmed or emerging international/regional policy on trafficking?

¹⁷ For example, United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2006).

¹⁸ For example, United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2) [Hereinafter: *Legislative Guides to the Organized Crime Convention and its Protocols*].

¹⁹ For example, Council of Europe, *Explanatory Report on the Convention on Action against Trafficking in Human Beings*, ETS 197, 16.V.2005 (2005) [Hereinafter: *Explanatory Report on the European Trafficking Convention*].

¹⁵ *Memorandum of Understanding for the Protection of Women and Children who are Victims of Human Trafficking and Smuggling on the Border between Mexico and Guatemala*, 22 February 2005.

¹⁶ *Accord de Coopération entre le Gouvernement de la République du Sénégal et le Gouvernement de la République du Mali en Matière de Lutte contre la Traite et le Trafic Transfrontaliers des Enfants*, Dakar, 22 July 2004.



- Can international law help to identify the substantive content of norms or principles set out in the Trafficking Principles and Guidelines?
- Can secondary rules of international law (most particularly, those rules that govern the issue of State responsibility for violations of international law) assist in identifying the responsibility of States in this area?

In considering these questions, the Commentary generally follows the hierarchy of sources identified above. Treaties are usually considered first, with the Trafficking Protocol receiving the most attention because of its position as the most significant, current, universal and widely ratified specialist trafficking treaty. The European Trafficking Convention, which post-dates the Trafficking Principles and Guidelines, is also considered in depth throughout the Commentary. While a regional treaty, this Convention is important because of the potential breadth of its coverage (over 40 major countries of destination, transit and origin) and its very strong human rights focus, which is particularly in tune with the direction and spirit of the Trafficking Principles and Guidelines and, in some respects, actually goes beyond them. The SAARC Convention receives relatively less attention because of its narrow focus on the trafficking of women and children for prostitution, the small number of States parties and its minimal impact on regional or international legal discourse around trafficking since its adoption in 2002. Other specialist treaties that consider trafficking within the context of a broader issue such as transnational organized crime (Organized Crime Convention) or international criminal law (Rome Statute) are also regularly referred to throughout the Commentary.

International human rights treaties are also an important resource in seeking to respond to the questions set out above. The Convention on

the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child are cited most often because they alone contain trafficking-specific provisions and because they provide a legal framework of protection for two groups identified as particularly vulnerable to the human rights violations associated with trafficking. The International Covenant on Civil and Political Rights prohibits a number of practices directly related to trafficking, including slavery, the slave trade, servitude and forced labour. Freedom of movement and the prohibition on arbitrary detention (particularly relevant in relation to the detention of victims of trafficking) are additional, relevant provisions of the International Covenant on Civil and Political Rights. The International Covenant on Economic, Social and Cultural Rights is the major instrument for the economic and social entitlements of victims of trafficking and includes the important right to work that is freely chosen and accepted. The Migrant Workers Convention, considered further under Principle 1 and related guidelines, is also relevant. However, it is important to note that this Convention is yet to attract the widespread ratification that would confirm general acceptance of its extensive protections for migrant workers and their families. The Commentary also highlights the extent to which more specialist human rights provisions, such as those contained in the Refugee Convention, are of direct relevance in this area.

Customary international law is cited regularly throughout the Commentary. In this area, however, as in most others, the relative importance of custom as a source of law has diminished as a direct consequence of growing treaty regimes, such as that which governs human rights, and the recently established regime governing transnational organized crime. Decisions of international courts and tribunals remain an important source of insight and authority. A large number of such decisions

are cited in the Commentary – principally, but not exclusively, from the human rights courts that have been established in Europe (the European Court of Human Rights) and the Americas (the Inter-American Court of Human Rights).

“Soft law” materials such as guidelines, non-binding bilateral agreements, resolutions of the United Nations General Assembly and its organs, and codes and standards issued by international organizations are referred to frequently throughout the Commentary. Soft law does not impose legal obligations on States and such sources must be used carefully in order to ensure that their legal weight is not overestimated or otherwise distorted. Within these limits such materials can play an extremely important role in relation to several of the questions posed above. They can, for example, help to identify or confirm a particular legal trend or even contribute to the development of customary international law in relation to a particular aspect of trafficking. They can also provide insight into the substantive content of more general legal norms that are contained in treaties. For example, the Trafficking Protocol requires States to take some measures to protect victims of trafficking. Soft law materials are a key resource in determining the actions required by States to fulfil this particular obligation. The human rights focus of this Commentary influences, to some extent, the type of soft law materials available for consideration. Two of the soft law sources that are frequently cited in the Commentary (the work of United Nations treaty bodies and of its special procedures) are explained in detail below.

2.7.1. THE WORK OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES

For each of the major international human rights treaties, a Committee of independent experts has been established that is responsible for monitoring the implementation, by States

parties, of its provisions.²⁰ As part of their obligations under these treaties, States parties are required to lodge regular reports (called “country reports”) with the respective Committees on the situation with regard to protected rights and the steps that State has taken to fulfil its treaty obligations. The Committees examine these individual “country reports” and a dialogue is initiated with the reporting State. In addition to providing guidance to that State, the “concluding observations” of a treaty body on the performance of a State party can provide useful guidance to other countries on what is expected of them in relation to a particular right or standard set out in the treaty.

Five of the treaty bodies – the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disabilities – are able to receive and act upon allegations of violations made by individuals against States parties, provided the relevant party has agreed to subject itself to such a procedure.²¹ These “complaints mechanisms” enable the Committees to apply the relevant law to real situations involving real people, in this way helping to clarify the substantive content of norms. Most treaty-based bodies also engage in active interpretation of the provisions of their founding instrument through “general comments” or “general recommendations”,

²⁰ These are: the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee against Torture; the Committee on the Rights of the Child; the Committee on Migrant Workers; and the Committee on the Rights of Persons with Disabilities.

²¹ Note that a complaints procedure for the Committee on Economic, Social and Cultural Rights has been adopted but is not yet in force. Article 77 of the Migrant Workers Convention also establishes an individual complaints procedure, which is not yet in force either.



thereby contributing to the development of an international jurisprudence of human rights.

The work of the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child and the Human Rights Committee is cited most frequently throughout the Commentary. However, it is important to acknowledge that most of the human rights treaty-based bodies – including the Committee on Economic, Social and Cultural Rights, the Committee against Torture, the Committee on the Elimination of Racial Discrimination and the Committee established under the Migrant Workers Convention – now regularly raise trafficking and related issues in their consideration of States parties' reports.

2.7.2. THE WORK OF THE UNITED NATIONS SPECIAL PROCEDURES

The United Nations investigatory mechanisms or "special procedures" are charged with monitoring, advising and publicly reporting on a human rights situation in a specific country (country mandates) or on a particular issue (thematic mandates). The term encompasses special rapporteurs, individual experts and working groups. The mandate holders of all special procedures serve in their personal capacity. They report annually to the United Nations main political body concerned with human rights, the Human Rights Council, and, less frequently, to the General Assembly. All thematic and country-specific mechanisms are authorized to receive information relevant to their mandate from a variety of sources (including intergovernmental and non-governmental organizations), and to make recommendations on preventing or redressing violations. Some mechanisms are empowered to respond to allegations of violations by, for example,

establishing a dialogue with complainants and Governments, or even engaging in actual investigation of allegations. The reports of the special procedures can be an important source of information on and insight into human rights norms and standards. Because special procedures are dealing with real situations, they are often able to identify the practical measures required by States to protect, respect and fulfil a certain human right.

The special procedures cited most commonly in this Commentary are: the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on torture; and the Special Rapporteur on the sale of children, child prostitution and child pornography. Other relevant special procedures are the Working Group on Arbitrary Detention and the recently established Special Rapporteur on contemporary forms of slavery.

2.7.3. ADDITIONAL SOURCES OF INFORMATION AND AUTHORITY

The Commentary uses a range of other materials to supplement the sources cited above. Interpretive texts that have been developed in connection with specific treaties, such as commentaries, *travaux préparatoires* and legislative guides, are particularly important in relation to identifying key obligations under those instruments. Academic writings provide additional insight but it is important to note that such writings cannot create law and are at best of evidential weight.²²

²² Martin Dixon, *Textbook on International Law*, 6th ed. (2007), p. 47.



KEY DEFINITIONS²³

This section sets out and analyses the definitions of the key legal terms used in this Commentary.

3.1. TRAFFICKING IN PERSONS

The Trafficking Principles and Guidelines spell out both the human rights standards applicable to trafficked persons and the requirements of criminal justice in relation to those suspected of trafficking. Their scope of operation (i.e., what constitutes trafficking and a trafficked person) must therefore be defined.

The Trafficking Principles and Guidelines explicitly adopt the definition of trafficking in persons contained in article 3 of the Trafficking Protocol:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception,

of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used...

Box 4, below, identifies the three elements that must all be present for a situation of trafficking in persons (adults) to exist.

The Protocol does not separately define a trafficked person but subsumes this within the definition of trafficking.

²³ For a detailed consideration of the history and substantive elements of the definition of trafficking, see Gallagher, *International Law of Human Trafficking*, chap. 1.

Box 4: Key elements of the international legal definition of trafficking in persons

KEY ELEMENT	
Action	Recruitment, transport, transfer, harbouring or receipt of persons.
Means	Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another.
Purpose	Exploitation (including, at a minimum, ²⁴ 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).

The Trafficking Principles and Guidelines are applicable to trafficked persons and trafficking. They do not apply to migrants who have been smuggled. Article 3 of the Protocol against the Smuggling of Migrants defines migrant smuggling as:

The procurement, in order 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 permanent resident.

Under this definition, migrant smuggling refers only to the illegal movement of persons across international borders. The Migrant Smuggling Protocol criminalizes smuggling when it is for personal gain. Its provisions do not apply to those who procure their own illegal entry or who procure the illegal entry of others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in the movement of refugees or asylum-

seekers.²⁵ The Migrant Smuggling Protocol does not address mere illegal entry and takes a neutral position on whether those who migrate illegally should be the subject of any offences.²⁶

What are the key differences between smuggling and trafficking? Unlike trafficking, migrant smuggling may well involve but does not require an exploitative purpose or the elements of force, deception, abuse of power or position of vulnerability, or fraud. Another important difference is that migrant smuggling requires the (illegal) crossing of an international border. Trafficking does not require illegal movement of this kind as it can take place within the borders of one country or even when borders are crossed legally.

The distinction between trafficking and migrant smuggling is a legal one and may be difficult to establish or maintain in practice. This is because trafficking and migrant smuggling are processes – often interrelated and almost always

²⁴ “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of its First to Eleventh Sessions, Addendum: Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto” (A/55/383/Add.1, para. 88).

²⁵ “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of its First to Eleventh Sessions, Addendum: Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto” (A/55/383/Add.1, para. 88).

²⁶ Article 5.



involving shifts, flows, overlaps and transitions. An individual can be smuggled one day and trafficked the next. The risks and consequences of misidentification, particularly with regard to the human rights of victims, are discussed at various points throughout this Commentary.

3.2. TRAFFICKING IN CHILDREN

The legal definition of a “child” is contained in article 1 of the Convention on the Rights of the Child: “a child means every human being below the age of eighteen years...”. International law provides a different definition for trafficking in children. In the case of trafficking in children, it is unnecessary to show that force, deception or any other means were used. It is only necessary to show:

- (a) An “action” such as recruitment, buying and selling; and
- (b) That this action was for the specific purpose of exploitation.

In other words, trafficking will exist where the child was subject to some act, such as recruitment or transport, the purpose of which is the exploitation of that child. This definition potentially makes easier to identify child victims of trafficking and their traffickers. However, its breadth may make it difficult to distinguish those who have been trafficked from the broader category of children on the move.

3.3. RELATED LEGAL TERMS

The definition of trafficking set out above contains a number of terms that are not defined by the instrument in which the definition appears. It is, therefore, necessary to consider these separately.

Slavery: article 1 of the 1926 Convention on Slavery defines slavery as “*the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised*”.²⁷

Servitude: both the Universal Declaration of Human Rights (art. 4) and the International Covenant on Civil and Political Rights (art. 8 (2)) stipulate that no person shall be held in servitude. While not defined in either instrument, the term is generally seen to be broader than slavery, referring to “*all conceivable forms of domination and degradation of human beings by human beings*”.²⁸

²⁷ For more on the relationship between trafficking and slavery, see part 1, sections 2.2.3, above, and 4.3, below.

²⁸ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (2005), p. 99. Note Professor Nowak’s position that debt bondage (defined below) is included within the prohibition on servitude contained in the International Covenant on Civil and Political Rights. For more on the legal concept of servitude and its use (or non-use) in international law, see Jean Allain, “On the curious disappearance of human servitude from general international law”, *Journal of the History of International Law*, vol. 11, No. 2 (2009), p. 303.

KEY ELEMENT	
Action	Recruitment, transport, transfer, harbouring or receipt of persons.
Purpose	Exploitation (including, 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).

Box 5: Key elements of the international legal definition of trafficking in children

Practices similar to slavery: the 1956

Supplementary Convention on Slavery refers to the institutions and practices of debt bondage, serfdom, servile forms of marriage and the exploitation of the labour of children,²⁹ which are all held to be *similar to slavery*. Debt bondage and servile forms of marriage are two practices of particular relevance in the trafficking context. Article 1 (a) of the Supplementary Convention on Slavery defines **debt bondage** as:

The status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

In relation to **servile forms of marriage**, article 1 (c) of the Supplementary Convention on Slavery refers to:

Any institution or practice, whereby:

- (i) a woman, without the right to refuse, is promised or given in marriage on payment

²⁹ "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" (art. 1 (d)).

of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (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.

Article 2 of the Convention Concerning Forced and Compulsory Labour, 1930, defines **forced labour** as:

[A]ll work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.³⁰

³⁰ In the case of children, the Committee on the Rights of the Child has explained the definition of forced labour as follows: "... any substantial work or services that a person is obliged to perform, by a public official, authority or institution under threat of penalty; work or services performed for private parties under coercion (e.g. the deprivation of liberty, withholding of wages, confiscation of identity documents or threat of punishment) and slavery-like practices such as debt bondage and the marriage or betrothal of a child in exchange for consideration (see International Labour Organization Convention No. 29 (1930) on Forced Labour (arts. 2 and 11), and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (art. 1)): "Revised Guidelines Regarding Initial Reports to be submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography" (CRC/C/OPSC/2).



KEY LEGAL ISSUES

A human rights-based approach to trafficking, explored further in the context of Principle 1 and related guidelines, requires consideration of a range of legal questions. Three of the major legal “issues” that are raised at various points throughout this Commentary are introduced below.

4.1. TRAFFICKING AS A VIOLATION OF HUMAN RIGHTS

International law prohibits certain practices that are closely associated with trafficking, including debt bondage, forced labour, the worst forms of child labour, child sexual exploitation, forced marriage, enforced prostitution and the exploitation of the prostitution. International law also contains a strong prohibition on slavery, a prohibition that extends beyond human rights law to other areas of international law including the law of the sea, humanitarian law and international criminal law. The prohibition on torture, identified as a rule of customary international law,³¹ has also recently been invoked by international human rights bodies

in the specific context of trafficking.³² As we come to understand more about how trafficking happens and why, the relevance of other strong international rules, including the prohibition on discrimination on the basis of race and sex,

ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 10; *Prosecutor v. Furundzija* (Trial Chamber) Case No. IT-95-17/1-T (10 December 1998) (Judgement), paras. 143-4; *Prosecutor v. Kunarac et al.* (Trial Chamber I) Case No. IT-96-23-T& IT-96-23/1-T (22 February 2001) (Judgement), para. 466 [Hereinafter: *Kunarac Trial Chamber*].

³² The Special Rapporteur on Torture has recently noted that victims of trafficking are often confined, forced to work for long periods of time, and subjected to severe forms of physical and mental violence “that may amount to torture or at least cruel, inhuman and degrading treatment or punishment” (A/HRC/7/3, para. 56). The Special Rapporteur cites (para. 57) *Siliadin v. France* in support of a contention that the State may be held accountable for failing to prevent, prosecute and punish trafficking by non-State actors and for failing to provide appropriate protection for victims. He further cites (para. 57) *Barar v. Sweden* in which the European Court held that the expulsion of a person to a State where she or he would be subject to slavery or forced labour might raise issues under the obligation to prohibit torture. The Committee against Torture has also recognized the link between trafficking and torture. See, for example, concluding observations on Russian Federation (CAT/C/RUS/CO/4, para. 11); South Africa (CAT/C/ZAF/CO/1, para. 24); Togo (CAT/C/TGO/CO/1, para. 26); Republic of Korea (CAT/C/KOR/CO/2, para. 18); and Austria (CAT/C/AUT/CO/3, para. 4).

³¹ Human Rights Committee, general comment No. 24 (1994): Issues relating to reservations made upon

has grown significantly. In short, many of the practices that are implicated in modern-day trafficking are unambiguously prohibited under international human rights law.

The present Commentary will show that international human rights law is also relevant in terms of directing or determining appropriate responses by States. The law relating to treatment of non-citizens, for example, confirms that States are required to extend important human rights protections to victims of trafficking within their borders (see discussion under Principle 1 and related guidelines). Human rights law also confirms that States cannot violate non-discrimination principles or norms protecting economic, social and cultural rights when developing or implementing their response to trafficking (see discussion under Principle 3 and related guidelines). In addition to basic rights, individual trafficked persons will, depending on their status, be entitled to additional protections such as those that international law recognizes as applicable to women, children, migrants, migrant workers, refugees, and non-combatants. The right of victims of trafficking to remedies (explored in detail under Principle 17 and related guidelines) is a critical aspect of the human rights framework dictating acceptable national responses.

Does international human rights law actually prohibit trafficking in persons – as opposed to practices involved in trafficking such as forced labour or slavery? In other words, is trafficking itself a violation of international law? This is an important question from both a policy and a practical perspective. To be able to say that trafficking violates international human rights law is important for advocacy purposes because it establishes a direct link with the secondary rules of responsibility and because it pushes States towards a particular level and type of response. Broader legal

and policy interventions that aim to eradicate trafficking receive a considerable boost if that phenomenon, not just its constitutive elements, can be characterized as against international human rights law. Finally, identifying trafficking as a human rights violation will activate State obligations where States have introduced special measures, including protection measures, for those victims deemed to have suffered “human rights” violations.³³

The clear prohibition on trafficking in the Convention on the Rights of the Child and the reference to trafficking in the Convention on the Elimination of All Forms of Discrimination against Women indicate that, at least in relation to trafficking in children and women, international law recognizes a relatively unambiguous prohibition. Over the past decade it has become possible to cite strong, recent evidence, derived from a range of sources including treaties,³⁴ interpretive texts,³⁵ resolutions of intergovernmental organizations³⁶ and findings

³³ This consequence is one of the main reasons why trafficking was specifically identified as a human rights violation in the preamble to the European Trafficking Convention. See *Explanatory Report on the European Trafficking Convention*, para. 41.

³⁴ For example, the preamble to the European Trafficking Convention: “Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being”. See also the preamble to the EU Council Decision of 19 July 2002 which states that “trafficking in human beings comprises serious violations of fundamental human rights and human dignity”. See further the 2009 proposal for a new Framework Decision on Trafficking, which states, in its preamble, that “[t]rafficking in human beings is a serious crime, often committed in the framework of organised crime, and a gross violation of human rights”.

³⁵ See, for example, *Explanatory Report on the European Trafficking Convention*, paras. 41-45.

³⁶ See, for example, General Assembly resolution 58/137 on strengthening international cooperation in preventing and combating trafficking in persons and protecting victims of such trafficking, preamble (“trafficking in persons [is] an abhorrent form of modern-day slavery and



of United Nations treaty bodies,³⁷ to indicate a general consensus among States that trafficking is, in all its forms, a serious violation of human rights.

An important, additional confirmation of this is provided by a recent judgement of the European Court of Human Rights. In *Rantsev v. Cyprus and Russia*, the Court was required to consider whether trafficking was included in article 4 of the European Convention on Human Rights, which prohibits slavery, servitude and forced or compulsory labour. It concluded that “there can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention... the Court concludes that trafficking itself, within

the meaning of article 3 (a) of the Palermo Protocol and article 4 (a) of the Anti-Trafficking Convention, falls within the scope of article 4 of the Convention” (para. 282).

While it is becoming easier to point to the existence of a generally applicable norm prohibiting trafficking, it remains difficult to identify the nature, scope and effect of this norm with absolute certainty. Complicating factors include the complexity of the trafficking phenomenon; the range of rules involved or potentially involved; and the difficult question of State responsibility for acts that often lie outside their direct sphere of control. The Trafficking Principles and Guidelines are an important contribution to the difficult but important task of identifying the scope and fleshing out the normative content of an international prohibition on trafficking.

[is] an act that is contrary to universal human rights”); General Assembly resolution 61/180 on improving the coordination of efforts against trafficking in persons, preamble (“contemporary forms of slavery violate human rights and ... trafficking in persons impairs the enjoyment of human rights”); Commission on Human Rights resolution 2004/45 on trafficking in women and girls, preamble (“eliminate all forms of sexual violence and trafficking ... which both violate and impair or nullify the enjoyment of the human rights and fundamental freedoms of victims of trafficking”); Human Rights Council resolution 11/3 on trafficking in persons, especially women and children, preamble (“trafficking in persons violates human rights and impairs the enjoyment of them”); Council of Europe, Recommendation Rec(2002)5 on the protection of women against violence, adopted by the Committee of Ministers on 30 April 2002 (defines “violence against women” as including “trafficking in women for the purposes of sexual exploitation and economic exploitation and sex tourism” and states that “violence against women both violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms”).

³⁷ The Human Rights Committee, in its concluding observations, has repeatedly identified trafficking as constituting a potential violation of articles 3, 8, 24 and 26 of the Covenant: Barbados (CCPR/C/BRB/CO/3, para. 8); Kosovo (Serbia) (CCPR/C/UNK/CO/1, para. 16); Paraguay (CCPR/C/PRY/CO/2, para. 13); Brazil (CCPR/C/BRA/CO/2, para. 15); and Slovenia (CCPR/CO/84/SVN, para. 11).

4.2. TRAFFICKING AS A FORM OF SEX-BASED DISCRIMINATION AND VIOLENCE AGAINST WOMEN³⁸

It can be argued that trafficking constitutes a violation of international law because it is contrary to the international prohibition on sex-based discrimination. A refinement of this position identifies trafficking as a form of violence against women and, therefore, a violation of the norm prohibiting discrimination on the basis of sex. These various claims are analysed below with particular reference to the work and functions of the Committee on the Elimination of Discrimination against Women.

³⁸ For a more detailed consideration of this issue, see Gallagher, *International Law of Human Trafficking*, chap. 3. For a comprehensive analysis of article 6 of the Convention on the Elimination of All Forms of Discrimination against Women and the related practice of the Committee on the Elimination of Discrimination against Women, see Janie Chuang, article 6, in *Commentary to the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (forthcoming).

Equal treatment and non-discrimination on the basis of sex is a fundamental human right firmly enshrined in all major international and regional instruments³⁹ (see discussion under Principles 3 and 7 and related guidelines). The Convention on the Elimination of All Forms of Discrimination against Women defines such discrimination as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (art. 1).

It is widely accepted that this prohibition requires States parties to take action to prevent private as well as public acts of discrimination.⁴⁰ The prohibition on sex-based discrimination is related to and reinforces the duty of equal application of the law.⁴¹

³⁹ Charter of the United Nations, Preamble, Article 1 (3); International Covenant on Civil and Political Rights, articles 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, articles 2, 3, 7; African Charter, articles 2, 18 (3); American Convention on Human Rights, article 1; European Convention on Human Rights, article 14.

⁴⁰ See Committee on the Elimination of Discrimination against Women, general recommendation No. 19: Violence against women, para. 9; Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104, article 4 (c); "Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy" (E/CN.4/1995/42, para. 72). See also Theodor Meron, *Human Rights Law-making in the United Nations* (1986), p. 60.

⁴¹ Article 26 of the International Covenant on Civil and Political Rights, for example, provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this

The discussion under Principle 5 and related guidelines confirms the link between sex-based discrimination and vulnerability to trafficking.

Violence against women is not directly addressed in any of the major international or regional human rights instruments.⁴² However, attitudes are changing and the issue is now a fixture on the mainstream human rights agenda. Two United Nations instruments are significant: general recommendation No. 19 on violence against women issued by the Committee on the Elimination of Discrimination against Women, and the Declaration on the Elimination of Violence against Women adopted by the General Assembly in 1993. Also relevant, both in a regional context as well as in terms of its overall influence on the direction and content of the debate on violence against women, is the 1994 Inter-American Convention on Violence against Women.

General recommendation No. 19 brings the issue of violence against women within the Convention on the Elimination of All Forms of Discrimination against Women by stipulating that the definition of discrimination contained in article 1 includes gender-based violence, i.e., violence that is directed against a woman because she is a woman or that affects women disproportionately. Gender-based violence is identified as "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. According to the Committee on the Elimination of Discrimination against Women, gender-based violence includes "acts that inflict physical, mental or sexual harm or

respect, the law shall prohibit any discrimination and shall guarantee to all persons equal and effective protection against discrimination on any ground such as ... sex".

⁴² This omission and the reasons behind it have been the subject of extensive analysis. For a useful overview, see E/CN.4/1995/42.



suffering, threats of such acts, coercion and other deprivations of liberty". Not all violence against women will be gender-based. Deciding whether a particular act of violence is gender-based (and therefore a form of sex-based discrimination) will involve consideration of the two prongs of the definition: first, whether women *as women* are targeted, and second, whether they are disproportionately affected.⁴³

General recommendation No. 19 makes specific reference to trafficking by identifying it as a form of violence against women that is incompatible with the equal enjoyment of rights by women and with the respect for their rights and dignity, putting women at special risk of violence and abuse.

In relation to article 6 of the Convention, general recommendation No. 19 also notes the following:

- States parties are required by article 6 to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women.
- Poverty and unemployment increase opportunities for trafficking in women.
- Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.
- In addition to established forms of trafficking, there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal

enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

- Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.

As general recommendation No. 19 makes clear, gender-based violence "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions". Importantly, the general recommendation points out that discrimination prohibited under the Convention is not restricted to action by or on behalf of Governments and it requires States to "take appropriate and effective measures to overcome all forms of gender-based violence, *whether by public or private act*" (emphasis added). This point has been reaffirmed by the Committee on the Elimination of Discrimination against Women on many occasions, including in its consideration of communications under the Convention's Optional Protocol.⁴⁴

The Declaration on the Elimination of Violence against Women, adopted by consensus in the General Assembly, applies to all forms of gender-based violence within the family and the general community as well as violence "perpetrated or condoned by the State, wherever it occurs". States are to "exercise due diligence to prevent, investigate and ... punish acts of violence against women, whether these acts are perpetrated *by the State or by private persons*" (emphasis added). As a resolution of the General Assembly, the Declaration does not have

⁴³ See further Gallagher, *International Law of Human Trafficking*, chap. 3.

⁴⁴ See, for example, *A.T. v. Hungary*, Communication No. 2/2003 (CEDAW/C/32/D/2/2003, para. 9.2); and *Fatma Yildirim (deceased) v. Austria*, Communication No. 6/2005 (CEDAW/C/39/D/6/2005, para. 12.1).

automatic force of law and it does not carry the important interpretive weight of a general recommendation. However, its potential capacity to contribute to the development of a customary international norm on the issue of violence against women, including the question of State responsibility for acts of violence perpetrated by private individuals or entities, should not be discounted,⁴⁵ particularly in the light of its adoption by consensus.

The Inter-American Convention on Violence against Women is currently the only international legal agreement specifically addressing the issue of violence against women. Its purpose is to prevent, punish and eradicate all forms of violence against women, defined as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in *the public or the private sphere*” (art. 1 – emphasis added). The Convention specifically recognizes trafficking (undefined) as community-based violence against women (as opposed to domestic violence or violence perpetrated or condoned by the State or its agents), thereby acknowledging that the harm of trafficking generally originates in the private sphere. States parties are required, under article 7, to:

- Refrain from engaging in any act or practice of violence against women;
- Ensure that their authorities or agents act in conformity with this obligation;
- Exercise due diligence in preventing, investigating and imposing penalties for violence against women; and
- Establish fair and effective legal procedures for women who have been subjected to violence.

⁴⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility (1984) ICJ Reports 392 (identifying General Assembly resolutions adopted by consensus as important sources of *opinio juris*).

The Convention provides for a range of potentially effective enforcement mechanisms including reporting and a complaints procedure open to both individuals and groups (arts. 10 and 12).

At the international political level, two key outcome documents of major world conferences – the Vienna Declaration⁴⁶ and the Beijing Platform for Action⁴⁷ – identify trafficking as a form of gender-based violence, as does the Secretary-General’s key report, “In-depth study on all forms of violence against women”.⁴⁸ The work of United Nations human rights mechanisms in addition to that of the Committee on the Elimination of Discrimination against Women,⁴⁹ and the United Nations High Commissioner for Refugees,⁵⁰ have also

⁴⁶ “Report of the World Conference on Human Rights”, Vienna, 14-25 June 1993, A/CONF.157/24, chapter III, Programme of Action, Part 1, para. 18 [Hereinafter: Vienna Declaration].

⁴⁷ “Beijing Declaration and Platform for Action”, adopted at the Fourth World Conference on Women (A/CONF.177/20), chapter IV, strategic objective D.3., para. 131.

⁴⁸ A/61/122/Add.1, paras. 135-138; United Nations High Commissioner for Human Rights, “Women 2000: The Future of Human Rights”, speech given at Columbia University, 4 June 2000.

⁴⁹ For example, the Committee against Torture recently addressed trafficking in its concluding observations of State party reports under the heading “Violence against women and children, including trafficking”: Russian Federation (CAT/C/RUS/CO/4, para. 11); Ukraine (CAT/C/UKR/CO/5, para. 14).

⁵⁰ “[Trafficking] of women and children for purposes of forced prostitution or sexual exploitation is a form of gender-related violence, which may constitute persecution”, within the legal definition of “refugee”. Office of the High Commissioner for Refugees, 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) [Hereinafter: UNHCR Trafficking Guidelines], para. 19; Office of the United Nations High Commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within



identified trafficking as a form of gender-based violence.

Note that this issue is considered further at various points throughout the Commentary, including under Principle 1 and related guidelines (human rights of women); Principle 2 and related guidelines (application of the due diligence standard in the context of violence against women); Principle 3 and related guidelines (anti-trafficking measures violating the prohibition on sex-based discrimination); and Principle 13 (investigation, prosecution and adjudication of trafficking in persons cases).

4.3. TRAFFICKING IN INTERNATIONAL HUMANITARIAN AND CRIMINAL LAW⁵¹

International humanitarian law or “the law of war” is a branch of international law that regulates the conduct of hostilities. A critical aspect of international humanitarian law is the protection that it affords civilians who are caught up in an international or internal armed conflict – protection that is additional to human rights laws, which continues to apply subject to lawful derogation.⁵² In relation to both international and non-international

armed conflicts, international humanitarian law (both customary and treaty-based) prohibits a number of trafficking-related practices including enslavement, the slave trade, forced relocation and deportation to slave labour, uncompensated or abusive forced labour and arbitrary deprivation of liberty.⁵³

Many rules of international humanitarian law now form part of international criminal law – that branch of law dealing with individual criminal responsibility for international crimes, including war crimes and crimes against humanity. The International Criminal Court and the ad hoc tribunals that preceded it are the major institutions of international criminal law. Their establishment provided the opportunity for further clarification of practices that are to be considered war crimes and crimes against humanity. Importantly, they also enabled the international community to address what many felt was a serious lack of attention to certain offences committed during armed conflict, including rape, enforced prostitution and enforced pregnancy.

The Statutes of the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda both identify rape, enforced prostitution and any form of indecent assault as war crimes.⁵⁴ Rape is further identified as a crime against humanity under the Statutes of the International Criminal Tribunals for both

the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01) [Hereinafter: UNHCR Gender Guidelines], para. 18.

⁵¹ For more on trafficking in international humanitarian law and international criminal law, including the international legal prohibition on slavery and enslavement, see Gallagher, *International Law of Human Trafficking*, chap. 3.

⁵² On this point, see *Legality or Threat of Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Reports 226, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Reports 136, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits (2005) ICJ Reports 168, paras. 216–220.

⁵³ See generally International Committee of the Red Cross, *Customary International Humanitarian Law*, Jean-Marie Henckaerts and Louise Doswald-Beck, eds. (Cambridge University Press, 2005), especially chapter 32.

⁵⁴ Statute of the Special Court for Sierra Leone, article 3 (e); Statute of the International Criminal Tribunal for Rwanda, article 4 (e) (when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds).

Rwanda and the former Yugoslavia.⁵⁵ The ad hoc tribunals have made significant doctrinal advances in relation to the international legal prohibitions that are potentially involved in or associated with trafficking. They have, for example, prosecuted individuals for sexual violence, and several defendants have been convicted of the crime against humanity of rape,⁵⁶ defined for the first time in 1998 by the International Criminal Tribunal for Rwanda.⁵⁷ Sexual violence has been recognized as an act of genocide as well as a form of torture, enslavement, persecution and inhumane acts and as the *actus reus* for these and other crimes.⁵⁸ As detailed in the discussion on slavery, above, the International Criminal Tribunal for the former Yugoslavia has also identified sexual and related violence as constituting the crime against humanity of enslavement. The judgement of the trial chamber, later confirmed on appeal,

⁵⁵ Statute of the International Criminal Tribunal for Rwanda, article 3 (g) (when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds); Statute of the International Criminal Tribunal for the former Yugoslavia, article 5 (g) (when committed in armed conflict and directed against any civilian population).

⁵⁶ For a comprehensive overview of these cases, see James R. McHenry III, "The prosecution of rape under international law: Justice that is long overdue", *Vanderbilt Journal of Transnational Law*, vol. 35, No. 4 (October 2002), p. 1269. For background information on several of the major indictments, see Kelly Dawn Askin, "Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals: Current status", *American Journal of International Law*, vol. 93, No. 1 (January 1999), p. 97. For a more recent and detailed analysis, see Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR* (2005).

⁵⁷ "[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive": *Prosecutor v. Akayesu* (Trial Chamber I) Case No. ICTR-96-4-T, 2 September 1998 (Judgement) (para. 598).

⁵⁸ See, for example, *Prosecutor v. Akayesu* (acts of sexual violence can form the *actus reus* for the crime of genocide).

explicitly recognized a distinct evolution in the international legal prohibition on slavery. The Tribunal identified a number of factors to be taken into account in properly identifying whether enslavement was committed, many of which are typical of contemporary trafficking fact patterns.⁵⁹

The International Criminal Court, established in 2002, has jurisdiction over genocide, war crimes, crimes against humanity and the crime of aggression (which has yet to be defined). The jurisdiction of the International Criminal Court is complementary to that of national courts, and as such is limited to situations where national systems fail to investigate or prosecute, or where they are "unable or unwilling" to do so genuinely.⁶⁰ The Rome Statute provides for individual criminal responsibility for persons who commit, attempt to commit, order, solicit, induce, aid, abet, assist or intentionally contribute to the commission of a crime within the jurisdiction of the International Criminal Court. This covers all persons without distinction, including on the basis of official capacity such as head

⁵⁹ For example, "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour": *Kunarac Trial Chamber*, para. 543.

⁶⁰ Rome Statute, articles 5 (1) and 17. "Inability" is determined by considering "whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings" (art. 17 (3)). In determining "unwillingness", the Court will consider whether one or more of the following exist as applicable: "(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility...; (b) There has been an unjustified delay in the proceedings ... inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially" (art. 17 (2)).



of State, member of Government or elected representative. Importantly, the Statute also provides for the responsibility of military commanders and other superior authorities for crimes committed by subordinates under their control (arts. 25, 27 and 28). In addition, article 25 (3)(d) of the Rome Statute criminalizes a new form of criminal participation: contributing to the commission by a group of a crime or an attempted crime creates individual criminal responsibility.

The Rome Statute provides that war crimes committed in situations of international armed conflict include: “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”. War crimes in situations of non-international armed conflict include: “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions”.⁶¹

The Rome Statute further provides that the constituent acts of “crimes against humanity” (which must, by jurisdictional necessity, be committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack)⁶² include: “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”. Enslavement is also listed as a

constituent act of crimes against humanity. As discussed previously and considered further below, the Statute provides that “enslavement” means “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.⁶³ Additional acts identified as war crimes and/or crimes against humanity that are of potential relevance to a situation of trafficking include deportation or forcible transfer (arts. 7 (1)(d) and 8 (2)(a)(vii)), “committing outrages upon personal dignity, in particular humiliating and degrading treatment” (art. 8 (2)), and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. The Rome Statute also criminalizes persecution, including gender-based persecution, if committed in connection with any inhumane act enumerated in the Statute or any crime within the jurisdiction of the Court.⁶⁴

The above overview has confirmed that a number of the practices associated with trafficking, including various forms of sexual violence such as enforced prostitution, can, subject to certain specific conditions, be identified as both war crimes and crimes against humanity, attracting individual criminal responsibility. Other questions, such as whether (and, if so, under what circumstances) trafficking *as trafficking* can be characterized as a crime against humanity, are not yet settled.⁶⁵

⁶¹ Articles 8 (2)(b)(xxii) and 8 (2)(e)(vi). Note that the elements of crime for the war crimes of enslavement, sexual slavery and enforced prostitution are identical to those set out for the equivalent crimes against humanity. See generally the discussion within this section.

⁶² Article 7 (1). Note that there is no requirement of a nexus to armed conflict.

⁶³ Articles 7 (1)(g) and 7 (2)(c). Note that “trafficking in persons” is not defined in the Rome Statute.

⁶⁴ Articles 7 (1)(k) (crime against humanity) and 7 (1)(h). Article 7 (2)(g) of the Rome Statute defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.

⁶⁵ For a consideration of this issue, see Gallagher, *International Law of Human Trafficking*, chap. 3.

SEE FURTHER:

- Non-discrimination and responses to trafficking: part 2.1, section 3.2
- Treatment of non-citizens: part 2.1, section 1.3; women: part 2.1, sections 1.4.1, 3.2; part 2.2, section 5.4; part 2.3, sections 7.4, 8.5; children: part 2.1, section 1.4.2; part 2.2, section 5.5; part 2.3, sections 7.4, 8.5, 10.1-10.4; migrants/migrant workers: part 2.1, section 1.4.3; refugees, asylum-seekers and internally displaced persons: part 2.1, sections 1.4.4, 3.4
- Sex-based discrimination and vulnerability to trafficking: part 2.2, section 5.4
- Access to remedies: part 2.4, sections 17.1-17.6

PART 2



Part 2.1

THE PRIMACY OF HUMAN RIGHTS

INTRODUCTION

Human rights law provides universal standards that are applicable to all persons. While the means to achieve human rights guarantees can – and should – be locally appropriate and contextually determined, the universality of their applicability to all persons, including everyone who has been trafficked, is indisputable.

The *Trafficking Principles and Guidelines* explicitly advocate a *human rights-based approach* to trafficking. The importance of this approach to trafficking has been confirmed by the international community⁶⁶ and by international human rights bodies.⁶⁷

As a conceptual framework for dealing with a phenomenon such as trafficking, a human rights-based approach is one that is *normatively based* on international human rights standards and is *operationally directed* to promoting and protecting human rights. Such an approach requires an analysis of the ways in which human rights violations arise throughout the trafficking cycle, as well as of States' obligations under international human rights law. It seeks to both identify and redress the discriminatory practices and unjust distributions of power that underlie trafficking, that maintain impunity for traffickers, and that deny justice to victims of trafficking.

⁶⁶ See, for example, Human Rights Council resolution 11/3 on trafficking in persons, especially women and children; General Assembly resolutions Nos. 63/156, 61/144 and 59/166 on trafficking in women and girls; Commission on Human Rights resolution 2004/45 on trafficking in women and girls; and General Assembly resolution 58/137.

⁶⁷ See, for example, Human Rights Committee, concluding observations: Barbados (CCPR/C/BRB/CO/3, para. 8); Yemen (CCPR/CO/84/YEM, para. 17); Tajikistan (CCPR/CO/84/TJK, para. 24); Thailand (CCPR/CO/84/THA, para. 20); Kenya (CCPR/CO/83/KEN, para. 25); Greece (CCPR/CO/83/GRC, para. 10). See also Committee on the Elimination of Discrimination against Women, Concluding Comments: Brazil (CEDAW/C/BRA/CO/6,

para. 24); Serbia (CEDAW/C/SCG/CO/1, para. 26). See further "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo" (A/HRC/10/16, para. 44 and Part V, conclusions and recommendations); "Integration of the human rights of women and a gender perspective: Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Sigma Huda" (E/CN.4/2006/62, para. 81); "Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda: Mission to Lebanon" (E/CN.4/2006/62/Add.3, paras. 71, 75 and 103); "Integration of the human rights of women and a gender perspective: Report of the Special Rapporteur on trafficking in persons, especially women and children, Sigma Huda" (E/CN.4/2005/71, paras. 10-11, 55-57).

Under a human rights-based approach, every aspect of the national, regional and international response to trafficking is anchored in the rights and obligations established by international human rights law. The lessons learned in developing and applying a human rights-based approach in other areas, such as development, provide important insights into the main features of the approach and how it could be applied to trafficking. The key points that can be drawn from these experiences include the following:⁶⁸

- As policies and programmes are formulated, their main objective should be to promote and protect rights;
- A human rights-based approach identifies *rights-holders* (for example trafficked persons, individuals at risk of being trafficked, individuals accused or convicted of trafficking-

related offences) and their entitlements and the corresponding *duty-bearers* (usually States) and their obligations. This approach works towards strengthening the capacity of rights-holders to secure their rights and of duty-bearers to meet their obligations; and

- Core principles and standards derived from international human rights law (such as equality and non-discrimination, the universality of all rights, and the rule of law) should guide all aspects of the response at all stages.

The three Principles and related guidelines that come under the heading “The primacy of human rights” provide a conceptual and legal umbrella for the document as a whole. This means that all other Principles and Guidelines must be interpreted and applied with reference to the rights and obligations set out in these first three Principles. The primacy of human rights is itself an overarching principle that applies throughout all interventions in the trafficking cycle and must guide the behaviour of all those involved, including State agents such as law-enforcement, immigration and prosecutorial and judicial personnel as well as both governmental and non-governmental service providers.

⁶⁸ This section is drawn from Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-based Approach to International Development Cooperation* (HR/PUB/06/8). For more on the history and application of rights-based approaches and justifications for them, see Mac Darrow and Amparo Tomas, “Power, capture, and conflict: a call for human rights accountability in development cooperation”, *Human Rights Quarterly*, vol. 27, No. 2 (May 2005), p. 471.



PRINCIPLE 1 AND RELATED GUIDELINES: **HUMAN RIGHTS OF TRAFFICKED PERSONS**

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

1.1. PURPOSE AND CONTEXT

Principle 1 and related guidelines require human rights to be central to all actions directed at both the prevention and combating of trafficking and the provision of protection and assistance to trafficked persons. This is an important starting point for the Trafficking Principles and Guidelines because, as noted in part 1, trafficking can be considered and dealt with from a range of different perspectives including migration, public order and crime control, as well as human rights. Principle 1 confirms that priority must be given to the human rights obligations accepted by States under international human rights law.

Prioritizing human rights does not mean that other objectives or approaches are to be considered unimportant or invalid. For example, States remain entitled to develop strong criminal justice responses to trafficking. In fact, the Commentary identifies a number of specific obligations in this regard (see discussion under Principles 12-17 and related guidelines). States

also remain free, within the constraints imposed by international law, to develop migration strategies that seek to address trafficking. However, at each step of every response, the human rights impact of that step and of the overall response must be considered and monitored. The ultimate objective of responses to trafficking should be to protect individuals from trafficking-related violations of their human rights and to provide assistance when such violations are not—or cannot be—prevented.

The centrality of human rights in preventing and combating trafficking is founded upon international and regional human rights law. Article 28 of the Universal Declaration of Human Rights provides that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”. The consequence of this article is that States must both themselves respect human rights and ensure compliance with human rights by non-State actors, in accordance with the duty of due diligence. The duty of due diligence is examined in more detail under Principle 2 and related guidelines.

Principle 1 seeks to ensure that trafficked persons are accorded all human rights, including those to which they are entitled as victims of crime as

well as as victims of human rights violations. This Principle is applicable to all State agents and to all other actors engaged in activities relating to the prevention and punishment of trafficking and the protection of victims.

1.2. KEY HUMAN RIGHTS INVOLVED IN TRAFFICKING

Making human rights the centre of all efforts to deal with trafficking requires identification of the major rights that are involved in trafficking and related exploitation. It is important to acknowledge that some rights will be especially relevant to the causes of trafficking (for example, the right to an adequate standard of living); others to the actual process of trafficking (for example, the right to be free from slavery); and still others to the response (for example, the right of suspects to a fair trial). Some rights are broadly applicable to each of these aspects.

The following is a list of the rights and obligations most relevant to trafficking. The sources of these rights and obligations are noted in box 6, below.

- Prohibition of discrimination on one or more of the prohibited grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status;

- The right to life;
- The right to liberty and security;
- The right of access to courts, to equality before the courts and to a fair trial;
- The right not to be submitted to slavery, servitude, forced labour, or bonded labour;
- Freedom from slavery in armed conflict;
- The right not to be subjected to torture, and/or cruel, inhuman or degrading treatment or punishment;
- The right to be free from gender-based violence;
- The right to associate freely;
- The right to freedom of movement;
- The right to the highest attainable standard of physical and mental health;
- The right to just and favourable conditions of work;
- The right to an adequate standard of living;
- The right to social security; and
- The right not to be sold, traded or promised in marriage.

Of the rights listed above, a number are recognized as constituting customary international law. These include: the prohibition on slavery and the slave trade; the prohibition on racial discrimination; the prohibition on torture; and the right to a remedy. As noted in part 1 (see section 2.3, above), this means that such rights bind all States, irrespective of whether or not they are party to the relevant treaty.



Box 6: Key human rights involved in trafficking

RIGHT/OBLIGATION	TREATY SOURCE
Right to life	• Universal Declaration of Human Rights, article 3; • International Covenant on Civil and Political Rights, article 6; • Migrant Workers Convention, article 9; • Convention on the Rights of the Child, article 6; • Convention on the Rights of Persons with Disabilities, article 10; • European Convention on Human Rights, article 2; • American Convention on Human Rights, article 4; • African Charter on Human and Peoples' Rights, article 4.
Prohibition on discrimination	• Universal Declaration of Human Rights, article 2; • International Covenant on Civil and Political Rights, articles 2 (1) and 26; • Convention on the Rights of the Child, article 2; • Migrant Workers Convention, article 7; • International Covenant on Economic, Social and Cultural Rights, article 2 (2); • Convention on the Rights of Persons with Disabilities, article 6; • European Convention on Human Rights, article 14; • American Convention on Human Rights, article 1 (includes "economic status"); • African Charter on Human and Peoples' Rights, article 2 (includes "fortune"). • <i>Non-treaty source</i>: Cairo Declaration on Human Rights in Islam, article 1.
Right to liberty and security	• Universal Declaration of Human Rights, article 3; • International Convention on the Elimination of Racial Discrimination, article 5 (b); • International Covenant on Civil and Political Rights, article 9; • Migrant Workers Convention, article 16; • Convention on the Rights of Persons with Disabilities, article 14; • European Convention on Human Rights, article 5; • American Convention on Human Rights, article 7; • African Charter on Human and Peoples' Rights, article 6.

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(Box 6 continued)

RIGHT/OBLIGATION	TREATY SOURCE
Right of access to courts, equality before the courts and a fair trial	• International Covenant on Civil and Political Rights, article 14; • International Convention on the Elimination of All Forms of Racial Discrimination, article 5 (a); • Convention on the Elimination of All Forms of Discrimination against Women, article 15; • Migrant Workers Convention, article 18; • Convention on the Rights of Persons with Disabilities, articles 12 and 13; • European Convention on Human Rights, article 6; • American Convention on Human Rights, articles 8 and 24; • African Charter on Human and Peoples' Rights, article 7; • Refugee Convention, article 16; • Protocol on the Rights of Women in Africa, article 8. • <i>Non-treaty source</i>: Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, article 5 (c).
Right not to be submitted to slavery, servitude, forced labour or bonded labour/debt bondage	• Slavery Convention, 1926, article 1; • Supplementary Convention on the Abolition of Slavery, 1956, article 1; • Convention Concerning Forced and Compulsory Labour, 1930, articles 1, 2 and 4; • Universal Declaration of Human Rights, article 4; • Convention Concerning the Abolition of Forced Labour, 1957, article 1; • International Covenant on Civil and Political Rights, article 8; • Migrant Workers Convention, article 11; • European Convention on Human Rights, article 4; • American Convention on Human Rights, article 6; • African Charter on Human and Peoples' Rights, article 5; • Rome Statute, articles 7 (c) and 7 (g). • <i>Non-treaty source</i>: Cairo Declaration on Human Rights in Islam, article 11.
Freedom from slavery in armed conflict	• Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), article 4; • Rome Statute, articles 8 (2)(b)(xxii) and 8 (2)(e)(vi).



RIGHT/OBLIGATION	TREATY SOURCE
The right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment	• Universal Declaration of Human Rights, article 5; • International Covenant on Civil and Political Rights, article 7; • Convention against Torture; • Convention on the Rights of the Child, article 37; • Migrant Workers Convention, article 10; • Convention on the Rights of Persons with Disabilities, article 15; • European Convention on Human Rights, article 3; • American Convention on Human Rights, article 5; • African Charter on Human and Peoples' Rights, article 5; • Protocol on the Rights of Women in Africa, article 4. • <i>Non-treaty source</i>: Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, article 6.
The right to associate freely	• Universal Declaration of Human Rights, article 20; • International Covenant on Civil and Political Rights, article 22; • Convention on the Rights of the Child, article 15; • European Convention on Human Rights, article 11; • American Convention on Human Rights, article 16; • African Charter on Human and Peoples' Rights, article 10.
The right to freedom of movement	• Universal Declaration of Human Rights, article 13; • International Covenant on Civil and Political Rights, article 12; • Convention on the Elimination of All Forms of Discrimination against Women, article 15 (4); • Migrant Workers Convention, article 8; • Convention on the Rights of Persons with Disabilities, article 18; • European Convention on Human Rights, article 3; • American Convention on Human Rights, article 12; • African Charter on Human and Peoples' Rights, article 12; • Refugee Convention, article 23.
The right to the highest attainable standard of physical and mental health	• International Covenant on Economic, Social and Cultural Rights, article 12; • Convention on the Elimination of All Forms of Discrimination against Women, article 12; • Migrant Workers Convention, article 28; • Convention on the Rights of the Child, article 24; • Convention on the Rights of Persons with Disabilities, article 15; • European Social Charter, article 11; • Protocol on the Rights of Women in Africa, article 14.

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(Box 6 continued)

RIGHT/OBLIGATION	TREATY SOURCE
The right to just and favourable conditions of work	• International Covenant on Economic, Social and Cultural Rights, article 7; • Convention on the Elimination of All Forms of Discrimination against Women, article 11; • International Convention on the Elimination of All Forms of Racial Discrimination, article 5 (e)(i); • Migrant Workers Convention, article 25; • Protocol on the Rights of Women in Africa, article 13; • European Social Charter, articles 1-4 and 8 (women).
The right to an adequate standard of living	• International Covenant on Economic, Social and Cultural Rights, article 11; • Convention on the Rights of the Child, article 27; • Convention on the Rights of Persons with Disabilities, article 28; • Refugee Convention, article 23.
The right to social security	• International Covenant on Economic, Social and Cultural Rights, article 9; • European Social Charter, article 12; • Convention on the Rights of the Child, article 26; • Migrant Workers Convention, article 27.



1.3. APPLICABILITY OF HUMAN RIGHTS TO NON-CITIZENS⁶⁹

The United Nations has defined a non-citizen as “any individual who is not a national of a State in which he or she is present.”⁷⁰ Non-citizens include migrant workers and their families as well as refugees and asylum-seekers and trafficked persons. The term “non-citizen” also applies to stateless persons, that is, individuals who have never formally acquired citizenship of the country in which they were born or who have somehow lost their citizenship without gaining another.⁷¹

The position of non-citizens under international human rights law is of particular relevance to an assessment of the rights of trafficked persons and the duties owed to them by States. Except in cases of internal trafficking, the most serious violations committed against a trafficked person will almost invariably take place outside the victim’s country of residence or citizenship, including in transit and, particularly, in destination countries. This is not to deny the reality of substantive violations occurring during the recruitment and initial transport phases. However, the purpose of that recruitment and transport is exploitation, and it is for this reason that the country of destination is an especially

dangerous one for trafficked persons and their rights. There is also a clear link between statelessness and trafficking. First, statelessness increases vulnerability to trafficking. Second, stateless people who are trafficked face unique difficulties, for example with regard to establishing their identity and accessing protection and support. Third, trafficking can sometimes result in statelessness, for example when individuals are trafficked abroad for marriage and lose their nationality in the process.⁷² The rights and obligations identified below apply, as minimum standards, to stateless persons. Such persons may also, under certain circumstances, be entitled to additional or special rights.

Can trafficked persons benefit from the protections of international human rights law when they are outside their own country, either physically or legally? In principle, the answer to this critical question will almost always be yes. International law generally accepts that treaties apply to all individuals within a State’s jurisdiction.⁷³ By extension, international human rights law will apply to everyone within a State’s territory or jurisdiction, regardless of nationality or citizenship and of how they came to be within the territory. Both the Charter of the United Nations and the Universal Declaration of Human

⁶⁹ For more on the issue of trafficked persons as non-citizens (including trafficked persons as migrant workers), see Gallagher, *International Law of Human Trafficking*, chap. 3. Generally on the issue of the rights of non-citizens, see *The Rights of Non-citizens* (United Nations publication, Sales No. E.07.XIV.2), especially pages 15-26.

⁷⁰ Declaration on the Human Rights of Individuals Who are not Nationals of the Countries in which They Live, General Assembly resolution 40/144, annex, article 1.

⁷¹ David Weissbrodt, “The protection of non-citizens in international rights law” in Ryszard Cholewinski, Richard Perruchoud and Euan MacDonald (eds.), *International Migration Law: Developing Paradigms and Key Challenges* (2007), pp. 221-222.

⁷² See further United States Department of State, *Trafficking in Persons Report* (2009); Vital Voices, *Stateless and Vulnerable to Human Trafficking in Thailand* (2007).

⁷³ See *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) [1932] PCIJ (Ser. A/B) No. 44 (identifying a difference between a State’s right to control the admission of foreigners versus the right of individuals found within the State); Vienna Convention on the Law of Treaties, article 29 (indicating that treaties apply to all individuals within the jurisdiction of the State party: “Territorial scope of treaties: Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”).

Rights confirm that human rights are applicable to all persons, by virtue of their humanity.⁷⁴

Many human rights treaties either explicitly or implicitly assert this position. For example, application of the International Covenant on Civil and Political Rights is specifically extended by article 2 (1) to “all individuals within [the] territory [of the State party] and subject to its jurisdiction ... without distinction of any kind”. Article 26 of the International Covenant on Civil and Political Rights also specifically guarantees, to “all persons”, equality before the law and equal protection of the law without discrimination. The Human Rights Committee has affirmed that:

The rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.⁷⁵

In its general comment No. 15, the Human Rights Committee has further specified that:

⁷⁴ The Charter of the United Nations in its Article 55 requires the Organization to: “promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. See also Article 13 which identifies, as one of the purposes of the United Nations, the promotion of international cooperation and “assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. The language of the Universal Declaration of Human Rights at article 2 is similarly inclusive with the rights set forth therein applying to “everyone” – without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷⁵ Human Rights Committee, general comment No. 15 on the position of aliens under the Covenant. See also its general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant (para. 10). The Special Rapporteur on the rights of non-

Aliens ... have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhumane or degrading treatment or punishment, nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them.

citizens has noted that the general comment very much reflects the substance of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live: *Prevention of discrimination and protection of indigenous peoples and minorities: the rights of non-citizens: Preliminary report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103 (E/CN.4/Sub.2/2001/20, para. 103)*. In the present context it is relevant to note that the Declaration specifically provides that nothing in it “shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate law and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights”.



Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

However, the scope and extent of human rights protection for non-citizens (sometimes referred to as “aliens” or “non-nationals”) remains controversial, uneven and, in some cases, uncertain. Notwithstanding repeated affirmations of the universality of human rights, State practice appears to support a different kind of treatment of aliens with respect to many aspects of public and private life. In addition, and despite the use of inclusive terminology, some of the major international human rights treaties contain provisions either implicitly or explicitly excluding non-citizens. Under such provisions, non-citizens unlawfully within the territory of a State are generally subject to even greater restrictions. The expansive position of the International Covenant on Civil and Political Rights, for example, must be read in conjunction with restrictions on the application of certain rights to individuals lawfully within the territory of the State party⁷⁶ and with the right of States parties to derogate from certain, non-fundamental rights

under specified circumstances.⁷⁷ Of all the core human rights treaties, only the Convention on the Rights of the Child provides an unambiguous assurance that its provisions apply to all children within the jurisdiction of the State party, without discrimination of any kind.⁷⁸

In its Advisory Opinion on the *Juridical Conditions and Rights of Undocumented Migrants* (Undocumented Migrants Case), the Inter-American Court of Human Rights gave a comprehensive analysis of the human rights of migrants and migrant workers. Its central position confirms that international human rights law does indeed extend basic protections to all persons including undocumented migrants:

[T]he regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because ... this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory. This does not mean that they cannot take any action against migrants who do not comply with

⁷⁷ International Covenant on Civil and Political Rights, article 4 (1), providing for derogations in times of public emergency which threaten the life of the nation provided that such measures are strictly required by the exigencies of the situation and do not involve discrimination “solely on the ground of race, colour, sex, language, religion or social origin”. Note that nationality is excluded from this list of prohibited grounds. According to the *travaux préparatoires*, this omission reflected an understanding of the fact that States will often find it necessary discriminate against aliens in times of national emergency. Nowak, *op. cit.*, p. 86.

⁷⁸ Article 2 (1) requires States parties to: “[r]espect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”. For a more detailed analysis of the applicability of the other core human rights treaties to non-citizens, see Gallagher, *International Law of Human Trafficking*, chap. 3.

⁷⁶ For example, freedom of movement (art. 12 (1)) and protection from arbitrary expulsion (art. 13).

national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason.

Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights.⁷⁹

By way of conclusion, it is possible to point to a general consensus on the applicability of core human rights to non-citizens. These rights include (but may well not be limited to) the right to life, liberty and security of person; liberty of movement including the right to return to one's own country; protection from refoulement; protection from arbitrary expulsion; freedom of thought, conscience and religion; the right to privacy; the right to recognition and equal protection before the law; the right not to be discriminated against on the basis of race, sex, language, religion or any other prohibited ground; and the right to health, education and housing.⁸⁰ As noted in the introduction to this

sub-section, certain categories of non-citizens, such as stateless persons, migrant workers, asylum-seekers, refugees and children, will be entitled to additional, status-related protection.⁸¹ In short, it is clear that the fundamental rights likely to be of most relevance to the trafficked person cannot be denied to them solely on the basis of their status as aliens or non-citizens.

If the State does distinguish between the rights it grants to trafficked persons (either specifically or indirectly in relation to their immigration or other status) and the protections it provides to others, then such a distinction must be reasonably justifiable. Any exceptions or exclusions must serve a legitimate State objective and be proportional to the achievement of that objective. A distinction or exclusion that materially harms the human rights of the individual concerned is unlikely to be justifiable. Under no circumstances would a State be able validly to exclude any non-citizens from protection of the core rights identified above.⁸²

1.4. HUMAN RIGHTS APPLICABLE TO SPECIAL GROUPS OF TRAFFICKED PERSONS

International human rights law recognizes that certain groups require additional or special

and Add.1); as well as from a distillation of the findings of those reports published in *The Rights of Non-citizens*, especially pages 15-26.

⁸¹ See further *The Rights of Non-citizens*, pp. 28-34.

⁸² See further "Prevention of discrimination: the rights of non-citizens: Final Report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283" (E/CN.4/Sub.2/2003/23). See also Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, especially articles 5 and 6, which spell out the basic rights to which non-nationals are entitled.

⁷⁹ *Juridical Conditions and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003, Inter-American Court of Human Rights (Ser. A) No. 18 (2003), paras. 118-119 [hereinafter: *Undocumented Migrants Case*].

⁸⁰ This list is drawn from the various reports of the Special Rapporteur on the rights of non-citizens, David Weissbrodt (E/CN.4/Sub.2/2003/23 and Add.1-4; E/CN.4/Sub.2/2002/25 and Add.1-3; E/CN.4/Sub.2/2001/20



protection. This may be because of past discrimination or because members of the group share particular vulnerabilities. Note that the issue of vulnerability in the specific context of trafficking is addressed in more detail under Principle 5 and related guidelines.

1.4.1. HUMAN RIGHTS OF WOMEN

While not minimizing the very real plight of trafficked men (and the gendered aspects of the trafficking response, referred to below, which can have a negative impact on men and boys), it is important to acknowledge that gender-based violations of human rights, particularly against women and girls, are one of the root causes of trafficking and a key feature of the trafficking process. As discussed under Principle 5 and related guidelines, gender-based violence and other forms of discrimination against women and girls can both create and aggravate vulnerability to trafficking and to trafficking-related harm. An understanding of this is essential to the development and implementation of an effective rights-based approach to trafficking.

Women and girls are trafficked into gender-specific situations of exploitation (for example, exploitative prostitution and sex tourism, and forced labour in domestic and service industries). Women and girls also suffer gender-specific forms of harm and consequences of being trafficked (for example, rape, forced marriage, unwanted or forced pregnancy, forced termination of pregnancy, and sexually transmitted diseases, including HIV/AIDS).

The operation of certain laws may have a particularly detrimental impact on the situation of trafficked women and girls. One example is provided by nationality and citizenship laws that deny citizenship to children born abroad

or that make women who migrate vulnerable to losing their citizenship.⁸³

In terms of the responses to trafficking, perceptions of gender play an important and not always positive role. The commonly held notion that “men migrate, but women are trafficked” has meant that national criminal justice agencies often appear to be slower to investigate and prosecute trafficking cases involving men – a reflection of a general bias in attention and focus, away from trafficking for forced and exploitative labour and towards trafficking for sexual exploitation. The negative impact of this is felt across the gender spectrum: men are not protected under laws and policies designed for trafficked women and children, and the perception of trafficked women as weak and ignorant is reinforced.

Anti-trafficking measures taken in the name of protecting victims and preventing trafficking can also operate in a discriminatory manner or otherwise result in further violations of the rights of women and girls. Examples considered in this Commentary include restrictions on the emigration of women and the detention of women and girl victims of trafficking, in violation of international human rights standards (see the discussion under Principle 3 and related guidelines). Apart from being a breach of fundamental rights, including the international prohibition against sex-based discrimination, such policies can actually make women more vulnerable – pushing them towards more expensive and riskier forms of migration.

Most of the international instruments cited in this Commentary are gender-neutral, that is, they apply equally to both women and men. The Trafficking Principles and Guidelines themselves

⁸³ Both these situations have come before the Committee on the Elimination of Discrimination against Women. See Committee on the Elimination of Discrimination against Women, Concluding Comments: Indonesia (CEDAW/C/IDN/CO/5, para. 28); and Viet Nam (CEDAW/C/VNM/CO/6, para. 18).

are also gender-neutral, to the extent that they recognise that it is not only women and girls who are trafficked but that men and boys are also subject to this form of abuse.

However, gender-neutral language can hide or obscure real difference. The way in which a particular right is understood, experienced, protected and violated will often be different for women and for men. This has been demonstrated in relation to issues and rights that were previously considered completely gender-neutral such as racial discrimination, torture, education and health.⁸⁴ A gender-sensitive

approach to trafficking that is firmly grounded in human rights, such as that taken in the Trafficking Principles and Guidelines, will seek to identify these differences and to tailor responses accordingly.

The Commentary highlights several rights and obligations that have special application to the situation of women who have been trafficked or who are vulnerable to trafficking. These include: the prohibition on sex-based discrimination; the prohibition on gender-based violence; and the right to marry with free and full consent. The source of these rights and obligations is noted in box 7, below. Note that the specific issue of trafficking as a form of discrimination against women and of gender-based violence has been considered above in part 1, section 4.2.

⁸⁴ See, for example, Committee on the Elimination of Racial Discrimination, general comment No. 25: Gender related dimensions of racial discrimination; A/HRC/7/3.



Box 7: Human rights of special significance to women and girls

RIGHT/OBLIGATION	TREATY SOURCE
Prohibition on sex-based discrimination	• Universal Declaration of Human Rights, article 2; • International Covenant on Civil and Political Rights, articles 2 (1), 3 and 26; • Convention on the Elimination of All Forms of Discrimination against Women, article 2; • Convention on the Rights of the Child, article 2; • Migrant Workers Convention, article 7; • International Covenant on Economic, Social and Cultural Rights, articles 2 (2), 3 and 7; • Convention on the Rights of Persons with Disabilities, article 6; • European Convention on Human Rights, article 14; • American Convention on Human Rights, article 1; • African Charter on Human and People's Rights, articles 2 and 18 (3). • <i>Non-treaty source</i>: Cairo Declaration on Human Rights in Islam, article 1.
The right to be free from gender-based violence	• Protocol on the Rights of Women in Africa, article 3 (4) and 4; • OAS Convention on Violence against Women, article 3; • <i>Non-treaty sources</i>: Committee on the Elimination of Discrimination against Women's general recommendation No. 19; Declaration on the Elimination of Violence against Women; Vienna Declaration and Programme of Action, part I, para. 18; part II, para. 38; Beijing Platform for Action, paras. 113 (b), 124 (b); Beijing +5 Outcome Document, paras. 41 and 59.
The right to marry with free and full consent	• Universal Declaration of Human Rights, article 16 (2); • International Covenant on Civil and Political Rights, article 23; • International Covenant on Economic, Social and Cultural Rights, article 10; • Convention on the Elimination of All Forms of Discrimination against Women, article 16 (1)(b); • American Convention on Human Rights, article 17 (3); • Protocol on the Rights of Women in Africa, article 6 (a); • Supplementary Convention on the Abolition of Slavery, 1957, article 1 (c).
The prohibition on exploitation of prostitution	• Convention on the Elimination of All Forms of Discrimination against Women, article 6; • Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, article 1.

1.4.2. HUMAN RIGHTS OF CHILDREN

International human rights law applies to all persons without distinction, and children are included in the generally applicable rules and standards cited throughout this Commentary. However, as recognized in the Trafficking Principles and Guidelines (Principle 10, Guideline 8), the particular physical, psychological and psychosocial harm suffered by trafficked children, and their increased vulnerability to exploitation, require them to be dealt with separately from trafficked adults in terms of laws, policies and programmes. Children may also be trafficked for purposes that are related to their age: for example, sexual exploitation, various forms of forced labour, and begging. An approach to trafficking that recognizes the particular situation of children is validated by international human rights law, which explicitly recognizes the special position of children and therefore accords them special rights.

International human rights law imposes important additional responsibilities on States when it comes to identifying child victims of trafficking and ensuring their immediate and longer-term safety and well-being. The core rule is derived from the obligations contained in the Convention on the Rights of the Child: in dealing with child victims of trafficking, the best interests of the child are to be at all times paramount (art. 3). In other words, States cannot prioritize other considerations, such as those related to immigration control or public order, over the best interests of a child victim of trafficking. In addition, because of the applicability of the Convention on the Rights of the Child to all children under the jurisdiction or control of a State, non-citizen child victims of trafficking are entitled to the same protection as nationals of the receiving State in all matters, including those

related to the protection of their privacy and physical and moral integrity. Its Optional Protocol on the sale of children reiterates the best interests principle and imposes specific additional obligations on States parties with respect to acts that are often associated with the trafficking of children.

Specific rights and obligations of direct relevance to the situation of trafficked children include the following:

- The right of children to protection from all forms of discrimination;
- The best interests of the child to be the primary consideration in all actions concerning or impacting upon children;
- The prohibition on the illicit transfer and non-return of children abroad;
- The right of children to be protected from economic exploitation and from performing hazardous or harmful work;
- The right of children to be protected from sexual exploitation and sexual abuse;
- The right of children to be protected from abduction, sale or trafficking;
- The right of children to be protected from other forms of exploitation;
- The obligation to promote the physical and psychological recovery and social integration of child victims; and
- The right of children to a nationality and the right to preserve that nationality.

The sources of these rights and obligations are given in box 8, below. Note that a number of specialist trafficking instruments, including the Trafficking Protocol and the European Trafficking Convention, also contain provisions that are specific to children. These are identified and considered at relevant points throughout the Commentary.



Box 8: Human rights of special significance to children

RIGHT/OBLIGATION	TREATY SOURCE
The right of children to protection from all forms of discrimination irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political, or other opinion, national, ethnic or social origin, property, disability, birth or other status.	• Convention on the Rights of the Child, article 2; • African Charter on the Rights and Welfare of the Child, article 3.
The best interests of the child to be the primary consideration in all actions concerning children	• Convention on the Rights of the Child, article 3; • African Charter on the Rights and Welfare of the Child, article 4.
Right of child to freedom of expression	• Convention on the Rights of the Child, article 12; • African Charter on the Rights and Welfare of the Child, article 7.
Prohibition on the illicit transfer and non-return of children abroad	• Convention on the Rights of the Child, article 11.
Protection of children from economic exploitation and from performing hazardous or harmful work	• Convention on the Rights of the Child, article 32; • Convention for the Elimination of the Worst Forms of Child Labour, 1999 (Worst Forms of Child Labour Convention), article 3 (d); • African Charter on the Rights and Welfare of the Child, article 15.
Protection of children from sexual exploitation and sexual abuse	• Convention on the Rights of the Child, article 34; • Optional Protocol on the sale of children, child prostitution and child pornography (Optional Protocol on the sale of children); • African Charter on the Rights and Welfare of the Child, articles 15, 16 and 27.
Protection of children from abduction, sale or trafficking	• Convention on the Rights of the Child, article 35; • Worst Forms of Child Labour Convention, article 3 (a); • Optional Protocol on the sale of children; • African Charter on the Rights and Welfare of the Child, article 29.
Protection of children from other forms of exploitation	• Convention on the Rights of the Child, article 36; • Worst Forms of Child Labour Convention.

(continued on next page)

(Box 8 continued)

RIGHT/OBLIGATION	TREATY SOURCE
Obligation to promote physical and psychological recovery and social integration of child victims	• Convention on the Rights of the Child, article 39.
Obligation to criminalize sale of children, child prostitution and child pornography	• Optional Protocol on the sale of children, article 3; • Worst Forms of Child Labour Convention, article 3 (a)–(b).
Right of children to a nationality and identity	• Convention on the Rights of the Child, articles 7 (1) and 8.



1.4.3. HUMAN RIGHTS OF MIGRANTS AND MIGRANT WORKERS⁸⁵

In addition to their status as “non-citizens”, considered at 1.3 above, trafficked persons outside their own country may also fall into related legal categories including those of “migrant” or “migrant worker.” This will be important to the extent that such classification provides additional or alternative means of securing protection and support.

States and the international human rights system have repeatedly affirmed the special vulnerabilities faced by migrants and the particular nature of the violations to which they are subject.⁸⁶ However, international human rights law does not provide extensive protections for migrants or migrant workers beyond those identified above as being applicable to all non-citizens. State obligations towards trafficked persons as migrants or migrant workers will

generally flow from the non-discrimination clauses found in the major human rights treaties and from international legal rules that do not permit differentiation in the treatment of nationals and non-citizens in the matter of fundamental human rights. That will not always be sufficient to guarantee the rights of this group – particularly its most vulnerable members: migrant workers who have entered and/or are residing unlawfully within the host State and who may well have been trafficked. Several international treaties provide important additional protections, and these are identified below.

ILO INSTRUMENTS PROTECTING MIGRANT WORKERS

The International Labour Organization has developed two broad conventions protecting the rights and interests of migrant workers. The first of these, adopted in 1949, is the ILO Migration for Employment Convention (Revised),⁸⁷ which covers individuals who migrate from one country to another with a view to working for an employer (i.e. not in a self-employed capacity). The Convention requires States parties, inter alia, to maintain or facilitate a reasonable and free service in order to assist migrant workers and to provide them with correct information; to take all appropriate steps against misleading propaganda concerning immigration and emigration; and to ensure legal equality in matters of work (opportunity and treatment) between documented migrants and nationals. The Convention does not specifically address the question of undocumented or illegal migrants apart from requiring States to impose “appropriate penalties” on those promoting clandestine or illegal migration.

⁸⁵ For more on trafficked persons as migrants and migrant workers, see Gallagher, *International Law of Human Trafficking*, chap. 3.

⁸⁶ See, for example, Migrant Workers Convention; General Assembly resolution 54/166 on the protection of migrants; Human Rights Council resolution 11/9 on human rights of migrants in detention centres; Human Rights Council resolution 9/5 on the human rights of migrants; Human Rights Council resolution 8/10 on the human rights of migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants; Commission on Human Rights resolution 2004/53 and 2005/47 on the rights of migrants; Commission on Human Rights resolution 2004/49 on violence against women migrant workers; Commission on Human Rights resolution 2002/62 and 2003/46 on the human rights of migrants; Commission on Human Rights resolution 2002/58 on violence against women migrant workers; Commission on Human Rights resolution 2002/59 on the protections of migrants and their families; Committee on the Elimination of Racial Discrimination, general recommendation No.30: Discrimination against Non Citizens; Report of the World Conference on Human Rights, Vienna, 14–25 June 1993 (A/CONF.157/24, Chapter III, Programme of Action, Part I, paras. 24, Part II, paras. 33-35); Declaration on the Human Rights of Individuals Who are not Nationals of the Countries in which They Live.

⁸⁷ Migration for Employment Convention (Revised), 1949, ILO No. 97, entered into force 22 January 1952. This Convention is accompanied by ILO Recommendation No. 86 concerning Migration for Employment (Revised), 1949.

In 1975 ILO adopted the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.⁸⁸ The Convention obliges States parties to respect the basic human rights of *all* migrant workers⁸⁹ – irrespective of their legal status in the country of employment. However, as with the 1949 Migration for Employment Convention, this obligation does not extend to the right to equal opportunity and treatment with nationals.⁹⁰ The first part of the Convention is devoted to suppression of migration in abusive conditions. States parties are required to establish the situation of migrant workers within their own territory and whether the conditions under which they are living and working contravene relevant laws and regulations (art. 2), and to take the necessary and appropriate measures, within their jurisdictions or in cooperation with other States, to combat clandestine migration and the illegal employment of migrants. Measures are to be taken to ensure that persons responsible for illegal migration are prosecuted. Importantly, States are required to provide minimum legal protection for migrant workers whose situation is irregular and basic human rights are not to be

conditional upon the circumstances of residence. Provision must also be made for civil or criminal sanctions for organizing migration with a view to abusive employment as well as for illegal employment and trafficking of migrant workers (art. 6 (1)).

THE MIGRANT WORKERS CONVENTION

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention) was adopted by the General Assembly in 1990. As stated in its preamble, the Convention is intended to expand upon rather than to replace or modify existing rights. It adopts an inclusive definition of “migrant worker”⁹¹ and applies to all migrant workers and their families without distinction of any kind. Key provisions of the Migrant Workers Convention with special resonance for trafficking include:

- Recognition that migrant workers and members of their families, being non-nationals residing in States of employment or in transit, are vulnerable to exploitation and abuse (preamble);
- Reiteration of the right to life (art. 9);
- Reiteration of the prohibitions on torture, slavery, servitude and forced labour (arts. 10 and 11);
- Recognition of the right to liberty and security of the person (art. 16);
- Obligation on States parties to protect all migrant workers effectively: “against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions” (art. 16 (2));

⁸⁸ Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975, ILO No. 143, entered into force 9 December 1978 [Hereinafter: ILO Migrant Workers (Supplementary Provisions) Convention].

⁸⁹ Ryszard Cholewinski cites an ILO Committee of Experts in support of the contention that the reference to basic rights is, in fact, extremely limited and should be taken to refer to the most fundamental of rights, including the right to life, the prohibition on torture and the right to a fair trial; it would not cover the right to equal opportunity and treatment with nationals: *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (1997), pp. 103 and 133.

⁹⁰ In both Conventions, the right to equal opportunity and treatment with nationals is extended only to migrants “lawfully” within the territory of the country of employment: ILO Migration for Employment Convention (Revised), article 6; ILO Migrant Workers (Supplementary Provisions) Convention, Part II.

⁹¹ “The term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” The Convention also defines the following terms: “frontier worker”, “seasonal worker”, “seafarer”, “worker on an offshore installation”, “itinerant worker”, “projected worker”, “specified-employment worker” and “self-employed worker” (all in article 2).



- Obligation on States to criminalize and sanction persons or groups who unlawfully destroy or confiscate identification, work or residency documents; use violence, threats or intimidation against migrant workers, or employ them in irregular circumstances (arts. 21 and 68); and
- Protection of all migrant workers, including those in an irregular situation, from unfair or arbitrary expulsion (art. 22).

Other international conventions with provisions relevant to the protection of migrant workers include the European Social Charter, article 19 (4), which provides rights for migrant workers and their families who are lawfully within the country.

The Inter-American Court of Human Rights has noted the precarious position of undocumented workers who “are frequently employed under less favourable conditions of work than other workers”. The Court has held that “the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment”. The State’s duty of due diligence means that it “should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards”.⁹²

1.4.4. HUMAN RIGHTS OF REFUGEES, ASYLUM-SEEKERS AND INTERNALLY DISPLACED PERSONS⁹³

Victims of trafficking may also be refugees, asylum-seekers or internally displaced persons

(IDPs). Refugees, asylum-seekers and IDPs are all entitled to the protection of their basic human rights as well as to additional status-related protections, considered briefly below. The technical legal question of whether trafficking can itself form the basis of a claim for refugee status (as well as the related issue of non-refoulement as it applies to the response of States to trafficking) is considered separately, under the discussion of Principle 3 and related guidelines, below.

International law as it relates to refugees seeks to provide some measure of legal protection for persons who are forced to flee their countries of origin because of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.⁹⁴ A claim for international protection in the case of trafficking can arise in different circumstances. For example:

- (i) Where the victim has been trafficked to a country other than her/his own and seeks the protection of the host State; or
- (ii) Where the victim, fearing trafficking or having already been trafficked within her or his own country, manages to escape and flee to another country in search of protection.

As discussed further under Principle 3 and related guidelines, in order to be recognized as a refugee, the individual concerned must be found to have a “well-founded fear of persecution” linked to one or more of the grounds set out in the Refugee Convention and

⁹² *Undocumented Migrants Case*, paras. 134, 136 and 148.

⁹³ For a more detailed consideration of the issues around trafficking and asylum, see Gallagher, *International Law of Human Trafficking*, chap. 3.

⁹⁴ The Refugee Convention, as amended by the Refugee Protocol, defines a refugee in article 1A(2) as anyone who: “[o]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

its Refugee Protocol. These two instruments also detail the human rights guarantees to be provided to refugees – including property, civil, labour and welfare rights.⁹⁵

Trafficking within the borders of one country shares many common features with internal displacement, and it has been argued that individuals who have been internally trafficked should be regarded as IDPs.⁹⁶ The introduction to the Guiding Principles on Internal Displacement⁹⁷ defines IDPs as “persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence ... and who have not crossed an ... [international] border.” The Handbook for applying the Guiding Principles confirms that “the distinctive feature of internal displacement is coerced or involuntary movement that takes place within national borders. The reasons for flight may vary and include armed conflict, situations of generalized violence, violations of human rights, and natural or human-made disasters.”⁹⁸ The elements of

coercion and involuntary movement fall within the definition of trafficking and it is widely accepted that conflict, disaster and violation of human rights all increase the vulnerability of individuals and groups to trafficking and related forms of exploitation.

The Guiding Principles on Internal Displacement identify the rights and guarantees relevant to the protection of persons who have become internally displaced. They are grounded in and consistent with international human rights law. Guiding Principle 1 provides that IDPs shall enjoy “in full equality, the same rights and freedoms” as other persons in the country and shall not be discriminated against in the enjoyment of their rights because of their displaced status. The Guiding Principles set out a detailed range of measures that are required to protect, support and assist those who have been internally displaced, including through trafficking. Of particular importance are the principles relating to longer-term solutions to displacement, including return, resettlement and local integration.⁹⁹ Note that the special needs of IDP women and girls are recognized in the Guiding Principles and elsewhere.¹⁰⁰

⁹⁵ For a comprehensive analysis of the rights of refugees, see James Hathaway, *The Rights of Refugees under International Law* (2005) [Hereinafter: Hathaway, *The Rights of Refugees...*].

⁹⁶ Susan Martin, “Internal trafficking”, *Forced Migration Review*, No. 25 (May 2006), p. 12.

⁹⁷ Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex). The Guiding Principles, which “are based upon existing international humanitarian law and human rights instruments”, were developed to: “serve as an international standard to guide governments as well as international humanitarian and development agencies in providing assistance and protection to IDPs”: Statement by the Under-Secretary-General for Humanitarian Affairs, Sergio Vieira de Mello in Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (American Society of International Law and Brookings Institution Project on Internal Displacement, 2000).

⁹⁸ Brookings Institution Project on Internal Displacement and the United Nations Office for the Coordination of Humanitarian Affairs, *Handbook for Applying the Guiding Principles on Internal Displacement* (1999) [Hereinafter: IDP Handbook].

⁹⁹ For more on the *Guiding Principles on Internal Displacement*, see the IDP Handbook, and Walter Kälin, “The guiding principles on internal displacement as international minimum standard and protection tool”, *Refugee Survey Quarterly*, vol. 24, No. 3 (2005), p. 27.

¹⁰⁰ See, for example, Principle 4 (non-discrimination; protection and assistance to take account of the special needs of certain IDPs including unaccompanied minors, mothers and female heads of household); Principles 7 and 18 (involvement of affected women in planning and decision-making about their relocation as well as the distribution of supplies); Principle 11 (protection against gender-based violence); Principle 19 (special attention to the health needs of IDP women); and Principle 23 (involvement of IDP women and girls in education programmes). The Beijing Declaration and Platform for Action, para. 58 (I), calls on Governments to “ensure that internally displaced women have full access to economic opportunities and that the qualifications and skills of refugee women are recognized”.



1.4.5. HUMAN RIGHTS OF PERSONS WITH DISABILITIES

The relationship between trafficking and disability has not yet been fully explored. The available literature generally does not touch on this issue and there is no reference to disability in any of the international instruments that are directly relevant to trafficking, including the Recommended Principles and Guidelines and the Trafficking Protocol.

Despite this lack of attention there is some anecdotal evidence emerging that disability, both mental and physical, can increase vulnerability to trafficking and related exploitation.¹⁰¹ According to World Vision, “[t]he very factors that challenge people living with disabilities to take an active role in their communities are the same ones that make them attractive to traffickers. People with disabilities are often worth less to their community and potentially more to traffickers”.¹⁰²

Certainly, persons with disabilities may be more susceptible to intimidation, coercion, deception and abuse of authority. In some cases (for example, the trafficking of persons with disabilities for forced begging), the very fact of an individual’s disability is key to their exploitation, as traffickers capitalize on the disability to make money. Disability can also be an element in the poverty, domestic and community violence, inequality and discrimination that are routinely identified as factors exacerbating vulnerability to trafficking.

The trafficking process and resulting exploitation may themselves be a cause of disability. The

trauma suffered by many survivors of trafficking has been well documented.¹⁰³ It is also clear that, especially for women and girls, trafficking increases the risk of contracting HIV/AIDS and other illnesses that cause serious disability.¹⁰⁴ Disability can also impact on the post-trafficking situation. Victims with disabilities may find it particularly difficult to access available protection and support mechanisms. The physical and attitudinal barriers that confront people with disabilities may further hamper the ability of victims with disabilities to receive the assistance they require and are entitled to.

Until recently, the international law on disability was not very clear. While several of the treaty bodies, including the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women, had issued general statements on disability,¹⁰⁵ only one of the core human

¹⁰³ See, for example, Cathy Zimmerman, *The Health Risks and Consequences of Trafficking in Women and Adolescents: Findings from a European Study* (London School of Hygiene and Tropical Medicine, 2003).

¹⁰⁴ See part 2.1, section 1.4.1, above.

¹⁰⁵ See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 5: persons with disabilities. The general comment identifies an obligation, on States parties, to eliminate discrimination of persons with disabilities in the areas of equal rights for men and women (art. 3), work (arts. 6-8), social security (art. 9), protection of the family (art. 10), adequate standard of living (art. 11), right to physical and mental health (art. 12), right to education (arts. 13 and 14) and the right to take part in cultural life and enjoy the benefits of scientific progress (art. 15). See also Committee on the Elimination of Discrimination against Women, general recommendation No. 18: disabled women, which states that women with disabilities suffer from “a double discrimination linked to their special living conditions” and are a particularly vulnerable group. It recommends that Governments provide information on women with disabilities in their periodic reports and on special measures taken to ensure that women with disabilities “have equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life.”

¹⁰¹ See USAID, *Women in Development, Women with Disabilities and International Development*, available at http://www.usaid.gov/our_work/cross-cutting_programs/wid/gender/wwd.html.

¹⁰² World Vision, *10 Things You Need to Know about Human Trafficking* (2009), p. 40.

rights treaties, the Convention on the Rights of the Child, contained specific provisions on disability.¹⁰⁶ As a consequence, the relevant rights have generally needed to be extrapolated from broader principles such as equality before the law, the right to equal protection by the law, and non-discrimination.

In December 2006 the General Assembly adopted a comprehensive convention on the rights of persons with disabilities.¹⁰⁷ The Convention, which entered into force early in 2008, built on a strong history of international activity in the area of disability rights.¹⁰⁸ It

¹⁰⁶ The Convention on the Rights of the Child lists disability as a prohibited ground of discrimination (art. 2); and states that children with disabilities are entitled to a “full and decent life” of dignity and participation in the community (art. 23).

¹⁰⁷ Convention on the Rights of Persons with Disabilities. Note that its Optional Protocol provides for the right of individual and group petition to the implementing committee.

¹⁰⁸ See, for example, Declaration on the Rights of Mentally Retarded Persons, General Assembly resolution 2856 (XXVI); Declaration on the Rights of Disabled Persons, General Assembly resolution 3447 (XXX); Declaration on the Rights of Deaf-Blind Persons, in Conference of Hope: Proceedings of the First Historic Helen Keller World Conference on Services to Deaf-Blind Youths and Adults (1979); World Programme of Action concerning Disabled Persons, General Assembly resolution 37/52; ILO Convention (No. 159) Concerning Vocational Rehabilitation and Employment (Disabled Persons), adopted 20 June 1983, entered into force 20 June 1985; Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, General Assembly resolution 46/119; and Standard Rules on the Equalization of Opportunities for Persons with Disabilities, General Assembly resolution 48/96 [Hereinafter: 1993 Standard Rules]. See also the reports of the Special Rapporteur on Disability, whose mandate includes monitoring the implementation of the 1993 Standard Rules (E/CN.5/2007/4, E/CN.5/2006/4, E/CN.5/2005/4, E/CN.5/2002/4 and E/CN.5/2000/3). See further “The right of education of persons with disabilities: Report of the Special Rapporteur on the Right to Education, Vernor Muñoz” (A/HRC/4/29).

has been identified as marking a “paradigm shift”, a clear move away from viewing persons with disabilities as objects (of charity, medical treatment and social protection) and towards viewing them as subjects of clearly defined rights who are themselves capable of claiming those rights and making decisions for their lives. The Convention adopts a broad definition of “disability” bringing within its scope “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (art. 1). It affirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It further clarifies how certain rights apply to persons with disabilities and identifies areas where adaptations are required in order to ensure that persons with disabilities are able to exercise their rights effectively.

The following provisions are of particular relevance to the issue of trafficking and disability:

- Obligation to guarantee that persons with disabilities enjoy their inherent right to life on an equal basis with others (art. 10);
- Obligation to ensure the equal rights and advancement of women and girls with disabilities (art. 6);
- Obligation to protect children with disabilities (art. 7);
- Obligation to ensure that laws and administrative measures guarantee freedom from exploitation, violence and abuse. In the event of abuse, States parties shall promote the recovery, rehabilitation and reintegration of the victim and investigate the abuse (art. 16); and
- Obligation to protect the physical and mental integrity of persons with disabilities (art. 17).



1.5. THE CRITICAL IMPORTANCE OF RAPID AND ACCURATE VICTIM IDENTIFICATION¹⁰⁹

The chapeau to Guideline 2 explains why identification of victims is so important and why it is an obligation:

A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place.

Why would a failure to identify trafficked persons quickly and accurately result in a denial of their rights? The answer to this lies at the core of the present Commentary: international law (and the national law of most countries) now recognizes that individuals who have been trafficked have a special status and that the State owes a particular duty of protection and support to those persons. If a trafficked person is not identified at all, or is incorrectly identified as criminal or as an irregular or smuggled migrant, then this will directly affect the ability of that person to access the rights to which she or he is entitled. In short, failure to quickly and accurately identify victims of trafficking renders any rights granted to such persons "purely theoretical and illusory".¹¹⁰

¹⁰⁹ For a discussion on rapid and accurate victim identification as a legal obligation, see Gallagher, *International Law of Human Trafficking*, chap. 5.

¹¹⁰ *Explanatory Report on the European Trafficking Convention*, para. 131. Note that this issue was recently raised in the context of the Committee on the Elimination of Discrimination against Women's consideration of a communication under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. While the communication was ultimately dismissed on the grounds that the complainant had failed to exhaust the available domestic

Guideline 2 provides explicit direction on victim identification. It notes the importance of written identification tools such as guidelines and procedures that can be used by police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants to permit the rapid and accurate identification of individuals who have been trafficked. Guideline 2 further notes the need for cooperation between the State officials and agencies involved in identification and for them to be given training in identification and in the correct application of agreed guidelines and procedures.¹¹¹ Guideline 2 also touches upon other issues relating to the identification and misidentification of victims including prosecution, detention and asylum. These matters are taken up in detail at other points throughout the Commentary.

SEE FURTHER:

- Criminal justice responses to trafficking: part 2.4, sections 12.1-17.6
- Vulnerability to trafficking: part 2.2, sections 5.1-5.7
- Detention of victims of trafficking: part 2.3, section 7.4
- Treatment of women: part 2.2, section 5.4; part 2.3, sections 7.4, 8.5
- Treatment of children: part 2.2, section 5.5; part 2.3, sections 7.4, 8.5, 10.1-10.4

remedies, a dissenting opinion issued by three members of the Committee pointed to an obligation on the State party under the Trafficking Protocol to exercise due diligence in identifying potential victims of trafficking and informing them of their rights. The dissent recommended that the State party should take measures to ensure that law enforcement officials were appropriately trained to interview and recognize trafficked persons at an early stage. *Zhen Zhen Zheng v. Netherlands* (CEDAW/C/42/D/15/2007, especially paragraphs 7-9).

¹¹¹ See also Guideline 5.7.



PRINCIPLE 2 AND RELATED GUIDELINES: RESPONSIBILITY OF STATES¹¹²

States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.

2.1. PURPOSE AND CONTEXT

Principle 2 confirms that all States, irrespective of their place in the trafficking cycle, have an international legal responsibility to act with due diligence in preventing trafficking; investigating and prosecuting suspected traffickers; and providing assistance and protection to those who have been trafficked.

This Principle reiterates a fundamental rule of international law: the State is responsible for breaches of international law that can be directly or indirectly attributed to it. The principle of State responsibility as it operates in the human rights context confirms that the State is held to a certain standard of care, even in situations where it is not the primary agent of harm. This standard

of care is referred to as “due diligence” and is explored further below.

2.2. DETERMINING LEGAL RESPONSIBILITY FOR TRAFFICKING

States may sometimes be reluctant to accept legal responsibility for trafficking and for the violations of human rights that are integral to the trafficking process. They may argue, for example, that the primary wrong of the trafficking and associated harms has been committed by a criminal or groups of criminals and not by the State itself. The State might also argue that it has done everything possible to prevent the harm.

Determining whether State responsibility exists in a particular situation involves a two-step test:

- Is the situation, action or omission attributable to the State?
- If yes: is the situation, act or omission a breach of an international obligation of that State?

The question of whether a particular situation, act or omission can be legally attributed to the State is a matter for the international rules

¹¹² This section draws on the more detailed analysis of the law of State responsibility as it relates to trafficking given in Gallagher, *International Law of Human Trafficking*, chap. 4.

of State responsibility.¹¹³ In some situations, the attribution of legal responsibility can be a straightforward matter because the situation, or the act or omission that led to it, can be directly tied to a public official or institution. Actions (or the inaction) of courts, legislatures, executive bodies and public officials operating in their official capacity are all examples of conduct that are directly attributable to the State (art. 4). Whether the body/official is operating in an “official capacity” will be easily answered in the affirmative where “the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it” (art. 7, commentary, para. 8).

The second part of the test – whether a situation, act or omission is a breach of an international law – is an objective question for the primary rules of international law. It requires consideration of the following questions:

- Does the particular obligation exist through treaty law, custom or other recognized source?
- If so, is the State in question bound by that obligation at the relevant time?

The question of the existence of an obligation is purely a matter for international law: characterization of an act as lawful under national law is not relevant.¹¹⁴

Sometimes the question of State responsibility can be easily settled. The passing of a trafficking statute that discriminates against women in contravention of the international prohibition on

sex-based discrimination (found in both treaty law and customary international law) would be one example of direct attribution to the State of an act that violates its international legal obligations. The known, systematic and recurring involvement of law enforcement officials in trafficking operations provides another relatively clear-cut example of the direct attribution of conduct that is contrary to international law and therefore incurs the legal responsibility of the relevant State. Additional instances of acts or omissions that violate legal obligations and that can be directly attributed to the State are cited throughout this Commentary.

Can the State be held responsible for the acts of others? Traffickers and their accomplices are, most often, private individuals, groups and networks. Certainly, public officials may facilitate this trade through their inaction, inertia and occasional active involvement. However, the *harm* of trafficking, in terms of both the process and the end result, is usually a direct consequence of actions taken by private entities rather than States, their institutions or their representatives.

International law is clear that “as a general principle the conduct of private persons or entities is not attributable to the State under international law.”¹¹⁵ There are some exceptions. Under the rules on State responsibility, the conduct of private entities can be attributed to the State in situations where, for example, they are empowered by the State to exercise elements of governmental authority or are under the direction or control of the State.¹¹⁶ In the majority

¹¹³ The agreed articulation of those rules is contained in the International Law Commission’s draft articles on responsibility of States for internationally wrongful acts with commentaries, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)* [Hereinafter: Draft articles on State responsibility].

¹¹⁴ Vienna Convention on the Law of Treaties, article 27; Draft articles on State responsibility, article 3.

¹¹⁵ Draft articles on State responsibility, article 8, commentary, para. 1.

¹¹⁶ The conduct of a person/entity empowered to “exercise elements of the governmental authority” (such as private companies that have been contracted to perform government services) can be attributed to the State if the person/entity was acting in that capacity at the time, and



of trafficking cases, though, State authorization or control is either non-existent or difficult to establish. There is, however, an alternative basis upon which States may be held responsible in the context of human rights violations, known as the standard of “due diligence”.

2.3. THE DUE DILIGENCE STANDARD

Under the standard of “due diligence”, the State is not held responsible for the *acts of others*, but it is held responsible for *its own* failure to prevent, investigate, prosecute or compensate for the commission of the act.

International human rights law imposes a wide range of obligations on the State which go well beyond the simple obligation “not to traffic”. These are commonly identified as obligations to *protect*, to *respect*, to *promote* and to *fulfil*. Examples can be found in many human rights treaties.¹¹⁷ The four-level typology of a State’s obligations with respect to human rights (to respect, protect, promote and fulfil) is

even if the person/entity exceeds authority or contravenes instructions: Draft articles on State responsibility, articles 5 and 7. The conduct of a person/entity can also be attributed to the State if they are acting under the instructions of, or under the direction or control of, the State (article 8); or if the State acknowledges and adopts the conduct as its own (article 11).

¹¹⁷ See, for example, International Covenant on Civil and Political Rights, article 6 (1) (“Every human being has the inherent right to life. This right shall be *protected* by law”); European Convention on Human Rights, article 1 (“The High Contracting parties shall secure to everyone in their jurisdiction the rights and obligations defined in Section I”); American Convention on Human Rights, article 1 (“The States Parties to this Convention undertake to *respect* the rights and freedoms recognized herein and to *ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms”); African Charter, article 18 (3) (“The State shall *ensure* the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child”) (emphases added).

now widely accepted.¹¹⁸ A failure on the part of the State to protect (including from private interference), respect, promote or fulfil its human rights obligations – owed to every person within its jurisdiction – is something that is directly attributable to the State and, therefore, sufficient to trigger its international legal responsibility.

Under the standard of “due diligence”, a State is obliged to exercise a measure of care in preventing and responding to acts by private entities that interfere with established rights. Failure to prevent an anticipated human rights abuse by a private individual or entity will therefore invoke the responsibility of the State. Similarly, legal responsibility will arise when the State fails to remedy abuses or violations of international human rights law, not only because access to remedies is of itself an established right (see discussion of Principle 17 and related guidelines), but also because failure by the State to provide remedies in cases involving non-State interference with rights is a breach of the standard of due diligence. In other words, liability arises where the State could have made the situation better for the victim but failed to do so.

The “due diligence” standard has a long history in the law of State responsibility for injury to aliens.¹¹⁹ It entered international human rights law through a landmark decision of the Inter-American Court of Human Rights in 1988, the

¹¹⁸ See Asbjorn Eide, “Economic, social and cultural rights as human rights” in Asbjorn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social, and Cultural Rights: A Textbook* (1995), pp. 21-40. For an application of the methodology, see *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2002).

¹¹⁹ Malcolm Shaw, *International Law* (2003), pp. 721-724; Dinah Shelton, “Private violations, public wrongs and the responsibilities of States”, *Fordham International Law Journal*, vol. 13 (1989), p. 1.

Velásquez Rodríguez Case,¹²⁰ in which the Court found that the disappearance of the complainant had been carried out by State officials. More importantly for the present discussion, the Court further held that “even had that fact not been proven,” the State would have been liable for its lack of due diligence in preventing or punishing the violative conduct of putatively private actors.¹²¹ The Court confirmed that responsibility is incurred when “a violation of ... rights ... has occurred with the support or the acquiescence of the Government, [or when] the State has allowed the act to take place without taking measures to prevent it or to punish those responsible” (para. 173). As noted above, attribution is not enough: there must also be breach of an obligation. In this case, liability derived from a breach, by the State, of the rule contained in article 1 of the American Convention on Human Rights that required States parties to “respect” the rights guaranteed by the Convention and to “ensure” their full and free exercise to all persons. In a judgement with implications for the international and regional human rights treaties that also impose on States an obligation to “protect” or “ensure” human rights for persons within their territories or under their jurisdictions, the Court held that States are required:

[T]o organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights (para. 166).

¹²⁰ *Velásquez Rodríguez Case*, Judgement of 29 July 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988). Note that the most relevant aspects of this judgement for the present study are also reflected in another case which was considered by the Court in 1989: *Godínez Cruz Case*, Judgement of 20 January 1989, Inter-American Court on Human Rights (Ser. C) No. 5 (1989). Both judgements are analysed in detail in Shelton, “Private violations, public wrongs and the responsibilities of States”.

¹²¹ *Velásquez Rodríguez Case*, para. 182.

In addition to preventing the violation of protected rights, the State must also attempt to investigate and punish such violations, restore the right violated, and provide appropriate compensation for resulting damages (para. 177). These heads of responsibility would apply even where the State itself was not the immediate agent of harm. For example, a State could be legally responsible for its lack of due diligence in preventing or responding appropriately to a violation (para. 172). A State could also incur responsibility by failing to investigate private abuses of rights seriously, and thereby aiding in their commission (para. 166). The doctrine to emerge from the *Velásquez Rodríguez Case* with respect to State responsibility for the acts of private entities is usefully summarized in the following extract from the judgement:

The State has [under article 1 of the American Convention] a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation (para. 174).

The decision in the *Velásquez Rodríguez Case* does not diminish the general rule governing the non-attribution of private conduct. The Court explicitly affirmed that the State is responsible only for those human rights violations that can ultimately be attributed to an act or omission by a public authority under the rules of international law (para. 164). In cases where responsibility for the initial act does not fall on the State, responsibility can still be imputed because of a subsequent failure on the part of the State to exercise “due diligence” in preventing, responding to, or remedying abuses committed by private persons or entities (para. 172). Whether or not such imputation is possible depends on the relevant primary rules and the



facts of the case. In other words, there must be an obligation, within the primary rule, for the State to prevent, respond or remedy abuses, and the facts must be able to show that the State has failed to discharge that obligation.

Since this decision, there has been increasing evidence that due diligence is becoming the accepted benchmark against which human rights obligations are to be interpreted. In *Osman v. United Kingdom*,¹²² the European Court of Human Rights held that the State could be held responsible for a failure of its police forces to respond to harassment that ultimately resulted in death (although the United Kingdom was not found to be responsible in this case). In *Akkoç v. Turkey*, the European Court of Human Rights, in the context of the right to life, explained that the State's primary duty is "to secure the right to life by putting into place effective criminal-law provisions to deter the commission of offences ... [and] law-enforcement machinery for the prevention, suppression and punishment of breaches".¹²³ The Court continued (citing *Osman v. United Kingdom*) that this duty may extend in appropriate circumstances "to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual." The African Commission on Human and Peoples' Rights has similarly explained that "the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies ... Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms".¹²⁴

¹²² *Osman v. The United Kingdom* (23452/84) [1998] ECHR 101 (28 October 1998).

¹²³ *Akkoç v. Turkey* (22947/93; 22948/93) [2000] ECHR 458 (10 October 2000), para. 77.

¹²⁴ *SERAC and CESR v. Nigeria*, para. 46.

The connection between trafficking and violence against women has already been noted, and it is in this context that the due diligence standard has been repeatedly affirmed by the international community as an appropriate measure of a State's obligation with respect to the conduct of private entities.¹²⁵ Decisions of regional courts have confirmed this trend. In *Fernandes v. Brazil*, a case of violence against a woman by her husband, the Inter-American Commission on Human Rights held the Brazilian authorities responsible for failing to protect and respond as required under the American Convention of Human Rights.¹²⁶ In relation to the disappearances of and attacks on women in Ciudad Juárez, Mexico, the same Commission

¹²⁵ The Declaration on the Elimination of Violence against Women defines gender-based violence as including all forms of such violence occurring within the family and the general community as well as violence "perpetrated or condoned by the State, wherever it occurs" (art. 2) and requires States to "exercise due diligence to prevent, investigate and ... punish acts of violence against women whether these are perpetrated by the State or private persons" (art. 4). The Committee on the Elimination of Discrimination against Women's general recommendation No. 19 confirms that discrimination prohibited under the Convention on the Elimination of All Forms of Discrimination against Women (defined to include gender-based violence) is "not restricted to action by or on behalf of Governments" (para. 9) and requires States to "take appropriate and effective measures to overcome all forms of gender-based violence, whether by private or public act" (para. 24 (a)). The Beijing +5 Outcome Document confirms that: "it is accepted that States have an obligation to exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the State or by private persons, and provide protection to victims" (para. 13).

¹²⁶ The Commission found that ineffective judicial action, impunity for perpetrators and the inability of victims to obtain compensation all demonstrated that Brazil lacked the commitment to take appropriate action to address domestic violence. The Commission considered Brazil to be liable for failure to meet the standard required in the OAS Convention on the Prevention of Violence against Women, article 7 (b), i.e. the standard of due diligence: *Maria Gives Penha Maia Fernandes v. Brazil*, Inter-American Commission on Human Rights, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000), paras. 56-57.

identified an obligation of due diligence upon Mexico, and provided a detailed series of recommendations to “improve the application of due diligence to investigate, prosecute and punish violence against women ... and overcome impunity” of the perpetrators, and “to improve the application of due diligence to prevent violence against women ... and increase their security”.¹²⁷ The Ciudad Juárez situation was also the subject of an inquiry by the Committee on the Elimination of Discrimination against Women. The report of that inquiry affirmed the obligation of due diligence and its particular significance in relation to private violence against women.¹²⁸

In *M.C. v. Bulgaria* (which concerned the rape of a child), the European Court of Human Rights held that, under the European Convention on Human Rights, States have an obligation to “enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution”.¹²⁹

The due diligence standard has been adopted by the Special Rapporteur on violence against women;¹³⁰ is repeatedly invoked by the Committee on the Elimination of Discrimination

against Women;¹³¹ and has been regularly recognized and applied by other United Nations human rights treaty bodies.¹³² In the specific context of trafficking, both the General Assembly and the Commission on Human Rights/Human Rights Council have, with increasing specificity, recognized the due diligence standard as applicable.¹³³

¹³¹ Committee on the Elimination of Discrimination against Women, general recommendation No. 19, para. 9 (“Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”). See also the decisions of the Committee on the Elimination of Discrimination against Women in *Shahide Goekce (deceased) v. Austria*, Communication No. 5/2005 (CEDAW/C/39/D/5/2005) and *Fatma Yildirim (deceased) v. Austria*, Communication No. 6/2005 (CEDAW/C/39/D/6/2005). In both these decisions the Committee on the Elimination of Discrimination against Women found that Austria had breached its obligations of due diligence with respect to preventing and investigating domestic violence.

¹³² Human Rights Committee, general comment No. 31: Nature of the General Legal Obligation imposed on States parties to the Covenant, para. 8 (“There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”); Committee on the Elimination of Racial Discrimination, *L.K. v. Netherlands*, Communication No. 4/1991 (CERD/C/42/D/4/1991, para. 6.6) (“When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition”).

¹³³ See, for example, General Assembly resolution 61/180, preamble (“Member States have an obligation to exercise due diligence to prevent trafficking in persons, to investigate this crime and to ensure that perpetrators do not enjoy impunity”); General Assembly resolution 63/156, preamble, and Human Rights Council resolution 11/3 on trafficking in persons, especially women and children, preamble (“States have an obligation to exercise due diligence to prevent, investigate and punish perpetrators of trafficking in persons, and to rescue victims as well as

¹²⁷ “The situation of the rights of women in Ciudad Juárez, Mexico: the right to be free from violence and discrimination,” Inter-American Commission on Human Rights, OEA/Ser.L/V/II.117, Doc. 44 (2003).

¹²⁸ “Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention and reply from the Government of Mexico” (CEDAW/C/2005/OP.8/MEXICO, especially paras. 273-277).

¹²⁹ *M.C. v. Bulgaria* [39272/98] [2003] ECHR 651 (4 December 2003) para. 153.

¹³⁰ “Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women” (E/CN.4/2000/68, paras. 51-53).



Deciding whether or not a State is meeting the due diligence standard ultimately comes down to an assessment of whether it is taking its obligations to prevent, respect, protect and fulfil seriously. A test proposed by the Special Rapporteur on violence against women in the context of a discussion on domestic violence is relevant:

The test is whether the State undertakes its duties seriously ... If statistics illustrate that existing laws are ineffective in protecting women from violence, States must find other complementary mechanisms to prevent domestic violence. Thus, if education, dismantling of institutional violence, demystifying domestic violence, training of State personnel, the funding of shelters and other direct services for victim-survivors and the systematic documentation of all incidents of domestic violence are found to be effective tools in preventing domestic violence and protecting women's human rights, all become obligations in which the State must exercise due diligence in carrying out.¹³⁴

2.4. SUMMARY OF THE KEY PRINCIPLES OF STATE RESPONSIBILITY RELEVANT TO TRAFFICKING

In determining the responsibility of States for trafficking and related harms, the following summary of the relevant international legal principles and rules provides guidance:

First, international legal responsibility requires that the act or omission must be attributable to the State.

provide for their protection ... not doing so violates and impairs or nullifies the enjoyment of the human rights and fundamental freedoms of the victims").

¹³⁴ "Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy" (E/CN.4/1996/53, paras. 37 and 141).

- The "official" (even if unauthorized) conduct of a State organ or a State official who violates established primary rules is attributable to the State.
- Whether an act or omission is determined to be "official" or private depends, to some extent, on whether the conduct in question is systematic or recurrent to the point where the State knew or should have known of it and should have taken steps to prevent it.
- States will generally not be held responsible for the conduct of private entities unless there is a special circumstance (indicating control and/or approval) linking apparently private behaviour to the State itself.

Second, in addition to being attributable to the State, the act or omission must *also* constitute a breach by the State of an international obligation.

- The question of whether there has been a breach of an obligation depends on the content and interpretation of the primary rule;
- In the area of human rights and trafficking, the general obligations of States extend beyond negative obligations of non-interference to include positive obligations such as legislative reform, the provision of remedies and protection from non-State interference. The composite nature of trafficking is reflected in the fact that breaches of obligation will often involve composite acts.

Third, despite the general rule of non-attribution of private conduct, there are circumstances under which the State can be held responsible for trafficking-related violations originating in the conduct of private persons or entities:

- In cases where responsibility for the initial act does not fall on the State, responsibility could still be imputed through a concomitant or subsequent failure on the part of the State

to prevent, respond to or remedy abuses committed by private persons or entities. Whether or not responsibility can be imputed in this way in a particular case will *always* depend on the content of the relevant primary rule (i.e., on whether the primary rule actually obliges States to prevent, respond to or remedy abuses).

- Human rights treaties often impose a general obligation on States to “respect” and/or “ensure”. In other words, States are required to guarantee rights as opposed to merely refraining from interfering with their enjoyment. This will usually require at least some action by the State party to prevent and respond to non-State interference with established rights.
- In the context of human rights, the standard of “due diligence” is becoming the accepted benchmark against which State actions to prevent or respond to violations originating in the acts of third parties are to be judged. An assessment of whether a State has met this standard will depend on the content of the original obligation (the primary rule) as

well as the facts and circumstances of the case.

In conclusion, States will be responsible for their own acts or omissions that breach their obligations under international law. In addition, States will generally not be able to avoid responsibility for the acts of private persons when their ability to influence an alternative, more positive outcome (judged against the primary rule) can be established. In such cases, the source of responsibility is not the act itself but the failure of States to take measures of prevention or response in accordance with the required standard. This issue will be considered in more detail, and with reference to specific examples, throughout the Commentary.

SEE FURTHER:

- State responsibility and due diligence in the context of public-sector trafficking: part 2.2, sections 6.1-6.4
- Due diligence in investigating, prosecuting and adjudicating trafficking cases: part 2.4, sections 13.2-13.3



PRINCIPLE 3 AND RELATED GUIDELINES: ANTI-TRAFFICKING MEASURES NOT TO AFFECT ESTABLISHED RIGHTS ADVERSELY

Anti-trafficking measures shall not adversely affect the human rights or dignity of persons, in particular the rights of those who have been trafficked, or of migrants, internally displaced persons, refugees or asylum-seekers.

3.1. PURPOSE AND CONTEXT

Measures taken to address trafficking can have an adverse impact on the rights and freedoms of trafficked persons and others,¹³⁵ and recent reports have documented the many ways in which anti-trafficking measures can interfere with established rights.¹³⁶ This danger has been repeatedly recognized by United Nations human

rights treaty bodies;¹³⁷ the Special Rapporteur on violence against women;¹³⁸ and the Special

¹³⁵ See further Gallagher, “Human rights and human trafficking: quagmire or firm ground?”, pp. 831-833. For a more detailed consideration of the “obligation of a lawful response”, see Gallagher, *International Law of Human Trafficking*, chap. 9.

¹³⁶ See, for example, Global Alliance against Trafficking in Women, *Collateral Damage: the Impact of Anti-Trafficking Measures on Human Rights Around the World* (2007) and Anne Gallagher and Elaine Pearson, “The high cost of freedom: a legal and policy analysis of shelter detention for victims of trafficking”, *Human Rights Quarterly*, vol. 32, No. 1.

¹³⁷ This recognition is evident in the Human Rights Committee’s repeated recommendation to States that their responses to trafficking should give prominent attention to the human rights of the victims: Yemen (CCPR/CO/84/YEM, para. 17); Tajikistan (CCPR/CO/84/TJK, para. 24); Thailand (CCPR/CO/84/THA, para. 20); Kenya (CCPR/CO/83/KEN, para. 25); Greece (CCPR/CO/83/GRC, para. 10); Barbados (CCPR/C/BRB/CO/3, para. 8). See also the recommendations contained in the concluding observations of the Committee on the Elimination of Discrimination against Women: Guatemala (CEDAW/C/GUA/CO/7, para. 26); El Salvador (CEDAW/C/SLV/CO/7, para. 23); Myanmar (CEDAW/C/MMR/CO/3, para. 27); Portugal (CEDAW/C/PRT/CO/7, paras. 34-35); Lebanon (CEDAW/C/LBN/CO/3, para. 29); Morocco (CEDAW/C/MAR/CO/4, para. 23); Brazil (CEDAW/C/BRA/CO/6, para. 24); Estonia (CEDAW/C/EST/CO/4, para. 19); Honduras (CEDAW/C/HON/CO/6, para. 21); Hungary (CEDAW/C/HUN/CO/6, para. 23); Pakistan (CEDAW/C/PAK/CO/3, paras. 30-31); Syrian Arab Republic (CEDAW/C/SYR/CO/1, para. 24); Kazakhstan (CEDAW/C/KAZ/CO/2, para. 18); Maldives (CEDAW/C/MDV/CO/3, para. 22); Peru (CEDAW/C/PER/CO/6, para. 31); Viet Nam (CEDAW/C/VNM/CO/6, paras. 18-19); China (CEDAW/C/CHN/CO/6, paras. 19-20); Georgia (CEDAW/C/GEO/CO/3, para. 22); Uzbekistan (CEDAW/C/UZB/CO/3, para. 26); Malaysia (CEDAW/C/MYS/CO/2, para. 24); Israel (A/60/38(SUPP), para. 250).

¹³⁸ See, for example, E/CN.4/2000/68, paras. 42-48.

Rapporteur on trafficking.¹³⁹ A human rights-based approach to trafficking requires steps to be taken to ensure that procedures are in place to prevent, monitor and redress such “collateral damage”.

Principle 3 directly builds on Principle 1 by confirming that measures taken to combat and prevent trafficking must not undermine or otherwise negatively affect human rights. This Principle, restated in Guideline 1, implicitly recognizes that actions taken in the name of responding to trafficking can have an adverse impact on the rights of a range of persons including, but not limited to, those who have been trafficked. The principle recognizes that certain groups are in particular danger of having their rights compromised through the application of anti-trafficking measures.

The leading international legal instrument on trafficking explicitly confirms Principle 3. Article 14 of the Trafficking Protocol states:

Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol

relating to the Status of Refugees and the principle of non-refoulement as contained therein.¹⁴⁰

A non-exhaustive list of examples of anti-trafficking measures that could be expected to affect rights negatively is provided in box 9, below.

The Commentary considers a number of these situations at various points. For example, the detention and criminalization of trafficked persons and others is briefly referred to below in the context of a discussion on the right to freedom of movement, and is examined in detail under Principle 7 and related guidelines. The issue of forced repatriation is considered below in the context of the principle of non-refoulement as well as more generally under Principle 11 and related guidelines. Violations of the rights of persons suspected or convicted of trafficking-related offences are explored under Principles 13 and 15 and related guidelines.

The following sub-sections highlight several human rights that are particularly at risk through the application of anti-trafficking measures: the prohibition of discrimination; the right to freedom of movement; and the right to seek and receive asylum from persecution.

¹³⁹ See, for example, “Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo” (A/HRC/10/16, paras. 32, 39 and Part V, conclusions and recommendations); E/CN.4/2006/62, paras. 90-91; E/CN.4/2005/71, paras. 10-11, 17, 24, 26. See also the following country mission reports of the Special Rapporteur on the human rights aspects of the victims trafficking in persons, especially women and children: Bahrain, Oman and Qatar (A/HRC/4/23/Add.2, paras. 65-68, 72-74, 81, 84, 95); Lebanon (E/CN.4/2006/62/Add.3, paras. 89, 91-95); Bosnia and Herzegovina (E/CN.4/2006/62/Add.2, paras. 80, 87-88).

¹⁴⁰ On the specific issues of asylum, refugee status and non-refoulement, see the discussion under section 3.4, below. See also *Trafficking Principles and Guidelines*, Guideline 1.9, which calls on States and other relevant actors to ensure that bilateral, regional and international cooperation agreements and other laws and policies concerning trafficking in persons do not affect the rights, obligations or responsibilities of States under international law, including human rights law, humanitarian law and refugee law.



Box 9: Examples of anti-trafficking measures that may adversely affect established rights

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

3.2. ANTI-TRAFFICKING MEASURES AND THE PROHIBITION ON DISCRIMINATION INCLUDING GENDER-BASED DISCRIMINATION

Major human rights instruments, both international and regional, prohibit discrimination on a number of grounds including race, sex, language, religion, property, birth or other status (see discussion under Principle 1 and related guidelines). Discrimination can be linked to trafficking in a number of ways. It is no coincidence that those most likely to be trafficked (irregular migrants, stateless persons, non-citizens and asylum-seekers, members of minority groups) are especially susceptible to discrimination and intolerance, based on their race, ethnicity, religion and other distinguishing factors. Some groups, such as migrant women and girls, are vulnerable to intersectional and multiple discriminations.¹⁴¹

In addition to increasing the risk of trafficking, discriminatory attitudes, perceptions and practices contribute to shaping and fuelling the demand for trafficking (see the discussion under Principle 4 and related guidelines).

Committee has noted that “racism, racial discrimination and xenophobia contribute to discrimination against women and other violations of their rights, including cross-border trafficking of women and children, and enforced prostitution and other forms of forced labour disguised inter alia as domestic or other kinds of personal service.” Human Rights Committee, Contributions to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (A/CONF.189/PC.2/14, para. 18). The General Assembly and Human Rights Council have both recently recognized that “victims of trafficking are particularly exposed to racism, racial discrimination, xenophobia and related intolerance and that women and girl victims are often subject to multiple forms of discrimination and violence, including on the grounds of their gender, age, ethnicity, culture and religion, as well as their origins, and that these forms of discrimination themselves may fuel trafficking in persons”. General Assembly resolution 63/156, preamble; Human Rights Council resolution 11/3 on trafficking in persons, especially women and children, preamble.

¹⁴¹ Committee on the Elimination of Discrimination against Women, general comment No. 25; Christine Chinkin and Fareda Banda, *Gender, Minorities, Indigenous People and Human Rights* (2004). The Human Rights

Racial and gender-based discrimination in the recognition and application of economic and social rights is also a critical factor in rendering persons more susceptible than others to trafficking. In both these cases, the impact of discrimination results in fewer and poorer life choices. It is the lack of genuine choice that can, in turn, render women and girls more vulnerable than men and certain nationalities and races more vulnerable to being trafficked in certain situations – where they are minorities, or where they are living in conditions of poverty or instability after conflict or political transition (see further the discussion under Principle 5 and related guidelines).

Measures taken by States and others to prevent or respond to trafficking can perpetuate discrimination and even violate the legal prohibition against discrimination. This danger is explicitly recognized in the Trafficking Protocol, which states that:

The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination (art. 14).

The problem of gender-based discrimination is particularly acute in respect of anti-trafficking measures. This is recognized in Guideline 1.4 which enjoins States and others 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”.

As noted above in part I, section 1.4.1, equal treatment and non-discrimination on the basis

of sex is a fundamental human right, firmly enshrined in the major international and regional instruments. Under international human rights law, an anti-trafficking measure will violate the prohibition on sex-based discrimination if it can be shown that it: (i) negatively affects the rights of the individual involved; and (ii) is overwhelmingly directed at and predominantly affects women and girls. This test is used at appropriate points throughout the present Commentary.

3.3. ANTI-TRAFFICKING MEASURES AND THE RIGHT OF FREEDOM OF MOVEMENT

The right to freedom of movement is generally held to refer to a set of liberal rights of the individual, including: the right to move freely and to choose a place of residence within a State; the right to cross frontiers in order to both enter and leave a country; and the prohibition on the arbitrary expulsion of aliens.¹⁴² In its article 12 the International Covenant on Civil and Political Rights explicitly recognizes and protects a right to freedom of movement, as do the Universal Declaration of Human Rights (art. 13 (1)) and all the major regional human rights treaties.¹⁴³

Freedom of movement is particularly vulnerable to being compromised by States in their efforts to respond to trafficking. States may, for example, take legislative, administrative or other measures to prevent individuals from emigrating in search of work. They may take (or may not prevent non-governmental entities from taking) national or foreign victims of trafficking into “protective”

¹⁴² Nowak, op. cit., p. 260.

¹⁴³ 4th Additional Protocol to the European Convention on Human Rights, articles 2-4; 7th Additional Protocol to the European Convention on Human Rights, article 1; African Charter, article 12; American Convention on Human Rights, article 22.



custody. They may prevent a victim from returning home until certain requirements, such as providing testimony against traffickers, have been met.

The *Trafficking Principles and Guidelines* contain a specific reference to freedom of movement in the context of protecting established rights:

States ... should consider ... protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right (Guideline 1.5).

When considering the human rights impact of a particular anti-trafficking measure, it is important to acknowledge that freedom of movement and related rights are not absolute. For example, under the terms of the International Covenant on Civil and Political Rights (art. 12 (1)), freedom of movement is only guaranteed, as a matter of law, to those who are *lawfully* within the territory of the relevant State. Freedom of movement and the right to leave can also be subject to lawful restrictions on the grounds of national security, public order, public health or morals, or the rights and freedom of others.¹⁴⁴ This caveat could conceivably provide legal justification for restrictions on freedom of movement that aim, for example, to secure witnesses for a prosecution or to protect trafficked persons from retaliation and intimidation. Such claims would need to be tested on their merits. It would also be important to ascertain independently that the claimed restrictions do not separately violate other recognized rights, for example,

the prohibition on discrimination, explored in detail above.¹⁴⁵

The Human Rights Committee, in considering the application of this exception, has noted that freedom of movement is “an indispensable condition for the free development of a person”.¹⁴⁶ Any restrictions on this right “must be provided by law, must be necessary... and must be consistent with all other rights” (para. 11). The Committee has also noted that:

Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law (paras. 14-15).

In deciding whether a restriction on freedom of movement is lawful, it is therefore necessary to ask whether the relevant restriction is: (i) provided for by law; (ii) consistent with other rights (such as the prohibition on sex-based discrimination); and (iii) necessary to protect the individual concerned. These requirements must all be fulfilled. For example, even if a State is able to argue that its emigration restrictions are based on a need to preserve public order or public morals through preventing trafficking, and that the measures taken are both necessary and in proportion to their stated aim, that same State

¹⁴⁴ International Covenant on Civil and Political Rights, article 12 (3). In relation to the right to leave one’s country, both the European Convention on Human Rights, article 3, and the American Convention on Human Rights, articles 22-23, provide that such restrictions must be “necessary in a democratic society”. The American Convention on Human Rights lists the scope of restrictions at article 30.

¹⁴⁵ On the issue of compatibility between restrictions on freedom of movement and compatibility with other rights protected in the International Covenant on Civil and Political Rights, see Nowak, op. cit., pp. 273-274.

¹⁴⁶ Human Rights Committee, general comment No. 27: Freedom of Movement, para. 1.

must also be able to show that its restriction is non-discriminatory. Since almost all emigration restrictions related to trafficking are limited to women and girls, it would be difficult for any State to argue convincingly for their lawfulness under current international legal standards.

3.4. ANTI-TRAFFICKING MEASURES, REFUGEE STATUS AND THE PRINCIPLE OF NON-REFOULEMENT¹⁴⁷

The discussion on Principle 2 and related guidelines noted the connection between trafficking and refugee status. In the context of non-violation of established rights, several different legal questions arise. First: is a trafficked person, as a matter of principle, entitled to seek and receive asylum? Second: under what circumstances would the fact or threat of trafficking influence a determination as to whether or not an individual can be considered a refugee? Third: can a trafficked person be lawfully repatriated or returned by a State when there is a risk of ill-treatment?

ENTITLEMENT TO SEEK AND RECEIVE ASYLUM

In relation to the question of whether a trafficked person is entitled to seek and receive asylum, international law is clear on the point that asylum claims are to be considered on their substantive merits and not on the basis of the applicant's means of entry.¹⁴⁸ In other words, an individual cannot be denied refugee status – or

the opportunity to make a claim for such status – solely because that person was trafficked or otherwise illegally transported into the country of destination. This rule has important practical significance. Many States impose penalties for unlawful entry, use of fraudulent travel documents, etc., and it has been noted that such penalties increasingly consist of a denial of rights in the context of refugee determination procedures.¹⁴⁹

The possibility that some victims or potential victims of trafficking may be entitled to international refugee protection is explicitly recognized in article 14 of the Trafficking Protocol and article 40 of the European Trafficking Convention. The Explanatory Report on the latter instrument confirms that:

The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have access to appropriate and fair asylum procedures (para. 377).

Asylum claims should be considered on their substantive merits and not on the basis of the applicant's means of entry. In practical terms this means that all persons, including both smuggled migrants and trafficked persons, should be given full opportunity (including through the provision of adequate information) to make a claim for asylum or to present any other justification for remaining in the country of destination on that basis.

TRAFFICKING AS THE BASIS OF A CLAIM FOR REFUGEE STATUS

The question of whether trafficking or fear of trafficking could ever constitute a valid basis for asylum is more complex. In order to be recognized as a refugee, the individual concerned must be found to have a “well-founded fear of persecution” that is linked

¹⁴⁷ This section draws on a more detailed consideration of trafficking and asylum and the impact of anti-trafficking measures on refugees and asylum-seekers in Gallagher, *International Law of Human Trafficking*, chaps. 3 and 9.

¹⁴⁸ See Refugee Convention, art. 31; see also Guy S. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, detention, and protection” in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), p. 183.

¹⁴⁹ Hathaway, *The Rights of Refugees...*, p. 408.



to one or more of the grounds listed in article 1A(2) of the Refugee Convention. In 2006 the Office of the United Nations High Commissioner for Refugees (UNHCR) issued a set of Guidelines on International Protection on the application of refugee law to victims of trafficking and persons at risk of being trafficked (UNHCR Trafficking Guidelines).¹⁵⁰ The Guidelines acknowledge (para. 6) that not all victims or potential victims of trafficking fall within the scope of the refugee definition and that being a victim of trafficking does not, per se, represent a valid ground for claiming refugee status. UNHCR has qualified this, however, by indicating that “in some cases, trafficked persons may qualify for international refugee protection if the acts inflicted by the perpetrators would amount to persecution for one of the reasons contained in the 1951 Convention definition, in the absence of effective national protection.”¹⁵¹ The various elements of the international legal requirements for international refugee protection are considered briefly below.

A WELL-FOUNDED FEAR OF PERSECUTION

What amounts to a well-founded fear of persecution that would validate a claim to asylum will depend on the facts of each individual case. The following points, listed in the UNHCR Trafficking Guidelines, are considered relevant in the context of trafficking:

- Forms of exploitation inherent in the trafficking experience (such as incarceration, rape, sexual enslavement, enforced prostitution, and forced labour) constitute serious violations of

human rights that will generally amount to persecution (para. 15); and

- Individuals who have been trafficked may experience a fear of persecution that is particular to the experience of being trafficked. They may, for example, face reprisals and re-trafficking as well as ostracism, discrimination or punishment should they be returned. Reprisals from traffickers (directed at the individual and/or the family of that person) could amount to persecution depending on the seriousness of the acts feared. Re-trafficking would usually amount to persecution. Severe ostracism, discrimination or punishment may amount to persecution, particularly if aggravated by trafficking-related trauma or if linked to an increased risk of re-trafficking (paras. 17-18).

The following additional points are relevant when the situation involves women or children who have been trafficked or who are at risk of trafficking:

- Trafficking of women and children for purposes of enforced prostitution or sexual exploitation is a form of gender-related violence that may amount to persecution within the legal definition of “refugee” (para. 19).¹⁵²
- Trafficked women and children can be particularly susceptible to severe reprisals, re-trafficking, ostracism and discrimination.¹⁵³

¹⁵⁰ See also Ryszard Piotrowicz, “The UNHCR’s Guidelines on Human Trafficking”, *International Journal of Refugee Law*, vol. 20, No. 2 (2008), p. 242.

¹⁵¹ *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, Global Consultations on International Protection, 2nd Meeting (EC/GC/01/11, para. 32).

¹⁵² See also Office of the United Nations High Commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01, para. 18) [Hereinafter: UNHCR Gender Guidelines].

¹⁵³ Office of the United Nations High Commissioner for Refugees, Guidelines on International Protection: “Membership of a Particular Social Group” within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (HCR/GIP/02/02, para. 18) [Hereinafter: UNHCR Social Group Guidelines].

- Women who have been trafficked or who fear trafficking may be identified as fearing persecution on the basis of their membership of a social group.

AGENTS OF PERSECUTION

Is it possible for non-State entities, such as traffickers and their accomplices, to inflict harm sufficient to warrant international protection under the refugee regime? While persecution is normally related to action by national authorities, it is now widely accepted that the nature of persecution does not require it to emanate from the State or to be attributable to the State. According to UNHCR, the persecutory acts relevant to the definition of “refugee” can indeed be perpetrated by individuals if they are “knowingly tolerated by the authorities or if they refuse, or prove unable to offer effective protection”.¹⁵⁴ The critical factor, therefore, in the view of UNHCR, is not the origin of the persecution but the ability and willingness of the State to protect the individual on his or her return.¹⁵⁵

STATE PROTECTION

International refugee law provides an alternative to State protection when such protection is unavailable or otherwise inaccessible to the individual in need. A decision as to whether or not the State meets the required standard is therefore an essential aspect of the refugee determination procedure. The question of whether the State is able to protect victims will depend on a range of factors, most importantly whether mechanisms are in place to prevent and combat trafficking and whether such mechanisms are being effectively implemented. The UNHCR Trafficking Guidelines are clear

on the point that: “Where a State fails to take such reasonable steps as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of the individual is likely to be well-founded” (para. 23). Until recently, it would have been difficult to identify accurately the “reasonable steps” required to meet this standard. However, the developments in international law and policy recounted in this Commentary serve to confirm a growing commonality of understanding on what is required to deal effectively with trafficking. The rights and obligations set out in the Trafficking Protocol, together with those derived from international human rights law, provide especially important guidance in assessing the adequacy of protection and assistance.

THE PLACE OF PERSECUTION

As noted above, the legal concept of “refugee” requires an individual to be outside her or his country of origin and, owing to a well-founded fear of persecution, to be unable or unwilling to avail herself or himself of the protection of that country.¹⁵⁶ UNHCR is clear on the point that the individual does not need to have left the country *because* of a well-founded fear of persecution. Such a fear (which still needs to relate to the applicant’s country of origin) could arise *after* that person has left the country. It must, however, relate to the applicant’s country of nationality or habitual residence. An individual who has been internally trafficked, or who fears such trafficking and escapes to another country in search of international protection, would generally be able to establish the required link “between the fear of persecution, the motivation for flight, and the unwillingness to return” (UNHCR Trafficking Guidelines, para. 26).

Even where the harm experienced by a victim of trafficking occurs outside the country of origin, this does not preclude the existence of a well-

¹⁵⁴ Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1979, HCR/IP/4/Eng/REV.1 (1979, re-edited January 2002), para. 65.

¹⁵⁵ UNHCR Trafficking Guidelines, para. 21.

¹⁵⁶ Refugee Convention, article 1A(2).



founded fear of persecution in that person's own country (para. 27). A determination on this point would require consideration of the full circumstances under which the victim had been trafficked, including the existence of a threat of harm to the victim in their country of origin.

THE REASONS FOR PERSECUTION

In order to qualify for refugee status, an individual's "well-founded fear of persecution" must relate to one or more reasons or *grounds* specified in the definition contained in the Refugee Convention: "race, religion, nationality, membership of a particular social group or political opinion". It is sufficient for the "ground" to be a relevant factor contributing to the persecution; it does not need to be the sole or even dominant cause (para. 29). In cases where there is a risk of persecution by a non-State actor for reasons related to one of these grounds, the causal link is established irrespective of whether the State's inability or unwillingness to protect is based on one of the grounds. Even where the persecution is unrelated to any of the accepted grounds, a causal link will still be established if the inability/failure of the State to protect is based on one of the grounds (para. 30).

Traffickers are generally motivated solely by considerations of profit. However, the UNHCR has noted the possibility of certain Convention-related grounds being used in the targeting and selection of victims of trafficking. For example, members of a particular race or ethnic group may be especially vulnerable to trafficking as a result of conflict or even because of specific market demands. Members of these groups may also be less effectively protected by the authorities in the country of origin (paras. 32 and 34).

Victims and potential victims of trafficking could also qualify for refugee status if it can be shown that their well-founded fear of persecution is related to their membership of a particular social group. In order to make such a determination, it

is necessary to show that members of this group share innate and unchangeable characteristics (other than being persecuted) and are generally recognized as a group (para. 37).¹⁵⁷ Not all members of the social group need to be at risk of persecution: it is sufficient to show that the claimant's well-founded fear of persecution is based on his or her membership of that group.¹⁵⁸ Women, men and children (as well as subsets of these groups, such as unaccompanied children) may constitute a particular social group for the purposes of determining refugee status. The fact of belonging to one of these groups might be one of the factors contributing to an individual's fear of being subject to persecution, such as sexual exploitation, through trafficking.¹⁵⁹ Former victims of trafficking might also be regarded as constituting a social group for whom future persecution could involve reprisals, punishment and ostracism (para. 39). The link between trafficking and membership of "a particular social group" continues to be explored at the national level in the context of specific refugee status determination procedures.¹⁶⁰

THE OBLIGATION OF NON-REFOULEMENT

The obligation of non-refoulement (non-return) is recognized as a norm of customary international

¹⁵⁷ See also *UNHCR Social Group Guidelines*.

¹⁵⁸ *UNHCR Social Group Guidelines*, para. 17.

¹⁵⁹ *UNHCR Trafficking Guidelines*, para. 38.

¹⁶⁰ Several decisions of the Canadian Courts have found a well-founded fear of persecution due to membership of a particular social group which relates to trafficking or its component acts: V95-02904 (Immigration and Refugee Board of Canada, Refugee Determination Division, 26 November 1997) (woman forced into prostitution); T98-06186 (Immigration and Refugee Board of Canada, Refugee Division, 2 November 1999) (women and/or former sex-trade workers); TA4-16915 (Immigration and Refugee Board of Canada, Refugee Protection Division, 16 March 2006) (single women who were trafficked in Ethiopia). The Australian Refugee Review Tribunal has dismissed several cases of women who claimed that, due to their membership of a "particular social group",

(Continued on next page)

law.¹⁶¹ The Trafficking Protocol specifically refers to this obligation (art. 14), as does the European Trafficking Convention (art. 40). In the context of international refugee law, the obligation prevents States from returning a person to another State where there are substantial grounds for

[Footnote 160 continued]

they would be at risk of being trafficked upon return to their country of origin: V01/13868 [2002] RRTA 799 (6 September 2002); N02/43616 [2003] RRTA 290 (31 March 2003); V03/16442 [2004] RRTA 474 (25 June 2004). In 2001, US authorities found a claimant had established a well-founded fear of persecution related to both forced prostitution and sexual slavery. It was not clear whether the grounds were political opinion or membership of a particular social group: Matter of J-M (number withheld) (BIA 30 March, 2001). Other recent US cases appear to indicate a tendency to identify failure to protect against forced prostitution as leading to persecution (based on the individual belonging to a social group defined as those who are under threat of being forced into prostitution). For cases considered by the United Kingdom Immigration Appeal Tribunal involving trafficked women and girls from Ukraine and Nigeria, see Annette Lansink, *Women and Migration, Interim Report on Trafficking in Women*, Committee on Feminism and International Law, Report of the 71st Conference of the International Law Association in Berlin (2004), pp. 20-21. For a comprehensive analysis of trafficking-related asylum applications and relevant case law in four major destination countries (Australia, Canada, United Kingdom, United States), see Kaori Saito, *International protection for trafficked persons and those who fear being trafficked*, UNHCR Research Paper No. 149 (2007), available at <http://www.unhcr.org/research/RESEARCH/476652742.pdf>.

¹⁶¹ See Office of the United Nations High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* (31 January 1994); Office of the United Nations High Commissioner for Refugees, "Summary Conclusions: The Principle of Non-Refoulement: Expert Roundtable organized by the UNHCR and the Lauterpacht Research Centre for International Law, University of Cambridge, United Kingdom, 9–10 July 2001" in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), p. 178; Nils Coleman, "Renewed review of the status of the principle of non-refoulement as customary international law", *European Journal of Migration and Law*, vol. 5, No. 1 (2003), p. 23.

believing that the individual in question would be subjected to persecution. In relation to a case involving a victim or potential victim of trafficking, a determination on this point would need to take into account the factors raised above relating to the willingness and capacity of the State to prevent and protect from trafficking.

The rule of non-refoulement extends beyond international refugee law. States are prevented from returning or extraditing a person to another State where there are substantial grounds for believing that the individual in question would be subject to torture or other forms of ill-treatment.¹⁶² For a detailed consideration of the principle of non-refoulement in the specific context of the repatriation of victims of trafficking, see the discussion under Principle 11 and related guidelines.

ENSURING NON-VIOLATION OF ESTABLISHED RIGHTS

Guideline 2.7 sets out what is required in order to ensure there are not violations of established rights in the context of international refugee law including the principle of non-refoulement:

[States should consider ensuring] that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

The UNHCR Trafficking Guidelines provide further information on a number of important practical requirements:

¹⁶² Convention against Torture, article 3 (1); Refugee Convention, article 33; International Covenant on Civil and Political Rights, article 7; Convention on the Rights of the Child, article 22. Note that the United Nations Special Rapporteur on Torture has recently linked torture and related harms to gender-based violence including trafficking (A/HRC/7/3, paras. 44, 56-58).



- Ensuring that a supportive environment is provided to applicants who claim to be victims of trafficking;
- Understanding that asylum-seekers who are victims of trafficking may be in fear of revealing the full extent of their persecution and that this fear may have a gender dimension that needs to be taken into account;
- Accepting that certain forms of trafficking may have a disproportionately severe effect on women and children and may, in fact, give rise to individuals being considered victims of gender-related persecution; and
- Avoiding any overt or implied link between the merits of an asylum claim and the willingness of a victim to give evidence against his or her exploiters (paras. 45-50).¹⁶³

3.5. MONITORING THE IMPACT OF ANTI-TRAFFICKING MEASURES

The Trafficking Principles and Guidelines recognize the critical importance of monitoring the impact of anti-trafficking interventions to ensure they do not interfere with, or otherwise negatively affect, established rights. Guideline 1.7 encourages the establishment of mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions. The same Guidelines also suggest that this role should be assigned to independent national human rights institutions – such as a national human rights commission – where these bodies exist.¹⁶⁴ States have entrusted a national rapporteur on trafficking

with responsibility for monitoring the national response.¹⁶⁵ Independent monitoring is an important aspect of ensuring that laws, policies and practices do not infringe on established rights. However, those governmental agencies most directly involved in the trafficking response – including legislators; law-enforcement, prosecutorial and judicial bodies and victim support agencies – should also monitor their own actions and performance from a human rights perspective.

The Trafficking Principles and Guidelines further note that non-governmental organizations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures.¹⁶⁶ Such monitoring should not be limited to the actions of the State but could usefully be extended to encompass the activities of the non-governmental agencies themselves – in particular, service providers and others directly involved with victims.

The human rights impact of anti-trafficking measures is not just an internal matter for the State. Guideline 1.8 envisages a role for the United Nations human rights treaty bodies – all of which receive and consider periodic reports from States parties on a range of issues and rights that relate directly to trafficking.

SEE FURTHER:

- Demand for trafficking: part 2.2, sections 4.1-4.4
- Freedom of movement: part 2.3, section 7.4

¹⁶³ On the gender aspects, see also *UNHCR Gender Guidelines*, and Cathy Zimmerman and Charlotte Watts, *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women* (World Health Organization, 2003).

¹⁶⁴ On the role of national human rights institutions in monitoring anti-trafficking interventions, see Asia Pacific Forum of National Human Rights Institutions (APF), Advisory Council of Jurists, *Consideration of the Issue of Trafficking: Background Paper and Final Report* (December 2002).

¹⁶⁵ This mechanism is expected to become a European standard through proposed revisions to the 2002 Council Framework Decision on Trafficking. See the 2009 proposal for a new Framework Decision on Trafficking.

¹⁶⁶ For an example of NGO monitoring of government responses to trafficking, see Global Alliance against Trafficking in Women, *Collateral Damage: the Impact of Anti-Trafficking Measures on Human Rights around the World* (2007).

- Repatriation and non-refoulement: part 2.3, section 11.2
- Rights of suspects and those convicted of trafficking: part 2.4, sections 13.4, 15.1-15.4

Part 2.2

PREVENTION OF TRAFFICKING

INTRODUCTION

In the context of trafficking in persons, prevention refers to positive measures to stop future acts of trafficking from occurring. Policies and activities identified as “prevention” are generally those considered to be addressing the *causes* of trafficking. While there is not yet universal agreement on the complex matter of causes, the most commonly cited causative factors are those that: (i) increase vulnerability of victims and potential victims; (ii) create or sustain demand for the goods and services produced by trafficked persons; and (iii) create or sustain an environment within which traffickers and their accomplices can operate with impunity. From this perspective, prevention can be seen to include a wide range of measures – from providing women with fair and equal migration opportunities, to strengthening the criminal justice response in order to end impunity and deter future trafficking-related crimes.

The Trafficking Principles and Guidelines consider prevention under three main headings that generally correspond to the categories identified above: reducing demand for trafficking (Principle 4 and related guidelines); addressing the factors that increase vulnerability to

trafficking (Principle 5 and related guidelines); and identifying and eradicating public-sector involvement in, and corruption related to, trafficking (Principle 6 and related guidelines). Each of these prevention goals is considered separately below. The prevention aspects of other obligations and responses are dealt with as they arise throughout the Commentary.

The principles of State responsibility, as set out under Principle 2 and related guidelines and discussed further throughout this section, confirm that States bear some responsibility for preventing the occurrence of an internationally wrongful act such as trafficking and its associated harms. The standard implied in this obligation is one of due diligence: the State is required to take “all reasonable and necessary measures to prevent a given event from occurring”.¹⁶⁷ A decision on what is “reasonable or appropriate” in the context of prevention will require consideration of the facts of the case and surrounding circumstances, including the capacities of the State, as well as of the relevant primary rules.

¹⁶⁷ “[B]ut without warranting that the event will not occur” (Draft articles on State responsibility, art. 14, para. 14).

The obligation of prevention is found in the major trafficking treaties including the Trafficking Protocol and the European Trafficking Convention. It is also affirmed through “soft law” sources including resolutions and policy documents of United Nations bodies and regional intergovernmental organizations and the work of the human rights treaty bodies and special procedures. These sources are cited throughout this section.

It is important to acknowledge that a human rights-based approach to trafficking may question or place limits on the use of certain commonly employed prevention strategies. The most important restriction in this regard is provided by the rule that responses to trafficking should not violate established rights (see the discussion under Principle 3 and related guidelines). The practical implications of this rule for prevention of trafficking are considered further below.



PRINCIPLE 4 AND RELATED GUIDELINES: PREVENTION THROUGH ADDRESSING DEMAND¹⁶⁸

Strategies aimed at trafficking shall address demand as a root cause of trafficking.

4.1. PURPOSE AND CONTEXT

Trafficking feeds into a global market that seeks cheap, unregulated and exploitable labour and the goods and services that such labour can produce – labour that can be supplied most profitably through traffickers. Sex tourism (including child sex tourism), the recruitment of domestic labour from developing countries, Internet pornography, and organized marriages between women from developing countries and foreign nationals are examples of new forms of actual or potential exploitation made possible through trafficking.

It is this realization that has prompted calls for States and others to regard demand as part of the problem of trafficking and to acknowledge demand reduction as an important prevention strategy. Demand, in this context, generally refers to two quite different things: *employer demand* for cheap and exploitable labour; and *consumer demand*

for the goods or services produced or provided by trafficked persons.¹⁶⁹ Demand may also be generated by exploiters and others involved in the trafficking process, such as recruiters, brokers and transporters, who rely on trafficking and victims of trafficking to generate income.¹⁷⁰

While accepting the need to address demand, it is important to acknowledge the limits of a term that is not properly defined, is under-researched and is still subject to debate and confusion. More generally, the use of the economic terminology of “supply and demand” in the trafficking context is not without problems and potential pitfalls. Trafficking networks and flows are still poorly understood, and the extent to which they mirror more traditional economic exchanges is not yet completely clear. In addition, there is no international consensus on the central question behind any economic analysis of trafficking: how, if at all, “the various areas of social and economic life within which trafficking and related

¹⁶⁸ This section draws on a more detailed discussion of the obligation to address demand in Gallagher, *International Law of Human Trafficking*, chap. 8.

¹⁶⁹ Bridget Anderson and Julia O’Connell-Davidson, *Trafficking: A Demand-led Problem? A Multi-country Pilot Study* (Save the Children, 2002), pp. 18 and 54. See also International Labour Organization, *The Mekong Challenge – Human Trafficking: Redefining Demand* (2005).

¹⁷⁰ International Labour Organization, *The Mekong Challenge...*, p. 4.

abuses occur should be regulated by the State, or whether market relations should apply in these areas.”¹⁷¹

It is also important to acknowledge a distinction between the *causes or factors* that shape demand and the *demands themselves*. This distinction becomes highly relevant when considering the roles and responsibilities of different actors including countries of origin, countries of destination and individuals. As noted by the authors of a major study on this issue, “to explore ‘the demand side of trafficking’ is not simply to enquire about the individuals who exploit or consume the labour/services of trafficked persons, but also to question the way in which States – through a combination of action and inaction – construct conditions under which it is possible or profitable to consume or exploit such labour/services.”¹⁷² States can of course play a more direct part in the demand cycle. Many countries of destination derive great benefit from cheap foreign labour which, deliberately unprotected by law, can be moved on if and when circumstances require. Countries of origin may rely heavily on the remittances of overseas workers and be reluctant to interfere with a system that brings economic benefits – even if it is clear that some of their citizens are being severely exploited.

Finally, demand cannot be considered separately from supply – not least because supply may well generate its own demand. For example, the availability of a cheap and exploitable domestic labour force (made possible through the factors further considered below, and more extensively under Principle 5 and related guidelines) can itself help generate demand for exploitative domestic labour at a level that might not otherwise have existed. Similarly, in relation to prostitution some argue that demand

actually fuels the market for persons trafficked into prostitution.

In keeping with the purpose of this Commentary, the emphasis of the following discussion is on human rights and on identifying ways in which rights violations linked to the demand for trafficking and related exploitation can be prevented and addressed.

4.2. AN OBLIGATION TO ADDRESS DEMAND?

Principle 4 identifies demand as a *root cause of trafficking* and requires States to address demand in their response to trafficking. It is reinforced by Guideline 7.1, which requires States and others to “analys[e] the factors that generate demand for exploitative commercial sexual services and exploitative labour and tak[e] strong legislative, policy and other measures to address these issues.”

The issue of demand is taken up by the major trafficking treaties. Article 9 (5) of the Trafficking Protocol requires States parties to “adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.” As noted in the Legislative Guide to the Protocol, this provision is mandatory. States parties to the Protocol are required to take at least some measures towards reducing demand that leads to trafficking.¹⁷³

In its article 6, the European Trafficking Convention requires States parties to adopt or strengthen legislative, administrative,

¹⁷¹ Anderson and O’Connell-Davidson, op. cit., p. 54.

¹⁷² Anderson and O’Connell-Davidson, op. cit., p. 5.

¹⁷³ *Legislative Guides to the Organized Crime Convention and its Protocols*, para. 70.



educational, social, cultural or other measures “to discourage demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking”. The Convention then includes a list of what its Explanatory Report refers to (in para. 110) as “minimum measures”: research on best practices, methodologies and strategies; raising awareness of the responsibility and important role of media and civil society in identifying demand as a root cause of trafficking; information campaigns involving public authorities and policy makers; and preventive measures including education programmes for children that integrate a gender perspective and that focus on the problem of gender-based discrimination.

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

The role of demand in fuelling trafficking, and the importance of addressing demand as part of a comprehensive response to trafficking and related exploitation, has been repeatedly recognized in other contexts. The preamble to the Optional Protocol on the sale of children, for example, refers to the efforts that are needed to raise public awareness and reduce consumer demand for the sale of children.¹⁷⁴ Several of the human rights treaty bodies¹⁷⁵ and Special

observations: Guatemala (CEDAW/C/GUA/CO/7, para. 24) (“encourages the State party to develop and implement awareness-raising programmes”); Rwanda (CEDAW/C/RWA/CO/6, para. 27) (“concerned at the lack of awareness of the scope of the phenomenon ... further concerned at the criminalization of women and girls involved in prostitution, while the demand is not being addressed”); Cameroon (CEDAW/C/CMR/CO/3, para. 31) (“calls on the State party to enhance measures aimed at the prevention of trafficking, including ... awareness-raising and information campaigns”); Libyan Arab Jamahiriya (CEDAW/C/LBY/CO/5, para. 28) (“calls upon the State party to take all appropriate measures to suppress the exploitation of prostitution of women, including discouraging male demand”); Uruguay (CEDAW/C/URY/CO/7, para. 29) (“recommends that the State party conduct nationwide awareness-raising campaigns on the risks and consequences of trafficking targeted at women and girls”); Mexico (CEDAW/C/MEX/CO/6, paras. 25, 27) (“recommends that the State party conduct nationwide awareness-raising campaigns on risks and consequences of trafficking targeted at women and girls”; “urges the State party to take all appropriate measures, including the adoption and implementation of a comprehensive plan to suppress the exploitation of prostitution of women and girls, child pornography and child prostitution, through, inter alia...discouraging the demand for prostitution”); Denmark (CEDAW/C/DEN/CO/6, para. 23) (“requests the State party to intensify its efforts to combat trafficking in women, including measures to prevent trafficking, minimize the demand for prostitution”); Philippines (CEDAW/C/PHI/CO/6, para. 20) (“calls on the State party to take appropriate measures to suppress the exploitation of prostitution of women, including through the discouragement of the demand for prostitution”); Australia (CEDAW/C/AUL/CO/5, paras. 20-21) (“concerned about the absence of effective strategies of programmes to ... address the demand for prostitution ... recommends the formulation of a comprehensive strategy to combat the trafficking of women and exploitation resulting from prostitution, which should include the development of strategies to discourage the demand for prostitution”). The Human Rights Committee, in its concluding observations, has repeatedly called for States to generate public awareness of the unlawful nature, risks and effects of trafficking and related practices: Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2, para. 13) (“undertake to promote a change of public perception regarding the issue of trafficking, in particular with regard to the status of trafficked persons as victims”); Costa Rica (CCPR/C/CRI/CO/5, para. 12) (“reinforce measures to combat trafficking of women and children and, in particular ... continue its efforts to generate public awareness of the unlawful nature of the sexual exploitation of women and children”); Thailand (CCPR/CO/84/

¹⁷⁴ Note that article 10 (3) requires international cooperation in addressing the root causes of offences addressed within the Protocol.

¹⁷⁵ See, for example, Committee on the Elimination of Discrimination against Women, concluding

(Continued on next page)

Procedures¹⁷⁶ have taken up this issue, in particular on the need to raise public awareness of the unlawful and exploitative nature of human trafficking. International and regional policy documents provide further confirmation of a growing understanding of the need for States to regard demand as a root cause of trafficking and a key factor in any effective prevention strategy.¹⁷⁷

(Footnote 175 continued)

THA, para. 21) (“take action to implement policies and legislation for eradication of child labour, inter alia through public-awareness campaigns and education of the public on protection of rights of children”); as has the Committee on the Rights of the Child: Chad (CRC/C/TCD/CO/2, para. 80) (“urges the State party to carry out awareness-raising activities in order to make both parents and children aware of the dangers of trafficking”); United States of America (CRC/C/OPSC/USA/CO/1, para. 23) (“recommends that demand for sexual services involving the exploitation of children be addressed through both prevention and prosecution measures. Preventive measures should include, among others, public awareness campaigns aimed at the individuals and groups creating demand for sexual exploitation of children”); Bulgaria (CRC/C/BGR/CO/2, para. 66 (b)) (“continue and strengthen its awareness-raising campaigns including through education and media campaigns”); Malaysia (CRC/C/MYS/CO/1, para. 96 (f)) (“continue to raise public awareness about detrimental effects of child trafficking and train professionals working with and for children, as well as general public, to identify, prevent and combat trafficking in children”).

¹⁷⁶ E/CN.4/2006/62, chap. II; “Report of the Special Rapporteur on sale of children, child prostitution and child pornography, Juan Miguel Petit” (E/CN.4/2006/67).

¹⁷⁷ See, for example, General Assembly resolution 61/180, para. 5, (“Recognizes the need to arrive at a better understanding of what constitutes demand and how to combat it, decides to strengthen efforts to counter the demand for victims of trafficking in persons, and encourages Member States to consider adopting legislative or other measures, such as educational, social or cultural measures, to discourage and reduce the demand that fosters all forms of exploitation of persons, especially women and children, and that thus promotes trafficking”); General Assembly resolution 63/156, preamble, paras. 2, 14 (“Noting that some of the demand for prostitution and forced labour is met by trafficking in persons in some parts of the world”; “Calls upon Governments to discourage, with a view to eliminating, the demand that fosters the

4.3. A HUMAN RIGHTS-BASED APPROACH TO UNDERSTANDING AND ADDRESSING DEMAND

As noted in the discussion under Principle 1 and related guidelines, a human rights approach is *normatively based* on international human rights standards and is *operationally directed* to promoting and protecting human rights. In developing rights-based strategies to reduce demand, the following considerations may be relevant:

trafficking of women and girls for all forms of exploitation, and in this regard to enhance preventive measures, including legislative measures, to deter exploiters of trafficked persons, as well as ensure their accountability”; and “[e]ncourages Governments ... to take appropriate measures ... to discourage, with a view to eliminating, the demand that fosters all forms of exploitation”; and *Trafficking in Persons, Especially Women and Children*, Human Rights Council Resolution 11/3, preamble and para. 3 (“Noting that some of the demand for prostitution and forced labour is met by trafficking in persons in some parts of the world”; and “[urges] governments to ... adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation of persons and leads to trafficking in persons”). On regional responses to the issue of demand, see, for example, the Brussels Declaration, para. 7 (“It should be an essential and common goal for the fight against trafficking to address the reduction of the demand for sexual services and cheap labour”); EU Plan on Best Practices, para. 3(vi) (“eliminating demand for all forms of exploitation, including sexual exploitation and domestic labour exploitation”); OSCE Action Plan, Recommendation IV(3.3) (“Adopting or strengthening legislative, educational, social, cultural or other measures, and, where applicable, penal legislation...to discourage the demand that fosters all forms of exploitation of persons, especially women and children, and that leads to trafficking”); ECOWAS Initial Plan of Action, p. 6, para. 1 (“States ... shall develop and disseminate public awareness materials focusing on ... discouraging the demand that leads to trafficking, particularly by addressing those who might exploit victims of trafficking, for example as child domestics or farm labourers”); Ouagadougou Action Plan, p. 4 (“Take measures to reduce the demand for services involving the exploitation of victims of trafficking in human beings”); OAS Recommendations on Trafficking in Persons, Sections II(2), V(1); COMMIT MOU, para. 26.



FOCUS AND SCOPE

- The obligation to address demand rests primarily with the country within which the exploitation takes place, because it is within these countries that both consumer and employer demand is principally generated.
- The links between demand and supply, noted above, also imply certain obligations on countries of origin. These are explored more fully in the discussion under Principle 5 and related guidelines, below.
- The demand reduction required under the Trafficking Protocol and the Trafficking Principles and Guidelines is not restricted to demand for exploitative sexual services but encompasses demand for the full range of exploitative practices identified in the international definition of trafficking.
- States are not precluded by international law from regulating prostitution as they consider appropriate, subject, of course, to their obligation to protect and promote the human rights of all persons within their jurisdiction.¹⁷⁸ Accordingly, rights-based strategies to address demand for exploitative/trafficked prostitution can be considered either separately from or in conjunction with strategies aimed at addressing demand for prostitution more generally.

DEMAND AND DISCRIMINATION

- Demand in the context of trafficking is often shaped by discriminatory attitudes (including cultural attitudes) and beliefs. Women may be preferred for certain forms of exploitation because they are perceived as weak and less likely to assert themselves or to claim the rights to which they are entitled. Certain ethnic or racial groups may be targeted for trafficking-related exploitation on the basis of

racist or culturally discriminatory assumptions relating to, for example, their sexuality, servility or work capacity.¹⁷⁹

- Demand for prostitution (often supplied through trafficking) may reflect discriminatory attitudes and beliefs based on both race and gender.
- Rights-based strategies to address demand should focus on addressing discriminatory attitudes and beliefs; particularly those directed against women and migrants.

THE ROLE OF THE STATE

- States are able to shape demand for the goods and services produced by trafficking through laws and policies on a range of matters, including immigration, employment, welfare and economic development. For example, failure to provide legislative protection for certain individuals, such as domestic workers, “entertainers” or migrant workers, creates an environment in which the exploitation of these persons becomes both “possible and worthwhile”.¹⁸⁰
- Laws and policies that institutionalize discrimination can also shape demand, as can a failure on the part of the State to challenge discriminatory social attitudes, practices and beliefs effectively.
- By maintaining trafficking as a low-risk, high-profit crime, a failure on the part of the State to investigate, prosecute and punish trafficking and related exploitation effectively can contribute to the demand generated by traffickers and exploiters.
- A more general failure on the part of the State to protect the rights of certain persons, including women, children and migrants, can further contribute to building demand

¹⁷⁸ See further the *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, para. 33 and note 15.

¹⁷⁹ Anderson and O’Connell-Davidson, op. cit., p. 42, noting that racism, xenophobia and prejudice against ethnic minority groups make it easier for consumers of the exploitation of trafficked persons to justify the practice.

¹⁸⁰ Anderson and O’Connell-Davidson, op. cit., p. 41.

by exacerbating vulnerability and, thereby, exploitability.

THE IMPORTANCE OF LABOUR PROTECTION

- As noted by the International Labour Organization, “[a] major incentive for trafficking in labour is the lack of application and enforcement of labour standards in countries of destination as well as origin ... [t]olerance of restrictions on freedom of movement, long working hours, poor or non-existent health and safety protections, non-payment of wages, substandard housing, etc. all contribute to expanding a market for trafficked migrants who have no choice but to labour in conditions simply intolerable and unacceptable for legal employment”.¹⁸¹
- Research confirms that demand for the labour or services of trafficked persons is absent or markedly lower where workers are organized and where labour standards for wages, working hours and conditions, and health and safety, are monitored and enforced.¹⁸²
- Rights-based strategies to address the demand for cheap, controllable labour should therefore aim to secure adequate labour protection – including through properly monitored regulatory frameworks – for all persons, including migrants and those working in the informal economy.¹⁸³

¹⁸¹ International Labour Organization, *Getting at the roots: Stopping exploitation of migrant workers by organized crime*, International Symposium on the United Nations Convention against Transnational Organized Crime: Requirements for Effective Implementation, Turin, 22-23 February 2002, section 3 (b).

¹⁸² Anderson and O’Connell-Davidson, *op. cit.*, p. 54.

¹⁸³ The Inter-American Court has held that: “States are obliged to ensure that, within their territory, all the labour rights stipulated in its laws – rights deriving from international instruments or domestic legislation – are recognized and applied. Likewise, States are internationally responsible when they tolerate actions and

NON-VIOLATION OF ESTABLISHED RIGHTS

- Human rights-based strategies to address trafficking-related demand must pass the test set out in Principle 3: there should be no violation of established rights, in particular, the rights of those who have been trafficked or of migrants, internally displaced persons, refugees or asylum-seekers.

THE IMPORTANCE OF RESEARCH

- Demand in the context of trafficking is still poorly understood, often leading to inappropriate responses. Research is an essential aspect of understanding demand. This is recognized in the European Trafficking Convention, which in article 6 (a) explicitly calls on States parties to undertake research on best practices, methods and strategies to discourage demand.

4.4. CRIMINALIZATION OF DEMAND

Neither the Trafficking Principles and Guidelines nor the Trafficking Protocol refers specifically to the criminalization of demand. However, the Legislative Guide for the implementation of the Protocol notes (in para. 74) that demand reduction “could be achieved in part through legislative or other measures targeting those who knowingly use or take advantage of the services of victims of exploitation.” This notion is carried further by article 19 of the European Trafficking Convention, entitled: “Criminalisation of the use of services of a victim”. Article 19 requires States parties to that treaty to consider:

adopting such legislative and other measures as may be necessary to establish as criminal

practices of third parties that prejudice migrant workers, either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination.” *Undocumented Migrants Case*, para. 153.



offences under its internal law, the use of services [of a victim of trafficking] ... with the knowledge that the person is a victim of trafficking in human beings.

The Explanatory Report to the European Trafficking Convention confirms that this provision was prompted by a desire to discourage the demand for exploitable people that drives trafficking. The provision also seeks to secure the potential criminalization of individuals involved in trafficking against whom the requisite elements of the crime may be difficult to prove. For example, the owner of business premises used for trafficking may not have undertaken any of the “actions” set out in the definition or used any of the required “means”, such as deception or coercion. Article 19 would enable the criminal prosecution of that individual if it could be shown that he or she knowingly made those premises available for the use of a trafficker.

The Explanatory Report (para. 232) provides an additional example of situation in which article 19 could apply: “[t]he client of a prostitute who knew full well that the prostitute had been trafficked could likewise be treated as having committed a criminal offence ... as could someone who knowingly used a trafficker’s services to obtain an organ.” Intent is the key element in the offence proposed under article 19. While evidence of a non-material ingredient such as intent may be difficult to prove, the Explanatory Report envisages (para. 235)

that the perpetrator’s intention can indeed be inferred from objective factual circumstances.¹⁸⁴

Criminalizing the use of the services of a trafficking victim – where the user knew or recklessly disregarded the fact that the individual involved was a victim of trafficking – is well within the spirit of the Principles and Guidelines. It addresses a critical link in the trafficking chain and can be considered a key aspect of a comprehensive strategy to reduce the demand for the goods and services produced through the exploitation of trafficked persons. The Principles and Guidelines provide an important framework for the important task of fleshing out the legal and policy parameters of this strategy. Note that this issue is also considered in the context of the discussion on the general obligation of criminalization set out in Principle 12 and related guidelines.

SEE FURTHER:

- Human rights-based approach to trafficking: part 2.1, sections 1.1-1.5
- Vulnerability to trafficking: part 2.2, sections 5.1-5.7
- Criminalization of trafficking and related offences: part 2.4, sections 12.1-12.3

¹⁸⁴ Note that article 6 (2)(f) of the Organized Crime Convention states, in reference to criminalizing laundering of the proceeds of crime, that: “Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective, factual circumstances”. The *Explanatory Report on the European Trafficking Convention* cites this provision in connection with its discussion of article 19.



PRINCIPLE 5 AND RELATED GUIDELINES: INTERVENTION TO ADDRESS FACTORS INCREASING VULNERABILITY¹⁸⁵

States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination.

5.1. PURPOSE AND CONTEXT

While our understanding of trafficking is incomplete, it is clear that certain factors help to shape the vulnerability to trafficking of an individual, a social group, a community or a society. These factors include human rights violations such as poverty, inequality, discrimination and gender-based violence – all of which help create economic deprivation and social conditions that limit individual choice and make it easier for traffickers and exploiters to operate. Factors that shape vulnerability to trafficking tend to impact differently and disproportionately on groups that already lack power and status in society, including women, children, migrants, refugees and internally displaced persons.

Vulnerability to trafficking can be short- or long-term, specific or general, procedural, political, economic, or structural. In order to ensure that responses are targeted, appropriate, and effective, it is important to understand the nature of particular forms of vulnerability. An example of a short-term, specific vulnerability is one caused by a lack of information about safe migration options and the dangers associated with trafficking.¹⁸⁶ This vulnerability could be addressed through initiatives aimed at improving the information position of potential migrants, including those who could be trafficked, with appropriate precautions and advice on how to avoid falling under the control of traffickers. Poverty and lack of access to avenues for safe, legal, and non-exploitative migration contribute to vulnerability in a far more complex way, and long-term and more comprehensive approaches will be needed in order to deal effectively with them.

¹⁸⁵ This section draws on a more detailed discussion of the obligation to address vulnerability to trafficking in Gallagher, *International Law of Human Trafficking*, chap. 8.

¹⁸⁶ This has been recently recognized by the General Assembly, which called on Governments “to undertake or strengthen campaigns aimed at clarifying opportunities, limitations and rights in the event of migration, as well as information on the risks of irregular migration and the ways and means used by traffickers, so as to enable women to make informed decisions and to prevent them from becoming victims of trafficking” (General Assembly resolution 63/156, para. 16).

Principle 5 recognizes that empowering vulnerable people through guaranteeing their human rights will reduce their susceptibility to being trafficked and exploited. It is addressed to States and others in a position to effect change. It requires them to consider the reasons why some people are trafficked and others are not; why some people are prepared to take dangerous migration decisions and others are not; why some people are more readily exploited than others, and in different ways. An understanding of vulnerability to trafficking should result in prevention measures that are realistic, effective and respectful of human rights. It should also contribute to more effective treatment of victims through, for example, better-informed support measures and reintegration programmes.

5.2. THE OBLIGATION TO ADDRESS VULNERABILITY TO TRAFFICKING

The discussion under Principle 2 and related guidelines confirmed that States have an obligation to prevent trafficking and associated human rights violations. Principle 5, specifically directed at both States and intergovernmental organizations, extends that obligation of prevention to the factors that increase vulnerability to trafficking including inequality, poverty and discrimination. Principle 5 is supplemented by Guideline 7, which identifies a range of measures that could be taken by States to address vulnerabilities, including: the provision of genuine livelihood options to traditionally disadvantaged groups; improving children's access to education; compulsory birth registration; review of policies that may compel people to take dangerous migration decisions; and promotion of legal, non-exploitative migration.

Relevant treaty law confirms the existence of certain obligations with respect to preventing trafficking through addressing vulnerability.

Article 9 (4) of the Trafficking Protocol, for example, requires States parties to "take or strengthen measures ... to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity." Article 31 (7) of its parent instrument, the Organized Crime Convention, also requires States to address the adverse social and economic conditions believed to contribute to the desire to migrate and hence, to the vulnerability of victims of trafficking.¹⁸⁷ Both treaties highlight the need for education and awareness-raising aimed at improving the public's understanding of trafficking, mobilizing community support for action against trafficking, and providing advice and warning to specific groups and individuals that may be at high risk of victimization.¹⁸⁸

The European Trafficking Convention affirms an obligation to prevent trafficking by addressing the factors that create or increase vulnerability. States parties to that instrument are required to:

- Establish and/or strengthen effective preventative policies and programmes for persons vulnerable to trafficking, including short-term measures such as information, awareness-raising and educational campaigns, together with longer-term social and economic initiatives that tackle the underlying and structural causes of trafficking;
- Take appropriate measures to enable legal migration including through the dissemination of accurate information; and
- Take specific measures to reduce children's vulnerability to trafficking, notably by creating

¹⁸⁷ See also *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, para. 71.

¹⁸⁸ Trafficking Protocol, art. 9 (2), Organized Crime Convention, art. 31 (5). See also *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, para. 71.



a protective environment for them (arts. 5 (2), 5 (4), 5 (5)).¹⁸⁹

All such measures must promote human rights and use an approach that recognizes both gender concerns and the special needs of children (arts. 1 (1)(a) and 5 (3)).

The importance of addressing vulnerability to trafficking is emphasized by United Nations political organs¹⁹⁰ and United Nations human rights bodies¹⁹¹ and through a range of regional

and international policy instruments.¹⁹² The Trafficking Principles and Guidelines highlight particular measures to reduce vulnerability, including: the provision of accurate information for potential migrants; the development of realistic information campaigns to inform communities about trafficking; and the expansion

¹⁸⁹ See also *Explanatory Report on the European Trafficking Convention*, para. 106. The Explanatory Report explains that the concept of a *protective environment*, as promoted by UNICEF, has eight key components: protecting children's rights from adverse attitudes, traditions, customs, behaviour and practices; government commitment to and protection and realisation of children's rights; open discussion of, and engagement with, child protection issues; drawing up and enforcing protective legislation; the capacity of those dealing and in contact with children, families and communities to protect children; children's life skills, knowledge and participation; putting in place a system for monitoring and reporting abuse cases; programmes and services to enable child victims of trafficking to recover and reintegrate.

¹⁹⁰ Trafficking in Persons, Especially Women and Children, Human Rights Council resolution 11/3, para. 3; General Assembly resolution 63/156, preamble, paras. 3, 4; Special Rapporteur on trafficking in persons, especially women and children, Human Rights Council resolution 8/12, preamble, para. 2; General Assembly resolution 61/180, para. 6; General Assembly resolution 61/144, para. 3; Commission on Human Rights, Trafficking in Women and Girls, CHR Res. 2004/45, para. 19; General Assembly resolution 58/137, preamble, paras. 2, 5.

¹⁹¹ The Committee on the Elimination of Discrimination against Women has repeatedly called on States to address the vulnerability of women to trafficking and related exploitation in its concluding observations: Cameroon (CEDAW/C/CMR/CO/3, para. 31); Madagascar (CEDAW/C/MDG/CO/5, para. 21); Myanmar (CEDAW/C/MMR/CO/3, para. 27); Saudi Arabia (CEDAW/C/SAU/CO/2, para. 24); Bolivia (CEDAW/C/BOL/CO/4, para. 27); Burundi (CEDAW/C/BDI/CO/4, para. 28); Belize (CEDAW/C/BLZ/CO/4, para. 22); Brazil (CEDAW/C/BRA/CO/6, para. 24); Estonia (CEDAW/C/EST/CO/4, para. 19); Guinea (CEDAW/C/GIN/CO/6, para. 29); Hungary (CEDAW/C/HUN/CO/6, para. 23); Indonesia (CEDAW/C/IDN/CO/5, para. 25); Kenya (CEDAW/C/

KEN/CO/6, para. 30); Mauritania (CEDAW/C/MRT/CO/1, para. 32); Mozambique (CEDAW/C/MOZ/CO/2, para. 27); Sierra Leone (CEDAW/C/SLE/CO/5, para. 29); Azerbaijan (CEDAW/C/AZE/CO/3, para. 20); Kazakhstan (CEDAW/C/KAZ/CO/2, para. 18); Namibia (CEDAW/C/NAM/CO/3, para. 21); Nicaragua (CEDAW/C/NIC/CO/6, paras. 21-22); Peru (CEDAW/C/PER/CO/6, para. 31); Viet Nam (CEDAW/C/VNM/CO/6, para. 19); Georgia (CEDAW/C/GEO/CO/3, para. 22); Philippines (CEDAW/C/PHI/CO/6, para. 20); Moldova (CEDAW/C/MDA/CO/3, para. 25); Uzbekistan (CEDAW/C/UZB/CO/3, para. 26); Bosnia and Herzegovina (CEDAW/C/BIH/CO/3, para. 28); Romania (CEDAW/C/ROM/CO/6, para. 23); Thailand (CEDAW/C/THA/CO/5, para. 28). The Committee on the Rights of the Child has done the same regarding children in its concluding observations: Democratic Republic of the Congo (CRC/C/COD/CO/2, para. 7); United Republic of Tanzania (CRC/C/OPSC/TZA/CO/1, para. 42); United States of America (CRC/C/OPSC/USA/CO/1, para. 44); Maldives (CRC/C/MDV/CO/3, para. 90); Sudan (CRC/C/OPSC/SDN/CO/1, paras. 6, 39); Kazakhstan (CRC/C/KAZ/CO/3, para. 61); Kenya (CRC/C/KEN/CO/2, para. 63); Bangladesh (CRC/C/OPSC/BGD/CO/1, para. 21); Costa Rica (CRC/C/OPSC/CRI/CO/1, paras. 21, 27); Latvia (CRC/C/LVA/CO/2, para. 58); United Republic of Tanzania (CRC/C/TZA/CO/2, para. 61); Qatar (CRC/C/OPSC/QAT/CO/1, para. 37); Russian Federation (CRC/C/RUS/CO/3, para. 74); Yemen (CRC/C/15/Add.267, para. 73); Armenia (CRC/C/14/Add.225, para. 67 (b)). The Special Rapporteur on trafficking in persons has repeatedly referred to the obligation to address vulnerabilities to trafficking: "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo" (A/HRC/10/16, paras. 50, 58 and Part V, Conclusions and Recommendations); E/CN.4/2006/62, paras. 69, 71, 73, 90-92; E/CN.4/2006/62/Add.1, para. 95; E/CN.4/2006/62/Add.3, para. 71; and E/CN.4/2006/62/Add.2, paras. 89-91).

¹⁹² The Brussels Declaration, para. 7; OSCE Action Plan, Recommendation IV(3); Ouagadougou Action Plan, pp. 1-2; ECOWAS Initial Plan of Action, p. 6, para. 2; OAS Recommendations on Trafficking in Persons, Section II, para. 17; COMMIT MOU, para. 22.

of opportunities for legal, gainful, and non-exploitative labour migration (7.4, 7.5 and 7.7).

Note that measures to reduce vulnerability to trafficking can be both direct and indirect. The compulsory registration of births, highlighted in Guideline 7, is one example of a measure that, effectively implemented, is likely to reap a range of rewards in terms of improving a child's access to his or her rights, including by reducing that child's vulnerability to trafficking and related exploitation.¹⁹³

5.3. ADDRESSING INCREASES IN VULNERABILITY RELATED TO INEQUALITY AND POVERTY

A United Nations study on the link between poverty and human rights identifies restricted opportunities to pursue wellbeing as a defining feature of a "poor person". In this sense, wellbeing refers not just to income level but to basic capabilities that are common to everyone – for example, being adequately nourished, being adequately clothed and sheltered, being able to avoid preventable morbidity, taking part in the life of a community, and being able to appear in public with dignity. In this understanding of poverty, an important element is an *inadequate command over economic resources*. If an individual lacks command over economic resources and this leads to a failure of the kind of basic capacities referred to above, then that person would be counted as poor.¹⁹⁴

¹⁹³ United Nations Children's Fund, *Birth Registration: Right from the Start* (March 2002). The right to birth registration is protected in the Convention on the Rights of the Child at article 7 (1) ("The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents").

¹⁹⁴ See Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework* (HR/PUB/04/1), pp. 5-12, especially page 10.

This analysis is very important in the present context because it acknowledges that poverty limits life choices. It can lead individuals to take risks and make decisions about their life and their future in a way that they never would if their basic capabilities were at acceptable levels. The Explanatory Report to the European Trafficking Convention explicitly recognizes the link between poverty and increased vulnerability to trafficking:

It is widely recognized that improvement of economic and social conditions in countries of origin and measures to deal with extreme poverty would be the most effective way of preventing trafficking. Among social and economic initiatives, improved training and more employment opportunities for people liable to be traffickers' prime targets would undoubtedly help prevent trafficking in human beings (para. 103).

Principle 5 identifies inequality as an additional factor contributing to vulnerability. Inequality can relate to wealth, income or opportunity. Inequalities that impact upon trafficking exist *within* as well as *between* countries. In short, trafficking inevitably involves the movement of individuals from regions or countries of relatively less wealth, income and opportunity to regions or countries of relatively greater wealth, income and opportunities.

Both poverty and inequality have strong gender dimensions.¹⁹⁵ In the context of trafficking, the gender determinant can be particularly detrimental. For example, as noted by the Committee on the Elimination of Discrimination against Women's general recommendation No. 19, poverty and unemployment force many

¹⁹⁵ The Beijing Declaration and Platform for Action notes at para. 48 that "[i]n addition to economic factors, the rigidity of socially ascribed gender roles and women's limited access to power, education, training and productive resources" contribute to the disproportionate number of women living in poverty.



women, including young girls, into prostitution.¹⁹⁶ Women working in prostitution are especially vulnerable to violence and exploitation for a range of reasons, including because their status, always low and often unlawful, tends to marginalize them.¹⁹⁷ Social and cultural attitudes towards women working in prostitution can also operate to increase their vulnerability. In its concluding observations on State reports, the Committee on the Elimination of Discrimination against Women has repeatedly identified a link between poverty and sexual exploitation and trafficking.¹⁹⁸ The Trafficking Principles and Guidelines explicitly call on States to review and modify “policies that may compel people to resort to irregular and vulnerable labour migration ... [including] examining the effect on women of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labour laws” (Guideline 7.6).

Addressing poverty and inequality must be a priority for all countries, and for the intergovernmental organizations that represent them and promote their interests. While this is a broad and long-term goal that goes well beyond the specific issue of trafficking, there are certain steps that could be taken in this direction specifically to address those aspects of poverty and inequality that are most directly relevant to trafficking. These include the following:

- Improved education opportunities, especially for women and children;¹⁹⁹
- Improved access to credit, finance, and productive resources, especially for women;²⁰⁰
- Elimination of any de jure or de facto barriers to employment for vulnerable groups, including women;²⁰¹

¹⁹⁹ See, for example, Committee on the Elimination of Discrimination against Women, concluding observations: Burkina Faso (CEDAW/C/BFA/CO/4-5, para. 30); Saint Lucia (CEDAW/C/LCA/CO/6, para. 20); Philippines (CEDAW/C/PHI/CO/6, para. 20); OSCE Action Plan, Recommendation IV(3.1) (“Improving children’s access to educational and vocational opportunities and increasing the level of school attendance, in particular by girls and minority groups”), Recommendation IV (3.2) (“Considering the liberalisation by governments of their labour markets with a view to increasing employment opportunities for workers with a wide range of skills levels”) and Recommendation IV (3.3) (“Developing programmes that offer livelihood options and include basic education, literacy, communication and other skills, and reduce barriers to entrepreneurship”).

²⁰⁰ OSCE Action Plan, Recommendation IV(3.3) (“Ensuring that policies are in place which allow women equal access to and control over economic and financial resources... Promoting flexible financing and access to credit, including micro-credit with low interest”).

²⁰¹ As noted by the Special Rapporteur on violence against women: “The failure of existing economic, political and social structures to provide equal and just opportunities for women to work has contributed to the feminisation of poverty, which in turn has led to the feminisation of migration as women leave homes in search of viable options” (E/CN.4/2000/68, para. 58). See also OSCE Action Plan, preamble (“Further concerned that root causes of trafficking in human beings...remain insufficiently tackled, in particular causes such as poverty, weak social and economic structures, lack of employment opportunities and equal opportunities in general”), Recommendation IV (3.1) (“Enhancing job opportunities for women by facilitating business opportunities for small and medium-sized enterprises (SMEs), organising SMEs training courses, and targeting them particularly at high-risk groups”), Recommendation IV (3.3) (“Taking appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of gender equality, the right to equal pay for equal work and the right to equality in employment opportunities”); Ouagadougou Action Plan, p. 3 (“States should endeavour to provide viable employment or other livelihood

¹⁹⁶ See also the Beijing Declaration and Platform for Action, which notes that poverty forces women into situations “in which they are vulnerable to sexual exploitation” (para. 51).

¹⁹⁷ Committee on the Elimination of Discrimination against Women, general recommendation No. 19, para. 15.

¹⁹⁸ See, for example, Democratic People’s Republic of Korea (CEDAW/C/PRK/CO/1, para. 42); Cambodia (CEDAW/C/KHM/CO/3, para. 20); Niger (CEDAW/C/NER/CO/2, para. 26); Mozambique (CEDAW/C/MOZ/CO/2, para. 26); Kenya (CEDAW/C/KEN/CO/6, para. 29).

(Continued on next page)

- Legal and social measures to ensure rights in employment including a minimum wage that allows an adequate standard of living;²⁰² and
- The provision of technical and other assistance to countries of origin to enable them to address inequalities that contribute to trafficking-related vulnerabilities.²⁰³

A rights-based approach to poverty reduction, an essential ingredient of preventive measures against trafficking, requires such measures to be implemented in a particular way. It requires implementation, without discrimination, of the guarantees to economic and social rights as well as civil and political rights.²⁰⁴ It also requires the inclusion of gender-analysis and human rights

(Footnote 201 continued)

opportunities for youth in general and in particular for young women at risk, especially in regions prone to trafficking”).

²⁰² Especially for migrant workers, see, for example, Committee on the Elimination of Discrimination against Women, concluding observations: Cyprus (CEDAW/C/CYP/CO/5, paras. 29-30); Malaysia (CEDAW/C/MYS/CO/2, paras. 25-26); Singapore (CEDAW/C/SGP/CO/3, paras. 23-24).

²⁰³ *Human Rights and Poverty Reduction...*, pp. 27-30; United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development* (2000), p. 12 (“Human rights and human development cannot be realized universally without stronger international action, especially to support disadvantaged people and countries to offset growing global inequalities and marginalization ... Aid, debt relief, access to markets, access to private financial flows and stability in the global economy are all needed for the full realization of rights in the poorest and least developed countries.”); World Bank, *World Development Report 2000–2001: Attacking Poverty* (2001), p. 11 (“There are many areas that require international action – especially by industrial countries – to ensure gains to poor countries and to poor people within the developing world. An increased focus on debt relief and the associated move to make development cooperation through aid more effective are part of the story. Of equal importance are actions in other areas – trade, vaccines, closing the digital and knowledge divides – that can enhance the opportunity, empowerment, and security of poor people.”)

²⁰⁴ *Human Rights and Poverty Reduction...*, p. 17.

criteria in the development, implementation, and evaluation of poverty reduction strategies and programmes.²⁰⁵

Several human rights treaties are of particular importance in addressing the link between poverty and vulnerability to trafficking. The key international instrument is the International Covenant on Economic, Social and Cultural Rights. At the regional level, the European Social Charter is another important example: guaranteeing a range of economic and social rights including non-discrimination, education, housing, health, education, and social and legal protection.

5.4. ADDRESSING INCREASES IN VULNERABILITY RELATED TO DISCRIMINATION AND VIOLENCE AGAINST WOMEN

As noted under Principle 3 and related guidelines, racial and gender-based discrimination, particularly in the recognition and application of economic and social rights, is a critical factor in rendering individuals and groups susceptible to trafficking. In both these situations the impact of discrimination, particularly in relation to access to education, resources and employment opportunities, results in fewer and poorer life choices. It is the lack of genuine choice that, in turn, renders women and girls more vulnerable than men, and certain nationalities and races more vulnerable than others, to the coercion, deception and violence of trafficking. In this context, States have an important obligation to ensure that their laws, systems and practices do not promote, reward or tolerate discrimination.

²⁰⁵ Beijing Declaration and Platform for Action, paras. 47, 67 and 68; *Human Rights and Poverty Reduction...*, pp. 10-11.



The link between discrimination and vulnerability to trafficking has been recognized by the human rights treaty bodies, in particular in relation to women. The Committee on the Elimination of Discrimination against Women, for example, has called upon States to review discriminatory legislation as a protection against trafficking.²⁰⁶ The Special Rapporteur on violence against women has also recognized that “[p]olicies and practices that either overtly discriminate against women or that sanction or encourage discrimination against women tend to increase women’s chances of being trafficked.”²⁰⁷ A similar finding has been made by the Special Rapporteur on Trafficking.²⁰⁸

While trafficking is itself a form of violence against women (see part 1, section 4.2, above), violence directed against or primarily affecting women can also be a factor increasing vulnerability to trafficking. For example, women

may accept dangerous migration arrangements in order to escape the consequences of entrenched gender discrimination, including family violence, and lack of security against such violence. In such cases the decision to move represents a recognition, on the part of the woman, that even unsafe migration provides the best available opportunity of escaping a dangerous and oppressive environment.²⁰⁹ Women may also be more vulnerable than men to coercion and force at the recruitment stage, increasing their susceptibility to being trafficked in the first place.

States (particularly countries of origin) and others can address increases in vulnerability to trafficking related to discrimination and violence against women through a range of practical measures that could include: providing safe shelter for women experiencing violence;²¹⁰ setting up crisis hotlines;²¹¹ and establishing victim support centres equipped with medical, psychological and legal facilities.²¹² Longer-term measures that seek to address the social, cultural and structural causes of violence are also important. These may include: reforming legislation that either discriminates against women or fails to address violence against women;²¹³ ensuring the prompt investigation

²⁰⁶ See, for example, concluding observations: Azerbaijan (A/53/38/Rev.1, paras. 74-75).

²⁰⁷ E/CN.4/2000/68, para. 43. See also E/CN.4/2006/62/Add.3, para. 21 (“The Special Rapporteur is convinced that widely held attitudes of racial and ethnic discrimination, which intersect with persistent patterns of gender discrimination, enhance demand for exploitation and trafficking since they make it socially more acceptable to exploit women from Africa, Asia or the poorest parts of Europe.”).

²⁰⁸ See “Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo” (A/HRC/10/16, para. 49) (“Restrictive immigration laws and policies are obstacles to a large supply of human power from source countries to meet the high demand for cheap labour in host countries. This helps generate a lucrative market for traffickers.”). See also Julia O’Connell Davidson, “‘Sleeping with the enemy’? Some problems with feminist abolitionist calls to penalise those who buy commercial sex”, *Social Policy and Society*, vol. 2, No. 1 (January 2003), p. 55 (“Governments are heavily implicated in the construction of the [sex trafficking] market through their [often gender discriminatory] policies”), cited in E/CN.4/2006/62, para. 72.

²⁰⁹ Note that family violence can also be a cause of children leaving home in circumstances that may make them vulnerable to trafficking.

²¹⁰ Human Rights Committee, concluding observations: Georgia (CCPR/C/GEO/CO/3, para. 8 (c)); Albania (CCPR/CO/82/ALB, para. 10); Slovakia (CCPR/CO/78/SVK, para. 9).

²¹¹ Human Rights Committee, concluding observations: Albania (CCPR/CO/82/ALB, para. 10); Slovakia (CCPR/CO/78/SVK, para. 9).

²¹² Human Rights Committee, concluding observations: Albania (CCPR/CO/82/ALB, para. 10); Slovakia (CCPR/CO/78/SVK, para. 9). See also A/61/122/Add.1, para. 270.

²¹³ Human Rights Committee, concluding observations: Libyan Arab Jamahiriya (CCPR/C/LBY/CO/4, para. 10). See also A/61/122/Add.1, paras. 262-265.

and prosecution of complaints related to violence against women;²¹⁴ providing access to effective remedies for gender-based violence;²¹⁵ implementing education initiatives aimed at educating the public about violence against women and combating negative attitudes towards women²¹⁶ (including, in some countries, the association of rape allegations with the crime of adultery);²¹⁷ and training police, immigration, judicial and medical personnel and social workers on the sensitivities involved in cases of violence against women.²¹⁸

5.5. ADDRESSING THE SPECIAL VULNERABILITIES OF CHILDREN, INCLUDING UNACCOMPANIED AND SEPARATED CHILDREN

International law recognizes that, because of their reliance on others for security and wellbeing, children are vulnerable to trafficking and related exploitation. In recognition of this vulnerability, children are accorded special rights of care and protection. Details of the relevant standard, including of the “best interests” principle that is required to be applied to all decisions affecting children, are summarized in part 2.1 (see section 1.4.2 above); considered in detail under Principle 10 and related

²¹⁴ Human Rights Committee, concluding observations: Georgia (CCPR/C/GEO/CO/3, para. 8 (b)); Honduras (CCPR/C/HND/CO/1, para. 7). See also A/61/122/Add.1, paras. 266-268.

²¹⁵ See also A/61/122/Add.1, para. 269.

²¹⁶ Human Rights Committee, concluding observations: Sudan (CCPR/C/SDN/CO/3, para. 14 (a)); Honduras (CCPR/C/HND/CO/1, para. 7); Albania (CCPR/CO/82/ALB, para. 10); Slovakia (CCPR/CO/78/SVK, para. 9). See also A/61/122/Add.1, paras. 271-272.

²¹⁷ Human Rights Committee, concluding observations: Sudan (CCPR/C/SDN/CO/3, para. 14 (b)).

²¹⁸ Human Rights Committee, concluding observations: Lithuania (CCPR/CO/80/LTU, para. 9). See also A/61/122/Add.1, para. 273.

guidelines, below; and referred to at appropriate points throughout this Commentary.

Appropriate responses to child vulnerability must be built on a genuine understanding of that vulnerability – specifically, why some children are trafficked and others are not. All measures taken to reduce the vulnerability of children to trafficking should aim to improve their situation – rather than to just prevent behaviours such as migration for work which, while not desirable, especially for young children, may not necessarily be exploitative or lead to trafficking.²¹⁹ It is also important to accept that children are not a homogenous group: older children have different needs, expectations and vulnerabilities than younger children; girls and boys can be similarly disaggregated.

The following is a representative list of actions that can be taken by States and others to reduce the vulnerability of children to trafficking. It reflects the Trafficking Principles and Guidelines and major policy documents and recommendations by United Nations human rights bodies:

- Ensure that appropriate legal documentation (including for birth, citizenship and marriage) is in place and available;²²⁰
- Tighten passport and visa regulations in relation to children, particularly unaccompanied minors and minors accompanied but not by an immediate family member;²²¹

²¹⁹ See further Mike Dottridge, *A Handbook on Planning Projects to Prevent Child Trafficking* (2007). See also International Labour Organization, *Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation, Textbook 1: Understanding Child Trafficking* (2009), pp. 15-16.

²²⁰ *Trafficking Principles and Guidelines*, Guideline 7.9; Brussels Declaration, para. 12.

²²¹ Brussels Declaration, para. 12 (“... specific action should be implemented such as in the field of passport and



- Improve children's access to educational opportunities and increase the level of school attendance, in particular by girls;²²²
- Protect children from violence including family and sexual violence;²²³
- Combat discrimination against girls;²²⁴

visa regulations, including the possibility to require that all children over the age of five must be in possession of their own passport and the extension of submission times for visa applications in respect of children to allow for background enquiry in the origin and destination countries. The inclusion of biometrics in issued travel documents will contribute to better identification of trafficked and missing children. Another important measure is to require carrier agents to retain the identity and travel documents of unaccompanied minors and those of children who are accompanied, but not by an immediate family member, that can then be handed into the possession of the immigration authorities at the point of arrival"); ECOWAS Initial Plan of Action, p. 9, para. 3 ("States shall take such measures as may be necessary, within available means: (a) to ensure that the birth certificates, and travel and identity documents they issue are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated, or issued; and (b) to ensure the integrity and security of travel or identity documents they issue, and to prevent their unlawful creation, issuance, and use").

²²² *Trafficking Principles and Guidelines*, Guideline 7.3; *Rights of the Child*, Commission on Human Rights resolution 2005/44, para. 32 (g) ("take the necessary measures to eliminate the sale of children, child prostitution and child pornography by adopting a holistic approach and addressing the contributing factors, including... lack of education"); OSCE Action Plan, Recommendation IV(3.1) ("Improving children's access to educational and vocational opportunities and increasing the level of school attendance, in particular by girls and minority groups"). In its concluding observations, the Committee on the Rights of the Child has repeatedly emphasized the need for States to ensure that children who choose to work still have access to education: Nepal (CRC/C/15/Add.261, para. 93); Antigua and Barbuda (CRC/C/15/Add.247, para. 61); Angola (CRC/C/15/Add.246, para. 65 (b)). The same has been said in relation to children seeking asylum: Netherlands (CRC/C/15/Add.227, para. 54 (d)); Canada (CRC/C/15/Add.215, para. 47 (e)).

²²³ Convention on the Rights of the Child, art. 19 (1); Committee on the Rights of the Child, concluding observations: Kenya (CRC/C/KEN/CO/2, para. 9).

²²⁴ United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* (United Nations publication, Sales No. E.06.V.11), xviii, 170.

- Raise public awareness of the unlawful nature and the effects of child trafficking and exploitation.²²⁵

Strategies to address the vulnerability of children to trafficking should acknowledge special needs. Children who may be especially vulnerable to trafficking include girls; abandoned, orphaned, homeless or displaced children; children in conflict zones; and children who belong to a racial or ethnic minority.²²⁶

The United Nations human rights system has recognized that unaccompanied or separated children outside their country of origin are especially susceptible to exploitation and abuse, including through trafficking.²²⁷ In its general

²²⁵ "Report submitted by the Special Rapporteur on the sale of children, child prostitution and child pornography, Juan Miguel Petit" (A/HRC/7/8, para. 39) ("Children will also be less vulnerable to abuse when they are aware of their right not to be exploited, or of services available to protect them, which means the need for permanent and massive preventive campaigns in the mass media and also in schools and on the streets"); ECOWAS Initial Plan of Action, p. 6, para. 2.; OSCE Action Plan, Recommendation IV (4.7); Committee on the Rights of the Child, concluding observations: Kenya (CRC/C/KEN/CO/2, para. 66 (g)); Nepal (CRC/C/15/Add.261, para. 96 (c)); Kyrgyzstan (CRC/C/15/Add.244, para. 62 (b)); Myanmar (CRC/C/15/Add.237, para. 73 (b)).

²²⁶ Committee on the Rights of the Child, concluding observations: Nepal (CRC/C/15/Add.261, para. 95) (vulnerability of girls, internally displaced children, street children, orphans, children from rural areas, refugee children and children belonging to more vulnerable castes); Angola (CRC/C/15/Add.246, para. 66) (vulnerability of internally displaced and street children); Canada (CRC/C/15/Add.215, para. 52) (vulnerability of Aboriginal children).

²²⁷ The Committee on the Rights of the Child defines these two terms as follows: "'Unaccompanied children' (also called unaccompanied minors) are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. 'Separated children' are children, as defined in article 1 of the Convention, who have been separated from

(Continued on next page)

comment No. 6, the Committee on the Rights of the Child has noted that:

Trafficking of such a child, or “re-trafficking” in cases where a child was already a victim of trafficking, is one of many dangers faced by unaccompanied or separated children. Trafficking in children is a threat to the fulfilment of their right to life, survival and development (para. 52).

In the same paragraph, in accordance with article 35 of the Convention on the Rights of the Child, the Committee has called upon States parties to take appropriate measures to prevent such trafficking including: identifying unaccompanied and separated children; regularly inquiring as to their whereabouts; appointing guardians; and conducting information campaigns that are age-appropriate, gender-sensitive and in a language and medium that is understandable to the child. The Committee has also noted a need for adequate legislation and effective enforcement mechanisms with respect to labour regulations and the crossing of borders.

5.6. ADDRESSING INCREASES IN VULNERABILITY IN CONFLICT AND POST-CONFLICT SITUATIONS

Trafficking is a feature of armed conflict as well as of post-conflict situations.²²⁸ During conflict, individuals may be abducted or otherwise

trafficked by military or armed groups in order to provide labour or military or sexual services. Even after the cessation of hostilities, civilian populations may be under extreme economic or other pressure to move, and are therefore particularly vulnerable to threats, coercion and deception. Wars and post-war economies are often built on criminal activities, which can quickly be expanded to include trafficking. Weak or dysfunctional criminal justice systems ensure that traffickers and their accomplices can operate with impunity. Violent and lawless war zones often become source, transit or destination points for victims of trafficking. The presence of international military or peacekeeping forces can present an additional threat of trafficking and related exploitation, with women and girls being at particular risk.

Trafficking during and after armed conflict usually has a very strong gender dimension. Where men and boys are trafficked, this is almost always for the purpose of supplying combatants to supplement fighting forces. Women and children are trafficked for a range of purposes including forced labour for armies and armed groups. Sexual exploitation is invariably a part of their exploitation. Such exploitation can include sexual servitude or enslavement as well as military prostitution and forced pregnancy.²²⁹

The factors that create or increase vulnerability to such trafficking are also highly gendered. Armed conflict destroys communities as a traditional means of support. During and after

(Footnote 227 continued)

both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members”: general comment No. 6: Treatment of unaccompanied or separated children outside their country of origin, paras. 7-8.

²²⁸ This aspect of trafficking has recently been recognized by the General Assembly, which has called upon

“Governments, the international community and all other organizations and entities that deal with conflict and post-conflict, disaster and other emergency situations to address the heightened vulnerability of women and girls to trafficking and exploitation, and associated gender-based violence” (General Assembly resolution 63/156, para. 4).

²²⁹ A/61/122/Add.1, para. 143.



wars, women are often left behind. In order to secure family survival, they may need to move to another part of the country or even abroad, invariably under extremely risky circumstances. The special vulnerabilities of internally displaced persons (IDPs) and refugees have already been outlined (see part 2.1, section 1.4.4, above). In the present context it is relevant to note that women and children constitute the overwhelming majority of IDPs and refugees resulting from armed conflict. On the move, in refugee camps or other temporary shelters they are highly vulnerable to violence and exploitation, including through trafficking.

International law and international policy require action to address the particular vulnerabilities of individuals caught up in conflict. To the extent that the situation, its cause or its consequences have a gender dimension, it is essential to ensure that responses include an appropriate gender perspective.

In 2003 UNHCR issued *Guidelines for Prevention and Response for Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons*. The Guidelines specifically address State responses in conflict and post-conflict situations, since these circumstances result in a large number of people becoming refugees, returnees and IDPs. To prevent violence against such persons, the Guidelines recommend: transforming socio-cultural norms (the socially prescribed roles, responsibilities, expectations, limitations, opportunities and privileges assigned to persons in the community based on their sex); rebuilding family and community support systems; creating conditions for improving accountability mechanisms; designing effective services and facilities (registering all refugees, providing identity documents, avoiding over-crowding); and influencing the formal and informal legal

framework (training criminal justice workers, implementing human rights law, developing appropriate sanctions).²³⁰

5.7. ENSURING THAT MEASURES TAKEN TO ADDRESS VULNERABILITY DO NOT VIOLATE ESTABLISHED RIGHTS

Principle 3 and related guidelines confirm that measures taken to combat and prevent trafficking must not undermine or otherwise negatively affect human rights. As noted in the discussion on this Principle, its presence implicitly recognizes that actions taken in the name of responding to trafficking can have an adverse impact on the rights of a range of persons including, but not limited to, those who have been trafficked. Efforts by States and others to reduce vulnerability to trafficking can run the risk of violating established rights. States may, for example:

- Fail to distinguish between children who are trafficked into situations of exploitation and children who migrate on their own or are assisted by others to find non-exploitative jobs they want to stay in;
- Fail to distinguish between those who are trafficked and those who migrate for work, even illegally;
- Prevent or obstruct children, women or members of a particular ethnic or racial group from leaving home or migrating in search of work;
- Accord insufficient recognition and protection to male victims of trafficking;
- Fail to focus adequate attention on all forms of trafficking; or
- Detain victims of trafficking, particularly

²³⁰ Office of the United Nations High Commissioner for Refugees, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response* (1 May 2003), pp. 35, 40-56. [Hereinafter, *UNHCR Sexual and Gender-Based Violence Guidelines*].

women and children, contrary to human rights standards.

A human rights-based approach to trafficking requires States and others engaged in responding to trafficking-related vulnerabilities to ensure that their actions promote the human rights of the individuals and groups who are the target of their interventions. Important guidance in this context is provided by the measures proposed in the discussion under Principle 3 and related guidelines, in relation to the prohibition

on discrimination; the right to freedom of movement; and the right to seek and receive asylum from persecution.

SEE FURTHER:

- Treatment of women: part 1, section 4.2; part 2.1, section 1.4.1; part 2.2, section 5.4
- Treatment of children: part 2.1, section 1.4.2; part 2.2, section 5.5; part 2.3, sections 10.1-10.4
- Treatment of refugees, asylum-seekers and IDPs: part 2.1, sections 1.4.4, 3.4



PRINCIPLE 6 AND RELATED GUIDELINES: IDENTIFYING AND ADDRESSING PUBLIC-SECTOR INVOLVEMENT IN TRAFFICKING²³¹

States shall exercise due diligence in identifying and eradicating public-sector involvement or complicity in trafficking. All public officials suspected of being implicated in trafficking shall be investigated, tried and, if convicted, appropriately punished.

6.1. PURPOSE AND CONTEXT

In many situations of trafficking, particularly those that are widespread, serious and intractable, there will be some level of direct or indirect involvement by public officials. Direct involvement refers to situations whereby public officials are actually a part of the trafficking process; for example as recruiters, brokers or exploiters. Examples of complicity in trafficking through less direct forms of involvement include the following:

- Border officials accepting bribes or inducements to permit the passage of persons who may be trafficked;
- Law enforcement officials (including international peacekeeping or international military personnel) accepting favours in

exchange for protection from investigation or prosecution;

- Labour inspectorates or health and safety officials accepting bribes to certify dangerous or illegal workplaces;
- Law enforcement or other public officials (including international peacekeeping or international military personnel) maintaining commercial interests in businesses using the services of trafficked persons, such as brothels; and
- Criminal justice officials, including prosecutors and judges, accepting bribes to dispose of trafficking cases in a particular way.

Public-sector complicity in trafficking, whether direct or indirect, undermines confidence in the rule of law and the fair operation of the criminal justice process. It fuels demand for illegal markets such as trafficking, and facilitates the efforts of organized criminal groups to obstruct justice. Public-sector complicity in trafficking exacerbates victim vulnerability and renders almost impossible the full discharge of a State's obligation to investigate and prosecute trafficking cases with due diligence.

Principle 6 is directed at States and requires them to use all reasonable efforts to identify, eradicate, investigate and punish public-sector involvement in trafficking.

²³¹ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 8.

6.2. THE OBLIGATION TO IDENTIFY AND ERADICATE PUBLIC-SECTOR INVOLVEMENT IN TRAFFICKING

Principle 6 is in two parts. The first part reiterates the State's duty to exercise due diligence to eradicate public-sector involvement in trafficking. Public-sector involvement may, as noted above, be through direct participation by Government officials in trafficking, or through complicity and connivance in the trafficking-related crimes of non-State actors. The second part of Principle 6, which requires States to take action against public officials who are suspected of direct or indirect involvement in trafficking, imposes procedural obligations as well as substantive ones. The obligation to investigate public officials as well as non-State actors suspected of involvement in trafficking is reaffirmed in Principle 13 and related guidelines.

Principle 6 is supplemented by Guideline 4.3, which identifies offences committed or involving complicity by State officials as "aggravating circumstances" warranting additional penalties. The Trafficking Principles and Guidelines also point out that complicity in trafficking by law enforcement officials obstructs victim involvement in criminal prosecutions and note that "[s]trong measures need to be taken to ensure that such involvement is investigated, prosecuted and punished" (Guideline 5).

The need to identify and eradicate public-sector involvement in trafficking is widely accepted in international law and policy. The Organized Crime Convention, for example, acknowledges the strong link between organized criminal activities such as trafficking and corruption.²³² Its article 8 requires States to take strong measures

to criminalize all forms of corrupt practices and ensure their laws are harmonized so as to facilitate cooperation.²³³ States parties are required to adopt measures designed to promote integrity and to prevent and punish corruption of public officials. States parties must also take measures to ensure effective action by domestic authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions (arts. 9 (1) and (2)).

Both the European Trafficking Convention and the SAARC Convention recognize public-sector complicity in trafficking as an aggravated offence warranting relatively harsher penalties.²³⁴ Many international and regional policy documents confirm the link between trafficking and corruption and the need for States to respond effectively.²³⁵

The obligation to investigate acts or omissions by public officials is reiterated in the range of instruments relating to violence against women considered throughout this Commentary.²³⁶ The General Assembly has also sought to protect trafficked persons against further harm by calling upon Governments to penalize persons

²³³ See further *ibid.*, paras. 163-192.

²³⁴ European Trafficking Convention, art. 24 (c); SAARC Convention, art. IV.

²³⁵ General Assembly resolutions 61/144 (para. 10) and 59/166 (para. 9); Brussels Declaration, para. 19; EU Plan on Best Practices, para. 4(x); OSCE Action Plan, Recommendation III(1.7); Ouagadougou Action Plan, pp. 1-2; OAS Recommendations on Trafficking in Persons, Section II(18).

²³⁶ See, for example, Committee on the Elimination of Discrimination against Women, general recommendation No. 19, para. 9; Declaration on the Elimination of Violence against Women, para. 4 (c); Beijing Declaration and Platform for Action, para. 124; Beijing +5 Outcome Document, para. 13; Inter-American Convention on Violence against Women, art. 7 (b).

²³² *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, paras. 163-165.



in authority found guilty of sexually assaulting victims of trafficking in their custody.²³⁷

CORRUPTION IN INTERNATIONAL LAW

Principle 6 and the treaties cited above are compatible with the growing body of international law that seeks to address corruption more generally, particularly those corrupt practices with transnational reach or effect. The most important instrument in this regard is the United Nations Convention against Corruption, which entered into force in 2005. The Convention seeks to promote and strengthen measures to combat public-sector and private corruption at both domestic and international levels. It represents a broad international consensus on what is required with respect to the prevention and criminalization of corruption and in terms of international cooperation and asset recovery. It applies to all the forms of trafficking-related corruption and complicity identified at section 6.1 above. In that context, the most important provisions of the Convention are as follows:

- States parties are required to establish specific corruption-related offences including bribery, embezzlement of funds; abuse of functions; trading in influence; and the concealment and “laundering” of the proceeds of corruption (arts. 16-19, 23 and 24);
- States parties are required to establish “obstruction of justice” – defined as the use of corrupt or coercive means to interfere with potential witnesses or to interfere with the actions of judicial and law enforcement officials – as a criminal offence (art. 25);²³⁸

- States parties are required to put in place a range of preventive measures directed at both public and private sectors. These include preventive anti-corruption policies, systems, procedures and institutions that promote the participation of society and reflect basic principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability (chap. II); and
- States parties are to cooperate with one another in every aspect of the fight against corruption including prevention, investigation and the prosecution of offenders. Countries are bound to render one another specific forms of mutual legal assistance in gathering and transferring evidence for use in prosecutions, to extradite offenders and to support the tracing, seizure and confiscation of the assets of corruption (chap. IV, especially arts. 43-44).

The United Nations Convention against Corruption builds on and reinforces a number of regional agreements on these issues including the African Union Convention on Preventing and Combating Corruption and Related Offences; the Inter-American Convention against Corruption; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the Council of Europe Criminal Law Convention on Corruption (criminalizing acts of corruption); and the Council of Europe Civil Law Convention on Corruption (providing for compensation for victims of corruption).

6.3. STATE RESPONSIBILITY AND DUE DILIGENCE IN THE CONTEXT OF PUBLIC-SECTOR COMPLICITY IN TRAFFICKING

Principle 6 confirms that States are responsible for identifying and responding to public-sector complicity in trafficking. Under Principle 2 and related guidelines, this Commentary set

²³⁷ General Assembly resolutions 61/144 (para. 7), 59/166 (para. 8), 57/176 (para. 8), 55/67 (para. 6), 52/98 (para. 4) and 51/66 (para. 7).

²³⁸ Note that article 23 of the Organized Crime Convention also requires criminalization of the obstruction of justice in a context that would directly cover proceedings related to trafficking in persons cases.

out the key points of the law of responsibility, confirming that a State will be responsible for acts or omissions that are: (i) attributable to the State; and (ii) a breach of its international legal obligation. These issues are considered further below with specific reference to public-sector complicity in trafficking.

ATTRIBUTION OF RESPONSIBILITY FOR CONDUCT OF PUBLIC OFFICIALS

International law is clear that the conduct of any organ of the State, such as a court, or the legislature, will always be regarded as an act of that State, for which the State is directly responsible (Draft articles on State responsibility, art. 4).²³⁹ Attribution for acts of officials who are part of a State organ (such as police, prosecutors, immigration officials) will depend on whether the individual concerned is acting in an apparently official capacity or under colour of authority. Importantly, “it is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power” (art. 4, para. 13). That the act in question was unauthorized or *ultra vires* is also irrelevant when determining whether or not it is to be characterized as an act of the State (art. 7).²⁴⁰ Both of these are important principles in the present context. States may defend themselves against allegations of public-sector involvement in trafficking by pointing out that

such involvement is contrary to national law and policy. Under the rules of attribution, “conduct carried out by persons cloaked with governmental authority” will be attributed to the State as an act of that State.²⁴¹ A national prohibition against trafficking would therefore be insufficient to enable the State to avoid its international legal responsibility for complicity in trafficking by its public officials.²⁴²

The task then becomes one of distinguishing between “official” conduct and “private” conduct. Some situations will be relatively straightforward. For example, a border official accepts money in exchange for turning a blind eye to groups of young women being escorted across the border in suspicious circumstances. This individual is undoubtedly acting contrary to internal law and thereby exceeding his or her lawful authority. However, it is the official position of that person which allows him or her to engage in this conduct. The attribution of that individual’s conduct to the State and a consequential finding of responsibility against the State should not, therefore, be particularly difficult.

The question of attribution may be more complicated when the acts or omissions in question appear to be those of private individuals who also happen to be agents of the

²³⁹ The International Court of Justice has confirmed this principle to be a norm of customary international law: *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999) ICJ Reports 87, para. 62.

²⁴⁰ Note that this provision applies both to organs of the State and to “a person or entity empowered to exercise elements of the governmental authority”. The European Court of Human Rights has held that a State’s authorities “are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected.” *Ilascu and Others v. Moldova and Russia* (48787/99) [2004] ECHR 318 (8 July 2004), para. 319.

²⁴¹ *Petrolane Inc. v. Islamic Republic of Iran* (1991) 27 *Iran-U.S.C.T.R.*, 64, p. 92, cited in Draft articles on State responsibility, article 7, para. 7. See also *Caire case v. UNRIAA* (1929), pp. 516, 531, cited in Draft articles on State responsibility, article 7, para. 5.

²⁴² In the *Velásquez Rodríguez Case*, for example, the Inter-American Court of Human Rights stated that a determination as to whether a breach of the American Convention on Human Rights had occurred did not depend on whether or not provisions of internal law had been contravened or authority exceeded: “Under international law, a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law” (para. 170).



State. Examples could include a Government official who employs a domestic servant who has been trafficked into that position, or a law enforcement official who maintains a private commercial interest in a brothel that exploits trafficked women. In such cases it will be necessary to question whether the conduct is “systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it” (art. 7, para. 8). If so, it should be possible to attribute such “official” involvement to the State without further analysis of the conduct itself.

If, on the other hand, the relevant conduct would be better described as “isolated instances of outrageous conduct on the part of persons who are officials”, then a distinction will need to be made between conduct which, while unauthorized, is undertaken with apparent authority (or, under “the colour of authority”),²⁴³ and purely private conduct. Apparent authority could be inferred in the second example provided in the previous paragraph, by showing that it is the official position of that individual that gives him or her the knowledge and protection making it possible to operate and maintain an unlawful, commercially successful operation. In other words, the conduct was only possible because of the individual’s official position and use of apparent authority. Additional evidence pointing to attribution could include, for example, the use of official vehicles to transport trafficked persons, the use of police intelligence to avoid raids, or the use of law enforcement colleagues to provide “protection”.

²⁴³ Under the United States Restatement, “A State is responsible for any violation of its obligations under international law resulting from action or inaction by ... (c) any organ, agency, official, employee or other agent of a government or any political sub-division, acting within the scope of authority or under colour of such authority”: American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987), sect. 207.

THE DUE DILIGENCE STANDARD AND PUBLIC-SECTOR COMPLICITY IN TRAFFICKING

Principle 6 requires States to exercise due diligence in identifying and dealing with public-sector complicity in trafficking. As noted above in the discussion of Principle 2 and related guidelines, the due diligence standard is commonly used to identify the obligations on States when it comes to responding to acts by private entities that interfere with established rights. The relevant principles confirm that failure to meet this standard, in terms of preventing an anticipated human rights abuse by a private entity, or to respond effectively to such an abuse, will invoke the responsibility of the State. Due diligence is also the appropriate standard in the following situations:

- In evaluating whether the State has taken sufficient steps to prevent involvement in trafficking by its officials; and
- In evaluating whether the State has discharged its obligation to identify, investigate and punish public-sector complicity in trafficking.

The discussion on due diligence under Principle 2 and related guidelines confirmed that deciding whether or not a State is meeting the due diligence standard ultimately comes down to an assessment of whether it is taking its obligations to prevent, respect, protect and fulfil human rights seriously. In the present context, those obligations include preventing and responding to public-sector complicity in the human rights violations associated with trafficking. The United Nations Human Rights Committee has spelled out the steps that should be taken to deal with violations of human rights involving public officials:

In order to combat impunity, stringent measures should be adopted to ensure that all allegations of human rights violations are promptly and impartially investigated, that the

perpetrators are prosecuted, that appropriate punishment is imposed on those convicted and that the victims are adequately compensated. The permanent removal of officials convicted of serious offences and the suspension of those against whom allegations of such offences are being investigated should be ensured.²⁴⁴

The following additional points, drawn principally from relevant case law, indicate further actions that may be required by States to meet the due diligence standard set out in Principle 6:

- States should ensure that the legal framework provides an appropriate framework for the identification, investigation and prosecution of trafficking-related offences, including those committed by, or with the complicity of, public officials;
- States should ensure that the involvement of public officials in trafficking or related offences is grounds for an aggravated offence attracting relatively harsher penalties;²⁴⁵
- States should ensure that procedures are in place for the effective investigation of complaints of trafficking involving or implicating public officials. These procedures should aim to ensure accountability, maintain public confidence and alleviate legitimate concerns. Accordingly, the investigation should commence promptly and be conducted with expedience. It must not be a mere formality but must be one that is capable of leading to the identification and punishment of culprits. The investigation must be independent and public. There must be meaningful measures to establish the truth of a victim's allegations or to obtain corroborating evidence;²⁴⁶ and
- Victims of trafficking that involves or implicates public officials should have available to them a mechanism for establishing the liability of any public officials or bodies for relevant acts or omissions.²⁴⁷ There should also be independent and effective scrutiny of complaints involving public officials.²⁴⁸

²⁴⁶ These procedural requirements are distilled from a body of case law of the European Court of Human Rights, including: *Ahmet Ozkan and Others v. Turkey* (21689/93) [2004] ECHR 133 (6 April 2004), paras. 310-314; *Paul and Audrey Edwards v. United Kingdom* (46477/99) [2002] ECHR 303 (14 March 2002), paras. 69-73; *Assenov and Others v. Bulgaria* (24760/94) [1998] ECHR 98 (28 October 1998), especially para. 102; and a series of cases involving actions of the Turkish security forces including: *Timurtas v. Turkey* (23531/94) [2000] ECHR 222 (13 June 2000), paras. 87-90; *Ertak v. Turkey* (20764/92) [2000] ECHR 193 (9 May 2000), paras. 134-135; *Çakici v. Turkey* (23657/94) [1999] ECHR 43 (8 July 1999), para. 87; *Tanrikulu v. Turkey* (23763/94) [1999] ECHR 55 (8 July 1999), paras. 101-111; *Ergi v. Turkey* (23818/94) [1998] ECHR 59 (28 July 1998), paras. 82-86; *Tekin v. Turkey* (22496/93) [1998] ECHR 53 (9 June 1998), paras. 62-69; *Kurt v. Turkey* (24276/94) [1998] ECHR 44 (25 May 1998), paras. 135-142; *Selçuk and Asker v. Turkey* (23184/94; 23185/94) [1998] ECHR 36 (24 April 1998), paras. 93-98; *Kaya v. Turkey* (22729/93) [1998] ECHR 10 (19 February 1998), paras. 86-92; *Aksoy v. Turkey* (21987/93) [1996] ECHR 68 (18 December 1996), paras. 95-100; and *Mentes and Others v. Turkey* (23186/94) [1997] ECHR 98 (28 November 1997), paras. 89-92. The elements of an effective investigation have also been confirmed through several cases of the Inter-American Commission/Court of Human Rights including: *Villagran Morales et al. (The Street Children case)*, Judgement of 19 November 1999, Inter American Court of Human Rights (Ser. C) No. 63 (1999), esp. para. 226; and *Raquel Martín de Mejía v. Peru*, Inter-American Commission on Human Rights, Case No. 10.970, Report No. 5/96 OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996).

²⁴⁷ *Osman v. United Kingdom*.

²⁴⁸ European Commission on Racial Intolerance, Second Report on the United Kingdom, 16 June 2000, cited in *The Rights of Non-Citizens: Final report of the Special Rapporteur, Mr. David Weissbrodt*, Addendum: Regional Activities (E/CN.4/Sub.2/2003/23/Add.2, para. 38).

²⁴⁴ Human Rights Committee, concluding observations: Colombia (CCPR/C/79/Add.76, para. 32).

²⁴⁵ See further discussion of aggravated offences under Principle 15 and related guidelines.



International and regional policy documents on trafficking provide some limited additional guidance.²⁴⁹ However, more work needs to be done to flesh out the factors that will help to determine whether a State has met the required standard of due diligence in relation to identifying and responding to public-sector involvement or complicity in trafficking.

6.4. THE INVOLVEMENT OF MILITARY, PEACEKEEPING, HUMANITARIAN AND OTHER INTERNATIONAL PERSONNEL IN TRAFFICKING AND RELATED FORMS OF EXPLOITATION

The involvement of military, peacekeeping, humanitarian and other international personnel in trafficking and related exploitation has been extensively documented. Studies into this aspect of the trafficking phenomenon confirm that such involvement can be both direct and indirect. Patronage of an establishment that uses trafficked labour is an example of indirect involvement. The sexual exploitation of women and children by international personnel is an example of more direct involvement.

The involvement of international personnel in trafficking is a complex issue and one that is not yet fully understood. Certainly, a large, predominantly male international presence can actually fuel the demand for goods and services produced through trafficking and exploitation, in particular prostitution. International personnel are generally deployed to situations of conflict or immediate post-conflict in which populations are vulnerable and basic institutions, including law enforcement, are fragile or non-existent.

Conflict-related demographic changes can mean that there are more civilian women than men. The absence of male family members; destruction of property or problems in accessing property; and emphasis on the rehabilitation of former combatants can all contribute to increasing the vulnerability of women in conflict and post-conflict situations. In addition, the legal framework governing engagement may be unclear and lines of responsibility and control blurred. The growing privatization of conflict, characterized by the increased involvement of private corporations as contractors and sub-contractors, has exacerbated problems of responsibility and control. These various factors can combine to create a climate of impunity – a legal and procedural vacuum in which international personnel involved in criminal exploitation and trafficking are not investigated, apprehended or prosecuted.

The Trafficking Principles and Guidelines focus particular attention on closing this responsibility gap: on identifying the obligations and responsibilities of States and intergovernmental organizations and ensuring that international military, peacekeeping and humanitarian operations do not become safe havens for traffickers and their accomplices.

Guideline 10 sets out the steps that those responsible for international personnel, most particularly States and intergovernmental organizations, should take to prevent and deal with direct and indirect involvement in trafficking and related exploitation. The following is a summary of the key points of Guideline 10 which have, in most cases, been affirmed and even strengthened by recent reports, recommendations, commitments and initiatives by the major intergovernmental organizations including the General Assembly;²⁵⁰ the

²⁴⁹ See, for example, the Brussels Declaration, para. 19, which recommends “[e]ffective legislative and regulatory measures to combat corruption, the establishment of standards of good governance ... and the development of mechanisms to curb corrupt practices”.

²⁵⁰ See, for example, “A comprehensive strategy to eliminate future sexual exploitation and abuse in United

(Continued on next page)

Security Council,²⁵¹ the North Atlantic Treaty Organization,²⁵² and coalitions of United Nations and private agencies involved in humanitarian work.²⁵³

Training: States and intergovernmental organizations should ensure that pre-deployment and post-deployment training programmes for international personnel adequately address the issue of trafficking and related exploitation and clearly set out the expected standard of behaviour. All such training should be developed within a human rights framework and should be conducted by experienced trainers.

Personnel procedures: States and intergovernmental organizations should ensure that recruitment, placement and transfer procedures (including those of private contractors and sub-contractors) are rigorous and transparent. States and intergovernmental

organizations should ensure that their personnel do not engage or find themselves complicit in trafficking; or use the services of individuals in relation to which there are reasonable grounds to suspect they may have been trafficked.²⁵⁴

Regulations and codes of conduct: States and intergovernmental organizations should develop regulations and codes of conduct setting out expected standards of behaviour; they should require all international personnel to report on any instances of trafficking or related exploitation that come to their attention.²⁵⁵ The relevant organizations should take responsibility for ensuring compliance with rules and regulations, as should managers and commanders.²⁵⁶

Investigation and prosecution: States and intergovernmental organizations should establish mechanisms for the systematic investigation of trafficking and related exploitation by international personnel.

Individual criminal disciplinary and financial responsibility: States and intergovernmental organizations should consistently apply appropriate criminal, civil and administrative penalties to those shown to have engaged or been complicit in trafficking and related exploitation.

(Footnote 250 continued)

Nations peacekeeping operations" (A/59/710). The General Assembly's debate on this report, held in April 2005, led to the adoption of a two-year package of reforms for peacekeeping on sexual exploitation and abuse: General Assembly resolution 59/300 on a comprehensive review of a strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations, endorsing the recommendations of the Special Committee on Peacekeeping Operations (A/59/19/Rev.1). In December 2007, the General Assembly, in its resolution 62/214, adopted the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel.

²⁵¹ For example, Security Council resolution 1820 (2008) on women and peace and security.

²⁵² NATO Policy on Combating Human Trafficking, adopted 29 June 2004. See also Keith J. Allred, "Combating human trafficking", *NATO Review* (2006, Summer Issue).

²⁵³ *Statement of Commitment on Eliminating Sexual Exploitation and Abuse by UN and Non-UN Personnel*, adopted in December 2006 by 22 UN agencies and 24 non-UN entities, available from <http://cdu.unlb.org/Portals/0/PdfFiles/PolicyDock.pdf>.

²⁵⁴ Note that all United Nations peacekeeping personnel – whether civilian or uniformed – are prohibited from committing acts of sexual exploitation and abuse, including the exchange of money, employment, goods or services for sex, as outlined in the Secretary-General's Bulletin, *Special measures for protection from sexual exploitation and sexual abuse* (ST/SGB/2003/13).

²⁵⁵ All United Nations peacekeeping personnel – whether civilian or uniformed – are bound to report concerns or suspicions of sexual exploitation or sexual abuse by a fellow worker. *Ibid.*

²⁵⁶ This important point on organizational, managerial and command responsibility is not made in Guideline 10 but is explicitly included in A/59/710.



Privileges and immunities: privileges and immunities attached to the status of an employee (such as an employee of a diplomatic mission or an intergovernmental organization) should not be invoked in order to shield that person from sanctions for trafficking or related offences.

Real progress has recently been made, particularly by intergovernmental organizations and agencies, in identifying and responding to trafficking and related abuses by their international personnel. The willingness of contributing Member States to support the effective implementation of new standards and procedures will be crucial to ensuring their success. It is also important to acknowledge that not all international operations are undertaken

under the umbrella of an intergovernmental organization, with the result that some personnel in the field will be beyond the reach of these newly developed standards and procedures. Accordingly, it will be up to the controlling State to ensure that measures are in place to prevent the involvement of their personnel in trafficking and other forms of exploitation, and to identify and deal with any such involvement.

SEE FURTHER:

- State responsibility and due diligence: part 2.1, sections 2.1-2.4; part 2.4, section 13.2
- Criminalization of trafficking: part 2.4, sections 12.1-12.3
- Investigation and prosecution: part 2.4, sections 13.1-13.4

Part 2.3

PROTECTION OF AND ASSISTANCE TO VICTIMS

INTRODUCTION

A human rights approach to trafficking demands that priority be given to protecting and supporting individuals who have been trafficked. The Principles and related Guidelines explored in this section set out the key components of a rights-based approach to victim protection and assistance.

The challenges in ensuring adequate and appropriate treatment for victims of trafficking are considerable. For example, despite their position as victims of crime and victims of human rights violations, many trafficked persons are implicated in committing offences of some sort, albeit under duress. This Commentary, under Principle 7 and related Guidelines, explores this phenomenon and its impact on human rights. The Commentary also details developments in international law and policy that point to a growing rejection of the idea of arresting or prosecuting trafficked persons for offences committed as a direct consequence of their having been trafficked; and a similar rejection of the idea of routinely detaining victims in welfare or immigration facilities.

Principles 8 and 9 and their related Guidelines identify, more specifically, the right of victims

of trafficking to protection and support, and also to legal assistance. The Commentary confirms that all victims, *irrespective of their involvement in any legal process*, have an enforceable right to immediate support and protection. States that accord victim status and assistance only to those who agree to get involved in the criminal justice process are not meeting this international standard. In terms of minimum entitlements, victims have the legal right to have their immediate physical safety ensured and to be protected, by the State, from further harm. In most cases, this will require victim privacy to be respected, in law and in fact. Victims should also be given information and legal advice on the options that are available to them, including their rights and options as witnesses under the criminal justice system of the country in which they are currently located.

The Trafficking Principles and Guidelines acknowledge the vulnerable position of children. Principle 10 and related Guidelines detail the special rights that are thereby accorded to them and the corresponding obligations of States and others dealing with child victims of trafficking. The Commentary explores this aspect of victim protection carefully, noting that the best interests of the child are to be at all times paramount

and that this overriding principle should be formally integrated into a State's procedures and guidelines for dealing with child victims.

Principle 11 and related Guidelines acknowledge the central importance, to victims and their rights, of safe – and preferably voluntary – return. The forced, unplanned and unsupported repatriation of victims of trafficking deprives them of access to rights and remedies

to which they are legally entitled and may compromise their safety. The Commentary explores the key issues in repatriation, including: the concept of safe and preferably voluntary return; entitlement to return; due process and the principle of non-refoulement; the right to remain during legal proceedings; the relationship between return and access to remedies; alternatives to repatriation; and supported reintegration.



PRINCIPLE 7 AND RELATED GUIDELINES: **NO DETENTION OR PROSECUTION FOR STATUS- RELATED OFFENCES**²⁵⁷

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

7.1. PURPOSE AND CONTEXT

In countries of transit and destination, trafficked persons are often arrested, detained, charged and even prosecuted for unlawful activities such as entering illegally, working illegally or engaging in prostitution. For example, trafficked persons may not have the correct migration or work papers; their identity documents may be forged or may have been taken away from them; and the exploitative activities demanded of a trafficked person, such as prostitution, soliciting or begging, may be illegal in the State of destination.

The criminalization of trafficked persons is commonplace, even in situations where it would appear obvious that the victim was an unwilling participant in the illegal act. Such criminalization

is often tied to a related failure to identify the victim correctly. In other words, trafficked persons are detained and subsequently charged, not as victims of trafficking, but as smuggled or irregular migrants, or undocumented migrant workers. Countries of origin sometimes directly criminalize victims upon their return, penalizing them for unlawful or unauthorized departure. Finally, it is not uncommon for victims of trafficking to be detained in police lock-ups, immigration centres, shelters or other such facilities, even for very extended periods.

The criminalization and detention of victims of trafficking are important issues because they are often tied to a failure on the part of the criminalizing State to afford victims the rights to which they are legally entitled under national and international law. For example, criminalization will generally result in the deportation of foreign victims – thereby denying them right of access to an effective remedy.²⁵⁸

²⁵⁷ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 5.

²⁵⁸ The Human Rights Committee has noted that for trafficked women who “are likely to be penalized for their illegal presence ... by deportation,” apprehension “effectively prevents these women from pursuing a remedy for the violation of their rights under article 8 of the Covenant”: concluding observations: Israel (CCPR/C/79/Add.93, para. 16).

The following discussion considers three issues: first, the status of trafficked persons as victims of crime and victims of human rights violations; second, the criminalization of trafficked persons for status-related offences; and third, the detention of trafficked persons for status offences, protection or any other reason. The issue of victim detention is given particular and detailed consideration owing to the prevalence of this practice and its serious implications for the rights of trafficked persons, in particular, women and children.

7.2. TRAFFICKED PERSONS AS VICTIMS OF CRIME AND VICTIMS OF HUMAN RIGHTS VIOLATIONS

Principle 7 does not use the expression “victim of crime”, nor does it define that status. It is, however based upon the understanding that a trafficked person is a victim of crime as that term has been defined at the international level:

[Victims of crime are] persons who ... 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.²⁵⁹

International human rights treaty law does not provide a rigorous framework of protection for the rights of victims of crime.²⁶⁰ The only directly relevant instrument in this context is a resolution of the General Assembly: the

1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

In a provision of particular relevance to the situation of many victims of trafficking, the Declaration notes how critically important it is for a person to be understood to be a victim of crime “regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim” (para. 2).

The Declaration is explicit on the point that victims of crime are to be treated with compassion and respect for their dignity, and to have their right to access justice and redress mechanisms fully respected. It also notes the importance, for victims, of access to remedies, an issue that will be discussed further below in the context of Principle 17 and related Guidelines.

In addition to being victims of crime, trafficked persons are also victims of human rights violations. In the context of extremely serious violations (a term that could include egregious cases of trafficking), the concept of victim has been defined, in the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, as follows:

[v]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the

²⁵⁹ Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34, para. 1.

²⁶⁰ A limited exception is provided by the Optional Protocol on the sale of children, articles 8 and 9 of which deal extensively with the rights and interests of child victims of the offences covered by that instrument.



direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.²⁶¹

The Basic Principles and Guidelines on the Right to a Remedy and Reparation also confirm that a person is to be considered a victim irrespective of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim (para. 9). This instrument further confirms that victims have a right to be treated with humanity and respect for their dignity and human rights and that measures should be taken to ensure their well-being and avoid re-victimization (para. 10) – a likely consequence of criminalization.

7.3. PROSECUTION FOR STATUS-RELATED OFFENCES

Principle 7 is clear that trafficked persons should not be charged or prosecuted for offences that have been committed in the course of their being trafficked. Principle 7 is supplemented by Guideline 2.5, which, in the context of the need for trafficked persons to be identified quickly and accurately, calls on States and others to ensure that “trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.”

Guideline 4.5 also considers the issue of prosecution for status-related offences with reference to the need for an adequate legal framework, requiring States to consider ensuring that “legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or

for the activities they are involved in as a direct consequence of their situation as trafficked persons.”

The Trafficking Protocol does not specifically address the issue of prosecution for status-related offences. However, the body established to make recommendations on the effective implementation of the Protocol has recently affirmed that: “States parties should ... [c]onsider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts.”²⁶²

Developments since the adoption of the Protocol are a further indication that the standard set out in the Trafficking Principles and Guidelines is receiving increased support. Article 26 of the European Trafficking Convention, for example, requires States parties, in accordance with the basic principles of their legal systems, to:

provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.²⁶³

This provision is narrower than that set out in the Trafficking Principles and Guidelines, in that it would prevent only the punishment of a trafficked person for a status-related offence, not their arrest, prosecution or conviction. Nevertheless, as the first – and, at present, the only – treaty-based standard relating to status-related offences, it clearly represents a step forward in the recognition of a need to prevent the criminalization of victims.

²⁶¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation, General Assembly resolution 60/147, para. 8.

²⁶² “Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009” (CTOC/COP/WG.4/2009/2, para. 12).

²⁶³ See also *Explanatory Report on the European Trafficking Convention*, paras. 272-274.

Outside of treaty law, the principle of non-criminalization for status-related offences finds support in a number of United Nations resolutions²⁶⁴ and reports of the Secretary-General²⁶⁵ as well regional soft-law instruments²⁶⁶ and other policy documents.²⁶⁷ It has also been

repeatedly recognized by the Committee on the Rights of the Child²⁶⁸ and the Committee on the Elimination of Discrimination against Women²⁶⁹ in issuing their concluding observations on the reports of States parties.

It is important to note that the non-criminalization principle reflects basic principles common to

²⁶⁴ See, for example, General Assembly resolution 63/156, para. 12, which “Urges Governments to take all appropriate measures to ensure that victims of trafficking are not penalized for being trafficked and that they do not suffer from revictimization as a result of actions taken by government authorities, and encourages Governments to prevent, within their legal framework and in accordance with national policies, victims of trafficking in persons from being prosecuted for their illegal entry or residence”. For previous General Assembly references to this issue, see its resolutions 61/144 (para. 18), 59/166 (paras. 8 and 18), 57/176 (para. 8), 55/67 (paras. 6 and 13), 52/98 (para. 4) and 51/66 (para. 7). The Human Rights Council and its predecessor, the Commission on Human Rights, have also addressed this issue. See, for example, Human Rights Council resolution 11/3, paragraph 3 (urging States to “take all appropriate measures to ensure that victims of trafficking are not penalized for being trafficked and that they do not suffer from revictimization as a result of actions taken by Government authorities, bearing in mind that they are victims of exploitation”, as well as Commission on Human Rights resolutions 2004/45 (para. 6) and 1998/30 (para. 3).

²⁶⁵ See, for example, A/63/215, which refers to “the principle of non-punishment” and states that “victims should be protected from re-victimization, including protection from prosecution for illegal migration, labour law violations or other acts” (para. 62).

²⁶⁶ See, for example, the Brussels Declaration, para. 13; Ouagadougou Action Plan; OAS Recommendations on Trafficking in Persons, Section IV(5); *Hemispheric efforts to combat trafficking in persons: Conclusions and recommendations of the first meeting of national authorities on trafficking in persons*, adopted at the fourth plenary session of the OAS, held on June 6, 2006, AG/RES. 2256 (XXXVI-O/06), IV(7); Cambodia-Thailand MOU, art. 7; OSCE Declaration on Trafficking in Human Beings adopted in Porto, 2002, Section II; OSCE, Vienna Ministerial Council Decision No. 1 (Decision on Enhancing the OSCE’s Efforts to Combat Trafficking in Human Beings), MC(8).DEC/1, 2000, para. 9.

²⁶⁷ See, for example, Beijing +5 Outcome Document, para. 70 (c), which states that governments should consider preventing trafficked persons from being prosecuted for illegal entry or residence into the State, “taking into account that they are victims of exploitation”. The Beijing

Declaration and Platform for Action, para. 124 (l) requires the State to create or strengthen institutional mechanisms so that victims of violence against women can report acts of violence “free from the fear of penalties”. See also the Regional Workshop on Human Trafficking and National Human Rights Institutions: Cooperating to End Impunity for Traffickers and to Secure Justice for Trafficked People: Concluding Statement and Plan of Action, Sydney, 20-23 November, 2005, preamble; the Resolution of European Women Lawyers Association on Trafficking in Human Beings regarding a future European Convention on Trafficking in Human Beings, General Assembly of the European Women Lawyers Association, Helsinki, Finland, 8 June 2003, 3; ASEAN Practitioner Guidelines, Section 1.C.2.

²⁶⁸ See, for example, Committee on the Rights of the Child, concluding observations: Kenya (CRC/C/KEN/CO/2, para. 66); Nepal (CRC/C/15/Add.261, para. 89); Antigua and Barbuda (CRC/C/15/Add.247, para. 65); Armenia (CRC/C/15/Add.225, para. 65). In relation to the Optional Protocol on Sale of Children, the Committee has clearly and consistently maintained the position that child victims of offences covered by the Optional Protocol should not be either criminalized or penalized and that all possible measures should be taken to avoid their stigmatization and social marginalization. See, for example, Committee on the Rights of the Child, concluding observations: Republic of Korea (CRC/C/OPSC/KOR/CO/1, paras. 40-41); United States of America (CRC/C/OPSC/USA/CO/1, paras. 36-37); Chile (CRC/C/OPSC/CHL/CO/1, paras. 29-30); Bangladesh (CRC/C/OPSC/BGD/CO/1, paras. 32-33); Sudan (CRC/C/OPSC/SDN/CO/1, paras. 29-30); Iceland (CRC/C/OPSC/ISL/CO/1, paras. 13-14).

²⁶⁹ Committee on the Elimination of Discrimination against Women, concluding observations: Lebanon (CEDAW/C/LBN/CO/3, paras. 28-29); Singapore (CEDAW/C/SGP/CO/3, paras. 21-22); Cook Islands (CEDAW/C/COK/CO/1, para. 26); Syrian Arab Republic (CEDAW/C/SYR/CO/1, paras. 18-19); Pakistan (CEDAW/C/PAK/CO/3, paras. 30-31); Viet Nam (CEDAW/C/VNM/CO/6, paras. 18-19); Uzbekistan (CEDAW/C/UZB/CO/3, para. 25); Malaysia (CEDAW/C/MYS/CO/2, para. 23); Cambodia (CEDAW/C/KHM/CO/3, paras. 19-20).



all major legal systems relating to responsibility and accountability for criminal offences. It is not intended to confer blanket immunity on trafficked victims who may commit other non-status-related crimes with the requisite level of criminal intent. For example, if a trafficked person engages in a criminal act such as robbery, unlawful violence, or even trafficking,²⁷⁰ then she or he should be subject to the normal criminal procedure with due attention to available lawful defences.²⁷¹ In the case of a trafficked child implicated in criminal offences, it is particularly important for due regard to be paid to the full range of rights and protections to which they are entitled.

7.4. DETENTION OF TRAFFICKED PERSONS²⁷²

As noted in the introduction to this section, victims of trafficking are often detained. The term “detention” is used in this context in accordance with its accepted meaning in international law: the condition of “any person deprived of personal liberty except as a result of conviction for an offence”.²⁷³ It can therefore cover a wide range of situations in which victims of trafficking are held in prisons, police lock-ups, immigration detention facilities, shelters, child welfare facilities and hospitals. In the context of trafficking, detention most

commonly occurs under the following circumstances:

- Where the victim is not correctly identified and is detained as an irregular/undocumented migrant pending deportation;
 - Where the victim is identified correctly but is unwilling or unable to cooperate in criminal investigations (or her/his cooperation is not considered useful) and is sent to a detention centre for immigrants pending deportation;
 - Where the victim, correctly or incorrectly identified, is detained as a result of her or his engagement in illegal activities such as prostitution or unauthorized work;
 - Where the victim is identified correctly and is placed in a shelter or other welfare facility from which she or he is unable to leave.
- Common justifications offered for this form of detention include the need to provide shelter and support; the need to protect victims from further harm; and the need to secure victim cooperation in the investigation and prosecution of traffickers.

The Trafficking Principles and Guidelines are explicit on the point that the detention of victims of trafficking is inappropriate and (implicitly) illegal. Under their provisions, States are required to ensure that trafficked persons are not, under any circumstances, held in immigration detention centres or other forms of custody (Guidelines 2.6, 6.1).

Neither the Trafficking Protocol nor the European Trafficking Convention refers specifically to the detention of victims of trafficking. It is therefore important to consider whether international human rights law offers any additional guidance on this point. Clearly, the status of trafficked persons as victims of crimes and as victims of human rights is important. If a victim of trafficking is to be characterized in either of these two ways then their detention would be appear to be a clear

²⁷⁰ It is not uncommon for individuals who have themselves been trafficked to become implicated in trafficking operations (for example, as recruiters).

²⁷¹ Anne Gallagher and Paul Holmes, “Developing an effective criminal justice response to human trafficking: lessons from the front line”, *International Criminal Justice Review*, vol. 18, No. 3, p. 318.

²⁷² This section draws on Gallagher and Pearson, loc. cit.

²⁷³ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly resolution 43/173, annex.

breach of the obligations owed by States to victims of crime and victims of gross human rights violations.

Two important human rights are also directly relevant: the right to freedom of movement and the prohibition on arbitrary detention. Both rights are considered further below.

THE RIGHT TO FREEDOM OF MOVEMENT

The right to freedom of movement is considered under Principle 3 and related Guidelines in the context of the obligation on States to ensure that measures taken to address trafficking do not interfere with established rights. The present section should be read in conjunction with that discussion, which provides additional detail on this important right.

By way of summary, it is relevant to note that freedom of movement is a core human right, protected by major international and regional human rights treaties. The only direct reference to freedom of movement in the specific context of trafficking is contained in the Trafficking Principles and Guidelines:

[States should consider] protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right. (Guideline 1.5)

The analysis conducted under Principle 3 and related Guidelines confirms that, for trafficked persons who are lawfully within the relevant country, their detention in any kind of public or private facility would generally violate their right to freedom of movement. The situation is not as clear for trafficked persons who are unlawfully within the country, as States could more easily present justifications relating to allowable exceptions such as reasons of public order, national security or public health. Such justifications would need to be tested on their merits. As noted by the Human Rights

Committee in its general comment No. 27, any restrictions on this right “must be provided by law, must be necessary ... and must be consistent with all other rights”.²⁷⁴

THE RIGHT TO LIBERTY AND THE PROHIBITION ON ARBITRARY DETENTION

The international legal standard in relation to liberty and the prohibition on arbitrary detention is set out in article 9 (1) of the International Covenant on Civil and Political Rights:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.²⁷⁵

The right to liberty is not absolute. International law recognizes that States should be able to retain the ability to use measures that deprive people of their liberty. The fact of deprivation of liberty becomes problematic under international law only when it is unlawful and arbitrary. States should make sure they define precisely those cases in which deprivation of liberty is permissible. The principle of *legality* is violated if someone is detained on grounds that are not clearly established in a domestic law or are contrary to such law.²⁷⁶

²⁷⁴ Human Rights Committee, general comment No. 27, para. 11.

²⁷⁵ Similar provisions can be found in the Universal Declaration of Human Rights, art. 3; European Convention on Human Rights, art. 5(1); African Charter, art. 6; American Convention on Human Rights, art. 7.

²⁷⁶ Nowak, op. cit., pp. 211 and 224. Note the prohibition on unlawful or arbitrary deprivation of liberty is also contained in other major human rights instruments including, for example, the Convention on the Rights of Persons with Disabilities (“States Parties shall ensure that persons with disabilities, on an equal basis with others ... [a]re not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in



It is not enough that the national law permits the detention of victims of trafficking. The *prohibition on arbitrariness* requires both that the law must not be arbitrary and that it must not be applied arbitrarily. The word “arbitrary” refers to elements of injustice, unpredictability, unreasonableness, capriciousness, and lack of proportionality, as well as to the common-law principle of due process of law.²⁷⁷ Deprivation of liberty as provided by law must not be “manifestly disproportional, unjust or unpredictable”. The manner in which a decision is taken to deprive someone of his or her liberty must be capable of being deemed appropriate and proportional in view of the circumstances of the case. Importantly, a detention that was not arbitrary originally may become so if it continues over time without proper justification.²⁷⁸ According to both the Human Rights Committee and the United Nations Working Group on Arbitrary Detention, the body that deals exclusively with this issue, the holding of immigrants in prolonged administrative custody without the possibility of administrative or judicial remedy may amount to arbitrary detention.²⁷⁹ The UNHCR Guidelines on the Detention of

no case justify a deprivation of liberty” (art. 14.1)). The same article requires that persons with disabilities who are deprived of their liberty are entitled, on an equal basis with others, to “guarantees in accordance with international human rights law”.

²⁷⁷ Ibid., p. 225. The Human Rights Committee has commented that not only must the detention be authorized by law, the detention must also be reasonable and necessary in all of the circumstances of the case, and a proportionate means to achieve a legitimate aim: *Van Alphen v. Netherlands*, Human Rights Committee, Communication No. 305/1988, para. 5.8; *A. v. Australia*, Human Rights Committee, Communication No. 560/1993, para. 9.2.

²⁷⁸ Nowak, op. cit., p. 225.

²⁷⁹ Commission on Human Rights resolution 1997/50 on the question of arbitrary detention; Working Group on Arbitrary Detention deliberation No. 5 regarding the situation of immigrants and asylum-seekers (E/CN.4/2000/4, annex II).

Asylum-Seekers indicate a presumption against detention and a requirement that alternative means to secure lawful outcomes (such as identification, victim protection, etc.) should be considered first.²⁸⁰

Finally, States are required, under international law, to ensure that the necessary procedural guarantees are in place for identifying and responding to situations of unlawful or arbitrary deprivation of liberty. The International Covenant on Civil and Political Rights specifies several of these procedural guarantees, including an individual’s entitlement to test the lawfulness of his detention before a court (art. 9 (4)), as well as an enforceable right to a remedy if the detention is found to be unlawful (art. 9 (5)).

Under this analysis, it is evident that the detention of victims of trafficking in jails, police lock-ups, immigration detention facilities, welfare homes or shelters could amount to unlawful deprivation of liberty and violate the prohibition on arbitrary detention. The risk of detention being characterized as unlawful or arbitrary is particularly high if it can be shown that such detention is:

- not specifically provided for in law or is imposed contrary to law;
- provided for or imposed in a discriminatory manner;²⁸¹

²⁸⁰ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers* (February 1999), available at: <http://www.unhcr.org/refworld/pdfid/3c2b3f84.pdf>.

²⁸¹ The grounds for such unlawful discrimination would include those set out in the International Covenant on Civil and Political Rights: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, taking into account potential limitations on the rights of non-citizens as outlined in part 2.1, section 1.3, above. Note that detention found to be discriminatory on the basis of disability would, absent adequate justification, contravene article 14 of the Disability Convention.

- imposed for a prolonged, unspecified or indefinite period;
- unjust, unpredictable and/or disproportionate;
- not subject to judicial or administrative review to confirm its legality and to confirm that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.

DETENTION, THE OBLIGATION OF PROTECTION AND THE PROHIBITION ON SEX-BASED DISCRIMINATION

Could detention be a necessary aspect of protecting victims from further harm? In exploring this question, it is important to acknowledge that trafficking is generally only made possible by and sustained through fear, violence and intimidation. Unlike with many other crimes, the threat to a victim does not end once she or he has escaped or been rescued from exploitation. In some cases, particularly where the victim is in contact with the criminal justice system, freedom from a trafficking situation can actually exacerbate the risks to that person's safety and well-being.²⁸² Children may also face additional risks.

The obligation on States to protect victims of trafficking must not be discharged in a manner that violates other rights. In this connection it is relevant to note that the practice of victim detention is often highly gendered. For example, the overwhelming majority of the trafficked persons detained in welfare shelters are female. One reason for this is that women and girls are more likely to be identified through official channels as trafficked and, therefore, are more likely than men and boys to enter both formal and informal protection systems. Male victims are commonly misidentified as irregular migrants, transferred to immigration detention facilities and eventually deported. Even when

correctly identified as having been trafficked, adult males are often ineligible for public or private shelter and protection.

Often the arguments advanced in favour of victim detention, particularly shelter or welfare detention, are also highly gendered. As noted above, protection from further harm is one of the most commonly cited justifications for detaining trafficked persons against their will. Female victims of trafficking are widely considered to need this protection much more than their male counterparts. Females, both women and girls, are also perceived as being less competent to make decisions about their own safety.

As noted in the discussion under Principle 1 and related Guidelines, equal treatment and non-discrimination on the basis of sex is a fundamental human right, firmly enshrined in the major international and regional instruments.²⁸³ In the present context, a determination that a situation of victim detention: (i) negatively affects the rights of the individual involved, and (ii) is overwhelmingly directed at and affects predominantly women and girls, should be sufficient to support a claim of unlawful discrimination on the basis of sex. In addition, as noted directly above, a finding that detention laws or practices discriminate unlawfully against women and girls would also be sufficient to support a claim of unlawful deprivation of liberty and/or arbitrary detention.

THE SPECIAL SITUATION OF DETAINED CHILD VICTIMS

In relation to the issue of shelter detention, it is important to recognize some fundamental differences between children and adults. A critical source of vulnerability for children lies in their lack of full standing – as a matter of

²⁸² See further United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* (United Nations publication, Sales No. E.08.V.14), pp. 224-240.

²⁸³ See further part 1, section 4.1.



fact as well as in law.²⁸⁴ A lack of agency is often made worse by the absence of a parent or legal guardian who is able to act in the child's best interests. Such absence is typical in trafficking cases, since the deliberate separation of children from parents or guardians is a common strategy for facilitating exploitation. In some cases, parents or carers are or have been complicit in the trafficking of the child. As children are more vulnerable than adults, the obligation to protect from further harm will have different implications where they are concerned. The premature release of a child from a shelter or other secure place of care, without an individual case assessment (including risk assessment), could greatly endanger the child and expose him or her to further harm, including re-trafficking.

It is for these reasons that the relevant laws, principles and guidelines emphasize the importance of ensuring that the child is appointed a legal guardian who is able to act in that child's best interests throughout the entire process, until a durable solution is identified and implemented.²⁸⁵ Typical tasks of a guardian would include ensuring that the child's best

interests remain the paramount consideration in all actions or decisions taken in respect of the child;²⁸⁶ ensuring the provision of all necessary assistance, support and protection; being present during any engagement with criminal justice authorities; facilitating referral to appropriate services; and assisting in the identification and implementation of a durable solution.²⁸⁷

These additional considerations do not take away from the fact that children who are placed in safe and secure accommodation are to be regarded as "detained" for the purposes of ascertaining their rights and the obligations of the State towards them. International legal rules on the detention of children are very exacting and are governed by the overriding principle of respect for the child's best interests. The strictness of the rules on juvenile detention reflects an acknowledgement of the fact that detained children are highly vulnerable to abuse, victimization and the violation of their rights. Under the provisions of the Convention on the Rights of the Child, no child is to be deprived of his or her liberty unlawfully or arbitrarily (art. 37 (b)). This prohibition extends beyond penal detention to include deprivation of liberty on the basis of the child's welfare, health or protection. It is therefore directly relevant to the situation of child victims of trafficking who are detained in shelters.²⁸⁸ International law requires any form of juvenile detention to be in conformity with the law,

²⁸⁴ This is acknowledged in the International Covenant on Civil and Political Rights which stipulates the right of the child to "such measures of protection as are required by his status as a minor" (art. 24).

²⁸⁵ *Trafficking Principles and Guidelines; UNICEF Guidelines*, especially section 4.1. While the Trafficking Protocol is silent on this point, the Commentary to the Protocol encourages States parties to consider "appointing, as soon as the child victim is identified, a guardian to accompany the child throughout the entire process until a durable solution in the best interest of the child has been identified and implemented. To the extent possible, the same person should be assigned to the child victim throughout the entire process": *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, para. 65 (a). The European Trafficking Convention at article 10 (4)(a) requires States parties to provide for the representation of a child identified as a victim of trafficking by a "legal guardian, organisation or authority, which shall act in the best interests of that child" (emphasis added). The Committee on the Rights of the Child, in its general comment No. 6, stated that "the appointment of a

competent guardian... serves as a procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child" and recommended that States appoint a guardian as soon as an unaccompanied or separated child is identified (para. 21).

²⁸⁶ The principle of "best interests of the child" is a legal doctrine accepted in many countries that has been enshrined in international law through art. 3 (1) of the Convention on the Rights of the Child.

²⁸⁷ *UNICEF Guidelines*, section 4.2; see also Committee on the Rights of the Child, general comment No. 6, para. 33.

²⁸⁸ The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly resolution

(Continued on next page)

used only as a measure of last resort, and imposed for the shortest appropriate period of time.²⁸⁹

In addition to stipulating the circumstances under which a child can be detained, international law imposes conditions on the conduct of such detention. Once again, the overriding principle is respect for the best interests of the child, including respect for his or her humanity and human dignity.²⁹⁰ Additional and more detailed rules include the following:

- The right of children in detention to be separated from adults in detention, unless this is not considered to be in a child's best interest;²⁹¹
- The right of a detained child to maintain contact with his or her family through correspondence and visits (barring exceptional circumstances);²⁹²

- The right of a detained child to prompt access to legal and other appropriate assistance;²⁹³
- The right of a detained child to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action;²⁹⁴
- Support for the physical and psychological recovery and social reintegration of the child victim in an environment that fosters his or her health, self-respect and dignity;²⁹⁵
- The right of a child who is receiving care, protection, or treatment of his or her physical or mental health, to a periodic review of the treatment provided and all other circumstances relevant to the placement;²⁹⁶
- Each case involving a child deprived of his or her liberty should be handled expeditiously, without any unnecessary delay.²⁹⁷

[Footnote 288 continued]

45/113, para. 11 (b), define a deprivation of liberty as any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which a person under the age of 18 is not permitted to leave at will, by order of any judicial, administrative or other public authority. Note that the Committee on the Rights of the Child has explicitly rejected detention of children in need of protection: "Such deprivation of liberty for children who have been abandoned or abused equates to punishment for children who are victims of crimes, not the offenders." See further Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice.

²⁸⁹ Convention on the Rights of the Child, art. 37 (b); *Rules for the Protection of Juveniles Deprived of their Liberty*, para. 2; Committee on the Rights of the Child, general comment No. 6, para. 61. See also the Committee's concluding observations: Netherlands [CRC/C/15/Add.227, para. 54]; Canada [CRC/C/15/Add.215, para. 47].

²⁹⁰ Convention on the Rights of the Child, art. 37 (c).

²⁹¹ *Ibid.*; *Rules for the Protection of Juveniles Deprived of their Liberty*, para. 29; Beijing Rules, para. 13.4; Committee on the Rights of the Child, general comment No. 6, para. 63.

²⁹² Convention on the Rights of the Child, art. 37 (c); *Rules for the Protection of Juveniles Deprived of their Liberty*, para. 59; Committee on the Rights of the Child, general comment No. 6, para. 63.

The above analysis confirms the need to ensure that decisions affecting the welfare and well-being of children must be made on a case-by-case basis and with a view to protecting the best interests of each individual child. The routine detention of child victims of trafficking in welfare or shelter facilities cannot be legally justified on the basis of protection, best interests or any other principle cited in this section.

²⁹³ Optional Protocol on the sale of children, art. 8; *UNICEF Guidelines*, sections 4 and 5; Committee on the Rights of the Child, general comment No. 6, para. 63.

²⁹⁴ Convention on the Rights of the Child, art. 37 (d). See also Committee on the Rights of the Child, concluding observations: Canada [CRC/C/15/Add.215, para. 47].

²⁹⁵ Convention on the Rights of the Child, art. 39; Optional Protocol on the sale of children, art. 9 (3); *UNICEF Guidelines*, sections 7.1 and 9.1. See also OK: Committee on the Rights of the Child, concluding observations: Nepal [CRC/C/15/Add.261, para. 96]; Myanmar [CRC/C/15/Add.237, para. 73]; Armenia [CRC/C/15/Add.225, para. 67].

²⁹⁶ Convention on the Rights of the Child, art. 25.

²⁹⁷ Optional Protocol on the sale of children, art. 8 (1) (g); *UNICEF Guidelines*, section 2.7.



CONCLUSIONS ON THE DETENTION OF VICTIMS

In evaluating the lawfulness or otherwise of victim detention it is important to draw a distinction between *routine detention*, applied generally and as a matter of policy, law or practice, and *case-by-case detention*. The above analysis confirms that the routine detention of victims or suspected victims of trafficking in public detention facilities or public/private shelters violates a number of fundamental principles of international law and is therefore to be considered, *prima facie*, unlawful. In some circumstances, the routine detention of victims of trafficking violates the right to freedom of movement, and in most circumstances, if not all, it violates the prohibitions on the unlawful deprivation of liberty and arbitrary detention. International law prohibits, absolutely, the discriminatory detention of victims, including detention that is linked to the sex of the victim. The practice of routine detention of women and girls in shelter facilities, for example, is clearly discriminatory and therefore unlawful. Routine detention of trafficked children is also directly contrary to international law and cannot be justified under any circumstances.

A State may, on a case-by-case basis, be able to defend victim detention successfully with reference, for example, to criminal justice imperatives, public order requirements or victim safety needs. The internationally accepted principles of *necessity*, *legality*, and *proportionality* should be used to assess the legality of any such claim. The application of these principles would, most likely, support a claim of lawful detention only in relation to a situation where detention is administered as a last resort and in response to credible and specific threats to an individual victim's safety. Even where such basic tests are satisfied, however, a range of protections should be in place to ensure that the rights of the detained person are respected and protected. Such measures would include, but are not be

limited to, judicial oversight of the situation to determine its ongoing legality and necessity, and an enforceable right to challenge the fact of detention.

International law requires special justifications and protections in all cases of detention of children. The detaining authority must be able to demonstrate that the detention is in the child's best interests. The detaining authority must also be able to demonstrate, in relation to each and every case, that there is no reasonable option available to it other than the detention of the child. Specific protections, including judicial or administrative oversight and the right of challenge, must be upheld in all situations where the fact of detention can be legally justified.

Failure by the State to act to prevent unlawful victim detention by public or private agencies invokes the international legal responsibility of that State (see the discussion under Principles 2, 6 and 13 and related Guidelines). Victims may be eligible for remedies, including compensation, for this unlawful detention. The matter of remedies is considered in more detail below under Principle 17 and related Guidelines.

7.5. A NOTE ON THE RIGHT TO CONSULAR ACCESS AND SUPPORT

Guideline 6.3 requests States and others to consider "ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality". It recommends that staff working in consulates and embassies should be given appropriate training in responding to requests for information and assistance from trafficked persons.

As noted throughout this section, the criminalization of victims of trafficking, including for status-related offences, is still widespread in every part of the world. The right

to consular access and support is especially important for trafficked persons who have been arrested, detained or charged with an offence. Under the Vienna Convention on Consular Relations, States parties are required to assist non-citizens who have been detained to contact consular officials from their country of citizenship. Specifically:

[if the individual concerned] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial, or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph (art. 36 (1)(b)).

The International Court of Justice has, on three recent occasions, examined the implications of this paragraph from the perspective of individual rights.²⁹⁸ In the *LaGrand* case, the court held that the Vienna Convention “creates an individual right to certain forms of consular assistance and does not merely regulate the rights and duties of States parties”.²⁹⁹ Under the provisions of this

instrument and on the basis of this judgment, trafficked persons who have been arrested and/or detained by the country of destination for any reason have the right to be informed of, as well as to seek and receive, consular assistance from their country of citizenship. The Migrant Workers Convention also specifies that, where a migrant worker is detained, the consular or diplomatic staff of his or her State of origin shall be informed without delay of the arrest and the reasons for it.³⁰⁰

Guideline 6.3 implicitly recognizes that effective consular support requires informed and committed consular staff. It is especially important for consular officials to understand the trafficking phenomenon and how it affects their nationals. Consular officials should also be aware of the rights of victims of trafficking, including their right to not be detained arbitrarily. A failure to provide the consular assistance to which an individual is entitled is a breach of international law, invoking the international legal responsibility of the offending State.³⁰¹

SEE FURTHER:

- Right to a remedy: part 2.4, sections 17.1-17.6
- Detention of child victims of trafficking: part 2.3, section 10.4
- Freedom of movement: part 2.1, section 3.3

²⁹⁸ *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Request for the Indication of Provisional Measures (1998) ICJ Reports 248; *LaGrand* case (*Germany v. United States of America*), Merits (2001) ICJ Reports 466; *Avena and Other Mexican Nations (Mexico v. United States of America)*, Merits (2004) ICJ Reports 12. See also *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion)* (*Solicitud de Opinión Consultiva presentada por el Gobierno de los Estados Unidos Mexicanos*) Inter-American Court of Human Rights OC-16/99 (1997).

²⁹⁹ *LaGrand* case (*Germany v. United States of America*), Merits (2001) ICJ Reports 466, as summarized in

Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Progress report of the Special Rapporteur, Mr David Weissbrodt, on the rights of non-citizens – United Nations activities* (E/CN.4/Sub.2/2002/25/Add.1, para. 71).

³⁰⁰ Migrant Workers Convention, art. 16 (7)(a).

³⁰¹ See *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*; *LaGrand* case (*Germany v. United States of America*); *Avena and Other Mexican Nations (Mexico v. United States of America)*. See also John Quigley, “The law of State responsibility and the right to consular access”, *Willamette Journal of International Law and Dispute Resolution*, vol. 11 (2003), p. 39.



PRINCIPLE 8 AND RELATED GUIDELINES: PROTECTION OF AND SUPPORT FOR VICTIMS³⁰²

States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.

8.1. PURPOSE AND CONTEXT

Victims who break free from their traffickers often find themselves in a situation of great insecurity and vulnerability. They may be physically injured as well as physically and/or emotionally traumatized. They may be afraid of retaliation. They are likely to have few, if any, means of subsistence.

Under Principle 8, the State is required, first and foremost, to ensure that the victim is protected from further exploitation and harm – from those who have already exploited that person and from anyone else. The State is also required to provide the victim with physical and psychological care that is adequate to meet at least immediate needs. These requirements

confirm and extend the State's obligation to safeguard the human rights of trafficked persons (see Principle 1 and related Guidelines) and to act with due diligence to ensure their safety and protection against further abuse (see Principle 2 and related Guidelines). Importantly, the provision of such care is identified as being a non-negotiable right of the victim: a right that should be recognized and implemented irrespective of that person's capacity or willingness to cooperate with criminal justice authorities in the investigation or prosecution of traffickers.

Principle 8 explicitly places the responsibility of protecting and caring for victims on the State. This responsibility becomes operational when the State knows or should know that an individual within its jurisdiction is a victim of trafficking. The principle is applicable to any country in whose territory a victim may be located. It applies to all trafficked persons, whether victims of national or transnational trafficking.

Principle 8 acknowledges that the harm experienced by victims of trafficking does not necessarily cease when they come to the attention of national authorities. The corruption and complicity of public officials may result in a continuation of an exploitative situation or the

³⁰² This section draws on Gallagher, *International Law of Human Trafficking*, chap. 5.

emergence of a new one. The harm already done to victims can be compounded by failures to provide medical and other forms of support – or by linking the provision of such services to an obligation to cooperate that victims may not be willing or able to meet.

The present section first considers the obligation on States to separate protection and support from victim cooperation. It then examines the issue of protection from further harm: what does this mean in the context of trafficking? What is the exact nature of States' protection obligations? Consideration is then given to the requirement, set out in Principle 8, that States must give protection and support to victims. The discussion considers whether a legal obligation exists in this regard and, if so, what this obligation actually entails.

8.2. SEPARATING PROTECTION AND SUPPORT FROM VICTIM COOPERATION

The linking of assistance and protection to cooperation with national criminal justice agencies is prevalent in all regions of the world. The legal and regulatory frameworks of many countries explicitly make any form of support conditional on cooperation. For some of these countries, the fact that a victim is willing to cooperate is insufficient – the relevant authorities are required to make a further determination on the quality and usefulness of that cooperation. Even in the few countries where non-conditional assistance is guaranteed by law, victims still tend to be pressured into providing information and testimony.³⁰³

³⁰³ See, for example, the case studies in Global Alliance against Trafficking in Women, *Collateral Damage: the Impact of Anti-Trafficking Measures on Human Rights around the World* (2007).

There are many problems with this approach. As detailed elsewhere in the present Commentary, victims of trafficking have a legal entitlement to receive assistance commensurate with their status as victims of crime and victims of human rights violations (see discussion under Principle 7 and related Guidelines). States are under a corresponding obligation to provide such assistance. Placing conditions on the provision of assistance denies the legal nature of both the entitlement and the obligation.

Other problems are more practical in nature. The linking of victim support to cooperation reflects the widely acknowledged importance of victim information and testimony in securing convictions against traffickers. However, a victim compelled to give testimony is unlikely to make a strong witness, particularly in the likely event that this person is still suffering from physical or psychological trauma or fears retaliation. Conditional assistance can be expected to exacerbate the high levels of distrust that may already exist between victims and law enforcement officials. Conditional assistance can also serve to undermine victim credibility in a manner that would be avoided if all identified victims were given similar levels of assistance and support.

Separating protection and support from victim cooperation is a fundamental tenet of the human rights approach to trafficking. The requirement that protection and support should not be made conditional on a trafficked person's capacity or willingness to cooperate in legal proceedings against their exploiters is echoed throughout the Trafficking Principles and Guidelines. In relation to shelter for victims, for example, Guideline 6.1 states that the provision of such shelter "should not be made contingent on the willingness of the victims to give evidence in criminal proceedings".

The Trafficking Protocol does not make any specific reference to this issue. The Legislative



Guide to the Protocol, however, states that “support and protection shall ... not be made conditional upon the victim’s capacity or willingness to cooperate in legal proceedings” (para. 62). In note 23 the Guide cites the Trafficking Principles and Guidelines to support this point. More recently, the body established to make recommendations on the effective implementation of the Protocol has also affirmed that “States parties should ... [e]nsure victims are provided with immediate support and protection, irrespective of their involvement in the criminal justice process.”³⁰⁴

The European Trafficking Convention is more explicit on the need to separate protection and support from legal cooperation. States parties to the Convention are required to:

adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness (art. 12 (6)).

The Explanatory Report on the Convention confirms that the drafters intended this provision to refer to both investigations and criminal proceedings (para. 168). However, the Report also highlights the fact that in the law of many countries it is compulsory to give evidence if required to do so. Under such circumstances, it would not be possible to rely on the above provision – or provisions mandating a “reflection and recovery period” (see section 8.6, below) – if refusing to act as a witness when legally compelled to do so (paras. 170 and 176).

While State practice still lags some way behind, the position taken by the European Trafficking Convention is early evidence of a trend towards acknowledging the need to detach protection and support from victim cooperation, particularly during the period immediately following

identification, when victims can be expected to be most vulnerable. Several human rights treaty bodies, including the Committee against Torture, have pointed out the importance of providing assistance on the sole basis of need,³⁰⁵ and others have also expressed concern at the tying of residence permits to victim cooperation.³⁰⁶

The growing acceptance of the importance of a “reflection and recovery period” – during which a victim is given the space, assistance, information and support that will allow her or him to make an informed decision about what to do next – provides additional evidence of the value of separating immediate assistance from a decision to cooperate. This concept is considered further at section 8.6 below.

8.3. PROTECTION FROM FURTHER HARM

The crime of trafficking is only made possible by, and sustained through, high levels of violence

³⁰⁵ For example, in its 2008 concluding observations on the report of Australia, the Committee against Torture requested that the State party: “take effective measures to prevent and punish trafficking in persons and provide recovery services to victims on a needs basis *unrelated to whether they collaborate with investigators*” (emphasis added) (CAT/C/AUS/CO/1, para. 32). The Committee on the Elimination of Discrimination against Women, in its 2007 concluding observations on the report of the Netherlands, called upon the State party “to provide for the extension of temporary protection visas, reintegration and support services to all victims of trafficking, including those who are unable or unwilling to cooperate in the investigation and prosecution of traffickers” (CEDAW/C/NLD/CO/4, para. 24).

³⁰⁶ Human Rights Committee, concluding observations: Belgium (CCPR/CO/81/BEL, para. 15); Committee on the Elimination of Discrimination against Women, concluding observations: France (CEDAW/C/FRA/CO/6, paras. 30-31); Australia (CEDAW/C/AUL/CO/5, para. 21). See also A/63/215: “[m]easures to protect and support victims, including the granting of residence permits or stays, should be unconditional and independent of a victim’s ability or willingness to assist in the investigation or prosecution of offenders” (para. 62).

³⁰⁴ A/63/215, annex I, para. 12.

and intimidation. Unlike with many other crimes, the threat to a victim does not end once she or he has escaped or been rescued from a criminal situation. In some cases, for example in situations where the victim is in contact with the criminal justice system, freedom from a trafficking situation can actually exacerbate the risks to that person's safety and well-being, as already mentioned above. The Trafficking Principles and Guidelines specifically refer (in Principle 8) to the responsibility of States to "protect trafficked persons from further exploitation and harm" (see also Principle 2), as well as the need for States and others to "ensure that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons".

What do the main treaties say about protection from further harm? The Trafficking Protocol requires each State party to "endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory" (art. 6.5). While this provision is limited by the soft nature of the obligation and the specific reference to physical safety, it nevertheless obliges States parties "to actually take at least some steps that amount to an 'endeavour' to protect safety".³⁰⁷ Importantly, the provisions of the Protocol on this point are supplementary to the stronger victim protection provisions contained in its parent instrument, the Organized Crime Convention. The relevant provisions of the Organized Crime Convention require States parties to provide witnesses with protection from potential retaliation or intimidation (art. 24). They also require States parties to take appropriate measures, within their means, "to provide assistance and protection to victims [of trafficking], in particular in cases of threats of retaliation or intimidation" (Guideline 6.6).

The European Trafficking Convention contains a general obligation on States parties to "take due account of the victim's safety and protection needs" (art. 12 (2)).³⁰⁸ This requirement is supplemented by a detailed provision that sets out the specific measures that must be implemented to provide victims and others (including witnesses and victim support agencies) with "effective and appropriate protection" from potential retaliation and intimidation, in particular during and after the investigation and prosecution processes (art. 28). The Optional Protocol on the sale of children also contains specific provisions on protection from further harm that would be applicable to certain child victims of trafficking (arts. 8 (1)(f) and 8 (5)).

In *Rantsev v. Cyprus and Russia*, the European Court of Human Rights recently considered the issue of protection in relation to both actual and potential cases of trafficking. The Court held that "in order for a positive obligation to take operational measures [such as to protect] to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of article 3 (a) of the Palermo Protocol and article 4 (a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk" (para. 286).

Various "soft law" instruments and documents support the obligation to protect victims of trafficking from further harm. Resolutions of the General Assembly and Human Rights Council

³⁰⁷ *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, para. 59.

³⁰⁸ Note that this provision will also apply to victims who have only provisionally been identified as such: art. 10 (2).



(formerly the Commission on Human Rights) have called on Governments to ensure the “protection” of victims of trafficking³⁰⁹ and, more recently, have identified an obligation to provide such protection.³¹⁰ The Human Rights Committee has repeatedly called for victim protection so as to enable victims to testify against the perpetrators of trafficking.³¹¹

The precise content of the obligation to protect from further harm will depend on the circumstances of each case. The standard of due diligence, discussed at various points throughout this Commentary, will certainly require States to take reasonable measures

³⁰⁹ Human Rights Council resolution 7/29 on the rights of the child, para. 36 (“Calls upon all States...to address effectively the needs of victims of trafficking...including their safety and protection”); General Assembly resolution 61/144, para. 17 (“Invites Governments to take steps to ensure that criminal justice procedures and witness protection programmes are sensitive to the particular situation of trafficked women and girls ... and to ensure that during [the criminal justice process] they have access to protection”); Commission on Human Rights resolution 2005/44 on the rights of the child, para. 32; General Assembly resolution 59/166, para. 17; Commission on Human Rights resolution 2004/45, *Trafficking in Women and Girls*, para. 10 (“Calls upon Governments to criminalize trafficking in persons...while ensuring protection and assistance to victims of trafficking”); and General Assembly resolution 58/137, para. 6 (“Also invites Member States to adopt measures...to provide assistance and protection to victims of trafficking”) and para. 7 (“Further invites Member States, as appropriate, to develop guidelines for the protection of victims of trafficking before, during and after criminal proceedings”).

³¹⁰ See, for example, General Assembly resolution 61/180, preamble (“Member States have an obligation to provide protection for the victims”).

³¹¹ Human Rights Committee, concluding observations: Kosovo (Serbia) (CCPR/C/UNK/CO/1, para. 16); Brazil (CCPR/C/BRA/CO/2, para. 15); Slovenia (CCPR/CO/84/SVN, para. 11); Thailand (CCPR/CO/84/THA, para. 21); Kenya (CCPR/CO/83/KEN, para. 25); Albania (CCPR/CO/82/ALB, para. 15); Serbia and Montenegro (CCPR/CO81/SEMO, para. 16); Latvia (CCPR/CO/79/LVA, para. 12); Russian Federation (CCPR/CO/79/RUS, para. 10); Slovakia (CCPR/CO/78/SVK, para. 10).

to this end. In most situations, reasonable protection from harm will require a positive and immediate action on the part of the State to move the trafficked person out of the place of exploitation to a place of safety. It is also likely that protection from further harm will require attention to the immediate medical needs of the victim. Risk assessment may be required to determine whether victims are at a particular risk of intimidation or retaliation. Risk assessment should take into account the individual profile of the trafficked person and should also be situationally appropriate. For example, the nature and level of any risk to a trafficked person may change if and when that person decides to speak with law enforcement, participates as a witness in a criminal trial, declines to speak or act as a witness, etc. Measures to protect victims from further harm should be used only with the consent of the beneficiary.³¹²

The aim of protection will also change depending on the stage at which this issue arises. The immediate obligation to protect from further harm relates, of course, to the victim. However, once criminal justice agencies become involved, the obligation will naturally extend to others who could potentially be harmed or intimidated by traffickers and their accomplices. In addition to victims, this list would potentially include informants, those giving testimony, those providing support services to the trafficked person, and family members.³¹³

Finally, it is important to acknowledge that the agents of the State may be a source of further

³¹² While the Trafficking Protocol is not specific on this point, the *Explanatory Report on the European Trafficking Convention* explicitly states that consent to protective measures is essential except in extreme circumstances such as an emergency where the victim is physically incapable of giving consent (para. 289).

³¹³ See, for example, the European Trafficking Convention, art. 28.

harm to a victim of trafficking. An example of such harm is the sexual assault of detained trafficked persons by law enforcement officials. The General Assembly has recently recognized this phenomenon and called on States to penalize persons in authority found guilty of sexually assaulting victims of trafficking in their custody.³¹⁴

The issue of protection from further harm is considered further in this Commentary in the context of the repatriation of victims of trafficking (see section 11.2) and child victims (see section 10.4).

8.4. PRIVACY AND PROTECTION FROM FURTHER HARM

Protection from further harm is inextricably linked to the protection of the trafficked person's privacy. Failure to protect privacy can increase the danger of intimidation and retaliation. It can cause humiliation and hurt to victims, and compromise their recovery. In addition, owing to the shame and stigmatization often attached to trafficking, for both victim and family, it is essential to protect victims' privacy in order to preserve their chances of social reintegration in their country of origin or the receiving country.³¹⁵

The Trafficking Principles and Guidelines address this issue by linking it directly to the need to ensure that trafficked persons are protected from their exploiters:

there should be no public disclosure of the identity of trafficking victims and their privacy should be respected to the extent possible, while taking into account the right of any

accused person to a fair trial (Guideline 6, para. 6).³¹⁶

The Trafficking Protocol requires States parties to protect the privacy and identity of victims of trafficking "[i]n appropriate cases and to the extent possible under its domestic law" (art. 6). The European Trafficking Convention sets out a general obligation to "protect the private life and identity of victims", laying down specific measures to meet that objective, which include setting standards for the storage of personal data and ensuring that the media respect the privacy and identity of victims (art. 11). It sets higher standards in respect of child victims. The SAARC Convention also specifies that judicial authorities must protect the confidentiality of child and women victims when trying trafficking offences (art. V). The issue of privacy in the specific context of child victims of trafficking is considered in more detail in the discussion of Principle 10 and related Guidelines, below.

These provisions give a strong indication that the protection of privacy should be extended to all trafficked persons unless there are reasonable grounds justifying interference with such privacy. Reasonable justification should include consideration of the rights of accused persons to a fair trial.³¹⁷ The possibility of a conflict between victims' right to privacy and the right of accused persons to a fair trial is considered in more detail below (Principle 13 and related guidelines).

³¹⁴ General Assembly resolution 63/156, para. 11.

³¹⁵ *Explanatory Report on the European Trafficking Convention*, para. 138.

³¹⁶ Guideline 6 also recognizes the significant practical obstacles facing law enforcement agencies in protecting the privacy of victims: "Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard".

³¹⁷ *Trafficking Principles and Guidelines*, Guideline 6.6; *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, para. 54.



8.5. PHYSICAL AND PSYCHOLOGICAL CARE AND SUPPORT

Principle 8 requires States to ensure that victims of trafficking have *access to adequate physical and psychological care*. It is supplemented by a number of Guidelines that focus on specific elements of such care and support. Guidelines 6.1 and 6.2, for example, request States and others to consider ensuring, along with non-governmental organizations, the availability of “safe and adequate shelter that meets the needs of trafficked persons” and “access to primary health care and counselling”.

Principle 8 and the Guidelines cited above must be read in light of the overriding principle that places the protection of human rights at the centre of any measures taken to prevent and end trafficking. This approach requires States to ensure that the rights of trafficked persons are protected and respected. In the present context, the right to the highest attainable standard of physical and mental health³¹⁸ and the right to adequate food, clothing and housing³¹⁹ are especially relevant. It is also important to keep

in mind that certain victims of trafficking may have special status-related rights. For example, as explored in detail below under the discussion of Principle 10 and related Guidelines, specific and additional obligations of care and support are owed by States to child victims of trafficking. The prohibition on sex-based discrimination is especially relevant when considering access to support and assistance. Women victims of trafficking are victims of gender-based violence and therefore entitled to access support and assistance on this basis, as well as on the basis of their status as victims of trafficking.³²⁰ Persons with a disability who are victims of trafficking will also be entitled to a level of protection and support that recognizes that disability.³²¹

The nature of the obligation on States to provide care and support for victims of trafficking is also inextricably tied up with their status as victims of crime and victims of human rights violations. This status, as noted above, gives such victims the right to be treated with humanity and respect for their dignity and human rights, as well as an entitlement to benefit from measures that ensure their well-being and prevent re-victimization.³²² More specifically, victims of crime are entitled to receive “the necessary material, medical,

³¹⁸ International Covenant on Economic, Social and Cultural Rights, art. 12; Convention on the Elimination of All Forms of Discrimination against Women, art. 12; Migrant Workers Convention, art. 28; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (e) (iv); Convention on the Rights of the Child, art. 24. The Committee on Economic, Social and Cultural Rights has asserted the obligation of States parties to respect the right to health of all persons, including especially vulnerable groups such as asylum-seekers and illegal immigrants: Committee on Economic, Social and Cultural Rights, general comment 14 (2000): The right to the highest attainable standard of health.

³¹⁹ International Covenant on Economic, Social and Cultural Rights, art. 11; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (e) (iii); Trafficking Protocol, art. 6 (3)(a); Refugee Convention, art. 21; Protocol on the Rights of Women in Africa, arts. 15, 16; SAARC Convention, art. IX (3); Committee on the Elimination of Discrimination against Women, general recommendation No. 19, para. 24 (t) (iii); Beijing Declaration and Platform for Action, para. 125 (a).

³²⁰ See, for example, Committee on the Elimination of Discrimination against Women, general recommendation No. 19, para. 24 (b): “[a]ppropriate protective and support services should be provided for victims”. See also art. 4 (g) of the Declaration on the Elimination of Violence against Women, which makes provision for specialized assistance for women subjected to violence, such as “rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and ... other appropriate measures to promote their safety and physical and psychological rehabilitation.” See also Beijing Declaration and Platform for Action, paras. 99, 106, 107, 122, 125, 130; and Beijing +5 Outcome Document, para. 97 (c).

³²¹ See generally the Convention on the Rights of Persons with Disabilities.

³²² Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 10.

psychological and social assistance through governmental, voluntary, community-based and indigenous means.”³²³

The major trafficking treaties lay down varying standards in relation to victim care and support. The Trafficking Protocol requires States parties to:

consider implementing measures to provide for the physical, psychological and social recovery of victims ... in particular the provision of (a) appropriate housing; (b) counselling and information in particular as regards their legal rights in a language that the victims ... can understand; (c) medical, psychological and material assistance; and (d) employment, education and training opportunities (art. 6 (3)).

The Legislative Guide to the Protocol notes that these support measures are intended to reduce the suffering and harm caused to victims and to assist in their recovery and rehabilitation. It further notes that, while not obligatory, implementing these provisions can bring important practical benefits, for example by increasing the likelihood of victim cooperation in investigations and prosecutions, and preventing further harm such as re-victimization. While these requirements are not mandatory, States parties are required to consider implementing them and are “urged to do so to the greatest extent possible within resource and other constraints” (para. 62).

The requirements of the European Trafficking Convention on the point of victim support and assistance are much stronger than those of the Protocol. They echo the priority placed on this matter by the Trafficking Principles and Guidelines. States parties to the European Trafficking Convention are required to provide all victims within their territory with a range of

measures designed to “assist victims in their physical, psychological and social recovery”. Such assistance is also to be extended to those who have been provisionally identified as victims and, crucially, cannot be reserved only for those agreeing to act as witnesses (arts. 10 (2) and 12 (6)). It is to include, at least, appropriate and secure accommodation, psychological support and material assistance at subsistence level; access to emergency medical treatment; translation and interpretation services; counselling and information; assistance with legal proceedings and, for children, access to education (art. 12 (1)). Additional provisions are made for victims lawfully within the territory of the State party (arts. 12 (3) and 12 (4)). The SAARC Convention calls on States parties to establish protective homes and shelters for the rehabilitation of victims, and to make provisions for legal advice, counselling and health care for victims (art. IX (3)).

Regional soft law agreements and policy statements affirm the importance of ensuring that victims of trafficking are supported and assisted. In Europe, these include the EU Plan on Best Practices,³²⁴ the European Experts Group Opinion of October 2005,³²⁵ the European Experts Group Opinion of May 2004,³²⁶ the Organization for Security and Co-operation in Europe (OSCE) Action Plan,³²⁷ and the Brussels Declaration.³²⁸ In Africa, they include the

³²⁴ EU Plan on Best Practices, para. 4 (vii).

³²⁵ Experts Group on Trafficking in Human Beings of the European Commission, Opinion of 11 October 2005 in connection with the conference “Tackling human trafficking: Policy and best practices in Europe” and its related documents, 2.

³²⁶ Experts Group on Trafficking in Human Beings of the European Commission, Opinion of 18 May 2004 on reflection period and residence permit for victims of trafficking in human beings, para. 3.

³²⁷ OSCE Action Plan, Section V.

³²⁸ Brussels Declaration, para. 13.

³²³ Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 14.



Ouagadougou Action Plan,³²⁹ the Economic Community of West African States (ECOWAS) Declaration on Trafficking in Persons,³³⁰ and the ECOWAS Initial Plan of Action.³³¹ In Latin America, they include the Organization of American States (OAS) Recommendations on Trafficking in Persons,³³² and Resolution 2348 of the Assembly-General of Organization of American States.³³³ In Asia, the COMMIT MOU obliges States to provide all victims of trafficking “with shelter and appropriate physical, psycho-social, legal, educational and health-care assistance”.³³⁴ The MOU between the Governments of Thailand and Cambodia requires the parties to “provide trafficked children, women, and their immediate family, if any, with safe shelters, health care, access to legal assistance, and other imperative for their protection” (art. 9).³³⁵

Resolutions of the General Assembly and Human Rights Council call for the provision of physical and psychological care to victims of trafficking.³³⁶ Several human rights treaty bodies have recommended the provision of

physical and psychological care and support, specifically rehabilitation³³⁷ and reintegration³³⁸ programmes; medical care;³³⁹ counselling;³⁴⁰ crisis centres and telephone hotlines;³⁴¹ and safe houses and shelters.³⁴² The Special Rapporteur on trafficking in persons has repeatedly referred

Commission on Human Rights resolution 2005/44, para. 32; General Assembly resolution 59/166, paras. 13 and 15; Commission on Human Rights resolution 2004/45, para. 2; General Assembly resolution 58/137, para. 6.

³³⁷ Human Rights Committee, concluding observations: Czech Republic (CCPR/C/CZE/CO/2, para. 12); Slovenia (CCPR/CO/84/SVN, para. 11); Russian Federation (CCPR/CO/79/RUS, para. 10); Committee on the Rights of the Child, concluding observations: Nepal (CRC/C/15/Add.261, para. 89); Myanmar (CRC/C/15/Add.237, para. 73); Armenia (CRC/C/15/Add.225, para. 67); Committee against Torture, concluding observations: Indonesia (CAT/C/IDN/CO/2, para. 20); the former Yugoslav Republic of Macedonia (CAT/C/MKD/CO/5, para. 22); Estonia (CAT/C/EST/CO/4, para. 18); Latvia (CAT/C/LVA/CO/2, para. 21); Ukraine (CAT/C/UKR/CO/5, paras. 14, 24); Committee on the Elimination of Discrimination against Women, concluding observations: Bolivia (CEDAW/C/BOL/CO/4, para. 28); Paraguay (CEDAW/C/PAR/CC/3-5, para. 29).

³³⁸ Committee on the Elimination of Discrimination against Women, concluding observations: Brazil (CEDAW/C/BRA/CO/6, para. 24); Philippines (CEDAW/C/PHI/CO/6, para. 20); China (CEDAW/C/CHN/CO/6, para. 20).

³³⁹ Human Rights Committee, concluding observations: Kosovo (Serbia) (CCPR/C/UNK/CO/1, para. 16); Committee against Torture, concluding observations: Indonesia (CAT/C/IDN/CO/2, para. 20); Ukraine (CAT/C/UKR/CO/5, paras. 14, 24); Committee on the Elimination of Discrimination against Women, concluding observations: Ireland (CEDAW/C/IRL/CO/4-5, para. 31).

³⁴⁰ Human Rights Committee, concluding observations: Kosovo (Serbia) (CCPR/C/UNK/CO/1, para. 16); Committee on the Elimination Discrimination against Women, concluding observations: Ireland (CEDAW/C/IRL/CO/4-5, para. 31).

³⁴¹ Committee on the Rights of the Child, concluding observations: Armenia (CRC/C/15/Add.225, para. 67).

³⁴² Committee against Torture, concluding observations: Japan (CAT/C/JPN/CO/1, para. 8); Committee on the Elimination of All Forms of Discrimination against Women, concluding observations: Ireland (CEDAW/C/IRL/CO/4-5, para. 31).

³²⁹ Ouagadougou Action Plan, pp. 1-2.

³³⁰ ECOWAS Declaration on Trafficking in Persons, para. 7.

³³¹ ECOWAS Initial Plan of Action, p. 5.

³³² OAS Recommendations on Trafficking in Persons, Section IV(1)(2).

³³³ Organization of American States, Hemispheric Cooperation Efforts to Combat Trafficking in Persons and Second Meeting of National Authorities on Trafficking in Persons, adopted at the fourth plenary session, June 5 2007, AG/RES. 2348 (XXXVII O/07), preamble, para. 1.

³³⁴ COMMIT MOU, paras. 17-18.

³³⁵ The MOU between the Governments of Thailand and Lao PDR requires the parties to provide legal assistance, health care and other necessary measures to protect victims and their families: Thailand-Lao PDR MOU, art. 8.

³³⁶ Human Rights Council resolution 7/29, para. 36; General Assembly resolution 61/180, para. 9; General Assembly resolution 61/144, paras. 15 and 17;

to Principle 8 in her communications with States.³⁴³

NON-COERCION IN THE PROVISION OF CARE AND SUPPORT

A human rights approach requires the provision of care and support to be both informed and non-coercive. Victims of trafficking should, for example, receive information on their entitlements so that they can make an informed decision. As discussed above, care and support should not be made conditional on cooperation with criminal justice authorities. Victims should also be able to refuse care and support. They should not be forced into accepting or receiving assistance.

This position is supported by Guideline 6.2 which states, in relation to health care and counselling, that “trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS”. The European Trafficking Convention goes even further, requiring, in relation to all the assistance measures provided for in that instrument, that States parties must ensure that the relevant services “are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care” (article 12 (7)). The Explanatory Report on the Convention makes specific reference to the issue of medical testing, noting that “... victims must be able to agree to the detection of illness such as HIV/AIDS for [the tests] to be licit” (para. 171).

In its general comment No. 3 (2003), the Committee on the Rights of the Child affirmed

that “States must refrain from imposing mandatory HIV/AIDS testing of children in all circumstances and ensure protection against it. While the evolving capacities of the child will determine whether consent is required from him or her directly or from his or her parent or guardian ... States parties must ensure that, prior to any HIV testing ... the risks and benefits of such testing are sufficiently conveyed so that an informed decision can be made” (para. 23). The Special Rapporteur on violence against women has also recommended that HIV testing be provided “only if requested by the person concerned”.³⁴⁴ The principle of non-coercion is also supported in the Brussels Declaration, which prohibits mandatory HIV/AIDS testing and recommends that the provision of support measures be on a “consensual and fully informed basis” (para. 13).

It is important to note that in this area, as in many others, the circumstances of the case may require a balancing of different rights and responsibilities. In the case of child victims of trafficking, for example, the application of the “best interests” principle (discussed further under Principle 10 and related Guidelines) may require the provision of services such as shelter and medical treatment on a non-consensual basis.

8.6. REFLECTION AND RECOVERY PERIODS

An increasing number of States are considering the option of offering a “reflection period” to trafficked persons, to provide them with time and space to decide on their options, including whether they will cooperate with criminal justice agencies in the prosecution of their exploiters. While the concept of a reflection period post-dates the Trafficking Principles and Guidelines, this innovation clearly goes some way towards meeting their objective of ensuring that trafficked

³⁴³ E/CN.4/2006/62/Add.1, paras. 21 (Cambodia), 50 (India), 66 (Israel) and 76 (Democratic People’s Republic of Korea).

³⁴⁴ E/CN.4/2000/68, para. 116 (c).



persons are in a position to make a free and informed choice about cooperating without the burden of conditional assistance.

The concept of reflection and recovery periods originated in Western Europe. It became the subject of an EU Directive in April 2004 and entered international law through the European Trafficking Convention. Under the European model, victims illegally present in a State (and those who may reasonably be presumed to be victims) are granted a period of grace, called a “reflection period”, allowing them to recover and escape the influence of traffickers so they can make an informed decision as to whether to cooperate with criminal justice agencies in the investigation and prosecution of their exploiters. According to the Explanatory Report on the Convention, victim recovery entails, for example, the healing of wounds and recovery from physical assault together with the recovery of a minimum degree of psychological stability (para. 173). Importantly, granting of the reflection period under the European Trafficking Convention is *not* conditional on future cooperation with criminal justice authorities.

The reflection period is required to be mandated by law and to last at least thirty days. During that time, victims and presumed victims are not to be removed from the territory of the State party and are entitled to the protection, assistance and support provisions available under the Convention. However, there are several important caveats. The reflection period can

be refused or terminated on grounds of public order or if it is found that victim status is being claimed improperly. In addition, the granting of a reflection period would not provide a basis for an individual to refuse to testify if she or he were legally compelled, by a judge, to do so.³⁴⁵

While the Trafficking Principles and Guidelines do not explicitly refer to a recovery and reflection period, the spirit of the Principles and Guidelines – in particular their emphasis on victim protection and informed, consensual involvement in legal proceedings – fully support this important new tool. There is also encouraging evidence that the concept of reflection and recovery periods is becoming more broadly accepted at both national and international levels.³⁴⁶

SEE FURTHER:

- Protection and repatriation: part 2.3, section 11.2
- Protection of children, privacy: part 2.3, section 10.4

³⁴⁵ European Trafficking Convention, arts. 13 (1) and 13 (3) and *Explanatory Report on the European Trafficking Convention*, para. 176.

³⁴⁶ See, for example, “Improving the coordination of efforts against trafficking in persons: Background paper of the Secretary-General”, transmitted by the Secretary-General to the President of the General Assembly on 5 May 2009, p. 41; Committee on the Elimination of Discrimination against Women, concluding observations: Denmark (CEDAW/C/DEN/CO/6, paras. 22-23); Human Rights Committee, concluding observations: Japan (CCPR/C/JPN/CO/5, para. 23).



PRINCIPLE 9 AND RELATED GUIDELINES: **LEGAL ASSISTANCE, PROTECTION AND TEMPORARY RESIDENCE PERMITS**³⁴⁷

Legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers. States shall provide protection and temporary residence permits to victims and witnesses during legal proceedings.

9.1. PURPOSE AND CONTEXT

Principle 9 focuses on the legal and other assistance that should be provided to trafficked persons in respect of any criminal, civil or other actions against traffickers. The underlying assumption of this Principle is that trafficked persons have an important role to play – and a legitimate interest – in legal proceedings against their exploiters. On this basis, all efforts should be made to ensure that victims are able to participate in legal proceedings freely, safely and on the basis of full information.

Victim involvement in legal proceedings can take a number of different forms. Individuals who have been trafficked may provide evidence against their exploiters, either through written statements or in person, as part of a trial. Trafficked persons may

also be called upon to provide a victim statement about the impact of the offence, which could become part of a sentencing hearing.³⁴⁸ In civil proceedings against their exploiters, trafficked persons may be applicants and/or witnesses. Even for a trafficked person who is unwilling or unable to testify, she or he still has a legitimate interest in the relevant legal proceedings, and this needs to be accommodated.

Principle 9 recognizes that victims involved – or potentially involved – in legal proceedings have special needs and vulnerabilities that must be addressed. Obligations that flow from this are supplemental to the protection, assistance and support obligations mandated for all trafficked persons and discussed in detail under Principle 8 above. Importantly, factors such as age and gender can have a significant impact on the nature and level of both the need and vulnerability of a particular victim. They should therefore be taken into account in assessing the response required.³⁴⁹ Principle 9 applies to all victims of trafficking in respect of which legal proceedings have commenced or may

³⁴⁷ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 5.

³⁴⁸ This possibility is envisaged in the *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, para. 56.

³⁴⁹ See Trafficking Protocol, art. 6 (4).

be expected to commence. It affects any State in which legal proceedings are commenced against suspected traffickers, and is addressed to State officials and institutions as well as to non-State service providers.

The first issue raised by Principle 9, and considered in detail below, relates to the general requirement that victims of trafficking should receive information and assistance on legal proceedings in order to ensure they can participate effectively. The special needs of victims who are acting as witnesses, in particular in criminal prosecutions, are then addressed. Finally, this section considers the legal status of victims throughout proceedings against traffickers. An individual who has been trafficked across international borders may not be in compliance with immigration requirements. Without special provision to remain, this could mean that trafficked persons are deported before they can participate in criminal actions against their exploiters. It could also operate to prevent victims of trafficking from accessing their right to an effective remedy through civil or other legal or administrative action. Lack of legal status can be used by States to justify detaining victims during legal proceedings, an approach that has been rejected in section 7.4 above as incompatible with internationally accepted standards of human rights. In this context, the option of temporary residence permits as a means of regularizing a victim's status during the course of legal proceedings is explored.

9.2. INFORMATION ON, PARTICIPATION IN AND ASSISTANCE WITH LEGAL PROCEEDINGS AGAINST TRAFFICKERS

Principle 9 confirms that trafficked persons have a legitimate role to play in criminal or civil actions against their exploiters – that they have a right to be heard and a right to be kept

informed. It also confirms that trafficked persons are entitled to use the legal system to ensure that their own interests are safeguarded and their own rights upheld. Principle 9 gives expression to the view that victims of human rights violations “should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.”³⁵⁰

Principle 9 confirms the right of victims of trafficking to receive legal and other assistance for the duration of any criminal proceedings against their exploiters. This provision is supplemented by several Guidelines that would also apply to any pre- or post-trial period. Guideline 4.8 requests States to consider:

Making effective provision for trafficked persons to be given legal information and assistance in a language they understand as well as appropriate social support to meet their immediate needs. States should ensure that entitlement to such information, assistance and support is not discretionary but is available as a right for all persons who have been identified as trafficked.

Guideline 6.5 reiterates that trafficked persons should be provided with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. It also notes that such information should be provided to victims in a language they understand.

The Trafficking Protocol requires trafficked persons to be provided with information on relevant court and administrative proceedings (art. 6 (2)(a)). In fact, the Protocol goes even further than the Trafficking Principles and Guidelines on this point by recognizing an

³⁵⁰ Villagran Morales *et al.* (*The Street Children case*), Judgement of 19 November 1999, Inter-American Court of Human Rights (Ser. C) No. 63 (1999), para. 227.



obligation on States to assist in ensuring that victims can be present at, and have their concerns and views considered during, criminal proceedings against traffickers (art. 6 (2) (b)). Both provisions are mandatory and echo a similar provision in the Organized Crime Convention (art. 25 (3)). The Protocol recognizes that the right of victims to be present and have their views known during legal proceedings is compromised by premature repatriation. It therefore requires States parties of destination to ensure, *inter alia*, “that such return shall be [undertaken] with due regard... for the safety of any legal proceedings related to the fact that the person is a victim of trafficking” (art. 8 (2)). This issue is considered further below in relation to temporary residence permits and, under Principle 11 and related guidelines, in the context of the obligation to ensure safe and preferably voluntary return.

The European Trafficking Convention, which also requires any return to be undertaken with due regard for legal proceedings (art. 16 (2)), establishes a range of victim assistance provisions relating to the legal process, including an obligation on States parties to ensure that victims are given counselling and information regarding their legal rights in a language they understand (art. 12 (1)(d) and (e)).

The SAARC Convention requires Member States to provide women and children victims of trafficking for the purpose of sexual exploitation with legal assistance (art. 5).

Soft-law support for a right of trafficked persons to legal information and assistance can be found in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Paragraph 6 includes such actions as keeping victims informed as to the scope, timing and progress of proceedings and of the disposition of their cases as well as providing victims with proper assistance. A key General Assembly resolution

on criminal justice measures to eliminate violence against women also urges States to “make available to women who have been subjected to violence information on rights and remedies and on how to obtain them, in addition to information about participating in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings”.³⁵¹

Other resolutions of the General Assembly³⁵² and the Commission on Human Rights/Human Rights Council,³⁵³ and concluding observations of United Nations treaty bodies,³⁵⁴ have also recommended the provision of legal assistance to victims of trafficking.

In summary, victims should be given a genuine opportunity to consider their legal options. This requires, at a minimum, the provision of information of a type and in a manner that will allow them to make an informed choice. Should victims be involved in, or otherwise support, any form of legal action, they have the right to play a meaningful role in that process.

9.3. THE PARTICULAR PROTECTION AND SUPPORT NEEDS OF VICTIM WITNESSES³⁵⁵

Victims have a critical role to play in the criminal prosecution of traffickers and their accomplices.

³⁵¹ Resolution 52/86, annex, para. 10 (a).

³⁵² Resolutions 61/144 (para. 15), 59/166 (para. 13) and 58/137 (para. 6).

³⁵³ Commission on Human Rights resolutions 2004/49 (para. 4) and 2004/45 (para. 20).

³⁵⁴ Committee against Torture, concluding observations: Indonesia (CAT/C/IDN/CO/2, para. 20); Ukraine (CAT/C/UKR/CO/5, para. 14); Committee on the Elimination of Discrimination against Women, concluding observations: Lebanon (CEDAW/C/LBN/CO/3, para. 29); Austria (CEDAW/C/AUT/CO/6, para. 26).

³⁵⁵ Additional information on this issue can be found in Gallagher and Holmes, *loc. cit.*

In fact, as noted throughout this Commentary, investigations and prosecutions are usually difficult and at times impossible without the cooperation and testimony of victims. While victim involvement in prosecutions is fraught with dangers and pitfalls, it is important to acknowledge that trafficked persons are the major source of the evidence necessary to secure the conviction of traffickers for the grave physical, sexual and psychological abuse that they typically inflict upon their victims. Accordingly, it is essential that States work towards a situation in which victims of trafficking are sufficiently informed and supported for those who wish to do so to be able to participate effectively and safely in the prosecution of their exploiters.

Victims of trafficking are often unwilling to assist in criminal investigations for fear of harm to themselves or their families. The Trafficking Principles and Guidelines require States to guarantee that protections for witnesses are provided for in law (Guideline 4.10). Guideline 5.8 provides greater detail, requesting States to consider:

Making appropriate efforts to protect individual trafficked persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. Appropriate protection programmes may include some or all of the following elements: identification of a safe place in the country of destination; access to independent legal counsel; protection of identity during legal proceedings; identification of options for continued stay, resettlement or repatriation.

In many cases, the prosecuting State cannot realistically provide victims with the level of protection they may need or want, through a lack of mandate, or resources, or both. The Trafficking Principles and Guidelines warn of

the need to ensure that victims fully understand the limits of protection and are not lured into cooperating by false or unrealistic promises regarding their safety and that of their families (Guideline 6.6). At the same time, as noted in both the European Trafficking Convention and the United Nations Organized Crime Convention, the State should do all within its power and resources to provide or otherwise ensure effective protection to victims who are cooperating in criminal investigations.³⁵⁶ The body established to provide recommendations on the effective implementation of the Trafficking Protocol has recently affirmed that “[w]ith regard to the protection of victims as witnesses, States parties should ensure measures for the protection of victims, including the provision of temporary and safe shelter and witness protection procedures, where appropriate”.³⁵⁷ The United Nations treaty bodies have repeatedly reaffirmed the need for States to provide witnesses with support and protection to enable them to testify against the perpetrators of trafficking.³⁵⁸

³⁵⁶ European Trafficking Convention, art. 28; Organized Crime Convention, art. 24. Note that trafficked persons have a right, through their status as victims of crime, to measures that ensure their safety from intimidation and retaliation (Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 6 (d)).

³⁵⁷ A/63/215, annex I, para. 14.

³⁵⁸ Human Rights Committee, concluding observations: Kosovo (Serbia) (CCPR/C/UNK/CO/1, para. 16); Brazil (CCPR/C/BRA/CO/2, para. 15); Thailand (CCPR/CO/84/THA, para. 21); Slovenia (CCPR/CO/84/SVN, para. 11); Kenya (CCPR/CO/83/KEN, para. 25); Albania (CCPR/CO/82/ALB, para. 15); Serbia and Montenegro (CCPR/CO/81/SEMO, para. 16); Latvia (CCPR/CO/79/LVA, para. 12); Russian Federation (CCPR/CO/79/RUS, para. 10); Slovakia (CCPR/CO/78/SVK, para. 10); Committee on the Elimination of Discrimination against Women, concluding observations: Lebanon (CEDAW/C/LBN/CO/3, para. 29); Singapore (CEDAW/C/SGP/CO/3, para. 22); Bosnia and Herzegovina (CEDAW/C/BIH/CO/3, para. 28); Malaysia (CEDAW/C/MYS/CO/2, para. 24).



The protection of victim-witnesses often has a strong gender component. Women victims may need to be protected to a different level and in a different manner than male victim witnesses.³⁵⁹ Child victims who are witnesses also have very special needs. These are addressed, in detail, in section 10.4 below.

Witness support and protection must extend to the trial process itself. Guideline 6.4 emphasizes the need for States and others to ensure that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical and psychological well-being. An

important aspect of this is protection of the victim's privacy. Victims of trafficking will be understandably reluctant to give evidence if this means being identified by the media or standing up in a public courtroom, often in view of their exploiter, and talking about traumatic personal experiences. This can be especially difficult for women and girls who have suffered sexual and other forms of violence at the hands of their exploiters. As noted above, victims can also be in real danger of retaliation and intimidation. It is essential for national criminal justice systems to find ways to assist victims of trafficking to participate, safely and meaningfully, in court processes. Potentially useful measures have been identified as including alternatives to direct testimony which are designed to protect the witness's identity, privacy and dignity. Such alternatives include using video, closed hearings and witness concealment, preliminary or accelerated hearings, and the provision of free legal counsel.

³⁵⁹ General Assembly resolution 52/86, on crime prevention and criminal justice measures to eliminate violence against women, urges States to ensure that criminal procedure measures can be taken to ensure the safety of victims, including protection against intimidation and retaliation and that victims and witnesses are protected before, during and after criminal proceedings (annex, paras. 8 (c) and 9 (h)).

Box 10: Trafficked persons as victims of crime and as witnesses

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (para. 6)

When developing systems and processes to encourage the participation of victims in court processes, it is essential to remain mindful of the rights of accused persons which must be upheld in order to ensure that they receive a fair trial. These rights are extensive and include: the right to be informed promptly and in detail of the nature and cause of the charges; and their right to examine, or have examined, the witnesses against them, and to obtain the attendance and examination of witnesses on their behalf under the same conditions.³⁶⁰ As noted in the Trafficking Principles and Guidelines, and also in the *Explanatory Report on the European Trafficking Convention*, this is an especially important consideration to weigh up when endeavouring to protect the victim's right to privacy.³⁶¹

9.4. THE RIGHT TO REMAIN DURING LEGAL PROCEEDINGS

Principle 9 articulates the right of trafficked persons to remain in the country during legal proceedings against traffickers and proposes the granting of temporary residence permits for this purpose. Principle 9 is supplemented by Guideline 4.7, which requests States to consider:

Providing legislative protection for trafficked persons who voluntarily agree to cooperate with law enforcement authorities, *including protection of their right to remain lawfully within the country of destination for the duration of any legal proceedings.* (emphasis added)

As noted above, the Trafficking Protocol places an obligation on countries of destination to return

victims to their home countries "with due regard for the safety of that person and for the status of any related legal proceedings" (art. 8 (2)). This provision should be read in light of the broader obligation to ensure victims are provided with an opportunity to participate as set out in the Organized Crime Convention (art. 25 (3)), as well as the specific obligation in the Protocol to provide victims with an opportunity to present their views (art. 6 (2)).

The right to remain during legal proceedings is often linked to more general provisions regarding the issuing of residency permits to victims of trafficking. In the European Trafficking Convention, for example, the need to remain "for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings" is one of two justifications offered to States parties for issuing a residence permit to victims (art. 14 (1)).³⁶² These issues are considered below.

9.5. TEMPORARY OR PERMANENT RESIDENCE PERMITS

As noted above, victims of trafficking who are unlawfully within a country face special dangers and vulnerabilities as a result of their irregular/undocumented status. They may be unable to access important sources of subsistence and support, including housing and work opportunities. They may be vulnerable to further exploitation as well as intimidation and retaliation. They risk being prevented from participating effectively and meaningfully in legal proceedings against traffickers. Unless their status is regularized, victims also risk being detained in immigration facilities or shelters. In addition, they are liable to deportation at any time.

³⁶⁰ International Covenant on Civil and Political Rights, art. 14 (3).

³⁶¹ Trafficking Principles and Guidelines, Guideline 6.6; *Explanatory Report on the European Trafficking Convention*, paras. 299-303.

³⁶² That the issuing of such a residence permit is "necessary owing to [the victim's] personal situation" is the other justification provided in article 14 (1).



The Trafficking Protocol encourages States to consider adopting legislative or other appropriate measures that permit victims of trafficking to remain in their territory, temporarily or permanently, in appropriate cases (art. 7). The extensive provisions of the Trafficking Principles and Guidelines explored throughout this section provide unequivocal support for measures designed to remove the vulnerabilities outlined above through the temporary regularization of a victim's status. Victims of trafficking may have their status regularized for a number of reasons and in a number of different ways, including:

- Through being granted a *reflection and recovery period*, during which non-conditional support is given with the aim of providing victims with time and space to decide on their options, including whether to cooperate with criminal justice agencies in the prosecution of their exploiters;
- Through being granted a *temporary residence permit linked to (usually criminal) proceedings against traffickers*; such visas usually require victim cooperation and expire once legal proceedings have been completed; and
- Through being granted a *temporary residence permit on social or humanitarian grounds* that may be related, for example, to respect for the principle of non-refoulement, the inability to guarantee a secure return, or the risk of re-trafficking.

The following important principles and obligations, raised at various points throughout this Commentary, should be kept in mind when a decision is to be made concerning whether or not victims are to be granted the right to temporary residence:

- The right of victims to participate in legal proceedings against traffickers (Principle 9 and related guidelines);
- The right of victims to receive protection from further harm (Principle 8 and related guidelines);
- The right of victims to access effective remedies (Principle 17 and related guidelines);
- The obligation on States not to return victims when they are at serious risk of harm, including from intimidation, retaliation or re-trafficking (Principle 11 and related guidelines); and
- The special rights of child victims of trafficking including the obligation to take full account of the child's best interests (Principle 10 and related guidelines).

SEE FURTHER:

- Protection from further harm: part 2.3, sections 8.1-8.6
- Special interests of children: part 2.3, section 10.3-10.4
- Repatriation, protection and the right to remain: part 2.3, section 11.2
- Right to a remedy: part 2.4, sections 17.1-17.6



PRINCIPLE 10 AND RELATED GUIDELINES: THE SPECIAL RIGHTS AND NEEDS OF CHILDREN³⁶³

Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.

10.1. PURPOSE AND CONTEXT

Children are naturally included in the rules and standards considered throughout this Commentary. Principle 10, however, requires special measures for child victims of trafficking. The chapeau to Guideline 8, which also deals with this issue, explains why special measures are so important:

The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked

children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.

Another important source of vulnerability for children lies in their lack of full legal standing in fact and in law. As noted in part 2.3, section 7.4 above, this lack of standing is often made worse by the absence of a parent or legal guardian who is able to act in the child's best interests. Many of the care and protection measures outlined in this section – from the prioritization of the child's "best interests" to the appointment of legal guardians – are designed to address the particular vulnerabilities faced by unaccompanied child victims.

Principle 10 upholds a distinction between child and adult trafficking that is recognized in international law.³⁶⁴ It is directed at States and other public and private actors that may be involved in the identification, treatment, protection, return and rehabilitation of victims of trafficking and in the prevention of child trafficking. Principle

³⁶³ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 5.

³⁶⁴ See part 1, sections 3.1-3.2 above.

10 finds further authority in the Trafficking Protocol, which requires States parties, in considering measures to assist and protect victims of trafficking, to take into account the special needs of child victims (art. 6 (4)).

The various components of the obligation to provide special treatment to child victims of trafficking are identified and considered in detail below.

10.2. IDENTIFICATION OF CHILD VICTIMS

Principle 10 is clear that “[c]hildren who are victims of trafficking shall be identified as such”. Guideline 8.2 requires States and others to ensure “that procedures are in place for the rapid identification of child victims of trafficking”. Elsewhere, the Trafficking Principles and Guidelines explain why the identification process is important and why the correct, timely identification of victims, including child victims, is an obligation:

A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place (Guideline 2).

If a trafficked child is not identified at all – or is incorrectly identified as a criminal or an irregular or smuggled migrant – then this will directly affect the ability of that child to access the rights to which she or he is entitled. This is because identification triggers a wide range of assistance, support and protection obligations on the part of the State. As with adults, failure to identify child victims of trafficking quickly and accurately renders any rights granted to children “purely theoretical and illusory”.³⁶⁵

³⁶⁵ *Explanatory Report on the European Trafficking Convention*, para. 131.

A related and equally important issue concerns the definition of trafficking in children. As noted in part 1 of this Commentary, the international legal definition of child trafficking is different from the definition of trafficking in adults. The crime of trafficking in children requires only an action (movement, sale, receipt, etc.) carried out for the purpose of exploitation: it is not necessary to establish any “means” such as deception, coercion or the abuse of power or of a position of vulnerability. As a result, it should be easier to establish a trafficking-related crime against a child. Failure to identify a child victim of trafficking as such has the effect of nullifying this important distinction, and thereby obstructs the successful investigation and prosecution of trafficking-related crimes affecting children. It could also lead to an incorrect charge, conviction or penalty, for example in circumstances where the trafficking of children is an aggravated offence.³⁶⁶

There are two key issues associated with the identification of child victims. The first relates to presumption of age. The second concerns the laws, systems and procedures that need to be in place to ensure that correct, timely identification can take place.

PRESUMPTION OF AGE AND PRESUMPTION OF VICTIM STATUS

Not all child victims of trafficking will present as such. They may appear to be 18 years of age or older. Their passports may have been destroyed or taken away from them. They may be carrying false identity papers that misstate their age. Child victims of trafficking may lie about their age because this is what they have been told to do by their exploiters. They may lie because they are afraid of being taken into care or sent back home. In much the same way that failure to correctly identify any victim of trafficking leads to

³⁶⁶ See the discussion of aggravated offences below, under Principle 15 and related guidelines.



a violation of that person's rights, treating a child victim of trafficking as an adult prevents that child from exercising the rights to which she or he is entitled under international and national law.

While the Trafficking Principles and Guidelines do not pronounce directly on this point, there does appear to be a growing acceptance of a presumption of age in the case of children. Under such a presumption, a victim who *may* be a child is treated as a child unless or until another determination is made. Evidence for the emergence of such a presumption can be found in the Legislative Guide to the Trafficking Protocol, which provides that "[i]n a case where the age of a victim is uncertain and there are reasons to believe the victim is a child, a State party may, to the extent possible under its domestic law, treat the victim as a child in accordance with the Convention on the Rights of the Child until his or her age is verified" (para. 65). This position is echoed in the European Trafficking Convention, which requires States parties to presume the victim is a child if there are reasons for believing that is so and if there is uncertainty about their age (art. 10 (3)). The Explanatory Report on the Convention confirms that the individual presumed to be a child victim of trafficking is to be given special protection measures in accordance with their rights as defined, in particular, in the Convention on the Rights of the Child (para. 136).

The UNICEF Guidelines on the Protection of Child Victims of Trafficking (UNICEF Guidelines) state that 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. Pending verification of the victim's age, she or he is to be treated as a child and accorded all the special protection measures stipulated in those Guidelines (section 3.2).

The presumption of age is linked to the presumption of status: a child who *may* be a

victim of trafficking is to be *presumed* to be a victim unless or until another determination is made. The relevant best practice guidance for law enforcement officials in the European Union, for example, states that "in any case where there are *any grounds* to suspect that a child is a victim of trafficking, that child *will be presumed* to be a trafficked victim and treated accordingly pending verification of the facts of the case".³⁶⁷

REQUIREMENTS FOR THE IDENTIFICATION OF CHILD VICTIMS

The identification of victims of trafficking is, as noted above in the context of Principle 1 and related guidelines, a complicated and inexact science. The presumption of age operates to remove the special or additional difficulties that would otherwise complicate the identification of child victims. Nevertheless, the particular situation of children necessitates special measures to ensure the quick and accurate identification of those who have been trafficked. Guideline 8.2 requests States and others to ensure that procedures are in place for the rapid identification of child victims of trafficking.

The European Trafficking Convention requires States parties to ensure that trained and qualified individuals are involved in identifying victims, including children. It further requires different authorities to collaborate both with each other and with the relevant support organizations to ensure victims can be identified in a procedure that duly takes account of the special situation of both women and children (art. 10 (1)).

The request in Guideline 8.2 for special identification procedures in the case of children is echoed in the UNICEF Guidelines, which emphasize how critically important it is for different agencies to work together and

³⁶⁷ International Organization for Migration, *Identification and Protection Schemes for Victims of Trafficking in Persons in Europe: Tools and Best Practices* (Brussels, 2005), p. 30.

share information. The proactive identification measures set out in this document include the following:

- States to take all necessary measures to establish effective procedures for the rapid identification of child victims, including procedures to identify child victims at ports of entry and other locations;
- Efforts to be made to coordinate information-sharing between relevant agencies and individuals in order to ensure that children are identified and assisted as early as possible; and
- Social welfare, health or education authorities to contact the relevant law enforcement authority where there is knowledge or a suspicion that a child is being exploited or trafficked or is at risk of exploitation or trafficking.

The Committee on the Rights of the Child has called on States to strengthen their efforts to identify trafficking in children – although not child victims of trafficking *per se*.³⁶⁸ The Committee on Migrant Workers has affirmed the importance of identifying victims of trafficking (of all ages).³⁶⁹

³⁶⁸ Committee on the Rights of the Child, concluding observations: Malaysia [CRC/C/MYS/CO/1, para. 96]; Jordan [CRC/C/JOR/CO/3, para. 93]; Oman [CRC/C/OMN/CO/2, para. 66]; Latvia [CRC/C/LVA/CO/2, para. 59]; Azerbaijan [CRC/C/AZE/CO/2, para. 66]; Lithuania [CRC/C/LTU/CO/2, para. 67]; China [CRC/C/CHN/CO/2, para. 88]; Mongolia [CRC/C/15/Add.264, para. 65]; Angola [CRC/C/15/Add.246, para. 67]; Slovenia [CRC/C/15/Add.230, para. 63].

³⁶⁹ Committee on Migrant Workers, concluding observations: Bolivia [CMW/C/BOL/CO/1, para. 42] (“The Committee encourages the State party to create mechanisms to facilitate the identification of migrant vulnerable groups, such as refugees and victims of trafficking”).

10.3. THE “BEST INTERESTS” OF THE CHILD

Principle 10, like Guideline 8, is clear that the best interests of child victims of trafficking are to be a primary consideration in all decisions or actions that affect them. The “best interests of the child” principle is a legal doctrine accepted in many countries that has been enshrined in international law through the Convention on the Rights of the Child (art. 3 (1)). Importantly, the wording of the reference to the “best interests of the child” in Guideline 8 is taken directly from that Convention.³⁷⁰ Many other international and regional human rights instruments have adopted and incorporated this principle.³⁷¹

In its general comment No. 6 (2005), the Committee on the Rights of the Child considered the application of the “best interests” principle in the context of unaccompanied or separated children (a group that can be expected to include victims of trafficking). In the case of a displaced child, “the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child’s life.” Such a determination requires “a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs... The assessment process should be carried out in a friendly and safe

³⁷⁰ Note that the Optional Protocol on Sale of Children, art. 8 (3), requires that the best interests of the child be “a primary consideration” in the treatment by the criminal justice system of child victims of offences under the Protocol.

³⁷¹ See, for example, the African Charter on the Rights and Welfare of the Child, art. IV; Convention on the Elimination of All Forms of Discrimination against Women, art. 5 (b); Inter-American Convention on International Traffic in Minors, art. 1; SAARC Convention on Child Welfare, art. III (4).



atmosphere by qualified professionals who are trained in age- and gender-sensitive interviewing techniques". The Committee then states that "[s]ubsequent steps, such as the appointment of a competent guardian as expeditiously as possible, serve as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child... In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian." The principle also requires that, where the authorities have placed a child in care, "the State recognizes the right of that child to a 'periodic review' of their treatment" (paras. 19-22).

The principle of the best interests of the child is enshrined in a number of legal and policy instruments specific to trafficking, including the European Trafficking Convention (art. 10 (4)(c), on family tracing). The SAARC Convention requires States parties to uphold the "best interests of the child" as a principle of paramount importance and to adhere to this principle in all actions concerning children (art. III). While the Trafficking Protocol does not specifically refer to the principle, it is identified as the appropriate standard in the Legislative Guide in relation to decisions concerning family tracing and reunification and repatriation of children.³⁷² The body established to make recommendations on the effective implementation of the Protocol has also affirmed that "States parties should ... [e]nsure that responses to child trafficking at all levels are always based on the best interest of the child."³⁷³ The UNICEF Guidelines identify the best interests of the child as a general principle that is to be borne in mind at all stages in the care and protection of child victims of trafficking

in countries of destination, transit and origin (section 2.2).

The principle has also been repeatedly upheld in the context of trafficking in resolutions of the Human Rights Council (formerly the Commission on Human Rights).³⁷⁴

What does it mean to prioritize the best interests of the child? In the context of trafficking, the following points, largely extrapolated from the Convention on the Rights of the Child, could provide useful guidance:

- In the case of actions and decisions affecting an individual child, it is the best interests of that individual child which must be taken into account;
- It is in a child's best interests to enjoy the rights and freedoms accorded them by international law and set out in the Convention on the Rights of the Child. For example, it is in a child's best interests to maintain contact with both parents in most circumstances (art. 9 (3)); it is in the child's best interests to have access to education (art. 28) and to health care (art. 24);
- A child capable of forming a view on his or her best interests must be able to give it freely, and it must be taken into account (art. 12). However, acting in the best interests of the child may sometimes require that his or her wishes are overridden;

³⁷² *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, paras. 66-67.

³⁷³ CTOC/COP/WG.4/2009/2, para. 13 (h).

³⁷⁴ The Human Rights Council, in its resolution 7/29 (para. 36 (e)), and the Commission on Human Rights, in its resolution 2005/44 (para. 32 (e)), call on States to "address effectively the needs of victims of trafficking... including their safety and protection, physical and psychological recovery and full reintegration into their family and society and bearing in mind the best interest of the child"; the Commission, in its resolutions 2004/48 (para. 37 (d)) and 2003/86 (para. 36 (d)), calls on States to "criminalize and effectively penalize all forms of... child trafficking ... while ensuring that, in the treatment by the criminal justice system of children who are victims, the best interests of the child shall be a primary consideration".

- Parents have primary decision-making responsibility on behalf of their children (arts. 5 and 18 (1)), but if they fail to make a child's best interests a basic concern, for example by being themselves complicit in the trafficking of that child, the State may intervene to protect those interests (see art. 9 (1), for example); and
- As stated by the Committee on the Rights of the Child in its general comment No. 6, States should not put other considerations, such as those related to immigration control or public order, before the best interests of a child victim of trafficking.

10.4. PROTECTION OF AND SUPPORT FOR TRAFFICKED CHILDREN

Principle 10 requires child victims of trafficking to be provided with appropriate assistance and protection, with full account being taken of their special vulnerabilities, right and needs. In accordance with the presumption outlined above, all persons identified as or reasonably presumed to be victims of trafficking, and identified as or reasonably presumed to be under the age of 18 years, are entitled to this higher standard of protection and support.³⁷⁵

Appropriate assistance and protection would include the provision of immediate support measures such as security, food and safe shelter in addition to access to health care, counselling

and social services.³⁷⁶ The services provided should be appropriate for the child's age and any special needs as well as for her/his gender, ethnic or cultural identity. All assistance and support given to children should be delivered by competent, trained professionals.³⁷⁷

The following Principles which apply to all trafficked persons deserve to be highlighted in this context:

³⁷⁶ The Convention on the Rights of the Child requires States parties to provide all appropriate measures to "promote [the] physical and psychological recovery" of a child who has suffered neglect, abuse, exploitation or torture (art. 39). The Committee on the Rights of the Child has repeatedly called for States to provide child victims of trafficking with health care, psychological assistance, rehabilitation and social reintegration services: concluding observations: Kenya (CRC/C/KEN/CO/2, para. 66 (c)); Antigua and Barbuda (CRC/C/15/Add.247, para. 65 (e)); Myanmar (CRC/C/15/Add.237, para. 70); Netherlands (CRC/C/15/Add.227, para. 57 (d)); Canada (CRC/C/15/Add.215, para. 53); Armenia (CRC/C/15/Add.225, para. 67 (b)).

³⁷⁷ Guideline 8.10 requests States and others to consider "taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking". In the *Legislative Guides to the Organized Crime Convention and its Protocols*, States parties are requested to consider "[e]stablishing special recruitment practices and training programmes in order to ensure that individuals responsible for the care and protection of the child victims understand their needs, are gender-sensitive, and possess the necessary skills both to assist children and to ensure that their rights are safeguarded" (Part 2, para. 65 (c)). This requirement is repeated in the UNICEF Guidelines, section 7.1. The Committee on the Rights of the Child has recommended that States "train law-enforcement officials, social workers and prosecutors on how to receive, monitor, investigate and prosecute cases, in a child-sensitive manner that respects the privacy of the victim", concluding observations: Kenya (CRC/C/KEN/CO/2, para. 66 (h)); Kyrgyzstan (CRC/C/15/Add.244, para. 62 (c)). Various resolutions of the Commission on Human Rights and General Assembly have also recommended that training take into account child sensitive issues: General Assembly resolutions 61/144 (para. 25) and 59/166 (para. 24); and Commission on Human Rights resolution 2004/45 (para. 23).

³⁷⁵ Principle 10 finds authority in the Convention on the Rights of the Child, which states that: "[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State" (art. 20 (1)). See also African Charter on the Rights and Welfare of the Child, art. XXV.



- A trafficked child should not be criminalized in any way. She/he should not be liable for prosecution for any status-related offences;³⁷⁸
- A trafficked child should never be placed in a law enforcement detention facility, including a police cell, prison or special detention centre for children. Any decision relating to the detention of children should be made case by case, and with full consideration of the best interests principle. Any detention of a child

victim of trafficking should, in all cases, be for the shortest possible time and subject to independent oversight and review.³⁷⁹

- Care and support for trafficked children should be made available as a right. They should never be conditional on the child's cooperation with criminal justice agencies;³⁸⁰ and
- Children should not be coerced into receiving care and protection, including medical assistance or testing, unless it can be demonstrated, case by case, that this is in the best interests of the individual child victim.³⁸¹

³⁷⁸ Guideline 8.3 requests States and others to ensure “that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons”. The UNICEF Guidelines appear to be broader on this point, declaring that: “the involvement of child victims in criminal activities shall not undermine their status as both a child and a victim, or their related rights to special protection”. On the issue of non-criminalization for status-related offences generally, see the authorities cited in part 2.3, section 7.3, above. The Committee on the Rights of the Child, in its general comment No. 6, stated that “in developing policies on unaccompanied or separated children, including those who are victims of trafficking ... States should ensure that such children are not criminalized solely for reasons of illegal entry or presence in the country”, para. 62. The Committee has repeatedly emphasized the non-criminalization of child victims of trafficking in its concluding observations relating to both the Convention and the Optional protocol on Sale of Children, Child prostitution and Child Pornography. See also, for example, the recommendations adopted at the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009 (CTOC/COP/WG.4/2009/2); European Trafficking Convention, art. 26; *Explanatory Report on the European Trafficking Convention*, paras. 272-274. See, for example, General Assembly resolution 63/156, para. 12, which “Urges Governments to take all appropriate measures to ensure that victims of trafficking are not penalized for being trafficked and that they do not suffer from revictimization as a result of actions taken by Government authorities, and encourages Governments to prevent, within their legal framework and in accordance with national policies, victims of trafficking in persons from being prosecuted for their illegal entry or residence”. For previous General Assembly references to this issue, see its resolutions 61/144 (para. 18), 59/166 (paras. 8 and 18), 57/176 (para. 8), 55/67 (paras. 6 and 13), 52/98 (para. 4) and 51/66 (para. 7). The Commission on Human Rights and the Human Rights Council have also addressed this issue. See, for example, Human Rights Council resolution 11/3, paragraph 3 (urging States to

“take all appropriate measures to ensure that victims of trafficking are not penalized for being trafficked and that they do not suffer from re-victimization as a result of actions taken by Government authorities, bearing in mind that they are victims of exploitation”) and Commission on Human Rights resolutions 2004/45 (para. 6) and 1998/30 (para. 3). See also A/63/215, para. 62 (“the principle of non-punishment”; “victims should be protected from re-victimization, including protection from prosecution for illegal migration, labour law violations or other acts”). See further the Brussels Declaration, para. 13; Ouagadougou Action Plan; OAS Recommendations on Trafficking in Persons, Section IV(5); Hemispheric efforts to combat trafficking in persons: Conclusions and recommendations of the first meeting of national authorities on trafficking in persons, adopted at the fourth plenary session of the OAS, held on June 6, 2006, AG/RES. 2256 (XXXVI-O/06), IV(7); Cambodia-Thailand MOU, art. 7; OSCE Declaration on Trafficking in Human Beings adopted in Porto, 2002, Section II; OSCE, Vienna Ministerial Council Decision No. 1 (Decision on Enhancing the OSCE’s Efforts to Combat Trafficking in Human Beings), MC(8).DEC/1, 2000, para. 9.

³⁷⁹ See authorities cited in section 7.4 above. See also Committee on the Rights of the Child, general comment No. 6: “In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained ... Where detention is exceptionally justified ... it shall ... only be used as a measure of last resort and for the shortest appropriate period of time” (para. 61). The Committee has echoed these views in its concluding observations: Netherlands (CRC/C/15/Add.227, para. 54 (d); and Canada (CRC/C/15/Add.215, para. 47 (c)).

³⁸⁰ See authorities cited in part 2.3, section 8.2, above.

³⁸¹ See authorities cited in part 2.3, section 8.5, above.

Guideline 8, supplemented by other provisions of the Trafficking Principles and Guidelines, gives important information on what constitutes “appropriate” assistance and support. International human rights treaties and key policy instruments provide additional guidance. The following are key aspects or components of the obligation to support and protect trafficked children and children at risk of being trafficked:

NON-DISCRIMINATION IN THE PROVISION OF PROTECTION AND ASSISTANCE

Every child under the jurisdiction or control of a State is entitled to care and protection on an equal basis. This means that non-national child victims of trafficking are to enjoy the same rights as national or resident children. Like their race, sex, language, religion, ethnic or social origin, their nationality is not to have a negative impact on their rights and freedoms.³⁸²

RIGHT TO INFORMATION AND RESPECT FOR THE VIEWS OF THE CHILD

Guideline 6.6 requires States to ensure that a child who is capable of forming his or her own views “enjoys the right to express those views freely in all matters affecting him or her, in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity”. This requirement, that the views of the child are to be respected and given due weight, is derived directly from an obligation set out in the Convention on the Rights of the Child (art. 12).³⁸³

The views of the child to be taken into account must be supported by adequate and accurate information. The UNICEF Guidelines emphasize the importance of ensuring that child victims are given information about, for example, their

situation, their entitlements, services available and the family reunification and/or repatriation process (section 2.5). Additional information requirements apply in respect of children who are or may be witnesses in criminal prosecutions. These are highlighted under the appropriate headings below.

RIGHT TO PRIVACY

While all trafficked persons have a right to privacy, this right is a particularly important aspect of providing child victims with the care, support and protection to which they are legally entitled. Failure to protect the privacy of child victims can increase the danger of intimidation and retaliation. It can also, as noted in the discussion of Principle 8 and related guidelines, cause humiliation and hurt to child victims, and compromise their recovery. Guideline 8.9 encourages States and others to protect, as appropriate, the privacy and identity of child victims and to take measures to avoid the dissemination of information that could lead to their identification.

The Trafficking Protocol focuses on privacy and the protection of identity in the specific context of legal proceedings (art. 6 (1)). The European Trafficking Convention, on the other hand, takes a much broader view, recognizing that the protection of private life is essential not only to ensure victims’ safety but also to preserve their chances of social reintegration in the country of origin or the receiving country.³⁸⁴ The Convention recognizes that “it would be particularly harmful for th[e] identity [of trafficked children] to be disclosed by the media or by other means”³⁸⁵ and requires States parties to:

adopt measures to ensure, in particular, that the identity, or details allowing the

³⁸² Convention on the Rights of the Child, art. 2.

³⁸³ See also African Charter on the Rights and Welfare of the Child, art. 4 (2).

³⁸⁴ *Explanatory Report on the European Trafficking Convention*, para. 138.

³⁸⁵ *Ibid.*, para. 142.



identification, of a child victim of trafficking are not made publicly known, through the media or by any other means, except, in exceptional circumstances, in order to facilitate the tracing of family members or otherwise secure the well-being and protection of the child (art. 11 (2)).

More generally, the Convention on the Rights of the Child prohibits arbitrary and unlawful interference with a child's privacy (art. 16). A similar provision is contained in its Optional Protocol on the sale of children (art. 8 (1)(e)). In its general comment No. 4 (2003), the Committee on the Rights of the Child elaborated on this provision.³⁸⁶ It encourages States parties to respect strictly children's right to privacy and confidentiality, including with respect to advice and counselling on health matters. In its general comment No. 6, the Committee reaffirmed a child's right to privacy in the context of separated or unaccompanied children (para. 29). The Committee has recommended that law enforcement officials, social workers and prosecutors should be trained to treat victims of trafficking in a child-sensitive manner that respects their privacy.³⁸⁷ Furthermore, the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime specify that child victims and witnesses should have their privacy respected as a matter of primary importance.³⁸⁸

The issue of privacy is discussed further below in the context of measures to support child victims who are participating in legal proceedings against traffickers.

APPOINTMENT OF A GUARDIAN

The Trafficking Principles and Guidelines do not refer directly to the appointment of a guardian to protect the rights and interests of child victims of trafficking. Nonetheless, this can be considered an important practical means of furthering the objectives of Principle 10 in respect of child victims. While the Trafficking Protocol is also silent on this point, the Legislative Guide to the Protocol encourages States parties to consider:

Appointing, as soon as the child victim is identified, a guardian to accompany the child throughout the entire process until a durable solution in the best interest of the child has been identified and implemented. To the extent possible, the same person should be assigned to the child victim throughout the entire process (para. 65 (a)).

The European Trafficking Convention requires States parties to provide for representation of an identified child victim of trafficking by a legal guardian, organization or authority, *which shall act in the best interests of that child* (art. 10 (4)(a), emphasis added). The Committee on the Rights of the Child, in its general comment No. 6, stated that "the appointment of a competent guardian ... serves as a procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child" (para. 21) and recommended that States appoint a guardian as soon as an unaccompanied or separated child is identified (para. 33). The UNICEF Guidelines provide detailed information on the functions and responsibilities of guardianship in the context of the special needs of child victims of trafficking (section 4). Typical tasks would include ensuring the child's best interests remain the paramount consideration in all actions or decisions taken in respect of the child; ensuring the provision of all necessary assistance, support and protection; being present during any engagement with criminal justice authorities; facilitating referral to appropriate

³⁸⁶ General comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child (para. 11).

³⁸⁷ Committee on the Rights of the Child, concluding observations: Kenya (CRC/C/KEN/CO/2, para. 66); Kyrgyzstan (CRC/C/15/Add.244, para. 61).

³⁸⁸ Economic and Social Council resolution 2005/20, annex, para. 26.

services; and assisting in the identification and implementation of a durable solution.³⁸⁹

CHILD VICTIMS IN CRIMINAL PROCEEDINGS

The Trafficking Principles and Guidelines confirm that all victims, including children, have a legitimate role to play in criminal or civil actions against their exploiters: that they have a right to be heard; a right to information; and a right to be kept informed. The Trafficking Principles and Guidelines also confirm that trafficked persons – children as well as adults – are entitled to use the legal system to ensure that their own interests are safeguarded and their own rights protected.³⁹⁰

It is important, however, to be mindful of the precarious position of child victims in the criminal justice system. These same concerns are particularly acute in the case of children who are asked, or required, to participate in the investigation and prosecution of their exploiters. Child witnesses are especially vulnerable to intimidation and reprisals from traffickers. Their families can also be at serious risk. In addition to safety and protection concerns, being involved in legal proceedings can also cause trauma for the child victim – which may significantly compromise or delay their recovery. In all cases, in determining whether a child victim should be involved in criminal proceedings and, if so, the nature and extent of that involvement, it will be important for the relevant authorities to consider the best interests of each individual child case by case. As noted above, the views of the child should also be taken into account.

Guideline 8.8 asks States and others to consider adopting “measures necessary to protect ... children at all stages of criminal proceedings

against alleged offenders and during procedures for obtaining compensation.” While the Trafficking Protocol does not specifically address this point, the Legislative Guide to the Protocol is even more detailed than Guideline 8.8, requesting States parties to:

Ensur[e] that, during investigation, as well as prosecution and trial hearings where possible, direct contact between the child victim and the suspected offender be avoided. Unless it is against the best interest of the child, the child victim has the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings. During legal proceedings, the right to legal safeguards and effective protection of child witnesses needs to be strongly emphasized. Child victims who agree to testify should be accorded special protection measures to ensure their safety (para. 65 (b)).

Measures to assist child victims of trafficking to participate, safely and meaningfully, in court processes should include:

- Providing the child victim with full information on legal and security issues;
- Granting a “reflection and recovery” period, before the child makes any decisions about her or his involvement in criminal proceedings;
- Prioritizing family reunification and return over criminal justice proceedings when such reunification/return is in the child’s best interests;
- Providing the child witness with legal representation and interpretation services;
- Avoiding direct contact between the child witness and the accused during all stages of a criminal investigation and prosecution; and
- Providing for alternatives to direct testimony – such as video, closed hearings and witness concealment – that protect the child

³⁸⁹ For a further elaboration on the duties of a guardian, see also Committee on the Rights of the Child, general comment No. 6, para. 33.

³⁹⁰ For authorities and references, see discussion in section 9.2, above.



witness's identity, privacy and dignity, while at the same time ensuring that the rights of accused persons to a fair trial are at all times respected.³⁹¹

DURABLE SOLUTIONS: FAMILY TRACING AND REUNIFICATION

Guideline 8.4 addresses the particular issue of family tracing in respect of unaccompanied child victims of trafficking:

In cases where children are not accompanied by relatives or guardians, [States and others are to consider] taking steps to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.

This Guideline is echoed in the Legislative Guide to the Trafficking Protocol, which requests the relevant authorities to "take all necessary steps to trace, identify and locate family members and facilitate the reunion of the child victim with his or her family where that is in the best interest of the child" (para. 66). The European Trafficking Convention similarly requires States parties to that instrument, following the identification of an unaccompanied child as a victim of trafficking, to "make every effort to locate his/her family when this is in the best interests of the child" (art. 10 (4)(c)). Importantly, decisions about family reunification should give due weight to the views of the child in accordance with that child's age and level of maturity.³⁹²

Especially for younger children, family reunification is often an important element in

securing their "best interests". International law, therefore, requires States to deal with family reunification requests "in a positive, humane and expeditious manner".³⁹³ Long delays in family tracing can lead to children being held in shelters or other detention facilities for unacceptable periods of time, in direct violation of their human rights.

DURABLE SOLUTIONS: REPATRIATION OF CHILD VICTIMS OF TRAFFICKING

The issue of repatriation is considered in detail below. The key Principle in this regard is Principle 11 which sets a standard of "[s]afe (and to the extent possible) voluntary return". Principle 11 also notes that trafficked persons should be offered legal alternatives to repatriation in cases where repatriation would pose a serious risk to their safety or that of their families.

While these provisions apply equally to trafficked adults and children, the Trafficking Principles and Guidelines, along with most other relevant instruments, recognize the need for special care in relation to decisions about the repatriation of children who have been trafficked. Article 16 (7) of the European Trafficking Convention, for example, is unequivocal on the point that "[c]hild victims shall not be returned to a State, if there is an indication, following a risk and security assessment, that such return would not be in the best interests of the child".

Guideline 8.5 calls on States and others to ensure that: "adequate care arrangements that respect the rights and dignity of the trafficked child" are established "[i]n situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests". As noted in both the European Trafficking Convention (art. 16 (7)) and the UNICEF Guidelines (sections 8.2 and

³⁹¹ See further UNICEF Guidelines, section 10; Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.

³⁹² Trafficking Principles and Guidelines, Guideline 8.6.

³⁹³ Convention on the Rights of the Child, art. 10 (1).

9.2), a determination to this effect would need to be made on the basis of a comprehensive risk assessment. The purpose of such a risk assessment should be to ensure that no decision is taken which places a child in a situation of foreseeable risk.

In its general comment No. 6 (para. 84), the Committee on the Rights of the Child recommended that the following factors be taken into account in determining whether the repatriation of an unaccompanied or separated child is in that child's best interests:

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

The Legislative Guide to the Trafficking Protocol is very specific on the need for special care in the repatriation of child victims:

In cases where child victims are involved, legislators may also wish to consider not returning those child victims unless doing so is in their best interest and, prior to the return, a suitable caregiver such as a parent, another relative, another adult caregiver, a government agency or a child-care agency in the country of origin has agreed and is able to take responsibility for the child and to provide him

or her with appropriate care and protection. Relevant ... authorities ... should be responsible for establishing whether or not the repatriation of a child victim is safe and should ensure that the process takes place in a dignified manner and is in the best interest of the child... (para. 66). In those cases where the return is voluntary or in the best interest of the child, each State party is encouraged to ensure that the child returns to his or her home country in a speedy and safe manner (para. 67).

The importance of cooperation and collaboration between countries of origin and destination in relation to safe repatriation of child victims of trafficking is noted in the Legislative Guide to the Trafficking Protocol (para. 67) as well as in the UNICEF Guidelines (section 9.2).

DURABLE SOLUTIONS: LOCAL INTEGRATION OR THIRD-COUNTRY RESETTLEMENT

As noted above, Principle 11 identifies the need for legal alternatives to repatriation, where this is required, because of risks to the safety of the victim and/or that child's family. Guideline 8.5 specifically addresses the situation where safe return is not possible or in the best interests of the child. In such cases, States and others are requested to ensure the establishment of "adequate care arrangements that respect the rights and dignity of the trafficked child".³⁹⁴

The UNICEF Guidelines provide important information on the key elements of "long-term care arrangements", highlighting access to health care, psycho-social support, social services and education (section 9.1). They also

³⁹⁴ While the Trafficking Protocol itself does not directly address the situation of children who cannot be safely returned, the Legislative Guide to it notes that: "In situations where the safe return of the child to his or her family and/or country of origin is not possible or where such return would not be in the child's best interest, the social welfare authorities should make adequate ... arrangements to ensure the effective protection of the child and the safeguarding of his or her human rights" (Part 2, para. 67, emphasis added).



identify the critical aspects of ensuring the child victim's safe resettlement in a third country where this is the required option (section 9.3) In its general comment No. 6, the Committee on the Rights of the Child identified local integration, inter-country adoption and third-country resettlement as alternatives to repatriation and outlined the considerations that should be taken into account in those cases (paras. 89-94).

SEE FURTHER:

- Prevention of trafficking in children: part 2.2, section 5.5
- Right to a remedy: part 2.4, section 17.1-17.6
- Victims' right to privacy: part 2.3, section 8.4
- Repatriation of victims: part 2.3, section 11.2
- Victim participation in legal proceedings: part 2.3, section 9.2



PRINCIPLE 11 AND RELATED GUIDELINES: **SAFE AND VOLUNTARY RETURN**³⁹⁵

Safe (and to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.

11.1. PURPOSE AND CONTEXT

In addition to being arrested and detained, trafficked persons are routinely deported from countries of transit and destination. Deportation to the country of origin or to a third country can have serious consequences for victims: they may be subjected to punishment by national authorities for unauthorized departure or other alleged offences; they may face social isolation or stigmatization, and be rejected by their families and communities; they may be subject to violence and intimidation from traffickers – particularly if they have cooperated with criminal justice agencies or owe money that cannot be repaid. Victims of trafficking who are forcibly repatriated, particularly without the benefit of

supported reintegration, are at great risk of being retrafficked.

In some cases, the deporting country may not bother to hide the fact that those being returned have, in fact, been trafficked. In many others, however, it is the incorrect identification of victims that provides a cover for automatic deportation policies and practices. This situation underscores the critical importance of quick, accurate victim identification as a first line of defence for trafficked persons and their rights. The issue of identification is discussed more fully above, in relation to Principle 1 and related guidelines (generally applicable principles) and Principle 10 and related guidelines (the special situation of children).

Principle 11 seeks to protect trafficked persons from forced deportation (as far as possible), and from unsafe repatriation. It is supplemented by several Guidelines, including: Guideline 4.6 (protection from summary return or deportation that jeopardizes the security of the trafficked person); Guideline 4.7 (protection of the right to remain for the duration of legal proceedings); Guideline 6.7 (repatriation and other options); and Guideline 6.8 (supported reintegration). Other Principles and Guidelines, which touch on related matters such as the right to a remedy, and special measures for children, are also

³⁹⁵ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 6.

relevant. Principle 3 and Guideline 1, both of which confirm that measures taken to combat and prevent trafficking must not undermine or otherwise negatively affect human rights, such as the prohibition on sex-based discrimination and rights protected by international refugee law, are also very important in the context of repatriation.

Principle 11 and supporting principles and guidelines are directed primarily at States because it is States that control most aspects of repatriation – although it is recognized that non-governmental organizations play an important role in key aspects of the repatriation process, particularly reintegration. The core standard of safe and preferably voluntary return is to be guaranteed by the State of destination *and* the State of origin. Countries of destination are clearly central to the effective implementation of the standard, as it is in these countries that key decisions are made about when, how and if repatriation is to take place. In addition, as noted above, the quality of the victim identification procedures in place in a country of destination is crucial to ensuring that correct decisions are made about victim repatriation. Countries of origin also have an important role to play, particularly in relation to identification and family tracing, risk assessment, the issuing of the necessary documentation and ensuring safe and successful reintegration. Third countries may also be involved, if resettlement outside the countries of destination and origin is the preferred option.

11.2. KEY ISSUES IN REPATRIATION

The following are key issues in repatriation raised by the Trafficking Principles and Guidelines.

SAFE AND PREFERABLY VOLUNTARY RETURN

Principle 11 articulates a standard of safe and preferably voluntary return. It is

supplemented, on this point, by Guideline 6.7, which reiterates the safe and preferably voluntary return standard, and Guideline 4.6, which requests States to ensure that trafficked persons are protected, by law, from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or that person's family.

The major trafficking treaties confirm and, in some cases, extend these protections. The relevant provisions of the Trafficking Protocol include the following:

- An obligation on countries of destination to conduct return “with due regard for the safety of [the] person and for the status of any [related] legal proceedings” (art. 8 (2));
- An obligation on countries of destination to ensure that such return “shall preferably be voluntary” (art. 8 (2));
- An obligation on countries of origin to accept the return of a trafficked national or resident without undue delay and with due regard for their safety (art. 8 (1));
- An obligation on countries of origin to cooperate in the return of a victim, including through verification of that person's nationality or residence (art. 8 (3)), and issuing of necessary travel documents (art. 8 (4)); and
- An obligation on all States parties “to protect victims of trafficking ... especially women and children, from revictimization” (art. 9 (1)(b)).

The European Trafficking Convention explicitly links return with rights and dignity. Its relevant provisions include:

- An obligation on countries of destination to conduct return “with due regard for the rights, safety and dignity” of the victim and for the status of any related legal proceedings (art. 16 (2));



- An obligation on countries of destination to ensure that such return “shall preferably be voluntary” (art. 16 (2));
- An obligation not to return child victims of trafficking “if there is an indication, following a risk and security assessment, that such return would not be in the best interests of the child” (art. 16 (7));³⁹⁶
- An obligation on countries of origin to facilitate and accept the return of a trafficked national or resident “with due regard for [the] rights, safety and dignity” of the victim and without undue delay (art. 16 (1)); and
- An obligation on countries of origin to cooperate in the return of a victim including through the verification of that person’s nationality or residence (art. 16 (3)), and issuing of necessary travel documents (art. 16 (4)).

The standard of safe and preferably voluntary return and many of the related guarantees set out above are echoed in international and regional policy documents³⁹⁷ as well as by United Nations

human rights treaty bodies³⁹⁸ and other human rights mechanisms.³⁹⁹

The obligation to provide safe and, as far as possible, voluntary return implies that the repatriating State (ideally with the assistance and support of the receiving State) will conduct pre-return risk assessments.⁴⁰⁰ Such assessments should preferably be undertaken on an individual basis and take into account the particular circumstances of each case. The way in which a person was trafficked; the extent to which they have cooperated in the prosecution of their exploiters; whether or not they owe money to traffickers; their age; their gender and their family situation; and the capacity of the country of return to provide effective protection, are all important factors that should contribute to a consideration of whether safe return is possible. Decisions on return should not be

³⁹⁶ A full consideration of the various issues surrounding the repatriation of child victims of trafficking is contained in section 10.4, above.

³⁹⁷ Specifically on voluntary return, see OSCE Action Plan, Section V(7.1); and the Brussels Declaration, para. 14. On other measures to ensure the safety of the victim, allowing the victim to remain in the destination country to protect their safety, or to give due consideration to the status of legal proceedings, see also the Ouagadougou Action Plan, pp. 4, 5, 7; ECOWAS Declaration on Trafficking in Persons, para. 6; ECOWAS Initial Plan of Action, pp. 3-4, paras. 7, 8, 9; EU Plan on Best Practices, para. 5(iii), and Annex, 6, Objective 2; OSCE Action Plan, Sections V(5.1)(5.2)(7.2) and (7.3); Experts Group on Trafficking in Human Beings of the European Commission, Opinion of 11 October 2005 in connection with the conference “Tackling Human Trafficking: Policy and best practices in Europe” and its related documents, 2; Experts Group on Trafficking in Human Beings of the European Commission, Opinion of 18 May 2004 on reflection period and residence permit for victims of trafficking in human beings, paras. 3, 5; Organization of American States, Hemispheric Cooperation Efforts to Combat Trafficking in Persons: Second Meeting of National Authorities on Trafficking in Persons, adopted at the fourth plenary session, 5 June 2007, AG/RES. 2348 (XXXVII O/07),

para. 3(b); OAS Recommendations on Trafficking in Persons, Sections V(3)(4)(5); Cambodia-Thailand MOU, art. 16; Thailand-Lao PDR MOU, arts. 14-15.

³⁹⁸ The Human Rights Committee has repeatedly affirmed that persons should not be returned to places where they face a real risk of torture or cruel, inhuman and degrading treatment: Georgia (CCPR/C/GEO/CO/3, para. 7); Libyan Arab Jamahiriya (CCPR/C/LBY/CO/4, para. 18); Sudan (CCPR/C/SDN/CO/3, para. 24); Ukraine (CCPR/C/UKR/CO/6, para. 9); Canada (CCPR/C/CAN/CO/5, para. 15); Thailand (CCPR/CO/84/THA, para. 17); concluding observations: Uzbekistan (CCPR/CO/83/UZB, para. 12). In 1996, commenting on Germany’s treatment of refugees from Bosnia and Herzegovina, the Committee welcomed Germany’s assurance that they would be returned primarily through voluntary repatriation (CCPR/C/79/Add.73, para. 10).

³⁹⁹ The Commission on Human Rights, in its resolution 2004/49, called upon Governments to “safeguard [victims’] dignified return to the country of origin” (para. 4). In his 2008 report to the Human Rights Council, the Special Rapporteur on the human rights of migrants called on States to make “all efforts ... to provide assistance to irregular migrants in their safe return” (A/HRC/7/12, para. 71).

⁴⁰⁰ In the case of child victims, risk assessment is mandated by the European Trafficking Convention, art. 16 (7) and is also referred to in the UNICEF Guidelines, section 8.2.

based on unverifiable or highly generalized situation reports produced by Governments, intergovernmental bodies or non-governmental organizations.

The importance of a pre-repatriation risk assessment has been particularly highlighted in the case of children. In its general comment No. 6, the Committee on the Rights of the Child specified that repatriation should not occur where there is a “reasonable risk” that the return would result in the violation of fundamental human rights of the child. The Committee recommended that the decision to return should take into account the “safety, security and other conditions, including socio-economic conditions, awaiting the child upon return” (para. 84).

ENTITLEMENT TO RETURN

All victims of trafficking – children as well as adults – who are not residents of the country in which they find themselves, are entitled to return to their country of origin.⁴⁰¹ This right places an obligation on the part of the country of origin to receive its returning nationals without undue or unreasonable delay.⁴⁰² In the case of trafficking, for the State of origin this is likely to involve conducting checks in order to verify whether the victim is a national or does indeed hold a right of permanent residence⁴⁰³ and, if so, ensuring

that the person is in possession of the papers required to travel to and re-enter its territory.⁴⁰⁴

The right to return also implies an obligation on the country of destination to permit those victims who wish to return to do so – again without undue or unreasonable delay. The detention of trafficked persons in shelters, prisons or immigration detention facilities is one way in which the right to return can be interfered with.⁴⁰⁵ Compelling victims to remain for the duration of lengthy criminal proceedings can also constitute an interference with the right of return. In individual cases, the State preventing the return must be able to show that its actions are in accordance with law and are not arbitrary or unreasonable.⁴⁰⁶ In relation to child victims, the obligation on States to consider the best interests of the child (discussed in section 10.3, above) will also be a major consideration when it comes to upholding this important right.

DUE PROCESS AND THE PRINCIPLE OF NON-REFOULEMENT

The return of trafficked persons cannot operate to violate their established rights (see further the discussion under Principle 3 and related guidelines). One important aspect of this protection relates to the right to due process. Repatriation that is not voluntary effectively amounts to expulsion from a State. International human rights law rejects arbitrary expulsion and is clear on the point that any alien lawfully within the country can only be expelled in accordance

⁴⁰¹ See Universal Declaration of Human Rights, art. 13 (2): “Everyone has the right to ... return to his country”; International Covenant on Civil and Political Rights, art. 12 (4): “No one shall be arbitrarily deprived of the right to enter his own country”. Similar provisions can be found in the major regional human rights instruments: 4th Protocol to the ECHR, art. 3 (2); American Convention on Human Rights, art. 22 (5); African Charter on Human and Peoples’ Rights, art. 12 (2).

⁴⁰² Trafficking Protocol, art. 8 (3); European Trafficking Convention, art. 16 (1).

⁴⁰³ Note that under article 8 (1) of the Trafficking Protocol, return must be facilitated and accepted in relation to all victims who are nationals or who had the right of permanent residence at the time of entry into the receiving country. This means that a trafficked person who had the

right of permanent residence in the country of origin, but subsequently lost it, could still be repatriated under this provision.

⁴⁰⁴ Trafficking Protocol, art. 8 (4); European Trafficking Convention, art. 16 (3)-(4).

⁴⁰⁵ On the issue of detention, see further part 2.3, section 7.4, above.

⁴⁰⁶ See the discussion of this standard in the context of victim detention in part 2.3, section 7.4, above.



with the law.⁴⁰⁷ An alien lawfully present is entitled to present reasons why she or he should not be expelled and these reasons must be reviewed by the competent authority.⁴⁰⁸ For trafficked persons who are not lawfully within the country, substantive and procedural guarantees against expulsion are much less clear and States generally retain a considerable degree of discretion in deciding whether and when to remove unlawful immigrants.⁴⁰⁹ However, one of the most important protections, potentially applicable to all non-citizens, relates to the principle of non-refoulement. Under this principle, States are prevented from returning an individual to a country where there is a serious risk that she or he will be subject to persecution

⁴⁰⁷ International Covenant on Civil and Political Rights, art. 13. For a comprehensive overview of the relevant law, see the recent work of the International Law Commission on the expulsion of aliens, key reports available from http://untreaty.un.org/ilc/guide/9_12.htm.

⁴⁰⁸ International Covenant on Civil and Political Rights, art. 13.

⁴⁰⁹ States parties to the Migrant Workers Convention, for example, may be held to a higher standard with regard to the expulsion of non-nationals: Migrant Workers Convention, arts. 22 and 67. The Inter-American Court of Human Rights has recognized that “the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights” (*Undocumented Migrants Case*, para. 119). Thus States may apply their immigration laws and require the exit of undocumented migrants, including trafficked persons. However any such process “must always be applied with strict regard for the guarantees of due process and respect for human dignity”: *Ibid.* The African Commission on Human and Peoples’ Rights has adopted a similar approach in saying that it “does not wish to call into question ... the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts”: *Union Inter Africaine des Droits de l’Homme, Fédération Internationale des Ligues des Droits de l’Homme and Others v. Angola*, African Commission on Human and Peoples’ Rights, Comm. No. 159/96 (1997), para. 20.

or abuse. The principle of non-refoulement, introduced above in the context of Principle 3 and related guidelines, is well established in international law, and the importance of protecting this principle in the context of measures to deal with trafficking is also widely accepted. Human rights treaty bodies⁴¹⁰ and regional human rights courts⁴¹¹ have confirmed that return that puts a person at risk of torture or cruel, inhuman or degrading treatment or punishment is contrary to international law. The prohibition on refoulement has been extended by regional courts and human rights bodies to certain situations where the fear of persecution emanates from non-State actors and the relevant State is unable to provide appropriate or effective protection.⁴¹²

⁴¹⁰ Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture and cruel treatment or punishment, para. 9. See also Human Rights Committee, concluding observations: Libyan Arab Jamahiriya (CCPR/C/LBY/CO/4, para. 18); Georgia (CCPR/C/GEO/CO/3, para. 7); Sudan (CCPR/C/SDN/CO/3, para. 24); Canada (CCPR/C/CAN/CO/5, para. 15); Ukraine (CCPR/C/UKR/CO/6, para. 9); Thailand (CCPR/CO/84/THA, para. 17); Uzbekistan (CCPR/CO/83/UZB, para. 12).

⁴¹¹ See, for example, *Soering v. United Kingdom* (14038/88) [1989] ECHR 14 (7 July 1989) (extradition risking torture, inhuman or degrading treatment or punishment); *Cruz Varas and others v. Sweden* (15576/89) [1991] ECHR 26 (20 March 1991) (extending these principals to deportation); *Saadi v. Italy* (37201/06) [2008] ECHR 179 (28 February 2008) (requirement that real risk of ill-treatment is not a mere possibility; risk of ill-treatment not to be weighed up against reason for expulsion; risk to be assessed on facts known/ought to have been known at time of expulsion). See also *D v. United Kingdom* (30240/96) [1997] ECHR 25 (2 May 1997) where the Court found the violation was through potential omission rather than positive action by the receiving State as the individual would, if returned, no longer be able to receive life-saving medical treatment.

⁴¹² See, for example, *Salah Seekh v. Netherlands* (1948/04) [2007] ECHR 36 (11 January 2007), para. 137; *HLR v. France* (24573/94) [1997] ECHR 23 (29 April 1997), para. 40. In *HLR v. France*, the applicant challenged his deportation to Colombia because he feared

(Continued on next page)

RIGHT TO REMAIN DURING LEGAL PROCEEDINGS

Principle 9 sets out the right of trafficked persons to remain in the country during legal proceedings against traffickers. It is supplemented by Guideline 4.7, which requests States to consider “[p]roviding legislative protection for trafficked persons who voluntarily agree to cooperate with law enforcement authorities, including protection of their right to remain lawfully within the country of destination for the duration of any legal proceedings”. The right to remain during legal proceedings is confirmed in treaty law. The Trafficking Protocol places an obligation on countries of destination to conduct return “with due regard for ... the status of any related legal proceedings” (art. 8 (2)).⁴¹³ The European Trafficking Convention obliges States parties that are countries of destination to conduct return “with due regard for ... the status of any related legal proceedings” (art. 16 (2)).

States should, therefore, be careful to ensure that the return of trafficked persons does not jeopardize the initiation and/or successful completion of any legal proceedings involving or implicating the victim. Such proceedings

(Footnote 412 continued)

the threats allegedly presented to him from the actions by drug traffickers there. The Court held that “where the danger emanates from persons ... who are not public officials” there was still a potential breach of article 3 where the risk is real and the State authorities cannot provide appropriate protection. The Committee against Torture has also concluded that in some exceptional circumstances there should be no return where the fear of torture on return is through the actions of non-State actors. See, for example, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, para. 6.5 (where non-State actors are exercising de facto governmental powers).

⁴¹³ As noted in part 2.3, section 9.2, above, this provision should be read in light of the broader obligation to ensure victims are provided with an opportunity to participate in legal proceedings as set out in the Organized Crime Convention (art. 25 (3)) as well as the specific obligation in the Protocol to provide victims with an opportunity to present their views (art. 6 (2)).

would (as noted immediately below and, in greater detail, in the context of Principle 17 and related guidelines) include those related to compensation. At the very least, there should be a deferral of deportation, accompanied by a temporary regularization of legal status, until the victim has been able to participate in the relevant legal proceedings.

ACCESS TO REMEDIES

All trafficked persons have an internationally recognized legal right to access fair and adequate remedies. The presence of the trafficked person in the country in which remedies are being sought is often a practical – and sometimes a legal – requirement if that person is to secure remedial action. In some countries, civil action to recover damages cannot commence until criminal proceedings have been concluded. Repatriation that does not take account of the victim’s right of access to remedies will inevitably obstruct the free and effective exercise of that right.⁴¹⁴ Guideline 9.3 notes the importance of arrangements that “enable trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings”.

The issue of remedies is considered in detail under the discussion of Principle 17 and related guidelines.

ALTERNATIVES TO REPATRIATION

In some cases, repatriation of the victim to her or his country of origin, even in the longer term, will not be the preferred course of action. This may be because of ongoing

⁴¹⁴ The *Explanatory Report on the European Trafficking Convention* notes that “it is ... essential that victims who are illegally present in the country be informed of their rights as regards the possibility of obtaining a residence permit under article 14 of the Convention, as it would be very difficult for them to obtain compensation if they were unable to remain in the country where the proceedings take place” (para. 192).



safety and security concerns. It may also be because of humanitarian considerations that relate, for example, to the victim's health or the links and relationships that she or he has established in the destination country. The emphasis in the Trafficking Principles and Guidelines is on ensuring the victim's safety. Principle 11 specifically identifies the need for "legal alternatives to repatriation" in situations where return would pose unacceptable risks to the victim and/or their family. Guideline 6.7 requests States to explore alternatives to repatriation, such as residency in the country of destination or resettlement in a third country, where circumstances require.

The Trafficking Protocol does not specifically address alternatives to repatriation except through indirect references in its parent instrument (art. 24) to certain forms of witness protection including relocation. The European Trafficking Convention takes a different approach. By recognizing the possibility of temporary visas and even permanent residency, this treaty does not automatically assume that repatriation is the immediate or even ultimate outcome of a trafficking event. States parties are encouraged to provide victims with residence permits where their stay is necessary owing to their personal situation or "for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings" (art. 14 (1)). The UNICEF Guidelines identify both local and third-country integration as appropriate options for a durable solution in cases where return to the country of origin is not in the child's best interests (section 9). The Committee on the Rights of the Child, in its general comment No. 6, has also affirmed that repatriation is not an option "if it would lead to a 'reasonable risk' that such return would result in the violation of fundamental human rights of the child" (para. 84). It too recommends local integration, inter-country adoption or resettlement in a third country as alternatives (paras. 89-94).

11.3. THE REINTEGRATION OF VICTIMS

Supported reintegration is a critical aspect of safe repatriation. Victims of trafficking who are provided with reintegration assistance are much less likely to be re-trafficked. They may also, depending on the nature and quality of the support provided, be less vulnerable to intimidation, retaliation, social isolation and stigmatization. Supported reintegration is a right owed to trafficked persons by virtue of their status as victims of crime and victims of human rights violations. It must be accompanied by respect for the repatriated individuals' rights, including their right to privacy and their right not to be discriminated against.

The Trafficking Principles and Guidelines endorse supported repatriation when such repatriation is safe and preferably voluntary and, in the case of children, is in that child's best interests. Guideline 6.8 requests States and others to ensure, in partnership with non-governmental organizations, that:

persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social reintegration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

This Guideline finds ample support in regional treaty law. The European Trafficking Convention requires States parties to:

adopt such legislative or other measures as may be necessary to establish repatriation programmes... [that] aim at avoiding re-victimisation. Each Party should make its best effort to favour the reintegration of victims into the society of the State of return, including

reintegration into the education system and the labour market, in particular through the acquisition and improvement of their professional skills. With regard to children, these programmes should include enjoyment of the right to education and measures to secure adequate care or receipt by the family or appropriate care structures (art. 16 (5)).

The Convention further requires States parties to adopt the measures necessary to ensure the availability of information on how to contact the structures that can assist victims in the country to which they are returned (art. 16 (6)). The SAARC Convention identifies a range of “rehabilitation” measures such as legal advice, counselling, job training and health care (art. IX (3)). The need for repatriation that prevents re-victimization is also emphasized in key international and regional policy instruments.⁴¹⁵

⁴¹⁵ UNICEF Guidelines, section 9.2.1; COMMIT MOU, para. 21. The Beijing Declaration and Platform for Action at para. 124 (d) requires States to develop strategies that ensure the re-victimization of victims of violence against women does not occur through gender-insensitive laws or judicial or other practices. The Beijing +5 Outcome Document, para. 97(c), directed at Governments and regional and international organizations, proposes measures to facilitate the return of trafficked persons to their State of origin and to support their reintegration there. The General Assembly has urged States “to support comprehensive, practical approaches by the international community to assist women and children victims of transnational trafficking to return home and be reintegrated into their home societies” in its resolutions 51/66 (para. 8) and 50/167 (para. 5). See also the Ouagadougou Action Plan, pp. 4, 5; ECOWAS Declaration on Trafficking in Persons, paras. 6, 8; EU Plan on Best Practices, Annex 7, Objective 1; Experts Group on Trafficking in Human Beings of the European Commission, Opinion of 11 October 2005 in connection with the conference “Tackling Human Trafficking: Policy and best practices in Europe” and its related documents, 2; Experts Group on Trafficking in Human Beings of the European Commission, Opinion of 18 May 2004 on reflection period and residence permit

Successful reintegration requires cooperation between the repatriating and receiving countries. Guideline 11.11 requests States to exchange information and experience relating to the implementation of assistance, return and reintegration programmes with a view to maximizing their impact and effectiveness. Guideline 11.12 requests States to encourage and facilitate cooperation between non-governmental organizations and other civil society bodies in countries of origin, transit and destination with a particular focus on ensuring support and assistance for trafficked persons who are repatriated. The importance of cooperation between countries in securing successful and supported repatriation of victims of trafficking is recognized in relevant regional treaties⁴¹⁶ as well as in key international and regional policy documents.⁴¹⁷

SEE FURTHER:

- Identification of victims: part 2.1, section 1.5, and of child victims: part 2.3, section 10.2
- Victims’ participation in legal proceedings: part 2.3, section 9.2
- Right to a remedy: part 2.4, sections 17.1-17.6
- Best interests of the child: part 2.3, section 10.3
- Non-refoulement: part 2.1, section 3.4

for victims of trafficking in human beings, para. 3; OSCE Action Plan, Sections III(8.1), V(4.4); Brussels Declaration, para. 15; OAS Recommendations on Trafficking in Persons, Section IV(1); Thailand-Lao PDR MOU, arts. 16-17; Cambodia-Thailand MOU, arts. 18-19.

⁴¹⁶ European Trafficking Convention, art. 16 (6); SAARC Convention, preamble, art. II.

⁴¹⁷ See, for example, COMMIT MOU, paras. 20-21; Ouagadougou Action Plan; EU Plan on Best Practices, para. 5 (i), Annex, 6, Objective 1; OSCE Action Plan, Section VI(3); Brussels Declaration, paras. 4, 13, 15.

Part 2.4

CRIMINALIZATION, PUNISHMENT AND REDRESS

INTRODUCTION

The final part of the Trafficking Principles and Guidelines deals with aspects of the criminal justice response to trafficking. The detailed provisions of this section confirm the critical importance of an effective criminal justice response as one element in a broader, rights-based approach to this phenomenon. A criminal justice response to trafficking that prioritizes rights and seeks both to end impunity for traffickers and to secure justice for victims deserves to take its rightful place as a critical component of any lasting solution to trafficking.

Through legal and policy developments that will be detailed in the following section, the international community has confirmed a number of important “markers” of an effective criminal justice response to trafficking. It is agreed, for example, that trafficking in all its forms should be criminalized; that traffickers should be investigated, prosecuted and punished; that their assets should be confiscated; and, in cases of trafficking across national borders, that international legal and operational collaboration should aim to ensure that there are no safe havens for traffickers. The Trafficking Principles and Guidelines add an important human rights

dimension to this by emphasizing, for example, the rights of suspects and the requirements of a fair trial, and the need to ensure that victims of trafficking can use the legal system to secure remedies for the harm that has been caused to them.

Principle 12 and related guidelines deal with the obligation of criminalization. As noted in this Commentary, a strong national legal framework around trafficking, based on the relevant provisions of international law, is the foundation and scaffolding of an adequate and appropriate national response to trafficking. The way in which States discharge their criminalization obligation will have important consequences for the impact and effectiveness of their overall response. For example, Principle 12 and related guidelines call on States to go beyond a criminalization of trafficking to include “related crimes” such as debt bondage, forced labour, child labour and forced marriage.

In its consideration of Principle 13 and related guidelines, the Commentary addresses the requirement that States give effect to their criminal laws through “effective investigation, prosecution, and adjudication”. It builds on the previous discussion of State responsibility and due diligence (under Principles 2 and 6

and related guidelines) by analysing the due diligence standard in this context. It then goes on to consider a number of specific issues in the investigation, prosecution and adjudication of trafficking-related cases such as training and organization, the rights of suspects, and the issues of equality, non-discrimination and gender.

Principle 14 and related guidelines acknowledge that the crime of trafficking is often transnational in both commission and effect. It is, therefore, essential to ensure that the international mobility of offenders does not enable them to evade prosecution by taking refuge in other countries, and that States are able to cooperate to ensure that the evidence and information necessary for successful prosecution can be moved from one country to another. Here the Commentary considers the law, policy and practice of extradition, mutual legal assistance and informal operational cooperation as tools of international cooperation to end impunity for traffickers and secure justice for victims.

The issue of sanctions for trafficking is taken up in the consideration of Principle 15 and related guidelines. This Commentary affirms that the applicable legal standard is “effective and proportionate” and, in analysing the content of this standard, notes the danger of sanctions that are out of proportion to the harm caused, or

overly harsh or rigid. The notion of aggravated offences is also considered in this context.

Trafficking is a high-profit crime and tracing, seizure and confiscation of assets is becoming an increasingly important part of an effective criminal justice response. In its discussion of Principle 16 and related guidelines, the Commentary considers the obligation to seize and confiscate assets and the need for international cooperation in this regard. This section also considers, in detail, the legal and policy implications of using confiscated assets to support victims of trafficking.

As victims of crimes and victims of human rights violations, trafficked persons have a legal right to access effective remedies. States have a corresponding obligation to ensure such access. Principle 17 and related guidelines affirm these rights and obligations and provide important guidance on both content and implementation. This issue is considered in detail, focusing on the general right to a remedy in international law; the right to a remedy in the context of violence against women; and the right to a remedy in the specific context of trafficking. The standard of “adequate and appropriate” is then considered, along with the other factors, such as access to information and support, that are critical to enabling victims to secure their right to a remedy.



PRINCIPLE 12 AND RELATED GUIDELINES: CRIMINALIZATION OF TRAFFICKING⁴¹⁸

States shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts and related conduct.

12.1. PURPOSE AND CONTEXT

Trafficking is a crime as well as a violation of human rights. The criminalization of trafficking is an important step forward in ending impunity for traffickers. It is also an essential component of a comprehensive national and international response.⁴¹⁹ States that fail to criminalize trafficking fully are failing in their obligation to protect victims of trafficking and to prevent future

trafficking. They are also failing to provide the necessary structures within which State agencies can investigate, prosecute and adjudicate cases of trafficking in persons to the required standard of due diligence.⁴²⁰

Principle 12 requires States to criminalize trafficking, its component acts and related offences. It is drawn directly from the criminalization provision of the Trafficking Protocol (art. 5), which has been described as “a central and mandatory obligation of all States parties to [that instrument]”.⁴²¹ The European Trafficking Convention contains a similar provision (art. 18). The SAARC Convention also requires the criminalization of trafficking and its related offences as defined in that instrument (art. III).⁴²² A requirement to criminalize trafficking in women can be inferred from the Convention on the Elimination of All Forms of Discrimination

⁴¹⁸ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 7.

⁴¹⁹ The United Nations has noted that the international requirement to criminalize trafficking, introduced into international law through the Trafficking Protocol, “was intended as an element of a global counterstrategy that would also include the provision of support and assistance for victims and that would integrate the fight against trafficking into the broader efforts against transnational organized crime” (Legislative Guide to the Trafficking Protocol, para. 35). The *Explanatory Report on the European Trafficking Convention* further notes the need to harmonize national laws as a way of “avoiding a criminal preference for committing offences in a Party which previously had less strict rules” (para. 216).

⁴²⁰ See further the discussion of Principles 2, 6 and 13 and related guidelines.

⁴²¹ *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, para. 36.

⁴²² Note that the scope of this provision is narrowed by the fact that the Convention applies only to trafficking in children and women for the purposes of prostitution.

against Women⁴²³ and an equivalent requirement in respect of children can be inferred from the Convention on the Rights of the Child.⁴²⁴ The Optional Protocol on the sale of children requires criminalization of a number of offences that are directly associated with trafficking (art. 3).

International⁴²⁵ and regional⁴²⁶ policy instruments confirm the importance of the obligation to criminalize trafficking. The international human rights treaty bodies and United Nations special procedures have also identified criminalization as both an obligation and a central component of an effective national response to trafficking in persons.⁴²⁷

⁴²³ Convention on the Elimination of All Forms of Discrimination against Women, article 6, requires States to “take all appropriate measures, including legislation, to suppress all forms of traffic in women”. Article 2 spells out States’ obligation to use legislative and other measures to achieve Convention rights.

⁴²⁴ Its article 35 requires States to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” Articles 34 and 36 contain more general provisions requiring States to protect children from, respectively, sexual exploitation and all other forms of exploitation.

⁴²⁵ Human Rights Council resolution 7/29, para. 36 (a); General Assembly resolution 61/144, para. 7; Commission on Human Rights resolution 2005/44, para. 32 (a); General Assembly resolution 59/166, para. 8; Commission on Human Rights resolution 2004/45, para. 10; General Assembly resolution 58/137, para. 4 (a).

⁴²⁶ EU Plan on Best Practices, para. 3 (iii); OSCE Action Plan, Recommendation III (1); Brussels Declaration, para. 16; ECOWAS Initial Plan of Action, p. 2, para. 4; OAS Recommendations on Trafficking in Persons, Section I(3); COMMIT MOU, para. 7.

⁴²⁷ Human Rights Committee, concluding observations: Barbados (CCPR/C/BRB/CO/3, para. 8); Kenya (CCPR/C/83/KEN, para. 25); Russian Federation (CCPR/C/79/RUS, para. 10); Committee on the Rights of the Child, concluding observations: Antigua and Barbuda (CRC/C/15/Add.247, para. 67); Committee against Torture, concluding observations: South Africa (CAT/C/ZAF/CO/1, para. 24); Committee on the Elimination of Discrimination against Women, concluding observations: Lebanon (CEDAW/C/LBN/CO/3, para. 29); E/CN.4/2006/62/Add.1, para. 90.

The key elements of the obligation to criminalize trafficking are identified and discussed below. The issue of criminal jurisdiction, which intersects with obligations related to extradition and international cooperation (discussed under Principle 14 and related guidelines below), is also considered.

12.2. KEY ELEMENTS OF THE CRIMINALIZATION OBLIGATION

There are several key elements in the obligation to criminalize trafficking.

CRIMINALIZATION INDEPENDENT OF ANY TRANSNATIONAL OFFENCE OR THE INVOLVEMENT OF ORGANIZED CRIMINAL GROUP

The central and mandatory obligation of all States parties to the Protocol is to criminalize trafficking in their domestic legal systems.⁴²⁸ The Protocol’s parent instrument, the Organized Crime Convention, requires the offence of trafficking to be established in the domestic law of every State party *independently of its transnational nature* or the involvement of an organized criminal group.⁴²⁹

APPLYING THE INTERNATIONAL DEFINITION

The obligation set out in Principle 12 requires States to criminalize trafficking as it has been

⁴²⁸ *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, paras. 269-270.

⁴²⁹ Organized Crime Convention, art. 34 (2). See also *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, paras. 18-19. See also “Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto” (A/55/383/Add.1, para. 59). Further on this aspect of the criminalization obligation, see Gallagher, “Human rights and human trafficking: quagmire or firm ground?”, pp. 812-814.



defined by international law. The Legislative Guide to the Trafficking Protocol (the legal instrument that sets out the internationally agreed definition) notes that the definition was intended to contribute to a standardization of the concept which in turn would “form the basis of domestic criminal offences that would be similar enough to support efficient international cooperation in investigating and prosecuting cases” (para. 35). Relevant aspects of the international legal definition include the following:

- Trafficking takes place for a wide range of purposes not limited to, for example, sexual exploitation;
- Women, men and children are trafficked;
- The elements of the crime of trafficking in children are different from those of the crime of trafficking in adults;
- An individual does not have to have been exploited for there to be trafficking in human beings. It is sufficient that they have been subject to one of the defining acts, by (in the case of adults) one of the defining means, for the purpose of exploitation;⁴³⁰
- The consent of the victim does not alter the offender’s criminal liability; and
- The offence must have been committed intentionally for there to be criminal liability.

Guidelines 3.1 and 4.1 emphasize the importance of States applying the internationally agreed definition of trafficking.

COMPLICITY AND LIABILITY IN TRAFFICKING OFFENCES

Most legal systems recognize only individual criminal responsibility for those who commit such crimes. International law is clear that liability must extend to legal persons as well as individuals. Organizing, directing or being an accomplice in the commission of trafficking offences, or

attempting to commit such offences, should also be criminalized.⁴³¹

The nature of the trafficking phenomenon makes it especially important for liability for trafficking offences to extend to both natural and legal persons. Legal persons, in this context, might include commercial companies and corporations operating in a range of different sectors such as tourism, entertainment, hospitality, labour recruitment, adoption and the provision of medical services.⁴³² Carriers, such as airlines, are another important group of legal persons whose potential complicity and liability is specifically identified in the Trafficking Protocol (arts. 11 (3) and 11 (4)). Guideline 4.2 requests States to consider enacting legislation to provide for the administrative, civil and criminal liability of legal persons for trafficking offences *in addition* to the liability of natural persons. This requirement is confirmed by relevant international treaty law.⁴³³

CRIMINALIZING RELATED CONDUCT

Principle 12 requires the criminalization of component acts⁴³⁴ and related conduct

⁴³¹ See Organized Crime Convention, art. 5; Trafficking Protocol, art. 5 (2); European Trafficking Convention, art. 21; SAARC Convention, art. III.

⁴³² Note that, under the European Trafficking Convention, States parties are required to ensure that liability can attach to legal persons when an offence under the Convention is committed for that legal person’s benefit by a “leading person” in the legal entity who is acting under its authority, or by an employee or agent acting within their powers (art. 22). The Explanatory Report on the Convention notes that liability can attach if it can be shown that there was a failure to take appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity’s behalf, para. 249.

⁴³³ Organized Crime Convention, art. 10; European Trafficking Convention, art. 22.

⁴³⁴ As used in the *Trafficking Principles and Guidelines*, the terms “component acts” and “component offences” have the same meaning as “trafficking” as defined in article 3 of the Trafficking Protocol (*Trafficking Principles and Guidelines*, note 2).

⁴³⁰ *Ibid.*, para. 33; *Explanatory Report on the European Trafficking Convention*, para. 225.

or offences. The Trafficking Principles and Guidelines identify related conduct or offences as including those “purposes” of trafficking set out in the definition contained in the Trafficking Protocol: “exploitation of prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude” (note 3).⁴³⁵ Guideline 4.1 states that: “[a]ll practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution should also be criminalized.” The concept of related offences would extend to rape, physical and sexual assault, unlawful detention and other acts that are a common feature of trafficking situations.

In advocating the criminalization of related conduct, Principle 12 and Guideline 4.1 go beyond the strict requirements of the internationally accepted obligation to criminalize trafficking.⁴³⁶ This can be explained by, and is in keeping with, the explicit human rights focus of the Trafficking Principles and Guidelines. Essentially, Principle 12 calls for the criminalization of the violations of human rights law most directly associated with trafficking. The definitive list would include not just the cited “sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude” but also debt bondage, the worst forms of child labour and forced marriage. An expanded list could also include violence against women, violations of the rights of migrant

workers and violations of economic, social and cultural rights. At least in relation to the former group, which consists of rights recognized under customary law and therefore applicable to all States in all situations, a failure to criminalize (and, subsequently, to investigate and prosecute) would represent a failure of the State to implement the corresponding right effectively.

There is also a practical aspect to the criminalization of a broader range of offences as part of a comprehensive national strategy to deal with trafficking. From a criminal justice perspective, the definition of trafficking is complex and the separate elements of the crime are often difficult to prove. Recent studies have indicated that it may be easier to investigate and prosecute more established and better understood offences such as debt bondage, sexual assault or forced labour, rather than the complex and resource-intensive crime of trafficking.⁴³⁷ This finding is confirmed by the major intergovernmental organizations working in this field – all of which encourage States to use related offences to secure convictions against traffickers.⁴³⁸ States and others must, of course, remain vigilant to ensure that the use of alternative offences strengthens rather than detracts from the overall effectiveness of the criminal justice response, including its ability to deliver justice to victims.

The term “related conduct” is sometimes also used to refer to actions that facilitate the commission of a trafficking offence, such as the production of fraudulent travel documents for the purpose of allowing trafficking in persons. International treaty law generally requires the criminalization of such “related conduct”.⁴³⁹

⁴³⁵ The lack of reference to “removal of organs” in this list is probably without significance given the open-ended nature of the list and the specific reference to article 3 (a) of the Trafficking Protocol (which does contain such a reference).

⁴³⁶ The requirement to criminalize related offences is not supported by either the Trafficking Protocol or the European Trafficking Convention. Their respective Commentaries are explicit on the point that the criminalization obligation relates to the constitutive acts taken together and not to the individual elements (Legislative Guide to the Trafficking Protocol, para. 33; *Explanatory Report on the European Trafficking Convention*, para. 224).

⁴³⁷ Gallagher and Holmes, loc. cit.

⁴³⁸ Ibid.

⁴³⁹ See, for example, European Trafficking Convention, art. 20.



USING RELATED OFFENCES TO PROSECUTE TRAFFICKING CASES

States may use related offences (such as rape, sexual assault, physical assault, debt bondage, slavery, even money laundering and corruption laws) to secure convictions against traffickers. This approach can be particularly useful in situations and in countries where:

- a distinct criminal offence of trafficking does not yet exist;
- the penalties for trafficking do not sufficiently reflect the nature of the crime; or
- the available evidence in the particular case is not sufficient to support a prosecution for trafficking but may be sufficient to prosecute for such related offences.

Prosecuting for related offences rather than for trafficking may be appealing in the short term, but has a number of potentially significant long-term consequences that should be taken into consideration. For example, a trafficking charge may enable victims to secure access to support services, protection and assistance that would not otherwise be available. As noted previously, these support services can include the possibility of a reflection period and temporary, or even permanent, residence status in the destination country.

CRIMINALIZATION OF THE USE OF THE SERVICES OF A VICTIM OF TRAFFICKING

Do the Trafficking Principles and Guidelines require States to criminalize those who use or otherwise benefit from the services of victims of trafficking? For example, should an individual (or company) purchasing goods produced through trafficked labour be held criminally responsible? Should the client of a person trafficked into prostitution be held criminally responsible? Should the owner of a business that uses trafficked workers be held criminally responsible? Does it make a difference whether or not the individual had or should have had knowledge of the trafficking?

This issue has already been addressed in the context of a discussion on strategies to reduce demand (Principle 4 and related guidelines), and the relevant points will therefore only be summarised. Neither the Trafficking Principles and Guidelines nor the Trafficking Protocol pronounces directly on whether the use of the services of victims of trafficking should be criminalized. The European Trafficking Convention requires States parties to consider criminalizing the knowing use of the services of a victim of trafficking (art. 19).⁴⁴⁰ The Explanatory Report on the Convention emphasizes its narrow application – to be liable for punishment under this provision, the user must be aware that the person is a trafficking victim (para. 234).

Certainly, there is growing acknowledgement that the end “users” of the services of victims of trafficking are a critical part of the problem and should be held accountable. Should this view become more widely accepted, it may be possible to sustain an argument to the effect that failure to criminalize one essential step in the trafficking chain equates with a failure to discharge fully the broader obligation of criminalization.

12.3. THE EXERCISE OF CRIMINAL JURISDICTION

The rules relating to the exercise of criminal jurisdiction (which form part of customary international law) are an important aspect of the criminalization obligation. These rules identify the circumstances under which a State is required to assert its criminal justice authority

⁴⁴⁰ Note that the SAARC Convention, which was concluded several years before the European Trafficking Convention, indirectly touches on the liability of end users by requiring States parties to provide for the punishment of any person “who keeps, maintains or manages or knowingly finances or takes part in the financing of a place used for the purpose of trafficking [for prostitution] and knowingly lets or rents a building or other place or any part thereof for the purpose of trafficking [for prostitution] (art. III (2)).

over a particular situation. They are more complicated for trafficking than for many other crimes because of the fact that trafficking often involves the commission of multiple offences in two or more countries. The Trafficking Principles and Guidelines do not make direct reference to issues of criminal jurisdiction. Nevertheless, this is clearly an important aspect of their broader focus on promoting the development of laws, structures and procedures that contribute to ending impunity for traffickers and securing justice for victims.

The international legal rules on jurisdiction in trafficking situations are set out in the major international and regional treaties. Their objective is to reduce or eliminate jurisdictional safe havens for traffickers by ensuring that all parts of the crime can be punished wherever they were committed.⁴⁴¹ Another concern is to ensure there are coordination mechanisms for cases where more than one country may have grounds for asserting jurisdiction.⁴⁴² The main rules derived from the major trafficking treaties are as follows:

- A State is *required* to exercise jurisdiction over trafficking offences when the offence is committed in the territory of that State or on board a vessel flying its flag or on an aircraft registered under its laws⁴⁴³ (territoriality principle);
- A State *may* exercise jurisdiction over trafficking offences when such offences are committed outside the territorial jurisdiction of that State against one of its nationals⁴⁴⁴ (principle of passive personality);

⁴⁴¹ *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 210.

⁴⁴² *Ibid.*

⁴⁴³ Organized Crime Convention, art. 15 (1); European Trafficking Convention, art. 31 (1)(a)-(c).

⁴⁴⁴ Organized Crime Convention, art. 15 (2)(a); European Trafficking Convention, art. 31(1) (e).

- A State *may* exercise jurisdiction over trafficking offences when such offences are committed outside the territorial jurisdiction of that State by one of its nationals⁴⁴⁵ (principle of active personality);
- A State *may* exercise jurisdiction over trafficking offences when such offences are committed outside the territorial jurisdiction of that State but are linked to serious crimes and money laundering planned to be conducted in the territory of that State;⁴⁴⁶
- A State *must* establish jurisdiction over trafficking offences when the offender is present in its territory of the State and the State does not extradite the offender on grounds of nationality or any other grounds⁴⁴⁷ (principle of “extradite or prosecute”).⁴⁴⁸

Related treaties, such as those dealing with the exploitation of children and trafficking in children for adoption, generally reiterate these rules.⁴⁴⁹ The importance of eliminating

⁴⁴⁵ Organized Crime Convention, art. 15 (2)(b); European Trafficking Convention, art. 31 (1)(d).

⁴⁴⁶ Organized Crime Convention, art. 15 (2)(c).

⁴⁴⁷ Organized Crime Convention, arts. 15 (3), 15 (4); European Trafficking Convention, art. 31 (3).

⁴⁴⁸ For a full discussion of this rule, see part 2.4, section 14.3, below.

⁴⁴⁹ See, for example, the Optional Protocol on the sale of children, art. 4 (jurisdiction over those accused of the sale of children, child prostitution or child pornography may be exercised by the territorial State; the State of registration of a ship or aircraft where the offences occurred; the State of which the victim is national or where she or he habitually resides; the State of which the alleged perpetrator is a national; and the State within whose territory the alleged offender is present. The same article requires jurisdiction to be established over the relevant offences “when the alleged offender is present in [the territory of the State party] and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals”). See also Inter-American Convention on International Traffic in Minors, art. 9 (territoriality; habitual residence of victim; presence of alleged offender within territory; presence of victim within territory).



jurisdictional gaps has also been emphasized by intergovernmental organizations and other policy-making bodies.⁴⁵⁰

As noted above, it is possible that more than one country will be in a position to assert jurisdiction over a particular trafficking case, or even in respect of the same offenders. This is called “concurrent jurisdiction”. Consultation and cooperation are important from the outset in order to coordinate actions and, more specifically, to determine the most appropriate jurisdiction within which to prosecute a particular case.⁴⁵¹ In some cases it will be most effective for a single State to prosecute all offenders, and in others it may be preferable for one State to prosecute some participants while one or more other States pursue the remainder. Issues such as nationality,

the location of witnesses, the applicable legal framework, resource availability and the location of the offender when apprehended will need to be taken into consideration.⁴⁵² The Organized Crime Convention provides that where several jurisdictions are involved, States parties are to consider transferring the case to the best forum in the “interests of the proper administration of justice” and “with a view to concentrating the prosecution”(art. 21).⁴⁵³

SEE FURTHER:

- State responsibility and due diligence: part 2.1, sections 2.1-2.4; part 2.2, section 6.3; part 2.4, section 13.2
- Extradition and mutual legal assistance: part 2.4, sections 14.1-14.4
- Demand for trafficking: part 2.2, sections 4.1-4.4

⁴⁵⁰ The General Assembly, for example, has also called upon Governments penalize all offenders involved in trafficking, whether local or foreign, though the competent national authorities, either in the country of origin or in the country in which the abuse occurs. See General Assembly resolutions 61/144 (para. 7), 59/166 (para. 8), 57/176 (para. 8), 55/67 (para. 6), 52/98 (para. 4) and 51/66 (para. 7). The ASEAN Practitioner Guidelines, at 2.B.2, note that: “where possible, extra-territorial provisions should be attached to trafficking in persons laws and related statutes as a further measure to remove safe havens for traffickers”.

⁴⁵¹ Such consultation is required under art. 15 (5) of the Organized Crime Convention and art. 31 (4) of the European Trafficking Convention.

⁴⁵² These issues are explored further in Pauline David, Fiona David and Anne Gallagher, *International Legal Cooperation in Trafficking in Persons Cases* (ASEAN, United Nations Office on Drugs and Crime, Asia Regional Cooperation to Prevent People Trafficking; forthcoming) [Hereinafter: ASEAN-UNODC-ARCPPT Handbook].

⁴⁵³ The ASEAN Practitioner Guidelines at 2.C.3 reiterate this requirement: “In appropriate transnational cases where traffickers could be prosecuted in two or more States, alternative means at the international, regional or bilateral levels could be considered to assess and coordinate criminal proceedings and, where appropriate, consider the transfer of criminal proceedings to the most appropriate State in the interests of the proper administration of justice.”

PRINCIPLE 13 AND RELATED GUIDELINES: EFFECTIVE INVESTIGATION, PROSECUTION AND ADJUDICATION⁴⁵⁴

States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.

13.1. PURPOSE AND CONTEXT

Principle 13 addresses the serious problem of a widespread culture of impunity for those involved in trafficking and related exploitation. Traffickers and their accomplices are seldom arrested, investigated, prosecuted or convicted. As noted throughout this Commentary, victims of trafficking are rarely identified and are too often criminalized. Despite being the key to successful prosecutions, victims are seldom brought into the criminal justice process as witnesses.

Principle 13 requires all States to give effect to their criminal laws by appropriately investigating allegations of trafficking, and by prosecuting those against whom there is adequate evidence and subjecting them to trial. It supplements

Principle 2, which declares unequivocally that “States have a responsibility under international law to act with due diligence to ... investigate and prosecute traffickers”. Also relevant are Principle 6 (investigation of allegations of involvement in trafficking by State officials) and Principle 12 (criminalization of trafficking under national law). The reference to component acts and related conduct in Principle 13 extends its application beyond trafficking to include other offences such as sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude, debt bondage, the worst forms of child labour and forced marriage.⁴⁵⁵ Principle 13 confirms that the State’s duty of due diligence extends to the investigation and prosecution of allegations of trafficking made against both public officials and non-State actors.

Relevant international treaty law does not specifically require States parties to investigate and prosecute trafficking cases. *Combating trafficking*, however, is one of the key purposes of all three specialist trafficking treaties.⁴⁵⁶ In addition, the investigation and prosecution

⁴⁵⁴ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 7. For a more practice-based analysis of issues relating to the effective investigation, prosecution and adjudication of trafficking cases, see Gallagher and Holmes, loc. cit.

⁴⁵⁵ See the discussion on this point in the context of Principle 12 and related guidelines, above.

⁴⁵⁶ Trafficking Protocol, art. 2 (a); European Trafficking Convention, art. 1 (1)(a); SAARC Convention, art. II.

of offences established under the Trafficking Protocol is expressly included in the scope of its application (art. 4), while the SAARC and the European Trafficking Convention both include detailed provisions relating to criminal procedure in the investigation and prosecution of trafficking offences.⁴⁵⁷

13.2. APPLICATION OF THE DUE DILIGENCE STANDARD

Principle 13, taken together with Principle 2, places a responsibility on States to investigate, prosecute and adjudicate trafficking with due diligence. Under Principle 2 it was shown that the due diligence standard, as it relates to investigation and prosecution, is well established in cases of human rights violations. It also confirms that the standard imposes a *positive duty* on States to ensure the effectiveness of their criminal law through effective investigation and prosecution.⁴⁵⁸ The duty to investigate and prosecute is applicable when there is an allegation of a violation by State officials *and* when the alleged perpetrator is a non-State actor.⁴⁵⁹ In the latter case a State will become responsible, under international law, if it fails seriously to investigate private abuses of

rights (thereby aiding their commission) and to punish those responsible.⁴⁶⁰ The standard of due diligence has been recognized by the international community in relation to the obligation on States to investigate and prosecute cases of trafficking in persons.⁴⁶¹

How does one gauge whether a State is taking seriously its obligation to investigate and prosecute trafficking cases? The worst case will generally be the easiest to decide. A State that does not criminalize trafficking, that fails to investigate *any* cases of trafficking, that fails to protect *any* victims or to prosecute *any* perpetrators when there is reliable evidence available of the existence of a trafficking problem, will clearly not pass the due diligence test. In less egregious cases, it is necessary to evaluate whether the steps taken evidence a seriousness on the part of the State to investigate and prosecute trafficking.

A decision as to whether or not a State has taken seriously its obligation to investigate and prosecute trafficking requires consideration of a myriad of factors extending well beyond Principle 13. The European Court of Human Rights has provided the following indicia of an effective investigation, which, while not developed in the specific context of trafficking, provide helpful guidance:

⁴⁵⁷ European Trafficking Convention, Chapter V; SAARC Convention, arts. III-VIII.

⁴⁵⁸ See *Velásquez Rodríguez Case*, paras. 173-177; *Osman v. United Kingdom*, para. 115; *Akkoç v. Turkey*, para. 77; *SERAC and CESR v. Nigeria*, para. 46; *Fernandes v. Brazil*, paras. 56-57; *M.C. v. Bulgaria*, paras. 150-153; *Juan Humberto Sánchez v. Honduras*, Judgement of 7 June 2003, Inter-American Court of Human Rights (Ser. C) No. 99 (2003) para. 110; *Finucane v. The United Kingdom* (29178/95) [2003] ECHR (1 July 2003), para. 67.

⁴⁵⁹ *Velásquez Rodríguez Case*, para. 173-177; *Osman v. United Kingdom*, para. 115; *Fernandes v. Brazil*, paras. 56-57; *M.C. v. Bulgaria*, para. 150-153; *Sánchez v. Honduras*, para. 142; *Calvelli and Ciglio v. Italy* (32967/96) [2002] ECHR (17 January 2002), paras. 48-51.

⁴⁶⁰ *Velásquez Rodríguez Case*, paras. 166, 173-177.

⁴⁶¹ See, for example, General Assembly resolution 63/156, preamble ("States have an obligation to exercise due diligence to prevent, investigate and punish perpetrators of trafficking in persons, and to rescue victims as well as provide for their protection, and that not doing so violates and impairs or nullifies the enjoyment of the human rights and fundamental freedoms of the victims"); and General Assembly resolution 61/180, preamble ("Member States have an obligation to exercise due diligence to prevent trafficking in persons, to investigate this crime and to ensure that perpetrators do not enjoy impunity").



- The independence of the investigators;
- Whether the investigation is capable of leading to a determination of whether the unlawful act was committed and to the identification and punishment of those responsible;
- Whether reasonable steps are taken to secure evidence concerning the incident;
- The promptness of the investigation; and
- Whether there is a sufficient element of public scrutiny of the investigation or its results.⁴⁶²

In a recent case (*Rantsev v. Cyprus and Russia*), the European Court of Human Rights considered this issue in the specific context of trafficking. The Court identified an obligation on States parties to the European Convention on Human Rights to investigate cases of trafficking. The need for such investigations to be full and effective, covering all aspects of trafficking allegations, from recruitment to exploitation, was “indisputable” (para. 307). The Court noted that these positive obligations applied to the various States potentially involved in human trafficking—States of origin, States of transit and States of destination (para. 289)—and found violations in this respect by both the Russian Federation (origin) and Cyprus (destination). It affirmed that States are required to “take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State” (para. 241) and that, “in addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories” (para. 289). The Court further held that “for an investigation to be effective, it must be independent from those implicated in the events. It must also be capable

of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next of kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests” (para. 288).

As well as the factual question of what the State actually did (or did not do) in relation to a particular situation, issues of mandate, organization and capacity are also relevant. Additional questions from this perspective could include:

- Is there an adequate legislative framework within which the criminal justice system can function effectively in relation to such cases?
- Have law enforcement agencies been given the powers required to investigate this crime?
- Do they possess the necessary technical capacity and can they access the required resources?
- Are they organized in such a way as to ensure that investigations can and do take place?

In evaluating the extent to which a State has met the due diligence standard, it is essential to recall that trafficking is a crime that relies heavily on the cooperation of victims. If victims are prevented or discouraged from making complaints, then this will have a direct impact on the ability of the criminal justice system to investigate and prosecute trafficking cases. In this context it is important to ascertain how easy (or difficult) it is for victims to make complaints to police. Is there provision for them to be protected and supported, or are they criminalized and deported? Are there genuine incentives for victims to cooperate (for example, the provision of short-term residence permits and/or reflection

⁴⁶² *Finucane v. United Kingdom*, paras. 68-71.

periods to allow an informed decision on cooperation)? How active is law enforcement in investigating trafficking? Do police rely just on complaints from victims or do they actually go out and investigate on their own?⁴⁶³

What happens further up the criminal justice hierarchy? When police are doing their job and investigating trafficking cases, do prosecutors or judges take such cases seriously? Do they understand the crime of trafficking, and are they able to apply the national legal framework? Is there real, effective cooperation between the various criminal justice agencies on this issue, or are prosecutions thwarted by competing agendas, corruption or inefficiency? To what extent does the criminal justice system guarantee free and fair trials, including respect for the rights of suspects?

Finally, is it even possible to know what is happening? In many countries, criminal justice data on trafficking is non-existent, unavailable or seriously compromised in terms of quality and/or reliability. States should be able to produce the necessary data on investigations, arrests, prosecutions and convictions for trafficking and

related offences, which will either confirm or call into question their adherence to the standard of due diligence.

The following section explores several of these issues in greater detail.

13.3. ISSUES IN THE INVESTIGATION, PROSECUTION AND ADJUDICATION OF TRAFFICKING CASES

The Trafficking Principles and Guidelines identify a number of issues and approaches that are directly relevant to the application of the due diligence standard in relation to the investigation, prosecution and adjudication of trafficking cases. These are considered in detail below. Other key issues, including those of particular relevance to the rights of victims, are dealt with elsewhere in this Commentary. These include: protection and support for victim witnesses (Principle 9 and related guidelines); protection and support for child victim witnesses (Principle 10 and related guidelines); non-criminalization and non-detention (Principle 7 and related guidelines); the right of victims to participate in legal proceedings (Principle 9 and related guidelines); the right of victims to remain during legal proceedings (Principles 9 and 11 and related guidelines); and access to remedies (Principle 17 and related guidelines).

THE TRAINING, EMPOWERMENT AND SPECIALIZATION OF CRIMINAL JUSTICE OFFICIALS

The Trafficking Principles and Guidelines recognize that building up the capacity of criminal justice agencies is an important preventive measure (Guideline 7.8). A skilled, empowered and adequately resourced law enforcement response is a powerful disincentive to traffickers as it increases, the risks and costs associated with their activities. This preventive element is an important aspect

⁴⁶³ Note that the European Trafficking Convention specifically requires States parties to “ensure that investigations into or prosecution of offences established in accordance with th[e] Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory” (art. 27 (1)). See also *Sánchez v. Honduras*: an investigation “must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the *initiative of the victim or his family or upon their offer of proof*” (para. 144, emphasis added); *Finucane v. United Kingdom*: “the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures” (para. 67). Note that the Human Rights Council has recently urged States not to make “accusations by or the participation of the victims of trafficking a precondition to the prosecution of trafficking” (resolution 11/3, para. 3 (b)).



of Principle 13 and is further considered above in relation to Principles 5 and 6 and their related guidelines.

An effective criminal justice response to trafficking requires trained, competent officials. This is recognized in the Trafficking Principles and Guidelines at Guideline 5.2 and is reinforced in the relevant international⁴⁶⁴ and regional⁴⁶⁵ trafficking treaties. The need for training has also been widely acknowledged by the General Assembly, the Commission on Human Rights/Human Rights Council and specialized

agencies⁴⁶⁶ as well as by the human rights treaty bodies and special procedures mechanisms.⁴⁶⁷ Regional policy documents have also highlighted the importance of training.⁴⁶⁸

The key aspects of effective training for criminal justice officials, as identified in the Trafficking Principles and Guidelines and elsewhere, are as follows:

- Training should be given to officials involved in the identification, investigation, prosecution and adjudication of trafficking cases including specialist and front-line law enforcement officials, immigration officials, prosecutors and judges;
- Training should adopt a human rights approach. It should seek to sensitize participants to the needs of trafficked persons, in particular those of women and children;

⁴⁶⁴ Trafficking Protocol, art. 10 (2) ("States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society."). The body established to provide recommendations on the effective implementation of the Protocol affirms that: "States parties should provide training to front-line law enforcement officials... soldiers involved in peacekeeping missions, consular officers, prosecutorial and judicial authorities, medical services providers and social workers ... in order to enable national authorities to respond effectively to trafficking in persons, especially by identifying the victims of such trafficking" (CTOC/COP/WG.4/2009/2, para. 9).

⁴⁶⁵ European Trafficking Convention, art. 29 (3) ("Each Party shall provide or strengthen training for relevant officials in the prevention of and fight against trafficking in human beings, including Human Rights training. The training may be agency-specific and shall, as appropriate, focus on: methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers"; SAARC Convention, art. VIII (2) ("The States Parties to the Convention shall sensitize their law enforcement agencies and the judiciary in respect of the offences under this Convention and other related factors that encourage trafficking in women and children."). Note also European Trafficking Convention, art. 10 (1) (on the need to ensure the provision of persons who are trained and qualified in preventing and combating trafficking, to identify and help victims).

⁴⁶⁶ Human Rights Council resolution 11/3 on trafficking in persons, especially women and children, para. 3. See also references to training in General Assembly resolutions 63/156 (para. 18), 61/180 (para. 7), 61/144 (para. 24), 59/166 (para. 23) and 58/137 (para. 5 (b)); and Commission on Human Rights resolution 2004/45 (para. 23); and UNICEF Guidelines, Guideline 3.11.

⁴⁶⁷ Human Rights Committee, concluding observations: Costa Rica (CCPR/C/CRI/CO/5, para. 12); Bosnia and Herzegovina (CCPR/C/BIH/CO/1, para. 16); Philippines (CCPR/CO/79/PHL, para. 13); Committee on the Rights of the Child, concluding observations: Kenya (CRC/C/KEN/CO/2, para. 66 (h)); Kyrgyzstan (CRC/C/15/Add.244, para. 62 (c)); Netherlands (CRC/C/15/Add.227, para. 57 (c)); Committee against Torture, concluding observations: Latvia (CAT/C/LVA/CO/2, para. 21); Estonia (CAT/C/EST/CO/4, para. 18); Japan (CAT/C/JPN/CO/1, para. 25); Committee on the Elimination of Discrimination against Women, concluding observations: Mozambique (CEDAW/C/MOZ/CO/2, para. 32); Italy (CEDAW/C/ITA/CC/4-5, para. 32); Austria (CEDAW/C/AUT/CO/6, para. 26); *Shide Goekce (deceased) v. Austria*, Communication No. 5/2005, para. 12.3; E/CN.4/2006/62/Add.2, paras. 80, 82 and 86; E/CN.4/2000/68, para. 122 (a).

⁴⁶⁸ OSCE Action Plan, Recommendation III (5); Brussels Declaration, para. 9; ECOWAS Initial Plan of Action, pp. 7-8, paras. 1-3; OAS Recommendations on Trafficking in Persons, Section II(9), (13); COMMIT MOU, para. 8; ASEAN Practitioner Guidelines, Part 1.B.

- Training should aim to provide criminal justice officials with the technical skills they require to identify, investigate, prosecute and adjudicate trafficking cases;
- Training should also aim to strengthen the capacity of criminal justice officials to protect victims and to respect and promote their rights;
- Training should encourage cooperation between criminal justice agencies and non-governmental agencies, especially those working to support victims of trafficking;
- Consideration should be given to the involvement of relevant non-governmental agencies in such training, as a means of increasing its relevance and effectiveness; and
- The quality of the training should be evaluated. Following training, trainee performance should be monitored and training impact assessment should take place.

The Trafficking Principles and Guidelines recognize that, in addition to receiving skills and awareness training, criminal justice officials and agencies need to be organized, empowered and funded in a manner that enables them to respond appropriately and effectively to the crime of trafficking.⁴⁶⁹ The position taken by the Trafficking Principles and Guidelines on this matter is confirmed by relevant treaty law⁴⁷⁰ and finds

⁴⁶⁹ Guideline 5.3 requests States to provide law enforcement authorities with adequate investigative powers and techniques to enable effective investigation and prosecution of suspected traffickers. Guideline 5.4 recommends that States consider establishing specialist anti-trafficking units, comprising both women and men, in order to promote competence and professionalism.

⁴⁷⁰ For example, Organized Crime Convention, art. 20 (special investigative techniques); Trafficking Protocol, art. 10 (information exchange and training); European Trafficking Convention, art. 29 (specialized authorities and co-ordinating bodies); SAARC Convention, art. VIII (1) ("The States Parties shall provide sufficient means, training and assistance to their respective authorities to enable them to effectively conduct enquiries, investigations and prosecution of offences under this Convention.").

considerable additional authority elsewhere.⁴⁷¹ The major points of agreement are as follows:

- A dedicated, specialized investigatory capacity is an essential component of an effective criminal justice response. The specialized authorities should be mandated to supervise and/or advise on all trafficking investigations undertaken within the country. They should be granted and should enjoy the legal and procedural powers required to conduct trafficking investigations using the full range of investigative techniques available. The specialized authorities capacity should have the necessary independence, capacity, resources and gender profile to carry out their work;⁴⁷²
- Consideration should be given to the specialization of other functions such as the prosecution and adjudication of trafficking cases – to the extent that the caseload requires;⁴⁷³

⁴⁷¹ See, for example, ASEAN Practitioner Guidelines, Part 1.B.1 ("A specialist investigation capacity within national police forces is key to a strong and effective criminal justice response to trafficking in persons"); OSCE Action Plan, Recommendation III (2.2) (special anti-trafficking units); ECOWAS Initial Plan of Action, p. 7, para. 1 ("special units, within existing law enforcement structures, with a specific mandate to develop and effectively target operational activities to combat trafficking of persons"). The Committee on the Elimination of Discrimination against Women has praised several States on the establishment of specialist law enforcement trafficking units: concluding observations: Luxembourg (CEDAW/C/LUX/CO/5, para. 31); Kenya (CEDAW/C/KEN/CO/6, para. 29). More generally, the Commission on Human Rights has called upon Governments to consider the need for "comprehensive anti-trafficking strategies, greater allocation of resources and better coordination of programmes and activities in tackling the problem of trafficking" (resolution 2004/45, para. 5).

⁴⁷² European Trafficking Convention, art. 29; ASEAN Practitioner Guidelines, Guideline B.1; International Criminal Police Organization (Interpol), *Trafficking in Human Beings – Best Practice Guidance Manual for Investigators* (2007), Ch 2/7; Gallagher and Holmes, loc. cit., pp. 323-326.

⁴⁷³ The ASEAN Practitioner Guidelines propose specialization of both the prosecutorial and adjudicatory



- Coordination between the various criminal justice agencies (for example, between front-line police agencies and specialist investigation units, or between specialist units and prosecutorial agencies) is essential. Such coordination should cover both policies and action. It may require the establishment of coordinating bodies;⁴⁷⁴
- Specialist criminal justice agencies dealing with trafficking should work closely with victim support agencies – including non-governmental organizations – to ensure that the rights of victims are upheld and that they receive protection and support appropriate to their needs;⁴⁷⁵ and
- Legislative or other measures should be in place to ensure that judicial proceedings protect victims' privacy and safety to the

functions: Guideline 1.B.2 ("Prosecution agencies should ... develop a specialist response capacity. A number of prosecutors – appropriate to the current and anticipated caseload – should be specially trained and designated to undertake the preparation and presentation of TIP and related prosecutions"), Guideline 1.B.5 ("A number of judges, appropriate to the current and anticipated caseload, should be specially prepared and designated to undertake the management and adjudication of TIP related trials."). The Brussels Declaration recommends the establishment of "[s]pecialised, joint investigative teams of investigators and prosecutors" (para. 17). See further Gallagher and Holmes, loc. cit., pp. 328 and 336.

⁴⁷⁴ European Trafficking Convention, art. 29 (2). The Committee on the Elimination of Discrimination against Women has repeatedly commended States for the establishment of national groups to coordinate actions to combat trafficking in its concluding observations: Luxembourg (CEDAW/C/LUX/CO/5, para. 31); Austria (CEDAW/C/AUT/CO/6, para. 25); Kazakhstan (CEDAW/C/KAZ/CO/2, para. 6); Georgia (CEDAW/C/GEO/CO/3, para. 6); Thailand (CEDAW/C/THA/CO/5, para. 5).

⁴⁷⁵ Trafficking Protocol, arts. 6 (3) and 9 (3); European Trafficking Convention, art. 35. The General Assembly and the Commission on Human Rights/Human Rights Council have repeatedly called for closer collaboration between Governments and NGOs to provide support for victims; see General Assembly resolutions 61/144 (paras. 15 and 17), 59/166 (paras. 13 and 15) and 58/137 (para. 9); and Commission on Human Rights resolution 2004/45 (paras. 3, 20 and 23).

extent that this is compatible with the right to a fair trial. In judicial proceedings, the rights and needs of child victims should be given the highest priority.⁴⁷⁶

A GENDER PERSPECTIVE ON THE CRIMINAL JUSTICE RESPONSE

International and regional treaty law notes the importance of ensuring the integration of a gender perspective into responses to trafficking.⁴⁷⁷ This need is particularly acute in the context of criminal justice responses. Men and boys are often overlooked as victims of trafficking. The harm done to them may be underreported and criminal justice agencies may be less willing to investigate and prosecute such cases.⁴⁷⁸ Women and girls have often been trafficked in ways that are specific to their gender and with impacts that can also be very gender-specific. Criminal justice systems are often ill-equipped to deal with this reality. Failure by national criminal justice agencies to integrate a gender perspective into their work may aggravate the harm done to victims and may render responses less effective in terms of ending impunity and securing justice.

While the under-investigation of male trafficking is a serious problem and must be addressed, discrimination and associated harms in the criminal justice response to trafficking are most obvious in relation to trafficked women and girls. Examples of actual or potential harm may include:

⁴⁷⁶ See further references and citations under Principle 10 and related guidelines, above.

⁴⁷⁷ See, for example, Trafficking Protocol, art. 10 (2); European Trafficking Convention, art. 17.

⁴⁷⁸ See, for example, Rebecca Surtees, "Trafficked men as unwilling victims", *St Antony's International Review*, vol. 4, No. 1 (2008), p. 16; United Nations Inter-Agency Project on Human Trafficking, *Exploitation of Cambodian Men at Sea* (2007).

- The arbitrary detention of women and girl victims;⁴⁷⁹
- Discriminatory and inappropriate investigatory responses that criminalize women and girls, especially vulnerable groups, including migrants and prostitutes;⁴⁸⁰
- Failure to acknowledge gender-specific violence such as sexual abuse and to provide or facilitate access to appropriate medical, psychological and psychosocial support;⁴⁸¹

⁴⁷⁹ See the discussion under Principle 7 and related guidelines.

⁴⁸⁰ The *Trafficking Principles and Guidelines* provide several examples of discriminatory/inappropriate criminal justice responses that would have a disproportionate effect on women and girls. Guideline 5.5 calls on States to guarantee “that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation”. Guideline 5.6 calls upon States to implement measures “to ensure that ‘rescue’ operations [such as raids on brothels and factories] do not further harm the rights and dignity of trafficked persons. Such operations should only take place once appropriate and adequate procedures for responding to the needs of trafficked persons released in this way have been put in place.”

⁴⁸¹ The Commission on Human Rights/Human Rights Council has called for Governments to “ensure all legislation related to combating trafficking is gender-sensitive and provides protection for the human rights of women and girls and against violations committed against women and girls” (Commission on Human Rights resolution 2004/45, para. 11). See also Human Rights Council Resolution 11/3, preamble and para. 3; General Assembly resolution 63/156, preamble and paras. 3, 4, 5, 6, 17, 18, 19 and 27; and Human Rights Council resolution 8/12, preamble and para. 4. The General Assembly, in its resolution 58/137, called for States to provide “humane treatment for all victims of trafficking, taking into account their age, gender and particular needs” (para. 6 (c)). The Special Rapporteur on violence against women has called for Governments to “ensure that all trafficking legislation is gender sensitive and provides protection for the human rights of women and against the particular abuses committed against women” (E/CN.4/2000/68, para. 122 (g)). United Nations treaty bodies have repeatedly called for States to target violence against women, specifically domestic violence and sexual abuse: Committee on the Elimination of Discrimination against Women, concluding observations: Uzbekistan (CEDAW/C/UZB/

- Failure to acknowledge the impact that concerns about loss of privacy and the prospect of humiliation may have on women and girl victims in the criminal justice process;⁴⁸²
- Interviewing/examining of female victims of trafficking by personnel who have not been trained in gender-sensitive methods of securing/recording evidence;⁴⁸³
- Rules of procedure and rules of evidence that unreasonably require evidence of force or restraint;⁴⁸⁴ and
- Rules of procedure and rules of evidence that permit or require evidence of the prior sexual conduct of the victim.⁴⁸⁵

CO/3, para. 10); Italy (CEDAW/C/ITA/CC/4-5, para. 32); Human Rights Committee, concluding observations: Libyan Arab Jamahiriya (CCPR/C/LBY/CO/4, para. 10); Sudan (CCPR/C/SDN/CO/3, para. 14); Zambia (CCPR/C/ZMB/CO/3, para. 19); Kenya (CCPR/CO/83/KEN, paras. 11-12).

⁴⁸² A/HRC/7/3, para. 61; Committee against Torture, *V.L. v. Switzerland*, (CAT/C/37/D/262/2005, para. 8.8).

⁴⁸³ A/HRC/7/3, para. 61. The General Assembly, in its resolution 59/166 (para. 24), and the Commission on Human Rights, in its resolution 2004/45 (para. 23), have recommended that training should take into account gender-sensitive issues and perspectives. See also the World Health Organization, *Ethical and Safety Recommendations on Interviewing Women Victims of Trafficking* (2003).

⁴⁸⁴ It is now well understood that victims can be denied liberty and freedom of movement without being physically detained – for example, through threats, retention of identity documents, etc. Note that rule 70 of the International Criminal Court’s Rules of Procedure and Evidence explicitly provides that: “(a) consent cannot be inferred from any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent;... (c) consent cannot be inferred from the silence, or lack of resistance, by a victim”. Note that the definition of trafficking in the Trafficking Protocol explicitly provides that consent is irrelevant.

⁴⁸⁵ Evidence of prior sexual history is sometimes used during criminal proceedings in trafficking cases in an effort to prove that the victim is prone to promiscuity and consented to sex. The Special Rapporteur on torture



As noted throughout this Commentary, States are required to ensure that their responses to trafficking – including their criminal justice responses – do not discriminate against any person on any of the prohibited grounds, and that such responses do not result in a violation of any other established right.⁴⁸⁶

13.4. THE RIGHTS OF SUSPECTS AND THE RIGHT TO A FAIR TRIAL

A human rights response to trafficking requires that the rights of all persons be respected and protected. The obligation set out in Principle 3, that anti-trafficking measures are not to affect the human rights or dignity of any person adversely, extends to individuals who are suspected (or, indeed, convicted) of trafficking offences.

Traffickers can never be pursued at the expense of international rules governing the administration of justice. These rules guarantee, to all persons, the right to receive a fair and public hearing by a competent, independent and impartial tribunal established by law.⁴⁸⁷ States that fail to observe these standards risk compromising the integrity and reputation of their national criminal justice systems. Such failures can also lead to an erosion of community support for the investigation and prosecution of traffickers.

has noted that the admission of this type of evidence increases the trauma of testifying as women may be humiliated in having to expose aspects of their private life that are irrelevant to ascertaining the fact of them having been trafficked (A/HRC/7/3, para. 62). Note that the International Criminal Court prohibits the admission of evidence related to the prior sexual conduct of the victim (Rules of Procedure and Evidence, rule 71).

⁴⁸⁶ See further discussion under Principle 3 and related guidelines, above.

⁴⁸⁷ International Covenant on Civil and Political Rights, arts. 9 and 14; European Convention on Human Rights, arts. 5 and 6; American Convention on Human Rights, arts. 7 and 8; African Charter on Human and Peoples' Rights, arts. 6 and 7.

Of course, the rights of a perpetrator cannot supersede an individual's right to life and to physical and mental integrity.⁴⁸⁸ A balancing of rights may also be required under special circumstances. For example, a trial involving an organized criminal group may require relatively greater attention be given to the rights of victims and the interests of the community at large. Generally, however, the rights of victim and suspect are not incompatible. As recognized in the Trafficking Principles and Guidelines and elsewhere,⁴⁸⁹ protection cannot be extended to victims at the expense of the basic rights of suspects.

The following principles and rights, enshrined in international law,⁴⁹⁰ must be upheld to ensure that trafficking cases are prosecuted and adjudicated fairly, in accordance with international human rights and criminal justice standards:

- All persons are considered equal before courts and tribunals;
- Everyone is entitled to and receives a fair and public hearing by a competent, independent and impartial tribunal established by law; and
- All accused persons are presumed innocent until proven guilty in accordance with the law.

More specifically, in the determination of any criminal charges, all accused persons have and enjoy the following rights:

⁴⁸⁸ This position has been affirmed by the Committee on the Elimination of Discrimination against Women. See, for example, *A.T. v. Hungary*, Communication No. 2/2003, para. 9.3; and *Fatma Yildirim (deceased) v. Austria*, Communication No. 6/2005, para. 12.1.5.

⁴⁸⁹ *Trafficking Principles and Guidelines*, Guideline 6.6. The need to ensure that provisions protecting victims' identity and/or privacy do not compromise suspects' rights is noted in the *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 2, para. 54.

⁴⁹⁰ See, for example, International Covenant on Civil and Political Rights, art. 14.

- To be informed promptly and in detail of the nature and cause of the charge against him/her;
- To be given adequate time and facilities to prepare a defence, and to communicate in private with counsel of his/her choosing;
- To be tried without undue delay;
- To be tried in his/her presence;
- To be provided with legal assistance where required by interests of justice;
- To be able to examine, or have examined, the witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her;
- To be provided with services of an interpreter if required; and
- Not to be compelled to testify against him or herself or to confess guilt.

In the specific context of a criminal trial it is the responsibility of both the prosecutor and the judge to ensure that a fair trial takes place in accordance with applicable international

standards.⁴⁹¹ Oversight mechanisms should be in place to ensure the transparency and accountability of the investigatory/prosecutorial/judicial process.

SEE FURTHER:

- State responsibility and due diligence: part 2.1, sections 2.1-2.4; part 2.2, section 6.3
- Responses to trafficking not to undermine human rights: part 2.1, sections 3.1-3.5
- Protection and support for victim witnesses: part 2.3, section 9.3
- Protection and support for child victim witnesses: part 2.3, section 10.4
- Non-criminalization and non-detention: part 2.3, sections 7.3-7.4
- Right of victims to participate in legal proceedings: part 2.3, section 9.2
- Right of victims to remain during legal proceedings: part 2.3, sections 9.4-9.5, 11.2
- Right to a remedy: part 2.4, sections 17.1-17.6

⁴⁹¹ This responsibility is noted in the ASEAN Practitioner Guidelines at 1.F.5.

PRINCIPLE 14 AND RELATED GUIDELINES:
**EXTRADITION AND OTHER
FORMS OF COOPERATION IN
CRIMINAL PROCEEDINGS⁴⁹²**

States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.

14.1. PURPOSE AND CONTEXT

It is possible for all elements of the crime of trafficking to take place within national borders and for offenders, victims and evidence to be located within the same country. Typically, however, trafficking cases are much more complicated than this. Alleged offenders, victims and evidence can each (or all) be located in two or more countries. The same fact can justify and give rise to criminal investigations and prosecutions in multiple jurisdictions. Informal cooperation mechanisms, and legal tools such

as extradition and mutual legal assistance, are important means of eliminating safe havens for traffickers, thereby ending the high levels of impunity currently enjoyed by traffickers.

Principle 14 concerns extradition, one of the oldest of all forms of international legal cooperation in criminal matters. Extradition is the formal name given to the process whereby one State (the Requesting State) asks another (the Requested State) to return an individual to face criminal charges or punishment in the Requesting State. Because of the nature of the human trafficking process, suspects wanted for prosecution in one State will often be located in another. This may be because they are nationals of that other State, or because they have deliberately taken steps to avoid prosecution or sentencing by fleeing to another State. Extradition will, therefore, sometimes be essential for the successful prosecution of trafficking cases.

Extradition is based on the principle that a person located in one State, who is credibly accused of committing serious crimes capable of being tried in another State, should be surrendered to that other State to answer for those alleged crimes. The rules governing extradition also seek to impose safeguards, however, to ensure that the person whose

⁴⁹² This section draws on Gallagher, *International Law of Human Trafficking*, chap. 7. For a detailed and practice-based consideration of extradition, mutual legal assistance and informal cooperation in the context of trafficking, see ASEAN-UNODC-ARCPPT Handbook. For a more general consideration of the major issues related to extradition, see Clive Nicholls, Clare Montgomery and Julian B. Knowles, *The Law of Extradition and Mutual Assistance* (2nd ed, 2007).

extradition is being sought will be protected from surrender in circumstances where they would suffer injustice or oppression in the State to which they would be extradited.⁴⁹³ In this context it is important to note that the extradition process is not one in which guilt or innocence is determined. It is the Courts of the Requesting State that will ultimately make that determination.

The Trafficking Principles and Guidelines also touch on other forms of assistance between countries in relation to the investigation and prosecution of trafficking offences. These forms of assistance fall into two types: (i) mutual legal assistance; and (ii) informal cooperation.

Mutual legal assistance (sometimes called mutual judicial assistance) is the process countries use when formally asking other countries to provide information and evidence for the purpose of an investigation or prosecution. Mutual legal assistance is a very formal cooperation tool, because it is generally used when a country is seeking to obtain evidence that will be admissible in a criminal trial. For this reason it operates under different, and far stricter, rules than those that apply to less formal agency-to-agency or police-to-police cooperation.

Common types of mutual legal assistance include: taking evidence or statements from individuals; locating and identifying witnesses and suspects; serving judicial documents; executing searches and seizures; freezing assets; providing originals or certified copies of relevant documents and records; identifying or tracing proceeds of crime; facilitating the voluntary appearance of individuals in the Requesting State; transferring proceedings/investigations/prisoners; transferring prisoners to give evidence; and video recording testimony.

⁴⁹³ *Knowles v. Government of the United States of America* [2006] UKPC 38 (United Kingdom Privy Council), para. 12, cited in Nicholls, Montgomery and Knowles, op. cit., p. 3.

Informal cooperation is a separate, less rule-bound international criminal cooperation tool, which is available outside the formal mutual assistance regime. Informal cooperation enables law enforcement and regulatory agencies (such as taxation and revenue authorities; companies and financial service regulators) to share information and intelligence directly with their foreign counterparts without any requirement to make a formal mutual assistance request. In this sense, informal cooperation complements mutual legal assistance regimes. This international cooperation tool can be used before an investigation becomes official and before the commencement of court proceedings – for example, to conduct surveillance or take voluntary witness statements. In circumstances where coercive measures are not required, it is usually faster, cheaper and easier to obtain information or intelligence on an informal basis than through formal mutual assistance channels.

The sharing of information in this informal way may involve: memoranda of understanding (MOUs) between counterpart agencies; liaison officer networks; overseas information exchange permitted in accordance with national laws; treaties; and regional and international organizations – for example Interpol, Europol, and the World Customs Organization.

The rules applicable to, and specific issues raised by, extradition, mutual legal assistance and informal cooperation are considered in detail below.

14.2. THE OBLIGATION TO EXTRADITE IN TRAFFICKING CASES

Extradition was traditionally based on pacts, courtesy or goodwill between heads of State. The legal basis for extradition today is generally domestic law and/or bilateral or multilateral treaties. Domestic law increasingly provides



for extradition in the absence of specific treaty-based agreements, and some countries now use it exclusively as their basis for extradition. Other countries have adopted a blended system in which extradition is permitted both on a treaty basis and on the basis of domestic law. With the emergence of international courts and tribunals that exercise criminal jurisdiction, treaties also provide for extradition to these non-State bodies.⁴⁹⁴

In the past, extradition laws and treaties would usually contain a list of the offences covered. More recent laws and treaties are based on the principle of *dual criminality*, which allows extradition in relation to an offence if it is criminalized in both the requested and the requesting countries and if the penalties provided for are above a defined threshold, for example, a defined period of imprisonment. The principle of dual criminality, which can have the effect of obstructing prosecutions, provides another compelling reason for States to criminalize trafficking as it has been defined by international law.

MAKING TRAFFICKING AN EXTRADITABLE OFFENCE

Principle 14 requests States to ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. Related offences, in this context, would include sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude, debt bondage, the worst forms of child labour and forced marriage.⁴⁹⁵ Principle 14 is supported by international treaty law. While the Trafficking Protocol does not deal with extradition, its parent instrument, the Organized Crime Convention, sets out a basic

minimum standard: requiring States parties to treat offences established in accordance with the Protocol (limited to trafficking, offences related to documents, etc.)⁴⁹⁶ as extraditable offences under their laws and to ensure that such offences are included as extraditable offences in every current and future extradition treaty (art. 16). Other relevant international and regional treaties also identify trafficking and related conduct as extraditable offences.⁴⁹⁷

In the European context, trafficking in persons and related conduct would fall within the categories of extraditable offences covered by the European Convention on Extradition.⁴⁹⁸ Similar umbrella extradition treaties have been concluded for the Americas and West Africa.⁴⁹⁹ International and regional policy on trafficking is also beginning to recognize the importance of

⁴⁹⁶ Note that the obligation to make trafficking an extraditable offence would apply only to offences constituting a “serious” transnational crime under the Convention and Protocol, and involving an organized criminal group (*Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, paras. 403, 414-417). States parties may, however, apply the extradition provisions to other offences (such as trafficking that does not involve an organized criminal group) and, under article 16 (2), are encouraged to do so.

⁴⁹⁷ SAARC Convention, art. VII; Inter-American Convention on Traffic in Minors, art. 10; Optional Protocol on the sale of children, art. 4.

⁴⁹⁸ See Convention relating to the simplified extradition procedure between Member States of the European Union (adopted by the Council of the European Union on 10 March 1995 to supplement the European Convention on Extradition). Note also, the introduction of a European Arrest Warrant through the Council Framework Decision of 13 June 2002 on a European Arrest Warrant and the Surrender Procedures between Member States [2002] OJ L 190. The European Trafficking Convention requires States parties to impose penalties that give rise to extradition (art. 23 (1)). Under article 2 of the European Convention on Extradition, this would require parties to provide for a custodial penalty of at least one year (*Explanatory Report on the European Trafficking Convention*, para. 252).

⁴⁹⁹ Inter-American Convention on Extradition, ECOWAS Convention on Extradition.

⁴⁹⁴ See Nicholls, Montgomery and Knowles, op. cit.

⁴⁹⁵ See discussion on related offences under Principle 12 and related guidelines, above.

ensuring that trafficking offences are subject to extradition.⁵⁰⁰

COOPERATING TO ENSURE EXPEDITED EXTRADITION

Guideline 11.9 emphasizes the importance of ensuring that requests for extradition in relation to trafficking are dealt with by the authorities of the requested State without undue delay. The Organized Crime Convention also encourages States to adopt a range of measures designed to streamline the extradition process by expediting requests and simplifying evidentiary procedures (art. 16 (8)). Other trafficking-specific policy instruments echo this request.⁵⁰¹

These provisions reflect an understanding that extradition is generally a very complicated and time-consuming process and is subject to numerous obstacles and restrictions. Unless States make a positive effort to streamline their extradition procedures in cases of trafficking, it is unlikely that this tool of international legal

cooperation will contribute greatly to ending impunity for traffickers who move across borders to escape prosecution or punishment for their crimes.

FAIR TREATMENT AND HUMAN RIGHTS IN EXTRADITION⁵⁰²

Principle 14 requests States to cooperate in order to ensure that appropriate extradition procedures are followed, in accordance with the relevant international legal rules. The importance of fair treatment and respect for human rights in extradition is confirmed by the Organized Crime Convention⁵⁰³ as well as by regional extradition treaties.⁵⁰⁴ The key rules to keep in mind when considering extradition in trafficking cases include the following:

- Dual criminality: the requirement for the offence to be a recognized criminal offence in both the Requesting and the Requested State;⁵⁰⁵

⁵⁰⁰ For example, the ASEAN Practitioner Guidelines (Part 1.A.4: "In order to ensure that there are no safe havens for traffickers, States are encouraged to either extradite or prosecute alleged offenders."); OSCE Action Plan (Recommendation III (1.6): "[e]nsuring that trafficking, its constitutive acts and related offences constitute extraditable offences under national law and extradition treaties"). The General Assembly, in its resolution 61/180, called on States to "consider establishing coordination and cooperation mechanisms at the national and international levels on extradition, mutual legal assistance and sharing police intelligence information" (para. 7).

⁵⁰¹ Under the ASEAN Practitioner Guidelines, for example, "States should accord high priority to and expedite requests relating to trafficking cases" (Guideline 2.D.4). More generally, the Brussels Declaration has requested States, "with the aim to speed up exchange of information in criminal investigations and mutual legal assistance" to establish "direct contacts between... law enforcement services and judicial authorities" (para. 16). The OAS Recommendations on Trafficking in Persons call on States to "introduce expeditious mechanisms ... to enable information to be exchanged and political dialogue to be strengthened among the countries of origin, transit, destination within and outside the hemisphere" (Section V(2)).

⁵⁰² This section draws on the Model Treaty on Extradition, annexed to General Assembly resolution 45/116 and subsequently amended by its resolution 52/88. See also John Dugard and Christine Van den Wyngaert, "Reconciling extradition with human rights", *American Journal of International Law*, vol. 92, No. 2 (April 1998), p. 187.

⁵⁰³ Organized Crime Convention, art. 16 (13), provides: "Any person [involved in an extradition request or process] ... shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present". Article 16 (14) provides that an obligation to extradite will not exist under the Convention "if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any of these reasons".

⁵⁰⁴ For example, the Inter-American Convention on Extradition, art. 16(1) provides that "The person sought shall enjoy in the requested State all the legal rights and guarantees granted by the laws of that State". See also ECOWAS Convention on Extradition, arts. 5, 14.

⁵⁰⁵ See Organized Crime Convention, art. 16 (1); European Convention on Extradition, art. 2; Inter-American



- No double jeopardy (*non bis in idem*): the Requested State must refuse cooperation if the person whose extradition is sought has been acquitted or punished in the Requested State for the conduct constituting the extradition offence;⁵⁰⁶
- The rule of “speciality” or “specialty”: the Requesting State must not, without the consent of the Requested State, try or punish the suspect for an offence that was not referred to in the extradition request or that is alleged to have been committed before the person was extradited;⁵⁰⁷
- The political offence exception: the right to decline to extradite a person because he or she is accused or has been convicted of a political offence;⁵⁰⁸
- The nationality exception: the right to decline to extradite a person who is a national of the Requested State (but note the rule of “extradite or prosecute”, discussed below);
- The right (or obligation) to refuse extradition on the basis that the extradition request is discriminatory in its purpose or if the rights of the person whose extradition

is sought may be prejudiced on one of the recognized grounds, such as race, sex, religion, nationality, ethnic origin or political opinion;⁵⁰⁹

- The right to refuse extradition on the basis that the offence for which extradition is being sought carries the death penalty (unless the Requesting State provides an assurance that it will not impose the death penalty or will not carry it out if it is imposed);⁵¹⁰ and
- The right (or obligation) to refuse extradition on the basis that the person sought would be subjected to torture or to cruel, inhuman or degrading treatment or punishment and/or the absence of the minimum guarantees in criminal proceedings.⁵¹¹

14.3. THE OBLIGATION TO EXTRADITE OR PROSECUTE

As noted above, States may be entitled to refuse extradition on certain grounds. They could refuse to extradite one of their nationals, for example, if the offence for which extradition is sought carries the death penalty. While respecting such entitlements, international law places an obligation on States refusing extradition to prosecute certain offences nevertheless. This obligation to either extradite or adjudicate/prosecute (*aut dedere aut judicare* or *aut dedere*

Convention on Extradition, art. 3; ECOWAS Convention on Extradition, art. 3.

⁵⁰⁶ Double jeopardy in its classic human rights sense applies only to double prosecution within the same jurisdiction. See, for example, *A.P. v. Italy*, Communication No. 204/1986 (“The [Human Rights] Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.”). However, in the context of extradition, the prohibition against double jeopardy can operate to exclude extradition notwithstanding that the prior adjudication occurred in a jurisdiction other than that of the Requesting State; see European Convention on Extradition, art. 9; Inter-American Convention on Extradition, art. 4 (1); ECOWAS Convention on Extradition, art. 13.

⁵⁰⁷ See European Convention on Extradition, art. 14; Inter-American Convention on Extradition, art. 13; ECOWAS Convention on Extradition, art. 20.

⁵⁰⁸ See European Convention on Extradition, art. 3 (1); Inter-American Convention on Extradition, art. 4 (4); ECOWAS Convention on Extradition, art. 4 (1).

⁵⁰⁹ Authority for the contention that such a refusal would be obligatory under international law is provided by the anti-discrimination clauses of all the major international and regional human rights treaties. See also European Convention on Extradition, art. 3 (2); Inter-American Convention on Extradition, art. 4 (5); ECOWAS Convention on Extradition, art. 4 (2).

⁵¹⁰ See European Convention on Extradition, art. 11; Inter-American Convention on Extradition, art. 9; ECOWAS Convention on Extradition, art. 17 (unless the death penalty also imposed in Requested State).

⁵¹¹ Authority for the contention that such refusal would be obligatory under international law is provided by the International Covenant on Civil and Political Rights, art. 7 and Convention against Torture, art. 3.

aut prosequi) has a long history in international law – particularly in international humanitarian law. It is specified in all four Geneva Conventions of 1949 in relation to the commission of “grave breaches” of the Conventions.⁵¹² The Convention against Torture contains a similar obligation,⁵¹³ as does the Statute of the International Criminal Court.⁵¹⁴ When it comes to violations of *jus cogens* norms (including those relating to slavery and the slave trade), it is accepted that the obligation to extradite or adjudicate/prosecute applies to all States as a matter of customary international law.⁵¹⁵ When the act of trafficking does not involve violations of *jus cogens* norms, the obligation is not customary and will apply only if imposed by treaties.

The Organized Crime Convention extends the principle of “extradite or prosecute” to trafficking offences.⁵¹⁶ States parties to the

European Trafficking Convention are similarly obliged to prosecute if a request for extradition for an offence established under that instrument is refused (art. 31 (3)).⁵¹⁷ Other international treaties⁵¹⁸ reiterate the importance of this principle.

14.4. MUTUAL LEGAL/JUDICIAL ASSISTANCE

As noted above, the successful investigation and prosecution of trafficking cases will often involve cooperation between States in securing evidence that is located in a country other than that in which the prosecution is to take place. When such cooperation involves evidence that is required to be admissible in court, or relates to outcomes that can be secured only by coercive means, it is generally governed by the strict “mutual legal assistance” rules set out in international and domestic laws.

Mutual legal assistance regimes are often established through a bilateral or multilateral treaty that may cover a single issue such as terrorism, money laundering or organized crime. An example is the regime established through the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Treaties can also be concluded for the purpose of providing a general framework of rules within which mutual legal assistance matters are dealt with between two or more countries. The Inter-American Convention on Mutual Legal Assistance in Criminal Matters and the Convention on Mutual Legal Assistance between Like-Minded ASEAN Countries are examples of this latter approach. Mutual legal assistance

⁵¹² For example, article 146 of Geneva Convention IV states: “Each High Contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case”.

⁵¹³ “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall, in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution” (art. 7 (1)).

⁵¹⁴ Rome Statute, particularly Part 2, arts. 5, 8 (1), 11, 12, 13, 17 and 19, and Part 3, art. 26.

⁵¹⁵ M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International law* (1995). See also Colleen Enache-Brown and Ari Fried, “Universal crime, jurisdiction and duty: the obligation of *aut dedere aut judicare* in international law”, *McGill Law Journal*, vol. 43 (1998), p. 613.

⁵¹⁶ Organized Crime Convention, arts. 15 (3) and 16 (10). Note that the *aut dedere aut judicare* rule is limited, in the Convention, to cases where refusal relates to nationality of the suspect.

⁵¹⁷ Note that the provision is limited to cases where refusal relates to nationality of the suspect.

⁵¹⁸ SAARC Convention, art. VII .4; Optional Protocol on the sale of children, art. 4 (3), 5; Inter-American Convention on Extradition, art. 8.



treaties generally indicate: the kinds of assistance to be provided; the rights of the requesting and requested States; the rights of alleged offenders; and the procedures to be followed in making, receiving and executing requests.

States can also deal with mutual legal assistance matters through their domestic law. Many countries have passed legislation enabling them to provide various forms of assistance to other States without the need for treaty-based relations. The legislation usually prescribes the preconditions and the procedure for making, transmitting and executing incoming and outgoing requests. Some laws designate specifically which foreign States will be provided with assistance and some provide that assistance will be extended on a case-by-case basis.

Guideline 11.8 of the Trafficking Principles and Guidelines deals with mutual legal assistance in the context of trafficking. It requests States to consider:

Ensuring judicial cooperation between States in investigation and judicial processes relating to trafficking and related offences, in particular through common prosecution methodologies and joint investigations. The cooperation should include assistance in: identifying and interviewing witnesses with due regard for their safety; identifying, obtaining and preserving evidence; producing and serving the legal documents necessary to secure evidence and witnesses; and the enforcement of judgements.

International treaty law confirms the importance of mutual legal assistance in trafficking and related cases. The Organized Crime Convention, as the parent instrument to the Trafficking Protocol, obliges States parties to afford one another the widest measure of such assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by

that instrument, including trafficking. It also sets out a detailed legal and procedural framework for mutual legal assistance between States parties (art. 18). In its article VI, the SAARC Convention contains an obligation of mutual legal assistance in respect of offences established under that treaty,⁵¹⁹ as does the Optional Protocol on the sale of children (arts. 6 and 10). The importance of mutual legal assistance in trafficking cases is reiterated in international and regional policy documents.⁵²⁰

Human rights guarantees apply as much to mutual legal assistance as they do to extradition. States must ensure that nothing in the terms of a mutual legal assistance request would constitute an actual or potential infringement of human rights, in relation to both the subject of the request and any third parties. The principles of necessity, proportionality and legality explored elsewhere in this Commentary will be relevant in this context. Particularly in relation to coercive measures, it is important to ensure that the measures are reasonable and necessary by taking into account the evidence sought and the seriousness of the offence under investigation. Cooperation may be refused when requesting States do not respect basic rights and procedural guarantees as set out in major human rights instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

⁵¹⁹ Note that the drafters of the European Trafficking Convention decided not to create a separate mutual legal assistance regime that would either unnecessarily duplicate or compete with the comprehensive standards already in existence (*Explanatory Report on the European Trafficking Convention*, para. 337).

⁵²⁰ The General Assembly, in its resolution 61/180, called on States to consider “establishing coordination and cooperation mechanisms at the national and international levels on... mutual legal assistance” (para. 7). See also, Brussels Declaration, para. 16; OAS Recommendations on Trafficking in Persons, Section III(6).

14.5. INFORMAL COOPERATION MEASURES

As noted above, informal cooperation is a separate, less rule-bound international crime cooperation tool, which is available outside and generally complementary to formal mutual assistance regimes. In circumstances where coercive measures are not required, it is usually faster, cheaper and easier to obtain information or intelligence on an informal basis than through formal mutual assistance channels. In the context of trafficking, informal cooperation measures could include the following:

- The identification and location of suspects, victims and witnesses;
- Taking voluntary witness/victim statements;
- Verifying information in statements;
- Criminal records checks;
- Telephone and internet subscriber/server checks;
- Passport and visa record checks; and
- Supplying public records (for example: address records, land registries, telecommunications company records, motor vehicle registrations and company registrations).

The Trafficking Principles and Guidelines encourage informal cooperation in the criminal justice process, with a particular focus on law enforcement cooperation. Guideline 11.6 requests States to consider establishing mechanisms to facilitate the exchange of information concerning traffickers and their methods of operation. Guideline 11.7 requests that consideration be given to the development of procedures and protocols for the conduct of proactive joint investigations by the law enforcement authorities of different concerned States. The Guidelines suggest that provision be made for the direct transmission of requests for assistance between locally competent authorities in order to ensure such requests are rapidly dealt with and to foster cooperative relations at the working level (Guideline 11.7).

The Organized Crime Convention and the Trafficking Protocol both recognize the value of police-to-police cooperation between States. The Convention lists a range of objectives for such cooperation including early identification of offences and exchange of information and intelligence (art. 27 (1)). It encourages States parties to enter into bilateral or multilateral agreements or arrangements with a view to enhancing cooperation between their law enforcement agencies (art. 27 (2)). The Protocol emphasizes cooperation through information exchange for purposes such as victim/perpetrator identification in transit, document verification and proactive intelligence gathering (art. 10 (1)). The body established to provide recommendations on the effective implementation of the Protocol affirms that: "States parties should... [u]tilize those provisions of the Organized Crime Convention that facilitate the use of joint investigation teams and special investigative techniques in the investigation of cases of trafficking in persons at the international level".⁵²¹ The importance of law enforcement cooperation in the investigation of trafficking-related crimes has been recognized widely outside these two treaties.⁵²²

⁵²¹ CTOC/COP/WG.4/2009/2, para. 24.

⁵²² For example, the Beijing Declaration and Platform for Action at para. 130 (c) requires States to "[s]tep up cooperation and concerted action by all relevant law enforcement authorities and institutions" aimed at dismantling trafficking networks at the national, regional and international levels. The General Assembly, in its resolution 58/137, encouraged States to implement the Organized Crime Convention and the Trafficking Protocol by "promoting cooperation among law enforcement authorities in combating trafficking in persons" (para. 4 (b)). The Organization of American States has recommended that member States should "introduce expeditious mechanisms... to enable information to be exchanged... among the countries of origin, transit, destination" and that "regional and international cooperation networks should be created to enable competent authorities, in particular judicial and police authorities, to combat the crime of trafficking in persons" (OAS Recommendations on Trafficking in Persons, Section V (2)). See also OSCE Action Plan, Recommendations III (2.5), (3).



Both the Trafficking Principles and Guidelines and the Organized Crime Convention encourage joint investigations in trafficking cases⁵²³ – a form of agency-to-agency assistance that enables the direct exchange of information between concerned countries. Such investigations could be envisaged for a case that is to be tried in a single jurisdiction. It would also be a useful tool when more than one State has jurisdiction over the offences involved. Joint investigations can be undertaken on a bilateral basis, or can be coordinated through an international or regional police agency (such as Interpol or Europol) or a regional prosecutorial agency such as Eurojust.⁵²⁴ The possibility of deploying coordinated, specialized investigator-prosecutor teams at the regional level has recently been

⁵²³ *Trafficking Principles and Guidelines*, Guideline 11.8; Organized Crime Convention, art. 19.

⁵²⁴ See further Gallagher and Holmes, loc. cit. The General Assembly, in its resolution 61/180, encouraged States to

raised in Africa,⁵²⁵ Europe⁵²⁶ and South-East Asia.⁵²⁷

SEE FURTHER:

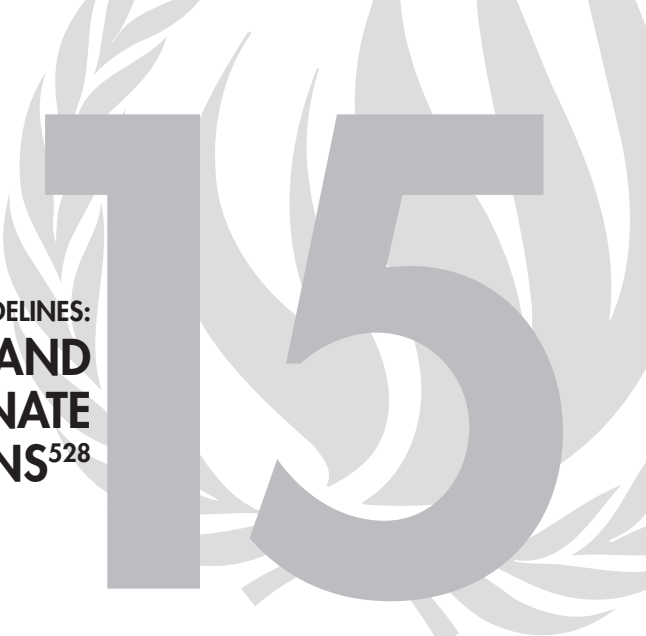
- Extradition and the penalties test: part 2.4, section 15.1

consider “sharing police intelligence information... taking into account the information and communication tools offered by Interpol” (para. 7). The Council of the European Union has also recommended that Member States “should ensure that national law enforcement agencies regularly involve Europol in the exchange of information, in joint operations and joint investigative teams and use the potential of Eurojust to facilitate the prosecution of traffickers (EU Plan on Best Practices, para. 4 (viii)).

⁵²⁵ See ECOWAS Initial Plan of Action, p. 7 (Specialization and Training), para. 1, which recommends the development of joint investigation units with input from government law enforcement agencies, government personnel and training agencies, Interpol and other law enforcement agencies.

⁵²⁶ The Brussels Declaration also recommends the establishment of “[s]pecialised, joint investigative teams of investigators and prosecutors” (para. 17).

⁵²⁷ ASEAN Practitioner Guidelines, Section 2.A.1.



PRINCIPLE 15 AND RELATED GUIDELINES: **EFFECTIVE AND PROPORTIONATE SANCTIONS**⁵²⁸

Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences.

15.1. PURPOSE AND CONTEXT

Sanctions are an essential component of a comprehensive response to trafficking. Sanctions that are disproportionate to the harm caused and the potential benefits derived from trafficking will create distortions that can only hinder effective criminal justice responses. Inadequate penalties for trafficking can also impair the effectiveness of international cooperation procedures, such as extradition, which are triggered by a severity test linked to the gravity of sanctions. Conversely, rigid or extremely severe sanctions, such as mandatory minimum custodial terms or provision for capital punishment, may not meet the required human rights and criminal justice standard in all cases, for reasons that are more fully explored below.

Principle 15 requires that effective and proportionate sanctions be applied to those

convicted of trafficking or its component or related offences such as sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude, debt bondage, the worst forms of child labour and forced marriage.⁵²⁹ It is linked and gives effect to Principles 12 and related guidelines (dealing with criminalization), and Principle 13 and related guidelines (dealing with investigation and prosecution). Principle 15 is directed at any State that exercises criminal jurisdiction over those involved in trafficking.

15.2. THE OBLIGATION TO IMPOSE SANCTIONS

The obligation to impose effective and proportionate sanctions, set out in Principle 15, is confirmed and extended through Guideline 4.3, which calls on States to make legislative provision for effective and proportionate criminal penalties, including custodial penalties giving rise to extradition in the case of individuals.⁵³⁰ This obligation is confirmed

⁵²⁸ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 7.

⁵²⁹ See the discussion of “related offences” under Principle 12 and related guidelines, above.

⁵³⁰ On the link between penalties and extradition, see the discussion under Principle 14 and related guidelines, above.

through international treaty law. The Organized Crime Convention, for example, includes the following requirements with respect to offences established under the Trafficking Protocol:⁵³¹

- Such offences are to be liable to sanctions that take into account the gravity of the offences; and
- Discretionary legal powers with regard to sentencing are to be exercised in a way that maximizes the effectiveness of law enforcement measures and gives due regard to the need to deter the commission of trafficking-related offences (art. 11).

The European Trafficking Convention requires trafficking and other offences established under that instrument to be punishable by “effective, proportionate and dissuasive sanctions” including custodial penalties that can give rise to extradition (art. 23 (1)).⁵³²

In cases of trafficking involving legal persons (such as companies, business enterprises and charitable organizations), both the Organized Crime Convention (art. 10 (4)) and the European Trafficking Convention (art. 23 (2)) require that such legal persons be made subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Punishment for the crime of trafficking may involve non-custodial sanctions or “measures”

directed either at individuals or at legal persons, such as companies. The confiscation of assets, discussed below in the context of Principle 16 and related guidelines, is an example of such a measure. The European Trafficking Convention envisages several others, including the closure of any establishment used to carry out trafficking in human beings and the banning of a perpetrator from carrying out the activity in the course of which the offence was committed (art. 23 (4)). The Explanatory Report on the Convention notes that this provision is aimed at enabling States to act against establishments that might be used as a cover for trafficking, such as matrimonial agencies, placement agencies, travel agencies, hotels or escort services (para. 257). It is also intended to “reduce the risk of further victims by closing premises on which trafficking victims are known to have been recruited or exploited (such as bars, hotels, restaurants or textile workshops) and banning people from carrying on activities which they used to engage in trafficking” (para. 256). The Trafficking Principles and Guidelines echo this concern by proposing a review of laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as a cover for trafficking (Guideline 4 (2)). In *Rantsev v. Cyprus and Russia*, the European Court of Human Rights confirmed that the prohibition on trafficking read into article 4 of the European Convention on Human Rights required States parties “to put in place adequate measures regulating businesses often used as a cover for human trafficking” (para. 284). The Court also considered immigration policy under the obligation of protection. Significantly, it found that the visa regime in Cyprus for foreign artistes, mostly young women, rendered the artistes vulnerable to trafficking and sexual exploitation. Given its weaknesses, the visa regime itself was held to violate the obligation to provide practical

⁵³¹ A State that is a party to the Organized Crime Convention and not the Trafficking Protocol would be required to establish that trafficking is, under its law, a “serious crime” as defined in the Convention for these provisions to apply to trafficking offences, Organized Crime Convention, art. 2 (9)(b); *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 302.

⁵³² As noted in the *Explanatory Report on the European Trafficking Convention*, this would require provision for custodial penalties of at least one year (para. 252).



and effective protection against trafficking and exploitation (para. 293).

International and regional treaties on related issues, such as the exploitation of children and migrant workers, identify an obligation on States parties to sanction violations of the rights protected by those instruments.⁵³³ On the particular issue of trafficking, the General Assembly⁵³⁴ and a number of human rights treaty bodies⁵³⁵ have emphasized the importance of punishing those involved in the trafficking and exploitation of human beings. Also relevant are the sanctioning provisions of a large number of instruments dealing with violence against women.⁵³⁶

⁵³³ Convention on the Rights of the Child, art. 32 (c) (economic exploitation of children); Optional Protocol on the sale of children, art. 3 (3) (sale of children, child prostitution and child pornography). The Migrant Workers Convention requires States parties to sanction those who use violence, threats or intimidation against migrant workers or members of their families in an irregular situation (art. 68 (1)(c)).

⁵³⁴ Resolutions 61/144 (para. 3), 59/166 (para. 4) and 58/137 (para. 5 (a)) (sexual exploitation).

⁵³⁵ The United Nations treaty bodies have repeatedly called on States to punish those who engage in trafficking, for example: Human Rights Committee, concluding observations: Czech Republic (CCPR/C/CZE/CO/2, para. 12); Slovenia (CCPR/CO/84/SVN, para. 11); Thailand (CCPR/CO/84/THA, para. 20); Albania (CCPR/CO/82/ALB, para. 15); Committee against Torture, concluding observations: Italy (CAT/C/ITA/CO/4, para. 22); Hungary (CAT/C/HUN/CO/4, para. 21); Tajikistan (CAT/C/TJK/CO/1, para. 8); Togo (CAT/C/TGO/CO/1, para. 26); Committee on the Elimination of Discrimination against Women, concluding observations: Lebanon (CEDAW/C/LBN/CO/3, para. 29).

⁵³⁶ Convention on the Elimination of All Forms of Discrimination against Women, art. 2 (b); Protocol on the Rights of Women in Africa, art. 4 (2)(e); Declaration on the Elimination of Violence against Women, art. 4 (d) (States should "[d]evelop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence"); Beijing Declaration and Platform for Action, para. 124 (c) (States to "[e]nact and/or reinforce penal, civil, labour

15.3. THE "EFFECTIVE AND PROPORTIONATE" STANDARD

Principle 15 requires "effective and proportionate" sanctions. The Organized Crime Convention (and, by extension, the Trafficking Protocol) requires penalties that take into account the gravity of the offence and that give due regard to deterrence. The European Trafficking Convention standard for sanctions is that they must be "effective, proportionate and dissuasive". Various soft-law sources confirm the general tenor of these provisions.⁵³⁷ Sanctions must be generally consistent with the harm caused and the benefits derived from trafficking and related exploitation. They must, in short, "clearly outweigh the benefits of the crime".⁵³⁸

and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence") and para. 130 (b) (States to strengthen "existing legislation with a view to ... punishing the perpetrators"); Beijing +5 Outcome Document, para. 69 (a) (States to criminalize all forms of violence against women), para. 69 (b) (States to prosecute and sentence appropriately the perpetrators of violence against women) and para. 97 (c) (proposing the strengthening of "national legislation by further defining the crime of trafficking in all its elements and by reinforcing the punishment accordingly"; Committee on the Elimination of Discrimination against Women, general recommendation No. 19, paras. 24 (g), (t)(i); General Assembly resolution 52/86, annex, para. 9 (a) (i).

⁵³⁷ See, for example, ASEAN Practitioner Guidelines at Part 1.A.2 ("Penalties for those convicted of the crime of trafficking in persons and related crimes should be appropriate to the gravity of the crime and ... reflect aggravating circumstances"). The United Nations human rights treaty bodies have in some cases specifically called on States to ensure that penalties are commensurate with the seriousness of the acts: Human Rights Committee, concluding observations: Costa Rica (CCPR/C/CRI/CO/5, para. 12); Committee against Torture, concluding observations: Bosnia and Herzegovina (CAT/C/BIH/CO/1, para. 21); Committee on the Elimination of Discrimination against Women, concluding observations: Morocco (CEDAW/C/MAR/CO/4, para. 23).

⁵³⁸ *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 262.

The standard of “effective and proportionate” requires consideration of many other factors. As noted above, inappropriately light sentences that do not reflect the harm caused, or the benefits derived, will compromise the criminal justice task and may even impair the effectiveness of international cooperation procedures such as extradition. Such sentences also fail the victims by not offering them the protection they deserve. At the same time, as noted elsewhere in relation to penalties for violence against women, draconian sanctions not consistent with the harm caused can have the unintended consequence of decreasing reporting and convictions.⁵³⁹

When considering whether penalties meet the generally accepted standard, it is important to keep in mind the multiple and varying parties involved. A typical trafficking case may involve recruiters and brokers as defendants as well as individuals more directly involved in the exploitation. The benefits that each party derives from the exploitation are likely to be starkly different, as will be their contribution to the harm caused to victims. It could be argued, on this basis, that legislatively mandated minimum penalties, particularly if set very high, do not satisfy the standard because they remove the measure of judicial discretion required for the mandated standard of “effective and proportionate” to be met.⁵⁴⁰ The death penalty is also problematic – and not just from a human rights perspective. While international law does not yet categorically reject capital punishment,⁵⁴¹ it is unlikely that providing such a sanction for trafficking offences would meet the “effective and proportionate” standard in all cases, given the complexity of the trafficking crime, the inevitable investigatory difficulties

and the highly variable levels of complicity among offenders.⁵⁴²

15.4. AGGRAVATED OFFENCES AND PREVIOUS CONVICTIONS

Guideline 4.3 requests States to consider, where appropriate, making legislative provision for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed, or involving complicity, by State officials.

This concept of aggravated offences is an aspect of the proportionality requirement discussed above. It accepts that a crime such as trafficking can be made worse under certain circumstances, when it should attract a different, presumably harsher, penalty. Aggravated offences are recognized in relevant treaty law. The European Trafficking Convention, for example, requires that, in the determination of penalties for trafficking-related offences, certain circumstances be regarded as aggravating. These include:

- When the offence deliberately or by gross negligence endangered the life of the victim;
- When the offence was committed against a child;
- When the offence was committed by a public official in the performance of her/his duties; and
- When the offence was committed within the framework of a criminal organization (art. 24).

⁵³⁹ A/61/122/Add.1, para. 360.

⁵⁴⁰ See further Gallagher and Holmes, loc. cit.

⁵⁴¹ See generally William Schabas, *The Abolition of the Death Penalty in International Law* (3rd ed, 2002); and Nowak, op. cit., pp. 133-153.

⁵⁴² Gallagher and Holmes, loc. cit. Some extradition treaties specify that States shall not grant extradition when the offence in question is punishable in the requesting State by death penalty (Inter-American Convention on Extradition, art. 9); or at least that States may refuse extradition in such circumstances (European Convention on Extradition, art. 11; ECOWAS Convention on Extradition, art. 17).



The SAARC Convention also contains an aggravated offences provision in respect of each of the above grounds, as well as in relation to the involvement of the offender in an organized criminal group or organized criminal activities; and the commission of offences in a custodial, educational or social institution or facility for children (art. IV).

Other related international and regional legal and policy instruments recognize the concept of aggravated offences,⁵⁴³ and the sentencing judgements of international tribunals provide important guidance on this point.⁵⁴⁴ Crimes against children and crimes committed by public officials in the performance of their duties are the most commonly cited grounds for imposing

relatively harsher penalties in relation to trafficking and comparable crimes.⁵⁴⁵

Trafficking is often conducted across national borders by criminal organizations whose members may have been tried and convicted in more than one country. While prior convictions in national courts are often taken into account in deciding penalties, previous convictions in foreign courts are not generally made known or considered for sentencing purposes. The European Trafficking Convention and SAARC Trafficking Convention both recognize the principle of *international recidivism* by providing that previous convictions in other countries, particularly for similar offences, could be taken into account when determining penalties.⁵⁴⁶ This provision addresses both the “effectiveness” and “proportionality” requirements discussed above.

⁵⁴³ The ASEAN Practitioner Guidelines (Part 1.A.2) state: “Penalties for those convicted of the crime of trafficking in persons and related crimes should be appropriate to the gravity of the crime and to reflect aggravating circumstances”. The Brussels Declaration calls on States to consider trafficking offences involving children as aggravated offences deserving of more severe penalties (para. 16). The Organization for Security and Co-operation in Europe has recommended that “legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances” (OSCE Action Plan, Recommendation III (1.4)). Statutes of the various international criminal tribunals require the Court, when sentencing for violations of international humanitarian law, to take into account the gravity of the offence and the individual circumstances of the convicted person (Rome Statute, art. 78; Statute of the International Criminal Tribunal for the former Yugoslavia, art. 24 (2); Statute of the International Criminal Tribunal for Rwanda, art. 23 (2)).

⁵⁴⁴ See, for example, the following sentencing judgements of the International Criminal Tribunal for the former Yugoslavia that consider what constitutes aggravating (and mitigating) factors to serious international crimes such as war crimes, crimes against humanity: *Prosecutor v. Rajic* (Trial Chamber I) Case No. IT-95-12-S, 8 May 2006 (Sentencing Judgement), paras. 97-137; *Prosecutor v. Plavsic* (Trial Chamber III), Case No. IT-00-39&40/1-S, 27 February 2003 (Sentencing Judgement), paras. 53-60; *Prosecutor v. Simic* (Trial Chamber II), Case No. IT-95-9/2, 17 October 2002 (Sentencing Judgement), paras. 40-43; *Prosecutor v. Sikirica et al.* (Trial Chamber III), Case No. IT-95-8, 13 November 2001 (Sentencing Judgement), para.

SEE FURTHER:

- Criminalization of trafficking and related offences: part 2.4, section 12.2
- Investigation and prosecution of trafficking: part 2.4, sections 13.2-13.3
- Punishment of legal persons, confiscation of assets: part 2.4, sections 16.1-16.3

109; *Prosecutor v. Todorovic* (Trial Chamber I), Case No. IT-95-9/1, 31 July 2001 (Sentencing Judgement), paras. 50-95; *Prosecutor v. Tadic* (Trial Chamber II), Case No. IT-94-1, 11 November 1999 (Sentencing Judgement), paras. 19-24; *Prosecutor v. Erdemovic* (Trial Chamber II), Case No. T-96-22, 5 March 1998 (Sentencing Judgement), para. 15.

⁵⁴⁵ European Trafficking Convention, art. 24 (b); SAARC Convention, art. IV (1)(e); Brussels Declaration, para. 16; OSCE Action Plan, Recommendation III (1.4).

⁵⁴⁶ European Trafficking Convention, art. 25: “[e]ach Party shall adopt such legislative and other measures providing for the possibility to take into account final sentences passed by another Party in relation to offences established in accordance with this Convention when determining the penalty”; SAARC Convention, art. IV: “States Parties ... shall ensure that their courts ... can take into account factual circumstances which make the commission of [offences established under the Convention] particularly grave, viz ... previous conviction, particularly for similar offences, whether in a Member State or any other country”.



PRINCIPLE 16 AND RELATED GUIDELINES: ASSET CONFISCATION AND DISPOSAL⁵⁴⁷

States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking.

16.1. PURPOSE AND CONTEXT

Human trafficking is a highly lucrative and relatively risk-free crime. Criminals involved in organizing and financing trafficking activities often distance themselves from direct involvement in the trafficking activity. This makes it difficult for investigators to gather sufficient evidence against them to secure convictions. Even if they are arrested and punished, many traffickers are still able to enjoy their illegal gains for their personal use, or that of their families, and for maintaining the operation of their trafficking enterprises. Given the large financial interests involved and the difficulties experienced in securing convictions, it is important to take steps to ensure that trafficking

does not reward its financiers, organizers and beneficiaries.

Asset recovery is usually a three-step process: (i) investigative measures to trace the assets in question; (ii) preventive measures to immobilize the assets identified as related to the crime in question (freezing, seizing); and (iii) confiscation, return and disposal.⁵⁴⁸ In the context of trafficking, effective asset recovery reduces the profits and increases the risks, thereby acting as an important deterrent. A strong confiscation and recovery regime can also support the criminal conviction of traffickers by providing evidence to substantiate and/or corroborate a case of human trafficking, for example by demonstrating to the court that the income of a private or legal person far exceeds what can be explained by legitimate sources.

Criminals involved in trafficking may organize their affairs so that the proceeds derived from a

⁵⁴⁷ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 7. For a more detailed consideration of the issue of asset confiscation, in particular with regard to mutual legal assistance, see the ASEAN-UNODC-ARCPPT Handbook.

⁵⁴⁸ The term “freezing” (or seizure) in the context of asset recovery is defined by the Organized Crime Convention as “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority” (art. 2 (f)). The term “confiscation” is defined in the same instrument as “the permanent deprivation of property by order of a court or other competent authority” (art. 2 (g)).

trafficking-related crime are located in a State other than the one in which they live or in which the crime is committed. The goal of ensuring that there are no safe havens for traffickers must encompass the assets they have accrued by exploiting their victims. International cooperation mechanisms that enable countries to give effect to foreign freezing and confiscation orders and to work together to recover criminal assets are a crucial part of effective asset recovery.

The assets and proceeds of trafficking could include property and monies such as:

- Profits from the services and exploitation of the victim;
- Costs paid by victims (passports, visa, transport), for example where the victim paid for illegally facilitated migration and subsequently became a victim of trafficking;
- Vehicles used to transport victims;
- Factories, brothels, boats or farms where the exploitation took place;
- Profits from the sale or resale of a person from one trafficker to another; and
- The value of unpaid services/salaries that would otherwise have been paid to the persons exploited.

The legal basis of a confiscation and recovery regime can be national law, bilateral or multilateral treaties or, most commonly, a combination of both. States generally develop their own national laws with specific provisions on a range of matters such as: which “proceeds” can be a target of confiscation; criminal and civil evidentiary standards; institutions, tools and court or legal orders for obtaining financial information, and procedures for recovering proceeds. In terms of cooperation with other countries, the recovery of proceeds is a form of mutual legal assistance. States will therefore rely on provisions of their national laws on mutual legal assistance as well as on any treaties that may exist between them and the cooperating

State.⁵⁴⁹ Domestic money-laundering laws and extradition treaties may also contain provisions on international cooperation in the recovery of the proceeds of crime.

Provision for the most appropriate use of confiscated assets is another important aspect. Some treaties specify how confiscated funds and property are to be used. Often, States have wide discretion in this matter and regulate the disposal of confiscated proceeds or property through a combination of domestic law and administrative procedures. This issue is considered further below in section 16.3.

16.2. THE OBLIGATION TO SEIZE AND CONFISCATE ASSETS DERIVED FROM TRAFFICKING

Principle 16 requests States, in appropriate cases, to freeze and confiscate the assets of both individuals and legal persons (such as companies and business enterprises) involved in trafficking. It is supplemented by Guideline 4.4, which requests States to consider “making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences”. As noted throughout this Commentary, the reference to related offences is to be taken to include sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude, debt bondage, the worst forms of child labour and forced marriage.⁵⁵⁰

Guideline 11.10 of the Trafficking Principles and Guidelines focuses on the international cooperation aspect of asset confiscation. It requests States to consider “[e]stablishing cooperative mechanisms for the confiscation

⁵⁴⁹ See further the discussion on mutual legal assistance under Principle 14 and related guidelines, above.

⁵⁵⁰ See the discussion of “related offences” under Principle 12 and related guidelines, above.



of the proceeds of trafficking. This cooperation should include the provision of assistance in identifying, tracing, freezing and confiscating assets connected to trafficking and related exploitation”.

Relevant treaty law confirms an obligation on States to seize and confiscate assets of trafficking. The Organized Crime Convention sets out detailed rules and procedures for the identification, tracing, freezing and seizure of assets and confiscation of proceeds of designated crimes, including trafficking (arts. 12-14). States parties to the Convention and the Trafficking Protocol⁵⁵¹ are required to create adequate powers (relating to both substantive and procedural law) to enable and support confiscation and seizure.⁵⁵² The Convention also sets forth a number of mechanisms to enhance international cooperation with respect to confiscation in order to eliminate advantages to criminals presented by national borders and differences in legal systems (art. 13). States parties are required to comply with requests for confiscation presented by another State party. Mutual legal assistance obligations under the Convention (explored in the context of Principle 14 and related guidelines) are to apply to such international cooperation.

The European Trafficking Convention requires States parties to “adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal

offences established in accordance with [the Convention], or property the value of which corresponds to such proceeds” (art. 23 (3)). Note the link between this provision and the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

International and regional treaties on related issues such as corruption⁵⁵³ and the sale of children, child prostitution and child pornography⁵⁵⁴ identify an obligation on States parties to confiscate the assets and proceeds of the relevant crimes. On the particular issue of trafficking, the General Assembly has emphasized the importance of asset confiscation,⁵⁵⁵ as have regional organizations.⁵⁵⁶

16.3. USING CONFISCATED ASSETS TO SUPPORT VICTIMS OF TRAFFICKING

Principle 16 requests States to consider ensuring, to the extent possible, that confiscated assets are used to support and compensate victims of trafficking. Guideline 4.4 is even more

⁵⁵³ United Nations Convention against Corruption, art. 31; Inter-American Convention against Corruption, art. XV; Criminal Law Convention on Corruption, art. 23; African Union Convention on Combating Corruption, art. 16.

⁵⁵⁴ Optional Protocol on the sale of children, art. 7.

⁵⁵⁵ Resolutions 61/144 (para. 10), 59/166 (para. 9) and 58/137 (para. 1).

⁵⁵⁶ See, for example, the ASEAN Practitioner Guidelines, at Part 1.A.3: “Offences of trafficking in persons, together with trafficking related crimes are recommended to be predicate offences in respect of money laundering legislation and assets confiscation provisions”; and Part 2.D.6: “Consideration should be given to amending domestic legislation to ensure that measures are taken to identify, trace and freeze or seize proceeds of crime derived from trafficking in persons for the purpose of eventual confiscation”. See also the Brussels Declaration, para. 16; EU Plan on Best Practices, para. 4 (v); OSCE Action Plan, Recommendation III (1.5); OAS Recommendations on Trafficking in Persons, Section III (3).

⁵⁵¹ A State that is a party to the Convention and not the Protocol would be required to establish that trafficking is, under its law, a “serious crime” as defined in the Convention for these provisions to apply to trafficking offences, Organized Crime Convention, art. 2 (9)(b); *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 302.

⁵⁵² Organized Crime Convention, art. 12. See further *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, paras. 302-313.

specific, requesting legislative provision for the confiscation of the instruments and proceeds of trafficking and related offences that, where possible, specifies that “the confiscated proceeds of trafficking will 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”.

As noted above, States generally regulate the disposal of confiscated assets through domestic law and administrative procedures. The linking of a criminal justice measure, such as the confiscation of proceeds, to victim support is an important step forward in integrating a human rights approach to trafficking. It finds considerable support in the relevant treaty law. While the Organized Crime Convention contains no mandatory provisions on the disposal of confiscated proceeds or property, States parties are required to consider specific disposal options. The priority option is victim compensation. Under the terms of the Convention, when a State party has responded to a request from another State party with regard to asset confiscation, then the requested State shall, if requested and legally able, “give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victim of the crime or return such proceeds of crime or property to their legitimate owners” (art. 14 (2)).

The European Trafficking Convention’s provisions on this point are also advisory rather than mandatory. States parties are required to guarantee compensation for victims “for instance through the establishment of a fund for victim compensation or measures or programmes

aimed at social assistance and social integration of victims, *which could be funded by the assets resulting from the application of [confiscation] measures*” (art. 15 (4), emphasis added). Human rights bodies and regional policy instruments provide additional evidence of a growing acceptance of the idea that proceeds of trafficking crimes confiscated by States should be returned, in one form or another, to the victims whose exploitation has made such profits possible.⁵⁵⁷ It has been noted, however, that such measures are not generally sustainable and should only ever be considered as an adjunct to an institutionalized, adequately funded victim support and protection programme.⁵⁵⁸ The key elements of such a programme are considered in detail below in the context of a broader discussion of the right to a remedy as set out in Principle 17 and related guidelines.

SEE FURTHER:

- Mutual legal assistance: part 2.4, section 14.4
- Criminalization of trafficking and related offences: part 2.4, section 12.2
- Victim support and protection programmes: part 2.3, section 8.5; part 2.4, section 17.5

⁵⁵⁷ See, for example, the ASEAN Practitioner Guidelines at Part 1.A.4: “As far as possible, confiscated assets should be used to fund both victim compensation claims and, where appropriate, other forms of counter-trafficking initiatives”; OSCE Action Plan, Recommendation III (1.5); E/CN.4/2006/62/Add.2, para. 78. See also General Assembly resolution 40/34, adopting the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, preamble: “[States are encouraged] to cooperate with other States, through mutual judicial and administrative assistance, in such matters as the detection and pursuit of offenders, their extradition and the seizure of their assets, to be used for restitution to the victims.”

⁵⁵⁸ See Gallagher and Holmes, loc. cit.



PRINCIPLE 17 AND RELATED GUIDELINES: ACCESS TO REMEDIES⁵⁵⁹

States shall ensure that trafficked persons are given access to effective and appropriate legal remedies.

17.1. PURPOSE AND CONTEXT

Redress of wrongs is a fundamental legal principle that constitutes both a general principle of law and a customary rule of law, recognized and applied in all legal systems.⁵⁶⁰

Victims of trafficking have often been exploited for little or no payment over long periods of time. They may have suffered injuries or contracted illnesses that require medical attention. They may have incurred debts as a result of their trafficking experiences. While remedies (or, more precisely, *reparation*) for trafficking are still very rare, there is a clear trend towards making this a legal and practical

possibility. For example, some countries have expressly granted victims of trafficking the right to private action against their traffickers and have included mandatory restitution to trafficked persons as part of the criminal sentencing of traffickers. Other countries grant victims the right to bring a civil action against their traffickers, regardless of their nationality or migration status.

Remedies confirm the status of trafficked persons as victims of crime and victims of human rights abuses. They are a practical means by which victims can both access and receive justice.

Remedies are strongly linked to rules of responsibility. In the context of trafficking, the obligation to provide remedies and the right to access remedies will normally arise in one or both of the following ways:

- Where the State is responsible for the violation of a human right that is protected under international law through either custom or treaty (for example, the prohibition on non-discrimination, the obligation to criminalize trafficking, the obligation to protect and support victims); and/or
- In situations where the State is not directly implicated in the initial harm, but it has failed

⁵⁵⁹ This section draws on Gallagher, *International Law of Human Trafficking*, chap. 6. For a more detailed consideration of the theory of remedies and the link with State responsibility in the context of violations of international human rights law, see Dinah Shelton, *Remedies in International Human Rights Law* (1999).

⁵⁶⁰ M. Cherif Bassiouni, "International recognition of victims' rights", *Human Rights Law Review*, vol. 6, No. 2 (2006), p. 203.

to discharge its obligation to prevent the harm and/or to respond appropriately (for example, failure to investigate and prosecute trafficking to the required standard of due diligence).⁵⁶¹

Note that non-State actors perpetrating a violation of human rights would be individually liable for reparation to victims.⁵⁶² The obligation on States to provide remedies for such violations must generally be linked to what is clearly an internationally wrongful act on the part of that State, such as a failure to protect or respond as detailed above. A State's duty to provide reparation for violations by non-State actors in the absence of such a distinct State wrong has been described as, at best, "an emerging norm".⁵⁶³

Can a State avoid the full weight of reparation owing for an internationally wrongful act by pointing to contributing factors or other causes falling outside its sphere of control? This is an important question because the "injury" of trafficking is often a cumulative one, caused by a combination of factors, not all of which can necessarily be attributed to the individual State that is held responsible for a particular injury. In some cases, a third State will be involved. For example, the failure of a country of origin to prevent individuals from being trafficked is a contributing cause of the harm they suffer in a country of destination. This reality, however, would be insufficient to reduce or attenuate the obligation of reparation owed in a particular case by either the country of origin or the country

of destination.⁵⁶⁴ As stated by the International Law Commission, "unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct".⁵⁶⁵

The Trafficking Principles and Guidelines are explicit on the point that "[t]rafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies" (Guideline 9, chapeau). This standard is explored further below with reference to both general human rights law and law specific to trafficking. The concept of "adequate and appropriate", as used in this context, is also considered.

17.2. THE OBLIGATION TO REMEDY VIOLATIONS OF HUMAN RIGHTS LAW

As noted by Bassiouni, "[a] State's duty to provide a domestic legal remedy to victims of violations of international human rights and humanitarian law norms committed in its territory is well-grounded in international law".⁵⁶⁶ This Commentary has confirmed that trafficking will

⁵⁶¹ See further the comprehensive discussion of State responsibility under Principle 2 and related guidelines, above.

⁵⁶² Bassiouni, *op.cit.*, p. 223.

⁵⁶³ *Ibid.*

⁵⁶⁴ In the *Corfu Channel Case*, for example, the United Kingdom recovered the full amount of its damage claim against Albania based on its wrongful failure to warn of the presence of mines, even though the mines had been laid by a third party (*Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* Assessment of the Amount of Compensation (1949) ICJ Reports 244, 250). Similarly, as shown by the International Court of Justice in the *Tehran Hostages* case, a State that is held responsible for an international wrong cannot lessen its obligation of reparation by pointing to concurrent causes on the part of a private party such as an organized criminal group (*United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* Judgment (1980) ICJ Reports 3, 29-33).

⁵⁶⁵ Draft articles on State responsibility, art. 31, para. 13.

⁵⁶⁶ Bassiouni, *op. cit.*, p. 213.



invariably involve multiple violations of human rights that are protected in treaties and, in some cases, through customary international law.

Most international and regional human rights treaties require States to provide access to remedies for such violations. The International Covenant on Civil and Political Rights, for example, requires States parties to ensure “that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy” (art. 2 (3)).⁵⁶⁷ A similar provision is found in the European Convention on Human Rights⁵⁶⁸ and American Convention on Human Rights (art. 25). The African Charter provides that every individual has “the right to appeal to competent national organs against acts violating his fundamental rights” (art. 7 (1)(a)). The Convention on the Elimination of all forms of Racial Discrimination requires States to provide effective remedies, and upholds the right of all persons to seek from national tribunals “just and adequate reparation or satisfaction for any damage suffered as a result of... discrimination” (art. 6). The Convention against Torture is also explicit in providing victims with an “enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible” (art. 14). In its article 39, the Convention on the Rights of the Child includes a similar provision. The Migrant Workers Convention provision on remedies is identical to that of the International Covenant on Civil and Political Rights (art. 83).⁵⁶⁹ The Statute of the International Criminal Court grants the Court

broad powers to order convicted persons to make symbolic or financial reparation to victims (art. 73).⁵⁷⁰

Once a right to a remedy can be found to exist in a treaty, then failure to provide such remedies becomes, of itself, an *additional* and *independent* breach of that instrument. In the human rights context, this can mean that the State will be held responsible for a series of violations, including both the individual violation that gives rise to the right to a remedy and the breach of the right to a remedy.

The obligation to provide a remedy for human rights violations may be present even when not specifically articulated in a treaty. One approach identifies this obligation as being itself a norm of customary international law.⁵⁷¹ Cited evidence includes the reference, in article 8 of the Universal Declaration of Human Rights, to the right of everyone to “an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law,” as well as reiterations of the right to a remedy in numerous other soft law instruments,⁵⁷² conforming State practice⁵⁷³

⁵⁶⁷ Note also art. 9 (5) which grants victims of unlawful arrest or detention an enforceable right to compensation, and art. 14 (6) which deals with compensation for miscarriage of justice.

⁵⁶⁸ “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority” (art. 13).

⁵⁶⁹ Note that the Convention also provides for an “enforceable right to compensation” with respect to unlawful detention or arrest (art. 16 (9)).

⁵⁷⁰ The Court itself may establish principles related to reparation and, in certain cases may award reparations to, or in respect of, victims including restitution, compensation and rehabilitation (art. 75). Note that the Statute contains a range of other provisions designed to secure justice for victims including measures to facilitate their protection as well as their participation in proceedings: see, for example, articles 43 and 68. These provisions have been extended through the Court’s rules of procedures and regulations as well as its jurisprudence. The Court is currently developing a court-wide strategy in relation to victims.

⁵⁷¹ Bassiouni, *op. cit.*

⁵⁷² The Court itself may establish principles related to reparation and, in certain cases, may award reparations to, or in respect of, victims including restitution, compensation and rehabilitation (art. 75).

⁵⁷³ See the examination of State practice in Bassiouni, *op. cit.*, pp. 218-223.

and the decisions of international courts and tribunals.⁵⁷⁴ According to another approach, the duty on a State party to provide a remedy for violations “is perhaps implicit in human rights treaties which require national implementation and whose effectiveness depends on the availability of municipal remedies”.⁵⁷⁵

Until recently, the only international instrument to focus specifically on the right to a remedy was the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration affirms that victims of crime, including victims of trafficking, are to be treated with compassion and with respect for their dignity; that they are entitled to access to justice and fair treatment; that judicial and administrative processes should be responsive to the needs of victims; and that those responsible for the harm should make appropriate restitution to the victim, including restitution from the State where it can be deemed responsible for the harm inflicted. It further affirms that, where compensation is not fully available from the offender, the State should endeavour to provide compensation from other sources when the victim has sustained serious injury (or to the family when the victim has died or been seriously incapacitated). The establishment of national funds for compensation to victims is encouraged.

⁵⁷⁴ For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez case*, “the State has a legal duty to take reasonable steps to prevent human rights violations and to ... ensure the victim adequate compensation” (para. 174).

⁵⁷⁵ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 138. It has also been contended, in the case of the Convention on the Elimination of All Forms of Discrimination against Women, that certain of its articles, taken together, constitute such a right. See also Rebecca Cook, “State responsibility for violations of women’s human rights”, *Harvard Human Rights Journal*, vol. 7 (Spring 1994), p. 125.

The 1985 Declaration dealt only with remedies for the victims of crimes committed by non-State actors. The rules on remedies and reparation applicable to human rights violations committed by or implicating States have recently been clarified with the adoption, in 2005, of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines on the Right to a Remedy and Reparation).⁵⁷⁶ This instrument confirms that the general obligation on States to ensure respect for and to implement human rights law includes an obligation to ensure equal and effective access to justice and the availability of remedies. It also confirms that the right to a remedy for gross violations of human rights – a term that would incorporate egregious cases of trafficking – includes the right of access to justice, the right to reparation for harm suffered *and* the right of access to information concerning violations and reparation mechanisms. Access to justice is seen as including the protection of victims’ privacy and safety in the course of any legal proceedings, and well as measures to ensure that victims actually can exercise their right to a remedy.

The Basic Principles and Guidelines on the Right to a Remedy and Reparation identify the purpose of reparation as being to promote justice by redressing violations. Reparation is, as noted above, linked to responsibility: a State is required to provide reparation for those acts or omissions that can be attributed to it. In relation to acts that cannot be attributed to the State, the responsibility for reparation falls on the perpetrator, and judgements to this effect

⁵⁷⁶ For more on this instrument, see Redress Trust, *Implementing Victim’s Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation* (2006).



should be effectively enforced by the State. If it is not possible to secure reparation for victims in this way, then the State itself should endeavour to ensure that reparation is made and other assistance provided.

The Basic Principles and Guidelines on the Right to a Remedy and Reparation confirm that reparation for victims of gross violations of human rights should be *full and effective*, while respecting the principles of appropriateness and proportionality. Reparation covers the elements identified at section 17.5, including restitution, compensation and rehabilitation. Guarantees of non-repetition are also highlighted as an important additional element that aims above and beyond the individual victim and focuses, in particular, on ensuring the prevention of future violations.

17.3. THE RIGHT TO A REMEDY FOR VIOLENCE AGAINST WOMEN

The obligation on States to investigate and prosecute violence against women has been confirmed at various points throughout this Commentary. An essential part of that obligation is a concurrent legal duty to provide just and effective remedies for women subjected to such violence. All the major legal and policy instruments relating to violence against women affirm the importance of remedies, including the OAS Convention on Violence against Women,⁵⁷⁷ the General Assembly Declaration on the Elimination of Violence against Women,⁵⁷⁸ the Committee

on the Elimination of Discrimination against Women's general recommendation No. 19⁵⁷⁹ and the Beijing Platform for Action.⁵⁸⁰ An important non-legal instrument that deals specifically with this issue is the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, adopted at a regional meeting of women's rights activists and advocates in 2007.⁵⁸¹

The various elements that should be covered by the right to a remedy – including reparation for harm suffered, restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition – are explored below at section

remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms”).

⁵⁷⁹ Committee on the Elimination of Discrimination against Women, general recommendation No. 19, para. 24 (i) (provision of effective complaints procedures and remedies, including compensation). See also General Assembly resolution 52/86, annex, para. 10 (c) (urging States to ensure women victims of violence receive “prompt and fair redress” including restitution or compensation).

⁵⁸⁰ Beijing Declaration and Platform for Action, para. 124 (d) (States to provide victims of violence against women (including trafficked persons) with “access to just and effective remedies, including compensation and indemnification and healing of victims”); para. 124 (h) (victims of violence against women to have access to the mechanisms of justice and effective remedies for the harm they have suffered and to be informed of their legal rights). Note also the Beijing +5, Outcome Document, para. 69 (b) (governments to take measures to provide victims with avenues for redress); para. 98 (a) (governments and international organizations should “improve knowledge and awareness of the remedies available” for violations of women's human rights).

⁵⁸¹ Adopted at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007. The Declaration affirms that the particular circumstances in which women and girls are made victims of crimes and human rights violations in situations of conflict require approaches specially adapted to their needs, interests and priorities. It identifies basic principles related to women's and girls' right to a remedy and reparations, and focuses on access to reparation and key aspects of reparation for women and girls.

⁵⁷⁷ OAS Convention on Violence against Women, art. 7 (g) (women victims of violence to have “effective access to restitution, reparations or just and effective remedies”).

⁵⁷⁸ Declaration on the Elimination of Violence against Women, art. 4 (d) (States to provide women subjected to violence with “access to the mechanisms of justice and, as provided for by national legislation, to just and effective

17.5. While the form and extent of the remedies required for trafficking when it is considered as violence against women will depend on the nature and circumstances of the offence, the Committee on the Elimination of Discrimination against Women has clarified that reparation should be proportionate to the physical and mental harm undergone and to the gravity of the violations suffered.⁵⁸² Other international human rights mechanisms have noted the particular issues and concerns that will arise with regard to remedies for violence against women.⁵⁸³

17.4. THE RIGHT TO A REMEDY IN THE SPECIFIC CONTEXT OF TRAFFICKING

Principle 17 identifies an obligation on States to provide victims of trafficking with access to effective and appropriate remedies. Guideline 9 confirms that this obligation arises out of an international legal right of trafficked persons, as victims of human rights violations, to such remedies. As noted immediately above, this principle finds ample authority in international human rights treaty law.

To what extent is the right to a remedy affirmed – or even extended – in treaties and other legal and non-legal instruments that deal specifically with trafficking? In one of

its few mandatory victim support provisions, the Trafficking Protocol requires States parties to ensure that their domestic legal systems contain measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.⁵⁸⁴ This provision does not amount to an obligation to provide compensation or restitution, as States need to offer only the legal possibility of seeking compensation.⁵⁸⁵ According to the Legislative Guide, the Protocol's requirement in this regard would be satisfied by the State's establishing one or more of three options: provisions allowing victims to sue offenders for civil damages; provisions allowing criminal courts to award criminal damages (paid by offenders) or to impose orders for compensation or restitution against persons convicted of trafficking offences; or provisions establishing dedicated funds or schemes to allow victims to claim compensation from the State for injuries or damages.⁵⁸⁶

The European Trafficking Convention takes a much more comprehensive approach to the issue of victim compensation and legal redress. First, it requires victims to be provided with appropriate information, including on the procedures they can use to obtain compensation (art. 15 (1)), as "people cannot claim their

⁵⁸² Human Rights Committee, *A.T. v. Hungary*, Communication No. 2/2003, para. 9.6 II (vi). Note also *Fernandes v. Brazil*, in which the Inter-American Commission on Human Rights recommended that a victim of domestic violence receive "appropriate symbolic and actual compensation" for the violence that she had suffered as well as for the failure of the State to "provide rapid and effective remedies, for the impunity that has surrounded the case for more than 15 years, and for making it impossible, as a result of that delay, to institute timely proceedings for redress and compensation in the civil sphere" (para. 61, Recommendation 3).

⁵⁸³ For example, the Special Rapporteur on Torture has noted that stigma is a central obstacle hindering justice for victims of sexual violence (A/HRC/7/3, para. 65).

⁵⁸⁴ Trafficking Protocol, art. 6 (6). See also Organized Crime Convention, art. 25 (2), and *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, paras. 368-371, for the text and commentary on the equivalent, and almost identical, provision.

⁵⁸⁵ *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 368. Note that the body established to provide recommendations on the effective implementation of the Protocol has recently affirmed that: "States parties should consider the possibility of establishing appropriate procedures to allow victims to obtain compensation and restitution" (CTOC/COP/WG.4/2009/2, para. 14).

⁵⁸⁶ *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 60.



rights if they do not know about them".⁵⁸⁷

Second, victims are required to be given access to legal assistance (art. 15 (2)).⁵⁸⁸ Once again, such assistance will often be critical to ensuring that the theoretical right to a remedy can be enjoyed in practice. Third, the Convention specifically provides that victims have a right to monetary compensation from convicted traffickers in respect of both material injury and suffering (art. 15 (3)).⁵⁸⁹ Finally, in recognition of the fact that in practice a State will rarely be able to force traffickers to compensate victims fully, the Convention requires parties to take steps to guarantee that victims are compensated. Examples given in the Convention include the establishment of a special fund or initiatives aimed at social assistance or the reintegration of victims (art. 15 (4)). The possibility of State compensation schemes being funded by the seized proceeds of trafficking is specifically noted.⁵⁹⁰

The obligation to provide effective and appropriate remedies to victims of trafficking is confirmed by United Nations organs,⁵⁹¹ human rights bodies⁵⁹² and a range of regional and international policy

instruments.⁵⁹³ The Optional Protocol on the sale of children also recognizes this obligation in the context of situations that will often involve trafficking (art. 9 (4)).

para. 13); Costa Rica (CCPR/C/CRI/CO/5, para. 12); Paraguay (CCPR/C/PRY/CO/2, para. 13); Brazil (CCPR/C/BRA/CO/2, para. 14). See also Committee against Torture, concluding observations: Costa Rica (CAT/C/CRI/CO/2, para. 7); Japan (CAT/C/JPN/CO/1, para. 25); Ukraine (CAT/C/UKR/CO/5, para. 26); Italy (CAT/C/ITA/CO/4, para. 24); Bosnia and Herzegovina (CAT/C/BIH/CO/1, para. 21); as well as the Committee on the Elimination of Discrimination against Women, concluding observations: Singapore (CEDAW/C/SGP/CO/3, para. 22). See further the following reports by Special Rapporteurs: "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo" (A/HRC/10/16, para. 44); "Report of Special Rapporteur on the human rights aspects of the victims trafficking in persons, especially women and children, Sigma Huda, Addendum 2: Mission to Bahrain, Oman and Qatar" (A/HRC/4/23/Add.2, para. 89); "Implementation of General Assembly resolution 60/251 of 15 March 2006 entitled 'Human Rights Council': Report submitted by the Special Rapporteur on the sale of children, child prostitution and child pornography, Juan Miguel Petit, Addendum 2: Mission to Ukraine" (A/HRC/4/31/Add.2, para. 75); "Rights of the child: Report submitted by the Special Rapporteur on the sale of children, child prostitution and child pornography, Juan Miguel Petit, Addendum 2: Mission to Albania" (E/CN.4/2006/67/Add.2, para. 119); "Integration of the human rights of women and a gender perspective: violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Addendum 3: Mission to the Islamic Republic of Iran" (E/CN.4/2006/61/Add.3, para. 72); "Integration of the human rights of women and a gender perspective: violence against women: Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Addendum 4: Mission to Mexico" (E/CN.4/2006/61/Add.4, para. 69); E/CN.4/2006/62/Add.2, para. 84; E/CN.4/2005/71, paras. 14, 33 and 35; E/CN.4/2000/68, para. 116 (f).

⁵⁹³ For example, ASEAN practitioner Guidelines, Part 1.A.7 ("To the extent possible, the legal framework should enable victims to seek and receive remedies including compensation from appropriate sources including those found guilty of trafficking and related offences"). See also the Brussels Declaration, para. 16; ECOWAS Initial Plan of Action, p 3, para. 6; OAS Recommendations on Trafficking in Persons, Section IV (8).

⁵⁸⁷ *Explanatory Report on the European Trafficking Convention*, para. 192. The report also notes that provision of information on the possibility of obtaining a residence permit will be very important for victims who are illegally in the country, as it would be very difficult for a victim to obtain compensation if she or he is unable to remain in the country.

⁵⁸⁸ On the degree of assistance required and whether it includes a right to free legal aid, see *Explanatory Report on the European Trafficking Convention*, para. 196.

⁵⁸⁹ See also *Explanatory Report on the European Trafficking Convention*, paras. 197-198.

⁵⁹⁰ On this point, see also the discussion on the use of confiscated assets to support victims of trafficking, under Principle 16 and related guidelines, above.

⁵⁹¹ General Assembly resolutions 61/144 (para. 18), 59/166 (para. 16) and 58/137 (para. 6 (b)); and Commission on Human Rights resolution 2004/45 (para. 4).

⁵⁹² Human Rights Committee, concluding observations: Japan (CCPR/C/JPN/CO/5, para. 23); the former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2,

17.5. THE STANDARD OF “EFFECTIVE AND APPROPRIATE” REMEDIES

Principle 17 requires access to “effective and appropriate” remedies. The above analysis confirmed the widespread acceptance of this standard in both law and policy. What do effective and appropriate actually mean in this context? Guideline 9.1 provides some direction on this point, referring to “fair and adequate remedies”, which may be criminal, civil or administrative in nature and which include “the means for as full a rehabilitation as possible.” More generally, it is accepted that remedies or reparation should be proportional to the gravity of the harm suffered.⁵⁹⁴

The following paragraphs identify the range of elements generally required for the reparation of an international wrong, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Each element is defined (using examples drawn from the Basic Principles and Guidelines on the Right to a Remedy and Reparation, paras. 19-23) and then explored briefly with reference to the specific situation and needs of trafficked persons.

Restitution involves material, judicial or other measures aimed at restoring the situation that existed prior to the violation – as far as this is possible. Effective and appropriate actions to secure restitution in a case of trafficking may include: release of the victim from detention (imposed by traffickers or by the State); recognition of legal identity and citizenship; return of property; and safe return to one’s place of residence.

Compensation is the commonest form of remedy, and is payable for damage caused by an

internationally wrongful act to the extent that such damage is economically assessable and “not made good by restitution”.⁵⁹⁵ In the case of trafficking, an effective and appropriate remedy could include: compensation payable for physical or mental harm; lost opportunities; loss of earnings; moral damage; and medical, legal or other costs incurred as a result of the violation. Mere difficulty in quantifying damage (such as putting a figure on loss of social position) must not be used as a reason to deny compensation.⁵⁹⁶

Rehabilitation is a victim-centred notion that recognizes a need to ensure that the person who has suffered violation of their human rights has his or her status and position “restored” in the eyes of the law and the wider community. Rehabilitation can include the provision of medical and psychological care as well as legal and social services. The present Commentary has confirmed that victims of serious violations of human rights such as trafficking will inevitably require a range of support services. The rehabilitation element of reparation would impose an obligation on the offending State to provide such services.

Satisfaction and guarantees of non-repetition:

Satisfaction is a remedy for injuries that are not necessarily financially assessable but can be addressed by ensuring that the violations of the victim’s rights are properly acknowledged and dealt with. Verification of the facts and full and public disclosure of the truth (to the extent that this will not cause further harm) are examples of remedies aimed at providing satisfaction to the victim.⁵⁹⁷ **Guarantees of non-repetition** are an important component of the right to a remedy in the case of trafficking, owing to the danger of

⁵⁹⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 15.

⁵⁹⁵ Draft articles on State responsibility, art. 36 (1).

⁵⁹⁶ Draft articles on State responsibility, art. 36 (16).

⁵⁹⁷ Bassiouni, op. cit., p. 270.



and harm caused by re-trafficking. Safe return, integration support and measures to prevent future trafficking such as those discussed under Principles 4-6 and related guidelines would be relevant to a discharge of this aspect of the remedies obligation, as would the effective investigation, prosecution and sanctioning of traffickers. In relation to trafficking that affects women and girls, measures aimed at modifying legal, social and cultural practices that sustain or promote the tolerance of such violence would be an important aspect of a guarantee of non-repetition.⁵⁹⁸

Both the form and the extent of remedies required will depend on the nature and circumstances of the breach as well as the content of the relevant primary obligation. In all cases, however, the form or forms must reflect the obligation on the offending State to wipe out, as far as possible, the consequences of the breach and to re-establish the situation that existed prior to its occurrence.⁵⁹⁹

17.6. INFORMATION AND OTHER MEANS OF ACCESSING REMEDIES

The Trafficking Principles and Guidelines note that the right to a remedy is often not effectively available to trafficked persons because they frequently lack information on the possibilities and processes for obtaining remedies. A right of access to effective remedies means that, in addition to making such remedies available under criminal or civil law, States should ensure that victims are provided with information and assistance that will enable them

to actually secure the compensation or restitution to which they are entitled. As noted above in the context of the European Trafficking Convention, victims cannot claim their rights if they are unaware of them. States parties to that Convention are required to ensure that victims are provided with both information and legal assistance for the purpose of pursuing the remedies to which they are entitled (arts. 15 (1) and 15 (2)). A similar requirement is set out in the Trafficking Principles and Guidelines.⁶⁰⁰

The Basic Principles and Guidelines on the Right to a Remedy and Reparation are even more detailed and specific in identifying the steps to be taken by States to ensure access to justice for victims of serious human rights violations. These include:

- Disseminating information about all available remedies;
- Developing measures to minimize the inconvenience to victims and their representatives; to protect against unlawful interference with victim privacy and to ensure their safety from intimidation and retaliation before, during and after judicial, administrative or other proceedings that affect their interests;
- Providing proper assistance to victims seeking access to justice; and
- Ensuring the availability of all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to a remedy (para. 12).

In the context of trafficking, an additional and important prerequisite for realizing the right to a remedy is the presence of the victim in the country where the remedy is being sought. This can be a matter of law as well as a practical issue. The Trafficking Principles and Guidelines request States to make arrangements to enable trafficked persons

⁵⁹⁸ This obligation to work towards modification of discriminatory or otherwise harmful practices and traditions is contained in the Convention on the Elimination of All Forms of Discrimination against Women, arts. 2 (f), 5 (a); the Inter-American Convention on Violence against Women, art. 7 (e); and the Protocol on the Rights of Women in Africa, arts. 2 (2), 5.

⁵⁹⁹ *Factory at Chorzow (Merits)* [1929] PCJ (Ser. A) No. 17, at 47.

⁶⁰⁰ Guideline 9.2 requests States and others to “[provide] information as well as legal and other assistance to enable trafficked persons to access remedies”.

to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings (Guideline 9 (3)). This aspect is also noted in the *Explanatory Report on the European Trafficking Convention* as a natural corollary to the right to a remedy (para. 192). The right of victims to be involved in legal proceedings (recognized in the Trafficking Protocol and discussed in detail under Principle 9 and related guidelines) is also relevant in this context.

Increasing the attention paid to the confiscation of assets in the context of trafficking in persons (Principle 16 and related guidelines) should also help in the enforcement of criminal or civil compensation claims against traffickers. This is particularly the case where States follow international and regional policy direction in ensuring that confiscated assets are made available for the purposes of victim support and compensation.⁶⁰¹

⁶⁰¹ On this issue, see the discussion in part 2.4, section 16.3, above.

In conclusion, if a State is directly or indirectly involved in the violation of an individual's right, then that same State must make a genuine attempt to provide the injured person with some measure of reparation or redress. In the present context this could involve the State ensuring the possibility of compensation and actively assisting a victim of trafficking to pursue a civil claim against a trafficker for damages and/or lost earnings. It might also mean that the State itself would have to provide compensation, particularly in situations where it has fallen short of the due diligence standard in preventing trafficking, investigating and prosecuting traffickers or protecting victims.

SEE FURTHER:

- State responsibility and due diligence: part 2.1, sections 2.1-2.4; part 2.2, section 6.3; part 2.4, section 13.2
- Victim support: part 2.3, sections 8.1-8.6
- Victim participation in legal proceedings: part 2.3, section 9.2
- Confiscation of assets for victim compensation: part 2.4, section 16.3



CITATION TABLE 1: TREATIES

TREATY	SHORT TITLE
2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, entered into force on 25 December 2003	Trafficking Protocol
2005 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, entered into force on 1 February 2008	European Trafficking Convention
1979 Convention on the Elimination of All Forms of Discrimination against Women, entered into force on 3 September 1981	
1989 Convention on the Rights of the Child, entered into force on 2 September 1990	
2000 United Nations Convention against Transnational Organized Crime, entered into force on 29 September 2003	Organized Crime Convention
1966 International Covenant on Civil and Political Rights, entered into force on 23 March 1976	
1904 International Agreement for the suppression of the White Slave Traffic, entered into force 18 July 1905	
1910 International Convention for the Suppression of the White Slave Traffic, opened for signature on 4 May 1910	
1949 Protocol amending the International Agreement for the Suppression of the White Slave Traffic and amending the International Convention for the Suppression of the White Slave Traffic, entered into force on 4 May 1949	Protocol amending the 1904 and 1910 Agreements
1921 International Convention for the Suppression of the Traffic in Women and Children, opened for signature on 30 September 1921	
1933 International Convention for the Suppression of the Traffic in Women of Full Age, entered into force on 24 August 1934	
1947 Protocol to amend the International Convention for the Suppression of the Traffic in Women and Children and the International Convention for the Suppression of the Traffic in Women of Full Age, entered into force on 12 November 1947	Protocol amending the 1921 and 1933 Agreements
1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, entered into force 25 July 1951	

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(Citation Table 1 continued)

TREATY	SHORT TITLE
2002 Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, entered into force on 1 December 2005	SAARC Convention
1926 Slavery Convention, entered into force 9 March 1927	
1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, entered into force 30 April 1957	Supplementary Convention on the Abolition of Slavery
1930 Convention Concerning Forced or and Compulsory Labour, ILO No. 29, entered into force on 1 May 1932	
1957 Convention Concerning the Abolition of Forced Labour, ILO No. 105, entered into force on 17 January 1959	
1999 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ILO No. 182, entered into force on 19 November 2000	Convention for the Elimination of the Worst Forms of Child Labour, 1999
1966 First Optional Protocol to the International Covenant on Civil and Political Rights, entered into force on 23 March 1976	
1966 International Covenant on Economic, Social and Cultural Rights, entered into force on 3 January 1976	
2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, opened for signature on 24 September 2009	
1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, entered into force on 22 December 2000	
1966 International Convention on the Elimination of All Forms of Racial Discrimination, entered into force on 4 January 1969	
1984 Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force on 26 June 1987	Convention against Torture
2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 22 June 2006	
2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, entered into force 18 January 2002	Optional Protocol on the sale of children
1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, entered into force 1 July 2003	Migrant Workers Convention
2006 Convention on the Rights of Persons with Disabilities, entered into force on 3 May 2008	



TREATY	SHORT TITLE
2006 Optional Protocol to the Convention on the Rights of Persons with Disabilities, entered into force on 3 May 2008	
1951 Convention Relating to the Status of Refugees, entered into force on 22 April 1954	Refugee Convention
1967 Protocol Relating to the Status of Refugees, entered into force on 4 October 1967	Refugee Protocol
1981 African Charter on Human Rights and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev.5, 21 ILM 58 (1982), entered into force on 21 October 1986	African Charter
1990 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, entered into force 29 November 1999	
2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, OAU Doc. CAB/LEG/66.6, entered into force on 25 November 2005	Protocol on the Rights of Women in Africa
1969 American Convention on Human Rights, entered into force on 18 July 1978	
1994 Inter-American Convention on International Traffic in Minors, entered into force 15 August 1997	
1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 3 September 1953, as amended by Protocol No. 11, entered into force on 1 November 1998	European Convention on Human Rights
1961 European Social Charter, entered into force on 26 February 1965, amendment entered into force on 7 January 1999	European Social Charter
1994 Organization of American States Convention on the Prevention, Punishment and Eradication of Violence against Women, entered into force on 5 March 1995	OAS Convention on Violence against Women
SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, signed on 5 January 2002	SAARC Convention on Child Welfare
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, annex III, entered into force on 28 January 2004	Protocol on the Smuggling of Migrants
Rome Statute of the International Criminal Court, entered into force on 1 July 2002	Rome Statute
2003 United Nations Convention against Corruption, entered into force on 14 December 2005	

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(Citation Table 1 continued)

TREATY	SHORT TITLE
1949 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, entered into force on 21 October 1950	Geneva Convention I
1949 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, entered into force on 21 October 1950	Geneva Convention II
1949 Convention (III) relative to the Treatment of Prisoners of War, entered into force on 21 October 1950	Geneva Convention III
1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War, entered into force on 21 October 1950	Geneva Convention IV
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, entered into force on 7 December 1978	Additional Protocol II
Statute of the International Criminal Tribunal for the former Yugoslavia, adopted by Security Council resolution 827 (1993) and amended by Security Council resolution 1166 (1998)	
Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 of 8 November 1994	
Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002	
1969 Vienna Convention on the Law of Treaties, entered into force on 27 January 1980	
1949 Migration for Employment Convention (Revised), ILO No. 97, entered into force on 22 January 1952	ILO Migration for Employment Convention (Revised)
1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, ILO No. 143, entered into force on 9 December 1978	ILO Migrant Workers (Supplementary Provisions) Convention
1983 Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons), ILO No. 159, entered into force on 20 June 1985	ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention
1963 Fourth Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 46, entered into force on 2 May 1968	Fourth Additional Protocol to ECHR



TREATY	SHORT TITLE
1984 Seventh Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, entered into force on 1 November 1988	Seventh Additional Protocol to ECHR
Charter of the United Nations, entered into force on 24 October 1945	
Statute of the International Court of Justice, entered into force on 24 October 1945	
1961 Vienna Convention on Consular Relations, entered into force on 19 March 1967	
1957 European Convention on Extradition, ETS No. 24, entered into force on 18 April 1960	
1995 Convention relating to the simplified extradition procedure between Member States of the European Union	EU Simplified Extradition Procedure
1981 Inter-American Convention on Extradition, OAS Treaty Series No. 60, entered into force on 28 March 1992	
Economic Community of West African States 1994 Convention on Extradition, A/P.1/8/94	ECOWAS Convention on Extradition
Organisation for Economic Co-operation and Development (OECD) 1997 Convention on Combating Bribery of Public Officials in International Business Transactions, entered into force on 15 February 1999	
1992 Inter-American Convention on Mutual Legal Assistance in Criminal Matters, OAS Treaty Series No. 75, entered into force on 14 April 1996	Inter-American Convention on Mutual Legal Assistance
2004 Convention on Mutual Legal Assistance between Like-Minded ASEAN Countries	ASEAN MLAT
1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No. 141, entered into force on 1 November 1999	Convention on Confiscation of Proceeds of Crime
1996 Inter-American Convention against Corruption, entered into force on 3 June 1997	
African Union 2003 Convention on Preventing and Combating Corruption and Related Offences, entered into force on 5 August 2006	African Union Convention on Combating Corruption
Council of Europe 1999 Criminal Law Convention on Corruption, ETS No. 173	
Council of Europe 1999 Civil Law Convention on Corruption, ETS No. 174	

CITATION TABLE 2: NON-TREATY INSTRUMENTS AND DOCUMENTS

INSTRUMENT/DOCUMENT	SHORT TITLE
Universal Declaration of Human Rights, General Assembly resolution 217A (III) of 10 December 1948	
<i>Recommended Principles and Guidelines on Human Rights and Human Trafficking</i> (HR/PUB/02/3)	Trafficking Principles and Guidelines
United Nations Standard Minimum Rules for the Administration of Juvenile Justice, General Assembly resolution 40/33 of 29 November 1985	Beijing Rules
United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly resolution 45/113 of 14 December 1990	Rules for the Protection of Juveniles Deprived of their Liberty
Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005	Basic Principles and Guidelines on the Right to a Remedy and Reparation
United Nations Children's Fund, <i>Guidelines on the Protection of Child Victims of Trafficking</i> (2006), available at: http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf	UNICEF Guidelines
Association of Southeast Asian Nations (ASEAN) Declaration on Trafficking in Persons Particularly Women and Children, adopted on 29 November 2004 by the Heads of State/Governments of ASEAN Member Countries in Vientiane	ASEAN Declaration on Trafficking in Persons
Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Subregion, Yangon, 29 October 2004	COMMIT MOU
Association of South-East Asian Nations (ASEAN), Criminal Justice Responses to Trafficking in Persons – ASEAN Practitioner Guidelines (Jakarta, 2007)	ASEAN Practitioner Guidelines
UN.GIFT – East Asia and the Pacific, <i>Recommendations on an Effective Criminal Justice Response to Trafficking in Persons</i> , Recommendations adopted by participants of the UN.GIFT Regional Workshop on Criminal Justice Responses to Trafficking in Persons, Bangkok, 2-4 October 2007	UN.GIFT Recommendations
Economic Community of West African States (ECOWAS), Declaration A/DC12/12/01 on the Fight against Trafficking in Persons, adopted by the Twenty-Fifth Ordinary Session of Authority of Heads of State and Government, Dakar, 20-21 December 2001	ECOWAS Declaration on Trafficking in Persons



Economic Community of West African States (ECOWAS) Initial Plan of Action against Trafficking in Persons (2002 – 2003), adopted by the Twenty-Fifth Ordinary Session of Authority of Heads of State and Government, Dakar, 20-21 December 2001	ECOWAS Initial Plan of Action
The European Union and African States, Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, adopted by the Ministerial Conference on Migration and Development, 22-23 November 2006	Ouagadougou Action Plan
The Brussels Declaration on Preventing and Combating Trafficking in Human Beings, adopted by the European Conference on Preventing and Combating Trafficking in Human Beings – Global Challenge for the 21st Century – Brussels, 18-20 September 2002	The Brussels Declaration
Organization for Security and Co-operation in Europe (OSCE) Permanent Council, Decision No. 557 OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 24 July 2003	OSCE Action Plan
Council of the European Union (EU), EU plan on best practices, standards and procedures for combating and preventing trafficking in human beings 2005/C 311/01, [2005] OJ C 311/01	EU Plan on Best Practices
Organization of American States (OAS), Conclusions and Recommendations of the First Meeting of National Authorities on Trafficking in Persons, OEA/Ser. K/XXXIX, approved at the plenary meeting, 17 March 2006	OAS Recommendations on Trafficking in Persons
Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking, Siem Reap, 31 May 2003	Cambodia-Thailand MOU
Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women (A/CONF.177/20/Rev.1)	Beijing Platform for Action
Further actions and initiatives to implement the Beijing Declaration and Platform for Action, General Assembly resolution S-23/3 of 16 November 2000	Beijing+5 Outcome Document
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985	Basic Principles for Victims of Crime and Abuse of Power
Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Lao People's Democratic Republic on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2005)	Thailand-Lao PDR MOU

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<i>Godínez Cruz Case</i> , Judgement of 20 January 1989, Inter-American Court on Human Rights (Ser. C) No. 5 (1989)
<i>Juridical Conditions and Rights of Undocumented Migrants</i> , Advisory Opinion OC-18/03 of 17 September 2003, Inter-American Court of Human Rights (Ser. A) No. 18 (2003)
<i>Prosecutor v. Kunarac et al.</i> (Trial Chamber I) Case No. IT-96-23-T& IT-96-23/1-T (22 February 2001) (Judgement)
<i>Prosecutor v. Kunarac et al.</i> (Appeals Chamber) Case No. IT-96-23 & IT-96-23/1-A (12 June 2002) (Judgement)
<i>Rantsev v. Cyprus and Russia</i> (25965/04) [2009] ECHR 22 (7 January 2010)
<i>Siliadin v. France</i> (73316/01) [2005] ECHR 545 (26 July 2005)
<i>MC v. Bulgaria</i> (39272/98) [2003] ECHR 651 (4 December 2003)
<i>Osman v. the United Kingdom</i> (23452/84) [1998] ECHR 101 (28 October 1998)
<i>Akkoç v. Turkey</i> (22947/93; 22948/93) [2000] ECHR 458 (10 October 2000)
<i>Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria</i> , African Commission on Human and Peoples' Rights, Communication No. 155/96 (2002)
<i>Maria Gíves Penha Maria Fernandes v. Brazil</i> , Inter-American Commission on Human Rights, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev., at 704 (2000)
<i>Juan Humberto Sánchez v. Honduras</i> , Judgement of 7 June 2003, Inter-American Court of Human Rights (Ser. C) No. 99 (2003)
<i>Prosecutor v. Furundzija</i> (Trial Chamber) Case No. IT-95-17/1-T (10 December 1998) (Judgement)
<i>Barar v. Sweden</i> (42367/98) Cases and Comment (1999) 3 <i>European Human Rights Law Review</i> 330
<i>Treatment of Polish Nationals in the Danzig Territory (Advisory Opinion)</i> [1932] PCIJ (Ser. A/B) No. 44
<i>L.K. v. Netherlands</i> , Communication No. 4/1991 (CERD/C/42/D/4/1991)
<i>Şahide Goekce (deceased) v. Austria</i> , Communication No. 5/2005 (CEDAW/C/39/D/5/2005)
<i>Fatma Yildirim (deceased) v. Austria</i> , Communication No. 6/2005 (CEDAW/C/39/D/6/2005)
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TA4-16915 (Immigration and Refugee Board of Canada, Refugee Protection Division, 16 March 2006)
V01/13868 [2002] RRTA 799 (6 September 2002)
N02/43616 [2003] RRTA 290 (31 March 2003)



V03/16442 [2004] RRTA 474 (25 June 2004)
<i>Matter of J-M</i> (number withheld) (BIA 30 March 2001)
<i>Finucane v. United Kingdom</i> (29178/95) [2003] ECHR 328 (1 July 2003)
<i>Calvelli and Ciglio v. Italy</i> (32967/96) [2002] ECHR 3 (17 January 2002)
<i>V.L. v. Switzerland</i> , CAT/C/37/D/262/2005 (22 January 2007)
<i>Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)</i> Request for the Indication of Provisional Measures (1998) ICJ Reports 248
<i>LaGrand case (Germany v. United States of America)</i> Judgment (2001) ICJ Reports 466
<i>Villagran Morales et al. (The Street Children case)</i> Judgement of 19 November 1999, Inter-American Court of Human Rights (Ser. C) No. 63 (1999)
<i>Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola</i> , African Commission on Human and Peoples' Rights, Communication No. 159/96 (1997)
<i>Soering v. United Kingdom</i> (14038/88) [1989] ECHR 14 (7 July 1989)
<i>Cruz Varas and others v. Sweden</i> (15576/89) [1991] ECHR 26 (20 March 1991)
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<i>D v. United Kingdom</i> (30240/96) [1997] ECHR 25 (2 May 1997)
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<i>HLR v. France</i> (24573/94) [1997] ECHR 23 (29 April 1997)
<i>Sadiq Shek Elmi v. Australia</i> , Communication No. 120/1998 (CAT/C/22/D/120/1998) 7
<i>Prosecutor v. Erdemovic</i> (Trial Chamber II) Case No. T-96-22, 5 March 1998 (Sentencing Judgement)
<i>Prosecutor v. Akayesu</i> (Trial Chamber I) Case No. ICTR-96-4-T, 2 September 1998 (Judgement)
<i>Prosecutor v. Tadic</i> (Trial Chamber II) Case No. IT-94-1, 11 November 1999 (Sentencing Judgement)
<i>Prosecutor v. Todorovic</i> (Trial Chamber I) Case No. IT-95-9/1, 31 July 2001 (Sentencing Judgement)
<i>Prosecutor v. Sikirica et al.</i> (Trial Chamber III) Case No. IT-95-8, 13 November 2001 (Sentencing Judgement)
<i>Prosecutor v. Simic</i> (Trial Chamber II) Case No. IT-95-9/2, 17 October 2002 (Sentencing Judgement)
<i>Prosecutor v. Plavsic</i> (Trial Chamber III) Case No. IT-00-39&40/1-S, 27 February 2003 (Sentencing Judgement)
<i>Prosecutor v. Rajic</i> (Trial Chamber I) Case No. IT-95-12-S, 8 May 2006 (Sentencing Judgement)
<i>United States Diplomatic and Consular Staff in Tehran (United States v. Iran)</i> Judgment (1980) ICJ Reports 3
<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)</i> Jurisdiction and Admissibility (1984) ICJ Reports 392
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Factory at Chorzow (Merits) [1929] PCIJ (Ser. A) No. 17

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Paul and Audrey Edwards v. United Kingdom (46477/99) [2002] ECHR 303 (14 March 2002)

Ahmet Ozkan and Others v. Turkey (21689/93) [2004] ECHR 133 (6 April 2004)

Kaya v. Turkey (22729/93) [1998] ECHR 10 (19 February 1998)

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Selçuk and Asker v. Turkey (23184/94; 23185/94) [1998] ECHR 36 (24 April 1998)

Kurt v. Turkey (24276/94) [1998] ECHR 44 (25 May 1998)

Tekin v. Turkey (22496/93) [1998] ECHR 53 (9 June 1998)

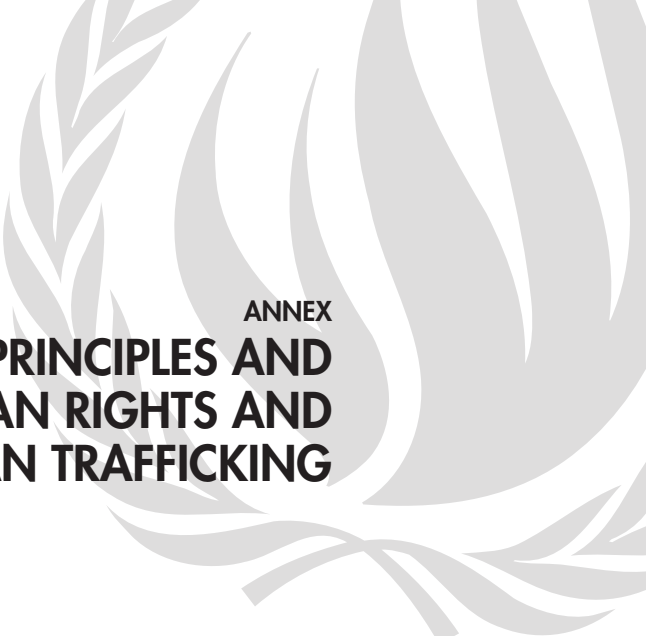
Raquel Martín de Mejía v. Peru, Inter-American Commission on Human Rights, Case No. 10.970, Report No. 5/96 OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996)

Villagran Morales et al. (The Street Children case), Judgement of 19 November 1999, Inter-American Court of Human Rights (Ser. C) No. 63 (1999)

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Van Alphen v. Netherlands, Human Rights Committee, Communication No. 305/1988 (CCPR/C/39/D/305/1988)

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ANNEX

RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING

RECOMMENDED PRINCIPLES ON HUMAN RIGHTS AND HUMAN TRAFFICKING⁶⁰²

THE PRIMACY OF HUMAN RIGHTS

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.
2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.

⁶⁰² The term “trafficking”, as used in the present Principles and Guidelines, refers to 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. *Source:* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (article 3 (a)).

3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.

PREVENTING TRAFFICKING

4. Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.
5. States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination.
6. States shall exercise due diligence in identifying and eradicating public-sector involvement or complicity in trafficking. All public officials suspected of being implicated in trafficking shall be investigated, tried and, if convicted, appropriately punished.

PROTECTION AND ASSISTANCE

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their

involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

8. States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.
9. Legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers. States shall provide protection and temporary residence permits to victims and witnesses during legal proceedings.
10. Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.
11. Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.

CRIMINALIZATION, PUNISHMENT AND REDRESS

12. States shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its

component acts⁶⁰³ and related conduct.⁶⁰⁴

13. States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.
14. States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.
15. Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences.
16. States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking.

⁶⁰³ For the purposes of the present Principles and Guidelines, the “component acts” and “component offences” of trafficking are understood to include the recruitment, transportation, transfer, harbouring or receipt of persons over eighteen years of age by means of threat, force, coercion or deception for the purpose of exploitation. The recruitment, transportation, transfer, harbouring or receipt of a person under eighteen years of age constitute component acts and component offences of trafficking in children. *Source:* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, articles 3 (a) and 3 (c).

⁶⁰⁴ For the purposes of the present Principles and Guidelines, conduct and offences “related to” trafficking are understood to include: exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude. *Source:* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, article 3 (a).



17. States shall ensure that trafficked persons are given access to effective and appropriate legal remedies.

RECOMMENDED GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING

GUIDELINE 1: PROMOTION AND PROTECTION OF HUMAN RIGHTS

Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.
2. Consulting with judicial and legislative bodies, national human rights institutions and relevant sectors of civil society in the development, adoption, implementation and review of anti-trafficking legislation, policies and programmes.
3. Developing national plans of action to end trafficking. This process should be used to build links and partnerships between governmental institutions involved in combating trafficking and/or assisting trafficked persons and relevant sectors of civil society.
4. Taking 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.
5. Protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right.
6. Ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.
7. Establishing mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions. Consideration should be given to assigning this role to independent national human rights institutions where such bodies exist. Non-governmental organizations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures.
8. Presenting detailed information concerning the measures that they have taken to prevent and combat trafficking in their periodic reports to the United Nations human rights treaty-monitoring bodies.⁶⁰⁵
9. Ensuring that bilateral, regional and international cooperation agreements and other laws and policies concerning trafficking in persons do not affect the rights,

⁶⁰⁵ The human rights treaty-monitoring bodies include the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against Women; the Committee on the Elimination of Racial Discrimination; the Committee against Torture; and the Committee on the Rights of the Child.

obligations or responsibilities of States under international law, including human rights law, humanitarian law and refugee law.

10. Offering technical and financial assistance to States and relevant sectors of civil society for the purpose of developing and implementing human rights-based anti-trafficking strategies.

GUIDELINE 2: IDENTIFICATION OF TRAFFICKED PERSONS AND TRAFFICKERS

Trafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process — such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place.

States are also obliged to exercise due diligence in identifying traffickers,⁶⁰⁶ including those who are involved in controlling and exploiting trafficked persons.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Developing guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons.
2. Providing appropriate training to relevant State authorities and officials in the identification of trafficked persons and correct application of the guidelines and procedures referred to above.
3. Ensuring cooperation between relevant authorities, officials and non-governmental organizations to facilitate the identification and provision of assistance to trafficked persons. The organization and implementation of such cooperation should be formalized in order to maximize its effectiveness.
4. Identifying appropriate points of intervention to ensure that migrants and potential migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance if required.
5. Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.
6. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.
7. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

⁶⁰⁶ The term “traffickers”, where it appears in the present Principles and Guidelines, is used to refer to: recruiters; transporters; those who exercise control over trafficked persons; those who transfer and/or maintain trafficked persons in exploitative situations; those involved in related crimes; and those who profit either directly or indirectly from trafficking, its component acts and related offences.



GUIDELINE 3: RESEARCH, ANALYSIS, EVALUATION AND DISSEMINATION

Effective and realistic anti-trafficking strategies must be based on accurate and current information, experience and analysis. It is essential that all parties involved in developing and implementing these strategies have and maintain a clear understanding of the issues.

The media has an important role to play in increasing public understanding of the trafficking phenomenon by providing accurate information in accordance with professional ethical standards.

States and, where appropriate, intergovernmental and non-governmental organizations, should consider:

1. Adopting and consistently using the internationally agreed definition of trafficking contained in the Palermo Protocol.⁶⁰⁷
2. Standardizing the collection of statistical information on trafficking and related movements (such as migrant smuggling) that may include a trafficking element.

⁶⁰⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), supplementing the United Nations Convention against Transnational Organized Crime, defines trafficking in persons as: "... 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)). The Protocol further states that 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 above (article 3 (c)).

3. Ensuring that data concerning individuals who are trafficked is disaggregated on the basis of age, gender, ethnicity and other relevant characteristics.
4. Undertaking, supporting and bringing together research into trafficking. Such research should be firmly grounded in ethical principles, including an understanding of the need not to re-traumatize trafficked persons. Research methodologies and interpretative techniques should be of the highest quality.
5. Monitoring and evaluating the relationship between the intention of anti-trafficking laws, policies and interventions, and their real impact. In particular, ensuring that distinctions are made between measures which actually reduce trafficking and measures which may have the effect of transferring the problem from one place or group to another.
6. Recognizing the important contribution that survivors of trafficking can, on a strictly voluntary basis, make to developing and implementing anti-trafficking interventions and evaluating their impact.
7. Recognizing the central role that non-governmental organizations can play in improving the law enforcement response to trafficking by providing relevant authorities with information on trafficking incidents and patterns taking into account the need to preserve the privacy of trafficked persons.

GUIDELINE 4: ENSURING AN ADEQUATE LEGAL FRAMEWORK

The lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels

in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation.

States should consider:

1. Amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements. All practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution should also be criminalized.
2. Enacting legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons. Reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as cover for trafficking such as marriage bureaux, employment agencies, travel agencies, hotels and escort services.
3. Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals). Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.
4. Making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences. Where possible, the legislation should specify that the confiscated proceeds of trafficking will 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.
5. Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.
6. Ensuring that the protection of trafficked persons is built into anti-trafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family.
7. Providing legislative protection for trafficked persons who voluntarily agree to cooperate with law enforcement authorities, including protection of their right to remain lawfully within the country of destination for the duration of any legal proceedings.
8. Making effective provision for trafficked persons to be given legal information and assistance in a language they understand as well as appropriate social support sufficient to meet their immediate needs. States should ensure that entitlement to such information, assistance and immediate support is not discretionary but is available as a right for all persons who have been identified as trafficked.
9. Ensuring that the right of trafficking victims to pursue civil claims against alleged traffickers is enshrined in law.
10. Guaranteeing that protections for witnesses are provided for in law.
11. Making legislative provision for the punishment of public sector involvement or complicity in trafficking and related exploitation.



GUIDELINE 5: ENSURING AN ADEQUATE LAW ENFORCEMENT RESPONSE

Although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended. More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand.

An adequate law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses. In many cases, individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms. These problems are compounded when law enforcement officials are involved or complicit in trafficking. Strong measures need to be taken to ensure that such involvement is investigated, prosecuted and punished. Law enforcement officials must also be sensitized to the paramount requirement of ensuring the safety of trafficked persons. This responsibility lies with the investigator and cannot be abrogated.

States and, where applicable, intergovernmental and non-governmental organizations should consider:

1. Sensitizing law enforcement authorities and officials to their primary responsibility to ensure the safety and immediate well-being of trafficked persons.
2. Ensuring that law enforcement personnel are provided with adequate training in the investigation and prosecution of cases of trafficking. This training should be sensitive to the needs of trafficked persons, particularly those of women and children, and should acknowledge the practical value of providing incentives for trafficked persons and others to come forward to report traffickers. The involvement of relevant non-governmental organizations in such training should be considered as a means of increasing its relevance and effectiveness.
3. 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.
4. Establishing specialist anti-trafficking units (comprising both women and men) in order to promote competence and professionalism.
5. Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.
6. Implementing measures to ensure that "rescue" operations do not further harm the rights and dignity of trafficked persons. Such operations should only take place once appropriate and adequate procedures for responding to the needs of trafficked persons released in this way have been put in place.
7. Sensitizing police, prosecutors, border, immigration and judicial authorities, and social and public health workers to the problem of trafficking and ensuring the provision of specialized training in identifying trafficking cases, combating trafficking and protecting the rights of victims.
8. Making appropriate efforts to protect individual trafficked persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. Appropriate protection programmes may include some or all of the following elements: identification of a safe place in the country of destination; access to independent legal

counsel; protection of identity during legal proceedings; identification of options for continued stay, resettlement or repatriation.

9. Encouraging law enforcement authorities to work in partnership with non-governmental agencies in order to ensure that trafficked persons receive necessary support and assistance.

GUIDELINE 6: PROTECTION AND SUPPORT FOR TRAFFICKED PERSONS

The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.
2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling. Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.
3. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality. Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.
4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.
5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.
6. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard.
7. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).
8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and



educational and employment services for returned trafficking victims.

GUIDELINE 7: PREVENTING TRAFFICKING

Strategies aimed at preventing trafficking should take into account demand as a root cause. States and intergovernmental organizations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice. Effective prevention strategies should be based on existing experience and accurate information.

States, in partnership with intergovernmental and non-governmental organizations and where appropriate, using development cooperation policies and programmes, should consider:

1. Analysing the factors that generate demand for exploitative commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues.
2. Developing programmes that offer livelihood options, including basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups.
3. Improving children's access to educational opportunities and increasing the level of school attendance, in particular by girl children.
4. Ensuring that potential migrants, especially women, are properly informed about the risks of migration (e.g. exploitation, debt bondage and health and security issues, including exposure to HIV/AIDS) as well as avenues available for legal, non-exploitative migration.
5. Developing information campaigns for the general public aimed at promoting awareness of the dangers associated with trafficking. Such campaigns should

6. be informed by an understanding of the complexities surrounding trafficking and of the reasons why individuals may make potentially dangerous migration decisions.
6. Reviewing and modifying policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effect on women of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labour laws.
7. Examining ways of increasing opportunities for legal, gainful and non-exploitative labour migration. The promotion of labour migration by the State should be dependent on the existence of regulatory and supervisory mechanisms to protect the rights of migrant workers.
8. Strengthening the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking as a preventive measure. This includes ensuring that law enforcement agencies comply with their legal obligations.
9. Adopting measures to reduce vulnerability by ensuring that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons.

GUIDELINE 8: SPECIAL MEASURES FOR THE PROTECTION AND SUPPORT OF CHILD VICTIMS OF TRAFFICKING

The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative

authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.

States and, where applicable, intergovernmental and non-governmental organizations, should consider, in addition to the measures outlined under Guideline 6:

1. Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo Protocol, evidence of deception, force, coercion, etc. should not form part of the definition of trafficking where the person involved is a child.
2. Ensuring that procedures are in place for the rapid identification of child victims of trafficking.
3. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.
4. In cases where children are not accompanied by relatives or guardians, taking steps to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.
5. In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child.
6. In both the situations referred to in the two paragraphs above, ensuring that a child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her,

in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity.

7. Adopting specialized policies and programmes to protect and support children who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and health-care assistance.
8. Adopting measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation.
9. Protecting, as appropriate, the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to their identification.
10. Taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking.

GUIDELINE 9: ACCESS TO REMEDIES

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

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Ensuring that victims of trafficking have an enforceable right to fair and adequate



remedies, including the means for as full a rehabilitation as possible. These remedies may be criminal, civil or administrative in nature.

2. Providing information as well as legal and other assistance to enable trafficked persons to access remedies. The procedures for obtaining remedies should be clearly explained in a language that the trafficked person understands.
3. Making arrangements to enable trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings.

GUIDELINE 10: OBLIGATIONS OF PEACEKEEPERS, CIVILIAN POLICE AND HUMANITARIAN AND DIPLOMATIC PERSONNEL

The direct or indirect involvement of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic personnel in trafficking raises special concerns. States, intergovernmental and non-governmental organizations are responsible for the actions of those working under their authority and are therefore under an obligation to take effective measures to prevent their nationals and employees from engaging in trafficking and related exploitation. They are also required to investigate thoroughly all allegations of trafficking and related exploitation and to provide for and apply appropriate sanctions to personnel found to have been involved in trafficking.

States and, where appropriate, intergovernmental and non-governmental organizations, should consider:

1. Ensuring that pre- and post-deployment training programmes for all peacekeeping, peace-building, civilian policing, humanitarian and diplomatic staff

adequately address the issue of trafficking and clearly set out the expected standard of behaviour. This training should be developed within a human rights framework and delivered by appropriately experienced trainers.

2. Ensuring that recruitment, placement and transfer procedures (including those of private contractors and sub-contractors) are rigorous and transparent.
3. Ensuring that staff employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions do not engage in trafficking and related exploitation or use the services of persons in relation to which there are reasonable grounds to suspect they may have been trafficked. This obligation also covers complicity in trafficking through corruption or affiliation with any person or group of persons who could reasonably be suspected of engaging in trafficking and related exploitation.
4. Developing and adopting specific regulations and codes of conduct setting out expected standards of behaviour and the consequences of failure to adhere to these standards.
5. Requiring all personnel employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions to report on any instances of trafficking and related exploitation that come to their attention.
6. Establishing mechanisms for the systematic investigation of all allegations of trafficking and related exploitation involving personnel employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions.
7. Consistently applying appropriate criminal, civil and administrative sanctions to personnel shown to have engaged in or been complicit in trafficking and related exploitation. Intergovernmental and non-governmental organizations should, in

appropriate cases, apply disciplinary sanctions to staff members found to be involved in trafficking and related exploitation in addition to and independently of any criminal or other sanctions decided on by the State concerned. Privileges and immunities attached to the status of an employee should not be invoked in order to shield that person from sanctions for serious crimes such as trafficking and related offences.

GUIDELINE 11: COOPERATION AND COORDINATION BETWEEN STATES AND REGIONS

Trafficking is a regional and global phenomenon that cannot always be dealt with effectively at the national level: a strengthened national response can often result in the operations of traffickers moving elsewhere. International, multilateral and bilateral cooperation can play an important role in combating trafficking activities. Such cooperation is particularly critical between countries involved in different stages of the trafficking cycle.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Adopting bilateral agreements aimed at preventing trafficking, protecting the rights and dignity of trafficked persons and promoting their welfare.
2. Offering, either on a bilateral basis or through multilateral organizations, technical and financial assistance to States and relevant sectors of civil society for the purpose of promoting the development and implementation of human rights-based anti-trafficking strategies.
3. Elaborating regional and subregional treaties on trafficking, using the Palermo Protocol and relevant international human rights standards as a baseline and framework.
4. Adopting labour migration agreements, which may include provision for minimum work standards, model contracts, modes of repatriation, etc., in accordance with existing international standards. States are encouraged effectively to enforce all such agreements in order to help eliminate trafficking and related exploitation.
5. Developing cooperation arrangements to facilitate the rapid identification of trafficked persons including the sharing and exchange of information in relation to their nationality and right of residence.
6. Establishing mechanisms to facilitate the exchange of information concerning traffickers and their methods of operation.
7. Developing procedures and protocols for the conduct of proactive joint investigations by law enforcement authorities of different concerned States. In recognition of the value of direct contacts, provision should be made for direct transmission of requests for assistance between locally competent authorities in order to ensure that such requests are rapidly dealt with and to foster the development of cooperative relations at the working level.
8. Ensuring judicial cooperation between States in investigations and judicial processes relating to trafficking and related offences, in particular through common prosecution methodologies and joint investigations. This cooperation should include assistance in: identifying and interviewing witnesses with due regard for their safety; identifying, obtaining and preserving evidence; producing and serving the legal documents necessary to secure evidence and witnesses; and the enforcement of judgements.
9. Ensuring that requests for extradition for offences related to trafficking are dealt with



by the authorities of the requested State without undue delay.

10. Establishing cooperative mechanisms for the confiscation of the proceeds of trafficking. This cooperation should include the provision of assistance in identifying, tracing, freezing and confiscating assets connected to trafficking and related exploitation.
11. Exchanging information and experience relating to the implementation of assistance,

return and integration programmes with a view to maximizing impact and effectiveness.

12. Encouraging and facilitating cooperation between non-governmental organizations and other civil society organizations in countries of origin, transit and destination. This is particularly important to ensure support and assistance to trafficked persons who are repatriated.

